Nabobbob v The Queen [2001] NTSC 42

PARTIES:	LAZARUS NABOBBOB
	v
	THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	8921644
DELIVERED:	4 June 2001
HEARING DATES:	22 and 23 May 2001
JUDGMENT OF:	BAILEY J

REPRESENTATION:

Counsel:

Appellant:	S Cox
Respondent:	R Wild QC

Solicitors:

Appellant:	NTLAC
Respondent:	DPP

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

Nabobbob v The Queen [2001] NTSC 42
No. 8921644

BETWEEN:

LAZARUS NABOBBOB
Appellant

AND:

THE QUEEN
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 4 June 2001)

Background

[1] This is an application by a person detained as an habitual criminal for a recommendation to His Honour, the Administrator, that he should be discharged or released on licence.

[2] The application is made pursuant to s 399 (repealed) of the *Criminal Code* which formerly provided:

> "(1) Any person detained as an habitual criminal may, with leave, apply to the Supreme Court for a recommendation that he, having sufficiently reformed or for some other sufficient reason, should be discharged or released on licence.

> (2) If such leave is granted the court shall thereupon make inquiry in such manner as is deemed fit and, upon being satisfied that such person has sufficiently reformed or that there is some other sufficient reason to warrant his discharge or release on licence, shall recommend to the Administrator that he be discharged or released on licence accordingly."

[3] The applicant was declared to be an habitual criminal on 2 August 1990 pursuant to s 397 (repealed) of the *Criminal Code*. The declaration was made after the applicant had been sentenced to an effective head sentence of 6 years imprisonment for one offence of aggravated unlawful entry and one offence of aggravated sexual assault. The effect of the declaration of the applicant as an habitual criminal was to require the applicant at the expiration of his sentence to "be detained in prison during the Administrator's pleasure" (s 398 (repealed) of the *Criminal Code*).

[4] Sections 397, 398 and 399 of the *Criminal Code* were repealed by the *Sentencing (Consequential Amendments) Act* 1996 (Act No 17 of 1996) which came into force upon the commencement of the *Sentencing Act* on 1 July 1996.

[5] Section 130 of the *Sentencing Act* provides:

> " Where, immediately before the commencement of this section, a declaration under section 397 or a direction under section 401 of the *Criminal Code* detaining a person at the Administrator's pleasure was in force, the person continues to be subject to the requirements of the declaration or direction in all respects, and the declaration or direction shall be subject to, and the person may be dealt with under, the *Criminal Code* or section 8A of the *Criminal Law (Conditional Release of Offenders) Act* as in force before that commencement, as if this Act had not commenced."

[6] Accordingly, in relation to the declaration of the applicant as an habitual criminal and his continuing indefinite detention in prison, the applicant is required to be dealt with under the relevant repealed provisions of the *Criminal Code*.

[7] On 6 October 2000, Angel J granted leave to the applicant to apply for recommendations in the alternative for the discharge of the declaration of the applicant as an habitual criminal or his release on licence pursuant to s 399 of the *Criminal Code*. In addition, Angel J ordered preparation of a report by the Director of Correctional Services (or his delegate) concerning the applicant, his family, community and the applicant's medical condition, including any recommendations as to his release and possible conditions to be applied on such release. Angel J further ordered preparation of a report by the Forensic Mental Health Unit of Territory Health Services.

[8] The reports ordered to be prepared by Angel J were received and marked as follows:

> Report of Northern Territory Correctional Services, signed by Mr Leon Pethick, Senior Probation and Parole Officer (Jabiru), dated 26 April 2000 : Exhibit 4
>
> Report of Top End Mental Health Services – Forensic Team, signed by Ms Gemma Smyth, Designated Mental Health Practitioner, dated 30 April 2001 : Exhibit 3

[9] In addition to Exhibits 3 and 4, a booklet of material (Exhibit 2) was tendered on behalf of the applicant. The booklet included:

- an affidavit of Ms Suzan Cox (counsel for the applicant) sworn on 29 September 2000 in support of the application for leave granted by Angel J on 6 October 2000
- a psychiatric report of Dr Lester Walton dated 30 March 2000
- twelve affidavits from members of the applicant's extended family and community.

