Olsen v The Queen [2002] NTCCA 7

PARTIES:	OLSEN, DARELLE GAY
	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 24 OF 2001
DELIVERED:	14 JUNE 2002
HEARING DATES:	24 MAY 2002
JUDGMENT OF:	ANGEL, MILDREN & RILEY JJ

CATCHWORDS:

APPEAL – APPEAL AGAINST SENTENCE – parity – whether appellant's sentence was manifestly disproportionate to her co-accused's sentence – whether sentencing judge failed to give sufficient weight to the disparate features of the appellant - no manifest discrepancy found in the circumstances

APPEAL – APPEAL AGAINST SENTENCE – whether sentence manifestly excessive – sentence not so very obviously excessive to be unreasonably or plainly unjust

APPEAL – APPEAL AGAINST SENTENCE – error of law – whether the influence of the appellant's husband was given appropriate weight in sentencing – "Stockholm" or "battered wife syndrome" – influence of husband found not high enough to warrant substantial mitigation – on the material before the sentencing judge no error was demonstrated

APPEAL – APPEAL AGAINST SENTENCE – error of law – irrelevant consideration – sentencing judge made reference to no attempt by the appellant to rebut the presumption of s.37(6) *Misuse of Drugs Act NT* – s.37(6) not in force at time of plea – ground not sustained as possession of drugs with intention to supply for commercial gain not in dispute.

Misuse of Drugs Act NT, s 37(6), Schedule 2
Sentencing Act NT, s 5

Engert (1995) 84 A Crim R 67, *Veen v The Queen (No.2)* (1988) 164 CLR 465, *Osland v The Queen* (1998) 197 CLR 316, *R v Oaks* [1995] 2 NZLR 673, *Lowe v The Queen* (1984) 154 CLR 606, *Raggett Douglas and Miller* (1990) 50 A Crim R 47, *Salmon v Chute & Anor* (1994) 94 NTR 1, *Cranssen v The King* (1936) 55 CLR 509, approved.

Ewart v Fox [1954] VLR 699, considered.

REPRESENTATION:

Counsel:

Appellant:	C McDonald QC
Respondent:	W J Karczewski QC

Solicitors:

Appellant:	Melanie Little
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	ang200204
Number of pages:	17

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

Olsen v The Queen [2002] NTCCA 7
No. CA 24 of 2001

BETWEEN:

OLSEN, DARELLE GAY
Appellant

AND:

THE QUEEN
Respondent

CORAM: ANGEL, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 14 June 2002)

ANGEL J:

[1] I agree with the other members of the Court that this appeal by leave of Martin CJ granted on 14 February 2002 from a sentence of Bailey J of three years imprisonment with sixteen months to serve should be dismissed.

[2] To my mind, Mr Karczewski QC's commonplace observation that the learned sentencing judge had to take account of all the circumstances of the case effectively disposed of what counsel for the appellant said was a "jurisprudential point of great significance". As Gleeson CJ said in *Engert* (1995) 84 A Crim R 67 at 68:

> "The principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment. Those purposes

were set by the High Court in *Veen (No 2)* (1988) 164 CLR 465 at 476; 33 A Crim R 230 at 237–238 as follows:

> '…protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform.'

A moment's consideration will show that the interplay of the considerations relevant to sentencing may be complex and on occasion even intricate. In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance. That was the particular problem being examined by the court in the case of *Veen (No 2).* Again, in a particular case, a feature which lessens what might otherwise be the importance of general deterrence, might, at the same time increase the importance of deterrence of the offender.

It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise."

See also s 5 *Sentencing Act* NT.

[3] Mr McDonald QC for the appellant complained that the learned sentencing judge had misunderstood the significance of the relationship between the appellant and her defacto husband, the co–accused Clugston, and we were referred to the old doctrine of marital coercion, see, eg *Ewart v Fox* [1954] VLR 699, and the more recent case–law on abusive relationships of dependency, such as *Osland* (1998) 197 CLR 316.

[4] In cases like the present, however, the personal circumstances of the offender are of less significance as a sentencing factor than general deterrence. The appellant pleaded guilty to eight offences under the *Misuse of Drugs Act* NT. There were three counts of unlawful possession of a commercial quantity of a Schedule 2 dangerous drug namely cannabis, cannabis resin and methylamphetamine, for each of which the maximum penalty is 14 years imprisonment. There was one count of unlawful possession of a traffickable quantity of cannabis for which the maximum penalty is five years imprisonment. There was one count of unlawful possession of a Schedule 1 dangerous drug, namely lysergic acid, for which the maximum penalty is two years imprisonment or a fine of $5,000 or both. There were three counts of supply of a dangerous drug, respectively cannabis, methylamphetamine and cannabis resin, each subject to a maximum penalty of five years imprisonment or a fine of $10,000 or both. Bearing in mind the number of offences and the maximum penalties therefor, the appellant received a merciful sentence indeed.

