PARTIES:	SMITH, Russell Edward v LUKER, Peter Charles
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	APPEALS FROM COURT OF SUMMARY JURISDICTION
FILE NOS:	No. 189/92
DELIVERED:	Darwin, 18 November 1992
HEARING DATES:	22 October 1992
JUDGMENT OF:	Angel J

CATCHWORDS:

Appeal - Justices - Appeal against sentence - Weight that may be attributed to community response to a particular crime - Must be a delicate balance between personal circumstances of offender and attitude of community

Justices Act 1928 (NT)

R v Mulholland (1991) 1 NTLR 1; 9, approved

Appeal - Justices - Appeal against sentence - Whether sentence manifestly excessive - Appellant resentenced

Justices Act 1928 (NT)

Unal Okutgen (1982) 8 A Crim R 262; 265, referred to

Taylor v R (1985) 18 A Crim R 14; 17, applied

REPRESENTATION

Counsel:

Appellant: S Cox

Respondent: J Karczewski

Solicitors:

Appellant: Legal Aid Commission (NT)

Respondent: Director of Public Prosecutions

Judgment category classification: B

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 189 of 1992

BETWEEN:

RUSSELL EDWARD SMITH
Appellant

AND:

PETER CHARLES LUKER
Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 18 November 1992)

This is an appeal from a sentence imposed by Gray SM sitting as the Court of Summary Jurisdiction at Pularumpi on 25 June 1992.

The appellant was charged with three offences: unlawful possession of a dangerous drug of trafficable quantity, contrary to s9 Misuse of Drugs Act (for which the maximum penalty is five years imprisonment or $10,000 fine); unlawful supply of a dangerous drug to another person, contrary to what was then s5(b)(a)(iv) of the Misuse of Drugs Act (for which the maximum penalty is five years imprisonment or $10,000 fine) and a third charge of possessing liquor in a restricted area contrary to the Liquor Act (the penalty for which the appellant does not dispute).

Upon his conviction for the charge of possession of cannabis, the appellant received a sentence of 18 months imprisonment. For the charge of supply of cannabis, the appellant was convicted and sentenced to two years imprisonment. The sentences were made concurrent and a non-parole period of 12 months was imposed. The appellant brings this appeal on the basis that the sentences, both individually and when viewed together, are manifestly excessive.

The appellant was imprisoned on 25 June 1992 and was subsequently bailed on 10 August 1992. He has spent a total of 46 days in custody.

The facts giving rise to the charges were that having arrived at Bathurst Island in about June 1991, the appellant resided with a family at Nguiu. His personal belongings were subsequently sent to Nguiu on 10 April 1992 and on that day he sold a portion of cannabis, known colloquially as a 'foil' to a local resident for $25.00. Between 10 and 19 April 1992, the appellant sold $430 worth of cannabis to members of the Nguiu community. The sales were mostly conducted from the appellant's residence.

Pursuant to a warrant, the appellant's home was searched on 19 April 1992. During the search, police located 12 sandwich bags containing cannabis leaf, three tobacco tins containing cannabis leaf in small quantities, one 250 millilitre orange juice bottle used as a smoking instrument, two tobacco tins containing cannabis seeds, two film canisters containing further seeds, one plastic container with about 150 seeds, an envelope and coin bag, both containing seeds, two sealed plastic bags containing traces of cannabis and a quantity of liquor - the subject of the third charge.

The total weight of cannabis leaf located was 293.8 grams, the total weight of cannabis seed was 57.1 grams. These are the subject of the possession charge.

Also located in the search was a sheet of cardboard listing names with amounts of money listed next to those names. The listed amounts of money totalled $430.00.

The appellant admitted having brought the cannabis to Nguiu for the purpose of selling it around the town. He also admitted that the names on the piece of cardboard were related to his selling cannabis.

In the interview, the appellant told police that he had been told to stop selling the cannabis by his adoptive grandmother and that, as a result, he was intending to return the located amount to his supplier.

These facts were admitted by the appellant. At the hearing, counsel for the appellant submitted several matters in mitigation. In summary these are: the appellant is 45 years of age, he has resided in the Northern Territory for 17 years and has had contact with Bathurst Island since 1977, some 15 years.

