CITATION: *Leighton Arnott V Corey James Pike [2018] NTLC032*

PARTIES:	Leighton Arnott v Corey James Pike
TITLE OF COURT:	Local Court
JURISDICTION:	Criminal
FILE NO(s):	21826194
DELIVERED ON:	26 November 2018
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HEARING DATE(s):	26 November 2018
JUDGMENT OF:	Chief Judge Lowndes

CATCHWORDS:

CRIMINAL LAW- STATUTORY INTERPRETATION – SECTION 5D(1) OF THE MISUSE OF DRUGS ACT – MEANING OF "SUPPLY"

Misuse of Drugs Act ss 3, 5D(1) and 40(3)
Interpretation Act ss 62B(1), (2) and (3)
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 applied
Williams v Balcin [2012] NTSC 15 applied

REPRESENTATION:

Counsel:

Complainant:	Mr I Rowbottam
Defendant:	Ms Kepert

Solicitors:

Complainant:	DPP
Defendant:	NTLAC

Judgment category classification:	A
Judgment ID number:	[2018] NTLC 032
Number of paragraphs:	44

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21826194

BETWEEN:

Leighton Arnott
Complainant

AND:

Corey James Pike
Defendant

REASONS FOR JUDGMENT

(Delivered 26 November 2018)

CHIEF JUDGE LOWNDES

THE ISSUE TO BE DETERMINED BY THE COURT

1. On 5 November 2018 the defendant pleaded guilty to a charge contrary to s 5A(1) of the Misuse of Drugs Act, involving the supply of a dangerous drug (cannabis) less than a commercial quantity. On the same day the defendant pleaded not guilty to a charge contrary to s 5D(1) of the Act involving the supply of a dangerous drug (cannabis) less than a commercial quantity with the circumstance that the drug was supplied in an indigenous community.

2. In relation to the not guilty plea a set of alleged facts was tendered by consent (Exhibit P1). The only issue in contention is whether the element of "supply in an indigenous community" has been established on the agreed facts according to law.

CONSIDERATION OF THE ISSUE

3. As the matter turns upon a proper construction of the offence creating provision, the starting point is Section 5D (1) of the *Misuse of Drugs Act.* That section provides as follows:

> A person commits an offence if:
>
> a. the person intentionally supplies, or takes part in the supply of, a substance or thing to another person; and
> b. the substance or thing is a dangerous drug and the person is reckless in relation to that circumstance; and
> c. less than a commercial quantity of the dangerous drug is supplied; and
> d. the dangerous drug is a Schedule 2 drug; and
> e. the dangerous drug is supplied in an indigenous community.

4. It is conceded by the defence that the agreed facts establish the first 4 elements of the offence as charged.

5. As regards the first element of the offence, supply is broadly defined in s 3 of the *Misuse of Drugs Act* and means:

> a. give, distribute, sell, administer, transport or supply, whether or not for fee, reward or consideration or in expectation of fee, reward or consideration; or
> b. offer to do an act mentioned in (a) above;
> c. do, or offer to do, an act preparatory to, in furtherance of, or for the purpose of, an act mentioned in paragraph (a);
>
> and include barter and exchange.

6. The agreed facts disclose that the defendant intended to convey the cannabis to the indigenous community of Millingimbi for the purpose of selling the cannabis to members of that community. During the course of undertaking that enterprise the defendant was apprehended approximately 120 kilometres from Maningrida- a place outside the indigenous community of Millingimbi. Whilst the defendant accepts on those facts that he intentionally supplied a dangerous drug to another person by reason of doing an act preparatory to, in furtherance of, or for the purpose of, an act mentioned in paragraph (a) of the definition of "supply",[1] he denies that the dangerous drug was supplied in an indigenous community (s5D(1) (e)). It is contended on behalf of the defendant that the circumstance of supplying a dangerous drug in an indigenous community requires proof that one of the activities specified in the definition of "supply" occurred in an indigenous community - that is to say the activity must have occurred within the physical or cadastral boundaries of the community. It is submitted that as the activity in the present case – namely the doing of an act preparatory to, in furtherance of, or for the purpose of an act mentioned in paragraph (a) of the definition of supply – occurred beyond the boundaries of the community the defendant cannot be found to have supplied the cannabis in an indigenous community.

