Mamarika v Ganley [2013] NTSC 6

PARTIES:	MAMARIKA, Nalita
	v
	GANLEY, Carney
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 71 of 2012 (21225080)
DELIVERED:	12 February 2013
HEARING DATE:	17 January 2013
JUDGMENT OF:	BARR J
APPEAL FROM:	Oliver SM

CATCHWORDS:

JUSTICES APPEAL – CRIMINAL LAW – APPEAL AGAINST SENTENCE – COMMUNITY CUSTODY ORDERS

Whether magistrate failed to apply the principle of imprisonment as a last resort – whether magistrate gave adequate weight to the personal circumstances of the appellant – 27 year old female first offender – unlawful possession of 25g cannabis in a public place – plea of guilty and co-operation with authorities – no known drug or alcohol problem – whether a custodial sentence of two months to be served by way of community custody order was manifestly excessive.

Community custody orders – consideration of statutory conditions attaching – obligation to participate in programs, counselling and treatment for drug/alcohol abuse – principle that conditions of suspended sentences should not be unduly harsh or unreasonable or needlessly onerous applied to community custody orders to which extensive conditions attach by operation of statute.

Appeal allowed – failure to consider imprisonment as a last resort – inadequate weight given to the appellant's personal circumstances – magistrate erred in imposing a custodial sentence and in ordering it to be served by way of a community custody order – sentence quashed – new sentence imposed to take account of events subsequent to original sentence.

Sentencing Act (NT), s 48A, s 48E
Misuse of Drugs Act (NT), s 9(2)(f)(i)
Justices Act, s 177

R v S W Bugmy [2004] NSWCCA 258, applied

Dinsdale v R (2000) 202 CLR 321; *Dunn v Woodcock* [2003] NTSC 24, followed

R v De Simoni (1981) 147 CLR 383, considered

REPRESENTATION:

Counsel:

Appellant:	J Hunyor
Respondent:	N Browne

Solicitors:

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

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

Mamarika v Ganley [2013] NTSC 6
No. JA 71 of 2012 (21225080)

BETWEEN:

NALITA MAMARIKA
Appellant

AND:

CARNEY GANLEY
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 12 February 2013)

Appeal against severity of sentence

[1] On 13 September 2012 the appellant pleaded guilty in the Court of Summary Jurisdiction sitting at Alyangula to a charge of unlawfully possessing cannabis plant material in a public place. The quantity of cannabis was approximately 25 grams.

[2] The agreed facts for the purposes of sentencing was as follows:

> The defendant is a 27 year old female who resides in Umbakumba Community.
>
> On the evening of 19 January 2012, the defendant was in Darwin with relatives [names read in court].

> While in Darwin the defendant sourced and took possession of approximately 25 grams of cannabis. The defendant later divided the cannabis into 50 individual clipseal bags each weighing approximately half a gram.
>
> At about 9.00 pm on 19 January 2012, the defendant left Darwin with her relatives to travel home. The defendant and other family members were being conveyed in a Toyota Landcruiser …
>
> At about 12.40 am on 20 January 2012, the vehicle was stopped near the intersection of Zimin Drive on the Stuart Highway, a short distance north of Katherine.
>
> The driver and occupants including the defendant were spoken to and informed that there were reasonable grounds to suspect that the vehicle was conveying drugs and was going to be searched under the provisions of s 120C of the *Police Administration Act*.
>
> The defendant and occupants were removed from the vehicle and a drug detection dog deployed. The dog provided a number of responses to the vehicle as well as to the defendant. A physical search of the defendant located a large food saver bag in her clothing, which contained the 50 small clip seal bags of cannabis.
>
> At the completion of the search the defendant was released to continue her journey, to be summonsed at a later time.
>
> At the time of the offence cannabis was a Schedule II substance listed in the *Misuse of Drugs Act*. The Stuart Highway, where the defendant was stopped, was a public place open to and used by the public.

[3] The threshold for a deemed "traffickable quantity" of cannabis plant material is 50 grams. The threshold for a deemed "commercial quantity" of cannabis plant material is 500 grams. The amount of cannabis in the possession of the appellant was thus neither a commercial quantity nor a traffickable quantity.

[4] The offence to which the appellant pleaded guilty carried a maximum penalty of 40 penalty units or two years' imprisonment.[1]

[5] The learned magistrate convicted the appellant and sentenced her to two months imprisonment, to be served by way of a community custody order.

