PARTIES:	BRIAN WILLIAM WILLIAMS
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA12 OF 1997
DELIVERED:	19 December 1997
HEARING DATES:	
JUDGMENT OF:	Angel, Mildren and Thomas JJ

REPRESENTATION:

Counsel:

Appellant:	S. Cox
Respondent:	R. Wild QC

Solicitors:

Appellant:	NTLAC
Respondent:	Office of the Director of Public Prosecution

Judgment category classification:	
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tho97015

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

No. CA12 of 1997

BETWEEN:

BRIAN WILLIAM WILLIAMS
Appellant

AND:

THE QUEEN
Respondent

CORAM: ANGEL, MILDREN AND THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 19 December 1997)

THE COURT:

On 18 July 1997 the appellant pleaded guilty to the following charges:

(i) Unlawful cultivation of a commercial quantity of cannabis contrary to s7(1) & (2)(a) of the *Misuse of Drugs Act*

(ii) Unlawful possession of a commercial quantity of cannabis contrary to s9(1) & (2)(d) of the *Misuse of Drugs Act*

(iii) Unlawful possession of a trafficable quantity of cannabis such contrary to s9(1) & (2)(e) of the *Misuse of Drugs Act*

(iv) Unlawful supply of cannabis contrary to s5(1)(a) and (2)(iv) of the *Misuse of Drugs Act*.

On 23 July 1997 his Honour the Chief Justice convicted the appellant and sentenced him to 2 years imprisonment which was ordered to commence on 18 July 1997. His Honour fixed a non-parole period of 12 months.

The *Misuse of Drugs Act* prescribes, in respect of the enumerated offences:

(i) A maximum penalty of twenty-five years imprisonment for the offence of unlawful cultivation of a commercial quantity of cannabis.

(ii) A maximum penalty of fourteen years imprisonment for the offence of unlawful possession of a commercial quantity of cannabis

(iii) A maximum penalty of five years imprisonment or $10,000 fine for the offence of unlawful possession of a trafficable quantity of cannabis

(iv) A maximum penalty of five years imprisonment or $10,000 fine for the offence of unlawful supply of cannabis.

On 10 October, 1997 the appellant was granted leave to appeal.

The grounds of appeal are as follows:

(a) The learned sentencing Judge erred in finding that the appellant's cultivation and possession of the prohibited drug was for a commercial purpose.

(b) The learned sentencing Judge erred in finding that the purpose of cultivating and possessing the prohibited drug was not limited to the appellant's own use and for giving it to others who lived at his premises and to acquaintances at social functions.

(c) The learned sentencing Judge erred in not giving sufficient weight to the circumstances in mitigation, namely:

    (i) the age of the appellant

    (ii) the appellant's lack of prior convictions

    (iii) the appellant's co-operation with police, including his full admissions on the record of interview

    (iv) the appellant's early plea of guilty

    (v) the appellant's good work record

    (vi) the appellant's poor health and its relationship to his use of the prohibited drug.

The Crown facts before the sentencing Judge were as follows:

"... at about 8.50am on Thursday 12 September 1996 members of the Combined Drug Enforcement Unit and the Major Crime Squad executed a search warrant on the premises of 47 Kentish Road, Noonamah, which is occupied by the prisoner Brian William Williams. The prisoner was spoken to briefly before police conducted a thorough search of his property.

> During the search a total of 4,896.9 grams of cannabis leaf was discovered in the following locations. A caravan next to a shed had a white polystyrene box containing dry cannabis leaf, and three pvc pipes containing cannabis leaf in a blue esky. There's another caravan standing alone, there was numerous cannabis plants located in that, drying on a blue plastic sheet.
>
> There's also the Toyota Corolla coupe NT registration 414-472, and in that was located deal bags of cannabis leaf on the front passenger seat. The search by police also located 21 grams of cannabis seeds in a drawer of a brown filing cabinet underneath the house on the property. Police also discovered 97 cannabis plants with an average height of 1.5 metres growing in pots in 10 separate sites scattered around the property.
>
> The prisoner was arrested and conveyed to the Peter McAulay Centre where he participated in a video taped record of interview. He admitted ownership of all the cannabis located on the property and stated that the cannabis leaf was harvested from plants he himself had cultivated. He admitted to watering and fertilising the 97 cannabis plants found growing on his property.
>
> During the record of interview the prisoner also admitted that between 9 September and 12 September 1996 at the property he supplied four deal bags of cannabis to a friend, Brendon Boyce. He claimed no money was exchanged, and that he supplied Boyce with the cannabis to keep him off alcohol. He stated further that he had previously supplied the cannabis to other acquaintances on social occasions at his home."

