Kyle v Rigby[2007] NTSC 57

PARTIES:	KYLE, ALAN VALDZ
	v
	RIGBY, KERRY LEANNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA26/07 (20706179)
DELIVERED:	9 November 2007
HEARING DATES:	26 September 2007
JUDGMENT OF:	OLSSON AJ
ON APPEAL:	Sentence imposed by Court of Summary Jurisdiction on 3 May 2007

CATCHWORDS:

Justices Appeal -- appeal against sentence and recording of a conviction -- quantity of cannabis possessed by appellant for personal use for pain relief -- amount within the maximum for which an "on the spot" fine of $200 could have been imposed -- offender elderly man in receipt of disability pension and suffering from various medical problems -- whether provisions of s 17 of Sentencing Act adequately taken into account -- whether quantum of the fine imposed properly related to means of offender and a due reflection of objective gravity of offending -- whether circumstances warranted or mandated a non-recording of conviction -- appeal allowed as to quantum of fine.

REPRESENTATION:

Counsel:	
Appellant:	C McAlister
Respondent:	M Johnson
Solicitors:	
Appellant:	Northern Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	ols200704
Number of pages:	14

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Kyle v Rigby [2007] NTSC 57
No. JA26/07 (20706179)

BETWEEN:

KYLE, ALAN VALDZ
Appellant

AND:

RIGBY, KERRY LEANNE
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 9 November 2007)

Introduction

[1] This is an appeal against a sentence imposed by a stipendiary magistrate upon the appellant on 3 May 2007, consequent upon him pleading guilty to a charge that, on 1 March 2007 at Palmerston, he unlawfully possessed cannabis plant material, a dangerous drug specified in Schedule 2 of the Misuse of Drugs Act.

[2] The learned magistrate recorded a conviction against the appellant and imposed a fine of $500 with a $40 victim levy. She allowed 28 days in which to pay those amounts.

[3] On the hearing of the appeal the appellant sought leave to amend the grounds of appeal so as to specifically aver that the learned magistrate failed to give any or due weight to the provisions of s 5(1)(a), s 5(2)(a) and s 17(1) of the Sentencing Act and in determining to record a conviction. Those amendments were not objected to.

[4] I take the grounds of appeal, in effect, to assert that not only was it inappropriate to record a conviction against the appellant but also the penalty imposed was manifestly excessive in the circumstances. It is specifically complained that:

(1) the learned magistrate erred in recording a conviction against the appellant in circumstances where the offence might have been met with an '*on the spot*' fine of $200 and in which the offence had been committed were generally such that it was inappropriate to record a conviction, particularly having regard to the fact that this would necessarily potentially trigger the operation of s 37(2) of the Misuse of Drugs Act in the event of the commission of another relevant drug offence; and

(2) the learned magistrate erred in imposing a fine of $500 having regard to the financial circumstances of the appellant.

The relevant facts

[5] The learned magistrate was informed that the appellant was a 61-year-old male who resided at 17 Lockwood Court in Moulden.

[6] Prior to Thursday 1 March 2007 he had purchased 26 g of cannabis and kept it at his residence hidden inside an orange juice carton in the pantry.

[7] At about noon on Thursday 1 March 2007 a search warrant was executed on his residence. As a result, police located the cannabis in the pantry.

[8] The appellant was apprehended at his residence and took part in a record of interview, during which he made full admissions concerning the offence. When asked if he owned the cannabis he replied "*Yes, my personal smoke. I use marijuana for pain relief*". He was then told that he would be summonsed.

[9] The learned magistrate was informed that the appellant had a minor antecedent record, although it was readily conceded that this was quite old. Indeed, it consisted of one conviction for disorderly behaviour in 1967, one minor assault charge in 1975 and one alcohol-related driving offence in 1976.

[10] Counsel for the appellant told the learned magistrate that, over the last many years, his client had been a very productive member of the community. He had spent up until about four years ago working in some quite difficult

places throughout the Territory, Western Australia and Queensland -- primarily as a plant and machinery operator with dozers and scrapers.

