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THE SUPREME COURT OF
THE NORTHERN TERRITORY

SCC 21906029

THE QUEEN

and

KERRY MCGUINNESS

(Sentence)

BLOKLAND J

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON MONDAY 16 SEPTEMBER 2019

Transcribed by:
EPIQ

HER HONOUR: Kerry McGuinness pleaded guilty on 6 September to one count of supply a Schedule 2 drug, namely, cannabis, less than a commercial quantity in an Indigenous community. He also pleaded guilty to one charge on complaint, namely, bring liquor into a restricted alcohol protected area, contrary to the *Liquor Act*.

The facts are that sometime prior to 12 February of this year, Kerry McGuinness purchased a quantity of cannabis and two bottles of alcohol in Darwin. During the evening of 12 February 2019 he drove a blue Holden Rodeo utility from Darwin to Ramingining whilst in the possession of the cannabis and liquor.

On 13 February 2019 his car was located by police officers parked in the front yard of Lot X [edited] Ramingining. The officers conducted a search of the vehicle pursuant to the *Liquor Act*. During the course of the search, two 1 litre bottles of Johnny Walker Red Label Scotch Whiskey were located and seized.

The driver of the car was identified as Kerry McGuinness. Police located him sitting inside the second bedroom of Lot X [edited] Ramingining. Inside the room was a quantity of cannabis and cash; \$2140, which was seized. A small amount of cannabis was contained in deal bags. There were also a number of unused deal bags inside the bedroom.

He was cautioned at the scene by a police officer and made admissions to the possession and supply of cannabis and bringing liquor into the community. He was arrested and taken to Ramingining Police Station. He declined to participate in a record of interview. He was later charged and granted bail on the same day. Ramingining Community was and is an alcohol protected area and obviously is an Indigenous community.

The cannabis was found to weigh 77.81 grams; over the traffickable quantity of cannabis, which is 50 grams, but not a commercial quantity of cannabis, which is 500 grams or more.

This is obviously a serious matter. The Court has long emphasised the harms introduced to Aboriginal communities through drugs, especially cannabis. It is not simply the effects of the drug itself upon individuals but the effects of diverting resources from socially deprived communities to drugs.

Over the years, older and respected members of Aboriginal communities have given evidence or statements, telling the courts, both this Court and the Local Court, that they do not want drugs in their communities. Mr McGuinness should be aware of that, as well as the fact that this is a serious criminal offence. Further, the mark-up in price in Indigenous communities is extraordinary. The Court was told on this occasion and in other sentencing cases that have been before the Court that the current value in Ramingining for 1 gram of cannabis plant material is approximately \$100. Consequently, Kerry McGuinness could have received around \$7781 if he had sold all of the cannabis. Obviously, the selling ceased after police intervened and \$2140 cash was seized.

Kerry McGuinness knew full well that both drugs and alcohol were prohibited in Ramingining. The maximum penalty for supply cannabis in those circumstances is 9 years imprisonment. The maximum penalty for bringing liquor into an alcohol-protected area is 100 penalty units or 6 months imprisonment.

I moderate some elements of the assessment of gravity of the offending, noting that although very serious, because the supply was taking place in an Indigenous community, there is no indication that this incident of supply was part of a broader sophisticated commercial operation. The amount of cannabis was towards the lower level of traffickable quantities and was far less than any deemed commercial amount.

The alcohol was in the vehicle and it is not suggested he brought it into the community to supply it. The Court was told he was initially going to drop it off to family at Batchelor, but when they were not there, it was still in his car and he continued on to Ramingining. He has to remember, however, that that amount of strong alcohol could wreak havoc in a community like Ramingining if people became aware of it being present in the community, and if indeed it was consumed. The Court was also told he had been asked to bring some cannabis to people that he knew in Ramingining.

It is appreciated that in terms of the amount of the drug and the level of profit, it is not in the higher levels that the Court often sees. I reiterate, however, it is serious because of the exploitation of a vulnerable section of the community.