There was no allegation by the Crown, either at the time of presenting the Crown facts, or during the course of submissions on sentence, that the cannabis was cultivated or possessed for a commercial purpose, as distinct from the quantity of cannabis constituting a commercial quantity.

The offences involved a substantial quantity of cannabis. His Honour had also been told by counsel for the appellant, Mr Loftus, that the appellant, during the last four years, had only had odd jobs, and had been on sickness

benefits as a result of knee and back injuries. Quite understandably his Honour was concerned about the quantity of cannabis involved. His Honour directly raised with counsel for the appellant his concerns on the issue in the following exchange:

> "HIS HONOUR: Mr Loftus, I should say the quantity of material involved here and the packaging of it and the admissions as to at least supply to somebody raises grave suspicions in my mind as to his purpose.
>
> MR LOFTUS: Well, he does admit of course that he gave this other amount to Brendon Boyce.
>
> HIS HONOUR: Yes, yes. No, I'd make it perfectly plain, I'm strongly of the view that on the prima facie evidence this was for a commercial purpose, not just a commercial quantity, but commercial purposes there.
>
> MR LOFTUS: I'm reminded by my instructing solicitor, Your Honour, those six bags that had been prepared, in fact they were going out on a shooting expedition and that was part and parcel of taking that out by way of supply for that particular purpose. In relation to the supply to Brendon Boyce, I'm instructed that he is a good friend of the prisoner, and he was given that cannabis to help keep him off alcohol. That Mr Boyce was also employed by him around the block doing odd jobs in the rural area generally.
>
> I'm instructed that in fact these other, some eight odd other people, men that were living there at the time, living on the block were in fact all alcoholics themselves, and my client sees it as some way to help get people off alcohol by letting them use cannabis. Your Honour, the accused indicated his guilt at the first available opportunity, cooperated with the police. This matter proceeded by way of hand-up committal, and indeed the matter came before this Supreme Court in February, and a plea of guilty was indicated then. But today was the first available date for this court to deal with the plea.
>
> He comes before the court as a person of prior good character and no prior convictions, he pleaded guilty. And in those circumstances I ask you to accept that by way of the hand-up committal, an early indication of pleading, there is evidence there properly of remorse which you can take into consideration. I'd ask that he being a first offender, Your Honour give earnest consideration to releasing him after the necessary 28 days

that would have to serve in any event. That Your Honour earnestly give consideration to suspending any sentence you might impose upon him."

After Mr Loftus had completed his submissions, counsel for the Crown said that the Crown had no sentencing submissions. His Honour did not indicate that he intended to reject the submission of Mr Loftus that there was no commercial purpose involved. The Court then adjourned and his Honour pronounced sentence a few days later.

His Honour, in the course of his remarks on sentence said:

"As to the plants, you watered and fertilised them. You claim that no money was exchanged as you supplied the cannabis to Boyce to keep him off alcohol. You admit that you had previously supplied cannabis to other acquaintances on social occasions, you say, at your home. Those admissions, and the assertions by your counsel that the cannabis leaf in your possession was not for any commercial purpose, *is not* accepted.

I indicated that in the course of submissions. I am entitled to regard the quantity of cannabis leaf involved, the ongoing nature of the operation, the fact that you had supplied some to others, and you had packaged some of it up into bags, [as] indicative that your purpose in growing the cannabis was not limited to using it for yourself and giving some of it away to others who live at the premises with a view to substituting it for alcohol.

Four deals, handed over to Mr Boyce, contained 64 grams, or about 16 grams each, meaning that the amount of leaf found in your possession can make up to about 300 deals of similar size. Although in some cases I would be prepared to allow that a quantity of cannabis, described as being a commercial quantity, was in fact not used in commerce, it is inherently improbable that that was the case here."

It was submitted by Ms Cox, counsel for the appellant, that the issue of whether the cannabis was cultivated or possessed for a commercial purpose

was a matter of aggravation, in respect of which the Crown bore the onus of proof beyond reasonable doubt, and that as the Crown did not even assert that the purpose was commercial, it was not open to his Honour to find as he did. Further, it was submitted that his Honour did not find the commercial purpose proved beyond reasonable doubt, but proceeded on the basis that it was up to the appellant to establish that the cannabis was not for a commercial purpose.

