CITATION:	*The Queen v Hiko (No 2)* [2018] NTSC 65
PARTIES:	THE QUEEN
	v
	HIKO, Quentin Tahu
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21744772
DELIVERED ON:	13 September 2018
DELIVERED AT:	Darwin
HEARING DATE:	5 and 6 September 2018
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – CONTESTED FACTS HEARING

Misuse of Drugs Act (NT) s 5

Filippou v The Queen (2015) 89 ALJR 776, *Leach v The Queen* (2007) 230 CLR 1, *The Queen v Olbrich* (1999) 199 CLR 270, considered.

REPRESENTATION:

Counsel:

Crown:	C Dixon
Accused:	S McMaster

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Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Maleys

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Hiko (No 2) [2018] NTSC 65
No. 21744772

BETWEEN:

THE QUEEN

AND:

QUENTIN TAHU HIKO

CORAM: GRANT CJ

REASONS FOR FINDINGS ON
CONTESTED FACTS HEARING

(Delivered 13 September 2018)

[1] The accused is charged by indictment dated 3 January 2018 with the supply of a commercial quantity of cannabis contrary to s 5(1) of the *Misuse of Drugs Act* (NT). He has pleaded guilty to the charge, with certain facts agreed and certain facts in dispute to be determined by the sentencing court.

The agreed facts

[2] It is agreed that on or about 20 April 2017 Chris Durilla ("Durilla") came into possession of a commercial quantity of cannabis contained in four separate packages. Durilla attended the Darwin Airport early on the morning of 21 April 2017. There is no contest that he was dropped

at the airport by the accused on that morning. Durilla was booked on a flight to Alyangula, which is a township on Groote Eylandt. A drug detection dog gave a conditioned response to Durilla's baggage, the baggage was searched and the cannabis was found, together with 700 small, empty clip seal bags. Police arrested Durilla. The collective weight of the cannabis was 602.17 g.

[3] The accused's fingerprint was found on the outside of one of the packages containing the cannabis. The accused's residence was subsequently searched and his fingerprints were found on a Tupperware container holding 27.57 g of cannabis, scales and clip seal bags, and on the clip seal bag in which the 25.57 g of cannabis was stored.

The facts in dispute

[4] The facts concerning the source of the cannabis, and the interaction between the accused and Durilla leading up to Durilla's arrest are in dispute. That dispute concerns whether the accused provided Durilla with the cannabis detected at the airport; whether the accused entered into an arrangement with Durilla for him to transport the cannabis to Alyangula and sell the cannabis on behalf of the accused; and whether that arrangement involved in the return of profits from that supply to the accused as part of that planned enterprise.

[5] A court may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established

beyond reasonable doubt: *The Queen v Olbrich* (1999) 199 CLR 270 at [27]–[28]; *Leach v The Queen* (2007) 230 CLR 1 at [41]; *Filippou v The Queen* (2015) 89 ALJR 776; [2015] HCA 29 at [64], [66]. The offender bears the burden of proving on the balance of probabilities matters which are submitted in his or her favour: *Filippou v The Queen* at [64], [66]; *The Queen v Olbrich* at [27]–[28].

[6] As the matters detailed in [4] above are adverse to the accused's interests, it is incumbent on the Crown to prove those matters beyond reasonable doubt before the court may act on them in the sentencing exercise. However, the accused does not dispute that he was peripherally involved in the transaction by which Durilla came into possession of the cannabis, and that involvement constituted a "supply" in the relevant sense. To the extent that the accused seeks to establish that the supply was not commercial in nature, and that he only stood to procure a relatively small quantity of cannabis for that involvement, the onus is on the accused to establish those matters in his favour on the balance of probabilities.

The tendency evidence

[7] In making those determinations, the Crown is entitled to rely on material which has previously been the subject of a tendency ruling in *The Queen v Hiko* [2018] NTSC 35. The tendencies alleged by the Crown are that the accused had: (a) a tendency to engage in the supply of cannabis plant material by sourcing the material and using other

people to transport and/or sell the cannabis on his behalf; and (b) a willingness to supply cannabis plant material to other people.

