CITATION:	*Harvey v Bofilios* [2017] NTSC 68
PARTIES:	HARVEY, Alicia Brooke v BOFILIOS, John
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 8 of 2016 (21456835)
DELIVERED ON:	28 August 2017
DELIVERED AT:	Darwin
HEARING DATE:	23 March 2017
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – DRUG OFFENCES – EVIDENCE – MATTERS RELATING TO PROOF – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS

Whether court erred in finding no case to answer on basis that appellant had failed to adduce any evidence that a dangerous drug was supplied as alleged in each of the charges – extended definition of "supply" – right of appeal against judgment of acquittal – errors of law and mixed fact and law – trial judge's ruling predicated on misapprehension of definition of "supply" – no contrary submission by prosecution – appeal dismissed.

Criminal Code Act (NT) s 414
Local Court (Criminal Procedure) Act (NT) s 163, s 177
Misuse of Drugs Act (NT) s 3

Australian Securities and Investments Commission v Vis (2000) 77 SASR 490, *Bridle v Verity* (2011) 30 NTLR 180, *Davern v Messel* (1984) 155 CLR 21, *Everett v The Queen* (1994) 181 CLR 295, *Gazepis v Police* (1997) 70 SASR 121**,** *Gerakiteys v The Queen* (1984) 153 CLR 317, *Holder v Lewis* (2003) 231 LSJS 431, *Johnson v Miller* (1937) 59 CLR 467, *Knight v Birch* (1992) 106 ACTR 27, *Peach v Bird* (2006) 159 A Crim R 416, *Pearce v The Queen* (1998) 194 CLR 610, *Police* v *Dorizzi* (2002) 84 SASR 416, *R v Addison* (1993) 70 A Crim R 213, *R v Dendic* (1987) 34 A Crim R 40, *R v Longshaw* (1990) 20 NSWLR 554, *R v Peirce* (1996) 2 VR 215, *R v Saffron* (1988) 17 NSWLR 395, *R v Swan* (2003) 140 A Crim R 243, *R v Tangye* (1997) 92 A Crim R 545, *R v Wilson* (2011) 30 NTLR 51, *SA Police v Murphy* (unreported, Supreme Court of South Australia, Debelle J, 9 January 1996), *Weiss v The Queen* (2005) 224 CLR 300, referred to.

CRIMINAL LAW – DRUG OFFENCES – EVIDENCE – BURDEN OF PROOF, PRESUMPTIONS, AND WEIGHT AND SUFFICIENCY OF EVIDENCE – WITNESSES

Whether court erred in finding only evidence respondent had supplied dangerous drugs came from the testimony of prosecution witness – existence of objective and contemporaneous evidence in corroboration – whether court will set aside decision based on the assessment of credibility – no error of law established – appeal dismissed.

Berlyn v Brouskos (2002) 134 A Crim R 111, *May v O'Sullivan* (1955) 92 CLR 654, *R v Prasad* (1979) 2 A Crim R 45, *State Rail Authority of New South Wales v Earthline Constructions* (1999) 73 ALJR 306, referred to.

REPRESENTATION:

Counsel:

Appellant:	DJ Morters
Respondent:	T Berkley

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Darwin Family Law

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

Harvey v Bofilios [2017] NTSC 68
LCA 8 of 2016 (21456835)

BETWEEN:

ALICIA BROOKE HARVEY
Appellant

AND:

JOHN BOFILIOS
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 28 August 2017)

[1] This is an appeal brought pursuant to s 163(3) of the *Local Court (Criminal Procedure) Act* (NT) from an order or adjudication of the Local Court finding the respondent not guilty of three charges on information dated 9 December 2014. The right of appeal created by the provision is limited to "an error or mistake on the part of the Local Court on a matter or question of law alone or a matter or question of both fact and law".[1]

1 *Local Court (Criminal Procedure) Act*, s 163(5); *Peach v Bird* [2006] NTSC 14; 159 A Crim R 416 at [7]-[11]; *Rigby v Taing* [2015] NTSC 16; 249 A Crim R 320; *Balchin v Anthony* [2008] NTSC 2; 22 NTLR 52 at [17].

