*Mamarika v Lee* [2013] NTSC 10

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| PARTIES: | MAMARIKA, Esmarelda |
| | v |
| | LEE, Jessica Beth |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | JA 70 of 2012 (21216479) |
| DELIVERED: | 1 March 2013 |
| HEARING DATE: | 17 January 2013 |
| JUDGMENT OF: | BARR J |
| APPEAL FROM: | COURT OF SUMMARY JURISDICTION |

**CATCHWORDS:**

**JUSTICES APPEAL – CRIMINAL LAW – APPEAL AGAINST SENTENCE**
Whether magistrate failed to apply the principle that imprisonment is a last resort – whether magistrate gave adequate weight to the personal circumstances of the offender – unlawful possession and supply of 73.24 grams of cannabis – intended supply to relatives in an indigenous community – no commercial motive for offending – 24 year old first offender – co-operation with authorities – pleas of guilty – sentence of four months imprisonment suspended after 28 days

Prevalence of like offending in the community – whether general deterrence required custodial sentence – weight to be given to general deterrence –

consideration of  penalties provided in *Misuse of Drugs Act* and relevant sentencing options

Appeal allowed – inadequate weight given to appellant's personal circumstances – failure to consider imprisonment as a last resort – magistrate erred in imposing custodial sentence – re-sentencing – new sentence imposed to take account of events subsequent to the original sentence

*Sentencing Act* (NT), s 7, 13, 17(1), 33A, 35, 39, 40(6), 44
*Misuse of Drugs Act* (NT), s 3, Schedule 2, 5(2)(a)(iv), 9(2) (e), 9(2)(f), 22(1), 37(6)(a)
*Justices Act*, s 177 (2) (c)

*Dinsdale v The Queen* (2000) 202 CLR 321, followed

*Meneri v Smith* [2001] NTSC 106; *Joran & others v Wilson & Another* [2006] 17 NTLR 65, followed

*R v Olbrich* (1999) 199 CLR 270; *Daniels v The Queen* [2007] NTCCA 9; *Williams v Balchin* [2012] NTSC 15; *Musgrave v Liyawanga* [2004] NTSC 53; *Grant v Cornford* [2010] NTSC 59, considered

**REPRESENTATION:**

*Counsel:*

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| Appellant: | J Hunyor |
| Respondent: | N Browne |

*Solicitors:*

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

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

*Mamarika v Lee* [2013] NTSC 10
No. JA 70 of 2012 (21216479)

BETWEEN:

**ESMARELDA MAMARIKA**
Appellant

AND:

**JESSICA BETH LEE**
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 1 March 2013)

**Appeal against severity of sentence**

[1] On 12 September 2012 the appellant pleaded guilty in the Court of Summary Jurisdiction sitting at Alyangula to a charge of unlawfully possessing cannabis plant material and to unlawfully supplying cannabis plant material to another person. The two charges related to the same cannabis, the quantity of which was 73.24 grams. Under the *Misuse of Drugs Act*,[1] the threshold for a "traffickable quantity" of cannabis plant material is 50 grams. The threshold for a "commercial quantity" of cannabis plant material is 500 grams.

[1] *Misuse of Drugs Act* (NT), s 3 and Schedule 2.

[2] The agreed facts for the purpose of sentencing were as follows:

> The defendant in this matter resides in the Umbakumba Community. Some time prior to Friday 27 April 2012, the defendant was in Darwin visiting family. Whilst in Darwin the defendant received a request from her cousin, who also resides in Umbakumba Community, to purchase a quantity of cannabis and bring it back to the Community.
>
> The defendant withdrew $800, being money deposited by her cousin, from her bank account. The defendant gave the money to an unknown person and asked them to source cannabis for her. The defendant received a total of 72 clip seal bags of cannabis from the unknown person. The defendant purchased a food saver machine and then sealed the 72 clip seal bags of cannabis into four separate packages.
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> The defendant also agreed to transport 20 clip seal bags, and one larger clip seal bag of cannabis to Umbakumba Community for a family member. The defendant took the cannabis and sealed it into two packages using the food saver machine. The defendant threw the food saver machine in a bin after she had completed packaging the cannabis.
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> On Friday 27 April 2012, the defendant drove with her mother and father in Northern Territory registered CA02FM, with three other vehicles in convoy, from Darwin towards Numbulwar. At the time the defendant had placed four packages of cannabis into her pockets and bra. The remaining two she placed in a shopping bag inside the vehicle. About 9.20 pm that evening the vehicle the defendant was travelling in and the other three vehicles were stopped at a vehicle check point being conducted by police on the Stuart Highway, just south of the Adelaide River Bridge.
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> The vehicle and the defendant were screened by a drug detector dog, which subsequently had a positive reaction to the defendant and the vehicle she was travelling in. The defendant was spoken to by police and subsequently produced four packages of cannabis from the clothing she was wearing. Police also located two packages in a white shopping bag in the vehicle the defendant was travelling in.

