Miles v The Queen [2001] NTCA 9

PARTIES:	MILES, BRETT VERNON
	v
	THE QUEEN
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA17 of 2000
DELIVERED:	6 September 2001
HEARING DATES:	3 August 2001
JUDGMENT OF:	MILDREN, BAILEY & RILEY JJ

REPRESENTATION:

Counsel:

Appellant:	S. Cox
Respondent:	J. Adams

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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

Miles v The Queen [2001] NTCA 9
No. CA17 of 2000

BETWEEN:

BRETT VERNON MILES
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, BAILEY & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 6 September 2001)

MILDREN J:

[1] I have had the advantage of reading in draft the judgments of Bailey and Riley JJ with which I concur. I agree that the appeal should be allowed and that the appellant should be resentenced in the manner indicated by Riley J.

BAILEY J:

[2] I have had the advantage of reading the judgment of Riley J in draft. I agree that the appeal should be allowed and the appellant re-sentenced in the manner suggested by his Honour.

[3] I wish only to add some comments concerning the quantities of heroin supplied by and in possession of the appellant. The amount of heroin supplied was 0.39 grams and the amount found to be in the appellant's possession was 4.12 grams. The *Misuse of Drugs Act* defines a trafficable quantity of heroin as not less than 2 grams and not more than 40 grams. It is apparent that if the quantity of a drug possessed or supplied were the sole or dominant factor in assessing the gravity of a drug offence, the appellant's offences would fall at the lower end of the scale of seriousness. However, the quantity of a drug supplied or possessed, while significant, is not the determinative element in assessing an appropriate sentence.

[4] In *Moran and Byrnes* (1987) 31 A Crim R 248, Tadgell J (Young CJ and O'Bryan J concurring) observed at 254:

> "… the quantity of a drug involved in any given count of drug trafficking is but one of the factors to be considered in assessing the sentence. The system, if any, and its potential, and the colour given by the surrounding circumstances of the trafficking are all to be closely considered in the formulation of an appropriate sentence."

Similarly, in *Laurentiu and Becheru* (1992) 63 A Crim R 402, Wood J at 418 noted:

> "It is also not entirely appropriate to place too much emphasis on the precise quantity of the drug involved, because in some cases, the present being one, the possession relates to that of an intermediary or principal in the course of an enterprise which is judged particularly criminal, whereas in other cases the possession may be that of the end user."

See also *Postiglione* (1991) 24 NSWLR 584 at 593; *Rocco* (1985) 37 SASR 515 at 517; *Morton* (1987) 28 A Crim R 409 at 410 and *Perrier (No.2)* [1991] 1 VR 717.

[5] In the present case, the appellant was a repeat offender who was on parole for a very serious drug offence. His involvement in the drug trade was more akin to a wholesaler than a street dealer. He demonstrated no remorse and was motivated only by the prospect of profit. He failed to co-operate with the authorities in any meaningful way. In the circumstances, condign punishment was necessary with the dominant sentencing objectives being punishment and deterrence, both general and personal. The head sentences imposed by the learned trial judge for the offences of supply and possession can be legitimately described as being at the top end of the range of penalties available, having regard to the relevant quantities of heroin. However, having regard to all the circumstances of the offences and the offender, such sentences were within the bounds of a sound exercise of judicial discretion, subject only to the question of totality arising from the applicant's outstanding sentence from his earlier offending.

RILEY J

[6] After a trial before a Judge and jury, the appellant was convicted of having unlawfully supplied heroin to Brian Fraser on 18 January 1997 and of having unlawfully possessed a trafficable quantity of heroin between 16 and 20 January 1997. He was sentenced on 27 November 1998 and appealed against both conviction and sentence to the Court of Criminal Appeal. On 20 April 2000 the Court of Criminal Appeal allowed the appeal on sentence and remitted the matter to the trial Judge for re-sentencing. On 14 July 2000 the appellant was sentenced to five years and six months imprisonment for the offence of supply heroin and three years and six months imprisonment for possession of heroin. Those sentences were directed to "run concurrently as to two years, making an effective sentence of seven years imprisonment." A non-parole period of five years and three months was set.