[5] The appellant was acting as both a wholesaler and retailer of dangerous drugs. She was a key player in storing and selling a variety of dangerous drugs. She was involved to a significant degree in a substantial drug enterprise the sole object of which was profit. Whilst her involvement in the trafficking of drugs was less than her co–offenders, she maintained the Darwin base of the drug operation in her co–accused's absence pedaling

drugs interstate. As the learned sentencing judge said, her level of criminality was high.

[6] Those actively participating in substantial illegal drug enterprises for profit, whatever their personal circumstances, deserve condemnation and should receive stern punishment. I consider the appellant and her co–accused were indeed fortunate that they received the lenient sentences they did.

MILDREN J :

[7] I agree with Riley J.

RILEY J:

[8] On 27 September 2001 the appellant pleaded guilty to eight offences under the *Misuse of Drugs Act*. On 10 October 2001 she was sentenced to imprisonment for a period of three years with that sentence to be suspended after she had served a period of sixteen months imprisonment. The appellant now appeals against her sentence. Leave to appeal was granted on 14 February 2002.

[9] The offences to which the appellant pleaded guilty occurred in 1999 and 2000. They included possession of a commercial quantity of cannabis plant material (6721.47 grams), possession of a commercial quantity of cannabis resin (673.95 grams), possession of a commercial quantity of methylamphetamine (463.73 grams), possession of a traffickable quantity of cannabis seed (22.3 grams), possession of lysergic acid, supply cannabis, supply methylamphetamine and supply cannabis resin.

[10] The circumstances of the offending were not in dispute. Between 16 August 1999 and 18 May 2000 the appellant with her de facto husband Trevor John Clugston and a co-accused engaged in the unlawful purchase, transportation and supply of dangerous drugs for profit. The extent to which each of the accused persons participated in the enterprise varied as did the amount of profit they each received. During the nominated period the appellant supplied quantities of cannabis, cannabis resin, lysergic acid and amphetamine to persons unknown in Darwin. She did this in varying quantities and up to twice a week for monetary gain.

[11] In January 2000 the appellant conveyed twelve cannabis plants, described as cuttings, from Adelaide to Darwin. Then, on 12 April 2000, she met the co-offender, Clugston, at Tennant Creek and received from him a quantity of cannabis which she also conveyed to Darwin. This cannabis was sold in Darwin to persons unknown and for financial gain.

[12] On 24 April 2000 the appellant met Clugston in Adelaide and received from him 6.75 kilograms of cannabis which she conveyed to Darwin. This cannabis was sold in Darwin to persons unknown.

[13] On 18 May 2000 the appellant drove her motor vehicle to an address in Moil. She had in her possession an esky that contained quantities of cannabis leaf, cannabis resin and amphetamine. She offered to sell drugs from the esky to a woman at the Moil address. She in fact sold 4 grams of amphetamine for $200 to the woman. On that same day the appellant was apprehended by police and when her vehicle was searched the police located the esky containing the cannabis leaf, cannabis resin and amphetamine together with $200 in cash being the proceeds of the earlier sale. The police then executed a search warrant on the residence occupied by the appellant and seized additional quantities of cannabis leaf, cannabis resin, amphetamine, lysergic acid and cannabis seed. Police also located $51,130 in cash which was said to be the property of the co-offender Clugston and was agreed to be the proceeds from the unlawful sale of drugs over a ten month period.

[14] It was agreed that the appellant was the owner of a Falcon station wagon which was used by Clugston to travel from Adelaide to Darwin to convey drugs for sale. The appellant was aware that Clugston and the other co-accused cultivated eight cannabis plants by growing them hydroponically on a property owned by herself and Clugston. Those plants were grown for

commercial purposes. When the police executed a search warrant at that address they located and seized twelve mature and healthy cannabis plants.

[15] On 20 May 2000 the appellant participated in an electronic record of interview at which time she made partial admissions.

