Musgrave v Roy [2005] NTSC 40

PARTIES:	MUSGRAVE, Raymond Mark
	v
	ROY, Lilly Garamara
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 3 of 2005 (20419657)
DELIVERED:	4 August 2005
HEARING DATES:	1 April 2005
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

MAGISTRATES – Appeal from Magistrate
CRIMINAL LAW – Drug offences

Appeal against sentence – supply of cannabis – whether magistrate erred in not recording a conviction – manifest inadequacy – material error of law and fact – definition of supply – supply of cannabis in Aboriginal communities – double jeopardy – appeal allowed – conviction recorded

Cransen v R (1936) 55 CLR 509; *Everett v The Queen* (1994) 181 CLR 295; *House v The King* (1936) 55 CLR 499; *R v Osenkowski* (1982) 30 SASR 212; *Pinkstone v R* (2004) 78 ALJR 797; *Scott v Perry* [2003] NTSC 26, applied

R v Morton [2001] NTCCA 6; *R v Thomas Edward Wesley* (unreported SCNT SCC 20103640, 20 September 2001, Angel J), followed

Cobiac v Liddy (1969) 119 CLR 257; *R v Hallocoglu* (1992) 29 NSWLR 67, referred to

R v Billiris (SCC 20317828); *v Fitirikkos* (SCC 20315986), distinguished

REPRESENTATION:

Counsel:

Appellant:	E Armitage
Respondent:	G Dooley

Solicitors:

Appellant:	DPP
Respondent:	NAALAS

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

Musgrave v Roy [2005] NTSC 40
JA 3 of 2005 (20419657)

BETWEEN:

RAYMOND MARK MUSGRAVE
Appellant

AND:

LILLY GARAMARA ROY
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 4 August 2005)

Introduction

[1] This is an appeal by the police against a sentence that was imposed on the respondent by the Court of Summary Jurisdiction on 24 November 2004. The appeal was commenced by a notice of appeal dated 21 December 2004.

[2] On 24 November 2004 the respondent pleaded guilty to a charge that contrary to s 5(1) of the Misuse of Drugs Act (NT) on 27 August 2004, the respondent unlawfully supplied cannabis, a dangerous drug specified in Sch 2, to another person, namely the Aboriginal people of Maningrida. Mr Loadman SM found the respondent guilty of the offence charged but

declined to record a conviction against the respondent. He placed her on a good behaviour bond for 12 months on her own recognisance in the sum of $500 with a $40 victims levy. The maximum penalty for the offence is a fine of $10,000 or imprisonment for five years.

The issues on appeal

[3] The grounds of appeal are that the learned magistrate erred:

1. In finding that it was an irrelevant fact for sentencing purposes that the respondent intended further acts of supply beyond the one count with which she was charged and to which she pleaded guilty.

2. In not recording a conviction.

[4] The principal issue is whether the learned magistrate erred in not recording a conviction. In my opinion he did err and the appeal should be allowed. The learned magistrate erred in finding that the respondent supplied 1.5 grams of cannabis instead of 115 grams of cannabis. Consequently he significantly underestimated the objective seriousness of the respondent's offending. A conviction should have been recorded.

The facts

[5] The facts of the respondent's offending were as follows:

(a) Sometime before 27 August 2004, the respondent agreed to transport 5 ounces of cannabis from Darwin to Maningrida, make up 100 deal bags from this cannabis and sell each bag for $50. The purpose of

the venture was to make $5000 that was to be returned to a co-offender in Darwin who was to pay the respondent $2000 for her efforts.

(b) On 27 August 2004, the respondent travelled to Maningrida from Darwin with the 5 ounces of cannabis. She hid four ounces at her neighbour's house. She divided one ounce into 1.5 gram deal bags. She made up seven deal bags which she hid in a nappy.

(c) The respondent sold one 1.5 gram deal bag to a man in Maningrida for $50.

(d) Police attended at the residence of the respondent and spoke with her. The respondent initially denied any knowledge of the cannabis. However, when further information was put to her she showed police the nappy that contained the remaining 6 deal bags and a plastic bag that contained the remainder of the divided ounce of cannabis. The respondent also produced the fifty dollar bill that she had obtained from the sale of the single deal bag of cannabis.

(e) The respondent was placed under arrest and taken to the police station. When questioned by police at the police station she told the police that she had another four ounces of cannabis hidden at her neighbour's house and that she was selling cannabis for a co-offender in Darwin. The respondent also showed police where the four ounces

of cannabis was hidden. The cannabis was then seized along with a number of unused deal bags.

(f) The total amount of cannabis seized was 115 grams.

(g) The respondent participated in a record of interview during which she made full admissions. She said that she planned to make around 100 deal bags of cannabis and then sell them to Aboriginal people at Maningrida for $50 each, making a total of $5000. The respondent was going to fly back to Darwin with the $5000 and give it to her co-offender who would then give her $2000.

[6] At the hearing in the Court of Summary Jurisdiction the respondent admitted the facts to which I have referred.

[7] During the hearing there was the following exchange between the learned magistrate and counsel for the appellant:

> "HIS WORSHIP: In order to know what to do with her, I need to know the quantity …. What amount are we talking about here?
>
> MS FAY: 115 grams.
>
> HIS WORSHIP: So it is 115 grams. That is a trafficable, not a commercial quantity is it?
>
> MS FAY: That is correct."