[7] At the time of sentencing it was noted by his Honour that the appellant was also required to serve the unserved portion of a sentence previously imposed upon him under the *Crimes Act* (Cth). That obligation arose by operation of the Act. The earlier offences involved three counts of being knowingly concerned in the importation of heroin in relation to which the appellant had been sentenced to nine years imprisonment with a non-parole period of four years and six months imprisonment. The appellant had been released on parole on 1 November 1995 and, taking into account entitlements to remissions, had a period of eighteen months imprisonment still to serve on 14 July 2000. The offences for which he was sentenced on 14 July 2000

occurred in January 1997 some fourteen months after the parole period commenced. The sentences in respect of the Northern Territory offences of possess and supply heroin were directed to commence "31 days prior to the expiry of the period you are to serve for the Federal offences". The thirty-one days referred to a period spent in custody prior to the appellant being sentenced in November 1998.

The Circumstances of the Offences

[8] The offending the subject of this appeal came to light in the following way. In 1997 the police provided an informer with $800 in bank notes the numbers of which had previously been recorded. The informer used that money to purchase heroin from Brian Fraser on18 January 1997. The heroin purchased was contained in a mixture of white powder stored inside a small balloon. On 19 January 1997 police executed a search warrant at premises occupied by the appellant and found a large amount of cash in separate bundles. The cash included the eight $100 notes that had previously been identified and recorded and passed by the informer to Mr Fraser. During the course of the search the appellant volunteered information which led police to locate a plastic container in which were found a number of balloons similar to the one that had been handed on by Mr Fraser to the informer. Upon analysis each of the balloons contained heroin and the analysis revealed that the heroin seized at the time of the search at the appellant's premises matched the heroin found in the balloon that had been handed on

by Mr Fraser to the informer. The appellant denied any involvement with any heroin. He suggested at his trial that the numbered bank notes had been "planted" during the course of the police search and, further, that the location of the heroin found in the plastic container was not something of which the appellant had informed the police. Notwithstanding his denials the appellant was found guilty.

[9] On 10 October 2000 the appellant was granted leave to appeal against his sentence on three grounds, namely: that the sentence was manifestly excessive; that the sentencing Judge erred in ordering partial cumulation of the penalties imposed in respect of the supply and possession charges; and that the overall sentence infringed the totality principle.

[10] The principles applicable to an appeal against sentence are well known. Sentencing is a matter of discretion and there is a strong presumption that the sentences and non-parole period imposed are correct. In the absence of demonstrated error the appellant must show that the sentencing Judge imposed a sentence that is so obviously excessive that it is manifestly unreasonable or plainly unjust. The sentence must be clearly and obviously, and not just arguably, excessive. It must be so disproportionate to the sentence required as to indicate error. It is not enough that this Court would have imposed a lesser or different sentence. See *R v Nagas* (1995) 5 NTLR 45 at 50-52.

Manifestly Excessive

[11] Complaint was made that in all of the circumstances the sentence for each of the offences was manifestly excessive, as was the non-parole period. It was the submission for the appellant that the sentences were "so far outside the range of sentences as to manifest error".

[12] The sentences imposed upon the appellant were for a period of five years and six months in respect of the charge of supply heroin and three years and six months for the charge of possess heroin. This is a total of nine years imprisonment in respect of the two offences. However the learned sentencing Judge directed that two years of those sentences be served concurrently leaving an effective sentence of seven years imprisonment with a non-parole period of five years and three months. In addition the appellant was required by statute to serve a period of eighteen months imprisonment by virtue of the reinstatement of the balance of his sentence for the 1991 offence of importing heroin. Altogether the appellant was effectively sentenced to imprisonment for a period of eight years and six months with a non-parole period of six years and nine months.

[13] The appellant pointed out that the amount of heroin that had been supplied was 0.39 milligrams and the amount of heroin found to be in his possession was 4.12 grams. It was submitted that a trafficable quantity of heroin was between 2 grams and 40 grams and the amount found to be in the possession of the appellant was therefore at the lower end of the range.

[14] Reference was made to a schedule of convictions and penalties imposed upon offenders who were dealt with by the courts as a result of the co-operation of the particular informant with the authorities. His Honour noted that those matters were "not truly comparative" and the distinguishing features "were plain". However he reviewed and had regard to each sentence. Given the wide variation in the nature of the offences and in the circumstances of the individual offenders referred to, compared with the situation of the appellant, I found the information contained in the Schedule to be of no assistance.

