CITATION:	*Edmonds v The Queen* [2019] NTCCA 1
PARTIES:	EDMONDS, Jarrad Keith 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 1 of 2018 (21733520)
DELIVERED:	4 January 2019
HEARING DATES:	30 May and 31 July 2018
JUDGMENT OF:	Grant CJ, Blokland and Barr JJ

CATCHWORDS:

CRIMINAL LAW – DRUG OFFENCES – JUDGMENT AND PUNISHMENT

Appeal against sentence – whether sentence manifestly excessive – commercial quantity of Schedule 1 drug – assessment of gravity of offending – inferences that may be drawn from Agreed Facts – extension of time and leave to appeal granted – appeal allowed and applicant resentenced.

Misuse of Drugs Act (NT) s 37(6)

Filippou v The Queen (2015) 89 ALJR 776, *House v The King* (1936) 55 CLR 499, *Lawrence v The Queen* (2007) 171 A Crim R 286, *Leach v The Queen* (2007) 230 CLR 1, *Markarian v The Queen* (2005) 228 CLR 357, *R v McNaughton* (2006) 66 NSWLR 566, *R v Scott* [2005] NSWCCA 152, *The Queen v Carey* [1998] 4 VR 13, *The Queen v Indrikson* [2014] NTCCA 10,

The Queen v Koumis (2008) 184 A Crim R 421, *The Queen v Olbrich* (1999) 199 CLR 270, *The Queen v Pham* (2015) 256 CLR 550, *The Queen v Roe* [2017] NTCCA 7, *Truong v The Queen* (2015) 35 NTLR 186; *Whitehurst v The Queen* [2011] NTCCA 11, *Wong v The Queen* (2001) 207 CLR 584, referred to.

REPRESENTATION:

Counsel:

Applicant:	JCA Tippett QC
Respondent:	D Morters SC

Solicitors:

Applicant:	Maleys Barristers and Solicitors
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	22

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Edmonds v The Queen [2019] NTCCA 1
No. CA 1 of 2018 (21733520)

BETWEEN:

JARRAD KEITH EDMONDS
Applicant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, BLOKLAND and BARR JJ

REASONS FOR JUDGMENT

(Delivered 4 January 2019)

THE COURT:

[1] On 20 October 2017 the applicant pleaded guilty to two offences against the *Misuse of Drugs Act* (NT) and was sentenced to a total term of 6 years' imprisonment. Count 1 charged that between 2 April 2017 and 14 July 2017 he supplied a commercial quantity of methamphetamine, which is classified as a Schedule 1 drug under the *Misuse of Drugs Act*. Count 2 charged that he supplied less than a commercial quantity of cannabis plant material, which is a Schedule 2 drug under the *Misuse of Drugs Act*.

[2] The sentencing judge adopted a starting point of imprisonment for eight years for the offence involving the methamphetamine, and a starting point of imprisonment for three years for the offence involving the cannabis. It was ordered that the second sentence be served concurrently with the first sentence, and then a discount of 25 per cent was applied to arrive at a total effective period of imprisonment for six years. A non-parole period of 4 years and 72 days was fixed in accordance with the 70 percent minimum required by s 55(3)(b) of the *Sentencing Act* (NT).

[3] The applicant seeks leave to appeal and an extension of time within which to bring that application for leave.[1] Should leave be granted, the sole ground of appeal is that the sentence imposed was manifestly excessive having regard to the facts and circumstances of the offence and the offender.[2]

The objective circumstances of the offending

[4] The agreed facts for the purpose of the plea were as follows.

[5] Between October 2015 and February 2017 the applicant deposited $293,195 into his ANZ bank account through different ATM outlets. He used that money to purchase Bitcoin totalling $275,200. At all material times he was employed as a roofer earning approximately $66,000 per annum.

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1 An application for leave to appeal and an extension of time within which to bring that application was previously refused by a single judge. The applicant applied for a rehearing under s 429(2) of the *Criminal Code*: Appeal Book (**AB**) 76-87.