[10] The makers of eight of the affidavits referred to above gave evidence in support of the applicant at a hearing arranged for the purpose at Oenpelli on 22 May 2001. The evidence and the contents of the affidavits generally are addressed later in these reasons.

[11] Ms Cox for the applicant also tendered a further affidavit from Ms Yvonne Margarula (Exhibit 10), a map (Exhibit 8) and an aerial photograph (Exhibit 9) of Mamadawerre Outstation (a location proposed as being suitable for the applicant to be confined to for an initial period of three years following his release on licence).

[12] Mr R Wild QC, DPP appeared for the respondent. Mr Wild tendered a booklet of material (Exhibit 1) which included:

- *R v Nabobbob*, SCC 148 of 1989, transcript – reasons for decision, Nader J
- *R v Nabobbob*, CA 11 of 1990, transcript – reasons for decision, Asche CJ, Martin and Mildren JJ
- Criminal record of the applicant as at 14 March 2001
- Pre-sentence report of Mr Leon Pethick, dated 11 May 1980 (considered by Nader J)
- Annual reports concerning the applicant prepared pursuant to s 400A (repealed) of the *Criminal Code*

- Information for an indictable offence, charging the applicant with an aggravated assault of 10 August 1996
- Summary of imprisonment details of the applicant as at 19 June 1990

[13] In relation to the information charging the applicant with aggravated assault on 10 August 1996, the applicant's criminal record discloses that he was convicted on 13 June 1997 and sentenced to a period of 10 months imprisonment.

[14] In addition to Exhibit 1, Mr Wild tendered three statutory declarations:

- Statutory declaration of Charlie Nalolmani, declared on 15 May 2001 (Exhibit 5)
- Statutory declaration of Christopher McDougall, declared on 14 May 2001 (Exhibit 6)
- Statutory declaration of Geoffrey Camp, declared on 14 May 2001 (Exhibit 7)

[15] Each of the makers of the statutory declarations and Mr Leon Pethick gave evidence at Oenpelli on 22 May 2001.

Declaration of Applicant as an Habitual Criminal

[16] On 2 August 1990, following pleas of guilty to one count of aggravated unlawful entry and one count of aggravated sexual assault, the applicant was sentenced to 2 years imprisonment and 6 years imprisonment respectively. The learned sentencing judge, Nader J, declined to specify a non-parole period and declared the applicant to be an habitual criminal pursuant to the s 397(3) (repealed)of the *Criminal Code*. The effect of that declaration was to impose an indefinite sentence of imprisonment upon the applicant at the completion of the 6 years imprisonment. The sentence of 6 years imprisonment was deemed to have commenced on 23 July 1989 to take account of time served by the applicant in custody. In passing sentence upon the applicant, His Honour made it clear that the effective head sentence of 6 years imprisonment was considerably less than he would have regarded as appropriate in the absence of the declaration that the applicant was an habitual criminal.

[17] The circumstances of the aggravated unlawful entry and aggravated sexual assault may be briefly described as follows.

[18] On 23 July 1989, the applicant was temporarily residing at Jabiru. At around 11 pm on that day he entered a caravan situated at Lakeview Caravan Park, Jabiru. Two sisters, aged 12 and 10, and their 2 year old brother occupied the caravan. The three children were asleep in their parents' bed. Their parents had gone out for the evening to a local hotel.

[19] The applicant walked through the caravan, turning off several lights as he went and entered the bedroom where the three children lay sleeping. The elder girl awoke to find the applicant touching her around the lower part of the body. She screamed and the applicant left the caravan. He returned around five minutes later with a torch and pornographic magazines. By this time, the 10 year old girl and her 2 year older brother were awake. The 12 year old girl again screamed and asked what the applicant wanted. The applicant replied that he wanted to "fuck" her. He threatened to kill the girl's younger sister and brother with a knife he had taken from the caravan's kitchen if the girl refused to have sex with him.

