Tjiong v Hales [2002] NTSC 34

PARTIES:	LINDSAY KUANG DJIN TJIONG
	v
	PETER WILLIAM HALES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 8/2002 (20112532)
DELIVERED:	31 May 2002
HEARING DATES:	4 and 12 April 2002
JUDGMENT OF:	THOMAS J

CATCHWORDS:

CRIMINAL LAW & PROCEDURE – sentencing – principle of parity of sentence – whether undue emphasis of prior conviction resulted in a disproportionate penalty – whether sentence manifestly excessive – whether insufficient grounds existed to avoid imposition of the mandatory 28 days imprisonment period – whether a magistrate intending on imposing a custodial sentence must first warn the accused and seek further submissions.

Misuse of Drugs Act (NT), s 3(b), s 7; s 37(2)

Parnell v The Queen (1992) 109 FLR 304, *Bann v Frew* (1982) 69 FLR 354, *Veen v The Queen* [No 2] 1988 164 CLR 465, *Duthie v Smith* (1992) 83 NTR 21, applied.
Saylor v Svikart [1994] NTSC 221, *R v Myra & Sibin Pavlovic* [2001] NTSC 22 November 2001, distinguished.

REPRESENTATION:

Counsel:

Appellant:	R. Jobson
Respondent:	T. Elliot

Solicitors:

Appellant:	Rob Jobson
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Tjiong v Hales [2002] NTSC 34
No. JA 8/2002

BETWEEN:

LINDSAY KUANG DJIN TJIONG
Appellant

AND:

PETER WILLIAM HALES
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 31 May 2002)

[1] This is an appeal from a decision of a stipendiary magistrate delivered on 20 December 2001.

[2] On that date the appellant entered a plea of guilty to a charge that:

Between 1 July and 15 August 2001 at Humpty Doo in the Northern Territory of Australia

1. did unlawfully cultivate a prohibited plant, namely cannabis;

and the number of prohibited plants amounted to a traffickable quantity, namely eight plants.

Contrary to Section 7 of the Misuse of Drugs Act.

The maximum penalty for this offence is seven years imprisonment.

[3] The appellant was convicted and sentenced to 28 days imprisonment.

[4] The grounds of appeal as set out in the Amended Notice of Appeal dated 28 March 2002 are as follows:

> "Ground 1:
>
> > The learned Magistrate erred in his finding that insufficient grounds existed pursuant to s 37(2) of the Misuse of Drugs Act to avoid the imposition of the mandatory period of imprisonment of 28 days:
>
> by the addition of the following grounds of appeal:
>
> Ground 2:
>
> > The sentence imposed was sufficiently disparate to that imposed on the co-offender as to give rise to a justifiable sense of grievance by the Appellant.
>
> Ground 3:
>
> > Undue weight was given by the learned Magistrate to the Appellant's single prior conviction leading to the imposition of a penalty which was disproportionate to the gravity of the subject offence.
>
> Ground 4:
>
> > The learned Magistrate rejected without any warning the submissions made by the Appellant's counsel that particular circumstances existed, despite an enquiry from the Appellant's counsel as to whether he could provide further assistance to the Court.
>
> Ground 5:
>
> > The imposition of a custodial sentence was manifestly excessive."

[5] The agreed Crown facts were as follows:

> "… at about the beginning of July the co-offender had at an address in Emanuel Road, Humpty Doo, placed a quantity of cannabis seeds in plastic pots placing those pots into a plastic box. She attended to the cultivation of those plants and on 15 August sometime in the morning she left her home with those plants and took them to the home of this defendant at Mango Road in Humpty Doo.
>
> At about 4 pm on Wednesday 15 August police executed a search warrant at 151 Mango Road. Both the defendant and co-offender were present at the time. Police located the eight cannabis plants. Then they seized a number of items in relation – of the hydroponic nature in relation to the cultivation. The defendant was arrested and conveyed to the Peter McAulay Centre where he refused to take part in a record of interview and was charged and later bailed to appear in relation to the matters."

[6] The appellant gave evidence in the Court of Summary Jurisdiction to the effect that he had known the co-offender, Janine Mary Murphy, a period of 14 months. The appellant was in a relationship with the co-offender. He gave evidence that he agreed Ms Murphy could bring the plants to his house during the period that her three children were at home on school holidays. The plants were set up in a spare bedroom of the appellant's house.

