SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ritzau* [2017] QCA 17
PARTIES:	**R** **v** **RITZAU, Orlin Cavell** (applicant)
FILE NO/S:	CA No 264 of 2016 SC No 61 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Cairns – Date of Sentence: 8 September 2016
DELIVERED ON:	24 February 2017
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2017
JUDGES:	Gotterson and Morrison JJA and Bond J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant pleaded guilty to trafficking in MDMA – where the applicant was sentenced to imprisonment for two years and six months, suspended after seven months with an operational period of two years and six months – where the applicant did not challenge the head sentence, but contended that the period of imprisonment to be served was excessive – where the contentions focused on the applicant's age, the nature of the trafficking, and that a wholly suspended sentence has been imposed in similar cases – where the respondent drew distinctions between the applicant and similar cases – where the applicant was found not to have engaged in specific rehabilitation and only desisted once arrested – where appropriate consideration was made of the applicant's good character and future prospects – whether the sentence was manifestly excessive *AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46, cited *Everett v The Queen* (1994) 181 CLR 295; [1994] HCA 49, cited *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25, cited *R v Casagrande* [2009] QCA 1, distinguished

R v Dowel; Ex parte Attorney-General (Qld) [2013] QCA 8, distinguished
R v Engellenner [2012] QCA 6, distinguished
R v Gladkowski (2000) 115 A Crim R 446; [2000] QCA 352, cited
R v Nabhan; R v Kostopoulos [2007] QCA 266, cited
R v McAway (2008) 191 A Crim R 475; [2008] QCA 401, cited
R v Pham (2015) 256 CLR 550; (2015) 90 ALJR 13; [2015] HCA 39, cited
R v SBK [2009] QCA 107, considered
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: M Johnson for the applicant
P J McCarthy for the respondent

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

[1] **GOTTERSON JA:** I agree with the order proposed by Morrison JA and with the reasons given by his Honour.

[2] **MORRISON JA:** On 8 September 2016, Mr Ritzau pleaded guilty to one count of trafficking in MDMA,[1] and one count of possession of MDMA. The trafficking took place over 18 days, between 13 May 2015 and 1 June 2015.

[3] He was sentenced to imprisonment for two years and six months on the trafficking charge, suspended after seven months for an operational period of two years and six months. On the possession charge he was sentenced to one month's imprisonment. The sentences were to be served concurrently.

[4] Mr Ritzau seeks leave to appeal against his sentence on the ground that it is manifestly excessive. The application did not challenge the head sentence of two and a half years, but rather the period of imprisonment to be served. While no specific error on the part of the learned sentencing judge was urged, the contentions focussed on several points, namely:

(a) the applicant was very young (aged 21 years), with a minor and irrelevant criminal history;

(b) the trafficking was for a very short period (about 18 days) and at no more than street level;

(c) whilst the trafficking was found to be for commercial gain, it was not extensive and the profit was small; and

(d) whilst a wholly suspended sentence would have been appropriate, Mr Ritzau had now served about five months and his sentence should be suspended immediately.

Circumstances of the offence

[5] An agreed Schedule of Facts was tendered. It revealed that Mr Ritzau was identified during an operation targeting street level supply of dangerous drugs. The

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1 Otherwise known as 3, 4-Methylenedioxymethamphetamine.

operation primarily relied upon the use of Law Enforcement Participants (LEPs), who would undertake controlled purchases of dangerous drugs. During the 18 days of the offence period Mr Ritzau sold pills containing MDMA to two LEPs, on four occasions.

15 May 2015

[6] Shortly before midnight on 14 May 2015 at a nightclub in Cairns, one of the LEPs was in conversation with another person when Mr Ritzau approached and asked if they had any "pingers". When the response was "no", Mr Ritzau asked if they were seeking any. When asked what he was offering, Mr Ritzau responded "pink apples and white Rolex's", saying they were a mixture of MDMA and speed. Mr Ritzau and the LEP went outside the nightclub where Mr Ritzau supplied seven tablets (six pink and one white) in exchange for $210. During that exchange Mr Ritzau gave his mobile phone number.

