PARTIES:	DUNLOP, Gregory Lewis
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA13 of 1997
DELIVERED:	11 February 1998
HEARING DATES:	9 December 1997
JUDGMENT OF:	MARTIN CJ., ANGEL & THOMAS JJ.

CATCHWORDS:

Criminal – appeal – appeal against sentence – possession of amphetamines and cannabis – whether applicant with severe medical condition should be imprisoned – manifestly unjust and excessive – sentencing discretion of Judge – weight to mitigating circumstances – general deterrence

Misuse of Drugs Act 1990 (NT), s40(c)
Criminal Code 1983 (NT), s410(c)
Sentencing Act 1995 (NT), s5 and s54

Gronow v Gronow (1979) 144 CLR 513 at 519 per Stephen J, quoted
Anderson v R (1993) 177 CLR 520, referred to
Storey (1997) 89 A Crim R 519, referred to
Mill v R (1988) 166 CLR 59 at 63, referred to
Alexiou v R, NTCCA, unreported, 4 April 1997 at 8, referred to
Rostron v R (1991) 1 NTLR 191, referred to
R v Smith (1987) 44 SASR 587 per King CJ at 588, 589, quoted
Jones (1993) 70 A Crim R 449 per Carruthers J at 456, mentioned
Bailey v R (1988) 34 A Crim R 154 at 156, 158, mentioned
McDonald (1988) 38 A Crim R 470 per Roden J at 475, mentioned

Eliasen (1991) 53 A Crim R 391 per Crockett J, mentioned

REPRESENTATION:

Counsel:

Appellant:	Mr D Grace QC with D Elliott
Respondent:	Mr M Carey

Solicitors:

Appellant:	Diana Elliott
Respondent:	Office of Director of Public Prosecutions

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

No. CA13 of 1997

BETWEEN:

GREGORY LEWIS DUNLOP
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ., ANGEL & THOMAS JJ.

REASONS FOR JUDGMENT

(Delivered 11 February 1998)

THE COURT:

Application for leave to appeal against sentence imposed on 6 August 1997. The applicant pleaded guilty to two charges. The first was that on 6 June 1996 he unlawfully possessed amphetamine, a dangerous drug specified in sch2 to the *Misuse of Drugs Act* 1990 (NT), the possession involving a statutory circumstance of aggravation namely, that the amount of the dangerous drug was a commercial quantity, being 114.5 grams. For that the maximum penalty is fourteen years imprisonment. The second, was that on the

same day he unlawfully possessed cannabis, a dangerous drug specified in sch2 to the Act, with a statutory circumstance of aggravation namely that the amount was a traffickable quantity, being 66.6 grams. For that the maximum penalty is a fine of $10,000 or imprisonment for five years. The learned Judge sentenced the applicant to four years imprisonment on the first charge, and imprisonment for one year on the second, but bearing in mind the totality principle, directed that six months of that sentence be served at the same time as the sentence on the first count, giving an effective sentence for both offences of four years and six months imprisonment. His Honour fixed a non-parole period of two years and three months, and ordered that the sentence be deemed to have commenced on 23 July 1997 to take into account time spent in custody.

Leave to appeal is required by s410(c) of the *Criminal Code* 1983 (NT). If leave is granted, the applicant proposes to raise as grounds of appeal:

1. That the sentence in each case was "manifestly unjust in light of the circumstances of the offence and the particular circumstances of the applicant". This was expanded in ground 2.

2. Each of the sentences imposed was manifestly excessive in all the circumstances of the offence and of the applicant. The following particulars were given, that is, that his Honour:

(a) failed to give proper weight to the rehabilitation affected by the applicant and his future prospects of rehabilitation;

(b) failed to give sufficient weight to the applicant's plea of guilty;

(c) failed to give sufficient weight to the applicant's poor physical health and previous ill health;

(d) failed to give proper weight to the applicant's difficult family background; and

(e) failed to take into account the fact that the cannabis was for the applicant's own use.

