Carnese v The Queen [2009] NTCCA 8

PARTIES:	**ROCCO CARNESE**
	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 11 of 2008 (20726996 and 29720782)
DELIVERED:	5 June 2009
HEARING DATE:	1 June 2009
JUDGMENT OF:	MILDREN, THOMAS AND RILEY JJ
APPEALED FROM:	MARTIN (BR) CJ

CATCHWORDS:

CRIMINAL LAW – APPEAL –DRUG OFFENCES – methandrostenolone – anabolic steroid – whether the recording of convictions was appropriate – sentence manifestly excessive – appeal allowed – convictions set aside – other penalties imposed by sentencing Judge should remain

Cobiac v Liddy (1969) 119 CLR 257; *Kelly v R* (2000) 10 NTLR 39; *Toohey v Peach* (2003) 141 A Crim R 437, followed

Hales v Adams [2005] NTSC 86; *Hesseen v Burgoyne* [2003] NTSC 47, approved

The Queen v McInerney (1986) 42 SASR 111, applied

Lanham v Brake (1983) 34 SASR 578, considered

Fox and Freiberg, Sentencing State and Federal Law in Victoria 2nd Ed., referred to

Misuse of Drugs Act (NT); *Private Security Act*(NT); *Sentencing Act* (NT) s 6, s 7, s 8

REPRESENTATION:

Counsel:

Appellant:	P Elliott
Respondent:	N Rogers

Solicitors:

Appellant:	Withnalls
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Ril0907
Number of pages:	15

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

Carnese v The Queen [2009] NTCCA 8
No. CA 11 of 2008 (20726996 and 20720782)

BETWEEN:

ROCCO CARNESE
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, THOMAS AND RILEY JJ

REASONS FOR JUDGMENT

(Delivered 5 June 2009)

The Court:

[1] On 27 October 2008 the appellant was sentenced in relation to two offences under the *Misuse of Drugs Act*. The first was that, on 15 September 2005, he unlawfully possessed a commercial quantity of methandrostenolone, a dangerous drug. The maximum penalty for the offence was imprisonment for 14 years. The second was that just over a year later, on 19 September 2006, he possessed a trafficable quantity of the same drug. The maximum penalty for that offence was imprisonment for five years. He was convicted on each count and fined $2000 on the first count and $1000 on the second.

[2] The major thrust of the appellant's submissions to this Court was that a conviction should not have been recorded in either case. There were five grounds of appeal with the principal ground being that the sentence imposed was manifestly excessive in all the circumstances.

[3] Prior to the hearing the appellant had been granted leave to appeal in relation to two of the grounds of appeal and the appellant sought leave to appeal in relation to the remaining grounds. It will be necessary to address each of the grounds of appeal and proposed grounds of appeal and then return to the principal ground. Before doing so it is convenient to relate the facts of the case and then consider the law in relation to the recording of a conviction.

The circumstances of the offending

[4] The first offence occurred on 15 September 2005 when police located 975 pills at the residence of the appellant. Thirty three of the pills, together weighing 135.86 grams, were subsequently analysed and found to contain the drug methandrostenolone which is an analogue of testosterone. The drug is commonly known as an anabolic steroid. The unchallenged inference drawn by his Honour was that at least the majority of the remaining pills also contained the drug. The volume of the drug constituted a commercial quantity for the purposes of the *Misuse of Drugs Act*.

[5] The learned sentencing Judge was informed that the appellant had obtained the pills in about 2000 or 2001 from an acquaintance who was involved in the greyhound racing industry and who was identified to the Court.

[6] In conducting the search of the appellant's premises on 15 September 2005 the police did not discover all of the pills in his possession. When they returned a year later, on 19 September 2006, they found a further 58 pills. The pills were different in shape from those found in 2005, however, despite the differences the learned sentencing Judge accepted that they were also some of the pills the appellant had obtained in 2000 or 2001. The pills weighed a total of 6.96 grams and, upon analysis, were found to contain a trafficable quantity of methandrostenolone for the purposes of the *Misuse Drugs Act*.

[7] At the time the police attended the residence of the appellant in September 2005 they also located a small amount of cannabis. Charges were laid in relation to the cannabis and the appellant pleaded guilty in the Court of Summary Jurisdiction to two counts under the *Misuse Drugs Act*. He was fined $300 and no conviction was recorded. This was not prior offending for present purposes.

