Brandenburg v Hales & Brandenburg v Carlon [2006] NTSC 3

PARTIES:	KENNETH JEFFREY BRANDENBURG v PETER WILLIAM HALES AND: KENNETH JEFFREY BRANDENBURG v LORRAINE JOY CARLON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA34/05 (20409708) JA35/05 (20501351)
DELIVERED:	12 January 2006
HEARING DATES:	22 December 2005
JUDGMENT OF:	THOMAS J

CATCHWORDS:

MAGISTRATES – APPEALS FROM MAGISTRATES – SENTENCE MANIFESTLY EXCESSIVE - Sentence on breach of offending excessive – relative circumstances of offender and offence.

Salmon v Chute & Anor (1994) 94 NTR 1, applied.

REPRESENTATION:

Counsel:

Appellant:	T Opie
Respondent:	N Browne

Solicitors:

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

Judgment category classification:	C
Judgment ID Number:	tho200603
Number of pages:	8

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Brandenburg v Hales & Brandenburg v Carlon [2006] NTSC 3
No. JA34/05 (20409708) JA35/05 (20501351)

BETWEEN:

KENNETH JEFFREY BRANDENBURG
Appellant

and:

PETER WILLIAM HALES
Respondent

AND:

KENNETH JEFFREY BRANDENBURG
Appellant

and:

LORRAINE JOY CARLON
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 12 January 2006)

[1] On 29 October 2004, the appellant pleaded guilty in the Court of Summary Jurisdiction to 11 property offences and two traffic offences. Prior to being sentenced he had successfully completed the Credit Court program. He was sentenced to a total of 13 months imprisonment suspended forthwith with an

operational period of two years. There were orders made for payment of restitution.

[2] On 5 July 2005, the appellant entered a plea of guilty to a charge that on 7 January 2005 he unlawfully possessed methylamphetamine, a dangerous drug as specified in Schedule 2, in a public place. Contrary to s 9(2)(f)(i) of the Misuse of Drugs Act.

[3] The maximum penalty for this offence under the provision of the Misuse of Drugs Act s 9(2)(f)(i) is $5,000 or imprisonment for two years. He was sentenced to one month imprisonment for that offence.

[4] The conviction and sentence of imprisonment placed him in breach of the 13 month suspended gaol sentence that had been imposed in the Court of Summary Jurisdiction on 29 October 2004. He was sentenced to serve six months of his suspended sentence concurrently with the sentence of one month imprisonment. The sentence to date from 3 July 2005.

[5] On 15 July 2005, the appellant filed a notice of appeal. After serving two months and two days in custody he was released on bail on 7 September 2005 and has been on bail since that time.

[6] At the hearing of this appeal, the appellant relied on two grounds of appeal particularised as follows:

> "**Ground One**
>
> The sentences imposed for both the breach and fresh offending were manifestly excessive in all of the circumstances of the offences and

the Appellant. The particulars upon which this ground is based are that:

(a) The Learned Magistrate failed to give adequate weight to the Appellant's cooperation with police, early plea and remorse;

(b) The Learned Magistrate gave inadequate weight to the Appellant's lack of previous drug convictions;

(c) The Learned Magistrate paid insufficient attention to the objective seriousness of the breach offences; and

(d) The Learned Magistrate's decision to revoke six months of the suspended sentence in the context of the subjective and objective features of the Appellant and his breach offending led the Court to impose a sentence that was manifestly excessive.

Ground Two

Leave is sought to add the additional ground of appeal that the Learned Magistrate erred in restoring six months of the suspended sentence. The particulars upon which this ground is based are that:

(a) The Learned Magistrate erred in failing to properly consider all of the circumstances that had arisen since the imposition of the suspended sentence as required under section 43(7) of the Sentencing Act;

(b) The Learned Magistrate gave insufficient attention to the fact that the breach was not harmful to the community;

(c) The Learned Magistrate gave insufficient consideration to the difference between the original offence and the breach offence;

(d) The Learned Magistrate fell into error when his Honour recognised that the breach offence was not serious but nevertheless restored the suspended sentence;

(e) The Learned Magistrate erred in assuming that the breach offence evinced an intention on behalf of the Appellant to disregard and abandon his obligations under the suspended sentence to be of good behaviour; and

(f) The Learned Magistrate placed undue emphasis on the leniency

granted by the Credit Court on 29 October 2004."

Ground One - The sentences imposed for both the breach and fresh offending were manifestly excessive in all of the circumstances of the offences and the Appellant.

