Snell v Davis [2008] NTSC 26

PARTIES:	SNELL, NAOMI JANET
	v
	DAVIS, STUART AXTELL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 5 of 2008 (20717154)
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JUDGMENT OF:	MILDREN J
APPEAL FROM:	Court of Summary Jurisdiction

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Misuse of Drugs Act, s 9(1), s 9(2)(d), s 9(2)(e), s 37(2), s 37(5)
Sentencing Act, s 5(2)

Citations:
Followed:
Wong v The Queen (2001) 207 CLR 584

Referred to:
Bakos v The Queen [2006] NTCCA 5
Maroney v The Queen [2003] 216 CLR 31
Miller v Burgoyne [2004] NTSC 47
Ross v Toohey [2006] NTSC 92

REPRESENTATION:

Counsel:

Appellant:	I Rowbottam
Respondent:	B Wild

Solicitors:

Appellant:	Withnalls
Respondent:	Office of the Director of Public Prosecutions

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

Snell v David [2008] NTSC 26
No. JA 5 of 2008 (20717154)

BETWEEN:

NAOMI JANET SNELL
Appellant

AND:

STUART AXTELL DAVIS
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 18 June 2008)

Introduction

[1] This is an appeal against a sentence of imprisonment for four months suspended on the appellant entering into a Home Detention Order for a period of four months imposed by the Court of Summary Jurisdiction in respect of pleas of guilty to three counts of possession of dangerous drugs contrary to s 9(1) and s 9(2)(e) of the Misuse of Drugs Act.

[2] The appellant was originally charged with six counts of possession. Following pleas to counts 1–3, the remaining counts, for which she was jointly charged with her de facto partner Mulhall, were withdrawn.

[3] The facts were that on 21 June 2007 police executed a search warrant at the home of the appellant and Mulhall and located a total of 8.74 grams of methyl amphetamine located in 12 different bags in various locations in the residence. Also located in two different bags were a total of 26 MDMA tablets weighing a total of 7.06 grams. There was also a total of 268.7 grams of cannabis located in various clip seal bags, including a small plant in a pot in the yard of the premises and 1.7 grams located in a yellow bowl on a table at the front of the residence. The total of the cannabis if sold in the Darwin market was about $8,000. The MDMA tablets were valued at about $1,300. The value of the methyl amphetamine was approximately $5,400.

[4] Each of the drugs was a "trafficable quantity" under the Act.

[5] At the time of sentencing the appellant was 29 years of age, with an eight year old son, whose father had been killed in a road accident in December 2003. In May 2005 the appellant's five year old daughter was also killed in a road accident when the appellant, who was driving, ran off the road and over-corrected causing the vehicle to rollover. After that it was put that the appellant's life spiralled out of control and she became addicted to drugs. In August 2006 she began a de facto relationship with Mulhall. At the time of sentencing the relationship with Mulhall had dissolved although the appellant was nine weeks pregnant to him.

[6] The appellant indicated a plea of guilty to the charges at an earlier time, had cooperated with the police and made admissions. On her first appearance in

the Court of Summary Jurisdiction, she was referred for assessment as to her suitability to enter into the CREDIT program. She was assessed as suitable and her bail was varied to allow her to participate in the program. Bail was enlarged on 12 October and 9 November following progress reports to the Court and on 9 November the matter was adjourned for a final progress report on 7 December. At the behest of the Court's CREDIT Clinician, Mr John Maher, the matter was brought forward to be finalised on 28 November 2007.

[7] At the hearing of the plea on 28 November, four reports including the final report were tendered. In the initial Assessment Report it was indicated that the appellant had stated that Mulhall did not use drugs and that the appellant had been irregularly employed as a casual hairdresser for the past four years, her ability to work having been compromised by her drug use. She indicated that she had been using illicit drugs for the past 10 years, had been a dependent user of amphetamines and ecstasy for the past three years and presented as being serious in her determination to give up her drug habit. It was recommended that she be admitted to the program on condition that she attended a weekly counselling program.