As to the proper weight to be given to particular matters, authority shows that error in that regard may justify the intervention of the appellate court, but:

> "… it is also well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion. When no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight: it follows that disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge"
>
> Per Stephen J. in *Gronow v Gronow* (1979) 144 CLR 513 at p519.

Further proposed grounds of appeal are:

3. That his Honour erred in law in failing to find mitigating circumstances, namely that:

(a) the applicant was addicted to amphetamines at the time that the amphetamines were buried on his premises; and

(b) the applicant did not bury the amphetamines on his premises, instead an unnamed person buried them there with the applicant's permission.

As to findings of fact, counsel for the Crown did not dispute before this Court the submission of counsel for the applicant that a sentencing Judge may not take facts into account in the exercise of the sentencing discretion in a way that is adverse to the interests of the accused, unless those facts have been established beyond reasonable doubt; but if there are circumstances which the Judge proposed to take into account in favour of the accused, it is enough that those circumstances are proved on the balance of probabilities: *Anderson v The Queen* (1993) 177 CLR 520 and *Storey* (1997) 89 A Crim R 519, where the Victorian Court of Appeal assembled five members to consider these questions. In *Anderson*, the majority comprising Deane, Toohey and Gaudron JJ. at p536 addressed the position as it was in South Australia which, as was pointed out by Brennan and Dawson JJ. at p526, had been followed in New South Wales, Tasmania and the Australia Capital Territory, and perhaps Western Australia. At the time a different view had been taken in Victoria and

Queensland. The position in Victoria was resolved in *Storey*. Our attention has not been drawn to any cases since then touching upon the law in Queensland, but we consider that the concession made by counsel for the Crown in this case was rightly made.

The fourth proposed ground of appeal is:

4. That the overall sentence imposed infringed the principle of totality in sentencing (*Mill v R* (1988) 166 CLR 59 at p63).

The applicant sought leave to add an additional ground of appeal based upon what was suggested was relevant new evidence which had come into existence after he had been sentenced which, it was submitted, would have led to a sentence different to that imposed if the evidence was in existence at the time of the imposition of the sentence. We heard the evidence subject to ruling as to whether it was admissible (see generally *Alexiou v The Queen*; Court of Criminal Appeal of the Northern Territory, unreported, 4 April 1997 at p8).

As to the facts, some were agreed, but others disputed and determined by his Honour after hearing and considering evidence, including sworn evidence of the applicant. The following facts were admitted. The police attended at the applicant's house and executed a search warrant. They found inside and outside the house a number of clip seal bags containing a white powder weighing in all about 1.5 kg and which, upon analysis, was found to contain 114.5 grams of amphetamine sulphate. The average of the amphetamine to the

white powder in each bag varied between 6% and 8%, although there was one amounting to 26%. The average of amphetamine to powder disposed of in the streets of Darwin is about 4%. Some of the clip seal bags were found inside PVC pipes buried in various parts of the garden adjoining the house. Three deal bags of what turned out to be cannabis plant material were located under some hay in the garden area. There was a total of $21,000 in cash under a wooden sleeper in the garden bed, a sawn off Bentley shotgun, two bags of shotgun shells, a number of unused small clip seal bags, a set of electronic weighing scales, a packet of Glucoden, and a packet of Epsom salts. Those items were found in various places in and outside the house. Glucoden and Epsom salts are cutting agents used to dilute amphetamine and other drugs in powder form. Five days later, the police again attended at the applicant's house and executed a further search warrant seizing a number of items including a packet of bicarbonate of soda (also a cutting agent), a glass jar and a plastic bag of white sugar, a blender and two kitchen sieves. Testing of more items did not disclose any amphetamine. The applicant claimed to police that the $21,000 cash was the balance of an inheritance from 1993, but police enquiries revealed that he had advised the Department of Social Security that the original inheritance of $62,000 had been reduced to a little over $4,000 by 8 October 1993.

