Harding v Kendrick [2013] NTSC 52

PARTIES:	**HARDING, Marc** v **KENDRICK, Suzanne**
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 29 of 2013 (21314126)
DELIVERED:	22 August 2013
HEARING DATES:	29 July 2013
JUDGMENT OF:	HILEY J

CATCHWORDS:

CRIMINAL LAW – sentencing - justices appeal - unlawful possession of cannabis – whether conviction should have been recorded – whether sentence manifestly excessive – *Sentencing Act* (NT) s 8 – consequences of recording a conviction – no error - appeal dismissed.

Misuse of Drugs Act (NT) s 9, s 23.
Sentencing Act (NT) s 8.

Hesseen v Burgoyne [2003] NTSC 47; *The Queen v Briese* (1997) 92 A Crim R 75, applied.

Clarke v The Queen [2009] NTCCA 5; *Dinsdale v The Queen* (2000) 202 CLR 321, *Hampton v The Queen* [2008] NTCCA 5, referred to.

REPRESENTATION:

Counsel:

Appellant	Koulla Roussos
Respondent:	Imogen Taylor

Solicitors:

Appellant:	
Respondent:	Director of Public Prosecutions

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

Harding v Kendrick [2013] NTSC 52
No JA 29 of 2013 (21314126)

BETWEEN:

MARC HARDING
Appellant

AND:

SUZANNE KENDRICK
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 22 August 2013)

[1] This is an appeal against a sentence imposed by the Court of Summary Jurisdiction on 17th April 2013 for an offence committed on 2nd April 2013 at Alice Springs, namely, the unlawful possession of cannabis plant material, a dangerous drug specified in Schedule 2 of the *Misuse of Drugs Act* (the **Act**), contrary to s 9(1)(f)(ii) of that Act. The learned magistrate convicted the appellant and imposed a $400 fine with a victims levy of $40.

[2] The appellant was riding his motorcycle on the Stuart Highway near Alice Springs when he was apprehended at a vehicle checkpoint. His motorcycle was searched by police, and 14 grams of cannabis was found in his back pack.

[3] The appellant pleaded guilty at the first opportunity and submissions were made on his behalf on 17th April.

[4] The appellant appeals on two grounds:

(a) that the learned magistrate erred in law in recording a conviction; and

(b) that the sentence was manifestly excessive.

[5] The appellant’s primary contention was that no conviction should have been entered.

[6] Section 8 of the *Sentencing Act 1995* (NT) provides as follows:

> "(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."

Hearing on 17 April 2013

[7] The appellant was represented at the hearing by counsel. Counsel submitted that the matter should be dealt with “on a parallel with an infringement notice." Counsel pointed out that in many cases the police officer would deal with a matter such as this by writing out and handing to an offender an infringement notice, which could be complied with by the payment of a $200 fine plus the victims levy. In such circumstances no conviction would be entered. She said that the only reason the matter had been brought before

the court was because the motor vehicle was stopped at the road-block which was in a public place. Although the complainant asserted that the offence occurred in a public place the appellant was not charged with being in possession of the cannabis in a public place (under s 9(1)(f)(i)), which would have attracted a higher penalty.

[8] Counsel informed the court that the appellant was cooperative with the police at the scene. Counsel also stated that the cannabis was for his own personal use, and was in fact rolled up into joints.

[9] The respondent provided the learned magistrate with information concerning the appellant's criminal history. The most recent convictions were in 1998 and related to an unregistered and uninsured motor vehicle. Prior to that the appellant had been convicted of some other offences, in 1986 and 1987, which convictions have now been "spent" in light of the *Spent Convictions Act 2009* (SA). None of his convictions have been in relation to drugs.

[10] Counsel for the appellant submitted to the learned magistrate that the appellant was "concerned about the effect that a conviction may have on him. He is a chap who travels internationally for his business purposes. He manages a couple of companies, but he ought to be treated no differently to anyone else and anyone else in this situation would, in my submission, be given in these circumstances the benefit of a no conviction disposition and a fine."

[11] His Honour responded by saying that the appellant was “not a cleanskin though.” Counsel submitted that he is (a “cleanskin”) in relation to this type of offending, and also that he has not been convicted of any kind of criminal offence since the late 1990s. She added: "So he may not be a cleanskin, but he's certainly someone who’s demonstrated subsequent to those offences that criminal offending is really not what he gets up to."