[16] Before the learned sentencing Judge the Crown submitted, and his Honour accepted, that Clugston and the co-offender (who is yet to be dealt with) "were the principals of an extensive and sophisticated drug enterprise involving the interstate transport of large quantities of illegal drugs for sale and profit, while (the appellant) was a comparatively minor participant, whose involvement was largely but not exclusively confined to the Darwin region."

[17] The Court was told that the appellant, who is now aged 50 years, met Mr Clugston in Cairns, Queensland, in 1979. They formed a relationship and, apart from some periods of separation, had been together for around twenty years. It was put to the learned sentencing Judge that Mr Clugston was the dominant partner and the appellant did what he told her out of a desire to keep the peace and avoid confrontation. It was submitted that she had been "gradually drawn into the drug activities" of Mr Clugston because of her strong dislike for confrontation and that she found it easier to go along with what was happening around her rather than to argue about it. It was submitted she was not involved as a principal, that she took no role in

the planning or organising of the trade and she gained no direct financial benefit from it.

The Grounds of Appeal

[18] The original grounds of appeal were that the sentence imposed on the appellant was manifestly excessive and that the sentence was not proportionate to the sentence imposed on Mr Clugston, "who had a much greater involvement in the offences". At the hearing of the appeal Mr McDonald QC, for the appellant, with the consent of the respondent, added two further grounds of appeal. The first was that the learned sentencing Judge erred by sentencing the appellant on the basis that the influence of Clugston over the appellant did not amount to "a substantially mitigating factor" notwithstanding that his Honour found that the appellant had acted to some extent under the influence and coercion of Clugston. The further ground of appeal added at that time was that the learned sentencing Judge erred in law by taking into account an irrelevant consideration namely that there had been no attempt on the part of the appellant to rebut the presumption in s 37(6) of the *Misuse of Drugs Act* that "the appellant intended to supply the relevant drugs for commercial gain."

[19] The appeal based on the suggested misapplication of s 37(6) of the *Misuse of Drugs Act* cannot be sustained. That section provides a presumption that, in certain circumstances, the offender intended to supply dangerous drugs for commercial gain. Although the section was not in force at a time relevant to

these proceedings and his Honour did make reference to it, that was of no significance in the sentencing process. The fact that the appellant was in possession of the identified drugs with the intention to supply those drugs for commercial gain was not in dispute. I would not grant leave to appeal on this ground.

The Relationship with Mr Clugston

[20] The principal focus of the appeal was the submission by the appellant that his Honour failed to accord appropriate weight to the fact that the appellant was under the influence and coercion of her de facto husband Mr Clugston. In his remarks on sentence the learned sentencing Judge observed that he did not regard the influence of Mr Clugston over the appellant as amounting to "a substantially mitigating factor". The appellant submits that his Honour was in error in so concluding.

[21] The evidence in relation to the relationship between Mr Clugston and the appellant came from a psychiatric report of Dr Lucire and evidence provided by the appellant before the learned sentencing Judge. In her report Dr Lucire summarised the relationship between the appellant and Mr Clugston and then made the following observations:

> (i) "Rella Olsen is an independent woman. She was not so much dependent upon Trevor Clugston as frightened of him, and in a position where, although she felt that she did not want the relationship, she was frightened to leave."

(ii) "On the history that I have, Rella Olsen suffered from quite severe depression from late 1997 to 1998 … Ms Olsen's depression was related to her predicament, her predicament being the unsatisfactory and unhappy relationship with Trevor Clugston."

(iii) "… Ms Olsen was influenced into a set of behaviours which have been alien to her before."

(iv) "It was her state of dependency, rather than a psychiatric injury that caused her to become involved, 'dependency', in the way that women who are in a situation from which they cannot see their way out, settle down and adopt the values of the aggressor. This is a variant of the Stockholm syndrome, sometimes called the 'battered woman defence'."

[22] In her evidence the appellant told his Honour that the relationship with Mr Clugston was a "strained one" and that it was "impossible" for her to remove herself from the relationship.

[23] There can be little doubt that conduct that falls short of providing an accused person with a defence of duress or coercion under the *Criminal Code* can be relevant to the sentencing process. Whether a person conducts himself or herself in a certain manner because of the inaptly named 'battered wife syndrome' or for some other reason relevant to the degree of culpability involved, must be relevant to the sentencing process. As Kirby J observed in *Osland v The Queen* (1998) 197 CLR 316 at 372, what is relevant "is whether admissible evidence establishes that such a victim is suffering from symptoms or characteristics relevant in the particular case to the legal rules applicable to that case." In each case where it is submitted that a person's action "can be explained by reference to (battered wife

syndrome) or its gender neutral equivalent, the court should focus its attention upon the relevance, if any, to the conduct of the particular accused of evidence explaining commonly observed responses of people living in an abusive relationship of dependency" (373).

