Laskie v Rigby [2013] NTSC 39

PARTIES:	**LASKIE, Shane**
	v
	RIGBY, Kerry Leanne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 3 of 13 (21243983)
DELIVERED:	19 July 2013
HEARING DATE:	3 June 2013
JUDGMENT OF:	BARR J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence – sentence within range of possible sentences – appeal dismissed

CRIMINAL LAW – Specific offences – disorderly behaviour – mid to high range of seriousness – prior convictions – sentencing options available to court – sentence of 6 weeks' imprisonment within range sentence not manifestly excessive – no error established – appeal dismissed

SENTENCE – Impact on accommodation – tension between rehabilitation and denunciation, punishment and deterrence

SENTENCE – Sentencing range – regard to obiter comments of superior court – correct sentencing principles applied – appeal dismissed

APPEAL – Justice's appeal – appeal against sentence – manifest excess not established – appeal dismissed

Justices Act 1929 (NT), s 177(2)(f)
Sentencing Act (NT), s 33A, s 39(4), s 39(6), s 39(3A)
Summary Offences Act s 47(c)

Berry v Westphal & Berry v Cassidy [2011] NTSC 59, referred to.

REPRESENTATION:

Counsel:

Appellant:	A Abayasekara
Respondent:	D Dalrymple

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
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

Laskie v Rigby [2013] NTSC 39
No. JA 3 of 13 (21243983)

BETWEEN:

SHANE LASKIE
Appellant

AND:

KERRY LEANNE RIGBY
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 19 July 2013)

Appeal against severity of sentence

[1] The appellant appeals the sentence imposed by the Court of Summary Jurisdiction on 27 February 2013. The appellant, aged 41, pleaded guilty to one count of disorderly behaviour in a police station and was sentenced to six weeks' imprisonment. The offence carried a maximum penalty of six months imprisonment or a fine of $2,000, or both.[1]

[2] The offending started at about 11 o'clock in the evening on 20 November 2012, after the appellant had been taken into protective custody by police on patrol and driven to the Darwin Watch House.

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[1] *Summary Offences Act*, s 47(c).

[3] The Watch House that evening was staffed by a female sergeant, a female auxiliary and a male auxiliary.

[4] The appellant apparently resented being in protective custody and once placed in a cell, started to shout, swear and demand to be released. His outbursts disturbed other prisoners.

[5] As a result, he was transferred into the observation cell, which is directly opposite the Watch House reception area.

[6] Once in the observation cell, the appellant twisted up a blanket and tied it around his neck. Watch House staff entered his cell and removed the blanket for safety reasons.

[7] The appellant then resumed yelling abuse and swearing. He threw cups and handfuls of water against the observation cell door and deliberately poured water under the cell door, causing water to pool on the floor of the Watch House reception area. Watch House staff placed a blanket outside the door to soak up the water.

[8] Some 10 minutes later the appellant told Watch House staff that he knew how to fake a seizure and that he intended to bring on a seizure. A few minutes later, the appellant motioned to staff that he had swallowed his Ventolin inhaler. He had not. Watch House staff entered the cell and removed the appellant's inhaler and T-shirt.

[9] A short time later the appellant took off his shorts, and started to stuff them into his mouth. His naked body was on display in front of staff and prisoners in the Watch House reception area.

[10] Watch House staff re-entered the cell and seized the appellant's shorts. They transferred him into a padded cell 'to preserve his dignity' and so that staff and other prisoners would not have to look at him.

[11] Inside the padded cell, the appellant started to vomit clear fluid. It is unclear whether this vomiting was intentional or unintentional. He was returned to the observation cell to allow him to have access to drinking water for hydration. Another blanket was provided to him to cover his naked body.

[12] Approximately 10 minutes later, the appellant deliberately hit his upper body against the cell door and walls. He yelled and swore at staff and threw water against the cell walls. He persistently banged his hands against the glass door of the cell while continuing to swear.

[13] A short time later, the naked appellant stood up on the toilet bowl in his cell, before urinating into the hand basin and then into a foam cup. He then stood at the glass door holding his penis in one hand and twirling it in a circular motion for about five minutes in full view of Watch House staff. It is unclear on the facts in evidence whether the appellant twirled his penis continuously for that five minutes, or whether he stopped from time to time before then resuming.