[11] It was further indicated to the learned magistrate that the appellant had other medical problems, including a lump in his throat that had been causing him considerable pain. It had been suggested by an acquaintance of the appellant that he try using cannabis for pain relief, because the pain killing medication that he had been prescribed was causing ulceration, constipation and other problems.

[12] It was further pointed out that the appellant had a hearing impairment and was diabetic.

[13] The learned magistrate was told that the cannabis had, in fact, produced beneficial results by way of pain relief but that, following the incident of 1 March 2007, the appellant had desisted from further use of that substance. His general practitioner was exploring traditional forms of medication for pain relief that did not have undesirable side-effects.

[14] It was put to the learned magistrate that, having regard to the appellant's good prior work record, his minimal record of prior offending, his personal circumstances and the fact that there was no suggestion that the possession of cannabis had been for other than his own personal use, it was appropriate not to record a conviction against him. This was particularly so as the recording of a conviction would necessarily activate the potential operation of s 37(2) of the Misuse of Drugs Act.

[15] Counsel for the appellant further drew attention to the fact that it had been open to the police to issue an infringement notice requiring payment of a fine of $200 rather than initiate a prosecution, because the quantity of cannabis involved had been less than 50 g. He argued that the amount of the drug was not large and that it was clearly possessed for personal use by way of pain relief. It was therefore difficult to understand why the police had adopted the course of action that they had.

[16] In the event, the police did not offer any explanation, beyond requesting the recording of a conviction because the appellant did have some prior criminal history.

The approach of the learned magistrate

[17] In her sentencing remarks the learned magistrate had this to say:

> "On 1 March the police found you in possession of 26 g of cannabis. They had a warrant to come into your house and they came in and found that in your pantry. You said it was your smoke and it was for pain relief and you were very frank with them when the police were there. That was on 1 March. You've waited in between now and then and your court case is on today and you've pleaded guilty straightaway.
>
> You had a whole lot of injuries including a very bad injury to your hand and I can see that brace is on your hand and you've also got other health problems and I've got some reports here about that. You are now 61. You've been to court before. Some of them are -- well all of them are a long time ago, though and I take that into account.
>
> You have been very anxious about this court case because it's been a while waiting to find out what's happening and you've pleaded guilty today as I say. Someone suggested that you could try cannabis for your pain relief, you've now stopped doing that. Cannabis is a drug under the Misuse of Drugs Act and it is not prescribed as pain relief.

> You're now speaking with your doctors about that pain relief. You've worked in a whole range of jobs before and I take that into account.
>
> Your lawyers asked for no conviction. In my view there is a whole range of reasons why I'm not going to order that. You have been to court before. This is 26 g of cannabis, halfway to being a trafficable quantity so it is not a small amount of cannabis and you are not of an age where I think it's -- there's particularly exceptional reasons why I should order no conviction. If you'd been say in your seventies or something like that I may well have considered it. You're convicted and fined $500. $40 levy, 28 days to pay. You'll get a piece of paper that will tell you how you could get more time to pay that money".

Issues on the appeal

[18] Counsel for the appellant invited attention to the provisions of s 17 of the Sentencing Act which mandates that, where a court decides to fine an offender it must, in determining the amount of the fine, take into account, as far as practicable, both the financial circumstances of the offender and the nature of the burden that its payment will impose on the offender.

[19] It was pointed out that the learned magistrate had not made any reference to this aspect in her sentencing remarks and that the fine imposed represented a full fortnight of disability pension payments that were, in any event, only a fraction of the average weekly earnings for full-time adults. It was stressed that the offender was 61 years of age, dependent on his pension and suffered medical problems that prevented him from returning to his former employment.

[20] Reference was made to a series of judicial dicta in which the point has been made that the imposition of a fine that is beyond an offender's reasonable capacity to pay is neither just nor rational (cf *Devlyn v Lowe*, Cosgrove J, unreported, Supreme Court, Tasmania, 23 May 1980, *Jabaltjari v McKinlay* Muirhead J, unreported, Supreme Court of the Northern Territory, 19 May 1981).

