SUPREME COURT OF QUEENSLAND

CITATION:	*R v Norris; Ex parte Attorney-General (Qld)* [2018] QCA 27
PARTIES:	**R** **v** **NORRIS, Andrew Noel Hensleigh** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 370 of 2016 DC No 128 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Maroochydore – Date of Sentence: 2 December 2016 (Long SC DCJ)
DELIVERED ON:	9 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2017
JUDGES:	Sofronoff P and Gotterson and Philippides JJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the respondent was convicted of unlawful trafficking, production and possession of a dangerous drug, and possession of equipment used in its production – where the respondent was a citizen of New Zealand but had lived in Australia on a visa since he was two years old – where the *Migration Act* 1958 (Cth) obliged the Minister to cancel the respondent's visa if a full-time custodial sentence was imposed – where the sentencing judge considered there to be a distinct prospect that, if revocation of the respondent's visa was mandated, the respondent might be detained in immigration detention pending the determination of a revocation application – where the sentencing judge considered the effect of immigration detention beyond a fixed release date upon the respondent's rehabilitation – where the appellant argued the sentencing judge had imposed a sentence to avoid, defeat or circumvent the possibility of deportation – whether the sentencing judge erred in failing to require the respondent to serve a period of actual incarceration

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent sold cannabis to the same three or four individuals for below street value – where the sentencing judge considered that the respondent had cooperated with the administration of justice and had good prospects of rehabilitation – where the sentencing judge considered the potential implications of immigration detention on the respondent's rehabilitation – whether the sentencing judge's failure to require the respondent to serve a period of actual incarceration resulted in a sentence that was manifestly inadequate

Drugs Misuse Act 1986 (Qld), s 5(1)(b), s 8(1)(d), s 9(1)(c), s 10(1)(a)
Migration Act 1958 (Cth), s 501, s 501CA

Guden v R (2010) 28 VR 288; [2010] VSCA 196, approved
R v Abdi [2016] QCA 298, approved
R v Chi Sun Tsui (1985) 1 NSWLR 308, explained
R v Lammonde [2007] QCA 75, distinguished
R v Latumetan & Murwanto [2003] NSWCCA 70, distinguished
R v MAO; Ex parte Attorney-General (Qld) (2006) 163 A Crim R 63; [2006] QCA 99, distinguished
R v Pham [2005] NSWCCA 94, distinguished
R v S [2003] 1 Qd R 76; [2001] QCA 531, distinguished
R v Schelvis; R v Hildebrand [2016] QCA 294, considered
R v UE [2016] QCA 58, approved
R v Weekes [2011] QCA 262, distinguished
R v Whyte [2003] QCA 56, distinguished

COUNSEL: M R Byrne QC for the appellant
J J Allen QC, with T G Zwoerner, for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Legal Aid Queensland for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Gotterson JA and the order his Honour proposes.

[2] **GOTTERSON JA:** On 14 November 2016 at the District Court at Maroochydore, the respondent, Andrew Noel Hensleigh Norris, pleaded guilty to a count of unlawfully trafficking in the dangerous drug cannabis between 28 August 2011 and 30 August 2015 (Count 1)[1] and a count of unlawfully producing a quantity of the same exceeding 500 grams between 28 May 2015 and 30 August 2015 (Count 2).[2] He also pleaded guilty to counts of unlawfully possessing cannabis in a quantity in excess of 500 grams (Count 3)[3] and of possessing an array of things for use in the

---

1 s 5(1)(b) *Drugs Misuse Act* 1986 (Qld) ("*DMA*").
2 s 8(1)(d) *DMA*.
3 s 9(1)(c) *DMA*.

production of a drug (Count 4).[4] The latter two offences were alleged to have occurred on 29 August 2015. All the offending was alleged to have occurred at Conondale.

[3] Convictions were recorded for all offences. The sentences imposed for Counts 1 and 2 were four years' imprisonment and 12 months' imprisonment respectively, to be served concurrently. Each term of imprisonment was suspended forthwith with an operational period of five years. In respect of Count 3, the respondent was released on probation for a period of two years with additional conditions that he submit to such medical, psychological or psychiatric assessments and treatment as the probation officer might reasonably require, and that he abstain from unlawful use of any dangerous drug and submit to drug testing as the probation officer might lawfully require. There was no separate punishment in respect of Count 4.