[8] The first progress report indicated that the counsellor was of the opinion that the appellant's drug use was closely linked to grief felt for the loss of the appellant's daughter, that she was participating very well in the counselling process and had admitted using amphetamines once during the past weekend, which she attributed to loneliness as her partner and son were

away and she had had sad thoughts about her daughter. Nevertheless the report indicated that she looked physically healthier, was making a good effort and demonstrating fair progress and had increased her work load.

[9] The second progress report was more positive with no drug use for the past 5 weeks and noticeable improvement in her physical appearance. The report indicated "very good progress", but that it was "unfortunate that she has to deal with the complications of a failing and domestically violent relationship whilst in treatment".

[10] The final report was very positive, concluding that she had successfully completed the program and was now receiving support from her family and friends which had not been available to her previously. She expressed an intention to return to her family in Queensland, as her step-mother was a psychologist who could support her during her early abstinence. A pathology report from blood collected on 28 November 2007 was negative for cannabis, cocaine, morphine, methamphetamines and benzodiazepines.

The Remarks on Sentencing

[11] The learned Magistrate, in her sentencing remarks indicated that the quantities of the methamphetamines and MDMA were a long way from being a commercial quantity, but the quantity of cannabis was halfway to being a commercial quantity which was "a significant matter in sentencing".

[12] During the sentencing hearing counsel for the appellant submitted that he was not going to call evidence to rebut the presumption of an intention to

supply because she was sharing drugs with Mulhall and also was intending to supply herself. The learned Magistrate indicated that if that was her intention, the appellant would need to give evidence, because of the quantities and values of the drugs concerned and as to whose money purchased the drugs, the appellant's counsel having submitted that the money came from Mulhall. That invitation was not accepted by her counsel.

[13] Counsel for the prosecution advised the Court that it was agreed that there was "a supply in the circumstances of supplying persons within the household".

[14] The learned Magistrate after referring to inconsistent statements made by the appellant to her counsellor about whether or not Mulhall was a drug user said in her sentencing remarks:

> "She now says that he's a heavy user and these are inconsistent statements and in my view they do not reflect well on the defendant who seems to be prepared to say whatever she wishes, or whatever she thinks is best to suit the immediate situation. I have been given no explanation how this quantity of drugs could have been afforded by the defendant and her former partner. I decline to find that she was an innocent conduit for her ex-partner. I do not find that she intended to supply the cannabis for commercial gain, but I find there is insufficient evidence before the Court for finding that all this cannabis was for use by her ex-partner."

[15] As to the results of the CREDIT program, the learned Magistrate made a number of comments, not all specifically addressed to the appellant, to the effect that:

- The program is relatively short and the programs should be longer, more intensive and subject to random urinalysis on a regular basis;

- After 10 years of drug use it is not possible to say there would be “no further province” (stet) but there had been some progress which would be reflected in the sentence;

- The CREDIT program should be case managed by individual magistrates. This case had been virtually taken out of the hands of the Court and the case management had been “usurped” because the Court had not agreed to a final report being prepared as early as 28 November;

- The courts should not condone continued drug use during the CREDIT program; and

- The objective factors called for a reasonable period of imprisonment to be actually served but there were a combination of subjective factors which persuaded the Court that the appropriate option was home detention.

[16] As part of the home detention order, the learned Magistrate ordered the appellant to submit to random breath testing and urinalysis every five days.

The Grounds of Appeal

[17] The appellant claims that the learned Magistrate made specific errors of fact and law and that the sentence imposed was manifestly excessive. It is convenient to deal with the grounds alleging error first.

Ground 4 – That the learned Magistrate erred in considering s 37(6) of the Misuse of Drugs Act, particularly in the face of concessions made by the respondent

[18] There were two aspects to this submission. First it was contended that the learned Magistrate, in order to have made an adverse finding in relation to the question of supply, erred because there was no evidence of a supply beyond that which the appellant conceded and that proof of any supply beyond that which was conceded needed a finding of fact beyond reasonable doubt upon positive evidence.

