Ibbotson v The Queen [2006] NTCCA 2

PARTIES:	IBBOTSON, Frederick Harry v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA14/05 (20204288)
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JUDGMENT OF:	ANGEL, MILDREN & RILEY JJ

REPRESENTATION:

Counsel:

Appellant:	J Tippett QC
Respondent:	D Lewis

Solicitors:

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

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

Ibbotson v The Queen [2004] NTCCA 2
No. CA 14/05 (20204288)

BETWEEN:

FREDERICK HARRY IBBOTSON
Appellant

AND:

THE QUEEN
Respondent

CORAM: ANGEL, MILDREN & RILEY JJ

EX TEMPORE REASONS FOR JUDGMENT

(Delivered 22 February 2006)

THE COURT:

[1] This is an application for leave to appeal from a net sentence of three years imprisonment with a non–parole period of 18 months passed upon the applicant on 27 May 2005 following his plea of guilty to five counts in an indictment dated 24 May 2005. The counts comprised: first, the unlawful supply of a commercial quantity of a dangerous drug specified in Schedule 2 of the Misuse of Drugs Act (NT) namely 12 grams of ketamine, for which the maximum penalty is 14 years imprisonment; secondly, the unlawful supply of another Schedule 2 drug namely methamphetamine powder for which the maximum penalty is five years imprisonment; thirdly, another unlawful supply of a Schedule 2 drug namely methamphetamine tablets for

which the maximum penalty is five years imprisonment; fourthly, the receipt of $10,000.00 cash knowingly obtained from the unlawful supply of dangerous drugs in contravention of s 6(1)(a) of the Misuse of Drugs Act (NT) for which the maximum penalty is 25 years imprisonment; fifthly and finally, unlawful possession of methamphetamine for which the maximum penalty is two years imprisonment.

[2] The applicant was arraigned and pleaded guilty to the five counts on 25 May 2005. Submissions on penalty were made and the learned sentencing judge adjourned the matter for sentence to 27 May 2005.

[3] On 27 May 2005, commencing at 9.31am the learned sentencing judge, for the reasons he then gave, passed sentences as follows: on the first count, three years imprisonment; on the second count, one year imprisonment; on the third count, one year imprisonment; on the fourth count, three years imprisonment; on the fifth count, six months imprisonment. His Honour directed that the sentences be served concurrently and backdated them to 24 May 2005 to take account of time spent in custody. He fixed a non–parole period of 12 months.

[4] Later that day, at 3.30 pm, the learned sentencing judge reconvened the court of his own motion. What then transpired is recorded in the transcript as follows:

> "Mr Lewis: I appear for the Crown, your Honour.

Mr Rowbottam: I appear for Mr Ibbotson, your Honour.

Your Honour, I understand that your Honour is proposing to deal with this matter under, I take it, s 112 of the Sentencing Act.

His Honour: Yes, I am. Just sit down for a moment, please, Mr Rowbottam.

I've asked that this matter be re–mentioned before me because there has been a slip. I failed to have regard to s 54 of the Sentencing Act, which provides that any non–parole period has to be at least 50% of the head sentence. Therefore I've asked that the matter come back pursuant to s 112 of the Sentencing Act so that the error which currently exists can be corrected.

Mr Lewis, is there anything you wish to say in that regard?

Mr Lewis: I suppose I should say in fairness to my learned friend so that he could respond to the Crown's position if he wishes to. That clearly it is a matter that is within the bounds of s 112 of the Sentencing Act to deal with. It concerns a sentence that was imposed that is not in accordance with the law in terms of the mandatory requirement that is imposed, your Honour, pursuant to s 54 of the Sentencing Act.

His Honour: Yes.

Mr Lewis: The Crown's submission is, and it's a matter entirely for your Honour, but for the assistance for your Honour I suppose I should say that the Crown submits that if your Honour considers that three years was the appropriate head sentence then the non–parole period that is imposed as a result of that follows automatically by the virtue of the –––

His Honour: The effect of the operation of s 54.

Mr Lewis: That's correct, your Honour.

His Honour: Yes, thank you, Mr Lewis.

Mr Rowbottam.

Mr Rowbottam: Your Honour, when – I didn't quite pick this up properly, it wasn't until later that my client actually asked me about it. In my submission, your Honour, you clearly had in mind that Mr Ibbotson served a period of 12 months –––

His Honour: No, that's not so, Mr Rowbottam.

Mr Rowbottam: I took it from your Honour's comments. In my submission –––

His Honour: Yes, you're wrong about that.

What's your next submission?

Mr Rowbottam: Well, I simply put that because I've heard your Honour's comments, sorry, your Honour.