[14] The appellant then yelled and swore at prisoners being processed into the Watch House. This was a deliberate attempt on his part to agitate other persons. He resumed throwing water against the cell glass. He reached under the cell glass door and pulled the blanket (which had been used to soak up water he had previously poured under the door) in an apparent attempt to drag the blanket back into the cell. He engaged in a brief tug-of-war with staff, which he lost. Staff recovered the blanket.

[15] Undeterred, the appellant resumed his standing position on the toilet bowl and rubbed his hands up and down between his buttocks in an agitated manner, yelling out "You lowlife fucking cunts". He then urinated into a foam cup, after which he poured urine and cups of water under the cell door causing further pooling on the floor of the reception area.

[16] Watch House staff took the appellant back to the padded cell where he continued to swear intermittently.

[17] At 5.30 the next morning he was taken to the Royal Darwin Hospital because Watch House staff were concerned that he was suffering from dehydration.

[18] On the agreed facts, the appellant's behaviour severely impacted upon the good order and functioning of the Watch House for over five and a half hours. Processing of prisoners was adversely affected by his persistent yelling and his deliberate attempts to agitate and distract Watch House staff from carrying out their duties.

[19] After the facts contained in [2] to [18] were read out in court, the magistrate asked the appellant, who at that stage was unrepresented, whether the facts were all true. When pressed, the appellant said that the facts were true. The prosecutor then tendered the appellant's criminal history, and again when pressed, the appellant conceded that the criminal history related to him.

[20] The magistrate indicated clearly to the appellant that she was intending to send him to gaol and asked him to make submissions as to why she should not.

[21] The appellant had some relevant prior convictions. On 15 January 1991 he engaged in disorderly behaviour for which he was convicted by the Adelaide Magistrates Court on 29 January 1991 and fined $100. At the same time he was convicted and fined $150 for carrying an offensive weapon.

[22] On 18 June 1991, the appellant urinated in a public place for which he was convicted by the Port Adelaide Magistrates Court on 14 December 1992 and fined $100.

[23] On 28 November 1994, the appellant engaged in offensive conduct for which he was convicted by the Byron Bay Local Court on 22 December 1994 and fined $250, plus court costs.

[24] On 17 November 1996, the appellant behaved in an indecent manner in respect of which he was convicted by the Cairns Magistrates Court on 3 December 1996 and fined $100.

[25] On 4 September 2006, the appellant once more engaged in disorderly behaviour for which he was convicted by the Adelaide Magistrates Court on 8 November 2006 and fined $250, plus court fees and costs.

[26] On 7 June 2009, the appellant committed an offence of aggravated assault "against child or spouse" in respect of which the Mt Gambier Magistrates Court discharged him without penalty on 20 May 2010. He was ordered to pay court costs. The disposition of the matter indicates that it was not serious offending of its kind.

[27] I have not set out the appellant's complete criminal histories in Victoria, Queensland, New South Wales and South Australia, but the convictions I have extracted are those most relevant to the offence for which he was dealt with by the Darwin Court of Summary Jurisdiction, with the exception of the last entry, which I have included only because it was the appellant's most recent prior offending.

[28] After the evidence had been tendered and read in court, the following exchange took place between the magistrate and the appellant:-

> HER HONOUR: You have been to court before for disorderly behaviours. You are not walking out of this court with a slap on the wrist and a small fine, I'm considering right now sending you to gaol. Why shouldn't I?
>
> THE DEFENDANT: Just, your Honour, just previous to that I'd been cracked in the skull by three people with a bottle of port and that. My skull was fractured down near my eye socket. I ended up in hospital and ended up in rehab for a heroin habit. I'd just got out

of rehab that day and I just wanted to celebrate and I guess I took it a bit too far and I was asleep at the bus stop.

HER HONOUR: 'A bit too far' this is an indication of what people regard as celebration and the impact it has on the community. I don't know if you watch television, but on Monday night on 4 Corners there was a program about the impact that alcohol is having on our entire community. This appalling behaviour, it tied up the resources of police for five and a half hours.

If you want to put before the court that in some way an injury to your head or your heroin addiction in some way affected your behaviour, you'll need to put it before the court in a proper way.

You said you went out to celebrate, you should have to bear the consequences for the sort of impact that your behaviour has upon the community. This is the worst example I have ever seen of this behaviour. Police resources were tied up the entire night having to put with your behaviour. They ended up taking you to the hospital. They were greatly concerned with you.

