PARTIES:	**NOBLE, Darrel Shane**
	v
	The Queen
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT OF NORTHERN TERRITORY
FILE NOS:	No. CA 1 of 1995
DELIVERED:	Darwin 21 July 1995
HEARING DATES:	10 July 1995
JUDGMENT OF:	Kearney, Angel JJ and Gray AJ

CATCHWORDS:

CRIMINAL LAW AND PROCEDURE - sentencing - prior criminal history - relevance to sentencing process

Veen (No.2) v R (1988) 164 CLR 465, applied
R v Mulholland (1991) 1 NTLR 1, folllowed
R v Babui (1991) 1 NTLR 139, followed

REPRESENTATION:

Counsel:

Appellant:	M. Robinson
Respondent:	C.B. Cato

Solicitors:

Appellant:	North Australian Aboriginal Legal Aid Service, Inc.
Respondent:	Office of the Director of Public Prosecutions

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

No. CA 1 of 1995

BETWEEN:

DARREL SHANE NOBLE
Applicant

AND:

THE QUEEN
Respondent

CORAM: KEARNEY, ANGEL AND GRAY JJ

REASONS FOR JUDGMENT

(Delivered 21 July 1995)

KEARNEY J:

The background

On 13 December 1994 the appellant pleaded guilty to 4 charges under the Misuse of Drugs Act; three were of unlawfully supplying a dangerous drug, cannabis, to other persons between 1 January and 25 May 1994, while the fourth was of unlawfully cultivating a commercial quantity of cannabis between 25 March and 25 May 1994. Schedule 2 to the Act provides that "not less than 20 plants" constitute a "commercial" quantity; the appellant admitted he had 104 plants under cultivation, a further 100 or so having died on him.

The charges of unlawful supply each carried a maximum punishment of a $10,000 fine or 5 years imprisonment; cultivating a commercial quantity carried a maximum punishment of 25 years imprisonment. The applicant had successfully asked that 2 associated offences be taken into account, under Code s396; see p3. He was sentenced to 18 months imprisonment on each of the supply charges, and to 3 years imprisonment on the cultivation charge. All 4 sentences were directed to be served concurrently, the effective sentence being 3 years imprisonment. A nonparole period of 15 months was fixed.

The application for leave to appeal

The applicant seeks leave to appeal against the severity of the sentences, under s410(c) of the Code; the application and the grounds of the substantive appeal were argued together. The grounds of appeal were as follows:-

(1) The sentences were manifestly excessive "particularly having regard to the objective circumstances" of the offences;

(2) When sentencing, his Honour had given insufficient weight to the following mitigating considerations -

(a) as to the cultivation charge, the lack of evidence that the applicant was cultivating for commercial gain, and the fact that the 104 plants were very small or merely seedlings - the total net weight being only 20.1 grams;

(b) as to the charges of supply, each involved minute amounts of cannabis, and constituted the means by which the applicant paid for stolen goods offered to him; and

(c) generally, the applicant had made full admissions when questioned by the Police, and apart from those admissions the evidence against him would have been insufficient to prove his guilt beyond reasonable doubt.

The transcript remarks on sentence

When sentencing the applicant, having noted the pleas of guilty and the maximum sentences applicable, his Honour said:-

> "You have also asked the Court to take into account certain other offences which were associated with those drug offences, and the court has agreed to do so. Those offences are that on 25 May 1994 you had in your possession a video cassette recorder, reasonably suspected of having been stolen - - - . And further, that you unlawfully possessed a bong for use in the administration of a dangerous drug, contrary to section 12 of the Misuse of Drugs Act. - - -
>
> The agreed facts are that on 25 May [1994] the police went to your home in Palmerston and located 104 plants which ranged in height from a few centimetres to about one metre, and which were growing in pots around the verandah and the garden. - - -
>
> On further searching your premises the police located the video cassette recorder, two Walkman radios and a small bag containing cannabis seed, and the bong.

