Hua v Dennien [2012] NTSC 17

PARTIES:	HUA, Quyen v DENNIEN, Jonathon
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 23 of 11 (21105628)
DELIVERED:	15 March 2012
HEARING DATES:	5 January 2012 and 13 February 2012
JUDGMENT OF:	BARR J
APPEAL FROM:	SMITH SM

CATCHWORDS:

APPEAL – APPEAL AGAINST RECORDING OF CONVICTIONS – SENTENCING DISCRETION – MANIFEST EXCESS

Whether learned Magistrate was in error by recording convictions – appellant was a director of a community store – criminal history an "assessable matter" for grant/renewal of a community store licence – no error in exercise of sentencing discretion – sentence not manifestly excessive

Northern Territory National Emergency Response Act 2007 (Cth) s 93(1), s 93(1)(e), s 94

Criminal Records (Spent Convictions) Act (NT)
Misuse of Drugs Act (NT) s 37(6)
Sentencing Act (NT) s 6, s 8

Cranssen v R (1936) 55 CLR 509; *Mace v Hales* [2002] NTSC 15; *Midjumbani v Moore* [2009] NTSC 27, followed

Carnese v The Queen [2009] NTCCA 8; *Daniels v The Queen* [2007] NTCCA 9; *Hales v Adams* [2005] NTSC 86, considered

REPRESENTATION:

Counsel:

Appellant:	T Meehan
Respondent:	M Nathan

Solicitors:

Appellant:	Bosscher Lawyers
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Bar1202
Number of pages:	18

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Hua v Dennien [2012] NTSC 17
No. JA 23 of 2011 (21105628)

BETWEEN:

QUYEN HUA
Appellant:

AND:

JONATHON DENNIEN
Respondent:

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 15 March 2012)

Appeal against severity of sentence

[1] The appellant argues that the magistrate sitting in the Court of Summary Jurisdiction erred in the exercise of his sentencing discretion by recording convictions against the appellant on his plea of guilty to unlawfully supplying cannabis to another person and to unlawfully possessing a traffickable quantity of cannabis plant material.

[2] The offence of unlawfully supplying cannabis carried a maximum penalty of imprisonment for 5 years or 85 penalty units. The offence of unlawfully possessing a traffickable quantity of cannabis also carried a maximum penalty of imprisonment for 5 years or 85 penalty units. A penalty unit is

$130. The maximum fine for each charge was thus $11,050. The magistrate convicted the appellant and imposed an aggregate fine of $600 (plus victims' levies). His Honour declined to order forfeiture of the appellant's motor vehicle.

[3] The appellant contends that the recording of convictions rendered the sentence manifestly excessive. That is the first ground of appeal.

The facts

[4] The facts on which the magistrate sentenced the appellant can be briefly stated.

[5] The appellant had lived in the Hodgson Downs Community (Miniyeri) for approximately 12 years. He was a part owner[1] and resident manager of the community store.

[6] On Saturday 12 February 2011 the appellant drove to Darwin in his Land Rover vehicle with three other occupants, one of whom was Felicia Daylight. The party arrived in Darwin at about 4.00 pm and the appellant and Ms Daylight booked into a hotel near the city centre.

[7] In the afternoon of Sunday 13 February the appellant and Ms Daylight attended several residences in the northern suburbs of Darwin in an attempt to purchase cannabis. The appellant eventually found a supplier in The Narrows from whom he purchased 112.19 grams of cannabis, divided into

[1] More accurately, the appellant was a shareholder and director of the company which owned and operated the community store.

four sandwich-size clipseal bags. The purchase price for the overall quantity was $1,350. The appellant subsequently sold one of the clipseal bags to Ms Daylight, a quantity of approximately 30 grams, for $500.

[8] That sale to Ms Daylight represented a profit to the appellant, as the magistrate commented in his sentencing remarks. His Honour's reasoning was as follows:

> "It seems to me that if the packages were each seen as the equivalent of an ounce in the circumstances I would have expected Mr Hua should have been paid and been prepared to accept in the vicinity of $335 to $350 or at the most, taking into account the amount of 30 grams as opposed to the usual 28 grams correlating to an ounce, perhaps up to $400."

