CITATION:	*Dumoo v The Queen* [2018] NTCCA 20
PARTIES:	DUMOO, Timothy v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 12 of 2018 (21541514)
DELIVERED:	17 December 2018
HEARING DATES:	3 December 2018
JUDGMENT OF:	Grant CJ, Southwood and Hiley JJ

CATCHWORDS:

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

Whether dispositions made open to sentencing court under ss 42 and 43 of the *Sentencing Act* (NT) – whether sentence imposed manifestly excessive – although the sentence imposed vitiated by error in principle no lesser sentence was warranted and should have been imposed – appeal dismissed.

Gilligan v The Queen [2007] NTCCA 8, *R v Horstmann* [2010] SASC 103, *R v Lutze* (2014) 121 SASR 144, *R v Meschede* [2016] SASCFC 49, *The Queen v Haji-Noor* (2007) 21 NTLR 127, referred to.

Criminal Code (NT) s 411
Sentencing Act (NT) s 42, s 44, s 47, s 48
Sentencing Regulations, reg 4(1)

REPRESENTATION:

Counsel:

Appellant:	J Brock with M Aust
Respondent:	WJ Karczewski QC, Director of Public Prosecutions

Solicitors:

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

Judgment category classification:	B
Number of pages:	20

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

Dumoo v The Queen [2018] NTCCA 20
No. CA 12 of 2018 (21541514)

BETWEEN:

TIMOTHY DUMOO
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, SOUTHWOOD AND HILEY JJ

REASONS FOR JUDGMENT

(Delivered 17 December 2018)

THE COURT:

[1] This appeal concerns the nature of an order made pursuant to s 40 of the *Sentencing Act* (NT) suspending a sentence to a term of imprisonment on conditions, and the dispositions potentially open to the sentencing court under ss 42 and 43 of the *Sentencing Act* in circumstances where there has been a breach of that order. Ultimately, however, it concerns whether a lesser sentence was warranted and should have been imposed.

Background

[2] On 10 November 2017, the appellant was sentenced after pleading guilty to one count of dangerous driving causing death. The learned sentencing Judge

sentenced the appellant to imprisonment for three years and nine months and suspended that term on the offender entering into a home detention order for nine months.

[3] On 6 April 2017 the sentencing court heard an application for the breach of the home detention order made pursuant to s 48(2) of the *Sentencing Act*. At that time the sentencing court directed that the order continue in force pursuant to s 48(9)(c) of the *Sentencing Act*.

[4] On 12 May 2017 the sentencing court heard a further application for breach of the home detention order. At that time the appellant made an application pursuant to s 47(1) of the *Sentencing Act* that the order be revoked, the sentence of imprisonment quashed, and the sentencing court deal with the offender as if he had just come before the court for sentence for the offence in respect of which the home detention order was made. In response to that application, the sentencing court granted conditional bail to the appellant to allow him to demonstrate his capacity to comply with the conditions which might be imposed on an order suspending sentence in the resentencing exercise. That order was presumably made in the exercise of a *Griffiths*-type discretion. Although the learned sentencing Judge did not expressly revoke the home detention order at that time, that must necessarily have been the mechanism by which the appellant was permitted liberty on bail.

[5] The appellant complied with the conditions of his bail during the adjournment period. On 27 July 2017 the sentencing court resentenced the

appellant to imprisonment for three years and nine months backdated to 13 June 2017 to reflect the period of 44 days the appellant spent on remand pending determination of the applications, suspended forthwith.[1] That order was made subject to supervision for three years and an operational period of four years.

[6] On 9 January 2018 the sentencing court heard an application for a breach of the conditions of the order suspending sentence which had been made by Community Corrections on 12 December 2017. At that time the learned sentencing Judge ordered a mental health assessment and adjourned the application to a date to be fixed. The appellant was again released on bail.

[7] On 11 January 2018 Community Corrections made a further application for breach of the conditions of the order suspending sentence. The application alleged that following his release on bail the appellant had failed to return to Wadeye and had consumed alcohol in breach of the conditions of bail. He was arrested and remanded in custody on 12 January 2018.