[15] Although the quantity of heroin involved was not substantial, the offending in this case can only be regarded as extremely serious. The circumstances surrounding the offending include that this was not the first offence of its kind for the appellant. He had previously been convicted of a serious drug offence leading to the imposition of a lengthy sentence of imprisonment. At the time of being sentenced for those matters the appellant was given a clear warning of the consequences of any further offending. At the time of the subject offending the appellant was on parole in relation to the earlier offending. He was obviously not deterred from further offending by the significant period of time that he had already spent in custody. Nor by the threat that he would serve the balance of that sentence if caught re-offending.

[16] The appellant maintained his denial of involvement in the offences and did so in a way that sought to blame others and attribute unlawful conduct to

others. He is not to be further punished for conducting his defence in this way but such conduct means that he has demonstrated no remorse for his actions and that he is not accepting responsibility for what he has done. As the learned sentencing Judge noted "there is no room for mitigation of penalty based upon remorse".

[17] There was no indication of any motive for offending on this occasion. The appellant was not an addict nor, it would seem, even a casual user of heroin. There was no suggestion of any pressing need for money or of any matter that might explain why a person in his situation would re-offend at all let alone whilst he was on parole. The appellant was not conducting this enterprise with a view to ensuring a supply of heroin for himself. It was a purely commercial operation. The learned sentencing Judge adopted the observations of Kearney J made in sentencing Mr Fraser:

> "Addicts receive a lesser sentence. The reason is that a non-addict is cold-bloodedly engaging in this terrible trade for profit, whereas an addict is at least, in part, engaged so as to feed his own habit."

[18] At the time of these offences the appellant was in his mid-30's and therefore not entitled to any benefit that might have flowed from being a youthful offender. He did not co-operate with the authorities in any meaningful way. He was a repeat offender and his involvement was more akin to a wholesaler rather than a retailer of the drug. He had a source of supply from which he provided some heroin to Mr Fraser who in turn supplied the heroin to another. Whether he is properly characterised as a wholesaler or retailer he

was removed from the situation of being the end retailer. The appellant was not a street dealer. He had supplied sufficient heroin to Mr Fraser to enable the on-sale of heroin to others. The heroin possessed by the appellant was valued at between $7200 and $40,000 depending upon the method of supply to others.

[19] The prospects for the rehabilitation of the appellant in all of those circumstances are substantially lessened. His Honour correctly regarded as significant for sentencing purposes the prospect that the appellant may again put the community at risk. Further, the need for both personal and general deterrence were clearly matters of importance in the sentencing process. There was limited opportunity for his Honour to extend leniency to the appellant.

[20] In relation to the individual head sentences for the charges of possession of heroin and supply of heroin the appellant says that his Honour failed to take into account or give sufficient weight to the conduct of the appellant at the trial, the personal circumstances of the appellant and the appellant's efforts at rehabilitation including his prospects for further rehabilitation.

[21] It was submitted that at the trial the appellant, who at that stage represented himself, conducted himself in an appropriate manner. He was said to have been courteous and polite and that he made admissions as to the chain of custody of the heroin and thereby saved the community the cost and inconvenience of calling witnesses as to that issue. Whilst those matters

may be so they must be seen in the context of the whole of the conduct of the appellant in the trial. He presented a defence that was based upon an allegation of unlawful conduct on the part of the authorities and upon what the jury must have found to be false denials. Viewed as a whole it can not be said that the conduct of the appellant in the course of the trial was such that he should be given some credit for it. The learned sentencing Judge looked at his conduct and noted, correctly, that the defence that he presented should not be held against him. However, viewed in its totality, the conduct of the defence was such that it did not call for the granting to the appellant of leniency in the sentencing process.

[22] When the appellant was sentenced in November 1998 the learned sentencing Judge did not have before him information regarding the antecedents of the appellant. At that time the appellant continued to represent himself. When the matter came back before the learned sentencing Judge in July 2000 the appellant was represented by experienced counsel and further information was provided to the Court. The personal circumstances of the appellant were the subject of submission and were referred to by his Honour in the course of his sentencing remarks. I see no basis for the submission that these matters were not taken into account by his Honour or were not given sufficient weight.

