*Hooton v The Queen* [2011] NTCCA 2

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| PARTIES: | HOOTON, Terry<br><br>v<br><br>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 20 of 2010 |
| DELIVERED: | 18 FEBRUARY 2011 |
| HEARING DATES: | 31 JANUARY 2011 |
| JUDGMENT OF: | RILEY CJ, SOUTHWOOD & BARR JJ |
| APPEALED FROM: | MARTIN (BR) CJ |

**CATCHWORDS:**

CRIMINAL LAW- sentence – whether sentence manifestly excessive – whether learned sentencing Judge failed to give weight to the principle of totality - whether learned sentencing Judge erred in over accumulating for particular offences – appeal allowed in part.

*Criminal Code*, s 411(4); *Misuse of Drugs Act*; *Sentencing Act*, s 50

*Attorney-General v Tichy* (1982) 30 SASR 84, applied.

*Damaso* (2002) 130 A Crim R 206; *Dicker v Ashton* (1974) LSJS 150; *Miles v The Queen* [2001] NTCA 9; *O'Rourke* [1997] 1 VR at 246; *Scanlon* (1987) 89 FLR 77; *R v Le Cerf* (1975) 13 SASR 237, considered.

*Murphy v The Queen* [2005] NTCCA 15, followed.

**REPRESENTATION:**

*Counsel:*

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| Applicant: | I Read |
| Respondent: | R Coates |

*Solicitors:*

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

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

*Hooton v The Queen* [2011] NTCCA 2
No. CA 20 of 2010

BETWEEN:

**TERRY HOOTON**
Applicant

AND:

**THE QUEEN**
Respondent

CORAM: RILEY CJ, SOUTHWOOD AND BARR JJ

REASONS FOR JUDGMENT

(Delivered 18 February 2011)

**The Court:**

[1] On 24 June 2010 the applicant was sentenced to a total term of imprisonment of eight years with a non-parole period of four years and six months in relation to a series of offences contrary to the provisions of the *Misuse of Drugs Act*. His application for leave to appeal was refused by a Judge of the Court, and he has now applied to have the matter determined by the Court. At the commencement of the hearing the applicant sought leave to add a further ground of appeal.

[2] The offending to which the applicant pleaded guilty occurred in the period between 13 June 2008 and 1 August 2008. At the time of sentence the

applicant was aged 44 years. He had been a consumer of cannabis for many years, and for some time had purchased cannabis from a regular supplier. In 2008 he was having difficulty in obtaining employment and he obtained drugs on credit. Subsequently he became involved in the criminal enterprise of his supplier. As the learned sentencing Judge observed, this was not a minor enterprise, but rather a major commercial enterprise involving the supply of cannabis and also quantities of MDMA and methylamphetamine.

[3] Over the relevant period the supplier would provide his customers with the mobile telephone number of the applicant. The customer would call the applicant and order drugs. The applicant would then obtain those drugs from the supplier and carry out the sale to the customer. He would account to the supplier for the whole of the cash proceeds. The applicant did not derive any significant profit from his involvement, but was supplied with sufficient cannabis for his own use and cash for "general living expenses".

[4] After his arrest the applicant entered into an interview with police in which he provided some false information, but he also made admissions. The evidence available against him included information obtained from the interception of telephone calls made and received by the applicant.

[5] In sentencing the applicant the learned sentencing Judge observed:

> Notwithstanding that you did not derive a large profit, you became actively involved in a very significant commercial drug operation and you played an important role in that criminal enterprise. Your involvement enabled the supplier to distance himself from the customers, leaving you as the essential link in the chain of supply.

> This is the context in which I am required to sentence you for the individual offences to which you have pleaded guilty.

[6] The offences to which the applicant pleaded guilty and the penalties imposed were as follows:

(a) Count 1: possession of $12,580 obtained from the sale of drugs. The money had been in the possession of the applicant at the time of his arrest at the warehouse from which the supplier ran the illegal enterprise. The money was to be provided to the supplier. There is a maximum penalty of imprisonment for 25 years for this offence. A sentence of imprisonment for three years was imposed;

(b) Count 2: possession of cannabis plant material, being 13.1 g, which was found in his vehicle at the time of his arrest. His Honour accepted that this cannabis was to be for the applicant's personal use. The maximum penalty for the offence is a fine of $2,000. No penalty was imposed;

(c) Count 3: possession of a trafficable quantity of cannabis plant material, namely 138.82 g found in a subsequent search of the applicant's home. His Honour found this cannabis to be intended for sale. There is a maximum penalty of a fine of $10,000 or imprisonment for five years for the offence. A sentence of imprisonment for 18 months was imposed and directed to be served cumulatively as to one year upon the sentence for count 1;

(d) Count 4: possession of $7,050 which was obtained from the sale of drugs and was found in the appellant's home. There is a maximum penalty of

imprisonment for 25 years for this offence. A sentence of imprisonment for three years was imposed and directed to be served concurrently with the sentence for count 1;