> As to the cultivation of the cannabis plants, you told the police that when seedlings came up in the garden you put them in pots, in which they were found. You knew they were cannabis plants. You installed a drip system to water them, and you fertilised them. When asked why you grew the plants you said that you initially planted many more, saying that about a hundred, or something like that, had already died. When asked if you had any intention of selling them you admitted that you are in financial difficulties, and that your wife had difficulties with rent, and that your children were sick. But notwithstanding that situation, you denied that you intended to sell it but, rather, in your words, you 'just grew it for smoke'.
>
> There was nothing found in or around the premises such as scales, plastic bags, foil and other paraphernalia which is often associated with the growing of cannabis for sale. But the other three [supply] offences indicate that you had something [sic, come] to learn of the value of the cannabis plants as a medium of exchange.
>
> The first of those offences was committed when you decided to buy a video cassette recorder, which you knew had been stolen, by supplying the people who had brought it to you with a number of cones of cannabis and $20 in cash.
>
> As to the second charge of unlawfully supplying a dangerous drug, you admitted that you were approached by another acquaintance for some cannabis, and you handed over about 6 seedlings, together with $10, in return for an AGEC Walkman cassette. Much the same transaction was conducted in relation to the TEAC Walkman, which constitutes the third offence [of supply].
>
> When questioned as to why you supplied cannabis to another person, you replied the people come [sic, came] to you and if they want a smoke, you give them a smoke. The court will deal with you, therefore, on the basis that although your objective was to get cannabis to smoke yourself, and give some away to others, you had started to embark on [sic, upon] a course of conduct which showed a propensity to utilise the cannabis for commercial purposes."

His Honour then referred to the personal history and circumstances of the applicant, and continued:-

> "Given the facts and circumstances already described, it was possible the Court would be able

> to deal with you by imposing a sentence of imprisonment for an appropriate time but then wholly, or at least substantially, suspending it upon your entering into a bond to be of good behaviour for some period. However, that course is not open to you." (emphasis mine)

His Honour then explained the reason a suspended sentence was "not open", viz:-

> "You have suffered a number of convictions in relation to cannabis, dating from 1987, being at about the time when you took it up in substitution for alcohol. You have been before the courts on five occasions [between] 1987, 1989, 1990 and 1994, on a variety of drug-related charges, including possession, use and cultivation and supply of cannabis.
>
> In the early days you were fined, but in 1990 you were convicted and sentenced to four months imprisonment on a series of drug-related offences which was suspended upon your entering into a bond that you would be of good behaviour for 18 months. To your credit, you did not offend in relation to drug matters during the period of that bond - - -.
>
> In February 1994 you were convicted of a number of offences: for having an unregistered firearm, fined $300; being an unlicensed shooter, fined $300; possessing cannabis, fined $250; cultivating a trafficable quantity of cannabis, 28 days imprisonment; and for aggravated assault, being an assault by a male upon a female, your de facto wife, you were sentenced to three months imprisonment.
>
> That last sentence was suspended after you had served 28 days upon your entering into a bond that you would be of good behaviour for 12 months. That bond was entered into on 25 March of this year. It was to be supervised, but whatever may have happened in that regard you have come before this court in circumstances where the bond has clearly been breached.
>
> - - - it is part of the agreed facts that on 25 May, that is just two months after you entered into the bond, the police found that you had 104 plants that you had been cultivating, and that clearly does amount to a breach of the bond.

- - - you will need to remember that the bond is still in place, although, because of the sentence that must be imposed upon you, you will probably have a restricted opportunity to commit further offences before it expires.

You have shown a persistent disregard of the law in relation to cannabis. You know it is unlawful to cultivate it, possess it or use it. You have been convicted for offences of that sort previously and suffered fines, a suspended gaol sentence of four months and a sentence of 28 days imprisonment.

You are not penalised again for that past offending but your record means that when you come to be dealt with on this occasion the court is unable to extend to you any mitigation on the basis that you are a first offender or a person of good character or that what you did on this occasion was a mere aberration. I must take into account that it was not just 104 plants that were found growing at the time that the police went to your place but about 100 more had died, by your own admission.

