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THE SUPREME COURT OF
THE NORTHERN TERRITORY

SCC 20917176

THE QUEEN

and

DONALD JAMES MORRIS

(Sentence)

KELLY J

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON FRIDAY 6 NOVEMBER 2009

Transcribed by:
Merrill Legal Solutions

MR TIERNEY: Tierney for the Crown, your Honour.

HER HONOUR: Thank you, Mr Tierney.

MS BENNETT: Bennett on behalf of the defendant, your Honour.

HER HONOUR: Thank you, Ms Bennett.

HER HONOUR: Donald James Morris, you, being an adult, have pleaded guilty to a charge that on 21 May 2009, at Palmerston in the Northern Territory of Australia, you unlawfully supplied a dangerous drug, namely, cannabis, as specified in Schedule 2 of the *Misuse of Drugs Act (NT)*, to a child. The maximum penalty for this offence is 14 years in prison.

Bear with me a moment.

MS BENNETT: Your Honour, could I just interrupt?

HER HONOUR: Yes.

MS BENNETT: And the basis for that is the application that I made pursuant to section 27 at the outset. I note there are people in the court.

HER HONOUR: Right. Well, there is no real reason, I think, to close the court today. The reason, as I understand it, that you closed the court, that you requested the court to be closed on the plea no longer applies, does it?

MS BENNETT: It would perhaps depend whether your Honour made a reference to the names that I supplied within the submissions and, if not, then no.

HER HONOUR: No. Thank you. I apologise for the interruption.

The facts are as follows:

You were born on 6 July 1960. At around 6:50 pm on Thursday, 21 May 2009, you were visiting Unit 3, 35 Cornwallis Circuit in Gray, a suburb of Palmerston in the Northern Territory. A 17-year old male youth, date of birth 8 November 1991, attended the unit with the intention of purchasing cannabis, a Schedule 2 dangerous drug. The youth had been told by friends that the unit was a place where cannabis was readily available for purchase. The youth attended the front door of the unit where he passed \$30 to you for the supply of cannabis. You took the \$30 and passed the youth back a clip seal bag containing 1.3 grams of cannabis.

This transaction was observed by police. As the youth left the unit he was stopped and searched. The clip seal bag containing cannabis was located and seized by police. Police then entered the unit of 3/35 Cornwallis Circuit where you were arrested for supplying cannabis. You were later charged and spent the night in prison. You were bailed the following day on 22 May 2009.

I accept that the unit was not yours and also that the cannabis was not yours, but belonged to the occupier of the unit. I accept that the offending was opportunistic in the sense that the occupier of the unit was away at the shops when the young man came to the door, and you took the opportunity of supplying him with cannabis in exchange for \$30. I also accept that you did not know that the person to whom you supplied the cannabis was under 18 years of age.

You have a reasonably lengthy record in the Northern Territory and South Australia, but mostly for traffic-related offences. You have served time in prison, having received short custodial sentences for assault in South Australia on two occasions. You also have two relevant prior convictions in South Australia for possession of cannabis. These were relatively minor offences involving small amounts of cannabis and you were fined on both occasions.

Your counsel and counsel for the Crown both agree that section 37(2) and (3) apply to your sentencing on the present charge, that is, section 37(2) and (3) of the *Misuse of Drugs Act (NT)*. Your counsel contended that this was because the two South Australian convictions for possession of cannabis amounted to an aggravating circumstance within the meaning of section 37(1), an aggravating circumstance being essentially a subsequent offence. However, while I agree that the provisions of section 37 sub-sections (2) and (3) apply, I view that as not because of the two South Australian convictions, but as a result of section 37(2)(a), which provides that:

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* is seven years imprisonment or more, 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, the Court is of the opinion that such a penalty should not be imposed.

The maximum penalty for the offence to which you have pleaded guilty is 14 years imprisonment.

Your counsel submitted that there are particular circumstances of the offence and also of you as the offender. As a result of which I ought to be of the opinion that a penalty of actual imprisonment should not be imposed. Alternatively, she has submitted that I ought to be of the opinion that given those particular circumstances, a sentence of actual imprisonment of less than 28 days is warranted. I should mention that section 37 sub-section (3) provides that where a Court does impose a sentence requiring the serving of a period of actual imprisonment for an offence under this *Act*, it shall not impose a sentence of less than actual imprisonment for 28 days.

I do not think I have the power to impose a sentence of imprisonment of less than 28 days. It seems to me that section 37(2) enables me to impose a sentence other than a sentence of actual imprisonment, but that if I am not

satisfied that a sentence of actual imprisonment should not be imposed, the minimum term I may impose is 28 days.

I have been told very little about your personal circumstances other than that you are 49 years old. You grew up in Elizabeth. You lived at home with your parents until you were 32, and that at age 34 you were diagnosed with paranoid schizophrenia.