[8] The tendency evidence adduced relates to 12 acts of the supply or purchase of cannabis for which the accused was found guilty in this Court on 7 August 2014. Those acts took place between 1 November 2013 and 29 January 2014, and the accused received $22,320 in cash during that same period obtained directly or indirectly from the unlawful supply of that cannabis. The acts relied upon by the Crown to establish the tendency are described in a set of Agreed Facts which essentially replicate the facts on which the accused pleaded guilty to the previous 12 acts of supply and purchase of cannabis.

[9] Those facts show in large part a high degree of specificity of conduct and a high degree of similarity between the different occasions. The persons to whom the cannabis was supplied were generally indigenous people. The cannabis was then transported to remote communities for the purpose of sale. The profit in a previously agreed amount was then returned to the accused.

The assessment of Durilla's oral evidence

[10] Durilla gave evidence during the disputed facts hearing. The evidence given during examination-in-chief, so far as is relevant for these purposes, may be summarised as follows. He first met the accused at the Hibiscus Tavern on the night before he was due to fly back to

Alyangula. They drank together at the Tavern before walking back to the accused's residence, at which they arrived somewhere between 9 and 10 o'clock at night.

[11] They then drank alcohol and smoked cannabis in the accused's backyard, during which time the accused asked Durilla to take a quantity of cannabis back to Alyangula and sell it on his behalf for $100 a "deal bag". The accused told Durilla that the sale of the cannabis would yield proceeds of between $50,000 and $60,000. Durilla's recompense for the transportation and sale of the cannabis would be an entitlement to half of the cannabis. The proceeds of the sale of the other half of the cannabis would be returned to the accused.

[12] Durilla gave the accused his mobile phone number to enable the accused to make contact with him on Groote Eylandt. The accused told Durilla that if he was apprehended by police Durilla should not mention the accused's name. The following morning the accused woke Durilla and took him to the airport.

[13] Durilla was then subjected to cross-examination directed to both undermining his account of the dealings with the accused, and undermining his credibility generally. The narrative events put by defence counsel in cross-examination were that Durilla had known the accused for some years; that Durilla had approached the accused through an intermediary looking to source cannabis to take back to

Alyangula; that the accused had identified a person who might be able to supply Durilla with cannabis; that Durilla had then purchased the cannabis from that source independently of the accused; that Durilla had attended the accused's residence earlier on the day of 20 April 2017 to provide the accused with an amount of cannabis in return for that introduction; that Durilla had then returned later that afternoon and attended the Hibiscus Tavern with the accused and gave him a further small amount of cannabis; that upon their return to the accused's residence later that night Durilla had asked the accused to drop him at the airport the following morning; that the accused had woken Durilla the next morning and had helped Durilla pack his belongings, including the cannabis (thus explaining the accused's fingerprint on a bag containing the cannabis); and that the accused had then taken Durilla to the airport.

[14] Durilla denied the existence of any arrangement under which he had asked a family member to approach the accused to arrange the purchase of cannabis. Durilla maintained that he was unaware of any such person as suggested by defence counsel in cross-examination. As I will come to shortly, this was a matter in respect of which the accused gave evidence in the disputed facts hearing.

[15] During the course of cross-examination, Durilla initially denied having met the accused before being approached by him at the Hibiscus Tavern on the night in question. However, later in the cross-

examination Durilla appeared to concede in response to a series of leading questions that he had met with the accused earlier that evening, and that they had walked together to the Hibiscus Tavern and drank there before returning to the accused's residence. He said on their return the accused gave him the cannabis and he packed it into his bag. However, in that passage of cross-examination Durilla maintained that it was not his cannabis, that it had been given to him by the accused, and that the accused had asked him to sell it.

[16] I find Durilla's initial account that the accused approached him without prior arrangement at the Tavern, and engaged him to transport the cannabis to Groote Eylandt and sell it there, to be inherently improbable. I consider it more plausible that some prior arrangement had been made for Durilla to meet with the accused in order to take possession of the cannabis for the purpose of transporting it to Groote Eylandt and selling it there. However, the fact that Durilla's account is not reliable in that aspect does not necessarily lead to a rejection of other aspects of his evidence. In making that assessment, I do not consider Durilla's account that this was the first occasion on which he had met the accused to be implausible.

[17] Durilla was then cross-examined about a sequence of statements he made to police. The first was an electronic record of interview conducted on the day of his arrest on 21 April 2017. The second was a

statement made to police in September 2017. The third was a statement made to police in June 2018.

