CITATION:	*Fernando v Nicholas* [2019] NTSC 19
PARTIES:	FERNANDO, Dorothy
	v
	NICHOLAS, Sally
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 64 of 2018 (21848916) LCA 65 of 2018 (21833730)
DELIVERED ON:	26 March 2019
HEARING DATE:	22 March 2019
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – JUDGMENT AND PUNISHMENT

Whether Local Court erred in imposing 21 days' imprisonment without suspension – whether failure to consider alternatives to imprisonment – whether sentence manifestly excessive – "short, sharp" period of imprisonment – nature of appeal – appeal allowed and offender resentenced.

Local Court (Criminal Procedure) Act 1928 (NT) s 176A
Sentencing Act 1995 (NT) s 60A

Dinsdale v The Queen (2000) 202 CLR 321, *Elliott v Harris (No 2)* (1976) 13 SASR 516, *Forrest v The Queen* [2017] NTCCA 5, *Gumurdul v Reinke* (2006) 161 A Crim R 87, *Lalara v Malogorski* [2012] NTSC 53, *Leaney v Bell* (1992) 108 FLR 360, *Markarian v The Queen* (2005) 79 ALJR 1048, *Marshall v Court* [2013] NTSC 75, *McCarthy v Trenerry* [1999) NTSC 29, *Millar v Brown* [2012] NTSC 23, *Parker v Director of Public Prosecutions (NSW)* (1992) 28 NSWLR 282, *R v Locke and Paterson* (1973) 6 SASR 298,

R v Zamagias [2002] NSWCCA 17, *Ryan v Malagorski* [2012] NTSC 55, *Seears v McNulty* (1987) 89 FLR 154, *Turner v Trenerry* [1997] NTSC 21, referred to.

REPRESENTATION:

Counsel:

Appellant:	T Jackson
Respondent:	J Bochmann

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Fernando v Nicholas [2019] NTSC 19
LCA 64 of 2018 (21848916)
LCA 65 of 2018 (21833730)

BETWEEN:

DOROTHY FERNANDO
Appellant

AND:

SALLY NICHOLAS
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 26 March 2019)

[1] On 27 November 2018 the appellant pleaded guilty to the offences of escaping lawful custody, fighting in a public place, breaching bail and possessing cannabis. The sentencing judge imposed imprisonment for 14 days for escaping lawful custody and seven days for fighting in public, with those sentences to be served concurrently.[1] The sentencing judge imposed imprisonment for seven days for the breach

1 The respondent draws attention to the fact that the structure of that sentence gives rise to a potential issue concerning the application of s 60A of the *Sentencing Act 1995* (NT). That section requires that if an offender is sentenced to a term of imprisonment for escaping from lawful custody, the escape sentence must be served at the end of all other sentences the offender is liable to serve, and any subsisting non-parole period is extended by the term of imprisonment under the escape sentence. That provision was inserted into the *Sentencing Act* by the *Correctional Services (Related and Consequential Amendments) Act 2014*, which commenced operation on 9 September 2014. While that issue is not the subject of any notice of contention, it may assume relevance in any re-sentencing exercise.

of bail, with that sentence to be served cumulatively on the other sentences. The sentencing judge convicted the appellant of possessing cannabis, and discharged her without further penalty. The total effective sentence was imprisonment for 21 days.

[2] The appellant has lodged appeals against those sentences on the grounds that both individually and in their totality they were manifestly excessive, and that the sentencing judge failed to consider alternatives to imprisonment.

The circumstances of the offending and offender

[3] On the evening of 10 August 2018 the appellant was drinking with her mother and they both became intoxicated. At about 1:45 a.m. that same night the appellant and her mother began fighting over alcohol. They began hitting each other with their fists, whereupon the appellant hit her mother in the head with a Bundaberg rum bottle causing a large gash to her head which bled profusely. The fight was heard by a neighbour who intervened and stopped it. The neighbour then called police.

[4] When police arrived they advised the appellant she was under arrest and placed handcuffs on her. While she was being escorted to the police vehicle the appellant managed to slip her hands out of the handcuffs and fled into the night. A chase ensued, but the appellant was not recaptured at that time. The appellant was subsequently

apprehended at her home address. The handcuffs were located under a sheet on her bed. The appellant was then taken to the Darwin watchhouse and placed in protective custody due to her level of intoxication. The appellant's mother was taken to the Royal Darwin Hospital for treatment to the wound to her head.