The applicant's sworn explanation for the presence of the amphetamine located in the garden was that it was not his, he had not buried it and did not know it was there in such quantities. The scales and clip seal bags found in the garden shed were not his, he said. He acknowledged that he knew there

was amphetamine somewhere outside the house, but not how much. He knew who had put it there, but refused to identify the man because of fear of what could happen to him or his family if he did. He gave some details of visits made by the unidentified man from whom he had purchased drugs of the same kind for a period of some six years and who had occasionally given him some. The amphetamines found in the house were his and for his own use. As to the $21,000, his evidence was that he did not believe in banks, and thus kept it where it was found, some of the money was left over from an inheritance, some from the sale of a truck, and some of it was in repayment of a loan. He denied that any of it was from the sale of amphetamines. As to the shotgun and cartridges, he said they had been left behind about five years previously by someone who had lived in the shed in the garden. Through his counsel he acknowledged that the cannabis was bought for his own use and for social friends. He was cross-examined, the Crown prosecutor obtaining a significant amount of information regarding financial transactions undertaken by the applicant including the purchase and sale of land and details of three bank accounts into which the applicant deposited significant sums of cash from time to time and for which he had no explanation.

His Honour was urged to accept the applicant's account as to how the amphetamines came to be in his back yard, but said that having reflected carefully upon it, "… because it's the crucial fulcrum of your case" he should reject the account "… as one which has been concocted and an account which is unbelievable, an account which you have carefully crafted so as to minimise your culpability". As to the money buried in the garden, his Honour said that

he did not accept his explanation and added "In the circumstances of this case, that is a matter which simply goes to your general credibility. I accept your account as to the presence of the shotgun …". Having again said that he rejected the explanation for the possession of the amphetamine, his Honour added, importantly, that he did not hold the false story that he gave of the involvement of the other man against him. It is clear that his Honour did not treat the false evidence given by the applicant as to how the amphetamines came to be in his back yard in any way adverse to the interests of the accused. He did no more than reject a story which, if accepted, may have mitigated the penalty.

The description of the amount of amphetamine as a "commercial quantity" and the amount of cannabis as a "traffickable quantity" is no more than a tag employed by the legislature which carries no implications that the drugs were in fact used in commerce or trafficking. His Honour noted that there was nothing in the *Misuse of Drugs Act* which deemed possession of a commercial quantity of a drug to be possession for the purposes of sale or supply to another person as appears in the legislation of some other jurisdictions. It is not apparent, and nor would we infer, that having rejected the applicant's evidence his Honour drew any inference from the agreed facts which was adverse to his interests.

Much was made by counsel for the applicant that during the course of his remarks his Honour said of the applicant that he gave his evidence "… in a forthright and frank manner", and observed that he was "an apparently

straightforward type of a person, as I say". The use of those words does not fit easily with the applicant's admission that he had lied about the extent of his cash assets in order to obtain social security payments, nor with his Honour's rejection of his account as to how the amphetamines came to be in his backyard and as to the source of the $21,000. In our opinion, his Honour's findings cannot be set at nought because of observations about the manner in which the applicant gave his evidence. That a witness may give evidence in a forthright, frank or straightforward manner does not necessarily carry with it an air of verisimilitude. There is no reason why his Honour's rejection of the applicant's explanations should be set aside. The proposed ground of appeal 3(b) is arguable (*Rostron v R* (1991) 1 NTLR 191), but on closer consideration, not sustainable.

As to the applicant's personal circumstances, he was aged 43 years at the time he was dealt with by his Honour. He had left school at the age of 15, coming from a dysfunctional family background, and it was at about that time that he started drinking which led to his becoming an alcoholic. Notwithstanding his problems with alcohol and other drugs, he had a fairly good work history until 1993, in which year he took up a single parent pension. He had the custody of a seven year old son by an earlier broken relationship, but in 1994 commenced a new relationship which is continuing. His defacto wife had a young child and there is an infant daughter of their union. He had numerous prior convictions, most drink related, but on 5 February 1993 in Darwin had been convicted and fined on each charge for possession and administration of amphetamines, and cultivating and

possessing cannabis. The applicant has used amphetamines over a period of about ten years and his consumption increased dramatically over the two years from about 1995. His Honour plainly accepted that the applicant had been addicted to amphetamines. The proposed ground of appeal 3(a) has no merit. The addiction was not advanced as mitigating the offence.

