Zamolo v The Queen [2011] NTCCA 8

PARTIES:	ZAMOLO, Anthony Joseph 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 25 OF 2010 (20929794 & 21012628)
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JUDGMENT OF:	SOUTHWOOD, KELLY AND MARTIN JJ
APPEALED FROM:	MILDREN J

CATCHWORDS:

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Criminal Code (Cth)
Criminal Code (NT), s 411, s 429(2)
Misuse of Drugs Act (NT)

R v Simpson (2001) 53 NSWLR 704, considered

REPRESENTATION:

Counsel:

Appellant:	P Elliott
Respondent:	J Renwick

Solicitors:

Appellant:	Withnalls
Respondent:	Commonwealth Director of Public Prosecutions

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

Zamolo v The Queen [2011] NTCCA 8
No. CA 25 of 2010 (20929794 & 21012628)

BETWEEN:

ANTHONY JOSEPH ZAMOLO
Appellant

AND:

THE QUEEN
Respondent

CORAM: SOUTHWOOD, KELLY AND MARTIN JJ

REASONS FOR JUDGMENT

(Delivered 12 August 2011)

THE COURT:

[1] On 8 October 2010 the appellant was sentenced to imprisonment for a period of eight years with a non-parole period of five years and six months for a series of offences against the *Criminal Code* (Cth) and the *Misuse of Drugs Act* (NT). A Judge of the Court granted leave to appeal against that sentence on two grounds namely:

(a) the sentence imposed in respect of the Commonwealth offences is manifestly excessive; and

(b) the learned sentencing Judge erred in that, subject to the requirements of s 19 of the *Crimes Act* 1914 (Cth), he imposed a sentence on the

Commonwealth offences that is wholly cumulative upon the sentence imposed on the Territory offences.

[2] Leave to appeal was refused on three grounds and the appellant has made an application pursuant to s 429(2) of the *Criminal Code* (NT) to have those grounds considered and determined by the Court of Criminal Appeal. The grounds in relation to which leave to appeal is sought are:

(c) the overall sentence imposed is manifestly excessive;

(d) the learned Judge erred in finding that the offending was in the "middle to high end of the range for this type of offending", as opposed to middle range alone; and

(e) the learned Judge erred in applying a discount of 20% on the sentence.

[3] At the hearing of the appeal the appellant sought leave to add another three grounds of appeal namely:

(1) the learned sentencing Judge found that the appellant had imported over four kilograms of the drug, when there was no evidentiary basis for making such finding;

(2) as a result of the finding made and referred to in proposed new ground 1 the learned sentencing Judge sentenced the appellant on an incorrect factual basis; and

(3) the learned sentencing Judge erred in finding that the appellant was well aware that the drug was illegal by the time he was importing it in bulk, as there was no evidentiary basis for such a finding.

[4] Leave to appeal was given on grounds (d) and (e) in paragraph 2 and the three additional grounds for which leave was sought at the hearing. The appellant did not pursue ground (c), that the overall sentence imposed was manifestly excessive.

[5] The offending related to the importation into Australia of a border controlled drug, 4-methylmethcathinone, which substance is an analogue of a border controlled drug, methcathinone. The drug was described by the learned Judge as being a drug which acts on the body and brain with effects similar to those of methamphetamine. It has no known medical application and in high doses can result in short-term paranoia or psychosis. There is a wide range of clinical symptoms for cases of toxicity in individuals along with a range of very unpleasant side effects. His Honour correctly concluded: "Clearly, this drug is potentially very dangerous".

[6] The offences under the Commonwealth law to which the appellant pleaded guilty were: (a) the importation of the drug; and (b) two counts of attempting to pervert the course of justice. The Territory offences were: (a) having unlawfully produced a commercial quantity of a dangerous drug namely 2718 g of 4-methylmethcathinone; (b) having on 25 August 2009 supplied a commercial quantity of the drug namely 144.2 g; and (c) on 3

September 2009 having possessed a commercial quantity of the drug namely 288.6 g.

[7] The circumstances of the offending were not in dispute. The Commonwealth offences were contained in the first indictment. Between August 2008 and August 2009 the appellant sent more than $100,000 to a person called Sabag in Israel in exchange for a number of packages of the drug. Between November 2008 and January 2009 he also ordered a number of parcels of capsules. He later told Sabag that he wanted a stronger product and further capsules were supplied. Between February and April 2009 he arranged with Sabag to import the drugs in bulk powder form indicating he could sell 1 kg a week and that his customers "liked the powder which had a strong effect". The appellant was provided with instructions as to how to mix the powder with caffeine in order to make 7500 capsules using a capsule filling device. He initially agreed to pay US $22,000 per kilogram with the price dropping to US $20,000 after the first few shipments. The shipments were directed to the address of a neighbour of the appellant. In February 2009 a shipment of the drug was intercepted, however there was then no method of detecting the drug and the appellant claimed it was fertiliser. The drug was released to him.

