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Court of Criminal Appeal
Supreme Court

New South Wales

Case Name:	Sabbah v R (Cth)
Medium Neutral Citation:	[2020] NSWCCA 89
Hearing Date(s):	27 March 2020
Date of Orders:	6 May 2020
Decision Date:	6 May 2020
Before:	McCallum JA at [1] Wilson J at [11] Cavanagh J at [158]
Decision:	1. Leave to appeal granted; 2. Appeal dismissed
Catchwords:	CRIME – Sentence – application for leave to appeal against asserted excessiveness of sentence – possession of counterfeit money – utility of sentencing statistics based on small sample – utility of decided cases in determining whether sentence is manifestly excessive
Legislation Cited:	Criminal Appeal Act 1912 (NSW) Crimes Act 1914 (Cth) Crimes (Currency) Act 1981 (Cth) Reserve Bank Act 1959 (Cth)
Cases Cited:	Barbaro v The Queen [2014] HCA 2 Dang v R [2014] NSWCCA 47 Dinsdale v The Queen 202 CLR 321, [2000] HCA 54 DPP v Kevin Rohde and Others (1985) 17 A Crim R 166 Hoare v The Queen (1989) 167 CLR 348; [1989] HCA 33 Hili v The Queen; Jones v The Queen [2010] HCA 45; 242 CLR 520

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Lowndes v The Queen 195 CLR 665; [1999] HCA 29
MLP v R [2014] NSWCCA 183
Markarian v The Queen 228 CLR 357; [2005] HCA 25
Muldrock v The Queen (2011) 244 CLR 120; [2011] HCA 39
Naveed v R [2019] NSWCCA 149
Ngatamariki v R [2016] NSWCCA
O'Keefe v R (1993) 67 A Crim R 381
Parente v R [2017] NSWCCA 284
Pham v R [2014] NSWCCA 115
R v Eddie Ali Shaitly (District Court of NSW, 3 October 1996, unrep)
R v Geaney (District Court of NSW, 27 October 1995, unrep)
R v Gittani [2002] NSWCCA 139
R v Institoris (2002) 129 A Crim R 458, [2002] NSWCCA 8
R v Meades (District Court of NSW 29 June 2000, unrep)
R v Megaloudis [2013] NSWDC 302
R v Oppedisano (District Court of NSW 27 October 1995, unrep).
R v Whyte (2002) 55 NSWLR 252; [2002] NSWCCA 343
The Queen v Pham [2015] HCA 39
Vandeventer v R [2013] NSWCCA 33
Vaiusu v R [2017] NSWCCA 71
Veen v The Queen (No 2) (1988) 164 CLR 465; [1988] HCA 14
Wong v The Queen 207 CLR 584; [2001] HCA 64

Category:	Principal judgment
Parties:	Henry Sabbah (Applicant) Director of Public Prosecutions (Commonwealth) (Respondent)
Representation:	Counsel: Mr M Crawford-Fish (Applicant) Mr R J Perrignon (Respondent) Solicitors: Mr A Harris (Applicant) Mr B Scard for Solicitor for Public Prosecutions

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	(Commonwealth) (Respondent)
File Number(s):	2016/00116063
Publication Restriction:	None
Decision under appeal:	
Court or Tribunal:	District Court of New South Wales
Jurisdiction:	Criminal
Date of Decision:	31 August 2018
Before:	Girdham SC DCJ
File Number(s):	2016/00116063

JUDGMENT

1 **MCCALLUM JA:** I agree with Wilson J that the appeal should be dismissed. Subject to what follows, I agree with her Honour's reasons for reaching that conclusion.

2 Justice Wilson's analysis of the comparable cases relied upon by the applicant includes reference to the remarks of Sully J in *R v Gittani* [2002] NSWCCA 139, which concerned the same offence as the offence under consideration here. The sentencing judge in that case (Kinchington QC DCJ) had said "it seems to me that any person who is convicted of the offence of knowingly having in his possession, without lawful excuse [counterfeit notes], must, bearing in mind the provisions of Sections 16A and 17A of the *Crimes Act*, ordinarily expect to go to gaol." The Court of Criminal Appeal rejected a submission that the judge had erred by accepting that proposition. Justice Sully said at [17] (Ipp AJA and Bell J agreeing at [1] and [25]):

> "It does not seem to me to be in any way erroneous in principle to hold that knowing possession without lawful excuse of counterfeit bank notes should attract, in the absence of cogent and compelling circumstances, some form of full-time custodial penalty."

3 Justice Wilson has also noted the remarks of Levine J in *R v Institoris* (2002) 129 A Crim R 458; [2002] NSWCCA 8 (also an appeal from Kinchington QC DCJ) in which his Honour stated a diluted version of the same proposition.

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4 Such remarks should not be understood to state a principle of law that constrains the sentencing discretion. The sentencing judge in *Gittani* found support for a normative proposition (such offenders must “ordinarily expect to go to gaol”) in the provisions of ss 16A and 17A of the *Crimes Act 1914* (Cth). But an examination of those provisions rebuts any pre-emptive conclusion as to the appropriate sentence for any particular offence. Section 16A(1) states the requirement (which exists in any event) for proportionality, which is inherently inconsistent with the statement of any proleptic norm. Section 16A(2) prescribes a non-exhaustive list of mandatory considerations the significance of which must be assessed in any individual case by the process of “instinctive synthesis” approved in *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25. As explained by McHugh J in *Markarian* at [51], that process requires the judge to identify all the relevant factors, discuss their significance and then make “a value judgment as to what is the appropriate sentence given all the factors of the case”, determining the sentence only at the end of that process. To say that process “should ordinarily” lead to the conclusion that a sentence of imprisonment must be imposed for a particular kind of offence, without knowing the content of any of the mandatory relevant considerations, is to subvert the discretion.

5 Section 17A is equally inconsistent with any “should ordinarily expect to go to gaol” principle. That section imposes a statutory prohibition on passing a sentence of imprisonment unless the judge has reached a state of satisfaction that no other sentence is appropriate:

> (1) A court shall not pass a sentence of imprisonment on any person for a federal offence, or for an offence against the law of an external Territory that is prescribed for the purposes of this section, unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case.

6 To reach that state of satisfaction on the basis of a statement in a different case to the effect that it should ordinarily be reached would be a wrong approach.

7 The statements in *Gittani* and *Institoris* were made before the decision of this Court in *Parente v R* [2017] NSWCCA 284. In that case, the Court considered the correctness of the Clark “principle” that drug trafficking in any substantial

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degree should lead to a custodial sentence unless there are exceptional circumstances. The Court decisively overruled the principle, holding that it was incompatible with the judicial sentencing discretion and should no longer be applied: at [101], [108]-[110] (Macfarlan JA; Hoeben CJ at CL; Leeming JA; Johnson J; R A Hulme J).

8 There is no doubt that the sentencing task requires judges to make difficult evaluative judgments. As explained by the plurality in *Veen v The Queen (No 2)* (1988) 164 CLR 465; [1988] HCA 14, the "troublesome nature of the sentencing discretion" arises from "unavoidable difficulty in giving weight to each of the purposes of punishment", which are various and overlapping and which cannot be considered in isolation from each other (at 476). The Court there described the various purposes of sentencing as "guideposts to the appropriate sentence" which sometimes point in different directions (see also the remarks of Spigelman CJ, concerning guideline judgments, that a guideline "is to be taken into account only as a 'check' or 'sounding board' or 'guide' but not as a 'rule' or 'presumption'": *R v Whyte* (2002) 55 NSWLR 252; [2002] NSWCCA 343 at [113], Mason P, Barr, Bell and McClellan JJ agreeing).

