CITATION:	*Witham v The Queen* [2018] NTCCA 1
PARTIES:	WITHAM, Richard v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING NORTHERN TERRITORY JURISDICTION
FILE NO:	21543274 & 21556216 (CA 3 of 2017)
DELIVERED ON:	18 January 2018
DELIVERED AT:	DARWIN
HEARING DATES:	27 November 2017
JUDGMENT OF:	KELLY, BLOKLAND and HILEY JJ
APPEAL FROM:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – appeal against sentence – assessment of prospects of rehabilitation – similar but more serious reoffending while on bail – prior convictions – no indication of remorse – no error in finding that "prospects of rehabilitation are very poor" in all the circumstances – appeal dismissed.

CRIMINAL LAW – appeal against sentence – manifest excess – offending in the upper range of offending – ongoing commercial nature of drug supply – supply cannabis to an Indigenous community – principal offender

with significant role – non-parole period high but not unreasonable due to aggravated circumstances and lack of mitigation — sentence stern but not manifestly excessive — appeal dismissed.

Misuse of Drugs Act (NT) ss 2(a)(iv), 5(1), 37(6)(a).

Daniels v The Queen (2007) 20 NTLR 147; *DPP v Dalgliesh (a pseudonym)* [2017] HCA 41; *Emitja v The Queen* [2016] NTCCA 4; *Noakes v The Queen* [2015] NTCCA 7; *The Queen v Roe* [2017] NTCCA 7; *Whitehurst v The Queen* [2011] NTCCA 11, referred to.

REPRESENTATION:

Counsel:

Appellant:	I.Read SC
Respondent:	M.Chalmers

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Director of Public Prosecutions (NT)

Judgment category classification:	B
Number of pages:	21

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

Witham v The Queen [2018] NTCCA 1
No. 21543274 & 21556216

BETWEEN:

RICHARD WITHAM
Appellant

AND:

THE QUEEN
Respondent

CORAM: KELLY, BLOKLAND and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 18 January 2018)

KELLY J

Introduction

[1] I have had the advantage of reading a draft of the reasons for decision of their Honours Blokland and Hiley JJ. I agree with their Honours' reasons. I would also dismiss the appeal.

[2] In my view there was ample evidence before the sentencing judge from which it was open to him to conclude that the appellant's prospects of rehabilitation were "very poor", notwithstanding his lack of relevant prior convictions and the fact that he had some skills and a work history before

injuring his back in 1993: the offending was serious; the second, more serious offence was committed while the appellant was on bail for the first offence; his Honour found that the appellant had told lies in evidence before him; the appellant had a long history of abusing cannabis and, as a disability pensioner, limited legitimate means to fund his habit. Further, he had shown an ability and willingness to make very large profits from supplying drugs at vastly inflated prices to the poor and vulnerable in an indigenous community while exploiting his indigenous associates by paying them a pittance – this despite staying in that community and witnessing first hand the condition of the people there. Importantly, his Honour had ample opportunity to observe the appellant in court giving evidence over a number of days and could form his own view of the appellant's character and prospects. It was not suggested by counsel for the appellant that his Honour should have found the appellant's prospects to be good. I agree with counsel for the respondent that it is not appropriate to subject the sentencing judge's remarks to a level of scrutiny which distinguishes between the aptness of describing the appellant's prospects as "poor" and "very poor": an assessment of "poor" prospects rather than "very poor prospects" would not have affected the sentencing disposition.

[3] I also agree with Blokland and Hiley JJ that neither the head sentence nor the non-parole period was manifestly excessive. The starting point for the head sentence was within the range of sentences for offending of a like nature. So far as the non-parole period is concerned, the appeal is against

the exercise of a discretion. The question therefore, is not whether this Court would have considered a shorter non-parole period to have been preferable, but whether the sentencing discretion mis-carried. To succeed, the appellant must show that, on the material before the sentencing judge, it was unreasonable to have imposed a non-parole period of the length imposed by the sentencing judge – that is to say that the non-parole period imposed was plainly and manifestly (and not just arguably) excessive in the circumstances. In my view, it was not. As the sentencing judge said, there was not a lot by way of mitigation. The appellant was not remorseful and there was nothing as yet to suggest that he was likely to change his ways. For that reason, his Honour determined that it not was appropriate to partially suspend the sentence, and that it should be left to the Parole Board to make an assessment of whether the appellant should be released on conditions at a later date.

