Johnson v The Queen [2012] NTCCA 14

PARTIES:	**JOHNSON, Danny Arthur**
	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:	CCA 2 of 2012 (21106424)
DELIVERED:	10 August 2012
HEARING DATES:	18 July 2012
JUDGMENT OF:	MILDREN, BLOKLAND and BARR JJ
APPEALED FROM:	RILEY CJ

CATCHWORDS:

CRIMINAL LAW – APPEAL AGAINST SENTENCE
Sentencing discretion – whether learned sentencing judge erred in fixing non-parole period rather than partially suspending sentence – benefit of fixing non-parole period – cannabis dependency significant cause for the offending – drug dependency treatment and rehabilitation not yet completed – fixing non-parole period not unreasonable or plainly unjust – appeal dismissed

Misuse of Drugs Act (NT) s 5(2)(b)
Sentencing Act (NT) s 54(1)

House v R (1936) 55 CLR 499, followed

R v Bernath [1997] 1 VR 271; *DPP v Castro* [2006] VSA 197; *R v Minor* (1992) 2 NTLR 183; *Stuart v R* [2010] NTCCA 16; *R v Wilson* [2011] NTCCA 9, considered

REPRESENTATION:

Counsel:

Appellant:	I Read
Respondent:	P Usher

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Bar1211
Number of pages:	14

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

Johnson v The Queen [2012] NTCCA 14
No. CCA 2 of 2012 (21106424)

BETWEEN:

DANNY ARTHUR JOHNSON
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, BLOKLAND and BARR JJ

REASONS FOR JUDGMENT

(Delivered 10 August 2012)

THE COURT

[1] On 18 July 2012 we dismissed the appeal in this matter. We now provide reasons.

[2] The sole ground of appeal was that the learned sentencing judge erred in fixing a non-parole period rather than partially suspending the sentence.

[3] On 6 January 2012, the appellant pleaded guilty to a single count that between 28 September 2010 and 21 February 2011 he unlawfully supplied the dangerous drug, cannabis, to three persons identified in the indictment and to other unknown persons, with the admitted circumstance of

aggravation that the amount of cannabis supplied was a commercial quantity.

[4] The offence, with the admitted circumstance of aggravation, carried a maximum penalty of imprisonment of 14 years.[1]

[5] At the sentencing hearing, a document setting out the agreed facts was tendered by the prosecution before being read out in court. Those agreed facts are reproduced below:

> 1. In September 2010 police commenced Operation Swiss, an investigation in relation to the distribution of cannabis in the Darwin area.
>
> 2. The accused was 33 to 34 years of age at the time of the offending. The accused worked part time as a musician. Over the period of the offending he resided at 7/5 Fleming Street, The Narrows with his partner and young child.
>
> 3. During the course of the investigation police intercepted telephone calls between the accused and others which revealed that the accused was purchasing cannabis in quantities of one or more pounds and distributing the cannabis in smaller quantities, either personally or through other distributors, to cannabis users in the Darwin community.
>
> 4. Telephone intercepts commenced about 28 September 2010 and finished on 21 February 2011 when the accused was arrested. During that period the accused used three identified persons, Tracey Moyle, Bob Djurovic and Timothy Bishop, to distribute cannabis for him. He purchased cannabis from two distributors, Reginald Emmerson and Ashley Bradbury. There are other calls evidencing the supply of cannabis to others directly by the accused.

[1] see s 5(2)(b)(iii) *Misuse of Drugs Act*.

5. In one conversation to Moyle on 13 November 2010, the accused reminded Moyle about the whole lot of money she had made over the past year working with him and that, if he were caught then, he would owe about $60000 or $70000.

6. In addition to the sales that he himself made directly, the accused utilised agents to facilitate the majority of his business dealings in cannabis. The accused sourced the cannabis which he then provided to the agents. The accused was the initial point of contact for customers, although in some instances, such as was the case ultimately with MOYLE, he authorised and encouraged the customer to make direct contact with the nominated agent. The accused was directly involved in the operations of the agent on a regular basis. The telephone intercept evidence reveal:

    - Discussions about how much (cannabis) they have left either as an individual or altogether;

    - Discussions about when the accused would next be sourcing cannabis, and getting money together for that;

    - Discussions about possible further avenues for sourcing cannabis or an increased customer base;

    - The accused advising the agent of where and when to meet certain customers, and how much they could have and what to charge them;

    - Discussions about how much money was owed, sometimes by the agent, but generally by the customer;

    - The accused using the homes of the agents as storage locations and on some of the occasions when he himself supplied a customer, having the agent bring around quantities of cannabis as and when customers required them;

    - Discussion about matters so as to avoid detection by police authorities; and

- Requests for one agent to provide/deliver cannabis to another agent for use in a supply.