[8] Between November 2008 and July 2009 the appellant sent a total of US $92,117.76 in 30 individual transactions to Sabag reflecting the importation of approximately 4 kg of the drug. The appellant also imported caffeine and empty capsules and a capsule filling machine for use in his enterprise.

[9] The Territory offences were contained in a separate indictment. On three separate occasions the appellant employed a co-offender, Shane Leslie Messel, to manufacture capsules of the drug mixed with caffeine. He supplied the drug, the capsules, the caffeine and the capsule filling machine to Mr Messel. On the first occasion Mr Messel manufactured between 400 and 500 capsules. He was paid $200 for his work. On the second occasion the appellant provided Mr Messel with premixed powder at a hotel in Darwin and Mr Messel there manufactured between 800 and 1000 capsules and was paid $500 for his work. On the third occasion the appellant supplied Mr Messel with the ingredients to manufacture more of the drug at a motel and Mr Messel made up a batch of 4800 capsules.

[10] Two unidentified men collected some of the capsules from the motel. When Mr Messel left he still had 3800 capsules. The appellant collected 2400 of the capsules leaving 1400 of the capsules with Mr Messel for safekeeping. Those capsules contained 288.6 g of the drug at 56.4% purity.

[11] On 3 September 2009 police executed search warrants and arrested two male persons. The appellant received information as to the police activity and telephoned Mr Messel instructing him to dispose of the drugs which he was holding for the appellant. He then sent him a text message instructing him to clean out the van used by him. Another text message was sent instructing Mr Messel to get rid of anything “written down”.

[12] A subsequent search of the home of Mr Messel located the 1400 capsules, $1,900 in cash, notes relating to packaging capsules and other items.

[13] On 2 September 2009 a parcel addressed to the appellant was delivered to the person who lived next door to the appellant's mother. The parcel contained a plastic bag in which were located 5000 empty gelatine capsules. The appellant telephoned his mother and directed that she locate the parcel and place it in a wheelie bin outside the house of the neighbour. A short time later the contents of the wheelie bin were collected by a truck. The truck was subsequently intercepted by police. Later police located a number of packages secreted in a stove behind a shed at another property. The packages contained $101,800 in cash.

[14] The appellant was arrested at the casino that evening. A search of his room located $23,904.80 in cash and chips.

[15] The learned sentencing Judge placed the offending "in the middle to high end of the range for this type of offending". He observed that the appellant was the principal in the scheme to import, produce, possess and supply the drug. The appellant obtained substantial financial benefit from the scheme and employed others to assist him in the scheme. He even involved his mother in an attempt to cover his tracks. The value of the drugs packaged by the appellant could have been as much as $300,000.

[16] In imposing sentence his Honour made the following observations:

> In relation to offences involving the importation, production, possession and supply of dangerous drugs of this kind, the main sentencing considerations are general and special deterrence and denunciation by the court of this kind of behaviour.
>
> The offending is serious and must result in a substantial sentence of imprisonment. I am satisfied that no other sentence is appropriate in all of the circumstances. I note also that less weight is to be given even to first offenders for drug offences than otherwise would be the case for other kinds of offending although that does not mean that little or no weight is to be given.
>
> So far as the offences of attempting to pervert the course of justice are concerned, it is very unusual for this charge to be brought in these circumstances. It is hardly to be expected that criminals who are about to be caught would not attempt to cover their tracks. No attempt was made to bribe anyone, threaten anyone, conspire with someone to create false evidence or any of the kinds of things one usually sees when dealing with offending of this kind. I think your offending in relation to these two offences is at the low end of the range.
>
> As the prosecutor rightly pointed out, there is considerable overlap between the facts which constitute each of the drug counts and I am required to ensure that this is taken into account. I am also required to apply the totality principle, that is to say, to look at the whole offending and to arrive at a sentence which is just and appropriate to the overall offending. This may be achieved by making some of the sentences partly concurrent and reducing the Northern Territory head sentence from what it might otherwise have been if it stood alone.

[17] The learned sentencing Judge considered the whole of the offending and determined that, in his opinion, "the total offending warrants an overall head sentence of ten years which should be reduced to eight years to reflect your pleas of guilty, remorse and cooperation". His Honour then went on to impose sentences which achieved that result. An aggregate sentence of imprisonment for four years was imposed in relation to the Territory offences with a non-parole period of two years. In relation to the

Commonwealth offences the appellant was sentenced to an aggregate term of imprisonment of six years with that sentence to commence at the expiration of the two year non-parole period fixed in relation to the Territory offences. His Honour fixed a non-parole period for the Commonwealth offences of three years and six months to commence from the expiration of a non-parole period for the Territory offences.

