The Queen v Jones [2000] NTSC 42

PARTIES:	MARTIN WILLIAM JONES
	v
	DAVID BENSON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	9927486
DELIVERED:	21 June 2000
HEARING DATES:	15 June 2000
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPEAL – APPEAL AGAINST DECISION

Appeal from Court of Summary Jurisdiction – particular circumstances – circumstances of aggravation on another offence – error such that Court should interfere – consideration to appropriate sentence - appeal allowed – conviction confirmed

Cranssen v The King (1936) 55 CLR 509; *Maynard v O'Brien* (1991) 57 A Crim R 1, *Duthie v Smith* (1992) 107 FLR 458, *R v Herbert Dennis Harris* Nader J 29 October 1991, *R v Randell William Cash* Thomas J 29 March 1994, *R v Ian Selwyn Hume* Kearney J 7 February 1992; referred to

Misuse of Drugs Act 1990 (NT), s 5(1), s 9 (1), and (2)e and s 37(2); *Justices Act 1928* (NT), s 177; Sentencing *Act 1995* (NT), s 40 (1), (2) and (6), s 43.

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	R Noble

Solicitors:

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

Judgment category classification:	C
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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The Queen v Jones [2000] NTSC 42
No. 9927486

BETWEEN:

MARTIN WILLIAM JONES
Appellant

AND:

DAVID BENSON
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 21 June 2000)

[1] This is an appeal from a decision of a stipendiary magistrate sitting in the Court of Summary Jurisdiction in Alice Springs on 18 April 2000.

[2] The appellant entered a plea of guilty to a charge that:

On 1 December 1999 at Yulara in the Northern Territory of Australia

1. Unlawfully possessed cannabis plant material, a dangerous drug specified in Schedule 2 of the *Misuse of Drugs Act 1990* (NT), and the amount of the dangerous drug was a trafficable quantity, namely 169.1 grams.

Contrary to Section 9(1) and (2)e of the *Misuse of Drugs Act*.

[3] The maximum penalty for this offence is five years imprisonment.

[4] A second charge of unlawfully supply cannabis, a dangerous drug specified in Schedule 2, to another person, contrary to s 5(1) of the *Misuse of Drugs Act*, was withdrawn by the prosecution.

[5] The applicant was before the Court with a prior conviction imposed in the Alice Springs Court of Summary Jurisdiction for possess thing – administer dangerous drug.

[6] This prior conviction meant the learned stipendiary magistrate was required to give consideration to the provisions of s 37(2) of the *Misuse of Drugs Act* which provides as follows:

> "(2) In sentencing a person for an offence against this Act the court shall, in the case of an offence for which the maximum penalty provided by this Act (with or without a fine) is –
>
> (a) 7 years imprisonment or more; or
>
> (b) less than 7 years imprisonment but the offence is accompanied by an aggravating circumstance,
>
> impose a sentence requiring the person to serve a term of actual imprisonment unless, having regard to the particular circumstances of the offence or the offender (including the age of the offender where the offender has not attained the age of 21 years) it is of the opinion that such a penalty should not be imposed."

[7] The learned stipendiary magistrate imposed a sentence of 28 days imprisonment.

[8] The appellant appeals from that sentence on the following grounds:

> "1. That the learned Magistrate erred in finding that there was nothing in the circumstances of the offender which were, for

the purposes of Section 37(2) of the *Misuse of Drugs Act*, 'particular'.

2. That the learned Magistrate erred in taking into account a circumstance of aggravation which would have warranted a conviction for a more serious offence which was not charged, namely that the Appellant had offered to supply cannabis."

[9] I propose to deal firstly with Ground 2 of the grounds of appeal.

Ground 2:

"That the learned Magistrate erred in taking into account a circumstance of aggravation which would have warranted a conviction for a more serious offence which was not charged, namely that the Appellant had offered to supply cannabis."