9 The synthesis of competing and often inconsistent considerations is the essence of the sentencing task. The notion that the outcome of that task can be pre-empted or circumscribed by normative rules or prescriptive constraints as to the kind of sentence that should ordinarily be imposed in any particular kind of case or the regard that should ordinarily be had to any particular kind of consideration has repeatedly been rejected by the High Court: *Hoare v The Queen* (1989) 167 CLR 348; [1989] HCA 33 at [22] (error in treating a statutory directive to "have regard" to the fact that a prisoner may earn remissions on sentence by good behaviour as being of itself a basis for increasing what would otherwise be seen as the appropriate or proportionate head sentence); *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64 at 611-612 [74]-[76] (error in identifying a predetermined range of sentences attributing a particular weight to some factors while leaving the significance of all other factors substantially unaltered); *Markarian* at [33] (error in proceeding on the assumption that any offence of supply involving more than 250 grams of heroin is likely to be a worse case than any offence involving only 250 grams or less), at [39] and [75]

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(error in taking a starting point giving notional quantification to objective factors and making adjustments around that point); *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [37]-[38] (error in applying a judge-made "norm" for the setting of a non-parole period in sentencing for federal offences); *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39 (error in taking the statutory standard non-parole period as a mandatory starting point for a two-stage sentencing process).

10 Those authorities make plain that statements to the effect that particular classes of offenders should or must ordinarily “go to gaol” cannot be treated as statements of binding principle.

11 **WILSON J:** On 31 August 2018, the applicant, Henry Sabbah, was sentenced by her Honour Judge Girdham SC in the District Court at Sydney for an offence of possession of counterfeit money, knowing it to be counterfeit money. Her Honour imposed a sentence of 3 years and 6 months imprisonment, with a non-parole period (“NPP”) of 2 years and 6 months imprisonment fixed. The sentence commenced on 21 November 2018, and expires on 20 May 2022; the NPP expires on 20 May 2021.

12 The offence, contrary to s 9(1)(a) of the *Crimes (Currency) Act 1981* (Cth), carries a maximum penalty of 10 years imprisonment, or a pecuniary penalty of $108,000, or both.

13 The applicant seeks leave to appeal against the asserted severity of that sentence, pursuant to s 5(1)(c) of the *Criminal Appeal Act 1912* (NSW). The application has been brought out of time, and leave is required to advance it.

The Proceedings before the District Court

14 The applicant entered a late plea of guilty on what would have been the first day of his trial, listed before the District Court on 3 July 2017. The matter was adjourned for sentence.

15 The matter came before the sentencing judge on 2 February 2018, 23 March 2018, 18 May 2018, 6 July 2018 and 17 August 2018. The frequent adjournments were sought to permit the applicant to secure a psychological report and the attendance of its author for cross-examination. Proceedings on

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sentence were ultimately heard on 17 August 2018, with her Honour imposing sentence on 31 August 2018. No psychologist's report was relied upon, although a psychiatrist's report was tendered, principally going to the applicant's history.

The Crown Case on Sentence

16 Part of the material tendered by the Crown was an agreed statement of facts, which her Honour accepted as establishing the facts of the offence. The following account is drawn from it.

17 On the evening of 12 April 2016, the applicant engaged the services of an Uber driver for some hours. The applicant was first driven from Alexandria to Fairfield, where he spent an hour and a half inside a house whilst the driver waited for him. The applicant was then driven back to Alexandria, where the driver again waited as the applicant briefly entered a unit complex, before returning to the hire car and asking the driver to take him to Redfern. The applicant left the Uber there, paying the driver $350.00 in cash, comprised of seven $50 notes. All of the cash was counterfeit currency. It was later recovered by police.

18 On 13 April 2016, the applicant used his Apple iPhone to take two photographs of one bundle of Australian fifty dollar banknotes, consistent with what was found in his possession the following day.

19 At 8pm on 14 April 2016, the applicant boarded a city train from the Fairfield Railway Station, travelling to Redfern Railway Station. He got off the train at Redfern at 8.40pm, and stopped to use a public telephone adjacent to Redfern Railway Station and across the road from the police station.

20 The applicant was observed by a police officer slamming the handset of the telephone down, and two officers approached him. After speaking to the applicant, the officers searched him and a satchel bag he was carrying. A large number of neatly tied $50 banknotes were located within the main compartment of the satchel bag. The notes were counterfeit. The applicant was asked about the amount of counterfeit cash in his bag, responding, "about thirty grand". Some 631 notes were discovered, with a total face value of $31,550. The applicant was arrested.

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21 On examining the notes, the officers found them to be separated into seven bundles, each secured with a rubber band. The counterfeit banknotes were covered in a white powdery substance, of the consistency of talcum powder, which fell away from the notes as the officer handled them. A chemical smell emanated from them, and the notes were bleeding ink at the edges.

22 During the search of the applicant's satchel bag, various personal cards and items were found including his Opal card, City bank visa debit card, phone charger, a set of keys; and a security key card, as well as approximately $170 in legitimate Australian banknotes, located in two further internal packets within the satchel bag. The applicant's Apple iPhone, storing the photographs of the counterfeit notes, was also located in his possession on arrest.

23 The applicant was charged with the present offence. At the time of charging, the applicant was on conditional bail with respect to two other matters. He was remanded in custody.

24 Whilst the applicant was on remand, he and his partner had a number of telephone conversations, each of which was recorded, being calls emanating from a prison. The applicant told his partner that "Pasquale" had been giving him $200 per day. It was an agreed fact that there was no evidence that the applicant had in fact received $200 a day.

25 The applicant also told his partner to tell Pasquale to give her $200-300 per day so that she could live. It was also a fact agreed between the parties that there was no evidence that Pasquale provided these monies. The applicant's partner later reported to him that Pasquale had said that he had paid some of the applicant's legal fees; it was an agreed fact that there was no evidence that this was so. The applicant told his partner that he was going to see Pasquale upon his release from gaol to get money from him; it was a further agreed fact that there was no evidence that this actually occurred.

26 In a telephone conversation between the applicant and his sister whilst he was on remand, the applicant said:

> "And he goes, he goes to me, 'go out west, go out west because he couldn't make it'. He had to go and pick up, I don't know and came back and drop it off to me and I'll give you some, so I was sitting there waiting like an idiot and

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> then I didn't, 'cause the phone, the phone went dead so I went to the phone booth".

27 The applicant's iPhone contained various contacts and associated phone numbers with names similar to "Pasquale", including a contact "Pasquale" and another "Pasquali".

28 An expert from the Reserve Bank of Australia later examined all 638 counterfeit banknotes; being 7 notes given by the applicant to the Uber driver and 631 notes found in the applicant's satchel bag. The expert concluded that all of the notes were counterfeit and were produced using consistent methods and materials. Many of the serial numbers were repeated, some more than once. The seven notes given to the Uber driver had differing individual serial numbers, but each of these numbers was repeated amongst the serial numbers of the counterfeit $50 banknotes found by police in the applicant's possession.

29 The Crown also tendered the applicant's criminal and custodial histories, the former from three states. These documents revealed that, in New South Wales, the applicant has an offending history commencing in 1991, when he was charged with offences of supplying a prohibited drug, two counts of possessing a prohibited drug, and having goods in custody. He was convicted and sentenced for those offences the following year. The applicant appeared before the criminal courts regularly thereafter.

30 He has convictions for supplying a prohibited drug (1993), assault occasioning actual bodily harm (1993), driving unlicensed and other traffic offences (1996), driving in a manner dangerous (2 counts, 1998), driving whilst licence cancelled (1999, 3 counts in 2000, 2 counts in 2001), and driving whilst disqualified (3 counts in 2003).

31 More seriously, the applicant was convicted in 2002 of two counts of robbery in company, and two counts of kidnapping, and sentenced to terms of imprisonment, the longest of which was for 7 years. An appeal against conviction and sentenced was dismissed by this Court in 2004.