2 AB 52.

[6] In the period between 3 April 2017 and 14 July 2017 police intercepted eight packages sent through Australia Post which contained illegal drugs purchased by the applicant. Seven of the eight packages contained methamphetamine. In total, 105 grams of methamphetamine was seized. One of the packages contained 28 grams of cannabis.

[7] On the first seven occasions, there were no deliveries of the drugs after police seized those packages. Following the seizure of the eighth package, the methamphetamine in that package was replaced with a neutral substance before it was received by Timothy Lewis. Lewis was apprehended following that receipt and told police he had agreed to receive the package on behalf of "Jarrad". The applicant admitted he had an arrangement with Lewis under which Lewis would collect the package on the applicant's behalf and deliver it to the applicant in return for payment of a small quantity of methamphetamine.

[8] A search warrant was executed at the applicant's residence on 13 July 2017. During the search, police located various implements which were used to consume dangerous drugs, three clip seal bags containing a total of five grams of cannabis and a clip seal bag containing 0.1 gram of methamphetamine.

[9] After the applicant was arrested, he participated in an interview with police. He admitted possession of the drugs and smoking implements located during the search of his residence. He denied any knowledge of the deposit of large

sums of money into his bank account and refused to comment on any of the packages police had intercepted, with the exception of the sixth package which contained seven grams of methamphetamine. He admitted he had purchased that package using Bitcoin on the dark web and arranged that it be posted to an address in Wulagi. By the time of the plea hearing the applicant had admitted all aspects of the offending and its attendant circumstances.

[10] The pleas of guilty were accepted by the sentencing court as pleas indicated at the earliest opportunity. The applicant had been remanded in custody from the time of his arrest on 13 July 2017.

[11] Counsel for the Crown referred the sentencing judge to an Australian Bureau of Criminal Intelligence report which identified the street value of methamphetamine at between $900 and $1,200 per gram.

The applicant's personal circumstances

[12] The applicant's counsel put forward the following matters relevant to his subjective circumstances, which appear to have been accepted by the sentencing judge.

[13] The applicant is 36 years of age. He was born and raised in Darwin, apart from short periods of time that he spent in Katherine and at Southport in Queensland. As a younger person he was a talented athlete until he suffered some significant sports-related injuries.

[14] From the time he left school in year 12, the applicant worked as a roofer for a building firm part-owned by his father. He holds a number of relevant trade qualifications and has a substantial work record.

[15] The applicant purchased his own home in 2006 for $260,000 and he has the continuing support of his long-term domestic partner, family and friends. A number of references were tendered during the plea hearing attesting to the applicant's sound work history and previous good character. The authors of the references expressed shock with respect to his offending.

[16] The sentencing judge was told the offending was directly related to a methamphetamine habit that the applicant had developed over a number of years. The sentencing judge was told that during the offending period the applicant was using up to three grams of methamphetamine per week. While some negative changes to the applicant's personality were noted by those close to him, those changes were attributed to depression. That was an assumption made by those around him, rather than a matter of expert medical assessment. The applicant did not take advice from his parents or others to seek medical assistance.

[17] The applicant had no previous criminal history, aside from two traffic matters in 2005 which were disregarded by the sentencing judge.

Manifest excess

[18] The principles governing an appeal of this kind are well known. It is fundamental that the exercise of the sentencing discretion is not disturbed on

appeal unless error in that exercise is shown. The presumption is that there is no error.

[19] The determination of an appropriate sentence is a matter of judicial discretion which involves the application of established principles in the process of instinctive synthesis. Given the nature of the sentencing discretion, judicial minds might reasonably differ as to the appropriate sentence to be imposed in a particular case. It is therefore not sufficient for an appellant arguing manifest excess to show that this Court might have imposed a lower sentence than that determined by the sentencing judge. The sentence must be demonstrated to be so excessive as to bespeak error in the exercise of the discretion, notwithstanding that no specific error can be identified.[3]

Sentencing principles and comparative sentences

[20] The sentencing principles applicable to offences of this kind are well established.[4] The gravity of the offending is informed by 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.[5] The weight or amount of drugs involved may be a factor of some importance, as it is a circumstance relevant to determining how far-reaching

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3 *House v The King* [1936] HCA 40; 55 CLR 499 at 505.

