PARTIES:	DUDGEON, Andrew Reginald v THOMAS, Peter Mark Johns
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA125 & 126 of 1997
DELIVERED:	24 December 1997
HEARING DATES:	22 December 1997
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Criminal law and procedure – Appeal and new trial and inquiry after conviction – Appeal against sentence – Totality principle – Penalty not to be disproportionate to instant offending – Insufficient weight given to plea of guilty – Whether offender treated as a 'drug dealer' by Magistrate –

Misuse of Drugs Act 1990 (NT), ss 9(1)&(2)(c)(ii)&(2)(f)(ii), 37 & Sch1
Sentencing Act 1995 (NT), ss 5(2)(j), 43(6)(b), 44, 50 & 58

Veen v The Queen [No 2] (1988) 164 CLR 465 at 477, referred to.
Williams v The Queen, Unreported NT Court of Criminal Appeal 19/12/97, referred to.

REPRESENTATION:

Counsel:

Appellant:	Mr J Lawrence
Respondent:	Ms A Fraser

Solicitors:

Appellant:	De Silva Hebron
Respondent:	Office of Director of Public Prosecutions

Judgment category classification:	C
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mar97051

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

No. JA125 of 1997 & JA126 of 1997

BETWEEN:

ANDREW REGINALD DUDGEON
Appellant

AND:

PETER MARK JOHNS THOMAS
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 24 December 1997)

Appeal against sentence. It was proposed that on 9 October 1997 a hand up committal take place in relation to two charges for that the appellant on 16 July 1997 unlawfully possessed cannabis contrary to s9(1) and (2)(f)(ii) of the *Misuse of Drugs Act* 1990 (NT), and secondly, that he unlawfully possessed lysergic acid, a dangerous drug specified in sch1 of the *Misuse of Drugs Act* contrary to s9(1) and (2)(c)(ii) of the Act. As his Worship put it in his remarks on sentence "[t]he defendant came to court earlier to plead guilty". His Worship heard the plea on 11 September. He also acknowledged that he had by committing those offences breached an order suspending a sentence to

three months imprisonment, which had been imposed on 17 April 1997 for possession of cannabis. The period specified from the date of that order during which the offender was not to commit another offence punishable by imprisonment was eighteen months.

The facts put forward by the prosecutor in relation to the offences committed on 16 July were, briefly, that the police executed a warrant at the appellant's address, he was asked if there were any drugs in the premises; he said that "there's drugs in the lounge" and indicated a small black leather bag on the floor in the lounge room. Identification of the drugs in question was not sought from the appellant, and nor did he volunteer the information.

In the bag there were two clip seal bags each containing ten smaller clip seal bags, and in each of those clip seal bags was one bag containing one "tab" of LSD. There was a further clip seal bag containing two smaller clip seal bags, and each of those bags contained one tab of LSD, a total of 22 tabs. In addition, there was a large clip seal bag containing 24 small clip seal bags, each of those containing approximately 1 gram of cannabis. Loose in the bag there were ten small clip seal bags, each containing approximately one gram of cannabis, making a total of 34 bags of cannabis in all. He was arrested, conveyed to the police centre, and interviewed. He made no admissions other than to confirm that he had indicated a black bag, and that he and his wife occupied the premises.

On the plea being taken the prosecutor was unable to produce a scientific analysis in relation to the lysergic acid, but counsel for the appellant admitted that the tabs did contain that drug.

The facts being admitted and the breach acknowledged, the appellant's prior criminal history was tendered. There were a significant number of traffic offences, but the only prior drug offence was that dealt with in April. In the circumstances his counsel acknowledged that a term of imprisonment was appropriate, referring specifically to s37 of the *Misuse of Drugs Act*. But what was sought was that the term of imprisonment imposed be suspended upon the appellant entering into a home detention order (s44 *Sentencing Act* 1995 (NT)). It was pointed out that the appellant had spent six weeks in custody, and it was submitted that that period of six weeks should go towards the "suspended sentence", so as to reduce the period of further imprisonment that should be served in relation to the breach.

Having briefly discussed those matters, his Worship said: "Your client's a dealer, isn't he?". Counsel for the appellant, who had not at that stage made any submissions regarding the possession of the drugs, said that when he purchased them they were already in the plastic sealed bags, they had not been separated by him, they "were going cheap and in a moment of stupidity, he purchased them. ... The deal was too good to refuse unfortunately". Asked how much was paid, the appellant's counsel said she had no instructions, and his Worship immediately indicated that he would have great difficulty in accepting that the appellant had the drugs for his own consumption, and "... it

could well be a case where your client might have to consider giving evidence to try to persuade me that he's not a dealer". There was discussion between counsel for the appellant and his Worship regarding that matter and the opportunity for him to give evidence was declined, his Worship said:

> "It is entirely a matter for him whether or not he wishes to give evidence. But as it stands at the moment, I would not be able to accept that these drugs were possessed for his own use by the way that they were packaged".

