CITATION:	*Lovegrove v The Queen* [2018] NTCCA 3
PARTIES:	LOVEGROVE, Stephen v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Northern Territory jurisdiction
FILE NO:	CA 1 of 2018 (21728714)
DELIVERED:	13 March 2018
HEARING DATES:	9 March 2018
JUDGMENT OF:	Grant CJ, Blokland J and Mildren AJ

CATCHWORDS:

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT

Whether s 63(5) of the *Sentencing Act* (NT) permits a court to backdate sentence to take into account time on bail in the circumstances described in s 5(2)(k) of the *Sentencing Act* – bail on electronic monitoring does not equate with "custody" within the meaning of s 63(5) – for s 63(5) to have application (a) the offender must have been in custody in relation to arrest for an offence (b) the offender is convicted of that offence and (c) the offender is sentenced to imprisonment in respect of that offence – the provisions of s 63(5) vest discretionary power to backdate sentence to date of arrest or any other date from that time – discretion not confined to the time spent in actual custody – discretion must be exercised judicially – court has discretion to backdate sentence to take into account the time spent on bail in the circumstances contemplated by s 5(2)(k) – no substantial miscarriage of justice – no lesser sentence warranted – appeal dismissed.

Bail Act (NT) s 27, s 27A
Criminal Code (NT) s 411
Sentencing Act (NT) s 5, s 63

Akoka v The Queen [2017] VSCA 214, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, *Alimudin v McCarthy; Nurdin v Bravos* (2008) 23 NTLR 102, *Brown v The Queen* [2013] NSWCCA 44, *Gilligan v The Queen* [2007] NTCCA 8, *Hughes v The Queen* (2008) 185 A Crim R 155, *Markarian v The Queen* (2005) 228 CLR 357, *Nottle v Trenerry* (1993) 3 NTLR 68, *Okwechime v Sindel* (2009) 235 FLR 299, *Pappin v The Queen* [2005] NTCCA 2, *R v Douglas* (Unreported, New South Wales Court of Criminal Appeal, 4 March 1997), *R v Eastway* (Unreported, New South Wales Court of Criminal Appeal, 19 May 1992), *R v Elphick (No 2)* [2015] ACTSC 23, *R v Eyles (No 3)* [2017] ACTSC 1, *The Queen v Zainudin and Ho* [2005] NTSC 14, *Wronski v Raue* [2012] ACTSC 87, referred to.

REPRESENTATION:

Counsel:

Appellant:	I Read SC and F Kepert
Respondent:	WJ Karczewski QC and C Ingles

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	23

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lovegrove v The Queen [2018] NTCCA 3
No. CA 1 of 2018 (21728714)

BETWEEN:

STEPHEN LOVEGROVE
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, BLOKLAND J and MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 13 March 2018)

THE COURT:

[1] This is an appeal against sentence. The appeal raises the correct construction to be given to s 63(5) of the *Sentencing Act* (NT).

Proceedings below

[2] The relevant offence was committed on 15 June 2017 and the appellant was arrested on that day and remanded in custody. The appellant was granted bail on 6 September 2017 on condition that he enter into a rehabilitation program for his addiction to cannabis. It was a condition of his bail that he was to wear an approved monitoring device and was subject to a curfew. The appellant was admitted to the Aranda House

rehabilitation program on 7 September 2017. He graduated from the program on 30 November 2017 and was moved to the Transitional After Care Unit. He was returned to the Aranda House program following the return of a positive test result for cannabis on 9 December 2017.

[3] On 18 January 2018, the appellant, having pleaded guilty to supplying a commercial quantity of cannabis, was sentenced to imprisonment for two years and one month, backdated to commence on 26 October 2017, thereby allowing for a period of 85 days that he had spent on remand before being bailed. The sentence was suspended on conditions after the appellant had served seven months backdated to October 2017.

[4] During the course of the sentencing proceedings the learned sentencing judge was invited to backdate the sentence beyond the period of 85 days that the appellant had spent on remand, to include the period that he was on bail subject to conditions. The learned sentencing judge gave careful consideration to the provisions of the *Sentencing Act* and concluded that s 63(5) of the *Sentencing Act* did not afford power to backdate the commencement of a sentence of imprisonment for either the time an offender spends in the community on electronic monitoring under the provisions of s 27A(1)(iaa), (iab) or (ia) of the *Bail Act* (NT), or time spent on bail at a residential facility subject to stringent conditions.