4 *The Queen v Roe* [2017] NTCCA 7 ("*Roe*"); *Truong v The Queen* [2015] NTCCA 5; 35 NTLR 186 at [34]-[36]; *The Queen v Indrikson* [2014] NTCCA 10 at [2]; *The Queen v Carey* [1998] 4 VR 13; 97 A Crim R 552 at 556; *The Queen v Koumis* [2008] VSCA 84; 184 A Crim R 421.

5 *The Queen v Roe* [2017] NTCCA 7 at [47]-[58] per Grant CJ and Southwood J.

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.[6]

[21] It is well recognised in cases of this kind that punishment, denunciation and general deterrence are the primary sentencing purposes.[7] Rehabilitation, including rehabilitation specifically for drug dependency, is usually given less weight, especially in cases involving commercial quantities of drugs and significant criminal networks.[8]

[22] The relevant maximum penalties are imprisonment for twenty-five years for the offending against Count 1 and fourteen years' imprisonment in respect of Count 2. As the relevant sentencing yardsticks, to be taken and balanced with all other factors, the maximum penalties for both offences clearly contemplate a wide range of offending and reflect the legislature's view of the gravity of the offending. The maximum penalties invite comparison between the worst possible case and the offending under consideration.[9]

[23] While comparative sentences are not in themselves determinative, they are of some utility in the assessment of manifest excess or inadequacy. In

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6 *Wong v The Queen* [2001] HCA 64; 207 CLR 584 at [67] per Gaudron, Gummow and Hayne JJ; *The Queen v Pham* [2015] HCA 39; 256 CLR 550 at [45].

7 *The Queen v Roe* [2017] NTCCA 7 at [47]; *Truong v The Queen* [2015] NTCCA 5 at [34], [36].

8 *The Queen v Roe* [2017] NTCCA 7 at [56]-[58] per Grant CJ and Southwood J.

9 *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at [31].

The Queen v Pham[10], French CJ, Keane and Nettle JJ said (footnote omitted):

> Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.[11]

[24] Comparative sentences involving the supply of commercial quantities of methamphetamine were reviewed recently in *The Queen v Roe*.[12] We will not repeat that analysis of those cases here, except to draw attention to the summary of that review by the majority in the following terms:

> [96] The comparable sentences referred to by the parties identify some cases that are relevantly very similar and some cases that are materially different to the case on appeal. Although there are one or two anomalies apparent from that survey, three broad categories of case involving the supply of commercial quantities of methamphetamine may be identified.
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> [97] First, there are cases which involve a one-off transaction by a single individual for commercial gain which is committed over a short and discrete period of time. These cases involve people who are in relatively low positions in the drug supply chain. They are often couriers at one level or another. The starting point in these cases is ordinarily a sentence of five to six years of imprisonment, but may be lower having regard to the particular subjective circumstances of the offender.
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> [98] The second category of case involves offenders who are in effect convicted of conducting a drug trafficking business for a continuing period of time. These offenders are characteristically higher up the level of the drug supply chain and they may have

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10 [2015] HCA 39.

11 *The Queen v Pham* (2015) 256 CLR 550 at [28].

12 *The Queen v Roe* [2017] NTCCA 7 at [65]-[101] per Grant CJ and Southwood J and at [160]-[193] per Blokland J.

established a small organisation in which they use other people as couriers and suppliers to drug users. The starting point in these cases is ordinarily a sentence of seven to 10 years' imprisonment.