[4] The legislation provides that the court may not fix a non-parole period of less than 50% of the head sentence. That does not mean that offenders being sentenced have some kind of prima facie entitlement to a non-parole period of 50% of the head sentence. The non-parole period is the length of time which, in the sentencing judge's assessment, is the minimum that justice requires the offender to serve given the objective seriousness of the offence, the offender's prospects of rehabilitation, the need for personal and general deterrence and all of the other relevant matters which the court is required to take into account. It has not been suggested that the sentencing judge in this

case took into account any irrelevant considerations or failed to take any of the relevant considerations into account. Given the objective seriousness of the offending and the other matters referred to above (and in more detail by Blokland and Hiley JJ) it cannot be said that a non-parole period of the length fixed by the sentencing judge was manifestly excessive.

BLOKLAND AND HILEY JJ

[5] On 14 July 2016 the appellant was sentenced to a total effective term of three years and eight months imprisonment for offences against the *Misuse of Drugs Act*. A non-parole period of two years and six months was set. This is an appeal against the severity of the sentence.

[6] The grounds of appeal are as follows:

Ground 1:

That the learned sentencing judge erred in finding that the appellant's "prospects of rehabilitation are very poor" in so far as it was unreasonable so to find in all the circumstances.

Ground 2:

That in all the circumstances the sentence imposed was manifestly excessive.

The proceedings in the Supreme Court

The appellant pleaded guilty to one count on the first indictment (21543274) namely, being in possession of a traffickable quantity of cannabis. The amount of cannabis was 80.05 grams. The date of the offending was 2 September 2015. In brief, the appellant was found in possession of the cannabis in a hotel room in Katherine. He gave evidence to attempt to rebut the presumption of intention to supply in s 37(6)(a) of the *Misuse of Drugs Act*. His account was rejected by the sentencing judge. He was sentenced to 14 months imprisonment for that count.

[7] The second indictment (21556216) contained three counts for offending that took place in Gapuwiyak between 7 November 2015 and 13 November 2015. Although very late in the overall proceedings, after a voir dire was conducted, the appellant pleaded guilty to all three counts on that indictment. Those counts were one of possess a traffickable quantity of cannabis, namely 224 grams, one of supply cannabis with the aggravating circumstance that it was supplied in an Indigenous community and one of possessing property, namely $24,000 in cash, obtained from taking part in the supply of dangerous drugs. At the time of the offending on the second indictment, the appellant was on bail for the charge on the first indictment. For the offending on the second indictment, he was sentenced to an aggregate of three years imprisonment, cumulative as to eight months on the sentence for the offending on the first indictment.

[8] The total effective sentence was three years and eight months imprisonment. A non-parole period of two years and six months was set.

Proceedings and material before the Supreme Court

[9] The facts in relation to the count on the first indictment were that the appellant, who was a disability pensioner and usually resident in Darwin, sourced some cannabis from an unknown person. He travelled from Darwin to Katherine and checked into Room 5 of the Stuart Hotel. On 2 September 2015 police received information that a person who was the subject of an outstanding warrant was in Room 5. Police attended the room, but the person the subject of the warrant was not present. The appellant was present. Police observed a glass bong and shortly after obtained and executed a search warrant. As a result of the search the following items were found: loose cannabis on a bedside table, a glass bong, four clipseal bags of cannabis under the bedside table and a Nokia mobile phone. The appellant was arrested and made a partial admission stating "I bought four ounces in Darwin for $500 an ounce … That's me bong. I smoke cannabis through that bong … That looks like three small bags of cannabis to me. It's mine. To smoke it". The total weight of the cannabis was 80.05 grams.[1]

[10] After the plea was entered and the facts were read on 21 June 2016, the appellant commenced giving evidence to attempt to rebut the presumption of supply. After his evidence in chief, due to the issues to be raised on the voir

[1] AB 210-211.

dire relevant to the second indictment, cross examination of the appellant was adjourned, initially to 1 July 2016, but was not concluded until 14 July 2016. The sentencing judge rejected the appellant's attempt to persuade the Court that the possession of the cannabis was for personal use. His Honour said of the appellant's evidence:[2]

> I do not accept the offender's evidence in this regard. His evidence did not make sense. It was not straight forward and open. It did not have a ring of truth and reality. It was inherently improbable. His evidence has not been consistent over time. It contained internal conflict and the offender was utterly dissembling.

[11] The appellant unsuccessfully applied for bail at the conclusion of the plea hearing on 21 June 2016.