[8] The appellant explained the presence of the drugs by reference to his business concerned with the hunting of wild pigs. When dogs are used for hunting wild pigs it is not unusual for them to receive injuries and the appellant would use steroids, lawfully obtained from a veterinary surgeon,

for administration to the dogs to assist in their recovery. It was lawful for him to use the steroids for his dogs provided he obtained the drugs from an appropriately qualified veterinary surgeon. The drugs which were located at the premises of the appellant were provided by the named associate and the learned sentencing Judge accepted that the appellant did not think he was "doing anything illegal".

[9] At the time of the search in September 2006 the appellant had not used all of the pills provided to him. He explained this was because he had moved away from the use of steroids in tablet form and turned to the easier alternative of injecting steroids into his dogs. There was no suggestion that the pills had been, or would be, used by the appellant personally, or supplied to any other person.

The sentence

[10] The learned sentencing Judge reviewed the personal circumstances of the appellant and went on to say:

> As I have said, I accept your evidence that you did not intend to supply the pills to any person or to use them yourself. Your sole purpose was to use the pills to assist the recovery of your dogs from injury. It is in these circumstances that I am urged not to record a conviction. In deciding that question I am required to have regard to all the circumstances of the case including the extent to which your offending is of a trivial nature and your character, age and antecedence.
>
> Although your counsel has urged to the contrary, in my view the quantity of the pills was a significant quantity. Obviously your offending is not as serious as someone who possesses the pills for personal use without any form of other lawful excuse in the

> background, but nevertheless it was a significant quantity and having obtained the pills back in 2000 and 2001, after you were caught in possession in 2005, you remained in possession of the balance for another 12 months. You have told me that you were unaware of the balance in the kitchen cupboards, but I am significantly sceptical about that. I think it is more likely that as there were no charges laid in connection with your first possession during the ensuing 12 months you decided that there would not be a problem in retaining the balance, but I am not in a position to make a positive finding about that matter. As it would be a circumstance of mitigation, however, I indicate that I am not in a position to make a positive finding that you were unaware of those pills in the kitchen cupboard. I am simply left in the position of not being able to make a positive finding one way or the other.
>
> In all the circumstances, I am not persuaded that I should not record a conviction. I have given anxious consideration to the impact of recording a conviction but, as I have said, in all the circumstances I am not persuaded that it is appropriate to decline to record a conviction.

[11] The learned sentencing Judge recorded convictions in relation to each count and imposed a fine of $2000 in relation to the first offence and a fine of $1000 in relation to the second offence.

The recording of a conviction

[12] Pursuant to s 7 of the *Sentencing Act*, where a court finds a person guilty of an offence it may, subject to special provisions relating to the offence, make orders without recording a conviction. Without recording a conviction it may order the dismissal of the charge, the release of the offender, the payment of a fine or the performance of community service.

[13] Section 8 of the Act provides direction in relation to the decision whether or not to record a conviction. The section is in the following terms:

8. Conviction or non-conviction

(1) In deciding whether or not to record a conviction, a court shall have regard to the circumstances of the case including:

(a) the character, antecedents, age, health or mental condition of the offender;

(b) the extent, if any, to which the offence is of a trivial nature; or

(c) the extent, if any, to which the offence was committed under extenuating circumstances.

[14] The section requires a consideration of "the circumstances of the case" including the identified and enumerated factors. All relevant circumstances must be taken into account by the sentencing court.[1]

[15] Section 6 of the Act provides that, in determining the character of an offender, the court may consider, inter alia, the following:

(a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender;

(b) the general reputation of the offender; and

(c) any significant contributions made by the offender to the community.

[16] "A conviction is a formal and solemn act marking the court's, and society's, disapproval of a defendant's wrongdoing".[2] The recording of a conviction is to be regarded as a component of the sentence and to be accorded weight in

[1] *Toohey v Peach* (2003) 141 A Crim R 437 at 440 - 441.
[2] *The Queen v McInerney* (1986) 42 SASR 111 at 124.

considering whether or not the sentence is proportionate to the offence.[3] The result of declining to record a conviction is to free the offender of some of the immediate legal consequences of his having committed the offence although s 7 of the Act permits other consequences to be imposed.

[17] In *Hales v Adams*[4] Southwood J said of the decision whether or not to record a conviction**:**

> It is a component of the sentence and is to be given weight in determining whether or not the sentence is proportionate to the offence. The more serious or blatant an offence, the less proportionate it is for the Court of Summary Jurisdiction to decline to record a conviction. Mature age offenders who have led previously blameless lives may benefit from an exercise of the discretion not to record a conviction. The discretion may also be exercised in an offender's favour where the offender has no previous convictions, or where the offending related to ill health or where it would, in itself, be a significant additional penalty for a first offender. On the other hand, the recording of a conviction may be necessary where the offender is of mature age and deterrence is being given weight, especially in relation to breaches of regulatory or social legislation. A useful summary of these considerations may be found in RG Fox and A Freiberg, Sentencing State and Federal Law in Victoria 2nd Ed, at 190–193.