[2] On hearing the appeal this court may, amongst other things, confirm, quash or vary the order or adjudication from which the appeal is brought. In the event the order or adjudication is quashed, this court may substitute or make any order or adjudication which ought to have been made in the first instance; or remit the case for hearing or for further hearing before the Local Court.[2] However, even where some material error is made out, this court may dismiss the appeal "if it considers that no substantial miscarriage of justice has actually occurred".[3]

[3] By information taken on 9 December 2014 the respondent was to alleged to have committed the following offences (among others):[4]

- that on 4 August 2014 at Palmerston he unlawfully supplied MDMA and a-PVP, a dangerous drug specified in Schedule 2, to Benjamin Elmer contrary to s 5(2)(a)(iv) of the *Misuse of Drugs Act* (NT) (**charge 1**);

- that on 13 September 2014 at Palmerston he unlawfully supplied MDMA and a-PVP, a dangerous drug specified in Schedule 2, to Benjamin Elmer contrary to s 5(2)(a)(iv) of the *Misuse of Drugs Act* (**charge 2**);

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2 *Local Court (Criminal Procedure) Act*, s 177(2).

3 *Local Court (Criminal Procedure) Act*, s 177(2)(f).

4 Appeal Book (**AB**) 1-2.

- that on 4 October 2014 at Palmerston he unlawfully supplied MDMA and a-PVP, a dangerous drug specified in Schedule 2, to Benjamin Elmer contrary to s 5(2)(a)(iv) of the *Misuse of Drugs Act* (**charge 3**).

[4] Those charges, together with a possession charge (**charge 10**), proceeded to hearing over various days in July and October 2015, and in February and April 2016. On 7 April 2016 the judge dismissed charges 1, 2 and 10 on the basis that no *prima facie* case had been established; and dismissed charge 3 on the basis that he could not be satisfied beyond reasonable doubt that the prosecution had proved its case.

[5] The grounds of appeal are that:

- the court erred in finding that there was no case to answer on charges 1 and 2 on the basis that the appellant had failed to adduce evidence that a dangerous drug was supplied as alleged in each of the charges; and

- the court erred in finding that the only evidence adduced by the appellant that the respondent had supplied dangerous drugs as alleged in charge 3 came from the testimony of the witness Benjamin Elmer.

Charges 1 and 2

[6] Section 3 of the *Misuse of Drugs Act* (NT) defines "supply" in the following terms:

> ***supply*** means:
>
> (a) give, distribute, sell, administer, transport or supply, whether or not for fee, reward or consideration or in expectation of fee, reward or consideration; or
>
> (b) offer to do an act mentioned in paragraph (a); or
>
> (c) do, or offer to do, an act preparatory to, in furtherance of, or for the purpose of, an act mentioned in paragraph (a);
>
> and includes barter and exchange.

[7] Various courts, including this one, have held that criminal responsibility will lie under paragraph (b) of that definition if an accused intends to offer to supply a dangerous drug and intends or reasonably foresees that the offeree will believe that offer to be genuine. It is not necessary that the accused intends to perform the agreement by supplying a dangerous drug; or in fact performs the agreement by supplying a dangerous drug; or was ever in a position to supply a dangerous drug in order to complete the agreement.[5]

[8] The appellant's contention in relation to charges 1 and 2 may be summarised as follows. The defence made a no case submission on the basis that the prosecution had failed to adduce evidence that the substances supplied were a dangerous drug. That submission did not

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5 *R v Dendic* (1987) 34 A Crim R 40 at 45; *R v Peirce* (1996) 2 VR 215 at 218-219; *R v Addison* (1993) 70 A Crim R 213; *R v Swan* [2003] NSWCCA 318; 140 A Crim R 243, *Bridle v Verity* [2011] NTSC 107; 30 NTLR 180.

draw the judge's attention to the extended definition of "supply". By operation of that definition, it was not incumbent on the prosecution to establish that the substances were a dangerous drug. The judge fell into error by dismissing the charges on that basis.

[9] The appellant's contention is complicated by the manner in which the prosecution ran its case. The information did not particularise the nature of the supply asserted. There was no request for particulars made by or on behalf of the accused. At the commencement of the trial, the prosecutor opened relevantly in the following terms:[6]

> As I've said, we have four counts that are in issue. The three supply counts, the – occur in the following way: they are all supplies, we say, by John Bofilios to Ben Elmer on [the] days in question. Ben Elmer attended the premises of John Bofilios. He, Ben Elmer, has been dealt with previously in this jurisdiction for his involvement in the matter and other matters, I might add.
>
> He will be my first witness. He will give evidence that he received the drugs. So there's the supply.
>
> In respect of the last one on 4 October – sorry, I will go back. In each of them there is preliminary Viber, which is an email-type transaction between the two of them, which is useful to pin the date.
>
> On the last one [count 3], Mr Elmer will say that he received the drugs from Mr Bofilios, he took them home, he divided them and then he gave them to a Matthew Wall on the same day. Matthew Wall put them in his car. Matthew Wall was arrested by police, the drugs were seized and analysed.