7. As mentioned earlier, whether or not the defendant supplied the cannabis in an indigenous community turns upon a proper construction of s 5D(1) (e). Therefore, something needs to be said about the contemporary approach to statutory interpretation.

[1] See *Williams v Blachin*[2012] NTSC 15 where Blokland J was satisfied on similar facts that the offence of supply had been established.

8. The modern approach to statutory interpretation has emphasised the importance of "contextual interpretation". In an address delivered by former Chief Justice Spigelman, his Honour made the following observation:[2]

> Law is a fashion industry. Over the last two or three decades the fashion in interpretation has changed from textualism to contextualism. Literal interpretation – a focus on the ordinary meaning of particular words- is no longer in vogue. Purposive interpretation is what we do now…In constitutional, statutory and contractual interpretation there does appear to have been a shift from text to context.

9. This modern approach to statutory interpretation is encapsulated in the decision of the High Court in *CIC Insurance Ltd v Bankstown Footbal Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ:[3]

> …the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned [reference to reports of the law reform bodies), one may discern the statute was intended to remedy: Attorney General v Prince Earnest Augustus of Hanover [1957] AC 436 at 461 cited in K&S Lake City Freighters Pty ltd v Gordon & Gotch Ltd (1985) 157 CLR 309 at 312, 315. Instances of general words in a statute being so construed by their context are numerous. In particular, as McHugh JA pointed out in Isherwood v Butler Pollnow Pty Ltd (1986) 6 NSWLR 363 at 388, if the apparently plain words of a provision are read in light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent: Cooper Brookes (Wollongong)Pty ltd v FCT (1981) 147 CLR 297 at 320-1.

[2] Chief Justice Spigelman "From Text to Context: Contemporary Contractual Interpretation", an address delivered at the Risky Business Conference Sydney 21 March 2007, p 1 cited by DC Pearce and RS Geddes " Statutory Interpretation in Australia" 8th ed at [2.6].
[3] Cited by Pearce and Geddes n 2 at [3.7].

10. In *Alcan (NT) Alumina Pty Ltd Commissioner of Territory Revenue (Northern Territory)* [2009] 239 CLR 27 at [47], Hayne, Heydon, Crennan and Kiefel JJ considered whether there had been any modification of the principles enunciated in *CIC Insurance Ltd v Bankstown Football Club Ltd*:[4]

> This Court has stated on many occasions that the task of statutory interpretation must begin with a consideration of the text itself….Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text…The language which has actually been employed in the text of the legislation is the surest guide to legislative intention…The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief …it is seeking to remedy.

11. French CJ, in a separate judgment, identified as a starting point in statutory interpretation "the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and the legislative purpose".[5] The Chief Justice went on to say:[6]

> It must be accepted that context and legislative purpose will cast light upon the sense in which the words of the statute are to be read. Context is here used in a wide sense referable, inter alia, to the existing state of the law and the mischief which the statute was intended to remedy…

12. As noted by Pearce and Geddes, "in recent years, the statements of the plurality in the *CIC Insurance* case and in *Alcan (NT) Alumina* together with the observations of

[4] Cited by Pearce and Geddes n 2 at [3.8].
[5] *Alcan (NT) Alumina Pty ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] 239 CLR 27 at [4]. cited by Pearce and Geddes n 2 at [3.8].
[6] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] 239 CLR 27 at [4] cited by Pearce and Geddes n 2 at [3.8].