[5] Later that day the appellant was granted bail to appear before the Local Court on 8 November 2018, subject to various conditions which are not presently relevant. The appellant failed to appear on that day. While that failure was not the subject of the charge for breach of bail, no explanation for that non-attendance was proffered during the course of the sentencing proceedings. The sentencing judge adjourned the matter for one week, to 15 November 2018, to give the appellant's legal representatives opportunity to contact her.

[6] The appellant again failed to attend court on 15 November 2018 and a warrant was issued for her arrest. During the course of the sentencing proceedings, defence counsel advised that following the adjournment on 8 November 2018 the appellant's legal representatives had left a letter at her last known address advising of the new court date. For reasons which were also not explained, the appellant did not receive that letter.

[7] The appellant was arrested on the warrant on 25 November 2018 and taken to the Darwin watchhouse. While being processed at the

watchhouse the appellant was found to be in possession of a clipseal bag containing 0.60 g of cannabis.

[8] While this was the appellant's first offending as an adult, she had a relevant criminal history in the Youth Justice Court.

[9] In August 2016, the appellant came before the Youth Justice Court charged with one count of stealing, one count of trespass on enclosed premises, one count of disorderly behaviour in a police station, two counts of assaulting a member of the police force and two counts of disorderly behaviour in a public place. Those offences were committed over the course of four separate episodes between 24 October 2015 and 20 January 2016. Those offences were found to be proved without proceeding to conviction. At that same time the appellant was found guilty of four breaches of the bail which had been granted for the principal offences, again without proceeding to conviction.

[10] In October 2016, the appellant was found to have failed to comply with a good behaviour order imposed by the Court on 12 August 2016. That breach was found to be proved and the conditions of the order were varied.

[11] In June 2017, the appellant again came before the Youth Justice Court charged with aggravated assault and damage to property committed on 10 April 2017. The offences were found to be proved without proceeding to conviction, and the appellant was released on a good

behaviour order of 12 months' duration. That period expired less than two months before the fresh offending which is the subject of this appeal. At that same time the appellant was found guilty of a breach of the bail which had been granted for those principal offences, again without proceeding to conviction.

[12] The appellant was 19 years of age at the time of this offending. She has a two year old son who is in foster care. The relationship with the child's father was volatile and had broken down. At the time of sentencing the appellant was unemployed but seeking work in childcare or the retail industry.

The sentencing proceedings and determination

[13] During the course of the sentencing proceedings, defence counsel made the submission that given the appellant's age and the absence of any recorded convictions a good behaviour bond was within range. Defence counsel also identified a community work order as another option which would meet the sentencing purposes of denunciation and general deterrence. When the sentencing judge indicated he was considering a custodial disposition, defence counsel pressed the submission that primacy should be accorded to the purpose of rehabilitation, and that if the court was minded to impose a term of imprisonment a suspension of that term would allow the appellant to continue her rehabilitation in the community. The prosecution

indicated that it would not oppose the imposition of a suspended sentence which was subject to appropriate conditions.

[14] The sentencing judge then proceeded to sentence. After observing that the guilty pleas to the charges had been entered at an early stage, noting that the appellant was appropriately treated as "a very youthful person for sentencing purposes", and going through a catalogue of the appellant's criminal history, the sentencing judge then made the following remarks culminating in the disposition:

> Ms Fernando has had every opportunity through the Youth Justice Court system and the latitude extended to youth which is usually in the form of not recording a conviction and good behaviour bonds or other forms of efforts of that nature to prevent people from being caught up in detention and having their reputations damaged for the future once they become adults.
>
> Now, of course, she is before the court for the first time as an adult and it is not sufficient, in my view, to say she is very young, she has got no convictions recorded, and you have to treat her with particular leniency. I don't accept that that is a reasonable submission with a history of this nature for this young person and such a relatively short gap in offending.
>
> The last serious offending was on 10 April 2017 and here we are dealing with serious offending on 11 August 2018; one year and four months later. The gap of one year and four months might have indicated some sort of change in lifestyle, but unfortunately, that is not the case.
>
> The breach of bail is interesting. It is only one breach of bail that's relevant because she didn't come to court on 8 November. I heard an explanation as to why there may have been some – a submission as to why there may have been some explanation for that non-attending in court and I was persuaded to adjourn the matter for one week, to 15 November, so that NAAJA might contact the defendant and have her to court a week later. I made it plain that a warrant would issue if she didn't attend the following week. She did not attend.

