Pittmann v The Queen [2013] NTCCA 16

PARTIES:	**PITTMANN, Paul Alexander**
	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 13 of 2013
DELIVERED:	7 November 2013
HEARING DATES:	31 October 2013
JUDGMENT OF:	RILEY CJ, BARR AND HILEY JJ
APPEALED FROM:	KELLY J in proceedings No 21246064

CATCHWORDS:

SENTENCING — Drugs — Unlawful possession — Purity — Presumed intention to supply for commercial gain — Presumption not rebutted — Sentence not manifestly excessive — *Misuse of Drugs Act 1990* (NT) ss 3(2), 3(3), 37(6).

Lo Castro v The Queen [2011] NTCCA 1, referred to.

REPRESENTATION:

Counsel:

Applicant:	P Elliott
Respondent:	D Morters

Solicitors:

Applicant:	Withnalls
Respondent:	Office of the Director of Public Prosecutions (NT)

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Pittmann v The Queen [2013] NTCCA 16
No CA 13 of 2013

BETWEEN:

PAUL ALEXANDER PITTMANN
Applicant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, BARR AND HILEY JJ

REASONS FOR JUDGMENT

(Delivered 7 November 2013)

The Court:

[1] On 14 March 2013 the applicant was sentenced to imprisonment for a period of four years and four months suspended on various conditions after he had served two years. The applicant had pleaded guilty to unlawful possession of a commercial quantity of methamphetamine (279.35g), possession of a trafficable quantity of methamphetamine (26.86g) and possession of a commercial quantity of ketamine (0.53g). The applicant sought leave to appeal against the sentence on two grounds, first that the sentence was manifestly excessive in all the circumstances and secondly that the sentencing judge erred in failing to properly have regard to the purity of the drugs.

[2] The application for leave was considered by a judge of the Court of Criminal Appeal and was refused. The applicant referred the matter to this Court pursuant to s 429(2) of the *Criminal Code* (NT).

[3] At the hearing the applicant also sought leave to add a further ground of appeal, namely that the sentencing judge erred in rejecting the evidence of the applicant.

The offending

[4] At the time of the offending the applicant was aged 50 years. On 4 December 2012 police intercepted his vehicle near the intersection of Temple Terrace and the Stuart Highway at Palmerston. A search of the vehicle revealed a total of 279.35g of methamphetamine, most of which was in a sandwich-sized clip-seal bag located under a towel on the passenger seat of the car. The balance was found in the applicant's wallet. The applicant was arrested and taken to the Darwin Watch House and placed in the cells. Later that same day a search was conducted of his home at Yarrawonga. During the search police located a further 26.86 g of methamphetamine and the 0.53 g of ketamine. Also found at the home were some digital scales and a large quantity of small clip-seal bags.

[5] The applicant gave evidence at the sentencing hearing for the purpose of discharging the presumption in the *Misuse of Drugs Act 1990* (NT)[1] that the

[1] Section 37(6).

applicant intended to supply the dangerous drugs for commercial gain. Her Honour found that the evidence of the applicant was:

> … riddled with evasions and inconsistencies and was designed to minimise the amounts of money [he was] getting, emphasise [his] drug dependency, and minimise the general commerciality of [his] involvement.

[6] The judge went on to conclude that the applicant had not discharged the onus of proving that the drugs were not intended to be supplied for commercial gain and said:

> I proceed on the basis that the methamphetamines, which you have pleaded guilty to possessing, were bought and sold by you for commercial gain. I accept that you probably intended to use some of the drug yourself. You had a small packet in your wallet which I assume was for your own use. I do not know how much you intended to sell, but infer from the quantity of the drug involved that you stood to make a considerable amount of money.

[7] A police officer gave evidence as to the value of the drugs found in the possession of the applicant. The officer expressed the opinion that the methamphetamine had been cut and he did not think it was of high quality but could not say how pure it was because it had not been analysed. Based upon the evidence of the police officer her Honour found that the methamphetamine in the possession of the applicant could have sold for between $175,000 and $350,000, which ‘is a considerable amount of money’.

The applicant

[8] The applicant was born in South Australia. His family suffered a terrible tragedy when he was 14 years of age. His 16-year-old sister was murdered by a serial killer which, of course, had a devastating impact upon the whole family. He completed high school in year 11. He was married in 1992 and separated from his wife in 2010. He has two children and one stepson. He now lives in an ongoing de facto relationship.