[10] Two matters may be discerned from that passage. The first is that on the prosecution opening the supply was constituted by the accused giving the drugs to the witness and the witness's receipt of those drugs.

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6 AB 12.

Secondly, it is apparent that the drugs in relation to count 3 were subsequently seized and analysed by police, and the prosecution was in a position to establish positively that the substance in question was a dangerous drug. That was not the case in relation to the substances involved in charge 1 and 2, and the prosecution at all times knew that to be the case.

[11] Even if it were to be accepted that the prosecution opening constituted the giving of particulars, those particulars did not form part of the information and were not to be treated as pleadings.[7] It was open to the prosecution during the course of the trial to vary the manner in which the supply had been characterised.[8] The prosecution was bound only to the legal nature of the offence with which the accused had been charged and the particular act, matter or thing alleged as the foundation of the charge.[9] That act, matter or thing was the supply of the dangerous drug to Elmer.

[12] Elmer's evidence in relation to charge 1 was that on 3 August 2014 he sent the accused a Viber message asking "if I could get any pills off him". The accused replied that he could. The following day Elmer

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7 *Gerakiteys v The Queen* (1984) 153 CLR 317 at 336.

8 *R v Saffron* (1988) 17 NSWLR 395 at 446-447. Of course, there is a necessary limitation on the ability of the Crown to do so in a trial by jury. If there is a change in the nature of the Crown case following the opening "it is vital that it be identified with some precision, in the absence of the jury, before counsel commence their final addresses": *R v Tangye* (1997) 92 A Crim R 545 at 556.

9 *Johnson v Miller* (1937) 59 CLR 467 at 489, 495, 501-502.

went to the accused's house and collected 10 pills in light brown capsule form which he believed to be MDMA.[10]

[13] Elmer's evidence in relation to charge 2 was that he made contact with the accused by text and Viber on 13 September 2014. The purpose of those messages was to ask if he could get more pills from the accused. The accused advised that he was able to provide those pills. Elmer attended at the accused's house and took possession of 20 pills in light brown capsule form which he believed to be MDMA. The following day he paid the accused $600 for those pills.[11]

[14] The Viber exchanges corroborate that there was some form of interaction and transaction between Elmer and the accused on both 4 August 2014 and 13 September 2014. By way of explanation of those exchanges, Elmer gave evidence that he and the accused at that time used the term "bolts" as code for MDMA pills.[12] A reading of the Viber messages shows that explanation to be entirely plausible.

[15] The relevant exchanges on 3 and 4 August 2014 were:[13]

> Elmer: Did you have any of them bolts left over for tomorrows race day
>
> Accused: Yup.
>
> Elmer: Tomorrow morning im not going for other mob 10 if u have them lol

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10 AB 15-16, 19-20.

11 AB 21-22.

12 AB 16.

13 AB 171-172.

Accused: Think so. Full length or short modified ones?

Elmer: Modified ones you made bcos them original ones were shit

Accused: Ok cool. Have plenty

….

Accused: You far off?

Elmer: Il come in 15 if not just put them bolts near the washing machine yea

[16] The relevant exchange on 13 September 2014 was:[14]

Elmer: Any nuts and bolts left

Accused: Only new n unmodified ones

Elmer: Yea thats what I ment

Accused: Think 6 or 8. Come round

[17] That evidence was clearly apt to establish supply constituted by offering to give or sell Elmer the dangerous drug. If accepted, it was sufficient to establish both that the accused intended to offer to supply a dangerous drug to Elmer, and that the accused intended or reasonably foresaw that Elmer would consider each of the offers to be genuine. On Elmer's evidence, he did in fact believe the offers to be genuine.

[18] At the close of the prosecution case defence counsel made a "no case" submission in relation to charges 1 and 2. The basis for that submission was put in the following terms:[15]

So on a fundamental basis, there has to be a link that is capable of supporting [a] finding of fact beyond reasonable doubt, that the supply of – particularly on 4 August and 13 September, involved

14 AB 174.

15 AB 121.

> drugs, and dangerous drugs specified in Schedule 2, specified in the information. Now that's quite frankly not possible on the state of the evidence. There is no evidence from Elmer that they were drugs. The only inference to be drawn, is he thinks he got drugs.

[19] That submission obviously failed to have regard to the extended definition of "supply". The submission continued:[16]

> There is absolutely – he's not an expert. He can't – there is no inference that it is MDMA that could be drawn from it. The only inference that can logically and properly be drawn, is that he thinks [he] is buying MDMA from [the accused].

