Hesseen v Burgoyne [2003] NTSC 47

PARTIES:	HESSEEN, Miriam
	v
	BURGOYNE, Robert Roland
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 38 of 2002
DELIVERED:	9 May 2003
HEARING DATES:	29 April 2003
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL
Justices appeal – unlawful possession goods – unlawful possession cannabis – manifestly excessive – erred in determining to record convictions – no prior convictions – person of good character – assessment of triviality and extenuating circumstances – conviction could have serious detrimental effect.

Summary Offences Act 1923 (NT), s 61; *Misuse of Drugs Act* 1990 (NT), s 9(1) and s 9(2)(f)(ii); *Sentencing Act* 1995 (NT), s 8

Gorey v Winzar, unreported, 4 April 2001, 1 NTJ (2001) at p 307, applied.
Briese (1997) 92 A Crim R 75 at 79, considered.
Mason v Pryce (1988) 34 A Crim R 1, applied.
House v The King (1936) 55 CLR 499, applied.
Dinsdale v The Queen (2000) 202 CLR 321, applied.

REPRESENTATION:

Counsel:

Applicant:	J Kelly
Respondent:	C Roberts

Solicitors:

Applicant:	NTLAC
Respondent:	DPP

Judgment category classification:	B
Judgment ID Number:	mar0318
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Hesseen v Burgoyne [2003] NTSC 47
No. JA 38 of 2002

BETWEEN:

MIRIAM HESSEEN
Applicant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 9 May 2003)

[1] Appeal against sentence. The appellant was convicted upon her pleas of guilty before the Court of Summary Jurisdiction at Alice Springs on 8 August 2002 for that:

1. On 11 January 2002 at Alice Springs she did have in her custody personal property namely $2,911.20 Australian currency, $310 US, and $5,000 in telephone cards, which at the time before making the charge was reasonably suspected of having been stolen or otherwise unlawfully obtained (s 61 Summary Offences Act 1923 (NT)), and

2. On the same date and place she unlawfully possessed cannabis plant material, a dangerous drug specified in Schedule 2 to the Misuse of Drugs Act 1990 (NT), contrary to s 9(1) and s 9(2)(f)(ii) of the Act.

[2] On the first count it was ordered that the appellant "enter into a good behaviour bond for two years in the amount of $500". In respect of the drugs offence, she was fined $300. The grounds of appeal are that the sentences were manifestly excessive and that the learned Magistrate erred in determining to record the convictions.

[3] The facts which were admitted and upon which her Worship proceeded may be summarised as follows:

Police executed a search warrant at the premises at which the appellant resided and the goods referred to in the first count were found and the cannabis detected. The goods were identified as having been stolen and there were matters put before her Worship to indicate that the appellant's boyfriend had stolen them. The appellant was arrested and taken to the Alice Springs Police Station, but when interviewed was said to have been uncooperative in that she said she did not know the cash and coins were at the house and she did not believe the Telstra phone cards had been stolen. She was unwilling to assist police in regard to the whereabouts of her boyfriend.

In relation to the cannabis, it was in a container in the house and amounted to .1 of a gram. The appellant said it was for her own use. When asked for

a reason for committing an offence in relation to the possession of the goods which were reasonably suspected of having been stolen, the appellant replied "I have done nothing. You can't charge me with these things".

[4] It is unclear as to what had been conveyed by the police to the appellant prior to the questioning as to the nature of the charges which were in contemplation. In fact, she was initially charged with unlawful entry into a number of buildings with intent to steal and of stealing a significant amount of goods as well as those which are presently under consideration. Those charges were not pursued.

[5] The appellant was kept in custody first at the police station and then at the prison for three days before being put before a Magistrate. She was not permitted at any time to communicate with anybody, but no complaint was made before his Worship or on this appeal in regard to the police conduct in respect of either of those matters. It must be accepted that they were acting lawfully, but those facts were matters to be properly taken into account when formulating an appropriate sentence.

[6] The degree to which the appellant failed to assist law enforcement agencies in the investigation of these or other offences is unclear. Her counsel before the learned Magistrate referred to there being three tape recordings of interviews involving the police and the appellant and it was suggested that much of the questioning was directed to the whereabouts of the appellant's boyfriend, as to which she had no knowledge. It will also be noted that

charges originally brought in relation to other matters were not pursued against her. She pleaded guilty at the first reasonable opportunity and was accordingly entitled to benefit in that regard.

[7] As to the degree of culpability in relation to what is called the "unlawful possession" charge, counsel conceded before the Magistrate that the goods were brought to the house occupied by the appellant by somebody who had received them in turn from the boyfriend and that person had taken the goods to various spots around the house and the property was left after he departed. The appellant acknowledged that she saw that the goods were there. The required suspicion that the goods were stolen attaches to the goods not the offender. It is not suggested that the appellant was in any degree criminally involved with the goods other than as charged.

[8] As to the appellant's personal circumstances, she was aged 19 at the time of this offending. She was born in New South Wales and after travelling around Australia and elsewhere with her family came to Alice Springs at the age of 14, eventually attaining education in Alice Springs and later in Adelaide to year 12. She then returned to Alice Springs and commenced working at an art gallery of which she became the manager and after these events returned to Adelaide. She intended to start studying natural therapy either in Adelaide or Melbourne. She had an extensive family in Melbourne and intended to return there to be with them and expected to be able to obtain employment in their business.

[9] A number of references were produced attesting to her having been placed in a responsible work position, including in respect of large sums of money. The indications were that she was an honest person.

[10] The thrust of submissions made on behalf of the appellant before the learned Magistrate, and before this Court, is that given the appellant's age at the time of the offending, her inexperience and the misplaced trust that she had in her former boyfriend it was appropriate for her to be released without a conviction being recorded.