[20] The applicant forced his 12 year old victim into her own bedroom and shut the door. He told her to shut up or he would bash her over the head with the torch. The applicant pushed the victim onto her bed, removed her underpants and caused her to part her legs. He then placed spittle on his penis and the girl's vagina. The applicant urinated on the girl's underpants.

[21] The applicant then lay on the victim in a manner designed to effect sexual intercourse and in a manner which caused pain and discomfort to his victim. He sucked her breasts. The applicant commenced the motions of intercourse by moving up and down on the girl causing her pain, but was interrupted by the arrival of the police. The police had been alerted by a triple zero telephone call from the victim's younger sister.

[22] In a record of interview conducted by the police during the following day, the applicant admitted entering the caravan to look for beer and food. He admitted threatening the children with the knife, but only to obtain beer and food. The applicant also admitted touching the 12 year old girl on the vagina and placing his index finger into her vagina. He denied active sexual intercourse took place. Medical examination and forensic testing of the victim failed to reveal any evidence of actual penetration. At the time of his apprehension, the applicant was observed to be under the influence of alcohol, but not such as to be considered fully intoxicated.

[23] In considering whether to declare the applicant to be an habitual criminal, Nader J reviewed the applicant's criminal record. At the time that he was declared to be an habitual criminal, the applicant was almost 34 years old. He will be 45 in September of this year. The applicant's criminal history is appalling. In the 10 years to June 1990, the applicant spent more than 7½ years in prison. The longest single period the applicant spent outside of prison during that 10 years was 7 months. His record, commencing at around the age of 18 includes convictions for the following offences:-

Criminal damage – 5 counts
Unlawfully on premises – 9 counts
Unlawful use of a motor vehicle – 4 counts
Escape lawful custody – 5 counts
Drive unlicensed – 2 counts
Exceed .08 – 2 counts

Drive without due care – 1 count

False name – 3 counts

Stealing (including an attempt) – 4 counts

Unlawful entry – 13 counts

Disorderly behaviour – 5 counts

Liquor Act offence – 1 count

Threatening words/indecent language – 3 counts

Breach of parole – 1 count

Breach of recognizance – 1 count

Breach bond – 1 count

[24] More significantly for present purposes, the applicant's record reveals a substantial number of offences involving violence and/or sexual misconduct:-

Carnal knowledge (girl aged 12 or under) – 1 count

Resist Arrest – 1 count

Armed with offensive weapon – 1 count

Common assault – 1 count

Aggravated assault – 10 counts

Indecent behaviour – 1 count

Assault occasioning actual bodily harm – 1 count

Break and enter with intent to rape – 2 counts

Assault police – 1 count

Aggravated sexual assault – 1 count

[25] Before the declaration of the applicant as an habitual criminal, he had been warned on at least two occasions that application for such a declaration was likely to be made if he continued to offend. The applicant's record showed that he had breached recognizances or bonds on each of the four occasions that these were granted and had also been returned to prison after breaching the terms of his parole.

[26] Nader J was forthright in his assessment of the applicant. After noting the applicant's "very exceptional" continuous and bad criminal history, His Honour observed:-

> "One could say it is almost a moral certainty that, upon his release from prison, the prisoner will continue to offend as he has in the past. There is absolutely nothing to indicate that he would change his life in the least. He has been a dedicated law breaker who has shown total disregard for the rights of his fellow human beings.
>
> In the past he has shown no signs of letting up. He has made no visible effort, that is any effort perceivable by the officers that have assisted me in these proceedings, to reform his life in any way at all and I have no hesitation in finding, as a matter of judgment based on my experience in these courts, that this man, upon his release from prison, will be very likely to go on committing crimes in the way he has in the past and society should not have to put up with that and, as far as this court is concerned, it would be remiss in its duty to humanity if it didn't do what it could do within the law to prevent him from doing it."

[27] His Honour later commented to the effect that if it was not appropriate to exercise the declaration to declare the applicant to be an habitual criminal –

> "… it never will be, as far as I can see. It is hard to imagine a situation where a person would more merit the use of a declaration … than this one."

[28] On 9 December 1991, the Court of Appeal refused the applicant leave to appeal against the declaration of him as an habitual criminal.