[7] I consider it relevant to note that in addition to the eight plants seized from the appellant's house police seized a further 29 items which were subsequently the subject of an order for forfeiture by the Court. These items included plastic pots, fans, fertiliser bottles, an air pump, a digital thermometer, a set of digital scales and a bottle of formula nutrient. The list of items seized was Exhibit 3 before the learned stipendiary magistrate. I have referred to this exhibit because in addition to the eight plants being seized by police from the appellant's home, there were many items seized which are used in the cultivation of cannabis plants.

[8] It was not disputed that the co-offender, Ms Murphy, planted and raised the plants which were taken to the appellant's home some hours before police searched the appellant's house and seized the plants. It was not in dispute that the appellant had not at the time the plants were seized, tended for them in any way.

[9] It was not part of the Crown case that the plants were for the purpose of actual supply. Mr Jobson, counsel for the appellant, submitted that the co-offender, Ms Murphy, had previously pleaded guilty and had satisfied the Court at that time that the cannabis was for her own use and was not for the purpose of supply. The Crown did not take issue with this statement.

[10] The cultivation was commenced by the co-offender at her own residence without any assistance or participation of the appellant.

[11] I accept the submission by Mr Jobson, counsel for the appellant, that with respect to the appellant "cultivation" was not in the physical sense as defined, but the extended sense pursuant to s 3(6) of the Misuse of Drugs Act. Section 3(6) provides as follows:

> "(6) For the purposes of this Act and the Regulations, a person takes part in the supply, cultivation, manufacture or production of a dangerous drug if the person –
>
> (a) takes, or participates in, a step, or causes a step to be taken, in the process of that supply, cultivation, manufacture or production;
>
> (b) provides or arranges finance for such a step in that process; or
>
> (c) provides the premises in or on which such a step in that process is taken, or suffers or permits such a step in that process to be taken in or on premises of which the person is the owner, lessee or occupier or in the management of which the person participates."

[12] I do not agree with Mr Jobson's submission that the role of the appellant in this offence was as a "possible aider and abetter" in the sense referred to by Bailey J in *R v Myra & Sibin Pavlovic* decision delivered on 22 November 2001. In this case the appellant made a decision to allow his co-offender to move the plants into his home. He gave evidence it was his intention to keep them there during the period of the school holidays. It was more than merely a passive role.

[13] I accept the appellant played a lesser role in the cultivation of these plants than his co-offender Janine Murphy. However, it was not an insignificant role. On 21 September 2001 the co-offender Janine Murphy, entered a plea of guilty to a total of three charges, being:

- 1 count of possession of a commercial quantity of cannabis, namely 880 grams.
- 1 count of possession of cannabis
- 1 count of cultivation of a traffickable quantity of cannabis, the number of prohibited plants amounted to a traffickable quantity, namely eight plants.

[14] The last charge being the same as the charge to which this appellant entered a plea of guilty.

[15] The co-offender was convicted and received a sentence of one month imprisonment, which was wholly and immediately suspended for a period of 12 months.

[16] The appellant's prior record of convictions was tendered and marked Exhibit 1 before the learned stipendiary magistrate.

[17] The appellant had a prior conviction imposed in the Court of Summary Jurisdiction on 3 March 2000 for offences under the Misuse of Drugs Act including cultivate cannabis – traffickable quantity. He was sentenced to six months imprisonment suspended upon his entering into nine months home detention.

[18] The co-offender, Janine Murphy, had no prior convictions.

[19] The learned stipendiary magistrate was made aware that the co-offender had no prior convictions and that the appellant had previously been sentenced to nine months home detention. However, it appears from the transcript of proceedings that his Worship was advised the co-offender had pleaded guilty to two offences. This information was not completely accurate as the appellant's co-offender had pleaded guilty and been sentenced in respect of three offences. His Worship was advised the co-offender had pleaded guilty to both of the charges on information. The appellant had pleaded guilty to the first charge on the information. The second charge on the information, with respect to the appellant, had been withdrawn.

