Nayidawawa v Moore; Nabegeyo v Middleton [2007] NTSC 63

PARTIES:	NAYIDAWAWA, ALAN
	v
	MOORE, DAVID
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 32 of 2007 (20703542)
PARTIES:	NABEGEYO, ASHRA
	v
	MIDDLETON, TRACY DALE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 33 of 2007 (20624595)
DELIVERED:	14 November 2007
HEARING DATES:	30 October 2007
JUDGMENT OF:	MILDREN J
APPEAL FROM:	Court of Summary Jurisdiction

CATCHWORDS:

CRIMINAL LAW – appeal against recording of conviction – whether recording a conviction unjust – possession of cannabis in public place – cannabis destined for remote Aboriginal community – principles of general deterrence not to be used to convey a message to a specific ethnic community but to members of the community generally – relevance of fact that matter could be dealt with by infringement notice – first offenders – possibility of harm to others – liability to mandatory minimum prison sentence on subsequent conviction – extent to which offences trivial – weight to be given to general deterrence

Statutes:
Criminal Records (Spent Convictions) Act, s 6(2), s 7(1), s 11, s 12, s 15
Misuse of Drugs Act, s 9(1), s 9(2)(f)(i), s 9(2)(f)(ii), s 20B, s 20B(1), s 20F(b), s 37(1)(a), s 37(2)(b), s 37(3)
Sentencing Act, s 8, s 8(1)(a), s 8(1)(b), s 13

Citations:
Followed:
Attorney-General v Smith [2002] TASSC 10
House v The King (1936) 55 CLR 499
R v Truong [2005] VSCA 147

Referred to:
Cobiac v Liddy (1969) 119 CLR 257
Daniels v The Queen [2007] NTCCA 9
Kyle v Rigby [2007] NTSC 57
Pearce-Grove v Thomas [1998] NTSC 24
R v Briese, ex parte Attorney-General (1998) 1 Qd R 487
Zefi v Police [2003] SASC 218

REPRESENTATION:

Counsel:

Appellant:	J Noud
Respondent:	C Baohm

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

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

Nayidawawa v Moore; Nabegeyo v Middleton [2007] NTSC 63
No. JA 32 of 2007 (20703542); JA 33 of 2007 (20624595)

BETWEEN:

ALAN NAYIDAWAWA
Appellant

AND:

DAVID MOORE
Respondent

AND BETWEEN:

ASHRA NABEGEYO
Appellant

AND:

TRACY DALE MIDDLETON
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 14 November 2007)

[1] These two appeals from the Court of Summary Jurisdiction were heard together. In both cases the appellants had pleaded guilty to a single count of possession of cannabis in a public place, contrary to s 9(1) and s 9(2)(f)(i) of the Misuse of Drugs Act. The maximum penalty for that offence is a fine of $5,000 or imprisonment for two years. The learned Magistrate in each case convicted the appellants and ordered that each of the appellants be

released on a 12 month good behaviour bond pursuant to s 13 of the Sentencing Act.

[2] The grounds of appeal in each case are as follows:

> "1. The learned magistrate erred by elevating the seriousness of the offending after taking into account matters that did not form part of the appellants offending, were not proven to the required standard and deprived the appellants of an opportunity of rebuttal;
>
> 2. The learned magistrate erred by giving insufficient weight to the criteria in Section 8 of the Sentencing Act NT."

Facts in the case against Mr Nayidawawa

[3] On Monday 5 February 2007, the appellant purchased 23 grams of cannabis from an undisclosed person in Darwin. This is a little less than one ounce (1 oz = 28.3 grams). At 3.00 pm the same day, the appellant attended Air Frontier at Darwin Airport in order to board a chartered flight to Goulburn Island. The cannabis was hidden in his underpants. A drug detector dog approached the appellant and indicated that there may be an illicit drug on his person. The appellant handed the cannabis to police. He was arrested and conveyed to Darwin Police Station. He later participated in an electronically recorded interview during which he claimed that the cannabis was for his personal use. At the time, Air Frontier was a public place.

[4] The appellant had no prior convictions of any kind. He has resided at Goulburn Island all of his life. He is 37 years old, married with four children who reside with him. He is a traditional owner of the area. He is

employed doing CDEP work and earns between $400 and $500 per fortnight. He is a member of the Community Council Members Board doing rehabilitation work with a clean-up group within a CDEP program.

[5] The submission of the appellant's counsel was that in all the circumstances a no-conviction bond was appropriate, particularly as the matter could have been disposed of by an infringement notice under s 20B of the Misuse of Drugs Act.