[7] Analysis of the pills revealed that the pink pills (gross weight, 1.393g) contained MDMA, and were 5.6 per cent pure (pure weight, 0.078g). The remaining tablet (gross weight, 0.26g) also contained MDMA and was 17.5 per cent pure (pure weight, 0.045g). The total pure weight of MDMA sold on this occasion was 0.123g.

16 May 2015

[8] Around midday on 16 May the LEP contacted Mr Ritzau by text message, asking to meet. Messages were exchanged between them and a meeting was arranged that afternoon. Mr Ritzau sold the LEP 10 pink pills for $300. These pills were visually identical to the pink pills purchased on 15 May 2015.

[9] Analysis of these pills (gross weight, 1.999g) revealed they contained MDMA, and were 11.3 per cent pure (pure weight, 0.225g).

20 May 2015

[10] On 19 May arrangements were made with Mr Ritzau and the LEP to meet the next day. On 20 May a number of text messages were exchanged and a meeting was arranged at an IGA supermarket. Mr Ritzau sold the LEP 20 pink pills for $500. The pills were packaged in separate bags of 10. These pills were visually identical to the pills purchased on 15 and 16 May 2015. Analysis revealed that the pills (gross weight, 3.986g) revealed they contained MDMA. Analysis was done on each bag separately and the contents of one was 12.9 per cent pure, and the other 12.8 per cent pure. The pure weight of MDMA sold on this occasion was 0.512g.

23 May 2015

[11] On 23 May 2015, a second LEP (using Mr Ritzau's phone number, given to him by the first LEP) arranged to meet Mr Ritzau. Mr Ritzau sold him 10 white pills with a Mitsubishi logo on them, for $300. Analysis of those pills (gross weight, 2.423g) revealed they contained MDMA and were 2.3 per cent pure (pure weight, 0.055g).

31 May 2015

[12] Shortly after midnight on 31 May 2015, a man spoke to an undercover agent in a nightclub, asking him if he was "chasing"[2], and told him that his friend was selling. The undercover agent said he was interested and Mr Ritzau came over soon after and spoke to him. They arranged to meet in the bathroom. Security guards were notified and asked to assist with detaining Mr Ritzau.

[13] Inside the bathroom the undercover agent told Mr Ritzau that he wanted to purchase as many pills as Mr Ritzau could supply. Mr Ritzau initially produced two clip seal bags holding 10 pills each, before producing another bag holding eight pills. These pills were pink with an apple symbol, and visually identical to the pills sold on 15, 16 and 20 May 2015.

[14] A security guard entered the toilet and the undercover agent snatched the three bags from Mr Ritzau. He and the security guard then escorted Mr Ritzau outside the nightclub and contacted police. Before police arrived Mr Ritzau fled the scene, but was located soon afterwards. He declined to participate in a recorded interview and was released on bail.

[15] Analysis of the 28 pills taken from Mr Ritzau showed that they contained MDMA with a purity ranging from 5.7 to 12.7 per cent. The gross weight was 5.780g, and the calculated pure weight of MDMA was 0.583g.

[16] Police executed a search warrant at Mr Ritzau's address. They located two capsules containing a brown crystal substance. They were analysed and revealed to contain MDMA. The gross weight of the crystal was 0.274g.

Antecedents of Mr Ritzau

[17] Mr Ritzau was born on 3 November 1993, and thus was 21 and a half years old at the time of offending and nearly 23 at the time of sentence. His criminal history was minor and irrelevant to the charges. His upbringing was unremarkable and references were tendered which revealed him to be generally responsible and, until this event, fulfilling a worthwhile role in society. After school he obtained a concreting job with one employer, and remained in that position for six or seven years. The employer described him as a valuable member of his team and able to run jobs and organise employees. He was educated to Year 12 and after leaving school and commencing employment, assisted his mother financially.

