CITATION:	*Duong v The Queen* [2021] NTCCA 3
PARTIES:	DUONG, Duc 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 24 of 2019 (21827909)
DELIVERED:	22 April 2021
HEARING DATE:	20 July 2020
JUDGMENT OF:	Southwood, Kelly JJ and Hiley AJ

CATCHWORDS:

CRIME – Appeal against sentence – error of law in making factual finding – no error found – Appeal dismissed

Appeal against sentence – manifest excess – commercial quantity of cannabis – level of involvement in drug enterprise – competing possibilities – significant role in supply – five years' imprisonment – well within range – appeal dismissed

Appeal against sentence – nature of appellate intervention for mistake of fact – rehearing – appeal dismissed

Criminal Code 1983 (NT) s 410(c), s 411(4)
Misuse of Drugs Act 1990 (NT) s 5(1), s 9(1), s (2)(d)

AB v R (1999) 198 CLR 111; *Bara v The Queen* [2016] NTCCA 5; *Bianamu v Rigby* [2020] NTSC 43; *Carroll v The Queen* [2011] VSCA 150; *Cheung v The Queen* (2001) 2019 CLR 1 *Clarke v The Queen* [2015] NSWCCA 232; *Cook v The Queen* [2018] NTCCA 5; *Emitja v The Queen* [2016] NTCCA 4; *Filippou v The Queen* (2015) 255 CLR 471; *Forrest v The Queen* [2017] NTCCA 5; *House v The King* (1936) 55 CLR 499; *Kentwell v The Queen* (2014) 252 CLR 601; *Lacey v Attorney-General* (Qld) (2011) 242 CLR 573; *Lam v The Queen* NTCCA No 27 of 2019 (21935123); *Leaney v Bell* (1992) 108 FLR 360; *Mason v Pryce* (1988) 53 NTR 1; *Morrow v The Queen* [2013] NTCCA 7; *R v Olbrich* (1999) 199 CLR 270; *R v Carrall* [2018] QCA 335; *R v O'Donoghue* (1988) 34 A Crim R 397; *R v Strbak* [2019] QCA 42; *Skinner v The King* (1913) 16 CLR 336; *Strbak v The Queen* [2020] HCA 10; *Szeto v Situ* [2017] NSWCA 136; *The Queen v Cumberland* [2019] NTSC 14; *The Queen v Day* (2004) 14 NTLR 201; *The Queen v Indrikson* [2014] NTCCA 10; *The Queen v Le Cert* [1975] 13 SASR at 239; *The Queen v Storey [1998] 1 VR 359; The Queen v Wilton Lam* (SCC 21935123, 17 April 2020); *Warren v Coombs* (1979) 142 CLR 531; *Weininger v R* (2003) 212 CLR 629; *Whitlock v The Queen* [2018] NTCCA 7; *Willis v The Queen* (2016) 261 A Crim R 151; *Winstead v The Queen* [2009] NTCCA 12, referred to.

REPRESENTATION:

Counsel:

Appellant:	L Nguyen
Respondent:	WJ Karczewski QC and T Grealy

Solicitors:

Appellant:	Robert Welfare & Associates
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	55

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

Duong v The Queen [2021] NTCCA 3
No. CA 24 of 2019 (21827909)

BETWEEN:

DUC DUONG
Appellant

AND:

THE QUEEN
Respondent

CORAM: SOUTHWOOD, KELLY JJ and HILEY AJ

REASONS FOR JUDGMENT

(Delivered 22 April 2021)

Southwood J

Introduction

[1] On 19 March 2019 the appellant was sentenced to five years' imprisonment for one count of supplying 28.3 kilograms of cannabis plant material contrary to s 5(1) of the *Misuse of Drugs Act 1990* (NT). The sentence was backdated to 26 June 2018 and ordered to be suspended after the appellant has served three years in prison. The maximum penalty for supplying a commercial quantity of cannabis is imprisonment for 14 years.

[2] On 27 February 2020 the appellant was granted an extension of time to make an application for leave to appeal, and leave to appeal against his sentence. He relies on the following grounds of appeal.

> **Ground 2** – The learned sentencing Judge committed an error of law in making factual findings which were neither agreed facts, nor supported by admissible evidence.
>
> **Ground 3** – The sentence of five years imprisonment with three years to serve was in all of the circumstances of the offender and the offending manifestly excessive.

[3] Ground 1 of the application for leave to appeal was abandoned.

[4] The following particulars were provided for ground 2.

> a. The learned Judge erred in concluding, "*I cannot mitigate the sentence on the basis that* you did not have a significant role in the operation or, for example, that *you were just a poorly paid driver*. I simply do not know."
>
> b. *In the absence of any facts or evidence presented* as to the extent to which the Appellant was involved in the enterprise and the significance (or otherwise) of the Appellant's role in the overall enterprise, the learned Judge erred in aggravating the sentence *by sentencing the Appellant "as someone who played a very significant role in bringing to the Territory a large and valuable quantity of cannabis plant material*."
>
> c. In doing this, the learned Judge failed to apply — or misapplied — key sentencing principles *pertaining to fact-finding* for sentencing — including:
>
> i. the principle that any fact that aggravates a sentence is required to be proven to the criminal standard, "beyond a reasonable doubt": *R v Storey* [1998] 1 VR 359, 371
>
> ii. the principle that an absence of persuasion about mitigating matters is not equivalent to persuasion of the opposite fact in aggravation: *Weininger* (2003) 212 CLR 629
>
> iii. the principle in *Filippou v The Queen* 256 CLR 47 that, "if the prosecution failed to prove beyond a reasonable doubt a possible circumstance of the offending which, if proved, would be adverse to the offender, but the offender failed to

establish on the balance of probabilities a competing possibility which, if proved, would be favourable to the offender, the judge could proceed to sentence the offender on the basis that neither of the competing possibilities was known", and

iv. the principle that — because a judge is required to resolve any reasonable doubt in favour of an accused — they may be required to sentence on a view of the facts which are most favourable to the accused: *Cheung v The Queen* (2001) 209 CLR 1.

d. Had his Honour properly applied the above principles, the Appellant would have been correctly sentenced on the basis that it was unknown as to whether or not he had a significant role in the [supply] enterprise — and consequently, his Honour would not have been able to sentence the applicant "as someone who played a very significant role in bringing to the Territory a large and valuable quantity of cannabis plant material."

[5] On 13 July 2020 the appellant abandoned particulars c. i to iv as particulars of ground 2. However, counsel for the appellant, Ms Nguyen, relied on the propositions summarised in those particulars in argument in support of ground 2, and at the hearing on 20 July 2020 Ms Nguyen referred the Court to *Filippou v The Queen*, *R v Storey*, *Weininger*, and *Cheung v The Queen*.

[6] Ground 2 is poorly pleaded. To assist the Court, on 10 July 2020 counsel for the appellant confirmed that the substance of this ground of appeal was that the sentencing Judge had mistaken the facts and sentenced the appellant on an incorrect factual basis; a factual basis which was said to have incorrectly aggravated the objective seriousness of the offending. Counsel for the appellant also confirmed that the factual findings which were said to be erroneous were: (i) the appellant was “someone who played a very significant role in bringing to the Territory a large and valuable quantity of

cannabis plant material"; and (ii) the sentencing Judge could not (and did not) mitigate the sentence on the basis that the appellant did not have a significant role in the operation or, for example, that he was just "a poorly paid driver".

[7] There were three bases on which the two alleged errors of fact were said to be made. First, finding (i) was not supported by admissible evidence or the agreed facts. It was urged on the Court that this finding was a finding about the appellant's role and position in the overall criminal operation and was inconsistent with the sentencing Judge's statement that, "I do not know your role and position in the overall operation". Second, finding (ii) was contrary to the weight of the evidence which established that the appellant was just a courier who did not have a significant role in the drug operation. In other words, those findings were unreasonable. Third, in finding the facts the sentencing Judge made the errors of law specified in the abandoned particulars c. i to iv of ground 2.

[8] While the exercise of the sentencing discretion on an incorrect or mistaken factual basis is a ground for appellate intervention, an error in the process of fact finding is not.[1] However, it was submitted that the legal arguments summarised in the abandoned particulars c. i to iv were relied on to explain to the Court how the sentencing Judge had mistaken the facts and to try and demonstrate that the asserted mistakes of fact were the product of errors of

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1 *R v Strbak* [2019] QCA 42 per Mc McMurdo JA at [19] – [20].

law. Counsel for the appellant was of the mistaken view that this Court will not interfere with a judge's findings of fact when passing sentence unless the Court concludes that the findings were not reasonably open to the sentencing Judge or were the product of errors of law.

[9] On one hand to say that a finding of fact is not open may mean that the evidence could not as a matter of law, support a finding to the requisite standard. On the other hand, it may mean something less than that. As Basten JA stated in *Clarke v R*,[2] it is hard to identify a precise meaning, other than that the appellate court could not be satisfied beyond reasonable doubt on the available evidence.

[10] In view of counsel for the appellant's apparent misunderstanding of the basis of appellate intervention for a mistake of fact in an appeal against sentence, it is necessary for the Court to say something about the nature of an appeal against sentence under the *Criminal Code 1983* (NT) and the role of this Court in reviewing fact-finding on a sentence passed by the Supreme Court. The Court's jurisdiction in sentencing appeals is conferred by s 410(c) of the *Criminal Code* which states (so far as is relevant to this appeal) that a person found guilty on indictment "may appeal to the Court: (c) with leave of the Court, against the sentence passed on the finding of guilt".

2 [2015] NSWCCA 232; (2015) 254 A Crim R 150 at [18].

[11] The Court's powers in the exercise of this jurisdiction are conferred by s 411(4) of the *Criminal Code* which states:

> On an appeal against sentence, the Court *must*:
>
> (a) if it is of the opinion that another sentence, whether more or less severe, *is warranted and should have been passed* – quash the sentence and either:
>
> (i) impose another sentence; or
>
> (ii) remit the matter to the court of trial; or
>
> (b) in any other case – dismiss the appeal.