> Police located a total of 29 clip seal bags and one larger clip seal bag of cannabis. The approximate net weight of the cannabis was 74.78 grams. The defendant participated in a video recorded interview where she made full admissions to purchasing, packaging and transporting the cannabis to Umbakumba for the purposes of giving it to family members.
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> When asked about the two packages of cannabis located in the shopping bag, she replied, "my cousin gave it to me to take back to Numbulwar", for her mother. The defendant was informed she would receive a summons and was released to continue travelling. At the time of the offence cannabis plant material was listed as a Schedule 2 Dangerous Drug in the *Misuse of Drugs Act*, and 74.78 grams is listed as a trafficable amount.
>
> The clip seal bags contained approximately 0.6 grams of cannabis. If sold in the community for $100, 78.78(*sic*) grams of cannabis plant material has a potential net worth of approximately $13,130.

[3] I raised with defence counsel at the hearing of the appeal the possibility that the unlawful supply charge was not made out on the agreed facts. The appellant was charged that she had unlawfully supplied cannabis plant material "to another person, namely, unknown person". The charge, by implication, alleges a completed supply. It did not appear that the appellant had actually supplied cannabis to any person. Defence counsel indicated that the plea of guilty to the unlawful supply charge had been entered on the basis of the extended definition of "supply" in s 3(1) *Misuse of Drugs Act* (in which "supply" is defined to include transporting and doing other acts preparatory to, or for the purpose of, supplying a dangerous drug). Notwithstanding that there was no actual supply to another person, the appellant did not wish to argue on appeal that the offence was not made out on the admitted facts.

[4] It is therefore not necessary to make any finding in relation to the issue referred to in the previous paragraph. I should say that the approach taken by defence counsel made sense to the extent that, relevant to this appeal against severity of sentence, the learned magistrate imposed an aggregate sentence for the two offences and, in effect, treated the offending the subject of the two charges as composite offending.

[5] Each of the offences to which the appellant pleaded guilty carried a maximum penalty of 85 penalty units or five years imprisonment.[2] If dealt with summarily, the maximum penalty for each of was 85 penalty units or two years imprisonment.[3] As mentioned in par [1] above, the threshold for a deemed "traffickable quantity" of cannabis plant material is 50 grams. Exceeding that threshold, in the case of a possession charge, triggers a higher maximum penalty[4] and a statutory presumption, for sentencing purposes, that the offender intended to supply the drug.[5]

[6] The statutory presumption as to intention to supply does not extend to presumed circumstances of supply. In the present case, the statutory presumption had no or little relevance because the appellant admitted, as part of the agreed facts, that she intended to supply most of the cannabis to her cousin (in response to her cousin's request), and the two other packages (those placed in the shopping bag) to her mother.

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2 s 9(2)(e) and s 5(2)(a)(iv) *Misuse of Drugs Act*.
3 s 22(1) *Misuse of Drugs Act*.
4 ie, higher than the penalty for possession of a quantity less than a traffickable quantity: compare s 9(2)(e) with s 9(2)(f) *Misuse of Drugs Act*.
5 s 37(6)(a) *Misuse of Drugs Act*.

[7] The appellant pleaded guilty to offences that carried a penalty of imprisonment or fines. There was no minimum sentence mandated by the *Misuse of Drugs Act* for either of the two offences. The general principle that imprisonment is a last resort, both for juveniles and adult offenders, applied in relation to the appellant's offending.