7. The accused typically sold cannabis at a rate of $380 per ounce. In a conversation with Moyle on 13 November 2010 he offered to sell her a pound lot for $5500 or $370 per ounce (there being 16 ounces in a pound). Information gleaned from telephone intercepts show that the accused supplied, either directly or through agents, at a minimum 85 ounces or 2410 grams of cannabis. On the basis of a sale price of $380 per ounce, the accused would have grossed in excess of $32300 from such sales.

8. The accused was interviewed by police on 21 February 2011. A number of the recorded telephone calls were played to the accused during the interview. The Accused made no admissions and responded "no comment" to each of the allegations as put to him. The accused was charged and taken into custody on 21 February 2011. He has been in custody since that time.

[6] The appellant had not previously offended in relation to drugs. He was 35 years old at the date of sentencing. His record comprised convictions for only two offences, both committed in October 2009: driving with a medium range blood alcohol content and a minor related traffic matter.

[7] The appellant's counsel emphasised the appellant's cannabis dependency in submissions to the learned sentencing judge. It was put that the appellant began smoking cannabis in his early teens. He stopped briefly when his daughter (now 3 years old) was born. His attempt to stop was unsuccessful. He was stressed because of family responsibility and his workload. He was working very long hours and trying to cope with an injured shoulder, and started smoking cannabis again. He "perceived Cannabis as a calming and relieving activity". His usage was described as "between heavy and chronic." In September 2010 he was offered cannabis on credit at $5,500

per pound. He accepted the offer and began obtaining one-pound bags of cannabis which he would sell in one-ounce bags for $380. This resulted in a 'paper profit' of $580 per pound of cannabis purchased and sold, but because of his dependency, the appellant generally retained some of the cannabis for his own consumption. It was said that "there was no cash windfall".[2]

[8] The appellant's counsel tendered a report of Rachael Lowe, a counsellor employed in the Prison In-Reach Program, dated 8 November 2011.[3] That report read, relevantly, as follows:

> "At the time of assessment Danny described a presence of dependence (DSM-IV Criteria) on cannabis prior to his incarceration. Mr Johnson demonstrated some awareness/insight into triggers and high risk situations informing PIP staff he often smoked cannabis as a 'cure' for his mental state, stating 'I'm highly strung without it'. He went on to express great concern about ways in which his life has been affected by his cannabis use and subsequent actions to date together with ways in which those around him have suffered as a direct result of his actions. On assessment Danny had started to consider supportive networks and changes he will need to implement into his life to ensure he remains free from substance abuse and criminal behaviour in the future. He remains adamant that he is willing to take whichever steps necessary to ensure he does not return to incarceration. Danny was assessed as being in the action stage of change and informed PIP staff he is confident in his ability to make this change.
>
> To date, Danny has engaged in 8 group sessions and 3 individual counselling sessions … During this time, Danny has gained increased insight into his substance misuse and common thinking errors which he used to justify and minimise his use to date. …

[2] AB 15-16.
[3] AB 68-69.

> Danny is able to continue with PIP group work whilst he remains on remand or if he is sentenced to less than 6 months. Whilst Danny has explored both residential and outpatient counselling for his release, given his extensive support networks within the community and motivation and ability to return to work, PIP have recommended he consider outpatient counselling at this stage. This form of treatment will allow Danny to reintegrate back into the community and continue to address his substance misuse."

[9] In the course of sentencing submissions, the learned sentencing judge expressed concern as to what the appellant proposed to do about his cannabis use after his release from prison.[4] On further questioning, the appellant's counsel informed his Honour that the main outreach centre for outpatient treatment for cannabis dependency was Amity,[5] but that no approach had to that time been made to Amity on behalf of the appellant. At a later stage, after a four-day adjournment, counsel submitted that Ms Lowe was "confident of [*the appellant's*] abilities to continue without the need for intensive counselling, and that, if it were a condition of the appellant's release, he would promptly present for assessment by Amity on his release.[6]

[10] In his sentencing remarks, the learned sentencing judge referred to the appellant's cannabis sale and distribution activities as a "relatively sophisticated operation". His Honour noted that the telephone intercept evidence related to the sourcing of cannabis, funding of the operation (to sell and distribute the cannabis), increasing the customer base, arranging meetings with customers, dealing with moneys outstanding, arranging

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4 AB 34.

5 A reference to Amity Community Services Inc., a non-government and non-religious organisation in Darwin which provides counselling services to assist people to deal with problem habits.