(e) Count 5: possession of a trafficable quantity of methylamphetamine, namely 2.15 g, also found at his home, which was held by his Honour to be intended for sale. There is a maximum penalty of a fine of $10,000 or imprisonment for five years for this offence. A sentence of imprisonment for two years was imposed of which one year was directed to be served cumulatively upon the sentence for count 1;

(f) Count 6: having supplied a commercial quantity of MDMA being a minimum of 1.288 kg resulting in a payment of $33,931 for which there is a maximum penalty of imprisonment for 14 years. A sentence of imprisonment for three years and nine months was imposed, of which two years was directed to be served cumulatively upon the sentence for count 5;

(g) Count 7: having supplied approximately 4 to 5 g of methylamphetamine resulting in a payment of $1,400 for which there is a maximum penalty of a fine of $10,000 or imprisonment for five years. A sentence of imprisonment for two years and six months was imposed of which one year was directed to be served cumulatively upon the sentence for count 6;

(h) Count 8: having supplied a commercial quantity of cannabis, approximately 1046 g, resulting in a payment of $12,010 for which the maximum penalty is imprisonment for 14 years. A sentence of imprisonment for two years and

nine months was imposed of which one year was directed to be served cumulatively upon the sentence for count 7.

[7] The learned sentencing Judge stated that in formulating the total head sentence of eight years he considered the principle of totality, as well as the total criminal conduct of the applicant, and he regarded the sentence as appropriate by which he meant that it was justly proportionate to the whole of the applicant's offending.

[8] In relation to the level of culpability of the applicant the learned sentencing Judge stated:

> So, Mr Hooton, you performed an important role in a large commercial drug enterprise over a period of approximately one and a half months. You participated in sales of significant quantities of three different types of drugs. In the chain of supply, you were next to the major supplier, that is, you were further up the chain of supply than the addict on the street who sells a quantity of drugs from time to time in order to finance a drug habit.

[9] His Honour reviewed the personal circumstances of the applicant and concluded that he was not a person of prior good character noting that he had previously committed offences involving cannabis and that he had a "shocking" driving record. His Honour noted that the applicant had strong family support, had accepted responsibility for his criminal conduct and demonstrated a determination to overcome problems with both alcohol and cannabis. He had successfully completed the CREDIT program but was not completely abstinent from cannabis. Whilst there were positive signs for rehabilitation his Honour concluded there was "a long way to go" and

personal deterrence remained a significant factor in sentencing. His Honour was not persuaded that the applicant was "truly sorry for becoming involved in the insidious drug trade".

**The proposed grounds of appeal**

[10] The applicant sought leave to argue three grounds of appeal. Initially the proposed grounds were that the sentence was manifestly excessive and that the learned sentencing Judge failed to give appropriate weight to the principle of totality. The additional ground identified at the commencement of the appeal was that:

> The learned sentencing Judge erred in over accumulating for particular offences, which upon proper analysis, form part of the continuing criminal enterprise, the subject of counts 6, 7 and 8.

**Concurrency**

[11] It was submitted on behalf of the applicant that the gravamen of the offending was the commercial supply of MDMA and cannabis and the supply of methylamphetamine. It was further submitted that the other offending was "part and parcel of the drug trafficking enterprise" and merely incidents of the drug trafficking operation. It was contended that there should be concurrency where separate offences form part of a continuing episode or course of criminal conduct.

[12] The applicant submitted that the learned sentencing Judge did not give sufficient weight to the overlap between the supply of dangerous drugs and the possession of tainted moneys, nor sufficient recognition to the overlap

between counts 3 and 5 being the possession of cannabis and methylamphetamine found in his home. Concurrence was required because of the confluence of offending.

[13] Section 50 of the *Sentencing Act* creates a prima facie rule that terms of imprisonment are to be served concurrently unless the court "otherwise orders". However there is no fetter upon the discretion exercised by the court and the prima facie rule can be displaced by a positive decision.[1] Generally speaking a court will not impose wholly cumulative sentences for a series of offences that are of a similar character or ordinarily associated and which simply represent facets of the one course of conduct.[2] An assessment must be made in each case as to the appropriate response to the offending in all the circumstances. Consideration of the extent to which the offences are separate and independent or, alternatively, overlapping is required. If the offences are closely related and interdependent that may lead to a conclusion that they arise out of the one transaction and require concurrency.[3] Each case must depend upon its own facts.

[14] As this Court observed in *Murphy v The Queen*:[4]

> The assessment will always be a matter of fact and degree. Reasonable minds might reach different conclusions as to the need for accumulation especially in cases that may be described as borderline. In many cases there will be no clearly correct answer and the overriding concern is that the sentences for the individual

[1] *Murphy v The Queen* [2005] NTCCA 15; *Miles v The Queen* [2001] NTCA 9.
[2] *Dicker v Ashton* (1974) LSJS 150; *Scanlon* (1987) 89 FLR 77 at 80-81.
[3] *O'Rourke* [1997] 1 VR at 246 at 253.
[4] [2005] NTCCA 15 at [26]; *Miles v The Queen* [2001] NTCA 9.