Kerry McGuinness is 58 years old and grew up in Darwin, attending Alawa Primary School and later, Casuarina College. He moved to Perth for some of his schooling to stay with extended family. He left school in year 10 and returned to Darwin. He has a strong and admirable employment history, having worked in the gas industry and also in ceramics.

Unfortunately, he has serious health conditions and is now in receipt of a disability pension. He has played both AFL and rugby league as a younger person at very high levels and maintains a strong involvement with the Darwin Buffalos Football Club and the Nightcliff Dragons Rugby League Club.

He provides support and care to his aged mother, who was present in Court for the plea hearing. She has limited mobility and lives on her own in Humpty Doo. He has two children; a 27-year-old daughter and an 8-year-old son, and is the grandfather to three young children and provides support and respite to his daughter, who is a single mother, when needed.

He is actively involved in the life of his son and provides support to his ex-partner, the son's mother. The Court was told it is likely he will become his son's full-time carer for a period due to family circumstances involving his ex-partner, who may need to travel interstate for family reasons.

Kerry McGuinness has a lengthy history of substance abuse, which started at about the age of 25. The drug use includes a variety of drugs. His counsel told the Court this drug use early coincided with the tragic loss of friends at a young age.

His history of drug abuse can also be traced to some degree through his previous convictions. There are many previous convictions for drug matters; primarily cannabis, from 1988, 2008, 2009, 2010, 2012 and 2013. For most of the drug matters, he was dealt with by way of fine and most do concern possession or administering a drug to himself. He has twice been placed on suspended sentences. There are a number of breaches of court orders, particularly bail.

The last time he appeared in court for any matter was in 2014. He is obviously able to regulate his behaviours, and given all of the material before the Court, in my view he has reasonable to good prospects of rehabilitation.

It is accepted that he has positively and proactively engaged with Alcohol and Other Drug counselling and has attended counselling for the past several years and is now abstinent from opiates.

The material before the Court indicates he is a strong contributor to the community and family. These matters, however, are not the dominant sentencing considerations, but I still take them into account in a general way.

AM, his nephew, the managing director of Finniss River Constructions, tells the court that Mr McGuinness has made great contributions both on and off the field in relation to sport, recreational and social activities, particularly through his long-time involvement with the Darwin Buffalos and the Nightcliff Dragons. AM describes him as selfless and a supportive family member and friend, who is active in the life of his 8-year-old son and who helps others when he can, despite his health becoming worse.

Another nephew, KH, tells the Court Kerry McGuinness is a respected and proactive member of the Kungarakan, the Finniss River Land Trust, which is their family group. He is a loving and caring person, who has always been there for family members, including looking after his father before his father passed away. He has been a mentor to KH and KH speaks of him as being a wonderful father.

LM, his brother, tells the Court about his work history in the general building and construction areas and all types of work in the oil and gas industry. He also speaks of his long-time involvement with the Darwin Buffalos and Nightcliff Dragons and contributions to community and family gatherings, which he tells the Court is valued by family friends and community.

His mother also tells the Court that she has depended on Kerry as she cannot walk very far without help, and she has told the Court how he looks after particular chores around her house and is concerned about her wellbeing.

There is also a lengthy letter from GA, who also speaks of Kerry McGuinness' lengthy sporting and community engagement and also includes him in the two families' struggles for equality, human rights and fairness, going back to Chief Protector's days. GA tells the Court that he and Kerry McGuinness and the families are proudly Kungarakan, whose area is around Batchelor, Adelaide River, including Litchfield National Park. He considers that they all carry a legacy of hard times and struggles but are not angry, vengeful or spiteful people. He tells the Court Kerry McGuinness has a caring nature and is always keen to help others and greets all of the family warmly and is highly respected.

It is concerning that with all of that support, Kerry McGuinness would go and commit a deliberate offence such as this; particularly the offence which is count 1 on the indictment. With all of those supports and the respect that he has, it is very surprising that he has offended in this way. It was a way to make money when he was, apparently, experiencing financial difficulties. That kind of motivation must be deterred.