[9] On the basis of that reasoning, the Magistrate did not accept the submission by the appellant's counsel that the supply by the appellant to Ms Daylight was only a 'technical supply' in the sense that both parties were purchasers from the one supplier and that the appellant was simply accepting from Ms Daylight a pro rata payment for her share of the joint purchase. The Magistrate reasoned, correctly in my view, that the appellant purchased the entire amount and then sold a part of it to Ms Daylight at a profit.

[10] At midday or thereabouts on Monday 14 February the appellant and Ms Daylight concealed the cannabis in a battery compartment under the front passenger seat of the appellant's vehicle, and then left Darwin to travel to Katherine. At about 3.00 pm police stopped the vehicle on the Stuart Highway just north of Katherine. The appellant agreed to a screening of his

vehicle by the police with the aid of a drug detector dog, and a search of the vehicle revealed the four clipseal bags of cannabis. Police also found $500 in cash.

[11] On these facts the appellant was charged with the unlawful supply of cannabis to Felicia Daylight, as well as the unlawful possession of cannabis plant material specified to be 112.19 grams. Notwithstanding the admitted sale of approximately one quarter of the cannabis to Ms Daylight, the appellant was still charged with, and pleaded guilty to, possession of the entire amount.

[12] Under the *Misuse of Drugs Act*, the threshold for a traffickable quantity of cannabis plant material is 50 grams. The threshold for a commercial quantity of cannabis plant material is 500 grams.

[13] In sentencing the appellant for unlawful possession of cannabis plant material, the court was required by s 37(6) *Misuse of Drugs Act* to presume that the appellant intended to supply the cannabis plant material. That presumption applied unless the contrary were proved.

[14] The appellant did not give evidence. However, it was an admitted fact that the appellant had sold approximately 30 grams of cannabis plant material to Ms Daylight. With respect to the 82.19 grams (approximately) then notionally remaining, it was put to the court and accepted by the magistrate that the cannabis was for the appellant's own use for the most part, but that

he would probably have shared it with some unknown persons should the circumstances have arisen.[2]

[15] Thus, although the appellant did not rebut the statutory presumption as to intention to supply (and did not attempt to do so), the circumstances of the deemed supply were viewed by the court in a way which was favourable to the appellant given the findings summarised in par [8] and par [9] above as to the appellant's having supplied for profit to Ms Daylight.

[16] Counsel for the appellant made strong submissions to the magistrate in an attempt to persuade his Honour that a conviction should not be recorded, and it appears from the sentencing remarks that the magistrate accepted most of the matters put by the appellant's counsel.

Relevant sentencing remarks

[17] In the course of detailed and carefully considered sentencing remarks, the magistrate went to some length to deal with all the matters put to him in mitigation, as the following transcript extract demonstrates:

> "Mr Hua is a man of 48 years of age with no priors. He comes from what might best be described as a difficult background. His story reflects a similar story to those I've heard, I suppose, many times before over the years of the process for Vietnamese people leaving Vietnam. He left Vietnam under cover of night. He ended up in Malaysia for about a year and eventually as a young man, I think at the age of 15 or 16, arrived in Australia with very little English, if

[2] See Sentencing Remarks, Transcript 17 May 2011 p 2.6: "I can accept that he probably would have shared it with some unknown persons should the circumstances have arisen. Whether that be his work colleagues or some other persons in the community, I am unable to say." See also T 5.1: "I find that most of the cannabis that was possessed by Mr Hua … and by that I'm referring to the 112 odd grams less the 30 grams, was for his own use, but he was likely to have supplied it by way of sharing it with unknown others."

any, and set about trying to make a life in Australia. He did that very successfully.

He got himself an education. He learned English. He began to work as a chef. Eventually he married a started a business. He suffered the sort of reverses of fortune that are not uncommon to any person in the community. His business failed. He lost his wife. He lost his house. Confronting that adversity, he set about reversing his misfortune.

He moved to the Northern Territory. He took up work firstly as a farmhand, then as a chef, then moved to Miniyeri where he's worked for 12 years in partnership with two others at the Miniyeri Store. I was told about the debts that he repaid. He strikes me as a man who is a hard worker, who is determined to make the best of his circumstances and he has confronted those sorts of things which, to be frank, most people somewhere along the way have to confront, but he has done it well.

