Chizwell v The Queen [2012] NTCCA 10

PARTIES:	**CHIZWELL, Chiz**
	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:	CA 14 of 2011 (21121438)
DELIVERED:	17 April 2012
HEARING DATES:	5 April 2012
JUDGMENT OF:	RILEY CJ, KELLY & BARR JJ
APPEALED FROM:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW - appeal against sentence - failure to correctly exercise discretion to suspend sentence - appeal dismissed - *Dinsdale v The Queen* (2000) 202 CLR 321

CRIMINAL LAW - appeal against sentence - whether sentence was manifestly excessive - exercise of discretion to suspend sentence - prospects of rehabilitation - appeal dismissed - *Dinsdale v The Queen* (2000) 202 CLR 321

CRIMINAL LAW - appeal against sentence - factors to be taken into account - good character - plea of guilty - appeal dismissed

Sentencing Act (NT) s 40(1)

Dinsdale v The Queen (2000) 202 CLR 321, followed.

REPRESENTATION:

Counsel:

Appellant:	In person
Amicus Curiae:	T Berkley and L Bennett
Respondent:	P Usher

Solicitors:

Appellant:	In person
Respondent:	Officer of the 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

Chizwell v The Queen [2012] NTCCA 10

No. CA 14 of 2011 (21121438)

BETWEEN:

CHIZ CHIZWELL
Appellant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, KELLY & BARR JJ

REASONS FOR JUDGMENT

(Delivered 17 April 2012)

The Court:

[1] On 5 April 2012 this Court dismissed the appellant's appeal against sentence. These are the reasons for so doing.

The sentence

[2] On 19 August 2011 the matter came before the Supreme Court pursuant to an ex officio indictment. The appellant pleaded guilty to having taken part in the supply of cannabis to another at Alice Springs and was sentenced to imprisonment for three years suspended after he had served a period of imprisonment of 18 months. The suspension was subject to the following conditions:

(a) for a period of six months following his release from prison, the appellant is to be under the supervision of the Director of Correctional Services or his delegate and is to obey all reasonable directions as to residence, reporting and associates;

(b) for a period of six months after his release from prison, the appellant is not to consume cannabis and he is to submit himself to urinalysis tests as directed by his Probation and Parole Officer; and

(c) under s 40(6) of the *Sentencing Act* the appellant is not to commit another offence punishable by a term of imprisonment for a period of two years after his release from prison.

The circumstances of the offending

[3] The appellant lived with his partner at Herbert near Darwin. The sentencing judge was told that he travelled from Darwin to Adelaide on 29 June 2011 to meet up with friends and to obtain cannabis. Whilst in Adelaide he came into possession of 17 double cryovaced sealed bags of cannabis plant

material and four "joints" of cannabis plant material. The packages of cannabis plant material weighed a total of 7919.16 g.

[4] The appellant was arrested on the Stuart Highway north of Alice Springs on 3 July 2011. The packages of cannabis were found under the tray liner of the utility vehicle that he had been driving. They had been secreted within the lining to minimise the risk of detection whilst the cannabis was being transported from Adelaide to Darwin. The four "joints" were in the cabin of the vehicle.

[5] The appellant participated in a formal record of interview in which he acknowledged that he was aware there was cannabis in the rear of his vehicle but he said he did not know how much cannabis was present. He thought there was approximately two pounds which in the metric scale is 900 grams. He advised police he did not pay for the cannabis. He said he did not intend to sell any cannabis however he may have given some to friends. He claimed not to have put the cannabis into the vehicle and he would not comment upon the identity of the person who did so.

[6] It was accepted that the "joints" were for his personal use and this offending was dealt with separately from the matter now under consideration.

[7] The value of the cannabis plant material would depend upon whether it was sold and if so on what basis. If it was sold by the pound it would realise between $78,000 and $95,000. If sold by the ounce it would realise between $98,000 and $127,000. If sold in gram lots it would realise about $237,000

and if sold in remote locations outside of the Darwin region it could realise around $791,000.

Ground 1: The learned sentencing judge imposed a sentence that in all the circumstances was manifestly excessive.