[8] The learned magistrate took as her starting point a sentence of imprisonment of five months, but allowed a discount of one month for the appellant's plea of guilty. The appellant was convicted, sentenced to a term of imprisonment of four months, partially suspended after the appellant had served 28 days imprisonment. Her Honour set an operational period of 12 months for the suspended sentence.[6]

[9] The appellant served nine days of her sentence before being granted bail pending the hearing of her appeal.

**Grounds of appeal**

[10] The grounds of appeal are as follows:

1. The learned magistrate erred in failing to properly apply the principle that a sentence of imprisonment is a last resort.

2. The learned magistrate failed to give adequate weight to the personal circumstances of the appellant and the appellant's plea of guilty and cooperation with authorities.

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[6] See s 40(6) *Sentencing Act*.

3. The sentence in all the circumstances was manifestly excessive.

**Ground 1: failure to consider imprisonment as a last resort**

**Ground 2: failure to give adequate weight to the personal circumstances and plea of guilty**

[11] I propose to deal with grounds 1 and 2 together.

[12] The appellant was 24 years old and was before the court as a first offender. She was single and lived with her mother. She had been working as a youth worker for the Youth Sport and Recreation Program at East Arnhem Shire Council for a period of 18 months. She worked part-time, five days per week, from 12 noon to 7.00pm. There was written evidence before the court that she had a very good rapport with young people in the community and that she brought maturity and commonsense to her work.

[13] The explanation for offending provided to the magistrate by defence counsel was that she had travelled to Darwin to see her uncle who was unwell and in hospital. While she was in Darwin, she received a phone call from a cousin who requested that she purchase cannabis for her. The appellant initially refused but was pressured by her cousin to obtain the marijuana. The money referred to in the agreed facts was paid into her account with the expectation she would withdraw the money and purchase marijuana to bring back to her community. The appellant felt pressured to comply with her cousin's request, even though she did not want to. Against her better judgment she gave in to the pressure and purchased the marijuana. The appellant's counsel told the magistrate that the appellant was very remorseful and

ashamed. The appellant's counsel also told the magistrate that the appellant accepted that she had not set a very good example as a youth worker.

[14] A written reference from the appellant's employer confirmed that the appellant had sought help from other family members to support her in future in the event that her cousin pressured her.

[15] The prosecutor did not dispute any of the facts put by way of explanation for the appellant's offending, nor did the magistrate indicate that she did not accept those facts.

[16] Defence counsel made a submission emphasising the appellant's youth, full co-operation with police, absence of prior offending, remorse and sense of shame. He appeared to accept that a sentence of imprisonment was inevitable but asked the magistrate to consider wholly suspending that term of imprisonment. Surprisingly, he did not ask the magistrate to consider any other sentencing dispositions within the range contained in s 7 *Sentencing Act*. Both offences to which the appellant pleaded guilty carried a penalty of imprisonment, or fines. The appellant was in employment, and had no dependants. Defence counsel did not provide information as to the appellant's income which the magistrate could have considered for the purpose of imposing a fine. Defence counsel did not ask for a report under s 35 *Sentencing Act* in relation to a possible community work order. He did not seek a report for the purposes of a home detention order under s 44

*Sentencing Act*. Indeed, defence counsel did not give the magistrate very much assistance in relation to the available sentencing alternatives.

[17] The prosecutor made submissions, including as to the appellant's level of co-operation with the police, the first part of which is difficult to understand, given the admitted facts:

> I don't believe that the full cooperation of the defendant was achieved. She could have given, handed over the drugs straight away on being pulled over by the police. Instead the police have to find the drugs and then she's handed them over....
>
> And your Honour, the offence date was April this year. Two drug squad officers, instead of being out there preventing cannabis reaching other communities, have had to be taken off the road to complete this file because the brief was requested by the defence, who were reviewing the electronic record of interview and suggested the lawfulness of the roadblock might be in question. ...
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> It does appear from the facts and from the submissions by defence that she was given money to purchase this on behalf of other people. It does show a level of sophistication as she's gone, she's purchased a food saver and she's packaged it all up, in more of a sophisticated attempt to hollow (?) the cannabis.
>
> Your Honour, just the regular, usual repeat things about mental illness that are causes in the community, the money leaving the community because of the cannabis. You have heard it before, your Honour, and again on behalf of the community I will be asking for a term of imprisonment, whether it is short and sharp followed by a suspended sentence. But this is, I know the last file was 53 grams, this is another quarter on top of that again.