[20] This means that the distinction between the appellant and the co-offender with respect to this particular offence was that the appellant had played a lesser role than the co-offender with respect to the charge of cultivate a commercial quantity of cannabis, the co-offender had been convicted on three charges and the appellant on one, the co-offender Janine Murphy had no prior convictions, the appellant had the prior conviction already referred to.

[21] I will deal with each ground of appeal.

Ground 2: The sentence imposed was sufficiently disparate to that imposed on the co-offender as to give rise to a justifiable sense of grievance by the appellant.

[22] The appellant complains that the sentence imposed was sufficiently disparate to that imposed on the co-offender as to give rise to a justifiable sense of grievance by the appellant.

[23] The principles relating to parity of sentence have been enunciated in a number of authorities:

In *Parnell v The Queen* (1992) 109 FLR 304 Angel J at 311:

> "Where, as here, a sentence standing alone is appropriate having proper regard to the circumstances of the offence and the offender, intervention by an appeal court on grounds that the sentence nonetheless should be set aside as unfairly disproportionate to sentences imposed on co-offenders is an exceptional course, because the court, in the name of equal justice between co-offenders inter se, is asked to interfere with what is otherwise an appropriate sentence, and interference will in many cases be calculated to result in inequality of sentencing as between the co-offenders as a group and

> other like offenders. Generally speaking, disparity warranting intervention will only be such as to shock the ordinary citizen's sense of fairness – in its very nature it will be obvious at a glance and speak for itself and cry out for correction."

and Priestley J at 311:

> "The High Court decision in *Lowe v The Queen* (1984) 154 CLR 606 recognised that (1) that disparity in sentencing of co-offenders may, of itself, call for intervention by a Court of Criminal Appeal; (2) the court may so intervene even in cases where the challenged sentence, standing alone, would be regarded as appropriate; (3) in such cases, where the court does intervene, it is to avoid the appearance of injustice by reason of the degree of the disparity.
>
> These three propositions were stated, in slightly different words, by at least three of the five judges in the case: Gibbs CJ (at 610), Mason J (at 611, 613-614) and Dawson J (at 623). The other two judges were Wilson and Brennan JJ. Of these, Wilson J agreed with Gibbs CJ and Dawson J.
>
> The extent of the disparity needed to induce the court to intervene, in cases where the considerations applicable to the co-offenders were substantially identical, was dealt with by Gibbs CJ as follows (at 610):
>
> > '…. the reason why the court interferes in such a case is that it considers that the disparity is such as to give rise to a justifiable sense of grievance, or in other words to give the appearance that justice has not been done. The decision whether the existence of a disparity calls for intervention is a matter which lies very much within the discretion of the Court of Criminal Appeal.'"

[24] In this case the evidence is that the appellant's involvement in the offence of cultivate traffickable quantity of cannabis was less than that of the co-offender, Ms Murphy.

[25] I accept the appellant was less involved than his co-offender in the cultivation of the traffickable quantity of cannabis, however, his part in providing premises for the continued cultivation of cannabis by the co-

offender was important in enabling the commission of an offence to continue.

[26] The authority to which I was referred by Mr Elliott, counsel for the respondent; *Bann v Frew* (1982) 69 FLR 354, Nader J analysed the authorities on the principle of parity of sentence and distilled certain guidelines at 363:

> "Some useful guidance can be seen to emerge from the cases. A sentence that is otherwise beyond legitimate challenge will be interfered with on the ground of disparity with another particular sentence only if:
>
> (1) The disparity is so gross as in itself to manifest an injustice.
>
> (2) Generally speaking, the other sentence is not so inadequate as to be seen to be manifestly wrong. (The appealed sentence would not manifest injustice contrasted with such a sentence).
>
> (3) The involvement and circumstances of the two offenders is such as to indicate equal or similar degrees of criminality. (If the degree of involvement or the relevant subjective factors differ to any extent disparity may not manifest any injustice unless the less criminally involved received the heavier sentence).
>
> (4) The prosecution has not by its conduct prevented the person with the lesser sentence from receiving a proper sentence: for example, by accepting a plea to a less aggravated offence thereby precluding consideration of some aggravating factors.
>
> These matters are in no sense principles of law but matters which can be seen to have been repeatedly considered in the decided cases.
>
> It is clear from what I have said that the ground relating to the youth and antecedents of the appellants and to the circumstances of the offences should be considered before the disparity ground. If the sentences passed were vitiated by error with regard to the 'disparity argument', the other ground may be superfluous."