We spend an enormous amount of public resources dealing with the impact of people's behaviour. Why should I not send you to gaol?

THE DEFENDANT: I work now, your Honour. I don't drink. I know I – what I did was just atrocious, I know that. My partner says I should be totally embarrassed of myself and I am. That is, I've never done anything like that before.

HER HONOUR: Well you've done some other things, because you've been before the court before for disorderly behaviour in the past, offensive behaviour, urinating in public. It's not entirely out or character. It probably hasn't been anywhere near to the degree of this.

So you've got a job?

THE DEFENDANT: Yes, I do.

HER HONOUR: What is your job?

THE DEFENDANT: I push trolleys at Nightcliff Shopping Centre five and a half days a week.

HER HONOUR: Is there anything else you want to tell me?

THE DEFENDANT: I just got a place in front of the place, like so, you know, it's only a minute to walk to work. So I'm constantly working. I don't go out and get drunk any more. I'm trying to save money just to get ahead and not be the person that I've been most of my life.

HER HONOUR: Is there anything else you want to say?

THE DEFENDANT: I'm totally sorry, I just – just hearing that now, I don't even remember half of that and look, it's made me feel - - -

HER HONOUR: Well perhaps we could get the closed circuit TV and we could play it and you could have a look. You've heard it. Do you accept that that is how you behaved?

THE DEFENDANT: Yeah, I do.

HER HONOUR: Do you accept that you've used the word 'atrocious'? You accept that your behaviour was atrocious?

THE DEFENDANT: Yes, I do.

HER HONOUR: Alright. Is there anything else you want to say now that I'm indicating to you, that it appears to me to be the sort of thing that you should be gaoled for?

THE DEFENDANT: All I can say is, I'm sorry. And I'm trying to better myself. I'm working and I'm not going out and getting drunk and I'll help the police with stuff, anything. Just please look, I've been in gaol before and I really don't want to go back to gaol. It's like – I hate gaol.

HER HONOUR: I don't think anybody likes it.

THE DEFENDANT: And I'm just trying to do my best now, it's like, I haven't gone back to drugs, I'm not drinking.

HER HONOUR: Alright, now did you seek any legal advice before?

THE DEFENDANT: No, I didn't.

HER HONOUR: I'm going to give you an opportunity, you're going to be taken into custody, you'll go down into the cells. If a person from Legal Aid can come and see you to see if there's something else that you want to put before the court.

So I'll speak to see if someone from Legal Aid is available before as I say it maybe something that you would like to get some legal advice on. Alright?

THE DEFENDANT: Yes, your Honour.

[29] When the appellant's case came back before the court in the afternoon, the appellant was represented by counsel. The magistrate informed counsel that her view as to the seriousness of the offending had changed and that she considered it was "not quite as bad as the worst case imaginable", but that in her view it fell objectively well above the mid range for offending of this kind.

[30] Counsel submitted on behalf of the appellant that his appalling behaviour arose from the fact that he was not thinking clearly because he was adversely affected by alcohol, possibly accentuated to some extent by the fact that he had been completely alcohol and drug free for the duration of his drug rehabilitation program (two to three months), which could have affected his tolerance levels. Counsel also explained the reason, not

presently relevant, for the appellant's resentment at being taken into protective custody. Counsel also drew to the attention of the magistrate that the appellant's last conviction for disorderly conduct had been in South Australia, in November 2006, a gap of some six years.

[31] Counsel submitted that the magistrate should take into account the day spent by the appellant in custody and impose a fine and a good behaviour bond, in order "to give him something to think about in future".

[32] The magistrate then asked counsel to clarify whether or not the head injury referred to by the appellant earlier in the day had any connection with the offending. Counsel obtained instructions and informed the magistrate that the injury occurred in an assault which had happened prior to the appellant commencing his drug rehabilitation program. Counsel said that the appellant did not seek to excuse his behaviour on the basis of that injury, but asked the court to take it into consideration.

[33] Counsel for the appellant then made some submissions to the effect that the offending was not as serious as the magistrate had characterised it to be and, in desperation, made the point that although the appellant had poured urine under his cell door, he had diluted it with water. Counsel submitted that the conduct was unpleasant but not particularly serious.

