R v Messel [2010] NTCCA 12

PARTIES:	THE QUEEN v MESSEL, Shane Leslie
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 12 of 2010 (20929772)
DELIVERED:	20 July 2010
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JUDGMENT OF:	MARTIN (BR) CJ, RILEY AND BLOKLAND JJ
APPEAL FROM:	KELLY J

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST SENTENCE
Criminal sentencing and procedure – whether sentence manifestly inadequate and reduction excessive – matters for mitigation – double jeopardy – appeal dismissed.

Misuse of Drugs Act s 8(1), s 8(2)(c), s 5(1), s 5(2)(b)(iii), s 9(1) and s 9(2)(d).
Daniels v The Queen (2007) 20 NTLR 147, applied.
R v Riley (2006) 161 A Crim R 414; *R v Osenkowski* (1982) 30 SASR 212, referred to.

REPRESENTATION:

Counsel:

Appellant:	R Wild QC
Respondent:	J Tippett QC

Solicitors:

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

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

R v Messel [2010] NTCCA 12
No. CA 12 of 2010 (20929772)

BETWEEN:

THE QUEEN
Appellant

AND:

SHANE LESLIE MESSEL
Respondent

CORAM: MARTIN (BR) CJ, RILEY AND BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 20 July 2010)

The Court:

[1] This is a Crown appeal against an aggregate sentence of imprisonment for 18 months, suspended after service of 28 days, imposed for three drug offences. The sole ground of appeal is that the sentence was manifestly inadequate.

[2] For the reasons that follow, notwithstanding that the sentence was manifestly inadequate, the appeal is dismissed.

Facts

[3] On 2 September 2009 police obtained a warrant enabling them to intercept communications from a mobile phone used by the respondent's co-offender.

The following day police executed search warrants at various premises and arrested relations of the respondent's co-offender. Later that morning police intercepted a call from the co-offender to the respondent in which the co-offender told the respondent to get rid of everything. In addition, text messages were sent from the co-offender's mobile phone to the same effect.

[4] That afternoon, police stopped and searched a work van being driven by the respondent. In the van they found numerous empty clipseal bags and a package labelled "bath salt" containing white powder residue which was later found to include traces of 4-methylmethcathinone, a dangerous drug under the *Misuse of Drugs Act*. Subsequently, as a result of information given by the respondent to police, a search was conducted of a house which the respondent had used in the commission of drug crimes. Police found approximately 1400 capsules containing powder, diary notes in the form of a ledger, scales and handwritten notes concerning the filling of capsules.

[5] The respondent subsequently participated in an interview with police. He fully co-operated and, from the admitted Crown facts, the learned sentencing Judge summarised the respondent's admissions in the following terms:

> "a. You were employed by AJZ to work on a part-time basis from his carpet cleaning business.
>
> b. In about June 2009, you accepted an invitation from AJZ to make extra money by helping him fill a quantity of capsules with a powder that you believed to be an illegal substance.
>
> c. Over four occasions since June 2009, you packaged a quantity of powder into capsules at AJZ's request.

d. The process involved initially using a capsule-filling device to put powder into capsules, all of which was provided by AJZ.

Towards the end of the offending, you were provided with caffeine and a mixing bowl in addition to the powder and asked by AJZ to mix the caffeine and powder before filling the capsules with the mixture.

e. On the first occasion, which was on a date unknown in the last week of June 2009, you were provided with a quantity of powder by AJZ, which you understood to be an illegal substance. AJZ told you to put the powder into capsules and provided you with the capsules and the capsule-filling device. He also provided you with scales and a quantity of ziplock plastic bags and instructed you to work out how much mixture was contained in a hundred-filled capsules.

f. You did the capsule-filling in your bedroom at your father's house over a period of about a week. During this time, you filled 400 to 500 capsules and worked out that 100 capsules contained 34 grams of mixture. You still had more than half the powder remaining, but told AJZ that you did not feel comfortable filling the capsules in your father's home. AJZ later collected the finished capsules from you and paid you $200 cash for the job. AJZ told you to hold on to the remaining powder.

g. On 10 July 2009, AJZ booked you in to the Darwin Central Hotel on Knuckey Street and instructed you to take the remaining powder and empty capsules there, and 'Go flat out.' You filled between 800 and 1000 capsules that night. AJZ collected the capsules later that night. You stated that you were paid an extra couple of hundred dollars for this work.