Although the formal diagnosis was made at that time, you had apparently been hearing voices for many years before that. You were on a disability pension as a result of your mental illness.

You live with your long-term partner and her children to whom you are a father.

I am told that you are under a management order under the *Mental Health and Related Services Act (NT)*, and that you are compliant with that management regime and taking your anti-psychotic medication. I have a letter from your case manager who has confirmed the details of your treatment and states that you have always been co-operative with mental health staff. I am also told that you have smoked cannabis for years, but that you have not smoked it since the incident the subject of the charge to which you pleaded guilty, and that you are resolved not to do so in the future.

You were taken into custody in relation to this charge on 21 May 2009 and released on bail on 22 May 2009. You failed to appear in court on 19 June 2009. You were arrested on 19 July 2009, appeared in court and were again granted bail on 20 July 2009. You were bailed to appear at an oral committal on 25 September 2009, but you again failed to appear. You were arrested on 22 October 2009 and have been in custody ever since.

The upshot of all that is that you have spent 20 days in custody. I am told that imprisonment is more difficult for you as a result of your mental illness and that you believe people in the prison are trying to kill you.

You made full admissions to police. You pleaded guilty at the earliest opportunity and I accept that your early plea is an indication of remorse and shows a willingness to advance the course of justice as well as having a utilitarian effect. I intend to allow an appropriate discount on the sentence I would otherwise have handed down, a discount of 25%.

The question remains whether having regard to the particular circumstances of the offence or of you as the offender, I am of the opinion that a penalty of actual imprisonment should not be imposed. His Honour, Mildren J, pointed out in the case of *Duthie v Smith* (1992) 83 NTR 21, to which I was referred by your counsel, that the overall policy of the *Act* is to impose more severe maximum sentences for drug offences generally. But he said:

Nowhere can I find any evidence apart from possibly 37(2) that the Legislature intended to impose harsh penalties for what might be fairly described as minor offences.

In that case, his Honour, Mildren J, rejected a narrow view of what was necessary to constitute particular circumstances sufficient for the purposes of section 37(2). He held, that for a sentencing judge to form the opinion that a sentence of actual imprisonment should not be imposed for the purposes of section 37(2), the particular circumstances must be sufficiently noteworthy or out of the ordinary relative to the proscribed conduct constituting the offence or of the offender to warrant a non-custodial sentence.

But like his Honour, Kearney J, before him, his Honour, Mildren J, said he did not consider that the circumstances needed 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.

I do not think that there are any circumstances relating to the actual offence itself considered alone that would cause me to be of that opinion. Although I accept that this supply is towards the less serious end of the scale, given the small amount and the isolated and opportunistic nature of the offending, supply of cannabis to a child is a serious offence and you supplied the cannabis in this instance by way of sale.

However, having regard to your particular personal circumstances, I am of the opinion that a penalty of actual imprisonment should not be imposed. Those circumstances are:

- (1) Your mental illness, which would make a sentence of actual imprisonment significantly tougher for you;
- (2) The fact that you have no prior convictions for supply of cannabis or any other dangerous drug;
- (3) The fact that your convictions for possession were relatively minor and, more importantly, occurred over 16 years ago, you have had no drug convictions since October 1993; and
- (4) The fact that you have already been, in effect, punished by having been in custody for 20 days, either initially on being apprehended and thereafter on remand.

If it were not for your early plea of guilty, I would have considered an appropriate penalty to be imprisonment for a period of eight months. Taking into account the guilty plea, I consider an appropriate sentence to be imprisonment for a period of six months wholly suspended. You will be convicted and sentenced to imprisonment for six months commencing on 22 October 2009.

I direct that the sentence be suspended on condition that you be of good behaviour for a period of twelve months from the commencement of your sentence. For the purposes of section 43 of the *Criminal Code (NT)*, I fix an operative period of twelve months. Now, that means that if you commit another offence within that twelve-month period, you can be brought back to court and you may have to serve six months.

I had considered making a supervision order and in normal circumstances would have done so. However, your counsel has submitted that there would be little value in such an order as you are already being managed and are, to an extent, already under supervision under the *Mental Health and Related Services Act (NT)*, and you are compliant with that regime. It seems to me preferable on the whole that that management regime continue and that you are not subject to two types of supervision simultaneously, which might result in your being under competing obligations.

Counsel for the Crown did not argue strenuously for a supervision order, but did suggest that it would be appropriate for you to be directed to submit to random drug testing by a Probation and Parole Officer, or Police. I do agree that there would be some purpose to such an order, however, I understand that for practical purposes such an order would normally require a supervision order to be made.

Moreover, having regard to the nature of your mental illness, I consider that the possible adverse effects of such an order might outweigh the potential benefits. I therefore impose no other conditions on the order suspending your sentence.

Anything further?

MS BENNETT: Nothing arising, your Honour.

MR TIERNEY: No, your Honour.

HER HONOUR: Please adjourn the court.
