Cameron Ford's Supreme Court case notes

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CORRUPT BENEFITS BY NON-OFFICIALS

In *R v Mossman* [2017] NTCCA 6, the Court of Criminal Appeal rejected a Crown appeal against the adequacy of a wholly suspended aggregate sentence of twelve months' imprisonment for a Minister's Chief of Staff receiving a waiver of service fees and a deferral of full payment for airfares. The Court said at [22] that Parliament treats corruption by officials more seriously than by non-officials in prescribing a lower maximum for the latter under s 236 of the *Criminal Code 1983* (NT). Factors in sentencing for the latter offence are the identity of the corrupted party and the nature and importance of the protected relationship, the objective of the offence, the value of the benefit obtained by the corrupted party, the level and seriousness of any breach of trust, the duration and complexity of the corrupt conduct, whether the corrupt conduct was systematic and sophisticated, and the amount of harm suffered by the corrupted party's 'principal', 'employer', 'beneficiary' or 'fiduciary'. The main sentencing objects are denunciation and deterrence and often the object of rehabilitation of the offender cannot be permitted to outweigh the need for punishment and the need to deter other persons from engaging in similar activity. Less weight is to be given to a person's previous good character because of the nature of the offence and the offender. Here the head sentence was appropriate because of the nominal value of the benefit.

CROWN APPEALS AND PARITY

In *R v Mossman* [2017] NTCCA 6, the Court of Criminal Appeal held that, in a Crown appeal, disparity cannot be an independent or stand-alone ground which would warrant appellate intervention and an increase to a sentence which otherwise falls within the sentencing range. The Crown must establish that the sentence is manifestly inadequate other than by reference to parity considerations. In other words, any contention that the sentencing court has imposed a sentence giving rise to disparity is properly viewed as a particular of the ground asserting manifest inadequacy. Similarly, an appeal court will not intervene to impose a heavier sentence in order to rectify an apparent disparity merely because a heavier sentence was imposed on a co-offender for the same or like offending. Those results follow necessarily from the principles which govern Crown appeals. They should be brought rarely, they may only be brought in the public interest, and they should be confined to the correction of manifest errors in the application of sentencing principle. Those principles would

not be served by Crown appeals directed to the increase on parity grounds of a sentence which otherwise falls within the sentencing range. There must be an attendant and manifest inadequacy to warrant appellate intervention. It is for those reasons that the principle of parity is not available to the Crown as an independent and freestanding ground of appeal. Those reasons have nothing to do with double jeopardy, and remain unaffected by the statutory abrogation of double jeopardy as a relevant consideration in prosecution appeals.

STEALING FROM TAXI DRIVERS

In *Edmond and Moreen v The Queen* [2017] NTCCA 9, by majority the Court of Criminal Appeal upheld a sentence of two years' imprisonment for stealing $460 from a taxi driver. Grant CJ and Hiley (Blokland J agreeing on this point) held at [10] that taxi drivers are vulnerable and need to be protected in their performance of their important public service so people will not be discouraged from driving taxis, particularly at night to remote locations. The amount stolen was not the gravamen of the offending; the gravamen was that the property was stolen during a confrontation with a vulnerable person working alone at night providing a necessary service to the public. To say that each particular act of stealing was of short duration, and did not involve a breach of trust in the legal sense, underplays the seriousness of the victim's predicament at the time when those acts took place. Nor does the absence of verbal or physical threats of violence reduce the seriousness of the offending. Rather, the presence of violence or the threat of violence would have been an aggravating factor. Pleading guilty at an early opportunity has nothing to do with the objective seriousness of the offending. The type of offence is prevalent. Blokland J disagreed on the application of the principles and would have resentenced to one year.

PROPORTIONALITY – CRIMINAL HISTORY AND COMMUNITY PROTECTION

In *Edmond and Moreen v The Queen* [2017] NTCCA 9, the Court of Criminal Appeal held at [35] that, absent contrary statutory direction, it is not permissible to punish offenders more severely than the offence itself warrants on account of criminal history. Although an offender's criminal history and propensity to commit similar crimes may tend against mitigation, and may elevate the weight attributed to personal deterrence and community protection in the sentencing calculus, it cannot increase the sentence beyond what is appropriate for the instant offence. Protection of the community is always a legitimate objective in sentencing but the pursuit of this objective cannot prevail over the overarching requirement for proportionality.

SENTENCING – OBJECTIVE SERIOUSNESS

In *Edmond and Moreen v The Queen* [2017] NTCCA 9, the Court of Criminal Appeal held at [5] that the objective seriousness of the offence is a vital matter for consideration in determining whether the punishment fits the crime. That determination must be influenced by the need to protect vulnerable members of the community. A sentence of imprisonment should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances. Objective circumstances may include the maximum statutory penalty for the offence, the degree of harm caused, the method by which the offence was committed, and the offender's culpability. The seriousness of a crime has two main elements—the degree of harmfulness of the conduct and the extent of the offender's culpability.