Ground (d): that the learned Judge erred in finding that the offending was in the "middle to high end of the range for this type of offending", as opposed to middle range alone

[18] We discern no error in the learned sentencing Judge's description of the offending as in the "middle to high end of the range for this type of offending" for all of the reasons pointed out by his Honour and set out at paragraph [15] above.

Ground (e): that the learned Judge erred in applying a discount of 20% on the sentence

[19] The application of a 20% reduction was not an error. In this jurisdiction there is no specified range and the size of the reduction depends on the circumstances of each case. The learned sentencing Judge took into account relevant matters in determining what reduction to allow, and no error has been demonstrated.

First and Second Additional Grounds: that the learned sentencing Judge found that the appellant had imported over four kilograms of the drug when there was no evidentiary basis for making such a finding and as a result sentenced the appellant on an incorrect factual basis

[20] At the hearing of the appeal the respondent advised that there had been some factual errors in the Crown facts tendered at the sentencing hearing. The respondent sought leave to file an affidavit setting out the correct facts. The facts set out in the affidavit were not disputed by the appellant and leave was given to file the affidavit. The thrust of that affidavit is that the amount of the prohibited drug imported by the appellant was not in excess of four kilograms as calculated by the learned sentencing Judge on the basis of the tendered Crown facts, but 3.877 kilograms.

[21] We consider the factual difference to be trivial and not such as, in itself, would warrant a different sentence being imposed.

Additional Ground 3: the learned sentencing Judge erred in finding that the appellant was well aware that the drug was illegal by the time he was importing it in bulk, as there was no evidentiary basis for such a finding

[22] We do not agree that there was no evidentiary basis for this finding by the learned sentencing Judge.

(a) The appellant received no response from his supplier to his requests to be assured that the drug he was importing was not illegal in this jurisdiction.

(b) In February 2009 when shipment of the drugs was intercepted by quarantine officers the appellant falsely told them that the product was fertilizer.

(c) In May 2009 the supplier advised the appellant that the product would be labelled as bath salts.

(d) Police located a number of packages secreted in a stove behind a shed in the appellant's backyard containing $101,800 in cash wrapped in plastic bags and covered with wrapping tape. The police also found $23,904.80 in cash and chips in the appellant's room at the Casino where the appellant was arrested. From this it can be inferred that the appellant was making large sums of money from the sale of the imported drug and believed it to be necessary to keep that money clandestinely.

(e) When the appellant became aware that police were investigating the operation the appellant contacted his employee, Messel, who had been filling the capsules for the appellant and told him to get rid of the drugs he was holding for the appellant to clean out the van used by him and the appellant in the dry cleaning business and to get rid of anything written down. The appellant also contacted his mother and arranged for her to find and dispose of a parcel containing empty capsules.

(f) The learned sentencing Judge was entitled to infer that, by the time the appellant was importing the drug in bulk, the appellant was well aware that it was illegal. This ground of appeal is dismissed.

Grounds (a) and (b): that the Sentence imposed in respect of the Commonwealth offences is manifestly excessive and that the learned sentencing Judge erred in imposing a sentence on the Commonwealth offences which was wholly cumulative upon the sentence imposed on the Territory offences

[23] Counsel for the appellant identified three aspects to the appellant's submissions on this aspect of the appeal.

(a) There was an error in making the sentence for the Commonwealth offences wholly cumulative with the sentence for the Territory offences.

(b) The sentence for the Commonwealth offences was manifestly excessive.

(c) As a result, the total sentence was manifestly excessive.

(a) <u>Error in making the Commonwealth sentences wholly cumulative with the Territory offences</u>

[24] Section 19 of the *Crimes Act* 1914 (Cth) provides:

> (1) Where a person who is convicted of a federal offence or federal offences is at the time of that conviction or those convictions, serving, or subject to, one or more federal, State or Territory sentences, the court must, when imposing a federal sentence for that federal offence, or for each of those federal

offences, by order direct when the federal sentence commences, but so that:

(a) no federal sentence commences later than the end of the sentences the commencement of which has already been fixed or the last to end of those sentences; and

(b) if a non-parole period applies in respect of any State or Territory sentences--the first federal sentence to commence after the end of that non-parole period commences immediately after the end of the period.

[25] The evident purpose of this section is simply to ensure that there is no gap between the end of a State or Territory sentence (or non-parole period) and the beginning of a Commonwealth sentence (or non-parole period) – ie that an offender not be released between completion of a State or Territory sentence and a sentence imposed concurrently for a Commonwealth offence.

