SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ostrowski; Ex parte Director of Public Prosecutions (Cth)* [2018] QCA 62
PARTIES:	**R** **v** **OSTROWSKI, Kyle Paul** (respondent) **EX PARTE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (appellant)
FILE NO/S:	CA No 60 of 2017 SC No 1414 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Director of Public Prosecutions (Cth)
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 3 February 2017 (Daubney J)
DELIVERED ON:	6 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	13 September 2017
JUDGES:	Fraser and Morrison JJA and Mullins J
ORDERS:	**1. Allow the appeal.** **2. Set aside so much of the order made in the Supreme Court Trial Division on 3 February 2017 fixing a non-parole period of two years and six months.** **3. Substitute a non-parole period of four years.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent was sentenced to eight years imprisonment with a non-parole period of two years and six months for the offence of importing a commercial quantity of a border controlled drug – where the respondent pleaded guilty – where a package containing 3,148.1 grams pure methamphetamine was sent to the respondent on a friend's behalf – where the respondent provided his name and an address for the package to be delivered – where the respondent thought the package was to contain cocaine – where the respondent had a minor criminal history and was driven by his drug addiction – where the respondent showed favourable prospects of rehabilitation – where the appellant contended the non-parole period did not adequately reflect the objective seriousness of the offending – whether the

sentence was manifestly inadequate

Crimes Act 1914 (Cth), s 16A(1)

Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
R v Agboti (2014) 246 A Crim R 72; [2014] QCA 280, considered
R v Onyebuchi; Ex parte Director Public Prosecutions (Cth) [2016] QCA 143, distinguished
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited
R v Pham, Tran & Dang; Ex parte Director of Public Prosecutions (Cth) [2017] QCA 46, cited
Veen v The Queen (No 2) (1988) 164 CLR 465; [1988] HCA 14, cited
Webber v The Queen [2014] NSWCCA 111, distinguished
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, considered

COUNSEL: L Crowley for the appellant
J J Allen QC for the respondent

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

[1] **FRASER JA:** The respondent was sentenced to eight years imprisonment, with a non-parole period of two years and six months, for the offence of importing a commercial quantity of a border controlled drug. The Commonwealth Director of Public Prosecutions has appealed against that sentence upon the ground that it is manifestly inadequate.

[2] The respondent pleaded guilty and was sentenced with reference to an agreed statement of facts. On 26 October 2015 Australian Border Force officers at the Brisbane International Mail facility examined an express mail service package sent from the United States of America. The package was addressed to the respondent at his grandfather's address. The respondent previously had lived there with his grandfather. The package, which was declared to contain vitamins, contained 34 bottles of white tablets described as iron tablets. Australian Federal Police officers took possession of the package. Upon forensic analysis it was found to contain about 7,793 tablets with a total net weight of 3,974.9 grams, comprising 79.2 per cent pure methamphetamine with a total weight of 3,148.1 grams. The estimated average street value of the methamphetamine was up to $2,704,500 (if sold in one gram amounts) or up to $8,113,650 (if sold in 0.1 gram amounts).

[3] On 3 November 2015 police officers conducted a controlled delivery to the address on the original package of a package containing a substituted substance. The respondent's grandfather signed for the package. He, and the respondent's mother who subsequently attended at the address, believed the package was for the respondent and were suspicious of its contents. On 8 November the respondent, using the mobile telephone of one Moore, asked the respondent's grandfather if a package had arrived for the respondent. The respondent's grandfather said that it had not. Later on the same day the respondent and Moore arrived at the address and the respondent again asked his grandfather the same question and received the same

answer. On 9 November Moore's mobile telephone was used to track progress of the delivery. Later on the same day, the respondent and Moore again went to the address. The respondent again inquired about the package and was again told that it had not been delivered.

[4] The respondent was arrested on 9 November 2015. At his initial police interview he denied all knowledge of the package and who was responsible for ordering the methamphetamine. He also denied asking his grandfather if the package had arrived. On 24 February 2016 the respondent underwent a further police interview after having obtained advice from his legal representative. The respondent then made the following admissions. He had been asked by Moore if he would be prepared to receive a package on Moore's behalf. Moore told the respondent that the package was to contain cocaine but was not specific as to the quantity. That request was made approximately one month before the respondent's arrest. The respondent provided Moore with the respondent's full name and the address where the package could be sent. There was no discussion about payment but the respondent expected to get some money for his assistance. (Defence counsel added during submissions to the sentencing judge that the respondent expected to receive some financial benefit, but not a significant financial benefit, and that he would also receive drugs.) At the request of Moore the respondent used Moore's mobile telephone to call his grandfather.