[12] The provisions of s 411(4)(a) of the *Criminal Code* differ from provisions in other jurisdictions such as s 6 of the *Criminal Appeal Act 1912* (NSW) and s 668E(3) of the *Criminal Code* (Qld) which state:

> … is warranted ***in law*** and should have been passed,

[13] Neither s 410(c) nor s 411(4) prescribes the grounds or basis for such an appeal, and on its face, s 411(4) of the *Criminal Code* appears to grant the Northern Territory Court of Criminal Appeal power to hear the plea on sentence afresh and overturn the sentence appealed from, regardless of error, if it thinks another sentence is warranted. However, there is a distinction between the Court's jurisdiction and its powers on appeal. The jurisdiction conferred on this Court by the above provisions is appellate jurisdiction. It is authority to determine an *appeal* against sentence if leave is granted. The scope of the Court's jurisdiction is determined by the words "may appeal to the Court: (c) with leave of the Court, against sentence..."/ "on an appeal against sentence" in the chapeaus of s 410 and s 411(4) which must be given

content.[3] Such an appeal is an appeal from a decision which is the product of the exercise of discretion and it is well established that the Court's authority to intervene is dependent upon the demonstration of error,[4] either specific errors of the kinds identified in *House v The King,*[5] or a conclusion of manifest excess or inadequacy of the sentence.[6] In the case of specific error, the Court's jurisdiction to intervene is enlivened and the Court is bound to resentence an offender *unless in the separate and independent exercise of its discretion* it concludes that no different sentence should be passed.[7]

[14] In *House v The King,* Dixon, Evatt and McTiernan JJ stated:

> The appeal is a *full one on law and fact* (*Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v Dignan*; *R v Hush; Ex parte Devanny*). *But the judgment complained of*, namely, sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. *The manner in which an appeal against an exercise of discretion should be determined is governed by established principles*. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. *It must appear that some error has been made in exercising the discretion.* If the judge acts upon wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, *if he mistakes the facts*, if he does not take into account some material consideration, then his determination should be reviewed *and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so*. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the

3 *Lacey v Attorney-General* (Qld) (2011) 242 CLR 573 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at 594 [49] – [51].

4 *Skinner v The King* (1913) 16 CLR 336 at 340; *Kentwell v The Queen* (2014) 252 CLR 601 at [35] per French CJ, Hayne, Bell and Keane JJ.

5 (1936) 55 CLR 499.

6 *House v The King* (1936) 55 CLR 499; *AB v The Queen* (1999) 198 CLR 111 at [104] – [107] and [130]; *Kentwell v The Queen* (2014) 252 CLR 601, French CJ, Hayne, Bell and Keane JJ at [35]; *R v Strbak* [2019] QCA 42 at [15].

7 *Kentwell v The Queen* (2014) 252 CLR 601, French CJ, Hayne, Bell and Keane JJ at [35].

> appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.[8]

[15] As is apparent from the above passage in *House v King*, one of the errors in the exercise of the sentencing discretion which will enliven the Court's jurisdiction to intervene in an appeal against sentence is: "if [the sentencing judge] mistakes the facts". The statement that a mistake of fact may enliven the exercise of the Court's powers on appeal is unqualified. It was not said by the High Court that a factual error can only be found where it constitutes an error of law or something very close to it. The approach adopted by the majority of the High Court in *House v King* was reaffirmed by the High Court in *Kentwell v The Queen*.[9] The joint reasons in that decision of the High Court accepted that the exercise of the sentencing discretion would miscarry where the sentencing judge "mistakes the facts or does not take into account some material consideration"[10] and once again there was no indication by the High Court that the mistake of fact must be such as to amount an error of law.[11] The words, "or does not take into account some material consideration" were not said to be a qualification or specification of what is required to constitute a mistake of fact.

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8 (1936) 55 CLR 499 at 504-505.

9 [2014] HCA 37; (2014) 252 CLR 601.

10 Ibid at [42].

11 *Clarke v The Queen* [2015] NSWCCA 232; (2015) 254 A Crim R 160 at [33].

[16] However, there are decisions of the Queensland Court of Appeal,[12] New South Wales Court of Criminal Appeal[13] and Victorian Court of Appeal[14] to the effect that an appeal against sentence *is an appeal in the strict sense*, and an appellate court will not interfere with a judge's finding of fact unless it concludes that the finding was not reasonably open or that it was the product of legal error.[15] That is, a factual error could only be found where there was, in effect, "an error of law or something very close to it".[16]

[17] There are also decisions of the Supreme Court of the Northern Territory to the effect that an appeal against sentence from the Local Court is an appeal *stricto sensu*.[17] However, those decisions are concerned with s 163 of the *Local Court (Criminal Procedure) Act 1928* (NT) (not s 410 and s 411 of the *Criminal Code*) and the earlier iterations of those provisions in the *Justices Act* and are not relevant to an appeal against sentence under the *Criminal Code* from a single judge of the Supreme Court. Likewise, what is stated in these reasons for decision, has no application to a sentencing appeal from the Local Court to the Supreme Court.

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12 *R v Carrall* [2018] QCA 355 at [10] per Sofronoff P with whom Jackson and Bowskill JJ agreed.

13 Referred to in *Clarke v The Queen* (2015) 254 A Crim R 150 at [25] per Basten JA.

14 *Carroll v The Queen* [2011] VSCA 150 at [16]-[18]; *Willis v The Queen* (2016) 261 A Crim R 151 at [94] – [101].

15 *R v Strbak* [2019] QCA 42 at [21].

16 *Clarke v The Queen* [2015] NSWCCA 232; (2015) 254 A Crim R at 160 [32].

17 *Mason v Pryce* (1988) 53 NTR 1; *Leaney v Bell* (1992) 108 FLR 360; *Bianamu v Rigby* [2020] NTSC 43.

[18] In *R v Carrall*, Sofronoff P stated:[18]

> It is important to bear in mind the fundamental proposition that an appeal against sentence under s 668D(1)(c) and 668E(3) of the *Criminal Code* (Qld) is in the nature of an appeal *strictu sensu*. *The Court of Appeal does not sit to rehear the proceeding*. An appellate court hearing such an appeal will not interfere with a judge's findings of fact *unless it concludes that the finding was not reasonably open or that it was the product of legal error*.

[19] However, s 668E(3) of the *Criminal Code* (Qld) is in different terms to s 411(4)(a) of the *Criminal Code* (NT). The Queensland provision states:

> On an appeal against sentence, the Court, if it is of the opinion that some other sentence, whether more or less severe, is warranted ***in law*** and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

As I have stated above, there is no such qualification in s 411(4)(a) of the *Criminal Code* (NT).

[20] In *Willis v The Queen* Weinberg and Beach JJA stated:[19]

> Self-evidently, a challenge to a finding of fact made by a sentencing judge in the course of sentencing an offender *will involve an appeal in the strict sense*. An appellate court will not substitute for any such finding its own view of what the facts disclose unless it concludes that the finding made below *was not reasonably open*.

[21] However, those decisions must be considered in the context of the respective legislative provisions governing appeals against sentence in those jurisdictions, the nature of the decision which is subject to a sentencing

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18 [2018] QCA 355 at [10].

19 (2016) 261 A Crim R 151 at [94].

appeal, and the High Court's decisions in *House v The King*,[20] *Lacey v Attorney-General* (Qld),[21] and *Kentwell v The Queen*.[22] As I have stated above, the majority of the High Court in *House* stated that an appeal against sentence was a full one on fact and law, albeit qualified by the established principles applying to an appeal from the exercise of a discretion, and the Court did not suggest that for a court's powers on appeal against sentence to be enlivened the mistake of fact must amount to an error of law or something very close to it. That approach was confirmed in *Kentwell*, and in *Lacey* the High Court determined that an appeal against sentence was an appeal in the nature of a rehearing.

[22] *Lacey* involved an appeal to the High Court from the Queensland Court of Appeal. It concerned s 669A(1) of the *Criminal Code* (Qld) which grants a right of appeal against sentence to the Attorney-General of Queensland and provided: "The Attorney-General may appeal against any sentence pronounced... and the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper." As to the nature of the appeal, the majority of the High Court stated:

> Appeals being creatures of statute, no taxonomy is likely to be exhaustive. Subject to that caveat, relevant classes of appeal for present purposes are:
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> 1. Appeal in the strict sense – in which the court has jurisdiction to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the

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20 (1936) 55 CLR 499 at 504-505.

21 (2011) 242 CLR 573.

22 (2014) 252 CLR 601.

original decision was given. Unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance.

2. Appeal de novo – where the court hears the matter afresh, may hear it on fresh material and may overturn the decision appealed from regardless of error.
3. Appeal by way of rehearing – where the court conducts a rehearing on the materials before the primary judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error. In some cases in an appeal by way of rehearing there will be a power to receive additional evidence. In some cases there will be a statutory indication that the powers may be exercised whether or not there was error at first instance.

Where the court is confined to the materials before the judge at first instance, *that is ordinarily indicative of an appeal by way of rehearing*, which would require demonstration of some error on the part of the primary judge before the powers to set aside the primary judge's decision were enlivened.

Section 671B of the *Criminal Code* confers "supplemental powers" on the Court of Appeal generally, including the power to receive evidence. But those powers are subject to an important limitation in s 671B(2) that "in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at trial".

The appellate jurisdiction conferred by s 669A(1) must be confined at least when the Attorney-General is asserting that the sentence should be increased, to the evidence before the primary judge, including evidence given at trial, what the jury necessarily found and evidence, if any, given at the sentencing hearing. Having regard to the categories of appellate jurisdiction and the confinement of the Court of Appeal to evidence before the primary judge, *it is open to construe s 669A(1) as creating an appeal by way of rehearing* and conferring appellate jurisdiction to determine only whether there has been some error on the part of the primary judge. Such error having been detected, the Court has a wide power indicated by the words "unfettered discretion" to vary that sentence.[23]

23 *Lacey v Attorney-General* (Qld) (2011) 242 CLR 573 at [57] – [60].

[23] In *Kentwell*, which was concerned with whether the Court of Criminal Appeal in New South Wales had erred in refusing to grant the appellant an extension of time in which to seek leave to appeal against sentence, the plurality of the High Court stated the following.