On the material before me, it seems having moved to Miniyeri, he settled into the community. He has been there for a significant period of time. He runs what, on the face of it, appears to be a successful store. He is accepted by the community. I'm told that he attends ceremony and that his attendance at ceremony has been a little more significant than simply attending the ceremony. He's been given a trusted role in caring for a young man who's being initiated.

I was provided two references from the community which I've marked D1 and D2. The first of those references referred specifically to investigations conducted by a group of people who are members of the Miniyeri community and from their investigations they were able to say that no information had been provided to them that suggested that Mr Hua has any involvement in supplying ganga for profit in Miniyeri. I note, I suppose, that the indication was 'supplying for profit'. It might be that the terms were used advisedly. They're consistent with the finding I've already made that he perhaps shares from time to time with unknown persons.

The second reference that was provided is a very good reference for Mr Hua. It sets out the description of a man who has worked very hard to make himself part of the community in Miniyeri to the extent, it seems to me, that someone from a very different culture to the

majority of those who live in Miniyeri can join in with the usual behaviours in Miniyeri.

It is a matter to be taken significantly into account that he's a person who is regarded highly by that community. He is said in this reference to have worked relentlessly to provide that community with a wider grocery range, better services, and he has trained numerous local community members in the store. He respects the elders. He's very popular among the children. He often helps locals who have difficulties reading and writing with the Centrelink forms.

Both financially and physically he is said to support the ceremonies, funerals, school excursions and hospital patients, just to name a few of the things. Those are all things that assist me in taking the view that he's a person of good character.

Further, off work, he always helps people to search for their family members who are stranded in the bush due to vehicle breakdowns. In August last year he was said to have even made what was described as a sacrificial decision to upgrade the community store at his own cost to comply with the community store licensing requirements. I'm not sure as to whether it can necessarily be regarded as a sacrificial decision. I presume that the store still has to make a profit, so I would except that those costs ultimately will be recouped, but nevertheless it's very clear that the community would appear to be happy with the way the store is run.

Going further, these members of the community who prepared this document have said that over the past they've had other store keepers, although I presume not for some time given Mr Hua's long period there, and he's regarded as having offered the best service and care and made an important contribution to the community. Members of the community are aware of the charges against him. Nevertheless, they've indicated that they are very hopeful that they want him to stay and to work in Hodgson Downs. That reference has been signed by a number of people. I won't go through each of those people."

[18] The magistrate then dealt with a submission made by counsel for the appellant that, because of their concern that the Miniyeri community store licence was at risk of not being renewed as a result of the appellant's

offending, the appellant's co-directors had resolved to remove him as a director of the company holding the store licence which, it was said, had the effect that the appellant was no longer working in the community store. It was submitted that recording a conviction carried a real risk that the appellant's involvement would be "caused to cease"; that he could no longer live and work in the community; and that he could no longer be associated with carrying on the business of the community store.[3] The appellant's co-directors' concern arose from s 93(1) of the *Northern Territory National Emergency Response Act 2007* (Cth), which listed various "assessable matters" which, under s 94 of that Act, the Secretary or an authorised officer of the Commonwealth must have regard to in deciding whether or not to grant a community store licence, or in deciding whether to revoke, vary, or impose conditions upon a community store. One such assessable matter (s 93(1)(e)) was "the character of the manager, employees and other persons associated with carrying on the business of the community store, including, but not limited to, whether the manager, employees or other persons have a criminal history".

[19] In response to the 'store licence' submission, the magistrate made the following sentencing remarks:

> "It would appear that the issues to do with the licence holding of the store and how it's run is a discretionary matter. Nevertheless, it would be – it seems obvious enough to me that all matters are to be taken into account by those who are responsible for decision making and I would presume that one of the matters they would take into

[3] Transcript 16 May 2011, p 21.7.

> account, although it's unclear to what degree, is whether there is a conviction or not conviction, but it does not seem that on the material before me it can be put higher than that.
>
> One of the matters that apparently can be taken into account is the wishes of the community and those wishes have at least been indicated to some extent in the materials I have and one would hope that ultimately those sorts of things would be taken (*into account*) by those who are responsible for making the decisions concerning licensing. Ultimately, those matters are not matters for me. Nevertheless, they are matters I can give some consideration to."