I have heard no explanation today as to why she didn't attend on 8 November. I have heard the explanation as to why she didn't attend on 15 November, which of course is the date of the offending. But the explanation that she didn't get the letter telling her court was on 15 November is of little assistance to the court when I'm not told why she didn't come when she was supposed to the week earlier and the court granted her an indulgence.

The defendant was intoxicated on 11 August. She fought with her mother who was also intoxicated and the submissions before me make it plain that that wasn't the first time that such a matter arose between the mother and daughter. She struck her over the head with a bottle and I have exhibit P3 before me which shows close-up photographs of the mother with a fairly serious looking gash about between 5 and 10 centimetres long and a couple of millimetres wide as it gapes in the middle. These things often look worse than they are because they bleed so heavily on the scalp and the forehead. But it's a significant wound and that, of course, is relevant to the charge of fighting in a public place.

However, the defendant was well aware of her obligations when being picked up for alleged offending. She has been before the court as a youth on no fewer than three occasions. All those other offences were rolled into one lot. So, she'd been before the court on three prior occasions.

She has been arrested on many more occasions than that. She was not any sort of novice when it came to the role of police. In fact, she had been found guilty of assaulting police on two prior occasions. On this occasion, she was informed that she was under arrest. She, nevertheless, managed to slip her hands out of the handcuffs and run away; not very effectively because she ran away to her home and she was picked up later in the same evening.

I'm satisfied that the course of behaviour in this young woman's life, culminating in the offences for which I will sentence her today make it plain that we've gone beyond the stage of good behaviour bonds or fines, even if they were appropriate.

On the earlier file 21833730, taking into account the timing of the pleas, on count 3, the escape lawful custody, the defendant is convicted and sentenced to 14 days' prison from today.

On count 4, the fighting in a public place, which has a maximum penalty of – sorry, the escaping from lawful custody at a time when you're under arrest for a matter on information has a maximum penalty of 3 years. 14 days have been imposed.

On count 4, fighting in a public place, there is a maximum penalty of 6 months' prison. The defendant is convicted and sentenced to

> 7 days' prison, which will be served concurrently with the sentence on count 3.
>
> On file 21848916, the breach of bail and possess Schedule 2, less than a traffickable quantity, on the breach of bail – the defendant has a lengthy history of breaching bail and she is well aware of her obligations. Her contumelious disregard at this stage does require a sentence of actual imprisonment.
>
> Count 1, she is convicted and sentenced to 7 days' prison which will be served cumulatively on the sentence on the earlier file.
>
> Count 2, the possession of Schedule 2 cannabis, not in a public place, a quantity of 0.6 grams, that is about the most minor offending of that nature which one can imagine, she is convicted and she is discharged without further penalty and she will pay the victim's levy of $150.
>
> Across both files, therefore, the total effective sentence is 21 days from today. I come to consider whether all or part of this should be suspended. None will be suspended. I am of the view that a short, sharp sentence is what's called for in all the circumstances of these matters.

[15] Against that background, I will deal first with the asserted failure on the part of the sentencing judge to consider alternatives to imprisonment.

Failure to consider alternatives to imprisonment

[16] It is well-established that a sentence to imprisonment should be imposed only as a last resort.[2] It may also be accepted that, except in the most obvious of cases, it is good practice for the sentencing court to indicate if it is considering imposing a custodial sentence in order to allow the parties to make submissions in relation to that matter.[3] The

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2 *Turner v Trenerry* [1997] NTSC 21 at [43]; *Gumurdul v Reinke* (2006) 161 A Crim R 87 at [29]-[31]; *Lalara v Malogorski* [2012] NTSC 53.

3 *Parker v Director of Public Prosecutions (NSW)* (1992) 28 NSWLR 282 at 296-7; *Lalara v Malogorski* [2012] NTSC 53 at [13].

sentencing judge's approach in the present case accorded with that practice. At the close of defence counsel's submissions on sentence the sentencing judge said:

> Ms Freeman, I'm not with you, I have to say. You have presented your client's interests admirably, but in my view, you have completely undersold the seriousness of her offending and I am looking at a gaol sentence, so you will need to – if you wish to address me further, I'll give you that chance.

[17] Defence counsel availed herself of that opportunity and made further submissions in relation to alternative dispositions. As already described above, defence counsel pressed the submission that primacy should be accorded to the purpose of rehabilitation, and that if the court was minded to impose a term of imprisonment a suspension of that term would allow the appellant to continue her rehabilitation in the community.

