The Queen v Woods [2009] NTCCA 2

PARTIES:	**THE QUEEN**
	v
	GRAYDON WOODS
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CCA 1 of 2009 (20800571)
DELIVERED:	23 March 2009
HEARING DATES:	13 March 2009
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN AND RILEY JJ
APPEALED FROM:	ANGEL J

CATCHWORDS:

CRIMINAL LAW – APPEAL AGAINST SENTENCE – Criminal appeal from Supreme Court – conspiracy to commit drug offences – pseudoephedrine – powerful matters of mitigation – recognizance release order – order suspending entirety of head sentence – difference between non-parole period and recognizance release order – time for release under recognizance to be determined by reference to particular circumstances not by reference to a norm – sentence manifestly inadequate – mercy – Appeal dismissed

R v Martinsen [2003] NSWCCA 144, considered
R v Bernier (1998) 102 A Crim R 44, distinguished
R v CAK & CAL; ex parte Commonwealth DPP [2009] QCA 23, doubted

CRIMINAL LAW – CROWN APPEAL – Crown appeal only brought in the rare and exceptional case – exercise of sentencing discretion not disturbed on appeal unless error in that exercise is shown – presumption that there is no error – where appellate court finds error recognition will be given to the element of double jeopardy in re-sentencing – sentence manifestly inadequate – unnecessary for court to interfere further

R v Allpass (1993) 72 A Crim R 561, applied
Everett v The Queen (1994) 181 CLR 295, followed

REPRESENTATION:

Counsel:

Appellant:	G Braddock SC
Respondent:	S Cox QC

Solicitors:

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

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

The Queen v Woods [2009] NTCCA 2
No CCA 1 of 2009 (20800571)

BETWEEN:

THE QUEEN
Appellant

AND:

GRAYDON WOODS
Respondent

CORAM: MARTIN CJ, MILDREN AND RILEY JJ

REASONS FOR JUDGMENT

(Delivered 23 March 2009)

Martin (BR) CJ:

[1] I agree that the appeal should be dismissed and with the reasons of Riley J. The matters of mitigation were powerful. In particular, the character references from persons who knew of the offending were remarkable. They paint a clear picture of an ordinary and unworldly 59 year old family person of otherwise exemplary character who reluctantly became entangled in the criminal enterprise. In these circumstances it is appropriate for this Court to send the message that the sentence was manifestly inadequate, but exercise mercy and decline to interfere.

Mildren J:

[2] I agree that the appeal should be dismissed for the reasons given by Riley J and Martin CJ.

Riley J:

[3] This is a Crown appeal against sentence.

[4] On 12 December 2008, following his plea of guilty, the respondent was convicted of the offence of conspiracy to commit an offence against Commonwealth law, namely, importing into Australia a commercial quantity of pseudoephedrine, a border controlled precursor. He was sentenced to imprisonment for five years backdated to 8 December 2008 with the unserved balance of the sentence "suspended" forthwith pursuant to s 40 of the *Sentencing Act* (NT).

[5] The sole ground of appeal is that the sentence was manifestly inadequate.

The circumstances of the offence

[6] The plan to import pseudoephedrine was conceived by Mehmet Seriban and Petr Petras. They intended to import a commercial quantity of pseudoephedrine by boat from Indonesia to a remote coastal location in the Northern Territory.

[7] Mr Petras was in Australia pursuant to a Business (Long Stay) Visa which was cancelled in 2004. He was taken into detention where he met and became friendly with Mr Seriban who was in custody serving a term of

imprisonment for facilitating the entry into Australia of unlawful noncitizens. Mr Petras had been a neighbour of the respondent and the respondent's wife, Ms Pickering. Ms Pickering offered herself as a guarantor/sponsor if Mr Petras was released into her custody. On 30 March 2005 he was released and lived for a time with the respondent and Ms Pickering at Humpty Doo. Mr Seriban was released from custody on parole on 22 December 2006 and he met the respondent and Ms Pickering through Mr Petras.

[8] Mr Seriban obtained permission to leave Australia to visit his mother in Turkey. At the request of the respondent Ms Pickering provided $2000 for the cost of the airline ticket to Turkey. Mr Seriban did not remain in Turkey but, rather, travelled to Malaysia and then Indonesia. There were many telephone discussions between Mr Seriban and Mr Petras including in relation to the planned importation of pseudoephedrine. The respondent and a fourth conspirator, David Lindsay Barry, were each approached by Mr Petras for assistance in providing and sourcing additional funds for the purchase of the pseudoephedrine and also in relation to other arrangements for the importation. Mr Barry agreed to assist Mr Petras in finding a buyer for the product upon its arrival in Australia.