[8] The two applications that the appellant be dealt with for breaches of the order suspending sentence were heard on 9 March 2018. At that time the learned sentencing Judge determined that it would be unjust to restore the sentence held in suspense and order the appellant to serve it pursuant to s 43(7) of the *Sentencing Act*; set aside the sentence which had been imposed on 27 July 2017; resentenced the appellant to the same head

---

1 Appeal Book (**AB**) 205

sentence which had been imposed in that earlier date, backdated to 8 November 2017 (to take account of the 44 days previously spent on remand prior to rearrest on 12 December 2017); and fixed a non-parole period of one year and 11 months from that date. The remarks made by the learned sentencing Judge, and the order setting the earlier sentence aside, demonstrate that s 42 of the *Sentencing Act* was the provision deployed for that purpose.

Grounds of appeal

[9] At hearing of the appeal counsel for the appellant sought leave to amend the grounds of appeal in the following terms:

(a) [The learned sentencing Judge] failed to provide sufficient reasons in effectively making an order for full restoration after determining it would be unjust.

(b) [The learned sentencing Judge] erred in making an order under s 42 [of the] *Sentencing Act* without jurisdiction.

(c) In the alternative to Ground 2, [the learned sentencing Judge] erred in effectively fully restoring the sentence after finding it would be unjust to do so.

(d) [The learned sentencing Judge] erred in taking into account irrelevant considerations and not taking into account relevant considerations in the following respects:

(1) it was not open to [the learned sentencing Judge] to find that there had been no compliance;

(2) [the learned sentencing Judge] failed to consider whether the breaching conduct evinced an abandonment of an intention to be of good behaviour;

(3) [the learned sentencing Judge] failed to take into account the disparity between the conduct constituting the breaches and the consequences of full restoration.

(e) The final order resulted in an unjust outcome in all the circumstances.

The function of the appeal court

[10] The determination made by the learned sentencing Judge was in error.

[11] First, it is apparent that the learned sentencing Judge proceeded in accordance with s 42(1) of the *Sentencing Act* on the basis of a misapprehension that a non-parole period could not be fixed in the event the sentence held in suspense was restored under s 43 of the *Sentencing Act*.[2] Neither counsel drew the court's attention to in the decision of this court in *The Queen v Haji-Noor*[3].

[12] The power to cancel an order suspending sentence and deal with the offender afresh under s 42(1) of the *Sentencing Act* is only enlivened on application made by the offender, the prosecutor, or an employee of the Agency under the Minister with portfolio responsibility for the *Correctional Services Act* (NT).[4] No such application was made in the present case,

---

2 AB 267; cf *The Queen v Haji-Noor* (2007) 21 NTLR 127.

3 (2007) 21 NTLR 127.

4 *Sentencing Act*, s 42(3); *Sentencing Regulations*, reg 4(1).

although neither counsel appearing in the application took objection to the course adopted by the learned sentencing Judge.

[13] Second, the learned sentencing Judge expressly found in accordance with s 43(7) of the *Sentencing Act* that it would be unjust to restore the whole of the sentence held in suspense and order the offender to serve it. It was for that reason the learned sentencing Judge adopted the mechanism under s 42(1) of the *Sentencing Act*. However, even if the disposition could be characterised as one made pursuant to s 43(5) of the *Sentencing Act*, the restoration of the whole of the sentence, even with the imposition of a non-parole period, was not available in circumstances where the learned sentencing Judge had found it would be unjust to do so. The restoration of the whole of the sentence held in suspense subject to a non-parole period is properly characterised as the restoration of the whole of the sentence, albeit with provision made for possible mitigation when the prisoner has served the minimum time required.

[14] Section 411 of the *Criminal Code* (NT) governs the determination of appeals to this Court. It provides:

> **Determination of appeal in ordinary cases**
>
> (1) The Court on any such appeal against a finding of guilt shall allow the appeal if it is of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court of trial should be set aside on the ground of the wrong decision on any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal.

