Musgrave v Liyawanga & Ors; Hales v Stewart [2004] NTSC 53

PARTIES:	MUSGRAVE, Raymond Mark v LIYAWANGA, Carole; JOHN-FORREST, Caroline; STEWART, Andrea; CARTER, Roslyn; ANKIN, Sarah Lyn; BROWN, Ollie AND HALES, Peter William v STEWART, Anthea
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	JA 43, 41, 44, 42, 40, 39 of 2004 (20409621, 20406090, 20407269, 20403933, 20407213, 20406505) and JA 45 (20404057)
DELIVERED:	6 October 2004
HEARING DATES:	20 September 2004
JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

Appeals by Crown against sentence – Misuse of Drugs Act s 5(1) – unlawful supply of cannabis – plea of guilty by seven respondents – no convictions recorded – whether sentences imposed by Magistrate were manifestly inadequate – same sentence imposed upon all respondents – questions of parity and consistency in sentencing – individual circumstances of the offending and the offender must always be considered – appeals dismissed.

Misuse of Drug Act (NT) s 5(1)

REPRESENTATION:

Counsel:

Appellant:	Ms A Barnett
Respondent:	Mr S Barlow

Solicitors:

Appellant:	DPP
Respondent:	NAALAS

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

Musgrave v Liyawanga & Ors; Hales v Stewart [2004] NTSC 53
Nos. JA 43, 41, 44, 42, 40, 39 of 2004
(20409621, 20406090, 20407269, 20403933, 20407213, 20406505)
No JA45 (20404057)

BETWEEN:

RAYMOND MARK MUSGRAVE
Appellant

AND:

CAROL LIYAWANGA
First Respondent
CAROLINE JOHN-FORREST
Second Respondent
ANDREA STEWART
Third Respondent
ROSLYN CARTER
Fourth Respondent
SARAH LYN ANKIN
Fifth Respondent
OLLIE BROWN
Sixth Respondent

AND

PETER WILLIAM HALES
Appellant

AND:

ANTHEA STEWART
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 6 October 2004)

Introduction

[1] The Director of Public Prosecutions ("the Director") has appealed against penalties imposed upon seven respondents by a Magistrate sitting at Maningrida on 29 and 30 April 2004. In each instance the respondents pleaded guilty to one count of unlawfully supplying cannabis to another person contrary to s 5(1) of the Misuse of Drugs Act 1990. The penalties were identical. Without recording a conviction, the learned Magistrate released each respondent on their own recognizance in the amount of $500 to be of good behaviour for a period of 12 months. The Director submitted that each penalty was manifestly inadequate because the Magistrate erred in declining to record a conviction.

[2] Immediately before the first of the seven respondents pleaded guilty, the Magistrate heard the plea of guilty of Ms Michelle Martin who was the co-offender of the respondent Ms Carol Liyawanga. Ms Martin pleaded guilty to one count of unlawfully supplying cannabis to another person and, without recording a conviction, the Magistrate released Ms Martin on a bond in her own recognizance of $500 to be of good behaviour for a period of 12 months. The Director submitted that the Magistrate erred in proceeding on the basis that by reason of "parity" the same penalty should be imposed upon the respondents. It is convenient, therefore, to set out first the circumstances of the offending by Ms Martin.

Michelle Martin

[3] On 18 March 2004 in Maningrida Ms Martin received a telephone call from her sister and co-offender, Ms Liyawanga, who was then in Darwin. Ms Liyawanga said she was sending an ounce of cannabis from Darwin the following day by mail. She asked Ms Martin to sell the cannabis at Maningrida and send half of the money Ms Liyawanga in to Darwin. Ms Martin agreed.

[4] The following day Ms Martin attended at the Maningrida airport and picked up a parcel of groceries containing the cannabis sent by Ms Liyawanga. Ms Martin travelled back to her outstation near Maningrida where she divided the cannabis into 20 satchels. Over the next couple of days people from Maningrida travelled to the outstation and bought cannabis from Ms Martin. Each of the 20 satchels was sold for $50 resulting in a total of $1,000 in proceeds. Ms Martin sent $500 to her sister in Darwin and kept the remaining $500 which she spent at the Maningrida shop.

