Maminyamanja v Warden [2012] NTSC 101

PARTIES:	MAMINYAMANJA, David v WARDEN, Shayne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELATE JURISDICTION
FILE NO:	JA 60 of 2012 (21121770)
DELIVERED:	18 December 2012
HEARING DATES:	11 December 2012
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	MS OLIVER SM

CATCHWORDS:

APPEAL- CRIMINAL LAW – Sentence- unlawfully possess cannabis - trafficable amount – alleged failure to impose an alternative disposition to actual imprisonment – whether sentence manifestly excessive – appeal dismissed.

Alcohol Reform (Substance Misuse Assessment and Referral for Treatment Court) Act 2011
Liquor Act s 75(1)(a),
Misuse of Drugs Act s 9, s 37
Sentencing Act s 48E(2)

Arnold v Trennery (1996) 118 NTR 1; *Daniels v The Queen* [2007] NTCCA 9; *Dinsdale v R* (2000) 202 CLR 1; *Habib Urahman v Semrad* [2012] NTSC

95; *Joran & Ors v Wilson & Another* [2006] NTSC 46; *Mawson v Nayda* (1995) 5 NTLR 56; *R v Tait and Bartley* (1976) 46 FR 386; *The Queen v Martyn* [2011] NTCCA 13; *Raggett, Douglas and Miller v R* (1990) 50 A Crim R 41; referred to.

REPRESENTATION:

Counsel:

Appellant:	Mr Giles O'Brien-Hartcher
Respondent:	Mr Steven Ledek

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Defendant:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	BLO1215
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Maninyamanja v Warden [2012] NTSC 101
No. JA 60 of 2012 (21121770)

BETWEEN:

MAMINYAMANJA, David
Plaintiff

AND:

WARDEN, Shayne
Defendant

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 18 December 2012)

Introduction

[1] This is an appeal against a sentence imposed by a magistrate sitting in the Court of Summary Jurisdiction on 12 July 2012 at Alyangula, Groote Eylandt. The appellant, almost a year before he was sentenced for the offence, pleaded guilty to the charge of unlawfully possessing a trafficable quantity of cannabis plant material contrary to s 9 of the *Misuse of Drugs Act*. On 12 July 2012 the learned magistrate convicted him for that offence and sentenced him to four months imprisonment to be suspended after serving a period of six weeks on conditions he undergo assessment and treatment, submit to testing if available and not leave Groote Eylandt. An operational period of two years from the date of release was set.

[2] In brief, the facts were that the appellant was arrested after a positive response of a narcotic detector dog at Darwin Airport. The appellant had bought 140 grams of cannabis in Palmerston. The cannabis was divided into 5 clip seal bags. He wrapped three of the bags in plastic film and hid them in his left sock; the remainder were wrapped and placed in the inside sole of his right shoe. On being told he would be searched, the appellant produced the cannabis. He was about to board the plane to go to Groote Eylandt with the cannabis. He made full admissions to police.

[3] The grounds of appeal are that the learned magistrate erred in failing to impose an alternative disposition to actual imprisonment and that the sentence was manifestly excessive. In essence the appellant argues a sentence of actual imprisonment was excessive and the sentence should have been fully suspended or a Community Custody Order be imposed. It was submitted the term of four months imprisonment was excessive.

History of the Proceedings in the Court of Summary Jurisdiction

[4] Although the appellant was sentenced on 12 July 2012 the history of related court appearances is relevant. It assists to show why in the face of operational difficulties with suggested community dispositions it was well open to the learned magistrate to determine the sentence on 12 July 2012 in the terms she did.

[5] Her Honour was persuaded after examining alternatives that some part of an inevitable term of imprisonment should be actually served. General

deterrence, prevalence of the offence and the circumstances of the appellant all pointed to that conclusion.

[6] The appellant committed this particular offence on 5 July 2011 and was charged in court on 19 July 2011. At the time of committing the offence he was on a suspended sentence imposed on 14 December 2010 for a conviction for driving in a manner dangerous and other traffic offences.[1] The operational period was 12 months.

[7] The offending the subject of this appeal was committed seven months into the operational period of the suspended sentence. After he was arrested on 5 July 2011 at Darwin Airport for this offence the appellant was also found to be in possession of alcohol. He was bailed on these offences to appear in the Alyangula Court of Summary Jurisdiction on 19 July 2011. (File 21121770).

[8] On 16 July 2011 he was arrested for driving unlicensed in Alyangula and summonsed to appear on 17 August 2011. (File 21123852).

