Winstead v The Queen [2009] NTCCA 12

PARTIES:	WINSTEAD, Kevin Charles 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:	CA 4 of 2009 (20425263)
DELIVERED:	27 October 2009
HEARING DATES:	27 October 2009
JUDGMENT OF:	MARTIN (BR) CJ, SOUTHWOOD and KELLY JJ
APPEALED FROM:	RILEY J

CATCHWORDS:

SENTENCE – Appeal against sentence – warehousing drugs – manifestly excessive – appeal dismissed.

Misuse of Drugs Act (NT) ss 9 and 37

R v King [1979] VR 399
R v Olbrich (1999) 199 CLR 270
R v Storey [1998] 1 VR 359

REPRESENTATION:

Counsel:

Applicant:	P Elliott
Respondent:	W J Karczewski QC

Solicitors:

Applicant:	Maley's Barristers & Solicitors
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Winstead v The Queen [2009] NTCCA 12
No. CA 4 of 2009 (20425263)

BETWEEN:

KEVIN CHARLES WINSTEAD
Applicant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, SOUTHWOOD AND KELLY JJ

REASONS FOR JUDGMENT

(Delivered 27 October 2009)

Martin (BR) CJ:

[1] I agree with Southwood J that both the applications for an extension of time and leave to appeal should be dismissed.

Southwood J:

Introduction

[2] On 6 January 2009 the applicant pleaded guilty to possessing 28.846 kilograms of cannabis plant material contrary to subsections 9(1) and (2)(d) of the *Misuse of Drugs Act* (NT). He was convicted and sentenced to six years imprisonment with a non–parole period of four years and six months.

[3] On 3 April 2009 the applicant applied for leave to appeal against sentence and for an extension of time within which to file a notice of appeal. On 11 May 2009 a single Judge of the Court of Criminal Appeal refused the applicant's application for an extension of time.

[4] On 13 May 2009 the applicant filed an application asking for his applications for an extension of time and leave to appeal to be considered and determined by the Court of Criminal Appeal. The reasons given for the delay in filing the notice of appeal were: the solicitors for the applicant were only retained on 21 January 2009; it was necessary to obtain and examine the transcript and obtain the advice of senior counsel before filing the notice of appeal; and the Crown was put on notice that it was likely that the applicant would seek leave to appeal against the sentence that was imposed on him.

Proposed Ground of Appeal

[5] The only ground of appeal sought to be relied on is: the sentence was manifestly excessive.

[6] The applicant relied on three arguments in support of the proposed ground of appeal. First, before the discount for the applicant's plea of guilty, the sentence was in excess of half the maximum penalty for the offence. The objective seriousness of the offence did not merit the penalty imposed on the applicant. The facts merely establish that the offender was in possession of the cannabis on behalf of another person and he was not otherwise involved.

Although the presumption created by s 37(6) of the *Misuse of Drugs Act* applied, there was no evidence of any significant involvement by the applicant in a commercial enterprise involving the cannabis; and no evidence that the applicant stood to make a significant commercial gain as a result of his possession of the cannabis. In the circumstances, undue weight was given to the volume of cannabis possessed by the applicant. Secondly, the fact the sentencing Judge found it was likely that any reward to the applicant would have been significant to him and the benefits to him must have outweighed the perceived risk involved, was not a sufficient basis for the imposition of the sentence. Thirdly, the learned sentencing Judge failed to or did not adequately take into account the facts that: the applicant voluntarily handed himself into the police after his premises were searched; and he only had a limited criminal history.

Subsection 37(6) of the *Misuse of Drugs Act* (NT)

[7] Relevantly, subsection 37(6) of the *Misuse of Drugs Act* states that in sentencing a person for an offence against section 7, 8 or 9, the court is to presume that, if the amount of the dangerous drugs to which the offence relates is a commercial quantity, the person intended to supply the dangerous drugs for commercial gain.

The facts

[8] Following his plea of guilty, the applicant admitted the following facts:

In August 2008 the applicant was employed as a driver for Bob Kerr Transport. He lived alone at 35 Brahminy Road, Humpty Doo.

On 14 August 2008, police executed a search warrant at 35 Brahminy Road, Humpty Doo. The offender was not present during the search.

As a result of the search Police located and seized the following items: a large brown cardboard box containing 20 cryovac packages of cannabis plant material weighing 9100.4 grams from under a mattress in the spare bedroom; a large 'Barbie Doll House' cardboard box containing 22 cryovac packages of cannabis plant material weighing 9905.9 grams from under a mattress in the spare bedroom; a large 'Leg Magic' cardboard box containing 10 cryovac packages of cannabis plant material weighing 4511.9 grams from under a mattress in the spare bedroom; a garbage bag containing 10 cryovac packages of cannabis plant material weighing 4463.4 grams from under the mattress in the spare bedroom; a grey plastic shopping bag containing one cryovac package of cannabis plant material weighing 450.9 grams from under a mattress in the spare bedroom; a clipseal bag containing cannabis plant material weighing 3.5 grams in the freezer of a small bar fridge in the kitchen; a clipseal bag containing cannabis plant material weighing 13.5 grams in the third drawer of the kitchen bench; a large cannabis bud weighing 0.8 grams in a green ceramic bowl within a kitchen cupboard; and an open cryovac bag containing cannabis plant material weighing 396 grams in a white plastic bucket in the cupboard of the offender's bedroom.