> offences and the total sentence imposed be proportionate to the criminality in each case.

[15] In *Attorney-General v Tichy*[5] Wells J observed:

> The practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time. What must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been guilty. Where there are truly two or more incursions into criminal conduct, consecutive sentences will generally be appropriate. Where, whatever the number of technically identifiable offences committed, the prisoner was truly engaged by one multifaceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient.

[16] Reference to the sentencing remarks reveals that his Honour did give consideration to the principle of totality and to the total criminal conduct. His Honour observed:

> I have borne in mind the point made by your counsel on your behalf that there may well be an overlap between the supply charges in counts 6, 7 and 8 and the possession of moneys that form the basis of the offences in counts 1 and 4.

[17] Careful analysis of the facts placed before his Honour suggests that this may have been a generous interpretation of events. It was conceded before this Court that the moneys that form the basis of the offences in counts 1 and 4 were not derived from the offending referred to in counts 6, 7 and 8. The argument for concurrency in relation to those offences is limited.

[18] Reference to the sentences imposed makes it plain that his Honour did direct a degree of concurrency in respect of the sentences imposed in relation to

counts 1, 3, 4, 5, 6, 7 and 8. Some degree of cumulation was appropriate. Some of the offences occurred on different days, they involved three different illegal drugs and they included supply to different people. In our opinion there is nothing in the manner in which the sentences were accumulated to suggest that his Honour erred in applying the principles of concurrency and totality.

[19] There was a case for concurrency between the sentences imposed in relation to counts 1 and 4 and his Honour in fact ordered total concurrency for those sentences. The ultimate issue is whether the total sentence was proportionate to the criminality involved.

[20] In relation to the submission made on behalf of the applicant that there was insufficient recognition of the overlap between counts 3 and 5, it must be noted that the sentences imposed in relation to each of those counts was directed to be served partially concurrently with the sentence imposed in relation to count 1. The effect of this direction was to provide for a level of concurrency as between the sentences in relation to counts 3 and 5. We see no error in the approach adopted.

**Totality**

[21] In relation to the principle of totality there can be no doubt that his Honour did take this into account and he explicitly stated that he had done so. The argument presented on behalf of the applicant was that his Honour failed to

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[5] (1982) 30 SASR 84 at 92.

review the aggregate sentence and consider whether the aggregate sentence was just. It is plain that his Honour did undertake this exercise. It is also plain that his Honour did not err when he undertook this exercise.

**Manifest excess**

[22] The complaint of the applicant was that the head sentence was manifestly excessive in all the circumstances and, in addition, the sentences imposed in relation to counts 5 and 7 were individually manifestly excessive.

[23] The principles applicable to such an appeal are well known. 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 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.

[24] We have revisited the circumstances surrounding counts 5 and 7 and have concluded that those sentences were each manifestly excessive. The

sentences were disproportionate to the criminality involved. There was a maximum available penalty of imprisonment for five years. A sentence of imprisonment for two years for possession of 2.15 g of methylamphetamine and a sentence of imprisonment for two years and six months for the supply of 4 to 5 g of methylamphetamine resulting in a payment of $1,400 were, in our view, manifestly excessive.

[25] Leave to appeal is granted and the appeal is allowed. It will be necessary to re-sentence the appellant.

**Re-sentence**

[26] In our opinion, a sentence of imprisonment for a period of one year in respect of count 5 and imprisonment for a period of 18 months in respect of count 7 should be imposed.

[27] We have given individual consideration to each of the other sentences imposed by his Honour and see no reason to interfere with them.

[28] Leave to appeal is granted and the appeal is allowed to the extent indicated above. To recognise the need for concurrency and for the application of the principle of totality, we re-sentence the applicant as follows:

(a) in relation to count 1 he is sentenced to imprisonment for a period of three years;

(b) in relation to count 2 no penalty is imposed;

(c) in relation to count 3 he is sentenced to imprisonment for a period of 18 months to be served cumulatively as to one year upon the sentence for count 1;

(d) in relation to count 4 he is sentenced to imprisonment for a period of three years to be served concurrently with the sentence for count 1;

(e) in relation to count 5 he is sentenced to imprisonment for a period of one year to be served cumulatively upon the sentence for count 1;

(f) in relation to count 6 he is sentenced to imprisonment for three years and nine months to be served cumulatively as to two years upon the sentence for count 5;

(g) in relation to count 7 he is sentenced to imprisonment for 18 months to be served cumulatively as to one year upon the sentence imposed in relation to count 6;

(h) in relation to count 8 he is sentenced to imprisonment for two years and nine months to be served cumulatively as to one year upon the sentence imposed in relation to count 6.

[29] The total sentence is therefore imprisonment for seven years commencing on 18 June 2010. We set a non-parole period of four years.

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