Gibson v Spencer [2016] NTSC 72

PARTIES:	GIBSON, Stephen Graham v SPENCER, Sean Michael
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 5 of 2016 (21554375)
DELIVERED:	21 DECEMBER 2016
HEARING DATES:	5 APRIL 2016
JUDGMENT OF:	KELLY J
APPEAL FROM:	A WOODCOCK SM

REPRESENTATION:

Counsel:

Appellant:	A Swindley
Respondent:	P Maley

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Maleys Barristers & Solicitors

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gibson v Spencer [2016] NTSC 72
No. JA 5 of 2016 (21554375)

BETWEEN:

STEPHEN GRAHAM GIBSON
Appellant

AND:

SEAN MICHAEL SPENCER
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 21 December 2016)

Background to appeal

[1] On 26 November 2015 the respondent pleaded guilty in the Darwin Court of Summary Jurisdiction to two charges:

(a) possessing fireworks outside the approved period (Count 3); and

(b) unlawful possession of a trafficable quantity of a Schedule 1 drug (cocaine) in a public place (Count 4).

[2] He was convicted on both counts. On Count 3 he was fined $200 with a $150 victim levy. On Count 4 he was sentenced to 12 months imprisonment suspended after two days, backdated to 24 November 2015.

[3] The Crown brings this appeal against the sentence imposed in relation to Count 4. The grounds of appeal argued were:

(a) that the sentence is one which the learned sentencing magistrate could not lawfully impose by reason of s 37(2) and (3) of the *Misuse of Drugs Act* ("the Act"); and

(b) that "the sentencing magistrate erred in finding that there were particular circumstances" as a result of which the sentence is manifestly inadequate.

The agreed facts

[4] The respondent arrived at Darwin Airport at about 1.20pm on 4 November 2015. He was screened by Australian Customs and Border Protection using a drug detection dog, and then searched. Customs officers found a vacuum sealed bag containing 24 grams of cocaine, concealed in a paper folder in his carry-on luggage.

[5] The respondent admitted to police in an electronically recorded interview that he had purchased an ounce (approximately 28 grams) of cocaine in Brisbane on or around 31 October 2015. He said he had consumed some of it over the next several days and then took a commercial flight from Toowoomba to Sydney and then on to Darwin carrying the rest of it.

Submissions at first instance

[6] In submissions in mitigation counsel for the respondent said that a friend of the respondent had arranged for some cocaine to consume at a concert he was in Brisbane to attend, and that he had been given a much larger quantity than he had been expecting.

[7] Count 4 carried a maximum penalty of imprisonment for 14 years. Hence, under s 37(2) of the Act the sentencing magistrate was obliged to sentence the respondent to a term of actual imprisonment unless, having regard to the particular circumstances of the offence or the offender, his Honour was of the opinion that such a penalty should not be imposed. Under s 37(3), if a sentence of actual imprisonment is to be imposed, the Court must not impose a sentence of less than actual imprisonment for 28 days.

[8] At the sentencing hearing, counsel for the respondent submitted that the sentencing magistrate should find that there were "particular circumstances" which would cause his Honour to be of the opinion that the penalty of 28 days actual imprisonment under s 37(2) and (3) should not be imposed. The appellant did not concede that his Honour should be of that opinion, in the particular circumstances of either the offence or the offender.

[9] As the charge involved a trafficable quantity of cocaine, by virtue of s 37(6) of the Act the sentencing magistrate was to presume that the respondent intended to supply the drugs, unless that presumption was rebutted. There was no attempt at the sentencing hearing to rebut that presumption of

supply. Counsel conceded that the respondent's intention was to share the cocaine with his friends. No evidence was called and no submissions were made as to whether the respondent was going to seek financial compensation from his friends for supplying them with the cocaine. (It was an admitted fact that the cocaine had a street value of between $600 and $800 per gram.)

[10] The "particular circumstances" of the offender relied on by counsel for the respondent for the contention that a sentence of actual imprisonment ought not be imposed were that:

(a) the respondent was 42 years old with no prior drug convictions;

(b) he was employed;

(c) he was supporting two children in Darwin and another two children and the mother of those children interstate;[1]

(d) it was an early plea; and

(e) he had spent two days in custody.

[11] The matter was adjourned to enable the Crown to obtain the respondent's South Australian criminal history and it turned out that he had 11 convictions for drug offences as well as convictions for property and dishonesty offences from that State.

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[1] Counsel for the appellant pointed out that at least one of those children was 24 years old and described by counsel as "independent".

[12] Counsel for the respondent modified the submission, pointing out that there had been a ten year gap in offending – while acknowledging the significant prior drug offending.

[13] The particular circumstance of the offending relied upon in support of the contention that a sentence of actual imprisonment should not be imposed was that there was no commercial element to the offence.