[4] On 22 December 2016, the appellant, the Attorney-General of Queensland, filed a notice of appeal against sentence in this Court.[5] The notice was filed pursuant to s 669A(1) of the *Criminal Code* (Qld).

[5] In written submissions, the appellant has indicated that no issue is taken with respect to the head sentences of four years' and of 12 months' imprisonment imposed for the trafficking and production offences or with the recording of a conviction only for Count 4.[6] The appellant's submission is that the only sentence to be imposed was one that required an actual period of imprisonment.[7]

[6] This submission aligns with the appellant's sole ground of appeal, namely, that "the sentencing judge erred in failing to require the respondent to serve a period of actual incarceration, thus resulting in a sentence that is manifestly inadequate". The sentence that should have been imposed for Count 1, it is submitted, is four years' imprisonment suspended after a period of between six and nine months with the sentences on the remaining counts being consistent with and giving effect to that as a global sentence.[8]

Circumstances of the offending

[7] Police executed a search warrant at the respondent's residence on 29 August 2015. They located 130 cannabis plants which were being grown hydroponically in a small shed and elsewhere. The plants ranged from seedlings to mature plants. The respondent admitted to letting each plant grow for about three months before cutting it from the roots and leaving it to dry above the ceiling. He would reap about four to five ounces of cannabis per plant.

[8] The respondent also admitted to being a long term user of cannabis and to trafficking in it over a period of four years. He would sell two to four ounces per week to a group of three to four individuals at $150 per ounce.[9] That was less than street value. Those admissions were the only evidence proving Count 1.[10]

---

4 s 10(1)(a) *DMA*.
5 AB69–70.
6 Appellant's Outline of Submissions ("AOS") para 10.3.
7 Ibid para 10.2.
8 Ibid para 11.
9 Based on these figures, the respondent would have received proceeds of sale of between $62,400 and $124,800.
10 AB43.

[9] Police also located a total of 2.648 kilograms of cannabis in various places at the residence. As well, they found electrical equipment necessary for hydroponic production of cannabis and potting mix and garden tools used in its production.

The respondent's citizenship

[10] The respondent is a citizen of New Zealand. He has resided in Australia on a visa since he was two years old. Before turning to the sentencing remarks, I propose to refer to provisions in the *Migration Act* 1958 (Cth) ("*MA*") to which the learned sentencing judge had regard in formulating the sentence imposed.

[11] Section 501 of the *MA* contains provisions for the refusal or cancellation of visas by the Minister who administers it. As to cancellation, presently relevant provisions are:

(a) s 501(2) which permits ("may") the Minister to cancel a visa that has been granted to a person if the Minister reasonably suspects that the person does not pass the character test and the person does not satisfy the Minister that they pass the test;

(b) s 501(3) which permits ("may") the Minister to cancel a visa if the Minister reasonably suspects the person does not satisfy the character test and the Minister is satisfied that cancellation is in the national interest; and

(c) s 501(3A) which mandates ("must") that the Minister cancel a visa if satisfied that the person does not pass the character test because the person has a substantial criminal record by virtue of the operation of s 501(7)(c) and the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of a State.

[12] Each of the provisions to which I have referred is referenced to a person not passing the character test. Section 501(6) concerns that test. Relevantly, s 501(6)(a) provides that a person does not pass it if the person has a substantial criminal record. In turn, s 501(7) defines what constitutes a substantial criminal record. Pursuant to s 501(7)(c), a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more.

[13] I pause here to note that the sentences of imprisonment for Counts 1 and 2 would, by operation of s 501(7)(c), impose on the respondent a substantial criminal record with the consequence under s 501(6)(a) that he does not pass the character test. Had the respondent been required to serve some or all of those sentences on a full-time basis in a prison, then the Minister would have been statutorily obliged by s 501(3A) to have cancelled his visa. Absent that requirement, the respondent's visa would remain liable to cancellation on a discretionary basis under s 501(2) or s 501(3) were the criteria for exercise of the discretion in either section otherwise fulfilled.

