Stewart v The Queen [2016] NTCCA 3

PARTIES:	STEWART, Jamie Charles
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 6 of 2016 (21555577)
DELIVERED:	26 AUGUST 2016
HEARING DATES:	26 JULY 2016
JUDGMENT OF:	KELLY J
APPEAL FROM:	SOUTHWOOD J

REPRESENTATION:

Counsel:

Appellant:	Self represented
Respondent:	S Ledek

Solicitors:

Appellant:	
Respondent:	Director of Public Prosecutions

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

Stewart v The Queen [2016] NTCCA 3
No. CA 6 of 2016 (21555577)

BETWEEN:

JAMIE CHARLES STEWART
Appellant

AND:

THE QUEEN
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 26 August 2016)

[1] This is an application for leave to appeal against sentence. Under s 429(1) of the *Criminal Code 1983 (NT)*, applications for leave to appeal are determined, in the first instance, by a single judge. A person whose application for leave to appeal has been rejected by a single judge, has the right to have the matter re-considered by three judges [s 429(2)].

History of the proceedings and the material before the sentencing judge

[2] On 18 March 2016, Mr Stewart pleaded guilty in the Supreme Court to one charge of unlawfully taking part in the supply of methamphetamine to another person, the maximum penalty for which, at the time the offence was committed, was imprisonment for 14 years. The quantity of

methamphetamine involved was 12.39 gms. (To put this in perspective, a trafficable quantity of methamphetamine is 2 gms or more and a commercial quantity is 40 gms or more.)

[3] On that date the sentencing judge ordered a supervision assessment including an assessment as to whether he would be capable of coping with a "COMMIT" disposition under a suspended sentence. His Honour also ordered an institutional report from the prison and adjourned the sentencing hearing to 8 April 2016.

[4] On 8 April, the sentencing judge had before him a supervision assessment from Correctional Services dated 7 April 2016 which assessed Mr Stewart as unsuitable for supervision and unsuitable for a COMMIT sentencing disposition. That report had attached to it a letter from Banyan House which assessed Mr Stewart as suitable for the Banyan House program, but added:

> However, Banyan House would, unfortunately, not be able to induct Mr Stewart due to conflict of interest. After reading the NT News report a couple of weeks ago, few of our residents approached staff and advised that they have had dealings with Mr Stewart and such dealings were of a violent nature with Mr Stewart the perpetrator. They also expressed concerns around their safety. Banyan House has a duty of care to our current clients and has to ensure their safety at all times. Hence Mr Stewart has not been successful in entering the residential treatment program at this instance. *[emphasis added]*

[5] His Honour also received an institutional report from the prison. It was not given an exhibit number but I presume it is the report dated 1 April 2016 annexed to the affidavit of Grant Eric Jonsson dated 11 August 2016, filed in response to my request for clarification of the precise material before his

Honour when sentencing Mr Stewart. That report contains (*inter alia*) the following remarks.

> **Breached and Incidents** (sic)
>
> Mr Stewart has numerous recorded incidents during his current episode, the majority being for threatening, abusive and non-compliant behaviour and fighting. His most recent incidents as listed below.
>
> On the 11th November 2015 Mr Stewart recorded an incident for making verbal threats towards an officer and his lawyer within the Court of Summary Jurisdiction, Darwin. A misconduct charge is pending for the incident.
>
> On the 12th December 2015 Mr Stewart recorded an incident for assaulting another prisoner not resulting in injury. A misconduct charge is pending for the incident.
>
> On the 28th January 2016 Mr Stewart recorded an incident for assaulting another prisoner resulting in injury. A misconduct charge is pending for the incident.
>
> Mr Stewart is an ongoing 'person of interest' to Darwin Correctional Centre's Intelligence Unit as the result of his criminal activity and associations.
>
> **Conduct and Behaviour**
>
> Mr Stewart is currently a high security prisoner and has been so since 26th October 2015. He was upgraded from medium security to high security due to the seriousness of his offences and an incident recorded for threatening behaviour at the Court of Summary Jurisdiction, Darwin.[1] Mr Stewart previously maintained a medium security rating from the 18th June 2015 until the 26th October 2015.

[1] Either this is an error, or it refers to another, earlier incident than the one referred to earlier in the report which is said to have occurred on 11 November 2015.