He had been in a defacto relationship for some 12 years. The relationship ended in January of this year. He had lived in Darwin with his defacto but following the break-up he was very distressed and decided to live at Nguiu where he has an adoptive family.

He had little money and decided to sell cannabis in order to make enough money to be able to pay to have his property shipped to Nguiu. He was unemployed at the time, although he has, since 1989, been on worker's compensation benefits. These benefits are payable for a back injury which he received in 1989 in the course of his employment as a driver with the RAAF.

It was submitted that he had started using cannabis to alleviate the pain of his back injury. He had not used cannabis prior to the accident. It was also submitted that he had a friend at Humpty Doo from whom he had obtained the cannabis on credit. It was put that the appellant had to sell the cannabis to recoup the money to pay his supplier.

Once the venture was initiated, he was told to stop by his adoptive grandmother. He knew that if he wanted to stay at Nguiu he would have to comply with this directive. On this basis he ceased his activities. In an attempt to return the cannabis to his supplier, he took it by plane, back to Darwin. Once at Humpty Doo he found his supplier was not in residence and not wishing to leave it there, he returned with the cannabis to Nguiu. On the weekend of his return he was arrested and charged.

There were discussions within the Nguiu community as to whether the appellant should be allowed to stay at Nguiu. A petition of 100 signatures was presented to the Nguiu Council on his behalf and as a result he was allowed to stay.

The appellant has no prior convictions for any drug matters; at p8 of the transcript of the Court of Summary Jurisdiction the learned Magistrate said "The record is of no great significance in relation to these offences." Further, at p11 the learned Magistrate said:

> "You have some prior convictions. None of them are directly relevant to these charges, but nonetheless you've got a record which it can't be said mitigates the position for you because you do have a record. But as I say it certainly doesn't aggravate the picture for you."

That record is not before me.

As I have indicated, his appeal is brought on the basis that the sentences, both individually and when viewed together, are manifestly excessive.

The first of the submissions put forward on behalf of the appellant was that a person must be sentenced on the facts of his offences. It was submitted that the sentences are not proportional to the gravity of the case and further that they do not reflect the personal circumstances of the appellant. Miss Cox for the appellant pointed to the weight placed by the learned Stipendiary Magistrate on the perceived response of the community of Nguiu to the appellant and his activities. It was submitted that such emphasis resulted in the miscarriage of the sentencing discretion.

No evidence was called as to what was the community response. The prosecutor indicated a number of things from the bar table: that in apprehending the appellant, the police had been responding to community complaints; that as a result of police action the church minister and a group of others approached the police to indicate their disapproval; that a majority of the community did not want the appellant to return to Nguiu because of his behaviour; that the community population is about 1500 persons and finally, that the police had noticed an escalation in drug related matters in Nguiu since the appellant's arrival. These matters were not objected to by counsel for the defence. In fact, Mr Dooley, who appeared for the appellant in the court below, admitted adverse community reaction when he said to the learned Stipendiary Magistrate:

> "What's working against Mr Smith, of course, is the large quantity he had. But obviously he was ambitious, Your Worship, when he first got there, but then he realised his activities were unpopular and even his close adopted relations were saying to him: 'Look, we don't want this to happen', he responded by saying: 'Well, I'll get rid of it and I'll cease', and, Your Worship, that's what he's done."

Counsel for the appellant, Miss Cox, pointed to the following remarks of the learned Magistrate as evidence of his inappropriate considerations.

> "I can fully understand why the community has expressed the concern that I understand it did express and I can fully understand why you were told to stop what you were doing and indeed the community would have been entitled to be completely and utterly outraged. That is apart from those that might have wanted to simply get the benefit of your supply of drugs. Other ordinary, particularly elderly people or older people in the community who were not seeking to use you as a supplier of drugs, were presumably outraged and may well remain outraged." ...
>
> "I take into[sic] your plea of guilty in fixing the terms of imprisonment themselves, but in my view the nature of the offences, the seriousness of the offences, the reaction of the community, the desire of the community to be protected and indeed the desire of the community to see the law enforced for the ultimate purposes of protecting it, are all legitimate proper desires and they must be all be given their due weight on sentencing."