[5] However, his Honour held that a sentencing court may take those matters into account and may, because of them, reduce a sentence of imprisonment which might otherwise have been imposed on an offender. His Honour said that a court would be in error if the accused's bail conditions demonstrated that in substance the offender has already suffered a penalty of significance but the sentencing court failed to take this into account in order to reduce the sentence of imprisonment accordingly.

[6] His Honour also found that there was no specific requirement to state the extent of any reduction, consistent with the principles of "instinctive synthesis" addressed by the High Court in *Markarian v The Queen*.[1] Nevertheless, his Honour considered that the better practice may be for the sentencing judge to state the extent of any reduction for the same reasons of clarity and transparency that the extent of reduction in sentence for a guilty plea is ordinarily stated.

[7] In the final result, the learned sentencing judge carefully considered the conditions of the appellant's bail over a period of four months. His Honour assessed those conditions as stringent and restrictive of the appellant's liberty in such degree that his head sentence and the actual time he should spend in actual imprisonment should be reduced by a period of two months.

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1 (2005) 228 CLR 357.

The power to backdate sentence

[8] The first question is whether his Honour's conclusions in relation to the operation of subs 63(5) of the *Sentencing Act* were correct.

[9] Section 5(2)(k) of the *Sentencing Act* provides that, in sentencing an offender, a court must have regard to:

> … time spent in custody by the offender for the offence before being sentenced, including time the offender resided at a specified place in accordance with a conduct agreement under the *Bail Act* that contained a provision mentioned in section 27A(1)(iaa), (iab) or (ia) of that Act.

[10] Section 5(2)(s) of the *Sentencing Act* provides that a court must also take into account "any other relevant circumstances".

[11] Section 27(2)(a) of the *Bail Act* provides that one of the conditions which may be imposed on the grant of bail is that the person enter into a "conduct agreement" to observe specified requirements as to the accused's person's conduct whilst on bail. Conduct agreements are dealt with in s 27A of the *Bail Act*. Relevantly, paragraphs 27A(1)(iaa), (iab) and (ia) relate to conditions of a conduct agreement which would require the wearing of an approved monitoring device. The *Bail Act* does not specifically provide for conditions requiring an accused person to enter into a residential facility for the treatment of drug or alcohol addiction. Usually this is achieved by a combination of one or more of the provisions of ss 27A(1)(d), (e), (f), (g), (h), (ha), (i), (iab) and (ia) of the *Bail Act*.

[12] In *Pappin v The Queen*,[2] the Court of Criminal Appeal considered whether it was appropriate for a sentence to take into account time spent on bail subject to restrictive bail conditions. At that time, s 5(2)(k) of the *Sentencing Act* did not provide for a court to take into account time spent residing at a specified place in accordance with a conduct agreement with reference to s 27A of the *Bail Act*, which was not then in force. The Court held that if the liberty of the offender has been significantly curtailed by restrictive bail conditions, it is open to a sentencing court to take that fact into account. No question arose in that case as to whether or not it was open to a court to backdate any part of the sentence as a means of achieving that objective.

[13] The power to backdate a sentence is contained in s 63(5) of the *Sentencing Act*, which provides:

> Where an offender has been in custody on account of his or her arrest for an offence and the offender is convicted of that offence and sentenced to imprisonment it may be ordered that such imprisonment must be regarded as having commenced on the day on which the offender was arrested or any other day between that day and the day on which the court passes sentence.

[14] For the reasons given by the learned sentencing judge, there is no identity between "custody" within the meaning of s 63(5) of the *Sentencing Act* and the time an offender spends in the community on

2 [2005] NTCCA 2.

electronic monitoring under the provisions of s 27A(1)(iaa), (iab) or (ia) of the *Bail Act*. As his Honour observed (footnotes omitted):[3]

> The ordinary meaning of 'custody' in this context is confinement of the person by the police, or in a prison, correctional centre or detention centre, or at court. The orthodox view is also that such confinement is in the nature of civil detention aimed at ensuring an accused person's appearance before the Court at a future date.