A Prison Behaviour Case Report completed on the 31st March 2016 has indicated that Mr Stewart's behaviour is inconsistent and dependant on whether or not he 'gets his way'. The report states that at times Mr Stewart displays good behaviour and is compliant with officer's instructions while other times he can be argumentative and disruptive.

Program Participation

Mr Stewart was scheduled to participate in the Safe Sober Strong program on the 28th January 2015 but did not attend. Mr Stewart has not submitted further requests to participate in programs. Notably there are limited treatment courses available to remand prisoners.

……

Employment and Work Performance

Mr Stewart has been unemployed since the 11th November 2015. He has previously worked as a Cleaner, Window Cleaner and Food Service in the medium accommodation sector.

Mr Stewart's employment opportunities are limited due to his security classification and remand status. Employment opportunities will become available as he progresses through the system to a lower security rating.

Health and Medical Issues

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On the 7th March 2016 Mr Stewart was seen by Forensic Mental Health as he was placed at risk after continually threatening self-harm as he wanted to remain in a single cell. It was reported that Mr Stewart has a history of impulsivity and anti-social behaviours. He is not an ongoing patient of Forensic Mental Health.

[6] On 8 April 2016, Mr Stewart's counsel made submissions to the sentencing judge about this report.[2]

(a) In relation to the incident on 11 November 2016 (involving threats in the CSJ), he said Mr Stewart had no memory of the incident but that he was drug affected and "probably in pretty severe emotional distress" at the time.

(b) In relation to the alleged assault on 12 December, he said that his instructions were that Mr Stewart was sitting at a table, another prisoner struck him and he retaliated. He pointed to the fact that there were no injuries and said that this was because Mr Stewart restrained the other prisoner. He submitted that it was a case of self- defence.

(c) Similarly, in relation to the incident on 28 January 2016, counsel said his instructions were that Mr Stewart was king hit trying to open a door while some other people were engaged in a fight. He said the injuries referred to in the report were those suffered by Mr Stewart himself.

(d) In relation to the comment in the report about the Safe Sober Strong program, counsel pointed out that it was in January 2015 that Mr Stewart had failed to attend the Safe Sober Strong program – at a time when he was in denial about his drug problem – and that it was

[2] Transcript of Proceedings, *R v Jamie Charles Stewart* (Darwin Supreme Court, 21555577, Justice Southwood, 8 April 2016) pp15 – 16

now his high security rating that was preventing him from doing the program.[3]

[7] Mr Stewart's counsel also addressed the fact of Mr Stewart's current high security status and how that might affect the sentencing judge's decision whether to partly suspend Mr Stewart's sentence. His Honour remarked:

> In those circumstances [ie Mr Stewart's high security rating] given his history we're looking at a non-parole period subject to anything you want to say.

[8] Defence counsel went on to make submissions as to why it would be appropriate to partially suspend the sentence, based largely on Mr Stewart's expressed desire to engage in rehabilitation and remain drug free.[4] He put forward a number of options including Banyan House and the Sunrise Centre.[5]

[9] Counsel also pointed out that Mr Stewart had been assessed as suitable for Banyan House, that Banyan House found that he had demonstrated motivation to examine and address his substance misuse and would benefit from the program, and that "the reason that he wasn't allowed into the

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3 Transcript pp 18

4 During these submissions it emerged that Mr Stewart's partner had returned to Melbourne with their baby son in breach of her bail and that there was an outstanding warrant for her arrest, but that it was her understanding that extradition was not being sought and she would only be arrested if she returned to the Territory. Transcript pp 16 – 17

5 Transcript pp 17 – 18

Banyan program" was because of a newspaper report that concerned some of the existing residents.[6]

[10] In light of those submissions his Honour adjourned the sentencing hearing to 29 April 2016 to enable further reports to be prepared. In doing so, his Honour said:

> Now, what you'll need by then and why I've made it some time after the 20th, Mr McMaster, is a full plan if there is to be any hope of release. So it won't be of assistance to me if you're in the same position then as you are today.
>
> ..
>
> So enquiries will need to be made of Banyan House. Enquiries need to be completed at Venndale and Bakhita and Sunrise and so on if there is to be any movement including, as I say, going back to Banyan and finding out what's the issue there, whether it still persists or not, because it seems to me, given his record, unless those things are in place, the appropriate disposition is a disposition with a non-parole period and then he can apply to have that sentence transferred to Victoria.[7]

[11] When the matter resumed before his Honour on 29 April 2016, his Honour noted that Mr Stewart still had outstanding matters to be dealt with in the CSJ, and that the present offending had been committed in breach of an existing suspended sentence of which there was one month and one week outstanding.[8] His Honour then considered an Amended Supervision Report dated 28 April 2016 which likewise assessed Mr Stewart as unsuitable for

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6 Transcript pp 17 - 18

7 There was evidence that Mr Stewart had been found suitable for a rehabilitation program in that State.

8 Transcript 29.04.16 pp 22 and 23 [actually the 1st and 2nd pages]

supervision or for the COMMIT program. That report set out the following results of inquires made as to the availability of residential rehabilitation programs for Mr Stewart.