32 The applicant resumed his criminal lifestyle after serving that sentence, accruing further convictions for driving whilst licence suspended (2012); two

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counts of possessing a prohibited drug, and one each of failing to supply a urine or blood sample in 2013; an offence of possessing an anabolic steroid, also from 2013; and a number of offences from 2013 that were dealt with in 2016, being offences of larceny, stalking or intimidation, using a carriage service to threaten harm, and larceny of a motor vehicle (by taking and driving it).

33 He also had a number of traffic offences in this period, including driving whilst disqualified.

34 In 2017, the applicant was convicted of taking part in the supply of a prohibited drug, and sentenced to a term of two years and 10 months imprisonment. A finding of special circumstances was made in the applicant's favour, and the NPP specified was 1 year and 9 months. He was directed to accept the supervision of the Community Corrections Service and engage in drug counselling.

35 In Queensland the applicant has been convicted or otherwise dealt with for obstructing police (3 counts in 1996 and 1998), serious assaults on police (5 counts in 1996 and 1998), and obscene language in a public place.

36 In Victoria the applicant was convicted in 1999 of recklessly causing injury and stating a false name.

37 A traffic history, although of limited relevance to the matter before the sentencing judge, showed that the applicant regularly flouted the traffic rules, and had done so since first licensed as a learner driver in 1995. He had frequently gone into custody as a fine defaulter.

38 Part of the Crown's case related to two of the applicant's more recent sets of criminal convictions, those from 2016 and 2017. The remarks on sentence of the respective sentencing judges were tendered relevant to each set of offences.

39 North DCJ sentenced the applicant on 7 June 2016 for the offences of larceny, stalking or intimidation, using a carriage service to threaten harm, and larceny of a motor vehicle. These offences all related to a Mercedes motor vehicle that the applicant had purchased with finance. When he failed to repay the loan

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monies, the car was repossessed. Using the keys he still had to the car the applicant stole it, leaving it with an acquaintance to be serviced. Police recovered the Mercedes from the mechanic and, thereafter, the applicant threatened and intimidated the mechanic, blaming him for the loss of the Mercedes. Finally, he stole a sum of money from him.

40 The sentencing judge imposed an overall term of 12 months imprisonment, structuring the sentences in such a way that the applicant was able to be released after 7 months, with the remaining 5 months being subject to a Federal recognizance, with the supervision of the Community Corrections Office.

41 On 24 November 2017, the offender again faced sentence, on this occasion for supplying a prohibited drug. Traill DCJ concluded that the applicant had been responsible for the delivery of a large amount of methylamphetamine, being aware that he was disseminating “not an insignificant quantity of a prohibited drug”. He played, in the conclusion of the sentencing judge, an integral role in the supply of the relevant drugs. The applicant was sentenced by her Honour in the District Court receiving, as noted above at [34], a custodial term with a finding of special circumstances in his favour.

42 Before Traill DCJ a psychological report was tendered on behalf of the applicant; that report formed part of the material the Crown tendered in the sentence proceedings for the current matter, as did a number of character testimonials that had been prepared on the applicant’s behalf for the 2017 sentence proceedings.

43 The psychological report noted that the applicant did not have any major psychopathology, but was anxious about the outcome of the criminal proceedings that were before Judge Traill. The applicant had told the author of the report that he was “entirely focused on turning his life around with a view to supporting his family”.

44 The character testimonials were all expressed in glowing terms, with the various authors stating confidence that the applicant was remorseful, and had successfully reformed himself, being committed to caring for his family.

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45 The Crown also tendered extracts from the applicant's Justice Health file, dating from 21 March 2004 to 28 November 2017. The entries record the applicant's consistent denial over the years of any health, mental health, or drug and alcohol issues, and his confidence that he would cope well in custody. He was regularly assessed as calm and co-operative, with "nil problems". The only entries recording any concern for the applicant dated to 2004, at a time when the applicant's appeal to this Court against sentence was dismissed, and he was upset at the prospect of spending a further five years in prison.

46 Finally, documents tendered by the Crown established that the applicant had spent a period of 42 days in custody solely referable to the offence before her Honour, between the expiry of the sentences imposed by North DCJ on 5 August 2016, and his released to bail on 15 September 2016.

47 In submission, the Crown provided the sentencing judge with a summary of cases which constituted "the limited jurisprudence […] for what they're worth". The summary referred to *R v Gittani* [2002] NSWCCA 139; *R v Megaloudis* [2013] NSWDC 302; *R v Meades* (District Court of NSW 29 June 2000, unrep); *R v Shaitly* (District Court of NSW 3 October 1996, unreported); and *R v Geaney; R v Oppedisano* (District Court of NSW 27 October 1995, unrep).

<u>The Applicant's Case</u>

48 The applicant did not give evidence. He tendered a psychiatric report from Dr Sathish Dayalan dated 16 August 2018, with respect to which his representative conceded that the weight to be given to the report was limited, as it was a retrospective assessment reliant upon the unsupported account provided to the doctor by the applicant.

49 Dr Dayalan took a history from the applicant, although he recorded that the applicant was "quite vague" about a number of matters. The applicant told the doctor that he had been financially stressed at around the time of the commission of the offence, and worried about supporting his family. He said that he had been using crystal methamphetamine, although he could not give Dr Dayalan anything other than a "very vague" account of the quantity or frequency of use. He claimed to have abused other illicit drugs in the past.

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50 The applicant said that he regretted the offence and was worried about being separated from his family.

51 Although Dr Dayalan noted that the applicant presented as “a bit vague” and struggled to answer questions such that he required “a fair amount of prompting and redirecting”, there was nothing in his presentation to point to any disorder of thought.

52 Dr Dayalan reviewed earlier psychological reports (that had been obtained for sentence but not tendered by the applicant), and set out the conclusions of the authors. He appeared to take those conclusions into account in providing his opinion that the applicant “is noted to have chronic low self-esteem” placing him at a “higher risk of depression and anxiety in stressful situations”.

53 Based on what he had been told by the applicant, and the opinions of others who had assessed the applicant for sentencing purposes, Dr Dayalan thought that the applicant’s “offending behaviour can be regarded as a desperate attempt of an individual with impaired cognition to deal with his stressful circumstances”. The nature of the “impaired cognition” or its manifestation was not stated. It appears that Dr Dayalan drew this reference from one of the psychological reports that the applicant secured for his sentence hearing, but did not ultimately tender in his case.

<u>The Conclusions of the Sentencing Judge</u>

54 The sentencing judge set out the nature and circumstances of the offence, as set out in the agreed facts tendered by the Crown, and recorded the maximum penalty applicable to the offence before the court. Her Honour also referred to the 42 days the applicant had already spent in custody referable to it. It being a Commonwealth offence, the sentencing judge had regard to Part 1B of the *Crimes Act 1914* (Cth).

55 Her Honour gave an account of the applicant’s personal circumstances taken from the psychological report prepared for the 2017 sentencing, and the report of Dr Dayalan prepared for the proceedings before her. She observed that the applicant was (at that time) aged 45 years, and had grown up in a loving family environment. He had attended Vaucluse High School, afterwards commencing an apprenticeship as an electrician, a qualification never completed due to his

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incarceration. He had two children, and two step-children, and was involved in a committed relationship.

56 The sentencing judge referred to the applicant's assertions as to former drug use and noted the recommendation of Dr Dayalan as to the importance of the applicant remaining abstinent from drug use.

57 Her Honour noted the applicant's criminal history, which she described as "lengthy".

58 Her Honour concluded that the applicant had not been subject to depression or anxiety, or indeed any other medical condition, in a material way at the time of the offending.