[29] A pre-sentence report prepared for Nader J assessed the applicant as an "articulate, alert and confident" person, but also a person whom "appeared to have an inflated opinion of himself and his importance within his family and community". The author of the pre-sentence report, Mr Leon Pethick, Probation and Parole Officer, described the applicant as an "arrogant, demanding and insensitive" person who had "gained little insight into the consequential effects of his anti-social and criminal behaviour". It was noted that the applicant had refused all attempts to help him with alcohol rehabilitation.

Applicant's response to imprisonment

[30] Since his incarceration in August 1990, annual reports to the Minister for Correctional Services have been prepared pursuant to s 400A (repealed) of the *Criminal Code* concerning the applicant's progress. It is not necessary to canvass these reports in detail, but the reports are both helpful and instructive in providing an annual review of the applicant's activities, attitudes and character.

[31] The author of the pre-sentence report before Nader J, Mr Leon Pethick, prepared annual reports dated May 1991, May 1992, June 1993 and August 1994. Aside from noting some efforts by the applicant to control his quick temper in the reports of 1993 and 1994, Mr Pethick's assessment of the

applicant generally remained very negative. In particular, Mr Pethick maintained his assessment that the applicant considered himself to be superior to others, lacked any remorse for his victims and refused to accept any personal responsibility for his offending behaviour.

[32] The author of a May 1995 report, Mr M Cornock, assessed the applicant as non-cooperative, arrogant and manipulative. Mr E Bennett in a report of June 1996 found nothing positive to say in the applicant's favour. Prison reports indicated that the applicant had an "unnerving effect on prisoners and causes unrest". Mr Bennett's concluding comments were:

> "There appears to have been little or no change in Nabobbob's attitude towards staff and/or other inmates at the Correctional Centre. He continues to behave in an aggressive manner towards other prisoners and does not take advantage of opportunities offered to him to improve his situation or demonstrate a change in attitude and behaviour."

[33] In May 1997, Assistant Commissioner Willard noted no improvement in the applicant's behaviour and attitude. Prison reports indicated that he displayed disruptive, irrational, and often violent behaviour with little respect for others.

[34] The June 1997 report prepared by Ms Marguerite Fawcett, Community Corrections Officer, noted that the applicant had been diagnosed with a heart problem, requiring treatment at Royal Adelaide Hospital. The applicant was said to be disruptive, abusive, manipulative and to display "no

understanding or remorse for his past offending behaviour or strategies for modifying his behaviour in future beyond the fact of his heart condition."

[35] In May 1998, Mr David Fields, Community Corrections Officer, was of the opinion that the applicant continued to display the characteristics of a persistent sex offender:

> "There is evidence of manipulative and threatening behaviour designed to satisfy the prisoner's needs. He appears incapable at this stage of moving beyond his own egocentric drives and realising the harm he has caused to others. The prisoner has given no indication that he understands why he committed the offences, nor has he given any thought as to how he might avoid further offending."

[36] The May 1998 report also notes that the applicant was assessed as unsuitable to attend a sex offenders' programme because of his unwillingness to discuss his past.

[37] In a report of July 1998, Assistant Commissioner Gray again notes that the applicant's unwillingness to discuss his past precluded him from participating in the sex offender's programme. The report refers to the applicant's disruptive and manipulative behaviour in relation to accommodation arrangements and art classes as well as idle threats to kill himself. The report assesses the applicant as a continuing threat to others.

[38] The 1999 report (unsigned and undated) follows a similar pattern to that of the July 1998 report (to the point of reproducing the July 1998 negative concluding comments). The applicant's behaviour is described as having fluctuated from "very poor to acceptable and can vary substantially

dependent upon whether 'his needs' are being addressed to his satisfaction or not".