[18] While accepting that it was not incumbent on the sentencing judge to "laboriously traverse every sentencing option before imposing imprisonment", the submission made in this respect was that the sentencing judge did not give adequate reasons as to why some lesser disposition would not suffice. As this Court observed in *Millar v Brown*[4]:

> It is not to be assumed that the failure to mention a sentencing principle means that it has been overlooked [*Van Toorenburg v Westphal* [2011] NTSC 31 at [23]]. In particular, magistrates are

4 [2012] NTSC 23.

> working under pressures which mean that they are simply unable to give the kind of detailed reasons which might be expected of a court delivering a reserved judgment, and sentencing remarks delivered in such circumstances should not be subjected to the same degree of critical analysis as the words in a considered reserved judgment [*Jambajimba v Dredge* (1985) 33 NTR 19 at 22 per Muirhead ACJ]. An appellate court is entitled to assume that a magistrate has considered all matters which are necessarily implicit in any conclusions which he has reached [*Bartusevics v Fisher* (1973) 8 SASR 601].[5]

[19] That is consistent with the understanding that the law does not require a sentencing court to give reasons for not entertaining particular non-custodial options.[6] In any event, the reasons why the sentencing judge considered that a sentence to imprisonment was necessary in these circumstances are tolerably clear from the sentencing remarks. They were, by way of summary:

(a) the objective seriousness of the offending called for that disposition;

(b) there was a recent and relevant criminal history (albeit as a youth), which included disorderly behaviour, assault and repeated breaches of bail;

(c) the appellant had previously taken the benefit of dispositions directed to her rehabilitation and which were designed, without apparent success, to bring her into adulthood as a law-abiding citizen;

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5 *Millar v Brown* [2012] NTSC 23 at [19].

6 *Ryan v Malagorski* [2012] NTSC 55 at [14].

(d) in the context of the present offending, the appellant had reached the point where some lesser disposition such as the imposition of a good behaviour bond or a fine was not appropriate; and

(e) the breach of bail, when considered in light of five previous proven breaches of that nature, indicated a contumelious disregard for the obligations arising under a bail undertaking and agreement.

[20] The sentencing judge dealt adequately with the question why, in his assessment, some lesser disposition would not suffice in the circumstances. It was not necessary for the purposes of reaching that conclusion to seek some assessment of the appellant's suitability for a community work order or supervision. That would only have been necessary had the sentencing judge reached the conclusion that a disposition of that nature might be appropriate having regard to the objective seriousness of the offending and the subjective circumstances of the offender. Counsel for the appellant suggested that the reasons given by the sentencing judge lead to the "inescapable conclusion" that he imposed the sentence to imprisonment "for the appellant's own good", in breach of Murphy J's *dictum* in *Veen v The Queen*[7]. Even if that *dictum* had any application to these circumstances, I am unable to discern such an intent or purpose from the sentencing remarks.

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7 *Veen v The Queen* (1979) 143 CLR 458 at 495. The principle expressed by Murphy J on which counsel for the appellant relies is in the following terms: "It is a distortion of the criminal law to sentence people to longer terms because they are sick or have diminished responsibility. It is inconsistent with the aims of criminal law."

[21] The second submission made in relation to this ground of appeal is that the sentencing judge placed undue weight on the appellant's prior criminal history. In that respect, counsel for the appellant drew particular attention to the decision in *Gumurdul v Reinke*.[8] In that case a sentence to imprisonment for four months, suspended after two months, was quashed where the appellant had a relevant prior record of property offences. That matter was decided largely on the basis that the magistrate gave undue weight to the factors of general and personal deterrence in circumstances where in the 15 month period between the last offending in time and the imposition of sentence the accused had overcome his previous problems with alcohol abuse and petrol sniffing (under which the subject and previous offences had been committed), had secured employment, and had resumed playing competitive football.

[22] That allocation of undue weight was exacerbated by an imperfect assessment of the true objective level of the criminality of the conduct. By way of example, the accused was sentenced to imprisonment for four months for the principal offence of unlawful use of a motor vehicle in circumstances where he played no part in the taking of the vehicle and his brief involvement was limited to the acceptance of a pressing invitation from his relatives to go for a ride in it. To proceed to a sentence of four months' imprisonment in those circumstances,

8 *Gumurdul v Reinke* (2006) 161 A Crim R 87.

almost two years after the commission of the first of the offences, was described by the appellate judge as a "quantum leap". That conclusion turned on the particular facts and circumstances of the case.

