Billingsley v The Queen [2004] NTCCA 4

PARTIES:	GLENN BRENTON BILLINGSLEY
	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 18 of 2003 (20308271)
DELIVERED:	3 June 2004
HEARING DATES:	20 May 2004
JUDGMENT OF:	ANGEL, MILDREN AND RILEY JJ

CATCHWORDS:

CRIMINAL LAW – Jurisdiction – Practice and Procedure – Judgment and punishment – Appeal against sentences imposed – Whether sentencing judge failed to give adequate weight to his antecedents, his co-operation with authorities, his plea of guilty, his remorse and his prospects of rehabilitation – Whether sentence manifestly excessive.

LEGISLATION

Misuse of Drugs Act
Sentencing Act s 40

REPRESENTATION:

Counsel:

Appellant:	S.J. Cox
Respondent:	W.J. Karczewski QC

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	ril0411
Number of pages:	9

ril0411

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

Billingsley v The Queen [2004] NTCCA 4
No CA 18 of 2003 (20308271)

BETWEEN:

GLENN BRENTON BILLINGSLEY
Appellant

AND:

THE QUEEN
Respondent

CORAM: ANGEL, MILDREN AND RILEY J

REASONS FOR JUDGMENT

(Delivered 3 June 2004)

THE COURT:

[1] On 26 September 2003 the appellant was sentenced to imprisonment for a period of two years and four months with a non-parole period of one year and two months in relation to three offences against the Misuse of Drugs Act. He appealed against that sentence on the grounds that: (a) the sentencing judge failed to give adequate weight to his antecedents; (b) the sentencing judge failed to give adequate weight to his co-operation with authorities; (c) the sentencing judge failed to give adequate weight to his

plea of guilty, remorse and prospects of rehabilitation and, finally, (d) the sentence was manifestly excessive.

[2] At the conclusion of the hearing we allowed the appeal. We re-sentenced the appellant by confirming the head sentence but directing that the balance of the sentence be suspended forthwith pursuant to s 40 of the Sentencing Act. We ordered that the operational period be the unserved balance of the sentence. These are the reasons for allowing the appeal.

[3] The circumstances of the offending were not in dispute. At the time the appellant was living and working in Katherine. At the beginning of February 2003 the appellant entered into an arrangement with a co-offender to store cannabis for the co-offender in Katherine. The co-offender provided a quantity of cannabis material which the appellant hid in the scrub near his rural residence outside of Katherine. When the co-offender required cannabis he would telephone the appellant who would take the required amount from the secret location, place it in clipseal bags in saleable quantities and leave it in a drawer in his residence before he went to work. The co-offender would then attend at the residence during the course of the day and collect the drugs. The appellant told police that this transfer of drugs occurred about once each week between February 2003 and May 2003.

[4] In exchange for this service the appellant was permitted to apply some of the cannabis for his own use. He told police that he smoked cannabis on a daily basis and was a heavy consumer of the drug.

[5] The Court was informed that between 1 February 2003 and May 2003 the appellant stored not less than 4.5 kilograms of cannabis plant material for his co-offender. In February 2003 the co-offender moved from Katherine to Darwin but the arrangement continued.

[6] The arrangement came to an end when police intervened. In May 2003 the appellant received a telephone call from the co-offender requesting he bring "two pounds of cannabis from Katherine to Darwin". The appellant collected not less than 1.5 kilograms of cannabis and took it to his home. On 30 May 2003 he transported 957.6 grams of the cannabis to Darwin and delivered 887 grams of that to his co-offender in 18 clipseal bags. Subsequently the co-offender sold that cannabis to an undercover policeman in a controlled purchase operation. The appellant was aware that the co-offender intended to supply the cannabis for commercial gain.

[7] The co-offender was the target of the investigation and was caught in the controlled purchase operation. When police searched his house the appellant was present. He was interviewed by police and made very full and frank admissions as to his involvement in the events. He admitted that he believed the co-offender was selling cannabis for a profit and he advised that he received cannabis for self-consumption in return for his involvement. He advised police that he sold some of the cannabis to his friends and did so at least once a week over the period February 2003 to May 2003. The sale price was $300 an ounce. All proceeds of the sale were provided to the co-offender.

[8] The appellant acknowledged his involvement in the matter as soon as he was spoken with by police. He spoke with police at length detailing the involvement of himself and of his co-offender. He indicated that he was prepared to give evidence against his co-offender. The Court of Summary Jurisdiction was advised that there was no need for a committal hearing and the matter came before the Supreme Court by way of ex officio indictment at the earliest possible time. The appellant at all times indicated that he would plead guilty.

[9] The appellant pleaded guilty to unlawful possession of a commercial quantity of cannabis plant material, namely 4.5 kilograms, for which there is a maximum penalty of imprisonment for 14 years; unlawfully supplying a commercial quantity of cannabis plant material, namely 887 grams, for which there is a maximum penalty of imprisonment for 14 years; and unlawfully supplying cannabis plant material to others for which there is a maximum penalty of five years imprisonment or a fine of $10,000.

[10] The Court was told that the appellant had been smoking cannabis since the age of 12 years. He started smoking as a consequence of problems within his family and, by the age of 17, was a heavy smoker of cannabis. That continued to be the case until the time of the offending when he was 33 years of age. As soon as he was arrested in relation to this offence he stopped smoking cannabis and, of his own volition, attended the Drug and Alcohol Counselling Service in Katherine. He was attending counselling consistently up until the time he entered prison on 12 September 2003. On

12 September 2003 the appellant attended at the Court of Summary Jurisdiction and through his counsel requested that his bail be revoked. He waived his right to committal proceedings and arranged for the matter to proceed in this court by way of ex officio indictment. He was in custody on remand from 12 September 2003 to 20 May 2004, a period in excess of eight months.

