

Sentencing in NSW Drug Supply Matters
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Introduction

1. The NSW Court of Criminal Appeal has said on numerous occasions that in cases where an offender has been substantially involved in the supply of prohibited drugs, a full-time custodial sentence must, unless there are exceptional circumstances, be imposed.
2. This has been described as a “rule”¹, a “policy”² a “principle”³ and a “well entrenched principle.”⁴
3. The CCA continues to apply this “rule” or “principle.”⁵
4. At times, the CCA refers to it as the “Clark principle.” This is because *R v Peter John Clark* (Supreme Court of NSW, CCA, 15 March 1990, unreported) is one case that is regularly cited as authority for this principle (even though it is not regarded as the origin of the rule).⁶
5. This paper refers to some of the cases that have considered this “principle” to hopefully assist practitioners in predicting its application. The paper is set out in four parts:
 - i. What does it mean to be substantially involved in the supply of prohibited drugs?
 - ii. What constitutes exceptional circumstances?
 - iii. Does the introduction of ICOs affect the principle?
 - iv. Will the principle continue to apply in the future?

¹ *R v Cacciola* (1998) 104 A Crim R 178 at 184 per Priestley JA.

² *R v Livas* [2006] NSWCCA 54 at [11] per Rothman J.

³ *R v Ozer*, NSWCCA, unreported, (9 November 1993) per Hunt CJ at CL.

⁴ *Reid v R* [2009] NSWCCA 37 at [21] per Buddin J.

⁵ For a recent example see *R v Ejefekaire* [2016] NSWCCA 308 at [49].

⁶ See *R v Saba* [2006] NSWCCA 214 at [17].

What does it mean to be “substantially involved in the supply of prohibited drugs”?

General Propositions

6. The *Clark* principle only requires the imposition of full-time imprisonment in drug supply cases where the offending conduct is of a certain character or reaches a certain level of seriousness.
7. The CCA has used a variety of phrases to describe such conduct including, “trafficking in any substantial degree”⁷ and being “substantially involved in the supply of prohibited drugs.”⁸
8. In *R v Gip; R v Ly* [2006] NSWCCA 115 McClellan CJ at CL reviewed a number of cases where these phrases were used and concluded the following about their meaning (at [13]):

My understanding of these various statements is that where a finding can be made that an offender has engaged in repeated offences so that his or her activities can be described as trafficking, a full time custodial sentence should, unless there are exceptional circumstances, be imposed. However, if only one offence can be proved, but the circumstances surrounding that offence indicate that it was the result of a sophisticated commercial arrangement, the objective criminality involved may also require a custodial sentence, unless exceptional circumstances can otherwise be shown.

9. It is not always easy to predict when a Court will determine that an offender’s conduct falls within one of the above categories and thereby attracts the requirement for a full-time custodial sentence. This is because each case requires individual assessment. As Basten JA said in *Forti v R* [2016] NSWCCA 127 at [20]:

...what constitutes ‘substantial’ involvement in the supply of drugs and whether ‘such activities may be described as ‘trafficking’ are matters for evaluation in the individual case.

10. Furthermore, the various phrases have not been rigidly defined. Rothman J made this point in *R v Gip; R v Ly* [2006] NSWCCA 115 at [41]:

...it is the involvement in general supply of drugs to others that is the concern of the principle that favours custodial sentences. As such, the term ‘drug trafficking’ or ‘trafficking’ ought not be given rigid definitions, or subjected to the same scrutiny to which we subject ‘supply’ and ‘deemed supply’ in the Act.

11. The outcomes in previous CCA decisions (set out below) provide some guidance in predicting when a Court will find an offender’s conduct amounts to substantial

⁷ *R v Bardo* (NSWCCA, 14 July 1992, unreported, Hunt CJ at CL).

⁸ *R v Gu* [2006] NSWCCA 104 per Howie J at [27].

involvement in drug supply.

12. The cases demonstrate that the Court will usually consider all of the circumstances of the case rather than fixating on individual factors such as the quantity of drugs involved.
13. The cases further demonstrate, however, that reasonable minds often come to different conclusions about what amounts to substantial involvement in drug supply.