[8] There was no challenge to the head sentence. The first complaint of the appellant was that the sentencing judge required the appellant to serve 50% of the sentence in prison before the term was suspended. It was submitted that this was inconsistent with normal sentencing practice in the Northern Territory for a first offender and that the median range for a suspended sentence was up to one third of the sentence being required to be served.

[9] In our opinion the material placed before this Court did not establish that there was a "normal sentencing practice" of the kind suggested.

[10] Where a court sentences an offender to a term of imprisonment of not more than five years the court has the power to suspend the sentence "where it is satisfied that it is desirable to do so in the circumstances".[1] Some guidance as to the application of the provision is to be found in *Dinsdale v The Queen*[2] where Kirby J said:

> There is a line of authority in Australian courts that suggests that the primary consideration will be the effect such an order will have on rehabilitation of the offender, which will achieve the protection of the community which the sentence of imprisonment itself is designed to attain. But most such statements are qualified by judicial recognition that other factors may be taken into account. The point is therefore largely one of emphasis.

[1] S 40(1) of the *Sentencing Act*.
[2] (2000) 202 CLR 321 at 347- 348.

> …
>
> In my view, to limit the exercise of the discretion to suspend a sentence of imprisonment by reference wholly, mainly or specially, to the effect which suspension would have on rehabilitation of the offender would constitute an error. There is nothing in the grant of the power, as expressed in the applicable legislation, to justify confining its availability in such a way. Had the legislature intended to limit the discretion to suspend by reference to such a consideration, it could have done so.
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> …
>
> Moreover, the scheme of the legislation, and the two steps which s76(1) and (2) of the Act requires, suggest, as a matter of construction, that the same considerations that are relevant for the imposition of the term of imprisonment must be revisited in determining whether to suspend a term. This means that it is necessary to look again at all the matters relevant to the circumstances of the offence as well as those personal to the offender.
>
> …
>
> Adopting this approach, then, permits attention to be given not only to the circumstances personal to the offender but also to the objective features of the offence. These may, in a particular case, outweigh the personal considerations of rehabilitation and mercy. They may require that the prison sentence be immediately served, despite mitigating personal considerations.

[11] In the present case the sentencing judge gave weight to the serious nature of the offending and also to the prior good character of the appellant and to his prospects of rehabilitation which, in his Honour's assessment, were "reasonable". We see no error on the part of the sentencing judge in this regard.

[12] Further, the appellant complained that the sentencing judge erred in imposing "parole like" restrictions on the appellant for the period of six

months after his release. It was submitted that the conditions were unnecessarily onerous on the appellant given his prospects of rehabilitation.

[13] The conditions imposed upon the appellant as part of the suspended sentence were, in our opinion, entirely appropriate.

[14] The first of those was that the appellant be under supervision for a period of six months and obey all reasonable directions as to residence, reporting and associates. This is a common provision found in many suspended sentences. The appellant had admitted his involvement in serious drug offending. He gave no acceptable explanation for his involvement in such offending and provided no credible information as to the surrounding circumstances of the offending. As his Honour observed the Court was left in a position of not knowing the full nature of the appellant's involvement. The reasons for his involvement and the extent of his involvement beyond the matters referred to above were not disclosed. In those circumstances a condition requiring supervision of the kind imposed was obviously required.

[15] The second condition was that the appellant was not to consume cannabis and was to submit himself for urinalysis as directed by his Probation and Parole officer. The consumption of cannabis is an unlawful activity. It could not be said that a condition not to consume cannabis was onerous. In addition there was, in this case, a sound basis for imposing the condition regarding cannabis. The appellant admitted that he was a consumer of cannabis and that he socialised with people who consume cannabis. It was

submitted on his behalf that over a period of some two years his cannabis consumption had increased significantly and had become a problem. The Court was told that he believed in retrospect that he may have been addicted at the time. His offending involved the supply of 7919.16 g of cannabis, some of which he claimed was for himself. In our opinion, the condition that he undergo appropriate testing was obviously required in all the circumstances.

Ground 2: The learned sentencing judge erred in law in that he failed to give sufficient weight to the appellant's prior positive good character.

