Pascoe v Howie & *Nulla v Howie* [2012] NTSC 13

PARTIES:	**PASCOE, Dale**
	v
	HOWIE, Richard
AND:	**NULLA, Josephat**
	v
	HOWIE, Richard
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 13 of 2011 (21033970) and JA 14 of 2011 (21033974)
DELIVERED:	6 MARCH 2012
HEARING DATES:	14 NOVEMBER 2011
JUDGMENT OF:	KELLY J
APPEAL FROM:	DR LOWNDES SM

REPRESENTATION:

Counsel:

Appellants:	G O'Brien-Hartcher
Respondent:	D Dalrymple

Solicitors:

Appellants:	North Australian Aboriginal Justice Agency
Respondent:	Office of Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	KEL 12005
Number of pages:	7

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

Pascoe v Howie & Nulla v Howie [2012] NTSC 13
No. JA 13 of 2011 (21033970) & JA 14 of 2011 (21033974)

BETWEEN:

DALE PASCOE
Appellant

AND:

RICHARD HOWIE
Respondent

AND BETWEEN:

JOSEPHAT NULLA
Appellant

AND:

RICHARD HOWIE
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 6 March 2012)

[1] On 5 May 2011 at the Maningrida Court of Summary Jurisdiction the appellant Dale Pascoe ("Pascoe") pleaded guilty to the following charges:

(1) one count of possessing a commercial quantity of kava (72.18 kg) not in accordance with a licence (s 9 of the *Kava Management Act*);

(2) one count of unlawfully possessing cannabis (3.62 gm) (s 9(1) of the *Misuse of Drugs Act*); and

(3) one count of bringing liquor into a prescribed area (s 75 of the *Liquor Act*, as amended by s 12 of the *Northern Territory National Emergency Response Act (Cth)*).

[2] Also on 5 May 2011 at the Maningrida Court of Summary Jurisdiction, the appellant Josephat Nulla ("Nulla") pleaded guilty to a single count of possessing a commercial quantity of kava not in accordance with a licence. That charge had been brought jointly against Pascoe, Nulla and two others, so Nulla pleaded guilty in relation to the same particularised amount of 72.18 kgs as had Pascoe.

[3] The prosecutor in the proceedings on 5 May 2011 relied upon a single set of facts in respect of Pascoe, Nulla, and the two co-offenders, and those facts were read onto the record a single time on the basis that they would apply to the sentencing of each of the four offenders. Immediately after the reading of the facts, Ms Wild on behalf of all of the accused, stated that the facts were agreed, subject to a querying of the appropriateness of alleging an "estimated street value" for the kava.

[4] Salient matters in the agreed facts put before the Court by the prosecutor included the following:

(1) The group was travelling by vehicle from Darwin to Maningrida via Oenpelli that is, into an Aboriginal Community.

(2) The kava was packaged into 955 clip seal bags and was concealed behind the front, rear and side door skins of the vehicle with the knowledge of Nulla and Pascoe.

(3) The contraband in the intercepted vehicle comprised not just kava, but also cannabis and alcohol and Pascoe appeared to be in the course of actually consuming alcohol at the time of the vehicle's interception, a short distance away from the Oenpelli community.

[5] In her submissions on behalf of Pascoe, Ms Wild conceded that her client had allowed his vehicle to be "modified to the extent for the kava to be put in" and for it to be then driven back to Maningrida. She said that "it was not for monetary gain" which appears to have been a denial that her client had any expectation of personal monetary gain. There was no claim that the packaged kava was not to be supplied to other persons at Maningrida, and it was evident from the agreed facts and their context that the carefully planned and organised supply operation must have been undertaken in order to generate monetary gain for someone, even if Pascoe himself was not to benefit directly.

[6] Ms Wild submitted that it would be appropriate to sentence Pascoe by way of a wholly suspended term of imprisonment and there then followed an exchange between her and the learned sentencing magistrate in which the

magistrate made references to warnings he had given previously in the court at Maningrida that there would be an "escalation in penalties", and Ms Wild queried his Honour's assessment of the local prevalence of kava offending.

[7] The first ground of appeal in both the notice of appeal filed on behalf of Pascoe and the notice of appeal filed on behalf of Nulla is that the sentencing magistrate placed undue weight on general deterrence.