> (a) Sunrise Centre advised they had no availability and a long wait list.
>
> (b) "Although Mr Stewart has stated he wishes to enter into residential rehabilitation to address his substance misuse, there are currently no rehabilitation programs in the Northern Territory who will accept him as a client given his extensive criminal history and the nature of his offending."

[12] In the course of sentencing submissions on 29 April, counsel for Mr Stewart acknowledged that Mr Stewart was "just not suitable" for residential rehabilitation programs in this jurisdiction,[9] but submitted that one option would be to suspend Mr Stewart's sentence on condition that he go straight to Victoria to attend the residential rehabilitation that was apparently available there. His Honour rejected that option because it would involve Mr Stewart being unsupervised. He expressed doubt as to the weight which could be given to Mr Stewart's expressed desire to attend rehabilitation "given his history of prior breaches of suspended sentences".[10]

[13] His Honour also remarked:

> Well, he's also behaved badly in prison and either as a result of his high security rating or for some other reason has failed to take up the

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9 Transcript p 26

10 Transcript p 25

> opportunity of being in the Safe Sober Strong program while in prison. [11]

In making this remark, his Honour did not make the error attributed to him by Mr Stewart of assuming that this failure had occurred while Mr Stewart was on remand.

[14] His Honour sentenced Mr Stewart on the same day (29 April 2016). In doing so, his Honour made the following remarks relevant to this application.

> The offender has been on remand since 10 or 11 November 2015. He has a high security rating. While in prison he has behaved badly. He has made threats towards a prison officer and assaulted other prisoners. His behaviour has been inconsistent. Whether he behaves well or not is dependent on whether he gets his own way or not. On 7 March 2016 he was assessed by Forensic Mental Health due to continued threats of self-harm because he had been denied a single cell. Following that assessment it was reported that he has a history of impulsivity and anti-social behaviour. He failed to attend the Safe Sober Strong program either as a result of his high security rating or for other reasons. That program is an appropriate rehabilitation course for him to undertake while on remand. He has been unemployed the whole time he has been in prison. His opportunity for employment has been restricted by his high security rating.
>
> The offender has been assessed for a variety of rehabilitation programs. He has been found unsuitable for Banyan House and Venndale Residential Rehabilitation and he is not suitable for either FORWAARD or CAAPS. He has been assessed by Recover Oz in Victoria and he has been found suitable for that program. But that is a program which is conducted in Victoria. It is important that the offender undertake a rehabilitation course for alcohol and other drugs before he is completely at large in the community.
>
> .....

[11] Transcript p 26

> As a result of his criminal history the offender has largely lost the entitlement to any leniency. He has a poor history of compliance with Court orders and he has been behaving badly while in prison. He committed this offence, as I have said, while serving a suspended sentence for another offence.
>
> ……
>
> In determining to fix a non-parole period rather than a suspended sentence of imprisonment I have taken into account the offender's prior criminal history, his breaches of suspended sentence of imprisonment, his behaviour in prison and the importance of the offender undertaking an alcohol and other drugs program before he is released into the community completely unsupervised. The most suitable program for him to undertake is the alcohol and other drugs program which is available to prisoners at the Holze Correctional Centre. Otherwise, he may apply to have his sentence of imprisonment transferred to Victoria and upon being granted parole, enter into the Recover Oz program in Victoria.

[15] His Honour sentenced Mr Stewart to a term of imprisonment two years and fixed a non-parole period of 12 months (the minimum required under the *Sentencing Act 1995 (NT)* where the sentence has not been suspended or partly suspended). The sentence was reduced by six months (from two years and six months) as a result of Mr Stewart's guilty plea and backdated to 10 November 2015 to take account of time spent in custody on remand. The sentencing judge dealt with Mr Stewart for breach of a suspended sentence he had been serving (for aggravated assault and being armed with an offensive weapon at night). His Honour restored the whole of the outstanding balance of one month and one week and directed that the restored sentence be served wholly concurrently with the sentence for the present offending.