We accept that a matter which aggravates an offence, if it is disputed, must be proved beyond reasonable doubt: *Anderson v The Queen* (1993) 177 CLR 520; *Langridge* (1996) 87 A Crim R 1; *Storey* (1996) 89 A Crim R 519. We also accept that intending to possess or cultivate cannabis for a commercial purpose is an aggravating matter: *Anderson v The Queen* (supra). Whilst it is also correct that the burden of proving an aggravating matter rests with the Crown where the Crown makes such an assertion (*Anderson v The Queen*, (supra)), it does not necessarily follow that the failure of the Crown to formally submit that the inference to be drawn from the facts is that the drugs were to be used for a commercial purpose precludes such a finding. It is open to a sentencing judge to draw such an inference from the facts not in dispute, notwithstanding that the Crown do not positively assert it. But before doing so, the sentencing judge should invite the attention of the parties to the course proposed to be taken before making use of it to see if the parties embrace it or reject it: *Storey*, (supra), at 528. In this case his Honour drew Mr Loftus' attention to the matter, but sought no submissions from the Crown prosecutor.

The proper course to follow is to have asked the prosecutor first; the prosecutor may have said that the Crown accepts that there was no commercial purpose, or none capable of being proven. If so, that would ordinarily be the end of the matter; or the Crown may have taken a neutral position, or have embraced his Honour's opinion. In this case, the position was that Mr Loftus made further submissions in answer to his Honour's suggestion, and the Crown made no submissions. It was still open to his Honour to have rejected the submissions of Mr Loftus if the explanations offered passed the bounds of reasonable possibility, but before doing so, his Honour should have indicated that to Mr Lotus before passing sentence and give him an opportunity to call evidence: *Ross v Svikart* (1989) 99 FLR 134 at 138; *Munungurr v The Queen* (1994) 4 NTLR 63 at 73-74. By not taking that course, counsel for the appellant was entitled to assume that his Honour had accepted his submission and that the appellant would be sentenced on the basis that no commercial purpose was involved, no issue having been taken to his submission either by his Honour or by the Crown. We would allow the appeal on this ground.

It is not clear that his Honour failed to apply the correct standard of proof. There is no requirement for a sentencer to use any particular verbal formula: *Storey*, (supra), at 533. Nor is it clear that his Honour assumed that there was a burden of proof which rested upon the appellant of satisfying him that the purpose was not commercial. An invitation to counsel for the appellant to address an issue, (or even to call evidence,) does not necessarily

mean that his Honour assumed any burden lay upon the appellant. If the facts gave rise to an inference of commercial use, and the explanation offered from the bar table passed the bounds of reasonable possibility, an invitation to further address that issue or to call evidence means no more than that if the issue is not addressed in some way the Court will probably be satisfied according to the necessary standard of the relevant matter in issue. If the accused gives or calls evidence, the sentencer will then have to give the accused the benefit of any reasonable doubt which remains. If the accused, having been invited to do so, fails to give or call any evidence, the sentencer will be entitled to take that into account as a circumstance which bears upon the probative value of the admitted facts or the evidence already before the sentencer: cf. *Weissensteiner v The Queen* (1993) 178 CLR 217 at 229. However, in the instant case, because of the course taken, there is enough doubt about whether his Honour applied the correct standard and burden of proof to allow the appeal on that ground as well.

The usual course in a case such as this is for the matter to be remitted to the sentencing Judge for resentence. In this case, the appellant has already been in custody since 18 July 1997; the Crown did not make any submissions indicating that it did not accept the submission of Mr Loftus; and the offences are not in the more serious category. If the matter is remitted, it may be some time before the appellant is able to be resentenced, having regard to the Court's present commitments and difficulties inherent in the fact that the

Christmas-New Year period is almost upon us. In those circumstances we consider that the proper course is that the appellant should be resentenced by this Court upon the basis that no commercial purpose had been proved.

The appellant is a 45 year old first offender with a good work record. He is married with three children aged 5, 10 and 15 and has lived at Noonamah for some years. He suffered work injuries to his back and knee, the latter when 16 years of age. He has had three knee operations, the first when 16 years of age. As a consequence of his injuries he has worked little over the past 4 years. In earlier times he was a heavy drinker but has not drunk alcohol for many years. He is a user of marihuana, both to help relieve pain from his injuries, and as a substitute for alcohol. He pleaded guilty and co-operated with the authorities. His Honour the Chief Justice considered the appellant was unlikely to re-offend.

We would sentence the appellant to imprisonment for 2 years, but direct that after serving 6 months he be released upon a bond to be of good behaviour for the period of the balance of the sentence, $2000 own recognizance. Pursuant to s40(6) of the *Sentencing Act* we specify a period of 2 years during which the appellant is not to commit another offence punishable by imprisonment if the offender is to avoid being dealt with under s43.

The appellant has been in custody since 18 July 1997. To take into account the period of time already spent in custody, this sentence is to date from 18 July 1997.

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