> The history of the provision is touched on in *Lacey v Attorney-General (Qld)*. Notwithstanding the breadth of its language, it was settled at an early stage that the appellate court's authority to intervene is dependent upon demonstration of error. The significance to the function of the appellate court of the distinction between specific error, *of any of the kinds identified* in *House v The King*, and the conclusion of manifest excess or inadequacy is explained by Hayne J in *AB v The Queen*. In the case of specific error, the appellate court's power to intervene is enlivened and it becomes the duty to re-sentence, unless in the separate and independent exercise of its discretion it concludes that no different sentence should be passed. By contrast, absent specific error, the appellate court may only intervene if it concludes that the sentence falls outside the permissible range of sentences for the offender and the offence.[24]
>
> […]
>
> In *Baxter v The Queen*, the Court of Criminal Appeal returned to a consideration of its function under s 6(3). Spigelman CJ took the opportunity to clarify the meaning of the last sentence in paragraph 79 of his reasons in *Simpson*.
>
> > The import of [79] of Simpson was to ensure that submissions in the Court of Criminal Appeal did not proceed as if the identification of error created an entitlement on the part of the applicant to a new sentence, for example, by merely adjusting the sentence actually passed to allow for the error identified. That would be to proceed on the assumption that the sentencing judge was presumptively correct, when the court has determined that exercise of the discretion had miscarried. Section 6(3) is directed to ensuring that the Court of Criminal Appeal does not proceed in that manner, but re-exercises the sentencing discretion taking into account all relevant statutory principles with a view to formulating the positive opinion for which the subsection provides.[25]
> >
> > […]

24 *Kentwell v The Queen* (2014) 252 CLR 601, French CJ, Hayne, Bell and Keane JJ at [35].

25 Ibid at [40].

> Spigelman CJ's analysis in *Baxter* should be accepted. When a judge acts on wrong principle, allows extraneous or irrelevant matters to guide or affect the determination, *mistakes the facts* or does not take into account some material consideration, the Court of Criminal Appeal does not assess whether and to what degree the error influenced the outcome. The discretion in such a case has miscarried and it is the duty of the Court of Criminal Appeal to exercise the discretion afresh taking into account the purposes of sentencing and the factors that the *Sentencing Act*, and any other Act or rule of law, require or permit. As sentencing is a discretionary judgment that does not yield a single correct result, it follows that a range of sentences in a given case may be said to be "warranted in law". A sentence that happens to be within range but that has been imposed as a result of a *legally flawed* determination is not "warranted in law" unless, in the exercise of its independent discretion, the Court of Criminal Appeal determines that it is the appropriate sentence for the offender and the offence. This is not to say that all errors in the sentencing of offenders vitiate the exercise of the sentencer's discretion. [...][26]

[24] Contrary to the decisions of the intermediate courts of appeal in the various state jurisdictions, the above judgments of the High Court establish that an appeal against sentence is an appeal in the nature of a rehearing. In an appeal against sentence by way of rehearing the Court is to conduct a *real review* of the plea on sentence and the sentencing remarks to see whether the sentencing judge erred in fact. Such errors of fact are not confined to errors of fact which also constitute errors of law. In *Lee v Lee*[27] Bell Gageler, Nettle and Edelman JJ, Kiefel CJ agreeing, stated:

> A court of appeal is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the trial judge has erred in fact or law. Appellate restraint with respect to interference with a trial judge's finding unless they are "glaringly improbable" or "contrary to compelling inferences" *is as to factual findings which are likely to have been affected by*

26 Ibid at [42].

27 [2019] HCA 28 at [55].

> *impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence*. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts. *Thereafter, "in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by findings of the trial judge*.

[25] Likewise in *Szeto v Situ*[28] Bathurst CJ observed:

> That disadvantage particularly arises in a case such as the present where the judge based his conclusion, to a significant extent, on the credibility of the principal witnesses. However, if a conclusion based on credit is shown by uncontroversial facts or uncontested testimony to be erroneous, the appellate court is obliged to intervene: *Fox v Percy*… at [28]. One instance where this may occur is where contemporaneous and apparently reliable documentary evidence is contrary to the credibility based finding of the trial judge: *State Rail Authority of NSW v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306 at [62]-[63], [93].

[26] In the Northern Territory most appeals to this Court against sentence arise from sentences imposed following a plea of guilty where the sentencing hearing proceeds on agreed facts which are admitted by the offender. Consequently, issues of credit or reliability rarely arise. In such appeals it has been the invariable practice of the Court to examine for itself the issues of fact. It is unnecessary for an appellant to establish an error of law or something very close to it in the fact finding process before the Court will intervene. In such a case the Court is in as good a position as the sentencing judge to decide the proper inferences to be drawn from the agreed or admitted facts which are undisputed. The Court exercises restraint before

28 [2017] NSWCA 136 at [26].

interfering with factual findings that involve an evaluative judgment, but if the Court is satisfied that the sentencing judge has mistaken a particular fact which was material to the exercise of discretionary power, the court identifies the error and then enters upon its own consideration of the appropriate sentence. Of course, not all factual errors will vitiate a discretionary judgment.

[27] Support for the approach outlined above is found in the reasons for decision of Basten JA in *Clarke v The Queen*.[29] That case concerned an appeal against sentence. The appellant was sentenced to a term of imprisonment for the offence of cultivating a large commercial quantity of cannabis by enhanced indoor means contrary to s 23(2)(a) of the *Drug Misuse and Trafficking Act 1985* (NSW). A large commercial quantity is 200 growing plants. The sentencing Judge found that "the number of growing cannabis plants was close to 2000". Ground 2 of the appeal, alleged an error on the part of the sentencing judge in his finding as to the number of plants being cultivated by the applicant.

[28] In his reasons for decision in *Clarke* Basten JA stated the following.[30]

> This Court [CCA NSW] continues to identify the scope of the appeal against sentence available to an offender by reference to a statement of Hunt J in *R v Donoghue* in the following terms:
>
>> It is important to emphasise that, unlike appeals to the Court of Appeal in civil cases, an appeal to this Court is not by way of rehearing. An appeal which is not by way of rehearing is no more

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29 [2015] NSWCCA 232; (2015) 254 A Crim R 160 at [32].

30 [2015] NSWCCA 232; (2015) 254 A Crim R 160 at [25] – [27] and [31].

> than the right to have a superior court interpose to redress the error of the court below... Error may be demonstrated if there is no evidence to support a particular finding, or if the evidence is all one way, or if the judge has misdirected himself... It is only where the very narrow basis upon which this court can intervene in relation to a trial judge's findings of fact has been established that the conviction can be set aside, and then only if the error has led to a miscarriage of justice... *Kryiakou* (1987) 29 A Crim R 50 at 60-61.

The language adopted in *O'Donoghue* should be approached with caution for a number of reasons. First, it was concerned, as the last sentence in the quotation indicates, with an appeal against conviction, to be addressed under s 6(1) not s 6(3). That said, it involved a challenge to a finding by the trial judge on a voir dire, relevant to the admissibility of evidence. Secondly, although there was reference to the judgment in a civil case as authority for the first proposition, the apparent dismissal of discussion of the scope of civil appeals may not be of assistance. Thus in *Lacey v Attorney-General (Qld)* the joint reasons expressly adopted a statement of the relevant classes of appeal from *Turnbull v Medical Board (NSW)*. (*Lacey* itself involved a consideration of the scope of a right of appeal conferred on the Attorney-General with respect to a sentence in a criminal case.)

Thirdly, *O'Donoghue* appears to equate an appeal by way of rehearing with what is usually described as an appeal in the strict sense. By contrast an appeal by way of rehearing depends upon demonstration of "some legal, factual or discretionary error" on the part of the primary judge. Furthermore, appeals by way of rehearing cover a range of circumstances including a power to receive [further] evidence, identified in a range of terminology.

[...]

Fifthly the last sentence in the passage from *O'Donoghue* set out above relied for support on a passage in *Kyriakou* in this Court. *Kyriakou* had been the subject of a special leave application to the High Court. In refusing special leave, Mason CJ (speaking for a Full Court) said:

> Although the judgment of the Court of Criminal Appeal *does not accurately express the role of an appellate when a challenge is made to such a finding of fact by a trial judge*, the Court is not persuaded that the Court of Criminal Appeal failed to examine for itself the critical issue of fact.

Reading together the second and third sentences in the extract from *O'Donoghue* set out above, it appears that factual error can only be found where there is, in effect, an error of law or something very close to it. <u>That would not accord with the explanation in *Kyriakou* that the appeal court should examine for itself the issue of fact. Nor does it</u>

accord with the approach identified in *House v The King*, referring to appellable error as including the sentencing judge having "mistaken the facts".

Finally, the limited approach to the identification of factual error asserted in *O'Donoghue* is not supported by the recent statement from *Kentwell* set out above: there, the joint reasons accepted that the exercise of the discretionary power would miscarry where the judge "mistakes the facts or does not take into account some material consideration". (There is no indication that the reference to a material consideration was intended to refer to a mandatory consideration, in the sense that failure to take it into account would demonstrate error of law.)

In some circumstances, factual findings will themselves involve an evaluative judgment, of a kind similar to the exercise of a discretionary power. No doubt the appellate court should exercise restraint in interfering with such findings. However, if the court is satisfied that the sentencing judge made a mistake with respect to a particular factual finding, which was material to the exercise of the discretionary power, the court should identify the error and then enter upon its own consideration of the appropriate sentence.

The present case provides an example of how those principles might operate. If this Court were persuaded that the sentencing judge had significantly overestimated the number of plants under cultivation, for whatever reason, being an issue material to the exercise of the sentencing discretion, that would be a relevant error.

To take a more limited approach would, no doubt, discourage applications for leave to appeal against sentence on factual grounds which may have limited prospects of success. However, if there be an error which may have affected the sentence imposed, the public interest in fairness to the individual offender does not warrant a construction of s 6(3) which could have the application dismissed at the preliminary stage. Fact finding is often critical to the ultimate imposition of a sentence. If the legislature had intended to limit applications for leave to appeal against sentence to circumstances where error of law can be identified, one would expect it to have said so. The authority of the High Court does not warrant the imposition of such a restriction; indeed it is unequivocally to the contrary. It may be that *O'Donoghue* was not intended to impose such a restriction; nevertheless, there are aspects of the language used which might be (and are) so understood. In my view, that is an erroneous approach.