Facts in the case against Ms Nabegeyo

[6] On Tuesday 26 September 2006 the appellant, whilst staying in Darwin, was given 24.5 grams of cannabis by an undisclosed person. She placed the cannabis inside a bag of groceries. At 8.30 am on the same day the appellant caught a taxi to Murin Airways at Darwin Airport where she left the groceries (including the cannabis) and paid for them to be sent to Croker Island. The airline suspected that the groceries contained cannabis and alerted the police. A police drug detector dog indicated the presence of a drug in the grocery bag. Police then located the appellant who gave them permission to search the bag and the cannabis was found. The appellant participated in an electronic record of interview and made admissions. At the time Murin Airways was a public place.

[7] The appellant had no prior convictions of any kind. She was 22 years of age at the time, single and living with her grandparents on Croker Island, where

she has lived all of her life. She had no children. The appellant was unemployed, but keen to find employment.

[8] The submission of the appellant's counsel was that in all the circumstances there should be a no-conviction bond. There was no suggestion that she intended to supply others.

Reasons of the learned Magistrate

[9] In rejecting the applications not to record a conviction the learned Magistrate said that the quantity was not a small amount, that the cannabis was directed to go to a remote Aboriginal community and that notwithstanding that the appellants faced the prospect of a mandatory sentence of imprisonment for another offence against the Act, it was necessary to impose a deterrent sentence despite the appellants' lack of prior convictions because of the "severe significant impacts of cannabis in Aboriginal communities, such as economic impacts, health impacts and the like". In the case of Mr Nayidawawa, the learned Magistrate also referred to the lack of a police presence on Goulburn Island and referred also to 'direct crime results' from cannabis in the communities.

Ground 1 of the appeals

[10] Counsel for the appellants submitted that the remarks of the learned Magistrate indicated that there was a finding of uncharged acts, namely the supply of cannabis to others, in respect of which neither had been charged. I am unable to accept that submission. The comments of the learned

Magistrate do not go that far. Indeed they do not even suggest an intent to supply others. The observations about the impact of cannabis in Aboriginal communities are quite consistent with the charge of possession. There is always a risk that cannabis can come into the possession of others later. It may be stolen; it may be humbugged or shared. The effects of cannabis to which the learned Magistrate referred might be experienced only by the appellant. Using cannabis may encourage others to do the same. It is clear that this is what the learned Magistrate had in mind when he said "that someone taking cannabis into communities is doing a disservice to the community because of the problem that it causes irrespective of whether it's for supply or not, it's just the simple fact that it's there". There is no substance to this submission.

[11] Alternatively it was put that if the learned Magistrate entertained any doubt that the appellants were not intending to use the cannabis solely for their personal use, he should have alerted the appellants to this and given them an opportunity to be heard. I am unable to read into the remarks of the learned Magistrate that he did not accept that the cannabis was intended solely for the appellants' personal use. Ground 1 is therefore not made out.

Ground 2

[12] The submission of the appellants was that the learned Magistrate should have found that the offending was, to some extent, trivial, that the

circumstances of the offenders fell within s 8(1)(a) of the Sentencing Act and that the learned Magistrate erred in deciding to record a conviction.

[13] Section 8 of the Sentencing Act provides:

> "**8. Conviction or non-conviction**
>
> (1) In deciding whether or not to record a conviction, a court shall have regard to the circumstances of the case including –
>
> (a) the character, antecedents, age, health or mental condition of the offender;
>
> (b) the extent, if any, to which the offence is of a trivial nature; or
>
> (c) the extent, if any, to which the offence was committed under extenuating circumstances.
>
> (2) Except as otherwise provided by this or any other Act, a finding of guilt without the recording of a conviction shall not be taken to be a conviction for any purpose.
>
> (3) A finding of guilt without the recording of a conviction –
>
> (a) does not prevent a court from making any other order that it is authorised to make in consequence of the finding by this or any other Act; and
>
> (b) has the same effect as if one had been recorded for the purpose of –
>
> (i) appeals against sentence;
>
> (ii) proceedings for variation or breach of sentence;

(iii) proceedings against the offender for a subsequent offence; or

(iv) subsequent proceedings against the offender for the same offence."