French CJ in the latter case have featured regularly in judicial statements of the basic principles of statutory interpretation".[7]

13. In *SM v R* [2013] VSCA 342 at [51) Weinberg JA referred to *Baini v R* [2012] 246 CLR 469 as a recent High Court decision essentially affirming the basic principles set out in *Alcan (NT) Alumina*.[8] His Honour went on to observe:[9]

> The fact that the High Court now regularly reminds courts that the process of statutory interpretation requires them to focus first upon the structure and text of the Act, and to move to broader contextual matters only at a later stage , most definitely does not mean that …"purposive" considerations can be ignored. However, the emphasis in statutory interpretation does seem, in recent times, to have shifted somewhat. It might be said that the current approach to the interpretative task requires courts to both begin and end with the text. That is, of course, always bearing in mind that any provision must be read in context, and against the background of the Act as a whole.

14. In a number of cases extrinsic material such as Second Reading Speeches have been referred to in order to identify the mischief that a legislative amendment was intended to address and remedy, which in turn has supplied the context for the modern approach: see *Burch v SA* (1998) 71 SASR 12 at 17-18; *Police v Kennedy* (1998) 71 SASR 175 at 184-5; *Gerah Imports Pty Ltd v Duke Group Pty Ltd* (2004) 88 SASR 419 at [32] – [345].

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[7] Pearce and Geddes n 2 at [3.9]. In *Biani v R* at [14] French CJ, Hayne, Crennan, Kiefel and Bell JJ made the following observation:

> As the High Court said in *Fleming v The Queen* (1998) 197 CLR; [1998] HCA 68 at [12], "the fundamental point is that close attention must be paid to the language" of the relevant provision because "there is no substitute for giving attention to the precise terms" in which that provision is expressed.

[8] Referred to by Pearce and Geddes n 2 at [3.9].

[9] *SM v R* [2013] VSCA 342 at [55]. See the various High Court decisions containing the reminder to which Weinberg JA refers in Pearce and Geddes n 2 at [3.9]: *R v Getachew* [2012] 248 CLR 22; *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] 290 ALR 647; *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] 293 ALR 257.

15. The use to which extrinsic materials can be put as an interpretational aid also extends to identifying the purpose or object of a statutory provision.[10]

16. The interpretative task in the present case must begin with a consideration of the text of the statutory provision in question, which it is accepted may require the provision to be read in context - which includes having regard to the purpose and policy of the provision and the mischief it sought to remedy.

17. The text of s 5D(1) (e) reads thus:

> The dangerous drug is supplied in an indigenous community.

18. The word "supplied", as appears in the statutory provision, is to be read in accordance with the definition of "supply" in s 3 of the Act. Accordingly, a dangerous drug is supplied in an indigenous community if:

    a. the dangerous drug is given, distributed, sold, administered, transported or supplied (whether or not for fee, reward or consideration or in expectation of fee, reward or consideration) in an indigenous community; or
    b. an offer is made to do act mentioned in paragraph (a) in an indigenous community; or
    c. an act is done preparatory to, in furtherance of, for the purpose of, an act mentioned in paragraph act (a) in an indigenous community or an offer is made to do an act preparatory to, in furtherance of, for the purpose of, an act mentioned in paragraph (a) in an indigenous community.

19. Read this way, the circumstance of supply in an indigenous community is satisfied even if an offer to do an act of the specified nature or the doing of an act preparatory to, in furtherance of,

[10] Pearce and Geddes n 2 at [3.10]. See *Minister for Immigration and Citizenship v SZJGV* [2009] 238 CLR 642; *HP Mercantile Pty Ltd v Commissioner of Taxation* [2005] 219 ALR 591; *Tran v Commonwealth [2010] 271* ALR 1.

for the purpose of, an act of the specified nature, occurs outside the physical or legal boundaries of an indigenous community - provided there is sufficient evidence that the offer to do the said act or the doing of the preparatory act was in furtherance of or for the purpose of supplying a dangerous drug in a particular community. In my opinion, on a natural reading of s 5D(1)(e) (read in conjunction with the definition of "supply" in s 3) this is the ordinary meaning conveyed by the text of the provision.