[18] The prosecutor thus sought a sentence of imprisonment, partly suspended, based (in part at least) upon a comparison between the appellant's case and a

previous case where the quantity of cannabis involved was 53 grams, compared to the 73.24 grams of cannabis in the possession of the appellant.

[19] The learned magistrate's sentencing remarks indicate that she was very concerned as to the level of use of cannabis on Groote Eylandt. She referred to the fact that in the court list that day there were 13 people charged with drug offences, and that that was the case "month after month". Her Honour was concerned, and rightly so, as to the prevalence of such offences in the community. The magistrate's comments as to prevalence were based on her own experience as a magistrate regularly visiting Groote Eylandt.[7] There is no issue on appeal that her Honour's remarks were not accurate. After referring to the often serious personal and community problems caused by the use of cannabis, her Honour went on to say, "The courts have to start setting very serious sentences for offending".

[20] Her Honour then referred to the fact that the appellant was a young woman with a good job, who worked with young people. She was a person who should have been well aware of the problems caused by cannabis. Her Honour remarked:

> I think you are in a different category of (to) older ladies who have pressure put on them to carry cannabis, and they do that in an unsophisticated way.

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[7] In this context, the observations of Riley J in *Meneri v Smith* [2001] NTSC 106 at [5] are apposite. The issue was whether it was appropriate for judicial officers to rely upon personal court experience in order to determine the prevalence of particular crimes. Riley J determined that, in the case of a magistrate who regularly visited the Hermannsburg community in central Australia and who had developed a personal familiarity with the community over a period of time, there was no basis to criticise the magistrate for relying upon personal court experience in determining prevalence of offences under the *Liquor Act*.

> This situation is quite different. You were willing to accept a transfer to your bank account. You would have needed to provide your cousin with your bank account details to let him do that. … You then went out and you bought a machine to vacuum seal the bag. It says to me that you know something about the way in which cannabis can be secreted, to stop it being detected.
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> So I don't think overall there is a great deal of innocence about this. (inaudible) not being in trouble before, but you didn't show immediate remorse. This is not a plea of guilty at the earliest opportunity. I would have given you five months imprisonment, I am reducing it to four months imprisonment for the plea of guilty. Because you have not been in trouble before I am going to suspend the sentence after you have served 28 days.

[21] The learned magistrate made a number of assumptions which were unfavourable to the appellant. First, she assumed that because the appellant was a young woman with a good job she was, or should have been (unlike the "older ladies") better able to resist the pressure applied to her by a family member to bring cannabis to the Umbakumba Community. That assumption was a conclusion based on the evidence, and on her Honour's experience, and does not indicate error. To the extent that the magistrate was drawing a comparison between the appellant's level of sophistication and her method of transporting, and that of the "older ladies", it was legitimate for her Honour to note the relative sophistication involved in the attempt by the appellant to seal the cannabis so as to make it less detectable by the authorities.

[22] Another unfavourable assumption was that the appellant had provided her cousin with her bank account details for the purpose of enabling money to be paid to that account for the purpose of buying drugs. It was not an

agreed fact that the appellant had provided her bank account details to her cousin, let alone that she had provided the details for the purpose of purchasing drugs. There are a number of possible circumstances in which the appellant's cousin may have obtained her bank account details which do not necessarily involve the provision of those details by the appellant herself, nor necessarily require that the provision of the details was for the purpose of a drug transaction. The magistrate was not entitled to take into account facts adverse to the appellant unless those facts were proven beyond reasonable doubt.[8]

[23] There is no doubt that the appellant's offending was serious, and it may be noted that if the appellant had been convicted of supplying cannabis plant material to a person in an indigenous community, the supply charge would have carried a maximum penalty of imprisonment of nine years. Although the appellant was not so charged, the statement of Blokland J in *Williams v Balchin*[9] is very relevant in the facts of this case:

> Any activity relating to the supply of drugs in Aboriginal communities attracts an emphasized application of the principle of general deterrence given the serious harm done in communities, "both in terms of human misery and economic harm to individual families".