[11] At the time of sentencing many positive matters regarding the appellant were placed before the Court. In summary, he was a man with a strong work record, with a reputation as an honest and reliable worker and as a person of general good character. He had no relevant prior convictions although he had some minor convictions from 1989 and 1991 which were of no significance for sentencing purposes.

[12] He was immediately remorseful upon detection and remained so at the time sentence was imposed. He demonstrated his remorse by making full and frank admissions to the police without which his involvement in the scheme would not have been known. He undertook to give evidence against his co-offender. He ceased using cannabis and enrolled himself in, and participated in, a rehabilitation course. After his arrest he told his employer what had occurred and resigned his employment in order to save the employer any embarrassment. The employer has indicated it will have him back if there is a position available when he leaves prison. Although he was granted bail the appellant surrendered himself and entered custody on

12 September 2003. There is not much else the appellant could have done to reflect the remorse he feels and his determination not to re-offend.

[13] The learned sentencing judge acknowledged the remorse and observed of the appellant:

> "You started along the road to your rehabilitation by undertaking counselling. The counsellor attests to your remorse which is evident in any event. You gave up smoking marihuana after your arrest. It is your expressed desire to keep off it and to seek further assistance so as to enable you to overcome the difficulties of your past. I am satisfied that your prospects for rehabilitation are good given the shock of this experience and the personal losses which have been brought about as a result of your criminal activity."

[14] His Honour went on to note the co-operation of the appellant amounted to "significant mitigation of penalty" and he allowed a deduction of 40% on the head sentence to reflect both the early plea and the full co-operation of the appellant with the authorities. Complaint was made by the appellant that the reduction did not give adequate weight to the appellant's co-operation with the authorities and his preparedness to assist in the prosecution of his co-offender. Particular emphasis was placed on the fact that the appellant, by his admissions, provided the basis upon which he was subsequently prosecuted. He was, to use the expression adopted in the court below, "convicted from his mouth". The plea was significant because it was a plea in recognition of wrongdoing accompanied by immediate and demonstrated remorse, along with a desire to facilitate justice. Whilst we consider the allowance to have been at the lower end of the available range we do not regard it as so low that we ought interfere.

[15] The appellant submitted that the head sentence of two years and four months imprisonment was manifestly excessive. The principles applicable to such an appeal are well known and need not be restated. It must be borne in mind that the offending in which the appellant was engaged was serious. He stored a substantial quantity of cannabis for his co-offender and delivered it to the co-offender on demand for the purposes of it being supplied for commercial gain. He was directly involved in the delivery of 887 grams of cannabis to the co-offender for the purpose of the sale to the undercover police officer. He was directly involved in the sale of cannabis to people in the Katherine area. Whilst he was not provided a monetary reward for his involvement with the operation of the co-offender he was rewarded with cannabis. Given the extent of his personal consumption, the reward was not insignificant. The criminal conduct continued over a period of months and notwithstanding there being ample opportunity to withdraw, the appellant failed to do so. The appellant knew that his co-offender was supplying cannabis for commercial gain and appreciated that by his actions he was aiding him in that activity. He was an integral part of the operation conducted by the co-offender.

[16] In the circumstances it has not been demonstrated that the head sentence imposed upon the appellant was manifestly excessive.

[17] In allowing the appeal this Court was concerned by the setting of a non-parole period of one year and two months. The submissions made to the learned sentencing judge on sentence by both counsel for the appellant and

counsel for the prosecution proceeded on the basis that it was appropriate to impose a suspended sentence. Both counsel addressed his Honour in terms of the sentence being suspended either at the conclusion of the mandatory 28 day period or within a month or so thereafter. There was no discussion regarding the appropriateness of a non-parole period. Neither counsel submitted that a non-parole period should be considered and his Honour did not raise with counsel the prospect that one might be imposed.

[18] It is not normally necessary for a sentencing judge to spell out why a non-parole period has been set rather than a suspended sentence being imposed. However in some cases, of which this is one, such reasons are called for. In this case the expected sentence would be one of a suspended sentence for a time less than the minimum non-parole period. Both counsel below appear to have made that assumption. They both submitted that a term of imprisonment partially suspended was an appropriate response to the offending. Neither addressed the issue of a non-parole period.

[19] The circumstances of the appellant strongly suggested that he was a prime candidate for a suspended sentence. His prospects for rehabilitation were extremely strong. He had done all he could to mitigate his offending. There was no suggestion that he or the community would benefit from his being supervised. It is not obvious to this Court why a non-parole period rather than a suspended sentence was imposed. In the circumstances the learned sentencing judge should have explained why he imposed a non-parole period, that being an unexpected result. He did not do so. Indeed, he did

not discuss the issue at all. There is nothing in the sentencing remarks to indicate that his Honour turned his mind to the issue of whether the sentence of imprisonment that he was imposing should be suspended in part. In the circumstances we felt that it was necessary to interfere and, for the reasons expressed, it was appropriate to impose a suspended sentence.

[20] In the circumstances we felt that it was necessary to interfere and, for the reasons expressed, to suspend the balance of the appellant's sentence, particularly given the almost eight months already spent in custody. We consider the appellant's offending did not call for a lengthier term of actual incarceration.

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