CITATION:	*Horder v The Queen* [2019] NTCCA 3
PARTIES:	HORDER, Damian 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:	CA 21 of 2017 (21725162)
DELIVERED:	10 January 2019
HEARING DATE:	7 June 2018
JUDGMENT OF:	Grant CJ, Blokland and Barr JJ

CATCHWORDS:

CRIMINAL LAW – DRUG OFFENCES – JUDGMENT AND PUNISHMENT

Whether sentence imposed for possession of tainted monies manifestly excessive in all the circumstances of the offence and the offender – where offence of dealing with tainted monies does not constitute a separate act of criminality warranting a charge separate and additional to the offence by which those monies were derived, the charge will be an abuse of process and/or may attract a plea in bar – no abuse of process in charging both a supply offence and dealing with monies derived from that supply – where the dealing with tainted monies shares conduct, elements or criminality with the offence by which the monies were derived, matter properly addressed in the imposition of penalty and appropriate orders for concurrency – no necessary call for concurrency where tainted monies are derived from some source other than the supply with which the offender is also charged – assessing objective seriousness of an offence against s 8(1) of the *Misuse of*

Drugs Act (NT) involves consideration of amount(s) involved, number of transactions, period over which transactions occurred, sophistication, size and extent of the operation which generated the monies, offender's role in operation and what became of the monies – assessment may also require comparison with the sentence fixed for criminal conduct by which proceeds derived – sentence to imprisonment for five years manifestly excessive – appeal allowed and applicant resentenced.

Misuse of Drugs Act (NT) s 8, s 37

Carroll v The Queen (2011) 29 NTLR 106, *Clarke v The Queen* [2019] NTCCA 2, *Thorn v The Queen* (2009) 198 A Crim R 135, referred to.

REPRESENTATION:

Counsel:

Appellant:	JCA Tippett QC
Respondent:	D Morters

Solicitors:

Appellant:	Maleys Barristers and Solicitors
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	15

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

Horder v The Queen [2019] NTCCA 3
No. CA 21 of 2017 (21725162)

BETWEEN:

DAMIAN HORDER
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, BLOKLAND and BARR JJ

REASONS FOR JUDGMENT

(Delivered 10 January 2019)

THE COURT:

[1] The appellant was charged by indictment with intentionally supplying a commercial quantity of cannabis and intentionally possessing $28,800 in cash knowing that it was obtained directly or indirectly from the supply of a dangerous drug. The maximum penalty for the supply offence was imprisonment for 14 years, and the maximum penalty for the possession of the tainted monies was imprisonment for 25 years.

[2] The appellant pleaded guilty to both charges and on 28 November 2017 he was convicted and sentenced to imprisonment for three years for the supply

offence and imprisonment for five years for the possession of the tainted monies. Those sentences were ordered to be served concurrently and backdated to 6 October 2017 to take account of the time the appellant had spent in prison prior to the grant of bail. That sentence was suspended after the appellant had served two years on conditions and subject to supervision by Community Corrections.

[3] On 5 December 2017 the appellant sought leave to appeal on the ground that the sentence was manifestly excessive in all the circumstances of the offence and the offender. Leave to appeal was granted by a single Judge on 6 March 2018, but only in relation to the sentence imposed for the possession of the tainted monies.

The agreed facts

[4] The appellant was 41 years of age at the material time. Some time prior to 26 May 2016 the appellant's co-offender, who was a truck driver based in Adelaide, came into possession of 13.6 kg of cannabis. That was 30 pounds in the imperial measure which was divided into 30 separate vacuum sealed bags which each contained one pound of the drug. Those bags were packed into two boxes and concealed in the rear of the road train the co-offender was driving from Adelaide to Darwin on behalf of his employer.

[5] The co-offender left Adelaide on 26 May 2017 and arrived at the Darwin depot on 28 May 2017. The appellant attended at the Darwin depot, met with the co-offender, and took possession of one box containing 15 pounds

of cannabis. In exchange he gave the co-offender a red metal toolbox containing $40,020 in cash. The appellant then left the depot and drove towards Palmerston. He was intercepted by police, his vehicle was searched and the cannabis was seized. Police then travelled to the depot and seized the red toolbox containing the cash. While police were still at the depot a second co-offender arrived there to collect the remaining 15 pounds of cannabis. She was also arrested by police.

[6] Police subsequently searched the appellant's residence and found a further $28,800 in cash, the proceeds of previous sales of cannabis by the appellant. The appellant had also received that cannabis from the first co-offender.

[7] Intelligence reports disclosed that cannabis was being sold in the Northern Territory for between $4,500 and $6,000 per pound and for $30 per gram. On the basis of those figures, the "wholesale" value of the cannabis was estimated to be in the vicinity of $150,000 with a potential "retail" value if sold by the gram in excess of $408,000.