[9] The appellant appeared in the Alyangula Court on 19 July 2011 in relation to this matter and the related charges. (File 21121770). The formal charges laid at that time were possess a trafficable quantity of cannabis, namely 141 grams; unlawfully supply cannabis to an unknown person in Groote Eylandt and unlawfully bring liquor, namely Bundaberg rum, into a prescribed area,

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[1] The sentence for drive unlicensed and uninsured were aggregated with the dangerous driving sentence. He was also fined $1500 for the offence of drive unregistered.

contrary to s 75(1)(a) *Liquor Act*. These charges were adjourned to 17 August 2011.

[10] On 17 August 2011 the appellant pleaded guilty to counts 1 and 3 on this file (21121770). Count 2 (the supply count) was withdrawn. He was also dealt with for the drive unlicensed committed on 16 July 2011. After the pleas of guilty were taken, he was formally found to be in breach of the earlier suspended sentence imposed for the dangerous driving and other traffic charges on file 21037922. He was remanded in custody to appear in Darwin on 22 August 2011 to be assessed for SMART[2] Court suitability.

[11] The appellant was assessed and admitted into the SMART Court programme in Darwin on 22 August 2011. On 5 September 2011 the six week sentence held in suspense on file 21037922 was ordered to be restored. The commencement date for the restored term was 17 August 2011. Further, on his release from prison he was ordered to enter the CAAPS[3] 12 week residential rehabilitation programme. On 26 September 2011 he formally entered into a SMART order on this matter (21121770) and for the drive unlicensed charge. (File 21123852).

[12] On 27 September 2011 he was released from prison, attended CAAPS with his wife and one of their children and commenced the 12 week residential rehabilitation programme. On 10 October 2011 he appeared in the Darwin Court of Summary Jurisdiction for a SMART review. The charges were

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2 *Alcohol Reform (Substance Misuse Assessment and Referral for Treatment Court) Act 2011*.
3 Council for Aboriginal Alcohol Program Services Inc.

adjourned for further review to 24 October 2011. The appellant failed to appear at the Darwin Court, having left CAAPS some days earlier. A warrant was issued for his arrest. I note the appellant spent less than one month at CAAPS; Her Honour was under the impression he spent two months at CAAPS. The appellant said he left CAAPS to attend a funeral.

[13] On 13 January 2012 the appellant was again arrested, this time near Mataranka for drive unlicensed, providing false particulars to police and bringing and possessing liquor (file 20219719). He was summonsed to appear at the Alyangula Court on 13 June 2012.

[14] On 16 January 2012 at Numbulwar he was arrested on the outstanding warrant for the charge the subject of this appeal. He was granted bail to appear at Alyangula Court on 15 February 2012. He failed to appear on 15 February 2012 and on 16 February a warrant was issued.

[15] On 13 June 2012 at Alyangula the appellant appeared on file 20219719 (drive unlicensed and give false particulars) and was further bailed to 11 July 2012. On 11 July 2012 the appellant appeared on files 21121770 (the subject of this appeal) and 21123852 (drive unlicensed in Alyangula). He also appeared on and indicated a plea to some of the charges on file 20129719. (The offences of driving unlicensed, providing false particulars to police and bringing and possessing liquor).

[16] On 11 July 2012, the learned magistrate, having taken the original pleas almost a year earlier to the charges including the charge the subject of this

appeal, heard submissions and ordered an assessment of the appellant for a Community Custody Order (CCO) for the following day. On the following day Her Honour also heard a plea to the charge of drive unlicensed and give false particulars on file 20219719.[4] Sentencing submissions relevant to all matters were made.

[17] Her Honour was informed that although the appellant was suitable for a CCO, a CCO disposition was unavailable at that time, because the relevant Corrections Officer was on leave. The appellant was however found to be suitable for supervision. On the basis of the relevant reports and after hearing submissions on behalf of the appellant and from the prosecutor the appellant was sentenced.

General Principles

[18] The principles that apply to an appeal against sentence are well known. An appellate court does not interfere with the sentence imposed merely because its own view is that the sentence is insufficient or excessive.

[19] It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error.[5] Error must be shown in order to justify disturbing the sentence discretion. The presumption is that

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4 The liquor charge did not proceed.

5 *R v Tait and Bartley* (1976) 46 FR 386 at 388.

there is no error.[6] It is encumbent on the appellant to show the sentence was manifestly excessive for such a ground to succeed.[7]

Ground One: Failure to impose a sentence other than imprisonment

[20] The appellant submits that the learned magistrate placed too much weight on general deterrence, prevalence and protection of the community which resulted in the imposition of an immediate term of imprisonment, six weeks of which was ordered to be served. The appellant contends the whole sentence should have been suspended and that a term less than four months would have been appropriate.[8]

[21] In relation to the submission that Her Honour placed too much weight on general deterrence I was referred to Her Honour's comments[9] about why cannabis was a problem in Groote Eylandt; the affect on health, (mental illness and physical health), the burden created on the community from this, especially on women, the amount of money used on cannabis to the detriment of the community and the contribution of cannabis to violence.