The total weight of the cannabis seized is 28.846 kilograms which is 58 times the commercial quantity of the drug which is 500 grams or more for the purposes of the *Misuse of Drugs Act*.

On 14 August 2008 the applicant contacted the Police and made an arrangement to be interviewed the following day. On Friday 15 August 2008 the offender attended the Darwin Police Station where he was arrested and took part in a formal record of interview during which he made no comment in response to the questions and allegations put to him. He was later charged and bail refused.

[9] During the plea on sentence Mr Read, who appeared on behalf of the applicant, also conceded that by warehousing the drugs, until they were moved on elsewhere, the applicant was plainly involved in a commercial

enterprise. The applicant did not shirk from the fact that he was part of the overall commercial possession of the drugs.

[10] Further, the applicant did not seek to challenge the following facts. Before executing the search warrant at the applicant's premises, the Northern Territory Police were informed by an informant that there were large quantities of drugs in the Northern Territory that had been sourced from South Australia. The drugs could be found in two possible locations one of which was the applicant's premises. The Police visited the other location first and ruled it out. They were then led to the applicant's premises. A major drug dealer was being monitored. There was an intercept of a telephone call between the offender and the major drug dealer in relation to this large haul of drugs. The police believed this major drug dealer was visiting the residence of the offender prior to making ongoing transactions of supply.

[11] Mr Read told the sentencing Judge that the applicant was looking after the cannabis for an acquaintance or a friend. He was not going to get anything other than a minor reward. He was able to smoke some of the cannabis that he was warehousing. However, the sentencing Judge did not accept Mr Read's statement from the bar table that the applicant was only going to get a minor reward. His Honour told Mr Read of his view and the applicant elected not to give evidence.

Remarks of the learned sentencing Judge

[12] When sentencing the appellant, the sentencing Judge made the following remarks which are of particular relevance to the appeal:

> ....
>
> The circumstances of the offending, as put to me, do not provide any detail of how this offending came to be. All I am told is that police attended at your premises at Humpty Doo and executed a search warrant. You live alone at the address in Humpty Doo and you were not present during the search.
>
> Whilst at the premises, police located the cannabis to which I have referred. It was packaged in Cryovac packages and found in various locations in the house, but mainly in the spare bedroom. I am told that there was no suggestion of any additional Cryovac bags or the presence of scales, or any other indicia of you dealing with drugs from your home.
>
> Following the search and seizure you were contacted. On 15 August 2008, you attended at the police station. You exercised your right to remain silent and you provided no additional information to police.
>
> In presenting your case before this Court, Mr Read, who appeared on your behalf, advised, without providing any detail, that you were holding the cannabis for someone else and that it was to be returned to that person after a couple of weeks. Mr Read said that you did not know what reward you would receive for your efforts, but you expected to receive some reward.
>
> Your situation is governed by s 37 of the *Misuse of Drugs Act*, which provides that I am to presume that you intended to supply the cannabis for commercial gain, unless the contrary is proved. You did not seek to rebut that presumption.
>
> .... You have a criminal history from Queensland, New South Wales, South Australia and the Northern Territory. The interstate criminal history is limited to traffic offences and is not really relevant for present purposes. However, of importance for present purposes is the criminal history from the Northern Territory.

On 2 December 2005, you were sentenced by me to imprisonment for a period of 15 months, in relation to three offences under the *Misuse of Drugs Act*. Those offences were committed in November 2004. The amount of cannabis involved on the earlier occasion was 954.9 grams together with five cannabis plants. In addition, you had cash in the amount of $7940 obtained from the commission of an offence, contrary to the *Misuse of Drugs Act*. I was then told that you had been under some financial pressure and you were selling the cannabis to relieve the pressure. You were going to use some of the cannabis yourself and sell the balance. The money was seized and your car was forfeited to the Crown.

….

I observed on that occasion that you were at risk of re-offending, and emphasised the need for personal deterrence. It seems that the sentence then imposed which was imprisonment for 15 months, suspended after four months, did not act as a sufficient deterrent. Clearly, any sentence I impose on this occasion must emphasise further the need for personal deterrence.

In addition, general deterrence is a very significant element in determining an appropriate sentence. The amount of cannabis involved on this occasion was substantial. It was likely to have led to significant quantities of cannabis becoming available to the Darwin community, or in the more remote communities in the Northern Territory.