[15] Section 5(2)(k) of the *Sentencing Act* does not operate to equate the circumstances on bail there described with "custody" as the word is used in s 63(5) of the *Sentencing Act*; and does not require a court to backdate the sentence in the circumstances there described. If that were intended, it would have been a simple matter for the legislature to have said so. All the formulation in s 5(2)(k) of the *Sentencing Act* achieves is to make those circumstances a matter to which a court must give consideration when sentencing an offender, without stipulating the manner in which they will operate in the sentencing calculus.

[16] That then leaves the question whether it is permissible to take those circumstances into account for the purposes of s 63(5) of the *Sentencing Act*.

[17] The forerunner to s 63(5) of the *Sentencing Act* was s 405(2) of the *Criminal Code* (NT) (now repealed), which was in similar terms. That provision was first considered by Mildren J in *Nottle v Trenerry*,[4]

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3 *The Queen v Lovegrove; The Queen v Clancy* [2018] NTSC 2 at [11].
4 (1993) 3 NTLR 68.

where his Honour said that whilst the power conferred on a court to backdate a sentence was discretionary, the failure to backdate a sentence to take into account time spent in custody is a sentencing error unless reasons are given for the failure to adopt that practice. At that time, there was no legislation in force concerning the grant of bail on conditions relating to the wearing of an approved monitoring device.

[18] The use of monitoring devices in relation to bail and in relation to the imposition of sentencing options such as home detention orders, suspended sentences and community custody orders is a relatively recent innovation. The enlarged meaning of "time spent in custody" in s 5(2)(k) of the *Sentencing Act* was inserted into the Act by s 26 of the *Justice (Corrections) and Other Legislation Amendment Act 2011* (NT). That Act also inserted s 27A into the *Bail Act* for the first time (although it has since been amended), and provided for monitoring orders in the *Sentencing Act*.

[19] *Nottle v Trenerry* did not purport to deal with what is meant by the expression "where an offender has been in custody" as it appeared in s 405(2) of the *Criminal Code* (and as it now appears in s 63(5) of the *Sentencing Act*). That question first arose for consideration in *The Queen v Zainudin and Ho*.[5] That case involved charges brought under

5 [2005] NTSC 14.

the *Criminal Code* (Cth) and the *Fisheries Management Act 1991* (Cth). The issue for determination was whether time spent in detention either under the *Fisheries Management Act 1991* or the *Migration Act 1958* (Cth) could be taken into account for the purposes of backdating the sentences to be imposed.

[20] The court held that the prisoner was arrested at the least from the moment he was handcuffed, and that it did not matter whether or not the arresting officer told the prisoner he was under arrest, or whether or not the arrest was lawful. However, it was held that the arrest was for conduct relating to breaches of the *Fisheries Management Act 1991*, not for a breach of the *Criminal Code* (Cth). The only penalty for breaches of the *Fisheries Management Act 1991* was a fine, but the breach of the *Criminal Code* (Cth) carried a sentence of imprisonment. The court in that case took into account the period of detention in assessing both the fine and the period of imprisonment, but did not backdate the sentence.

[21] *Alimudin v McCarthy; Nurdin v Bravos*[6] was the next case to consider whether or not time in detention under the *Fisheries Management Act 1991* and under the *Migration Act 1958* was "custody on account of his or her arrest for an offence" for the purposes of s 63(5) of the *Sentencing Act*. It was conceded that a person detained under either of

6 [2008] NTCA 7; (2008) 23 NTLR 102.

the Commonwealth Acts was "arrested" in the relevant sense; the only question being whether an offender must be arrested and detained in custody for a particular offence and then sentenced for the same offence before the section could have application. The offenders had not been charged with any offence at the time of arrest and detention under consideration in that case.

[22] The court held that s 63(5) of the *Sentencing Act* should be accorded the widest available application consistent with the wording of the provision.[7] It was held that the expression "arrested for an offence" reflects the need for there to be an arrest for conduct which gives rise to an offence, and that when the person is subsequently convicted it is necessary to consider whether that conviction arises out of the same conduct which give rise to the initial arrest and entry of the person into custody or detention.

[23] In New South Wales, the power to backdate a sentence is contained in s 47 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). That section provides, relevantly:

> (2) A court may direct that a sentence of imprisonment:
>
> (a) is taken to have commenced on a day occurring before the day on which the sentence is imposed, or
>
> (b) commences on a day occurring after the day on which the sentence is imposed, but only if the sentence is to be served consecutively (or partly concurrently and partly

7 *Alimudin v McCarthy; Nurdin v Bravos* [2008] NTCA 7; (2008) 23 NTLR 102 at [25].

consecutively) with some other sentence of imprisonment.