[23] The appellant's third submission on this ground is that the sentencing judge fell into error by not considering the suspension of the sentence to imprisonment which had been imposed. That submission is made subject to the appellant's contention that the sentencing judge erred in the process of determining to impose a sentence of imprisonment, and that a disposition of that nature was inappropriate.

[24] For the reasons given by Kirby J in *Dinsdale v The Queen*[9], it is no doubt correct to say that imprisonment is a penalty of last resort; the court must give careful consideration to whether that disposition is the appropriate penalty in the circumstances; if imprisonment is the appropriate penalty the court must give consideration to the question of suspension; and in determining whether the sentence of imprisonment should be suspended the court must consider all of the objective and subjective features of the matter.

[25] But it is also correct to say that it was not incumbent on the sentencing judge to state explicitly that he had given consideration to an order suspending sentence, and to describe why he chose not to adopt that

9 *Dinsdale v The Queen* (2000) 202 CLR 321.

course. As the New South Wales Court of Criminal Appeal observed in relation to the New South Wales sentencing legislation:[10]

> So in the second step, where, for example, the term chosen is one of 18 months or less the alternatives generally available would be, in escalating order of severity: an order suspending the sentence; a home detention order; a periodic detention order; full-time custody: *R v LRS* [2001] NSWCCA 338 per Sully J at [65]. Of course the court has a discretion as to which of the available alternatives is chosen, but that discretion must be exercised according to established sentencing principles.
>
> Having determined the appropriate sentence, the court must explain the sentence imposed and this may require in an appropriate case some discussion of the alternatives available and why a particular alternative has been chosen: *JCE* at [19]. But it is unnecessary that a sentencing court expressly state that it has applied these two steps in arriving at the sentence imposed: *R v Foster* at [33]. In particular, merely because a court has not expressly indicated that it has taken the two-step approach to the determination of a sentence of imprisonment it does not follow that it has failed to carry out the sentencing exercise in this manner: *R v Saldaneri* [2001] NSWCCA 480 at [14]. However, the nature of the sentence imposed and the failure to record that a two-step approach has been taken may lead this Court to examine carefully the findings made by the sentencing judge to determine whether the sentence is erroneous: *R v Foster* at [35].

[26] The sentencing judge's reasons in relation to that particular determination were economical. After determining that the imposition of a total effective sentence of 21 days was the appropriate disposition, the sentencing judge then said, "I come to consider whether all or part of this should be suspended. None will be suspended. I am of the view that a short, sharp sentence is what's called for in all the circumstances of these matters." Those reasons clearly indicate that a two-step

10 *R v Zamagias* [2002] NSWCCA 17 at [29]-[30].

approach was taken to the determination. The sentencing judge had earlier in his reasons given attention to the objective and subjective features of the matter, and it is properly assumed that those features were taken into account in determining whether or not to suspend the sentence to imprisonment.

[27] If it is accepted that it was unnecessary for the sentencing court to state expressly that it had given consideration to the alternative of suspending the sentence in whole or in part, there is nothing in the sentencing remarks to indicate that the sentencing judge committed an error of principle by not making an order suspending sentence. However, the submission that an order suspending sentence was both available and warranted in all the circumstances also falls for consideration under the ground asserting manifest excess. I turn then to consider the contention that the sentence to actual imprisonment was manifestly excessive.

Manifest excess

[28] The principles which govern the determination of appeals on this ground were restated by the Court of Criminal Appeal in *Forrest v The Queen*.[11] They are (footnotes omitted):

> The exercise of the sentencing discretion is not to be disturbed on appeal unless error is shown. The presumption is that there is no error. Appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences

11 *Forrest v The Queen* [2017] NTCCA 5.

> that have been imposed in other cases. Intervention is warranted only where the difference is such that in all the circumstances the appellate court concludes there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons.
>
> Manifest excess is a conclusion which does not depend upon attribution of specific error in the reasoning of the sentencing judge. The relevant test is whether the sentence is unreasonable or plainly unjust. It must be shown that the sentence was clearly and not just arguably excessive. In approaching the task of determining whether a sentence is unreasonable or plainly unjust, the appeal court does so within the context that there is no one single correct sentence. The process of sentencing comprehends that there may have been compliance with the appropriate sentencing principles at first instance notwithstanding that there may also be differences of judicial opinion concerning the result.[12]

[29] The maximum penalty for the offence of escaping lawful custody is imprisonment for three years. The maximum penalty for the offence of fighting in a public place is imprisonment for six months. The maximum penalty for the breach of bail offence is imprisonment for two years and/or a fine of 200 penalty units. The significance of the maximum penalty prescribed for an offence was described in *Markarian v The Queen*[13] in the following terms:

> Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks. It is well accepted that the maximum sentence available may in some cases be a matter of great relevance ...
>
> It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly,

12 *Forrest v The Queen* [2017] NTCCA 5 at [63]-[64].