[24] It is unclear why the learned magistrate said in her sentencing remarks that the appellant did not show "immediate remorse", but it would appear that her Honour was referring to the delay in entering pleas of guilty, referred to

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8 *R v Olbrich* (1999) 199 CLR 270 at [27].
9 *Williams v Balchin* [2012] NTSC 15 at [17].

by the prosecutor. That delay arose because the appellant's lawyers wished to investigate the lawfulness of the road block at which her family vehicle was stopped (I presume with a view to excluding evidence obtained as a result of the vehicle search). The fact that the appellant did not plead guilty at an early opportunity was relevant in considering the discount to be allowed for the pleas, since considerations of utilitarian value and remorse are both relevant in that exercise, but the delay in pleading guilty did not of itself indicate the absence of "immediate remorse".

[25] The appellant's co-operation with police was such that, at the time her family vehicle was apprehended, she participated in a video recorded interview where she made full admissions to purchasing, packaging and transporting (or intention to transport) the cannabis to Umbakumba for the purposes of giving it to family members. There was evidence before the court that the appellant had informed her employer of her offending and taken responsibility for it. It was submitted on her behalf, and not contradicted, that she was remorseful and ashamed.

[26] The appellant submits that the learned Magistrate erred in failing to consider alternative dispositions before proceeding to impose a term of imprisonment.

[27] The appellant relies on the decision of Angel J in *Joran & others v Wilson & Another*, some relevant extracts from which I set out below:[10]

> [28] None of the appellants fell within the sentencing provisions of s 37(2) and (3) *Misuse of Drugs Act* (NT) which requires a sentencing court to impose a minimum period of 28 days actual incarceration, unless having regard to the particular circumstances of the offence or the offender, it is of the opinion that such a penalty should not be imposed. Thus the full range of sentencing dispositions as prescribed by s 7 *Sentencing Act* (NT) was available to the Chief Magistrate.
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> [34] There is no sentencing principle that first offenders who supply cannabis to or within Aboriginal communities must expect immediate imprisonment regardless of the circumstances. A sentence of imprisonment is only imposed when all other sentencing options have been eliminated, and when imposed, consideration has been given as to whether it should be suspended or not. Compare *Wood v Samuels* (1974) 8 SASR 465 at 468.
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> [51] There is, as I have said, no principle that all persons found guilty of unlawful supplying cannabis of whatever amount to or within Aboriginal communities must be incarcerated. Such is contrary to the whole tenor of s 37 of the *Misuse of Drugs Act* (NT) and the provisions of s 7 of the *Sentencing Act* (NT). The legislation itself has said via s 37 of the *Misuse of Drugs Act* (NT) what conduct prima facie attracts a minimum penalty of 28 days actual incarceration, in the absence of particular circumstances which justify why there should be no actual incarceration.
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> [53] A sentencing court contemplating incarceration of an offender who has contravened s 5(1) of the *Misuse of Drugs Act* (NT) for unlawfully supplying cannabis in an amount of less than a commercial or trafficable quantity, needs to ask itself whether it is satisfied that no disposition other than that requiring the offender to serve a term of actual imprisonment, will in all the circumstances of the case sufficiently reflect any need for personal deterrence and the need for general deterrence. As I have said and re-emphasise, general deterrence can be achieved by dispositions other than actual incarceration.

[10] *Joran & Ors v Wilson & Anor* [2006] NTSC 46; 17 NTLR 65.

> [55] The unlawful supply of cannabis to and within Aboriginal communities is to be condemned and deterred, strongly condemned and deterred. But this does not necessitate the incarceration of offenders, let alone first offenders. Of course, each case is to be regarded individually in its own circumstances, as was emphasised by Martin (B.R.) CJ in *Musgrave v Liyawanga* (2004) NTSC 53.

