Cameron Ford's Supreme Court case notes

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MARCH

COSTS
Settlement before trial

In *REF and SJP v Chief Executive Officer, Territory Families* [2019] NTSC 4 Barr J awarded costs to plaintiffs who withdrew their proceeding after the defendant capitulated on the grounds that the defendant unreasonably in resisting the proceedings and then capitulating, that the plaintiffs had no reasonable alternative but to commence litigation, and that from a practical standpoint the plaintiffs had been successful.

CRIMINAL JURISDICTION
Historic offences

In *R v Walker* [2019] NTSC 6, Mildren AJ ruled before trial that the Supreme Court did not have jurisdiction to try offences under the repealed *Criminal Law Consolidated Act and Ordinance* for which the penalty was two years' imprisonment and which were not stated to be indictable offences. Under the *Criminal Code 1983* (NT), the Supreme Court has no jurisdiction to try summary offences at nisi prius, and except as the Code specifically provides, cannot impose a penalty for a summary offence. The Code states that an offence is not an indictable offence unless an Act states so or the maximum penalty exceeds two years. After the ruling and the trial but before written reasons were delivered, counsel drew the court's attention to s 20 of the *Criminal Law and Procedure Act* which was in force in the period 1981-83, but had been repealed, which said that offences punishable by more than six months' imprisonment were indictable offences. His Honour said his ruling might well have been different had he been aware of that provision.

SENTENCING

3 categories of meth cases

In *Edmonds v The Queen* [2019] NTCCA 1 the Court of Criminal Appeal explained at [24]-[26] that the three categories of supply of commercial quantities of methamphetamine cases identified in *R v Roe* [2017] NTCCA 7 at [65]-[101] set out below are broad categorisations only, that the penalties are indicative starting points before taking into account pleas and remorse, that all categories are objectively serious, that penalties may be higher or lower having regard to subjective circumstances but cannot be disproportionate to the crim or less than the objective gravity of the offence requires, that R v Roe is not a guideline judgment for which there is no statutory scheme in the Territory, and that individual cases may not fall neatly into one of the categories due to their objective circumstances. The categories were:

CASE	PENALTY Starting point
A one-off transaction by a single individual for commercial gain committed over a short and discrete period.	5-6 years
A drug trafficking business conducting for a continuing period.	7-10 years
Members 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.	13 years

FACTS ADVERSE TO ACCUSED

In *Edmonds v The Queen* [2019] NTCCA 1 the Court of Criminal Appeal held at [35] that a sentencing 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 unless facts are agreed. Agreed facts may be used directly or to contextualise the offending to establish, for example, whether the offending was part of an organised drug distribution exercise of isolated incidents. Care must be taken not to elevate the gravity beyond what may reasonable be inferred, and the accused should not be punished for uncharged acts.

DE SIMONI PRINCIPLE

In *Clarke v The Queen* [2019] NTCCA 2 the Court of Criminal Appeal held at [49] that the appellant had not been sentenced for a more serious offence than charged contrary to the principle in *R v De Simoni*. The court said that, given the various and diverse sentencing considerations that may be relevant to assessing both the gravity of the offending and the subjective circumstances of the offender in any given case, it is readily conceivable that an offender charged with non-commercial supply of drugs, depending on the scale of activities, prior convictions and response to previous orders, may ultimately be sentenced to a term that approximates the term imposed on an offender dealt with for a single act of commercial supply in different circumstances.

RECEIVING OR POSSESSING TAINTED PROPERTY – 6 PRINCIPLES

In *Clarke v The Queen* [2019] NTCCA 2 the Court of Criminal Appeal held at [59] that the sentencing principles for offences of dealing with the proceeds of crime are similar to those for an offence of receiving or possessing tainted property contrary to s 8(1) of the *Misuse of Drugs Act*. At [78]-[84] the court set out 6 principles. (1) Where the "dealing" with the proceeds of crime does not constitute a separate act of criminality from the crime itself warranting a separate charge and penalty, the charge will be an abuse of process and/or may attract a plea in bar. (2) In the ordinary course there will be no abuse of process in charging both a drug supply offence and dealing with, receiving or possessing monies derived from that supply. (3) Where the dealing does constitute a separate act but shares conduct, elements or criminality with the offence by which the proceeds were derived, the matter is properly addressed in the imposition of penalty. (4) There will be no necessary call for concurrency where the tainted monies are derived from some source other than the supply with which the offender is also charged, and the ordinary principles will apply. (5) The maximum penalty fixed by s 8(1) of the *Misuse of Drugs Act* is a "catch-all" penalty designed to accommodate a very broad range of offending behaviours which requires a careful assessment of the objective seriousness of the offending under consideration. (6) A range of factors will be relevant to the assessment of the objective seriousness of the offence, including the amount(s) involved, the number of transactions, the period

over which those transactions occurred, the sophistication, size and extent of the operation which generated the proceeds, the offender's role in that operation, what became of the money, and how that sentence compared with a sentence appropriately reflecting the seriousness of the dishonesty offences by which the monies had been obtained. See also *Horder v The Queen* [2019] NTCCA 3.

PLEA DISCOUNT FOR SEX OFFENCES

In *Turley v The Queen* [2019] NTCCA 4 the Court of Criminal Appeal held at [26]-[32] that there was no need for a principle requiring special discounts for pleas to sexual offences as the sentencing discretion was sufficiently wide to take account of the circumstances. There is no standard or maximum reduction in recognition of a plea of guilty of 25% or otherwise. The circumstances affecting the weight to be given to the plea as a mitigating factor are almost infinitely various and are inter-related in complex ways. They include when the offender indicates he will plead guilty (and thus the saving in time and money); the extent and nature of co-operation given to authorities and whether it includes the voluntary disclosure of offending which may not otherwise have come to light; the strength of the Crown case and any difficulties in proof; the extent the plea is indicative of genuine remorse as distinct from a mere acknowledgment of the inevitable; the extent the plea serves the self-interest of the accused and other factors affecting the utilitarian and humanitarian value of the plea including sparing complainants and other witnesses the trauma of having to give evidence and the other benefits to victims.

RELATIVE HARM OF SCHEDULED DRUGS

In *R v Meginess* [2019] NTCCA 5 the Court of Criminal Appeal held at [22]-[23] that, where Parliament has placed drugs in similar categories and established penalties based on quantities, it would be inappropriate for the court to assess the seriousness of offending on the basis of value judgments about the relative harm of one drug vis-à-vis another drug in the same category. However, the court is not required to treat each form of the commission of the offence as being equally serious.

SERIOUSNESS OF SCHEDULE 1 DRUGS

In *R v Meginess* [2019] NTCCA 5 the Court of Criminal Appeal allowed a Crown appeal against the full suspension of a sentence of three years for four counts of supply of commercial quantities of MDMA, ketamine, Lysergide and MDA. The maximum penalties were four years for MDA and 25 years for the other drugs. The respondent was ordered to serve 6 months of the sentence before suspension because punishment, denunciation and general deterrence are the main sentencing objects for these offences rather than rehabilitation.

PREVIOUS OFFENCES FOR DRINK DRIVING

In *Jeffrey v Rigby* [2019] NTSC 2 the Full Court held that convictions for "exceed .08" under previous legislation were not relevant in determining whether a later offence was a "second or subsequent offence" for the purposes of s 22(2) of the *Traffic Act* to attract the mandatory minimum period of disqualification.