[20] The magistrate was correct when he said that the fact of the appellant's conviction was one of the matters, and one of many matters, which the Secretary or authorised officer could take into account. I note that the reference to "assessable matters" covers a wide range of considerations including the quantity, range and quality of food, drink and grocery items in stock to meet the needs of the particular community; the capacity of the store manager to promote "better nutritional outcomes" through stock placement, store layout and floor displays; the quality of the retail management practices of the store manager; the financial practices of the owner and manager of the store in relation to the sustainable operation of the store; and the store's record of compliance with the requirements of the income management regime.

[21] Counsel for the appellant had also sought favourable consideration on the basis of the appellant's assistance to the investigating authorities. There was no evidence as to the significance of the information provided by the appellant to the police, and the magistrate dealt with the submission by

giving the appellant credit for the fact that he had provided assistance in making full admissions and providing all information that could reasonably be expected of him. He also found that the appellant had not attempted to hide anything from the police in terms of information relating to the supply of cannabis to the appellant.

[22] In the absence of evidence or information provided to the Court of Summary Jurisdiction as to the utility and significance of the information provided to police by the appellant, the approach of the magistrate was reasonable and appropriate. There was no error in the exercise of the sentencing discretion.

[23] At a point well into his sentencing remarks, the magistrate focused his consideration on whether or not the appellant should be dealt with by way of a "without conviction disposition".[4]

[24] The magistrate referred to s 8 *Sentencing Act* and to the specific circumstances which he had to take into account in deciding whether or not to record a conviction. He then referred to s 6 *Sentencing Act* in relation to determining the character of the appellant. He referred to the absence of prior convictions; the appellant's good reputation; and the appellant's significant contributions to the community. The magistrate also referred to the decision of the Court of Criminal Appeal in *Carnese v The Queen*,[5] and in particular par [16] and par [17] of that decision. The magistrate observed that in *Carnese* the sentencing Judge accepted that the appellant had thought

---

4 Transcript 17 May 2011, p 7.7.
5 *Carnese v The Queen* [20091 NTCCA 8.

that he was acting lawfully in possessing steroids for a lawful purpose (in that case, to administer to his dogs). However, the magistrate noted that the appellant in the present case did not believe that his possession of cannabis was lawful. The magistrate continued:

> "In this case, there is no question that Mr Hua was well and truly aware that the possession of cannabis was something that the law forbade. The issue that I have to grapple with is that on the side of Mr Hua's character, it's very clear that he's a person otherwise of good character. He's a person, apart from this matter, who one would wish to encourage to be and remain in the community that he's in.
>
> On the other hand, the amount of cannabis that he sourced was, while not at the top end of the scale, a reasonably significant amount."

[25] A short while later his Honour concluded :

> "… Mr Hua is a man who comes before the court as a person of good character. I … have been sorely tempted to give him a disposition which is without conviction. (*However*) it seems to me that with an amount of cannabis involved of this amount, the matters put before me would have to be, in terms of the issues to deal with the supply in particular, of such a kind that they demonstrated absolutely that there was no other supply.
>
> The plea to the supply causes me sufficient concern that I am not prepared to take the course requested by Mr Hua's counsel and fine Mr Hua without conviction. Taking into account, however, the very significant matters that are before me, the fine that I will impose upon him is far less than I would ordinarily impose. ….".

[26] As can be seen from the above extracts, the magistrate fully appreciated the tension in the sentencing exercise he was carrying out between prior good character and rehabilitation, on the one hand, and the seriousness of the dangerous drugs charges on the other.