[16] Mr Stewart complains that there are factual inaccuracies in his Honour's sentencing remarks as a result of which he should be given leave to appeal against the sentence.

[17] On 7 June 2016, Mr Stewart filed an application for leave to appeal against the sentence imposed on him by Southwood J. (Leave to appeal against sentence is required under s 410(c) of the *Criminal Code*.)

[18] In his affidavit in support of the application for leave to appeal, Mr Stewart states that the grounds of the proposed appeal are:

(a) that the learned sentencing judge "erred in details of error",

(b) that he "failed to take into account the details", and

(c) that the sentence is manifestly excessive.

[19] From the material supplied by Mr Stewart, I take grounds (a) and (b) together to be a reference to what Mr Stewart claims to have been factual errors in the sentence. Specifically, Mr Stewart complains:

(a) that the sentencing judge sentenced him on the basis that he had not been found suitable for admission to the residential rehabilitation program at Banyan House when he had in fact been found suitable; and

(b) that there were errors in the institutional report provided to the Court by Correctional Services which caused his Honour to wrongly conclude that Mr Stewart "had behaved badly in prison".

Were there factual errors in the sentencing remarks?

(a) The alleged error re Banyan House

[20] Mr Stewart contended strongly that he had been assessed as suitable for Banyan House – not unsuitable.

[21] In support of that contention Mr Stewart produced a letter from Banyan House dated 25 July 2016 stating that he was suitable for their residential rehabilitation program and that a place would be available for him from 2 August 2016. This, of course is not relevant to the question of whether he had been assessed as suitable for that program at the time of sentencing.

[22] I mentioned this matter on 26 July 2016 at which time Mr Stewart appeared by video-link from the prison. Mr Ledek appeared for the Crown. At that time I indicated that if the sentencing judge had been given the correct information to the effect that Mr Stewart had at that time been assessed as unsuitable for Banyan House, the fact that he had now been reassessed as suitable would not be a ground of appeal and I would not grant leave to appeal based on that information. However, I indicated that I would be likely to grant leave to appeal if the sentencing judge had been given the wrong facts in relation to his being found unsuitable for Banyan House because, on my reading of the sentencing remarks, there was a possibility that if Mr Stewart had in fact been found suitable, his Honour might have given him a partly suspended sentence (suspended after 12 months or some

lesser period) in order to attend residential rehabilitation.[12] Because of that, I advised the parties that I needed to know precisely what was before the sentencing judge in relation to Mr Stewart's suitability for admission to Banyan House. At my request, after that mention Mr Ledek provided to the Court (and to Mr Stewart) copies of all of the material before his Honour including the letter from Banyan House (which was annexed to the first supervision report of 7 April).

[23] An examination of that letter (relevant parts of which are set out at [4] above) shows that Mr Stewart's contention that he had been assessed as suitable by Banyan House is correct. However, the letter from Banyan House also said that "Banyan House would, unfortunately, not be able to induct Mr Stewart due to conflict of interest" and that essentially because of the concerns some existing of their client's had for their safety "Mr Stewart has not been successful in entering the residential treatment program at this time."

[24] The thing which, for obvious reasons, was of major concern to the sentencing judge in determining whether to partly suspend the sentence or fix a non-parole period, was not whether Mr Stewart was theoretically "suitable", but whether he had a place in the Banyan House Residential treatment program which he could enter if released on a suspended sentence.

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[12] Mr Stewart was arraigned and pleaded guilty on 18 March 2016. On that date his Honour ordered a supervision assessment including an assessment as to whether he would be capable of coping with a "COMMIT" disposition under a suspended sentence. He also ordered an institutional report from the prison and adjourned the sentencing hearing to 8 April 2016.

At the relevant time, he did not,[13] although the letter stated: "Banyan House will be happy to reconsider Mr Stewart's request for residential rehabilitation once he has completed all his legal obligations and that he presents himself as a voluntary client at a later date."

[25] Accordingly, Mr Stewart has not demonstrated that his Honour was in error in sentencing him on the basis that he was "unsuitable" for any of the residential rehabilitation programs in the Territory: what his Honour meant was that he did not, at that time, have a place in any of those programs.