[9] He commenced drinking alcohol and smoking cannabis at about the age of 16 or 17 years. He commenced using amphetamines in about 2008. He has always maintained full-time employment and, at the time of the offending, was a self-employed block layer. Her Honour concluded that the applicant had been 'a constructive and contributing member of society'. On the other hand, her Honour did not see any indication of genuine remorse on the part of the applicant but only sorrow at having been caught.

[10] The applicant has a criminal history from Queensland, South Australia and the Northern Territory. There was only one drug-related conviction, being for the possession of a small amount of LSD some years ago for which a fine was imposed.

The sentence

[11] The sentencing judge imposed an aggregate penalty for the three counts. In determining an appropriate sentence her Honour emphasised the need for general deterrence, denunciation, punishment and personal deterrence.

[12] Her Honour started with an aggregate sentence of imprisonment for five years and six months. This was reduced by a little over 20% to reflect credit for the early plea, leaving a head sentence of imprisonment for four years and four months. The sentence was suspended after a period of two years on conditions as to supervision and the undertaking of rehabilitation programs as directed.

The purity of the drugs

[13] In many cases involving dangerous drugs the dangerous drug will have been mixed with cutting agents for the purpose of on-sale or use. Section 3(2) of the *Misuse of Drugs Act* provides that the expression 'dangerous drug' includes a preparation or mixture of the dangerous drug (which may include a substance that is not a dangerous drug) that contains any proportion of the dangerous drug. Section 3(3) of the Act then provides that, when determining whether an amount of a preparation or mixture of substances that contains a dangerous drug is equal to or more than the trafficable quantity or commercial quantity of the dangerous drug, the amount is to be determined as if all of the preparation or mixture were comprised of the dangerous drug.

[14] In the present case, if the purity of the methamphetamine or ketamine found in the applicant's possession had been reduced by use of a cutting agent or agents, the total amount of each mixture was to be considered to determine whether the applicant possessed a commercial quantity or a trafficable quantity of the particular drug. By his plea the applicant acknowledged that

he possessed a commercial quantity of amphetamine and, separately, of ketamine.

[15] Section 37(6) of the *Misuse of Drugs Act* provides that for offences of this kind, if the amount of the dangerous drug to which the offence relates is a commercial quantity, there is a presumption that the person intended to supply the dangerous drug for commercial gain. The presumption applies unless the contrary is proved. The applicant gave evidence before the sentencing judge regarding his drug habit and his sale of drugs to support that habit. Her Honour did not find him to be a witness of truth. Her Honour determined that the applicant had not discharged the onus of proving that the drugs were not intended to be supplied for commercial gain. Indeed, the applicant acknowledged that he intended to sell some of the drugs and that he had sold drugs in the past.

[16] In light of all the evidence her Honour proceeded to sentence on the basis that the applicant had bought and sold amphetamines for commercial gain. It was accepted that some of the drug would be used by the applicant. There was no direct evidence accepted by her Honour as to how much of the drug the applicant intended to sell but her Honour inferred from the quantity involved that the applicant 'stood to make a considerable amount of money'.

[17] The applicant submitted that the drugs were of low purity and therefore worth a lot less than the estimation given by police. It was submitted that the sentencing judge ought to have had regard to the purity of the drugs

when sentencing as a measure of the harm that the drugs may ultimately cause and also as a measure of the value of the drugs.

[18] We accept that the purity of the drugs may be relevant to an assessment of the culpability of an offender.

[19] The evidence in this regard came from the applicant and a police officer. The applicant's evidence was that he had been 'an addict for three years'. He said he had 'used amphetamines quite regularly for the past two years' and had been using 'three times in a day'. Each week he had obtained from the same source the amphetamine to support his habit. He would also sell drugs 'at least once a week'. In relation to the amphetamine he received he said, 'in my experience, it wasn't a high-grade quality. It was enough to suffice for what I wanted to use it for.'

[20] The police officer who gave evidence as to the value of the seized drugs acknowledged that the methamphetamine 'had been cut' and that he did not think it was of high quality. After considering the surrounding circumstances, he observed that the 'drugs that Mr Pittmann was apprehended with I don't believe was smokable ice'. However, he could not say how pure it was as the mixture had not been analysed. Notwithstanding that he did not have a precise knowledge of the purity of the methamphetamine he was able to give evidence of its value saying 'it would be at the lower end of the scale'. He expressed the view that '$1000 a gram'

would be ‘a conservative estimate for what any amphetamine will sell for in Darwin’. His evidence was accepted by the sentencing judge.

[21] In relation to the value of the drug it is apparent that her Honour did have regard to the fact that the amphetamine was not pure. The evidence of the police officer, which was based on the assumption that the seized drugs had been cut and were not of high quality, was accepted, as was his evidence of the value of the drug as sold on the streets of Darwin.