[5] The respondent was aged 24 at the time of the offence and was 25 when sentenced. He had a minor criminal history. On 6 March 2012 he was sentenced to 18 months' probation for unauthorised dealing in shop goods. On 20 July 2015 he was fined $300 for two counts of possession of a prohibited drug and one count of possession of a knife in a public place on 30 June 2015. The respondent was unemployed and in receipt of a Centrelink benefit at the time of his arrest.

[6] At the sentence hearing, defence counsel tendered bundles of material concerning the respondent's rehabilitation and references, and provided further information to the sentencing judge about the respondent's personal circumstances. The respondent completed Grade 10 and an apprenticeship in horticulture and landscaping. Once he was qualified he completed three years' work as an employed landscape gardener. He subsequently moved from the Gold Coast to a provincial city where he operated his own landscaping business. The business failed when the respondent broke his hand. The respondent then returned to the Gold Coast, where he was introduced to amphetamines. He quite quickly became addicted, which in turn led to his inability to hold down a job. He spiralled out of control and ultimately lived in a caravan park. It was there he met Moore who, the respondent said, asked if the package of drugs could be sent to the respondent's home address. The driving force for the respondent to become involved in the offending was his drug addiction.

[7] The respondent first applied for entry into a residential treatment program in July 2015, before he committed the offence. Similarly, he commenced attending sessions with a psychologist on 22 September 2015, before he committed the offence. The respondent attended 17 such sessions, with a further session booked for a time after the date of the psychologist's report. Upon a scale of 1 – 40 measuring progress towards therapeutic outcomes, the respondent scored 13 at his first session on 22 September 2015 and had improved to a score of 33.5 by 11 January 2017. The psychologist reported that there had been significant improvements in the

respondent's depression, anxiety and substance concerns. After being charged the respondent continued to attend sessions with the psychologist. The respondent followed the psychologist's recommendations to access treatment at a detoxification unit and then proceed to residential treatment. The respondent completed seven months of residential rehabilitation and was attending a halfway house program. He had been drug-free for about nine months. Urinalysis screening supported that assertion. He was well established in his recovery from drug addiction and his mental health symptoms were effectively managed. The respondent regularly attended Narcotics Anonymous meetings. As part of his halfway house program he engaged in volunteer work four days a week, providing administrative support to the program and emotional support to its residents. The respondent intended to study social work in the near future with a view to assisting other individuals with substance-related concerns. Various references spoke highly of the respondent's progress in rehabilitating himself, his volunteer work in public campaigns against ice addiction, and his character generally. The respondent was supported by family and friends.

[8] The sentencing judge made the findings and observations to the following effect. By any objective measure this was a very large importation of methamphetamine. The respondent knew that the package contained an illicit drug, but he did not know it was methamphetamine and thought it was cocaine. The specific identity of the drug did not detract from the fact that the respondent knew he was a party to the importation of a dangerous drug. The respondent did not know the quantity that was being imported. He took the risk of that quantity being imported by becoming engaged in the activity. The respondent was ready, willing and able to undertake an essential role in the evil business of importation of a large quantity of methamphetamine into the country. The sentencing judge referred to considerations which illustrated the importance of general deterrence in a sentence for this offence.

[9] The sentencing judge described the respondent's co-operation with the authorities as limited co-operation: the respondent blamed Moore for the respondent's involvement, but the respondent declined to give a statement implicating Moore. The sentencing judge found that the respondent had taken significant steps towards rehabilitation and had good prospects of future rehabilitation. The sentencing judge also took into account in the respondent's favour the matters relied upon by defence counsel mentioned in the preceding paragraphs and that the respondent gave an early indication of his intention to plead guilty and entered an early plea of guilty. After analysing comparative sentences, the sentencing judge determined that the appropriate head sentence was eight years' imprisonment. The sentencing judge observed that he had particular regard to the respondent's rehabilitation and the very positive steps he had taken. His Honour decided that the non-parole period should be set at a period which was much less than what otherwise would be contemplated on a sentence for this Commonwealth offence, but concluded that the appropriate non-parole period was two years and six months.