Examples

14. In ***R v Bardo* (NSWCCA, 14 July 1992, unreported)** the Crown appealed against the imposition of a Community Service Order. The Respondent was found guilty of selling 4.9 grams of heroin for \$980. In dismissing the Crown appeal Hunt CJ at CL (Sheller JA and Badgery-Parker J agreeing) said:

This present case of the supply of a relatively small amount of drug on one occasion does not amount to trafficking in a substantial degree, and the judge was not bound to find exceptional circumstances before he considered other than a custodial sentence.

15. In ***Scott v R* [2010] NSWCCA 103** the police found 27.1 grams of methylamphetamine (purity 1%), along with some seeds, scales and resealable bags in the Applicant's home at Lightning Ridge. The Applicant admitted to possession but denied the drugs were to be supplied. He told the police he paid \$200 for the drugs and then mixed it with 25 – 27 grams of glucose. Furthermore, he said the scales were for weighing both opals and cannabis and that the resealable bags were for cut opals.
16. The Applicant was found guilty and sentenced to full-time imprisonment. An appeal against the sentence was allowed because the sentencing Judge applied the principle in *Clark* without first determining if the Applicant was substantially involved in drug supply. Hislop J (Allsop P and Grove J agreeing) said at [31]:

In my opinion it could not be said that the evidence admitted of no conclusion other than that the Applicant was substantially involved in the supply of prohibited drugs.

17. In ***Youssef v R* [2014] NSWCCA 285** the police searched the Applicant's car and found a total of 29.86 grams of cocaine (about 10 times the traffickable quantity). Three small plastic bags were found hidden in a plastic cover under the handbrake. A further, larger bag was found in a compartment within the ceiling of the car. The cocaine in this larger bag was found to have a purity of 54 per cent.
18. The Applicant did not give evidence at his sentence hearing but told the authors of both a psychologist's report and a Pre-Sentence Report that he was using cocaine

regularly at the time of the offence and that he had purchased a quantity of the drugs for himself and his friends to be consumed at his birthday party the following evening. The sentencing Judge did not accept this account and found the Applicant was supplying some portion of the drugs to others for a financial benefit. The sentencing Judge concluded the Applicant was substantially involved in drug supply.

19. McCallum J (Simpson J agreeing) allowed the appeal and re-sentenced the Applicant to a suspended sentence. Her Honour said at [29]:

I accept that the sentencing judge in the present case was not required to accept the applicant's account, which was not given on oath or affirmation, that the drugs were acquired for the purpose of the party the following evening. However, I do not think it was open to his Honour to be satisfied beyond reasonable doubt that the applicant was "substantially involved in supply" or that he was a trafficker in the sense understood in *Clark*.

20. Price J dissented and said at [4]:

The total quantity of 29.86 grams of cocaine was almost six times the indictable quantity specified in the *Drug Misuse and Trafficking Act 1985* (NSW). The sentencing Judge was entitled to find that this amount of cocaine had substantial value, was entirely inconsistent with the appellant's lifestyle and was, at least in part, to be supplied to others for a substantial benefit. This was in my opinion, a significant offence of supply and there was no alternative to a term of full time imprisonment.

21. In *Fayd'Herbe v R* [2007] NSWCCA 20 the Applicant pleaded guilty to one count of ongoing supply of ecstasy contrary to s 25A of the DMTA (max. penalty 20 years). The offence involved supplying ecstasy to an undercover officer on four separate occasions. In total, 8 tablets (total weight 2.46 grams, purity 23 per cent) were supplied for \$230. There were also three drug supply offences on a form 1 (the supply of two ecstasy tablets for \$70, the supply of three ecstasy tablets for \$90 and a deemed supply involving seven ecstasy tablets). There were also further form 1 offences of drug possession and goods in custody.