[20] The other inferences that could logically and properly be drawn from the evidence were that the accused intended to offer to supply a dangerous drug to Elmer, and that the accused intended or reasonably foresaw that Elmer would consider the offer to be genuine. In fact, defence counsel went so far as to suggest that it may have been a commercial transaction in which "someone sticked another".[17] That form of "rip-off" is precisely the conduct which the decisions from this and other superior courts have said fall squarely within the "offer" provisions of the extended definition of "supply".[18]

[21] In response to the judge's suggestion that it would not matter whether the pills contained a dangerous drug or not, defence counsel responded that the accused had been charged with unlawful supply of a Schedule 2 drug; that the prosecution had to adduce evidence that there was "the

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16 AB 122.

17 AB 122.

18 See, in the particular, the discussion in *R v Swan* (2003) 140 A Crim R 243.

action of a supply [of] a dangerous drug"; and that the prosecution had to adduce evidence that it was a dangerous drug under the legislation.[19] Having regard to the authorities cited above, that submission was clearly wrong in law.

[22] It would seem that the prosecutor was operating under the same misapprehension. He expressly agreed in response that the Crown had to prove what was supplied was a dangerous drug or precursor.[20] The prosecutor conceded that the substances the subject of charges 1 and 2 were not subject to analysis, which presented "a difficulty for the prosecution".[21] The prosecutor sought to sustain those charges on the basis of Elmer's evidence that he believed the substances on each occasion to be MDMA. The extrapolation sought to be drawn was that because Elmer also had that belief in relation to the third episode of supply, and analysis showed that substance to be a dangerous drug, it was possible to infer that the two earlier episodes had also involved a dangerous drug.[22]

[23] Ultimately, the judge did not consider that connection with the substance involved in charge 3 was sufficiently strong to sustain the Crown case on charges 1 and 2, and ruled in favour of the "no case"

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19 AB 123.

20 AB 137-138.

21 AB 140.

22 AB 141.

submission.[23] That ruling was predicated on the same misapprehension, and contaminated by error as a result. However, it is difficult to criticise the judge for that ruling in circumstances where both the prosecution and the defence had made submissions that it was incumbent on the prosecution to establish, at the very least, that the substance the subject of each charge was a dangerous drug specified in Schedule 2.

[24] It remains then to consider the nature of the avenue of appeal created under s 163(3) of the *Local Court (Criminal Procedure) Act*. There is a historical presumption against a legislative intent to confer a right of appeal against judgment of acquittal.[24] That presumption operates with less force in relation to the acquittals in summary proceedings. As Doyle CJ observed in *Australian Securities and Investments Commission v Vis*:[25]

> Gibbs CJ said (at 31):
>
> > "…The view has been taken that the common law rule against double jeopardy would be infringed by allowing an appeal from an acquittal, since the rule requires that an acquittal be treated as final."
>
> A little later he said (at 32):
>
> > "…that a statute will not be understood to confer a right of appeal from a decision dismissing a criminal charge unless it does so distinctly."

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23 AB 143.

24 *Davern v Messel* (1984) 155 CLR 21 at 51-52 per Mason and Brennan JJ.

25 (2000) 77 SASR 490 at [34], referring to passages from *Davern v Messel*.

When he came to consider courts of summary jurisdiction, he said (at 37-38):

> "A decision of a court of summary jurisdiction discharging a complaint or information has never been regarded with the same sanctity as the verdict of a jury. The consistent trend of legislation, both in England and Australia, has been towards allowing the prosecution to appeal against an order of a magistrate or justices dismissing a charge and empowering the court on appeal to quash the order and to direct that the defendant be convicted."

After referring to a number of decided cases, he said (at 38):

> "...It is apparent that it is no longer exceptional, or thought to be contrary to public policy, in Australia, to allow an appeal from an acquittal by a magistrate or justices."

....

Mason and Brennan JJ appeared to have recognised the same principle of interpretation as that referred to by Gibbs CJ: at 46. When they came to consider the position in Australia, after referring to a number of English decisions, they said (at 51):

> "The course of judicial decisions in Australia on statutory provisions providing for an appeal from orders made in summary proceedings has been less uniform than in England and Ireland."

After referring to a number of Australian decisions they said (at 52):

> "The Australian cases indicate that our courts have readily perceived indications of statutory intention to confer a right of appeal on a prosecutor from an acquittal in summary proceedings. There has been less reluctance to concede a right of appeal from an acquittal in summary proceedings than from an acquittal on indictment, for the very good reason that a jury verdict of not guilty has been traditionally regarded as inviolate."