[6] There is no issue on appeal as to whether possession of cannabis within the confines of a motor vehicle was possession of cannabis "in a public place" within s 9(2)(c)(i) *Misuse of Drugs Act*.

Grounds of appeal

[7] 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.

3. The learned magistrate failed to consider the effect of s. 37 of the *Misuse of Drugs Act*.

4. 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, plea of guilty and co-operation with authorities

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

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[1] S 9(2)(f)(i) *Misuse of Drugs Act*.

[9] In the course of his submissions on behalf of the appellant, defence counsel informed the magistrate that the appellant did not herself smoke cannabis (or drink alcohol) and that she was carrying the cannabis found in her possession for another person in her community. I interpose that the 'drug mule' explanation does not sit comfortably with the admitted fact that the appellant divided the cannabis into 50 individual clipseal bags. One has to question why a mere courier would undertake that task. It was further submitted that the appellant had answered the questions of police officers and had co-operated with them. It was further submitted that, because the appellant was a first offender, the court could deal with the matter by way of a fine, which would be a significant imposition but would nonetheless involve her having to take responsibility for her offending.

[10] Her Honour responded to those submissions as follows:

> Mr Bowen, I'm not sure if you have been in court [when I have been] dealing with other people on drug charges this week, and certainly not on other occasions, but I have indicated very clearly that the prevalence of cannabis problems on Groote Eylandt and the number of people who bring cannabis in from Darwin, from Cairns as well, is at such a great level that, even first time offenders can expect a custodial sentence.

[11] At that stage, defence counsel suggested to her Honour that a community work order might be an appropriate sentencing disposition. Possibly then fearing the worst, defence counsel then suggested that a wholly suspended sentence might be appropriate.

[12] Her Honour's response was to ask for an assessment for a community custody order. A court must receive a pre-sentence report before ordering that a sentence of imprisonment be served by way of a community custody order.[2] Given that a community custody order is only available where a court decides to impose a sentence of imprisonment (of not more than 12 months) on an offender, it would appear that the magistrate had by this stage determined that a sentence of imprisonment was an appropriate disposition.

[13] The author of the pre-sentence report assessed the appellant as suitable for a community custody order.

[14] Of possible relevance to this appeal is the fact that the appellant admitted to the author of the pre-sentence report that she had made the decision to herself purchase the cannabis and transport it to Numbulwar. The appellant admitted that she intended to sell the cannabis, and said that she intended to forward the proceeds to her mother in Darwin to enable her to buy food. This Court is not in a position to determine on appeal whether the appellant's admission and explanation was entirely true, but it appears to be more consistent with the admitted fact that the appellant divided the cannabis into 50 individual clipseal bags than was the 'drug mule' explanation referred to in par [9].

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[2] S 48B(1) *Sentencing Act*.

[15] The transcript indicates that both the police prosecutor and defence counsel were provided with a copy of the pre-sentence report, and both made some further submissions in relation to the proposed community custody order when the appellant's case came back before the magistrate. Neither made submissions in relation to the appellant's admission referred to in par [14].

[16] In sentencing the appellant, the magistrate referred to the appellant's admission as to intended sale by her of the cannabis:

> You obtained some cannabis, it was put into small deal bags, and you were picked up on the way back through to Numbulwar. You have admitted to the Corrections Officer that you did intend to sell the cannabis when you arrived in this part of the country, and it was for the purpose of sending money back to your mother. … The fact that it was to be supplied by you [is not something] that I can take into account in sentencing because it relates to a more serious offence. The offence that I'm dealing with is one that carries a maximum penalty of 2 years' imprisonment, so it is a lesser offence than ones that I have dealt with for other people who I've been sentencing in relation to cannabis (inaudible) …".

[17] Her Honour's remarks suggest that she was exercising care not to infringe the principle in *R v De Simoni*[3] by taking into account a circumstance of aggravation which had not been charged. It was held in *De Simoni* that a sentencing judge could not take into account an uncharged circumstance of aggravation and thereby impose a penalty more severe than the judge would otherwise have imposed. The learned magistrate was aware that supply of a dangerous drug "to a person in an indigenous community" carried a

[3] *R v De Simoni* (1981) 147 CLR 383 at 389.5 per Gibbs CJ.

maximum penalty of nine years' imprisonment.[4] Her Honour's caution was appropriate for the reason also that the appellant's admission to the author of the pre-sentence report was not part of the agreed facts in evidence, and had not been formally proved.[5]

[18] Her Honour then made comments about the nature of problems caused by cannabis on Groote Eylandt:

> … Cannabis has become a really serious problem for people in this community. (It is) widely used, people spending a lot of money on cannabis that they could be using for other things, … to look after their elderly relatives, for example; to look after their children better. And it is a drug that causes such a lot of problems for people in terms of their mental health and the way in which they behave. And the court has got to take a very stern view about this.