[27] In this case, the subjective factors are very different, the co-offender was sentenced on the basis of being a first offender. The appellant had, within a relatively short time prior to this offence, been convicted on a number of

drug related offences and served a period of nine months home detention. Despite this he made a deliberate decision to allow the co-offender to move the plants to his house and continue the cultivation in his home. This difference in the subjective factors relevant to each offender and their respective, although differing involvement, means the disparity in the two sentences does not give rise to a justifiable sense of grievance by the appellant. Accordingly this ground of appeal has not been made out.

Ground 3: Undue weight was given by the learned magistrate to the appellant's single prior conviction leading to the imposition of a penalty which was disproportionate to the gravity of the subject offence.

[28] Clearly the learned stipendiary magistrate was concerned about the appellant's prior conviction because in his reasons for sentence he said this (t/p 8 – 9):

> "….. You have pleaded guilty to unlawfully cultivating a traffickable a quality (sic) of marihuana plants, namely eight plants. It was only a matter of luck for you that they were only there for less than one day, but you had made a deliberate decision to allow a friend to move in these plants to be cultivated at your home hydroponically.
>
> You did that knowing full well the penalties to be paid because you had been in court the year before and received a six month gaol sentence suspended on home detention in 9 months, for doing the same thing. Despite that sentence, you had a choice. You made the choice to allow those marihuana plants to be situated in your home only a year after sitting in that house for 9 months on a home detention order.
>
> I note that when you were sentenced in March, there we're several other marihuana offences, anyway, you don't to fall (sic) to be sentenced on your previous record of course, but in my view it would start to make a mockery of the laws that Parliament has passed in relation to amongst other things, cannabis, if you were just to walk away today given the matters that I have already referred to.

> Section 37 tells me that you ought to go to gaol for at least 28 days unless circumstances particular to the offence or you move me to be of an opinion that such a penalty should not be imposed.
>
> I must say nothing I have heard moves me into that opinion. You made a deliberate choice, you knew the penalty to be paid an you are going to pay it today. It was your choice."

[29] His Worship then asked if Janine Murphy was a first offender. He was advised that she was. His Worship then went on to say:

> "Yes, well that is another reason to have suspended her for one month, but despite the particulars of the offence pointed out to me, what comes through is it was a deliberate choice to break the law. You broke the law with a mind set that I infer, full well knew the penalties to be paid and you are going to pay them today you are convicted and sentenced to 28 days imprisonment. Thank you."

[30] The appellant fell for consideration under the provisions of s 37(2) of the Misuse of Drugs Act which provides as follows:

> " (2) In sentencing a person for an offence against this Act the court shall, in the case of an offence for which the maximum penalty provided by this Act (with or without a fine) is –
>
> (a) 7 years imprisonment or more; or
>
> (b) less than 7 years imprisonment but the offence is accompanied by an aggravating circumstance,
>
> impose a sentence requiring the person to serve a term of actual imprisonment unless, having regard to the particular circumstances of the offence or the offender (including the age of the offender where the offender has not attained the age of 21 years) it is of the opinion that such a penalty should not be imposed."

[31] This provision applied to the appellant because the offence itself carries a maximum seven years imprisonment and because of his prior conviction.

[32] His co-offender, Ms Murphy, also fell to be considered under the provisions of s 37(2) of the Misuse of Drugs Act because the offence of cultivate a traffickable quantity of cannabis, namely eight plants, carries a maximum of seven years imprisonment.

> "In *Veen v The Queen* [No. 2] (1988) 164 CLR 465; 77 ALR 385; 33 A Crim R 230 the majority said (at 477-478; 393; 238):
>
> > '… the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: *Director of Public Prosecutions v Ottewell* [1970] AC 642 at 650: [1968] 3 All ER 153 at 156; 52 Cr App R 679 at 685 (HL).
> >
> > The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instance case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind. Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties."

[33] The appellant had been convicted on 3 March 2000 of the following offences.

