Wunungmurra v The Queen [2006] NTCCA 3

PARTIES:	WUNUNGMURRA, Paul Gurrumuruwuy 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 18 of 2005 (20421645)
DELIVERED:	21 FEBRUARY 2006
HEARING DATES:	21 FEBRUARY 2006
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & THOMAS JJ

CATCHWORDS:

CRIMINAL LAW

Appeal against sentence – allegation of miscarriage of justice because the appellant did not place all relevant material before the sentencing Judge – the additional material did not justify the exercise of discretion not to record a conviction – taking into account the additional material the original sentence was within the range of sentencing discretion – appeal dismissed.

REPRESENTATION:

Counsel:

Appellant:	D Ross QC and A Bligh
Respondent:	A Elliott

Solicitors:

Appellant:	NAALAS
Respondent:	DPP

Judgment category classification:	A
Judgment ID Number:	Mar0601
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Wunungmurra v The Queen [2006] NTCCA 3
No. CA 18 of 2005 (20421645)

BETWEEN:

PAUL GURRUMURUWUY WUNUNGMURRA
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 21 February 2006)

Martin (BR) CJ:

[1] On 28 July 2005 the appellant pleaded guilty to unlawfully supplying a commercial quantity of cannabis. The learned sentencing judge imposed a sentence of two years imprisonment to be suspended after the appellant had served three months. The appellant appeals against the sentence. There is no complaint that the sentencing judge erred on the material before him, but the appellant has placed additional material before this court which should have been before the sentencing judge. Based on the additional material it is the case for the appellant that there has been a miscarriage of justice and that the sentence is manifestly excessive. In particular, the appellant

submitted that he should not be required to serve any part of a sentence of imprisonment.

[2] The facts can be stated quite briefly. Police received information that the appellant had been selling cannabis in the Lake Evella Community. When police spoke to the appellant he said, 'I am happy you caught me, I wanted to stop selling cannabis, it is no good.' The appellant admitted he had been selling cannabis and produced $700 cash from his wallet. He said he had sold seven sachets of cannabis that day.

[3] The appellant voluntarily took police to a location several kilometres from Lake Evella where he had hidden a backpack containing 213 grams of cannabis. The cannabis was packed in sachets and a plastic bag and a large number of unused sachets were inside the backpack.

[4] In a subsequent interview the appellant told police that in the preceding weeks he had accumulated $20,000 from the sale of cannabis which he had given to a person named Tom and another unknown male person. In turn, those persons were to give the funds to a named person on whose behalf the cannabis had been sold "the principal". The appellant admitted he was in the process of selling more cannabis on behalf of the principal at the time he was arrested. He was expecting to accumulate a further $20,000.

[5] For his role in the enterprise the appellant was to be provided with approximately 200 grams of cannabis. He intended to sell that cannabis and anticipated earning between $2,000 and $3,000 which would represent

payment for his role. The appellant intended to keep some of the cannabis which he would supply to relatives. The appellant was not a cannabis user.

[6] According to the appellant he met the principal in about August 2003. Subsequent to that date on a fortnightly basis during the dry the appellant had received shipments of cannabis from the principal and supplied cannabis to persons in the Lake Evella Community. On each occasion he returned the bulk of the money from the sales to the principal, less his compensation.

[7] The sentencing judge accepted that the appellant was not high up in the cannabis distribution chain and that he used most of the money received to support his large family. His Honour noted that the appellant had taken responsibility for his offending and that he had shown genuine remorse for his conduct. His Honour accepted that the appellant had made full and frank admissions to the police because he wanted to stop selling cannabis.

[8] In 1995 the appellant was convicted of drinking and driving offences, but he has not otherwise previously been in trouble with the law. The sentencing judge found that the appellant's prospects of rehabilitation were good.

[9] The appellant placed before the sentencing judge a detailed statement of his illegal conduct. He named the other persons who were involved and stated that he was prepared to give evidence.

[10] The sentencing judge was told that the appellant was born in April 1955. Reference was made to the appellant's traditional lifestyle and his

acceptance of ceremonial responsibilities which were interrupted at the time of his arrest. Counsel informed his Honour that at the time of his arrest the appellant was involved in a series of ceremonies in respect of a death. In addition, a reference from a community educator with Aboriginal Resource and Development Services was placed before the sentencing judge which spoke highly of the appellant as a man of quiet confidence, who tried very hard to be independent and who was very involved in the local Uniting church. The appellant was described as an honest and upright man.