59 As to the objective gravity of the offence, the sentencing judge concluded that the applicant was a "trusted courier with knowledge of the larger criminal enterprise" and, having regard to his use of seven counterfeit notes to pay the Uber driver on 12 April 2016, and the photographs of the bundled notes found on his phone taken on 13 April 2016, knowledge of what it was he had in his possession, and contact with the source of the notes that was not limited to a single instance.

60 Bearing in mind the applicant's assertion to Dr Dayalan that he was in financial difficulties at around the time of the commission of the offence, and the agreed facts as to the absence of evidence of profit received, her Honour found that the applicant's motivation had been financial. The offence was premeditated.

61 The sentencing judge found the "offending to be objectively a grave and serious example of an offence of its kind".

62 Her Honour referred to the applicant's plea of guilty entered on 3 July 2017, the day his trial was due to commence. He had not participated in records of interview and could not be a recipient of leniency by reasons of cooperation pursuant to s 16A(2)(h) of the *Crimes Act*. The sentencing judge regarded the Crown case as "strong" and the plea as "late". Other than the plea, her Honour noted that the applicant had taken little responsibility for his actions. He was reported to have expressed guilt and regret for having committed the offence. Before the Court, there was little otherwise to show remorse for the offending

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and the sentencing judge noted that "regret does not equate to remorse or contrition".

63 She observed that the applicant's offence was committed at a time when he was subject to a bond, and at liberty on conditional bail. Given his history, the sentencing judge concluded that the applicant's chances of remaining crime free were poor, as were his prospects of rehabilitation. She was, however, satisfied that the applicant was motivated to remain out of custody in the future, given his separation from his children and partner, and his family's financial reliance on him. Her Honour was hopeful that the applicant's separation from family might cause him to reflect and appreciate the consequences of his offending behaviour and embrace the need for reform and change.

64 The sentencing judge pointed to the need for the sentence imposed upon the applicant to import a large measure of general deterrence, observing:

> There is a need for the sentence imposed to be of such a severity that it will act to deter others from engaging in such activity. The community must protect its currency; the need to deter others overshadows other considerations.

65 Her Honour concluded that the offence was "objectively grave" and that only a sentence of imprisonment was appropriate. She was conscious of the need to observe the principle of totality, having regard to the time served relative to the matter before her, and the sentence imposed by Traill DCJ that the applicant was then serving.

66 She continued:

> I have had regard to the comparative cases put before the Court by the Crown. The High Court has reaffirmed that consistency in sentencing is not synonymous with numerical equivalence. I have considered those cases and I have been informed by them, however the circumstances of those cases necessarily differ and there is limited utility engaging in comparative exercises. Here the offender had notes of a substantial face value, he was, I have found, close to the source, he does not have good character, his prospects of rehabilitation are poor and, whilst he is full of regret, I am not satisfied he has remorse and his plea of guilty was late.

67 A discount of 10% on the sentence that would otherwise have been imposed was allowed to acknowledge the plea of guilty, and her Honour backdated the commencement of sentence to take into account the 42 days served, and to allow three months of concurrency with the 2017 sentence. The sentence of 3

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years and 6 months imprisonment was directed to commence on 21 November 2018.

The Application to this Court

68 The applicant filed a Notice of Intention to Apply for Leave to Appeal on 5 September 2018, within time. On 10 May 2019, the Registrar extended time in which the Notice had effect to 30 May 2019, pursuant to Rule 3A of the *Criminal Appeal Rules.* The Notice then lapsed, with no application filed, and no further extension of time in which to do so sought.

69 The present application, for an extension of time and leave to appeal, was filed on 20 November 2019. The Court has power to extend time, if it sees fit, pursuant to s 10(1)(b) of the *Criminal Appeal Act 1912* (NSW) and Rule 3B(c) of the *Criminal Appeal Rules.*

70 In support of his application for an extension of time, the applicant relies upon the statement of his solicitor, Mr Harris, signed on 19 November 2019. Mr Harris was approached by the applicant on 6 May 2019 to assist him in prosecuting an appeal, and thereafter took steps to advance the application as expeditiously as he could. There is no adequate explanation for the delay between the date when sentence was imposed, and the date when the applicant sought the assistance of Mr Harris, a period in excess of eight months.

71 Despite this, I propose to delay the determination of the question of leave until after examining the merit or otherwise of the application, since the prospects of an appeal's success are relevant to determining whether an extension of time should be allowed.

<u>The Proposed Ground of Appeal</u>

72 The applicant seeks leave to appeal against the sentence, advancing the sole ground that the sentence is manifestly excessive.

73 To make good that contention the applicant relies heavily on what are asserted to be comparable cases and, to a lesser extent, the limited statistics available for persons sentenced for an offence contrary to s 9(1)(a) of the *Crimes (Currency) Act*. He acknowledges that the statistics cannot of themselves

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inform the question of manifest excess, and the utility of comparing one case against another can be limited, but he nevertheless submits that the material can provide a yardstick against which to compare the impugned sentence.

74 A table of 11 cases was provided by the applicant. He submits that, even accepting the differences in both the objective and subjective circumstances between his case and the eleven referred to, the sentences imposed point to excess in that imposed upon him.

75 The applicant argues that the differences in the circumstances between the comparable cases and his own cannot reasonably account for the difference in sentence, and support his contention that there has been "latent error" in the determination of sentence. He suggests that there may have been error in the assessment made by the sentencing judge of the objective gravity of the offence, or in her Honour's consideration of other decided cases. He contends that a plainly unjust sentence has been imposed.

76 The Crown submits that intervention by this Court is not warranted simply because the impugned sentence is different from sentences imposed in other cases, or because this Court might have imposed a different sentence. The assessment as to the gravity of the offence was well open to the sentencing judge, and the use she made of the authorities provided to the court was limited, and not erroneous. Nothing in the facts of the offending conduct or the applicant's subjective case point to error, or a sentence which is plainly unjust.

Consideration

77 The principles that bear upon the assessment of a ground of appeal which argues that a sentence was manifestly excessive were collected by R A Hulme J in *Vaiusu v R* [2017] NSWCCA 71. His Honour there said, with the agreement of Bathurst CJ and Beech-Jones J, at [28]:

> When it is contended that a sentence is manifestly excessive it is necessary to have regard to the following principles derived from *Lowndes v The Queen* [1999] HCA 29; 195 CLR 665 at 671-672 [15]; *Dinsdale v The Queen* [2000] HCA 54; 202 CLR 321 at 325 [6]; *Wong v The Queen* [2001] HCA 64; 207 CLR 584 at [58]; *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at 370-371 [25]; and *Hili v The Queen; Jones v The Queen* [2010] HCA 45; 242 CLR 520 at [55].

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a. Appellate intervention is not justified simply because the result arrived at in the court below is markedly different from sentences imposed in other cases.

b. Intervention is only warranted where the difference is such that it may be concluded that there must have been some misapplication of principle, even though where and how is not apparent from the reasons of the sentencing judge, or where the sentence imposed is so far outside the range of sentences available that there must have been error.

c. It is not to the point that this Court might have exercised the sentencing discretion differently.

d. There is no single correct sentence and judges at first instance are allowed as much flexibility in sentencing as is consonant with consistency of approach and application of principle.

e. It is for the applicant to establish that the sentence was unreasonable or plainly unjust.

78 To discharge the burden of establishing that the sentence imposed upon him was unreasonable or plainly unjust the applicant points to the range of sentences imposed in what are said to be comparable cases. Since the applicant relies so heavily on these cases to establish error, it is useful to consider each of the eleven cases summarised in the brief table provided to the Court in support of the appeal.