He will be required to serve further time in custody, as in my view, general deterrence must be served. However, I will moderate the time he will actually serve because of his documented health conditions.

The letter from Dr CH before the Court states that he suffers from moderate to severe emphysema. He can walk a maximum of 20 yards without becoming breathless, and his abilities to perform all but basic functions are impaired. He requires three inhalers and regular medications and needs to be reviewed on a monthly basis. He needs to access medical treatment quickly if he gets a flare up of his condition, and Dr CH tells the Court that prison may well impair his ability to access care quickly.

In my view, this is not a case of assessing particular circumstances. In my view, without the medical materials, the offending is objectively serious enough to justify a term beyond the minimum 28 days, although I am very mindful of his serious health conditions. I am, as a result of that, going to reduce the amount of time that he will actually serve as a result of his conditions. This is a genuine case of significant health issues that would make prison more onerous for him than many other persons.

As is well-known, general deterrence and denunciation are the dominant sentencing principles, but given his personal health matters, which are well-documented, the time to actually serve will be reduced. He will, however, be monitored for some time by Community Corrections.

I note the report from Community Corrections is very positive. He is suitable for supervision. He has already engaged in Alcohol and Other Drugs counselling, confirmed in a letter from Top End Health Service, which indicates he has had consistent engagement in respect of the opiate pharmacotherapy since 2005 or 2006. He has developed stability while on the program and been compliant with the program and does not miss appointments. His case manager has had no issues

with his conduct and she notes he makes considered and thoughtful goals and reflects a strong family focus. She says he has remained in open and honest communication.

It is also noted he pleaded guilty early and made admissions at that scene to the police. There will be a 25 per cent adjustment. The Court has been told he will lose his accommodation if absent for more than one month. The order I will make today will allow him to remain in those premises. I do not think it is in the community's or anyone's interest for someone of his health status to lose his accommodation at this stage. While he will end up, so far as I can see, being able to stay there, it must be on the conditions that have been outlined by Community Corrections.

In my view, the overall seriousness of the offending means that it would be inadequate to invoke particular circumstances and he must serve more gaol time. However, that will be significantly reduced for the reasons I have mentioned.

Count 1 on indictment: convicted and sentenced to 12 months imprisonment, commencing on 5 September 2019; suspended after serving 28 days on the conditions, which I will read out in a moment, set out in the s 103 report.

On the matter on complaint, he is convicted and sentenced to 14 days imprisonment, which will be concurrent with the term on the indictment.

The operational period will be 12 months after release, during which he is not to commit another offence punishable by imprisonment, or else the term held in suspense may well be imposed.

So the conditions are as follows.

1. He must not during the period of the order in force, namely, 1 year after release, commit another offence whether in or outside of the Territory, punishable on conviction by imprisonment.
2. For that period, namely, the 12 months after release, he is under the ongoing supervision of a Probation and Parole Officer and must obey all reasonable directions and report to a Probation and Parole Officer directly after the order comes into force.
3. He must tell a Probation and Parole Officer of any change of address or employment within two clear working days after the change.
4. He must not leave the Territory except with the permission of a Probation and Parole Officer.
5. He will at the direction of a Probation and Parole Officer immediately enter into a residential rehabilitation program or any other program assessed as suitable, participate fully in that program and do nothing to cause his early

discharge.

6. He will not consume a dangerous drug and will submit to testing as directed for the purpose of detecting the presence of dangerous drugs.
7. He will participate in assessment, counselling and/or treatment as directed by a Probation and Parole Officer.

I think I need to make an order. I order forfeiture of the \$2140 cash seized by police offices, forfeiture to the Northern Territory under s 33(3) of the *Misuse of Drugs Act*.

MS DIXON: Is it 34(3), your Honour?

HER HONOUR: Section 34(3), I beg your pardon, *Misuse of Drugs Act*.

Are there any queries in relation to the sentence?

MS FREEMAN: No, your Honour.

HER HONOUR: All right.

Thank you both very much for your assistance.

Adjourn the court please.