[24] In circumstances where it is submitted that the "syndrome" is present it will be necessary to consider the actions of the woman and her culpability for those actions in light of her particular circumstances and the knowledge that exists of "its effects on the mind and the will": *R v Oakes* [1995] 2 NZLR 673 at 675.

[25] In dealing with the submission that the offences were commenced and continued "primarily due to the nature and character of the relationship" with Mr Clugston the learned sentencing Judge said:

> "Ms Fraser, for the Crown, conceded that the prisoner acted, to some extent, under the influence and coercion of Clugston, but not in such circumstances as to amount to a defence. I accept that that was so, but, in my view, Clugston's influence over the prisoner does not amount to a substantially mitigating factor. The prisoner is a mature woman who, in the past, has left Clugston and taken out restraining orders against him. She is said to have been suffering depression and other psychological problems after reconciling with Clugston, albeit the evidence in this regard is slight and little more than assertions from the Bar table.
>
> There is nothing to suggest that Clugston used physical force or threats to pressure the prisoner into drug dealing. There is no evidence that she suffered from a psychiatric condition which affected her actions. It is simply put that she felt trapped and found it easier to go along with Clugston than to separate from him or report him to the authorities.

> Keeping in mind the extent and the seriousness of the prisoner's offences, this is completely inadequate as a basis for substantial mitigation. Far from simply "going along" with Clugston's drug activities, the prisoner supplied drugs to the Darwin market for months in the absence of Clugston interstate. She weighed, packed, and priced drugs. She forwarded money to Clugston interstate, at his direction.
>
> The prisoner is mature, intelligent and was not financially dependent on Clugston. I am satisfied that she was a willing and active participant in an extensive drug enterprise, albeit that she did not appreciate the full scale of it and would not have involved herself without the pressure from Clugston."

[26] It is clear that his Honour took into account the submissions made on behalf of the appellant in this regard. He accepted that the appellant "to some extent" acted under the influence of Mr Clugston. His Honour quoted from the report of Dr Lucire and referred to the so-called "Stockholm syndrome" or "battered wife defence". In my opinion it cannot be said that his Honour failed to take those submissions into account. Whilst it is true that his Honour gave the matter little weight the basis for so doing was spelled out in his reasons and, in my view, those reasons are unexceptional.

[27] There were numerous factors to be taken into account in determining the impact of this submission upon sentence and his Honour addressed those. Seen in context the relationship between the appellant and Mr Clugston was not such as to call for substantial mitigation. Her offending took place over a period of eleven months. She visited at least one purchaser and took with her an esky in which she displayed her wares. She had available cannabis leaf, cannabis resin, amphetamine and lysergic acid. The quantity of drugs

sold by her exceeded the commercial quantity specified in Schedule 2 of the *Misuse of Drugs Act.* The appellant provided $5000 of her own money to assist Mr Clugston to purchase the stockpile of cannabis the subject of count 1 and she transported cannabis from Tennant Creek to Darwin giving rise to that stockpile. She sent money to Mr Clugston whilst he was interstate to enable him to purchase more drugs and she participated in the enterprise by weighing, packing and pricing drugs for sale. She sold drugs on Clugston's behalf whilst he was away. She acted on her own. On two of those occasions she sold drugs in circumstances which effectively placed her in the position of a wholesaler. Although she did not directly benefit from the proceeds of the drug sales she benefited indirectly and she knew that Mr Clugston was selling drugs with the intention of making a profit. Whilst she may have been to some extent under the influence of Mr Clugston she was a mature, educated person who had functioned independently in society. Although she may have been influenced by Mr Clugston the level of her subjugation was not such as to merit substantial mitigation. His Honour concluded that "[t]he level of her criminality is high". The view formed by his Honour was open on the material before him. In my opinion no error on the part of his Honour has been demonstrated.

The Sentence of Trevor Clugston

[28] The appellant complains that in recognising the early plea of guilty and the co-operation with the authorities the learned sentencing Judge erred by

failing to reduce the appellant's sentence sufficiently when compared with the reduction allowed in the sentence of Mr Clugston. It was submitted that his Honour failed to give sufficient weight to the significant disparate features that the appellant was of good character, had no prior criminal convictions and that her role was less than that of Mr Clugston.