[14] I note also that s 501CA of the *MA* makes provision for the revocation of a decision made under s 501(3A) to cancel a visa. Section 501CA(4) sets out the circumstances in which such a cancellation may be revoked. Pursuant to s 501CA(6), any detention of a person during the period that began with the making of a cancellation decision under s 501(3A) and ending with its revocation, is lawful.

As this Court observed in *R v Schelvis; R v Hildebrand*,[11] the legislative intent at the time of the enactment of ss 501(3A) and 501CA included that a person who fails the character test and is released from criminal custody would remain in immigration detention whilst revocation is pursued. The provision in s 501CA(6) accommodates an application of the legislation that accords with that intent.

Matters referred to by the learned sentencing judge

[15] The learned sentencing judge referred to the following aspects of the offending as ones that he took into account in sentencing:

(a) it was necessarily of a significantly serious character;[12]

(b) how much profit was made was not clear but it was likely to have been substantial;[13]

(c) whilst the offending continued over four years, the respondent had supplied only the same three or four individuals, had sometimes exchanged cannabis for goods or services rather than cash, and had sold below the known average price;[14]

(d) the offending had maintained the respondent's long term addiction to cannabis;[15] and

(e) there was no commercial aspect to the possession charge.[16]

[16] Citing the decision of this Court in *R v Dowel; ex parte Attorney-General (Qld)*,[17] his Honour noted that there was authority to the effect that it is not inevitable that there must be, in every case of trafficking, the imposition of a custodial sentence, particularly one with an immediate actual custodial requirement.[18] He referred also to the principle in s 9(2)(a) of the *Penalties and Sentences Act* 1992 (Qld) that a sentence of imprisonment should be imposed only as a last resort.[19]

[17] The learned sentencing judge, however, concluded that the head sentence for the trafficking offence should be a substantial term of imprisonment in the interests of denunciation and deterrence.[20] The commerciality involved in the trafficking and ongoing production, viewed objectively and in the context of comparable sentences, called for a head sentence of about four years.[21]

[18] His Honour then identified as "the more critical questions" ones as to the form in which such a sentence should be imposed, and particularly whether it was appropriate that the respondent serve any actual custody.[22] In that context, he referred to the respondent's age, 53 years at sentence,[23] his antecedents, a prior

---

11 [2016] QCA 294 per Fraser JA at [74] (Morrison JA and Peter Lyons J concurring).
12 AB33 ll9-10.
13 Ibid ll45-46.
14 Ibid ll31-48; AB34 ll33-41.
15 AB34 ll41-43. Some of the tendered references referred to the offending as the respondent's "hobby": AB34 ll42-43.
16 Ibid ll3-5.
17 [2013] QCA 8 at [21].
18 AB34 ll12-24.
19 Ibid ll25-28.
20 AB35 ll4-6.
21 Ibid ll6-10.
22 AB35 ll12-15.
23 Ibid ll17-18.

conviction for possession many years ago,[24] his good prospects of rehabilitation, as evidenced by a series of eight clean urine tests,[25] and the responsibility shown by the respondent in his roles as a husband and father.[26] His Honour also noted that the respondent had cooperated significantly with police and made admissions, particularly with respect to the trafficking.[27] Further he had cooperated significantly with, and facilitated, the administration of justice by both the admissions and his pleas.[28]

[19] The learned sentencing judge then posed the question whether, and if so how, the prospects of the respondent's deportation upon a cancellation of his visa might be taken into account in sentencing him.[29] He referred to the provisions of the *MA* which I have mentioned. Next, he cited from paragraph 71 of the decision in *Schelvis & Hildebrand* where it was noted that a little earlier in time, this Court, in *R v UE*,[30] had adopted a decision of the Court of Appeal of Victoria in *Guden v R*[31] as correctly expressing the applicable principle. That decision was to the effect that if the risk of deportation following a sentence to a term of imprisonment greater than 12 months is capable of assessment by the sentencing court, then it may be shown by evidence to be relevant to the sentence in two ways; firstly, it may well mean that the burden of imprisonment will be greater than for someone who faces no risk of deportation; and, secondly, in an appropriate case, it will be proper to take in account the fact that a sentence of imprisonment will result in the offender losing the opportunity of settling permanently in Australia.[32]

[20] His Honour considered the potential application of the provisions of the *MA* in the respondent's case. He stated the following conclusions in respect of it:[33]

> "(a) the prospect of an ultimately unfavourable decision as to your prospective deportation is entirely speculative, whether arising because of the application of s 501(3A), or otherwise, and therefore [it is] not appropriate to take into account any hardship that may ensue from the prospect of your deportation, by way of mitigation of sentence; and
>
> (b) in the circumstances, where you will effectively be left in a similar state of anxiety or apprehension as to that prospect, whether or not there is an immediate custodial component in your sentence, that also militates against any material allowance, on account of any such custodial component being more burdensome because of any such apprehension."

