

Damaso v The Queen [2002] NTCCA 2

PARTIES: BRETT WILLIAM DAMASO

v

THE QUEEN

TITLE OF COURT: COURT OF CRIMINAL APPEAL OF
THE NORTHERN TERRITORY

JURISDICTION: APPEAL FROM THE SUPREME
COURT EXERCISING TERRITORY
JURISDICTION

FILE NO: CA 11 of 2001

DELIVERED: 1 May 2002

HEARING DATE: 13 March 2002

JUDGMENT OF: MILDREN, BAILEY & RILEY JJ

CATCHWORDS:

APPEAL – effect of amendments to s 37 of the *Misuse of Drugs Act* – s 37(6)(b) raises a presumption that an accused in possession of a commercial quantity of cannabis intended to supply the cannabis for commercial gain – effect of the provision is to presume the existence of a circumstance of aggravation unless the contrary is proved on a balance of probabilities – reversal of the onus of proof – interference with right of a defendant to have a circumstance of aggravation proved against him beyond reasonable doubt – presumption against retrospectivity applicable – presumption has no application to facts occurring before date of commencement of amendment, 14 December 2000.

Misuse of Drugs Act (NT): s 37(1), (6) and (7)
Criminal Code (NT)
Trade Practices Act (Cth)

Maxwell v Murphy (1956-1957) 96 CLR 261 at 267, applied.
Rodway v The Queen (1989-1990) 169 CLR 515, applied.

Fabian (1993) 64 A Crim R 365, followed.
Anderson v The Queen (1993) 177 CLR 520, followed.
R v Olbrich (1999) 199 CLR 270, followed.
MCP Muswellbrook Pty Ltd v Deutsche Bank (Asia) AG (1988)
12 NSWLR 16, considered.
Richardson v Shipp [1970] Tas SR 105, applied.
R v Simpson [2001] NSWCCA 534, unreported, delivered
19 December 2001, applied.
Dinsdale v The Queen (2000) 202 CLR 32, applied.
Astill (No 2) (1992) 64 A Crim R 303, applied.

REPRESENTATION:

Counsel:

Appellant:	J Tippet QC
Respondent:	M Carey

Solicitors:

Appellant:	NAALAS
Respondent:	DPP

Judgment category classification:	B
Judgment ID Number:	bai0207
Number of pages:	24

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Damaso v The Queen [2002] NTCCA 2
No. CA 11 of 2001

BETWEEN:

BRETT WILLIAM DAMASO
Appellant

AND:

THE QUEEN
Respondent

REASONS FOR JUDGMENT

(Delivered 1 May 2002)

CORAM: THE COURT

Background

- [1] On 23 May 2001, the appellant pleaded guilty and was convicted of two offences under the *Misuse of Drugs Act* (“*MOD Act*”). The first offence was one of unlawful possession of cannabis. The offence was aggravated by reason that the appellant was in possession of a commercial quantity of cannabis, namely, 940.5 gms. The maximum penalty for this offence, contrary to s 9(1) and (2)(d) of the *MOD Act* is imprisonment for 14 years. The second offence was one of unlawfully supplying cannabis. The maximum penalty for this offence, contrary to s 5(1) and (2)(a)(iv) of the *MOD Act* is a fine of \$10,000 or imprisonment for 5 years.

- [2] The two offences were committed between 11 December and 22 December 1999. The cannabis which was the subject matter of the first offence was located in eleven bags of various weights at the appellant's residence. Other items found at the premises included two sets of electronic scales and a quantity of unused clipseal bags. In an electronically recorded record of interview the appellant admitted that the cannabis, bags and scales were his property. He said that he had intended to "weigh some ounces up" and "... just keep them as presents. I was going to give them to my family as presents and so on". The appellant also admitted to having smoked cannabis with friends at various times between 11 and 22 December 1999 and to having allowed friends to smoke his cannabis in his absence. These admissions formed the basis of the second offence.
- [3] It was an admitted fact that the "street value" of the cannabis in the appellant's possession was \$23,500 (based on \$25 per gram).
- [4] In the course of the proceedings before the learned Chief Justice, reference was made to s 37(6) and (7) of the *MOD Act* which are in the following terms:
- “(6) In sentencing a person for an offence against section 7, 8 or 9, the court is to presume that –
- (a) if the amount of the dangerous drugs to which the offence relates is a traffickable quantity - the person intended to supply the dangerous drugs; and
- (b) if the amount of the dangerous drugs to which the offence relates is a commercial quantity - the person intended to supply the dangerous drugs for commercial gain.
- (7) Subsection (6) applies unless the contrary is proved.”