Even allowing for all the usual problems that seem to beset cannabis growers, which reduce the benefit which might be derived from the crop, yours was nevertheless far from being an insignificant or minor enterprise and the 104 plants, although mainly seedlings, clearly had the potential to grow much larger and produce a much more significant volume of that dangerous drug.

The law of the Northern Territory in regard to an offender such as you is quite clear. It is provided in the Misuse of Drugs Act that you must serve a term of actual imprisonment of not less than 28 days. There are no particular circumstances which would cause me to be of the opinion that such a penalty should not be imposed in your case." (emphasis mine)

His Honour then proceeded to impose the sentences set out at p2.

The submissions

(a) In support of the 'manifestly excessive' ground (see (1) on p2) Mr Robinson of counsel for the applicant made 4 submissions.

(i) He referred to 11 sentences in cannabis cases handed down between 1992 and 1995 by single Judges of the Supreme Court. He submitted that they provided "guidance" as to the sentencing appropriate in this case, and that the present sentences so far exceeded these "guideline" sentences as to manifest error. Mr Cato of counsel for the Crown submitted that these cases did not establish a "range" of sentencing for the cultivation of a commercial quantity of cannabis. I consider that Mr Cato is correct; I reject Mr Robinson's submissions. These are only 11 of many cases. There are often some similarities in the objective circumstances of the many cases of "backyard" cannabis cultivation of the present type, but there are usually wide variations in the personal circumstances of the offenders. Significantly, in several of these cases the accused had no relevant prior criminal history. As the Full Court said in *R v Young* [1990] VR 951 at 955:-

> "Any judge with experience of sentencing knows that no two cases are the same and that the circumstances of particular offences and particular offenders are infinitely various - - -"

(ii) Mr Robinson submitted that his Honour had given undue adverse weight to the relevant factor of the appellant's criminal history. He referred to the passages emphasized at p6, and submitted that they disclosed errors of 2 types. First, the use to which his Honour put the appellant's criminal history contravened what was said by Mason CJ in *Veen (No.2) v R* (1988) 164 CLR 465 at p477, in that he gave it "such weight as to lead to the imposition of a penalty which is disproportionate to the instant offence." Second, (though this was really the first submission put another way) the effective sentence was too severe, in relation to the gravity of the offences committed as well as the appellant's prior criminal history; this was illustrated by the sentencing cases in (i) above.

I noted at p6 that his Honour treated the appellant's prior criminal history as preventing his punishment being mitigated as it could have had he been "a first offender or a person of good character" or had his offences been "a mere aberration". I consider that there was no error in that approach and that there is no substance in

these submissions, for the reasons set out at pp11-12, and at (i) on p7.

(iii) Mr Robinson also submitted that the applicant's subjective circumstances in the sense of his prior criminal history could not be used to increase the effective sentence appropriate to the criminality of his offences measured by their objective circumstances. I accept that proposition. He submitted that the 11 sentences in (i) above indicated that the effective sentence appropriate to that level of criminality was a fully-suspended term of imprisonment. For the reasons set out in (i) above I do not accept that those sentences reliably indicate the appropriate effective sentence in this case.

(iv) He submitted that the fact that the total weight of the growing plants and seeds was only 20.1 grams was perhaps "the most critical" of the objective circumstances of the cultivation offence, and pointed to a low degree of criminality. I do not accept that. Schedule 2 of the Act renders "not less than 20 plants" a commercial quantity; similarly, but as separate circumstances of aggravation, 500 grams of "cannabis plant material", and

> 100 grams of "cannabis seed" constitute a commercial quantity. Clearly, it is the number of plants, and not their weight, which is "most critical" for present purposes, though the weight of the material to which they give rise is also a significant matter.

(b) As to grounds 2(a)-(b) on pp2-3 Mr Robinson informed us that 6 cones of cannabis were involved in the first charge of supply, and 6 seedlings of cannabis in the second and third. He submitted that the appellant had not initiated these transactions, but had engaged in "opportunistic bartering", and not in a course of commercial supply, in the ordinary sense of those words. I do not consider that his Honour gave insufficient weight to the matters raised in grounds 2(a)-(b).