[23] In this Court it was submitted that his Honour failed to take into account or accord sufficient weight to the appellant's rehabilitation to date and the

prospects for further rehabilitation. The sentencing remarks addressed the submissions that were put to his Honour on this issue. His Honour said:

> "Since you have been in custody, you have undertaken counselling with a view to resolving family issues. As to your future, your plan is to follow the pest control business for which you are qualified. Whilst in prison, you have behaved yourself as a prisoner and attended a number of educational courses in computer studies and other fields, which would appear to be helpful if you went into business. They are positive indications that you have embarked upon programs of self-improvement which are likely to assist you to re-integrate into the community. You will be given credit for that, being an indication of your willingness and capacity to rehabilitate yourself."

[24] Later his Honour said:

> "However, I note your prospects of rehabilitation have improved and I should allow for the possibility that your attitude might change further while you are in prison. Ultimately it will be the Parole Board who will assess your prospects at the expiry of the non-parole period."

[25] It is clear from those remarks that his Honour in fact considered the appellant's rehabilitation and the prospects for further rehabilitation. Those matters were taken into account.

[26] When one considers the individual sentences imposed by the learned sentencing Judge in this matter those sentences must be considered in the context of all of the surrounding circumstances. Whilst the sentences can be seen to be severe that is not surprising given the seriousness of the offending considered in light of those surrounding circumstances. In my view, whilst the head sentences imposed can be legitimately described as being at the top end of the range of penalties available, they cannot be said

to be manifestly excessive. They are not so disproportionate to the circumstances as would indicate error and they should not be interfered with.

[27] It was the submission of the appellant that the non-parole period imposed by the learned sentencing Judge reflected the fact that his Honour could not have given sufficient weight to the appellant's prospects for rehabilitation. Particular reference was made to the appellant's difficult background, his limited education, his psychiatric problems and the "significant steps" already taken towards rehabilitation whilst in custody. It was submitted that a significantly lower non-parole period ought to have been fixed.

[28] In determining the non-parole period his Honour observed that "the minimum 50% is inadequate, bearing in mind your breach of parole in respect of the Federal offence, coupled with your distinct lack of any sign of remorse." The appellant says that in proceeding in this way his Honour effectively punished the appellant twice for the breach of parole. It was submitted that the appellant was obliged to return to prison for his breach of parole and the breach was again given weight by his Honour in establishing the non-parole period in respect of the Territory offences.

[29] The purpose of parole has been addressed by the High Court in *Power v The Queen* (1974) 131 CLR 623 (at 629) where Barwick CJ, Menzies, Stephen and Mason JJ were dealing with ACT legislation and described parole as being intended to "provide for mitigation of the punishment of the prisoner

in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence." This observation was adopted by Dawson, Toohey and Gaudron JJ in *Bugmy v The Queen* (1990) 169 CLR 525 at 536. In fixing the non-parole period the sentencing Judge does not approach the task on the footing that "he or she is solely or primarily concerned with the prisoner's prospects for rehabilitation. *Power v The Queen* … put paid to that notion": *Bugmy v The Queen* (supra at 530-531). Relevant factors in fixing a non-parole period will include the prospects for rehabilitation of the prisoner along with matters relevant to the wider interests of the community that are taken into account in fixing the head sentence. Such matters will include, where appropriate, the need for community protection as well as personal and general deterrence: *Lane* (1995) 80 A Crim R 208 at 210-211.

[30] The submission of the appellant that he was "punished twice" for the breach of parole is not soundly based. The appellant was required to return to prison because his parole order was revoked by operation of s 19AQ of the *Crimes Act*. The fact that he had breached his parole was also a matter relevant to the imposition of a further non-parole period in relation to the offences committed in January 1997. Taking that matter into account did not mean that the appellant was being punished again but rather impacted upon the ability of the Court to provide for early conditional release or a shorter non-parole period. It affected the consideration of matters such as

the prospects for rehabilitation, the need for community protection and personal deterrence.

[31] In the present case the non-parole period set by the learned sentencing Judge was a period of five years and three months. In my view the non-parole period set by his Honour in respect of sentences he imposed has not been demonstrated as being in error. It is not manifestly excessive.