[21] The learned sentencing judge had noted the decision of this Court in *R v Abdi*[34] earlier in his remarks.[35] He continued:[36]

---

24 Ibid ll18-24.
25 Ibid ll33-41.
26 Ibid ll43-49; AB36 ll1-2.
27 AB35 ll26-30.
28 Ibid.
29 AB36 ll10-11.
30 [2016] QCA 58.
31 (2010) 28 VR 288; [2010] VSCA 196.
32 Ibid at [27].
33 AB37 ll9-18.
34 [2016] QCA 298.

> "However, there are further complications indicated by the decision in *Abdi* and particularly, the need to have regard to the likely consequences of particular orders that might be made and in your situation and particularly having regard to the lengthy period of your residence in and ties to this country, those extend beyond the particular issues as to whether any term of imprisonment which is imposed, should be suspended, or whether any order as to parole release or eligibility is appropriate.
>
> In the circumstances and when appropriate allowance is made for the mitigating factors that have otherwise been identified and if any period in immediate custody is required, at most that is likely to be relatively modest and a matter of months rather than years. But and as the circumstances that confronted the Court of Appeal in *Abdi* aptly demonstrate (although it would appear for different reasons), there is the distinct prospect (beyond mere speculation) of an additional period in immigration custody, if s 501(3A) is engaged by any such order and what may be expected as your inevitable attempts to achieve revocation of the mandated cancellation of your visa, not be resolved before any release date that is the subject of the orders of the Court.
>
> In that regard, your otherwise similar position to that of *Schelvis*, can be distinguished, in that, as was noted in dealing with the contentions put on her behalf, she was not eligible for release on parole "for very many years", as a reflection of her more egregious offending.
>
> As was noted in *Abdi*, the likely consequences of particular sentencing orders need to be considered and here it can be noted that the ability of the Court to confidently make an efficacious order that will have effect to appropriately reflect the mitigating factors and particularly your prospects of rehabilitation, by allowing for your release from custody at an appropriate point, are not enhanced by an order that requires immediate incarceration. That is not to say that, your position may not be affected by subsequent executive action, but that is not the issue for present purposes.
>
> Rather, the concern of the Court is to make orders that appropriately, having regard to the particular circumstances of this case, reflect all of the purposes of justly punishing you, denouncing and deterring your conduct (both personally and generally) and further providing for your advanced steps towards rehabilitation which, as has been noted, may be seen as best achieved with the established support you have in Queensland and in that way, providing for the protection for the Queensland community. In that sense, the Court needs to be cognisant of the potential effect and consequences of the orders that may be made but is not concerned to pre-empt or avoid prospective exercise of separate executive power."

[22] It is evident from these remarks that his Honour considered that were actual custody to be imposed, it would, in all the circumstances, be for a matter of months.[37] He

---

35 AB36 l12.

36 AB36 l20 – AB 38 l9.

had regard to the "distinct prospect" that if revocation of the respondent's visa was mandated under s 501(3A)MA, then he might well be detained in immigration detention pending the determination of a revocation application, beyond the date fixed for release from actual custody. However, it was not that prospect, of itself, that caused his Honour not to impose actual custody. It was the consequence that it would have, in particular, upon the respondent's advanced steps towards rehabilitation, that was, in his Honour's view, a relevant consideration.