- administer dangerous drug to self
- possess a dangerous drug

- supply schedule 2 substance
- possess cannabis – traffickable
- cultivate cannabis – traffickable quantity

[34] The Court imposed an aggregate sentence of six months imprisonment suspended upon the appellant entering into a nine months home detention order.

[35] The appellant successfully completed this order. However, I consider it relevant that he was convicted of five separate offences. He received a substantial penalty but was extended the leniency of a home detention order rather than serve a gaol sentence.

[36] The prior conviction was only one year and five months prior to the commission of this offence. It is not a situation where the conviction was imposed many years ago. The appellant cannot claim credit for good behaviour during a lengthy intervening period since his last conviction. This offence occurred eight months after he had completed a home detention order for drug related offences. In *Duthie v Smith* (1992) 83 NTR 21 Mildren J said at p 31:

> "It would defy common sense for a court not to take into consideration the seriousness or otherwise of a relevant prior conviction, as well as how much time had elapsed since that prior conviction had been recorded."

[37] The learned stipendiary magistrate correctly pointed out the appellant was not to be sentenced on his previous record. However, it was a factor his Worship properly took into account.

[38] Accordingly this ground of appeal is dismissed.

Ground 4: The learned magistrate rejected without any warning the submissions made by the appellant's counsel that particular circumstances existed, despite an enquiry from the appellant's counsel as to whether he could provide further assistance to the Court.

[39] Mr Jobson, counsel for the appellant referred to the following exchange between himself and the learned stipendiary magistrate at the conclusion of his submissions (t/p 8):

> "MR JOBSON: Can I assist you any further Your Worship?
> HIS WORSHIP: I don't know, can you?
> MR JOBSON: Well, those are my submissions otherwise.
> HIS WORSHIP: Thank you."

[40] Mr Jobson argues that absent any direct response no further submissions were sought or put. It is Mr Jobson's submission that no prior indication had been given by the learned magistrate that he would not find particular circumstances existed and that the appellant was in jeopardy of a custodial sentence.

[41] Mr Jobson referred to the decision of *Saylor v Svikart* (unreported) decision of Martin CJ delivered 18 May 1994.

[42] Mr Jobson argued that the submissions put to the learned magistrate were directly aimed at mitigation of penalty – namely, the effect of s 37(2) of the Misuse of Drugs Act.

[43] Further, he submits that a failure to indicate the rejection of submissions, especially where a custodial sentence was the only penalty open to the Court, was procedurally unfair and it led to the imposition of a more severe sentence than might otherwise have been the case.

[44] I do not agree with this submission.

[45] The principle as discussed in *Saylor v Svikart* (supra) is not applicable in this circumstance. In *Saylor v Svikart* the learned stipendiary magistrate raised for the first time during the sentencing process an adverse inference against the appellant on the facts presented to him. Martin CJ at p 2 said:

> "… He did not warn counsel for the appellant that he was not inclined to accept that part of the submissions, which went to the mitigation of penalty. That is no less important than failure by a Magistrate to warn that he or she was not inclined to accept part of the accused's version as to the circumstances of the offence or other matters going to the appellant's degree of culpability. In such a case, if the sentencing tribunal is not prepared to act upon the accused's version of the facts, then counsel for the accused should be informed accordingly, and be prepared to go into evidence to resolve the matters (see for example *M v Waldron* (1988) 56 NTR 1 and the cases referred to at p5; *G v Bourne* unreported Angel J, 4 October 1991). In the latter case Angel J applied the same principles to a case in which the learned Magistrate formed an unfavourable view of the accused and, on the basis of that view, rejected submissions as to his contrition, without indicating to counsel his opinion. …"

[46] In the appeal before this Court the appellant was for sentence which involved a consideration of s 37(2) of the Misuse of Drugs Act. The learned stipendiary magistrate did not reject the factual basis of any submission made on behalf of the appellant, nor did he raise in his reasons for sentence any matter not covered by counsel for the appellant, or draw any adverse inference which the appellant should have been given an opportunity to address. There was no denial of natural justice.

[47] I do not regard *Saylor v Svikart* (supra) as authority for the principle that whenever a magistrate concludes that it would be appropriate to impose an actual custodial sentence under s 37(2) of the Misuse of Drugs Act, he must first warn the appellant of his intentions and seek a further submission. Nor am I aware of any such authority.