The parties' submissions

[10] The appellant argued that the non-parole period of two years and six months rendered the sentence manifestly inadequate. The appellant acknowledged that the effect of the sentencing judge's remarks was that the respondent's prospects of rehabilitation were very favourable but argued that the sentencing judge gave undue emphasis to personal matters relating to the respondent's rehabilitation efforts and

his prospects of rehabilitation. The non-parole period did not adequately reflect the objective seriousness of the offending. The respondent contended that support for that submission was found in comparable sentencing decisions: *R v Onyebuchi; Ex parte Director Public Prosecutions (Cth)* [2016] QCA 143, *Webber v The Queen* [2014] NSWCCA 111, and *R v Agboti* [2014] QCA 280. The appellant argued that the head sentence imposed upon the respondent was at the lower end of the range for the offending in this case and the setting of a non-parole period representing 31.25 per cent of the head sentence produced a sentencing outcome that did not properly reflect the sentencing principles for offences of this nature. The appellant referred to the sentencing principles expressed in *Hili v The Queen*,[1] *Veen v The Queen (No 2)*,[2] *R v Pham*,[3] and intermediate appellate court decisions applying those decisions.

[11] The respondent emphasised that upon the sentencing judge's findings the respondent's efforts at and prospects of rehabilitation were very compelling and the respondent had entered an early plea of guilty. It was submitted to be a proper exercise of the discretion for the sentencing judge to emphasise those matters in fixing the non-parole period. The respondent submitted that the motivation for the offending was the respondent's drug addiction, at least in large measure, and that increased the significance of the respondent's progress towards rehabilitation. It was also particularly significant that the respondent had embarked upon a residential treatment program and sought assistance from the psychologist before the commission of the offence and the receipt of the package containing the drug. The respondent disavowed a contention that his residence in the treatment program should be taken into account in a way analogous to pre-sentence custody, but argued that it revealed the extent of his rehabilitative efforts. The combined effect of the respondent having taken steps towards his future rehabilitation even before he committed this offence together with the evidence that he had succeeded in maintaining abstinence from illegal drugs for a significant period after his arrest, made the case unusual by comparison with otherwise similar sentencing decisions.

[12] The respondent relied upon *Webber* and *Onyebuchi* as comparable sentencing decisions and submitted that in each case the offender's efforts at and prospects of rehabilitation were much less favourable than the respondent's. The respondent did not dispute the sentencing principles for which the appellant contended but referred to decisions concerning the significance of an offender's state of knowledge about the quantity of the drug imported: *R v Pham, Tran & Dang; Ex parte Director of Public Prosecutions (Cth)*[4] and *Agboti*.[5] The respondent relied upon the sentencing judge's finding that the respondent did not know the quantity of drug that was being imported and submitted that for this reason his culpability was not as high as in *Webber* and *Onyebuchi*. The appellant also emphasised the limitation upon intervention in a sentence by an appellate court that there must have been some misapplication of principle, rather than merely a disagreement about the appropriate sentence: *Lowndes v The Queen*,[6] *Wong v The Queen*[7] and *R v Pham*.[8]

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1 (2010) 242 CLR 520 (which referred to *Power v The Queen* (1974) 131 CLR 623, *Deakin v The Queen* (1984) 58 ALJR 367 and *Bugmy v The Queen* (1990) 169 CLR 525).
2 (1988) 164 CLR 465.
3 (2015) 256 CLR 550 at [26]-[29].
4 [2017] QCA 46.
5 (2014) 246 A Crim R 72.
6 (1999) 195 CLR 665 at 671-672 [15].
7 (2001) 207 CLR 584 at 605 [58].