- [5] These provisions had been added to the *MOD Act* by Act No 74 of 2000 which had come into force on 14 December 2000. The learned Chief Justice noted that the effect of the amendments to s 37 was to raise a presumption that the appellant intended to supply the cannabis (the subject-matter of the first offence) for commercial gain unless the contrary is proved on the balance of probabilities.
- [6] The amending Act of 2000 defined “commercial gain” (s 37(1) of the *MOD Act*) as follows:
- “in relation to supplying dangerous drugs, means to supply the dangerous drugs for fee, reward or consideration or in expectation of a fee, reward or consideration”.
- [7] The learned Chief Justice ruled that the presumption applied in relation to the first offence committed by the appellant notwithstanding that it was enacted and came into force approximately one year after the appellant’s offence.
- [8] There was no attempt by or on behalf of the appellant to rebut the presumption raised by s 37(6)(b) of the *MOD Act*. Neither was there any evidence in the Crown’s case to rebut the presumption.
- [9] The learned Chief Justice held that the appellant was presumed to have intended to supply the cannabis referred to in the first offence for commercial gain.

[10] In sentencing the appellant, the learned Chief Justice took into account the appellant's cooperation with the police, his early indication of his intention to plead guilty and genuine remorse. His Honour also had regard to the appellant's personal circumstances, favourable character references tendered on the appellant's behalf and his "reasonable" prospects for rehabilitation. The learned Chief Justice considered that while the appellant's possession of more than \$23,000 worth of cannabis, which he intended to supply for commercial gain, was "... not the most serious offence of its kind" it was "... twice the amount prescribed as a commercial quantity and cannot be treated lightly". His Honour also took into account that the appellant had two previous convictions for possession of cannabis for which he had been punished by way of fines, but indicated that the previous convictions weighed "little in my mind in the circumstances of the case".

[11] The learned Chief Justice sentenced the appellant to imprisonment for two years for the offence of aggravated unlawful possession and six months for the unlawful supply offence. The sentences were ordered to be served concurrently with a non parole period of one year.

Grounds of Appeal

[12] Leave to appeal against the appellant's sentence was granted on 13 September 2001 upon the sole ground:

"That the learned sentencing judge erred in finding that changes to s 37 of the *Misuse of Drugs Act* were retrospective and that they applied to the defendant (appellant)".

[13] At the outset of the appeal, counsel for the appellant, Mr Tippet QC sought leave to add an additional ground of appeal:

“That the sentence is manifestly excessive”.

[14] Mr Carey, counsel for the Crown, did not oppose the application. The Court ordered that the application for leave and the merits of the proposed additional ground of appeal would be heard together.

[15] For convenience, the introduction of s 37(6) and (7) of the *MOD Act*, together with the definition of “commercial gain” added to s 37(1) are referred to hereafter as “the 2000 amendments”.

Section 37(6) and (7) of the *MOD Act*

[16] The respective positions of the appellant and the respondent may be summarised in brief terms.

[17] For the appellant, Mr Tippet submitted that:

- a) decided cases dealing with the sentencing of drug offenders recognise that it is appropriate to differentiate between those who possess drugs for their own consumption (and possibly extending to possession for supply to friends or others on a limited basis to support the offender’s addiction) and those who possess drugs principally or substantially for commercial gain;

- b) in accordance with general principles, if the Crown wishes to rely on some alleged, but disputed, factual circumstance as aggravating an offence, the onus lies upon the Crown to establish the existence of that circumstance beyond reasonable doubt;
- c) prior to the 2000 amendments, the Crown bore the onus of proving beyond reasonable doubt that a person in possession of dangerous drugs intended to supply those drugs for commercial gain;
- d) prior to the 2000 amendments, in the absence of an admission, a person had a “right” not to be penalised for an intent to supply dangerous drugs in his possession for commercial gain unless this was established beyond reasonable doubt by the Crown;
- e) the 2000 amendments are substantive rather than procedural in nature – the 2000 amendments affect the rights and liabilities referred to in c) and d) above;
- f) the 2000 amendments are subject to the general presumption against retrospective operation of legislative amendments and, in the absence of a contrary intention, apply only to facts arising after the date of commencement (14 December 2000); and
- g) the 2000 amendments have no application to the facts of the appellant’s offence of unlawful possession of cannabis between 11 to 22 December 1999.