[22] In sentencing her Honour determined that the drug was ‘not high-grade’ although she adopted the evidence of the applicant that it was sufficient for his purposes. Her Honour described it as ‘impure methamphetamine’. The applicant was sentenced on the basis that the methamphetamine was of low purity. There can be no valid complaint on the part of the applicant.

[23] In our view no error occurred in this regard.

Manifest excess

[24] The applicant sought to appeal on the basis that the sentence imposed, including the period required to be served before release, was manifestly excessive in all the circumstances of the offender and the offending.

[25] The principles applicable to such an appeal are well known.[2] It is fundamental that the exercise of the sentencing discretion is not 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

[2] *Lo Castro v R* [2011] NTCCA 1 at [46].

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. He must show that the sentence was clearly and obviously and not just arguably excessive.

[26] This was serious offending. The applicant was in possession of a commercial quantity of the dangerous drugs. Some of the drugs were for his use but, as her Honour determined, an amount was for sale. The applicant stood to make a considerable amount of money in the process. This was, in part, a significant and ongoing commercial operation. The applicant was a part of a chain leading to distribution of methamphetamine into the community with consequent adverse effects for those who consume the drug and for other members of the community. The enterprise only came to an end when the applicant was apprehended by police. The applicant did not display any true remorse. In our opinion the head sentence imposed and the period to be served before the sentence was suspended were both comfortably within the available range.

The applicant's evidence

[27] The applicant sought leave to add a further ground of appeal, namely that the sentencing judge erred in rejecting the evidence of the applicant. In particular the applicant referred to the following part of the judge's sentencing remarks:

> I do not accept your evidence either as to the prices you paid, the prices you sold it for, the quantities you used or the quantities you sold. It seemed to me that your evidence was riddled with evasions and inconsistencies and was designed to minimise the amounts of money you were getting, emphasise your drug dependency, and minimise the general commerciality of your involvement.

[28] Counsel for the applicant referred to parts of the applicant's evidence concerning the 275.98 grams of methamphetamine that had been found under a towel on the passenger's seat of his car. This was the subject of count 1.

[29] It would appear that the applicant was attempting to explain how it was that he was in possession of the 275.98 grams of methamphetamine (which is approximately 10 ounces) and why he had not paid the full purchase price of $10,000 when he purchased the drugs. He said that he had not asked for 10 ounces, but that he had 'made inquiries about acquiring two ounces of pure amphetamine' and that he intended to mix it himself. He said he actually received the 10 ounces and was told that 'they couldn't be [sic] with 2 ounces of pure and that's what [he] got and [he] had to take because there was no taking anything back'.

[30] He said that he was going to consume two thirds of the methamphetamine himself and sell the other third ‘to subsidise [his] habit’.

[31] He said that he would usually get one ounce on a Friday for $1400, divide it up into ‘eight-balls’ (there being eight eight-balls per ounce) and sell ‘usually three [eight-balls] over the course of the week’, and ‘that would subsidise the $1400 that I’d need for an ounce.’ He later said that he would sell an eight-ball for $350. This would mean that he would in fact receive $1050 for the three eight-balls, not $1400.

[32] The police officer testified that a reasonably conservative estimate of the price of the methamphetamine the subject of count 1 was $1000 per gram. There being 3.5 grams in an eight-ball, this would mean that an eight-ball was worth more than $3000. When asked why the applicant was selling the eight-balls so cheaply counsel could only submit that he was selling it to friends at a cheaper rate. In the circumstances this explanation is implausible.

[33] At another point in his evidence the applicant said that he was using about an eight-ball a day, usually in two or three hits, but that sometimes if he didn’t work late he would ‘just have the morning and lunchtime hit’. Shortly after that he said that he usually used an ounce a week, and then he said ‘some of that’s sold to subsidise.’ That evidence is inconsistent with his other evidence about selling about a third of an ounce in order to subsidise the cost of the other two thirds which he had said was for his own use. If he

was using an eight-ball a day himself, he would only have had one eight-ball left to sell out of an ounce. Of course if he used an ounce a week he would have had nothing left to sell in order to subsidise the cost of that ounce.

[34] In reaching her conclusions and expressing the views quoted in [27] above, the sentencing judge identified a number of other inconsistencies within the applicant's evidence and said that she found some of his evidence both confusing and illogical. We are of the same view. In our opinion there was a sound evidentiary basis for the conclusions of the judge and we see no reason to interfere.

[35] The application for leave to appeal is dismissed.

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