Kevin Rohde and Others

79 The first of the cases is *DPP v Kevin Rohde and Others* (1985) 17 A Crim R 166 in which four men were convicted of offences of forging, uttering and possessing counterfeit $50 banknotes with a face value of almost $5 million contrary to the *Reserve Bank Act 1959* (Cth). The maximum penalty for possessing counterfeit money was 4 years imprisonment; forging carried 14 years by way of maximum sentence. The matter came before the Victorian Court of Appeal after the Crown appealed against the asserted inadequacy of sentence imposed on each man.

80 Kevin Rohde, who played a prominent role in the offences, had been sentenced to imprisonment for three and a half years with a minimum term of one year and three months. He had been a 42 year old business man of good character who was persuaded to print counterfeit notes by his solicitor, as a means of extracting himself from pressing debts. In his case, the appeal was allowed (by majority) and an overall sentence of five years imprisonment, with

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a minimum term of three years, was imposed. The discrete sentence imposed for the possession offence was two years imprisonment with a minimum of one year, that is, half of the available maximum penalty. In determining the sentence the court took into account Mr Rohde's guilty plea, his lack of prior convictions, that he had abandoned the enterprise prior to arrest, his assistance to authorities by giving evidence against a co-offender, and his demonstrated remorse.

81 Grantley Rohde, Kevin Rohde's 20 year old son, had been induced by his father to assist him with the printing, when he could not manage the modern printing equipment. Although very reluctant to become involved he agreed, to save his father from financial ruin. He was a young man of good character who pleaded guilty and was found to be remorseful. Although the appeal court noted that it would have imposed a custodial sentence, the appeal against the sentence imposed upon Grantley Rohde, a 2 year good behaviour bond, was dismissed as being within the available sentencing range.

82 Jon Argyle, a 21 year old employee of Kevin Rohde who lived in the Rohde family home, was also persuaded to help with the printing. He was in a position of dependency upon Rohde, and was owed some $5000 in wages. Feeling that he had little option but to help his employer, he hoped for some modest financial gain if he did so. He had no relevant prior convictions, had pleaded guilty, was co-operative with the police, and was remorseful. Although similarly observing that it would have imposed a custodial sentence at first instance, the Crown's appeal against a 2 year bond was dismissed by the appellate court.

83 The fourth man was John Tyrell, aged 35 years, who had been introduced to the scheme by Mr Rohde's solicitor. He rented the premises in which the notes were "finished", obtained the paper for the enterprise, and took possession of $27,000 of forged banknotes. His role was to have been to "launder" the notes, in exchange for which he would receive 10-20% of the funds, depending on his expenses. He pleaded guilty to forging notes with intent to defraud contrary to s 47, uttering notes knowing them to have been forged contrary to s 47, and possession of forged notes contrary to s 48 of the *Reserve Bank Act.* The

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sentence at first instance was the imposition of a good behavior bond for three years.

84 The Crown appeal was upheld by majority and he was resentenced to a total effective term of four years imprisonment, with a minimum term of two years. The court recognized his former good character, of which there was "uncommonly strong evidence", his plea of guilty, and the assistance he gave to police. He had been induced by the solicitor to enter the scheme, and agreed to it as he was in serious financial difficulty. He was trying to bring it to an end when arrested.

O'Keefe

85 In *O'Keefe v R* (1993) 67 A Crim R 381 the offender pleaded guilty to charges of offering to sell, and possession of, counterfeit money contrary to s 8 and s 9 respectively of the *Crimes (Currency) Act.* The maximum penalty for the s 8 offence was 12 years imprisonment. At first instance he was sentenced to 4 years imprisonment for the s 8 offence, and 5 years imprisonment for the s 9 offence, to be served concurrently. He appealed to the Court of Appeal in Victoria.

86 O'Keefe had been approached by a family member who told him that he had found $400,000 in United States currency hidden in a car he had imported from the USA. The relative, Mr Makin, wanted O'Keefe's assistance in showing one of the notes to an acquaintance of O'Keefe who had travelled in America, to ascertain if the notes were genuine. O'Keefe, who believed the notes were legitimate, showed them to his friend and was told they were not. He passed that information on to Makin. Police became aware that O'Keefe was trying to sell US currency cheaply, and introduced an undercover operative to him via telephone as a potential purchaser. O'Keefe passed on the operative's details to his relation, telling Makin that he was unwilling to meet the buyer. Makin attended the meeting instead, showing the operative some of the US notes. There was to be a further meeting between the operative and Makin, but neither O'Keefe nor Makin attended. O'Keefe told Makin that he had had enough; Makin was suspicious of the operative.

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87 When he was arrested O'Keefe made a full confession of his involvement with the counterfeit currency. When the police were unable to discover where Makin had hidden the notes, O'Keefe persuaded him to reveal their location to police. After Makin and another accused pleaded not guilty, O'Keefe made a detailed statement against them and indicated his willingness to give evidence at their trials. The fact that he had no involvement with the producer of the notes, his assistance to authorities, his early guilty plea, his former good character, age (50 years) and stable family circumstances, were taken into account on sentence.

88 The Court of Appeal granted leave to appeal, and reduced the applicant's sentence, holding that what must have been a nine year sentence prior to discounts for assistance and the plea was too severe in the circumstances of the case. In reducing the sentence the appellate court referred to the offender's plea and willingness to give evidence against two others, and to the role he had played in recovering the fake notes. It regarded the offender as a "lesser player" who had never had control of the counterfeit notes, and who had wished to withdraw before any sale was concluded. The court noted that the applicant had been brought into the affair by another, he did not initiate or plan the exercise, and he was involved in only one attempt to sell the notes, for a short period, during which he was not aware the notes were forged. He subsequently tried to extricate himself. There was no evidence that he was to receive any benefit.

89 The Court of Appeal held that the details of the offences and the offender's limited involvement in them placed them at the lower end of the range of seriousness for this offence. An overall sentence of 18 months imprisonment was imposed, with an overall non-parole period of 9 months. This sentence took into account a discount on sentence for assistance to authorities, with a further discount (of 10 months) to make allowance for the unavailability of remissions in Victoria. Without discounts, the sentence for the possession offence would have been 2 years and 6 months imprisonment, and 3 years imprisonment for the offer to sell.

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Elie Gittani

90 In *R v Elie Gittani* [2002] NSWCCA 139 the offender stood trial for possessing 91 counterfeit $50 notes contrary to s 9 of the Crimes *(Currency) Act* and was convicted. The maximum penalty at the time was 10 years imprisonment, and/or a maximum fine of $66,000. The offender was 24 years old at the time of the commission of the offence. He had been apprehended at a market wearing a “bum bag” that contained the counterfeit money. The face value of the notes was $4550.

91 The offender was sentenced to 2 years imprisonment, to be released on a recognizance after serving 6 months. He appealed against the harshness of the sentence. His appeal was dismissed by this Court.

92 The Court noted, in dismissing the appeal, that the sentencing judge had taken into account all relevant features. They were the fact that the offender did not intend to pass the notes to others; the strength of the subjective material presented on sentence; the evidence of hardship to the offender’s wife and two children that would follow his imprisonment; the offender’s limited criminal history which included only minor matters of little or no relevance to the sentencing exercise; that he had never previously served a term of imprisonment; that his prospects of rehabilitation were so strong that no supervision was required under the recognizance; and that he was unlikely to re-offend.

93 The Court concluded that there was no error in the conclusion of the trial judge that any person convicted of an offence of possessing counterfeit currency should ordinarily expect to go to gaol. It said, at [17]:

> […] there is no error disclosed by that approach. The knowing possession, without lawful excuse, of counterfeit bank notes is in any circumstances a serious offence. A worst case of the particular kind attracts a statutory maximum penalty of, relevantly, imprisonment for 10 years. The clear legislative purpose in having established the offence at all is, in my opinion, the resolute protection of the integrity of the national currency. In connection with a matter of such importance, it does not seem to me to be in any way erroneous in principle to hold that knowing possession without lawful excuse of counterfeit bank notes should attract, in the absence of cogent and compelling circumstances, some form of full-time custodial penalty.