[18] For the Crown, Mr Carey submitted that:

- a) the 2000 amendments are procedural rather than substantive in nature: the amendments affect only the procedure by which disputed facts (here, the intent to supply for commercial gain) are to be determined by a court;
- b) in the Northern Territory, the burden of proof in criminal trials is governed by statute (s 440 of the *Criminal Code*) not common law;
- c) prior to the 2000 amendments, no right existed in the Northern Territory at common law requiring proof beyond reasonable doubt of an intention to supply dangerous drugs for commercial gain;
- d) the presumption that the legislature does not intend to affect basic common law doctrines unless its intention is expressed in the clearest of terms has no application to the 2000 amendments;
- e) an intention to supply dangerous drugs for commercial gain is neither a “circumstance of aggravation” within the meaning of s 1 of the *Criminal Code* nor an “aggravating circumstance” within the meaning of s 27 of the *MOD Act*;
- f) a person can have no vested right for a trial to be conducted in accordance with any particular procedure before the date of commencement of the trial; and

g) the 2000 amendments apply to all relevant criminal proceedings conducted after the date of commencement, namely 14 December 2000, and accordingly applied to the proceedings of 23 May 2001, notwithstanding that the appellant's offence of aggravated unlawful possession was committed prior to that date of commencement.

[19] The general presumption against retrospective operation of legislation was summarised by Dixon CJ in *Maxwell v Murphy* (1956-1957) 96 CLR 261 at 267 in the following terms:

“The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed. The basis of the distinction was stated by Mellish LJ in *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62 at p 69. ‘No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done’”.

[20] Immediately after the above passage, His Honour observed:

“The distinction is clear enough in principle and its foundation in justice is apparent. But difficulties have always attended its application.”

[21] Some of the difficulties referred to by Dixon CJ were addressed by the High Court in *Rodway v The Queen* (1989-1990) 169 CLR 515. In that case, the applicant had been charged with certain sexual offences in relation to a girl under the age of seventeen years. At the date of the alleged offences, the *Criminal Code* (Tasmania) required corroboration of the evidence of the complainant before a person could be convicted of the offences alleged against the applicant. Before the commencement of the applicant's trial, the Tasmanian *Criminal Code* was amended by repealing the requirement for corroboration and replacing it with a provision which abolished any rule of law or practice requiring a judge to warn the jury of the danger of convicting on the uncorroborated evidence of the complainant, and precluded him from giving such a warning unless satisfied that it was justified in the circumstances. The issue before the High Court was whether the new provisions applied to the trial of the applicant.

[22] The High Court held the new provisions applied to the trial on the ground that the amendment did not affect existing rights and obligations, but operated to affect the way in which rights fell to be determined at trial, and thus did not fall within the presumption against the retrospective operation of a statute.

[23] In a unanimous judgment, the High Court observed at 518:

“The rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. It is said that

statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation. It would, we think, be more accurate to say that there is no presumption against retrospectivity in the case of statutes which affect mere matters of procedure. Indeed, strictly speaking, where procedure alone is involved, a statute will invariably operate prospectively and there is no room for the application of such a presumption. It will operate prospectively because it will prescribe the manner in which something may or must be done in the future, even if what is to be done relates to, or is based upon, past events. A statute which prescribes the manner in which the trial of a past offence is to be conducted is one instance. But the difference between substantive law and procedure is often difficult to draw ...”