[39] The July 2000 report was prepared by the Superintendent of Darwin Correctional Centre, Mr R Williams. The report noted that the applicant's accommodation was changed 12 times during the year (down from 21 moves during the previous year) as a result of inmates' complaints as to the applicant's socially disruptive and intimidating behaviour. The applicant attended several prison programs including: Ending Offending, Anger Management and a Domestic Violence Program. In addition to the applicant's attendance at these rehabilitative courses, Mr Williams offered some guarded optimism for the future in his concluding comments:

> "On summing up the writer believes Nabobbob's overall behaviour for the year showed signs of improvement, although there were several instances where staff were forced to endure his demanding and churlish behaviour. Signs are there that he can perform at an acceptable level and he can distinguish between what is acceptable behaviour and that which is not acceptable however, in fact he is a cunning and manipulative person who is well versed in how to get his own way. He understands that it is up to him to maintain a consistent acceptable standard if he wishes to progress through the classification streams eventually achieving the lowest security rating available for his length of sentence and status.
>
> Several meetings have taken place between staff and Nabobbob in relation to what is expected of him to improve his overall performance. He has been left in no doubt as to which areas he needs to improve to make his performance acceptable. He indicated to this office that he would make a commitment to improve his personal behaviour and overall performance. Although it should be noted that he has made promises before and never kept them."

Reports ordered by Angel J

[40] Mr Leon Pethick prepared the report (Exhibit 4) on behalf of the Director of Correctional Services. Mr Pethick has known the applicant for many years – and as previously noted, was the author of the pre-sentence report ordered by Nader J prior to the applicant's declaration as an habitual criminal.

[41] It is not necessary to recite the Correctional Services report in detail. However, it is appropriate to highlight some matters canvassed by Mr Pethick in arriving at his conclusion that:

> "… at the present time the writer is not confident to recommend release."

[42] The report notes that in the six months prior to preparation of the report, as with the previous year, the applicant's security rating has fluctuated between low to medium to high. The applicant's accommodation arrangements have changed ten times in a year – a pattern repeated over the years, it is said, because of fellow inmates' complaints as to the applicant's socially disruptive behaviour and attitudes. The report notes that the applicant has a history of being placed "at risk" (that is being placed in safe, solitary confinement and subject to psychiatric intervention after being assessed as being at risk of self-harm). The most recent incidents prompting this designation being:

- 8 February 2001 – applicant attempted to hang himself
- 9 March 2001 – applicant claimed to have swallowed glass

- 9 March 2001 – applicant verbally abused medical staff and prison officers

- 9 March 2001 – applicant set fire to items in cell

[43] The report notes that the applicant suffers from a cardiac condition that required treatment in the Royal Adelaide Hospital in June 1997. The prison doctor (Dr C Wake) reported in an annual report for the current year that the applicant suffers from:

- Ischaemic heart disease (stable angina)

- Non cardiac chest pain (combination of indigestion, chest wall pain and anxiety)

Dr Wake's opinion is that the applicant's health is stable and that his conditions are regularly reviewed and appropriately medicated. However, reports also indicate that the applicant's attitude to medical staff is far from favourable. Dr Wake is of the view that the applicant suffers a personality disorder, is abusive, displays conflicting and threatening behaviour, is highly manipulative and uses threats of suicide and chest pain continuously.

[44] Mr Pethick's report includes details of educational programmes undertaken by the applicant in prison and more relevantly, rehabilitation programmes. The applicant has twice completed the 'Ending Offending Programme' in addition to anger management and domestic violence programmes. Three of the rehabilitative programmes were completed by the applicant in 1999 and 2000. Earlier in these reasons it has been noted that the applicant has

been assessed as unsuitable to participate in a sex offenders' programme because of his unwillingness to discuss his past. Mr Pethick notes that the sex offenders' programme has been available to the applicant since 1998 but the applicant has maintained his exclusion from participation because of his refusal to discuss his personal and criminal behaviour.