22. The Court unanimously rejected an argument that the sentence (involving full-time custody) was manifestly excessive. Adams J, however, made the following relevant observations about the offending (at [23] – [24]):

The crucial question in this case, as it seems to me, is whether the conduct involved in the offence demonstrates that he was "substantially involved in the supply of prohibited drugs". If all that was shown were the occasions to which the charge in the indictment referred, I would have concluded that he was not so substantially involved. The small quantity of drugs, the unsophisticated mode of delivery, the limited scope of the dealing and the small sums involved brought the objective criminality well within the exceptional category. It is not suggested that the applicant held himself out as being in a position to supply greater quantities or other drugs, nor

was there a suggestion that this was because the applicant saw it “as profitable or prudent to immunise [himself] from the significant penalties which exist for dealing in single large quantities, and in particular, by selling small enough deals from a stock warehoused elsewhere”. It does not appear that the applicant was part of a syndicate or organized group. The Form 1 offences of supply must, of course, be borne in mind but I do not think that they make the applicant’s dealing “substantial” in the relevant sense. The applicant was himself an addict. Even in respect of the seven tablets giving rise to one of the supply counts on the Form 1, the learned trial judge held that some were for actual supply and some for personal use.

In my view, the offending here, as the learned sentencing judge found, was at the bottom of the range of criminality for offences falling within s25A. Even if the applicant’s criminality be held to be “substantial” in the *Clark* sense, in my view it fell well within the exceptional category. In all the cases in this Court that I have looked at in dealing with the *Clark* principle, the quantities and the extent, organization and sophistication of trading were greatly in excess of this applicant’s.

23. Howie J, by contrast, viewed the offending differently (at [29]):

I would, however, point out that the amount of drugs supplied by the applicant under the s25A offence was twice the indictable quantity for that drug. The amount supplied in both that offence and the matters on the Form 1 was about four times the indictable quantity over a period of about four months. I would class such an ongoing participation in the distribution of drugs within the community as a substantial involvement in the supply of the drugs.

24. Price J joined in the orders but did not otherwise specifically describe his evaluation of the Applicant’s conduct.

25. In ***Zahrooni v R* [2010] NSWCCA 252** the Applicant was stopped in a car. He was in possession of 69 grams of opium (more than double the traffickable quantity) in 48 plastic sachets, a 4 centimetre knife, \$1077 in cash, two mobile phones – one of which contained a text message which read “Hey babe, how much for a quarter of an ounce?” In dismissing one of the grounds of appeal Simpson J (Hoeben and RA Hulme JJ agreeing) said at [33]:

In my opinion, had the judge expressly adverted to the contentious phrase (“trafficking to a substantial degree”), he would inevitably have concluded that Mr Zahrooni’s activities came within that description...

26. In ***Reid v R* [2009] NSWCCA 37** the Applicant was sentenced to a term of full-time imprisonment after he pleaded guilty to four charges of drug supply. The Applicant was found in a car with 20 ecstasy tablets weighing 4.99 grams (charge 1) and 3.31 grams of methylamphetamine (charge 2). The Applicant told the police he had just supplied another person about 0.1 – 0.2 grams of crystal methamphetamine for \$300 (Charge 3) and was about to supply a third person with 0.08 grams of

methylamphetamine (Charge 4).

27. In dismissing the appeal against sentence Buddin J (McClellan CJ at CL and James J agreeing) found no error in the following conclusion of the sentencing Judge (see [21] – [22]):

With perhaps the exception of the deemed supply of ecstasy charge, when one considers the supplies the subject of the three other charges before me in isolation, one may not necessarily come to the conclusion that the offender was substantially involved in the supply of prohibited drugs. However, it is impossible to look at each of the four supply charges before me in isolation from each other. When the number of supply offences and the variety of drugs supplied are taken into account, one must inevitably come to the conclusion that the offender was substantially involved in the supply of prohibited drugs, even though he was not to make any financial profit from it.

28. In *Pak v R* [2015] NSWCCA 45 the Applicant pleaded guilty to two counts of drug supply (6.48 grams of amphetamine and 6.17 grams of N, N dimethylamphetamine). There were also three form 1 offences (two of drug possession and one of driving under the influence of drugs.) In dismissing the appeal against a full-time custodial sentence Davies J (RA Hulme and Bellew JJ agreeing) found no error in the sentencing Judge's approach to evaluating the level of trafficking (at [16] – [18]):

The Sentencing Judge noted that the quantities of the drug involved were only slightly more than the indictable quantity and about twice the trafficable quantity. His Honour said that if it were merely the quantity of the drugs, he would not be able to find beyond reasonable doubt that the offender was involved in trafficking to a substantial degree.