(2) The Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) Subject to the special provisions of this Division the Court shall, if it allows an appeal against a finding of guilt, quash the finding of guilt and direct a judgment and verdict of acquittal to be entered.

(4) On an appeal against a sentence, the Court must:

(a) if it is of the opinion that another sentence, whether more or less severe, is warranted and should have been passed – quash the sentence and either:

(i) impose another sentence; or

(ii) remit the matter to the court of trial; or

(b) in any other case – dismiss the appeal.

[15] This is an appeal against sentence. If the sentence imposed is vitiated by error in principle, including the erroneous application of statutory provisions, the appeal court is required to resentence an appellant if it reaches the further conclusion that a less severe sentence is warranted and should have been passed.[5] As Mildren J observed in *Gilligan v The Queen*:

> 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.[6]

[16] The appeal court may refrain from interfering with the sentence if it thinks that the resulting penalty was appropriate notwithstanding the demonstrated error. In such a case, the appeal court will not vary the sentence if it thinks

5 *Criminal Code* s 411(4).

6 *Gilligan v The Queen* [2007] NTCCA 8 at [12].

that the same or a higher sentence would be passed if it were to exercise the discretion itself. However, the appeal court may reduce the sentence if in the exercise of its own discretion it considers that a lesser sentence is appropriate, even though the sentence under appeal is not manifestly excessive.[7]

[17] While this matter might conceivably have been an appropriate vehicle for an application pursuant to s 112 of the *Sentencing Act*, or for remittal to the sentencing court, the effluxion of time since the order was made calls for the question of sentence to be dealt with by the appeal court. That requires a consideration of the applications made pursuant to s 43(2) of the *Sentencing Act* dated 12 December 2017 and 11 January 2018. That undertaking does not invite any further examination in relation to the correctness or otherwise of the learned sentencing Judge's determination in that respect.

The applications for breach

[18] Although the immediately relevant applications are those brought in respect of the breach of the order suspending sentence, the earlier applications in relation to the breach of the home detention order are relevant in the contextual sense at least. They go to the nature and quality of the appellant's compliance with orders from the time of the initial sentence.

[19] The first application for breach of the home detention order was made on 27 March 2017. It was supported by affidavits made on 27 and 29 March 2017.

---

7 *R v Horstmann* [2010] SASC 103 at [36]-[38]; subsequently endorsed in *R v Meschede* [2016] SASCFC 49 at [3]. See also *R v Lutze* [2014] SASCFC 134; 121 SASR 144 at [47].

The allegation of breach was that the appellant had failed to obey reasonable directions from a probation and parole officer and had purchased or consumed alcohol. The affidavit material disclosed the following matters.

[20] From the time the order for home detention was made on 10 November 2016 the appellant had complied with directions to report in person only sporadically. The appellant had failed to return to his employment as a Ranger. There were some concerns about substance misuse and the appellant's mental state. On 19 November 2017 the appellant had removed his electronic monitoring device and left his place of home detention. He was given a written warning in relation to that breach without any application being pursued.

[21] On 7 March 2017 arrangements were made for the appellant to travel to Darwin to attend a residential rehabilitation program. On 20 March 2017 the appellant left the residential rehabilitation facility in breach of his curfew. He was absent from the facility overnight. He was subsequently given a warning not to leave the facility without permission. On 25 March 2017 the appellant again left the facility in breach of curfew he became intoxicated and was taken into custody by police. On 27 March 2017 the appellant contacted Community Corrections at Wadeye and stated that he no longer wished to undertake the residential rehabilitation program, and that he was residing with extended family in Darwin. Despite that indication, the appellant did return to the rehabilitation facility.

[22] When the application for breach came before the court in 6 April 2017 the learned sentencing Judge directed that the order continue in force.