[9] The learned sentencing judge found that the respondent was initially unaware of what was taking place. His Honour described the involvement of the respondent in these terms:

> You, Woods, were initially unaware of Petras' plans, and at first lent money to Seriban because you had been spun a full story by Petras about Seriban needing money to complete repairs to a house in Indonesia. You were told that Seriban was hard up and needed the money for that purpose, and that was your purpose in advancing the money to lend it so he could fix a house. You were gullible in the extreme. Most importantly for present purposes, as your counsel submitted, after you became aware of Petras' and Seriban's real plans you felt trapped and simply wanted your money back, that is, you had no profit motive in what you did. You nevertheless plainly, were actively involved in this importation from at the latest mid October 2007 to the time of your arrest on 7 January 2008 at 2:50 pm".

[10] In his record of interview, Mr Petras said that he and Mr Seriban had determined to pay the respondent $50,000 for his part in the importation. The learned sentencing judge accepted that the respondent was unaware of this plan and concluded that the respondent had no profit motive. His Honour found that the respondent was an honest person who was gullible and "an unworldly naive person". His Honour also said that Mr Petras took advantage of the respondent in an unscrupulous manner, concluding that the respondent "never contemplated getting profit from the importations, once the plan was told to (him), (he) felt particularly exposed and (he) reluctantly followed." These and other findings by the learned sentencing judge were not challenged by the Crown and this appeal must be determined in accordance with such findings.

[11] The learned sentencing judge observed that the respondent had "a minimal involvement in the conspiracy". Information regarding the extent of the involvement of the respondent was contained in the agreed facts placed before his Honour. Those facts included that, in August 2007, at the request

of the respondent, Ms Pickering placed $6000 into the bank account of Mr Seriban with the understanding that it was for the purpose of renovating the house. On 12 October 2007 the respondent transferred $3000 to Indonesia for the use of Mr Seriban. By that date the respondent was fully aware that the money he transferred was being used to fund the importation of drugs into Australia. On 22 October 2007 the respondent transferred a further $300 to Mr Seriban. On 4 November 2007 he gave permission to two of his co-conspirators to use the Nissan Patrol vehicle, registered in the name of his wife, to enable them to travel to, and prepare, the remote location where the drugs were to be secreted upon arrival in Australia. Further, on 9 November 2007, the respondent gave permission to his co-conspirators to use the motor vehicle to travel to Katherine for the purposes of setting up an e-mail address through which Mr Petras could communicate with Mr Seriban.

[12] In his record of interview the respondent falsely denied any knowledge of the conspiracy to import a commercial quantity of border controlled precursor or having taken any part in such a conspiracy.

[13] The value of the pseudoephedrine to be imported depended upon the manner in which it was to be sold. If sold in bulk the reward would have been between $825,000 and $1.12 million. If sold in street level doses the reward would have been in the order of $3.75m to $5.65m. This was a significant commercial criminal enterprise.

The co-offenders

[14] Mr Seriban was found guilty after a trial by jury. The sentencing judge indicated that a sentence of 15 years was appropriate, but imposed a sentence of 12 years and three months to take into account that Mr Seriban would serve an additional two years and nine months of a previous sentence. A non parole period of seven years and 10 months was fixed which meant that Mr Seriban would serve nine years before being eligible for parole. Mr Barry pleaded guilty and was sentenced to imprisonment for seven years with a non-parole period of three years and six months. Mr Petras also pleaded guilty and was sentenced to imprisonment for a period of 12 years with a non-parole period of seven years.

Manifestly inadequate

[15] The complaint of the appellant is that the sentence was manifestly inadequate in all of the circumstances. The principles applicable to a Crown appeal are well known. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such

error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just inadequate but manifestly so. The appellant must show that the sentence was clearly and obviously, and not just arguably, inadequate.