The Sentencing Judge went on to note, however, the other items that were found which he enumerated as scales, a blank prescription, numerous empty resealable bags, the container containing clear crystal rock, a plastic bag containing foil and a smaller clear plastic bag containing white powder, four resealable bags containing clear crystals, one small resealable bag containing white powder, one resealable bag with six resealable bags containing a black liquid.

By reason of those matters his Honour said that he was satisfied beyond reasonable doubt that the Applicant was involved in an enterprise that envisaged supply on more than one occasion and when those matters were taken into account with the quantity of the drugs, he was satisfied beyond reasonable doubt that the Applicant was involved in trafficking to a substantial degree.

29. In *Smaragdis v R* [2010] NSWCCA 276 the Applicant pleaded guilty to various offences including one count of supplying 25.6 grams of cocaine. In dismissing the appeal against sentence Fullerton J (RA Hulme and Simpson JJ agreeing) said at [12]:

...the fact that the supply charge involved five times the indictable quantity was itself, in my view, sufficient to warrant it being described as trafficking to a substantial degree.

What constitutes exceptional circumstances?

General Propositions

30. There is no clear definition of what constitutes exceptional circumstances to justify an alternative to full-time imprisonment: see e.g. *Polley v R* [2015] NSWCCA 247 at [37].
31. In *Forti v R* [2016] NSWCCA 127 Basten JA said at [20]:

Care should be taken in using the term “exceptional circumstances” as if it were a statutory prescription requiring definition. It is no more than a handy phrase covering a range of factors which may provide guidance.
32. Various cases suggest that the requirement to establish exceptional circumstances may be satisfied by pointing to a combination of factors: see e.g. *R v Cacciola* 104 (1998) A Crim R 178 at 182.
33. Both objective and subjective factors may be considered as part of the combination.⁹ This can obviously include a broad range of matters.
34. Factors prior to the offence that might be relevant include previous good character, youth, a difficult upbringing, a mental disorder and addiction (particularly relevant when acquired at a young age or brought on by an acute personal crisis).
35. Factors surrounding the offence that might be relevant include the number of offences (including any form 1 offences), the maximum penalty, the quantity of the drug,¹⁰ the purity of the drug, the type of supply,¹¹ the level of planning, the level of sophistication, the offender’s role, motive,¹² the amount of dissemination into the community, any entrapment and any duress.
36. Factors after the offence that might be relevant include the cessation of offending prior to arrest,¹³ a plea of guilty, remorse, assistance to authorities, extra-curial punishment,¹⁴ demonstrated rehabilitation, evidence that gaol will reverse previous

⁹ See the approach in cases such as *Saba v R* [2006] NSWCCA 214 at [20] – [21] and *Smaragdis v R* [2010] NSWCCA 276 at [40].

¹⁰ See *Fayd’Herbe v R* [2007] NSWCCA 20 at [25].

¹¹ See Drug Misuse and Trafficking Act s 3.

¹² *R v Pickett* [2010] NSWCCA 273 at [76].

¹³ *R v Pickett* [2010] NSWCCA 273 at [71] – [78] and [85]; *R v Burns* [2007] NSWCCA 228 at [30].

¹⁴ See e.g. *R v Gouliaditis (No 2)* [2016] NSWDC 216 at [27] per Berman DCJ.

rehabilitation,¹⁵ pre-sentence custody, pre-sentence quasi custody, hardship to others caused by incarceration and adverse health (physical or mental).

37. In cases where a combination of *subjective* circumstances is relied upon, an alternative to full-time imprisonment will only be justified where “*the aggregate of all those circumstances point to the case being one of real difference from the general run of cases that come before the courts*”: *R v Cacciola* (1998) A Crim R 178 at 181.

