The Queen v Indrikson [2014] NTCCA 10

PARTIES:	**THE QUEEN**
	v
	INDRIKSON, KERO
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 3 of 2014 (21325675)
DELIVERED:	11 June 2014
HEARING DATE:	11 June 2014
JUDGMENT OF:	RILEY CJ, SOUTHWOOD and KELLY JJ
APPEALED FROM:	HILEY J

CATCHWORDS:

REPRESENTATION:

Counsel:

Appellant:	W J Karczewski QC and D Jones
Respondent:	I Read SC

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Sou1404
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Indrikson [2014] NTCCA 10
No. CA 3 of 2014 (21325675)

BETWEEN:

THE QUEEN
Appellant

AND:

KERO INDRIKSON
Respondent

CORAM: Riley CJ, Southwood and Kelly JJ

EX TEMPORE

REASONS FOR JUDGMENT

(Delivered 11 June 2014)

The Court:

Introduction

[1] This is a Crown appeal against sentence.

[2] On 7 March 2014 the respondent was sentenced to four years and two months imprisonment for unlawfully supplying 67 kilograms of cannabis, which is 134 times the commercial quantity of the dangerous drug, and to nine months imprisonment for possessing a traffickable quantity of methamphetamine. The second sentence of imprisonment was ordered to be served wholly concurrently with the first sentence of imprisonment giving a

total sentence of four years and two months imprisonment. A non-parole period of two years and one month was fixed.

[3] The Crown appeals against the sentence of four years and two months which was imposed for count 1 on the indictment being the count of supplying a commercial quantity of cannabis. The Crown relies on the sole ground of appeal that the sentence was manifestly inadequate. It submits that the sentence imposed for count 1 was so disproportionate to the seriousness of the crime, as to shock the public conscience. The sentence departs from accepted sentencing standards.

The facts

[4] The facts of the offending are as follows.

[5] The respondent is 46 years of age. Michelle Larfield, the co-offender, is 48 years of age. At the time of the offending, which is the subject of this appeal, they were in a de facto relationship and they resided on a property at Arbus Road in Humpty Doo.

[6] On 18 April 2013 the Northern Territory Police started investigating the activities of the respondent and the co-offender. The investigation involved the use of a surveillance device installed at the offenders' residence, the interception of the respondent's mobile telephone service and other surveillance of the offenders.

[7] As a result of their electronic monitoring of the offenders, police discovered that on 15 April 2013 the offenders drove to Birdsville with $200,000.00 in cash and they met with an associate from Adelaide. The respondent purchased 100 pounds of cannabis from his associate. The cannabis was placed in the false bottom of a fuel drum which was filled with liquid. The offenders then returned to Darwin. The respondent engaged others to travel on the Stuart Highway in advance of their motor vehicle and advise the offenders of any police presence on the highway.

[8] After he returned to Darwin the respondent sold the cannabis in pound lots for $4,600.00 per pound and in smaller amounts for significantly more than $4,600.00 per pound. The respondent made a profit of 130 percent from the sale of the cannabis.

[9] Before 27 May 2013 the respondent made arrangements with his associate in Adelaide for the purchase of more cannabis. The discussions between the respondent and his associate included statements to the effect that the associate had only half the usual quantity of cannabis ready to supply.

[10] On 27 May 2013 the offenders travelled to Fowler's Bay in South Australia where they met the respondent's associate. They then drove to Kadina and the respondent purchased 22.4 kilograms of cannabis. On 13 June 2013 the offenders drove towards Darwin on their return journey.

[11] At 12.45 pm on 15 June 2013 police stopped the offenders five kilometres south of Katherine and searched their motor vehicle. They found

22.4 kilograms of cannabis in the false bottom of a 44 gallon drum that was in the back of the offenders' motor vehicle. Police also found 1.97 grams of methamphetamine and other small quantities of cannabis in the possession of the offenders.

[12] The offenders were arrested and taken to Darwin.