[22] Her Honour also made reference to court sittings in Alyangula where up to 30 percent of the matters in the court list are cannabis cases. Her Honour made a number of comments about the reason for the need for terms of

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6 *Raggett, Douglas and Miller v R* (1990) 50 A Crim R 41 at 42.
7 *Arnold v Trennery* (1996) 118 NTR 1 at 7.
8 The maximum penalty for this offence is 5 years imprisonment or 85 penalty units.
9 T 12 July 2012 at 11.

imprisonment for offences of this kind. Her Honour said this included terms of imprisonment even for persons on their first drug offences.[10]

[23] I do not take Her Honour as suggesting imprisonment was the starting point and that only a term of actual imprisonment would do in every case. Her Honour was emphasising that the prevalence of offending of this type must be reflected in the sentence. There was no challenge to the finding of prevalence of offending of this type in Groote Eylandt.

[24] Her Honour acknowledged that the appellant had not previously been found guilty of a drug offence but clearly he had numerous prior convictions, mostly for dishonesty, some for significant violence and many traffic matters. He had previously served many terms of imprisonment. Although the suspended sentence that was breached by this offending was not imposed for a drug matter, that factor still counted against the appellant in the overall weighing of all of the competing matters.

[25] Notwithstanding the restoration occuring at a time much earlier than the sentence imposed for the breaching offence, the learned magistrate considered totality.[11] It is relevant to take into account the likelihood of compliance and that includes past compliance (or not) if a sentence is to be wholly or partially suspended. The appellant's recent history could not have engendered confidence. The integrity of the suspended sentence regime is also relavant. At 141 grams this particular charge involved a significant

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10 T 12 July 2012 at 12.
11 T 12 July 2012 at 12.

amount of cannabis. The trafficable amount is 50 grams. Her Honour noted the appellant did not seek to rebut the presumption of possession for supply. All of these factors meant the appellant was likely to receive a term of imprisonment.

[26] Despite the appellant's precarious position the learned magistrate was clearly open to exploring other sentencing options. Her Honour had previously referred the appellant to the SMART Court where he was assessed as suitable and ordered to complete residential rehabilitation. He left rehabilitation within the month.

[27] The appellant submitted the approach by the learned magistrate to general deterrence and the more punitive aspects of sentencing was contrary to His Honour Angel J's observations in *Joran and Ors v Wilson and Another*.[12] There His Honour said: "There is no principle that all persons found guilty of unlawful supplying cannabis of whatever amount must be incarcerated". His Honour pointed out that the *Misuse of Drugs Act* (NT) itself specifies what conduct prima facie attracts a minimum penalty of 28 days actual imprisonment absent particular circumstances.[13]

[28] The appellant argued that what was said in *Joran* in relation to supply must be the same for the "less serious offence" of possession of a trafficable quantity of cannabis. What this submission overlooks is that there must be an assessment of the circumstances of every case, the offender and the

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12 [2006] NTSC 46.
13 S 37 *Misuse of Drugs Act*.

offending. "Supply" cannabis is not automatically treated as being in a more serious category than aggravated possession. Some supplies have been regarded as social rather than commercial or the amount of cannabis involved is extremely small. Most of the examples of supply in *Joran* were of small amounts of cannabis. I accept there is no presumption of imprisonment in cases where s 37 *Misuse of Drugs Act* does not apply. I am not persuaded Her Honour took a contrary approach.

[29] The types of harms that Her Honour pointed out in her remarks are discussed in other cases notably in *Daniels v The Queen*.[14] *Daniels* was a much more serious example of cannabis and other offending than is the case here, however Her Honour was still dealing with a relatively serious example of aggravated possession of cannabis destined to a community that Her Honour regarded as vulnerable to harm. It was an obvious case for regard to general deterrence. I fail to see the sentence was not proportionate to the offending.[15] Her Honour clearly weighed rehabilitation against the need for punishment. The whole approach was consistent with exploring options conducive to rehabilitation weighed against the more punitive aspects of sentencing. It was all but conceded by the appellant's counsel in the Court of Summary Jurisdiction that imprisonment was an appropriate penalty save that there was an argument for ordering a Community Custody Order or a suspended sentence.

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14 [2007] NTCCA 9.