(c) As to ground (2)(c) on p3, I note that it is commonly the case that an accused's admissions constitute the evidence which incriminates him. There is nothing to suggest that his Honour failed to give such credit to the applicant as was appropriate, for promptly admitting his guilt on the cultivation charge. As to that, I consider that the applicant had little choice but to do so, the cannabis having been discovered on a search of the premises where he was staying. *R v Ellis* [1986] 6 NSWLR 603 shows that an admission of guilt of a crime otherwise unknown merits significant leniency additional to that attributable to a plea of guilty, the degree varying in accordance with the likelihood of guilt

being discovered and established. It is clear from the applicant's record of interview that the Police already had information about the transactions which led to the supply charges. The mere fact that his Honour did not discuss the mitigating effect of the admissions does not mean that that effect was overlooked. I consider there is no merit in this ground.

Conclusions

As is apparent from the foregoing, I consider that none of the grounds of appeal would be established. I accept Mr Cato's submission that taking into account the objective circumstances of these offences, and the applicant's subjective circumstances (in particular his relevant prior criminal history), the effective sentence of 3 years imprisonment with a nonparole period of 15 months cannot be said to lie outside the proper exercise of the extensive sentencing discretion of the learned Judge.

In reaching that conclusion I consider that it is very relevant that in passing the Misuse of Drugs Act only 5 years ago the Legislative Assembly fixed the maximum punishment for cultivating not less than 20 cannabis plants, at 25 years imprisonment. That is a very heavy discretionary maximum punishment; it is of course applicable only in the 'worst case' examples of this offence. By way of comparison, the Criminal Code (which came into force some 11½ years ago) provides that rioters who destroy various items of property, pirates and kidnappers for ransom face a maximum of 20 years

imprisonment; robbers, blackmailers, extortionists, persons causing grievous harm and persons conspiring to murder all face a maximum of 14 years imprisonment. I bear in mind the limited utility of such comparisons, in the absence of a specific and comprehensive 'grading' of offences in a sentencing statute. Nevertheless, to some extent it indicates the legislative evaluation of where the cultivation offence currently stands within the penal system. The legislature clearly intends that the cultivation of relatively few cannabis plants be treated as a very serious offence; see *R v Jackson* (1972) 4 SASR 81 at 87 and *R v Peel* [1971] 1 NSWLR 247 at 256, 262. It is the duty of the courts to uphold that statutory intention; they must not subvert it and should endeavour to give effect to it.

In my opinion the sentence of 3 years imprisonment implements the legislature's intention; it represents substantially the full length of the effective sentence appropriate to the criminality of the objective circumstances of the applicant's offences and his subjective circumstances, since he was unable to rely on a previous good character, or on any other substantial mitigating factors, his admissions of guilt not carrying substantial weight in the circumstances.

As to the appropriate order, I would adopt the approach in *McDonald v The Queen* (1992) 85 NTR 1 at pp3-5. Since no arguable case has been made out that his Honour's sentencing discretion miscarried, and no real element of injustice appears which might operate against the applicant if

leave to appeal were refused, I would refuse leave to appeal, and affirm the sentences imposed below.

ANGEL J and GRAY AJ:

This is an application for leave to appeal against sentence pursuant to s410(c) of the Criminal Code.

On 13 December 1994 the applicant pleaded guilty before the Chief Justice to three charges of unlawfully supplying a dangerous drug, cannabis, to other persons between 1 January and 25 May 1994, and one charge of unlawfully cultivating a commercial quantity of cannabis between 25 March and 25 May 1994.

The maximum penalty in respect of each of the unlawful supply charges was a $10,000 fine or five years imprisonment and the maximum penalty for the cultivating charge was 25 years imprisonment. The applicant successfully requested that two associated offences be taken into account, pursuant to s396 of the Criminal Code. He was sentenced to 18 months imprisonment in respect of each supply charge and three years imprisonment in respect of the cultivation charge. The four sentences were directed to be served concurrently, making an effective sentence of three years imprisonment. A 15 month non parole period was fixed.