6 AB 56.

storage locations, and avoiding detection by authorities. His Honour noted that the amount of cannabis supplied over the relevant period, either directly or through agents, was 85 ounces, resulting in gross receipts of at least $32,300.[7]

[11] His Honour continued:

> …. You commenced your criminal enterprise when you were offered cannabis on credit. You sold a significant part of the cannabis to cover your cost of purchase, and you then used the balance for your personal consumption.
>
> It was put to me that you did not make a huge profit from the undertaking, and I accept that to be so. Nevertheless this was plainly a commercial enterprise and one of an ongoing nature. It only came to end when you were arrested. The agreed facts reveal that you grossed in excess of $32,000 from sale of cannabis in that period when you were under surveillance.[8]

[12] Further remarks by his Honour indicate that he was concerned as to the appellant's rehabilitation. Because cannabis dependency was a significant cause of the appellant's offending, and a likely trigger for his offending in future, his Honour correctly linked rehabilitation with elimination of cannabis dependency:

> Since you have been in custody you have been involved with some counselling. You arranged that yourself. I have a report from a counsellor indicating that you have some insight into the impact of your cannabis use. You have given thought to how you might deal with your cannabis problem in future. The counsellor recommends that you consider outpatient counselling upon your release from prison. Given your history of cannabis misuse, that would seem to be good advice.

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[7] AB 78.
[8] AB 80.

> I regard the gaining of insight and your efforts to obtain rehabilitation in prison as being positive signs for your rehabilitation. I also regard your family's support as being a positive matter. On the other hand I regard your long and significant involvement with cannabis as being a matter of concern.
>
> You will only rehabilitate yourself if you can overcome your problems with cannabis. I regard your prospects for rehabilitation as positive, but caution that much will depend upon your success in dealing with your drug problem.[9]

[13] The appellant was convicted and sentenced to imprisonment for three years. He was given a discount of 20 per cent for his plea of guilty. The sentence was backdated and deemed to have commenced on 21 February 2011 to reflect the time spent in custody on remand. The learned sentencing judge imposed a non-parole period of 18 months.

[14] His Honour did not give extensive reasons for fixing a non-parole period rather than partially suspending the sentence. However, his Honour's reasoning is tolerably clear from that part of his sentencing remarks extracted in par [12] above, and from the passage set out below:

> In all the circumstances I have considered it appropriate to impose a non parole period. It will be for the parole board, in conjunction with yourself to devise the best program for you upon your release. That should occur at the time you become eligible to seek release.[10]

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[9] AB 80.
[10] AB 82.

Appellant's arguments on appeal

[15] The appellant's counsel argued that his Honour erred in the exercise of his sentencing discretion by declining to partially suspend the appellant's sentence. His written submissions were as follows:

> "It is not clear from the learned sentencing judge's sentencing remarks whether he considered a partially suspended sentence or not, and nor is it apparent that if he did consider a partially suspended sentence, why he declined to impose one. There appear to be no matters in either the objective seriousness of the offending or the subjective circumstances of the appellant which would militate against a partially suspended sentence ….. As such, there would appear to have been a wrong approach in the exercise of the sentencing discretion."

[16] Counsel for the appellant then referred to a number of matters which, he said, favoured a partially suspended sentence but which "appear to have been given insufficient weight" by the sentencing judge, including: the plea of guilty, remorse and the facilitation of the course of justice; the period of 11 months spent on remand; the hardships he endured on remand; the absence of relevant prior convictions; the fact that long term use of cannabis had been a reason for offending; the fact that the appellant had never previously been sentenced to imprisonment; the appellant's good prospects for rehabilitation; the appellant's otherwise good character and his ability to participate in employment and contribute constructively to the community.

[17] Counsel for the appellant also argued that there was no evidence before the sentencing judge that the appellant would have been other than a satisfactory prisoner and thus that he did not need the incentive of a non-parole period to be of good behaviour whilst in prison. It was further argued that there was

no evidence that the appellant required time "to prove himself as being capable of resuming a responsible attitude to life".[11] Counsel urged that the sentencing judge should have exercised his sentencing discretion in such a way as to provide a certain date of release, to ensure that the appellant would then be able to "return to the supportive family life which would likely enhance his prospects of continued rehabilitation."