[45] Mr Pethick outlines in his report the efforts made to gauge community attitudes to the possible release of the applicant from imprisonment. In view of the prominence given by Ms Cox to the level of family and community support for the applicant's release, it is appropriate to set out this part of Mr Pethick's report:

> "Over many years it has become evident to the writer there are diametrically opposed views in the community regarding Nabobbob. These views have been influenced by family obligations through the cultural kinship system of those being interviewed.
>
> All of the non-family members in the community who have been interviewed stated they considered he should never be released. Some of those interviewed have expressed fear for their safety and that of young women. They have all stated that they could not voice their views and opinions freely and openly in the community. They made it clear that some of Nabobbob's family could make their life very uncomfortable if these opinions became public knowledge and voiced fears regarding possible retribution.
>
> A Senior Traditional Landowner, who is not related to the prisoner, informed the writer that under cultural law Nabobbob would have been subjected to payback and speared for the type of offences he had committed. He considered that 'being in prison is being dead'.
>
> There were members of his family who considered he had brought shame to the family and should never be released. One member of his family, an aunt, stated that if the family wanted to see him 'they could visit him in prison' and 'that would make sure there would be

no trouble.' The writer interpreted this response as meaning that no one would be required to worry about where Nabobbob was, or what he was doing, if he remained in prison and family contact could be maintained.

As expected and understandably so, under traditional family obligations no close family member had any concerns with Nabobbob being released. They generally considered he had been sufficiently punished. Most of the family members contacted, when asked where Nabobbob should reside if released, designated a location many kilometres away from their home region as his place of residence. His mother and uncle are prepared to have him live with them at Mamadawerre Outstation.

In the writer's opinion it is reasonable to suggest that although family members agreed with the possibility of his release, they were not prepared to have him reside in their close proximity.

The remainder of those close family members questioned, who considered he could be released, have suggested that Nabobbob would now listen to and be guided by Senior Traditional owners and Ceremony men. They also stated these men would reprimand him if he failed to obey their directions. The family agreed he had never complied with previous directions from these elders. They also stated they could not provide any evidence to confirm he had changed sufficiently to the extent he would abide by the elders directions in the future, except he has given them his word.

On 18 April 2001, the writer visited Gumarinban, Kudjekbinj and Mamadawerre Outstations to gauge the latest sentiments of the residents of these outstations as they are all in close proximity to each other and where Nabobbob has indicated he would reside.

All persons spoken to were related to the prisoner either by blood or marriage. While there was lengthy debate about any conditions he should be obliged to comply with if he was released, there was no strong opposition to him being released. Everyone interviewed agreed he should reside at Mamadawerre Outstation and not leave except in the case of a personal medical emergency. Such emergency to be determined by the doctor or health sister, or with the prior authority of his supervising officer."

[46] On behalf of the applicant, Ms Cox objected to the hearsay character of Mr Pethick's observations on community opposition to the applicant's release. I do not consider such an objection is valid. Pursuant to s 399(2) (repealed) of the *Criminal Code*, the court shall make inquiry "in such manner as is deemed fit". It is clear that formal rules of evidence are both inappropriate and inapplicable to any enquiry of the present nature. A good deal of the material relied upon by both parties to the present application is hearsay. That is, in a practical sense, inevitable given the relevance of the applicant's history over the past eleven years of his imprisonment. In relation to hearsay, the issue is one of weight not admissibility.

[47] In Mr Pethick's evaluation, the applicant has consistently refused to accept or acknowledge culpability for his offending. The applicant continues to deny responsibility for his behaviour. In Mr Pethick's opinion, any brief periods where the applicant's behaviour appeared to indicate an improvement in his attitude were subsequently shown to be examples of the applicant's capacity for manipulation for his own ends. Mr Pethick accepted in his report that the applicant's difficulties in complying with prison regulations and directions may not be replicated in complying with conditions imposed upon a release on licence. However, Mr Pethick suggests that there needs to be some clearly identifiable positive changes to the applicant's behaviour "before there can be any confidence he would abide by regulations and directions if released into the community"

[48] In giving evidence, Mr Pethick stood by his report. He expressed his concern that if the applicant was required to stay at a remote outstation as a term of his release, the applicant might manipulate absences through demands for medical attention. He accepted that in recent years there had been a shift in the attitude of the applicant's family members in favour of the applicant's release subject to conditions. Mr Pethick also gave evidence that it would be possible and practical to supervise the applicant at a remote outstation through a combination of monthly visits in the 'dry' season and telephone contacts generally.