[24] After referring to examples where (at 519) “... the simple classification of a statute as either procedural or substantive does not necessarily determine whether it may have a retrospective operation”, the Court continued at p 521:

“But ordinarily an amendment to the practice or procedure of a court, including the admissibility of evidence and the effect to be given to evidence, will not operate retrospectively so as to impair any existing right. It may govern the way in which the right is to be enforced or vindicated, but that does not bring it within the presumption against retrospectivity. A person who commits a crime does not have a right to be tried in any particular way; merely a right to be tried according to the practice and procedure prevailing at the time of trial. The principle is sometimes succinctly, if somewhat sweepingly, expressed by saying, as did Mellish LJ in the passage cited by Dixon CJ in *Maxwell v Murphy*, that no one has a vested right in any form of procedure. It is a principle which has been well established for many years: see also *Wright v Hale* (1860) 6 H&N 227 at p 233 [158 ER 94 at p 96], per Wilde B; *Attorney-General v Sillem* (1864) 10 HLC 704 at p 763 [11 ER 1200 at p 1224], per Lord Wensleydale; *Warner v Murdoch* (1877) 4 Ch D 750 at p 752, per James LJ.”

[25] At 522, their Honours held:

“Some procedures at a trial provide fundamental protection against wrongful conviction, but, in conformity with the passage already quoted from the judgment of Dixon CJ in *Maxwell v Murphy*, this ordinarily provides no basis for regarding them as having a

retrospective operation simply because the trial concerns events and transactions past and closed. The fact that such procedures are important does not alter the way in which they operate and, if they operate so as to affect no existing rights or obligations but merely the way in which those rights or obligations are to be contested in court, then they do not fall within the presumption against retrospectivity. Fundamental rights, irrespective of whether they should be classified as procedural or substantive, will almost invariably be reflected in the common law and the protection against statutory interference with them, whether prospective or retrospective, lies in another presumption. That is the presumption that the legislature does not intend to affect basic common law doctrines unless it expresses its intention in the clearest of terms: *Potter v Minahan* (1908) 7 CLR 277 at p 304; *Baker v Campbell* (1983) 153 CLR 52 at pp 96-97, 104, 116, 123; *Sorby v The Commonwealth* (1983) 152 CLR 281 at pp 289-290; *Hamilton v Oades* (1989) 166 CLR 486 at p 495.

Whether or not the previous requirement of the law that certain evidence required corroboration before it could safely be relied upon could be described as basic or fundamental, both in *Attorney-General's Reference No 1 of 1988* (1988) 49 SASR 1 and in this case the statutory amendments were clearly intended to alter the existing law with respect to corroboration. Both amendments were procedural in character. They did not operate to affect existing rights or obligations. Rather, they operated to affect the way in which rights fell to be determined at trial and, for that reason, they did not fall within the presumption against retrospective operation. It follows that, in our view, *Attorney-General's Reference No 1 of 1988* was wrongly decided and that the Tasmanian Court of Criminal Appeal was correct in declining to follow the decision.”

- [26] In the present case the gravamen of the submissions on behalf of the Crown is that the 2000 amendments are procedural in the relevant sense of that term as applied in *Rodway*. Mr Carey submitted that the amendments affect only the procedure by which a disputed fact (the intent to supply dangerous drugs for commercial gain) is to be determined by the Court: in the words of the High Court, the 2000 amendments “... operated to affect the way in which rights fell to be determined at trial ...”.

[27] In the case of a person convicted of unlawful possession of a substantial amount of cannabis, there can be no doubt that whether he or she intended to supply the cannabis for commercial gain is of substantial relevance to the determination of an appropriate sentence. An offender who has such an intention is likely to receive a more severe sentence than a person who possesses cannabis for their personal consumption or to share with friends unmotivated by gain.

[28] We agree, with respect, with the observations of Kirby P in *Fabian* (1993) 64 A Crim R 365 at 368:

“... it is appropriate, in sentencing drug offenders, to differentiate between those who wholly or partially use drugs to feed their own addiction and those who cynically manipulate and use others who are already addicted, solely for greed and commercial advantage. The former are often themselves victims of an addiction which common experience shows it is extremely hard to escape from. The latter, for their own gain, take advantage of the former.”

