

R v Day

31 March, 10 May 2004
(BR) Martin CJ, Mildren & Thomas JJ
[2004] NTCCA 2

This was a Crown appeal against a sentence of 2 years imprisonment, suspended immediately, with an operational period of 3 years, following the respondent's pleas of guilty to -

- (1) supplying methamphetamine (an "eight ball" - 3.654 grams),
- (2) supplying MDMA (20 tablets - 4.402 grams), and
- (3) supplying a commercial quantity of MDMA (299 tablets - 103.2 grams).

All supplies were made to a registered police informant over a 9 day period. Count 3 attracted the operation of ss.37(2) & (3) of the *Misuse of Drugs Act* which required the court to impose a sentence requiring the respondent to serve a term of actual imprisonment of not less than 28 days unless, *having regard to the particular circumstances of the offence or the offender (including the age of the offender where the offender has not attained the age of 21 years) it is of the opinion that such a penalty should not be imposed.* The sentencing judge found a number of *particular circumstances* which allowed him not to impose the mandatory 28 day minimum period of imprisonment. Several findings were challenged on appeal including (1) the offender's criminal record was *not highly relevant* (he was treated as a first offender), (2) the offending was *an aberration*, and (3) it was unlikely that the offender would offend again.

The respondent was aged 37 years and had a miscellany of prior convictions going back to 1984. Count 1 occurred the day after the offender completed serving a 4 month home detention order for driving while disqualified. The respondent made no statement to police, pleaded guilty (but in the light of a strong Crown case) and during the course of the plea, made a belated offer of assistance to the prosecuting authorities to give evidence against a co-offender. In the Crown's view, the subsequent statement made by the respondent to the police purporting to implicate the co-offender was of little assistance. The potential retail value of the 299 tablets the subject of count 3 was \$21,000, a mark up of approximately 100% on the negotiated wholesale price actually paid. The respondent knew that it was the intention of the person to whom he supplied the drugs to further distribute them.

In separate judgments Martin CJ & Mildren J (Thomas J agreeing) allowed the appeal and ordered that the sentence be suspended after the offender had served 2 months.

The judgments are notable for their discussion of the following issues:

- When is an offender entitled to be treated as a first offender.
- The sort of facts capable of constituting *particular circumstances* for the purpose of s.37(2) of the *Misuse of Drugs Act*.

- The importance of the Crown's views regarding the weight to be given to the offender's cooperation with the authorities.
- The relevance of lack of prior convictions for offenders participating in the drug trade.
- The sentencing benchmark indicated by Mildren J. His Honour was of the opinion that a proper sentence required the respondent to have served at least 10 months imprisonment before the balance of his sentence was suspended. However, the bench mark was not applied by the court when re-sentencing the respondent because of the *double jeopardy* principle and because the respondent had been on conditional liberty for a little over 5 months at the time the court delivered its decision.

The court confirmed the head sentence of two years imprisonment, quashed the order wholly suspending service of the sentence and in lieu thereof ordered that the sentence be suspended after having served two months. An operational period of three years from 3 October 2003 (the date the original sentence was imposed) was fixed.