[19] The learned Magistrate made no finding of an intention to supply other than what the appellant had conceded. All that was said was that the Court was not prepared to find that all the cannabis was for use by the appellant's ex-partner. This finding did not go beyond the concession made by the prosecution in so far as by that finding, the Court may have intended to convey an intention by the appellant to supply herself as well. Counsel for the appellant, in his submissions to the Court below as well as in this Court, submitted that an intention to supply oneself was still a supply, relying on *Maroney v The Queen*[1] There may be some doubt as to whether that case is

[1] *Maroney v The Queen* [2003] 216 CLR 31

as wide as the proposition contended for, but as the appellant ultimately abandoned this ground of appeal it is unnecessary to consider it further.

Ground 2 – That the sentence erred in comparing and contrasting the offending with possession of a commercial quantity of cannabis

[20] Section 9(1) of the Misuse of Drugs Act provides that it is an offence to unlawfully possess a dangerous drug. "Dangerous drug" is defined by reference to a substance or thing or a plant specified in Schedule 1 or 2. Cannabis plant material is in Schedule 2 which provides that a trafficable quantity is 50 grams and a commercial quantity is 500 grams. Section 9(2)(d) imposes a maximum penalty of imprisonment for 14 years where the amount of the drug is a commercial quantity and $10,000 or imprisonment for 5 years where the amount of the drug is only a trafficable quantity.

[21] Counsel for the appellant submitted that the learned Magistrate fell into error in concluding that it was "a significant matter in sentencing" that the quantity of plant material was "halfway to being a commercial quantity". It was put that the quantity fixed by the legislature is arbitrary and ought not to be used as a measuring stick of the objective criminality of the offending. Counsel for the respondent submitted that the quantity of the drugs was not the sole or even the principal factor which the Court took into account in sentencing. Neither side referred me to any authorities.

[22] In *Wong v The Queen*[2] the High Court considered the relevance of the weight of a narcotic in sentencing an offender for being knowingly concerned in the importation of a commercial quantity of heroin, contrary to s 233B of the Customs Act (Cth), which like the Misuse of Drugs Act provided for a differing range of maximum penalties depending on the quantity of the drug being imported. Gaudron, Gummow and Hayne JJ said[3] that the selection of the weight of the narcotic as the chief factor to be taken into account in fixing sentence represented a departure from principle, although their Honours also said that within both categories of offending, i.e. where the narcotic was a commercial quantity or a trafficable quantity, the particular quantity can have significance in fixing sentence[4]. Their Honours pointed out that the Court is obliged to consider and take into account all of the circumstances known to the Court and referred to in s 16A of the Crimes Act (Cth). It was therefore wrong to have given primacy to weight as the chief sentencing factor. Kirby J reached the same conclusion[5].

[23] I consider that the same approach is warranted by s 5(2) of the Sentencing Act and that it would be appellable error if the learned Magistrate had given primacy to the weight of the plant material. However, I consider that it is clear that no such error was made. The weight of the material is a relevant factor. The learned Magistrate's sentencing remarks indicate that she did not give primacy in consideration of the appropriate penalty to the weight of the

[2] *Wong v The Queen* (2001) 207 CLR 584
[3] *Wong v The Queen* (2001) 207 CLR 584 at 609 [70]
[4] *Wong v The Queen* (2001) 207 CLR 584 at 609 [63]
[5] *Wong v The Queen* (2001) 207 CLR 584 at 631-632 [129]-[134]

plant material, but took into account all the factors relevant to a properly balanced sentence. This ground of appeal is not made out.