[18] His counsel told the learned sentencing judge that he engaged in the trafficking to make extra cash because even though he was working he "just wasn't going anywhere and he just wasn't getting ahead".[3] Counsel also said that the drugs found on the police search were simply some that he had not got rid of, and had been for his own personal use.[4]

Approach of the sentencing judge

[19] The learned sentencing judge reviewed the circumstances in which the offences had happened. Having done that his Honour took into account the following factors in determining the sentence to be imposed:

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2 Evidently a reference to whether he was seeking drugs.
3 AB 15.
4 AB 16.

(a) the 47 pills supplied to the LEPs, and the 28 pills intended to be supplied at the nightclub, gave an indication of the level at which Mr Ritzau was trafficking;

(b) the quantities of the pills were not at wholesale levels, but sufficient to make more than a single sale to an individual, but rather to make a variety of sales on any given night;

(c) the trafficking extended over a period of 18 days and consisted of "getting about nightclubs selling ecstasy";

(d) the two capsules of MDMA found during the search were not suggested to be another indicia of trafficking, but rather suggested that having been arrested and charged, that was enough to scare Mr Ritzau away from further trafficking activity;

(e) no particular weight was placed upon the criminal history which was "minor in the extreme";

(f) Mr Ritzau's personal antecedents, which included references demonstrating that before the trafficking he was a worthwhile member of the community, apparently maturing reasonably well, collecting a good work history and a good work reputation;

(g) Mr Ritzau still had "plenty to look forward to in [his] life";

(h) the offending was not brought on by an addiction to drugs, but rather the "reality is [Mr Ritzau] chose to graduate from being a recreational user into a seller of the drug, to make some money on the side";

(i) Mr Ritzau had chosen to distribute the MDMA to others, spreading the risk that the drugs might not be properly processed; that conduct was "for [his] own selfish purposes to make some money";

(j) Mr Ritzau was still young, being 21 when the offending occurred;

(k) whilst Mr Ritzau had desisted from trafficking before he was arrested for it, that was only because of his arrest at the nightclub, and not of his own volition;

(l) the plea of guilty was early, and there had been some delay on the part of the prosecution in presenting the indictment; that delay was characterised by the learned sentencing judge as "quite material delay in getting your case to Court, but it is not your fault"; and

(m) weight had to be given to general deterrence.

[20] In relation to the imposition of a period of actual imprisonment the learned sentencing judge made a number of observations during his sentencing remarks. His Honour first observed that the detectable pattern in authorities suggested that even in the case of a young person trafficking at street level and during a short period of time, the offender would as a general proposition, face a period of actual imprisonment[5]. Then, having reviewed the various factors referred to above his Honour said:

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5 AB 24.

> "Having said all of that though, and given the circumstances I have described, I am not persuaded that this case is that kind of case in which I ought not still give weight to the principle of general deterrence, to send a signal that those who trade in drugs for money must know that they are going to have to serve some jail time."[6]

Discussion

[21] On the hearing of the application there was no challenge to the learned sentencing judge's characterisation of the facts. Thus one can proceed on the basis that Mr Ritzau was: young at the relevant time (21 and a half years old); still young at the sentence; trafficked in MDMA for a relatively short time (18 days) for commercial gain; only desisted once he had been arrested; had no relevant criminal history; and had previously been of good character and a worthwhile member of the community and was likely to continue to be so in the future.

[22] The reference from Mr Ritzau's employer[7] revealed that Mr Ritzau had been employed as a concreter for the one employer for over six years, becoming a valued employee. The employer described Mr Ritzau as a "valuable member" of the team, that it would be "extremely hard to replace him", and that his actions were "totally out of character for a young man who shows a great deal of promise and [in] work and life".

[23] What becomes apparent from the employer's reference is that Mr Ritzau continued in the same employment after he had been arrested and bailed. What that meant in a practical sense was that whilst there had been no reoffending in the one year and three months since he was arrested, there was no other specific rehabilitation to which attention might be directed.