[29] As McMurdo (P) JA stated in *R v Strbak,*[31] those lines of authorities in New South Wales and Queensland are not easily reconciled with the relevant ground for appellate intervention stated in *House v The King*, and recently restated in *Kentwell v The Queen*, namely that the sentencing Judge has mistaken the facts.[32]

[30] As D Mildren QC stated in The Appellate Jurisdiction of Courts in Australia,[33] "there are some factual mistakes which are in reality errors of law, such as making a finding where there was no evidence to support the finding, but a most common error is drawing the wrong inference from facts as found or not in dispute". As to correcting errors which are the result of drawing the wrong inference the majority of the High Court in *Warren v Coombs* stated:[34]

> Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusions of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it. These principles we venture to think, are not only sound in law, but beneficial in their operation.
>
> […]
>
> With the greatest respect, we can see no justification for holding that an appellate court, which, after, having carefully considered the judgment

31 [2019] QCA 42 at [21], [23] – [25].

32 The decision of the Queensland Court of Appeal in *R v Strbak* was overturned by the High Court in *Strbak v The Queen* [2020] HCA 10 but nothing in the decision of the High Court touches on these remarks of McMurdo JA.

33 The Federation Press 2015 at 143.

34 (1979) 142 CLR 531 at 551-552 per Gibbs CJ, Jacobs and Murphy JJ.

> of the trial judge, has decided that he was wrong in drawing inferences from established facts, should nevertheless uphold his erroneous decision. To perpetuate error which has been demonstrated would seem to us a complete denial of the purpose of the appellate process. The duty of the appellate court is to decide the case – the facts as well as the law for itself. In so doing it must recognise the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they themselves are, or if, after giving full weight to his decision, they consider that it was wrong, they must discharge their duty and give effect and give effect to their own judgment.

[31] While *Warren v Coombs* is a civil case, and different burdens of proof apply to facts sought to be established by the Crown and the offender, the same principles must apply to the determination of whether a sentencing judge has made a mistake of fact.

The facts

[32] When the appellant committed the offence of supplying a commercial quantity of cannabis he was 27 years old, residing in New South Wales, and an unlawful non-citizen having had his student visa cancelled on 27 July 2015.

[33] Before 22 June 2018 William McDonald, Tuan Le and the appellant formed a plan to transport a commercial quantity of cannabis to Darwin for supply to the community. Mr McDonald was an Australian citizen residing in Woodroffe. He was a person of interest to detectives in the Drug and Organised Crime Division of the Northern Territory Police.

[34] On 22 June 2018 the appellant hired a car from Hertz rental cars in Bankstown on terms that he would return the car to Hertz at the Darwin Airport on 25 June 2018.

[35] Before leaving Sydney, the appellant took possession of 28,246.6 grams (or 62.4 pounds) of cannabis from an unknown person. He took possession of the cannabis for the purpose of transporting it to Darwin for supply. Some of the cannabis was divided into zip lock bags and some into cryovac bags. All of the bags of cannabis were placed in larger “Space bags”. The appellant put the cannabis into two suit cases. He packed 18,527.1 grams of cannabis in a black Audi soft shell suitcase, and 9,729.5 grams of cannabis in a brown KinyiBao soft shell suitcase. He then loaded the two suitcases into the hire car and drove from Bankstown to Queensland.

[36] In the vicinity of Roma, the appellant had a single motor vehicle accident. On 24 June 2018 he was given a replacement hire car which he collected from Hertz rental cars in Toowoomba. He put the two suitcases containing the cannabis in the replacement hire car and drove to Darwin. He arrived in Darwin on 25 June 2018.

[37] On 25 June 2018 Tuan Le travelled from Brisbane, where he was living, to Darwin on a Virgin flight. He arrived in Darwin at 3 pm and booked two nights’ accommodation at the Rydges Hotel in Palmerston. He was allocated room 606. At 7.36 pm the appellant booked one night’s accommodation at the same hotel. He was allocated room 103.

[38] Before 10.51 am on 26 June 2018, William McDonald contacted Tuan Le and arranged to meet him and the appellant in the undercover carpark of the hotel to facilitate the ongoing supply of the cannabis. At 10.51 am Mr McDonald arrived at the undercover carpark of the hotel in his Toyota Hilux utility which had a Queensland registration. He went into the hotel and gave $2,600 to Mr Le who gave the money to the appellant.

[39] Shortly before 11.20 am, the appellant checked out of the hotel, and he and Mr Le went to the undercover car park where they met Mr McDonald. Mr Le and the appellant walked to the appellant's hire car and collected the suitcase containing 18,527.1 grams of cannabis. Mr McDonald remained at his vehicle and moved various items which were on the back seat into the rear cargo space to make room for the cannabis. Mr Le wheeled the suitcase containing the cannabis to Mr McDonald's Hilux, and he and Mr McDonald placed the cannabis on the back seat.

[40] After the cannabis was placed in the Hilux, all three men got into the vehicle and Mr McDonald attempted to drive off. Police intercepted the vehicle and directed all three offenders to get out. Police then searched the Hilux and the appellant's hire car.

[41] During the search of the Hilux police seized:

(a) the suitcase containing 18,527.1 grams of cannabis,

(b) the $2,600 in the appellant's backpack,

(c) a mobile phone and wallet on the appellant's person,

(d) an iPhone in Mr Le's shorts,

(e) $215 in Mr Le's wallet,

(f) a black Apple iPhone in the centre console of the Hilux, and

(g) a blue notebook containing bank account details which was in the centre console of the Hilux.

[42] During the search of the appellant's hire car police found the suitcase containing 9,729.5 of cannabis, a leather jacket and a pair of disposable latex gloves.

[43] The police also searched room 606 of the hotel. Present in the room at the time was Mr Le's partner. They found and seized $1,280 which was in a red hand bag on a table in the room, $850 which was also on the table, a silver iPhone and a black Samsung phone.

[44] The offenders were arrested and taken to the Darwin watch house. The appellant participated in an electronically recorded interview with police with the assistance of a Vietnamese interpreter. He denied knowledge of the cannabis and falsely stated: he received two suitcases in Sydney which he was told to transport to Darwin by road; he thought the suitcases contained dog and cat food; and when he gave one of the suitcases to the "Western man" he was given $2,600 from Mr McDonald via Mr Le.

[45] If sold in Darwin at the 2018 rate of $5,000 per pound, the cannabis had the potential to realise $312,000. If sold at the 2018 rate of $30 per gram, the cannabis had the potential to realise $847,698.

[46] There was also evidence before the sentencing Judge that the total rental charge for the hire of the Hertz rental car was $2,399.97 and the appellant paid for the hire of the car with his credit card. One of the photographs in exhibit P2 was a photograph of the appellant's Hertz rental agreement which shows the total hire charges.

[47] During his plea on sentence *the appellant did not give evidence* about his role in the transport and supply of the cannabis, or the amount of money or other benefit he was to receive for his participation in the criminal enterprise. The sentencing Judge raised his concerns about the lack of evidence about these matters with Mr Gillard, who was the counsel who had carriage of the plea on sentence for the appellant. There was the following exchange.

His Honour:	The Crown facts states...
Counsel:	That's right, yes, your Honour. It is clear that Mr Duong was to receive some financial reward from his role.
His Honour:	He was to receive a financial...
Counsel:	Yes, yes. And certainly, your Honour, that's the presumption which we don't seek to overturn. It is also clear from the $2,700 that was found on him.
His Honour:	Why is that - I'm not sure what that money was for. It's not very far off the cost of the hire agreement if I have understood that correctly.

Counsel:	Yes, your Honour, and I didn't particularly notice that particular figure on the hire car.
His Honour:	The Crown doesn't assert anything in relation to that amount of money or a connection with the hire agreement but I just don't know – are you saying that the $2,600 or whatever was paid, the cash found, was the payment for his courier activities or don't your instructions descend to that?
Counsel:	That, your Honour, is perhaps a natural inference to be drawn from those facts.
His Honour:	Well, I'm not sure. That's the point. I don't know what it's for.
Counsel:	Yes.
His Honour:	Likewise, I don't know why only part of the cannabis was unloaded and one-third was left in the vehicle driven by your client. They're unknowns are they not?
Counsel:	I don't have any particular instructions on that point, your Honour, but it seems to me perhaps that the second case was to be unloaded in the same fashion as the first.
Crown Counsel:	I object to that. There's no evidence of that in terms of – but I'm going to want him to adduce the evidence.
His Honour:	Yes, Mr Gillard, they are unknowns.
Counsel:	They are unknowns, your Honour, and that's certainly – I won't make any submissions about that. In terms, your Honour, of the financial reward to be provided to him *he instructs that he was to receive some financial reward from his role. What that was, your Honour is unclear* but, your Honour, in my submission that can be looked at in the context of the financial difficulty that he was facing at the time. And that's, your Honour, is perhaps a reason for the offending if there ever is one. But I won't put that any more or any more strongly than that. In terms of, your Honour, his responses in the record of interview he instructs that he denied knowledge of the contents of the cases because he was fearful of police and the consequences of making that admission at the time. As I understand

	it, your Honour, the police officers who arrested him were undercover police. Ultimately, when he did participate in that record of interview it seems to have been his first interaction with police in this country so.
His Honour:	But he was taken to the Darwin Police Station and he had an interpreter there for an interview, did he not?
Counsel:	That's right, yes, yes, but...
His Honour:	Anyway he told...
Counsel:	He told a lie your Honour.
His Honour:	*And he didn't actually say anything about what he was to receive for his role.*
Counsel:	*No.*
His Honour:	*So there's no evidence of those matters and I really can't make any findings either way, can I?*
Counsel:	*That's right.*
His Honour:	*As to the extent of the benefit that he would receive.*

[48] The effect of the above exchange between Mr Gillard and the sentencing Judge is that the defence conceded there was no evidence about the size of the financial reward the appellant was to receive for his involvement in the supply of cannabis.

The Sentencing Remarks

[49] After describing the appellant's personal circumstances, to the limited extent they were revealed to the Court at first instance, and summarising the admitted facts, the sentencing Judge made the following remarks.

> I want to say something about the principles in relation to sentencing for offending of this kind. The seriousness of such offending depends on a range of factors, including the role and position of the offender in the particular operation, the sophistication of the enterprise, the extent

of the commercial nature of the operation and the amount of drugs involved or intended to be involved.