[34] Counsel then put a potentially significant matter (and apologised for not telling the court earlier), namely that the appellant was the sole financial provider for himself and his partner. Counsel informed the court that the

couple had only six weeks previously moved into a residence in Progress Drive, Nightcliff, and that if the appellant were not able to work (through being incarcerated), the couple would lose their home. Counsel then sought further instructions and informed the court that the appellant's partner suffered from anxiety and depression, for which she was medicated and under the care of a psychiatrist.

[35] The magistrate then addressed the following sentencing remarks to the appellant:

> HER HONOUR: When you are sentenced, the court has to first of all say objectively how serious is this. That is, not looking at you as a person, but looking at what your actions were on that day and saying how serious they are. You have heard Mr McMaster and myself exchanging about whether it is objectively very serious or not particularly serious, or in the middle, or that sort of thing.
>
> First of all, I have to look at the maximum penalty that parliament has provided, which is a penalty of $2,000 or 6 months in prison and then I have to decide whether your behaviour on that night, where it does fall within that range, because obviously, the worst kind of examples get the worst penalties and the least examples get the lightest penalties.
>
> Your behaviour; in total you were at the police station for about five and a half hours and it started with you shouting and swearing and demanding that you be released from custody, which disturbed the other prisoners and then you escalated and some of the behaviour you then engaged in was not only disorderly, but was actually dangerous, and in particular to yourself, because you were doing things such as twisting a blanked and tying it around your neck and it seems that perhaps there was some form of trying to attract attention to yourself so that you could get out.
>
> …

[36] After restating the facts, essentially as set out in [2] to [18] above, the magistrate continued:

> HER HONOUR: Earlier I said that I thought this was as bad as case as it could get. I do not actually think it is the worst case imaginable, but it certainly is more than above the mid range, and I do not agree with what Mr McMaster said. I do not think it is a case of just being naked and a bit offensive in front of a range of robust police officers.
>
> It was persistent and ongoing. A number of people were impacted, not just police, but also other prisoners. They were impacted in various ways. In some cases what you were doing was just offensive. In other cases, you placed yourself in danger, as well as being disorderly; which is the description of the offence. The level of police resources that were tied up in having to respond to you is another indication in my view, that it was an above average range of seriousness of an offence of this kind.
>
> You have entered a plea of guilty, and that plea of guilty was at the earliest opportunity. You get the maximum discount, that is 20% less than what you otherwise would have got on the basis of what is called utilitarian value of the plea; that is, saving the court time and the money in proving the case against you and that includes the police resources of coming and having to give that evidence. However, it was a very strong case, occurring as it did within a police station and with many, many witness and really, I cannot imagine that it would have been defensible.
>
> There is no other indication other than saying today numerous times that you are sorry and I think you are now sorry, but I think part of that is that you are sorry that you are now in the situation that you are in, but still you have said those words, and some people do not say those, so there is some indication of remorse, as well as your plea of guilty.
>
> You have a lengthy prior criminal history in five jurisdictions, including some offences of a similar type, and they are January 1991, you were convicted in Adelaide of disorderly behaviour. In December 1992, you were convicted of urinating in a public place in Port Adelaide. In 1994, you were convicted of offensive conduct in Byron Bay, in New South Wales. In December 1996, you were

convicted of behaving in an indecent manner in Cairns, in Queensland. In November 2006, you were convicted of disorderly behaviour in Adelaide.

Now many of those offences are a long, long time ago, and the most recent one is six years ago, and you are not in any way being punished for what you have done in the past, but the reason I have read them out and the reason they are taken into account is to show that this is not a one off or an aberration, but in fact, you have behaved in this way, many times over many years.

Put today is that you were out celebrating. It is quite extraordinary that someone would be celebrating their rehabilitation by getting intoxicated to such a level. I am not exactly sure what your level was. On one hand you are saying through your lawyer that it was not so great that you deserved to be in custody, but on the other hand, you indicated that you can barely remember what happened and I do know that you were ultimately taken to hospital on that night.

There is also put in mitigation that a term of imprisonment will impact another person; in particular, your partner and it very well may operate very harshly upon her and it will be very disappointing for her. However, the purpose in sentencing you today is to punish you. It is also to deter you and other people, unfortunately this kind of behaviour in all sorts of public places by highly intoxicated people and the huge impact it has on the rest of the community is very prevalent. It is very, very common. It is also to denounce the conduct, in other words, to say this is unacceptable conduct for the community.