[26] The learned sentencing Judge did not, as contended by the appellant, make the sentences for the Commonwealth and Territory offences wholly cumulative. He imposed an aggregate sentence of imprisonment for four years in relation to the Territory offences with a non-parole period of two years. In relation to the Commonwealth offences, he imposed an aggregate term of imprisonment for six years commencing on the expiration of that two-year non-parole period and fixed a non-parole period for the Commonwealth offences of three years and six months. The nett effect was that the head sentence for the Commonwealth offences was concurrent with the sentence for the Territory offences as to two years, and cumulative as to two years. By virtue of s 19(1)(b), the Commonwealth sentence (and hence

the non-parole period for the Commonwealth offences) had to commence immediately upon the expiration of the non-parole period for the Territory offences.

[27] We do not think that the learned trial Judge erred in his approach to accumulation of the sentences. The learned sentencing Judge correctly noted that there was considerable overlap between the facts which constituted each of the drug counts and applied the totality principle by considering the sentence warranted by the total offending, allocating that sentence between the Commonwealth and Territory offences and making those sentences partially concurrent.

(b) and (c) <u>Sentence for Commonwealth offences (and hence total sentence) manifestly excessive</u>

[28] That leaves the ground of appeal that the sentences for the Commonwealth offences are manifestly excessive. The principles applicable to an appeal on the grounds that the sentence is manifestly excessive are well known. The exercise of the sentencing discretion is not to be disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error and the appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it be shown that the sentencing Judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing Judge

said in the proceedings, or the sentence itself may be so excessive as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so; that is that the sentence was clearly and obviously and not just arguably excessive.

[29] The sentence imposed, after an allowance of 20% for the plea, remorse and co-operation was 6 years, meaning that his Honour had a starting point of 7 ½ years. The maximum sentence for the importation charge was 10 years imprisonment and a fine of $220,000; the maximum penalty for each of the charges of attempting to pervert the course of justice was imprisonment for 5 years and a fine of $33,000.

[30] Although his Honour found that the offending on the importation charge was in the middle to high end of the range for this type of offending, in relation to the charges of attempting to pervert the course of justice he found that the offending was at the lower end of the range. He noted that the offending conduct consisted of an attempt to cover the offender's tracks, and that "no attempt was made to bribe anyone, threaten anyone, conspire with someone to create false evidence or any of the kinds of things one usually sees when dealing with offending of this kind". It can safely be concluded, therefore, that the charges of attempting to pervert the course of justice contributed little to the aggregate sentence of 6 years imposed in relation to the Commonwealth offences.

[31] His Honour also noted that the offender had "a few minor prior convictions of no great significance" and had good prospects of rehabilitation.

[32] We were referred to a number of cases from different jurisdictions, all of which were different on the facts and which we did not find of assistance. Nevertheless, in all of these circumstances, we consider that the sentence for the Commonwealth offences was manifestly excessive.

[33] Counsel for the respondent argued that we should focus on the aggregate sentence imposed, rather than simply the sentence for the Commonwealth offences, as that is how the learned trial Judge crafted the sentence. The respondent contended that it was not sufficient for the appellant to show that there had been an error in the sentencing process. Rather "this Court must form a positive opinion that some other sentence ….. is warranted in law and should be passed."[1]

[34] Counsel for the appellant pointed out, however, that there had been no Crown appeal against the sentence for the Territory offence and, therefore, if we were of the view that the Commonwealth sentence was manifestly excessive, we could not disallow the appeal by saying that the Territory sentence was too low and therefore the aggregate sentence for both Territory and Commonwealth offences was not such as to warrant the imposition of a different sentence. In our view, this submission must succeed, by reason of s 411(4) which provides:

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1 *R v Simpson* (2001) 53 NSWLR 704 per Spigelman CJ at 720-721.

> (4) On an appeal against a sentence the Court, if it is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor and in any other case shall dismiss the appeal. *[emphasis added]*

[35] This sub-section means that we must consider the appeal against the Commonwealth sentence on a stand alone basis and, if error is demonstrated, and this Court is of the opinion that a different sentence was warranted, we are obliged to pass the sentence which, in our opinion, ought to have been passed. There being no Crown appeal against the Territory sentence, that sentence must stand. That does not mean that, on re-sentencing for the Commonwealth offence, we are precluded from again considering the questions of concurrency and totality in relation to the overall offending. Indeed we are obliged to do so.

Resentencing

[36] Taking into account the matters found by the learned sentencing Judge and set out above, and those factors set out in s 16A of the *Crimes Act* (Cth) known to the Court, and applying the 20% reduction found by the sentencing Judge to be appropriate in the circumstances, this Court considers that an appropriate aggregate sentence for the Commonwealth offences would be imprisonment for 4 years, to commence at the end of the 2 year non-parole period for the Territory offences.

[37] For the reason given by the sentencing Judge, namely the seriousness of the offending, we also consider it appropriate to fix a non-parole period rather

than making a recognizance release order. We fix a non-parole period in relation to the Commonwealth sentence of 1 year. That brings the total head sentence to 6 years imprisonment and the total non-parole period to 3 years.