Sentencing under the *Crimes Act* 1914 (Cth)

[16] The appellant points out that his Honour purported to impose a suspended sentence under the terms of s 40 of the *Sentencing Act* (NT). For a Commonwealth offence the sentencing process is governed by the provisions of Part 1B of the *Crimes Act* 1914 (Cth). Section 19AB of that Act requires a court, when passing a sentence of imprisonment in excess of three years, to either fix a non-parole period or make a recognizance release order unless satisfied that neither is appropriate. Although his Honour erred in relying upon the provisions of the *Sentencing Act*, he was able to impose a similar sentence utilising the provisions of s 20(1)(b) of the *Crimes Act*.

Submissions of the appellant

[17] The appellant submitted that the head sentence of imprisonment for five years was "at the bottom of the range for an offence of this kind" but did not challenge that sentence. Rather, it was submitted that the decision to suspend the sentence forthwith should be quashed and a recognizance release order made pursuant to s 20(1)(b) of the *Crimes Act* that the respondent be released after having served 60 to 66 per cent of the head sentence.

[18] It was the submission of the appellant that the order suspending the entirety of the head sentence forthwith meant the sentence was manifestly inadequate. The appellant asserted that the New South Wales Court of Appeal had "held on numerous occasions that the pre-release period for a Commonwealth offence should usually be 60 to 66 per cent of the head sentence". In support of that contention various cases were referred to, with particular reference being made to the decision of the Queensland Court of Appeal decision in *R v CAK & CAL; ex parte Commonwealth DPP*[1] where Atkinson J (with whom Muir JA and Lyons J agreed) said:

> The norm for non-parole periods and periods required to be served before a recognizance release order for Commonwealth offences is generally considered to be after the offender has served 60 to 66 per cent of the head sentence. The precise figure may be outside the range as it is a matter of judicial discretion and is not necessarily capable of precise mathematical calculation, but that is the usual percentage of the sentence. A sentence that was well outside that range would have to have most unusual factors to justify it.

[19] The assertion that the norm for non-parole periods for Commonwealth offences is generally considered to be after the offender has served 60 to 66 per cent of the head sentence is supported by reference to the cases cited by her Honour and by the appellant. However, the extension of that observation to periods to be served before a recognizance release order may take effect does not have the same support. Reference was made by her Honour to *R v Bernier*[2]; *R v Stitt*[3]; *R v* Sweet[4]; *Bick v R*[5]; *Ly v R*[6]; and

[1] [2009] QCA 23 at [18]
[2] (1998) 102 A Crim R 44 at 49
[3] (1988) 102 A Crim R 428 at 432
[4] (2001) 125 A Crim R 341 at 346-347

Studman v R[7]. Each of those cases dealt exclusively with non-parole periods and reflected the observation made by the Court in *Bernier* that "the norm for non-parole periods is in the range of about 60 per cent to 66⅔ per cent".

[20] The only case referred to which involved a recognizance release order was *R v Martinsen*[8] where Hidden J (with whom Sheller JA and Carruthers AJ agreed) observed at [14] in relation to the sentence there under challenge that:

> The period of sixteen months which his Honour required the applicant to serve before release on recognizance is two thirds of the sentence, and is consistent with the norm for non-parole periods for Commonwealth offences: *R v Bernier* (citation omitted). Making all due allowance for the applicant's illnesses, a custodial period of that length remains an appropriate reflection of his criminality.

[21] Those observations are some distance from suggesting that "the norm" for a period required to be served before a recognizance release is of the order of 60 to 66 per cent of the head sentence.

[22] The statutory regime providing for a recognizance release order specifically contemplates that the prisoner may be released forthwith. By operation of s 20(1)(b) of the *Crimes Act* (Cth), where a person is convicted of a federal offence, the court may sentence the person to imprisonment but direct that the person be released upon giving security either forthwith or after he or she has served a specified period of imprisonment. Thereafter, the statutory

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[5] [2006] NSWCCA 408 at [13]
[6] [2007] NSWCCA 28 at [16]
[7] [2007] NSWCCA 326 at [9]-[11]
[8] [2003] NSWCCA 144

regime provides for what is to happen in the event that there is a failure to comply with any condition of discharge or release.

[23] The fixing of a non-parole period is a different exercise from ordering the conditional release of an offender after conviction. A significant difference between the two is that the fixing of a non-parole period establishes the period during which the prisoner is not able to be granted parole. Whether he or she is granted parole after the expiry of the period is for the relevant Parole Board to determine in light of the circumstances existing at the completion of the non-parole period. On the other hand, a recognizance release order allows the sentencing judge, at the time of sentencing, to fix with certainty the date upon which the person shall be released (which may be immediately) subject, of course, to compliance with the terms of the order.