Also the court is supposed to try and come up with some form of sentence that will assist you in your rehabilitation. The best way for you to rehabilitate yourself is to not to drink, as well as to stay away from drugs, because it does seem that over the years, some of your offences have also been associated with alcohol, although, obviously a lot more have been associated with drugs. In my view, there is no other alternative other than a term of imprisonment for this matter. I have referred specifically to the case that went to the Supreme Court and there were some comments made about the levels and appropriate sentences of these kind of offences in this court.

> In all the circumstances, you are convicted and sentenced to a term of imprisonment for a period of 6 weeks, to date from today and I do take into account that you spent today in custody.

[37] The case before the Supreme Court referred to by the magistrate was *Berry v Westphal*.[2] In addition to using foul and abusive language to arresting police and Watch House staff, Mr Berry had dropped his jeans, bent over, spread his buttocks cheeks apart with his hands, exposed his anus and sprayed diarrhoea all over the glass door of an observation cell at the Alice Springs Watch House. When removed from his soiled cell and placed in a clean cell, he sprayed diarrhoea over the glass door of that cell also. When asked why he behaved in that way, he replied, "Because I wanted to". Mr Berry appealed his sentence of two months' imprisonment on the ground that the sentence was manifestly excessive. However, Kelly J considered that the offending was towards the most serious end of the scale of offending for disorderly behaviour and held that a sentence of two months for the described episode of disorderly conduct was within range of the magistrate's sentencing discretion and was not manifestly excessive.[3]

[38] In response to the appellant's counsel's submission in *Berry v Westphal* that, in counsel's experience, the maximum sentence imposed by the Court of Summary Jurisdiction had been imprisonment for one month for a serious case of disorderly conduct, Kelly J lamented the absence of appropriate

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2 *Berry v Westphal & Berry v Cassidy* [2011] NTSC 59.

3 Kelly J reasoned at [47] that, if the learned magistrate had given a reduction in penalty for the early guilty plea of approximately 20% (an early guilty plea but with little or no remorse), then the magistrate's starting point was around 2½ months, less than half the maximum penalty of six months.

published material from the Court of Summary Jurisdiction sufficient to enable her Honour to identify a sentencing range, and then went on to say:

> "… if there were indeed a practice in the Court of Summary Jurisdiction to hand down sentences of no more than imprisonment for one month for even the most serious examples of disorderly conduct, then it seems to me that this might be an indication that that Court was not giving appropriate weight to the maximum sentence for this offence prescribed by the legislature. In the absence of published sentencing data, it is impossible to know if this is the case."[4]

Grounds of appeal

[39] The grounds of appeal argued and ultimately relied on by the appellant were as follows:[5]

(2) That the overall sentence imposed by the learned sentencing magistrate was manifestly excessive.

(3) That the learned magistrate failed to consider the principle that imprisonment is a sentence of last resort.

(4) That the learned magistrate erred by not giving any consideration to whether the term of imprisonment ought to be suspended.

(5) That the learned magistrate erred in not properly considering giving sufficient weight to the appellant's rehabilitation.

(6) That the learned magistrate erred by placing undue emphasis on comments made obiter by Kelly J in *Berry v Westphal*.

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4 at [49].
5 numbered as in the amended Notice of Appeal.

(7) That the learned magistrate failed to take into account a relevant consideration, namely, that a term of actual imprisonment would result in the loss of the appellant's accommodation.

Consideration of appeal arguments

[40] The principles applicable to appeals against severity of sentence are well known. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error and the appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it is shown that the sentencing judge or magistrate was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge or magistrate said in the proceedings, or the sentence itself may be so excessive as to manifest such error. In relying upon the ground of manifest excess it is incumbent upon an appellant to show that the sentence was not just excessive but manifestly so. The appellant must show that the sentence was clearly and obviously and not just arguably excessive.