13 *Markarian v The Queen* [2005] HCA 25; (2005) 79 ALJR 1048.

> because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick ...[14]

[30] The offence of escaping lawful custody is considered for obvious reasons to be serious in nature. That is reflected in the maximum penalty of imprisonment for three years. The sentences imposed will vary widely according to the particular circumstances of the custody, the mechanism by which the escape was effected, and the period during which the offender remained at large following the escape. This escape was at the lower end of the scale of seriousness. It did not involve violence, premeditation or any degree of sophistication. The offender was apprehended shortly after the escape at her usual place of residence. However, even less serious examples of this type of offending may attract sentences to imprisonment in the order of three months. More serious examples of this type of offending have typically attracted sentences to imprisonment in the order of 12 months.

[31] The sentence to imprisonment for seven days for the breach of bail was unremarkable in the circumstances. As already noted, the appellant had five previous breaches as a juvenile, and failed to attend court in accordance with her undertaking on two occasions prior to the eventual resolution of the charges which are subject to this appeal. In matters involving a catalogue of very serious offences, together with a breach

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14 *Markarian v The Queen* [2005] HCA 25 at [30]-[31] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

of bail, it is not uncommon for a conviction to be entered on the bail offence without further penalty. That is almost invariably an application of the principle of totality and does not suggest that serious consequences do not attach to a failure to comply with the conditions of bail fixed by the court.

[32] There are some breaches which are minor in nature and which are rectified by the offender after only a brief period of non-compliance. Examples include a failure to report to police on a particular day followed by an attendance at the police station the following day. The imposition of a custodial sentence would not ordinarily be imposed for such a breach. Other breaches are more serious, including the fundamental failure to appear in court in accordance with an undertaking. It is not uncommon for breaches of that type to attract sentences to imprisonment of up to one month in duration.

[33] The offence of fighting in a public place is perhaps more fact-sensitive than the other two offences of which the appellant was convicted. There is no sentencing range or standard for this type of offence, but the sentence imposed in these circumstances properly took into account the contextual factors referred to by the sentencing judge. That is, the fighting in question involved the use of a bottle by the appellant, her mother suffered harm in the course of that fight, and the behaviour of the protagonists was such that a neighbour felt compelled to intervene and call the police.

[34] Having regard to those matters, it cannot be said that the individual sentences imposed for each of the offences, or the total effective period of imprisonment, were unreasonable or plainly unjust. If anything, each of the sentences imposed fell at the lower end of the range of dispositions which were conceivably open, even allowing for the appellant's subjective circumstances. It would seem plain that the reason for this may be found in the sentencing judge's reference to the imposition of "a short, sharp sentence". That is usually reflective of a sentencing approach under which an offender is subjected to a period of imprisonment without suspension, but under a head sentence which is shorter than would otherwise have been imposed.

[35] Courts in the various common law jurisdictions have all deployed "short, sharp" sentences designed to provide the shock sometimes thought to act as a powerful personal deterrent which compels offenders to consider the consequences of their actions rather than to recidivate. The disposition is sometimes combined with partial suspension, under which the offender is sentenced to a head sentence which is then suspended after a short period of actual incarceration. Partially suspended sentences of that nature are considered by some to be a more effective deterrent because they provide the offender with the actual "clang of the prison gates" and a "short sharp and ... nasty

taste of prison"[15], followed by a period of suspension under threat of further restoration.[16]

[36] This form of sentence has a long history. An annual report delivered to the New Zealand Parliament in 1929 acknowledged that the aim of judges and magistrates alike was, as far as possible, to avoid sending a man to prison for a first offence, but to give "short, sharp sentences" for a second offence, because it was believed that the short sentence of imprisonment for a second offence would, in the large majority of cases, "cure the man".[17] It is perhaps noteworthy for these purposes that the practice was not to send the offender to jail for the first offence unless there was a real reason for it.