[8] Despite the admitted facts and the above conversation with counsel for the appellant, the learned magistrate found at page 8 of the transcript of

24 November 2004 that, “The facts of the matter are that she (the respondent) indeed supplied 1.5 grams of cannabis. I don’t believe that it is a matter to weigh into the sentencing of the defendant that she might have supplied more. She apparently was in possession of 115 grams. However, what she did was to supply 1.5 grams and if that is not small beer, although it is supply, then I do not know what small beer means.”

The law

[9] The magistrate’s finding constituted a material error of law and fact. Although the respondent only sold 1.5 grams of cannabis, she admitted and pleaded guilty to supplying 115 grams of cannabis to Aboriginal people at Maningrida. She transported 115 grams of cannabis from Darwin to Maningrida preparatory to and in furtherance of supplying the whole of that amount of cannabis to Aboriginal people at Maningrida in the expectation that she would be paid $2000 after all of the 115 grams of cannabis was sold. The fact that at the time she was apprehended by police, she had not as yet sold all of the 115 grams of cannabis does not diminish the fact that the applicant was engaged in a significant act of supply of cannabis.

[10] The definition of “supply” in s 3 of the Misuse of Drugs Act is as follows:

> "supply" means –
>
> (a) give, distribute, sell, administer, transport or supply, whether or not for fee, reward or consideration or in expectation of fee, reward or consideration;

(b) offering to do an act referred to in paragraph (a); or

(c) doing or offering to do an act preparatory to, in furtherance of, or for the purpose of, an act referred to in paragraph (a),

and includes barter and exchange;"

[11] The respondent's conduct fell within both subparas (a) and (c) of the definition of supply. "Supply" should be given its wider literal meaning. It was unnecessary for the prosecution to establish actual delivery or sale of the whole of the 115 grams of cannabis to Aboriginal people in Maningrida: *Pinkstone v R* (2004) 78 ALJR 797.

[12] When regard is had to the fact that the respondent supplied 115 grams of cannabis, not 1.5 grams, the sentence imposed is "all out of proportion to any view of the seriousness of the offence which could reasonably be taken": *Cransen v R* (1936) 55 CLR 509; *R v Osenkowski* (1982) 30 SASR 212. The sentence is so manifestly inadequate as to constitute an error in principle: *Everett v The Queen* (1994) 181 CLR 295 at 300. It was so even having regard to the respondent's character, antecedents, age and health. There were no extenuating circumstances and insufficient weight was given to deterrence by the learned magistrate, the need for which is well demonstrated by the decisions of this Court.

[13] The supply of such a quantity of cannabis in an Aboriginal community is a serious matter and those who engage in such conduct should expect to go to prison: *R v Thomas Edward Wesley* (unreported SCNT SCC 20103640, 20

September 2001, Angel J); *Scott v Perry* [2003] NTSC 26, Mildren J. The cases of *R v Billiris* (SCC 20317828) and *R v Fitirikkos* (SCC 20315986) are distinguishable as in those cases the cannabis was all for personal use. The respondent in this case supplied cannabis for commercial gain. In any event, in each of the cases of *R v Billiris* (supra) and *R v Fitirikos* (supra) a conviction was recorded against the defendants.

[14] While it is true that a person's character, antecedents, age and health may be a sufficient basis to exercise the discretion not to record a conviction: s 8 Sentencing Act, *Cobiac v Liddy* (1969) 119 CLR 257 at 265; the learned magistrate acted upon a wrong principle and failed to take into account the material consideration of the true quantity of the drug that was supplied: *House v The King* (1936) 55 CLR 499 at 505. When regard is had to all of the relevant circumstances including the true seriousness of the offence it is not a proper case for there to be no conviction recorded. Given her age, the respondent must have fully understood the serious nature of her offending which was planned. While the respondent was previously of good character, her good character was not exceptional.

Double jeopardy

[15] In the event that a Crown appeal is upheld the Court of Criminal Appeal has stated that an appellate court will not necessarily impose the sentence that should have been imposed below: *R v Morton* [2001] NTCCA 6 per Riley J. The fact that a successful appeal places the respondent in the position of

being "twice in jeopardy" often leads to a discount being applied: *R v Hallocoglu* (1992) 29 NSWLR 67 at 80. The extent of the discount will vary according to the circumstances of the particular matter and will range from substantial to none at all.

Orders

[16] The principles about double jeopardy have particular application in the present matter. The offending the subject of this appeal occurred in or about August 2004 and was dealt with on 24 November 2004. The respondent has been at large the whole time since her offending. The respondent is a 52 year old Aboriginal lady who has six children. Her partner passed away eight years ago. She has eight grandchildren and seven great-grandchildren. She has worked throughout her life. She had to stop work in order to care for her 85 year old mother. The respondent was to undergo heart surgery in December 2004. Prior to the offending the subject of this appeal she had no criminal history. She co-operated with the police. In the circumstances it would be unjust and counterproductive to now impose even a suspended term of imprisonment.

[17] I allow the appeal and in part set aside the sentence appealed from. I set aside the decision not to record a conviction against the respondent for the offending. I record a conviction against the respondent for the offence that contrary to s 5(1) of the Misuse of Drugs Act on 27 August 2004 at Maningrida in the Northern Territory of Australia, the offender unlawfully

supplied cannabis plant material, a dangerous drug specified in Sch 2 of the Misuse of Drugs Act, to Aboriginal people at Maningrida.