The weight of the amount of drugs may be a factor of some importance, as it is a circumstance relevant to determining how far-reaching and sophisticated the enterprise was and the amount of profit expected. However, the amount of the drug involved is not always the primary factor in assessing the gravity of the offending.

In your case, it is difficult to make many relevant findings because there are so many "unknowns". You lied in your police interview and you did not give evidence at your sentencing hearing. There is no evidence as to the identity of the Sydney supplier of the cannabis to you, nor as to how and by whom the purchase was financed, whether by you or someone else.

Your counsel told the court today that you were working only one to two days per week as a painter, earning only $50 a day. Again, the matters conveyed to the court were somewhat vague and it is difficult for me to make any findings, even on the balance of probabilities, in relation to those matters.

The photographs tendered in evidence indicate that the car rental agreement was in your name and paid for by a credit card in your name. The amount of $2,600 you were paid after you arrived in Darwin may have been reimbursement of the rental charges, but that is not clear.

Other matters which remain unknown are the benefit which you were to receive for transporting this very significant quantity of cannabis from Sydney to Darwin, and exactly what you and the other two would have done with the 18.5 kilograms of cannabis had you not been arrested in the Rydges car park. Another unknown was what was to happen with the remaining 9.7 kilograms of cannabis or thereabout which was found in your vehicle.

Finally, it is unclear whether you were a mere transporter or whether you had equity in or ownership of the cannabis consignment, and a vested interest in its supply and distribution in the Darwin market. *I do not know your role and position in the overall operation.*

In those circumstances, I have to sentence you as someone who played a very significant role in bringing to the Territory a large and valuable quantity of cannabis plant material. I cannot mitigate the sentence on the basis that you did not have a significant role in the operation or, for example, that you were just a poorly paid driver. I simply don't know.

I cannot even be satisfied that your role was complete once the cannabis had been transferred to Mr McDonald's vehicle. The fact that there was still more than 9.7 kilograms of cannabis in your vehicle indicates that you still had work to do.

> Cannabis is a widely used drug in the Northern Territory, which causes serious social dysfunction and damage to users and their families, particularly vulnerable people in Aboriginal communities. For many years now, the courts in the Northern Territory have been emphasising the significant harm caused by cannabis to the entire Northern Territory community. As a result, punishment, denunciation and general deterrence are important sentencing objectives in your case.
>
> I formally convict you. Noting that the maximum penalty is 14 years' imprisonment, I take as my starting point, a term of imprisonment of six years. However, I will reduce my starting point by one year to give you credit for your plea of guilty.
>
> I sentence you to a term of imprisonment of 5 years.
>
> […]
>
> Because you are a first offender, I consider that it is appropriate to suspend your sentence rather than fix a non-parole period. I therefore direct your sentence be suspended after you have served 3 years. […]

Consideration of Ground 2

[50] To succeed on ground 2 the appellant needed to establish that the agreed facts did <u>not</u> exclude beyond reasonable doubt the possibility that he might have simply been a courier who transported the cannabis to Darwin and did no more. Unless the appellant could do that, he could not establish that he should be sentenced on a different basis. That was so regardless of any errors (which I do not find) the sentencing Judge may have made in the fact finding process.

[51] Both at first instance, and on appeal, the appellant has sought to minimise his role in the offending and reduce its objective seriousness. He has endeavoured to do so in circumstances where: (i) he lied to the police and did not tell them anything about his role or the reward he was to receive; (ii) he elected <u>not</u> to give evidence during the plea on sentence; and (iii) his

counsel, Mr Gillard, conceded during the plea on sentence that there was no evidence about the financial reward he was to receive for his role.

[52] Counsel now appearing for the appellant, Ms Nguyen, submits that it may be inferred that the appellant had such a limited role from the following facts:

a. Mr McDonald was the person who resided locally, in Darwin, whereas Mr Le and the Appellant had to travel to Darwin;
b. Mr McDonald paid the Appellant $2,600 (by passing $2,600 to Le to give to the Appellant);
c. the Appellant could not speak English and therefore could not communicate with Mr McDonald – it can be inferred that he and Le communicated in Vietnamese;
d. Mr Le took charge in wheeling the large suitcase from the hire car to Mr McDonald's car; and
e. Mr Le sat in the front passenger seat in Mr McDonald's car, while Mr McDonald was in the driver's seat, and the Appellant sat in the back seat.

[53] The facts relied on by the appellant provide an incomplete account of the appellant's offending as revealed by the admitted facts. While there were assertions from the bar table, both in this Court and in the court below, there was no evidence that appellant could not speak any English. As the appellant: (i) had been in Australia since 2013 (which was five years at the time he committed the offence); (ii) studied business administration in Australia for a short period of time; (iii) worked as a ceiling painter; (iv) dealt with the hospitalisation of his partner following birth of their child; (v) was able to hire a car in Bankstown, deal with a motor vehicle accident in Roma, and rehire a car in Toowoomba; and (vi) book his own

accommodation at Rydges Hotel in Darwin, there is a fair inference that he could speak some English.

[54] The admitted facts and exhibit P2 establish the following. The appellant joined in a conspiracy to supply 28.3 kilograms of cannabis in Darwin with two other men. He obtained possession of the 28.3 kilograms of cannabis which is 56 times the commercial quantity of cannabis. However, the facts do not establish that he paid for, or financed, the purchase of the cannabis. He invested at least $2,400 of his own funds in the venture. He hired and paid the rental charges for the two hire cars he used to transport the cannabis from Sydney to Darwin. He obtained two suitcases. He determined what proportion of the cannabis was to go in each suitcase. He placed 18.5 kilograms of cannabis, about two thirds of the cannabis, in one suitcase. He placed 9.7 kilograms of cannabis, about one third of the cannabis, in the other. He placed the suitcases in the hire cars which he drove to transport the cannabis to Darwin. His journey included overnight stops and the change of hire cars at Toowoomba. He stored the 28.3 kilograms of cannabis overnight in the hire car in the underground carpark at the Rydges Hotel in Darwin. He met Mr McDonald and Mr Le at the hotel. He facilitated the removal and transfer of the 18.5 kilograms of cannabis from his hire car to the Hilux owned by Mr McDonald. He got into the Hilux to further assist with the distribution and/or storage of the 18.5 kilograms of cannabis. This may be inferred from the facts that the 18.5 kilograms of cannabis was placed in the Hilux before he got in and he

retained control of the remaining 9.7 kilograms of cannabis. He continued to store the 9.7 kilograms of cannabis in the hire car which remained parked at Rydges Hotel. He thereby retained control of 19 times the commercial quantity of cannabis. There was no evidence that he handed possession and control of the hire car to anyone else. There was no evidence to suggest that Mr McDonald was aware there was 9.7 kilograms of cannabis remaining in the hire car.

[55] In my opinion, based on the facts I have summarised at [54], his Honour accurately described the whole of the appellant's criminal conduct. He did so in accordance with the agreed facts. The appellant did not simply transport the cannabis to Darwin with the use of the hire cars, deliver all of the 28.3 kilograms of cannabis to the other two offenders for $2,600, return the hire car to Hertz, and return to Sydney. The agreed facts plainly establish that the appellant played a very significant role in bringing a large and valuable quantity of cannabis plant material to the Territory; and those facts exclude the possibility that he might have been someone who simply transported the drugs to Darwin and did no more. He did more than that and his involvement in the offending was incomplete when he was apprehended by police.

[56] If the appellant wished to be sentenced on a different basis to that established by the agreed facts, for example, on the basis that: (i) he did only what he was directed to do; (ii) his involvement in the offending was complete when he got into the Toyota Hilux; (iii) he was to have nothing

more to do with either the 18.5 kilograms or the 9.7 kilograms of cannabis; and (iv) he was to be reimbursed for the cost of the hire car and paid a fixed amount of about $300 for his involvement in the offending, then it was up to the appellant to tender evidence which mitigated his offending accordingly. He did not do so.

[57] In the absence of evidence from the appellant, the sentencing Judge was required to act as I stated in *Winstead v R*.[35]

> […] If the applicant wished to be sentenced on the basis that he was only holding the drugs for a short period of time and that the only reward he was to receive was that he was permitted to smoke some of the cannabis in his possession, the burden was on him to give evidence and prove these facts on the balance of probabilities as they are facts favourable to the applicant.
>
> In the absence of evidence from the applicant, the proper course was for the sentencing Judge to treat the offender as if he had told the court nothing about the circumstances of the offence at all and to apply normal sentencing principles. That is what the judge did.
>
> The sentencing Judge was required to sentence the appellant on the facts known to him, […]. […]
>
> As was said by Young CJ, Lush and Brooking JJ in *R v King*:
>
> > A court must sentence a man upon the case made out by the Crown in evidence or appearing from the depositions, but it nonetheless looks to him to put forward material in mitigation of the offence. The applicant's failure to prove on the hearing of the plea any mitigating circumstance of the offence, as opposed to mitigating factors personal to himself, is a relevant matter. In the case of drug offences, very often only the offender will be in a position to prove the true extent of his involvement in commercial dealing. The extent of his participation will hardly ever appear from overt acts which the Crown will be able to prove. If the offender does not give evidence, he can hardly complain if the court declines to draw inferences in his favour.

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35 [2009] NTCCA 12 at [14] – [17].

[58] The fact that the sentencing Judge did not know the appellant's role and position *in the overall criminal operation* did not mean that his Honour was bound to sentence the appellant on the most favourable version of the offending for which the appellant contended, without tendering the necessary evidence. This was not a case where the Crown failed to prove that the appellant engaged in the very significant role found by the sentencing Judge. That finding is *not* a finding about the appellant's role and position in the overall criminal operation. It is a finding about the extent of the accused's criminal conduct based on the agreed facts and available evidence.