[24] In *R v SBK*[8] this Court dealt with a relatively young offender who pleaded guilty to trafficking in MDMA over a period of about three months. As a result of admissions made by him, police were able to establish the extent of his trafficking. He was found in possession of 180 ecstasy tablets and $600 in cash, which was the product of the sale of 20 ecstasy tablets. The 180 tablets were to be sold to another buyer, who was to take them in one lot and then on-sell them. He had been selling ecstasy tablets to friends and acquaintances in the nightclub strip and had in the last month increased his drug dealing to replace lost income. He started selling five to 10 tablets per transaction, but increased the quantity when he saw the opportunity for enhanced profits. His weekly profit was in the range of $250 to $1,000.

[25] His eventual sentence was affected by what was referred to as a "very significant" discount because of his "remarkable cooperation with the authorities".[9] However, in the course of his reasons, Chesterman JA,[10] made reference to the importance of deterrence in drug trafficking cases, even where they involve young offenders. His Honour adopted a passage from *R v Nabhan; R v Kostopoulos*[11]:

> "While the consideration of deterrence may be of little relevance in relation to some offences and some offenders, it is clearly an

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6 AB 25.
7 AB 35.
8 [2009] QCA 107.
9 Per McMurdo P at [2].
10 With whom Keane JA concurred.
11 [2007] QCA 266, at [43].

> important consideration in relation to those who conduct criminal enterprises solely for commercial gain. This is not a … crime of passion or … a crime committed on the spur of the moment. In the case of large scale commercial drug traffickers … the sanctions of the criminal law will only have the desired effect of suppressing commercially motivated crime if it is made clear to the entrepreneurs that risks of the enterprise do not justify the rewards."[12]

[26] Chesterman JA also adopted what was said by McMurdo P in *R v McAway*[13]:

> "Those engaging or contemplating engaging in significant trafficking in dangerous drugs, including ecstasy, for commercial gain must understand that they are likely to be caught and when they are, any short-term gains made by them will be far outweighed by the penalties imposed by the courts. On a cost-benefit analysis, the business of trafficking is not viable."[14]

[27] After referring to what was said in *McAway* by the President as to the life threatening nature of ecstasy, Chesterman JA had the following to say in relation to the period of six months specified in *SBK* as the period of actual imprisonment:

> "The courts would fail in their duty to do what can be done to supress trafficking in dangerous drugs, and the public would, I think, be affronted if a dealer in dangerous drugs, even one who confessed so frankly and co-operated so fully as did the applicant was not sent to jail, even briefly. The applicant, though not a large dealer, was selling fairly significant quantities of MDMA for a discernible profit. Although he was himself a consumer of ecstasy he was not drug dependent and engaged in his trade for profit. From small beginnings he extended his business to bulk sales and deliberately increased his activity to provide an income when he was disabled from work.
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> In these circumstances a custodial sentence had to be imposed. The sentence actually delivered is distinctly reasonable, giving the full regard to the applicant's assistance and his co-operation with the administration of justice."[15]

[28] McMurdo P agreed that the application for leave to appeal against sentence in *SBK* should be dismissed. Her Honour referred to the significant discount to which the offender was entitled because of his remarkable cooperation with authorities, but concluded that even in such a case the sentence was not manifestly excessive. In doing so her Honour said:

> "The present applicant's trafficking in MDMA was at street-level. That does not mean that deterrence is not a relevant sentencing principle. Of course, it is. But deterrence becomes proportionately more important to the sentencing discretion the higher the level of the trafficking."[16]

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12 *SBK* at [18].
13 [2008] QCA 401 (de Jersey CJ and Muir JA concurring).
14 *SBK* at [19].
15 *SBK* at [24]-[25].
16 *SBK* at [3].