[29] In the Northern Territory, we consider that it is trite to say that sentencing courts view an intent to supply dangerous drugs for commercial gain as a serious circumstance of aggravation in terms of penalty for those convicted of unlawful possession. In this regard, Mr Carey’s submission that such an intent is neither a “circumstance of aggravation” within the meaning of s 1 of the *Criminal Code* nor an “aggravating circumstance” within the meaning of s 37 of the *MOD Act* is not to the point. Those terms are defined in s 1 and s 37 for specific purposes quite distinct from those which arise in this case. In the present context, classification of the relevant intent as a

circumstance of aggravation is adopted simply to indicate that the existence of such an intent will increase the seriousness of the offence and is likely to result in a higher penalty than would be imposed in the absence of such an intent.

[30] In the submission of Mr Tippet, prior to the 2000 amendments, if the Crown wished to rely on an alleged intent to supply dangerous drugs for commercial gain as an aggravating circumstance in the above sense, the Crown bore the onus of proving such an intent beyond reasonable doubt. We agree with that submission. In *Anderson v The Queen* (1993) 177 CLR 520 at 536, Deane, Toohey and Gaudron JJ held:

“If, on a sentencing hearing after a plea of guilty, the Crown wishes to rely on some alleged, but disputed, factual circumstance as aggravating the offence, the ordinary rule is that the onus lies upon the Crown to establish the existence of that circumstance. It is common ground, and rightly so, that the standard of proof which rests upon the Crown in such a case in South Australia is the ordinary criminal standard, namely, beyond reasonable doubt. If the Crown fails to establish the disputed circumstance of aggravation to that standard of proof, the offender must be sentenced on the basis that that circumstance of aggravation has not been shown to exist. Thus, in the present case where the Crown relied on commercial purpose as a circumstance of aggravation, it was for the Crown to satisfy the sentencing judge beyond reasonable doubt that the appellant had had such a purpose. If the Crown failed to discharge that onus, the appellant was entitled to be sentenced on the basis that his cultivation of cannabis had not been shown to have been for such a purpose.”

[31] There can be no doubt that this statement of principle represents the law in the Northern Territory in common with all other Australian jurisdictions: see also *R v Olbrich* (1999) 199 CLR 270 at para [27]. The fact that in the

Northern Territory the onus on the Crown to prove disputed circumstances of aggravation beyond reasonable doubt is governed by statute (s 440(1) of the *Criminal Code*) rather than the common law in no sense derogates from the statement of principle expressed by the High Court in *Anderson*. Section 440(1) of the *Criminal Code* simply reflects the common law.

[32] The gravamen of Mr Tippet's submissions on behalf of the appellant is that the 2000 amendments do not merely affect the way in which "... rights (fall) to be determined at trial" (or perhaps, more accurately, the way in which a disputed circumstance of aggravation is to be proved), but rather relieve the Crown of its burden to prove a circumstance of aggravation beyond reasonable doubt.

[33] The effect of the 2000 amendments is to presume the existence of a circumstance of aggravation against a drug offender "unless the contrary is proved". It is clear that the offender carries the burden of persuasion to rebut the presumed fact – albeit on a balance of probabilities rather than beyond reasonable doubt. The effect of the 2000 amendments is to reverse the onus of proof: that which the Crown was formerly required to establish beyond reasonable doubt is to be taken as proved unless the offender proves otherwise on a balance of probabilities.

[34] The 2000 amendments are "procedural" in the sense that the provisions are directed to what is required in criminal proceedings to establish a fact which may affect sentence, but clearly the new provisions also relieve the Crown

of its former burden (or “liability”) to prove a disputed fact beyond reasonable doubt. Looked at in that light, the 2000 amendments derogate from an offender’s former “right” not to be penalised for an intent to supply dangerous drugs for commercial gain unless such an intent was established beyond reasonable doubt by the Crown. In our view, the effect of the 2000 amendments is in marked contrast to the effect of the legislative amendments considered by the High Court in *Rodway*.