Appellant's submissions

[23] The appellant's principal submission is that two decisions of this Court, *R v S*[38] and *R v MAO; ex parte Attorney-General (Qld)*,[39] which preceded *UE* have not been overruled. They remain binding authority in Queensland and should be preferred to the reasoning in *Guden* as adopted in *UE*.[40]

[24] Implicit in this submission is the proposition that there is a divergence in principle between *S* and *MAO*, on the one hand, and *Guden* and *UE*, on the other. In developing this submission, the respondent characterised the divergence as one of degree. The submission was that *S* and *MAO* "do not preclude some consideration being given to the deportation issue, but they do preclude any consideration being allowed to result in a sentence that avoids, defeats or circumvents the possibility of detention".[41]

[25] From this submission, it is clear that the appellant does not contend that no aspect of any of the provisions in the *MA* relating to the cancellation of visas can be of relevance to sentencing in any respect. Indeed, there is no authority to that effect.

[26] The appellant also submitted that the learned sentencing judge had misapplied *Abdi* by impermissibly assuming that the processes under the *MA* would frustrate or detract from the respondent's rehabilitation.[42] He had imposed a sentence that avoids, defeats or circumvents the possibility of deportation, it was argued.

[27] Apart from this issue of principle, the appellant submitted that the respondent's sentence was manifestly inadequate.[43] Other sentences imposed for comparable offending over four years demonstrated the inevitability of a period of actual incarceration.[44]

Respondent's submissions

[28] The respondent noted that this Court had applied the reasoning in *Guden* in the decisions of *UE*, *Schelvis & Hildebrand*, *R v Pearson*[45] and *R v Lincoln*.[46] There was no reason why this Court would now overrule that clearly established line of authority.[47]

---

37 This is not dissimilar to the appellant's submission that suspension after six or nine months should have been ordered.

38 [2003] 1 Qd R 76; [2001] QCA 531.

39 (2006) 163 A Crim R 63 [2006] QCA 99.

40 AOS para 10.20; Appeal Transcript ("AT") 1-19 ll8-10.

41 AOS para 10.21.

42 AOS para 10.26.

43 AOS paras 10.28–10.31.

44 AOS para 10.31.

45 [2016] QCA 212 per Gotterson JA at [22] (Fraser and Philip McMurdo JJA agreeing).

46 [2017] QCA 37 per Margaret McMurdo P at [67]–[70] (Morrison JA agreeing) and Philippides JA at [99]–[100].

47 Respondent's Outline of Submissions ("ROS") paras 7–8.

[29] Importantly, the learned sentencing judge did not fashion a sentence which sought to avoid deportation. It remained a possibility with the sentence that was imposed. The sentence was fashioned to accommodate the effect that the distinct prospect of immigration detention beyond a fixed release date might have on rehabilitation.[48] It was open to his Honour to have taken that into account. For him to have ignored it would have been to repeat the error identified by this Court in *Abdi*,[49] it was submitted.

[30] The respondent's sentence was not otherwise manifestly inadequate.[50] However, if an appealable error were to be found, the residual discretion should be exercised to dismiss the appeal.[51]

The appellant's principal submission

[31] I propose first to refer to the decision in *S*. In that case, the offender had been sentenced to a term of actual imprisonment. He was a US citizen and had received a notice under antecedent provisions in the *MA* that cancellation of his visa was under consideration. He applied to have his sentence reopened on that account. The sentencing judge refused his application. On appeal, McPherson JA (with whom Thomas JA and Mullins J agreed) observed:[52]

> "…I consider that the process of sentencing should not seek to anticipate the action that some other authority or tribunal, lawfully acting within the limits of a proper discretion, may take in future, by so adjusting the sentence as to defeat, avoid or circumvent that result. …More specifically, in *R v Chi Sun Tsui* (1985) 1 NSWLR 308, 311, Street CJ said that "the prospect of deportation is not a relevant matter for consideration by a sentencing judge in that it is the product of an entirely separate legislative policy area of the regulation of society". Those remarks of the learned Chief Justice were cited without apparent disapproval in *R v Shrestha* (1991) 173 CLR 48, 58.
>
> …It would in my opinion be quite wrong for the sentencing judge to deliberately impose a lesser sentence in order to avoid the possibility of deportation, only to find that the Minister in fact later exercised his discretion to allow the offender to remain in Australia. That would have the consequence of imposing a sentence that was less severe than that visited upon an Australian citizen who was at no risk of deportation. It would produce a regime under which visitors or non-permanent residents were sentenced more leniently than Australians who had committed the same kind of offence. That cannot be a proper result in the administration of justice."