38. Rehabilitation is a factor that has been considered in numerous cases. *R v Thompson* (NSWCCA, 4 April 1991, unreported) has been cited as authority for the proposition that “*rehabilitation by itself is not an exceptional circumstance.*”¹⁶

39. The full quote of Hunt CJ at CL in *Thompson* is:

Uninstructed by authority, I would have said that the achievement of rehabilitation, however exceptional that fact itself may be, would not without more amount to an exceptional circumstance warranting other than a custodial order. Where, for example, there is medical evidence that there is a serious risk that the rehabilitation so far achieved would be destroyed by a custodial sentence, that additional fact could in the particular case constitute that rehabilitation an exceptional circumstance. Everything will depend upon the particular case involved.¹⁷

40. Some examples of previous cases are summarised below. In considering these examples, the following point made by Priestley JA in *Cacciola* at 182 should be borne in mind:

For the respondent the point was made that, although it might be right to say that there are a number of cases in which some of these items had been held by this Court not to constitute exceptional circumstances, it was not a logical process to take them one by one and say, that since each one had on occasion been held not to constitute exceptional circumstances, therefore, the aggregate did not constitute exceptional circumstances. That argument is correct...

Examples

41. In ***R v Cacciola* (1998) 104 A Crim R 178** the respondent received a good behaviour bond after pleading guilty to 8 counts of supplying methylamphetamine. The offences occurred over a 6 week period. The drugs were sold for a total of approximately

¹⁵ See *R v Harmouche* [2005] NSWCCA 398 at [52]; *R v Thompson* (NSWCCA, 4 April 1991, unreported).

¹⁶ See e.g. *Saba v R* [2006] NSWCCA 214 at [18]; *Santos v R* [2010] NSWCCA 127 at [29].

¹⁷ See also *R v Harmouche* [2005] NSWCCA 398 where RS Hulme J (Sully and Latham JJ agreeing) said at [52] “I would add that the achievement of rehabilitation does not of itself constitute exceptional circumstances justifying a sentence other than full time custody albeit if there is evidence that full time custody is likely to have the effect of nullifying rehabilitation previously effected, the situation may be different.”

\$3500. There was also an offence of possessing ecstasy on a form 1.

42. Priestley JA (Abadee and Kirby JJ agreeing) held the sentencing judge erred in finding the circumstances were sufficiently exceptional to justify a non-custodial sentence. His Honour said at 181:

The sentencing judge took into account and these matters were proper to take into account for the purposes of sentencing generally the respondent's youth, the fact he had no prior convictions, his pleas of guilty, his remorse, his prospects of rehabilitation which on the evidence before the sentencing judge were very promising, and his readiness to assist the police.

...

Each of the matters that the judge apparently took into account in arriving at the decision to impose a non-custodial sentence is really a common place matter which frequently happens to people convicted of crime. A number of the cases do have an aggregation of circumstances similar to those in the present case, but a combination of subjective circumstances each strong in itself does not add up to exceptional circumstances unless the aggregate of all those circumstances point to the case being one of real difference from the general run of cases that come before the courts. This case, in my opinion did not fall into that class.

43. In *Smaragdis v R* [2010] NSWCCA 276 the Applicant was found in a car with 25.6 grams of cocaine, a bag of bicarbonate soda, electronic scales, a bag containing hundreds of unused small resealable bags, an open packet of glucodin, two mobile telephones, a mortar and pestle, a small black notebook, a plastic cylinder containing a measuring cup, \$15 823 in cash (\$8032 of which was held to be proceeds of crime) and a taser. He admitted to selling about \$7000 worth of cocaine in the 6 weeks prior to his arrest. The supply charge for which the Applicant was sentenced related to the 25.6 grams in his possession at the time of his arrest.

44. Fullerton J at [29] summarised the Applicant's counsel's submissions as follows:

[T]he evidence established what he described as "wholly exceptional" subjective circumstances which, coupled with the finding that the offending was below mid range, warranted a departure from the general rule requiring the imposition of a full-time custodial sentence. He identified these subjective circumstances as the applicant's addiction to cocaine (the onset of which was coincident with significant personal stresses and ill health), that he had no criminal record, that he had good prospects of rehabilitation and was unlikely to re-offend, that he was in employment at the time of sentence, that he pleaded guilty at the first opportunity and that he has shown remorse.

45. Her Honour (Simpson and RA Hulme JJ agreeing) dismissed the appeal and said at [40]:

I am not persuaded that the features of the applicant's subjective case relied upon by the applicant's counsel, either individually or in aggregate, warranted a finding of exceptional circumstances, or that there are other features of the offending which serve to distinguish this case from what have emerged in the collected authorities as a general category of drug supply cases.