20. It is trite law that in ascertaining the meaning of a statutory provision the provision must be read in the context of the Act and with other sections of the Act. Adopting that approach, the ordinary meaning of s 5D(1) (3) is reinforced by the provisions of s40(3) of the Act which reads as follows:

> In a prosecution for an offence against section 5D(1), a statement in the complaint or indictment that the place at which the alleged supply occurred, or was to occur, was at the relevant time an indigenous community, is evidence of the matters stated.

21. Although only an evidentiary provision, s 40(3), by referring to the place (being an indigenous community) at which the alleged supply was to occur, is a clear indication that s 5 D (1) (e) is capable of being established even though preparatory acts constituting the supply are committed beyond the boundaries of an indigenous community.

22. In my opinion, this construction of s 5D(1) (3) is also supported by the general purpose and policy of the provision, in particular the mischief it sought to remedy when s 5(2) (a) (iv) was amended.

23. In this regard it is apposite to refer to s 62B (1) of the Interpretation Act which deals with the use of extrinsic materials as an interpretational aid:

> In interpreting a provision of an Act, if material not forming part of the Act is capable of assisting in ascertaining the meaning of the provision the material may be considered:
>
> a. To confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
> b. To determine the meaning of the provision when:
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

24. Section 62B(2) of the Act lists the extrinsic material that may be taken into account in the interpretation of a statutory provision. Those materials include explanatory memoranda and second reading speeches.

25. Section 62B(3) provides that in determining whether consideration should be given to any such extrinsic material, or in considering the weight to be given to any such material, regard should be had, in addition to any other relevant matters:

> a. the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
> b. the need to avoid prolonging legal or other proceedings without compensating advantage.

26. It is clear from s 62B of the *Interpretation Act* that regard may be had to extrinsic materials even where the statutory provision is "clear on its face".[11] However, if the provision is unambiguous and "clear on its face", extrinsic materials may only be

[11] *Commissioner of Australian Federal Police v Curran* (1984) 3 FCR 240 at 250; *Minister for Immigration and Multicultural and Indigenous Affairs* [2003] 130 FCR 456 at [67] –[69]; *Gardiner Smith Pty Ltd v Collector of Customs* (1986) 66 ALR 377 cited by Pearce and Geddes n 2 at [3.17]

resorted to in order to confirm the ordinary meaning of the provision.[12] Put another way:[13]

> …extrinsic materials may be referred to, but they cannot alter the interpretation that the court, without reference to those materials, would place upon the provision.

27. In *Re Australian Federation of Construction Contractors: Ex parte Billing* (1986) 68 ALR 416 at 420 the High Court unanimously held that s 15AB of the *Acts Interpretation Act* 1901 Commonwealth (which is in equivalent terms to s 62B of the *Interpretation Act*) could not be used for "the purpose of departing from the ordinary meaning of the text unless either the meaning of the provision to be construed is ambiguous or obscure or in its ordinary meaning leads to a result that is manifestly absurd or is unreasonable".[14]

28. The circumstances in which a court is permitted to depart from the ordinary meaning of the text of a provision are discussed by Pearce and Geddes:[15]

> In order that a reference to extrinsic materials may have the potential to change an interpretation of legislation which would otherwise have been arrived at, it is necessary for a court to conclude that one of the conditions in s 15AB (1)(b) (i) or (ii) has been met. That means that the court must conclude, without taking account of any materials not forming part of the Act, that the provision in question is "ambiguous" or "obscure" or that taking account of its context and underlying purpose or object, the ordinary meaning leads to a result that is "manifestly absurd" or "unreasonable"…[16] In some cases the court considers the extrinsic material and then concludes that it cannot assist because the words are

[12] Pearce and Geddes n 2 at [3.17].
[13] Pearce and Geddes n 2 at [3.17].
[14] Cited by Pearce and Geddes n 2 at [3.17].
[15] Pearce and Geddes n 2 at [3.18].
[16] *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] 130 FCR 456 at [67] – [72].

