Presswell v Burgoyne [2005] NTSC 67

PARTIES:	PRESSWELL, Daryl
	v
	BURGOYNE, Robert Roland
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	No JA 29 of 2005 (20426796)
DELIVERED:	21 October 2005
HEARING DATE:	23 September 2005
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

MAGISTRATES – Appeals from Magistrates
CRIMINAL LAW – Miscellaneous offences

Appeal against sentence, aggregate sentence, manifestly excessive sentence

Fines and Penalties (Recovery) Act; Justices Act; Misuse of Drugs Act; Sentencing Act, s 52; Summary Offences Act

Kelly v The Queen (2000) 10 NTLR 39, approved
Markarian v The Queen (2005) 79 ALJR 1048; *Putland v The Queen* (2004) 218 CLR 174, applied

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	CW Roberts

Solicitors:

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

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

Presswell v Burgoyne [2005] NTSC 67
No. JA 29 of 2005 (20426796)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against the sentence of the Court of Summary Jurisdiction at Alice Springs

BETWEEN:

PRESSWELL, Daryl
Appellant

AND:

BURGOYNE, Robert Roland
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 21 October 2005)

INTRODUCTION

[1] The appellant appeals against the sentence of imprisonment that was imposed on him by the Court of Summary Jurisdiction on 29 July 2005. After convicting the appellant of unlawfully possessing a trafficable quantity of cannabis at Alice Springs on 24 November 2004 and of having in his custody $11,050 cash that was reasonably suspected by police of having been obtained from the sale of cannabis, the Court of Summary Jurisdiction sentenced the appellant to an aggregate term of imprisonment of two months

suspended forthwith on condition that the appellant undergo two months home detention. The charge of unlawfully possess a trafficable quantity of cannabis was brought on information for an indictable offence. The charge of being reasonably suspected of having otherwise unlawfully obtained the $11,050 was brought on complaint.

[2] The appeal is made pursuant to s 163 Justices Act. It was commenced by notice of appeal dated 2 August 2005. The appellant has been on bail since the notice of appeal was filed in the Court of Summary Jurisdiction. He served four days home detention before being bailed.

THE ISSUES

[3] There are three grounds of appeal. First, the Court of Summary Jurisdiction erred in imposing an aggregate sentence for the two offences for which the appellant was convicted because the charges were not joined in the same information for an indictable offence nor the same complaint. Secondly, the learned magistrate failed to have proper regard to the appellant's plea of guilty to unlawfully possessing a trafficable quantity of cannabis. Thirdly, the sentence of imprisonment was manifestly excessive.

[4] In my opinion the appeal should succeed. The sentence of imprisonment that was imposed on the appellant should be set aside and an appropriate sentence should be substituted for the sentence of imprisonment that was imposed by the Court of Summary Jurisdiction on 29 July 2005. The only power of the Court of Summary Jurisdiction to impose an aggregate

sentence of imprisonment is that contained in s 52 Sentencing Act: *Putland v The Queen* (2004) 218 CLR 174 at par [69]. That section limits the power to impose an aggregate sentence of imprisonment to circumstances in which there are "2 or more offences joined in the same information or complaint." The offences in this case were not joined in the same information or complaint. Furthermore, I accept counsel for the appellant's submission that the power to impose an aggregate sentence should be used cautiously, particularly when sentencing a person for offences of a markedly different nature: *Putland v The Queen* (supra) at pars [116] and [117]

[5] However, the second and third grounds of the appeal cannot be sustained. The learned magistrate expressly stated that she gave the appellant a discount for pleading guilty to unlawfully possessing a trafficable quantity of cannabis and neither by reference to comparative sentences nor otherwise was it established that the sentence was manifestly excessive. Although the sentence that was imposed by the Court of Summary Jurisdiction was towards the upper end of the range of sentences for such offending no error in principle was demonstrated other than the aggregation of the sentence of imprisonment. Nor did the Court of Summary Jurisdiction misunderstand or wrongly assess some salient feature of the facts.