[37] A program which formalised a "short, sharp shock" sentencing approach to young offenders was introduced in England in the late 1970s. The program was subsequently abandoned in the late 1980s on the basis that its utility for the purpose of personal deterrence had not been demonstrated, and that it operated only to provide a measure of satisfaction to victims and the community in seeing the offender lose his or her liberty, albeit for a short time, and to serve the punitive and denunciatory purposes of sentencing.

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15 James Dignan, "The Sword of Damocles and the Clang of the Prison Gates: Prospects on the Inception of the Partly Suspended Sentence" (1984) 23(3) *Howard Journal of Criminal Justice* 183, 191.

16 See *R v Locke and Paterson* (1973) 6 SASR 298 at 301, where Bray CJ remarked: "Anyone released under a suspended sentence therefore knows, or ought to know, that the sword of Damocles hangs over his head and that only his continued good behaviour and observance of the bond can prevent his automatic incarceration under the suspended sentence".

17 New Zealand Parliamentary Debates, Volume 222, p 948.

[38] Most Australian jurisdictions have enacted statutory provisions which constrain the sentencing process by expressly or impliedly requiring that a sentence of imprisonment can only be imposed after all other alternative forms of sentence have been excluded. In Western Australia, the discretion is further constrained by a provision which prohibits a court from imposing a term of imprisonment of six months or less.[18] This provision was introduced in 2003 to encourage courts to make greater use of alternatives to imprisonment, by precluding use of the "short, sharp shock" of a short term. It was considered at the time that short sentences were of little utility because they failed as a means of providing deterrence, community protection and addressing offending behaviour. However, it is not clear that the provision has had the intended effect, and it may have had the unintended consequence of "sentence creep". A review of the *Sentencing Act 1995* (WA) recommended the reduction of the minimum aggregate term to three months.[19]

[39] The imposition of "short, sharp" sentences remains a lawful and legitimate sentencing tool and disposition in jurisdictions where there is no statutory prohibition.[20] The availability of that disposition is subject to the ordinary principles. First, the head sentence cannot be

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18 *Sentencing Act 1995* (WA), s 86. When the provision was originally introduced in 1995 it prohibited a court from imposing a term of imprisonment of three months or less.

19 Department of the Attorney General, Statutory Review of the *Sentencing Act 1995* (WA) (October 2013), p 58.

20 The position that short prison sentences are a necessary part of the sentencing continuum is supported in Arie Freiberg, *Pathways to Justice: Sentencing Review* (2002) 136.

disproportionate to the gravity of the offending, and imprisonment must be the appropriate penalty in the circumstances bearing in mind that imprisonment is a penalty of last resort. Secondly, if imprisonment is the appropriate penalty, the court must give consideration to the question of suspension having regard to all of the objective and subjective features of the matter.

[40] That second stage of the process has been described as a "penological paradox", requiring as it does that the court, having already determined that no sentence other than imprisonment is appropriate, must then determine whether or not to suspend the execution of the sentence. In that second stage of the decision-making process the court must revisit the very factors which it considered in arriving at the decision that imprisonment was the only appropriate sentence. The courts have rationalised that paradox by proceeding on the basis that a sentence to imprisonment remains a grave and punitive disposition even when suspended. In *Elliott v Harris (No 2)*, Bray CJ observed that:

> So far from being no punishment at all, a suspended sentence is a sentence of imprisonment with all the consequences such a sentence involves on the defendant's record and his future.... A liability over a period of years to serve an automatic term of imprisonment as a consequence of any proved misbehaviour in the legal sense, no matter how slight, can hardly be described as no punishment.[21]

21 *Elliott v Harris (No 2)* (1976) 13 SASR 516. This statement continues to be endorsed in courts across Australia: see, for example, *R v JCE* (2000) 120 A Crim R 18; *Latham v The Queen* (2000) 117 A Crim R 74 ; *Humphrey v Police* [2000] SASC 391; *R v Foster* (2001) 33 MVR 565; *R v Zamagias* [2002] NSWCCA 17; *R v Y* (2002) 36 MVR 328; *R v Temby* [2003] SASC 230; *Peart v Police* (2003) 229 LSJS

[41] The appellant submitted in this appeal that a sentence to actual imprisonment rather than a wholly suspended sentence was manifestly excessive having regard to both the objective and subjective features of the matter. First, the offences in question, although no doubt serious, were at the lower end of the scale of seriousness and had their genesis in an apparently consensual fight between the appellant and her mother. Secondly, the appellant's record as a juvenile notwithstanding, it was the appellant's first offending as an adult. The appellant had never previously served time in prison and had successfully completed a 12 month good behaviour order imposed following her last episode of offending as a juvenile. Thirdly, the "short, sharp" period of actual incarceration imposed by the sentencing judge: (a) would operate to expose the appellant as a relatively minor offender to more serious offenders in prison; (b) would have significant negative impacts on the offender's family circumstances and prospects of employment; and (c) would potentially increase the likelihood of recidivism through stigmatisation and the flow on effects of having served time in prison.