[14] In deciding whether or not to record a conviction under s 8, the learned Magistrate undoubtedly had a discretion. Clearly there were circumstances in each case which the learned Magistrate might have found warranted the exercise of his discretion in the appellants' favour. It is well established that on an appeal against a discretionary judgment, it is not sufficient that the appeal court might have exercised the discretion differently. What must be shown is that the learned Magistrate erred in the exercise of his or her discretion. As was said by Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 504-505:

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[15] A matter urged by counsel for the appellant, Mr Noud, is that the learned Magistrate failed to find that the offending was, if not trivial, at least relatively so. In support of this contention, Mr Noud, pointed out that s 8(1)(b) does not require a finding that the offence is trivial. The words used by the draftsman are 'the extent, if any, to which the offence is of a trivial nature'. Further, each of the sub-placita of s 8(1) (a), (b) and (c) are not cumulative, but are connected by the word "or". Therefore, so it was submitted, if an offence is at the low end of the scale of seriousness, without necessarily being trivial, it may still warrant the exercise of the discretion in favour of the appellant. I accept this submission. Even if the offence was not at the low end of the scale, s 8 would allow the exercise of the discretion having regard to, for example, the character and age of the offender under s 8(1)(a) and the circumstances of the case generally: see *Cobiac v Liddy* (1969) 119 CLR 257 at 265; 275-276. In that particular case, the offence was not trivial, but the High Court still upheld the Magistrate's decision not to record a conviction.

[16] In further support of this submission, Mr Noud submitted that it was relevant to take into account that these offences could have been dealt with by an infringement notice under s 20B(1) of the Misuse of Drugs Act. Clearly that is so, notwithstanding that the maximum penalty is imprisonment for two years. The learned Magistrate was made aware of this during submissions; he said that this was anomalous. What I glean from this observation is that the learned Magistrate was of the view that s 20B(1)

should be confined to possession cases where only a fine can be imposed, *viz* offences against s 9(1) and s 9(2)(f)(ii). However, in the end it was recognised by the Court that the Act would have permitted the matters to be dealt with in that way, so no error is shown.

[17] I think that the fact that the offending might have been dealt with by an infringement notice and the payment of an amount of $200 is an indication by the legislature that the mere fact that the possession occurred in a public place did not preclude the matter being dealt with without the stigma of a conviction. Although the fact that a matter may have been dealt with by an infringement notice does not preclude the Court from imposing any penalty which the Court thinks fit (see s 20F(b)), if the Court is of the view that the matter ought to have been dealt with by an infringement notice this is a matter which the Court should take into account in deciding whether or not to record a conviction: *Zefi v Police* [2003] SASC 218 at [19], [20] per Gray J; but the reverse is not to be implied: see *Pearce-Grove v Thomas* [1998] NTSC 24 per Thomas J where her Honour did not record a conviction where the quantity of the drug exceeded 50 grams and, therefore, could not have been dealt with by an infringement notice. It is also pertinent to observe that the quantity of the cannabis involved in each case was less than half the amount which could have attracted an infringement notice. Clearly in order to impose a conviction in a case where the matter could have been dealt with by an infringement notice, something more must be shown than that the quantity of the cannabis was less than 50 grams and that the

possession occurred in a public place. That "something more" might be that the offender has a relevant previous conviction for drug offending or anything else in the whole of the circumstances of the offence or the offender which warranted a conviction being recorded: *c.f. Kyle v Rigby* [2007] NTSC 57 per Olsson AJ.

[18] The learned Magistrate was aware that the recording of a conviction for the offence exposed the appellants to the mandatory minimum sentencing provisions contained in the Act for a subsequent offence against the Act. It is not clear to me whether or not the Court was aware that this also flowed from a finding of guilt without the recording of a conviction.
Section 37(1)(a) of the Act defines an "aggravating circumstance" to mean "a second or subsequent offence against this Act". The effect of an aggravating circumstance is that it exposes the offender to the possibility of a mandatory minimum term of 28 days for a subsequent offence against the Act: see s 37(2)(b) and s 37(3).

[19] The learned Magistrate did not refer, in his sentencing remarks, to the other well-known consequences of recording a conviction. However, no specific point was made of that by Mr Noud and I would not have thought that an experienced Magistrate would be unaware of them. In *R v Briese, ex parte Attorney-General* (1998) 1 Qd R 487 at 491 the Court of Appeal of Queensland emphasised the need of courts to be aware of the ramifications of a public nature of the recording of a conviction and their potential effects. These include potential prospects of employment, insurers and

various government departments including the Department of Immigration and in the case of drug offences they are likely to include overseas immigration officials. In deciding whether or not to record a conviction the Court must weigh up the public interest, and the need for an official record to be made of the commission of the offence, against the beneficial nature to the offender of a conviction not being recorded and in the case of a crime involving a victim, whether or not the victim might feel vindicated by the non-recording of a conviction: *Attorney-General v Smith* [2002] TASSC 10 at [26].