15 Recently discussed in *Habib Urahman v Semrad* [2012] NTSC 95 at [47].

[30] The appellant was assessed as suitable to undertake a Community Custody Order (CCO) but that option was not immediately available because the Corrections Officer who was able to supervise the community work component was on leave. It was argued there was nothing to prevent the learned magistrate from adjourning the appellant's case to the next sittings of the Alyangula Court when the Corrections Officer was back from leave, or alternatively ordering that the CCO come into force at a time specified in the future. The CCO is a term of imprisonment served in the community. It differs from a suspended sentence. It is a stricter form of punishment served in the community rather than prison. Section 48E (2) *Sentencing Act* regulates the community work component of the Community Custody Order. It requires the offender "for 12 hours during each week the order is in force, attend at the place specified in the order, or as otherwise directed by a Probation Officer". As the Probation Officer would not be available it was considered not to be a suitable case for a CCO. It is not necessary for the purposes of this appeal to determine whether the Probation Officer could have otherwise directed *when* the work could be performed outside of the 12 hours per week.

[31] Although the option of adjourning the case in order to ensure the Corrections Officer's availability may have been open to Her Honour, given the appellant's history in relation to recent non appearances and re-offending while on bail, (albeit in a less significant way such as drive unlicensed), there were potentially further risks associated with further

adjournments. The case had gone on for one year. Although Her Honour was clearly open to considering a CCO, it was flagged early in the proceedings that there was quite a strong punitive interest in offences that involved bringing cannabis to Groote Eylandt.[16] When the appellant was to be assessed her Honour explained to him that she did not know whether that would be the order she was going to make but she would ask Corrections to talk to him and tell her about his suitability.

[32] The learned magistrate was clearly concerned that the provisions governing the CCO were not well tailored to remote settings given the strict compliance required in circumstances where the resources were not available.[17] She expressed significant frustration at the inadequacy of the application of the provisions in remote areas. Supervision was however available, although there were misgivings expressed given the lack of drug testing available. Her Honour also considered the option of community work coupled with a suspended sentence and supervision.

[33] Clearly options other than an actual term of imprisonment were entertained. That is evident from the very structure of the sentence and the history of proceedings. Imprisonment was an appropriate order and I see no error in Her Honour's approach in ordering a four month term to be suspended after the service of six weeks on conditions. I would not allow the appeal on ground one.

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16 T 11 July 2012, at 5.
17 T 12 July 2012, at 4.

Ground Two: Manifestly Excessive

[34] Much of what is relevant to this ground has been discussed in the context of ground one. I will not repeat that discussion but adopt similar reasoning in relation to this ground. *Dinsdale v R*[18]was relied on for the following propositions: the Court must consider whether imprisonment is the appropriate penalty – it is a penalty of last resort; if imprisonment is appropriate consideration must be given to the question of suspension; the Court must consider all of the objective and subjective features when determining suspension. Those principles are accepted but in my view that is the very approach taken by the learned magistrate both when setting the head term and the term to be served before suspension and supervision.

[35] There were many competing factors considered by Her Honour including:

- The seriousness of the offending – there was no rebuttal of the presumption of supply of a relatively significant amount of cannabis.
- The offending was in breach of a suspended sentence.
- The community where the cannabis would have been supplied was vulnerable to harms of the type referred to in *Daniels* and by Her Honour.
- Offending of this type is prevalent, especially at Groote Eylandt.

[18] (2000) 202 CLR 1.

- The appellant was not a person of good character. He had many previous convictions and served previous terms of imprisonment.

- The appellant had a child with a disability and cared for the other child while his partner was in Darwin with the disabled child – the information about this was not comprehensive[19] in the Court of Summary Jurisdiction although clearly her Honour considered it in an overall sense rather than specifically as "hardship".[20]

- The appellant had mental health concerns and had self harmed previously in prison.

- The appellant had previously served the restored term of six weeks imprisonment before entry into the SMART programme – totality was applied in that context.

- The appellant was drug dependant and had managed to be drug free since release – given the understandable scepticism in relation to the claimed abstinence particular conditions were imposed on the suspended sentence.

- The appellant had entered CAAPS as part of the SMART programme – he was given credit for two months participation, rather than one month. He left rehabilitation early.

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[19] I acknowledge this case was but one of many in the context of a busy remote circuit court. This type of material is unlikely to be able to be presented in a cogent way as described in *Mawson v Nayda* (1995) 5 NTLR 56; *The Queen v Martyn* [2011] NTCCA 13.

[20] As discussed in *Mawson v Nayda* and *Martyn* (above).

- He pleaded guilty at the second appearance – an early plea with appropriate mitigation.

[36] I am not persuaded, given the mix of competing considerations that I consider were properly calibrated by Her Honour, that the sentence was manifestly excessive.

[37] Ground two is dismissed.

[38] The orders are that the appeal is dismissed and the sentence of the Court of Summary Jurisdiction is affirmed.

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