Rioli v The Queen [2010] NTCCA 13

PARTIES:	RIOLI, John Patrick 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 14 of 2010 (20933276)
DELIVERED:	18 October 2010
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JUDGMENT OF:	SOUTHWOOD, BLOKLAND AND BARR JJ
APPEALED FROM:	MILDREN J

CATCHWORDS:

SENTENCE – Appeal against sentence – supply of cannabis to a child in an Aboriginal community – manifestly excessive – appeal allowed.

Misuse of Drugs Act (NT) s 5(1) & s (2)(a)(iii)

Clarke v R [2009] NTCCA 5
Cranssen v The King (1936) 55 CLR 509
Daniels v The Queen (2007) 20 NTLR 147

REPRESENTATION:

Counsel:

Appellant:	I Read
Respondent:	W J Karczewski QC

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
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

Rioli v The Queen [2010] NTCCA 13
No. CA 14 of 2010 (20933276)

BETWEEN:

JOHN PATRICK RIOLI
Appellant

AND:

THE QUEEN
Respondent

CORAM: SOUTHWOOD, BLOKLAND AND BARR JJ

REASONS FOR JUDGMENT

(Delivered 18 October 2010)

Southwood J:

Introduction

[1] On 28 April 2010, the appellant was convicted of three counts of supplying cannabis to a child contrary to s 5(1) and (2)(a)(iii) of the *Misuse of Drugs Act* (NT). He was sentenced to an aggregate sentence of two years and three months imprisonment to be suspended after the appellant had served six months of the sentence in prison.

[2] The appellant has appealed against his sentence. The grounds of appeal are:

1. The sentencing judge erred in applying the sentencing principles enunciated in *Daniels v The Queen*[1] to this case.

2. The sentencing judge erred in finding that the significant difference in age between the applicant and the child was an aggravating circumstance.

3. The sentence was manifestly excessive.

Section 5 of the Misuse of Drugs Act

[3] Subsections 5(1) and 2(a)(iii) of the *Misuse of Drugs Act (NT)* state:

> (1) A person who unlawfully supplies, or takes part in the supply of, a dangerous drug to another person, whether or not:
>
> (a) that other person is in the Territory; and
>
> (b) where the dangerous drug is supplied to a person at a place outside the Territory, the supply of that dangerous drug to the person constitutes an offence in that place,
>
> is guilty of a crime.
>
> (2) A person guilty of a crime under subsection (1) is, subject to section 22, punishable on being found guilty by a maximum penalty of:
>
> (a) Where the amount of the dangerous drug supplied is not a commercial quantity:
>
> (i) …
>
> (ii) …
>
> (iii) where the dangerous drug is a dangerous drug specified in Schedule 2, the offender is an adult and the person to whom it is supplied is a child – imprisonment for 14 years; …

[1] (2007) 20 NTLR 147.

[4] A child is defined by s 3 of the *Misuse of Drugs Act (NT)* as a person who has not attained the age 18 years.

[5] As the appellant had previously been convicted of possessing a dangerous drug, s 37(2) of the *Misuse of Drugs Act (NT)* was activated and the sentencing judge was required to sentence the appellant to serve a term of actual imprisonment of not less than 28 days, unless having regard to the circumstances of the offences and the applicant, the sentencing judge was of the opinion that such a sentence should not be imposed.

The facts

[6] Following is a summary of the facts as found by the sentencing judge.

[7] Both the appellant and the child are of Aboriginal descent. At the time of the offending the appellant was 46 years of age. He lived in Pirlangimpi. He lived next door to the child's grandmother with whom the child was residing. The child was 15 years of age. Both the appellant and the child were cannabis users.

[8] On three occasions between 1 June 2009 and 29 September 2009 the child attended the appellant's home and on each occasion she smoked two or three bongs of cannabis which was given to her by the appellant. It is likely that the child asked the appellant if she could have some cannabis. There was no evidence before the sentencing judge about how much cannabis was in each of the bongs of cannabis the child smoked.

[9] On each of the three occasions the child attended the appellant's home they had sexual intercourse. However, the cannabis was not supplied in return for sexual favours. It is likely that the child went to the appellant's home to both use cannabis and to have sexual intercourse with him. The appellant was in a depressed state and the child's visits to his home took his mind off the sadness from which he suffered.