[29] Guidance is also to be gained from the decision of this Court in *R v Dowel; Ex parte Attorney-General (Qld)*[17]. The offending in that case was at a greater level than in the present case, but Muir JA[18] had cause to review other decisions including *R v Casagrande*[19] and *R v Engellenner*[20]. Having done so his Honour said:

> "The considerations which prompted the leniency of the Court in *Casagrande* and *Engellenner* were, in some respects, different from those present here. The cases are useful however as demonstrations, if any demonstration is needed, that even in drug trafficking cases there is no inflexible rule necessitating the imposition of a custodial sentence. Each sentence must be imposed by reference to the facts of the case in light of the relevant statutory requirements, sentencing principles and standards derived from statute, decided cases and comparable sentencing decisions. It is as well also to bear in mind the breadth of the sentencing discretion. In *Markarian v The Queen*, Gleeson CJ, Gummow, Hayne and Callinan JJ said:
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> > 'As has now been pointed out more than once, there is no single correct sentence. And Judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies.'
> > (citations omitted)
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> …
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> Referring to sentence appeals on manifestly excessive or manifestly inadequate grounds, Gaudron, Gummow and Hayne JJ said in *Wong v The Queen*:
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> > 'In this second kind of case appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons.'"[21]

[30] Further, *Dowel* recognised that non-custodial sentences for trafficking offences are the exception rather than the rule. Muir JA said:

> "Counsel for the appellant correctly emphasised the heinous nature of trafficking in drugs such as those under consideration. That users of such drugs may be physically and mentally harmed by them and liable to harm others when under their influence is merely an aspect of the social corrosion promoted by their production, consumption and distribution. The Legislature, in response to the problem, has provided a high maximum penalty for trafficking in Schedule 1 drugs

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17 [2013] QCA 8.
18 With whom Fraser JA and Dalton J concurred.
19 [2009] QCA 1.
20 [2012] QCA 6.
21 *Dowel* at [21] and [23].

> (25 years imprisonment) and the Courts regard general deterrence as an important consideration in sentencing for such offending. Consequently, as the sentencing judge recognised, non-custodial sentences for trafficking offences tend to be imposed only in exceptional circumstances."[22]

[31] In the course of submissions before this Court, counsel for Mr Ritzau initially put his contentions on two bases. The first was that the sentence was manifestly excessive because it was not wholly suspended. The second, or alternative, was that as Mr Ritzau had already served about five months imprisonment at the time of the hearing of the application, the sentence should be amended to provide for immediate suspension.

[32] As oral submissions progressed that position modified in the sense that it was accepted that a period of actual imprisonment was within the bounds of what might be imposed. Ultimately counsel submitted:

> "In short, the argument is this. At that age, with … certainly no relevant previous criminal history, a short, sharp period of custody, followed by either a parole period or a suspension, would be more than adequate to deal with this offending behaviour. And, getting back to the start of it, given the realities of life, if that suspension occurred after five months imprisonment, that would be an appropriate and proper disposition of this case."[23]

[33] The reference to the "realities of life" was to the fact that Mr Ritzau had served about five months by the time the application was heard in this Court.

[34] That ultimate submission correctly recognised the force of what was said in *SBK*. Whilst the trafficking was greater than in Mr Ritzau's cause, it involved a relatively young offender with an exemplary work history, whose remarkable level of cooperation extended not only to confessions of conduct with which he could not have otherwise been charged, but also to the provision of valuable assistance in respect of other offenders, which involved some personal danger. His cooperation was such that he attracted the greater leniency mandated by *AB v The Queen*[24]. That leniency was at the level of substantial discounts of at least one-third, referred to in *R v Gladkowski*.[25]

[35] Even so, the six month period of actual imprisonment in *SBK* was not found to be manifestly excessive. Part of the reason for that was that although the cooperation was to be substantially rewarded, the discount "must not result in a sentence which affronts the public".[26]

[36] Immediate release on parole or immediate suspension is appropriate "only in exceptional circumstances", to use the phrase in *Dowel* at [16]. One such case is *Engellenner*. That involved an 18 year old trafficking in MDMA but acting as a middle man. He normally did not make any profit from the transactions, but was

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22 *Dowel* at [16].
23 Appeal transcript T1-6.
24 (1999) 198 CLR 111, per Hayne J at 155.
25 [2000] QCA 352 at [7].
26 *SBK* at [22].

given a few tablets for his own use. Thus the circumstances were, as this Court recognised in *Dowel*, "quite exceptional".[27]