[99] The third category of case involves those offenders who are part of drug trafficking syndicates of various sizes who are at relatively high levels in the drug supply chain who stand to make very large profits. The starting point in these cases is a sentence in the vicinity of 13 years' imprisonment (again depending upon the particular subjective circumstances of the offender), which is a starting point of approximately 50 per cent of the maximum sentence.[13]

[25] A number of matters should be understood concerning that summary. First, it operates as a broad categorisation of the dispositions made in those cases which were subject to review. Secondly, the penalties referred to are indicative starting points before the application of any reduction to take account of a plea of guilty and remorse. The indicative starting points make it clear that all three categories of offending are objectively serious. Thirdly, in each of those categories the penalty imposed may be lower (or higher) having regard to the particular subjective circumstances of the offender. However, the application of subjective factors cannot result in an outcome which is disproportionate to the crime.[14] The sentence cannot be less than the objective gravity of the offence requires.[15] Fourthly, that summary does not operate, and is not intended to operate, as a "guideline judgment". There is no statutory scheme for the delivery of guideline judgments in this jurisdiction, and the purpose of the summary is only to

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13 *The Queen v Roe* [2017] NTCCA 7 at [96]-[99].

14 See *R v Scott* [2005] NSWCCA 152 at [15].

15 See *R v McNaughton* [2006] NSWCCA 242; 66 NSWLR 566 at [15].

give indications of particular factors taken into account or given particular weight, and of the kind of outcome that might be expected in a certain kind of case in the interests of consistency.

[26] Finally, the objective circumstances of some types of offending may be such that the case does not fall comfortably or precisely within one or other of the categories described in that summary. This is such a case. However, the assessment of moral culpability and objective seriousness still requires a consideration of factors such as the social consequences that follow from the commission of the offence[16]; the existence of a commercial venture in the supply of drugs; the role of the offender in that enterprise; the level of his or her participation in the offence; the reward which the offender hoped to gain from participation in the offence; the difficulty in detecting the offence; and the quantity of drugs involved (subject to the qualification posited above).

Characterisation of the offending

[27] It should be observed at the outset that the charge in Count 2 related to the supply of 33 g of cannabis. The current threshold for a commercial quantity of cannabis is 500 g. Allowing for the 25 per cent reduction, the sentence imposed in respect of that offence was imprisonment for two years and three months. Viewed in isolation, that sentence was plainly and obviously excessive. By reason of the order for concurrency, however, it had no bearing on the total effective period of imprisonment. The primary focus of this appeal is necessarily on the sentence imposed on Count 1.

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16 *Wong v The Queen* (2001) 207 CLR 584 at [64].

[28] A number of matters are not in dispute and may be accepted. First, the applicant's activity had a commercial character. Secondly, the use of Bitcoin and the dark web in order to purchase the drugs elevated the gravity of the offending because it demonstrated a degree of sophistication (of a sort), and it gave rise to obvious and intended difficulties in detecting the activity. Having said that, almost all cases involving the commercial supply of methamphetamine involve subterfuge of one type or another to disguise criminal activity.

[29] The matters in dispute resolve essentially to the following issues. The first is the extent to which the monies in the amount of $293,195 deposited into the applicant's bank account and used to purchase Bitcoin may be inferred to be the proceeds of drug supply and used to purchase methamphetamine for further supply. The second and related area of dispute is the scope and nature of the applicant's commercial operation.

[30] During the course of the sentencing proceedings, the prosecution submitted that the applicant had earlier deposited a total of $295,000 into his account and had used the money to purchase drugs on the dark web. That was said to demonstrate the commercial purpose of the applicant's activity, which in turn could be taken into account to determine the nature of the offending.[17] While those observations may not be contentious in the sense that clearly some of those funds were used to purchase drugs, the submission went

17 AB 14.

further and invited the Court to infer the packages that were intercepted were "just a small amount of the material that was being ordered by this offender and he was involved in something much more substantial".[18]

[31] It is plain from the sentencing remarks that the sentencing judge proceeded on the basis that the $275,200 in Bitcoin was used to purchase drugs, and particularly methamphetamine; that this was demonstrative of the large scale of the applicant's commercial operation; that the scheme was sophisticated in nature; and that the applicant was "at the apex of this plan". During the course of the appeal hearing, counsel for the respondent submitted that the reasoning in *Lawrence v The Queen*[19] permitted the sentencing judge to draw those inferences concerning the true nature and extent of the applicant's activities.