[42] I note in this respect that in the four months since the conclusion of the sentencing proceedings in the Local Court the appellant has been on appeal bail subject to conditions involving twice-weekly reporting to

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194; *R v Whelan* (2004) 42 MVR 541*; R v Suri* [2004] SASC 80; *Sumner v Police* [2004] SASC 158; *DPP (Vic) v Oversby* [2004] VSCA 208; *DRI (a child) v Read* (2004) 42 MVR 566; *R v Errigo* (2005) 92 SASR 562 at [27]; *DPP (Vic) v Gany* (2006) 163 A Crim R 322.

police and a restriction on the purchase or consumption of alcohol. There has been no reported breach of those conditions during the period of bail. That compliance might be said to go to the correctness or adequacy of the Local Court's assessment of the appellant's prospects of rehabilitation at the time the original sentence was imposed.

[43] Although that is a matter which might properly be taken into account in any resentencing exercise, it cannot be taken into account in determining the appeal against sentence. The provisions of s 176A of the *Local Court (Criminal Procedure) Act 1928* only permit the introduction of evidence "related to the time when sentence was passed, either to make up for a deficiency in that evidence which could have been brought forward at that time, or to better explain the evidence which was brought before that Court".[22] It is only where fresh evidence is properly received on appeal that the appellate court may then form its own independent opinion of the evidence and "give judgment as if it were sitting as a court of first instance".[23] Where fresh evidence is not admitted on appeal it must proceed in the nature of an appeal in the strict sense.[24]

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22 *McCarthy v Trenerry* [1999) NTSC 29 at [20], cited in *Marshall v Court* [2013] NTSC 75 at [12].

23 *Seears v McNulty* (1987) 89 FLR 154 at 160.

24 *Leaney v Bell* (1992) 108 FLR 360 at 368.

[44] In my assessment, this was not a case in which the gravity of the offences committed or the level of the appellant's moral culpability made an order suspending sentence inappropriate. In circumstances where either a sentence to actual imprisonment or a conditional order suspending a sentence to imprisonment would be appropriate, the order suspending sentence should usually be imposed. In drawing that conclusion I do not attribute any specific error to the reasoning of the sentencing judge. I find simply that having regard to the appellant's age and lack of any adult criminal history, and the circumstances of this offending, a requirement that the appellant serve a period of actual imprisonment at this stage would not be just.

[45] I make that finding in full recognition of the principle that there is no one single correct sentence in the matter. I also make that finding on the understanding that in many cases the imposition of a "short, sharp" sentence will be just and appropriate, and that there may be circumstances in which a short, sharp sentence to imprisonment will be preferable to a lengthy conditional sentence.

Disposition and resentence

[46] As I have already observed, I consider that the head sentences imposed in this matter were at the lower end of the range by reason of their incorporation into a "short, sharp" period of actual imprisonment. If I was sentencing afresh I would have imposed higher head sentences suspended subject to supervision on conditions, however I feel

constrained from doing so in this context. Accordingly, I make the following orders:

1. The appeal is allowed and the sentence imposed by the Local Court on 27 November 2018 is quashed.
2. For the offence of fighting in public, the offender is convicted and sentenced to imprisonment for seven days.
3. For the offence of breach of bail, the offender is convicted and sentenced to imprisonment for seven days to be served concurrently with the first sentence.
4. For the offence of escaping lawful custody the offender is convicted and sentenced to imprisonment for 14 days, to be served cumulatively on the other sentences.
5. For the offence of possessing cannabis, the offender is convicted and discharged without further penalty.
6. The total effective sentence is imprisonment for 21 days.
7. That sentence to imprisonment is wholly suspended with effect from 27 November 2018, subject to an operational period of 12 months from that date for the purposes of ss 40(6) and 43 of the *Sentencing Act*.