[32] Evidently, his Honour's criticism was directed towards the deliberate imposition of a lesser sentence in order to avoid the possibility of deportation. That criticism was made in circumstances where his Honour perceived that the reopening application was made in order to have the Court impose such a sentence.

[33] In *MAO*, this Court held that a sentencing judge had erred in principle by reducing, by one week, the sentence he would otherwise had considered appropriate, in order

---

48 ROS paras 15, 17.
49 AT1-49 ll11-35.
50 ROS paras 19–22.
51 ROS paras 23–24.
52 At [5].

to avoid the risk of the offender's deportation. Chief Justice de Jersey (with whom Williams and Keane JJA agreed) affirmed that it is impermissible for a judge to reduce an otherwise appropriate sentence to avoid the risk of deportation.[53]

[34] The Chief Justice then cited the passage from the judgment of McPherson JA in *S* to which I have referred and adverted to the decision of this Court in *R v Bob*; *ex parte Attorney-General (Qld)*.[54] At paragraph 30, his Honour repeated the following passage from his *ex tempore* reasons in *Bob* (Davies JA and Atkinson J agreeing) concerning prospects of deportation:

> "Her Honour was apparently not influenced by the issue of deportation in the context of the *Migration Act* in determining upon the sentence imposed, and she was not obliged to take that significantly into account. Indeed, as the judge rightly pointed out during the reopening proceedings, what was proposed then, and what is renewed here now, that is "to fashion a sentence which would not otherwise be considered appropriate solely to circumvent the *Migration Act*", would not be a correct approach to the matter.
>
> Her Honour described that as "the very thing that ought not to occur, that is fashioning a sentence solely to defeat the exercise of discretion under s 501 of the *Migration Act*". I respectfully agree."

[35] Hence, in *MAO*, also, the criticism was directed at fashioning a sentence solely to circumvent the *MA*. Criticism on that basis is unexceptionable. Clearly, it would be wrong for a sentence to be moulded in order to defeat the operation of another law.

[36] It may be accepted that in *S*, McPherson JA's reference to the observation of Street CJ in *Chi* is capable of being understood as an endorsement of a statement of general application, much broader than the focused criticism to which I have referred. Such was recognised by the Court of Appeal of Victoria in *Guden*.[55]

[37] In that case, Maxwell P, Bongiorno JA and Beach AJA eschewed a general principle to the effect that the possibility of deportation is an irrelevant consideration in the sentencing process. To extract such a principle from *Chi* was to read the observation of Street CJ out of context. In explaining that, their Honours said:

> "16. The starting-point is the decision of the New South Wales Court of Criminal Appeals in *R v Chi Sun Tsui v R*.[56] The issue before the court in that case was whether the prospect of the offender's deportation was:[57]
>
> > a relevant or permissible matter to be considered when determining whether or not to specify a non-parole period.
>
> Under the relevant NSW legislation, the sentencing court could decline to specify a non-parole period either by reason of the nature of the offence or of the offender's antecedents, or 'for any other reason which the court considers sufficient'.

---

53 At [18].
54 [2003] QCA 129.
55 At footnote 14.
56 (1985) 1 NSWLR 308.
57 Ibid 310E.

17. A different provision of the same legislation prohibited the Parole Board from refusing to release a prisoner on parole 'by reason only that, in the opinion of the Board, the prisoner may become liable to be deported'. Street CJ (with whom Slattery CJ at CL and Roden J agreed) held that the same legislative policy should be taken as governing the sentencing court's decision whether or not to fix a non-parole period:[58]

> … [The provision addressed to the Parole Board] seems to me to import likewise that the prospect of deportation is equally irrelevant to be weighed by a sentencing judge when he comes to considering whether a non-parole period should be specified. The legislature has in [that provision] answered the policy consideration in terms which indicate that the rehabilitative philosophy that underlies the parole legislation is not to be regarded as impinging in any way upon the deportation of a prisoner, once that prisoner is free from the custodial restraints of a State or Commonwealth sentence. The discretion to withhold a non-parole period is exercisable for the two specific reasons enunciated in s 21(1)(a) as well as "for any other reason which the Court considers sufficient": s 21(1)(b). Holding the view, as I do, that *the prospect of deportation is not a relevant matter for consideration by a sentencing judge, in that it is the product of an entirely separate legislative and policy area of the regulation of our society*, I do not consider that that prospect can be weighed as "for any other reason" within s 21(1)(b).