[5] Acting on information received, police asked Ms Martin to attend at the Maningrida Police Station. On 2 April 2004 Ms Martin participated in an audio record of interview with the police and admitted the facts.

[6] After the prosecutor had outlined the facts, the Magistrate asked the prosecutor what he, the Magistrate, had been doing with first time offenders like Ms Martin. His Worship made the observation that “We had quite a lot

last time" and then said "I just think there should be some uniformity but I can't remember what I've been doing."

[7] The prosecutor responded that he could not remember what had been done previously and added that in the case of Ms Martin there were "a couple of special things".

[8] The submissions of counsel for Ms Martin disclosed that she was 41 years of age and had not previously offended. She became involved in the offending at the request of her sister because her sister needed money for a plane ticket home to Maningrida and to go shopping in Darwin. Ms Martin agreed to the plan partly to assist her sister, but also because as a mother of five children she was in financial need herself.

[9] The Magistrate was informed that Ms Martin had given exceptional service to the community. She had been a teacher within the community for the previous 16 years and given significant service to the community by working at the outstation. She was embarrassed by her offending and was determined not to offend again.

[10] Counsel put to the Magistrate that the prosecutor did not oppose the imposition of a bond without the recording of a conviction. The prosecutor agreed and observed that there were special considerations involved. He advised the Magistrate that there were 14 homelands around Maningrida and Ms Martin looked after them. He noted there were up to 14 children involved. He added that she had been doing this work for 16 years.

Ms Martin's character, as demonstrated by her service to the community, established a case for declining to record a conviction.

[11] It was against that background that the Magistrate determined not to record a conviction and imposed the bond.

Carol Liyawanga

[12] As mentioned in connection with Ms Martin, it was the respondent, Ms Carol Liyawanga who initiated the offending by telephoning Ms Martin and asking her sister to sell the cannabis at Maningrida. The respondent concealed the cannabis in a parcel of groceries and sent the parcel to the Maningrida airport. After Ms Martin sold the cannabis she sent $500 to the respondent who spent it on new clothes and a return air ticket to Maningrida. At Maningrida the respondent attended at the police station and made admissions to the offending.

[13] The respondent had not previously offended.

[14] When the prosecutor had finished outlining the facts, the following exchange occurred:

> "His Worship: It's the same disposition then for parity in other reasons, I guess.
>
> Prosecutor: Your Worship, I might just venture to submit that the prosecution has no objection to principles of parity applying in this particular situation, although this particular situation doesn't apply to other people necessarily with the same charges."

[15] In imposing sentence the Magistrate stated briefly that in the light of the explanation he had heard he did not propose to say anything at all.

[16] In my opinion, the prosecutor erred in relying upon the principles of parity to effectively concede that the penalty imposed upon Ms Martin should be imposed upon Ms Liyawanga. It was Ms Liyawanga who initiated the criminal venture. She provided the cannabis. Apart from the fact that the respondent had not previously offended, nothing was known about the respondent's background. Counsel for the respondent had not made any submissions. Nothing was known about the circumstances in which the respondent decided to initiate the venture. Nothing had been put to the Magistrate as to the circumstances in which the respondent came to be in possession of the cannabis that she sent to her sister. The character of Ms Martin, including her contribution to the community, had been an important factor in the exercise of the discretion not to impose the conviction. Nothing was known of Ms Liyawanga's background in this regard.

[17] In the absence of further information about the respondent and the circumstances of her offending, in my view it was inappropriate for the Magistrate to proceed to impose the same penalty as that imposed upon Ms Martin merely because Ms Martin and the respondent were co-offenders. The individual circumstances of Ms Liyawanga and her offending should have been considered before a decision was reached as to whether the same penalty was appropriate and, in particular, whether it was appropriate to

exercise the discretion not to impose a conviction. Although the ultimate decision was for the Magistrate, it appears that the conduct of the prosecutor materially contributed to his Worship's decision to impose the same penalty without hearing from counsel for the respondent.