[23] The second application for breach of the home detention order was made on 11 April 2017, and was supported by an affidavit of that same date. That affidavit disclosed that on 10 April 2017 the appellant had been given permission by staff at the rehabilitation facility to attend the Royal Darwin Hospital to visit a family member. He failed to return at the agreed time. His electronic monitoring device showed him at various locations in the northern suburbs of Darwin over the course of that day. Later that night family members became concerned when the appellant became highly intoxicated and unresponsive. They called an ambulance. The appellant was subsequently admitted to hospital for extreme alcohol intoxication. He was discharged the following day, but was unable to be located at the rehabilitation facility or at the house in which he had been residing with extended family. His electronic monitoring device had not been charged and had ceased transmitting.

[24] That application for breach was heard over the course of a number of days in April and May 2017, and culminated in the learned sentencing Judge revoking the home detention order, resentencing the appellant, and making an order suspending that sentence subject to supervision on conditions.

[25] The first application for breach of the order suspending sentence was made on 12 December 2017. It was supported by an affidavit of that same date.

The allegation of breach was that the appellant had failed to submit to counselling, treatment and rehabilitation services. That allegation was comprised by a number of failures. On 27 November 2017 the appellant failed to report to Community Corrections. On 11 December 2017 the appellant again failed to report to Community Corrections as directed. Over that same general period the appellant had failed to attend counselling as directed. The broader concern expressed by Community Corrections was that the appellant's family felt threatened by the appellant's behaviours, but the appellant was resistant to involvement in any interventions that might assist in addressing those behavioural difficulties. Community Corrections expressed the view that the appellant would benefit from a period of structured imprisonment to stabilise his behaviours.

[26] The application came on for hearing on 9 January 2018, at which time the appellant was granted bail. Matters transpiring after that time led to the second application for the breach of the order suspending sentence dated 11 January 2018. The affidavit material disclosed that following the appellant's release on 9 January 2018 arrangements were made to repatriate him to Wadeye on the afternoon flight the following day. Community Corrections in Wadeye met that flight, but the appellant was not on it. Police attended at the appellant's mother's residence in Darwin and took the appellant into custody. He was intoxicated at the time.

[27] It was in those circumstances that the learned sentencing Judge came to deal with the appellant on 9 March 2018.

Consideration

[28] During the course of the appeal hearing we sought further information in the nature of an updated assessment of suitability for supervision and an institutional report. We also gave the appellant opportunity to put further material in relation to prospective living arrangements at Wadeye and the attitude of his family to his return.

[29] The institutional report dated 14 December 2018 contains the following relevant information. The appellant has been involved in a number of breaches and incidents during the period of his incarceration. There have been four recorded breaches involving fighting with rival group members from the Wadeye region. The nature and causes of that form of conflict are well known to this Court. The appellant received periods of separate confinement for that conduct. Most recently, in August 2018 he received three days' separate confinement for fighting with another prisoner.

[30] There are also several recorded incidents which involved the appellant making threats to prison officers and general poor behaviour. He received cautions for those behaviours and was subjected to monitoring. However, his security rating in the prison was reviewed in November 2018 and it was considered that there had been improvements in his behaviour and compliance which warranted his reclassification as a medium security prisoner. As a result he was moved to the low accommodation sector. Since that time his behaviour appears to have settled further. He has been respectful to officers and staff, but appears a little socially isolated.

[31] So far as his medical presentation is concerned, the report notes that the appellant has chronic issues with the misuse of alcohol and other drugs. He has previously made threats of self-harm and remains under a medication regime for depression while in prison. The dosage under that regime was reduced from July 2018 in response to the appellant's reports that his condition had improved. There are five recorded "At Risk" episodes through the various periods of the appellant's incarceration. The most recent episode of that nature occurred in March 2018 and was attributed to bereavement issues.

[32] The assessment of suitability for supervision dated 16 December 2018 contains the following relevant information. The appellant was interviewed on 6 and 13 December 2018 for the purpose of preparing the report. During the course of those interviews the appellant indicated that he wished to return to supervision and to residential rehabilitation. He was advised that if released on supervision he would be required to report weekly to the Community Corrections office in Wadeye, and would be referred for alcohol and other drug counselling. He was advised further that Community Corrections would be unable to assist him with transport in order to meet those obligations. The appellant indicated he would be prepared to comply with those obligations. When asked why he considered he would be able to comply with those obligations at this point in time given his history of non-compliance, the appellant replied that he had been in gaol for a year and did not want to be in gaol anymore.