[26] Mr Stewart submitted that "Justice Southwood could have handed down a sentence that I enter Banyan House once conflicting parties had completed their program". It is true that the sentencing judge could have handed down a suspended sentence fixing that as a condition, but that is not the same as saying he should have done so. His Honour determined that it was important for Mr Stewart to undertake an alcohol and other drugs program before he is released into the community unsupervised. In light of Mr Stewart's drug dependency and history of breaching suspended sentences, such a conclusion was not only unexceptional but almost inevitable.

(b) Alleged errors in the Institutional report from the prison

[27] Mr Stewart has submitted:

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[13] Mr Stewart in fact appears to acknowledge this. In his written submissions he states: "And secondly he made reference to Banyan House not finding me suitable when in fact they did find me suitable but due to an internal conflict I was unable to enter the program." *[emphasis added]*

(a) that the sentencing judge said (erroneously) that Mr Stewart had refused to take part in the Safe Sober Strong program while on remand, when in fact the course he had refused was eight months before his arrest on this charge (presumably while serving a term of imprisonment for a different offence);[14]

(b) that the sentencing judge had been wrongly informed that Mr Stewart had not been employed while in prison when he had been a block cleaner since December 2015;

(c) that the sentencing judge wrongly found that he had "threatened to self-harm demanding a single cell" when prison medical records would show no self-harm and prison housing records would show that he has always had a single cell from 11 November 2015 to 29 April 2016; and

(d) that there were various mitigating factors relating to the incidents for which he had been disciplined while in prison which had not been put before the sentencing judge. (The chief of these is that, in relation to two of the physical altercations alleged against him, Mr Stewart says he was king hit and acting in self-defence, a fact which he says would be demonstrated "if video footage were available".)

[28] In his submissions, Mr Stewart claims that he has been denied access to prison records which he says would substantiate the above complaints. If

[14] During sentencing submissions on 18 March 2016, Mr Stewart's counsel told the Court that Mr Stewart had requested to participate in the Safe Sober Strong program while on remand but had been told that, due to his high security rating, he was ineligible to participate. [Transcript 18.03.16 p 9] (His Honour was also told by counsel that the reason for the high security rating was likely Mr Stewart's history of violent offending.)

leave to appeal were to be granted, it would be open to Mr Stewart to subpoena the relevant records and seek leave to adduce additional evidence on the appeal. In order to obtain leave to adduce that evidence on appeal, Mr Stewart would have to show (at the least) that the evidence he wishes to adduce would have had the capacity to affect the sentencing disposition if it had been before his Honour.[15]

[29] In relation to the contention set out in [27](a) above, reference to the sentencing remarks makes it clear that his Honour did not make the error complained of. He stated that Mr Stewart "failed to attend the Safe Strong Sober program either as a result of his high security rating or for other reasons".[16] He did not say when. Further, in remarks to counsel during sentencing submissions, his Honour said, "as a result of his high security rating or for some other reason [Mr Stewart] has failed to take up the opportunity of being in the Safe Sober Strong program while in prison."[17]

[30] In relation to the contention in paragraph [27](b) above, the institutional report from the prison bears out what Mr Stewart says about his having been

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15 Although an appellate court is able to entertain new evidence where it is necessary to do so in order to avoid a miscarriage of justice, [*Betts v The Queen* (2016) 90 ALJR 758; [2016] HCA 25 per French CJ, Kiefel, Bell, Gageler and Gordon JJ at [2]; *R v Fordham* (1997) 98 A Crim R 359 per Howie JA at 378] it has been repeatedly held that courts should be slow to admit new evidence on a sentencing appeal [see eg *Fordham* at pp377 - 378]. Fresh evidence will not be admitted on appeal if it does not have the capacity to have affected the outcome of the proceedings at first instance. To do so would be pointless. [*Khoury v The Queen* (2011) 2009 A Crim R 509; [2011] NSWCCA 118 at [108]]

16 See para [14] above.

17 See para [13] above.

employed while in prison.[18] It is not that his Honour was misled by the prison authorities.[19] Rather his Honour made a mistake in his remarks. However, in my view there is no real possibility that this error affected the sentencing judge's sentencing disposition. His Honour correctly attributed Mr Stewart's difficulty in obtaining employment to his high security status (rather than, say, to any unwillingness to work) and it is inconceivable that this slip would have made the difference between a non-parole period and a partly suspended sentence. It is clear from the sentencing judge's remarks that the overwhelming factors in his Honour's decision to fix a non-parole period were the lack of availability of residential rehabilitation programs, and Mr Stewart's prior criminal history, in particular his history of breaching suspended sentences.