[32] Because the appellant had also to serve the remainder of his earlier sentence he was not eligible for release on parole for a period of six years and nine months. His Honour referred to the provisions of the *Crimes Act* and in particular the requirements of s 19AR(3)(e) which provides that where the unserved part of the outstanding sentence is three years or less (as is the case here) "the court imposing the new sentence or sentences must not fix a non-parole period but may make a recognizance release order in respect of the outstanding sentence or sentences". His Honour declined to make a recognizance release order because that order would be overtaken by the obligation of the appellant to commence serving the Territory sentence. The appellant makes no complaint in relation to this aspect of the reasoning of his Honour. However it remains relevant to the submissions made as to the totality principle addressed later in these reasons.

Cumulation

[33] The appellant complains that the learned sentencing Judge erred in ordering partial cumulation of the penalties imposed in respect of the supply and

possession charges. It was submitted that s 50 of the *Sentencing Act* creates a prima facie rule that terms of imprisonment imposed on a person in situations such as this ought to be concurrent. There must, it was submitted, be good reason for displacing the prima facie rule and directing partial or total cumulation instead.

[34] It was noted that his Honour had in the course of his sentencing remarks observed that "the offence of supply involves elements beyond those involved in the possession. In fact, the possession is common to both. Accordingly, total concurrency is not appropriate". It was submitted that there is no basis in principle for ordering cumulation of penalties for two separate offences merely because one of the offences has elements in common with, but also additional to, the elements of the other offence. Further it was submitted that the circumstances of the offences in this case did not provide "good reason" for displacing the prima facie rule of concurrency. It was submitted that it could legitimately be said that the offences arose from substantially the same act or same circumstances or at least a closely related series of occurrences. In those circumstances cumulative penalties should not be imposed.

[35] Whilst s 50 of the *Sentencing Act* does create a prima facie rule that terms of imprisonment are to be served concurrently unless the court "otherwise orders" there is no fetter upon the discretion exercised by the court. The prima facie rule can be displaced by a positive decision: *R v Mantini* [1998]

3 VR 340. In *Attorney-General v Tichy* (1982) 30 SASR 84 Wells J observed (at 92):

> "It is both impracticable and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether the sentences should be ordered to be served concurrently or consecutively…what is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the circumstances broadly and reasonably, can be characterised as his criminal conduct. Sometimes, a single act of criminal conduct will comprise two or more technically identified crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct that, reasonably characterized, are really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent; the courses of criminal conduct may coincide with technical offences or they may not. Sometimes, the process of characterization rests upon an analysis of fact and degree leading to two possible answers, each of which, in the hands of the trial judge, could be made to work justice. The practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time. What must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been (found) guilty… Where consecutive sentences are imposed it may be thought that they are kept artificially apart where they should, to some extent, overlap. Where concurrent sentences are imposed, there is the danger that the primary term does not adequately reflect the aggravated nature of each important feature of the criminal conduct under consideration."

See also: *R v Scanlon* (1987) 89 FLR 77; *Taylor* (1992) 58 A Crim R 337.

[36] Where an offender is convicted of several offences arising out of the same set of facts the sentences will normally be concurrent and where the offences are entirely distinct they will normally be cumulative: *R v Carey* (1975) 11 SASR 575 at 577. However views may differ as to the category into which the circumstances of a particular case fall. In many cases there

will be no clearly correct answer. The overriding concern is that the sentences for the individual offences and the total sentence imposed be proportionate to the criminality in each case.

[37] In *Koushappis v R* (1988) 34 A Crim R 419 the Court of Criminal Appeal in Western Australia considered a matter in which the appellant was convicted of possessing heroin with intent to sell and also of the sale of heroin. The Court said (at 422):

> "The question for decision is whether the two terms imposed by the learned judge should be served cumulatively.
>
> The relevant principle is that:
>
> > "… where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive": see D A Thomas, *Principles of Sentencing* (2nd ed, 1979), p53.
>
> It is clear that the applicant was retailing heroin from the one supply and the two offences were committed on the same day within minutes of each other. The heroin in the applicant's possession was the balance remaining after the sale, the subject of the second count. In our opinion the one transaction rule should apply. The position would not necessarily be the same had there been subsequent sales from the one supply."