[27] It has been noted by the Court of Criminal Appeal that cannabis is a dangerous drug and that the supply and use of cannabis is the cause of considerable harm and dysfunction in the community. In *Daniels v The Queen*,[6] the Court said:

> "[25] The criminal courts of the Northern Territory are all too familiar with the devastating effects of cannabis within Aboriginal communities across the Territory. It is not correct to view such offending as victimless. There are countless victims. They are the users of cannabis within the Aboriginal communities and others in those communities who are adversely affected by the devastating impacts upon the users. In particular, the children of heavy users suffer dreadfully.
>
> [26] Over many years, sentencing Judges and this Court have repeatedly emphasised the gravity of the criminal conduct involved in the distribution of cannabis within Aboriginal communities. Offenders have been on notice that significant terms of imprisonment will be imposed for such offending. "

[28] The appellant was not charged with unlawfully supplying cannabis to a person in an indigenous community, although on the facts it was clear that the cannabis he possessed was to be taken into an Aboriginal community. The magistrate appreciated the distinction,[7] and it is not argued on appeal that he infringed the principle in *R v De Simoni*.[8] There was no suggestion that the appellant intended commercial or extensive dealing in cannabis in a way which would make the above extracted remarks of particular relevance to him. In my view, however, the magistrate was still justified in assessing the appellant's offending as serious, and in considering the amount of

---

6 [2007] NTCCA 9.
7 Submissions, Transcript 16 May 2011 p 13; Sentencing Remarks, Transcript 17 May 2011 p 9.9.
8 *R v De Simoni* (1981) 147 CLR 383 at 389 per Gibbs CJ.

cannabis “a reasonably significant amount”, it being more than double the threshold for a trafficable quantity.

Arguments on appeal

[29] The appellant's argument that recording convictions rendered the sentence manifestly excessive was based mainly on the effect which, it was said, convictions would have upon the appellant's role in the community store, explained in par [18] to par [20] above: “The recording of convictions against the appellant was unreasonable or plainly unjust in that it amounted to a significant additional penalty beyond fines by jeopardising his position in the community store.”[9]

[30] The respondent to this appeal has conceded[10] that a finding of guilt without the court proceeding to conviction would have been an immediate “spent conviction”, and that as a result the spent conviction could not have been considered or taken into account on any consideration of the appellant’s “character” or “criminal history”.

[31] However, the appellant's case was not that his conviction would result in the loss of, or non-renewal of the licence to operate the community store. The

---

9 Appellant's Outline of Submissions on Appeal, paragraph 17.

10 The concession was made on the basis of ss 7(2) and 11 *Criminal Records (Spent Convictions) Act* (NT). Although I accept the concession for present purposes, I have not determined whether, and if so, to what extent the Northern Territory legislation is affected by Part VIIC of the *Crimes Act 1914* (Cth). However, if the magistrate had decided not to record convictions, then the court’s disposition would have resulted in an immediate spent conviction under the Northern Territory legislation – see s 7(2). However, it would not become a spent conviction under Commonwealth legislation until a 10 year “waiting period” had expired – see s 83ZM(2)(b) *Crimes Act 1914* (Cth). The issue would then be whether the Territory legislation would prevail. In that context s 85ZP(3) *Crimes Act* 1914 (Cth) suggests that the Commonwealth legislation does not authorise a person or body to take into account a conviction for an offence if to do so would contravene ‘State law’ (which includes the law of the Northern Territory). That suggests that the Secretary could not take the non-conviction disposition into account because that would be a contravention of s 11 *Criminal Records (Spent Convictions) Act* (NT).

facts were not argued to be directly analogous to those in *Carnese*[11] where the conviction would have resulted in automatic loss of a licence under the *Private Security Act* (NT). Rather, the appellant relied on s 93(1)(e) of the *Northern Territory National Emergency Response Act 2007* (Cth) to suggest that the community store licence was at risk unless the appellant removed himself (or was removed by his fellow directors) from all involvement or connection with the company which operated the community store under the licence, a harsh outcome after 12 years of positive involvement in the Minyerri community on the part of the appellant. The situation was therefore more comparable with that in *Hales v Adams,*[12] where the recording of the conviction did not result in the immediate revocation of the respondent's motor dealers licence under the *Consumer Affairs and Fair Trading Act* (NT), but simply gave the Commissioner for Consumer Affairs a basis for considering whether the licence should be revoked. An additional difference was the 'derivative' aspect: the store licence was not held by the appellant but by a company controlled by the appellant and others. The contention was that, although the licence might be saved, it would be at the expense of the appellant's ongoing involvement.