> not "ambiguous" or "obscure" and that giving the words their ordinary meaning does not lead to a "manifestly absurd" or "unreasonable" result".[17]

29. The term "ambiguous" is to be broadly interpreted: the use of the word "ambiguity" in the realm of statutory interpretation is not confined to lexical or verbal ambiguity and syntactic or grammatical ambiguity: it extends to situations in which the scope and application of a particular statutory provision is doubtful.

30. On the basis that the meaning of the text of s 5D(1) (e) is "clear on its face"(as found above), I turn to consider the contents of the Second Reading Speech to the Misuse of Drugs Amendment Bill 2013.

31. As mentioned in the Second Reading Speech, s 5(2) (a) (iv) was inserted by the *Misuse of Drugs Amendment Act* 2008. The effect of the new section was to include in the offence of supplying a dangerous an additional circumstance – namely the supply of a dangerous drug to a person in an indigenous community. However, it soon became apparent that s 5(2)(a)(iv) did not achieve the aim or purpose of the provision which was to tackle the devastating impact that dangerous drugs were having on indigenous communities.

32. The second reading speech then refers to two Supreme Court decisions which highlighted the deficiency in the wording and operation of s 5(2)(a)(iv).

33. The first is the unreported decision of *Nunggarrgalu v Millar* (11 January 2013) where Barr J ruled that wording of s 5(2)(a) (iv) required proof of actual supply to a person. The second is the decision of Blokland J in *Williams v Balchin* [2012] NTSC 15 at 10 which was to this effect:

> Although the definition of "supply" in the *Misuse of Drugs Act* NT includes all acts preparatory to actual supply, such as where the drugs were transported or otherwise prepared with the purpose of supply, the circumstance of aggravation

[17] See for example *Amos v Brisbane City Council* [2006] 1 Qd R 300 at [28] –[32].

is not expressed to be generally" in an indigenous community" but rather "to a person in an indigenous community".

34. The Second Reading Speech goes on to say:

> In practical terms, the rulings [referring to the two Supreme Court decisions] mean the third limb of the definition of supply in s 3 of the Act, namely "act or acts done in preparation to supply" does not supply to the additional circumstances inserted by the Amendment Act. This is despite the full definition applying to every other offence in the Misuse of Drugs Act.
>
> Currently, investigators must allow a dangerous drug to be supplied "to a person in an indigenous community" before they can arrest an offender and charge him or her on the basis [of] the additional circumstance, and hence the higher maximum penalty, is applicable. This is the case even where an offender is arrested at an airport or in a bus outside an indigenous community and there is clear evidence of an intention to supply in the indigenous community. This fact is clearly at odds with the intention of the Amendment Act as outlined in the Second Reading Speech in 2008, and unduly restricts the definition of supply as it applies to this offence.
>
> Clause 4 of the Bill amends section 5 (2) (a) (iv) by omitting the words" to a person". This means the nine year imprisonment maximum penalty will be applicable where offenders are apprehended outside an indigenous community but evidence proves beyond reasonable doubt they were preparing to supply the drug in the indigenous community. Clause 4 also amends section 5(3) of the Misuse of Drugs Act to allow a statement to be used as evidence of the fact that the offence occurred, or was to occur, in an indigenous community. Currently, the section only allows for the statement to be used when the supply is alleged to have actually occurred in an indigenous community.