[18] Ms Liyawanga was the first of the respondents to be sentenced. The other respondents were sentenced in the following order.

Caroline John-Forest

[19] On the morning of 10 March 2004 Ms John-Forest flew from Darwin to Maningrida. In Darwin she had purchased an ounce of cannabis from an unknown person which she concealed in her luggage. The cannabis was wrapped in a large clip seal bag sealed with masking tape in an endeavour to conceal the odour.

[20] At her home in Maningrida the respondent cut the cannabis and placed it into 22 small clip seal deal bags. She put out the message that she was dealing in cannabis. During the next hour the respondent sold all of the 22 bags for $50. Each sale was to an Aboriginal person of Maningrida. From the total of $1,100 the respondent spent $500 at the Maningrida store.

[21] Later that day, acting on information received police spoke to the respondent. She surrendered the balance of $600 and made full admissions. Asked why she was selling the cannabis, the respondent replied "to buy groceries."

[22] The respondent had not previously offended.

[23] Counsel for the respondent informed the Magistrate that the respondent did not smoke marijuana and did not consume alcohol. She said the respondent had been tempted by seeing other people making money in the community. The respondent had been told she could make money. Counsel put to the Magistrate that having been apprehended the respondent recognised that she would not do it again.

[24] Counsel advised the Magistrate that the respondent had two daughters aged four and 15 years. The respondent worked as an assistant and receptionist at the job education training centre. Although she was earning a reasonable wage, she was experiencing a number of financial difficulties related to obligations towards family members and arising out of cultural issues. Hence the temptation to commit the offences. Previously the respondent had been an assistant teacher for three years at Ngukurr and had worked for the council in Maningrida. She had undertaken study as a bookkeeper.

[25] The Magistrate asked the prosecutor about his attitude to recording a conviction. The prosecutor responded that the most important aspect was general deterrence and that in other cases the recording of a conviction would have jeopardised the offender's employment. In response counsel for the respondent said she did not have any information as to whether her client would lose her job if a conviction was recorded. She submitted that the

respondent's contribution to the Ngukurr and Maningrida communities was sufficient to justify not recording a conviction.

[26] The Magistrate agreed that the respondent's contribution to the communities was sufficient to justify not recording a conviction and suggested to the prosecutor that it would be unfair on the respondent to be dealt with in a manner different from two other female offenders who had not been convicted. The prosecutor indicated there was a basis for a distinction, but the Magistrate expressed the view that it would be unjust to the respondent to convict her and would leave her with a "justifiable feeling of having been dealt with unjustly". His Worship expressed the view that the criminality of the respondent's conduct was not such as to justify departing from the approach taken with respect to the other offenders.

[27] The Magistrate then observed that this type of offending was "becoming a really prevalent offence". He asked the prosecutor what he, the Magistrate, had imposed upon male offenders charged with similar offences who were sentenced by his Worship on a previous occasion. It is unclear from the transcript who responded, but his Worship was advised that the male offenders had been convicted and placed on a good behaviour bond for 12 months. His Worship then made the following observations:

> "Thanks, yes. Well, viva le France. So, there are advantages in being female. You can be treated differently.
>
> Well, probably if I hadn't have dealt with with those two other women, who obviously you know about this morning, the way I did.

> I would have probably convicted you and that probably less so than most other people, perhaps, in other more urban societies, especially those people who travel, would have meant a very big thing in your life, probably it won't mean as much to you.
>
> However, it is a penalty in itself that's avoided, so … I'm not going to treat you [in] any significantly different way from those two other women.
>
> Now, you're found guilty. I don't convict you. $500 own recognizance good behaviour bond. If you do nothing wrong for twelve months that will be the end of it and if you break the law at all, you will have to come back here. You may lose $500 and you could be re-sentenced, you could be convicted next time. There's a victim levy of $40 and as your lawyer has probably told you, perhaps, the biggest thing is this, you do another drug offence and you'll go to gaol next time."