Sentencing for the receipt or possession of tainted monies

[8] The operation of s 8(1) of the *Misuse of Drugs Act* in the sentencing context is discussed in *Clarke v The Queen*[1], which was delivered at the same time as the decision in this appeal. We will not repeat that discussion save to reiterate the general principles which have operation in this context.

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1 [2019] NTCCA 2.

[9] First, where the offence of receiving or possessing tainted monies (or dealing with the proceeds of crime, as the case may be) does not constitute a separate act of criminality warranting a charge separate to the offence by which those monies were derived, the charge will be an abuse of process and/or may attract a plea in bar.

[10] Secondly, in the ordinary course there will be no abuse of process in charging both a drug supply offence and dealing with, receiving or possessing monies derived from that supply.

[11] Thirdly, where the offence involving the tainted monies shares conduct, elements or criminality with the offence by which the monies were derived, the matter is properly addressed in the imposition of penalty and appropriate orders for concurrency having regard to the commonality between the offences.

[12] Fourthly, there will be no necessary call for concurrency where the tainted monies are derived from some source other than the supply with which the offender is also charged, and the ordinary principles will apply.

[13] Fifthly, the maximum penalty fixed by s 8(1) of the *Misuse of Drugs Act* is a "catch-all" penalty designed to accommodate a very broad range of offending behaviours which requires a careful assessment of the objective seriousness of the offending under consideration.

[14] Finally, the assessment of objective seriousness will involve a consideration of, where apparent, the amount(s) involved, the number of transactions, the period over which those transactions occurred, the sophistication, size and extent of the operation which generated the monies, the offender's role in that operation and what became of the monies. That assessment may also require some comparison with the sentence fixed for the criminal conduct by which those proceeds were derived.

The sentence imposed for the possession of the tainted monies

[15] As described at the commencement of these reasons, the Supreme Court convicted and sentenced the appellant to imprisonment for three years for the supply offence and imprisonment for five years for the possession of the tainted monies. Those sentences were ordered to be served concurrently and backdated to 6 October 2017.

[16] This is not a case in which the tainted monies were derived from the supply for which the appellant was also sentenced. The appellant attended at the Darwin depot and took possession of 15 pounds of cannabis. That was the conduct giving rise to the supply offence. Police subsequently searched the appellant's residence and found a further $28,800 in cash in the appellant's possession which was the proceeds of previous sales of cannabis by him.[2] That possession was the conduct giving rise to the offence of possessing tainted monies. The only commonality between those offences was that they

2 That matter formed part of the Agreed Facts: see AB 8, [7].

both involved the supply of cannabis which the appellant had received from the first co-offender on different occasions.

[17] The sentencing facts are inscrutable in relation to a number of factors which might ordinarily be considered in assessing the objective seriousness of an offence against s 8(1) of the *Misuse of Drugs Act*. Only the bare amount of the monies involved is known, together with the fact that they were derived from the sale of cannabis by the appellant. The facts do not disclose the number of transactions, the period over which those transactions occurred, the nature of the operation which generated the monies, or the offender's specific role in that operation. Those uncertainties notwithstanding, the fixing of a proportionate sentence for the offence involving the tainted monies requires some comparison, in the manner discussed in *Thorn v The Queen*[3], with the sentence which might be fixed for the criminal conduct by which those proceeds were derived. That is a hypothetical comparison given that the appellant has not been charged with any criminal offence in relation to the supply of the cannabis by which the $28,800 was derived.

[18] The sentencing facts do disclose that cannabis is sold in the Northern Territory for between $4,500 and $6,000 per pound and for $30 per gram. Given the quantities involved in the supply offence, the more likely inference is that the appellant was selling the cannabis by the pound, or at least in relatively large quantities. On the basis of those figures and the

3 [2009] NSWCCA 294, 198 A Crim R 135.

more likely inference, the monies in the appellant's possession would reflect the sale of approximately five or six pounds of cannabis, if sold by the pound. There is no basis on which to infer to the requisite standard that the appellant was selling cannabis by the gram, and that the monies in his possession were the proceeds of the sale of some lesser quantity over a far greater number of transactions. Even if such an inference was available, it would make little difference in the assessment of objective seriousness.

[19] There are a number of recent comparative sentences in this jurisdiction for offences against s 8(1) of the *Misuse of Drugs Act* involving tainted monies derived from the supply of cannabis. The results in those matters over the last four years which bear some comparison with the present circumstances may be summarised as follows.

(a) In the matter of *Higgins* the offender was sentenced to imprisonment for five years after discount for his guilty plea for the possession of $121,145 obtained from the commission of drug offences.