[12] On 1 July 2017 the appellant pleaded not guilty to the three counts on the second indictment and a voir dire was conducted over a number of days.[3] On the final day of the voir dire hearing the appellant changed his pleas to guilty to all three counts. At that time the appellant also completed his evidence that was relevant to count one and the attempt to discharge the presumption. Final submissions were made by counsel.

[13] The facts found with respect to the second indictment were that at some time before 8 November 2015 the appellant sourced 224 grams of cannabis.[4] He travelled from Darwin to Katherine where he picked up Ms Angela Ashley and together they drove to Gapuwiyak on 8 November 2015. The appellant

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2 AB 342.
3 Evidence and submissions were heard on 1, 4, 5, 6, 11 and 14 July 2016.
4 AB 340.

drove to the home of Mr Lesley Campion and parked his car behind Mr Campion's house. He and Mr Campion covered the car with a tarpaulin so that police could not see it. The appellant and Ms Ashley stayed in a small flat at the rear of Mr Campion's house. There they divided the cannabis into small clip seal bags containing approximately one gram. The bags of cannabis were sold for $100 each. An arrangement was made between the appellant, Mr Campion and his daughter for the two of them to assist him to sell the cannabis to local Indigenous people. Mr Campion and his daughter spread the word that cannabis was for sale at their house.

[14] People in the community who wanted to buy cannabis would give Mr Campion or his daughter $100. They would in turn give the money to the appellant and he would give them the cannabis, which was then given to the purchasers. On some occasions, the appellant sold cannabis directly to the buyers.

[15] All of the cannabis was sold between 8 and 12 November 2015. As a result of the sale the appellant received $24,000. The appellant and Ms Ashley wrapped the money inside sandwich bags. The money was concealed underneath a spare tyre well inside his car.

[16] The appellant was apprehended 129 kilometres south west of Gapuwiyak on the Central Arnhem Highway. He was arrested and the money was found and seized. His car was also seized. Mr Campion and his daughter made

admissions to police about selling the cannabis. They told police they received $200 each from the appellant for their assistance.

[17] The appellant's previous drug related court matters are as follows:[5]

2010 Queensland: Possess dangerous drugs, possess utensils or pipes. Convicted and fined $400.

2009 Queensland: Possess utensils or pipes. Without conviction, fined $250.

2005 Victoria: Cultivate and possess cannabis. Convicted and aggregate fine of $500.

1993 Victoria: Possess and use cannabis. Convicted and fined $150 on each.

1993 Victoria: Possess cannabis. Convicted and fined, aggregate with other offences, $350.

1993 Victoria: Possess drug of dependence, cultivate cannabis. Convicted and fined, aggregate with other offences, $400.

1993 Victoria: Cultivate and possess cannabis. Convicted and fined $350 and $150 respectively.

1992 Victoria: Possess drug of dependence, cultivate cannabis. Without conviction, community based order in conjunction with other offences.

[18] Although of less relevance for sentencing purposes, it should also be noted the appellant has previous multiple convictions for traffic offences, offences

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5 AB 310-321.

against public order and some previous court matters for offences against the person. He has no claim to good character.

[19] In terms of the appellant's subjective circumstances, the sentencing judge was told the appellant was born in 1959, and was from Victoria.[6] He was 55 at the time of the offending. He completed year 11 at school, left halfway through year 12 and joined the army. He became a trauma medical attendant. His counsel told the Court this work may have had a detrimental effect on him, although no further material about that subject was put before the Court. The Court was told the appellant ran the medical centre of 35 Transport Squadron for six years. He did not start using drugs until he left the army aged 23, when he commenced using cannabis recreationally. He worked in a number of hospitals throughout Victoria, and later worked in the building trade. He married in 1987 and divorced after six years. He subsequently worked on fishing boats but injured his back in 1993. From that time he was on a disability pension. His cannabis use increased to assist with pain relief. He had renal failure in 1996 and as a result, lost a kidney. He came to the Northern Territory in 2012, bought a boat and lived in it. He continued to use cannabis for both pain relief and on a recreational basis.

[20] The learned sentencing judge also referred to a statutory declaration from a community leader at Gapuwiyak tendered by the Crown. His Honour set out the following portion of the statutory declaration:

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6 AB 9-10; 337.

I am a community elder and a traditional land owner from Gapuwiyak community, a remote Aboriginal community in the far north east of Arnhem Land.

I was born there in 1958 and have lived my entire life there.