After his arrest for these offences, and spending about a fortnight in custody, he was released on bail and went to Banyan House in June 1996, where he completed the residential alcohol and drug rehabilitation programme extending over a period of six months. He told his Honour he had had no drugs since then, and drank little alcohol. He had continued his contact with the organisation, and a report of the Director, supported by evidence in Court, concluded that he had a personal commitment and genuine desire to change, and had been able to cease his substance abuse and learn appropriate coping skills. His relationship with his partner and children had improved greatly. It was said he had strong family values, despite his upbringing. His defacto wife was supportive. It was said he embarked upon his rehabilitation with a positive attitude and demonstrated commitment throughout the time he spent as a resident at Banyan House, and she confirmed that he had continued as an out patient with the same commitment and positive approach "Greg Dunlop has made significant behavioural and attitude changes since he began the program at Banyan House". In the view of the Director, upon taking into account his state of health and family responsibilities, the applicant had very good reason to continue a socially acceptable lifestyle. That evidence was accepted by his Honour and urged before this Court as a factor which should

weigh heavily in favour of the applicant, going to the prospects of his rehabilitation.

His medical condition, which again features significantly in the case brought to this Court, as his Honour said, is not good. The primary concern, as reflected in a report from Dr Snelling which was before his Honour, is an on going moderately severe inflammation of his kidneys with a progressive loss of renal function. The treatment carries various health risks. The doctor's prognosis was for progressive renal impairment leading to failure requiring dialysis, which might occur within three to five years. The report also noted hypertension and a nephrotic syndrome, and that the applicant was then taking a number of tablets for his various conditions. It was the doctor's opinion that should the applicant be incarcerated, he would require regular specialist medical follow up and ongoing medical treatment. Those matters were all before his Honour in the form of a written report from the doctor, and his remarks confirm that he paid regard to the contents of the report though not referring to all of it.

In mitigation it was specially put to his Honour, and he took into account the guilty plea, adding that given the circumstances of the police discovery of the drugs, the applicant had little choice, but nevertheless indicated he would give him some credit for the plea. His Honour noted the provisions of s40(c) of the *Misuse of Drugs Act* that proof that a dangerous drug was at the material time in or on a place of which a person was an occupier is evidence that the drug was then in that person's possession unless it be shown that the person

then neither knew nor had reason to suspect that the drug was in or on that place. His Honour especially noted the turn around in the applicant's life, meaning, we think, his successful undertaking of the rehabilitation programme at Banyan House, and bore in mind what he described as his sad state of health.

His Honour reminded himself of the purposes of sentencing and the sentencing factors set out in s5 of the *Sentencing Act* 1995 (NT), and noted that there was no evidence before him that the amount of amphetamines were for the applicant's personal use, and thus no mitigation was available on that account. The applicant's case before his Honour was that he had nothing to do with the amphetamines found in the garden. In conclusion his Honour said:

> "The Court must recognise and give effect to the severe maximum penalty which the legislature specifies for count 1. I should say I regard your offence in count 1 as serious. The public interest and the need for personal and general deterrence is the principal consideration in sentencing you, although here I am satisfied that as a result of the turn around in your life in the last twelve months, the need for personal deterrence is not very significant in your case."

The submissions of counsel for the applicant going to the claim that the sentence was manifestly excessive were devoted to endeavouring to convince this Court that his Honour failed to give sufficient weight to mitigating circumstances. It is plain from his remarks that he took all those factors into account, and we are not satisfied that he failed to give sufficient weight to any or all of them. No error in the sentencing discretion has been established.