When sentencing the applicant, the Chief Justice said:

> "You have also asked the Court to take into account certain other offences which were associated with those drug offences, and the court has agreed to do so. Those offences are that on 25 May 1994 you had in your possession a video cassette recorder,

reasonably suspected of having been stolen - - - . And further, that you unlawfully possessed a bong for use in the administration of a dangerous drug, contrary to section 12 of the Misuse of Drugs Act. - - -

The agreed facts are that on 25 May [1994] the police went to your home in Palmerston and located 104 plants which ranged in height from a few centimetres to about one metre, and which were growing in pots around the verandah and the garden. - - -

On further searching your premises the police located the video cassette recorder, two Walkman radios and a small bag containing cannabis seed, and the bong.

As to the cultivation of the cannabis plants, you told the police that when seedlings came up in the garden you put them in pots, in which they were found. You knew they were cannabis plants. You installed a drip system to water them, and you fertilised them. When asked why you grew the plants you said that you initially planted many more, saying that about a hundred, or something like that, had already died. When asked if you had any intention of selling them you admitted that you are in financial difficulties, and that your wife had difficulties with rent, and that your children were sick. But notwithstanding that situation, you denied that you intended to sell it but, rather, in your words, you 'just grew it for smoke'.

There was nothing found in or around the premises such as scales, plastic bags, foil and other paraphernalia which is often associated with the growing of cannabis for sale. But the other three [supply] offences indicate that you had something to learn of the value of the cannabis plants as a medium of exchange.

The first of those offences was committed when you decided to buy a video cassette recorder, which you knew had been stolen, by supplying the people who had brought it to you with a number of cones of cannabis and $20 in cash.

As to the second charge of unlawfully supplying a dangerous drug, you admitted that you were approached by another acquaintance for some cannabis, and you handed over about 6 seedlings, together with $10, in return for an AGEC Walkman cassette. Much the same transaction was conducted

in relation to the TEAC Walkman, which constitutes the third offence [of supply].

When questioned as to why you supplied cannabis to another person, you replied the people came to you and if they want a smoke, you give them a smoke. The court will deal with you, therefore, on the basis that although your objective was to get cannabis to smoke yourself, and give some away to others, you had started to embark on a course of conduct which showed a propensity to utilise the cannabis for commercial purposes."

His Honour then referred to the personal history and circumstances of the applicant, and continued:-

"Given the facts and circumstances already described, it was possible the Court would be able to deal with you by imposing a sentence of imprisonment for an appropriate time but then wholly, or at least substantially, suspending it upon your entering into a bond to be of good behaviour for some period. However, that course is not open to you."

His Honour then explained the reason a suspended sentence was "not open", viz:-

"You have suffered a number of convictions in relation to cannabis, dating from 1987, being at about the time when you took it up in substitution for alcohol. You have been before the courts on five occasions, 1987, 1989, 1990 and 1994, on a variety of drug-related charges, including possession, use and cultivation and supply of cannabis.

In the early days you were fined, but in 1990 you were convicted and sentenced to four months imprisonment on a series of drug-related offences which was suspended upon your entering into a bond that you would be of good behaviour for 18 months. To your credit, you did not offend in relation to drug matters during the period of that bond - - -.

In February 1994 you were convicted of a number of offences: for having an unregistered firearm, fined $300; being an unlicensed shooter, fined $300; possessing cannabis, fined $250; cultivating a trafficable quantity of cannabis, 28 days imprisonment; and for aggravated assault, being an

assault by a male upon a female, your de facto wife, you were sentenced to three months imprisonment.

That last sentence was suspended after you had served 28 days upon your entering into a bond that you would be of good behaviour for 12 months. That bond was entered into on 25 March of this year. It was to be supervised, but whatever may have happened in that regard you have come before this court in circumstances where the bond has clearly been breached.

- - - it is part of the agreed facts that on 25 May, that is just two months after you entered into the bond, the police found that you had 104 plants that you had been cultivating, and that clearly does amount to a breach of the bond.