[48] The appellant was facing the prospect of an actual custodial sentence unless he could demonstrate particular circumstances of the offence or the offender which would enable the magistrate to conclude that such a penalty should not be imposed. The learned stipendiary magistrate accepted the matters put to him on behalf of the appellant but declined to exercise a discretion and suspend the sentence of imprisonment. This was simply a situation where the learned stipendiary magistrate disagreed with the submission made on behalf of the appellant that the sentence of actual imprisonment should be suspended under the provisions of s 37(2) of the Misuse of Drugs Act.

[49] I do not consider the appellant has substantiated this ground. This ground of appeal is dismissed.

Ground 1: The learned magistrate erred in his finding that insufficient grounds existed pursuant to s 37(2) of the Misuse of Drugs Act to avoid the imposition of the mandatory period of imprisonment of 28 days: by the addition of the following grounds of appeal:

[50] Section 37(2) of the Misuse of Drugs Act provides as follows:

> " (2) In sentencing a person for an offence against this Act the court shall, in the case of an offence for which the maximum penalty provided by this Act (with or without a fine) is –
>
> (a) 7 years imprisonment or more; or
>
> (b) less than 7 years imprisonment but the offence is accompanied by an aggravating circumstance,
>
> impose a sentence requiring the person to serve a term of actual imprisonment unless, having regard to the particular circumstances of the offence or the offender (including the age of the offender where the offender has not attained the age of 21 years) it is of the opinion that such a penalty should not be imposed.
>
> (3) Where a court imposes a sentence requiring the serving of a period of actual imprisonment for an offence against this Act, it shall not impose a sentence of less than actual imprisonment for 28 days."

[51] When considering the particular circumstances of the offence or the offender, Mildren J held in *Duthie v Smith* (supra) at 30:

> "… I do not consider that the circumstances need to be so noteworthy or out of the ordinary as to convey the meaning that only in rare cases will there be found circumstances that fall within that class."

[52] The particular circumstances of this offence is that the appellant played a lesser role than his co-offender. He had not and there is no evidence he had any intention of physically participating in the cultivation of the plants. The

plants involved were immature, six weeks old. There were a total of eight plants only three plants over the "traffickable" quantity of five plants. Nevertheless he was active and played a significant role in the sense that he provided the premises so that the cultivation could continue. It was quite a sophisticated operation involving as it did quite extensive hydroponic equipment. The court dealing with the co-offender had accepted these plants were grown solely for the use of the co-offender. There was no evidence of any intention to supply cannabis to another person either by the appellant or by the co-offender.

[53] The circumstances to be taken into account in relation to the offender are that he had successfully completed the nine month home detention order and consequently the six month suspended sentence. The relationship between the appellant and the co-offender was of a personal nature. The offender has employment with the Letterbox Shop. Character references were tendered. The two persons who provided these references attested to the appellant's integrity and the care he has given to a paraplegic friend.

[54] The appellant notified the Crown there would be a plea of guilty to the subject charge on 29 October 2001. By his early plea of guilty the appellant facilitated the course of justice.

[55] I have dealt in some detail with the prior conviction under Ground 3 of the Notice of Appeal. I will not repeat these reasons here save to state that they are also relevant to the circumstances of the offender.

[56] I do not consider the learned stipendiary magistrate fell into error in finding that insufficient grounds existed pursuant to s 37(2) of the Misuse of Drugs Act to avoid imposition of the actual period of 28 days imprisonment.

Ground 5: The imposition of a custodial sentence was manifestly excessive.

[57] The submissions under this ground of appeal include failing to consider parity of sentence between the appellant and a co-offender, undue emphasis on the appellant's prior conviction, wrongfully assessing the salient feature of the evidence in relation to the particular circumstances of the offence and the offender.

[58] These submissions have been considered under the other grounds of appeal.

[59] The appellant has not demonstrated any error of law on the part of the learned stipendiary magistrate.

[60] In addition to these considerations, the sentence of 28 days actual imprisonment is not on the face of it manifestly excessive.

[61] I would dismiss this ground of appeal.

[62] The order I make in this matter is that the appeal be dismissed.

———————————————————