In relation to the amphetamines, the weight of the prohibited drug was 114.5 grams. The weight attracting the maximum penalty of fourteen years imprisonment was 100 grams or more. It is easy enough to imagine a person being charged with possession of such a drug having a weight far greater than 114 grams, but the law imposes the maximum penalty of fourteen years imprisonment where the weight is 100 grams, and the amount in the possession of the applicant was significantly in excess of that. It is not irrelevant to note that the maximum sentences for possession of dangerous drugs are graduated depending upon the weight involved. For amphetamines, the maximum penalty for possessing 100 grams is five years. The applicant had more than that. His Honour was right in regarding general deterrence as being the principle consideration.

As to the charge relating to cannabis, it was submitted that his Honour failed to take into account that it was for the applicant's own use. That is so because of his Honour's remarks that the applicant did not use cannabis very much himself and that he really had it for the use of other people "… from which I gather you mean social occasions". That is what his counsel said before his Honour. His Honour did not err in that regard.

The evidence, which the applicant sought to introduce on the appeal, had to do with his medical treatment after entering the prison at Darwin on 6 August 1997. In an affidavit sworn on 5 December 1997, three days prior to the hearing before this Court, the applicant refers to a number of occasions during the period from 30 August to 30 October on which he says there were

errors made by medical staff at the prison in regard to medication, sometimes tablets containing in excess of, and on others less than, the prescribed amount were given; on other occasions the full range of tablets were not made available (at one stage he was on 15 tablets a day). He also complains about delay in attendance by a medical practitioner after he reported illness to a nurse, and of the failure of the authorities to take him to see the specialist, Dr Snelling, at an appointed time at the Darwin hospital on one occasion. He was concerned that his medical condition was not being properly managed. The validity of his concern was confirmed in a report of Dr Snelling of 4 December. In particular, the doctor refers to hypertension and the need to control it and other problems without which it would be likely the applicant would progress more rapidly to the end stage of renal disease. Dr Snelling noted that the applicant attended all monthly appointments with the one exception.

Dr Money, the medical officer at the gaol, also provided a report dated 27 November 1997. He was called to give oral evidence including in relation to a change in prescription by the specialist late on Friday 28 November at the hospital. The applicant brought the details of the change to the attention of the sister at the gaol the next day, and the adjustment was then made. If the applicant had not informed the nurse on the Saturday, the medication would have been changed on the Monday when Dr Money resumed his normal duties. The doctor's evidence included details of the system whereby the required medication for each prisoner is recorded on a computer which prints out labels showing what is to be dispensed to each of them, and how that is then

dispensed by the nurses. He was aware of three mistakes having been made concerning the applicant. He also acknowledged that the computer had malfunctioned on a few occasions, in which case the medical people rely upon memory, or on the prisoners pointing out errors which they note. The doctor is at the gaol during normal working hours Monday to Friday, and available on call on other days and times. He recalled the applicant seeing him at the gaol clinic on two occasions regarding mistakes in the medication which the doctor was then able to correct. He confirmed that control of medication relied upon the diligence of the medical staff, and in this particular case, the applicant's own detailed knowledge.

In cross-examination, Dr Money said that apart from the incident involving the change prescribed on 28 November, there had been no mistakes for several weeks prior to his giving evidence. (It is doubtful that that incident amounted to a "mistake", but that is the way the cross-examiner put it).

Dr Money had noted a loss of weight of 1.5kgs by the applicant from August to December, but said that was a benefit to him. He also noted that his blood pressure had risen and spoke of the importance of maintaining it as normal as possible. The rise in blood pressure was attributed by him to family problems causing stress.

The picture that emerges from all that is that the applicant has health problems which require medication, the medication is available at the gaol,

there is a system to see that it is administered properly, errors can be made, he was seen regularly by the specialist and changes to medication implemented. The applicant himself had noted errors and delays in dispensing the required tablets. There is no evidence that any of the mistakes or delays had any deleterious effect upon his health.

The statutory rights and obligations as to the health care of prisoners is clear. The applicant, as with all prisoners, is to be given access to a visiting medical officer upon request (*Prisons (Correctional Services) Act* 1980 (NT), s71) and the Director of Correctional Services is to comply with the directions of a visiting medical officer relating to the maintenance of the health of a prisoner (s72).