That case differed from the present case in that here the appellant was convicted of simple possession of a quantity of heroin not possession of heroin for sale or supply. Further, in the present case the possession and the supply were not so closely linked in time and circumstance as to require the application of the "one transaction" rule. Views may differ as to whether or not that rule should apply.

[38] In this case the learned sentencing Judge compared the two offences and the circumstances in which they arose. It is to be noted that the amount of heroin supplied to Mr Fraser was a small proportion of the total found in the possession of the appellant. Whilst the offence of supply heroin may be said to arise out of the possession of the heroin, and there is an element of overlap, the offences involved different conduct on the part of the appellant. As the learned sentencing Judge observed "the offence of supply involves elements beyond those involved in the possession." His Honour concluded that in the circumstances "total concurrency is not appropriate".

[39] The approach adopted by his Honour is consistent with the observations of McHugh, Hayne and Callinan JJ in *Pearce v The Queen* (1998) 194 CLR 610 (at 623) where their Honours said:

> "To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts."

[40] The learned sentencing Judge directed that the individual sentences be served concurrently as to the period of two years. In my opinion it cannot be said that the conclusions reached or the sentences imposed were not available to the Judge in the proper exercise of his discretion. In my view

the difference in the offences ought to be recognised in the sentencing process by the partial cumulation of the sentences and that is what occurred. However that cumulation should not lead to a "crushing" sentence.

Totality

[41] The final submission of the appellant was that the overall sentence imposed upon him infringed the totality principle. This occurred by virtue of the partial cumulation of the sentences for possessing heroin and supplying heroin and, further, by making the total effective sentence of seven years cumulative upon the eighteen months imprisonment required to be served under the *Crimes Act*. As a consequence of that process the effective total head sentence was eight years and six months imprisonment with a non-parole period of six years and nine months. The submission was that the overall criminality of the appellant did not justify a sentence of that magnitude and "an appropriate result could have been achieved by reducing the sentences in respect of each of the possession and supply charges, or by ordering total concurrency between the sentences imposed in respect of the possession and supply charges or by ordering concurrency with the federal sentence".

[42] The totality principle requires a sentencing Judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence does not exceed the overall culpability of the offender: *Postiglione v The Queen* (1996-1997) 189 CLR 295 at 340; *Mill v The*

Queen (1988-1989) 166 CLR 59 at 62-63. The aggregate sentence must be "just and appropriate" and not "crushing". That sentence is to be considered in light of "the total criminality involved not only in the offences for which the offender is being sentenced, but also in any offences for which the offender is currently serving a sentence": *Postiglione v The Queen* (supra at 308).

[43] Reference to the sentencing remarks of the learned sentencing Judge reveals that he did not undertake expressly the exercise discussed in the above authorities. In my view it was an error to fail to do so. Consideration of the fact that the head sentence becomes effectively imprisonment for eight years and six months and that the appellant must serve a period of imprisonment of six years and nine months before becoming eligible for parole leads to the conclusion that the sentence was not "just and appropriate", it was crushing. It is appropriate to effect a reduction in that period by making an order for concurrency as between the sentences imposed for the possession and supply charges on the one hand with the reinstated sentence of eighteen months imprisonment on the other hand. I would direct that those sentences be served concurrently as to the period of twelve months. To that period of concurrency I would add one month to provide for time spent in custody making a total period of concurrency of thirteen months.

[44] The sentence I would impose would be as follows. The appellant be sentenced to imprisonment for five years and six months in respect of the

offence of supply heroin. He be sentenced to three years and six months imprisonment in respect of the offence of possess heroin. Those two sentences run concurrently as to the period of two years making an effective sentence of seven years imprisonment. The non-parole period is five years and three months. By operation of statute the appellant is required to serve the unserved portion of the earlier sentence being eighteen months imprisonment. The sentences now imposed will be served concurrently with that sentence as to the period of thirteen months. The sentence of imprisonment now imposed and the non-parole period will commence thirteen months prior to the expiry of the period the appellant must serve by operation of the *Crimes Act* in respect of the importation charge.

[45] I would allow the appeal and sentence the appellant accordingly.

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