I am currently on the Board of Directors of the Arnhem Land Progress Aboriginal Corporation which contributes to the development of local economies and Indigenous businesses where they operate.

I am also a member of the local Gapuwiyak Community School Committee and regularly attend meetings regarding issues surrounding the school.

There are numerous issues within our community. However, none are as significant and detrimental to the health and well-being of our community as cannabis abuse.

Having lived my whole life in the community, I have seen things become progressively worse since the introduction of cannabis into the Gapuwiyak community.

Years ago, it was mostly just the adults that smoked cannabis. However, nowadays kids as young as 12 and 13 are smoking it.

School attendance at our school in Gapuwiyak used to be really good. At one stage we had almost 90 percent of kids attending school. Last year in 2015, our average attendance rate was about 20 percent.

The problem is that parents stay up all night smoking cannabis and gambling and nobody is supervising the kids. So as a result the kids are staying up all night; some of them sniffing petrol, others smoking cannabis, some drinking home brew. When it comes to morning time, all the parents are asleep and all of the kids are asleep.

Nobody is making sure that their kids are getting up and going to school and it has started a real problem in the community because it’s the same thing every day.

> Another problem with the cannabis in the community is that money is supposed to be spent on food and clothes for children. Instead, it is being spent on cannabis. I am on the Board of Directors at the local community store. I am aware that on some days more than $18,000 is withdrawn from the ATM at the store. There are no other legitimate businesses in Gapuwiyak. So, the only place people go to spend money is at the store. This means that on some days $18,000 is being spent on gambling and cannabis – the only two things you can't buy from the store in Gapuwiyak.
>
> This means $18,000 which could be spent on feeding families and children healthy food or even clothes is being spent on cannabis and gambling. I have heard that cannabis can cost people about $200 for just a little bag. Sometimes people buy two or three little bags.
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> Cannabis has hurt my family directly as well. My son smokes cannabis and it hurts me because I think he could have such a bright future. He could be a smart man like me. He could have a good job. Instead, he stays up all night smoking cannabis and then sleeps all day.
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> …
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> It is sad because when I and the elders of Gapuwiyak look at the young people we worry. We are worried that when we pass away there will be no one to pass on the tradition, pass on the culture. Because of this cannabis, we have a whole generation of children with mental problems and depression. They just sit around smoking cannabis, feeling bad for themselves. They don't realise how good life could be for them.

Discussion of ground one

[21] This ground complains the sentencing judge was in error by finding the appellant's prospects of rehabilitation were "very poor". Senior counsel for the appellant emphasised the non-parole period was unusually high at 68 per cent of the head sentence. It was submitted the appellant was not a

person of "settled criminal habits" and it was unfair and unreasonable that the appellant's prospects were assessed in such a poor light. Although the appellant had a criminal history, his counsel emphasised he had not previously been ordered to serve a significant term of imprisonment. Consequently, it was submitted personal deterrence should not be a significant factor.

[22] Attention was also drawn to the appellant's medical condition and his earlier substantial work history. His counsel suggested that given the appellant's age and antecedents it was reasonable to expect he would be effectively deterred without a substantial non-parole period or overall sentence.

[23] We reject this ground. His Honour's finding about the appellant's prospects was not made lightly and was well open on the material before him.

[24] Counsel for the appellant drew our attention to a number of sentencing decisions.[7] We have had regard to those decisions. While it is the case that in a number of other sentencing matters involving defendants with poor antecedents, such a finding was not made and those defendants had the benefit of receiving only the minimum non-parole period, in our opinion it was not an unreasonable finding in all of the circumstances of this particular matter.

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7 "Comparative Sentencing Tables". Index: 1. Supply to Indigenous Communities Commercial. 2. Supply between 500g and 2kg (Compiled by the Northern Territory Legal Aid Commission).

[25] Reference was made by counsel for the appellant to the sentence of *R v Anthony David Orrell*.[8] The offender Orrell pleaded guilty to one count of possessing a commercial quantity of methamphetamine, receiving $5,500 in cash by way of the proceeds of supply, unlawful supply of methamphetamine and receiving a further $5,000 in proceeds. He was sentenced to a total of six years imprisonment with a non-parole period set at 50 per cent, or three years. That case involved very serious offending across two files. The offender Orrell had extensive previous drug and other convictions. He did however receive an overall twenty per cent reduction for pleas of guilty. He was 31 years old and had been involved in a serious accident as a younger person and had suffered as a result of a friend dying in another motor vehicle accident. He was addicted to both "ice" and alcohol. By the time of the sentencing hearing he had completed the Safe Sober Strong programme in custody and was seeking or engaged with other professionals for help with his many problems. He had suffered depression and although remorse was not accepted, he had apologised for his offending and pleaded guilty. In those circumstances the sentencing judge was able to take into account a range of subjective factors that were not open to the appellant in this matter. Counsel for the appellant also sought to highlight the circumstances of the offender in *The Queen v Roe*.[9] It was submitted the appellant was not addicted, therefore the negative consequences of addiction