[13] Later on 15 June 2013 the police searched the offenders' residence and found a further 336.5 grams of cannabis, 1.99 grams of methamphetamine, a set of digital scales and two cryovac machines. The total amount of dangerous drugs located in the motor vehicle and in the home of the offenders was 22.74 kilograms of cannabis and 3.96 grams of methamphetamine. The methamphetamine in the possession of the offenders was for personal use only.

[14] Police in South Australia investigated the activities of the respondent's associate. He was found to be in possession of a 44 gallon drum, which had been modified in a similar manner to the 44 gallon drum in the respondent's possession, and a number of items which indicated the associate was involved in the cultivation of cannabis.

The respondent's subjective circumstances

[15] The respondent has a criminal record. However, he has no prior convictions for drug offences. The majority of his prior convictions are for minor offences.

[16] The respondent grew up in Berri in South Australia. He is the second of seven children born to his father who was the local General Practitioner and mother who was the director of nursing at an elderly persons' home.

[17] Although he attended boarding school, the respondent finished school at the age of 15 years. He has always worked. His first job was at the Kangarilla abattoirs because he originally wanted to be a butcher, however, after 12 months he moved to Adelaide to take up a position as an apprentice automotive parts interpreter at John H Ellers' Holden where he completed a four year apprenticeship. He worked with John Ellers for eight years.

[18] After the respondent came to Darwin, he obtained work with Kerry Holden where he worked for another eight years and was second in charge of spare parts.

[19] He also formed a relationship with D. They purchased land at Humpty Doo and built their own home. They had one son together. However, the relationship came to an end when D left the respondent without notice and went to Adelaide with their son and all of their money and treasured possessions.

[20] The respondent could not cope with his separation from D and he lost his job and then all his assets. He had a problem with the misuse of cannabis and amphetamine before his relationship with D broke down and this problem escalated after their separation.

[21] The respondent ultimately managed to recover to some degree and found employment with Bridge Toyota for three years. He then went to Adelaide to try and reconcile with D and reunite with his son but was unsuccessful. He then returned to Darwin and found work with Geminex for about two years and then Nedrill for about four years. He lost his job at Nedrill because he tested positive to amphetamine and cannabis. He then had a further emotional collapse and his life reached a new low. Mr Read SC told the sentencing judge that the respondent then decided to extricate himself from his predicament by turning to trafficking in cannabis.

[22] Since being remanded in custody the respondent has been helping other prisoners with reading and writing and their paperwork. He has also made inquiries about apprenticeships, work opportunities and other programs that may be available at the Darwin Correctional Centre and ultimately he has found employment.

[23] The sentencing judge found that the respondent had expressed some degree of remorse but his Honour was not confident that the respondent truly appreciated the damage he may have caused to others. His Honour gained the impression that the respondent was sorry for himself and members of his family and friends who he may have let down by his conduct, rather than the real victims of such crimes.

[24] The sentencing judge found that the respondent had good prospects of rehabilitation. His Honour considered that the respondent had "been shocked into realising that he must not do anything like this again".

Objective seriousness of the offending

[25] The offence of supplying cannabis committed by the respondent is a very serious offence. The respondent deliberately chose to engage in the supply of large amounts of cannabis in the Northern Territory for commercial gain. Cross border trafficking and the supply of cannabis in the Northern Territory is prevalent. The respondent's conduct involved the importation into the Northern Territory of a substantial amount of cannabis on two occasions. The respondent knew the quantities of cannabis he was importing into the Northern Territory. The transhipment of the 100 pounds of cannabis is the largest transhipment of the dangerous drug that has come before the Supreme Court of the Northern Territory. The respondent sold all of the 100 pounds of cannabis that he imported from Birdsville and he would have sold the cannabis he imported from South Australia if he had not been arrested. He made a considerable profit from the sale of the 100 pounds of cannabis. Both of the interstate trips were planned and the cannabis was concealed in a sophisticated manner. The respondent employed other persons to prevent the interception and detection of the importation of the 100 pounds of cannabis from Birdsville.