[16] In the sentencing remarks the sentencing judge observed:

> The offender is a first offender. Prior to this offending, he had a positively good reputation both with regard to his businesses and within his community. In the past, the offender has organised a number of community events for the purpose of raising money for various charities. He has also campaigned against child abuse. He had a reputation as an honest, dependable, reliable, trustworthy and helpful person. He held free woodwork classes for men on his premises. All of the offender's referees stated that the offending was completely out of character.

And later:

> I have also had regard to the offender’s prospects of rehabilitation and to his prior positively good character. The offender is entitled to some credit for his years of service to his community. I consider the offender’s prospects of rehabilitation to be reasonable. But for his prior good character, I would have fixed a non-parole period.

[17] The appellant submitted that, whilst his Honour acknowledged the positive good character of the appellant and that it was relevant to determining an appropriate sentence, there was a failure to give sufficient weight to good

character. The requirement that the appellant serve 50% of the head sentence before suspension was said to be too great a period.

[18] In addition it was argued that the appellant's prospects of rehabilitation were incorrectly assessed by his Honour as "reasonable" rather than as "excellent". It was submitted that the sentencing judge placed too much weight on general deterrence and, "effectively and impermissibly", punished the appellant for failing to disclose the names of the persons from whom he had obtained the cannabis. In this regard the judge stated:

> In the circumstances, the Court is left in the position of not knowing the full nature of the offender's involvement in this venture. It can be inferred, however, that the adventure was premeditated and organised and that the offender stood to make a significant commercial gain from his activities.
>
> Further, it cannot be said that the offender has accepted full responsibility for his conduct. Rather, he has attempted to minimise his involvement.

[19] The period of actual imprisonment to be served before the sentence was suspended reflected the assessment of his Honour as to the minimum term necessary to reflect the seriousness of the offending. Whilst acknowledging and giving the appellant credit for his contribution to the community the judge was left with a dearth of information regarding the circumstances of, and the motivation for, the appellant’s involvement in such serious offending. His Honour was correct to regard the appellant’s prospects of rehabilitation with caution in those circumstances. There was no suggestion in the sentencing remarks that the appellant was being punished for not

naming others involved in the offending. The submission for the appellant to that effect is without foundation.

Ground 3: The learned sentencing judge erred in law in that he failed to give sufficient weight to the appellant's early plea of guilty.

[20] The appellant pleaded to an ex officio indictment. The offending occurred on 3 July 2011 and he was sentenced on 19 August 2011. The appellant admitted his offending on the day of his arrest and he entered a plea at the first available opportunity. It was submitted that he displayed a clear willingness to facilitate the course of justice. It was also submitted that his Honour was in error in concluding that the appellant showed no remorse.

[21] Counsel who appeared on behalf of the appellant at the sentencing hearing provided an explanation for the offending. The Court was told that the appellant had travelled to Adelaide to purchase cannabis for his own use. Whilst he was in Adelaide he was introduced to some people who offered to provide him with cannabis for his own use and also undertook to service his utility without charge if he took a shipment of cannabis from Adelaide to Darwin. It was suggested that the appellant then provided his utility to those people and they placed the cannabis in the location in which it was subsequently found by police. This explanation was challenged by the Crown. The appellant elected not to give evidence when provided with the opportunity to do so. His Honour rejected the explanation stating that "the suggested arrangements beggar belief" and gave reasons for the conclusions reached. Those reasons have not been challenged.

[22] As we have noted the sentencing judge concluded that the Court was left in the position of not knowing the full nature of the involvement of the offender in this serious offending. His Honour concluded that in light of the implausible explanation provided on behalf of the offender it could not be said that the offender had accepted full responsibility for his conduct and also that he had attempted to minimise his involvement. The judge observed that the plea was largely of utilitarian value in that it saved considerable time and expense. It was noted that the appellant was caught "in the act" and that he took steps to minimise the consequences for himself. His Honour reduced the sentence that would have been imposed on the appellant by nine months to reflect the credit due for the plea of guilty. This was a discount of 20%. In our opinion the discount provided by the learned judge was appropriate in all the circumstances.

[23] For these reasons the appeal was dismissed.