His Honour: Yes.

Mr Rowbottam: If your Honour pleases.

His Honour: The effect of s 54 as I've indicated is that the minimum non–parole period which can be imposed is 50% of the head sentence.

I have reflected upon my earlier comments and I have also given further consideration to whether the sentence ought to be suspended or not.

In all of the circumstances, it is my view that the non–parole period of 12 months which I have set ought to be vacated and I order that there be a non–parole period of 18 months consistent with s 54 of the Sentencing Act.

It is my view that the order more accurately reflects the competing factors in the sentencing of the offender on this occasion. So I confirm that in those circumstances I vacate the non–parole

period of 12 months and direct that the non–parole period be a period of 18 months.

Is there anything further that either counsel wishes to say?

Mr Lewis: No, your Honour."

The Court then adjourned.

[5] The application for leave to appeal was put on four bases. First it was said that the learned sentencing judge "failed to properly consider a partially suspended sentence". This ground may be shortly disposed of. The gravity of the offending necessarily calling for the imposition of a gaol term, counsel for the appellant cited a number of similar cases involving unlawful supply of dangerous drugs where suspended sentences had been imposed and invited the learned sentencing judge to do likewise. Counsel for the Crown made no submission to the contrary. The learned sentencing judge's remarks demonstrate that he did consider partly suspending the sentence but rejected that course in favour of fixing a non–parole period. His Honour did not spell out his reasons for doing so save to say that fixing a non–parole period "more accurately reflects the competing factors in the sentencing of the offender on this occasion". Whilst it was not suggested that some sort of 'tariff' was applicable to this case it was submitted that the applicant might reasonably have expected a partly suspended sentence, a common disposition in earlier cases. In this context it is worth repeating the following passage from the well–known judgment of King CJ in *Yardley v Betts* (1979) 22 SASR 108 at 113–114:

> "It was argued before us that an offender who has to suffer a penalty greater than the hitherto observed norm would be justified in entertaining a sense of injustice. I cannot accept the argument so formulated. When a person commits a crime he renders himself liable to the punishment prescribed by law. He suffers no injustice if the punishment imposed is within the statutory maximum and is not excessive having regard to all the circumstances. The notion of a criminal complaining that he experiences a sense of injustice, because he committed his crime on the faith of the current practice of the courts, and then got more than he bargained for, strikes me as ludicrous. Is the same criminal justified in entertaining a sense of injustice, if the warning, although given, was not published by the media or not by the section of the media which he sees or hears? He might perhaps have been out of the State when the warning was given. I am firmly of the view that an offender has no cause for complaint, if he receives a sentence which is within the legal maximum and is fair and reasonable having regard to all the circumstances of the case, simply because courts have been in the habit hitherto of imposing somewhat lighter sentences."

[6] It was next submitted that the sentence imposed was manifestly excessive, particularly having regard to the circumstance that the applicant was a first offender at the time of offending, that the offences had occurred some three years before his arraignment and sentences in relation to ketamine had increased during the interim and that the applicant had a serious drug addiction at the time of the offending which was not solely for commercial gain. The short answer to this submission is that the sentence and non–parole period of themselves do not demonstrate error in being manifestly excessive. Particularly is this so having regard to the nature of the offences and the offending and the maximum penalties fixed by Parliament therefor. The drugs in question were supplied by the applicant to a Police informer in exchange for $10,000.00. General and personal deterrence were obvious

sentencing considerations to be reflected in any disposition. There is no substance in this ground.

[7] It was further submitted that the learned sentencing judge in notionally reducing the sentence by six months on account of the applicant's plea of guilty failed to discount the sentence enough on that account. In our view, again, there is no substance in this ground. The net head sentence of three years imprisonment is well within the limits of the learned sentencing judge's sentencing discretion in relation to these five offences. As has been said so often sentencing is not a mathematical exercise or an exact science, cf *Markarian* (2005) 215 ALR 213.

[8] The most substantial ground of the application was that when the learned sentencing judge reconvened the court pursuant to s 112 Sentencing Act the learned sentencing judge ought to have invited and heard further submissions on whether the three year head sentence should be partly suspended or whether, given the head sentence of three years, the minimum non–parole period of 18 months necessitated by s 54 Sentencing Act should be fixed.

[9] This ground was initially argued on the basis that counsel for the applicant was prevented from putting any such submission to the learned sentencing judge. In this behalf an affidavit of Ian John Rowbottam who appeared as counsel for the applicant before the learned sentencing judge was tendered without objection before this Court.