[49] The report (Exhibit 3) of Ms Gemma Smyth of Top End Mental Health Services indicates that the applicant has never required treatment for any major mental illness. The report notes that the attempt by the applicant to hang himself earlier this year together with setting fire to his cell mattress was prompted by distress at the death of a family member. The report comments favourably upon the applicant's completion of an anger management programme during 1999, assessing his participation as "very good". The report details recent contacts between the applicant and Mental Health Services – noting that it is of concern that the applicant has never been referred to the service for assessment or treatment in relation to sexual offending. The report also refers to the applicant's commitment to abstain from alcohol if granted conditional release and his preparedness to accept confinement to a dry community.

Dr Lester Walton's report

[50] A report dated 30 March 2000 from Dr Lester Walton, consultant psychiatrist, is included in the applicant's booklet of materials, Exhibit 2.

[51] Dr Walton refers in his report to the documents forwarded to him for preparation of his report. He interviewed the applicant on three occasions in September and December 1999 and March 2000.

[52] In brief, Dr Walton's opinion is that despite being suicidally depressed at times, the applicant is not mentally ill and indeed "remains a man of apparently above-average intelligence". Dr Walton refers to the applicant's past alcohol dependence and acknowledges that there is a risk of relapse into alcohol abuse despite the long period of enforced abstinence during the applicant's years in prison. Dr Walton is of the view that the applicant does seem to appreciate the relevance of his alcohol abuse in the past in terms of his likelihood of offending and notes the applicant's laudable aspirations to remain alcohol free for the rest of his life (albeit Dr Walton expresses some doubt that the applicant can sustain abstinence for the indefinite future).

[53] Dr Walton refers in his report to the applicant's "significant cardiac disease" and his fear of premature death in prison. Dr Walton considers that the applicant's medical condition may have had a salutary effect upon him in terms of appreciating that alcohol may aggravate his condition.

[54] In relation to the risk of recidivism, Dr Walton expresses guarded optimism. While acknowledging that the most reliable predictor (of a number of unreliable predictors) of a person's likelihood of re-offending is his past

behaviour, Dr Walton considers that the applicant as an intelligent mature person appreciates that further offending would in all probability result in an effective life sentence for him.

[55] One further observation of Dr Walton is worthy of note:

> "Mr Nabobbob does not make spontaneous utterance of remorse, rather conversation repeatedly turns to his regarding himself as being a victim of injustice, he implying that this is on a racial basis, because he has sustained an indefinite sentence, whereas he regards other prisoners with similar histories of offending as not having been singled out for such treatment. Nevertheless, he freely acknowledges his wrongdoing and expresses remorse in response to questioning."

Community attitudes to the applicant's potential release

[56] At para [45] above, reference was made to Mr Pethick's comments on community attitudes towards the possible release of the applicant from imprisonment. Ms Cox tendered thirteen affidavits from persons who support the conditional release of the applicant.

[57] In general terms the affidavits addressed possible release of the applicant upon conditions that would require him to reside at Mamadawerre Outstation – a 'dry' community of some 60-70 persons situated around 100 kilometres, by road, east of Oenpelli. Other conditions of release contemplated by the makers of the affidavits included:

- a prohibition on the applicant leaving Mamadawerre Outstation for a period of three years except for urgent medical attention or with the approval of a Correctional Services Officer

- a prohibition upon the applicant consuming alcohol

- a requirement that the applicant be subject to supervision of Correctional Services and abide by reporting conditions

- a prohibition upon the applicant approaching within 100 metres of the Mamadawerre School when the visiting teacher is in attendance

- a requirement to obey the lawful and reasonable instructions of a senior community elder – Isiah Burrundi (or in his absence from Mamadawerre, Mukuguddu Nabegeyo).

[58] The affidavits of the following twelve persons are included in Exhibit 2:

(a) Isiah Burrundi – president of the Demed Association (the outstation organisation responsible for the provision of public services to outstations in the Oenpelli Region); senior elder / traditional owner of Mamadawerre outstation; full cousin of the applicant; resident at Mamadawerre outstation.