[37] However, further reference to *Engellenner* is useful to understand why it was the Court substituted immediate parole release. Apart from what has been referred to above, Engellenner was only 18, had no relevant criminal history and had engaged in positive rehabilitation in the 21 months that had elapsed while on bail.[28] Atkinson J[29] expressed the reasons this way:

> "In *R v Casagrande*, the Attorney-General's appeals against sentences of three years imprisonment for unlawfully trafficking in schedule 1 and schedule 2 drugs with immediate release on parole was unsuccessful. In that case the immediate parole release date was appropriate in light of the respondent's youth (he was only 17 years of age), the fact that he had spent 46 days on remand, the trafficking charges were substantially facilitated by his own frank admissions to police, and he had voluntarily undertaken drug rehabilitation.
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> A comparison with *Casagrande* suggests that a parole release date after the applicant had served six months imprisonment was, in this case, manifestly excessive. The applicant in this case is also very young; he had no relevant criminal history; he did not gain any monetary reward from his drug dealing which was limited to friends; he made admissions to police and assisted the administration of justice with a very early plea of guilty. He had not reoffended in a very long period in the community after his offending had been detected; he had obtained full-time employment and had the substantial support of two families. His continued rehabilitation from drug use will be assisted by a long period on parole."[30]

[38] The distinguishing features in *Casagrande* and *Engellenner* are not present here. Mr Ritzau was not in the teenage bracket, trafficked for profit (albeit small), made no admissions, and did not embark on particular rehabilitation. For that reason, in my view, the contention that the appropriate sentence in this case was one of immediate suspension, cannot be sustained.

[39] That has the practical effect that the alternative contention is to be considered as one that seven months is manifestly excessive whereas five months is not. I am unpersuaded that is so. To make that finding would mean that the period of actual imprisonment was less than that which was found to be appropriate in *SBK*, where the outcome was affected by extraordinary cooperation with the authorities. That factor is not present here.

[40] True it is that in *SBK* the Court merely found that the sentence was not manifestly excessive. But even allowing for that, in my view *SBK* does provide a measure of guidance.

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27 *Dowel* at [20].
28 *Engellenner* at [6].
29 With whom de Jersey CJ and White JA concurred.
30 *Engellenner* at [11]-[12].

[41] One must bear in mind the passage from *Wong* set out in paragraph [29] above. The same principle was recently affirmed in *R v Pham*, by French CJ, Keane and Nettle JJ:[31]

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

[42] As was pointed out in *Markarian v The Queen*, there is no single correct sentence, and Judges at first instance are allowed a considerable degree of flexibility. Further, as was said by McHugh J in *Everett v The Queen*[32]:

> "Defining the limits of the range of appropriate sentences with respect to a particular offence is a difficult task. What is the range in a particular case is a question on which reasonable minds may differ. It is only when a court of criminal appeal is convinced that the sentence is definitely outside the appropriate range that it is ever justified in granting leave to the Crown to appeal against the inadequacy of a sentence. Disagreement about the adequacy of the sentence is not enough to warrant the grant of leave. Sentencing is too inexact a science to make mere disagreement the criterion for the grant of leave to appeal against the inadequacy of a sentence."

[43] The same principle applies in the case of a submission that a sentence is manifestly excessive. The range is something upon which reasonable minds may differ and disagreement about the adequacy of the sentence is not enough to warrant the grant of leave.

[44] I am unpersuaded that the period of seven months imposed in Mr Ritzau's case can be said to be so far out of consideration that there must have been some misapplication of principle. There is, therefore, no reason to set aside that part of the sentence in favour of the five months already served.

[45] I would refuse the application for leave to appeal.

[46] **BOND J:** I agree with the order proposed by Morrison JA and with the reasons given by his Honour.

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31 *R Pham* [2015] HCA 39; (2015) 90 ALJR 13 at [28]; see also *R v Neeto* [2016] QCA 217, at [28].

32 (1994) 181 CLR 295 at 306-307.