[28] I accept the relevance to this appeal of the above cited passages, notwithstanding that the quantity of cannabis plant material here involved was a "traffickable quantity". It may be noted that a traffickable quantity may be as much as 499.99 grams, such that the quantity possessed by the appellant was at the low end of the range, in fact, less than 15% of the upper threshold quantity. Moreover, on the admitted facts, there was no profit motive for the appellant's offending.

[29] *Joran & others v Wilson & Another* was decided before the decision of the Court of Criminal Appeal in *Daniels v The Queen*,[11] an authority relied on by the counsel for the respondent. The appellant, Daniels, was sentenced for possession of a commercial quantity of cannabis (597.6 grams) and for possession of property ($11,700) obtained from the sale and supply of cannabis to vulnerable members of the Ngukurr Community. While on bail, he re-offended and was arrested on his way back to Ngukurr Community in possession of a further commercial quantity of cannabis (1.232 kg). That was the context in which the Court made the following important statement:

> The criminal courts of the Northern Territory are all too familiar with the devastating effects of cannabis within Aboriginal communities across the Territory. It is not correct to view such offending as

[11] *Daniels v The Queen* [2007] NTCCA 9.

> victimless. There are countless victims. They are the users of cannabis within the Aboriginal communities and others in those communities who are adversely affected by the devastating impacts upon the users. In particular, the children of heavy users suffer dreadfully.
>
> Over many years, sentencing Judges and this Court have repeatedly emphasised the gravity of the criminal conduct involved in the distribution of cannabis within Aboriginal communities. Offenders have been on notice that significant terms of imprisonment will be imposed for such offending. …[12]

[30] The statement by the Court of Criminal Appeal in *Daniels* applies generally to sentencing for all offending relating to the supply of drugs in Aboriginal communities (even where actual supply to a person in an indigenous community has not taken place). However, in each case there must be a careful consideration of fact and degree. The need for denunciation and general deterrence does not automatically overwhelm other sentencing objectives and principles, and clearly must yield as and when the circumstances of the case require.

[31] In the present case, the sentencing objective of general deterrence, and even well-founded concerns as to prevalence of offending involving cannabis, should not have led to the imposition of a punishment which was not just in all the circumstances. I refer to the circumstances both of the offending and of the offender. Nor should the need for general deterrence have caused the court to exclude all available sentencing options from its consideration, particularly in the case of a first offender.

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[12] *Daniels v The Queen* [2007] NTCCA 9 at [25] – [26].

[32] I appreciate that an experienced magistrate in a busy court cannot be expected to refer to all of the sentencing options considered and excluded along the way to the ultimate sentence imposed. I also appreciate that in this case Defence counsel did not press for a disposition other than for a fully suspended sentence. I refer to my comments in par [16] above. However, the legislation creating the offences to which the appellant pleaded guilty expressly provides the power to fine up to a maximum of 85 penalty units as an alternative to imprisonment. The *Sentencing Act* provides a range of non-custodial sentencing dispositions in a range starting from non-conviction dismissals leading up to imprisonment, some of which (in my view) were appropriate sentencing options for the appellant. It was not argued on appeal that the appellant should not have been convicted.[13] Therefore, in the case of this appellant, reasonable and appropriate sentencing dispositions were (1) conviction and imposition of a fine; and (2) conviction and a community work order.

[33] The magistrate could have imposed a relatively substantial fine, in an amount which nonetheless took account of the appellant's financial

[13] Such an argument would have to contend with statements of this Court to the effect that, when a female indigenous offender has engaged in the serious criminal conduct of bringing cannabis into a community or of supplying cannabis to other members of a community, the mere fact that the female offender has not previously offended will not in itself justify the exercise of discretion not to convict; see *Musgrave v Liyawanga* [2004] NTSC 53 at [65], extracted in *Joran v Wilson* (2006) 17 NTLR 65 at [44].

circumstances.[14] As mentioned, the appellant was in regular employment and a fine of an appropriate amount would have been a genuine punishment, as well as serving the sentencing objectives of specific and general deterrence.