[8] In *R v Kaisitiane Hanisi*[1] ("*Hanisi*") his Honour Justice Southwood sentenced an offender in relation to an offence under s 9 of the *Kava Management Act* involving the possession of 447.7 kilograms of kava, which the offender had driven into the Northern Territory from Queensland. His Honour stated:

> "Deterrence is the primary consideration when considering the sentence to be imposed under s 9 of the *Kava Management Act*. Such crimes as these are prevalent. The importation of such large amounts of kava into the Northern Territory has the capacity to undermine the regulatory regime that has been established in the Northern Territory and to cause considerable harm including financial harm to people living in remote Aboriginal communities. In order to protect the community, the offender and others must be discouraged from committing similar offences."

This ground of appeal must fail.

[9] The second ground of appeal in both the notice of appeal filed on behalf of Pascoe and the notice of appeal filed on behalf of Nulla is that the learned magistrate erred in finding the offences prevalent in the absence of evidence.

[1] SC 20606681, 29/6/06

[10] It was submitted by counsel for the appellant that it was not open to the learned magistrate to form the view that "kava matters" were prevalent without receiving evidence. I do not agree. It was open to the learned magistrate to take into account his own experience in coming to this view.

[11] It was also submitted that it was not open to the learned magistrate to take into account prevalence as a factor which might increase the severity of the sentence which would otherwise be handed down unless he was satisfied beyond reasonable doubt that the matters were in fact prevalent. Counsel relied for this submission on the principle that if a sentence proposes to take into account something adversely to the interests of the accused, in the sense of being likely to result in a more severe sentence than would otherwise be the case, he or she must be satisfied of that fact beyond reasonable doubt.[2] Mr Dalrymple for the respondent submitted that *Storey* was not applicable when looking at a notion such as prevalence as it was not a "sentencing fact". I tend to agree. The relative prevalence of offences is a value judgment made by the sentencer based upon facts and experience. In any event, if it were necessary for the learned magistrate to have been convinced beyond reasonable doubt that kava matters were "prevalent", I see no reason to suppose that he was not convinced of that to the requisite standard. It surely cannot be suggested that a magistrate is obliged to add the words, "I am convinced beyond reasonable doubt" every time he or she mentions that a particular type of offence is prevalent.

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2 *Ivan Leonard Storey* (1996) 89 A Crim R 519 at 529.

[12] Both parties tendered by leave evidence of numbers of kava matters coming before the court and amounts of kava seized in the period since 1 January 2009. However, prevalence is not a mathematical notion that can be determined by counting up kilograms of kava or numbers of cases. It requires a subjective judgment. An experienced magistrate can tell from his own general experience and by looking at the court list whether there are a lot of matters coming before the court and in doing so will no doubt take into account the well known fact that not all cases which come before the court on a first mention eventually proceed to finality through the courts.

[13] In my view, the learned magistrate was perfectly entitled to form the view based on his own experience that kava matters were prevalent. In coming to this judgment he appears to be supported by the remarks of Justice Southwood in *Hanisi* referred to above.

[14] The appellants also contend that they were denied procedural fairness on the issue of prevalence because the learned magistrate referred to his own research in the court lists and did not provide counsel with the opportunity to make submissions in relation to that research.

[15] The following exchange occurred between counsel and the learned magistrate:

> "MS WILD: Your Honour, I'm not sure if it's been previously put before your Honour by way of evidence that there is a prevalence of this offence. I'm not sure I would agree (inaudible) ---

HIS HONOUR: Well, I do based on just sitting here.

MS WILD: --- on judicial notice. I'm not sure if ---

HIS HONOUR: Absolutely, yes.

MS WILD: Well, I would object to that, your Honour.

HIS HONOUR: Well, I don't think you can because I mean, I'm in the best position to make the assessment. In fact, at one sittings – and I said this – during the 12 month period I think there were 44 defendants that came before this court in relation to these matters and I put that on the record too. I do all these things for a purpose and I usually research pretty well before I do things because I call for all the back court lists.

I don't know if you were here, sergeant, but probably not.

But yes, I did all of that. And in Darwin I dealt with a matter and again I echoed everything I'd said before. I mean, if you want to argue it's not prevalent, then we can put it over to another time but it really is ---

MS WILD: Well, I (inaudible) evidence before the court that it is prevalent. I don't need to argue it.

HIS HONOUR: Well, the court lists speak for themselves which I researched before I made the announcement. I'll adjourn it and I'll go back and I'll dig it out the – I'll dig it out. I'm just telling you what I've done and said on prior occasions."

[16] This ground of appeal must fail. In the exchange quoted above the learned magistrate offered to adjourn the matter if counsel for the accused wanted to argue the issue of prevalence. That offer of an adjournment was refused. There was no procedural unfairness.

[17] The appeal is dismissed.