(3) In deciding whether or not to make a direction under subsection (2)(a) with respect to a sentence of imprisonment, and in deciding the day on which the sentence is taken to have commenced, the court must take into account any time for which the offender has been held in custody in relation to the offence or, in the case of an aggregate sentence of imprisonment, any of the offences to which the sentence relates.

[24] It has been consistently held in New South Wales that allowance should be made for time spent on bail on onerous conditions and that the amount of time allowed should be included in calculating the period during which the sentence is backdated.[8] Although differently expressed, the provision is similar to s 63(5) of the *Sentencing Act* in that it refers to "any time for which the offender has been held in custody in relation to the offence".

[25] The position in Victoria is different. Section 18(1) of the *Sentencing Act 1991* (Vic), which provides for the backdating of sentences, is quite differently worded. In *Akoka v The Queen*[9] it was held that "quasi-custody" under strict bail conditions while undergoing rehabilitation does not amount to a "period during which [the offender] was held in custody in relation to proceedings for the offence" within

8 *Brown v The Queen* [2013] NSWCCA 44 and cases therein cited. A similar position has been adopted in New South Wales and the Australian Capital Territory in relation to time spent in a rehabilitation facility prior to sentence: *R v Douglas* (Unreported, New South Wales Court of Criminal Appeal, 4 March 1997); *Hughes v The Queen* [2008] NSWCCA 48, (2008) 185 A Crim R 155 at [37]-[38]; *R v Eyles (No 3)* [2017] ACTSC 1; *R v Elphick (No 2)* [2015] ACTSC 23 at [86 [-] 90]; *Wronski v Raue* [2012] ACTSC 87 at [10]; *Okwechime v Sindel* (2009) 235 FLR 299 at [65].

9 [2017] VSCA 214.

the meaning of that section. However, the Court held that such custody could be taken into account as part of the "instinctive synthesis" without being numerically identified; although "a sentencing judge should ordinarily explain how the punitive nature of residency at a rehabilitation facility has informed – in terms of the weight assigned to it – the instinctive synthesis".[10]

[26] The proper approach to the interpretation of the *Sentencing Act* is to begin with the plain words of the section in their ordinary grammatical meaning. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*,[11] Hayne, Heydon, Crennan and Kiefel JJ said (footnotes omitted):

> This Court has stated on many occasions that the task of statutory construction 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 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.

[27] On the plain wording of the section, all that needed to be shown for s 63(5) of the *Sentencing Act* to have application to the appellant was: (a) he had been in custody in relation to his arrest for an offence; (b) he was convicted of that offence; and (c) that he was sentenced to imprisonment in respect of that offence. On the facts of the present

10 *Akoka v The Queen* [2017] VSCA 214 at [110].

11 [2009] HCA 41; (2009) 239 CLR 27; 260 ALR 1; at [47].

case, there is no doubt that the appellant was arrested in relation to the offence on 15 June 2017, that he was held in custody until his release on bail on 6 September 2017, and that he was convicted and sentenced to imprisonment for that offence on 18 January 2018.

[28] Once that was shown, the provisions of s 63(5) of the *Sentencing Act* gave rise to a discretionary power to backdate the sentence to the date of his arrest or any other date between then and the date the court passed sentence. The exercise of that discretion was not confined to the time spent in actual custody. However, it is a discretion which must be exercised judicially, both as to whether the sentence is to be backdated at all, and, if so, for what period of time.

[29] The respondent's argument to the contrary was, in essence, that the opening phrase of s 63(5) of the *Sentencing Act* conditions and restricts the circumstances in which, and the purposes for which, a sentence may be backdated. The argument follows that the words "[w]here an offender has been in custody" give rise to the statutory implication that only time spent in "custody" may be reflected in an order that imprisonment must be regarded as having commenced on some day prior to sentence. That restriction should not be implied.

[30] First, there is no warrant for reading into s 63(5) of the *Sentencing Act* additional words such as "to reflect the actual period of pre-sentence custody on account of his or her arrest". That is particularly so given

the ameliorating purpose of the provision. Properly characterised, the reference to "custody" in the opening phrase of the provision effects no greater restriction than the references to "custody" in s 47(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and s 63(2) of the *Crimes (Sentencing) Act 2005* (ACT).[12] It may be noticed that neither the New South Wales provision nor the Australian Capital Territory provision makes reference to any other act, fact or circumstance which might be taken into account in determining whether to backdate sentence, and by how much.