[32] The magistrate was told in the course of the appellant's counsel's submissions that, if a conviction were recorded, the appellant could not be a director of the licensee company and could not work in the store.[13] His

---

11 *Carnese v The Queen* [2009] NTCCA 8, at [25] and [42].
12 *Hales v Adams* [2005] NTSC 86 at [18].
13 Submissions, Transcript 16 May 2011 p 9.2.

Honour was clearly aware of those contended matters when sentencing the appellant the next day, as evidenced by the remarks extracted in par [19] above. However, it is apparent that the magistrate did not accept as absolute fact the proposition that if the appellant had a conviction recorded against him, he could not be a director and could not work in the store. His Honour correctly appreciated that the fact of a conviction recorded against the appellant would be one of the matters which would be taken into account in relation to the renewal of the store licence, but considered that it could not be "put higher than that". The magistrate appreciated that the character of the manager, employees and other persons associated with the business of the community store was one of many "assessable matters" to be considered, and that the criminal history of the appellant (if he remained the manager, employee or simply a person "associated with carrying on the business of the community store") was likewise a consideration, albeit one expressly referred to.

[33] Notwithstanding the co-directors' decision to remove the appellant for fear that his offending might result in the revocation of the store licence if he stayed on, the submissions made by the appellant's counsel to the magistrate were speculative. There was no evidence as to whether the co-directors' fears in respect of the store licence were justified and that the removal of the appellant was reasonably necessary to ensure that the store licence was not revoked. If the appellant were to remain associated with the business of the community store, it was unclear what effect his conviction on drugs

charges would have on the assessment of his character by the Secretary or authorised officer, bearing in mind the many positive things he had done for the community and its residents over many years. It was consequently also unclear as to whether the assessment of the appellant's character would have any and if so what effect on the licence renewal.

[34] I do not accept the appellant's argument that the recording of convictions was unreasonable or unjust in jeopardising the appellant's ongoing involvement in the community store. There was no error on the part of the magistrate in relation to these matters.

Further ground

[35] As mentioned above in par [24], in considering whether or not he would record a conviction, the magistrate said:

> "I must say I have been sorely tempted to give him a disposition which is without conviction. It seems to me that with an amount of cannabis involved of this amount, the matters put before me would have to be, in terms of the issues to deal with the supply, in particular, such a kind that they demonstrated absolutely that there was no other supply".

[36] The appellant argues as an additional ground of appeal that the above statement, in particular the words "demonstrated absolutely", reveals error on the part of the magistrate "by constraining himself artificially and contrary to law when considering whether to record a conviction." It was submitted that the appropriate test to be applied by the magistrate in the circumstances was proof on the balance of probabilities, but that the

magistrate actually imposed upon the appellant a burden of proof significantly higher, even higher than that of 'beyond reasonable doubt'.

[37] The appellant's submission misconstrues the magistrate's remarks. Immediately after the passage extracted in the previous paragraph, his Honour continued: "The plea to the supply causes me sufficient concern that I am not prepared to take the course requested by Mr Hua's counsel and fine Mr Hua without conviction." As I interpret the remarks overall, in their proper context, the magistrate was indicating no more than that the admitted past supply to Ms Daylight and the likely future supply to other persons were factors which influenced him to exercise his discretion to record a conviction rather than to not record a conviction. The supply aspects were ultimately the difference between a non conviction disposition and the conviction disposition imposed. There was no upwards escalation of the standard of proof.

[38] The principles applicable to an appeal against sentence are well known. The court will only interfere with a magistrate's sentencing discretion if it is satisfied that the sentence was manifestly excessive, for example: *Mace v Hales,*[14] or that error in the exercise of the sentencing discretion is shown, such as acting on a wrong principle, or misunderstanding or wrongly assessing some salient feature of the evidence: *Cranssen v R.*[15] The

[14] [2002] NTSC 15.
[15] (1936) 55 CLR 509 at 519 - 520.

presumption is that there is no error: *Midjumbani v Moore*.[16] The appellant has not established error in the exercise of the sentencing discretion, and has failed to show that the recording of convictions made the sentence manifestly excessive. The appeal must therefore fail.

Conclusion

[39] The appeal is dismissed.

---

[16] [2009] NTSC 27.