[25] As Doyle CJ concluded in relation to the relevant statutory provision in that case, it is clear from the terms of s 163(3) of the *Local Court (Criminal Procedure) Act* that the prosecutor can appeal against an acquittal and equally clear that a prosecutor can appeal against the

inadequacy of a penalty. However, that avenue of appeal remains subject to the limitations which govern prosecution appeals generally. There is no doubt that a prosecution appeal puts the accused in jeopardy for the second time.[26] As Gummow J observed in *Pearce v The Queen*:[27]

> The third principle concerns the injustice to the individual which would be occasioned by a requirement to litigate afresh matters already determined by the courts. The maxim, *nemo debet bis vexari pro una et eadem causa* (it is the rule of law that a man shall not be twice vexed for one and the same cause), appears in *Sparry's Case* (1589) 5 Co Rep 61a [77 ER 148]. (The maxim applies not only to *res judicata* doctrines but also to vexatious litigation and abuse of process. Kersley, *Broom's Legal Maxims*, 10th ed. (1939) at 220.) In its application to criminal proceedings, it "has become known as the rule against double jeopardy': *Rogers v The Queen* (1994) 181 CLR 251 at 277.

[26] That is so in appeals against both sentence and acquittal. The principle has application to appeals from orders in summary proceedings, and gives rise to the same limitations.[28] It may be noted in that respect that s 414(1A) of the *Criminal Code* has application only to appeals against sentence before the Court of Criminal Appeal.[29]

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26 *Everett v The Queen* (1994) 181 CLR 295 at 299-300.

27 (1998) 194 CLR 610 at [54].

28 See *R v Longshaw* (1990) 20 NSWLR 554 at 563-564; *Knight v Birch* (1992) 106 ACTR 27 at 31-32.

29 This provision was enacted to provide that in exercising its discretion on an appeal against sentence with respect to an indictable offence the Court of Criminal Appeal must not take into account any element of double jeopardy.

[27] This type of appeal is also limited to "an order or adjudication". That connotes a final order or adjudication, which excludes attempts to review interlocutory orders and evidentiary rulings.[30] In such appeals, a "no case" acquittal will only be susceptible of challenge on the basis of an erroneous evidentiary ruling in circumstances where that evidence would otherwise have established a case to answer. In those circumstances, the evidentiary ruling will be instrumental in the order or adjudication for acquittal. In *Holder v Lewis*, Doyle CJ, with whom Prior and Perry JJ agreed, observed:[31]

> The Magistrate's decision to exclude the evidence was not "an interlocutory judgment". It was not a judgment at all. It was simply a ruling made in the course of the trial: see *Legal Practitioners Complaints Committee v A Practitioner* (1987) 46 SASR 126; *Dorizzi* at [19]. The appeal to the Supreme Court was an appeal against the Magistrate's order dismissing the complaint. That order is a judgment given in the action. The appeal was competent.
>
> ...
>
> The present case is quite different [to the situation considered in *Dorizzi*]. As I have pointed out, if the excluded evidence was admitted, Mr Holder had a case to answer. The complaint against him should not have been dismissed. The further evidence, coupled with the excluded evidence, established that Mrs Holder and the company had a case to answer. Accordingly, the decision to dismiss the charges against them was shown to be wrong.

[28] There is also a tendency on the part of courts when dealing with appeals of this nature to be more willing to interfere where there is

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30 *Police v Dorizzi* [2002] SASC 356; 84 SASR 416.

31 *Holder v Lewis* (2003) 231 LSJS 431.

an error of law;[32] but, as has been seen, an appeal under s 163(3) of the *Local Court (Criminal Procedure) Act* is expressly limited to "an error or mistake on the part of the Local Court on a matter or question of law alone or a matter or question of both fact and law". On the other hand, the appellate court will be reluctant to interfere with a verdict of acquittal which is based upon a reasonable doubt. This is for the obvious reason that the appeal court will usually not have the same advantages as the trial judge where the issues in the appeal depend on the view taken of conflicting testimony or an impression gained from an observation of a witness.

[29] These limitations were summarised by Southwood J in *Peach v Bird* in the following terms:[33]

> Strict principles apply to a prosecution appeal against the dismissal of a complaint. The allowance of an appeal against a dismissal of a complaint has always been regarded as the exercise of an exceptional discretionary power. This is because, as in the case of prosecution appeals against sentence, what is involved is the undesirable placing of an alleged offender in a situation of double jeopardy: *The King v Wilkes* [1948] HCA 22; (1948) 77 CLR 511 at 516. An appeal should only be allowed in the clearest and most compelling circumstances, for the purpose of correcting manifest error. An appellate court will be prepared to set aside an order of dismissal based upon the impact of the evidence upon the fact finder and remit a matter for retrial only where it appears that the order of dismissal sought to be impugned was plainly wrong on any reasonable interpretation of the recorded evidence and the inferences that patently arise from it: *Semple v Williams* (1990) 156 LSJS 40.