[59] In *Filippou v The Queen*[36] the plurality of the High Court stated:[37]

> But, as was established in *R v Olbrich*, a sentencing judge may not take facts into account in a way that is adverse to an offender unless those facts have been established beyond reasonable doubt and, contrastingly, the offender bears the burden of proving on the balance of probabilities matters which are submitted in his or her favour. Where therefore the prosecution fails to prove a fact or circumstance which is adverse to the offender, but the judge is not satisfied on the balance of probabilities of an alternative version more favourable to the offender, *the judge is not bound to sentence the offender on a basis which accepts the accuracy of the more favourable version*. If the prosecution fails to prove beyond reasonable doubt a possible circumstance of the offending which, if proved, would be adverse to the offender but the offender fails to establish on the balance of probabilities a competing possibility which, if proved, would be favourable to the offender, *the judge may proceed to sentence the offender on the basis that neither of the competing possibilities is known*. As was stated by the majority in Olbrich:
>
> > *[We] reject* the contention that a judge who is not satisfied of some matter urged in a plea on behalf of an offender must, nevertheless, sentence the offender on a basis that accepts the

36 (2015) 255 CLR 471.

37 Ibid at [64].

> accuracy of that contention unless the prosecution proves the contrary beyond reasonable doubt. The incongruities that would result if this submission were accepted are well illustrated by the present case. The respondent swore that he was a courier but the judge disbelieved him. *To require the judge to sentence the respondent on the basis that he was a courier is incongruous*.

[60] The sentencing Judge sentenced the appellant in accordance with the above principles. As was stated by his Honour in his sentencing remarks, the competing contentions in this case were whether the appellant was (i) a mere transporter; or (ii) had equity in, or ownership, of the cannabis consignment, and a vested interest in its supply and distribution in the Darwin market. The sentencing Judge did not sentence the appellant on either of those bases because neither contention was proven to the respective standard. Nor did he draw any inference against the appellant because of his silence.[38] He sentenced the appellant simply on the basis that he was someone who played a very significant role in bringing to the Territory a large and valuable quantity of cannabis plant material which was clearly established by the agreed facts.

[61] Counsel for the appellant, Ms Nguyen, made the following submission.

> It was open, on the facts, for his Honour to conclude that it is unknown whether the appellant was a poorly paid driver, and the exact extent of his role was unknown. However, these unknowns cannot then lead to a conclusion that the Appellant was "*someone who played a very significant role in bringing to the Territory a large and valuable quantity of cannabis plant material*". The sentencing of the appellant "*as someone who played a very significant role in bringing to the Territory a large and valuable quantity of cannabis plant material*" was therefore an error of fact *and of law*.

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38 *Strbak v The Queen* [2020] HCA 10 at [13].

The respondent asserts that his Honour's conclusion that the offender "played a very significant role" goes no further than a mere descriptor of what is reflected in the agreed facts. However, it is clear that his Honour's mind was directed at the Appellant's overall role in the supply operation, and *not just his role as a courier*. So much is clear from the remarks that immediately follow, being, "*I cannot mitigate the sentence on the basis that you did not have a significant role in the operation or, for example, that you were just a poorly paid driver*".

That sentence suggests that his Honour was not satisfied on the balance of probabilities, that the Appellant was a poorly paid driver (a matter that would operate to mitigate the sentence). However, not knowing a fact – or being unable to reach a finding either in mitigation or aggravation – does not equate to being persuaded of an aggravating feature, as an absence of persuasion about a mitigating factor is not equivalent to persuasion of the opposite fact in aggravation.[39]

Sentencing the Appellant as "*someone who played a significant role*" suggests that the learned Judge was satisfied of certain facts about his overall role "*in the operation*" which work to aggravate his sentence. However, in the light of being "*unclear whether you were a mere transporter or whether you had equity in or ownership of the cannabis consignment, and a vested interest in its supply and distribution in the Darwin market*", his Honour could not have been satisfied beyond a reasonable doubt of any aggravating facts concerning the appellant's role beyond what was in the agreed facts, namely, that he was a courier.

[62] The above submissions only need to be stated to see they cannot be sustained. They misapprehend the competing contentions in this case and are contrary to what was plainly stated in *Olbrich*, *Filippou* and *Winstead*. This is made abundantly clear by the assertions in the last paragraph of the quote at [59] above. Contrary to what was rejected in *Olbrich* and *Filippou*, the appellant's submissions, in effect, assert that because it was not established that the appellant had equity in, or ownership, of the cannabis consignment, and a vested interest in its supply and distribution in the Darwin market, the learned sentencing Judge was required to conclude that the appellant was a

39 *Weininger v R* (2003) 212 CLR 629.

mere courier. This ignores what is otherwise plainly established by the agreed facts and his Honours finding that he was not satisfied that the appellant was a courier who simply transported the cannabis to Darwin.

[63] The sentencing Judge's conclusion that it was unknown if the appellant was a poorly paid driver, and the exact extent of his role was unknown, did *not* lead his Honour to conclude that the Appellant was "someone who played a very significant role in bringing to the Territory a large and valuable quantity of cannabis plant material". His Honour canvassed all of the relevant material facts in the case in his sentencing remarks. In coming to the conclusion that I have just referred to, his Honour's mind was not directed to the appellant's overall role in the supply operation. His Honour stated that "I do not know your role and position in the overall operation". His Honour did not equate his finding that he was not satisfied on the balance of probabilities that the appellant was a poorly paid driver, with the aggravating aspects of the appellant's offending conduct that he ultimately found.

[64] The fact that what may have been the full extent of a person's involvement in criminal activity is unknown, or cannot be proven, does not mean the person is not to be sentenced for the full extent of their proven involvement in the offending. Consistent with what was declared in *Olbrich*,[40] while distinctions between courier and principal may be useful in determining an

40 (1999) 199 CLR 270 at 279.

offender's role in a drug transaction involving the importation of drugs into a jurisdiction for sentencing purposes, such characterisations must not obscure the assessment of what the offender did. Ground 2 of the appeal should be dismissed.

Ground 3

[65] As to ground 3, the appellant submits that upon the facts of this case, which were contested in this appeal, the sentence imposed on the appellant was unreasonable or plainly unjust and disproportional to the objective seriousness of the offending.

[66] The approach to be taken by an appellate Court when such a ground of appeal is raised is well established. In *Forrest v The Queen*[41] this Court stated:

> The exercise of the sentencing discretion is not to be disturbed on appeal unless error is shown. The presumption is that there is no error. Appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that in all the circumstances the appellate court concludes there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons.
>
> Manifest excess is a conclusion which does not depend upon attribution of specific error in the reasoning of the sentencing judge. The relevant test is whether the sentence is unreasonable or plainly unjust. It must be shown that the sentence was clearly and not just arguably excessive. In approaching the task of determining whether a sentence is unreasonable or plainly unjust, the appeal court does so within the context that there is no one single correct sentence. The process of sentencing comprehends that there may have been compliance with the appropriate

41 [2017] NTCCA 5 at [63] and [64].

> sentencing principles at first instance notwithstanding that there may also be differences of judicial opinion concerning the result.

[67] As Hayne J stated in *AB v R*,[42]

> [In] the case of manifest excess, the error in reasoning of the sentencing judge is not discernible; all that can be seen is that the sentence imposed is too heavy and thus lies outside the permissible range of dispositions. Only then may the appellate court intervene and, in the exercise of its discretion, consider what sentence is to be imposed.

[68] The appellant relies on three propositions to make out this ground of appeal. First, the appellant should have been sentenced as a courier who merely transported the cannabis to Darwin. Second, the sentencing Judge failed to give sufficient weight to the appellant's deprived circumstances and prospects of rehabilitation. Third, the sentence fell outside the relevant range of sentences.

[69] None of the above propositions can be sustained.

[70] The sentencing principles applicable to large and potentially very profitable dangerous drug importations into the Northern Territory such as the present are well known. Denunciation, community protection and deterrence are the dominant sentencing objects. Rehabilitation weighs less heavily than other sentencing objects and the mitigating aspects of the offence may be overridden.

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42 (1999) 198 CLR 111 at [130].

[71] The offending in this case was objectively serious. The appellant played a crucial role in importing into the Northern Territory 56 times the commercial quantity of cannabis for supply in the Darwin Community. He did so for the commercial gain of all those involved in the transaction. Although the reward the appellant was to receive was unknown, he played a crucial part in a significant commercial enterprise. The offending was not opportunistic. The appellant and two other men planned to bring the cannabis into the Northern Territory for supply in the Darwin community. The appellant knowingly entered into a joint enterprise with his two co-offenders, one of whom had an established capacity to supply drugs in the Darwin community. The appellant took possession of the cannabis in New South Wales and drove through two states to bring the cannabis into the Northern Territory. His role in the offending was not complete at the time he was apprehended. He retained possession of 9.7 kilograms of cannabis. If the cannabis had been sold at 2018 prices, that amount of cannabis had the potential to return somewhere between $300,000 and $850,000.

[72] By way of mitigation, the sentencing Judge reduced the sentence he would otherwise have imposed on the appellant by 12 months as a result of his plea of guilty. His Honour also took into account the fact that the appellant was a first offender when determining to suspend part of the appellant's sentence of imprisonment. Apart from these factors, there was not a great deal by way of mitigation. The appellant's financial and employment position was unclear and it was not established he was of positively good character. He

had the capacity to pay the charges for hire of the rental car and it was not established that he engaged in the criminal conduct because of financial need. He was an unlawful non-citizen because he had not completed the required English language course and had been excluded from the education course he had come to Australia to undertake. No "good character" references were tendered on his behalf. He knowingly chose to commit the offence as a mature adult.

[73] Counsel for both parties took the Court to a range of sentencing cases, including decisions of the Court of Criminal Appeal, involving sentences which have been passed for similar offending. Those cases demonstrate that the sentence imposed on the offender was well within range. The decisions of the Court of Criminal Appeal demonstrate that a standard has been set for sentencing offenders who engage in the importation and supply in the Northern Territory of dangerous drugs on a large scale. Those decisions establish starting points in excess of imprisonment for five years.

[74] Of particular relevance to this case are the decisions of this Court in *Winstead v The Queen*,[43] *Lam v The Queen*,[44] and *Cook v The Queen*.[45]

[75] In *Winstead* the applicant was charged with possessing 28.846 kilograms of cannabis contrary to s 9(1) and (2)(d) of the *Misuse of Drugs Act 1990*. He was responsible for warehousing the cannabis for a major drug dealer for

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43 [2009] NTCCA 12.