He added that he could draw an inference from the information before him as to that use.

The plea proceeded, including the providing of information as to the appellant's personal background, a 29 year old man with a wife and six dependent children who at the time of the offence was under some stress because of family circumstances: "... he saw the drugs and the deal as a way of escape, of beating his troubles if only for a small period of time". It was put that he could not afford to pay a fine due to the weight of financial responsibilities of his family, and submitted that there was no profit motive involved as the appellant was not intending to sell the drugs, they being for his own personal use.

His Worship then enquired of counsel for the appellant as to how he came by the money to pay for the drugs and what his income was from employment, which was put at between $120 and $350 a week. At his request the prosecutor informed his Worship that the street value of all of the drugs was

$1,485 and his Worship enquired rhetorically as to where he would get that amount of money to buy drugs bearing in mind his dire financial straits.

The prosecutor pointed out that if his Worship was to deal with the breach of the suspended sentence order and impose a term of imprisonment, then s43(6)(b) of the *Sentencing Act* provides that that term of imprisonment was to be served concurrently unless the court otherwise ordered. As to the question of possession, the prosecutor said: "It's really a matter that the court has canvassed with my learned friend as to the way in which your Worship approaches the amount of drug and the way it was packaged." He adopted a neutral stance. Counsel for the appellant confirmed that his client had declined the opportunity to give evidence.

His Worship adjourned consideration to the next day. At the commencement of his remarks on sentence his Worship:

- declared the case to be "a bit of a mystery because I am not given all the information";
- took into account "in a small way" the plea of guilty because the matter had been set down for committal, although noting that the appellant had come to court earlier to enter his plea;
- noted the appellant's prior record especially the conviction for the drug offence on 18 April and the sentence then imposed;
- rejected the submission that the drugs then in question was for the appellant's own use for two reasons:

    1. The packaging of the tablets

2. The mystery surrounding the acquisition of the drugs and the appellant's failure to give evidence about that.

Given the appellant's poor financial circumstances, his Worship speculated as to how he could have found the money to purchase the drugs. As might be expected the speculation led to no conclusion, but his Worship maintained his refusal to accept that the drugs were for the appellant's own use, and declined to allow any leniency on that account.

His Worship did not make any finding as to the purpose for which the appellant had the drugs.

Proceeding to consider other factors relating to sentence, his Worship noted the appellant's personal circumstances, emphasised the need for there to be both general and personal deterrence, especially bearing in mind the harmful effects of LSD, emphasised the seriousness of the breach of the suspended sentence order, bearing in mind that only three months had elapsed and that the drugs, the subject of the then charge, were cannabis and LSD.

In conclusion his Worship said:

> "So there has to be something done to discourage people from dealing with drug dealers. If people don't go to drug dealers, and don't buy drugs, then there is less of a market, and hopefully less drug dealers to push their drugs on other unsuspecting people."

Given his Worship's opening question to counsel for the appellant, "Your client's a dealer, isn't he?" those closing words prior to imposing sentence could be seen as indicating that his Worship regarded the appellant as being a drug dealer. I think not. In the intervening reasons, his Worship examined the material, and lack of material, before him and went no further than to reject the appellant's story that the drugs were for his own use. He did not assign any other purpose. It seems to me that what his Worship was saying was that "buyers" such as the appellant must be deterred. That would have an effect on the suppliers or dealers. That does not lead to a view that his Worship punished the appellant for being a dealer. He refused to allow him leniency on the basis that the drugs were for his own use. The sentence of four months imprisonment (after allowing two months off for abolition of remissions) was imposed as a penalty for straightforward possession, without any adjustment one way or the other for the purpose behind it. The deterrence of which his Worship spoke was directed towards discouraging the appellant and other like minded people from acquiring the drugs, by whatever means, and thus propping up the dealers.

The grounds of appeal are:

1. That his Worship erred in law by finding that the appellant intended to sell the drugs;

2. His Worship misapplied sentencing principles in sentencing the appellant;

3. The sentence imposed was manifestly excessive.

For reasons already given, I reject the ground of appeal based on an alleged finding by his Worship that the appellant intended to sell the drugs. There was no such finding and none can be implied. It was open to this Worship to reject the appellant's claim to having the drugs for his own use; he gave him the opportunity to give evidence and that was declined. The learned Magistrate was entitled to treat that as a strengthening of his opinion.