46. Fullerton J also referred to a number of cases where the circumstances were not sufficiently exceptional to justify an alternative to full-time imprisonment. Her Honour summarised these at [33] – [36]:

In *R v Hawkins* (Court of Criminal Appeal, 12 September 1991, unreported) this Court was not satisfied that exceptional circumstances were established where the offender was found with less than the trafficable quantity of prohibited drugs (in that case heroin in small but saleable quantities), where she had a minor record of prior criminal convictions, had cooperated with the police, had entered into a methadone program since the offending, and had been assessed as suitable for a community service order. Despite having a strong subjective case she received a sentence of full-time custody.

In *R v Curtis* (Court of Criminal Appeal, 22 April 1993, unreported) this Court was satisfied that the offender's involvement as an intermediary in the supply of cocaine, even as a one-off offence, was not sufficient to treat the case as exceptional. The Crown appeal against the inadequacy of a sentence to be served by way of periodic detention was upheld and a period of full-time custody was substituted. I note that the quantity of drugs supplied was 338 grams and that the offender was rewarded by being provided with drugs worth \$1,000.

Similarly, in *R v McArthur* [2002] NSWCCA 390 a relatively low level of culpability and a powerful subjective case were found to be insufficient to constitute exceptional circumstances. In that case the offender provided assistance to a friend's drug supply operation whilst he was hospitalised for a short time, without any financial benefit or expectation that there would be a financial benefit when the offender supplied drugs on her friend's behalf.

In *R v Nasr* [2004] NSWCCA 441 this Court found that an offender's subjective case comprised of an early plea, remorse, significant progress towards drug rehabilitation, permanent employment for nearly two years since his release to bail and no prior criminal history, whilst impressive, was not exceptional and a sentence of full-time custody was substituted for a sentence to be served by periodic detention. In that case the offender was a member of a syndicate involved in the distribution of drugs in which he was involved on a daily basis for at least 10 days.

47. ***R v Pickett* [2010] NSWCCA 273**, on the other hand, is a case where exceptional circumstances justified the imposition of a suspended sentence for an offence of supplying cocaine on an ongoing basis (involving three sales). There were also two additional offences of supplying cocaine on a form 1. In total, the Respondent sold 26.92 grams of cocaine (about 5 times the indictable quantity) for \$8250. He was 48

years old, he had a limited criminal history, he was remorseful, he suffered from depression but had good rehabilitation prospects. The sentencing Judge accepted that the Respondent was acting at the behest of Mr Buttrose, a more serious drug dealer.

48. Simpson J (R A Hulme and Fullerton JJ agreeing) dismissed the Crown appeal. Her Honour (at [71] – [78]) identified the Respondent’s voluntary cessation of criminal activity prior to his arrest as a “key circumstance” which when combined with the other circumstances made the case sufficiently exceptional to justify the suspended sentence.

49. Fullerton J, in a separate judgement, said at [84] – [85]:

...I accept that there is no settled category of circumstances that might warrant the appellation of exceptional, I am unable to see how the respondent’s mere potential to make a future contribution to a community youth based program, even if taken in combination with his age and his work history, was of sufficient weight to support a finding of exceptional circumstances such as to justify a departure from the general principle requiring a sentence of full-time custody.

However, were his Honour to have taken into account the respondent’s voluntary withdrawal from further participation in Buttrose’s drug business, together with his age and the evidence of his real and established rehabilitation as a one-off offender in the drug trade, and his willingness to make a positive contribution to a charitable program, I share the view of Simpson J that the case was one to be properly regarded as within the exceptional category such that the Crown appeal must fail.

50. In *Pickett*, Simpson J at [73] – [77] also referred to ***R v Burns* [2007] NSWCCA 228** which her Honour summarised as follows:

In *R v Burns* [2007] NSWCCA 228, the respondent to a Crown appeal had pleaded guilty to one charge under s 25A(1), of supplying MDMA (also known as “ecstasy”). A second charge of supplying the same drug was taken into account under Pt 3 Div 3 of the Sentencing Procedure Act.

In that case the respondent was sentenced to imprisonment for 2 years, and, as in the present case, an order was made under s 12 of the Sentencing Procedure Act that execution of the sentence be suspended. The Crown appealed on the ground that the sentence was manifestly inadequate.