Ground 2: Error in determining that the number of tablets *required* the conviction of the appellant.

[18] The appellant seeks leave to appeal on this ground.

[19] It was submitted on behalf of the appellant that the learned sentencing Judge fell into error in concluding that there "was a significant quantity" of pills by reference to the number of pills involved. It was submitted that the rate of administering the pills to the dogs of the appellant meant that the pills

[3] *Lanham v Brake* (1983) 34 SASR 578 at 585.
[4] [2005] NTSC 86 at [17]

would have lasted approximately 3-4 months had he not adopted the different method of providing steroids to his dogs by way of injection.

[20] There were 975 pills found at the residence of the appellant on 15 September 2005 and a further 58 pills found on 19 September 2006. Whilst those numbers are, of themselves, significant what is more significant is the quantity of the prohibited drug to be found in those pills. The pills seized on the first occasion contained a commercial quantity of the drug and those seized on the second occasion contained a trafficable quantity of the drug.

[21] The submission on behalf of the appellant suggests that the learned sentencing Judge relied exclusively upon the number of tablets as the reason for recording a conviction. Reference to the sentencing remarks makes it clear that, although his Honour placed weight on the number of tablets, this was but one matter that his Honour took into account in deciding whether or not to record convictions. Whilst the quantity of the drugs seized was a relevant consideration to be taken into account, a fair reading of the whole of the Sentencing Remarks reveals that his Honour did not regard the number of tablets as requiring the imposition of a conviction.

[22] Leave to appeal should not be granted in relation to this ground.

Ground 3: Failing to give sufficient weight to the effect of a conviction on the appellant.

[23] The appellant seeks leave to appeal on this ground.

[24] Submissions were placed before his Honour urging that a conviction not be recorded. The primary thrust of the submission was that if the appellant was convicted he would lose his licence under the *Private Security Act* which, it was submitted, was required for the operation of a business he operated supplying ATMs at public functions. In addition, reference was made to the circumstances of the offending including that the offending arose out of the one set of circumstances and that there had been a substantial delay between the finding of the drugs and proceeding to prosecution.

[25] The appellant was called to give evidence in the proceedings. Having heard his evidence the learned sentencing Judge accepted that if a conviction was recorded the appellant would automatically lose his licence under the *Private Security Act* and, as a consequence, would be unable to operate his ATM business. In effect, the appellant would lose a significant part of his employment. Those findings were not challenged on appeal. The loss of his business would, of course, add considerably to the burden of the sentence imposed upon the appellant. It would amount to a significant additional penalty beyond the fines. In the special circumstances of this case, where it was accepted that the appellant thought he was acting lawfully, it could not be said that the indirect consequences of a conviction, being the loss of a significant part of his employment, were the natural consequences of his conduct and, therefore, part of what he deserved.[5]

[5] Fox and Freiberg, Sentencing State and Federal Law in Victoria 2nd Ed, at [3.905].

[26] A review of the sentencing reasons makes it apparent that his Honour placed all matters in the balance and gave "anxious consideration to the impact of recording a conviction". Having done so, and without further elaboration, his Honour apparently concluded that the offending was too serious to pass without conviction notwithstanding the powerful factors in mitigation that had been identified. The reasons for so concluding were not exposed.

[27] Leave to appeal on this ground should be granted. The impact upon the appellant of recording a conviction is a matter to be considered in determining whether the sentence was manifestly excessive in all the circumstances.

Ground 4: Failing to take into account delay in charging the appellant.

[28] Leave to appeal has been granted on this ground.

[29] It was the submission of the appellant that the offending occurred in September 2005 and September 2006 but it was not until 4 May 2007 that the appellant was informed that he was to be prosecuted. The appellant argued that the fact of delay was not accorded appropriate weight by the learned sentencing Judge and that it was noted that delay was not referred to by his Honour in the sentencing remarks. This submission on behalf of the appellant ignores the fact that delay was the subject of discussion between his Honour and counsel for the defence immediately prior to delivering reasons for sentence.

[30] It appears the reason for the delay in proceeding with the prosecution arose from the need to obtain expert analysis of the tablets seized from interstate. In the sentencing proceedings there was no submission made on behalf of the appellant that the appellant had taken any steps to his prejudice in the intervening period or that he was under any other pressure as a result of the delay. To the contrary it was submitted that throughout the relevant period the appellant believed he had done nothing unlawful. He kept the drugs seized in September 2006 on the basis that he was lawfully entitled to do so notwithstanding the earlier seizure in September 2005. It seems he was confident in his position and untroubled by the events of September 2005.