[11] The discretionary power of the court to proceed in that way is to be found in s 8 of the Sentencing Act 1995 (NT) providing as follows:

> "(1) In deciding whether or not to record a conviction, a court shall have regard to the circumstances of the case including -
>
> (a) the character, antecedents, age, health or mental condition of the offender;
>
> (b) the extent, if any, to which the offence is of a trivial nature; or
>
> (c) the extent, if any, to which the offence was committed under extenuating circumstances."

[12] In considering that submission her Worship noted that the appellant was 19, had no prior convictions and was otherwise regarded as a person of good character. However, in relation to the unlawful possession count her Worship said that by allowing the property to be left in her house she had allowed the crime to be continued and that it should have been obvious that the goods had not been lawfully obtained. The offence was one which required the imposition of a sentence that would operate as both personal

and general deterrence. On that basis the learned Magistrate proceeded to sentence on that count as I have already indicated.

[13] As to the cannabis, her Worship noted it was only a small quantity and that the appellant was forthright with police about her possession of it. She does not appear to have separately considered whether that charge should be dealt with under s 8 and proceeded to impose the fine. In addition to pressing before this Court the minuscule quantity of cannabis, the subject of the drugs charge and the matters personal to the appellant, reliance was also placed upon the provisions of Part IIB of the Misuse of Drugs Amendment Act pursuant to which the appellant could have been dealt with by way of an infringement notice given by police, since the amount in her possession was less than 50 grams. In that event a penalty of $200 was payable and when paid, "shall be deemed to have expiated the offence". No conviction would have been recorded. That places no restraint upon a court if the matter proceeds by way of summons. As to the unlawful possession count, it was urged that her role was limited to being in temporary custody of the goods in question and did not display a significant degree of criminal culpability on her part.

[14] The extent to which an offence may be found to be of a trivial nature was dealt with by me in some detail in *Gorey v Winzar*, unreported, 4 April 2001, 1 NTJ (2001) at p 307 commencing at p 311. An assessment of whether something is trivial can only be made in light of the particular circumstances of the offence which must be looked at objectively without

regard to the result or consequences of finding that it was not trivial. A number of the authorities in this regard were reviewed.

[15] As to the broader circumstances of the offence, the court is to pay regard to the extent to which it was committed under extenuating circumstances. Such circumstances are those that lessen the seeming magnitude of guilt or, in other words, which tend to diminish the offender's culpability. To be extenuating the circumstances must be such as to excuse to some degree the commission of the offence charged and it is the extent of those circumstances to which the court is to have regard.

[16] Section 8 requires the court to have regard to all of the circumstances of the case not just the enumerated matters in deciding whether or not to record a conviction. Accordingly, notwithstanding that the offender may be of good character without prior convictions and of an age which might usually attract leniency and give rise to consideration of the application of s 8, the court must nevertheless take into account the nature of the offending involved.

[17] A finding of guilty without the recording of a conviction is not to be taken to be a conviction for any purpose (s 8(b)). As observed by the Court of Appeal of Queensland in *Briese* (1997) 92 A Crim R 75 and 79 the effect of such an order is capable of considerable effect in the community:

> "Persons who may have an interest in knowing the truth in such matters include potential employers, insurers, and various government departments including the immigration department."

Their Honours go on to observe that, on the other hand, the beneficial nature of such an order to the offender needs to be kept in view:

> "It is reasonable to think that this power has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received."

[18] Considerations such as those were advanced by counsel for the appellant on the basis that a conviction for either or both of these offences could have a serious detrimental effect upon the appellant's employment opportunities and so on.

[19] Although it is recognised that a conviction for a dishonestly offence may have a detrimental effect upon the appellant's employment prospects and perhaps in other ways, nevertheless there is no evidence in her case of any adverse consequence which would result from the recording of a conviction. The appellant would always have the opportunity of explaining the circumstances of the offence to whomsoever may be concerned about it . The court record could normally be expected to show the penalty inflicted and that is likely to convey to the interested enquirer the view the court took as to the seriousness of the offending and the circumstances of the offender at the time. Production of these reasons for the orders which are about to be made will also serve to elucidate the position.

[20] Judicial minds may well differ as to the significance to be placed upon any one or more of the enumerated factors in s 8 as well as the other

circumstances of the case, and in ultimately deciding whether or not to record a conviction the sentencer is exercising a judicial discretion. An appellate court will only interfere if there is some reason for regarding that the discretion conferred upon the Magistrate was improperly exercised and the Magistrate fell into error (*Mason v Pryce* (1988) 34 A Crim R 1). It may not be obvious how the sentencer fell into error, but if the sentence is unreasonable or plainly unjust, the appellate court may interfere (*House v The King* (1936) 55 CLR 499; *Dinsdale v The Queen* (2000) 202 CLR 321).

[21] In my opinion her Worship erred in not accepting the submission that there be no conviction recorded in respect of the possession of .1 of a gram of cannabis. With respect to her Worship, it does not appear she gave separate consideration to that offence and, viewed objectively, it cannot be regarded as anything other than of a trivial nature. No complaint was made as to the imposition of the fine and in those circumstances the appropriate order is that the appeal in relation to that matter be allowed, it be ordered that no conviction be recorded, but the fine of $300 be affirmed.

[22] As to the charge relating to possession of goods reasonably suspected of having been stolen, I am not satisfied that her Worship erred in the exercise of her discretion. This might be regarded as a case which fell close to the border, but since no particular error had been found on her Worship's part, and there is nothing which otherwise satisfies me that there was an error in the exercise of the discretion, the appeal will be dismissed.