- [35] The legislative amendments considered in *Rodway* did not have any impact on the Crown’s onus to prove beyond reasonable doubt the requisite elements of a sexual offence. The amendments removed only the need for the evidence of a complainant to be corroborated in some material particular implicating the accused. “Corroboration” was not, nor could it ever be, an element of a sexual offence. The former Tasmanian law required, as a matter of practice or procedure, that corroboration was to be established in proving the elements of a sexual offence. What the Crown had to prove for a conviction was not changed by the legislative amendments, only what evidence was required for such a conviction. The legislative amendments considered in *Rodway* did not relieve the prosecution of its burden to prove a disputed fact. The only change was to what was required to prove facts in dispute. This is quite different from the effect of the 2000 amendments to the *MOD Act*. The introduction of the (rebuttable) presumption relieved the prosecution of its burden to prove a disputed fact, namely the existence of an intention to supply dangerous drugs for commercial gain. The

amendments extend beyond merely changing what evidence is required to prove that disputed fact.

[36] Support for the latter conclusion is provided by several authorities, referred to by Mr Tippet, which have considered the introduction of statutory presumptions.

[37] In *MCP Muswellbrook Pty Ltd v Deutsche Bank (Asia) AG* (1988) 12 NSWLR 16, Powell J considered whether section 51A of the *Trade Practices Act* (Cth) was intended to apply to events occurring before the date of its commencement.

[38] The *Trade Practices Act* was amended by adding a new section, 51A, in the following terms:

- “(1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
- (2) For the purposes of the application of sub-section (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.”

[39] Powell J at 31 observed:

“... it seems to me, the provisions of s 51A which purport to reverse the onus of proof are not, as counsel for the plaintiffs would have them, to be regarded as dealing with a matter of procedure, but rather, are to be regarded as dealing with a matter of substantive law, since they would constitute an interference with the rights of a

defendant otherwise to have any case raised against him proved by the plaintiff: see *Ah Hing v Hough* (1926) 28 WALR 95; *Richardson v Shipp* [1970] Tas SR 105; see also *Pearce's Statutory Interpretation in Australia*, 2nd ed (1981) Ch 10, at 149.”

[40] With respect, it is arguable whether the provisions of s 51A of the *Trade Practices Act* purport to “reverse the onus of proof”. In order to rebut the statutory presumption that a representation is misleading, a defendant is required only to *adduce evidence* that it had reasonable grounds for making the representation. In contrast to the 2000 amendments to the *MOD Act*, a defendant does not carry the burden of persuasion to rebut the fact presumed by the legislation, only a burden to adduce evidence to the contrary. The provision says nothing about the weight of such evidence. In particular, the provision does not require the defendant’s evidence to amount to proof that the defendant had reasonable grounds for making the relevant representation. Nevertheless, Powell J held that s 51A of the *Trade Practices Act* interfered with the rights of a defendant to have any case raised against him proved by the plaintiff and, in consequence, was not to be given retrospective effect.

[41] In *Richardson v Shipp* [1970] Tas SR 105, section 41C(12) of the *Traffic Act* (Tasmania) was amended between the date of the alleged offence and the hearing to provide that in such proceedings the “(breathalyser) instrument ... shall be deemed to have given an accurate indication of the percentage ... unless the contrary is proved”.

[42] Burbury CJ held at 108:

“The effect of the new enactment is therefore to deprive a defendant charged with this offence of a basic safeguard adopted by our law that a person charged with a crime or summary offence does not have to prove his innocence but that the prosecution must prove his guilt to the satisfaction of the court or a jury to the point where upon the evidence it cannot be said that there is any reasonable doubt about it. Uninstructed by authority on the precise point I would hold an enactment of this kind does not have retrospective effect, because although it may be said to be procedural in character, it adversely affects a vested right, and that is the presumption of innocence. However I find strong persuasive authority for this view in *Ah Hing v Hough* (1926) 28 WAR 95, where the Full Court of the Supreme Court of Western Australia held that a newly enacted amendment to the Commonwealth *Immigration Act* 1901 reversing the onus of proof in relation to an offence under the Act did not operate retrospectively. Burnside J in his judgment said at pp 98, 99:

‘The effect of the Statute of 1925 was to alter one of the fundamental principles of the law of evidence. It alters the most sacred principle of the criminal law, by making a person charged with an offence prove his innocence, which otherwise he was not bound to do. That appears to me to be a sufficiently clear indication that it is not merely a question of procedure, but a question of taking away a right from him, a right which he had, to have his innocence presumed, and of casting upon him the onus of proving that he was not guilty.’”