[18] So far as the electronic record of interview was concerned, Durilla conceded during cross-examination that he made no mention of the accused's involvement during the course of that interview. Durilla said that was because he was mindful of the accused's warning not to mention his name if he was arrested by police.

[19] Durilla's initial account to police was that he had stayed at his sister's unit the previous night. He told them that he caught a taxi to the airport. He told police that he did not know the cannabis was in his backpack. He told them that some unknown person must have put the cannabis in his bag. He told police that if he had discovered the cannabis following his arrival to Groote Eylandt he would have reported the matter to police. Durilla conceded in cross-examination that these were lies, but maintained that they were told to police in an attempt to escape criminal responsibility and to conceal the involvement of the accused.

[20] During the course of that record of interview Durilla eventually broke down in terms of his knowledge of the presence of the cannabis in his bag. He told police that he had bought the empty clip seal bags at the Casuarina Shopping Centre for "three dollars each". He told the police he had bought the bags for the purpose of selling the marijuana. He

told the police that he had put the cannabis in his bag. He told the police that he had purchased it from a "white guy". He told police that somebody had given him $11,000 to purchase the cannabis. He told police he was going to deliver the cannabis to a person on his arrival at Groote Eylandt in exchange for a small amount of that cannabis. He told police that he wasn't personally going to be involved in the sale of the cannabis. Of course, it was not suggested by defence counsel in cross-examination that these were also lies told during the initial record of interview for the purpose of minimising his culpability and concealing the involvement of the accused.

[21] Durilla agreed that during the course of the record of interview police had told him that the value of the cannabis found in his bag was in the order of $64,000. It was then suggested to him that the evidence he gave in examination-in-chief to the effect that the accused had told him that the cannabis could be sold for between $50,000 and $60,000 was a figure he derived from the information provided by police during the course of the interview. The accused accepted that proposition during the course of cross-examination. The matter was then subject to re-examination, the gist of which was that the accused had first told him that the retail value of the cannabis was in the order of $50,000-$60,000 during the course of the drive from the accused's residence to the airport on the morning of 21 April 2017. That figure is broadly consistent with the value which was suggested to him by police during

the course of the record of interview. I do not consider that there was any necessary or material inconsistency between the answers given by Durilla in relation to those matters during the course of his evidence.

[22] Durilla was also cross-examined in relation to various aspects of the statement he gave to police in September 2017. It was suggested to him that in that statement he told police that the accused had given him the cannabis and told him that someone would collect it from him when he arrived in Alyangula. Durilla agreed that account was also not true, at least to the extent that it represented some other person would collect the cannabis and that Durilla would not be involved in its sale.

[23] Durilla was then cross-examined in relation to the statement he gave to police in September 2017. The thrust of that questioning was that he had been told that if he gave evidence against the accused he would receive a shorter sentence. Durilla agreed that was the case. Durilla also agreed that was the first time he had said that the accused had given him the cannabis. Durilla also agreed that he had given that account in order to get the "best sentence" he could. In saying that, however, Durilla maintained his insistence that the cannabis had been given to him by the accused.

[24] Durilla gave a further statement to police in June 2018 in which he says for the first time he gave the full account of his and the accused's involvement in the transaction. I bear in mind in my assessment of

Durilla's evidence the possibility that it might be unreliable for the reasons the defence suggests. He was no doubt involved in the transportation and intended sale of the cannabis. He pleaded guilty to that involvement. He has received a discount on sentence for implicating the accused in the matter, and his desire to keep that discount might conceivably provide some incentive to maintain a false account.

[25] However, at the time Durilla gave the statement to police in June 2018, and at the time he gave evidence during the course of the contested facts hearing, he had already been sentenced for his involvement, he had received a reduced sentence for his assistance to authorities, and he had no specific motive to lie in that account. What he did have was an obligation under the terms of the order suspending sentence to give evidence in the proceedings against the accused to the best of his ability. Bearing those matters in mind, I reject the suggestion that Durilla's evidence implicating the accused was actuated by a specific motive to lie.

[26] Durilla frankly accepted his involvement in the transaction. He frankly accepted that he initially lied to police about the circumstances in which the drugs came into his possession. He frankly accepted that the subsequent decision to implicate the accused was motivated by a desire for a reduction in his own sentence, while at the same time maintaining that the substance of his account was true. Those two states of affairs

are not mutually exclusive. A desire or motive to achieve the best result in his own sentencing proceedings is not inconsistent with his account also being true.