[31] In relation to the contention in [27](c) above, his Honour relied on the institutional report from the prison, relevant extracts from which are set out at [5] above. That report did not say Mr Stewart <u>wanted</u> a single cell, rather that "he wanted <u>to remain</u> in a single cell", which is not inconsistent with Mr Stewart's contention about the true state of affairs. Further, the report does not state that Mr Stewart self-harmed, only that he threatened to self-harm. Again, this is not inconsistent with what Mr Stewart says. It seems to me that Mr Stewart's assertions in relation to this matter do not lead to a

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[18] See [5] above. The report does not tally exactly with Mr Stewart's assertion but does show he has been employed.

[19] As his Honour was not misled, there would be no call for additional evidence from prison records in relation to Mr Stewart's employment to be adduced at the hearing of any appeal.

conclusion that his Honour was misled by the prison report. It should be noted that Mr Stewart has not denied the substance of that part of the report, ie that he threatened self-harm to get his way and was placed at risk.

[32] His Honour did refer to Mr Stewart's "continued threats of self-harm because he had been denied a single cell", which was an error, but again there is no possibility that this error would have affected the sentencing disposition. It is inconceivable that his Honour would have come to a different decision had he kept in mind that Mr Stewart threatened self-harm because he didn't want to be taken out of a single cell rather than because he wanted to get into one.

[33] In relation to the contention in [27](d), the report does not say that Mr Stewart was at fault, merely that he was involved and the incidents were under investigation. His Honour was therefore not misled by the prison report and there would be no need for any additional evidence on any appeal. Moreover the mitigating factors (including Mr Stewart's claims that he was the victim not the aggressor) were all put to the sentencing judge by Mr Stewart's counsel. (See [6](a), (b) and (c)above.)

[34] Although the sentencing judge was not misled by the prison report, his Honour did proceed on the basis that Mr Stewart had assaulted other prisoners.[20] However, again, I do not think there was a real possibility that, had his Honour kept in the forefront of his mind the fact that it had not been

[20] See [14] above.

demonstrated that Mr Stewart was the aggressor in these two incidents, that would have made a difference to his Honour's sentencing dispositions or even the reasons set out at [14] above. There was plenty of other material before his Honour which could (and did) lead him to conclude that Mr Stewart "had behaved badly in prison" and in any event, the major factors leading to the imposition of a non-parole period were the lack of available residential rehabilitation programs and Mr Stewart's prior criminal history, in particular his history of breaching suspended sentences.

[35] In summary, I do not think that Mr Stewart has sufficient prospects of succeeding on the grounds of appeal based on factual errors in the sentence to warrant granting him leave to appeal against the sentence.

[36] I should add for completeness that in his submissions, Mr Stewart claims he was in fact remorseful. The sentencing judge found he was not. This does not give rise to an appealable error. Although Mr Stewart was no doubt sorry for the predicament he found himself in (and the effects on his family), there was nothing before his Honour to suggest that Mr Stewart was genuinely remorseful for the part he had pleaded guilty to playing in bringing dangerous drugs into our community. In any event his Honour allowed a reduction of 20% for Mr Stewart's guilty plea.

The manifestly excessive ground

[37] In his handwritten submission in support of the application for leave to appeal Mr Stewart said (presumably in support of the proposed ground of appeal that the sentence was manifestly excessive):

> My main argument is that my conviction should have been unlawfully possess contrary to section 9(1) and (2)(b)(ii) ... no case of supply has been made bar transport alone, no proceeds of supply, statements or txts proving supply, no drug related items clip seal bags, scales, ledgers. I plead guilty and made admissions on advice from my lawyer.

[38] This does not raise a valid ground of appeal. Transport of drugs comes within the extended definition of supply under s 3 of the *Misuse of Drugs Act 1990 (NT)*, Mr Stewart pleaded guilty to supply after receiving legal advice, and in any case he has not appealed against his conviction on that charge.[21]

Principles

[39] Mr Stewart also contends that the sentence is simply too high, and compares his sentence with three others (Steven Martin (sic), Anthony Orello (sic) and Condello) in which he says that, in comparison, much more lenient sentences were given.