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Institoris

94 *R v Institoris* (2002) 129 A Crim R 458; [2002] NSWCCA 8 was another case that came before this Court, following appeals brought by both the offender and the Crown. By majority, the Crown's appeal was allowed, with the Court concluding that the sentence imposed at first instance was manifestly inadequate.

95 The offender had pleaded guilty to twelve *Crimes (Currency) Act* offences, being six counts of selling counterfeit currency, three of disposing of counterfeit currency, one count of buying an implement to make counterfeit currency, and two of being knowingly concerned in making counterfeit currency. The maximum penalties for these offences ranged from 10, 12 or 14 years imprisonment. The longest sentence imposed at first instance was for the offences of being knowingly concerned in the making of counterfeit currency, being sentences of 5 years and 6 months imprisonment, with a NPP of 4 years 6 months. The sentences for the other offences ran concurrently with these terms.

96 The offender had been involved with others in two schemes to make counterfeit currency, one to produce $100 notes and the second to produce $50 notes. After meeting a man who could manage the production work, the offender assisted in purchasing computer equipment needed for the venture, and secured premises at which the production could be carried out. He paid the living expenses of the printer, telling him they should produce three million dollars in false $100 notes. After a time, the printer left the operation, taking some notes with him, and leaving others with the offender. The printer was arrested soon after but he could not identify the offender.

97 The offender met some other men some time later, and showed them a sample of the counterfeit $100 notes, offering to sell them. These men became informants of the National Crime Authority ("NCA"), and the NCA became involved in an investigation into the offender's activities. The offender subsequently made a number of sales to the informants: 95 false $100 notes in exchange for $3300 in genuine currency; 300 counterfeit $100 notes in

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exchange for $10,500 in legitimate monies; and one note as a sample of a newly produced batch, provided free of charge.

98 The offender took up with another individual, to whom he supplied the necessary equipment to produce further counterfeit notes, including some partially printed $100 notes. He instructed the second printer to produce counterfeit $50 notes and, once the quality become good enough to sell the notes, the offender got in contact with his previous purchasers, the NCA informants. After providing a free sample of the product, he arranged to sell them counterfeit $50 notes.

99 He subsequently sold 396 counterfeit $50 notes with a face value of $19,800 to the informants for $7000 in genuine currency; and a further batch of 584 counterfeit $50 notes, with a face value of $29,200, at a price of $9,000. He was arrested.

100 On appeal, Levine J (the minority, but not in this regard) considered the case to be “very serious,” given its sophistication, the two separate schemes involved, and the large amount of notes that had been produced and sold. Although it was observed that there was no “established range of sentence, or tariff” (at [44]), it was noted that a custodial sentence will generally be imposed in counterfeiting matters.

101 The objective gravity of the offender’s crimes was regarded as high. He had been the principal of the enterprises and had recruited two printers to assist him. The offender had pleaded guilty. He had a criminal history involving convictions for dishonesty offences, drug offences, assault, and hindering an investigation. He was found to be remorseful and contrite. The offender was in poor health, but the prison system was able to adequately care for him.

102 By majority, this Court concluded that the sentences imposed at first instance failed to reflect the criminality involved in the crimes, and failed to impose any significant punishment for the offences involving production and distribution. The two separate schemes were deserving of separate punishment requiring some degree of accumulation.

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103 Matters in mitigation were the plea of guilty and the statutory requirement that then applied for a reduction in sentence to allow for the unavailability of remissions.

104 In determining to intervene and re-sentence the offender Howie J (with whom Mason P agreed) had regard to the principle of double jeopardy and to the offender's ill health. His Honour said,

> The sentence I would now impose has been significantly reduced from that which I believe should have been imposed upon the respondent because of the prisoner's medical condition and double jeopardy [102].

105 The sentence imposed for one of the offences, knowingly concerned in the production of counterfeit money, was quashed, and in lieu a fresh sentence of 5 years was imposed for that count, commencing 4 years after the commencement of the other sentences,. This had the effect of increasing the overall sentence to one of 9 years imprisonment. An effective overall NPP of 5 years and 6 months resulted from the resentencing exercise, being an increase of one year on the NPP imposed at first instance.

Megaloudis

106 The offender in *R v Megaloudis* [2013] NSWDC 302 was a 42 year old male, who stood trial for, and was convicted of, six offences under the *Crimes (Currency) Act*, one of which was a charge of possession of counterfeit currency. The other counts related to the manufacture of counterfeit money, the provision of information as to the disposal of counterfeit money, the procuring of materials intended for use in making counterfeit money, the possession of materials intended for use in making counterfeit money, and the possession of machines or other instruments or materials intended for use in making counterfeit money.

107 The offender had been involved in the creation of a false lease for premises at which counterfeit money was produced. He also played a role, as a principal (with others) in securing sophisticated printing machines and other equipment for use in the production of false $50 polymer notes. When a search warrant was executed at premises associated with the offender, police discovered the printers, related materials such as polymer plastic sheeting, and a quantity of counterfeit money. The face value of the notes seized was $32,150.

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108 When sentence was imposed in the District Court the sentencing judge afforded a degree of leniency to the 42 year old offender, who had no criminal history, due to his former good character. The offender was well educated to tertiary level and had worked in a number of areas, including conducting his own businesses. He had suffered some adversity in business, and was declared bankrupt at one point.

109 The offender had married at age 19 and he and his wife had two children of 12 and 13 (at the time of sentence). After the birth of the couple's youngest son the offender's wife suffered a mental collapse and was hospitalised. She continued to receive treatment for a mental illness as at the time of sentence. The offender had been caring for her and the children throughout. His own health was impaired, with the offender suffering from a long term anxiety condition that followed a serious motor vehicle accident, celiac's disease, gastric ulcers, asthma, migraine and neck pain. A psychiatric report noted that the offender was likely to have a panic disorder and a substance abuse disorder in remission.

110 The offender had not abused alcohol or drugs until about six months prior to his arrest when, struggling under the stress of caring for his wife and children, he had begun to use cocaine and cannabis. Since being remanded in custody he had abstained from the use of any illicit drug.

111 An overall sentence of 4 years and 3 months imprisonment was imposed, with an overall NPP of 2 years and 2 months.

Meades

112 In *R v Meades* (District Court of NSW, 29 June 2000, unreported) the offender pleaded guilty to possessing counterfeit money contrary s 9(1)(a) of the *Crimes Currency Act.*

113 The offender took possession of counterfeit notes with a face value of $26,600, made up of 266 $100 notes, which were hidden in a plastic pipe in his backyard and in a bag in his house.

114 The offender had one prior conviction for drink driving, which the sentencing judge disregarded. There was evidence before the court concerning the

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offender's former good character, including information as to his involvement with the Police Citizen's Youth Club and his work as a lifeguard. He was a qualified plumber and had worked consistently in that capacity.

115 The offender had taken possession of the notes to assist a friend, who was "in danger of being raided". He would not reveal his friend's identity.

116 The sentencing judge assessed the appropriate sentence as a term of 12 months imprisonment, which was reduced to eight months to recognize the plea of guilty and the unavailability of remissions on sentence. A sentence of 8 months imprisonment was imposed.

Shaitly

117 In *R v Eddie Ali Shaitly* (District Court of NSW, 3 October 1996, unreported) the offender pleaded guilty to charges of uttering counterfeit money and possessing counterfeit money, contrary to s 7(a) and 9(1)(a) of the *Crimes (Currency) Act.* The s 7(a) offence carried a maximum penalty of 12 years.