[19] Her Honour's comments were well-founded and reflected the sentencing purposes of denunciation and general deterrence. She continued:

> You are not a lady who has been in any trouble before and that is in your favour. What I am going to do is give you what is called a community custody order. So it is setting a period of imprisonment, but it is saying that you can serve that in the community, provided you stay out of trouble. So no more offending, and you stick to the rules of the order. And those rules include doing community work.

[20] Her Honour then convicted the appellant and imposed a two-month sentence of imprisonment, to be served by a community custody order.

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[4] S 5(2)((a)(iv) *Misuse of Drugs Act*.
[5] see also s 379 *Criminal Code* which provides for admissions at trial.

[21] In my opinion, her Honour erred in the exercise of her sentencing discretion by (1) imposing a sentence of imprisonment and (2) ordering that the sentence be served by way of a community custody order.

[22] A sentence of imprisonment for a first offender in the circumstances of this case failed to take account of the relatively small amount of cannabis involved, the appellant's prior good character, her plea of guilty and her co-operation with the police. I consider that, taken in the context of the remarks extracted and set out in par [10] above, the magistrate's dismissal without reasons of the sentencing option of a community work order, and even that of a fully suspended sentence, evidence that her Honour failed to properly apply the principle that a sentence of imprisonment is a last resort.[6]

[23] A community custody order is available in relation to certain kinds of offences where the court decides to impose a sentence of 12 months or less. A community custody order is a sentence of imprisonment, albeit one which is served in the community.[7] It must be borne in mind that a community custody order establishes a very intensive regime. The statutory conditions of order[8] apply automatically, and include the obligation to report to and receive visits from a probation officer at least twice during each week the order is in force; to inform a probation officer of any change of address or employment within two clear working days of any change; not to leave the

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6 See, for example, *Dinsdale v R* (2000) 202 CLR 321 at 328, at [14] per Gleeson CJ and Hayne J.

7 The 'community custody order' under Part 3, Division 5, Subdivision 2A *Sentencing Act*, being a custodial sentencing option, is to be distinguished from the 'community based order' under Part 3, Division 4A, which is a non-custodial sentencing option.

8 S 48E(1) *Sentencing Act.*

Northern Territory except with permission of a probation officer; and to comply with the reasonable directions of a probation officer in the use of an approved voice recognition system for the effective monitoring of the offender's activities.

[24] The sentenced offender under a community custody order is on a 'tight leash'. In addition to the restrictions mentioned, the offender must perform 12 hours of community work each week, and the Director of Correctional Services may increase the obligatory number of hours to a maximum of 20 hours per week.[9]

[25] The offender must spend "any balance of the hours" each week undertaking a prescribed program, or undergoing counselling or treatment, as directed by the Director.[10] The counselling or treatment must relate to the offender's psychological or psychiatric problems or the offender's misuse of alcohol or drugs.[11] These statutory requirements are an indication that persons who are required to serve their sentence by way of a community custody order are people who are in need of such programs, counselling or treatment.

[26] In addition to the statutory conditions, including participation in programs, counselling or treatment as directed by the Director, the court may impose a condition that an offender undertake one or more specified prescribed programs. The court may also order that an offender not consume or

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9 S 48E(2)(a) and s 48E(3) *Sentencing Act*.
10 S 48E(2)(b) *Sentencing Act*.
11 S 48E(5) *Sentencing Act*.

purchase alcohol or a non-prescribed drug.[12] The court may also order that an offender reside at a specified place and may even impose a condition that an offender wear an approved monitoring device for the period the order is in force (or some lesser period). Although the learned magistrate did not impose any such additional conditions, the possible conditions which the court may impose indicate the nature and level of seriousness of the offending which might lead to a community custody order, and the type of offender for whom a community custody order might be an appropriate sentence.

[27] It may also be noted that administration of a community custody order requires intensive input on the part of any probation officer assigned to supervise the offender. I note that s 48E(1)(d) reads:

> "The offender must report to, and receive visits from, a probation officer at least twice during each week the order is in force …."