Consideration

[13] Section 16A(1) of the *Crimes Act* 1914 (Cth) requires that in determining a sentence for a federal offence, the sentencing court must impose a sentence that is of a severity appropriate in all of the circumstances of the offence. In a case, such as this, where it is necessary that considerations of deterrence and punishment be reflected in the sentence, "the necessary deterrent and punitive effects of sentences … must be reflected both in the head sentence and also in any provision for earlier release from custody".[9] The non-parole period is to be the sentencing judge's estimation of "the period before the expiration of which release of that offender would … be in violation of justice according to law, notwithstanding the mitigation of punishment which mercy to the offender and benefit to the public may justify".[10]

[14] The maximum sentence for the importation of a commercial quantity (750 grams or more) of the border controlled drug methamphetamine is life imprisonment. As the sentencing judge observed, by any objective measure the importation of more than three kilograms of pure methamphetamine is a very large importation and the respondent's conduct in facilitating the importation of that very large importation of methamphetamine was bad by any objective standard.

[15] In *Wong*,[11] Gaudron, Gummow and Hayne JJ held that the amount of narcotic involved can have significance, but not chief importance, in fixing the sentence to be imposed on an offender. Their Honours referred to the fact that it is not uncommon for those involved in importing narcotics to know nothing about what they are dealing, apart from the fact that it is a quantity of narcotic and observed that "there will be many cases in which a sentencing judge will be more concerned to identify the level of the offender's criminality by looking to the state of the offender's knowledge about the importation in which he or she was involved".[12] In that respect the sentencing judge concluded that the respondent did not know the quantity that was being imported, that was the risk the respondent took by becoming engaged in the activity, and the respondent was ready, willing and able to undertake an essential role in importation of a large quantity of methamphetamine. Those conclusions were justified in circumstances in which the respondent told police officers that Moore asked him if he was prepared to receive at the address given by the respondent a package containing cocaine, the respondent gave Moore his full name and the address to where the package could be sent, and the respondent expected that the respondent would, in return, be given money and drugs for his personal use by way of recompense.

[16] In *Webber v The Queen*, the New South Wales Court of Criminal Appeal dismissed an appeal against a sentence of 11 years' imprisonment with a non-parole period of seven years for the offence of importing a commercial quantity of cocaine contrary to s 307.1 of the *Criminal Code Act* 1995 (Cth). A commercial quantity of cocaine was two kilograms. The imported drug had a calculated pure weight of 2219.3 grams within a gross weight of 3280.7 grams. The drug was found in a

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8 (2015) 256 CLR 550 at 559 [28].

9 *Hili v The Queen* (2010) 242 CLR 520 at 533 [41] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting from *R v Ruha* [2011] 2 Qd R 456 at 470 [45].

10 *Bugmy v The Queen* (1990) 169 CLR 525 at 538 (Dawson, Toohey and Gaudron JJ) quoting from *Morgan and Morgan v The Queen* (1980) 7 A Crim R 146 at 154 (Jenkinson J).

11 *Wong v The Queen* (2001) 207 CLR 584 at 609 [67].

12 *Wong v The Queen* (2001) 207 CLR 584 at 609 [68]-[69]. Those passages were quoted with approval by French CJ, Keane and Nettle JJ in *R v Pham* (2015) 256 CLR 550 at 562 [35].

consignment, declared as a golf buggy, of a motorcycle engine in which the cocaine was secreted. The offender was the nominated consignee and the nominated address was at a golf course where the offender worked as a golf instructor. The offender's role was summarised as follows:

> "…the offender…allowed his name, his contact details and his reputation as a professional golfer to be used in accepting delivery on the consignment concealing cocaine. He was the point of contact for Australia Post. He requested Australia Post that the consignment be kept in long term storage until he could arrange collection. He discussed with his de facto partner, who is then named, the possibility of paying someone to drive down to Sydney to collect the package and drive it up to Ballina. He communicated with Australia Post on a number of occasions in order to arrange a day and time for collection of the consignment and he communicated in code and met with a named person to arrange for that person to collect the consignment…"[13]

[17] Fullerton J, with whom Hoeben CJ at CL and Adamson J agreed, analysed the evidence and concluded that it supported a degree of knowledge and involvement commensurate with that of a joint venture with another man, who the offender had claimed had organised and stood to profit from the importation. The offender was 37 years old when he committed the offence. He was an admired and respected professional golfer and had a minor criminal record. He had admitted to having a long history of infrequent social use of cannabis. There was no express finding about the offender's prospects of rehabilitation but the sentencing judge in that matter could not be sure that the offender would not re-offend.