[28] The remarks of the Magistrate indicate that he would probably have convicted the respondent if he had not previously dealt with Ms Martin and Ms Liyawanga without recording convictions. His Worship appears to have regarded the principles of parity or consistency in sentencing as requiring the imposition of the same penalty as that imposed upon Ms Martin. In the absence of the type of character demonstrated by Ms Martin's extensive service to the community, however, it is difficult to justify not recording a conviction in the face of the objective seriousness of the offending by Ms John-Forest. The need for both general and individual deterrence is well demonstrated by the cases before the Magistrate and by this respondent's explanation that she was tempted to commit the offence because she had seen other people making money in the same way.

[29] In my opinion the Magistrate erred in approaching the sentencing of the respondent on the basis that she would have "a justifiable feeling of having been dealt with unjustly" if he convicted her. It appears that the Magistrate was erroneously committed to the path of declining to record a conviction by reason of an incorrect view of the application of the principles of parity and consistency of sentencing. The erroneous submission of the prosecutor with respect to parity between Ms Martin and Ms Liyawanga contributed to that error and to the failure of his Worship to consider and compare the individual circumstances of the offending and the offender.

Andrea Stewart

[30] The Magistrate dealt with the next four female respondents either briefly or without giving any reasons. His Worship apparently decided that parity and consistency in sentencing justified and required that he not impose a conviction in each instance. His Worship continued to overlook the requirement that the individual circumstances of both the offending and the offender must always be considered.

[31] On 25 March 2004 while in Darwin the respondent Ms Andrea Stewart received in the mail from her aunt an amount of $400 with instructions to buy $350 worth of cannabis. She was to keep $50 as payment.

[32] The respondent purchased 24.1 grams of cannabis for $350. On 26 March 2004 the respondent packed the cannabis into her luggage and flew to Maningrida. On arrival at Maningrida police asked if she had anything in

her bags that she should not have. The respondent replied in the affirmative and said she had a bag of ganga. At the Maningrida Police Station the respondent surrendered the bag of cannabis. When asked why she had the cannabis in her possession, she replied, "To give to Stella".

[33] The respondent was then aged 19 years. She had not previously offended.

[34] In imposing the penalty, the Magistrate did not give any reasons. He told the respondent that "Next time you play with this stuff you go to gaol".

Roslyn Carter

[35] During the evening of Friday 13 February 2004 the respondent was staying in Darwin. In company with a co-offender, Anthea Stewart, the respondent made a phone call from a telephone box to a cannabis supplier and ordered one ounce of cannabis. Just under an hour later the supplier arrived at the phone box where he spoke with the respondent and her co-offender. It was the co-offender who purchased an ounce of cannabis head from the supplier for $350.

[36] Together the respondent and the co-offender cut the cannabis into small portions and filled 42 small satchels which were placed in a larger clip seal bag. The larger bag was wrapped with newspaper and taped.

[37] The respondent concealed the package in her carry bag. She and her co-offender discussed plans to sell the cannabis at Maningrida. It was agreed

that the respondent would return to Maningrida where she would sell the 42 satchels for $50 each giving a total return of $2,100.

[38] The respondent flew to Maningrida during the afternoon of 15 February 2004. She was met by police who had obtained a warrant to search her luggage. Police located the satchels. Each weighed approximately .7 of a gram giving a total weight of 33 grams.

[39] The respondent made full admissions. She told police she was to make a couple of hundred dollars from selling the cannabis and was to send the rest to her co-offender in Darwin. She was planning to sell the cannabis to Aboriginal persons at Maningrida.

[40] Informed that the respondent had not previously offended, the Magistrate replied "So, she's another one of the ladies of Maningrida turned to a life of crime".

[41] Counsel for the respondent informed the Magistrate that the respondent joined the enterprise because she wanted to buy a pram for the baby of her cousin.

[42] At the time of sentence the respondent was aged 35 years. She had trained at the Batchelor Institute to be a primary teacher. Although she was unemployed at the time of the offending, she had previously worked as a health worker.