In sentencing an offender, a court shall have regard to whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so, or indicated an intention to do so (*Sentencing Act*, s5(2)(j)). Another matter to be taken into account is the assistance given by the offender to law enforcement agencies. It was submitted that his Worship did not give sufficient weight to these matters in mitigation. As to assistance to the law enforcement agencies, there was little, initially. The appellant was confronted with a search warrant, the drugs were not in a concealed place, and thus it might be thought were readily to be found. His pointing out where they were was acknowledging the inevitable. To some extent so was the plea of guilty, although it will be noted that he was prepared

to enter that plea notwithstanding that there was not at the time any proof that the tablets contained lysergic acid. Furthermore, he indicated that he was prepared to so plead, and to submit to the jurisdiction of the Court of Summary Jurisdiction about a month before the date which had been fixed for committal. As his Worship pointed out, that saved some time and expense in preparation of the papers for that purpose. I consider that his Worship undervalued the mitigatory effect of the guilty plea in those circumstances.

Although attention in this case was directed particularly towards the charge of possession of lysergic acid, it must not be overlooked that there was a second charge relating to cannabis. The total weight was 34 grams, thus making it less than a trafficable quantity and as the charge stipulates, bringing it within the penalty prescribed in s9(2)(f)(ii) of the Act, a penalty of $2,000. For that the appellant was fined $500, but no time was granted to pay, and an order was made that he serves eleven days imprisonment in default of payment. No objection is made to that order. It seems to have been accepted by the parties that that period of eleven days was to be served concurrently with the sentence otherwise imposed (s50 *Sentencing Act*).

The maximum penalty in respect of possession of the lysergic acid in these circumstances was a fine of $5,000 or imprisonment for two years. Applying s58 of the *Sentencing Act*, his Worship imposed a penalty of four months, when he considered six months would otherwise be appropriate, after

taking into account the abolition of remission. The whole of that sentence is attributable to the possession of the lysergic acid. Possession of cannabis was dealt with separately. As to the breach of the order suspending sentence, his Worship could have restored the whole or any part of that sentence, extended the operational period to a date after the date of the order, or made no order with respect to the suspended sentence. As already indicated, where a court orders an offender to serve a term of imprisonment that had been held in suspense, the term shall, unless the court otherwise orders, be served immediately and concurrently with any other term of imprisonment previously imposed on the offender by that ruling of the court. Here, there had been previously imposed a sentence of four months imprisonment, and his Worship restored the whole of the suspended sentence of three months and ordered that it be served cumulatively with that sentence of four months, a total of seven months imprisonment. His Worship ordered that the total period of imprisonment commence from 1 August 1997, being the date upon which the appellant was first taken into custody.

His Worship was right to refuse to extend any leniency to the appellant as if he were a first offender. The prior conviction in relation to cannabis and the short period of time after the suspension of the sentence then imposed before being found in possession of the drugs, the subject of these charges, showed that the current offences were not uncharacteristic aberrations, but rather manifested a continuing attitude of disobedience of the law. As pointed out in

Veen (1988) 164 CLR 465 at 477, in such a case retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted than one which would be warranted absent those considerations. However, that antecedent criminal history cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. As to that, the quantity of lysergic acid in the appellant's possession is unknown. However, given the charge against him, it was alleged to have been less than .002 grams, any more and he might have been charged with being in possession of a trafficable quantity (see sch1 to the *Misuse of Drugs Act*). An important feature in gauging the seriousness of the offence is missing, and this court is in no position to come to a view about that matter simply taking into account the facts as known. In the circumstances then, the appellant was found in possession of a amount of lysergic acid less than .002 grams, which his Worship found was not for his own use, but in respect of which there had been findings as to the purpose for which it was in his possession. For that the imposition of a nominal sentence of six months imprisonment out of a total of two years imprisonment, even bearing in mind the prior conviction for a drug offence, has the appearance of being disproportionate. I have already indicated I think his Worship did not give enough weight to the plea of guilty in the circumstances in which it was entered. I am satisfied, however, that his Worship did not err in the exercise of his discretion in ordering that the whole of the suspended sentence be served, and be served cumulatively upon the sentence for the instant offences.

It was a bad case of flagrant disregard of the opportunity offered by the suspended sentence, by not only offending within a relatively short period thereafter, but also in committing a further offence of a similar kind and compounding it by the admixture of drugs.

I also take into account the totality principle. The sentence to four months imprisonment for possession of lysergic acid is quashed and in lieu thereof, the appellant is sentenced to serve two months imprisonment after taking into account abolition of remissions. Otherwise the orders made by his Worship remain such that the total effective period of imprisonment is five months to commence as from 1 August 1997.

After hearing argument in this matter my attention was been drawn to the decision of the Court of Criminal Appeal in *Williams v The Queen*, unreported, delivered 19 December 1997 in which the Court had occasion to provide guidance as to the procedure to be followed by a sentencing judge or magistrate who is inclined to reject a mitigating explanation given on behalf of an accused from the bar table.