118 The respondent had been involved with Mr Institoris, and was one of the two NCA informers who had purchased counterfeit notes from Institoris using monies supplied by the NCA, as part of that agency's investigation into the counterfeiting scheme. The offender sought to pass one of the counterfeit $100 notes, but it was identified as counterfeit. Closed circuit security footage showed him trying to hide an additional forty counterfeit $100 notes, which were later seized.

119 The offender had a lengthy criminal history, and drug addiction. However, he had provided assistance to police that was described as particularly material and sensitive. The sentencing judge imposed a fixed term of 8 months imprisonment for each of the two charges, to be served concurrently. A considerable degree of leniency (equating to a 50% discount on sentence) was allowed because of the material assistance the offender had given to the authorities (as described when considering *Institoris*, above).

Geaney and Oppedisano

120 Each of the offenders in the last of the cases relied upon by the applicant, *R v Geaney; R v Oppedisano* (District Court of NSW, 27 October 1995,

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unreported), pleaded guilty to possession of counterfeit money, contrary to s 9(1) of the *Crimes (Currency) Act.* The maximum penalty at the time was 10 years imprisonment, or a $60,000 fine, or both).

121 The offender Oppedisano was observed by police sitting in his car apparently counting something. He was stopped and found with 188 counterfeit $100 notes in his possession. The total face value was $18,800. The offender told the police that he had received the notes from the co-offender Geaney, who had instructed him to deliver the notes to a third person, who was to pay $9500 for them.

122 Geaney was arrested and told police that she had been given the counterfeit notes by someone she knew only as Barry, and instructed to convey them to the purchaser. Barry was to telephone her and arrange to collect the money paid for the counterfeit monies. She said that she was to be paid $500, and intended to use the money to buy her daughter a telescope.

123 The counterfeit notes were amateurish in production, being produced on two sheets of paper glued together, with the watermark and metallic thread imitated by a print of them on one side of the notes, and with a limited range of serial numbers printed in a typeface not used on genuine notes. The notes were not the correct colour, and they were smaller than genuine notes. The sentencing judge was doubtful that the notes would have withstood scrutiny in the marketplace if passed.

124 The offender Geaney was a 29 year old unmarried woman with a 10 year old child. She had left school at 15 years of age, and had been unemployed at the time of the commission of the offence. She was endeavoring to establish a business printing T-shirts. She had suffered a significant back injury in a motor vehicle accident and suffered from residual issues and psychological problems as a result. Geaney had a criminal history which began when she was aged 19 years, and contained entries for drug and dishonesty offences. She was subject to two good behaviour bonds at the time of the offending, one for a traffic offence and another for an offence of having goods in custody.

125 She gave evidence that her criminal activity was a corollary of bad company and drug involvement, and that she had now stabilised herself and resumed

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the care of her 10 year old daughter. Other evidence supported this. She was remorseful.

126 The sentencing judge concluded that her role was more significant than that of Oppedisano, as she had supplied him the counterfeit notes.

127 The offender Oppedisano gave evidence on sentence, telling the sentencing judge that he had undertaken the delivery to please Geaney, with whom he was infatuated, hoping to win her favour. He had not expected to receive any monetary reward. He was a 26 year old man who was fully employed at the time of the offending, having worked for the same employer for the previous seven years. He had only one criminal conviction, of “a totally different character”, which was disregarded by the sentencing judge. He was found to be remorseful.

128 The sentencing judge took these favourable subjective features into account, together with the pleas of guilty in determining the manner in which the sentences were to be served. A sentence of two years imprisonment was regarded by the sentencing judge as appropriate in all the circumstances, but it was reduced to allow for the absence of remissions in NSW. Geaney was sentenced to 18 months imprisonment to be served by way of periodic detention, whilst Oppedisano was sentenced to 15 months imprisonment, also to be served by way of periodic detention.

129 The applicant argued that these cases point to excess in the sentence imposed upon him. Looking at the eleven cases in the applicant’s table, he argues that it is open to infer that error may have infected the sentencing process and, absent that error, a lesser penalty may have been imposed.

130 The statistics held by the Judicial Commission are also relied upon. These collect a total of 6 cases between 1 February 2014 and 31 January 2019 where an offender was dealt with for possessing counterfeit currency, and show that in 33% of cases (that is, two) a release order was made; whilst in 67% of cases (four of the six sentences reflected by the statistics) a term of full-time imprisonment was imposed.

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131 Of the four cases where a prison sentence was imposed two offenders received sentences of six months, one received a two year sentence, and one a sentence of two years and six months imprisonment. These statistics, it is submitted, support the inference of error established by consideration of the eleven cases, in that the sentence imposed upon the applicant was higher than any of those reflected by the statistical sample.

Consideration

132 This Court has frequently emphasised the lack of utility in relying on a series of cases, or sentencing statistics, or both, to contend that a particular range of sentence can be determined and, in turn, that the impugned sentence falls outside it and is manifestly excessive. The point has been made in, to select a very few from a very long list, *Vandeventer v R* [2013] NSWCCA 33 at [45] – [46]; *Dang v R* [2014] NSWCCA 47 at [55]; *Pham v R* [2014] NSWCCA 115 at [57]; *MLP v R* [2014] NSWCCA 183 at [41] – [44]; *Ngatamariki v R* [2016] NSWCCA 155 at [65]; and *Naveed v R* [2019] NSWCCA 149 at [63].

133 It is an easy thing to find a case or cases where another offender has received a lesser sentence and, by making the comparison between penalties imposed, argue that the sentence in the case at hand was too harsh.

134 That approach is far too glib a mechanism by which to assess the complicated task which is determining an appropriate sentence for an offender. It also falls foul of what has been said by the High Court about the use of so-called comparable cases. In *Hili v The Queen*; *Jones v The Queen* 242 CLR 520 [2014] HCA 45 at [59] the Court said, citing *Dinsdale v The Queen* (2000); [2000] HCA 54; 202 CLR 321 at 325 at [6] and *Wong v The Queen* (2001) 207 CLR 584 at 605 [58]:

> […] appellate intervention on the ground that a sentence is manifestly excessive or manifestly inadequate "is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases".

135 It was held that the range of sentences that have been imposed in the past does not fix the boundaries within which future judges must determine sentences.

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136 The question was revisited in *Barbaro v The Queen* [2014] HCA 2; and in *The Queen v Pham* [2015] HCA 39. In the latter, the High Court said at [26] – [28],

> As was explained in *Hili*, the point of sentencing judges and intermediate appellate courts having regard to what has been done in other comparable cases throughout the Commonwealth is twofold: first, it can and should provide guidance as to the identification and application of relevant sentencing principles; and, secondly, the analysis of comparable cases may yield discernible sentencing patterns and possibly a range of sentences against which to examine a proposed or impugned sentence.
>
> It does not mean that the range of sentences so disclosed is necessarily the correct range or otherwise determinative of the upper and lower limits of sentencing discretion. As was emphasised in *Hili*, and again more recently in *Barbaro v The Queen*, the sentencing task is inherently and inevitably more complex than that. But it does mean that to prefer one State's sentencing practices to sentencing practices elsewhere in the Commonwealth, or at least to prefer them for no more reason than that they are different, is contrary to principle, tends to exacerbate inconsistency and so ultimately is unfair.
>
> Previous decisions of this Court have laid down in detail the way in which the assessment of sentences in other cases is to be approached. It is neither necessary, therefore, nor of assistance to repeat all of what has previously been said. But, in view of the way in which the Court of Appeal approached the task in this case, it is appropriate to re-emphasise the following:
>
> (1) Consistency in sentencing means that like cases are to be treated alike and different cases are to be treated differently.
>
> (2) The consistency that is sought is consistency in the application of the relevant legal principles.
>
> (3) Consistency in sentencing for federal offenders is to be achieved through the work of intermediate appellate courts.
>
> (4) Such consistency is not synonymous with numerical equivalence and it is incapable of mathematical expression or expression in tabular form.
>
> (5) For that and other reasons, presentation in the form of numerical tables, bar charts and graphs of sentences passed on federal offenders in other cases is unhelpful and should be avoided.
>
> (6) When considering the sufficiency of a sentence imposed on a federal offender at first instance, an intermediate appellate court should follow the decisions of other intermediate appellate courts unless convinced that there is a compelling reason not to do so.
>
> (7) 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 (footnotes omitted).