[31] Secondly, s 63(5) of the *Sentencing Act* does not in its terms prohibit a court from taking into account loss of liberty through onerous bail conditions. What a court must do in pursuance of s 5(2)(k) of the *Sentencing Act* is take bail on particular conditions into account. How that is done, and what weight is given to those circumstances, is left to the court's judgement based on all the circumstances. Counsel for the respondent draws attention to the fact that when the legislature enacted the current iteration of s 5(2)(k) of the *Sentencing Act* it did not also amend s 63(5) of the *Sentencing Act* to provide that time on bail could or should be taken into account in backdating sentence. That submission identifies the difference between s 5(2)(k) bail and "custody", but not does not address the breadth of the discretion

12 The Australian Capital Territory provision provides relevantly: "(1) The court may direct that a sentence of imprisonment is taken to have started on a day before the day the sentence is imposed. (2) For subsection (1), the court must take into account any period during which the offender has already been held in custody in relation to the offence."

conferred by s 63(5) of the *Sentencing Act*. A similar observation may be made in relation to the use of the word "custody" in its ordinary sense throughout Subdivision 3 of Division 5 of Part 3 of the *Sentencing Act*.

[32] Thirdly, and following on from the previous point, the scope of s 63(5) of the *Sentencing Act* is properly regarded as ambulatory in nature. There is no doubt, as counsel for the respondent submitted, that prior to the most recent amendments to s 5(2)(k) of the *Sentencing Act*, and the related amendments to the *Bail Act*, the discretion conferred by s 63(5) was ordinarily exercised with reference to time spent in "custody" and detention. While those amendments did not equate s 5(2)(k) bail with "custody" for that purpose, they did focus attention on the breadth of the discretion conferred by s 63(5) of the *Sentencing Act*. As Spigelman CJ observed in *Deputy Commissioner of Taxation v Clark*,[13] where:

> … [the] Parliament has chosen a formulation which is of indeterminate scope and of a high level of generality, a court should interpret the provision on the basis that the intention of the original enactment was that the particular application of the provision may vary over time.

[33] The current iteration of s 5(2)(k) of the *Sentencing Act* was enacted as part of a suite of amendments which introduced electronic monitoring as what was essentially a form of custody designed to reduce the prison

13 (2003) 57 NSWLR 113 at 142.

population. It is unsurprising in those circumstances that s 5(2)(k) of the *Sentencing Act* refers to custody as including bail on those conditions, and unsurprising that s 63(5) of the *Sentencing Act* might be applied to take account of time spent subject to those restrictions prior to sentence.

[34] Fourthly, counsel for the respondent points to the injustice which would arise in the application of s 63(5) of the *Sentencing Act* exclusively to bail involving an electronic monitoring condition, but not to residence on bail in a rehabilitation program subject to strict conditions which did not involve electronic monitoring. That submission is predicated on a construction which would equate s 5(2)(k) bail with "custody" for that purpose, and limit the operation of s 63(5) to those circumstances. For the reasons already given, the amendments do not operate in that fashion. While the amendments draw attention to the scope of the discretion conferred by s 63(5) of the *Sentencing Act*, they do not circumscribe it.

[35] The discretion must be exercised judicially in determining whether a period on bail in a rehabilitation program will warrant its exercise. In determining what period of backdating, if any, should be allowed for such residence it would be necessary to give careful consideration to the conditions of the program and the strictures applied at the facility

in question. The learned sentencing judge drew attention to the New South Wales authorities which examine these matters.[14]

[36] There is no doubt a qualitative difference between time spent on bail in a rehabilitation facility or wearing an electronic monitoring device and time spent in actual imprisonment. It was to this difference that the New South Wales Court of Criminal Appeal was referring when it observed:[15]

> There is surveillance and there is a system in place where defaulters who are on bail are immediately reported to the police. But the fact remains that any resident who is on bail is free to leave Odyssey House at any time, although the most inevitable consequence of doing so is that he will then be returned to custody in gaol. There is nevertheless a real distinction.