[40] The principles to be applied in appeals of this nature are well known. An appellate Court does not interfere with the sentence imposed merely because

[21] At page 4 of Mr Stewart's submission in support of his application for leave to appeal against his sentence, he states: "I appeal conviction of supply methamphetamine." However, he has not in fact done so, he is now out of time and he has not sought leave to appeal out of time.

it is of the view that the sentence is insufficient or excessive. It interferes only if it can be shown that a sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error.[22] The presumption is that there is no error. In relying on this ground it is incumbent upon an appellant to show that the sentence was clearly and obviously and not just arguably excessive.[23]

[41] The Court of Criminal Appeal in *Truong v The Queen*[24] applied the following statement of Bongiorno JA in *Hanks v The Queen:*[25]

> The term 'manifest excess' is usually used when a ground of appeal alleges that a sentence is so egregiously erroneous that the sentencing judge must have made a sentencing error although that error cannot be identified. To succeed on this ground the excess must be obvious, plain, apparent, easily perceived or understood and unmistakable. It must be so far outside the range of a reasonable discretionary judgment as to itself bespeak error.

[42] Mr Stewart would therefore face a high bar in attempting to convince an appeal court that his sentence was manifestly excessive.

[43] Mr Stewart pointed to three cases in which he argued the offenders received more lenient treatment than he did. Two of those (Anthony Orell and Joel

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22 *R v Tait and Bartley* (1979) 46 FLR 386; [1979] FCA 32 at 388

23 *Whitehurst v The Queen* [2011] NTCCA 11 at [12]; *Noakes v The Queen* [2015] NTCCA 7 at [23]

24 (2015) 35 NTLR 186; [2015] NTCCA 5 at [37]

25 [2011] VSCA 7 at [22]

Condello) were convicted of the more serious offence of possession of a commercial quantity of methamphetamine. They received sentences of imprisonment for four years nine months (reduced from six years) and four years (reduced from five) respectively. They are not really comparable. In the third case relied upon (that of Stephen Martins), the offender received a term of imprisonment for 18 months (reduced from two years) suspended after five months on conditions, for possession of 13.3 gms of methamphetamine – a roughly comparable amount to Mr Stewart.
Mr Martins pleaded guilty to possession – not taking part in supply - and in any case, there is no tariff for this type of offending. Both the objective and subjective factors are almost infinitely variable. On a perusal of cases extracted from the sentencing data base, Mr Stewart's sentence does not stand out. It is certainly not "so far outside the range of a reasonable discretionary judgment as to itself bespeak error".

[44] In his submissions on this ground of appeal, Mr Stewart contended:

> Even taking into account sentencing guidelines and the 14 year maximum my 2 year 6 month original sentence is very close to a 3 year sentence based on a mathematical equation and worst case scenario of amount, priors, community harm and nearly every guideline.

[45] I do not understand the reference to "a 3 year sentence". However, if one takes a mathematical approach, as submitted by Mr Stewart, a trafficable quantity of methamphetamine under the *Misuse of Drugs Act* is between 2 gm and 40 gm. 12.39 gms is more than six times the minimum trafficable

amount and around 1/3 of the maximum trafficable amount. (An amount of 40 gms or more is a commercial quantity, supply of which carries a maximum penalty of 25 years imprisonment.) Mr Stewart's sentence (imprisonment for two years) was 1/7 of the maximum penalty. It would be extremely difficult to argue that a sentence of 1/7 the maximum for taking part in a supply of 1/3 of the maximum trafficable quantity was manifestly excessive when, as his Honour found, there was not much in the way of mitigating circumstances and Mr Stewart had a fairly lengthy criminal history including a history of disobedience to court orders.

[46] In my view he has no real prospect of establishing on appeal that the sentence was manifestly excessive.

[47] Leave to appeal is denied.

[48] Mr Stewart has also applied for bail pending appeal. I adjourned his bail application pending determination of his application for leave to appeal. As leave to appeal has been denied, the Court has no power to grant bail (*Bail Act* s 6). Accordingly I dismiss the application for bail[26].

[49] Mr Stewart has the right (under s 429(2) of the *Criminal Code*) to have his application for leave to appeal against his sentence re-considered by three judges.

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[26] Had leave to appeal been granted, Mr Stewart would have faced a high hurdle in satisfying the court that bail should be granted given that his partner has absconded to Victoria with their 10 month old son in breach of her own bail on other drug charges. It seems to me that that circumstance points to a high risk that Mr Stewart would fail to appear in answer to his bail.