And further:

> "It is an extremely serious charge to be bringing substantial quantities of drugs to any community including an Aboriginal community and seeking to make a profit out of selling it to people in that community and particularly bearing in mind the obvious reaction of great distress in that community and disturbance and concern about what you were doing. Ultimately, having to be told by a woman, that no doubt ought to lead to stop what you were you[sic] doing. Something you should never have commenced, ever."

In particular Miss Cox submitted that the learned Magistrate acknowledged that there was very little chance of the appellant reoffending and yet looked to imprisonment as the primary sentencing option without viewing other possibilities.

It is trite that in the ordinary sentencing course, general deterrence and perceived community reaction to a particular crime are proper considerations in the sentencing process.

As counsel for the appellant - somewhat under fire - fairly conceded, the gravity of an offence may be heightened in circumstances where the community wherein the offence was committed considers that the offence is particularly offensive.

The voluntary possession and supply of prohibited drugs, and in particular indiscriminate supply in an isolated community largely free of such drugs is a crime, inter alia, against that community. It is not the case that community reactions to such offending must necessarily be subordinated to other considerations involved in the sentencing process. A "delicate balance" must be achieved. That "balance must be a just sentence from the point of the view of the prisoner and of the community", per Gallop J in *R v Mulholland* (1991) 1 NTLR 1 at 9.

It is clear from the learned Magistrate's remarks on sentencing that he did take into account matters personal to the appellant. Community response was before him in that it was proffered by the prosecution as a circumstance of the case, and was not objected to by the defence.

The learned Magistrate was entitled to look to the community reaction, especially in the context of these offences. His actions in doing so are not grounds for appeal. These offences are graver than had they been committed in the City of Darwin.

Counsel for the appellant submitted that the sentences are so excessive that it may be inferred that the sentencing discretion of the learned Stipendiary Magistrate miscarried.

Counsel for the appellant referred the court to *Unal Okutgen* (1982) 8 A Crim R 262 at 265, where it was said:

> "Now, it is trite to say - and it is said in almost every appeal of this nature - that when sentencing a prisoner the trial judge is exercising a discretion and, on normal principles, a discretionary judgment made at a hearing is not set aside by a court of appeal unless the court is of opinion that the learned judge has taken into account things that he should not have taken into account or has failed to take into account things he should have, or has made some error in law, or even if an error his Honour has fallen into cannot be identified, on the face of it, the sentence imposed was so manifestly excessive that there must be some error in the sentencing discretion. In this case I am not able to detect a specific error in the learned judge's reasons for sentence. However, I have come to a clear view that the sentence imposed

was of such as[sic] character that there must have been some error in the learned judge's reasoning for him to have arrived at the sentence that he did arrive."

Whether a sentence is manifestly excessive should be readily discernible. Generally speaking, it should arouse a spontaneous reaction of 'Oh my gosh!' It has been said that "to describe a sentence as manifestly inadequate is something that is not capable of sustained argument. The inadequacy is either manifest or it is not ...": *Taylor v R* (1985) 18 A Crim R 14 at 17. These remarks apply equally to the question of excessiveness.

It was part of the prosecution case that the appellant had made most of the sales from his residence, ie he was not peddling drugs on the street. At the time of his arrest, the appellant had ceased his activities and had attempted to return the cannabis to his supplier. He has shown remorse, is not likely to reoffend (such was accepted by the learned Magistrate), was co-operative with the police and pleaded guilty at the earliest possible opportunity. The appellant has no relevant prior convictions.

Given these circumstances, the sentences do manifest themselves as excessive.

I propose to resentence the appellant.

I make the following orders:

(1) appeal allowed;

(2) that the sentence of 18 months imprisonment imposed for the offence of unlawful possession of a dangerous drug of trafficable quantity (contrary to s9 Misuse of

Drugs Act) be set aside and in substitution therefor the appellant be sentenced to twelve months imprisonment;

(3) that the sentence of two years imprisonment imposed for the offence of unlawful supply of a dangerous drug to another person (contrary to the then s5(b)(a)(IV) Misuse of Drugs Act) be set aside and in substitution therefor the appellant be sentenced to 18 months imprisonment;

(4) that such sentences be concurrent;

(5) that time served to be taken into account;

(6) that the balance of the sentences be suspended forthwith upon the appellant entering into a bond to be of good behaviour for the period of two years from this day in the sum of $1000 own recognisance.