h. You next filled capsules for AJZ on 31 July 2009 and 1 August 2009 at the Best Western Motel, Darwin Airport. AJZ had booked a room for you for two nights and provided you with a quantity of powder. You filled 1500 capsules over two days checking out of the hotel on 2 August 2009. AJZ collected about 1000 of the capsules before you checked out of the hotel and then collected the remaining 400 to 500 capsules from your home a few days later. You received $400 to $500 for doing this work.

i The fourth occasion was from 24 to 26 August 2009. You were again booked into the Best Western Motel by AJZ and provided with material and equipment in order to fill a quantity of capsules. This time, however, the powder was provided in a foil package labelled as 'Bath Salts'. You confirm that this was the empty package found in your van on 3 September 2009.

j. You stated that the bath salts package stated on the packaging that it weighed one kilogram and you were also provided with two 400-gram packages of caffeine, empty capsules and mixing bowls.

k. That between 24 and 26 August 2009, you made a total of 4800 capsules from the ingredients supplied to you by AJZ. You filled 1600 capsules on the first night. AJZ collected 100 of those capsules on that night.

l. On 25 August 2009, you filled 1800 capsules. At 5 pm on that day, a man you did not know came to the motel room and collected 200 capsules from you. Another man attended and collected 500 capsules from you at about 7 pm the same evening.

m. On 26 August 2009, you used the last of the mixture and produced 1400 capsules. AJZ then attended at the hotel and collected 200 capsules, leaving 3800 with you, which you then took home. AJZ subsequently paid you $2000 for the capsule-filling done between 24 and 26 August 2009.

n. Over the following weeks, AJZ called at your residence on two occasions collecting 1000 capsules on the first visit and 1400 on the second. The remaining 1400 were left with you and were seized by police on 3 September 2009. You stated that you took the 1400 capsules from AJZ's work van and hid them inside a rolled up swag in your bedroom after you received the phone and SMS warnings from AJZ on 3 September 2009. You intended to hold the capsules until given further instructions by AJZ."

[6] After summarising the admissions, based on the admitted Crown facts, the sentencing Judge made the following findings concerning the respondent's criminal activities:

> "In relation to the quantities of drugs concerned, your mixing of the one-kilogram bag of powder labelled as 'Bath Salts' with the two 400-gram packages of caffeine would have created a total of 1.8 kilograms of caffeine and 4-methylmethcathinone mixture, which you packaged into capsules.
>
> Forensic analysis of the 1400 capsules found at your home identified the substances as 4-methylmethcathinone of 56.4 percent purity. The 1400 capsules found at your home contained a mixture weighing 288.6 grams. It was estimated that the 700 capsules, supplied by you to the two unknown males who attended your hotel room on 25 August contained at least 144.2 grams of the mixture.
>
> According to your own calculations, the 400 to 500 capsules filled by you in late June 2009 contained between 135 and 170 grams of 4-methylmethcathinone mixture. The 800 to 1000 capsules filled by you on 10 July 2009 contained between 272 and 340 grams of 4-methylmethcathinone mixture and the 1500 capsules filled by you on 31 July 2009 and 1 August 2009 contained 510 grams of 4-[methyl]methcathinone mixture.
>
> You have, therefore, packaged a total of between 2718 grams and 2810 grams of 4-methylmethcathinone mixture for AJZ between June 2009 and 26 August 2009."

Objective seriousness

[7] Based on the admissions and agreed Crown facts, the respondent pleaded guilty to three drug offences. The first and most serious offence was the offence of unlawfully producing a dangerous drug between June and 3 September 2009 in the circumstance of aggravation that the drug produced was a commercial quantity, namely, 2718 grams. The second offence was

the offence of taking part in supply of a dangerous drug in the circumstance of aggravation that the amount supplied was a commercial quantity, namely, 144.2 grams. This offence related to the 200 capsules collected by an unknown man on 25 August 2009.

[8] The third offence of possession of a dangerous drug in the circumstance of aggravation that the amount possessed was a commercial quantity, namely, 288.6 grams, related to the 1400 capsules found at the respondent's home. These were the capsules remaining in the possession of the respondent at the time that police became involved.

[9] The total criminal conduct in which the respondent engaged was undoubtedly very serious. He assisted in the production of a little over 2.7 kilograms of a dangerous drug which, in the capsule form, could have been sold for a total in the vicinity of $300,000. The respondent's reward for being involved was relatively small, but this is not an unusual feature attached to the criminal offending of persons engaged to perform tasks such as packaging in order to assist those higher up the chain of supply to carry out their insidious trade. The respondent performed an important function in a large commercial enterprise aimed at the supply and distribution of a dangerous drug. The drug is not, in itself, very common and has been described as an emerging drug. It is a synthetic stimulant drug that acts on the body and brain in a manner similar to the effects of methamphetamine.