[10] This affidavit is in the following terms:

> "I, Ian John Rowbottam, solicitor, ... make oath and say as follows:
>
> 1. I am the previous solicitor for the Appellant in this matter. On 25 May 2005 I appeared as counsel for the Appellant upon his plea in the Supreme Court. On that date, guilty pleas were entered to the offending set out in the indictment.
>
> 2. Sentencing commenced at 9.31 am, on 27 May 2005, wherein the Appellant was initially (sic) to 3 years imprisonment 'with a non–parole period' of 12 months (appeal Book page 48). At the time of sentencing, I didn't realize the error presuming, since all of my comparative sentences and submissions went to the imposition of a suspended sentence, that His Honour simply used the wrong terminology. Mr Ibbotson asked about the terminology and I informed him that it was simply an error in terminology.
>
> 3. Some hours later, in the afternoon, I was contacted by either the learned sentencing Judge's Associate or a member of the Sheriff's Office (I cannot recall who), pointing out that an error had occurred as His Honour had set a non–parole period of 12 months. I was asked if the matter could be "corrected in Chambers". I insisted that this could not occur as my client had heard "12 months" and should be there if the sentence was altered in any way and further, because I wanted to make submissions if it was now to be suggested that the sentence was now to include a non–parole period.
>
> 4. I then attended the Supreme Court and the matter was brought on again at 3.30 pm wherein the Appellant was then re–sentenced to three years with a non–parole period of 18 months (see Appeal Book pages 50–52A inclusive).
>
> 5. On 25 May 2005, I had made submissions as to the imposition of a partially suspended sentence and had referred the Court to a number of comparative sentences which demonstrated that such offending is often dealt with by way of a partially suspended sentence of imprisonment.
>
> 6. Having perused the transcript of that afternoon. I do not believe that it can possibly reflect the tone and manner with which I was dealt as Counsel. I was told to 'sit down' in an aggressive and demeaning manner.

7. At the bottom of page 51 I was interrupted while attempting to make submissions and, further, over the page at 52, was also again interrupted. Although the transcript suggests that His Honour invited me to make submissions, the tone, manner and volume of His Honour had the effect of preventing me from doing so. I was therefore denied the opportunity of being heard on the central issue of the imposition of a partially suspended sentence.

8. Although embarrassing to me personally as an advocate, unfortunately I allowed myself to be intimidated and consequently my client was deprived of submissions being made that could well have resulted in a different sentence being imposed. I can only say that I was intimidated into not putting forward those submissions.

9. This is only the third time that I have been directed to 'sit down' whilst attempting to make submissions by any judicial officer and the fourth time I have been spoken to loudly and aggressively by any judicial officer in my career. The other three occasions have also been by His Honour. Two of those occasions arose in the context of earlier mentions of Mr Ibbotson's matter.

10. Those events have unfortunately had an impact upon me such as to contribute to prevent me making submissions.

Sworn by the deponent)
at Darwin on 9 February) (signed) Ian Rowbottam
2006 before me:) .....

(signed) Vanessa Marle Farmer
.....
Vanessa Marle Farmer
Commissioner for Oaths (NT)"

[11] We called for the audio tape of the proceedings and it was played in court. Suffice it to say both the audio tape and the transcript comprehensively contradict the assertions and criticisms made of the learned sentencing judge. We do not accept what is asserted in paragraphs 2, 6, 7, 8, 9 and 10

of the affidavit. For present purposes we disregard it. We note that Mr Rowbottam did not avail himself of an opportunity to be heard as to the contents of his affidavit.

[12] It was also submitted that in all the circumstances a misunderstanding had occurred between counsel for the applicant and the learned sentencing judge at the resumed hearing. We do not accept this. The learned sentencing judge made his position quite clear. Mr Rowbottam is not an inexperienced legal practitioner.

[13] Upon reconvening the Court pursuant to s 112 Sentencing Act, the learned sentencing judge in our view ought to have invited specific submissions on the appropriate course following his vacating the 12 months non–parole period. A non–parole period in accord with the Sentencing Act requirements necessitated the applicant to serve an additional six months in prison. That prospect, in fairness to the applicant, called for submissions focused on why that course was to be preferred to the alternative of a partly suspended sentence. Although the learned sentencing judge invited submissions generally and, contrary to counsel's sworn affidavit, gave counsel ample opportunity to make submissions generally, in the circumstances we consider his Honour erred in proceeding to fix the increased non–parole period without specifically inviting further submissions. We also are of the view his Honour should have given reasons for making the order he did.

[14] Initially we were invited to remit the case back for rehearing. However s 411(4) Criminal Code (NT) provides as follows:

> "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."