[10] Following upon the plea of guilty to the offence on Count 1 on information, the police prosecutor read out the following precis of the facts in support of the charge which were agreed by counsel for the defence. These facts were as follows (t/p 2 – 3):

> "…. some time on the morning of 1 December 1999 the defendant and a co-offender departed Alice Springs to travel to Mutijulu community in Yulara, arriving there at about 12 pm. The defendant had in his bag a large quantity of cannabis. The defendant and co-offender drove into the community with this cannabis.
>
> About 5 pm on the same date the defendant and co-offender drove into the Yulara Resort with a large quantity of cannabis. They went to the Outback Pioneer Hotel, where they approached a staff member to see if he wished to purchase drugs. A short time later police arrived and the defendant was seen to place something down the front of his trousers. On being searched, a plastic bag containing 38 small deal size bags of cannabis were seized. A blue carry bag and a black jacket belonging to the defendant was also seized.
>
> The defendant was then arrested and conveyed to the police station. On searching the jacket, one sandwich bag of cannabis was located.

> On searching the bag, four other sandwich bags of cannabis were located along with numerous empty deal bags similar to those containing the cannabis. The weight of the cannabis – it was later weighed, Your Worship, and it came to 169.1 grams. He declined at a later stage to participate in a record of interview. ...."

[11] The above precis included the following statement which was not relevant to the charge to which Mr Jones had entered a plea of guilty but was relevant to the charge of supply cannabis which had been withdrawn by the prosecution:

> "They went to the Outback Pioneer Hotel, where they approached a staff member to see if he wished to purchase drugs."

[12] From a reading of the transcript of the proceedings before the learned stipendiary magistrate, this aspect of the precis was expanded on by counsel for the defence which must have served to reinforce an irrelevant but highly prejudicial fact in the mind of the learned stipendiary magistrate who was to sentence the appellant.

[13] The learned stipendiary magistrate then delivered his reasons for sentence which were as follows (t/p 6 - 7):

> "... Mr Jones, you were sitting in court when I dealt with a young person a short time ago and I made the statement that many people think that the use of cannabis is decriminalised, and it is clearly not. You have been dealt with by the court on one previous occasion, that being 8 January 1998 when you received a monetary penalty in relation to possessing a thing for administering a dangerous drug; that being cannabis.
>
> I do accept the explanation provided by you, there being no other evidence before me, as to how you came to be involved in this venture. But regardless of that, the fact of the matter is that you had a large amount of cannabis with you. You were present at a location

where you had that cannabis packaged in a particular way that would assist in the selling of that drug. You did in fact approach a person at Yulara, sounding him out for that purpose. You were willing, it seems to me, to make a profit from breaking the law and that to me is a very serious matter.

I do acknowledge, as I've indicated, that you didn't start out with that idea. But you certainly did accept the suggestion and you did prepare to carry out that suggestion. The Sentencing Act provides under section 37 that a person in your circumstances must receive a term of actual imprisonment of at least 28 days, unless this court, having regard to the particular circumstances of the offence or of you, this court is then of the opinion that such a penalty should not be imposed.

First of all in relation to the particular circumstances of this offence, I don't believe that there is anything in there that should excuse you from serving a term of actual imprisonment. As I've indicated, it was clearly an attempt at the time – I withdraw that. It was the possession of cannabis at the time in circumstances in which a profit could have been made if you'd carried through with your intention. There is no mitigating factor there, other than that you hadn't started out with that idea, that would take you out of the purview I believe of section 37 of the Misuse of Drugs Act.

Turning to your offences, I note – or your particular circumstances, I do note that you came before the court on a prior occasion for a relatively minor matter under this Act. But because of coming before the court in those circumstances, you are subject to this mandatory sentencing provision. And I do note that you haven't served time in prison before. You have a series of offences, mainly motor vehicle offences other than for the drug one, and I do take that into account, as I do your plea of guilty.

But the intent of the Act is quite clear. This is an offence accompanied by an aggravating circumstance, albeit the aggravating circumstance is the appearance in court on a relatively minor matter. There is nothing within your personal circumstances or the circumstances of the offence that lead me to believe that an actual term of imprisonment should not be imposed and you will be imprisoned for that mandatory term of 28 days. Thank you."