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32 *SA Police v Murphy* (unreported, Supreme Court of South Australia, Debelle J, 9 January 1996).

33 *Peach v Bird* [2006] NTSC 14; 159 A Crim R 416 at [12].

[30] As noted at the outset, even where there is manifest error of law, or of mixed fact and law, this court may dismiss the appeal "if it considers that no substantial miscarriage of justice has actually occurred".[34] That requires the appeal court to review the evidence and reach its own conclusions giving due weight to the fact that the trial judge has seen and heard the witnesses. The fact that there is an error by the court below does not mean that the appeal court is required or permitted to allow the appeal if it is satisfied that there has been no miscarriage of justice.[35] The cases dealing with the operation of the proviso in appeals against conviction have little to say about the present circumstances.

[31] What is clear is that in both appeals against acquittal and appeals against conviction the operation of the proviso will not turn on "an exercise in speculation or prediction" of what the tribunal of fact may ultimately have determined in the absence of the error in question.[36] In the present circumstances, if error of law is established the proviso requires nothing more than for the appeal court to determine whether a substantial miscarriage of justice has actually occurred and, if not, whether the appeal should be dismissed

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34 *Local Court (Criminal Procedure) Act*, s 177(2)(f).

35 *Gazepis v Police* [1997] SASC 6813; 70 SASR 121 at 129.

36 *Weiss v The Queen* (2005) 224 CLR 300 at [39].

on that account.[37] That consideration includes an institutional and constitutional presumption that charges of this nature will be determined in accordance with the law, but that is not necessarily the determining factor or the overarching principle. Otherwise, there would be no room for the operation of the proviso in cases of error.

[32] Finally, the appeal court retains a residual discretion to dismiss a prosecution appeal if the interests of justice militate in favour of that result. It is not made explicit in the authorities whether that consideration forms part of the determination of whether there has been a substantial miscarriage of justice, or whether the residual discretion extends beyond and stands independently of the proviso. The factors which an appellate court may take into account in the exercise of the residual discretion suggest that its exercise extends beyond the question whether there has been a substantial miscarriage of justice, but it is unnecessary to decide that question for present purposes.

[33] In *R v Wilson*,[38] Riley CJ noted that "[f]actors that may be relevant to the exercise of the residual discretion to dismiss an appeal … include the presence of unfairness arising from such matters as delay, parity, the totality principle, rehabilitation and fault on the part of the

37 *Weiss v The Queen* (2005) 224 CLR 300 at [40]-[47].

38 [2011] NTCCA 9; 30 NTLR 51.

Crown".[39] Even where some manifest error has been demonstrated, an appeal court will be slow to intervene in an appeal against acquittal where there is a countervailing factor which may warrant the exercise of the residual discretion.

[34] Having regard to those principles, the following conclusions may be drawn.

[35] First, counsel for the appellant is correct in the submission that criminal responsibility will lie under paragraph (b) of the definition of "supply" if an accused intends to offer to supply a dangerous drug and intends or reasonably foresees that the offeree will believe that offer to be genuine. For that reason, the determination that it was necessary in the prosecution of charges 1 and 2 to establish that the substance the subject of each charge was a dangerous drug specified in Schedule 2 was manifestly wrong in law.

[36] Secondly, counsel for the appellant is correct in the submission that there was sufficient evidence to establish that the accused both intended to offer to supply a dangerous drug to the offeree and intended the offeree to take the offer as genuine, such that there was a case to answer on charges 1 and 2.

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39 *R v Wilson* [2011] NTCCA 9; 30 NTLR 51 at [27].

[37] Thirdly, there was clear fault on the part of the prosecutor at first instance in failing to have regard to the extended definition of "supply". Although the "no case" submission run by counsel for the defence was predicated on an erroneous conception of "supply", the prosecutor had opened on the basis that the supply was constituted by the accused giving the drugs to the witness and the witness's receipt of those drugs. The prosecutor did not seek to correct or vary his position at any stage during the conduct of the trial, and in fact adopted the defence's premise in the "no case" submission. This was not a situation in which the prosecution urged a particular construction which was erroneously rejected by the trial judge. In those circumstances, the prosecution cannot now deploy the definitional point to impugn the trial judge's determination.