[20] In considering the public interest, it is important to bear in mind that a conviction does not become spent under the Criminal Records (Spent Convictions) Act, in the case of an adult, for a period of 10 years and even then only if in the meantime the offender has not been convicted of an offence punishable by imprisonment: Criminal Records (Spent Convictions) Act s 6(2); whereas if a Court proceeds to discharge a person without recording a conviction, the conviction is spent immediately: s 7(1). The effect of a spent conviction is *inter alia* that subject to certain exceptions set out in s 15 of the Act, the person to whom it relates is not required to reveal the conviction (s 11) and it is an offence for someone with access to the records to reveal the conviction (s 12). This does not prevent spent convictions being brought to the notice of a court when sentencing a person for an offence.

[21] Mr Noud submitted that the learned Magistrate gave too much weight to the need to protect Aboriginal communities from the effects of cannabis when there was no evidence from which it could be inferred that the cannabis would be used by anyone else. Counsel for the respondent, Ms Baohm, referred me to the observations of the Court of Criminal Appeal in *Daniels v The Queen* [2007] NTCCA 9 where the Court referred at length to the problems caused by cannabis use in Aboriginal communities and indicated that, so far as trafficking is concerned, penalties need to be increased. Their Honours' remarks about the harm caused by cannabis use are not limited to the spread of cannabis by traffickers. It is clear that, as their Honours said at [37], "The negative effects of the consumption of cannabis not only impact upon the individuals concerned, but upon the community as a whole".

[22] In *R v Truong* [2005] VSCA 147, the Victorian Court of Appeal said that the principle of general deterrence is concerned with the engagement in prohibited conducted by members of the community generally and should not be used to convey a message to a specific ethnic community by the imposition of a deterrent sentence upon an offender who is regarded as an appropriate vehicle essentially because he or she is a member of that community. However, that principle does not operate here for two reasons. First, a deterrent sentence was not imposed upon either of the appellants because they are members of a remote Aboriginal community. The fact that the appellants are both Aboriginals is clearly irrelevant. A deterrent sentence may be warranted regardless of whether or not the appellants were

Aborigines. Secondly, the principle does not operate to prevent the Courts from imposing a deterrent sentence in order to protect remote Aboriginal communities in particular need of the protection of the criminal law.

[23] The learned Magistrate was entitled to take that into account, but in this case, although the intent was to bring the cannabis into the communities, in fact the cannabis never left Darwin. In any event, I do not think that their Honours' remarks in *Daniels* would preclude a court in a proper case from dealing with the matter under s 8 of the Sentencing Act, particularly as a finding of guilt would in itself expose an offender to a possible mandatory minimum sentence of imprisonment even many years hence for a further offence. That at least serves the purpose of specific deterrence.

Conclusion

[24] In my opinion, no specific error has been shown and the only question is whether the failure to exercise the discretion in favour of the appellants could be described as "unreasonable or plainly unjust" so that error might be inferred.

[25] In the case of Mr Nayidawawa, although he had no prior convictions, his intent was to smuggle the cannabis into a community, which as the learned Magistrate observed, had no police presence. As he lived with his wife and four children, there was greater potential for harm to others had he succeeded. As a senior man, his criminality set a bad example in his community. He was caught red-handed. An element of general deterrence

was justified. I bear in mind that although the possession occurred in a public place it was not visible to others, that the amount of the cannabis was less than half the trafficable quantity, but it was not insignificant. His future prospects of employment do not appear to be likely to be affected. I do not think, taking into account all of the circumstances including his plea of guilty, I can conclude that the learned Magistrate's decision was unreasonable or unjust. There were factors present which warranted the course taken. I would dismiss his appeal.

[26] The case of Ms Nabegeyo is, I think, quite different. She not only had no convictions but she was a relatively young offender being only 22 years of age. She lived with her grandparents and had no children. There is no evidence that her possession of the cannabis might cause a potential risk to children or others. Her plea of guilty was made in circumstances where there might have been difficulty in proving that she knew that the cannabis was in her groceries without her admissions. A conviction is likely to have a not insignificant effect on her future prospects of employment. In her case I think less weight should have been given to general deterrence because of her age and plea of guilty. The amount of the cannabis was less than half the trafficable quantity and it was not visible to others. I think that it was unreasonable or unjust to record a conviction in all of the circumstances. I would therefore allow her appeal, set aside the sentencing order imposed by the learned Magistrate and, in lieu thereof, order pursuant to s 11 of the Sentencing Act that without recording a conviction she be released upon her

entering into a bond in the sum of $1,000 O/R to be of good behaviour for a period of 12 months calculated from 30 May 2007.