Personal matters and Mitigation

[10] To be weighed against the seriousness of the respondent's criminal conduct were matters of significant mitigation. At the time of sentencing the respondent was aged 29 and, prior to this offending, had never been in trouble with the law. He had been a responsible worker and referees spoke highly of him as a quiet, respectful and courteous person. The referees regarded his conduct as totally out of character, a view which was accepted by the sentencing Judge. Her Honour also accepted that the respondent was truly sorry for his conduct and had good prospects of rehabilitation. These findings are not challenged by the Crown.

[11] Of particular significance by way of mitigation was the respondent's cooperation with the police when initially interviewed and his subsequent cooperation with respect to proceedings against the co-offender. In the respondent's cooperation with police immediately following his apprehension, the respondent not only made full admissions, but also voluntarily disclosed matters about which the police had no information. Before the sentencing Judge and this Court, the Crown accepts that had it not been for the respondent's volunteered admissions, the Crown would not have been in possession of evidence concerning the charge of supplying a drug to which the respondent pleaded guilty.

[12] The respondent's cooperation did not end with full admissions. He provided information to police, including a written statement, and had agreed to give evidence in proceedings against the co-offender. It was common ground

that the respondent provided substantial assistance in the case against the co-offender. In oral submissions counsel for the Crown before the sentencing Judge characterised the information with respect to production as a "substantial amount of information of high value".

[13] The importance of full cooperation with investigating authorities, particularly to the extent of giving evidence in a prosecution against other drug offenders, should not be underestimated. This type of cooperation is highly valuable to law enforcement authorities who rely heavily upon information and assistance from people like the respondent. It is well settled that sentencing courts will recognise such cooperation through substantial reductions of sentences. The extent of the reduction will necessarily depend upon the seriousness of the offending and the extent and value of the cooperation.

Approach of sentencing Judge

[14] There is no apparent error in the approach of the sentencing Judge to the difficult task of balancing the competing factors relative to sentencing. Her Honour referred to all relevant matters and demonstrated that she understood the balancing exercise in which she was required to engage. Her Honour properly determined to impose an aggregate sentence.

[15] The sentencing Judge stated that had it not been for the respondent's plea of guilty and cooperation with the authorities, she would have imposed a sentence of imprisonment for three years. After making allowance for the

plea of guilty and extensive cooperation, her Honour determined that a sentence of 18 months imprisonment was appropriate and that suspension of the sentence should occur after service of the minimum of 28 days. It is in the final step of the determination of the starting point, the extent of reduction and the period to be served before suspension that the Director of Public Prosecutions contends that her Honour fell into error.

Sentence manifestly inadequate and reduction excessive

[16] There is no tariff for the crimes under consideration. However, as was discussed in *Daniels v The Queen*,[1] there are sentencing standards established by previous decisions for these types of offences. The role of those sentencing standards was identified in the following passages from *Daniels*:[2]

> "The role of sentencing standards must be properly understood. They do not amount to a fixed tariff, departure from which will inevitably found a good ground of appeal. We respectfully agree with the observations of Cox J in *R v King* (1988) 48 SASR 555 as to the proper role of sentencing standards (at 557):
>
> > '… In a word, this case is about sentencing standards, but it is important, I think, to bear in mind that when a standard is created, either by the cumulative force of individual sentences or by a deliberate act of policy on the part of the Full Court, there is nothing rigid about it. Such standards are general guides to those who have to sentence in the future, with certain tolerances built into or implied by the range to cater for particular cases. The terms of approximation in which such standards are usually expressed – 'about' and 'of the order of' and 'suggest' and so on – are not merely conventional… It follows that a particular sentence will not necessarily represent

[1] (2007) 20 NTLR 147 at 152 [29].
[2] *Daniels v The Queen* (2007) 20 NTLR 147 at 152 [29].

> a departure from the standard because it is outside the usual or nominal range; before one could make that judgment it would be necessary to look at all of the circumstances of the case. Those circumstances will include, but of course not be confined to, the questions whether or not the offences charged are multiple or single and whether the defendant is a first offender with respect to the particular crime charged. That is not to undermine the established standard but simply to acknowledge that no two cases, not even two 'standard' cases, are the same…'"

[17] As we have said, the respondent's total criminal conduct over a significant period was very serious. It was not a 'run of the mill' offence against the drug laws. There were significant factors of mitigation but in our view the starting point of three years imprisonment was far too low and is properly described as manifestly inadequate. A starting point in the order of five to six years was appropriate.