[33] The author of the report states that:

> Community Corrections still holds concerns that if the appellant is released he would fall back into his previous pattern of consuming cannabis to self-medicate in Wadeye leading him not wanting to engage or listen to anyone including family and would remain in his bedroom most of the time sending him back into a depressed state.

[34] Further:

> Whilst Mr Dumoo has spent nearly a year in prison and has been on antidepressant medication for at least six months in a controlled environment, this may have given Mr Dumoo the time to clear his head and put him on the path to becoming a functioning member of society again where he may be able to comply with an order in a community setting.

[35] The initial concern expressed is no doubt well-founded having regard to the appellant's history. The hope expressed in the second passage must be considered in light of the appellant's history and past performance. After a year in prison the appellant remains a medium security rated prisoner and he has only just been downgraded from a high security rated prisoner. Further, the appellant has undertaken no rehabilitation program while in prison. The appellant clearly has not established that he could be a functioning member of the community. For reasons that we will come to, his interests will best be served by him remaining in prison, getting his security rating down to either a Low 2 or Open security rating, participating in the Sentenced to a Job program, completing an alcohol rehabilitation program and being released on sanctioned based parole.

[36] We have received letters from the appellant's mother and partner. They express support for the appellant's return to community. They state that the appellant would be able to live in his parents' house, and that he would have the use of a bedroom he ordinarily shares with his partner. The appellant's mother expresses the understanding that the accused has recently been taken off his medication at the prison, but will still require check-ups at the community clinic. She expresses a willingness to help the appellant attend the clinic for that purpose and to meet his reporting obligations. Of course, those expressions of support must be seen in light of the difficulties which the appellant presented to his family while his sentence to imprisonment was suspended, and their heavy reliance on community services to address those difficulties.[8]

[37] Against that background, it was the appellant's principal contention that a partial restoration is all that is called for in the circumstances. A number of matters were identified in support of that submission.

[38] First, the nature and terms of the order suspending sentence imposed intensive conditions on the appellant which would provide adequate structure in terms of supervision, support services and compliance with his medication regime. The difficulty with that submission is that there had been a failure by the appellant to comply with the intensive conditions to which the order suspending sentence, and before that the home detention

8 See, for example, AB 209-210, 216-217.

order, was subject. It is difficult in those circumstances to advance the proposition that those conditions in and of themselves will provide adequate structure.

[39] The learned sentencing judge was presented with a situation in which there had been a history of non-compliance and multiple breaches over an extended period of time stretching back to shortly after the making of the home detention order. The appellant was not engaging with medical, correctional and rehabilitative services. It is plain from the affidavit and other material which had been presented on the various breach applications that the appellant's behavioural difficulties were impacting negatively on his family. They were experiencing difficulty managing his presentation. As a result, the clinic and Community Corrections were being used as *de facto* policing agencies.[9] While in Darwin, the appellant had repeatedly absconded from the residential rehabilitation facility.

[40] In the circumstances, the learned sentencing Judge clearly and reasonably concluded that the appellant would benefit from the structure that a period of re-imprisonment would afford. Once that conclusion was reached, the question then became whether the court should make some prognostication concerning when the appellant's condition would adequately stabilise, or whether that was a matter best left in the hands of the Parole Board having regard to the appellant's progress during the period of incarceration. Given

9 AB 209-210, 216-217.

the long history of breaches and the appellant's obvious instability, a full restoration with the fixing of a non-parole period is the most appropriate mechanism to adopt in the circumstances.

[41] Secondly, counsel for the appellant submitted that although the breaches in question were not trivial in nature, they were not constituted by further offending. Rather, they were breaches of curfew and lapses into alcohol misuse which could not be characterised as evincing an intention to disregard the obligation to be of good behaviour. It was also suggested that the conduct fell short of demonstrating a continuing attitude of disobedience to the law; but that submission failed to acknowledge that breaches of the conditions imposed by the court on the order suspending sentence did constitute a repeated and continuing disobedience of that kind.