[18] In this case the sentencing judge distinguished *Webber* on three bases. First, the sentencing judge observed that Webber's offending was compounded by a number of other convictions. The other convictions were for the supply of one gram of cannabis, possessing 73.3 grams of cannabis, and possessing 1.6 grams of cocaine. For those offences that offender was given concurrent terms of imprisonment of fifteen months, fifteen months, and twelve months respectively. The reasons of the Court of Criminal Appeal do not indicate that the criminality in those relatively minor offences was taken into account in fixing the sentence for the Commonwealth offence. Secondly, the sentencing judge observed that the sentence in *Webber* was regarded by Fullerton J as being at the more severe end of the range. Upon a close reading of Fullerton J's reasons, it appears that her Honour did not express that view. Her Honour referred to an observation to that effect by counsel for the appellant,[14] identified the relevant question in the appeal as being whether the sentence under challenge exceeded the bounds of a proper sentencing discretion, and noted that it was not to the point that the sentence under challenge might be described as severe or whether the court would have imposed the same or some other sentence.[15]

[19] I respectfully agree with the sentencing judge's third ground for distinguishing *Webber*, that the offender in that case had a higher and more serious degree of criminality than did the respondent. Webber was an older man who used his cloak of

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13 [2014] NSWCCA 111 at [23].
14 [2014] NSWCCA 111 at [47].
15 [2014] NSWCCA 111 at [46].

respectability to participate in a joint venture to import the narcotic and he did not have obviously good prospects of rehabilitation, whereas the respondent's addiction drove his decision to assist the importation by allowing others to organise the importation of the narcotic to be delivered to the address given by the respondent and the respondent had unusually good prospects of rehabilitation. It is therefore unsurprising that the respondent's term of imprisonment and non-parole period are both significantly shorter than in *Webber*. The fact that the non-parole period in this case amounts to a smaller proportion of the term of imprisonment than it was in *Webber* is also unsurprising. Although the sentencing considerations taken into account when fixing a minimum term are the same as those taken into account in determining the head sentence, the way in which those matters are relevant and the relative weights attached to them differ according to the different purposes of those periods.[16] In particular, the non-parole period is to be determined by balancing the interests of the community which imprisonment of an offender is designed to serve, against advantages to the community which release on parole is likely to confer and whatever degree of mitigation the offender may claim without injustice.[17] Accordingly, a favourable view of an offender's prospects of rehabilitation may result in a shorter non-parole period than otherwise would be the case.[18]

[20] In *Onyebuchi*, the court found that a sentence of seven years' imprisonment with a non-parole period of three and a half years was manifestly inadequate and re-sentenced the offender to nine years' imprisonment with a non-parole period of four and a half years. The pure weight of the drug imported in *Onyebuchi* was 791.9 grams (79.4 per cent of the weight of impure methamphetamine imported, 997.4 grams) was very significantly less than in the present matter. As the prosecutor conceded at the sentence hearing, Onyebuchi's role in the importation was more significant than the role of the respondent; Onyebuchi travelled to the place from which the packages were imported, appeared to have a connection with the importers at that place, and had a role in communications between the various parties involved. Onyebuchi entered an early plea of guilty, he had no previous convictions, he had an employment history, was 29 years of age when he offended, and performed impressively in prison whilst on remand, including being well-mannered and co-operative and undertaking a number of courses. It was the extent of that offender's role that proved determinative in the Court's decision to allow the appeal and impose a more severe sentence in *Onyebuchi*.[19] Although the weight of the drug in *Onyebuchi* was significantly less than in this case, it cannot be said that the sentencing judge made any error susceptible of appellate correction by concluding, as his Honour did, that the degree of culpability and criminality of Onyebuchi was more significant than the respondent's role in this case.

[21] It was clearly within the discretion of the sentencing judge to impose a materially less severe sentence upon the respondent than the sentences imposed in *Webber* and *Onyebuchi*. Nevertheless, the non-parole period of two years and six months in the respondent's sentence appears excessively lenient when regard is had to the non-parole periods in *Webber* and *Onyebuchi*, and notwithstanding the respondent's more favourable circumstances, and the facts and circumstances and the overall sentences in each case.

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16 *Bugmy v The Queen* (1990) 169 CLR 525 at 531 (Mason CJ and McHugh J).
17 *Bugmy v The Queen* (1990) 169 CLR 525 at 531.
18 *Bugmy v The Queen* (1990) 169 CLR 525 at 532.
19 [2016] QCA 143 at [43], [44].