In that case, again like the present, the respondent had voluntarily ceased his criminal activity and had in fact moved interstate in order to separate himself from association with those with whom he had been involved...

In the result, the Court in *Burns* held that that circumstance was sufficient, together with other circumstances, to take the case into the exceptional category.

51. In *Fayd'Herbe v R* [2007] NSWCCA 20, referred to earlier, Adams J dismissed the appeal but hinted that a more lenient outcome may have also been a permissible result (see [24] - [25]):

In my view, the offending here, as the learned sentencing judge found, was at the bottom of the range of criminality for offences falling within s25A. Even if the applicant's criminality be held to be "substantial" in the *Clark* sense, in my view it fell well within the exceptional category. In all the cases in this Court that I have looked at in dealing with the *Clark* principle, the quantities and the extent, organization and sophistication of trading were greatly in excess of this applicant's.

It was submitted by counsel for the applicant in this Court that, taking into account the early plea of guilty, the circumstances surrounding the offence involving the street level dealing of very small quantities of ecstasy, the applicant's prior good character and excellent prospects of rehabilitation, a full time term of imprisonment was not the only sentencing option open to the learned sentencing judge. There is much to be said for this submission. However, the question for this Court is not whether it was within the learned sentencing judge's discretion to pass a more lenient sentence but whether, passing the sentence that was imposed, his Honour's discretion miscarried.

Does the introduction of ICOs affect the principle?

52. The rule requiring full-time imprisonment in these matters pre-dates the creation of Intensive Corrections Orders as a sentencing option.

53. In *EF v R* [2015] NSWCCA 36 an appeal against sentence was allowed because the sentencing Judge failed to consider the availability of an ICO. On appeal, the Applicant was re-sentenced to a suspended sentence. In allowing the appeal, Simpson J observed at [9]:

It seems to have been assumed by all concerned that, because the offence was of drug dealing 'to a substantial degree', non-custodial options were not available.

54. At no stage in *EF* did the CCA expressly indicate that "exceptional circumstances" justified the course taken on appeal.

55. It is perhaps for that reason the authors of *Criminal Law News*, RA Hulme J and Berman DCJ, commented as follows (see Volume 22 Issue 4 at p 61):

On one view it might be that the court considered the existence of exceptional circumstances to be an unnecessary consideration and that a sentencing judge may consider the imposition of something other than a full time custodial sentence regardless of whether such circumstances exist or not. If that is the approach that was taken it appears contrary to a long line of authority.

56. *EF* was then considered in *R v Ejerfekaire* [2016] NSWCCA 308 where the CCA allowed a Crown appeal against the inadequacy of an ICO imposed in a drug supply case.

57. The Court in *Ejerfekaire* reaffirmed the principle in *Clark* and said (at [62]) that an ICO may be imposed “*if exceptional circumstances have been established.*” The Court said at [61]:

The Court does not take her Honour [Simpson J in *EF*] to have intended by this statement that the long-standing principle that exceptional circumstances must be established before a person who supplies prohibited drugs to a substantial degree is to avoid a sentence of full-time custody is no longer good law...

Will the principle continue to apply in the future?

58. Although the *Clark* principle is now regarded as “well entrenched” it has not always been the subject of universal endorsement. For example, in *R v Braithwaite* [2005] NSWCCA 451 Hodgson JA (McClellan CJ at CL and Hall J agreeing) was somewhat critical of the sentencing judge’s approach. His Honour said at [25] and [29]:

Further I do not think it was correct to say that, in all cases of s 25(1) offences, it is a pre-condition to suspending the sentence that the offences fall towards the lower end of the scale or that there be exceptional circumstances...

I do consider that, in cases such as this of supply of drugs, a strong case needs to be made out to justify suspending the sentence.¹⁸

59. In *Fayd’Herbe v R* [2007] NSWCCA 20 Adams J observed the difference (albeit subtle) between the Court’s approach in *Braithwaite* and *Clark*. His Honour expressed a preference for the *Braithwaite* approach but acknowledged the strength of authority that has followed *Clark* at [22]:

Were there no contradicting line of authority, I would have preferred, with respect, the approach taken in *Braithwaite*. Casting sentencing options in terms of exceptions (though frequently done) strikes me as unnecessarily emphatic. To state what should be done in the usual case or normally should be done should be sufficient and accords appropriate respect to the importance of the exercise by the primary judge of his or her judicial discretion. Be that as it may, I think it must be concluded that the weight of decisions of this Court favours the *Clark* line of authority...