[29] The learned sentencing Judge sentenced Mr Clugston on 17 August 2001 to imprisonment for four and a half years with a nonparole period of two years and three months. In passing sentence his Honour indicated that he adopted a starting point of seven and a half years imprisonment as an aggregate sentence but reduced that by 40 per cent to take into account the plea of guilty of the prisoner, his "honest and comprehensive account" of his involvement in the drug trade, and, significantly, the co-operation of Mr Clugston in relation to proceedings against the co-accused who was yet to come before the courts. His Honour observed that Mr Clugston co-operated fully with the authorities and the assistance he would give in relation to the prosecution of the co-accused was "likely to prove very significant indeed".

[30] The sentence imposed upon the appellant was to imprisonment for three years with a direction that she be released after serving sixteen months. She was not given a nonparole period but rather a certain date of release. In her case his Honour indicated that he had allowed a discount of "approximately one-third" in recognition of the mitigating factors which included "her early plea, remorse, previous good character, rehabilitation prospects, belated

assistance to police and her offer to give evidence against [the alleged co-offender] if necessary." The starting point for his Honour was therefore a sentence of approximately four years and six months imprisonment.

[31] In fixing a discount of approximately one third in the sentence of the appellant his Honour considered what had occurred in relation to Mr Clugston. He acknowledged that the plea of the appellant came at an early stage in proceedings and that she "belatedly" offered to assist police and give evidence against the co-accused. However his Honour was "not persuaded that she has been entirely honest" in relation to her "realisation that she might have useful information". His Honour reviewed the matters relevant to the appellant and then fixed upon the discount granted. This is a matter for the exercise of a discretion and I can see no error on the part of his Honour.

[32] The appellant pointed out that Mr Clugston was the "main offender" and that the appellant had a lesser role. She was the least culpable of the three co-accused. It was also noted that the appellant pleaded guilty to eight counts arising out of her involvement in the matters whereas Mr Clugston had pleaded guilty to ten counts. The additional matters to which Mr Clugston had pleaded guilty were count 6 (cultivating cannabis) and count 10 (possessing the sum of $51,130). It was submitted that the appellant had received no direct financial gain from the offences and that she had no prior criminal record whereas Mr Clugston had previous convictions for serious offences although, as was acknowledged by the appellant, they occurred "a

long time ago". In fact they occurred in the mid-1960s and were of a quite different kind from those before the Court in 2001.

[33] The Court will interfere in cases of this kind when "there is a manifest discrepancy such as to engender a justifiable sense of grievance, by reducing a sentence, which is not excessive or inappropriate considered apart from the discrepancy, to the point where it might be regarded as inadequate": *Lowe v The Queen* (1984) 154 CLR 606 at 613-614.

[34] The sentencing remarks of the learned sentencing Judge made it clear that he had in mind the sentence imposed upon Mr Clugston when determining the sentence for the appellant. He compared and contrasted their roles and their levels of culpability. When the sentence imposed upon the appellant is compared with that imposed upon Mr Clugston it can be seen that the starting point adopted by his Honour reflected a substantially greater sentence for Mr Clugston. There is a difference of three years imprisonment. That difference reflects the view his Honour formed of the respective levels of involvement and culpability of the appellant and Mr Clugston. The observations of his Honour make it clear that he took into account the matters now complained of by the appellant. There is no manifest discrepancy between the sentence imposed upon the appellant and that imposed upon Mr Clugston. In my view error on the part of his Honour has not been demonstrated.

Manifestly Excessive

[35] The final ground of appeal presented on behalf of the appellant was that the sentence was manifestly excessive. In developing the argument reference was made to matters that have been discussed above. The general principles applicable to an appeal against sentence on this ground are well known. In the absence of identified error an appellant seeking to establish that a sentence was manifestly excessive must show that the sentence was not just arguably excessive but that it was so "very obviously" excessive that it was "unreasonable or plainly unjust": *Raggett, Douglas & Miller* (1990) 50 A Crim R 41 at 47; *Salmon v Chute & Anor* (1994) 94 NTR 1. It is not enough that members of this Court would have imposed a less or different sentence. There must be some reason for regarding the sentencing discretion as having been improperly exercised: *Cranssen v The King* (1936) 55 CLR 509 at 519-520. In my view the sentence imposed on the appellant was appropriate in all the circumstances and this Court ought not interfere.

[36] I would dismiss the appeal.