[37] Gleeson CJ recognised the distinction in *R v Douglas*[16] in the following terms:

> [T]his Court has, on a number of occasions, recognised the regime at Odyssey House, which is ultimately directed at treatment and rehabilitation in the case of drug users, as being of a quasi-custodial nature. Indeed on a number of occasions when considering credit that an offender ought to be given for presentence custody, or a regime in the nature of presentence custody, the Court has treated time spent at Odyssey House as warranting credit, if I may use that expression, in the order of approximately 50 percent of the credit that would be given for pre-sentence custody.

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14 *The Queen v Lovegrove; The Queen v Clancy* [2018] NTSC 2 at [29]-[32].

15 *R v Eastway* (Unreported, New South Wales Court of Criminal Appeal, 19 May 1992).

16 *R v Douglas* (Unreported, New South Wales Court of Criminal Appeal, 4 March 1997).

[38] The regime must be capable of characterisation as "quasi-custodial" in terms of discipline, structure, demands, strictures, expectations and work before it will warrant the exercise of the discretion to backdate sentence. Moreover, on proper construction there is nothing ss 5(2)(k) and 63(5) of the *Sentencing Act* which would require the sentencing court to exercise the discretion to backdate simply because a person had been subject to bail involving an electronic monitoring condition. That will again depend on matters of circumstance and compliance.

[39] Finally, a construction which affords the discretion the widest available application would promote the purposes or objects of the provision. Those purposes include the alleviation of pressure on an offender to plead guilty to hasten a sentence, especially when delays are inevitable and often outside of the offender's control. They also include ensuring that time in custody and "quasi-custody" truly forms part of the sentence, that offenders understand that time served has actually been taken into account, and that justice is not only done but seen to be done.[17]

[40] In addition, a mechanism which permits backdating to take account of time spent in "quasi-custody" would better serve the accuracy of the record for future sentencing courts, the community (for the purposes of denunciation and deterrence), and statistical purposes. As counsel for

17 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

the appellant submitted, to afford that operation to s 63(5) of the *Sentencing Act* allows the imposition of a head sentence which is not disproportionate to the circumstances of the offending, and does not run the risk of distorting the process of "instinctive synthesis". It also permits a court to take into account time spent in "quasi-custody" in appropriate circumstances where the operation of a mandatory sentencing regime might otherwise preclude giving credit for that matter in the fixing of a head sentence.

[41] In the light of these considerations, we consider that a court has discretion to backdate a sentence, where appropriate, to take into account the time spent on bail in the circumstances contemplated by s 5(2)(k) of the *Sentencing Act*.

[42] Consistently with *Nottle v Trenerry*, any period of actual custody, whether in a police cell or on remand in a prison, should ordinarily be included in the period during which the sentence is backdated. The same might be said of any period spent in a hospital whilst being detained on remand. It might, or might not, be appropriate, when backdating a sentence, to include any part of detention on remand if it relates also to some other offence with which the individual is charged, but which is not the subject of the conviction and sentencing order, depending on the circumstances. Similarly, if the effect of a person's bail conditions are such as to significantly interfere with his or her liberty, but are not as stringent as would be the conditions on remand,

it may be a proper exercise of the court's discretion to make some allowance for that either in backdating the sentence or in taking it into account in the head sentence. The more stringent the conditions, the greater the allowance which should be made for it.

[43] However, as the submissions of the respondent demonstrate, there are circumstances in which injustice might arise if the only manner in which to reflect significant loss of liberty is to backdate the sentence. For example, it may be that an accused was never arrested at all, but summonsed to appear and then placed on bail containing very stringent conditions. Or it may be that although an accused was arrested, and held in custody, he or she was not held in custody at any time for the offence of which he or she is ultimately convicted. Nothing in the foregoing analysis has the effect that if the circumstances of "quasi-custody" do not fit into the precise wording of s 63(5) of the *Sentencing Act*, a court may not otherwise make allowance for that in imposing sentence.

[44] The court is able to take periods spent in "quasi-custody" into account in a number of ways. First, it might be taken into account in fixing the length of the head sentence. Secondly, it might be taken into account in determining what period of further custody is necessary and appropriate having regard to the nature of the offending, and for that to be given effect in fixing the non-parole period or by an order suspending sentence. Thirdly, it might be taken into account in fixing

the time to which the sentence is backdated. Whilst it would not amount to sentencing error to take it into account in fixing the head sentence as the learned sentencing judge did on this occasion, it will often be preferable to make allowance for it by backdating the sentence.