[22] In *Agboti* the Court allowed an appeal against the sentence of 11 years' imprisonment with a non-parole period of five years and six months upon the offender's plea of guilty to importing a commercial quantity of methamphetamine. A sentence of nine years and six months' imprisonment with a non-parole period of four years and six months was substituted. The offender was a 23 year old resident of Nigeria. She flew into Brisbane, bringing a suitcase in which there was concealed a bag of substance containing a pure weight of methamphetamine of 2,326.5 grams, the street value of which was said to be between $3.4 million and $10.2 million and the wholesale value which was said to be between $454,000 and $779,000. At a time when the offender was fragile, bordering on desperate,[20] a friend offered to pay for the expenses of travel overseas planned by the offender if she travelled via Australia and there delivered some medicine to a friend of the friend. She was provided with a suitcase and told that the medication was in it, although the suitcase appeared to be empty. She appreciated that there was a substantial risk that she was being asked to carry an illegal drug. She was found to have showed genuine remorse. The offence was out of character and occurred in the context of her need to get away from events which had occurred. She quickly admitted her involvement in the offence, cooperated with police and entered an early plea of guilty. The circumstance that the offender was in a fragile state of mind bordering on desperation was significant for the decision of the court to reduce the sentence.

[23] Bearing in mind that the respondent clearly understood that the importation he facilitated was of a narcotic, whereas the finding in *Agboti* was only that she recognised a substantial risk that she was being asked to carry an illegal drug, and also bearing in mind the finding in *Agboti* about the offender's fragility, the circumstance that the offender personally carried the drugs into Australia does not indicate that *Agboti* was a much more serious case overall. There are of course material differences between the circumstances of the offences and the circumstances of the offenders in these cases, and it was open to the sentencing judge to find that the sentence imposed upon the respondent should be more lenient than the sentence imposed upon *Agboti*. Even so, the sentence imposed upon the respondent seems unduly lenient when compared with the sentence imposed upon *Agboti*, even when full allowance is made for the differences between the cases.

[24] Some guidance as to the appropriate sentence may be derived from those decisions. In particular, *Agboti* is sufficiently comparable to supply a yardstick against which this sentence may be considered. As always, there are differences between the circumstances of the offences and the offenders' personal circumstances, but those differences do not all favour relative leniency in the respondent's sentence. He was involved in the importation of a larger amount of the same drug, he did not merely suspect or appreciate a substantial risk but correctly believed that that the importation was of a narcotic, and the addiction which supplied the motivation for his offending compares unfavourably with Agboti's unfortunate personal circumstances at the time of her offence. Other circumstances, especially the unusually strong findings about the respondent's rehabilitative progress and prospects, may be regarded as justifying what otherwise would seem to be the relatively lenient term of imprisonment of eight years and a relatively lenient non-parole period. But for offending of this nature and seriousness, the necessary deterrent and punitive effects of the sentence are not sufficiently reflected in such a

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20 (2014) 246 A Crim R 72 at 84 [51], with reference to the detailed circumstances set out in [7]-[10].

term of imprisonment when it is coupled with a non-parole period as short as two years and six months. No error can be discerned in the sentencing remarks but the sentence itself reveals that there must have been an error of principle. The shortness of the non-parole period renders the sentence imposed by the sentencing judge manifestly inadequate. It is therefore necessary to set aside the sentence as a whole and re-exercise the sentencing discretion afresh.[21]

[25] The favourable findings by the sentencing judge about the respondent's progress towards and prospects of rehabilitation, his relative youthfulness, his plea of guilty, and his other personal circumstances may be taken into account in imposing what otherwise might be regarded as a lenient term of eight years and an unusually short non-parole period, but the non-parole period in all of the circumstances of this case should not be less than four years.

Proposed orders

[26] I would allow the appeal, set aside the order made in the Trial Division fixing a non-parole period of two years and six months, and instead fix a non-parole period of four years.

[27] **MORRISON JA:** I agree with the reasons of Fraser JA and the orders his Honour proposes.

[28] **MULLINS J:** I agree with Fraser JA.

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21 *Kentwell v The Queen* (2014) 252 CLR 601.