Thus we must either pass a different sentence or dismiss the appeal.

[15] We heard further submissions on sentence. In light of those submissions we are satisfied that in the circumstances there is no reason to interfere with the sentence passed by the learned sentencing judge. We consider a sentence of three years imprisonment with a non–parole period of eighteen months is justified having regard both to the circumstances of the offending and the circumstances of the applicant.

[16] The applicant is a man in his mid–forties, married with a very young child. On 20 March 2002, in company, he supplied a Police informer with 48 small grey tablets "with a lightening bolt design", 10 small white tablets "with a Playboy design", 69 small white tablets "with a heart design", 50 small white tablets "with a Playboy design", a sealed plastic wrap containing white powder and a Clipseal bag containing off white powder for which he was paid $10,000.00 cash. Subsequent analysis proved the drugs to include 12 grams net of ketamine (a commercial quantity for the purposes of the Misuse of Drugs Act (NT) comprised an amount greater than 0.10 grams) 997 milligrams net of methamphetamine present in powder form and

572 milligrams net of methamphetamine present in tablet form. Those drugs respectively relate to counts 1, 2 and 3. Acceptance of the $10,000.00 cash in exchange for the drugs constitutes count 4. The exchange took place in a pre–arranged room at the Alatai Apartments in McMinn Street, Darwin. A subsequent search of the applicant's vehicle revealed a further plastic bag containing three Clipseal bags with white crystal powder which proved upon analysis to contain methamphetamine, the net amount being 529 milligrams. That possession constituted count 5.

[17] At the time of the offending the applicant had a serious drug dependency problem. At the hearing before the learned sentencing judge it was ultimately conceded by counsel for the applicant that the applicant had not stopped using illicit drugs at the time of sentencing. In relation to the applicant's drug abuse his counsel put submissions to the learned sentencing judge as follows:

> " The situation is, your Honour, he tells me that he was using somewhere around $750 to $1000 worth of drugs a week at this stage. His expectation in relation to this whole enterprise was that his expenditure would simply go back into his habit. He obviously along with Mr Clarke was in a position of having to pay for the drugs they had obtained. His expectation is about 20% might have been for profit, so we're not talking a large amount, but the reality is that was simply going back into his drug habit, your Honour. When I say profit, it obviously was one poor mark up.
>
> Your Honour, the situation is this, you've got a man who – and I don't know if your Honour wishes me to address his underlying habit. He's not coming here to say that he is absolutely cured and 100% will never re–offend. The difficulty is, he has struggled with his drug use for years – many, many years, your Honour. And

anyone who could predict the future, in my submission, would simply be off with the fairies.

The reality is he is a long–term addict who was in the grip of a very bad period of his addiction."

[18] The prosecutor Mr Lewis later made reference to this and the following exchange occurred:

" Mr Lewis: However, we haven't reached the point of rehabilitation yet, your Honour. There's no suggestion – and there certainly was a submission by my learned friend to you, that it would be fantasy to suggest that he has stopped using drugs.

His Honour: No, well I think he was quite frank that there certainly had not been, as yet, a complete recovery.

Mr Lewis: Well that's right, your Honour ––

Mr Rowbottam: Your honour, I might say this – just in relation to that point, if I might interrupt my learned friend. The basis of that is this – that this man's addiction has been so long standing that to say – I guess I put it in terms of an alcoholic. To say that one can simply say you can turn off the light is fanciful. But ––

His Honour: You've said that. But implicit in that submission, is there not, is the fact that he is still, from time to time albeit fighting against it, taking drugs?

Mr Rowbottam: Has – my understanding is that it hasn't been for some time, but has. I mean, the difficulty is, is that obviously he's– this may be a lifelong battle, your Honour. I was putting it that way, if your Honour pleases.

His Honour: What do you mean by 'putting it that way'? He has now stopped, but may relapse, or he hasn't stopped completely?

Mr Rowbottam: Well, my instructions are that – I guess, hasn't in the past. Whether he will in the future or not – he hasn't used for

some time but I haven't got the specifics as in time. But I think it would be safer to put it as in hasn't completely – has not completely, your Honour.

His Honour: Has not completely stopped using drugs?

Mr Rowbottam: Yes.

His Honour: Yes, thank you."

[19] Given both the serious nature of the offending and the applicant's continuing drug dependency problem it seems to us that the applicant's fitness to be released is better to be adjudged by the Parole Board at the time of contemplated release rather than predetermined and fixed by the sentencing Court. In these circumstances, it is, we think, appropriate that the minimum statutory non–parole period be imposed. We would therefore grant leave to appeal but dismiss the appeal.