Ground 3 – The learned Magistrate failed to give proper weight to the appellant's participating in the CREDIT program

[24] The nature and purposes of the CREDIT program was discussed by Olsson AJ in *Miller v Burgoyne*[6] and it is unnecessary to repeat what his Honour said on that occasion in detail. Suffice it to say that his Honour pointed out that in cases where an offender has successfully completed the program general deterrence will normally have ceased to be a or the predominant factor in sentencing, particularly in cases involving first offenders where there are significant mitigatory factors also to be considered and where the level of offending is not anywhere near the top of the scale. In that case, the offender had pleaded guilty not only to possession of a trafficable quantity of cannabis, but also to four counts of supply. The learned Magistrate had imposed a sentence of imprisonment of four months imprisonment suspended after having served 7 days. The offending in that case did not attract the mandatory minimum sentence of 28 days required by s 37(2) of the Misuse of Drugs Act. In allowing the appeal and ordering the sentence to be fully suspended on conditions, his Honour said that such an approach tended to undermine the efficacy of the program which was designed to encourage rehabilitation. Nevertheless, as his Honour observed, there is no hard and fast rule that successful participation in the program would automatically result in a fully suspended sentence. The decision in

[6] *Miller v Burgoyne* [2004] NTSC 47

that case was subsequently approved by the Court of Criminal Appeal in *Bakos v The Queen*[7].

[25] The learned Magistrate's sentencing remarks in the instant case indicated that general deterrence must have been given more prominence than it deserved in order to arrive at the conclusion that "the objective factors in this case calls for a reasonable period of imprisonment to be actually served", but because of mitigatory factors which were identified the sentence would be suspended on entering into a home detention order. As I pointed out in *Ross v Toohey*[8] home detention is almost as serious as a term of actual imprisonment and that home detention is, in fact, a form of imprisonment and there may be very serious consequences if the conditions are breached.

[26] It was submitted that the learned Magistrate's remarks concerning the alleged "usurpation" of the case management process, the nature of the treatment program itself, "some progress" as a result of the completion of the program and the conditions of the home detention order which required random breath and urinalysis every five days indicated that the learned Magistrate failed to accord proper weight to the completion of the program by the appellant. I accept this submission. First, as to the nature of the program, this was outlined in the assessment report of 13 September 2007. When this report was first considered and the appellant granted bail to

[7] *Bakos v The Queen* [2006] NTCCA 5
[8] *Ross v Toohey* [2006] NTSC 92 at [18]

participate in the program, the Court, constituted by a different Magistrate, impliedly, if not actually, approved the suggested program. It is plainly unjust to fail to give appropriate weight to the program because a different Magistrate thinks that the program is inadequate. Second, the fact that a final report was prepared without a request from the Court was not the appellant's doing. If the Court considered that the final report was premature, it ought to have adjourned the sentencing hearing and admitted the appellant to bail to continue in the program until it was satisfied that a final report was appropriate. However that may be, in this case the person in charge of the program had reported to the Court that the appellant had satisfactorily completed the program, so there may have been little point to such a course except to establish the Court's authority. Thirdly, the conditions requiring testing every five days indicates that the Court, contrary to the facts contained in the report, did not accept that the program had been satisfactorily completed when there was no evidence that this may not have been the case, particularly in the light of the pathology report from blood collected on 28 November 2007. Fourthly, the evidence showed that the appellant had been drug dependent for many years. Drug dependency is a matter which sometimes is a mitigatory factor; on other occasions it may lead to a longer sentence if there is a serious risk of reoffending. Consistently with s 37(5) of the Misuse of Drugs Act in this case I consider that it is a mitigatory circumstance which ought to have been given weight, in the light of the completion of the program. The imposition of a home

detention order under the conditions specified indicates that not enough weight was given to this factor.

Conclusions

[27] For the reason already discussed, I consider that the appellant has demonstrated error and, on those circumstances, it is not necessary to consider the remaining grounds of appeal.

[28] It now falls to me to exercise the discretion afresh. No complaint is made about the head sentence. The appellant's submission is that the sentence should have been fully suspended. I agree.

Orders

[29] (1) The appeal is allowed and the sentences imposed by the learned Magistrate are set aside.

(2) In lieu thereof, the appellant is convicted on each count and there will be an aggregate penalty of imprisonment for four months effective from the date of this order, suspended forthwith. I fix a period of 18 months from the date hereof as the period during which the appellant is not to reoffend if she if to avoid the consequences of s 43 of the Sentencing Act.