[12] The police prosecutor submitted that a non-conviction would not be appropriate, particularly in light of the appellant’s criminal history, albeit interstate.

[13] His Honour then said:

> "It's my view that it's never a good reason to not record a conviction because a person tends to travel overseas. That amounts to a submission that you want to hide something from foreign governments, who are entitled to know the background of people that they're checking, but he does have no record in relation to these matters, but has a record in relation to other matters."

[14] His Honour then said: "Taking all things into account, I think it's appropriate that he be convicted. So he’s found guilty and convicted. There’ll be a fine of $400 with a victims levy of $40."

The appeal

[15] Consistent with the submissions referred to in [10] above, the written Outline of Submissions on behalf of the Appellant seemed to rely upon the effect that a conviction may have upon the appellant’s ability to travel overseas. However at the hearing of the appeal counsel was critical of what

his Honour had said about this topic, quoted in [13] above, and contended that this amounted to an irrelevant consideration and thus amounted to error on his part.

[16] Although his Honour made those comments just before announcing his decision I do not think that they played a significant role in his reasoning process. Rather I think that they were made in response to the submissions that had been made on behalf of the appellant as to the effect that a conviction may have on him as a person who travels internationally for business purposes.

[17] In any event there was no evidence or contention put to the learned magistrate about the specific effect of a conviction upon the appellant's ability to travel. In particular there was no reason for the appellant to be treated any differently to any other person similarly circumstanced in relation to the possible effect of a conviction upon his ability to travel.

[18] The appellant also pointed out that the recording of a conviction is a significant event and cited authorities to the effect that one of the reasons for enabling a court to not enter a conviction is because of the consequences that the recording of a conviction often has.

[19] These include *Hesseen v Burgoyne* [2003] NTSC 47 and *Thompson v Thomas* [2003] NTSC 108 at [12], both of which quoted from and applied what was said by the Court of Criminal Appeal of Queensland in *The Queen v Briese* (1997) 92 A Crim R 75.

[20] *Hesseen v Burgoyne* was an appeal against sentence where the appellant had been convicted of and sentenced for two offences, one of which was unlawful possession of goods worth about $8000 reasonably suspected of having been stolen, and the other being the unlawful possession of 0.1 of a gram of cannabis plant material found in a container in her house. She had spent three days in custody before appearing before a magistrate, and she pleaded guilty at the first opportunity. She was 19 years of age, had no prior convictions and had produced a number of references that demonstrated that she was a responsible person of good character. She appealed against the sentence and the recording of the convictions.

[21] At [13] Martin CJ said: "Her Worship noted it was only a small quantity and that the appellant was forthright with police about her possession of it. She does not appear to have separately considered whether that charge should be dealt with under s 8 and proceeded to impose the fine."

[22] As in the present case, the appellant had pointed out that she "could have been dealt with by way of infringement notice given by police, since the amount in her possession was less than 50 grams. In that event a penalty of $200 was payable and when paid, shall be deemed to have expiated the offence. No conviction would have been recorded." However Martin CJ said that "that places no restraint upon a court if the matter proceeds by way of summons."[1]

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[1] *Hesseen v Burgoyne* [2003] NTSC 47 at [13].

[23] Martin CJ went on to say, from [14]:

> "[14] The extent to which an offence may be found to be of a trivial nature was dealt with by me in some detail in *Gorey v Winzar*, unreported, 4 April 2001, 1 NTJ (2001) at p 307 commencing at p 311. An assessment of whether something is trivial can only be made in light of the particular circumstances of the offence, which must be looked at objectively without regard to the result or consequences of finding that it was not trivial. A number of the authorities in this regard were reviewed.
>
> [15] As to the broader circumstances of the offence, the court is to pay regard to the extent to which it was committed under extenuating circumstances. Such circumstances are those that lessen the seeming magnitude of guilt or, in other words, which tend to diminish the offender's culpability. To be extenuating the circumstances must be such as to excuse to some degree the commission of the offence charged and it is the extent of those circumstances to which the court is to have regard.
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> [16] Section 8 requires the court to have regard to all of the circumstances of the case not just the enumerated matters in deciding whether or not to record a conviction. Accordingly, notwithstanding that the offender may be of good character without prior convictions and of an age which might usually attract leniency and give rise to consideration of the application of s 8, the court must nevertheless take into account the nature of the offending involved.
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> [17] A finding of guilty without the recording of a conviction is not to be taken to be a conviction for any purpose (s 8(b)). As observed by the Court of Appeal of Queensland in *Briese* (1997) 92 A Crim R 75 and 79 the effect of such an order is capable of considerable effect in the community:
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>> "Persons who may have an interest in knowing the truth in such matters include potential employers, insurers, and various government departments including the immigration department."
>
> Their Honours go on to observe that, on the other hand, the beneficial nature of such an order to the offender needs to be kept in view:
>
>> "It is reasonable to think that this power has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be