44 NTCCA No 27 of 2019 (21935123) (unreported 17 April 2020).

45 [2018] NTCCA 5.

commercial gain. He knew he had the cannabis in his possession and that he was playing an important role in the distribution of the dangerous drug. There are clear parallels between *Winstead* and this case. Unlike Winstead, the appellant does not have a criminal record but his offending was more serious. He was actively involved in bringing the cannabis into the Northern Territory. Winstead was sentenced to six years' imprisonment with a non-parole period of four years, which is a greater sentence than that imposed on the appellant. The Court of Criminal Appeal held in *Winstead* that although the sentence was towards the top of the range, it was not manifestly excessive.

[76] There are also some parallels between *Lam* and this case. *Lam* was a Crown appeal against sentence. The respondent pleaded guilty to a single count of supplying just over 25 kilograms of cannabis. He was sentenced to three years' imprisonment with a 70 per cent non-parole period. The principal ground of appeal was that the sentence was manifestly inadequate. The respondent was dependent on cocaine and was indebted to his drug dealer for over $20,000. For bringing the cannabis to Darwin he was to receive a reduction in his drug debt of $10,000. He flew to Darwin with two suitcases containing the cannabis. He had a very limited criminal record comprised of cannabis possession offences committed in 2010 and 2012, for which he received good behaviour bonds without conviction. He was sentenced on the basis that he was a courier. The appeal was allowed and the respondent was resentenced by the Court of Criminal Appeal to four years and nine months'

imprisonment suspended after two years and nine months. When passing sentence the Court of Criminal Appeal stated:

> It may be accepted that, as a courier, he was being used by more important people in the drug supply chain, so that if the drugs were detected, he and not they would pay the price. However, the role of a courier is a very important role in the overall scheme of drug supply in the Territory from interstate, since without the courier, the higher level entrepreneur would not succeed in bringing drugs to the local market.
>
> Therefore, in addition to denunciation and punishment, general deterrence is an important objective in the sentencing of offenders such as the respondent. The courts must impose sentences sufficient to discourage potential couriers from embarking on that course.

[77] In *Cook* the Court of Criminal Appeal dismissed an appeal against a sentence of four years and six months' imprisonment suspended after three years. The sentence had been reduced by 25 per cent for a plea of guilty from a starting point of six years' imprisonment. Although Mr Cook purchased the cannabis for $20,000 and only 10.0349 kilograms of cannabis was involved, there are, once again, parallels between that case and this case. After he purchased the cannabis, Mr Cook put the cannabis in a duffel bag and a trunk which he purchased, then put the trunk in his utility and drove from Adelaide to the Northern Territory. He was apprehended just before he reached Katherine. He was 30 years old and had no prior convictions.

[78] The sentence imposed on the appellant by the sentencing Judge in this case is consistent with all three of the above decisions of the Court of Criminal Appeal. The sentence is clearly within the range of available sentences and complies with current sentencing standards.

[79] The sentence imposed on the appellant was not manifestly excessive and this ground of appeal should also be dismissed.

Conclusion

[80] I would dismiss the appeal against sentence.

Kelly J

[81] The appellant pleaded guilty to supplying a commercial quantity of cannabis plant material and was sentenced to a term of imprisonment for five years (reduced from six years for his plea of guilty), suspended after three years. The amount of cannabis supplied was 28.3 kilograms (62.4 pounds) around 56 times the commercial threshold. The offence carries a maximum penalty of imprisonment of 14 years.

[82] The sentencing judge summarised the agreed facts as follows. (No point has been raised about the accuracy of that summary.)

> [A]t some time prior to 22 June 2018 you became involved with two other men: William McDonald and Tuan Le, in a plan to transport a commercial quantity of cannabis into Darwin for supply to the community.
>
> At the time, McDonald was a person of interest to the police in connection with the supply of commercial quantities of cannabis into Darwin.
>
> Your active involvement commenced in the afternoon of 22 June 2018, when you hired a rental car in Bankstown, a suburb of Sydney, and arranged to return that vehicle to the Darwin Airport on 25 June 2018.
>
> Before leaving Sydney, you obtained approximately 28.3 kilograms or 62.4 pounds of cannabis from an unknown person. Some of the cannabis was contained in Ziplock bags and some of the cannabis in Cryovac bags. All of the bags then placed into larger space bags.

You packed the cannabis into two suitcases with approximately 18 and a half kilograms in one suitcase and more than 9 and a half kilograms of cannabis in a second suitcase. The total, as mentioned, was 28.3 kilograms.

You then drove the cannabis from Sydney to Queensland. In the vicinity of Roma, your rental vehicle was involved in an accident but you were given a replacement vehicle in Toowoomba, into which you transferred the two suitcases before continuing driving to the Northern Territory. You arrived in Darwin on 25 June 2018.

Meanwhile, on 25 June, Mr Le flew from Brisbane to Darwin. On arrival, he booked accommodation at the Ridges Hotel in Palmerston. You separately arranged accommodation at the same hotel.

In the morning of 26 June, Mr McDonald contacted Mr Le and arranged to meet with Mr Le and yourself in the undercover car park at the Ridges Hotel. At the Ridges Hotel, Mr McDonald gave Mr Le $2600, which Mr Le then passed onto you. You put it in your backpack. The arranged meeting between the three of you took place at about 11:20 am in the Ridges undercover car park.

There, you and they helped transfer the suitcase containing the 18.5 kilograms of cannabis from the rear of your hire car to the rear seat of Mr McDonald's vehicle.

All three of you then got into McDonald's vehicle, with McDonald driving, Le in the front passenger seat and you in the rear driver's seat. Police intercepted the vehicle before it left the car park and placed all three of you under arrest.

Police found the suitcase with 18.5 kilograms of cannabis in the rear seat of McDonald's vehicle. They found the other suitcase with the 9.7 kilograms of cannabis in the rear load space of your rental vehicle. They also found the $2600 in cash in your backpack in the rear seat of the vehicle.

After you were arrested and cautioned, you participated in a formal interview with police, with the assistance of a Vietnamese interpreter. You denied knowledge of any of the cannabis and told the police that you had received two suitcases in Sydney, which you were told to transport to Darwin by road. You told the police that you thought they contained dog and cat food.

If the cannabis had been sold in Darwin at the then-current rate of $5000 per pound, the cannabis you transported had the potential to realise $312,000. If the cannabis had been sold at the rate of $30 per gram, the cannabis had the potential to realise almost $850,000.

[83] In his sentencing remarks, the sentencing judge said:

In your case, it is difficult to make many relevant findings because there are so many "unknowns". You lied in your police interview and you did not give evidence at your sentencing hearing. There is no evidence as to the identity of the Sydney supplier of the cannabis to you, nor as to how and by whom the purchase was financed, whether by you or someone else.

Your counsel told the court today that you were working only one to two days per week as a painter, earning only $50 a day. Again, the matters conveyed to the court were somewhat vague and it is difficult for me to make any findings, even on the balance of probabilities, in relation to those matters.

The photographs tendered in evidence indicate that the car rental agreement was in your name and paid for by a credit card in your name. The amount of $2600 you were paid after you arrived in Darwin may have been reimbursement of the rental charges, but that is not clear.

Other matters which remain unknown are the benefit which you were to receive for transporting this very significant quantity of cannabis from Sydney to Darwin, and exactly what you and the other two would have done with the 18.5 kilograms of cannabis had you not been arrested in the Ridges car park. Another unknown was what was to happen with the remaining 9.7 kilograms of cannabis or thereabouts which was found in your vehicle.

Finally, it is unclear whether you were a mere transporter or whether you had equity in or ownership of the cannabis consignment, and a vested interest in its supply and distribution in the Darwin market. I do not know your role and position in the overall operation.

In those circumstances, I have to sentence you as someone who played a very significant role in bringing to the Territory a large and valuable quantity of cannabis plant material. I cannot mitigate the sentence on the basis that you did not have a significant role in the operation or, for example, that you were just a poorly paid driver. I simply do not know.

I cannot even be satisfied that your role was completed once the cannabis had been transferred to Mr McDonald's vehicle. The fact that there were still more than 9.5 kilograms of cannabis in your vehicle indicates that you still had work to do.

[84] The appellant has sought leave to appeal against the sentence imposed. Two grounds are pursued:

- Ground 2: The learned sentencing judge erred in making findings of fact that were not in the agreed facts and not supported by admissible evidence.

- Ground 3: The sentence was manifestly excessive.

Ground 2:

[85] The appellant complains about this passage in the sentencing remarks.

> In those circumstances, I have to sentence you as someone who played a very significant role in bringing to the Territory a large and valuable quantity of cannabis plant material. I cannot mitigate the sentence on the basis that you did not have a significant role in the operation or, for example, that you were just a poorly paid driver. I simply do not know.

[86] The appellant relies on the principle in *Filippou v The Queen*[46] that if the prosecution fails to establish a circumstance adverse to the offender beyond reasonable doubt, and the offender fails to establish a competing possibility on the balance of probabilities, the sentencing judge should sentence on the basis that neither of the competing possibilities is known. The appellant also relies on the logical proposition that absence of persuasion about mitigating possibilities is not the same as persuasion of the opposite fact in mitigation.[47]

[87] The appellant's contention is that had the sentencing judge applied these principles the appellant would have been sentenced on the basis that it was

46 256 CLR 47.

47 See also *Weininger* (2003) 212 CLR 629.

unknown whether he had “played a very significant role in bringing to the Territory a large and valuable quantity of cannabis plant material”.

[88] This argument is based on the false assumption that not knowing what role the appellant played in the operation, and therefore not being able to mitigate the sentence on the basis that he “did not have significant role in the operation”, is the same thing as saying it was not known whether he played “a very significant role in bringing to the Territory a large and valuable quantity of cannabis plant material”. These are two very different propositions.

[89] The role the appellant played in bringing a large amount of cannabis into the Territory is set out in detail in the agreed facts summarised at [82] above and it was “very significant” by any standard. (Prior to 22 June he became involved with his co-offenders in a plan to transport a quantity of cannabis into Darwin for supply to the community; he hired the car used to transport the cannabis; obtained the cannabis from an unknown person; packed it into two suitcases; drove it over 1000 kms from Sydney to Roma where the car was involved in an accident; went back some 300 kms to Toowoomba and transferred the two suitcases containing the cannabis into a replacement vehicle; continued to drive over 3200 kms to Darwin; arranged accommodation in the same hotel in Darwin as one of the co-offenders; met two co-offenders in the carpark of the hotel; received $2,600 and put it in his backpack; helped transfer one suitcase to a co-offender’s vehicle; left the other suitcase containing over 9 ½ kilograms of cannabis in the hire car that

he was to return on 25 June; and went as a passenger with the co-offenders in their vehicle, with the suitcase containing over 18 ½ kilograms of cannabis, at which point they were arrested.)