(b) In the matter of *Daly* the offender was sentenced to imprisonment for 19 months after discount for his guilty plea for the possession of $7,385 obtained from the commission of a drug offence. The offender was also charged with and convicted of the primary supply offence involving 1.979 kg of cannabis, and was sentenced to imprisonment for two years and six months. The sentences were ordered to be served in full

concurrency in circumstances where the tainted monies were derived from the supply for which the appellant was also sentenced.

(c) In the matter of *Goedegebuure* the offender was sentenced to an aggregate term of imprisonment for three years and 10 months for offences which included supplying 21 kg of cannabis and possessing tainted monies in the sum of $177,085. That sentence incorporated a discount for the offender's guilty plea and remorse, and a further discount on *Ellis* grounds.

(d) In the matter of *Daniels* the offender was convicted of supplying cannabis in an indigenous community, the possession of cannabis and the possession of $8,140 obtained from the supply of that cannabis. He was sentenced after discounts for his pleas of guilty to imprisonment for three years and two months for the supply offence and imprisonment for two years and five months for the possession of the tainted monies. One year of the sentence for the offence of possessing tainted monies was ordered to be served cumulatively on the sentence for the supply offence.

(e) In the matter of *Turnbull* the offender was sentenced after discount for his guilty pleas to imprisonment for 15 months for the supply of 637.6 g of cannabis and to imprisonment for 20 months for the possession of $19,900 obtained from the supply of cannabis. Those sentences were ordered to be served cumulatively as to four months.

(f) In the matter of *Calesso* the offender was sentenced after discount for his guilty pleas to an aggregate period of imprisonment for three years for the offences of supplying 7.257 kg of cannabis, possessing a small quantity of cannabis plant material, and possessing $4,850 obtained from the supply of that same cannabis.

(g) In the matter of *Bosse* the offender was sentenced after discount for his guilty pleas to an aggregate period of imprisonment for three years and six months for the offences of supplying 1.308 kg of cannabis and possessing $94,470 obtained from that and other supply activity.

(h) In the matter of *Ahfat* the offender was sentenced after discount for his guilty pleas to an aggregate period of imprisonment for two years for the offences of supplying cannabis and possessing $17,205 obtained from the supply of that same cannabis.

(i) In the matter of *Cameron* the offender was sentenced after discount for his guilty pleas to an aggregate period of imprisonment for two years and four months for the unlawful supply of 2.815 kg of cannabis and possessing $8,586 obtained from the supply of that same cannabis.

(j) In the matter of *Witham* the offender was sentenced after discount for his guilty pleas to an aggregate period of imprisonment for three years for the possession of a small quantity of cannabis, the supply of a trafficable quantity of cannabis to an indigenous community and possessing $24,000 obtained from the supply of that and other cannabis.

(k) In the matter of *Salzberger* the offender was sentenced after discount for her guilty pleas to an aggregate period of imprisonment for three years for three counts of supplying cannabis in an indigenous community and two counts involving the receipt of a total of $14,300 obtained from that supply.

(l) In the matter of *Hubbard and Patrick* the offender *Hubbard* was sentenced after discount for his guilty pleas to a total effective period of imprisonment for five years for a range of offences, the principal ones of which were the supply of 4.889 kg of cannabis, the supply of 1.006 kg of cannabis and the possession of $68,850 from that supply. Before orders for partial concurrency, each of those offences attracted an individual sentence of imprisonment for 28 months. The offender *Patrick*, whose involvement was at a lower level, was sentenced after discount for her guilty pleas to a total effective period of imprisonment for three years for those same offences.

(m) In the matter of *Delacoeur* the offender was sentenced after discount for his guilty pleas to an aggregate period of imprisonment for 18 months for the offences of supplying cannabis in an indigenous community and receiving $9,900 obtained from that supply.

(n) In the matter of *Do* the offender was convicted of supplying 1.018 kg of cannabis, the possession of a small quantity of cannabis seeds, and the possession of $30,000 obtained from the supply of that and other cannabis. He was sentenced after discounts for his pleas of guilty to

imprisonment for two years for the supply offence and imprisonment for two years for the possession of the tainted monies. One year of the sentence for the offence of possessing tainted monies was ordered to be served cumulatively on the sentence for the supply offence.

(o) In the matter of *Herbert* the offender was sentenced to an aggregate period of imprisonment for 18 months for the supply of 445 g of cannabis in an indigenous community and the possession of $30,000 obtained from the supply of cannabis. That sentence incorporated discounts for both the offender's pleas of guilty and his significant cooperation with authorities.

(p) In the matter of *Robinson* the offender was sentenced after discount for his pleas of guilty to an aggregate period of imprisonment for three years for the cultivation of cannabis, the possession of 6.286 kg of cannabis, and the possession of $19,164 in cash, gold bars and a motorcycle obtained from the supply of cannabis.

[20] The sentences imposed on the co-offenders in this matter do not give rise to any issue concerning parity.