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8 SCC 21524915, Sentencing Remarks, 15 January 2016.
9 [2017] NTCCA 7.

on prospects of rehabilitation as discussed in *Roe* did not apply.[10] It was pointed out that in *Roe* despite poor prospects, the non-parole period was set at 50 per cent of the six year sentence.

[26] His Honour mentioned there was little by way of mitigation.[11] There is no suggestion that observation was in error. Nor could there be in our view.

[27] In assessing the appellant's prospects for rehabilitation, it was highly significant that the appellant offended again in a similar but much more serious way while on bail. The re-offending in a more serious manner while on bail sets this matter apart from the majority of broadly comparable cases referred to us. Although the appellant's previous convictions for cannabis-related offences were comparatively minor, he had been dealt with many times before the courts, indicative of a need for some emphasis to be placed on specific deterrence.

[28] Although the appellant eventually pleaded guilty to all of the offending, only the guilty plea to the offending in Katherine could be regarded as an early plea. The pleas of guilty to the Gapuwiyak matters were late pleas. His Honour heard the appellant give evidence and was well placed to assess the level of any remorse or genuine acceptance of responsibility. There were no indications of remorse. The appellant's counsel suggested the appellant's conduct during the proceedings may have demonstrated recalcitrance on his part, but he submitted recalcitrance was not a sufficient

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10 *The Queen v Roe* [2017] NTCCA 7 at [45]-[46].
11 AB 344.

basis on which to make the adverse finding about his prospects. His Honour simply found: "[t]here is nothing yet to suggest he is likely to change his ways".[12] Recalcitrant or not, we detect no error in his Honour's approach.

[29] The appellant was a mature person and was prepared to engage in serious offending while on bail for similar offending. The Gapuwiyak offending was particularly serious as it took place in an Indigenous community. It also involved elements of exploitation. The appellant demonstrated persistence with offending in a mercenary manner, despite being on conditional liberty.

[30] In our view the finding with respect to very poor prospects was open to the sentencing judge and we would not uphold this ground.

Manifestly excessive

[31] It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error is shown. Specific error aside, a sentence is not to be disturbed unless it is so excessive as to manifest error. It must be shown that the sentence was clearly and not just arguably excessive.[13]

[32] The appellant's case on appeal emphasised that the supply in Gapuwiyak was less than a commercial quantity, although it was acknowledged the criminal episode was commercial in nature. It took place in an Indigenous community and involved large profits. It was acknowledged the tainted

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12 AB 344.

13 *Whitehurst v The Queen* [2011] NTCCA 11 at [12]; *Noakes v The Queen* [2015] NTCCA 7 at [23]; *Emitja v The Queen* [2016] NTCCA 4 at [39].

property charge increased the available sentencing discretion as the maximum penalty for that charge is 25 years imprisonment. Counsel also acknowledged the planning and concealment were aggravating features.

[33] Despite the principles concerning the approach to be taken to sentencing for offending of this kind in Indigenous communities enunciated in *Daniels v The Queen,*[14] it was submitted the offending did not warrant the term of imprisonment and the non-parole period that was imposed. Much reliance was placed on the relatively lower amounts of cannabis involved, in the sense that neither count involved a commercial level of cannabis of 500 grams. Nevertheless, the offending was objectively serious for other reasons.

[34] The offending at Gapuwiyak was in the upper range of offending of that kind. It must be remembered that the aggravated form of the offence under ss 5(1) and (2)(a)(iv) of the *Misuse of Drugs Act* involving supply in an Indigenous community expressly excludes commercial quantities.[15] Had the amount of cannabis involved met the threshold for a commercial quantity, the maximum penalty would have been 14 years imprisonment, wherever the offending took place.

[35] When considering the objective gravity of an offence under ss 5(1) and (2)(a)(iv) of the *Misuse of Drugs Act*, by definition the amount of cannabis

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14 [2007] NTCCA 9; 20 NTLR 147.