[6] No error in sentencing an offender is made by a court simply because a court does not expressly stipulate the specific amount by which a sentence of imprisonment has been discounted by the court because an offender has pleaded guilty: *Markarian v The Queen* (2005) 79 ALJR 1048. There is no

specific discount in sentence for a plea of guilty. The discount in sentence to be given to an offender for pleading guilty will vary according to the circumstances of each case. However, it is preferable for a court to specify the amount of any reduction in a sentence of imprisonment that an offender receives for pleading guilty. To do so ensures that the court fully discloses the reasoning of the court prior to pronouncing sentence: *Kelly v The Queen* (2000) 10 NTLR 39 at [27].

[7] The appellant has to be re-sentenced in any event as on 7 October 2005 I quashed the appellant's conviction for the offence, contrary to s 61 Summary Offences Act, of having in his custody $11,050 cash that was reasonably suspected by police of having been otherwise unlawfully obtained.

SECTION 177 JUSTICES ACT

[8] Pursuant to s 177 of the Justices Act this Court has the power to affirm, quash, or vary the conviction, order, or adjudication appealed from, or substitute or make any conviction, order, or adjudication which ought to have been made in the first instance. In the circumstances of this case I have quashed the sentence of imprisonment that was imposed on the appellant by the Court of Summary Jurisdiction on 29 August 2005 and I have re-sentenced the appellant.

RE-SENTENCE

[9] The facts of the appellant's possession of cannabis are as follows. At 10.45 am on 24 November 2005 the police executed a search warrant at 79 Dixon Road, Alice Springs. There are two residences at that address, a flat where the appellant lived and a house that was known as the Primer residence. Inside the Primer residence police located 113 grams of cannabis. The appellant admitted ownership to 70 grams of the 113 grams of cannabis that was located by police. The value of the 70 grams of cannabis was in excess of $700. 70 grams of cannabis is 20 grams over the trafficable quantity of cannabis. Police arrested the appellant and the appellant agreed to participate in an electronically recorded record of interview. At the time of his arrest the appellant was using a significant amount of cannabis on a reasonably regular basis. During the interview that was conducted by police the appellant made further admissions to possessing 70 grams of cannabis. The maximum penalty for the offence is a fine of $10,000 or imprisonment for five years. A maximum term of two years imprisonment may be imposed by the Court of Summary Jurisdiction.

[10] The learned magistrate in the Court of Summary Jurisdiction found that the 70 grams of cannabis in the appellant's possession was for his own personal use and was not to be supplied. No challenge was made by the respondent to that finding in this Court. The effect of the finding by the Court of Summary Jurisdiction is that the presumption contained in s 37(6)(a) Misuse

of Drugs Act that the appellant intended to supply the 70 grams of cannabis is rebutted.

[11] While drug offending is a serious matter, the offending that is the subject of this appeal is towards the lower end of seriousness for such offending. The 70 grams of cannabis is not significantly over the prescribed trafficable quantity: Sch 2 Misuse of Drugs Act. The range of trafficable quantities that is specified for cannabis is from 50 grams to 500 grams. The 70 grams of cannabis in the offender's possession was for his personal use, not for supply.

[12] The offender is 40 years of age. He was 39 years of age at the time of the offending that is the subject of this appeal. There is a long gap in his offending. His last drug offending was in 1987 when he was convicted of possess cannabis and fined $250. The learned magistrate also found that since this offending the appellant has ceased smoking cannabis. No challenge is made to that finding in this Court. The offender pleaded guilty to the offence. He admitted his offending to police. The appellant has reasonable prospects of rehabilitation.

[13] Having had regard to the particular circumstances of the offence and the offender I am of the opinion that a penalty of imprisonment should not be imposed as is otherwise required by s 37(2) Misuses of Drugs Act. I consider that the appellant should pay a fine of $1,000.

[14] I have also taken into account the fact that the offender has already spent four days in home detention.

ORDERS

[15] I make the following orders:

1. I quash the sentence of two months imprisonment to be suspended upon the appellant undergoing home detention for a period of two months that was imposed on the appellant by the Court of Summary Jurisdiction on 29 July 2005 and all ancillary orders that were made by the Court of Summary Jurisdiction.

2. I substitute an order that the appellant is to pay a fine of $1,000.

3. The fine is required to be paid within 28 days. An extension of time to pay the fine may be obtained pursuant to s 25 Fines and Penalties (Recovery) Act from the Fines Recovery Unit.

[16] I will hear the parties as to costs.