[28] I do not need to interpret that statutory condition for the purposes of this appeal, but a plain reading is that there must be four contacts per week: two reports by the offender and two visits by the probation officer. Whether the legislation requires two or four contacts per week, there is no doubt that the legislature intended a regime of intensive supervision and probation officer

[12] S 48F(1) *Sentencing Act*.

involvement.[13] The Director of Correctional Services must necessarily allocate considerable resources to the administration of all aspects of a community custody order.

[29] In relation to the conditions attaching to suspended sentences, it has been held that conditions must reasonably relate to the purpose of the sentence, either to the character of the offence or to matters such as deterrence or rehabilitation. Conditions should not be unduly harsh or unreasonable or needlessly onerous.[14]

[30] In my opinion, the reasoning in relation to the need to ensure that conditions imposed under suspended sentences are relevant and reasonable applies also to sentencing dispositions to which statutory conditions attach. If the statutory conditions are not relevant or are unduly harsh, unreasonable or needlessly onerous, then the sentencing disposition to which those conditions attach by operation of law is not an appropriate sentencing disposition.

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[13] Community custody orders were introduced into the *Sentencing Act* by the *Justice (Corrections) and Other Legislation Amendment Act 2011*, Act No 24 of 2011, s 29. With respect to the community custody order, the Minister's Second Reading Speech was in part as follows: "The introduction of a new sentencing option called the Community Custody Order, which is deemed imprisonment in the community for a term of up to 12 months and which mandates intensive supervision by Community Corrections, community working programs, treatment or training ….." and later in the Speech: "The community custody order has some similar features to the community based order, but the level of supervision is more intensive." (underlining emphasis added).

[14] See *R v S W Bugmy* [2004] NSWCCA 258 at [61]; see also *Dunn v Woodcock* [2003] NTSC 24 at [7].

[31] The appellant was not a repeat drink driving offender or drug dependent person who needed a significant amount of supervision and therapeutic input to help her to deal with alcohol or drug or behavioural problems. She was a first offender, without any history of cannabis usage or alcohol problems, who had an amount of cannabis in her possession which was only half the threshold for a traffickable quantity of cannabis. Even with the appellant's admitted repackaging of the cannabis into the 50 individual clipseal bags, an appropriate sentence could still have been a conviction and a relatively substantial fine, in an amount which nonetheless took account of the appellant's financial circumstances;[15] release on a good behaviour bond following conviction; or a community work order, with a conviction. If the magistrate considered that the appellant needed to make amends to the community, her Honour had the option of ordering the appellant to perform up to 480 hours of work under an approved project which would benefit the community.[16]

[32] In my opinion, the learned magistrate erred in imposing a custodial sentence, and in the manner she ordered the custodial sentence to be served.

Conclusion and orders

[33] I allow the appeal on Grounds 1 and 2. I would also allow the appeal on Ground 4. It is not necessary for me to decide Ground 3. Pursuant to s 177(2)(c) *Justices Act* I affirm the finding of guilty and the conviction

[15] *Sentencing Act*, s 17(1).
[16] *Sentencing Act*, s 33A and s 34.

imposed by the learned magistrate, but for the reasons given I quash the sentence of two months' imprisonment and the community custody order imposed by her Honour.

[34] My re-sentencing of the appellant is complicated by the fact that she commenced to serve her sentence of imprisonment under the community custody order on 13 September 2012 and, although she failed to report on three occasions in strict compliance with the community custody order, she nonetheless completed three weeks of community work pursuant to the order. She carried out 12 hours of community work for each of those three weeks, a total of 36 hours of community work in the period up to 5 October 2012. The community custody order was then suspended on 18 October 2012 pending the hearing of this appeal.

[35] In the circumstances, I propose to order the release of the appellant, and I make the following order by way of substituted sentence:

> "Pursuant to s 13 *Sentencing Act*, I order that the appellant be released on her giving security without sureties by her own recognisance in the sum of $1,000 that she will appear before the court if called on to do so during the period of 18 months commencing this day, and that she will be of good behaviour for the said period of 18 months."

[36] The substituted sentence should not be taken to be a sentence which I consider should have been imposed by the learned magistrate. The substituted sentence is intended to take account of the events which have

taken place since the learned magistrate dealt with the appellant on 13 September 2012.

[37] I will hear counsel on the final orders required to give effect to these Reasons.