[24] In general terms s 19AB of the *Crimes Act* (Cth) provides that where federal sentences exceed a period of three years the court must either fix a single non-parole period or make a recognizance release order. The court may decline to take either course if, having regard to the nature and circumstances of the offence or offences and the antecedents of the person, the court is satisfied that neither is appropriate. For present purposes s 19AC goes on to provide that where there is imposed a federal sentence not exceeding three years the court must make a recognizance release order and must not fix a non-parole period. However, where the sentence is less than six months the court is not required to make a recognizance release

order. It may also decline to make such an order where it is satisfied that such an order is not appropriate.

[25] Commonwealth offences vary greatly in their seriousness. It is not uncommon for less serious offences committed in circumstances calling for mitigation of penalty to attract a recognizance release order without service of a term of actual imprisonment. Minor social security fraud is an example. Whilst there may be sound reasons for the suggestion that the norm for non-parole periods for Commonwealth offences may be considered to be in the range of about 60 per cent to 66 per cent of the head sentence those reasons do not apply to the making of a recognizance release order. In my view, the fixing of the time for the release of a prisoner under a recognizance release order is to be determined by reference to the particular circumstances of the offence and the offender in the context of all of the circumstances of the case. The time is not to be determined by reference to a norm. I do not accept the written submission of the appellant to the contrary.

Was the sentence manifestly inadequate?

[26] The issue then to be addressed is whether the sentence imposed was manifestly inadequate. The learned sentencing judge made significant findings in favour of the respondent. He found that the respondent was gullible; that he came into the undertaking innocently and then felt trapped; that he was not driven by a profit motive but simply wanted his money back; that he was a reluctant participant; and that his co-offenders used him. In

addition, his Honour took into account the early plea, the age of the respondent (59 years) and that the respondent was of prior good character and was unlikely to reoffend. In light of all those matters the learned sentencing judge wholly suspended the sentence.

[27] The activities of the respondent and the matters found in his favour must be considered in the context of the offending. As I have observed, this was a major commercial criminal enterprise. The introduction of the anticipated amount of pseudoephedrine into Australia and the successful conversion of that pseudoephedrine into illegal drugs would almost inevitably have had a substantial and negative impact upon many people. No matter what may have been his motive the respondent elected to play a significant part in the illegal activity. It would seem he was not concerned as to the consequences his actions may have had for others and he was largely driven by a desire to recover money that he thought may have been lost. He was not motivated by profit but he was motivated by a strong desire for the return of his money. He placed his concern to recover his money ahead of all other concerns. At a point when he was fully aware of the enormity of the criminal activity proposed to be undertaken he continued his involvement. His continued involvement was with full knowledge of the enterprise, he was actively involved and his reward was to be the return of his money. He was involved in many conversations regarding the criminal enterprise and he assisted the principal conspirators by providing additional money and by allowing the Nissan motor vehicle to be used in the manner previously

described. His involvement stretched from mid October 2007 through to the time of his arrest in January 2008. In my view his involvement in the conspiracy, although nowhere near as serious as the actions of his co-conspirators, required a period of actual imprisonment. The sentence was manifestly inadequate.

A Crown appeal

[28] This is a Crown appeal and the principles applicable to such appeals are well established. A Crown appeal should only be brought in "the rare and exceptional case" to establish some point of principle, for example, where a sentence reveals such manifest inadequacy as to constitute an error in principle: *Everett v The Queen*[9].

[29] Where the appellate court finds error and decides to resentence an offender it will ordinarily give recognition to the element of double jeopardy involved “by imposing a sentence that is somewhat less than the sentence it considers should have been imposed at first instance”. However, an appellate court “has an overriding discretion which may lead it to decline to intervene even if it comes to the conclusion that error has been shown in the original sentencing process”: *Allpass*[10].

[30] In the present case the sentence was manifestly inadequate and, in my view, a term of actual imprisonment was required. Such a response is necessary where the criminal conduct is of the order seen in this case. That message

[9] (1994) 181 CLR 295 at 299 and 300
[10] (1993) 72 A Crim R 561 at 562-563

having been established and by reason of the respondent's minor role, naivety, age and previous good character, it is my view that it is unnecessary for this court to interfere further.

[31] I would dismiss the appeal.