[18] All the appellant's arguments would have been equally applicable to a submission that the learned sentencing judge should fix the minimum non-parole period, in the event he were to fix a non-parole period. In other words, the matters which (it was argued) favoured a partially suspended sentence also supported the fixing of the minimum non-parole period permitted by law.[12]

[19] Even though there was a potentially good case for a partially suspended sentence, the appellant's counsel did not ask for a report under s 103 *Sentencing Act* as to the suitability of the appellant to be supervised by a probation officer under a suspended sentence, or as to the recommended conditions of a suspended sentence. Counsel did not ask the judge for an adjournment to enable a pre-sentence report to be provided under s 105 *Sentencing Act*. Further, even though the judge expressed concern as to what the appellant proposed to do about his cannabis use after his release from prison, as mentioned in par [9] above, and referred to the absence of

[11] Reference was made to *Stuart v R* [2010] NTCCA 16 at [65] – [68]; *R v Wilson* [2011] NTCCA 9.
[12] s 54(1) *Sentencing Act* (NT) requires a court to fix a non-parole period of not less than 50% of the sentence.

evidence of the appellant's suitability for the Amity program,[13] the position after a four-day adjournment remained that the appellant had still not been assessed by Amity for participation in out-patient counselling upon his release. Counsel for the appellant informed his Honour that Amity would not be able to go to the prison to see the appellant "in any time less than 10 days". Counsel did not, however, ask the judge for a further adjournment to enable an assessment to take place and for a report to be provided.

[20] The learned sentencing judge's sentencing remarks extracted in par [12] and par [14] above suggest that his Honour did not consider that he had sufficient evidence to predict the progress and extent of the appellant's rehabilitation so as to confidently determine and fix a release date under a partially suspended sentence.

[21] In *R v Minor,*[14] this Court considered the circumstances in which it would be appropriate for a sentencing judge to impose a partially suspended sentence rather than a non-parole period. A relevant consideration is that the Parole Board is often in a better position to determine whether it is appropriate that a prisoner be released than a sentencing judge would have been at the time the original sentence was imposed.[15]

[22] The benefit of fixing a non-parole period is to provide an offender with some hope for an earlier release from prison and in turn to give an incentive

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[13] AB 35.
[14] *R v Minor* (1992) 2 NTLR 183. See also *Stuart v The Queen* [2010] NTCCA 16 at [65] - [68]; *R v Wilson* [2011] NTCCA 9 at [45]-[47].
[15] *R v Minor* (1992) 2 NTLR 183 at 197-8, per Mildren J.

for rehabilitation, including an incentive to fully engage in rehabilitation programs while in prison. The parole system provides an incentive to a prisoner to achieve the conditions upon he might reasonably expect to be released on expiry of the non-parole period, and enables the Parole Board to not only consider whether or not a prisoner should be released, then or at a later time, but also "the conditions under which the prisoner should be released taking into account the then prevailing relevant circumstances."[16]

[23] Even with shorter sentences, the Parole Board may still be in a better position to determine an appropriate release date than a sentencing judge. This is more likely to be so where the risk of re-offending is closely linked to the success or otherwise of an offender-specific drug dependency treatment and rehabilitation program not yet undergone (or not completed) by the offender, as in the present case.

[24] This Court will only interfere with the exercise of a sentencing discretion on the basis explained by the High Court in the well-known authority of *House v R*:-

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in

[16] *R v Minor* (1992) 2 NTLR 183 at 188, per Martin J.

> substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred." [17]

[25] Where the ground of appeal is that a sentencing Judge failed to give sufficient weight to particular factors (as the appellant asserts here), in contrast to a ground asserting that the sentencing Judge disregarded a factor altogether or took an irrelevant factor into consideration, an appellate court must be especially cautious not to substitute its own opinion for that of the judge in the absence of identifiable or manifest sentencing error.[18]

[26] Even though, as mentioned, there was a potentially good case for a partially suspended sentence, the appellant has failed to demonstrate error on the part of the learned sentencing judge. We can discern no error in principle or indication that his Honour gave weight to irrelevant considerations or failed to take into account relevant ones. For his Honour to fix a non-parole period (in fact the minimum permitted by law) was not "unreasonable or plainly unjust."

[27] To alter the sentence so as to substitute an order for a partially suspended sentence after the appellant had served 18 months in prison would be substituting one discretion for another and would not be justified or

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[17] *House v R* (1936) 55 CLR 499 at 504-505; see also *Cranssen v R* (1936) 55 CLR 509 at 519-520.
[18] *R v Bernath* [1997] 1 VR 271 at 277 per Calloway J, approved by the Court of Appeal of the Supreme Court of Victoria in *DPP v Castro* [2006] VSCA 197 at [17].

permissible in circumstances where, as we have found, his Honour's discretion did not miscarry.

Conclusion

[28] For these reasons, the Court dismissed the appeal.