[42] Thirdly, it was submitted that the appellant had complied with conditions over a not insubstantial period of time, and the episodes of non-compliance were relatively brief in comparison. The history and circumstances of the breach applications described above tell against any submission that the Court could have confidence that the appellant now, and for the first time, understands that if he does not comply he will go back to prison. Submissions in almost precisely the same terms were made on a number of previous occasions, but the breaches have persisted.[10] Similarly, in the

10 See, for example, AB 224-225 in submissions made on 9 January 2018 immediately prior to the appellant's final breach.

Assessment of Offender Suitability for Supervision dated 24 May 2017[11] the appellant is recorded as saying, in response to the question why he would now be prepared to comply with the conditions of a supervised order when previously he had not:

> I have now been in prison for a while, I want to go home and be with family. I was not thinking straight before. I follow rules in prison so I will follow the rules in community.[12]

[43] There is an obvious and striking similarity between the reasoning advanced by the appellant at that time and the reasoning advanced in this appeal in support of a partial restoration and an order suspending sentence.

[44] Fourthly, it was submitted that the breaches were associated with the appellant's mental health issues. The import of that submission would seem to be that the appellant's mental condition was the causative factor in the previous breaches which no longer presents, and his moral culpability for the breaches was diminished as a result. There is no evidence before the court which would suggest a causal relationship between the appellant's mental condition and the breaches in question, in the sense that the appellant's ability to understand the consequences of his actions was materially or substantially impaired. Counsel for the appellant expressly eschewed any submission to the effect that the appellant was unaware of the potential consequences of breach or that he did not understand his obligations under the terms of the suspended sentence.

---

11 AB 164.

12 AB 165.

[45] That is borne out by the opinions expressed by the report of Dr Walton, a consultant psychiatrist, dated 1 March 2018. In addressing the reasons underlying the breach on 10 January 2018, Dr Walton expressed the view that it "did not occur because he was in the grips of alcohol addiction nor was the behaviour the product of any mental disorder". Rather, Dr Walton expressed the opinion that the appellant's conduct was attributable to psychological immaturity and his inability "to resist the cajoling of others towards any particular activity, most relevantly resumption of alcohol consumption".[13] Even were that not so, the suggestion that the appellant's mental condition may have contributed to his previous breaches and failure to engage with support services only draws attention to the benefit of a period of structured engagement.

[46] Finally, it was suggested that there would be a gross disparity between the conduct constituting the breaches and a full restoration, even allowing for the imposition of a non-parole period of one year and 11 months. This was said to have been acknowledged by the court at the time the sentence was restored. The learned sentencing Judge's comment to the effect that full restoration of the three years and nine months would be manifestly unjust must be seen in context. It is clear that the comment was directed to a full restoration without the ameliorating effect of a non-parole period. We do not consider that a restoration with the imposition of a non-parole period would give rise to the disparity for which the appellant contends. He has

13 AB 260.

been afforded and rejected repeated opportunities to comply with orders and take the benefit of therapeutic services. He has shown a continuing and contumelious disregard for the conditions previously imposed by the court on the order suspending sentence, and for the leniency previously extended.

[47] As is the case in determining whether to fix a non-parole period or make an order suspending sentence, any consideration of the appropriate response to the breach of an order suspending sentence is not concerned exclusively with the opportunity for rehabilitation. While the prisoner's rehabilitation through conditional freedom is a necessary consideration, the determination of an application for breach of an order suspending sentence also has a penal element which must appropriately reflect the purposes of retribution, protection of the community and deterrence with specific reference to the nature of the offender's breach. The penal and rehabilitative considerations do not necessarily and always work in competition. There will be circumstances where an order for full restoration will both be proportionately punitive and provide a structure which moderates chaotic behaviours and assists in rehabilitation. This is such a case.

Disposition

[48] Although the sentence imposed was vitiated by error, we do not consider that a less severe sentence is warranted and should have been passed. The appeal is dismissed.

———————————————————