[11] The sentencing judge was not given full details of the appellant's role as a senior member of his community. The additional material placed before this court establishes that at the time of his arrest the appellant was undergoing formal legal education within a traditional chamber of law that was convened to enable the Dhalwangu and Madarrpa clan nations to formally acknowledge the holiness of a deceased member of the chamber. The chamber attends to the burial rights of the deceased, but in addition lessons are taught, the business of the clan nation is discussed and legal decisions are made.

[12] In a joint affidavit dated 18 August 2005 three senior members of the Lake Evella Community described the appellant as a very important man in the community. The appellant is involved in the school and is highly respected. The affidavit asserts that the appellant has many roles to play within the community.

[13] One of the deponents, Mr Binigiri Wurramurra, gave evidence before me on the hearing of the application for leave to appeal. I found Mr Wurramurra to be an impressive witness and accepted his evidence. That evidence is part of the material before this court. It is apparent that the appellant is a senior teacher within the community and plays an important role as a leader of his clan. Mr Wurramurra described the appellant as coming from a "very special family line" which amounted to coming from a "royal family in Aboriginal law".

[14] In addition to his community responsibilities the appellant is a member of a group of traditional dancers who have performed in Australia and overseas. He has earned international standing and his work has brought credit to the Lake Evella Community.

[15] It is unfortunate that his Honour was not given full details of the appellant's senior role within the community and of his contribution to that community. They were matters of relevance to an assessment of both the appellant's character and of his prospects of rehabilitation. The appellant was entitled to call in aid by way of mitigation, his contribution to the community.

[16] As frequently occurs in the criminal law, the additional factors of mitigation do not operate only by way of mitigation. It is an aggravating feature of the appellant's offending that he was a leader of the community within which he supplied cannabis. The appellant abused his position of authority. Aboriginal communities must understand that notwithstanding a position of

seniority within a community, those who commit serious offences will receive the appropriate penalty. General deterrence is a matter of significance in the exercise of the sentencing discretion.

[17] Condemnation of the appellant's criminal conduct is also significant. For a number of years this court has emphasised that those who supply cannabis to members of Aboriginal communities are committing serious offences which have devastating effects within the communities. The appellant's offending was a particularly serious example of the crime of supplying cannabis. It was committed over a period of 12 months as part of a commercial operation involving large sums of money and the introduction of large quantities of cannabis into the Lake Evella Community.

[18] Counsel for the appellant urged that the appellant should not be convicted of the offence to which he pleaded guilty. Reference was made to the factors of mitigation to which I have referred and to the possibility that a conviction might prevent the appellant travelling with the dancing troupe to perform overseas. In my view however, bearing in mind the gravity of the appellant's criminal conduct, those factors do not justify the exercise of the discretion not to record a conviction.

[19] In my opinion, on the material before the sentencing judge, the sentence of two years imprisonment was a moderate sentence and the judge exercised considerable leniency in requiring that the appellant serve only three months. Further, taking into account the additional material placed before

this court and making full allowance for all the factors of mitigation, including the appellant's mature age, absence of relevant prior offending, contribution to the community, plea and co-operation with the authorities, in my view the sentence imposed by the judge was well within the range of the sentencing discretion. If the appellant was to be sentenced afresh I would not impose a different sentence.

[20] In these circumstances, in my view a miscarriage of justice did not occur and it is unnecessary to discuss the circumstances in which an Appellant Court will receive material additional to that made available to the sentencing judge.

[21] The appeal should be dismissed.

Mildren J:

[22] I agree with the judgement of the Chief Justice. I accept the Chief Justice's findings concerning the evidence of Mr Binigiri Wurramurra.

[23] On the assumption that the grounds had been made out warranting this court re-sentencing the appellant, I would not have imposed a sentence of less than that actually imposed. I agree that the appeal should be dismissed.

Thomas J:

[24] I agree with the decision of the Chief Justice and with his reasons. I agree the appeal should be dismissed. I have nothing to add.