[43] In imposing sentence, the Magistrate made the following remarks:

> "Well, I think you are the fourth or fifth woman in the last two days who has decided this is an easy way to make a couple of thousand dollars. You got absolutely nowhere and all you've done is cause yourself some serious trouble. I say "serious trouble" because you are now found guilty of an offence under the drugs legislation.
>
> Next time, if there's a next time, you'll be visiting Berrimah. You'll go to gaol for a second conviction under the Drugs Act. Anyway this time, like all those other women that have been before me, I will find you guilty and not convict you in respect of the supply charge in relation to the cannabis."

Anthea Stewart

[44] Early in February 2004 the respondent flew from Maningrida to Darwin with her younger sister for medical reasons. The facts of purchase of cannabis are set out earlier in these reasons in connection with Ms Carter. After the cannabis had been split into 42 clip seal bags, the respondent instructed Ms Carter to take the cannabis to Maningrida and sell it for $50 per bag. Such roles would have resulted in a total return of $2,100. Ms Carter was arrested on arrival in Maningrida on 15 February and the cannabis was seized.

[45] On 16 February 2004 the respondent admitted her involvement. She said she purchased the cannabis to give to her cousin to sell at Maningrida for grocery money. She said she did not expect to make a return from her initial outlay of $350.

[46] The respondent had not previously offended.

[47] After the facts had been given to the Magistrate, his Worship asked the prosecutor whether the disposition should be the same as Ms Carter. He received an affirmative response. No reasons were given.

Sarah Lyn Ankin

[48] At about 1pm on 21 March 2004 the respondent arrived at the Darwin airport with the intention of flying to Maningrida. At the check-in counter she was approached by a co-offender, Marissa Henwood, who spoke with her and placed a baby powder container of cannabis into the respondent's luggage. The co-offender told the respondent there was ganga inside the container and gave directions as to what to do in Maningrida.

[49] When approached by the police on arrival at Maningrida, the respondent gave permission for her luggage to be searched. Police found 55 deal bags in the baby powder container. The cannabis weighed 39.5 grams. In another bag police found a foil containing two grams of cannabis.

[50] The respondent made frank admissions to the police. She said she had been instructed by Merissa Henwood to deliver the cannabis to Terrence Dudunga. She had received the foil from her cousin in Darwin with instructions to deliver it to her cousin's husband.

[51] The respondent had not previously offended.

[52] At the outset of the hearing, and after counsel for the respondent intimated that the respondent intended to plead guilty, the Magistrate made the following observation:

> "They're all the same. Are there any women in this place that are not dealing in cannabis?"

[53] After the prosecutor had completed the outline of facts and counsel for the respondent indicated the facts were admitted, the Magistrate immediately asked the prosecutor whether there was any reason why he should not put the respondent on a no conviction bond. The prosecutor responded in the negative. After observing that the discovery of the offending involved good police work, the Magistrate made the following observations in imposing penalty:

> "Well, if you ladies in Maningrida don't stop selling ganga, very soon there's going to be fifty Maningrida women at Berrimah, all having – I suppose they don't knit any more. You'll be having secret women's business at Berrimah.
>
> You go to gaol if you do this again. This time I'm not convicting you. $500 good behaviour bond, you do nothing wrong in the next twelve months that's the end of it. Victim levy of $40. Don't do it.
>
> You can see I'm getting through to her. I've persuaded her to change her ways, she'll never do that again."

[54] The Magistrate should not have made remarks about "secret women's business at Berrimah". Those remarks were inappropriate.

[55] In sentencing each of the respondents Andrea Stewart, Roslyn Carter, Anthea Stewart and Sarah Ankin, the Magistrate simply assumed that consistency in sentencing both justified and required that each be treated in the same way as the previous respondents. As I have said, that approach was erroneous and the error was carried through with respect to the final respondent, Mr Brown. As a consequence, counsel for each of these respondents was not required to make submissions concerning the circumstances of the offending or the offender. In the absence of both submissions and reasons by the Magistrate, in each instance I am unable to determine whether there was a proper basis for declining to record a conviction.

Ollie Brown

[56] The final respondent to be sentenced was the only male offender and again the Magistrate imposed a bond without recording a conviction. On Sunday 14 March 2004 the respondent Mr Ollie Brown was at home in Maningrida. During the day a co-offender, Lachlan Carter, came to the respondent's home and gave him a bag containing cannabis. The respondent kept the cannabis in a locked room and later delivered it to another co-offender, Henry Morgan, who on-sold the cannabis. The respondent received $300 for his role.