The appellant's subjective circumstances

[10] The appellant had only one relevant prior conviction. On 18 June 2008 he was convicted of possessing a dangerous drug in Pirlangimpi Court of Summary Jurisdiction and fined $300. Some money was also forfeited.

[11] The appellant was drug dependant. He had been using excessive amounts of cannabis for 25 years. He was born in Darwin and grew up in Garden Point. He had been in employment nearly all of his working life and had an excellent work record. He is separated from his wife. She left him for a younger man. The appellant and his wife have six children. He has provided well for his children. The appellant had a reputation as an honest, reliable, caring and selfless man. He was well liked and held in high regard by the members of his community.

[12] After this offending, the appellant, on his own initiative, took steps to rehabilitate himself. He attended a Catholic Care Workers program, and he had given up cannabis for five months by the time he came to be sentenced.

[13] The sentencing judge accepted that the appellant was remorseful.

The remarks of the sentencing judge

[14] The sentencing judge placed considerable weight on denunciation and general deterrence. During his remarks on sentence, among other things, his Honour stated:

> There is no suggestion by the Crown that sexual intercourse took place without the child's consent. No charge of having sexual intercourse without consent was laid. The aggravating features of this case are that the offending took place on three separate occasions and the child was only 15 years of age, and you believed her to be 16 years of age which was, in any event, well below the age of 18 years.
>
> ….
>
> … I consider that it is also an aggravating feature that you [the applicant] are 47 (sic) years of age at the time of the offending and that there is a significant disparity in the ages.
>
> ….
>
> Your counsel submitted to me that your personal circumstances were such where I ought not to impose a mandatory minimum period of 28 days imprisonment. However, in my opinion, the offences are too serious for a fully suspended sentence. The Court of Criminal Appeal in the case of *Daniels v The Queen* pointed out the devastating effects which cannabis is having within Aboriginal communities across the Northern Territory. In the judgment of Martin CJ and Riley J, their Honours said this:
>
> > Over many years, sentencing Judges in this Court have repeatedly emphasised the gravity of the criminal conduct involved in the distribution of cannabis within Aboriginal communities. Offenders have been on notice that significant terms of imprisonment will be imposed for such offending. In *R v Greenhalgh* the sentencing judge expressed the view that the current trend of sentences appeared to be low and issued an explicit warning that, in future cases, his Honour intended to increase penalties.
>
> Their Honours referred to the widespread problems arising out of substance abuse and, in particular, cannabis and the harms which

follow, which include increased suicide and self-harm; friction and dispute stemming from users seeking money for drug use; young people making demands for money to purchase cannabis and threatening violence or self-harm if money is withheld; and the negative impact on participation by youths in work, school, sports, culture and other aspects of community life. Cannabis use has led to mental health problems and of the compounding of harms associated with excessive drinking, kava consumption and inhalant abuse.

Their Honours observed:

> The abuse of cannabis continues to cause tremendous damage within Aboriginal communities. It leads to misery and dysfunction within those communities.

Of course, those comments were made in the context of an offence of supplying cannabis, but nevertheless, they apply equally to a case such as this. The Court must send the correct message, namely, that offences of this kind will be met with stern punishment. There must be a sentence which reflects denunciation of this kind of conduct and to deter others who might be minded to offend in a similar way.

On the other hand, in view of the evidence concerning your remorse and the steps you have taken to return to your church and give up the use of cannabis after such a long period of addiction, I do not consider that any significant element of personal deterrence is necessary in this case. Allowance must also be taken into account for the matters put in mitigation and they must be given appropriate weight.

Grounds 1 and 2

[15] Proposed grounds of appeal 1 and 2 cannot be sustained.

[16] When sentencing an offender for offences such as this, as is the case when sentencing for all offences, the Court must have regard to the maximum sentence stipulated by Parliament. The maximum sentence for each of the appellant's offences is a sentence of imprisonment for 14 years. By stipulating that the maximum sentence for the supply of a non-commercial

quantity of cannabis to a child is 14 years imprisonment, Parliament has made it clear that it treats the supply of any quantity of cannabis to a child as a very serious offence. By way of contrast, the maximum sentence for the supply of a non-commercial quantity of cannabis to an adult is a sentence of imprisonment for five years. Parliament has determined that the supply of cannabis to a person who is less than 18 years of age is a very significant aggravating circumstance of an offence committed contrary to s 5 of the *Misuse of Drugs Act (NT)*.