15 Section 5(1)(2)(a): "Where the amount of the dangerous drug supplied is not a commercial quantity".

will be less than the scheduled 500 grams that defines a commercial quantity. The sentencing yardstick here was a maximum penalty of nine years imprisonment. It is within that penalty context that the gravity of the offending is to be assessed. In any event, while important, the weight of the cannabis is not the sole or most significant factor in sentencing in cases of this kind.

[36] Other factors relevant to the assessment of the gravity of the offending include the ongoing commercial nature of the appellant's drug supply activities from late August 2015 to November 2015. During that time he breached bail by re-offending. He was the principal offender. His significant role in the offending is a major factor informing the gravity of the offending. He engaged local people in Gapuwiyak for a minor cost to himself to assist him to sell the cannabis. He made a significant profit from a small community that can ill afford to have $24,000 drained from its overall financial resources. We have already set out the community leader's statutory declaration that highlights the detriment to the Gapuwiyak community.

[37] In any event, those factors have long been recognised as features that in the sentencing decisions of this Court require significant penalties. In *Daniels v The Queen*,[16] Martin (BR) CJ and Riley J said:

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16 (2007) 20 NTLR 147 at [42].

> Commercial drug offending within Aboriginal communities has remained far too prevalent. As we have said it is time for penalties to be increased in order to reflect the need for greater general deterrence. Those who engage in drug offending related to Aboriginal communities, particularly commercial drug activities, are on notice that in future longer terms of imprisonment will be imposed.

[38] The adverse social consequences of the appellant's offending in Gapuwiyak elevates the gravity of the offending beyond an assessment based simply on the amount of cannabis or money involved. In terms of comparative sentences, we have considered the sentences referred to us by counsel for the appellant. We have not identified a cannabis supply case that has set a non-parole period of 68 per cent of the sentence, however in our view, given the aggravating features we have discussed, the lack of mitigation and the overall circumstances, while the sentence may be regarded as a stern sentence, it was not manifestly excessive. Sentences for offending of this kind should be significant. The sentence does not demonstrate error of the kind that would justify interference by this Court. In our view neither the overall sentence nor the non-parole period depart from the genuinely comparable cases in such a manner as to demonstrate error.

[39] His Honour was bound to set a minimum non-parole period of fifty per cent. As counsel for the Crown has pointed out, other than the fifty per cent prescribed minimum, the discretion was at large. Further, as well as facilitating rehabilitation, the non-parole period must represent the minimum period the Court thinks is appropriate for an offender to serve before being considered for release by the Parole Board. As pointed out by counsel for

the Crown, in the circumstances of this case where punishment, denunciation and deterrence were uppermost in the sentencing exercise, it was not unreasonable for a non-parole period in excess of the statutory minimum to be applied whilst still allowing for rehabilitation. It was well within his Honour's discretion to reflect his view of the gravity of the offending and the appellant's poor prospects in the non-parole period.

[40] As we have noted, the comparative sentences provided tend to indicate the length of the non-parole period is somewhat unusual. That factor alone does not demonstrate the sentence here was manifestly excessive. There were particular features in this matter calling for a strong sentence. In any event, as pointed out by counsel for the Crown, the High Court in *DPP v Dalgliesh (a pseudonym),*[17] has recently reviewed the relevance of comparative sentences when setting a sentence in an individual case. *Dalgliesh* emphasises the importance of the maximum penalty as the yardstick.[18] Further, it emphasises that the principle of "reasonable consistency" as between sentences requires consistent application of relevant legal principles.[19] Although comparable cases can illustrate the possible range of sentences, they do not define the range. Appellate intervention on the grounds of manifest excess is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases,

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17 [2017] HCA 41.

18 *DPP v Dalgliesh (a pseudonym)* [2017] HCA 41 at [10] citing *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at 372 [31].

19 *DPP v Dalgliesh (a pseudonym)* [2017] HCA 41 at [49] citing *Hili v The Queen* [2010] HCA 45; 242 CLR 520 at 535 [49].

the appellate court is driven to conclude there must have been some misapplication of principle.[20]

[41] We do not conclude, having regard to the comparative sentences or other features of the case, that there has been any misapplication of principle. We also agree with the additional observations made by her Honour Kelly J.

[42] We do not uphold this ground.

Order of the Court

[43] The appeal is dismissed.

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[20] *DPP v Dalgliesh (a pseudonym)* [2017] HCA 41 at [59] citing *R v Pham* [2015] HCA 39; 256 CLR 550 at 559 [28].