18. In *R v Shrestha*,[59] the High Court addressed the same issue – the fixing of a non-parole period – under Commonwealth sentencing law, and (by majority) came to the same conclusion. In a joint judgment, Deane, Dawson and Toohey JJ held that the likelihood of deportation if the convicted person were subsequently released on parole was not an obstacle to the setting of a non-parole period.[60] In their dissenting judgment, Brennan and McHugh JJ referred to the decision in *Chi Sun Tsui* as standing for the proposition that:[61]

> the prospect of deportation is not an admissible or relevant factor to be considered in the exercise of a discretion to withhold the specification of a non-parole period.

19. The oft-cited statement by Street CJ – that the prospect of deportation 'is not a relevant matter for consideration by

---

58 Ibid 311C-E (emphasis added).
59 (1991) 173 CLR 48.
60 At 71–3.
61 *R v Shrestha* (1991) 173 CLR 48 at 57. Their Honours also referred to *R v Mesdaghi* [1979] 2 NSWLR 68 at 71.

> a sentencing judge' – must therefore be understood as explained by, and limited to, the statutory context in which it arose and the particular issue which the court was addressing – that of the fixing of a non-parole period. There was no occasion for Street CJ to make, nor do we think his Honour intended to make, any wider statement about the relevance of deportation as a factor in sentencing."

[38] Their Honours affirmed that, subject always to the state of the evidence before the sentencing court, the prospect of deportation is a proper matter for consideration in determining an appropriate sentence. In that context, their Honours cautioned against mere speculation and explained two ways in which it might be relevant.[62]

[39] In *UE*, counsel for the offender-applicant for leave to appeal against sentence relied on the principle expressed in *Guden* which their respondent acknowledged ought to be accepted as correct.[63] Philippides JA, with whom Morrison JA and North J agreed, described the reasoning in *Guden* as "compelling" and noted that it had been adopted in subsequent decisions of that Court.[64] Her Honour also regarded the observations of Street CJ in *Chi* as not being of general application. She considered that any suggestion by way of *obiter* in *S* that they were ought not to be followed.[65]

[40] Her Honour continued:

> "[16] It is undoubtedly correct that, in an appropriate case, the prospect of deportation may be a relevant factor, personal to the offender, to be considered in mitigation of sentence. The prospect of deportation may affect the impact of a sentence of imprisonment, because it makes the period of incarceration more burdensome, and also because upon release, the fact of imprisonment will result in the offender being deprived of the opportunity of permanent residence in Australia. While the prospect of deportation may be a relevant mitigatory factor, the sentencing court cannot be asked to speculate about that prospect or as to the impact of deportation on the offender. Proof that deportation will in fact be a hardship for the particular offender will be required.[66]
>
> [17] As to the prospect of deportation, the following observations in *Guden* are pertinent:[67]
>
> > "If defence counsel on a plea in mitigation can say no more than that a term of imprisonment of more than 12 months will, upon its expiry, enliven the power of the Minister for Immigration either to revoke an existing visa or to decline to renew one, then deportation may properly be viewed … as 'a completely speculative possibility'."

---

62 At [26], [27].
63 At [13], [14].
64 At [14].
65 At [15].
66 *Guden* (2010) 28 VR 288 at 295 [28]–[29]; *Peng* [2014] VSCA 128 at [23]; *TAN* (2011) 35 VR 109 at [126].
67 (2010) 28 VR 288 at 295 [28].

The application for leave to appeal against sentence was refused for a deficiency of evidence before the sentencing judge as to hardship arising from deportation.

[41] As the respondent correctly submits, *UE* has been consistently followed in this Court in its acceptance of the reasoned principle enunciated in *Guden*. I agree that that principle is correct and am of the view that it ought to continue to be applied by sentencing courts in Queensland.

[42] I also consider that the contextual limitation to the observation of Street CJ in *Chi*, identified in *Guden*, is significant and need be borne in mind. I note that other decisions of the New South Wales Court of Criminal Appeal to which this Court was referred in oral argument, *R v Latumetan & Murwanto*[68] and *R v Pham*,[69] were also concerned with the setting of non-parole periods.