Further intervention

[45] Although the mechanism adopted by the learned sentencing judge in fixing sentence was permissible, for the reasons we have given there was error in an approach which denied the application of s 63(5) of the *Sentencing Act* to time which an offender spends in the community on electronic monitoring under the provisions of s 27A(1)(iaa), (iab) or (ia) of the *Bail Act*.

[46] However, even where specific error is established this court may only proceed to resentence an appellant if it reaches the further conclusion that a less severe sentence is warranted and should have been passed.[18] As Mildren J observed in *Gilligan v The Queen*:[19]

> The fact that error has been disclosed does not automatically have the consequence that "some other sentence ... is warranted in law": see *Damaso* [2002] NTCCA 2; (2002) 130 A Crim R 206 at 217 [53]. I accept the submission … that if error is disclosed, the Court must consider for itself what is the appropriate sentence and if the Court forms a positive opinion that some other lesser sentence is warranted, the Court must impose it.

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18 *Criminal Code*, s 411(4).

19 [2007] NTCCA 8 at [12].

[47] The offence in question was supplying a commercial quantity of cannabis. The maximum penalty for that offence was imprisonment for 14 years. The offending involved the shipment of 2.72 kilograms of cannabis from South Australia into the Northern Territory. That was more than five times the threshold amount for a commercial quantity. The appellant's admitted intention was to sell the cannabis in the Northern Territory for profit, no doubt taking advantage of the higher prices that could be obtained for the drug in the Northern Territory. The cannabis was concealed in a metal car fridge within the vehicle driven by the offender. As the sentencing judge allowed, it was a small commercial enterprise involving a one-off transaction which was not characterised by the sophistication sometimes seen in cross-border transportation cases.

[48] At the time of the offending the appellant was a mature, intelligent, capable and well-resourced adult. He was 41 years of age when sentenced. He had no connection to the Territory and the only purpose for his travel was to engage in the offending behaviour. He had a long-term problem with the misuse of cannabis. He pleaded guilty, but did not volunteer any information to police concerning the source from which he had purchased the cannabis.

[49] As described at the outset, the appellant was granted bail on 6 September 2017 on condition that he enter into a rehabilitation program for his addiction to cannabis. It was a condition of his bail

that he was to wear an electronic monitoring device. He was admitted to the Aranda House rehabilitation program on 7 September 2017.

[50] During the hearing of the appeal the court received a document describing the rules which applied to the appellant in that program. They included a non-contact period for the first 10 days following admission; no personal phone calls in the first 10 day period; initial drug screening and random alcohol and other drug testing; random property and room searches; no smoking on the grounds; limitations on business appointments outside the premises; email access restricted to once per week; mobile phones not allowed during Phase 1 and restricted during subsequent phases; no television until after 5 pm; no takeaway food or drinks; personal shopping permitted on Fridays only; visitors permitted on Sundays only; and leave allowed only in Phase 3 and then limited to two days once every fortnight.

[51] As also described at the outset, the appellant graduated from the Aranda House program on 30 November 2017 and was moved to the Transitional After Care Unit. The rules and conditions of residence in that unit were more relaxed. They included some restrictions on the use of mobile phones and email and Internet access; restrictions on the ownership and use of televisions and DVD players; restrictions on the times at which personal shopping could be undertaken, a 6 pm curfew; and day leave after two weeks and weekend leave after a month.

[52] The appellant was returned to the Aranda House program following the return of a positive test result for cannabis on 9 December 2017. Despite that setback, those programs afforded him at least some insight into his offending and provided some therapeutic benefit.

[53] Against that background, the appellant was sentenced to imprisonment for two years and one month. That sentence was backdated to account for the full period of 85 days that he had spent on remand, and suspended after he had served seven months. Although the sentencing judge found that the court did not have power to backdate sentence to take account of any period spent in the rehabilitation programs, the head sentence and the time spent in actual imprisonment was reduced by a period of two months in recognition of the restrictions on liberty that applied during those programs.

[54] Having regard to the objective circumstances of the offending and the subjective circumstances of the appellant, we are unable to conclude that a less severe sentence is warranted and should have been passed; and nor do we consider that the error we have found gave rise to any substantial miscarriage of justice.

Disposition

[55] The appeal is dismissed.