35. It should be noted that the two Supreme Court cases relied upon in the Second Reading Speech as highlighting an issue with s 5(a) (2) (iv) appear to have dealt with a slightly different factual scenario to the one in the present case. The preparatory acts in the two Supreme Court cases appeared to have occurred in an indigenous community; but did not constitute a supply of dangerous drugs in an indigenous community because there was no actual supply. The facts in the present

case are different in that the preparatory act relied by the prosecution as constituting a supply in an indigenous community occurred outside the community. Despite that factual difference, the significant point made in those two Supreme Court rulings is that preparatory acts of supply were insufficient to establish the circumstance specified in s 5(2)(a)(iv).

36. Apart from the reference to the two Supreme Court cases, there is ample material in the Second Reading Speech that confirms that "the meaning of [s 5D(1) (e)] is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose and object underlying the Act".

37. The Second Reading Speech makes it abundantly clear that s5 (2) (a) (iv) was amended by omitting the words" to a person" and replaced with s 5D (1)(e) so as to ensure that the full definition of "supply" in s 3 of the Act applied to the circumstance of supplying a dangerous drug in an indigenous community. The Second Reading Speech discloses that the underlying purpose or object of the amendment was to ensure that preparatory acts of supply, whether committed inside or outside an indigenous community, would be sufficient to establish the supply of a dangerous drug in an indigenous subject to relevant and sufficient evidence. The Second Reading Speech also identifies the mischief that the amendment sought to remedy, namely that s 5(2)(a)(iv) as enacted was clearly at odds with the intention of the Amendment Act as outlined in the Second Reading Speech in 2008 and unduly restricted the application to the definition of "supply" to the additional circumstance contained in the section.

38. Although I have found that the ordinary meaning of s 5D(1) (e) encompasses preparatory acts of supply occurring outside the boundaries of an indigenous

community, I accept that minds may differ; and a different mind may find the meaning of the provision to be ambiguous in the sense of being doubtful.

39. In the event that the meaning of the provision is considered to be doubtful, it is again legitimate to have regard to the Second Reading Speech. Recourse to the Second Reading Speech would again reveal the purpose or object underlying the enactment of s 5D(1) (e) and the mischief it was intended to remedy. The ambiguity would be resolved in favour of a construction of the provision that recognises preparatory acts outside an indigenous community as capable of amounting to the supply of a dangerous drug in an indigenous community.

40. Finally, I do not consider that the ordinary meaning conveyed by the text of s 5 D(1) (e), taking into account its context in the Act and the purpose or object underlying the Act, leads to a result that is manifestly absurd or is unreasonable. In fact, the ordinary meaning conveyed by the text of the section is to very much to the contrary. It is sensible, logical and reasonable. The supply of drugs in indigenous communities is a matter of grave concern, given the devastating impact that dangerous drugs have on the members and families of those communities. A statutory provision that targets not only the actual supply of drugs in an indigenous community, but also preparatory acts (either inside or outside an indigenous community) in furtherance of, or for the purpose, of an actual supply of drugs in that community, is based on sound public policy and entirely justified from a crime prevention perspective. It is difficult to discern any reason of policy which would militate against the natural reading of the text of s 5D(1) (e).

41. Although it is not necessary to have recourse to it, the Second Reading Speech reveals that the ordinary meaning of the text of the section in no way leads to a

result that is manifestly absurd or unreasonable; and is entirely consistent with the above analysis.

CONCLUSION

42. I find the defendant guilty of the offence of supplying a dangerous drug in an indigenous community.

43. In my opinion, s 5D(1) (e) of the *Misuse of Drugs Act*, read in conjunction with the definition of "supply" in s 3 of the Act, criminalises preparatory acts of supply that are committed outside an indigenous community, provided there is sufficient evidence that those acts were done in furtherance of, or with the object of, supplying a dangerous drug in an indigenous community.

44. In the present case the defendant committed a preparatory act outside the boundaries of an indigenous community with the intention of supplying a dangerous drug in the indigenous community of Millingimbi.

Dated 26 November 2018

……

Dr John Lowndes
Chief Judge of the Local Court of the Northern Territory