[21] The second co-offender who was arrested when she arrived at the depot to purchase the other 15 pounds of cannabis was charged with a single count of supplying a commercial quantity of cannabis. She was not charged with receiving or possessing tainted monies. She was 19 years of age at the time of the offending and it was apparent from the agreed facts, and accepted by

the Crown, that she was acting primarily as an intermediary to collect the cannabis on behalf of her partner. Her partner subsequently confirmed that account and gave police details of the manner in which he had intended to dispose of the cannabis. The second co-offender was sentenced to imprisonment for 15 months backdated to 26 October 2017 to take into account the 32 days she had spent in prison before being granted bail.

[22] The first co-offender was charged with supplying a commercial quantity of cannabis and the intentional possession of $40,020 obtained directly or indirectly from the supply of a dangerous drug. He was sentenced some weeks later on the basis that the tainted monies were to be remitted to a principal in Adelaide, he was a courier whose commercial reward in the enterprise was very small in relative terms, he was 52 years of age, he had a minor and limited criminal history, he had a substantial work record, he had entered early pleas of guilty to the charges, and he was entitled to a significant discount on *Ellis*[4] grounds. The first co-offender was sentenced to an aggregate period of imprisonment for three years. In the course of those sentencing proceedings the first co-offender's circumstances were expressly contrasted with the circumstances which presented in sentencing the appellant. It may also be noticed that the tainted monies for which the first co-offender was convicted and sentenced were derived from the supply offence with which he was also charged, and had come from the appellant.

4 *R v Ellis* (1986) 6 NSWLR 603.

[23] The learned sentencing judge accepted that the appellant had a substantial work record, that until this offending he had been regarded as a man of good character, and that he had only minor prior convictions which had no relevance to the sentencing exercise. Against that background, and having regard to the amount of tainted monies in the appellant's possession, the means by which those monies were derived, and the fact that the monies in the appellant's possession would reflect the sale of approximately five or six pounds of cannabis, we have come to the conclusion that the sentence to imprisonment for five years after discount for the plea of guilty for the offence against s 8(1) of the *Misuse of Drugs Act* was manifestly excessive. We consider that the objective seriousness of the offence in this case, when considered in light of the appellant's personal circumstances, properly attracted a sentence of imprisonment for two years and six months after discount for the plea of guilty.

[24] The question is then to what extent that sentence should be cumulative upon the sentence to imprisonment for three years which was imposed for the supply of the 15 pounds of cannabis. As we have already observed, this is not a case calling for full concurrency on the basis that the tainted monies were derived from the supply for which the appellant was also sentenced. However, as this Court observed in *Carroll v The Queen*[5], an offender should not be sentenced simply and indiscriminately for each crime he is convicted of but for what can be characterised as his criminal conduct. The

5 [2011] NTCCA 6; 29 NTLR 106 at [42] and [44].

sentences for the individual offences and the total sentence imposed must be proportionate to the criminality.

[25] This is not a matter in which the offences formed part of a single episode of criminality in which the sentence imposed for one of the offences will reflect the criminality of both. As has already been noted, the only commonality between those offences was that they both involved the supply of cannabis which the appellant had received from the first co-offender on different occasions. However, the principle of totality requires the imposition of a sentence which is justly proportionate to the whole of the appellant's conduct, and operates to preclude cumulation beyond what is proportionate to the total criminality of that conduct. In the application of that principle we consider that the sentence imposed for the offence against s 8(1) of the *Misuse of Drugs Act* should be served cumulatively as to 12 months on the sentence imposed for the supply offence. That would yield a total effective period of imprisonment of four years.

[26] That reduction in sentence also requires some consideration of the original order that the sentence be suspended after the appellant had served two years. We consider that the appellant's personal circumstances and good prospects of rehabilitation also warrant a reduction in that period to allow his release after he has served the minimum time which the circumstances of the offending require, subject to supervision on the same terms and conditions fixed by the sentencing judge for the balance of the order suspending sentence.

Disposition and resentence

[27] Accordingly, we make the following orders:

1. The appeal is allowed.

2. The sentence of imprisonment for five years imposed for the offence against s 8(1) of the *Misuse of Drugs Act* is set aside.

3. The appellant is sentenced to imprisonment for two years and six months for the offence against s 8(1) of the *Misuse of Drugs Act.*

4. One year of that sentence is to be served cumulatively on the sentence of imprisonment for three years for the offence of supplying a commercial quantity of cannabis contrary to s 5(1) of the *Misuse of Drugs Act.*

5. The total effective period of imprisonment is four years backdated to 6 October 2017.

6. That term of imprisonment will be suspended after the appellant has served one year and six months, subject to supervision on the conditions fixed by the sentencing judge on 28 November 2017.

7. An operational period of two years and six months from the date of the appellant's release is fixed for the purposes of ss 40(6) and 43 of the *Sentencing Act* (NT).

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