[21] In the course of my judgment in *Fry v Bassett* (1986) 44 SASR 90, I made the point that, if it is appropriate to impose a fine, the quantum of it must be related to the means of a defendant in some logical manner, particularly in the case of persons who are of very limited resources. I went on to say that, whilst fines must, in general, constitute a proper reflection of the gravity of the offending, nevertheless, subjective consideration must be given to what level of fine will act as a sufficient level of punishment to a defendant in his particular circumstances. That view was accepted by the Chief Justice in *Campbell v Tudor-Stack* [2003] NTSC 19.

[22] It was submitted that the fine was simply too much in the case of this particular appellant, having regard to his straightened financial circumstances and the undue burden that its payment would impose on him. Thus, it constituted an appealable error (*Aref Rahme* (1989) 43 A Crim R 81).

[23] Mr Johnson, of counsel for the respondent, acknowledged that the learned magistrate had not specifically referred to this aspect in her sentencing

remarks. However, he submitted that a failure to do so and to specifically refer to the limited financial circumstances of the appellant did not, of itself, amount to error. He also sought to draw a distinction between the present case and instances in which what had been under consideration were very large monetary fines.

[24] Whilst, no doubt, the circumstances under review in various of the decided cases did involve very substantial monetary fines, that is not to say that the fundamental principle involved is any less applicable in a case such as the present. At the end of the day what is in issue is the practical impact of a proposed fine on the individual offender and the extent to which it constitutes a sufficient level of punishment to *that* person in his or her particular circumstances.

[25] In the instant case there can scarcely be any doubt that a fine of $500 on a man reliant upon a disability pension of $250 per week would necessarily have a Draconian effect, even if arrangements were made for payment of it by instalments. Whilst I do not question the propriety of a fine of the amount here in issue in the case of an offender who was receiving a normal, albeit perhaps basic, wage in regular employment, it is difficult to reconcile the imposition of it on the appellant conformably with the mandate of s 17 of the Sentencing Act. The natural inference, absent some statement of rationale in the relevant sentencing remarks, is that, *per incuriam*, this aspect was overlooked or not given due weight in the sentencing process.

[26] I am reinforced in that view by a consideration of the provisions of s 20B of the Misuse of Drugs Act which provides for the possibility of investigating police officers to proceed by way of issue of an infringement notice that would attract a fine of $200.

[27] Whilst the learned magistrate quite correctly pointed out in her sentencing remarks that the amount of cannabis possessed was almost half that which would constitute a trafficable quantity, nevertheless, it was still well within the maximum amount in respect of which, as a discretionary act, the police officers could have issued an infringement notice. I am bound to comment that I find it somewhat difficult to understand why, in the particular circumstances of this offender, the police officers insisted on proceeding by way of prosecution rather than infringement notice.

[28] I, of course, do not suggest that in every case in which the quantity of cannabis is less than the maximum prescribed quantity an infringement notice ought automatically to issue. It would, for example, normally be quite inappropriate in the case of someone who was either a persistent offender or who was in possession of cannabis in circumstances that were highly suggestive of dealing in the drug.

[29] In the instant case, there was no evidence of that type of scenario and a very real and reasonable explanation as to why the appellant possessed and was using the cannabis. I would have thought that, if ever there was a case that merited the exercise of discretion to issue an infringement notice, this was

it. Even so, the requirement to pay $200 would necessarily give rise to significant punishment of and hardship on the appellant and constitute a very real deterrent against re-offending.

[30] In so commenting, I by no means seek to ignore the provisions of s 20F of the Misuse of Drugs Act. I merely seek to contrast, in a practical way, what has occurred in the instant case at the insistence of the police with what would have been a more practical and commonsense outcome in all the circumstances.

[31] Further, the maximum fine applicable to an offence of this type is $2000. Given that the appellant had a minor antecedent record of very stale convictions, and no prior drug offences, a fine of $500 constitutes a very substantial proportion of that maximum for a first offence of its type in the relevant circumstances, as I have outlined them.

[32] In his most helpful submissions, Mr Johnson drew attention to the fact that the learned magistrate had been made well aware of the fact that the circumstances could have attracted the issue of an infringement notice. He submitted, in effect, that there was no reason to assume that she did not take that situation into account and had not ignored what would have been the level of penalty associated with it.