[26] The respondent was clearly a principal of a significant commercial enterprise that involved the importation and sale of large amounts of

cannabis in the Northern Territory. He financed, organised and executed the importation and distribution of the cannabis in the Northern Territory and he engaged others to assist him in achieving his endeavours.

[27] The quantity of cannabis is an important factor to be taken into account in this case when assessing the objective seriousness of the offence because on each occasion the respondent imported cannabis into the Northern Territory he knew how much cannabis he was importing; and he made a significant amount of money from the sale of the 100 pounds of cannabis he imported and sold.

Consideration

[28] In our opinion, the sentence imposed on the respondent for the offence of supplying 67 kilograms of cannabis was so disproportionate to the seriousness of the respondent's crime that it does shock the public conscience. The sentence imposed was significantly out of step with other sentences and was manifestly inadequate.

[29] The importation and sale of such large amounts of cannabis causes significant harm in the community. Transhipments of cannabis are prevalent. The respondent had demonstrated a capacity to recover from setbacks in his life, he had the capacity to obtain $200,000 for the purchase of the dangerous drug and as a mature and intelligent adult he deliberately chose to stop leading a law abiding life and engage in criminal conduct for commercial gain at a very high level of offending. He was aware of the harm

that his misuse of dangerous drugs had caused him but he persisted in the misuse of dangerous drugs.

[30] While the respondent had no relevant prior convictions, he was not a first offender and his prior good character and prospects of rehabilitation do not carry much weight in the circumstances of this case. As the respondent was highly placed in an enterprise he established for the importation, distribution and sale of drugs, the principal sentencing objectives are general deterrence and protection of the community, punishment and denunciation.

[31] The cases referred to by the Director of Public Prosecutions in the annexure to his submissions give a sound indication of the prevailing sentencing standards and the sentence passed by the sentencing judge is significantly out of step with those standards.

[32] As part of the respondent's submissions, Mr Read argued that although the counsel for the Crown in the court below prepared written submissions and conscientiously sought to assist the court, it might be that a more senior prosecutor could properly have put the sentencing submissions more forcefully in the circumstances of this case. It might be that in real terms, the Crown position was not properly put, specifically with regard to the objective seriousness of the case.

[33] In this regard, Mr Read asked the Court to exercise the discretion referred to by the Court of Criminal Appeal in *R v Martyn*[1] at subparagraphs [13](e) and (f)[2], namely:

> (e) Apart from double jeopardy considerations, the Court retains a residual discretion to determine that, despite error having been established and being satisfied that a different sentence ought to have been passed, a Crown appeal should be dismissed or a reduced sentence should be imposed.
>
> (f) Factors that may be relevant to the exercise of the residual discretion to dismiss an appeal, despite inadequacy of sentence, include the presence of unfairness arising from such matters as delay, parity, the totality principle, rehabilitation and fault on the part of the Crown.

[34] In our opinion, there is nothing in this case which causes the Court to exercise the residual discretion that it retains and is referred to in *R v Martyn*.

[35] The appeal is therefore allowed. The sentence of four years and two months imprisonment with a non-parole period of two years and one month for the offence of supplying a commercial quantity of cannabis is set aside.

Re-sentence

[36] Having considered all of the circumstances in this case and allowing a 20 percent discount for the respondent's plea of guilty, for the offence of supplying a commercial quantity of cannabis we sentence the respondent to eight years imprisonment with a non-parole period of four years. The

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1 (2011) 30 NTLR 157.
2 (2011) 30 NTLR 157 at 162.

sentence of imprisonment is back dated to 15 June 2013. The order of the sentencing judge that the sentence for count 2 is to be served concurrently with the sentence of imprisonment for count 1 remains in place, giving a total sentence of eight years imprisonment with a non-parole period of four years commencing on 15 June 2013.