[57] Two days later when interviewed by the police the respondent made full admissions.

[58] The respondent's only prior offending was in 1988. He offended in minor ways which were dealt with by fines.

[59] In imposing the bond the Magistrate made the following observations:

> "You're the first man here in two days that's not been convicted in relation to this matter. And that's only because obviously, you've pleaded guilty as soon as you could and you've never had any drug involvement before. Next time you're involved in drugs you go to gaol."

[60] It is not unreasonable to conclude that by the time the Magistrate came to deal with the respondent Mr Brown, the pattern of not recording a conviction for this type of offence was well established. In the absence of submissions from counsel on behalf of the respondent, there was nothing in the material before his Worship which was capable of justifying proceeding without a conviction.

Conclusion

[61] In ordinary circumstances the errors by the Magistrate would justify interference by this Court. However, these are Crown appeals and special considerations apply to such appeals. In addition, the tone was set by the erroneous approach to parity in sentencing with respect to the respondent Ms Liyawanga and the prosecutor contributed to that erroneous approach. Further, in the case of some respondents, if counsel for a respondent had made submissions, a case for declining to record a conviction may have been made out. I have the power to remit those matters to the Magistrate's Court for further consideration, but there is force in the submission that such a

course would be unfair to each respondent. In addition to the expense incurred in a further hearing, unnecessary additions to the busy court list at Maningrida should be avoided.

[62] The combination of circumstances has persuaded me that although errors occurred, bearing in mind the special considerations that apply to Crown appeals I should exercise my discretion not to interfere. In taking this course, however, I emphasise that in considering questions of parity and consistency in sentencing, each case must be assessed according to the individual circumstances as they relate to the offending and the offender. I appreciate the pressure under which Magistrates work in busy bush courts and their need to proceed expeditiously. However, each case must still be decided according to its individual circumstances. In addition, although detailed reasons are not required, from the point of view of the parties and the appellate court at least brief reasons should be given.

[63] There are further matters that should be emphasised. First, the remarks of the Magistrate might convey the impression that female persons who offend against the drug laws will be treated differently from male offenders. That impression is incorrect. Where their culpability is equal to that of male offenders, unless personal circumstances justify different treatment, female offenders are not entitled to extra leniency and should not expect to be treated differently from male offenders.

[64] Secondly, the incorrect impression may have been conveyed by the Magistrate's decision that if one of a group of offenders succeeds in establishing a case for the exercise of a discretion not to record a conviction, necessarily the same result will be achieved for the other offenders. As I have said, each case must be considered individually. The fact that one offender makes out a case for the exercise of the discretion does not necessarily mean that the other offenders will similarly succeed in not having a conviction recorded.

[65] Finally, the incorrect impression has been conveyed that female offenders who have not previously been in trouble and who bring cannabis into indigenous communities or supply cannabis to members of their indigenous communities will not be convicted. That impression must also be corrected. Speaking generally, when a female indigenous offender has engaged in the serious criminal conduct of bringing cannabis into a community or of supplying cannabis to other members of a community, the mere fact that the female offender has not previously offended will not in itself justify the exercise of the discretion not to convict. Ordinarily, in the absence of significant matters relating to the character, antecedents, age, health or mental condition of the offender, a conviction should be recorded.

[66] This Court has repeatedly emphasised the seriousness of supplying cannabis to members of indigenous communities. Cannabis causes great damage and misery within the communities. General deterrence is of particular importance. The courts are not blind to the increasing prevalence of this

offence, nor to the increasing involvement as couriers of persons, both male and female, who have not previously offended against the criminal law. It is readily apparent that those higher in the distribution chain are using these types of people with the lure of financial reward or reward in kind. The message should be sent to those persons in indigenous communities who are tempted to engage in this type of criminal conduct that their sex and absence of prior offending will not ordinarily protect them against conviction.

[67] The appeals are dismissed.
