

CUMBERLAND v THE QUEEN (D23/2019)

Court appealed from: Court of Criminal Appeal of the Supreme Court of the Northern Territory
[2019] NTCCA 14

Date of judgment: 19 June 2019

Special leave granted: 11 December 2019

The appellant pleaded guilty in the Local Court to six charges against the *Misuse of Drugs Act* (NT), arising out of a course of dealing in cannabis and MDMA (ecstasy) between April 2015 and April 2017. The appellant was committed to the Supreme Court for sentence. On 11 April 2018, the appellant was sentenced. The primary judge, Blokland J, found he had made good progress towards rehabilitation. Her Honour imposed an aggregate sentence of 4 years and 6 months' imprisonment, to be suspended after the service of two years, backdated to 27 June 2017 to take account of time spent on remand and on bail. This sentence took into account a reduction of 25% in recognition of the appellant's guilty pleas, meaning that Her Honour's starting point was six years' imprisonment. In her sentencing remarks Her Honour said: "The sheer gravity of the offending points towards setting a non-parole period. However, with timely pleas of guilty, his relatively young age, the matters of life adversity and psychological issues, and importantly, good progress towards rehabilitation the Court is justified to pass a total sentence of less than five years and order partial suspension on conditions set by Corrections This will involve electronic monitoring, as occurred while he was on bail."

By s 40(8) of the *Sentencing Act* (NT) ('the Act'), "[a] partially suspended sentence of imprisonment is taken, for all purposes, to be a sentence of imprisonment for the whole term stated by the court". Taking into account periods spent in custody and on restrictive conditions of bail, under the sentence the appellant was to be released from custody on 26 June 2019, on conditions that included electronic monitoring.

On 30 April 2018, the Crown appealed against the sentence imposed by the primary judge. On 18 July 2018, argument on the Crown appeal was heard by the Court of Criminal Appeal, comprising Kelly, Barr and Hiley JJ. In the course of the argument no submission concerning the exercise of the residual discretion was developed by counsel for the appellant and, as matters then stood, he did not seek to rely on the residual discretion. At the hearing on 18 July 2018 there was discussion of the appellant's providing possible further evidence relevant to any re-sentencing. The matter was left on the basis that the applicant would have 14 days within which to put before the Court any further material relevant to re-sentence (with the Crown given seven days to reply). The Court reserved its decision on 18 July 2018.

On 2 August 2018 the three-member Court announced that it determined to allow the appeal and to state a case for a Court of Criminal Appeal constituted by five judges (the "five-member CCA") to determine the application of s 55 of the Act on re-sentencing. On 12 March 2019 the five-member CCA (comprising Grant CJ, Kelly, Barr and Hiley JJ and Riley AJ) heard oral argument on the issues relating to s 55 of the Act and reserved its decision. On 17 June 2019 the Court advised the parties by email that judgment would be delivered on 19 June 2019. The email did not indicate that both the three-member and the five-member CCA would deliver judgment. On 19 June 2019 the five-member CCA delivered its judgment [2019] NTCCA 13. Immediately thereafter, and without hearing any further submissions, the three-member CCA delivered its judgment re-sentencing the appellant for a total period of eight years, backdated to 27 June 2017. This included sentences for counts 2 and 4 totalling seven years and nine months' imprisonment. Because the sentence exceeded five years, the effect of s 55 of the Act, as had been determined by the five-

member CCA, was that a non-parole period of not less than 70% of 7 years and 9 months must be imposed. The non-parole period fixed by the CCA was 65 months and one week or five years, five months and one week. This was more than two and a half times longer than the unsuspended portion of the sentence (ie, the period to be served in custody) imposed by the primary judge. The matter had been before the CCA for 13 months; the decision of the three-member CCA had been reserved for some 11 months. The re-sentencing by the three-member CCA occurred one week prior to the date on which, under the sentence imposed by the primary judge (and which he was still serving up to that point), the appellant would have been entitled to be released from custody. Its effect was to extend the remaining minimum period of imprisonment from one week to three years, five months and nine days.

The appellant argues that the CCA failed to apply the principles applicable to Crown appeals against sentence, including that in the case of Crown appeals against sentence, the Court retains a "residual discretion" to dismiss an appeal notwithstanding that it is satisfied that the sentence originally imposed was affected by error. Also, that by the time the judgment of the CCA came to be delivered, a substantial delay had occurred in the appellate proceedings. The appellant also submits that the CCA should not have separately determined the Crown's appeal when the principles and circumstances applicable to re-sentencing were not known.

Whilst conceding that on a prosecution appeal the appellant bears the onus of negating any reasons raised as to the why the residual discretion should be exercised, the respondent argues that the express disavowal by the appellant's counsel of reliance on any matters that might raise the residual discretion "in effect informed the CCA that it was unnecessary to consider the residual discretion." The respondent submits that there was no failure by the CCA to consider the questions of delay and other relevant matters to the re-sentencing. The respondent concedes that that appellant was denied procedural fairness by the CCA in the re-sentencing exercise although this will found a basis for allowing an appeal only where it has led to a miscarriage of justice. That being the case the respondent concedes that it may be necessary for this matter to be remitted to the CCA for the purpose of re-sentence.

The grounds of appeal include:

- That the Court of Criminal Appeal erred in failing to consider and apply the principles relevant to Crown appeals both when deciding whether to allow the Crown's appeal against sentence and when re-sentencing the appellant including the delay in determining the appeal and re-sentencing, the length of the new sentence and the appellant's good prospects of rehabilitation.
- That the Court of Criminal Appeal erred in separately determining that the appeal should be allowed at a point in time when the principles to be applied and the circumstances applicable at the time of any re-sentencing were not known.
- That the Court of Criminal Appeal erred in failing to accord the appellant procedural fairness in the conduct of the Crown appeal against sentence.