[27] Throughout the course of his evidence Durilla did not resile from the account that he had received the cannabis directly from the accused and that the arrangement was he would sell it and return proceeds from the sale of at least some of that cannabis to the accused. Based on my impression of his demeanour while giving evidence, and the context in which that evidence was given, I accept that Durilla's evidence is reliable in those essential aspects. However, there are some matters in which his evidence is too uncertain for any adverse finding to be made against the accused in some particular respects. I will come to those matters later in these reasons.

Assessment of the accused's oral evidence

[28] I come then to my consideration of the accused's evidence. That evidence is broadly consistent with the narrative events put by defence counsel to Durilla during the course of cross-examination. That is, the accused was asked through a family friend of his wife if he could get some cannabis for Durilla. He put that family friend in contact with a supplier he knew to have cannabis on the understanding that Durilla would provide him with a small amount of cannabis by way of payment for the introduction. Later that day Durilla dropped 7 g of cannabis at the accused's house and said he was going to take it back to sell on

Groote Eylandt. Durilla then came back at approximately 2 o'clock on the following afternoon wanting to purchase more. He then came back later that afternoon and they went to the Hibiscus Tavern together before returning to the accused's house. Durilla asked the accused if he could give him a lift to the airport. The accused woke up at approximately 5 o'clock the following morning, woke Durilla, helped Durilla pack his belongings, including the cannabis, and then drove him to the airport.

[29] The first thing to notice about the accused's account is that he declined to identify the unnamed family member. That was in circumstances where the identification of this unnamed person would not further incriminate the accused, and, on the accused's account, would not have incriminated the unnamed person. Of course, failing to identify that person closes off any objective enquiry as to the truth of the account. If some name was given enquiries might be conducted to determine whether such a person existed. If that person was found to exist, he could be questioned about the account so that some assessment could be made about its validity. This is a matter which bears upon the assessment of the reliability of the accused's evidence.

[30] It is true to say that there might be a number of reasons for the accused's refusal to name the family friend (or the person who supplied the cannabis). The reasons proffered by the accused during the course of re-examination were that he was in a family feud with the family

friend involved, and implicating that person would inflame matters. So far as his refusal to name the supplier of the cannabis was concerned, the accused said doing so would cause “real damage”.

[31] I find both those reasons unconvincing. In my assessment of the accused’s demeanour, and the plausibility of his evidence in context, I find that his refusal to name the family friend is directed to avoiding any objective enquiry into the truthfulness of the account. Further, I reject that account on the basis that in my assessment it is a confection designed to minimise his culpability for the offending.

Relevant findings of fact

[32] In both my rejection of the accused’s account concerning his involvement, and in my acceptance of Durilla’s account in its essential aspects, I take into account the inference that can be drawn from the evidence concerning tendency which I have already detailed. I consider that tendency makes it more probable that the accused was actively and directly involved in the supply of the cannabis to Durilla, and that the purpose of the supply was for Durilla to sell the cannabis on Groote Eylandt and return some of the proceeds of that sale to the accused.

[33] In reaching that conclusion I also bear in mind the other evidence, including that the accused took Durilla to the airport on the day in question and the presence of the accused’s fingerprints on one of the

packages containing the cannabis. While the accused has sought to identify some reasonably possible explanation inconsistent with guilt for the presence of those fingerprints on the packages, I reject his evidence in that respect. In doing so, I am mindful that in determining facts adverse to the accused on the basis of Durilla's account it remains necessary to be satisfied beyond reasonable doubt of those facts.

[34] I am satisfied beyond reasonable doubt on the basis of the prosecution evidence that the accused provided the cannabis to Durilla; the accused entered into an arrangement with Durilla for him to transport the cannabis to Alyangula and sell the cannabis; and that arrangement involved the return of some of the proceeds from those sales to the accused. However, I do not find Durilla's evidence sufficiently certain and cogent in relation to the precise details of that arrangement to make any findings against the accused concerning those details. In particular, I am unable to find how much the accused was to receive from the sale beyond the fact that it was some not insubstantial commercial reward. It also follows from these findings that I do not accept the accused has proved on the balance of probabilities that his only return was to be a small quantity of cannabis.