[43] In our view, whether the 2000 amendments to the *MOD Act* are properly characterised as “procedural” or “substantive”, the introduction of the presumption constitutes an interference with the right of a defendant otherwise to have a circumstance of aggravation proved against him beyond reasonable doubt by the Crown. In these circumstances, the presumption against retrospectivity applies and we are satisfied the learned Chief Justice erred in finding that the 2000 amendments applied to the facts of the appellant’s case.

“Manifestly Excessive”

- [44] Mr Tippet sought leave to rely on an additional ground of appeal that the appellant’s sentence (effectively two years imprisonment with a non parole period of 1 year) is “manifestly excessive”.
- [45] In support of both his application for leave and the merits of the proposed ground of appeal, Mr Tippet handed up a table summarising various sentences imposed for offences under the *MOD Act*. He also referred at some length by way of comparison to the Chief Justice’s reasons for sentence in *R v Bilston*, SCC 20110584, Supreme Court of the Northern Territory, unreported, delivered 7 March 2002.
- [46] The general principles applicable to appeal against sentence are well known. The presumption is that there is no error in the sentencing; an appellant must demonstrate that the sentencer erred, either by acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the facts: *Raggett* (1990) 50 A Crim R 41. In applying these principles to submissions that a sentence is “manifestly excessive” it is for the appellant to show that the nature of the sentence itself affords convincing evidence that in some way the exercise of the discretionary sentencing power was unsound. To do so, he must show that the sentence was clearly and obviously, and not just arguably, excessive: *Cranssen v The King* (1936) 55 CLR 509 at 520.

[47] In *R v Morse* (1979) 23 SASR 98 at 99 King CJ with whom White and Mohr JJ concurred said:

“This court can interfere only if it is convinced that the sentence was manifestly excessive. To determine whether a sentence is excessive, it is necessary to view it in the perspective of the maximum sentence prescribed by law for the crime, the standards of sentencing customarily observed with respect to the crime, the place which the criminal conduct occupies in the scale of seriousness of crimes of that type, and the personal circumstances of the offender.”

[48] The nature of a submission that a sentence is manifestly excessive is said to be such that it “is not capable of sustained argument” as Young CJ put it in *Taylor* (1985) 18 A Crim R 14 at 17. However, in the case of cannabis offences under the *MOD Act*, which come all too frequently before the Supreme Court, where the ground of appeal relied on is that a sentence is manifestly excessive, the current sentencing “tariff” is capable of being established by statistical material. It is for an appellant to place such material before the court: see generally on the use of statistical material *R v Dixon* (1975) 22 ACTR 13 at 17; *R v Williscroft* [1975] VR 292 at 301; *Winkler v Cameron* (1981) 33 ALR 663 at 666-8; *Sewell v Walsh* (1981) 5 A Crim R 204 at 206; *Jurkovic* (1981) 6 A Crim R 215 at 220; *Clair v Brough* (1985) 37 NTR 11 at 14-16; *Breed v Pryce* (1985) 36 NTR 23 at 25-28; *Tarry v Pryce* (1986-87) 45 NTR 1 at 3-9; *R v Ireland* (1987) 49 NTR 10 at 17-20 and 30-36; *R v Allinson* (1987) 49 NTR 38 at 40; *Richardson v Sweeney* (1987) 31 A Crim R 183 at 190-192; *Morris v East* (1988) 83 ACTR 1 at 3-10; *Mason v Pryce* (1988) 54 NTR 1 at 5 and 8; *Wood v McDonald* (1988) 35 A Crim R 296 at 297-8; *Smith* (1990) 50 A Crim R 476

at 478-9; *Rory* (1992) 64 A Crim R 134 at 136-8; and *McKay v Hayward*, unreported, Supreme Court (Kearney J), 15 December 1995.

[49] We do not consider that the table summarising sentences imposed for offences under the *MOD Act* handed up by Mr Tippet provides the appropriate assistance to consider whether the appellant's sentence falls within or outside the generally accepted range of sentences imposed for similar offending. The case summaries follow no consistent pattern. Many of the cases referred to are concerned with cultivation of cannabis rather than unlawful possession with intent to supply for commercial gain. In some of the summaries, but not all, reference is made to whether the offender has a prior record of similar offending. In some of the summaries reference is made to findings that possession of cannabis was for personal consumption or with intent to supply for commercial gain, but other summaries make no reference to these crucial issues.