[38] Fourthly, the passage of time since the alleged commission of the offences, in combination with the fault on the part of the prosecution, also militates against allowing the appeal and remitting the matter for rehearing. Ranged against that, the quantities of the drug involved in these two charges and the relative seriousness of the offending do not demand a different result.

[39] The appeal on this ground is dismissed.

Charge 3

[40] The position in relation to charge 3 was different. Wall had been found in possession of the dangerous drug which formed the basis for the charge. Elmer's evidence was that he had given the capsules he had purchased from the accused to Wall. The drugs in Wall's possession were different to the drugs found in the accused's possession when the search warrant was executed at his premises on 4 October 2014.

[41] The defence submission in relation to this particular charge had two primary limbs. The first was that Elmer's evidence was inherently unreliable. The second was that the accused had no dominion over the pills because Elmer had free access to the accused's residence and was dealing at the time. Accordingly, no inference could be drawn that the drugs were in the accused's possession or control simply because they had been found in his backyard.

[42] Defence counsel effectively conceded that there was sufficient evidence on charge 3 to close off a "no case" submission, but made in the alternative what was described variously and without apparent distinction as a *Prasad* submission and a "second limb" submission.

[43] *R v Prasad*[40] holds that it is within the discretion of the judge to inform the jury of the right to bring in a verdict of not guilty at the close of the prosecution case if they are not satisfied that the evidence is

40 (1979) 2 A Crim R 45.

sufficient to justify a conviction. In summary trials the test is whether the tribunal of fact may be satisfied that the evidence is sufficient to justify a conviction. As King CJ observed:[41]

> I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal considers that the evidence is so lacking in weight and reliability that no reasonable tribunal could safely convict on it.

[44] An acquittal on that basis may be distinguished from circumstances where there is no *prima facie* case. Whether or not to enter an acquittal on *Prasad* grounds is a matter of fact and not law.

[45] The "second limb" submission is a reference to the decision of the High Court in *May v O'Sullivan*.[42] A submission in those terms may be made in circumstances where:

(a) the prosecution has established a *prima facie* case;

(b) the evidence is not sufficiently lacking in cogency or reliability so as to warrant the application of *Prasad*;

(c) the evidence is arguably incapable of excluding a reasonable doubt; and

(d) there is, for that reason, no need to go into evidence to support a finding of reasonable doubt.

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41 *R v Prasad* (1979) 2 A Crim R 45 at 47-48.

42 [1955] HCA 38; 92 CLR 654.

[46] Elmer's evidence was said by defence counsel to be unreliable on a number of grounds.[43]

[47] First, it was submitted that Elmer's evidence concerning the form of the pills or capsules supplied to him by the accused was both internally inconsistent and inconsistent with Wall's evidence as to what he received from Elmer. A reading of the transcript would suggest that such inconsistency as there was might have been attributable to confusion artfully caused during cross-examination rather than the inherent unreliability on the part of the witness.

[48] Secondly, it was submitted that Elmer's account of dealing drugs for the accused for no profit was inherently improbable. That was said to be particularly so in circumstances where Elmer had provided evidence to that effect in pleading guilty to the criminal charges that had been brought against him in respect of these transactions, and had received a discount on sentence for agreeing to give evidence against the accused. One condition to the receipt of that discount was that Elmer had to give evidence in accordance with the statement he had provided to police. It was in his mind that the evidence he gave in this trial had to be consistent with the account he had given earlier. The submission was that this quest for consistency coloured his evidence at trial.

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43 AB 130-135.

[49] Thirdly, Elmer had previously been recorded in an intercepted telephone call telling a female associate he had been in possession of 190 pills, 18 bars of steroids and four handguns at or about this time. During the course of the trial Elmer said this had been a lie on his part. In the defence's submission this established a propensity for prevarication which made the witness's evidence inherently unreliable.

[50] The judge made the following determination in relation to charge 3:[44]

> In relation to charge 3, the evidence that supports that charge really comes from Mr Elmer. In order to connect the defendant with the substance in question one has to work backwards and forwards as Mr Adams submitted. But it is largely a process of deductive reasoning. But no matter which way one moves forwards or backwards, at the end of the day the strength of the prosecution case turns upon the view that the court forms of Mr Elmer.
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> ....
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> I really could not receive this person as a witness of truth, of credibility and reliability. In my view it would be impossible to do so. And I think that as the prosecution case turns upon the evidence of Mr Elmer I consider that the case against the defendant is so lacking in weight and reliability that no reasonable court could safely convict on the evidence in relation to charge 3.