[32] The decision in *Lawrence* concerned an appeal against the sentence imposed for single counts of trafficking methylamphetamine and MDMA respectively. The appellant had been arrested and found to be in possession of 39.322 g of methylamphetamine and 0.66 g of MDMA. However, the agreed statement of facts recorded that leading up to the appellant's arrest police had intercepted numerous telephone calls relating to the sale and trafficking of drugs of that kind. Those calls demonstrated that the charges arose in the context of distribution activity ranging from small numbers of tablets up to one ounce packages of methylamphetamine.

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18 AB 14.

19 [2007] ACTCA 10; 171 A Crim R 286 ("*Lawrence*").

[33] The appellant in *Lawrence* contended that the sentencing court fell into error in sentencing him for uncharged acts of drug-related activity inferred from the telephone intercepts, rather than on the basis of the two counts of trafficking to which he had pleaded guilty. The appeal court found no error in the approach of the sentencing judge, and said:

> We do not consider that his Honour did any more than is appropriate in having regard to the agreed statement of facts which makes it clear that these charges arose from a relatively well organised drug distribution exercise, involving what may be described as both "retail" sales of individual tablets of ecstasy, and "wholesale" sales of one ounce packages of methylamphetamine powder.[20]

[34] In reaching that conclusion, the appeal court made reference to the decision of the High Court in *Weininger v The Queen*[21], to the effect that a person who admits to the commission of other offences will ordinarily receive a heavier sentence than a person who has previously led a blameless life. It would seem clear from that reference that the appeal court considered the sentencing judge had drawn inferences from the sentencing facts for the purpose only of determining that the two offences charged were not isolated incidents, and as a matter going to character and antecedents. The appeal court did not suggest that it would have been properly open to sentence the appellant on the basis that the subject offending included the uncharged acts.

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20 *Lawrence v The Queen* (2007) 171 A Crim R 286 at [4].

21 [2003] HCA 14; 212 CLR 629 at [32].

[35] For the purpose of sentencing, a court may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt.[22] That principle is subject to a number of qualifications. First, and obviously, facts which are agreed for the purpose of sentencing must necessarily be taken into account where relevant. Secondly, it is open to a sentencing court to use agreed facts in order to contextualise the offending for the purpose of determining such matters as whether the charges formed part of an organised drug distribution exercise or represented isolated incidents. While the context may be ascertained in part from reasonable inferences drawn from the sentencing facts, care must be taken not to elevate the gravity of the offending beyond what may be reasonably inferred having regard to the requisite standard of proof.

[36] It may be noticed in this respect that the Agreed Facts included the following matters:

> Between October 2015 and February 2017 the offender deposited $293,195 in cash into an ANZ bank account held in his name through ATM outlets. He used that money to purchase bitcoin from a financial institution named BTC Markets. The total amount of bitcoin purchased was $275,200.
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> …
>
> The offender used the Bitcoin to purchase dangerous drugs on the dark web.

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22 *The Queen v Olbrich* [1999] HCA 54; 199 CLR 270 at [27]–[28]; *Leach v The Queen* [2007] HCA 3; 230 CLR 1 at [41]; *Filippou v The Queen* [2015] HCA 29; 89 ALJR 776 at [64], [66].

[37] It is express in those facts that the applicant deposited a cash amount of $293,195 into an ANZ bank account over a period of approximately 17 months. That was an average of about $17,000 per month. As noted above, during that period the applicant was earning approximately $66,000 gross per annum as an employed roofer. The Agreed Facts do not disclose the specific amounts deposited on each occasion, the dates of deposit or the intervals between them. Those facts also do not disclose how much Bitcoin was spent. It was not possible for the sentencing court to infer whether amounts of Bitcoin remained in the applicant's Bitcoin wallet and, if so, how much. Similarly, and in the absence of any further fact, evidence or concession concerning the source of the monies, it was not possible for the sentencing court to infer to the requisite standard that the monies used to purchase that Bitcoin were the proceeds of drug-related activity; although suspicions might reasonably arise given the disparity between the applicant's earnings and the total amount of the deposits.