[50] We also derive little if any assistance from *R v Bilston*, *supra*. The case concerns a mature aged first offender cultivating cannabis, admittedly motivated by profit. The facts of the offences are far removed from the appellant's case as are the personal circumstances of the two offenders.

[51] In our view, the appellant has failed to demonstrate that the appellant's sentence is manifestly excessive. The sentence does not appear to us to qualify as manifestly excessive when viewed in the light of the maximum penalties of imprisonment for 14 years and 5 years applicable to the

appellant's offences. As the learned Chief Justice acknowledged in his reasons for sentence, general deterrence must play a significant part in sentencing those who deal in dangerous drugs for profit.

Determination of the Appeal

[52] Section 411(4) of the *Criminal Code* provides:

“On an appeal against a sentence the Court, if it is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor and in any other case shall dismiss the appeal.”

[53] It is clear from the terms of s 411(4) that identification of some kind of error by the learned Chief Justice – here, the erroneous application of the presumption raised by the 2000 amendments to the appellant's offence of aggravated unlawful possession of cannabis – is not of itself a sufficient basis for this Court to allow the appeal and re-sentence the appellant. By s 411(4) this Court must form a positive opinion that “... some other sentence ... is warranted in law and should have been passed”. Unless the Court forms such an opinion, the essential pre-condition for the exercise of the power to “... quash the sentence and pass such other sentence in substitution therefor” is not satisfied: see *R v Simpson* [2001] NSWCCA 534, unreported, delivered 19 December 2001 at paras [74] to [80] and [100]; *Dinsdale v The Queen* (2000) 202 CLR 321 at paras [3] and [21]; *Astill* (No 2) (1992) 64 A Crim R 303 at 304.

[54] In the present case, the facts found by the learned Chief Justice were admitted by the appellant. The appellant did not give evidence and no witnesses were called either on his behalf or for the Crown. In such circumstances, this Court is in an equally good position as the court below to assess the facts of the case and determine what inferences should be drawn from such facts.

[55] The facts here are:

- a) the appellant was in possession of eleven bags of cannabis with a combined weight of 940.5 gms;
- b) the estimated “street value” of the cannabis was \$23,500;
- c) in addition to the cannabis found at his home, other items found in the appellant’s possession included two sets of electronic scales (in his bedroom) and a quantity of small plastic unused clipseal bags (in a toolbox);
- d) when asked what he used the scales for, the appellant told the police: “I was going to weigh some ounces up and didn’t get around to doing it”; and
- e) when asked what he was going to do with the ounces once weighed, the appellant said: “Just keep them as presents. I was going to give them to my family as presents and so on”.

[56] We consider that the only reasonable inference from these facts is that the appellant intended to supply cannabis in his possession for commercial gain. In the light of his admissions to police of having shared cannabis with

friends, we would accept that the appellant did not intend to supply all of the cannabis in his possession for commercial gain. However, the claim that he kept two sets of electronic scales in his bedroom to weigh ounces of cannabis as presents for members of his family is not worthy of belief. If the appellant intended to use the cannabis only for his personal consumption and that of his family and friends, he would not need the precision offered by two sets of electronic scales. Having regard to the quantity of cannabis and the equipment for weighing and packaging, the only reasonable inference is that the appellant intended to supply cannabis for commercial gain. In short, we consider that the learned Chief Justice was correct in sentencing the appellant on the basis that he intended to supply the cannabis in his possession for commercial gain.

[57] In the light of that conclusion, notwithstanding the learned Chief Justice’s error in relying on the presumption raised by the 2000 amendments to the *MOD Act*, we do not believe that there is any proper basis for the formation of an opinion that “... some other sentence ... should have been passed”. We consider that the sentence imposed was appropriate.

[58] We would refuse the application for leave to appeal on the additional ground that the sentence is manifestly excessive. We would also dismiss the appeal based on the appeal ground for which leave was granted on the basis that, notwithstanding the error of the learned Chief Justice, we are not of the opinion that some other sentence is warranted in law.