[51] The appellant's complaint in relation to that finding was that it constituted a conclusion that "the only evidence upon which count 3 was based came from Elmer". While one might question that characterisation of the judge's finding, the essence of the appellant's submission in this respect is that there was other evidence which

44 AB 152.

supported the case against the accused and operated in corroboration of Elmer's account.

[52] That evidence included the Viber messages demonstrating both a history of supply and a transaction at the relevant time; the tablets and powders containing dangerous drugs which were seized from the accused's residence, evidence of which was received at exhibit P5; the capsules and capsule press seized from the accused's residence; the $9,900 in cash which was seized from the accused's residence; and Wall's evidence to the extent that it was generally corroborative of Elmer's account.

[53] The Viber messages were of particular significance in that respect.

[54] On 1 October 2014 there were a number of exchanges between Elmer and the accused in which the accused reminded Elmer that he needed to pay for "that 20 hrs ya got off me". On that same day Elmer asked whether he could grab "20 more hrs" over the weekend "if you have them". The accused replied, "Got plenty of broken up hours around the place but will have to see about 20".

[55] On 4 October 2014, Elmer asked whether the accused was home so he could pick up "them hrs". The accused replied to the effect that he would go home to meet Elmer, obviously for that purpose.

[56] There was no dispute that the exchanges in question were between the accused and Elmer.[45] Elmer gave direct and uncontradicted evidence that during the course of those exchanges in early October 2014 the term "hours" was the code which they had by then adopted to refer to pills containing MDMA.[46] Those messages provided powerful corroboration for Elmer's account that the accused supplied him with dangerous drugs, including on the occasion in question.

[57] While it may be accepted that the trial judge drew an unfavourable impression of Elmer during the course of his evidence, caution must be exercised in drawing those sorts of impressionistic conclusions as to the credibility of a particular witness where they are at odds with other objective and contemporaneous evidence. The process is otherwise apt to become one of intuition rather than analysis.

[58] It is also the case that where there is objective and contemporaneous evidence concerning the relevant facts and inferences, the trial judge enjoys no real advantage over an appellate court in the assessment of those facts and inferences. This was a matter to which Kirby J gave some attention in *State Rail Authority of New South Wales v Earthline Constructions* in the following terms (footnotes omitted):[47]

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45 AB 39.

46 AB 108.

47 [1999] HCA 3; 73 ALJR 306 at [90]-[91].

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> The true advantages in fact-finding which the trial judge enjoys include the fact that the judge hears the evidence in its entirety whereas the appellate court is typically taken to selected passages, chosen by the parties so as to advance their respective arguments. The trial judge hears and sees all of the evidence. The evidence is generally presented in a reasonably logical context.
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> ….
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> All of the foregoing considerations leave to be weighed, in some cases at least, the impression which the trial judge holds of a particular witness, perhaps influenced by the witness's demeanour and the kinds of considerations commonly referred to such as hesitation or displays of partisanship not readily conveyed, or conveyed at all, by the printed record. One can hold different views about whether such considerations should intrude in the assessment of qualified expert witnesses. One can strive to minimise resort to such considerations in the case of lay witnesses, out of recognition of the fallibility of human assessment of credibility from appearances. But because trials remain public procedures for the resolution of disputes, it is inescapable that, in some cases at least, credibility assessments will be required where there is no documentary, electronic or other incontrovertible evidence to resolve the conflict presented for decision. In such cases it will remain the fact that, try as it might, the appellate court cannot procure from the printed record exactly the same materials on which to base the judicial decision as the trial judge had.

[59] A trial judge must be particularly alert to "the fallibility of human assessment of credibility from appearances" in the presence of objective evidence which either supports or undermines the witness's evidence. Having regard to the content of the Viber messages, an appeal court might readily conclude that the trial judge's rejection of Elmer's evidence in relation to charge 3 was made in error.

[60] In the present circumstances, however, the Local Court's determination may only be disturbed on the ground of error of law or error of mixed fact and law. As already noticed, the entry of the acquittal on *Prasad*

grounds was a determination of fact and not one of law or mixed fact and law. There is no error of law involved in making a wrong finding of fact or drawing an illogical inference, so long as the finding is not one that could only be made by an irrational tribunal acting arbitrarily.[48] That is not the case here.

[61] For that reason the appeal on this ground must fail notwithstanding the difficulties which attend the trial judge's finding in this respect.

Disposition

[62] The appeal is dismissed.

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48 *Berlyn v Brouskos* [2002] VSC 377; 134 A Crim R 111 at [30].

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