[38] Against that background, the statement in the Agreed Facts to the effect that the applicant used the Bitcoin to purchase dangerous drugs on the dark web is open to various interpretations. At one of the end of the spectrum, it could be taken to mean that the applicant used the entirety of the $275,200 in Bitcoin to purchase dangerous drugs. However, given the lack of specificity and the requirement that matters adverse to an offender must be established beyond reasonable doubt, the most which could be inferred is that the applicant used an unspecified portion of that Bitcoin to purchase

dangerous drugs on the dark web. Counsel for the respondent ultimately conceded that to be the case during the course of the appeal hearing.

[39] The second area of dispute concerns the scope and nature of the applicant's commercial operation. That is, whether the reference in the Agreed Facts to the applicant's use of Bitcoin to purchase dangerous drugs from the dark web operates for sentencing purposes as a broader description of the offender's activities or whether it is limited specifically to the eight packages sent through Australia Post which were intercepted between April and July 2017. Those shipments are set out in table form in the Agreed Facts. The only explicit reference to that issue in the Agreed Facts is in the following terms:

> The offender now admits purchasing the drugs identified in the table and directing delivery to the listed addresses for the purposes of supplying the dangerous drugs in the Darwin community.

[40] That fact and concession does not extend beyond the drugs identified in the table. The Crown's submission on appeal was that the fact seven of those packages were intercepted allowed an inference to be drawn that the applicant had arranged for the importation of a substantially greater number of packages which had avoided interception. The submission followed that the applicant would not have persisted in the activity and "written off" the missing packages had he not been actually receiving a substantial amount of drugs or number of packages. That inference cannot properly be drawn in circumstances where it is not known how much Bitcoin the applicant

purchased; how much was spent on each of the eight consignments referred to in the Agreed Facts; and how much Bitcoin remained in his Bitcoin wallet. This is not to say positively that the applicant used the Bitcoin to purchase only those drugs set out in the table. It is only to recognise that matters adverse to an accused must be established beyond reasonable doubt.

[41] Against that background, for sentencing purposes the salient features of the applicant's offending in relation to the methamphetamine may be described as follows. Between October 2015 and February 2017 the applicant purchased Bitcoin to the value of $275,200. The applicant used some unspecified portion of that Bitcoin to purchase unspecified quantities of methamphetamine and cannabis on the dark web. Between 2 April and 14 July 2017 police intercepted eight packages which the applicant had caused to be sent to his nominees in the Darwin area. All of those packages contained drugs of the type and quantities tabulated in the Agreed Facts which had been purchased by the applicant using the Bitcoin. In total, 105 g of methamphetamine and 28 g of cannabis were intercepted. The applicant's intention in purchasing those drugs was to supply them in the Darwin community for commercial reward. Although the applicant no doubt intended to be the principal in that supply, there is nothing to indicate that it involved an extensive network or high levels of activity over an extended duration as presented in *Lawrence* and *Roe*.

[42] So far as the applicant's personal use of methamphetamine is concerned, there was no evidence that he was a heavy user of methamphetamine and

addicted to or dependent on that drug. When asked by police whether he was an ice user he replied, “Off and on I suppose”. The applicant did not give evidence during the sentencing proceedings in relation to that matter. As already described above, submissions were made during the course of the sentencing process to the effect that the applicant's family noticed changes in the applicant’s behaviour which they attributed to a possible depression. The materials received on the plea indicate that the applicant's partner and family were unaware of any dependency on illicit substances. While counsel for the respondent concedes that there may have been some level of drug dependency, that does not obscure the fact that the applicant purchased the drugs for the purposes of supplying them into the Darwin community for commercial gain.