[90] His role in the "operation", in the sense used by the appellant, meaning his place in the organisation of people carrying out the offence, is not relevant to that finding. The appellant's role in bringing a large amount of cannabis into the Territory, detailed in the agreed facts, would accurately have been described as very significant even if the sentencing judge had been satisfied that he was "a lowly paid driver".

[91] The appellant contended that, read as a whole, the passage complained of amounted to a finding by the sentencing judge that the appellant was not "a lowly paid courier" and that he had a significant role in the "operation": that is to say that his Honour had impermissibly turned an absence of evidence of a mitigating factor into a positive finding of an aggravating factor. This contention cannot be accepted. In the first sentence of the passage complained of, the sentencing judge stated, accurately, based on the agreed facts, that the appellant had "played a very significant role in bringing to the Territory a large and valuable quantity of cannabis plant material". In the second sentence, all that his Honour was doing was indicating the absence of relevant mitigating factors: he was not drawing any inferences that were aggravating features of the offending.

[92] His Honour's findings and conclusions were quite consistent with the agreed facts. There was no error.

Ground 3:

[93] The principles applicable to appeals of this nature are well known.[48] The presumption is that there is no error. An appellate court interferes only if it is shown that the sentencing judge committed error in acting on a wrong principle or in misunderstanding or 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. It is incumbent upon the appellant to show that the sentence was clearly and obviously, and not just arguably, excessive.

[94] In support of this ground of appeal, counsel for the appellant placed a great deal of emphasis on characterising the appellant as a courier. It is true that the prosecutor said during the sentencing hearing, "I guess while the Crown would say that certainly his role seems to be that of a courier he's certainly had opportunity to desist and he has made a conscious decision to continue with the transportation to the Northern Territory."[49]

[95] Also, defence counsel said, "So that is my submission that contextually as part of the sentencing exercise it is conceded, your Honour, very much at the

48 See, for example, *Whitlock v The Queen* [2018] NTCCA 7; *Bara v The Queen* [2016] NTCCA 5 at [75]-[76]; *Emitja v The Queen* [2016] NTCCA 4 at [39]-[40]; and *Morrow v The Queen* [2013] NTCCA 7 at [36].

49 The remark was made in reference to the fact that the appellant broke down in Queensland and arranged for a replacement vehicle to transport the drugs.

outset that this is very serious offending. It's a very large quantity of the substance. And I agree, your Honour, with my learned friend's submission that Mr Duong's role is best described as a courier in this enterprise."

[96] However, not very much significance attaches to this. The fact is that the appellant's precise role in the organisation and what his reward was to be are both among the many unknowns in the case.[50] Others are set out in the sentencing judge's remarks at [83] above.

[97] There is, however, sufficient detail in the agreed facts from which an inference can be drawn that the appellant's role was more than "a mere courier" in the classic sense of one who is handed drugs for transport and does nothing more than transport them and hand them over to a recipient at the destination. The appellant paid for the hire car; he packaged the drugs and put them into the suitcases; he went to considerable effort to transport the drugs via two states into the Northern Territory; he did not simply hand them over when he arrived, but assisted in putting one package (the suitcase containing 18 ½ kilograms of the drug) into a co-offender's car and then got into the car with the drugs and the co-offenders; and he left the other suitcase containing more than 9 ½ kilograms of the drug in the boot of the car which he had hired and was obliged to return. There is no evidence about what was to happen to the 9 ½ kilograms of cannabis in the boot, who

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50 The appellant received $2,600 but there is no evidence what that was for – whether it was his reward or part of his reward or whether it was reimbursement for the cost of the hire car. The only thing one can infer about the appellant's anticipated reward is that he must have considered it sufficient to justify the risk.

owned it or what was to happen to it, but the inference is inescapable that the appellant must have had some further role to play in the process, if only a minor one, so he could return the car without a suitcase full of drugs in the boot.

[98] In any case, the focus on whether the appellant should be characterised as "a courier" is unhelpful; the task of the sentencing judge was to sentence the appellant for the offence to which he had pleaded guilty based on what he actually did, as set out in the agreed facts. As the majority held in *R v Olbrich*:[51]

> Further, it is always necessary, whether one or several offenders are to be dealt with in connection with a single import of drugs, to bear steadily in mind the offence for which the offender is to be sentenced. Characterising the offender as a "courier" or a "principal" must not obscure the assessment of what the offender did.
>
> There are, of course, cases in which only one offender is prosecuted but it is clear that the importation is part of a business venture that is organised hierarchically. I such a case a distinction between courier and principal may be useful to indicate where an offender fitted into the hierarchy of the organisation. And that, in turn, might assist in identifying the nature of the offender's criminality. But there was no evidence, one way or the other, to suggest that this was such a case.

[99] Those remarks are particularly apposite to the present case with its absence of evidence about the organisation and the role in it of the offender. The sentencing judge was right to focus on sentencing the appellant on the basis of what was contained in the agreed facts and not speculating about matters concerning which there was no evidence.

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51 (1999) 199 CLR 270 at 278.

[100] In any case, characterising the appellant as a courier would not necessarily mean that his sentence ought to have been a lesser one. In *The Queen v Le Cert*,[52] Wells J said:

> [A]ssuming all other things are equal, it does not follow that a person less exalted in the organisation can confidently expect that his punishment will be correspondingly less severe. …. It remains true that he has knowingly entered into a unlawful conspiracy with persons known and unknown to obtain and distribute drugs, and it is only because persons like him are ready, able and willing, to do such a thing that the entrepreneur is able to ply his nefarious trade on a large scale. If there were no middlemen and underlings, there would be no top men in an organisation. If an organisation is starved of recruits it must collapse.

[101] The appellant did not rely on parity as a ground of appeal, but did include the case of one co-offender, McDonald, among the cases relied upon to establish a range. McDonald pleaded guilty to possession of the 18 ½ kilograms of cannabis found in his car when police arrested the three co-offenders, whereas the appellant pleaded guilty to the supply of 28.3 kilograms. Like the appellant, he had no prior convictions. McDonald was sentenced to three years nine months imprisonment (reduced from five for his guilty plea) with a non-parole period of two years eight months, a sentence which sits comfortably with the appellant's sentence given the difference in the amounts of cannabis involved in the two cases and the extent of the appellant's known significant role in bringing the cannabis to the Territory (as detailed in [78]).

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52 [1975] 13 SASR at 239; *The Queen v Le Cert* was applied by Mildren J in *The Queen v Day* (2004) 14 NTLR 201 and the principle quoted and applied many times since in sentencing remarks and on appeals. See for example *Winstead v The Queen* [2009] NTCCA 12 at [13].

[102] Of more importance are Court of Criminal Appeal decisions. In the case of *The Queen v Lam*,[53] Lam was initially sentenced to three years imprisonment reduced from five years for the guilty plea, with a 70% non-parole period. He had a number of minor court appearances for possession of drugs but the sentencing judge accepted that he was "largely a man of good character". There was a crown appeal against sentence and a cross-appeal against the imposition of a non-parole period. Both were successful and Lam was resentenced to imprisonment for four years nine months suspended after two years nine months – a sentence very similar to that of the appellant.

[103] The other CCA decision which is of relevance is *Winstead v The Queen*.[54] Winstead was sentenced to six years imprisonment with a non-parole period of four and a half years for possession of 28.846 kilograms of cannabis. His role was essentially a passive one (unlike the active role played by the appellant in this case in bringing the cannabis into the Territory). Winstead was warehousing the cannabis for a third party and not otherwise involved in the supply of the drug. He contended that he was only going to receive a minor reward for this service but the sentencing judge did not accept that and said:

> I am unable to say what your precise role in the organisation was. However, it is clear that you, by your conduct, were to play a part in ensuring that a significant criminal operation was able to continue, and that cannabis would be made available for supply to members of the community for reward. The rewards available to someone in the

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53 *The Queen v Wilton Lam* (SCC 21935123, 17 April 2020).

54 [2009] NTCCA 12.

> organisation were significant. To what extent you would benefit from the enterprise is, as I say, unclear. However, I am able to say that your involvement was important to the process and that it is likely that your reward would have been significant to you. ... I can only assume that you would not have acted as you did, unless you thought the benefits to you outweighed the risks involved.

[104] The Court of Criminal Appeal upheld Winstead's sentence and endorsed the above remarks. Southwood J (with whom Martin (BR) CJ and Kelly J agreed) said:[55]

> In the absence of evidence from the applicant, the proper course was for the sentencing Judge to treat the offender as if he had told the Court nothing about the circumstances of the offence at all and to apply normal sentencing principles. This is what the sentencing Judge did.
>
> The sentencing Judge was required to sentence the applicant on the facts known to him, the most significant of which was the weight of the cannabis. The sentencing Judge was also entitled to conclude that the applicant's reward would have been significant to the applicant and that the applicant would not have acted as he did unless he thought the benefits to him outweighed the risks involved.

[105] These remarks, too, are apposite to the appellant's case.

[106] The appellant has failed to establish that the sentence imposed was manifestly excessive. The appeal should be dismissed.

[107] I agree with Southwood J's analysis of the nature of an appeal under s 410(c) of the *Criminal Code*.

55 at [15] and [16].

Hiley AJ:

[108] I agree with the reasons and conclusions expressed by Southwood and Kelly JJ. In particular, I appreciate and agree with Southwood J's analysis of the nature of an appeal under s 410(c) of the *Criminal Code*.

[109] In addition to the decisions of the Court of Criminal Appeal referred to by Southwood J at [54] to [57] of his reasons and by Kelly J at [102] to [103] of her reasons, I note the Court's decisions in *The Queen v Cumberland* [2019] NTSC 14, *Whitlock v The Queen* [2018] NTCCA 7 and *The Queen v Indrikson* [2014] NTCCA 10, all of which involved the supply of large quantities of cannabis plant material.