137 The applicant’s argument, whilst acknowledging those limitations, relies upon an erroneous approach to the use of statistics and comparable cases. It is not the outcome of sentencing expressed in the number of years or months

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imprisonment that was imposed in other cases which is useful in considering the correctness of the sentence imposed in an individual case; it is the application of principle and the discernment of sentencing patterns.

138 The sentencing judge was well aware of this. Her Honour observed that "consistency in sentencing is not synonymous with numerical equivalence", and she well understood that there was "limited utility" in engaging in a comparative exercise between the applicant's circumstances and those in the few decisions provided to her by the Crown during the proceedings on sentence.

139 There is limited utility in this Court undertaking a comparative exercise between the applicant's circumstances and those of the eleven offenders in the cases he relies upon, not least because, as should be clear from the summary of the circumstances of each of the eleven undertaken above, none of the other matters were truly comparable at all.

140 The four offenders in *Kevin Rohde & Ors* were so differently placed to the applicant as to make comparison meaningless. The offences were different and carried differing maximum penalties to the charge against the applicant. The sentencing regime in the early nineteen eighties also differed. The offenders were all men of good character; none were subject to conditional liberty; none had been repeatedly granted leniency by sentencing courts on their assertion of having resolved upon a law abiding future life; all were truly remorseful; and each gave very significant assistance to authorities deserving of a reduction in sentence. For the offence of possessing counterfeit currency, despite his powerful subjective case, Mr Rohde received a sentence of imprisonment which was fully half the available maximum of 4 years imprisonment, a greater proportion of the maximum than that imposed upon the applicant.

141 Nothing in that case assists the applicant in pointing to a manifestly excessive sentence imposed upon him.

142 In *O'Keefe* the offender was a man of good character whose criminality was very low. He had been involved by a relative who prevailed upon him for assistance and he did little more than make a few inquiries for his relation,

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before telling him he wanted nothing more to do with the venture. He had no connection to the producer of the notes. He was found to be remorseful, and he gave significant assistance to the authorities, being instrumental in the seizure of the counterfeit notes, and making a statement against both co-offenders, with a view to giving evidence at their trials. The sentencing regime differed, in that a reduction of sentence was required to be given to reflect the absence of a scheme for remissions.

143 The applicant's circumstances do not bear comparison with those of Mr O'Keefe.

144 In *Elie Gittani* the offender's criminality was also relatively low and the number of notes many fewer than those in the applicant's possession. His subjective case was a very strong one; he had no relevant criminal record and good prospects of rehabilitation. Those features alone sufficiently distinguish this case from the applicant's such that it is useless as a comparator.

145 In *Institoris* the offences and offending were very different to that of the applicant, setting it apart at the outset. When one adds to that the application of the principle of totality, which would have operated to reduce individual sentences; the applicability of double jeopardy, which would have had the same effect; and the offender's ill health, the usefulness of this case as a comparator or in setting a range is very limited indeed.

146 The usefulness of *Megaloudis* is also very limited. There were multiple charges and totality played a role in the determination of sentence. The offender's subjective case was much stronger than that of the applicant: he had no criminal history and good prospects of rehabilitation; he had been usefully employed for his entire adult life; he had a stable family life in which he was the main support for his wife and children; he was the carer for his mentally ill wife; and he was in poor health.

147 The offender in *Meades* had a lesser number of counterfeit notes in his possession than the applicant and he was doing no more than holding them to assist a friend. His criminality was much lower than the applicant's and his subjective case much more deserving of leniency. He had no relevant criminal

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history and there was evidence before the sentencing court of his good character and solid work history. His case does not assist the applicant.

148 In *Shaitly* the offender's criminality was much lower than that of the applicant, and his subjective case, despite having a criminal record, was compelling. He had acted as an informant for the NCA, attending meetings with the counterfeiter, making purchases using funds supplied to him by the investigating agents, and providing intelligence and evidence used by the NCA to arrest the principal. There is simply no comparison between his circumstances and those of the applicant.

149 The criminality of the two offenders in *Geaney and Oppedisano* was much lower than that of the applicant, and the subjective cases of each much more persuasive. The counterfeit notes involved were fewer and of such poor quality as to make it unlikely they could be passed; neither offender was close to the producer. Whilst Geaney was subject to conditional liberty, there was evidence to point to a positive change in her circumstances, and her prospects for the future were accepted as good. Oppedisano had no relevant criminal history, and had been motivated to become involved with the counterfeit notes by nothing more than a wish to win the favour of a young woman he admired. Neither offender was a trusted courier close to and with knowledge of the counterfeiting enterprise. The sentencing regime applicable at the time required a downward adjustment to recognise the absence of a scheme of remissions on sentence.

150 None of these cases provide either a useful comparison against which the sentence imposed upon the applicant may be assessed, or are such as to establish a "correct" range of sentence, outside which that imposed upon the applicant may be judged to fall, pointing to error.

151 In the applicant's case the sentencing judge had regard to all of the relevant objective and subjective features of the case. She (correctly in my view) assessed the applicant's crime as grave and serious, having regard to the number of notes in his possession; the fact that he was close, and had access to, the source, since he had passed other notes two days before his arrest; that he was a trusted courier with knowledge of the enterprise; the quality of the

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notes, which was such as to allow them to be successfully passed into circulation; the planned nature of the offending; and that the offender was involved for financial gain.

152 Her Honour then had proper regard to the applicant's subjective case, limited as it was. She allowed an appropriate discount on sentence to reflect the very late plea of guilty, and noted his claimed substance abuse. In truth, there was little more that her Honour could view as having a favourable impact on sentence. The applicant has a very lengthy criminal record, including convictions for extremely serious matters, and he was subject to conditional liberty at the time of the offending conduct. There was no credible evidence of remorse. The psychiatric report could carry very little weight, since the conclusions of the doctor were based on only the applicant's self-report, and the opinions expressed in psychological reports not relied upon by the applicant before her Honour. There was no credible evidence that the applicant suffered from any medical or psychological condition that might have mitigated sentence. His future prospects could only reasonably be assessed as poor.

153 Noting the applicable sentencing principles, and having regard to all relevant features, her Honour determined that a sentence of 3 years and 6 months, with a NPP of 2 years and 6 months was appropriate. That sentence is less than half the available maximum penalty, and reflects a proper assessment of all relevant considerations. Her Honour's conclusion was open to her in my view and no error is disclosed.

154 The applicant has failed to establish that the sentence imposed upon him was unfair or plainly unreasonable.

Leave

155 Although the evidence to explain the considerable delay in instituting these proceedings is unsatisfactory, I would nevertheless grant leave to the applicant to advance his appeal, on the basis that, as was observed in *Institoris*, there is "no tariff" for an offence of this nature.

156 The appeal must, however, be dismissed.

157 I propose the following orders:

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(1) Leave to appeal against sentence is granted;

(2) Appeal dismissed.

158 **CAVANAGH J:** I have had the benefit of considering the judgment in draft of Wilson J. I agree with the orders proposed by her Honour and the reasons therefor.

159 I also agree with the additional observations of McCallum JA.

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