You were to profit from the arrangement, although the measure of your reward is unclear. This is a serious example of offending of this kind and, in my view, calls for condign punishment.

You are entitled to credit for your plea of guilty and your acceptance of responsibility. You are not entitled to credit for any further co–operation with the authorities.

I am unable to say what your precise role in the organisation was. However, it is clear that you, by your conduct, were to play a part in ensuring that a significant criminal operation was able to continue, and that cannabis would be made available for supply to members of the community for reward. The rewards available to someone in the organisation were significant. To what extent you would benefit from the enterprise is, as I say, unclear.

> However, I am able to say that your involvement was important to the process and that it is likely that your reward would have been significant to you. This follows from the fact that you have previously been dealt with for such offending and you must have known the consequences of re-offending at the time you became involved in this enterprise.
>
> I can only assume that you would not have acted as you did, unless you thought the benefits to you outweighed the risks involved. You have chosen not to place any further explanation or material by way of mitigation before me. There is no suggestion that you acted under any compulsion by way of threat or otherwise. There is no suggestion that you were or are addicted to cannabis. There is no suggestion that you were other than a user of cannabis. There is no suggestion that you were in financial difficulties or had any other compelling reason to act as you did.
>
> Whatever may have been the reason that you involved yourself in this illegal activity, you were aware of the risks. You were prepared to take those risks and you must now bear the consequences.
>
> ….

Consideration

[13] In my opinion, although the sentence is towards the top end of the range of sentences for offences such as this, the sentence is not manifestly excessive. The applicant was warehousing a large quantity of cannabis for a major drug dealer for commercial gain. The applicant knew he had the cannabis in his possession and, being so entrusted, he must have known he was playing an important part in the distribution of the drug. It is only because the applicant was ready, willing and able to do such a thing that the major drug dealer is able to ply his nefarious trade in the Northern Territory. Although

the weight of the drug is not generally the chief factor to be taken into account in fixing a sentence, in this case it was a very significant factor.

[14] The applicant made no attempt to rebut the presumption created by s 37(6) of the *Misuse of Drugs Act* which required the sentencing Judge to presume that the applicant intended to supply the cannabis for commercial gain. If the applicant wished to be sentenced on the basis that he was only holding the drugs for a short period of time and that the only reward he was to receive was that he was permitted to smoke some of the cannabis in his possession, the burden was on him to give evidence and prove these facts on the balance of probabilities as they are facts favourable to the applicant.[1]

[15] In the absence of evidence from the applicant, the proper course was for the sentencing Judge to treat the offender as if he had told the Court nothing about the circumstances of the offence at all and to apply normal sentencing principles.[2] This is what the sentencing Judge did.

[16] The sentencing Judge was required to sentence the applicant on the facts known to him, the most significant of which was the weight of the cannabis. The sentencing Judge was also entitled to conclude that the applicant's reward would have been significant to the applicant and that the applicant would not have acted as he did unless he thought the benefits to him outweighed the risks involved. The transaction was entered into for

[1] *R v Storey* [1998] 1 VR 359.
[2] *R v Olbrich* (1999) 199 CLR 270 at 276 [11].

commercial gain and ordinarily there is a direct relationship between the quantity of the drug and amount of the reward.

[17] As was said by Young CJ, Lush and Brooking JJ in *R v King:*[3]

> A court must sentence a man upon the case made out by the Crown in evidence or appearing from the depositions, but it none the less looks to him to put forward material in mitigation of the offence. The applicant's failure to prove on the hearing of the plea any mitigating circumstances of the offence, as opposed to mitigating factors personal to himself, is a relevant matter. In the case of drug offences, very often only the offender will be in a position to prove the true extent of his involvement in commercial dealing. The extent of his participation will hardly ever appear from overt acts which the Crown will be able to prove. If the offender does not give evidence, he can hardly complain if the court declines to draw inferences in his favour.

[18] The sentencing Judge was also entitled to give significant weight to specific deterrence and to reflect the weight given to specific deterrence in both the head sentence and the non-parole period. About two and a half years prior to possessing the 28.846 kilograms of cannabis, the offender had been convicted of three serious drug related offences for which he was sentenced to an actual term of imprisonment and the level of his offending had significantly escalated. Further, as the sentencing Judge found, the applicant's prospects of rehabilitation were poor.

[19] While the sentencing Judge erred in finding that after the search of his premises the offender was contacted by police, the discount given for the offender's plea was an appropriate discount which is proportionate to the

[3] [1979] VR 399 at 406.

fact that the applicant did contact the police and to the utilitarian value of his plea of guilty. The Crown case against the offender was a strong case and while the offender has accepted responsibility for his criminal conduct, his plea was not indicative of genuine remorse.

[20] In the circumstances, the applicant's applications for an extension of time and leave to appeal should be dismissed.

Kelly J:

[21] I agree with Southwood J that both the applications for an extension of time and leave to appeal should be dismissed.

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