[43] In *Abdi*, the evidence before the sentencing judge would not have justified a finding that deportation would have harmed the offender in either of the two ways identified in *Guden*. Significantly, this Court held that the sentencing judge had erred by not considering the relevance of the likely deportation to the efficacy of a court ordered parole and the potential consequences of that for the offender.[70] The relevance of that factor was illustrated by events subsequent to sentencing. The offender was in immigration detention following his release on court-ordered parole on 26 October 2016. Because of the detention, he could not comply with parole conditions. An order for suspension of his sentence from that date was substituted.

[44] The correctness of that aspect of the decision in *Abdi* is not challenged in the appellant's submissions in this appeal. In my view, it articulates a compatible companion principle to that enunciated in *Guden*.

[45] For these reasons, I do not accept the appellant's principal submission. Specifically, I do not agree that the course taken in *UE* and subsequent decisions of this Court with respect to the decision in *Guden* need, or should, be disavowed.

Application of principles

[46] Turning first to the uncontentious principle enunciated in *S* and *MAO*, I would reject the appellant's submission that it was infringed by the learned sentencing judge. His Honour did not deliberately impose the sentence he did for the purpose of defeating, avoiding or circumventing the operation of provisions in the *MA*. It may be accepted that the immediate suspension of the sentences of imprisonment had the effect that the respondent's visa was at risk, rather than certainty, of cancellation. But that was not an end in itself. His Honour's purpose was to minimise the risk of interruption to the respondent's rehabilitation that immigration detention beyond a fixed release date would entail.

[47] Further, as to the principle in *Guden*, the learned sentencing judge concluded that the prospect of an ultimately unfavourable decision with respect to the respondent's prospective deportation was entirely speculative. Consistently with that conclusion, he declined to take into account any hardship that might ensue from a deportation, by way of mitigation of sentence. In doing so, his Honour correctly applied the principle.

---

68 [2003] NSWCCA 70 at [27].
69 [2005] NSWCCA 94.
70 Per Philip McMurdo JA at [48] (Fraser and Morrison JJA agreeing).

[48] Moreover, the approach taken by his Honour aligns with the companion principle applied in *Abdi*. Consistently with it, it was appropriate for him to have taken into account the distinct prospect of adverse potential consequences for the respondent's rehabilitation arising from immigration detention beyond a date from which the respondent's sentence might have been suspended.

Manifest inadequacy

[49] Whilst the respondent's sentence was wholly suspended, he is required to undergo a two year period of probation on terms moulded to further his rehabilitation. Whether that sentence with those features is manifestly inadequate, of course, falls to be assessed by reference to all relevant circumstances.

[50] As the sentences referred to by the appellant illustrate, in many instances, offenders who have trafficked in cannabis have been sentenced to serve periods of actual custody. However, features specific to them, for example, the extensive criminal histories of the applicants in *R v Lammonde*[71] and *R v Weekes*,[72] and the wide customer base in *R v Whyte*,[73] limit their utility as comparators for a case such as this where the respondent sold to a small group of friends for markedly below street value and where the potential implications of immigration detention on rehabilitation are in play. Furthermore, decisions that particular sentences are not manifestly excessive, such as *R v Gault*[74] and *R v Thearle*,[75] do not create base line sentences for reasoning deductively that a sentence without a component of actual custody is necessarily manifestly inadequate.

[51] I am unpersuaded that the respondent's sentence is manifestly inadequate. In my view, it is a sentence that takes fairly into account the nature and seriousness of the offending as well as the respondent's personal circumstances, including his continuing rehabilitation. It was within a sound exercise of the sentencing discretion.

Disposition

[52] For these reasons, I conclude that the ground of appeal has not been made out. The appeal must therefore be dismissed.

Order

[53] I would propose the following order:

1. Appeal dismissed.

[54] **PHILIPPIDES JA:** I agree that the appeal should be dismissed for the reasons given by Gotterson JA.

---

71 [2007] QCA 75.
72 [2011] QCA 262.
73 [2003] QCA 56.
74 [2006] QCA 316.
75 [2012] QCA 42.