[18] In addition, in our opinion the total reduction of 50 percent by reason of the plea of guilty and assistance to the authorities was excessive. While it is important to encourage offenders to plead guilty and assist the authorities, there is a limit to the reduction that is appropriate. In the particular circumstances under consideration, we would regard a reduction in the order of 40 percent as a reduction that properly reflects the necessary recognition of the plea of guilty and assistance.

[19] In the context of the reduction, the submissions of counsel for the respondent tended to allocate a percentage reduction for each aspect in respect of which a reduction of sentence was appropriate and then to accumulate those separate percentages in order to arrive at an overall

reduction. In our opinion it is not appropriate to identify a discrete percentage reduction for each element, such as, the plea of guilty and the cooperation with the authorities. The proper approach is to consider all of these matters in their totality and to arrive at a reduction which properly recognises the plea, remorse and assistance.

[20] As to the question of suspension of the sentence after service of 28 days, in the average run of cases involving drugs of this quantity and value such a period would be manifestly inadequate. We include in the average run of cases those involving offenders of prior good character. However, in the case of the respondent, not only was the respondent of prior good character, he volunteered offending of which the authorities were unaware and provided very valuable assistance, which included the giving of evidence against the co-offender. Notwithstanding these factors, in view of the seriousness of the total criminal conduct, suspension after 28 days was a particularly lenient result and a period which we would regard as unduly generous. It borders on being manifestly inadequate.

Crown appeal – principles

[21] The principles governing Crown appeals against sentence are not in doubt. They have been discussed in numerous authorities, including *R v Riley*,[3] and it is unnecessary to repeat that discussion. It is not simply a matter of determining whether the sentence was low. Before a Court of Appeal can

[3] (2006) 161 A Crim R 414 at 419 [18] – [20].

interfere, the sentence must be so low as to be properly characterised as manifestly inadequate to the extent that it demonstrates error in point of principle. Another well known approach is to determine whether the sentence is "so disproportionate to the seriousness of the crime as to shock the public conscience".[4]

[22] Importantly, in a case such as the one under consideration which contains powerful factors of mitigation, and factors of mitigation which include the public policy of encouraging cooperation with law enforcement authorities, even if the Court of Appeal is satisfied that the sentence is manifestly inadequate to the point of demonstrating error in point of principle, the appeal by the Crown does not necessarily succeed. Before setting aside the sentence and re-sentencing, the Court must be satisfied that the case under consideration is one of the "rare and exceptional" cases in which the Crown appeal should be allowed. It is not uncommon for the Court of Appeal to determine that a sentence is manifestly inadequate, but for reasons borne out of powerful factors of mitigation, the sentence will be allowed to stand with an indication that the sentence was too low and should not be followed in the future.

[23] There is a further factor of importance in the case of the respondent. Sentence was imposed on 6 May 2010 and the period of imprisonment was backdated to 28 April 2010 to reflect time spent in custody. The respondent was released in late May 2010 and has got on with his life between release

[4] *R v Osenkowski* (1982) 30 SASR 212 per King CJ at 213.

and the hearing of this appeal. As counsel for the respondent submitted, the evidence supports the view that the respondent is being rehabilitated and the possibility of future offending is low.

[24] In these circumstances the principle of double jeopardy is of particular importance. Having served the penalty which the sentencing Judge considered appropriate, the respondent now faces the prospect of both an increase in the penalty and having to interrupt his life and rehabilitation by re-entering prison.

Conclusion

[25] For the reasons discussed, in our view this is a special case in which significant leniency was not only warranted, but was appropriate. Notwithstanding that too much leniency was afforded to the respondent, for the reasons that justified significant leniency and in recognition of the principle of double jeopardy, this is not one of those rare and exceptional cases in which the Crown appeal should be allowed. This is one of those cases where the purposes of the Crown appeal can satisfactorily be achieved by this Court indicating that the sentence was manifestly inadequate and should not be regarded as a precedent. In the special circumstances of this case, the message can be sent about the appropriate level of penalties and it is both unnecessary and inappropriate to interfere and now require the respondent to serve a further term of imprisonment.

[26] For these reasons, the appeal is dismissed.