[17] Further, in a number of cases[2] the Court of Criminal Appeal has stated that because of the prevalence of such offending and the harm caused to Aboriginal communities by the supply and consumption of cannabis significant weight must be given to denunciation and general deterrence in the sentencing process. The application of those principles is not confined to the supply of commercial quantities of cannabis. Those principles are equally applicable when sentencing an offender for the supply of cannabis to a child in an Aboriginal community. Children in those communities are particularly vulnerable. It is the experience of the Court that the supply of cannabis to children can be particularly harmful. If children become dependant upon a drug at an early age they are likely to suffer the greatest harm and experience the greatest difficulty in overcoming their drug dependency.

[2] *Daniels v The Queen* (2007) 20 NTLR 147; *Clarke v R* [2009] NTCCA 5.

[18] It follows that the age of the child to whom drugs are supplied is a relevant factor to consider when assessing the objective seriousness of an offence contrary to s 5(1) and (2)(a)(iii) of the *Misuse of Drugs Act (NT)*. Likewise, the age of the offender may also be a factor that is relevant to the objective seriousness of such offending. The age of the offender may have a bearing on the offender's moral culpability. The moral culpability of a mature and experienced adult, who is aware of the harm that may be caused by the consumption of illicit drugs, and who is likely to have more influence over the behaviour of the child to whom the illicit drugs are supplied, is likely to be higher than, for example, a 19 or 20 year old person who does not fully appreciate the harm that may be caused by the consumption of illicit drugs.

[19] In this case, the appellant's moral culpability was relatively high. Given his level of education, life experience and age, he must have been aware of the harm that the consumption of illicit drugs may cause to a child and he put his own needs above the wellbeing of the child. In the course of maintaining their relationship he supplied the child with cannabis for her immediate consumption.

Manifestly excessive

[20] In my opinion, the sentence imposed on the appellant was plainly unjust; particularly, when regard is had the appellant's subjective circumstances including his remorse and the steps which he had taken towards rehabilitating himself by the time he was sentenced. The objective

circumstances of this case place it at the lower level of offending. A small unspecified amount of cannabis was supplied to a child, at her request, for her immediate consumption on three discrete occasions over a short period of time. A sentence of two years and three months imprisonment to be suspended after six months is out of all proportion to any view of the objective seriousness of the offending which could reasonably be taken[3].

[21] While it is important to give appropriate weight to denunciation and general deterrence when sentencing an offender for supplying cannabis to a child, it must be remembered that s 5(1) and (2)(a)(iii) of the *Misuse of Drugs Act (NT)* cover a range of offending against children of various ages and a range of quantities of cannabis up to a commercial quantity of 500 grams of cannabis. In the particular circumstances of this case, the sentencing judge gave manifestly disproportionate weight to denunciation and general deterrence.

[22] I would allow the appeal against sentence. The appellant should be re-sentenced.

Re-sentence

[23] But for the fact that the appellant has served almost six months of his original sentence in prison, I would have re-sentenced the appellant to an aggregate sentence of 14 months imprisonment to be suspended after the applicant has served three months in prison. But for the appellant's pleas of

[3] *Cranssen v The King* (1936) 55 CLR 509 at 520.

guilty, I would have imposed an aggregate sentence of 18 months imprisonment. I would have allowed a discount of four months because of the appellant's pleas of guilty. Under s 40(6) of the *Sentencing Act (NT)*, I would have specified an operative period of two years from the date of the appellant's release from prison during which he must not commit another offence punishable by a term of imprisonment.

[24] However, given the time that the appellant has already served in prison, I would sentence the appellant to six months imprisonment back dated to 20 April 2010.

Blokland J

[25] I agree with the sentence proposed by Southwood J and his reasons for decision.

Barr J

[26] I agree with the proposed sentence of six months imprisonment and with Southwood J's reasons for decision.