[34] The magistrate could also have made a community work order, subject to the requirements set out in s 35(1)(a) and (b) *Sentencing Act* being satisfied. The stated purpose of a community work order is to reflect the public interest in ensuring that a person who commits an offence makes amends to the community for the offence by performing work that is of benefit to the community.[15] The appellant could have been required to perform up to 480 hours of work in an approved project. Allowing for eight-hour workdays, that is 60 days of community work. The sanctions for breach are significant. The court has the option of ordering imprisonment on the basis of one day for each eight hours of community work not carried out; alternatively, the court may re-sentence in any manner in which it could have dealt with the offender if it had just found the offender guilty of the offence.[16]

[35] Another possible disposition was an order for release on a good behaviour bond pursuant to s 13 *Sentencing Act*. The period of good behaviour may be

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[14] *Sentencing Act*, s 17(1). It is well settled that where possible the court should obtain information about the financial circumstances of offender before imposing a fine. It was pointed out by Martin CJ in *Grant v Cornford* [2010] NTSC 59 at [24] that the principle which underlies the statutory requirement in s 17(1) is that fines imposed upon impecunious offenders run the risk of amounting to an unduly harsh penalty and, in some situations, might amount to a de facto term of imprisonment if imprisonment is a consequence of a failure to pay.

[15] See s 33A *Sentencing Act*.

[16] See s 39(4), (6) and (3A) *Sentencing Act*. Under s 39(3A), the court must take into account the extent to which the offender had complied with the order before breaching it.

up to five years, and the security may be fixed in such amount as the court considers fit.

[36] My reading of the transcript of proceedings confirms that there was no mention by the magistrate of any lesser sentencing disposition than that which she imposed. Having considered all of the evidence before the court, the submissions of defence counsel and of the prosecutor, and the magistrate's sentencing remarks, I have come to the conclusion that her Honour erred in the exercise of her discretion by failing to consider imprisonment as a last resort.

[37] In my view, having regard to the following matters: (1) the appellant's relative youth and absence of prior offending; (2) the relatively low amount of the traffickable quantity of cannabis plant material involved; (3) the absence of a commercial motive for offending; (4) the appellant's co-operation with police, at least to the extent referred to in par [25] above; (5) the appellant's pleas of guilty; (6) the community interest in facilitating the appellant's rehabilitation to the greatest permissible extent, but still having regard to the important purposes of sentencing other than rehabilitation, a sentence other than a sentence of imprisonment (albeit suspended after 28 days) should have been imposed. In my judgment, the magistrate erred in the exercise of her discretion by imposing a custodial sentence.

[38] Even though the sentence of imprisonment imposed by the learned magistrate was partially suspended, s 40(3) *Sentencing Act* provides that the court must not impose a suspended sentence of imprisonment unless the sentence of imprisonment, if unsuspended, would be appropriate in the circumstances having regard to the Act. That subsection reflects two principles of sentencing: (1) that imprisonment is a punishment of last resort and (2) the related consideration that committing a further offence during the period of suspension should not produce an unintended consequence.[17]

[39] I allow the appeal on the first and second grounds. It is not necessary to decide the third ground of appeal. The convictions will stand. However, pursuant to s 177(2)(c) *Justices Act* I quash the sentence of imprisonment imposed by her Honour. In re-sentencing the appellant, I take into account the fact that she has now spent nine days in custody in relation to her offending, and I therefore make the following order:

> Pursuant to s 13 *Sentencing Act*, I order that the appellant be released on her giving security without sureties on her own recognisance in the sum of $1,500 that she will appear before the court if called upon to do so during the period of two years commencing this day, and that she will be of good behaviour for the said period of two years.

[40] The sentence imposed by me is not a sentence which I consider the magistrate should have imposed. In my view, the most appropriate sentence would have been a relatively substantial fine, in an amount which nonetheless took account of the appellant's financial circumstances, as

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[17] *Dinsdale v The Queen* (200) 202 CLR 321 at 328 [14] per Gleeson J and Hayne J, referring to Western Australian legislation substantially the same as s 40(3) *Sentencing Act* (NT).

explained in par [33] above. The re-sentencing takes into account events subsequent to the appellant's sentencing, namely that she served nine days in prison before being granted appeal bail.

[41] I will hear from counsel as to any consequential orders required to give effect to these reasons.

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