Disposition and resentence

[43] Having regard to the circumstances and objective seriousness of the applicant’s offending, we have reached the conclusion that the starting point of imprisonment for eight years for the offence involving the methamphetamine was manifestly excessive. As we have already observed, a starting point of imprisonment for three years for the offence involving the cannabis was also manifestly excessive. This is a case in which the imposition of an aggregate sentence is appropriate, with a starting point of imprisonment for six years.

[44] We apply a reduction of approximately 20 per cent to that starting point in recognition of the applicant’s pleas of guilty. It may be noticed that the

sentencing judge allowed a discount of 25 per cent. Although the applicant is entitled to receive recognition for his early pleas of guilty given that they facilitated the course of justice, in our view the circumstances do not warrant the application of the full discount given the doubt arising as to the genuineness of his remorse having regard to his lies and non-disclosures to the investigating authorities. The application of that discount yields a head sentence of imprisonment for four years and 10 months.

[45] The question then becomes whether a non-parole period should be fixed or whether an order suspending sentence on conditions should be made. As this Court observed in *Whitehurst v The Queen*[23], in choosing whether to proceed by way of a suspended sentence or a non-parole period consideration must be given to "any relevant legislative provisions, the nature of the offending, the minimum period of imprisonment which must be actually served to reflect the seriousness of the offending, and the personal circumstances of the offender including any prospects for rehabilitation. Consideration of the personal circumstances of the offender and his prospects for rehabilitation is likely to involve determining how any prospects for rehabilitation may be addressed and enhanced; whether there is a need for supervision and, if so, the nature of that supervision; the existence of, and the nature of, any support mechanisms available to the offender outside the custodial setting; [and] the identification of impediments and risks to rehabilitation."

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23 [2011] NTCCA 11 at [27]-[29].

[46] To that end, this Court adjourned the hearing of the appeal to allow an assessment to be made of the applicant's suitability for supervision. He was assessed as suitable subject to certain conditions. Having regard to that assessment, the salient features of the offending which have been described above, the applicant's lack of any relevant criminal record, sound work history and previous good character, and the fact that there was some element of drug dependency involved, we have reached the conclusion that an order suspending sentence is best designed to achieve both the penal and rehabilitative purposes of the sentencing process. However, that order will only take effect after the minimum period of imprisonment which must be actually served to reflect the seriousness of the offending.

[47] Accordingly, we make the following orders:

1. Leave to appeal and an extension of time within which to make that application for leave is granted.

2. The appeal is allowed.

3. The applicant is sentenced to an aggregate term of imprisonment for four years and 10 months backdated to 13 July 2017.

4. That term of imprisonment will be suspended on the following conditions after the applicant has served two years and three months:

    (a) during the period of the order suspending sentence the applicant is under the ongoing supervision of a probation and parole officer,

must obey all reasonable directions from a probation and parole officer, and must report to a probation and parole officer within two clear working days after the order comes into force;

(b) the applicant must tell a probation and parole officer of any change of address or employment within two clear working days after the change;

(c) the applicant must not leave the Territory except with the permission of a probation and parole officer;

(d) the applicant will, at the direction of a probation and parole officer, immediately enter into a residential rehabilitation program, or any other program assessed as suitable, participate fully in that program and do nothing to cause his early discharge;

(e) the applicant will not consume a dangerous drug, and will submit to testing as directed by a probation and parole officer for the purpose of detecting the presence of dangerous drugs;

(f) the applicant will participate in assessment, counselling and/or treatment as directed by a probation and parole officer;

(g) while attending a residential rehabilitation program, the applicant must wear or have attached an approved monitoring device in accordance with the directions of a probation and parole officer, and allow the placing, or installation in, and retrieval from, the premises or place specified in the order of such machine,

equipment or device necessary for the efficient operation of the monitoring device; and

(h) the applicant shall comply with the electronic monitoring rules as stipulated in the Rules for Electronic Monitoring document.

5. An operational period of two years and seven months from the date of the applicant's release is fixed for the purposes of ss 40(6) and 43 of the *Sentencing Act* (NT).

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