60. The *Clark* principle is somewhat anomalous in the sense that there is no equivalent rule in NSW for many other serious offences. For example, there is no rule that a

¹⁸ Hall J (Simpson and James JJ agreeing) quoted *Braithwaite* with apparent approval in *R v BCC* [2006] NSWCCA 130 at [51].

perpetrator of sexual assault or a person that intentionally causes grievous bodily harm must, in the absence of exceptional circumstances, receive a full-time custodial sentence.¹⁹

61. The *Clark* principle does not derive from any particular statutory provision. Rather, it appears to have arisen and developed in decisions of the CCA.

62. Recently, in *Youssef v R* [2014] NSWCCA 285 McCallum J said (at [32]):

The proposition approved by the majority in *Clark*, asserting as it does the existence of a constraint devised by the Court of Criminal Appeal on the exercise of the sentencing discretion of judges, may warrant reconsideration in light of the remarks of the High Court (in a different context) in *Hili v R; Jones v R* [2010] HCA 45 at [36] to [38]. However, the correctness of the decision in *Clark* was not raised in the present appeal and in any event need not be determined.

63. The High Court, in the period since *Youssef*, has not directly considered the *Clark* principle.

64. Nonetheless, the High Court has confirmed the correct approach to sentencing involves a process of instinctive synthesis which requires all relevant factors to be considered before a value judgment can be made about the appropriate sentence. This is distinct from the two tiered approach which was described and criticised by McHugh J in *Markarian v R* (2006) 228 CLR 357 at [51] and [53]:

By two-tier sentencing, I mean the method of sentencing by which a judge first determines a sentence by reference to the "objective circumstances" of the case. This is the first tier of the process. The judge then increases or reduces this hypothetical sentence incrementally or decrementally by reference to other factors, usually, but not always, personal to the accused. This is the second tier.

...

In my view, the judge who purports to compile a benchmark sentence as a starting point inevitably gives undue - even decisive - weight to some only of the factors in the case.

65. For now, *Clark* remains the law in NSW, however, given McCallum J's remark in *Youssef*, practitioners should at least be alive to the possibility of the principle being reconsidered at a future time.

66. One matter that might prompt reconsideration of *Clark* is the prospect of reform to sentencing in NSW. For instance, in May 2017 the NSW government indicated an intention to abolish suspended sentences and to "strengthen" Intensive Corrections

¹⁹ A rule somewhat similar to the *Clark* principle has developed in armed robbery cases: see e.g. *R v Henry* (1999) 46 NSWLR 346 at [113].

Orders.²⁰ If ICOs become more onerous or more closely supervised because of these reforms then the judiciary might need to re-evaluate the appropriateness of such orders as sentencing options.²¹ This might cause re-consideration of the principle in *Clark*, particularly to the way it was applied to ICOs in *Ejefekaire* (referred to above).

Conclusion

67. The above cases demonstrate that the precise application of the *Clark* principle is not always easy to predict. For Legal Aid practitioners responsible for representing clients in such matters there are perhaps three points that can be taken from the above cases.
68. First, practitioners should not too readily assume that an individual offender will necessarily be found to be “substantially involved in drug supply”. Secondly, practitioners should not too readily assume that his or her individual case is not exceptional. Thirdly, practitioners should be alive to the possibility of the *Clark* principle being reconsidered in the future, particularly as sentencing law develops and legal reform continues.

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2 August 2017

²⁰ See fact sheet attached to media release “Tough and smart sentencing for safer communities”, May 2017 at <http://www.justice.nsw.gov.au/Documents/Reforms/sentencing-factsheet.pdf>.

²¹ In *R v Thompson* (unreported, NSWCCA, 4 April 1991) Hunt J rejected a submission that an increase in the maximum number of hours in a Community Service Order should alter the principle in *Clark*.