[41] I turn to consider the objective seriousness of the offending conduct. The appellant's behaviour was significantly offensive, even for Watch House staff who are well-trained and experienced in dealing with men and women who misbehave in Police custody. The behaviour was significantly disruptive to the proper running of the Watch House, affecting as it did the

orderly reception and processing of other persons being taken into custody that night and early morning. The appellant's disorderly behaviour was prolonged; it went on for several hours. The appellant's disorderly behaviour was attention-seeking; he intended to (and did) distract Watch House staff from their other duties. The appellant deliberately manipulated the appropriately protective concerns of those staff members. One must admire the dedication and professionalism of the staff members who endured the appellant's gross misbehaviour and still managed to remain attentive to the needs of a man in protective custody and to discharge their duty of care to him in a professional manner at all times, for example, by twice providing him with a blanket to cover himself; by giving him water to ensure he did not dehydrate (even though he would misuse the water); and finally by arranging for his transfer to hospital for medical assessment.

[42] The appellant's offending called for denunciation, punishment and deterrence, both general and specific.

[43] It is apparent from the magistrate's sentencing remarks that her starting point was a sentence of seven to eight weeks, from which she allowed the stated discount of 20 per cent to arrive at the sentence of six weeks. There is no issue on appeal as to the percentage discount. The issue is thus whether the sentence of six weeks was manifestly excessive, taking into account both the objective seriousness of the offending and the personal circumstances of the offender, and considered in the context that the maximum penalty was a term of imprisonment of six months.

[44] In my judgment the sentence of six weeks imprisonment was not manifestly excessive. It was within a range of possible sentences, custodial and non-custodial, which the magistrate could properly have imposed depending on the sentencing objectives she sought to achieve.

[45] I turn now to consider the other grounds of appeal.

[46] As to the ground that the magistrate failed to consider the principle that imprisonment is a sentence of last resort, Mr Abayasekara, counsel for the appellant, refers to the statement by the magistrate in sentencing that there was no alternative other than a term of imprisonment, and that during the course of the sentencing proceedings, the magistrate made no reference and gave no apparent consideration to the range of sentencing dispositions available to her, including community work orders, community based orders, suspended sentences with or without supervision, home detention orders and community custody orders.

[47] As appears from the transcript extracted in [28] above, her Honour gave a clear indication of her thinking that a term of imprisonment was the appropriate sentence and quite appropriately invited submissions from the appellant in relation to that proposed sentencing option.

[48] There is no clear indication that her Honour worked her way through all of the sentencing dispositions referred to by the appellant's counsel on appeal. However, I conclude from the transcript that her Honour must have considered, and dismissed, the defence submission that she should take into

consideration the one day spent in custody (at court) and sentence the appellant by a fine, with a good behaviour bond. In the present case there is no reason to believe that her Honour did not consider all sentencing dispositions. The fact that she did not specifically refer to them cannot be conclusive.

[49] In my opinion, a community work order requiring the appellant to carry out a substantial number of hours of community work would have been an appropriate sentencing disposition. Subject to the requirements set out in s 35(1)(a)and (b) *Sentencing Act*, the magistrate could have made a community work order. 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.[6] The appellant could have been required to perform up to 480 hours of work in an approved project. Allowing for eight hour working days, that represents 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.[7] Under s 39(3A), the court must take into account the extent to which the offender had complied with the order before breaching it.

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[6] See s 33A *Sentencing Act*.
[7] See s 39(4), (6) and (3A) *Sentencing Act*.

[50] Notwithstanding my view that a community work order (for a substantial number of hours of work) would have been an appropriate sentencing disposition, a sentence of six weeks imprisonment was within a range of possible sentences, custodial and non-custodial, which the magistrate could properly have imposed depending on the sentencing objectives she sought to achieve. The sentencing discretion was vested in her Honour, and this Court can intervene only if there is demonstrated error.

[51] Moreover, in relation to the possibility of a community work order, counsel for the appellant did not ask the magistrate to order a report as to the suitability of the appellant to participate in an approved project under a community work order. Nor did counsel ask the magistrate to order a report in relation to a community based order, a home detention order, a community custody order or a suspended sentence under supervision.

[52] The appellant has not established that the magistrate erred in failing to consider imprisonment as a sentence of last resort.

[53] As to the ground of appeal that the magistrate erred by not giving any consideration to whether the term of imprisonment ought to be suspended, I am not satisfied that her Honour did not consider suspending the sentence. Whether that was the case or not, where a sentence is a relatively short one, sometimes (and not always appropriately) referred to as a “short sharp sentence” there is often not much point in suspending the sentence. It depends upon the sentencing objective sought to be achieved.