[14] From reading of these reasons for sentence, I have concluded that the learned stipendiary magistrate did take into account in imposing sentence matters that went to an aggravating circumstance or another offence with

which the appellant was not charged. The learned stipendiary magistrate makes reference in the course of his reasons for sentence to the appellant approaching a person at Yulara for the purpose of selling the cannabis. His Worship said “you were willing, it seems to me, to make a profit from breaking the law and that to me is a very serious matter"” The learned stipendiary magistrate makes further reference to the profit that could have been made if the appellant had carried through with his intention.

[15] These remarks made by the learned stipendiary magistrate indicate that the aggravating circumstance with which the appellant had not been charged assumed a high degree of importance and were matters not germane to the offence which His Worship was required to consider.

[16] I am satisfied the appellant has established this ground of appeal.

[17] Counsel for the Crown concedes that ideally the reference to supplying cannabis should not have been put before the magistrate to be taken into consideration. The Crown agrees that these matters were put before the learned stipendiary magistrate and taken into account by the magistrate in imposing sentence.

[18] It is the Crown submission that although the error did occur it was not significant and the learned stipendiary magistrate’s decision should not be interfered with.

[19] The principles on appeal are well established. I agree with the submission made by counsel for the Crown that:

> "It is not enough that the members of the court themselves would impose a less or different sentence or that they think the sentence over severe, an appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or 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.
>
> *Cranssen v [The King]* (1936) 55 CLR 509, 519"

[20] In this particular matter, I consider that the learned stipendiary magistrate did proceed on a misunderstanding as to the essential elements of the offence to which the appellant had pleaded guilty and placed considerable significance on material which was an aggravating circumstance that had not been charged.

[21] I am satisfied that the error was such that this Court should interfere with the sentence and give consideration to an appropriate sentence.

[22] The approach to the provisions of s 37(2) of the *Misuse of Drugs Act* have been considered in *Maynard v O'Brien* (1991) 57 A Crim R 1, Angel J at 7:

> "… It seems to me that 'particular circumstances' when referred to in s 37(2) of the Act means circumstances sufficiently noteworthy or out of the ordinary, relative to the prescribed conduct constituting the offence, or of the offender, to warrant a non custodial sentence. …"

[23] In adopting this statement of principle Mildren J in *Duthie v Smith* (1992) 107 FLR 458 at 467 added:

> "... I do not consider that the circumstances need to be so noteworthy or out of the ordinary as to convey the meaning that only in rare cases will there be found circumstances that fall within that class. ..."

[24] The circumstances of the offender in this case are that he is 36 years of age. The only relevant prior conviction is for a very minor offence under the *Misuse of Drugs Act*. He has been consistently in employment although in a variety of jobs. He did have a conviction on 8 January 1998 for drive exceed .08. It was when he was pulled up for this offence that police located a pipe used for administering a drug and he was also charged with the offence of possess thing – administer dangerous drug, and convicted of that offence on the same date. Prior to 8 January 1998, there was a period of almost eight years in which the appellant had no convictions at all. A character reference was tendered before the learned stipendiary magistrate. The appellant has previously been married and has four children by this marriage. Although he has been responsible for the care of these children they do not currently reside with him.

[25] I have been referred to a number of other sentencing decisions of this Court including *The Queen v Herbert Dennis Harris* No. 170 of 1991, a decision of Nader J delivered 29 October 1991; *The Queen and Randell William Cash* No. 27 of 1994, a decision of Thomas J delivered 29 March 1994; *The Queen and Ian Selwyn Hume* No. 205 of 1991, a decision of Kearney J delivered 7 February 1992.

[26] I propose to allow the appeal and pursuant to s 177 of the *Justices Act 1928* (NT) vary the sentence as follows.

[27] I confirm the conviction I impose a sentence of 28 days imprisonment. I consider that having regard to the circumstances of the offence and of the offender it is appropriate to suspend this period of imprisonment. Pursuant to s 40 (1) and (2) of the *Sentencing Act 1995* (NT), this sentence is suspended upon the condition that the offender be of good behaviour for two years.

[28] Pursuant to s 40(6) I specify a period of two years from the date of this order during which the offender is not to commit another offence punishable by imprisonment if the offender is to avoid being dealt with under s 43.

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