[31] There is nothing in the material placed before this Court to suggest that the learned sentencing Judge erred by failing to give due consideration to the issue of delay.

[32] No error on the part of the learned sentencing Judge has been demonstrated.

Ground 5: The plea of guilty

[33] The appellant seeks leave to appeal on this ground.

[34] The appellant submits that in all the circumstances of the case it is not possible to ascertain what weight, if any, was given to the plea of guilty in the sentencing mix.

[35] It is conceded by the appellant that at the commencement of the sentencing remarks his Honour noted that the appellant had pleaded guilty to the two

offences contained in the indictment. Whilst it is true that there was no further mention of the plea there was no obligation upon his Honour to specify what discount was given.[6]

[36] There is nothing in the material placed before this Court to suggest that his Honour did not make due allowance for the plea of guilty. Leave to appeal should not be granted.

Ground 1: The sentence imposed was manifestly excessive

[37] The appellant submitted that the imposition of a conviction in relation to each of the counts on the indictment was, in all the circumstances, manifestly excessive.

[38] It is plain that the discretion to be exercised rests with the sentencing Judge. The issue to be resolved on appeal is whether there were facts which justified the learned Judge exercising his discretion in the way that he did i.e. to record a conviction. The issue is not whether any member of this Court would have taken the course taken by his Honour: *Cobiac v Liddy*[7] per Windeyer J who said at page 275:

> The question is not what we would do, but what could he lawfully do. The discretion was his. He could exercise it as he thought expedient, provided that in the circumstances it was open to him to exercise it at all.

This passage was cited with approval by the Northern Territory Court of Criminal Appeal in *Toohey v Peach* (supra).

---

[6] *Kelly v R* (2000) 10 NTLR 39.
[7] (1969) 119 CLR 257

[39] Similar views were expressed by Martin (BF) CJ in *Hesseen v Burgoyne*[8] where his Honour was dealing with the application of s 8 of the *Sentencing Act* and said (at [20]):

> Judicial minds may well differ as to the significance to be placed upon any one or more of the enumerated factors in s 8 as well as the other circumstances of the case, and in ultimately deciding whether or not to record a conviction the sentencer is exercising a judicial discretion. An appellate court will only interfere if there is some reason for regarding that the discretion conferred upon the Magistrate was improperly exercised and the Magistrate fell into error (*Mason v Pryce* (1988) 34 A Crim R 1).

[40] In determining whether the imposition of convictions was manifestly excessive in the present case it is necessary to again consider the circumstances of the offending. The unchallenged facts upon which his Honour proceeded included that the appellant had, in the past, lawfully used steroids obtained from a veterinary surgeon for administration to his hunting dogs. On the occasion of the offending he had obtained the drugs from a named acquaintance in the greyhound industry. Had he obtained them from a veterinary surgeon, as he had in the past, the possession would have been lawful. The learned sentencing Judge accepted that the appellant did not regard the possession of the steroids as being in any way unlawful. He possessed them for a lawful purpose being to administer them to his dogs. There was no suggestion that the appellant possessed the steroids for use by himself or for supply to any other person. There was no suggestion of any risk that the drugs would be used for an illegal purpose. The reason the

[8] [2003] NTSC 47

tablets were retained over a lengthy period of time was because the process the appellant had previously adopted for administering steroids to the dogs changed from the forced feeding of tablets to the dogs to one of injecting steroids.

[41] In addition to those matters it is significant that the appellant entered a plea of guilty at the earliest reasonably available opportunity. Further, he had not at any relevant time been in trouble with the law and he was regarded as a witness of truth by the learned sentencing Judge. This was not blatant offending. It was offending resulting from ignorance. The circumstances of the offending did not demand a sentence reflecting a need for personal or general deterrence.

[42] Also of significance in this unusual case is the accepted impact of a conviction upon the appellant being the automatic loss of his licence under the *Private Security Act* with the consequence that he would lose one of the two businesses operated by him.

[43] Whilst the quantity of the drug found in the possession of the appellant was a factor to be taken into account in determining whether the penalty of conviction ought to be imposed it was, in the peculiar circumstances of this matter, outweighed by the factors mitigating against such a result.

[44] In our opinion, in all of the circumstances, the sentence imposed was manifestly excessive. Leave to appeal should be granted in relation to Ground 3, the appeal should be allowed and the convictions set aside.

Otherwise the penalties imposed by the learned sentencing Judge should remain.