Findings by the sentencing magistrate

[14] The learned sentencing magistrate described the respondent's criminal history as "appalling", but said he had put it long behind him. His Honour made the following finding:

> I am satisfied that particular circumstances are made out. Considering the whole of my sentencing discretion, all of the relevant factors under the *Sentencing Act*, I think it [would] be better that you be brought before the Court, given a large suspended sentence, and have that humiliating process rather than to lock you up where you can't work, pay taxes and provide …

[15] His Honour then convicted the respondent and sentenced him to 12 months imprisonment (reduced from 16 months to take account of the guilty plea) suspended after two days for a period of 12 months, backdated two days to take into account time spent in custody on remand. (He also fined the respondent for the fireworks offence. There is no appeal against that sentence.)

Principles applicable to appeals on sentence

[16] It is fundamental that an exercise of sentencing discretion not be disturbed on appeal, unless error in that exercise is shown. The presumption is that there is no error.

[17] An appellate court should not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. It is incumbent on the appellant to show that the sentencing discretion of the learned magistrate was improperly exercised. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error.

Ground 1

[18] Ground 1 is that the sentence on Count 4 could not lawfully be imposed by reason of s 37(2) and (3) of the Act.

[19] Section 37(2) provides:

> In sentencing a person for an offence against this Act the court shall, in the case of an offence for which the maximum penalty provided by this Act (with or without a fine) is:
>
> (a) 7 years imprisonment or more; or

(b) less than 7 years imprisonment but the offence is accompanied by an aggravating circumstance,

impose a sentence requiring the person to serve a term of actual imprisonment unless, having regard to the particular circumstances of the offence or the offender (including the age of the offender where the offender has not attained the age of 21 years) it is of the opinion that such a penalty should not be imposed.

[20] In sentencing the respondent, the learned magistrate said, "I am satisfied that particular circumstances are made out," which is a shorthand expression indicating that he was of the opinion, having regard to the particular circumstances of the offence or the offender (or both), that a sentence of actual imprisonment should not be imposed. Yet the form of the sentence imposed was one which included two days actual imprisonment – albeit, two days that had already been served. This was clearly not intended by the sentencing magistrate. His Honour was simply adopting the usual practice of backdating the commencement of a sentence to reflect time spent in custody.

[21] The difficulty is that this form of sentencing is not permitted by s 37(3) which provides:

Where a court imposes a sentence requiring the serving of a period of actual imprisonment for an offence against this Act, it shall not impose a sentence of less than actual imprisonment for 28 days.

[22] The appeal must be allowed on this ground. The simplest remedy which would reflect the disposition clearly intended by the sentencing magistrate would be to resentence the respondent to the same term of imprisonment to

commence on the date the sentence was imposed (26 November 2015) and direct that it be wholly suspended. First, however, the other ground of appeal must be considered.

Ground 2

[23] The second ground of appeal is a composite one. The appellant contends that the learned sentencing magistrate erred in finding that in the particular circumstances a sentence of actual imprisonment should not be imposed and that the resulting sentence was manifestly inadequate.

[24] Section 37(2) reverses the normal sentencing principle that imprisonment should be a last resort. It provides that imprisonment should follow unless the circumstances of the offence or the offender warrant otherwise, and the onus is on the accused to establish that a sentence of imprisonment should not be imposed.[2] The circumstances need not to be so noteworthy or out of the ordinary as to convey the meaning that only in rare cases will there be found circumstances that fall within the class.[3]

[25] The appellant submitted that even on "the factual matrix" outlined by counsel for the respondent at the sentencing hearing, when considering the objective circumstances as outlined in the agreed facts, and the matters put to his Honour in submissions, "the finding of 'particular circumstances' with

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2 *R v Day* (2004) 14 NTLR 218 at [51]

3 *Duthie v Smith* (1992) 107 FLR 458 at p 467

respect to the offender is without sufficient basis" and, accordingly, the sentence is manifestly inadequate, so as to shock the public conscience.

[26] I reject that submission. I detect no error in the approach adopted by the learned sentencing magistrate. The factors put before the sentencing magistrate by counsel for the respondent were all matters it was appropriate for him to take into account when considering the particular circumstances of the offence and of the respondent and determining whether, in those particular circumstances, a sentence of actual imprisonment should be imposed. His Honour had a wide discretion and was entitled to form the view that those circumstances in combination warranted the imposition of a sentence other than one of actual imprisonment for the reasons given by his Honour. I do not consider the sentence so imposed to be manifestly inadequate.

[27] Although the sentencing discretion is at large once the appeal has been allowed on ground 1, I see no reason to interfere with the sentence imposed by the sentencing magistrate amended to reflect his evident intention.

Orders

[28] The appeal is allowed. The sentence imposed is set aside and in lieu thereof I sentence the respondent to a term of imprisonment for 12 months beginning on 26 November 2015. I direct that the sentence be wholly suspended and fix an operational period of 12 months.