[33] I do not doubt that this submission is accurate. However, it seems to me, on reading the relevant sentencing remarks, that the learned magistrate became preoccupied by the fact that the quantity of cannabis involved was half way

towards being a trafficable quantity and that her thinking was somewhat dominated by that consideration to the exclusion of the very important information before her that was pertinent to a proper application of s 17 of the Sentencing Act to the specific circumstances.

Conclusion

[34] In addressing this matter I am acutely aware of the well settled principles governing appeals against sentence.

[35] It is trite to say that this Court, in its appellate role, will not interfere with a sentence imposed merely because it is of the view that it would have imposed a less or different sentence, or that it is felt that the sentence imposed is over-severe. It interferes only if it be shown that the sentencing magistrate was in error, by 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 learned magistrate said in the proceedings, or the sentence itself may be so excessive, in the circumstances, as to manifest error. (*Salmon v Chute and Anor* (1994) 94 NTR 1 at 24, *Crannsen v The King* (1936) 55 CLR 509).

[36] In my opinion, for the reasons already expressed, the appellant has demonstrated error in the sentencing process. I consider that, in the particular circumstances of this case, the fine imposed was manifestly excessive. The appeal as to penalty will be allowed, the fine imposed set aside and a fine of $200 substituted for it.

[37] On the other hand, I am by no means convinced that the learned magistrate fell into error in recording a conviction against the appellant.

[38] As I understand the submissions on the appellant's behalf, it is said that the learned magistrate ought to have deemed the offence to be trivial within the meaning of that expression in s 8(1) of the Sentencing Act.

[39] As the Chief Justice pointed out in *Gorey v Winzar* (2001) 1 NTJ 307, an assessment of whether an offence is trivial requires an objective assessment of the particular circumstances of that offence.

[40] True it is that, as counsel for the appellant declaimed, the relevant possession was at the appellant's suburban residence for his own personal use for pain relief, involved only about half of the trafficable quantity and well within the potential ambit of operation of s 20B of the Misuse of Drugs Act and was not accompanied by any aggravating circumstances. She sought to derive comfort from that section as indicating the view of the legislature that an offence at this level could well be regarded as trivial.

[41] Counsel further sought to rely on considerations related to the character, antecedents, age and health of the appellant and (by inference) the extent to which it could fairly be said that extenuating circumstances existed. Particular reference was made to the long period that has elapsed since there had been any prior offending on the part of the appellant.

[42] As was pointed out by Windeyer J, in the well-known case of *Cobiac v Liddy* (1968) 119 CLR 257 at 275-276, a decision as to whether or not to record a conviction involves the exercise of discretion. It is well settled that an appellate court will not interfere with the exercise of such a discretion at first instance unless the justice of the case patently demands it. The discretion is that of the Court at first instance.

[43] As Mr Johnson rightly pointed out, counsel for the appellant at first instance did not really go so far as to submit to the learned magistrate that the subject offence was in fact trivial. It is plain that the learned magistrate certainly did not consider that the offence, as committed, was trivial, particularly bearing in mind the quantity of cannabis involved. Nor was she of the view that the circumstances were sufficiently extenuating as to warrant the non-recording of a conviction. She particularly referred to that aspect and expressed the view that her approach might have been different in other circumstances.

[44] Whilst it is true that there certainly were some extenuating circumstances that particularly bore upon penalty, I find myself unable to conclude that the exercise by the learned magistrate of her discretion to record a conviction was erroneous.

[45] Whilst it may well be the case that this matter would have been better disposed of by the issue of an infringement notice in the first place, the police were entitled to opt for prosecution and the appellant was found in

possession of a significant quantity of cannabis. The fact that the recording of a conviction might potentially trigger the future operation of s 27(2) of the Misuse of Drugs Act is no basis for declining to record a conviction, at least in the circumstances of a case such as that now before me. Despite the appellant's expressed motive for possessing the cannabis, he nevertheless knowingly and deliberately committed a substantial breach of the law.

[46] In my opinion this aspect of the appeal has not been made good and must be dismissed.

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