> so grave that the offender will be continually punished in the future well after appropriate punishment has been received."
>
> [18] Considerations such as those were advanced by counsel for the appellant on the basis that a conviction for either or both of these offences could have a serious detrimental effect upon the appellant's employment opportunities and so on.
>
> [19] Although it is recognised that a conviction for a dishonestly offence may have a detrimental effect upon the appellant's employment prospects and perhaps in other ways, nevertheless there is no evidence in her case of any adverse consequence which would result from the recording of a conviction. The appellant would always have the opportunity of explaining the circumstances of the offence to whomsoever may be concerned about it. The court record could normally be expected to show the penalty inflicted and that is likely to convey to the interested enquirer the view the court took as to the seriousness of the offending and the circumstances of the offender at the time. Production of these reasons for the orders which are about to be made will also serve to elucidate the position.
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> [20] Judicial minds may well differ as to the significance to be placed upon any one or more of the enumerated factors in s 8 as well as the other circumstances of the case, and in ultimately deciding whether or not to record a conviction the sentencer is exercising a judicial discretion. An appellate court will only interfere if there is some reason for regarding that the discretion conferred upon the Magistrate was improperly exercised and the Magistrate fell into error (*Mason v Pryce* (1988) 34 A Crim R 1). It may not be obvious how the sentencer fell into error, but if the sentence is unreasonable or plainly unjust, the appellate court may interfere (*House v The King* (1936) 55 CLR 499; *Dinsdale v The Queen* (2000) 202 CLR 321).
>
> [21] In my opinion her Worship erred in not accepting the submission that there be no conviction recorded in respect of the possession of .1 of a gram of cannabis. With respect to her Worship, it does not appear she gave separate consideration to that offence and, viewed objectively, it cannot be regarded as anything other than of a trivial nature."[2]

[24] Counsel for the respondent pointed out that any offence under s 9(1) of the Act, including this offence, is defined as a "crime" and may be dealt with on

[2] *Hesseen v Burgoyne* [2003] NTSC 47 at [21].

indictment. Counsel acknowledged however that an offence of this kind, namely an offence against s 9(1)(f) of the Act, would normally be dealt with summarily.[3]

[25] Having regard to the circumstances set out in s 8(1) of the *Sentencing Act:*

(a) there was little evidence or other material concerning the good character of the appellant, and although he had no prior drug convictions he was not a "cleanskin"[4];

(b) the offence was not trivial[5] – although the cannabis may well have been for the personal use of the appellant, the quantity was approximately one third of a trafficable quantity (and 140 times the amount involved in *Hesseen v Burgoyne*);

(c) there is no suggestion that the offence was committed under extenuating circumstances.

[26] Having regard to the well established principles relating to appeals against exercises of discretion in *House v The King* (1935) 55 CLR 499, and appeals against sentence in cases such as *Dinsdale v The Queen* (2000) 202 CLR 321, *Hampton v The Queen* [2008] NTCCA 5 at [45] and *Clarke v The Queen* [2009] NTCCA 5, I do not consider that the learned magistrate erred

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3 See ss 23(2) and 23(4) of the Act.

4 Cf *Hales v Adams* [2005] NTSC 86 at [17] where Southwood J suggested that mature age offenders who had previously led blameless lives may benefit from an exercise of the discretion not to record a conviction.

5 See *Tambyrajah v Gablonski* (2004) 147 A Crim R 18 per Le Miere J at 21-22 for a discussion about triviality of an offence.

in acting on a wrong principle or that the sentence, in particular the entry of the conviction, was manifestly excessive.

[27] The appeal is dismissed.

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