The proposed fresh evidence does not show anything regarding the health condition of the applicant beyond that which was before his Honour in the form of the report from Dr Snelling, which relevantly revealed that he was on a number of blood pressure and fluid tablets to control his nephrotic syndrome, kidney disease and hypertension, and that he would be on them indefinitely. The doctor there added that should he be incarcerated he would require regular specialist medical follow up on at least a monthly basis and ongoing oral medication which he would be able to administer himself. However, "incarceration itself should not affect his disease per se". As indicated earlier, his Honour made specific mention of the applicant's medical condition in the course of his remarks on sentence. Although not referring to everything that was contained in Dr Snelling's report, it is clear from what his Honour said

that he had read everything and was summarising its contents. Later, his Honour said that he accepted in favour of the applicant that there had been a turn around in his life in the past twelve months, and that he bore in mind, also, his rather sad state of health. That is clearly indicative of his Honour having treated the applicant's state of health as a factor mitigating the punishment. Since there was nothing before his Honour to show that there was a serious risk of imprisonment having a gravely adverse effect upon the applicant's health, he must have considered that imprisonment would be greater burden on the offender by reason of his state of health (*R v Smith* (1987) 44 SASR 587 per King CJ. at 589, referred to with approval in, for example, *Jones* (1993) 70 A Crim R 449, Court of Criminal Appeal, New South Wales per Carruthers J. at p456, in the High Court in *Bailey v The Queen* (1988) 34 A Crim R 154 at 156 and 158, the Court of Criminal Appeal of New South Wales in *McDonald* (1988) 38 A Crim R 470 per Roden J. at p475 and in *Eliasen* (1991) 53 A Crim R 391 per Crockett J.)

We do not admit into evidence the material in Mr Dunlop's affidavit, the reports annexed nor the oral evidence of Dr Money. None of it goes to show that the applicant is presently suffering from any form of ill health which he was not suffering at the time he was sentenced. The events occurring after sentence about which the applicant complains do not show the true significance of the facts which were in existence at the time of the sentence, nor do they go to show to any greater degree than was before his Honour the extent and implications of his health condition (see per King CJ. in *R v Smith*

at pp588-589). No miscarriage of justice has been demonstrated by the proposed fresh evidence.

The applicant also sought to place into evidence a copy of an order made in the Court of Summary Jurisdiction at Darwin on 3 September 1997 that the $21,000 be delivered as to $5,000 to the Northern Territory and $16,000 to the applicant. There is no information by what authority or means that order came to be made and it does not convey any facts which were in existence at the time of the imposition of the sentence, nor does it explain anything that was before the learned sentencing Judge "… so as to put them in a new light", as it was put by King CJ. at p588. All that is revealed is that after the date of sentencing an order was made as to the disposal of the $21,000. It is not admissible. The tender of the evidence is rejected.

Apart from the matter arising under ground 3(a), the other proposed grounds are arguable and leave to appeal is granted in respect of them. The appeal is dismissed in so far as it relates to the sentence imposed in relation to the possession of amphetamines. It should be noted that his Honour was constrained in the fixing of the period during which the applicant is not to be released on parole by s54 of the *Sentencing Act*. It was not open to him to fix a period of less than 50% of the sentence, had he been minded to do so.

We are agreed that in all the circumstances of the offence and of the offender the sentence to imprisonment for a period of one year for possession of the cannabis was manifestly excessive. The weight involved was 66.6

grams and the range of weight for a traffickable quantity of cannabis plant material is from 50 grams to 500 grams. Below 50 grams the penalty is $2,000. Given the nature of the offending in each case, we are of the view that it would be appropriate to order that the sentences be served concurrently.

The sentence of four years imprisonment in respect of the possession of the amphetamines is confirmed, the sentence of 12 months imprisonment in respect of the possession of cannabis is quashed and in lieu thereof a sentence to imprisonment of three months is imposed and it is ordered that the two sentences be served concurrently as from 23 July 1997. We fix a non parole period of two years.