[54] As to the ground that the magistrate did not properly consider and give sufficient weight to the appellant's rehabilitation, it is obvious that her Honour considered rehabilitation; hence her reference to it in her sentencing remarks. However, I conclude from those remarks that her Honour did not see the point of providing conditions in the court's sentencing order to help the offender to be rehabilitated, because her Honour took the view that the offender's true path to rehabilitation was in not drinking as well as staying away from drugs.

[55] A further ground of appeal was that the learned magistrate placed undue emphasis on comments made by Kelly J in *Berry v Westphal*, discussed by me in [37] and [38] above.

[56] My understanding of the magistrate's statements shortly prior to sentencing was that her Honour had read the decision of Kelly J in *Berry v Westphal* and had noted the judge's remarks that, if it had been the general practice of the Court of Summary Jurisdiction to sentence offenders to no more than one month for the offence of disorderly behaviour in a police station, it was a possible indication that the court was not giving appropriate weight to the maximum penalty prescribed by the legislature. There was no error in the magistrate's reference to the decision of Kelly J. The magistrate went on to apply proper sentencing principles, starting with a consideration of the objective seriousness of the offending, then looking at matters in mitigation and matters personal to the offender, and ultimately concluding that the

appropriate sentence was a term of imprisonment.[8] The magistrate probably drew some comfort from the fact that a sentence of two months' imprisonment imposed by another magistrate for an arguably more egregious and certainly more disgusting example of disorderly behaviour had not been disturbed on appeal and had been held to be within the appropriate sentencing range. However, the magistrate did not depart from proper sentencing principle.

[57] The appellant has not established that the magistrate fell into error by placing undue emphasis on comments made by the appeal judge in *Berry v Westphal*.

[58] The appellant argues that the magistrate's approach in coming straight to the point and asking the appellant why he should not be sentenced to a term of imprisonment is evidence that the magistrate had not looked at alternative sentencing dispositions. I disagree. The magistrate's approach does no more than demonstrate that her Honour had come to the view that a term of imprisonment was the appropriate sentencing disposition, and that she wished to ensure that she was aware of any matters which the appellant might have wished to submit contrary to her Honour's proposed course. Indeed, the magistrate's approach elicited some very relevant submissions from the self-represented appellant.

[8] Transcript 27/02/2013, page 9.2 onwards.

[59] The final ground of appeal is that the magistrate failed to take into account the relevant consideration that a term of actual imprisonment would result in the loss of the appellant's accommodation. The first point to note is that there was no evidence that a term of imprisonment would result in the loss of the appellant's accommodation. It could be inferred that a term of actual imprisonment of six weeks would probably put the appellant and his partner under some financial stress to maintain their accommodation, but it would not be unreasonable to assume that the appellant's partner was entitled to some disability income from which rental could be paid. The appellant informed the magistrate that he was constantly working and that he did not go out and get drunk any more, adding that he was trying to save money to get ahead. He did not disclose the amount of any savings he had managed to accumulate from which rental could be paid.

[60] The issues of disruption of employment and disruption of accommodation were significant rehabilitation issues which were in tension with the sentencing objectives of denunciation, punishment and deterrence. There is no doubt that the magistrate appreciated that a term of imprisonment would adversely affect the appellant, both in terms of employment and accommodation; moreover, that the appellant's imprisonment would have an adverse affect on his partner. The magistrate acknowledged specifically that imprisonment "very well may operate very harshly upon her and will be very disappointing for her."

[61] Harsh though the sentence may have been in terms of its effect on the appellant and his partner (which the magistrate clearly appreciated), it was within the magistrate's discretion to emphasise, as she saw fit, the specific sentencing objectives she sought to achieve. This Court may well feel some sympathy for the appellant, in spite of his appalling behaviour, but in the absence of error this Court should not disturb the sentence.

Conclusion

[62] In my opinion the appellant has not established that the sentence was manifestly excessive. The offending conduct was in the mid to high end of the range of seriousness; the appellant was not a first offender; and the sentence was approximately only 25 per cent of the maximum penalty provided for under the *Summary Offences Act*.

[63] If, contrary to my decision, the magistrate erred as contended by the appellant in relation to any one or more of the grounds (other than the ground of manifest excess), I would still dismiss the appeal, in reliance on s 177(2)(f) *Justices Act*, because I consider that no substantial miscarriage of justice has occurred in the sentencing of the appellant.

[64] The appeal should be dismissed.