[7] The principles to be applied in considering an appeal against sentence were established by Kearney J in *Salmon v Chute & Anor* (1994) 94 NTR 1 at 24 and *Raggett, Douglas & Miller v R* (1990) 50 A Crim R 41 at 42:

> I venture to repeat certain comments I made in *Raggett, Douglas and Miller v R* (1990) 50 A Crim R 41 at 42:
>
> > It is fundamental that a trial judge's [or magistrate's] exercise of his sentencing discretion is not to be disturbed on appeal, unless error in that exercise is shown: *Griffiths v R* (1977) 15 ALR 1, 137 CLR 293 at 308-9, per Barwick CJ. The presumption is that there is no error.
>
> See also *R v Anzac* (1987) 50 NTR 6 at 11-12.
>
> In *R v Tait* (1979) 24 ALR 473 at 476, 46 FLR 386 at 388, the Full Court of the Federal Court, citing from *Cranssen v R* (1936) 55 CLR 509 at 519, set out the fundamental rule on appeals against sentence as follows:
>
> > "The jurisdiction to revise such a discretion must be exercised in accordance with recognised principles. It is not enough that the members of the court would themselves have imposed a less or different sentence, or that they think the sentence over-severe …"
> >
> > An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. *It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence*. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error … [emphasis added]."

[8] These principles are applicable to this appeal and have been applied by judges of this Court over many years.

[9] The agreed facts with respect to the offence of unlawfully possess amphetamine in a public place are as follows:

> "… on Sunday 16 January 2005 the defendant hitchhiked and walked to Darwin City from Noonamah where he had been previously camping.
>
> At 3 am on Monday 17 January the defendant visited the vicinity of Austin Lane where he met with a male already known to him. The defendant then purchased four clipseal bags containing a dangerous drug, namely, methylamphetamine.
>
> The total weight coming to 189 milligrams or 1.89. After the deal the defendant walked to Cavenagh Street where he was spoken to by police outside the De Fish Café. A Comms check was conducted after police spoke with the defendant, the defendant was arrested in relation to an unrelated matter and was conveyed to Darwin Watchhouse.
>
> Whilst being processed at the watchhouse a search was conducted of the defendant and his property. During the course of the search four clipseal bags containing a white substance suspected as being methylamphetamine was located in the defendant's wallet.
>
> The defendant was placed in the cells and detained utilizing s 137 of the Police Administration Act. The defendant later participated in an electronic record of interview, when asked what the white powder that was found in his possession was the defendant replied 'speed'. When asked his reason for possessing the drug the defendant replied, 'for personal use'. The defendant was later charged."

[10] The learned stipendiary magistrate correctly noted that a serious aspect of the offending was that by committing this offence, the appellant was in breach of a suspended sentence imposed in October 2004. Other matters put forward for consideration on sentence were as follows:

- Mr Brandenburg had no prior convictions for drug offences. Section 37 of the Misuse of Drugs Act was not brought into effect.

- Mr Brandenburg did exceptionally well on the Credit Court program which he completed in October 2004.

- He had attended the Credit Court program because the property offences with which he had been charged were drug related.

- His conviction and sentence imposed in October 2004 attracted considerable publicity.

- He was dismissed from his employment and found difficulty in obtaining alternative employment. At the time of the plea of guilty on 5 July 2005, he had car detailing work organised. He had also done volunteer work with the Salvation Army.

- The appellant is 33 years of age with a good work history. A resume of his employment history was Exhibit 2 before the Court of Summary Jurisdiction.

- The learned stipendiary magistrate found the offence of possess amphetamine was towards the lower end of seriousness of drug offences in the Northern Territory – possessing a Schedule 2 drug in a public place. It was not a large amount, approximately one fifth of a gram. His Honour acknowledged that most persons charged with this offence are fined or placed on a bond.

- The learned stipendiary magistrate noted the connection between the previous property offences and the later offence of possess amphetamine.

They were both drug related in that the property offences were committed for the purpose of obtaining drugs which was why the appellant had been referred to the Credit Court program.

- There was an early indication of a plea of guilty. Mr Brandenburg had been cooperative with the authorities and shown remorse.

[11] The onus is upon the appellant to show that the original Court's sentencing discretion has erred (*Cranssen v The King* (1936) 55 CLR 509 at 519).

[12] I am persuaded that to restore six months of the 13 month suspended sentence of imprisonment to be served was excessive and this manifests error on the part of the learned stipendiary magistrate.

[13] I would allow the appeal. I would re-sentence the appellant and make the following orders:

1. Offence of possess amphetamine in a public place - convicted and sentenced to 14 days imprisonment.

2. Breach of Bond – convicted and sentenced to 13 months imprisonment concurrent with the sentence for possess amphetamine.

3. This is a total of 13 months imprisonment backdated to 3 July 2005. The appellant to be released after serving a period of two months and two days to 7 September 2005. The balance of the period of 13 months imprisonment is suspended on condition the appellant be of good behaviour.

4. I specify a period of two years from the date of this order during which the appellant is not to commit a further offence punishable by imprisonment if he is to avoid being dealt with under s 43 Sentencing Act.

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