- - - you will need to remember that the bond is still in place, although, because of the sentence that must be imposed upon you, you will probably have a restricted opportunity to commit further offences before it expires.

You have shown a persistent disregard of the law in relation to cannabis. You know it is unlawful to cultivate it, possess it or use it. You have been convicted for offences of that sort previously and suffered fines, a suspended gaol sentence of four months and a sentence of 28 days imprisonment.

You are not penalised again for that past offending but your record means that when you come to be dealt with on this occasion the court is unable to extend to you any mitigation on the basis that you are a first offender or a person of good character or that what you did on this occasion was a mere aberration. I must take into account that it was not just 104 plants that were found growing at the time that the police went to your place but about 100 more had died, by your own admission.

Even allowing for all the usual problems that seem to beset cannabis growers, which reduce the benefit which might be derived from the crop, yours was nevertheless far from being an insignificant or minor enterprise and the 104 plants, although mainly seedlings, clearly had the potential to grow much larger and produce a much more significant volume of that dangerous drug.

The law of the Northern Territory in regard to an offender such as you is quite clear. It is provided in the Misuse of Drugs Act that you must serve a term of actual imprisonment of not less than 28

> days. There are no particular circumstances which would cause me to be of the opinion that such a penalty should not be imposed in your case."

The applicant complained, inter alia, that the Chief Justice had given insufficient weight to the fact that there was no evidence that the applicant was cultivating for commercial gain, that the 104 plants were very small or merely seedlings with a total net weight of 20.1gms, and that minute amounts of cannabis were involved in the supply charges and that the applicant had made full admissions when questioned by the police. It was also said that undue adverse weight had been given to the applicant's prior criminal history.

We do not think there is any substance in these submissions. As to the cultivation count, the applicant had five times the number of plants that make a cultivation commercial. The Chief Justice correctly took into account that it was not just the 104 plants that were found growing at the time, but that 100 more plants had died by the applicant's own admission. The Chief Justice sentenced on the basis that although the applicant's objective was to get cannabis to smoke himself, and to give some away to others, he had "... started to embark on a course of conduct which showed a propensity to utilise the cannabis for commercial purposes".

The applicant's prior criminal history was highly relevant. The applicant's history demonstrated a contumelious disregard of the law. Leniency had been shown to this 26 year old applicant on previous occasions, and, as the present offences demonstrated, to no good purpose. In February 1990,

the applicant had received a suspended sentence for supplying and producing cannabis. On 28 February 1994, the applicant was sentenced to 28 days imprisonment for unlawful cultivation of cannabis. The present offences closely followed his release from prison. He has other drug convictions. The court was entitled to have regard to his history as an aggravating factor, *Veen (No 2)* (1988) 164 CLR 465, *Mulholland* (1991) 1 NTLR 1, *Babui* (1991) 1 NTLR 139.

The offending was not a minor or insignificant enterprise. The mere fact that the cultivation comprised seedlings at the time of police intervention does not reduce the applicant's culpability or the seriousness of the offending. There was potential for the applicant to profit considerably. As already noted, the applicant had well over the number of plants constituting a commercial crop. The applicant's prior history of offending emphasised the need for a sentence containing a strong element of personal deterrence; and, in our view, the learned Chief Justice was within his sentencing discretion in imposing a sentence of three years imprisonment for the cultivation.

In our view, the learned Chief Justice was also entitled to impose the sentences he did in relation to the supply charges. Those offences evidenced the sale of cannabis and plants for commercial gain. They were over an extended period. The Chief Justice did not accumulate the sentences, but directed that they be served concurrently. An overall sentence of 18 months for offences of this kind by an offender of this kind was not manifestly excessive.

In our view, the effective sentence of three years imprisonment with a non parole period of 15 months for a cultivation of this size and the supply of that drug for gain on three occasions, given the need for personal deterrence, was not manifestly excessive.

We discern no error of sentencing principle adverse to the accused. The effective sentence and non parole period are not manifestly excessive.

The application for leave to appeal against sentence is refused.
