

*Bakos v The Queen* [2006] NTCCA 5

PARTIES: BAKOS, RONNIE  
v  
THE QUEEN

TITLE OF COURT: COURT OF CRIMINAL APPEAL OF  
THE NORTHERN TERRITORY

JURISDICTION: CRIMINAL APPEAL FROM THE  
SUPREME COURT EXERCISING  
TERRITORY JURISDICTION

FILE NO: NO. CA 29/2005 (20502273)

DELIVERED: 3 MARCH 2006

HEARING DATES: 17 FEBRUARY 2006

JUDGMENT OF: ANGEL, MILDREN & RILEY JJ

**CATCHWORDS:**

STATUTES – INTERPRETATION- CRIMINAL LAW– DRUG OFFENCES  
- SENTENCE

Appeal against sentence – *Misuse of Drugs Act* (NT) – Section 37(5) -  
Defendant drug dependent person - Whether mitigating – Drug dependence  
at time of offending a circumstance of the offending for the purpose of  
section 37(2) *Misuse of Drugs Act* (NT) –Appeal allowed.

*Tramontano v R* (2002) 131 ACrimR 1; *Miller v Burgoyne* (2004) 150  
ACrimR 7, applied.

**REPRESENTATION:**

*Counsel:*

Appellant: S Cox QC  
Respondent: Dr N Rogers

*Solicitors:*

Appellant: Northern Territory Legal Aid  
Commission  
Respondent: Office of Director of Public  
Prosecutions

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

*Bakos v The Queen* [2006] NTCCA 5  
No. CA 29/2005 (20502273)

BETWEEN:

**RONNIE BAKOS**

Appellant

AND:

**THE QUEEN**

Respondent

CORAM: ANGEL, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 3 March 2006)

**THE COURT:**

- [1] On 17 February 2006 at the conclusion of the hearing of this matter we allowed this appeal by leave against sentence and ordered that the non-parole period fixed by the judge at first instance be set aside. We further ordered that the unserved balance of the head sentence be suspended on condition that the appellant place himself under the supervision of the Director of Correctional Services for a period of 18 months and that the suspension of the sentence be conditional upon the appellant obeying all lawful directions of the Director of Correctional Services, undertaking such urine analysis tests as may from time to time be required by the Director of Correctional Services and such drug counselling as may be recommended by

the Director of Correctional Services, and further, not using any illicit drugs during the period of 18 months. We fixed an operative period for the purposes of s 40(6) Sentencing Act (NT) of 18 months from 17 February 2006.

- [2] What follows are our reasons for making those orders.
- [3] On 7 December 2005 the appellant pleaded guilty to three offences under the Misuse of Drugs Act (NT). The three offences comprised the unlawful possession of a trafficable quantity of cocaine (9.167 grams) contrary to s 9(1) and (2)(b)(ii) Misuse of Drugs Act (NT) for which the maximum penalty is seven years imprisonment; the unlawful possession of a trafficable quantity of heroin (7.1264 grams) contrary to s 9(1) and (2)(b)(ii) Misuse of Drugs Act (NT) for which the maximum penalty is seven years imprisonment; and finally, the unlawful supply of heroin to another person contrary to s 5(1) & (2)(a)(ii) Misuse of Drugs Act (NT) for which the maximum penalty is 14 years imprisonment. For the purposes of the Misuse of Drugs Act (NT) a trafficable quantity of heroin and of cocaine is more than two grams but less than 40 grams. On 15 December 2005 the appellant was sentenced to an aggregate sentence of 16 months imprisonment with a non-parole period of eight months.
- [4] We granted leave to the appellant to add a third ground of appeal as follows:
- “that the learned sentencing judge erred in finding that s 37(5) [Misuse of Drugs Act] only applied to an offender who is drug dependent at the time of sentencing.”

- [5] The learned sentencing judge held “that s 37(5) speaks at the time of plea and not at the time of the offending.” Both the appellant and the Crown agreed that this statement is clearly in error. We agree.
- [6] Section 37(2) Misuse of Drugs Act (NT) provides that a term of actual imprisonment of not less than 28 days is to be imposed for an offence carrying a maximum penalty of seven years or more, or of less than seven years accompanied by an aggravating circumstance, unless having regard to the particular circumstances of the offence or the offender, the Court is of the opinion that such a penalty should not be imposed. Section 37(2) applied to the appellant because of prior drug convictions (an aggravating circumstance) and also be reason of his conviction in respect of the unlawful supply of heroin.
- [7] Section 37(5) Misuse of Drugs Act (NT) provides that where it is proved to the satisfaction of the court that the offender is a drug dependent person, that fact should be taken to be a circumstance of the offending for the purpose of s 37(2).
- [8] We agree with the submission that if the sentencer is satisfied that the defendant is a drug dependent person that is a circumstance of the offender which may be taken into account in the decision whether or not to impose the otherwise mandatory 28 day period of actual imprisonment. The legislation recognises that drug addiction may be a matter of mitigation and

in some circumstances it may be relevant to the moral culpability of the offender committing the offence: see *Tramontano v R* (2002) 131 ACrimR 1.

- [9] Although s 37(5) uses the present tense, in our view, it is clear that s 37(5) speaks of the time of the offending. As was pointed out in the course of submissions, were it otherwise, an offender who is drug dependent at the time of the offence would be acting against his interests if he were to take up a rehabilitation program prior to sentence, that is, an offender would be encouraged to continue abusing drugs until the time of sentence so as to take advantage of s 37(5). Such a result would be both manifestly absurd and unreasonable.
- [10] Given the learned sentencing judge's error the matter fell for resentencing.
- [11] At the time of his arrest the appellant was a drug dependent person and had been so for some eight years. At the time of sentence some 11 months later he had successfully completed the CREDIT Program. He was using methadone, a dangerous drug pursuant to Schedule 2 of Misuse of Drugs Act (NT) which was prescribed on a gradually decreasing level. He had been heroin and cocaine free for some 10 months.
- [12] The appellant has fully co-operated with the Police. The appellant indicated an early plea of guilty. There was a hand-up committal. At the time of the offending he was a drug dependent person. The drugs were predominantly for his own use. The supply count consisted of a single act of supply of .1 gram of heroin for \$100.00 to a member of his partner's family who was a

heroin user. The \$100.00 was to cover his costs. It was not a case of supply for profit. The only evidence of supply was the appellant's own admission to Police. At the time of his arrest he was in gainful employment for the first time since 2001. He had undertaken counselling for grief and was in a supportive and happy relationship and was genuinely committed to his own recovery from long-standing drug addiction. The appellant had not previously been sentenced to imprisonment. He did have prior drug convictions which had been dealt with by way of a bond or fines. The largest fine imposed previously was \$500.00.

[13] Whilst we disagree with the submission that the head sentence of 16 months imprisonment was manifestly excessive, we agree with the submission that this was not a case that required a non-parole period. In particular we agree that the appellant's drug dependency, the connection between that dependency and the offending, that there was no motivation for profit, his co-operation with the authorities, his genuine and remarkably successful rehabilitation which had been effected to the time of sentence, and since, justified this Court making the orders it did. In our opinion general deterrence is achieved by confirming the head sentence of 16 months imprisonment and the suspension of the balance of the sentence is justified not only having regard to the mitigating factors to which we have referred but in particular bearing in mind the appellant's successful completion of the Credit NT Scheme. In this regard we fully concur with the reasons for judgment of Olsson AJ in *Miller v Burgoyne* (2004) 150 ACrimR 7.