WHETHER NEW TRIAL MOST ADEQUATE REMEDY

In *BD v The Queen* [2017] NTCCA 8, the Court of Criminal Appeal held at a new trial should usually be ordered after a conviction is quashed if the evidence is sufficient to secure a conviction, leaving it to the discretion of the Director of Public Prosecutions (DPP) as to whether to bring a new trial. It is important that society's interests in seeing justice done according to the constitutional arrangements are protected by maintaining the independence of the DPP and the jury. Other relevant factors are whether a significant part of the sentence has been served, the expense and length of a new trial, the length of time between the alleged offence and the new trial, and the impact of a new trial on the accused, witnesses and others affected by the prosecution and the events giving rise to it. Here the accused had suffered considerably from his first trial and conviction, the prosecution case could be described as weak, the offence, though of a serious type, was at the low end, and the accused had already served two weeks of a two-month sentence. Nevertheless it was in the interests of justice to order a new trial and the DPP decide whether to proceed.

CROWN APPEAL – MANIFEST INADEQUACY

In *R v Mossman* [2017] NTCCA 6 and *R v Roe* [2017] NTCCA 7, the Court of Criminal Appeal held at [8] and [11] respectively that Crown appeals against sentence should be a rarity brought only to establish some matter of principle, and to afford an opportunity to the Court of Criminal Appeal to perform its proper function in this respect; namely, to lay down principles for the guidance of courts sentencing offenders. The reference to a 'matter of principle' must be understood as encompassing what is necessary to avoid the kind of manifest inadequacy or inconsistency in sentencing standards which constitutes an error in point of principle. Sentences which are so inadequate as to indicate error or departure from principle, and sentences which depart from accepted sentencing standards, constitute error in point of principle which the Crown is entitled to have corrected. 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 the reasons. Even where manifest inadequacy is found, this Court retains a residual discretion as to whether the respondent should be re-sentenced. Section 414(1A) of the *Criminal Code 1983* (NT) removes any need for the Court of Criminal Appeal to give consideration to ensuring that Crown appeals are 'rare and exceptional'. Responsibility in that regard rests with the DPP.

SENTENCING – SUPPLY METHAMPHETAMINE

In *R v Roe* [2017] NTCCA 7, the Court of Criminal Appeal upheld a Crown appeal against a sentence of three years and nine months, suspended on conditions after one year and nine months for trafficking five times the commercial quantity of methamphetamine over three-month period for significant profit. The Court said there were three broad categories of supply offences—one-off transactions by a single individual for commercial gain which is committed over a short and discrete period of time, where the sentencing starting point is ordinarily five to six years; conducting a drug trafficking business for a continuing period of time where the sentencing starting point is ordinarily seven to ten years; and being part of drug trafficking syndicates of various sizes at relatively high levels in the drug supply chain and standing to make very large profit, where the sentencing starting point is ordinarily around thirteen years. In the last two categories, the weight to be given to punishment, denunciation and deterrence usually significantly outweighs the weight to be given to rehabilitation. Circumstances justifying suspension are unlikely to be found in the common types of offence. Relevant factors are the social consequences that are likely to have followed from the supply, the quantity of the drug involved, the number of transactions and period over which the supply took place, the offender's role in the supply, the extent to which the offender is engaged in cross-border importation or exportation, and the amount of profit or reward the offender hoped to gain. The chief considerations pointing to inadequacy of the sentence here were the harm caused in the community by the organised supply of this insidious drug of dependency; the level and nature of the respondent's offending; the lack of a significant causal connection between his misuse of methamphetamine and the offending; the fact that the respondent by his own experience with methamphetamine was capable of appreciating how dangerous the drug was; and the sentences that have been imposed in those cases most closely comparable with the matter on appeal.

APPEALS DISMISSED FOR WANT OF PROSECUTION

In *Jenkins v Registrar of the Supreme Court* (No 1) [2017] NTCA 4, Jenkins v Registrar of the Supreme Court (No 2) [2017] NTCA 5, *Jenkins v Todd* [2017] NTCA 6, Grant CJ sitting as the Court of Appeal dismissed an appeal by a self-represented litigant for failing to take directed steps for nine months. The appeal was incompetent and had no prospects of success. While the court will only dismiss an appeal by an unpresented litigant in exceptional cases, this was an exceptional case. Past experience showed he was incapable of preparing the necessary material and refused to instruct counsel.