(b) Mukuguddu Nabegeyo – senior elder / traditional owner of Mamadawerre outstation; cousin of the applicant; resident of Mamadawerre outstation.

(c) Kenneth Manigru – senior elder; Deacon of the Anglican church; uncle of applicant; resident at Oenpelli but regular visitor to Mamadawerre outstation in connection with church business.

(d) Joseph Burmada – Councillor of Gunbalanya Community Council; elder of Oenpelli; resident at Banyan; cousin of applicant's mother.

(e) Grace Nawirridj – President of Gunbalanya Community Council; senior elder / traditional owner; aunt of the applicant.

(f) Davidson Nawirridj – cousin of the applicant; resident at Oenpelli but regular visitor to Mamadawerre outstation to visit daughter and son-in-law.

(g) Sandra Nababbob – sister of the applicant; resident of Oenpelli and regular visitor to Mamadawerre outstation.

(h) Andrew Marralngurra – cousin of the applicant; resident of Oenpelli; Church of England member.

(i) Terry Marralngurra – nephew of the applicant; resident at Banyan; visited applicant in prison over past four to five months.

(j) Stephanie Nababbob – mother of applicant; resident at Mamadawerre outstation.

(k) Christine Nababbob – cousin of the applicant; resident at Oenpelli.

(l) Edna Nabbob – cousin of the applicant; resident at Oenpelli.

[59] Each of the persons named at (a) to (h) above gave evidence on behalf of the applicant.

[60] In addition to the affidavits included in the applicant's booklet of material (Exhibit 2), Ms Cox also tendered an affidavit (Exhibit 10) sworn by Yvonne Margarula. Ms Margarula is Chairperson of the Gundjehmi

Aboriginal Corporation, a Mirrar traditional owner, a member of the Board of Kakadu National Park, a trustee of Gagudju Children's Trust and a director of Gagudju Enterprises. She is a niece of the applicant and states that she has known the applicant for all of her life and has spoken to the applicant by telephone "about once a month" whilst he has been in prison.

[61] On behalf of the respondent, Mr Wild QC tendered a statutory declaration (Exhibit 5) from a member of the applicant's family – Mr Charlie Nalolmani. Mr Nalolmani also gave evidence. He is the applicant's uncle – albeit he has not met the applicant since the 1980s. Mr Nalolmani is a traditional owner of the land around Mamadawerre outstation.

[62] It is not necessary to detail the evidence of the applicant's family members in detail. Each of those who had sworn affidavits or made a declaration and/or gave evidence supported the conditional release of the applicant. In particular, each of the family members agreed that the applicant should be required to stay at Mamadawerre outstation for an initial period of three years and only be permitted to leave for urgent medical attention or with the approval of a Correctional Services Officer.

[63] The senior elders and traditional owners (Isiah Burrundi, Mukugudda Nabegeyo, Kenneth Manigru, Grace Nawirridj, Jospeh Burmada and Charlie Nalolmani) are each willing to supervise the applicant and provide him with guidance and support. Each was confident that the applicant would act in compliance with their reasonable instructions. The senior elders and

traditional owners had consulted family members of the applicant and residents of Mamadawerre outstation. Their evidence was that there was unanimous support for the release of the applicant from prison upon the basis that the would reside at the (dry) outstation and be subject to strict conditions of supervision. In broad terms, the family members considered that the applicant had spent sufficient time in prison and should now be released to live in his own country with the support and guidance of his family members.

[64] Aside from members of the applicant's extended family, Mr Wild QC called evidence from two other witnesses relevant to community attitudes as to the applicant's potential release from prison – Mr Geoffrey Camp and Mr Christopher McDougall.

[65] Mr Camp is the manager of the Oenpelli Health Centre. The Centre provides health services, including the provision of doctors and nurses to Oenpelli and the surrounding region, including Mamadawerre outstation.

[66] The present practice is that a doctor and nurse team from the Oenpelli Health Centre visit Mamadawerre outstation every two to three weeks. For the future, arrangements are being made for a lone nurse to visit and camp overnight at the outstation every one to two weeks. Mr Camp gave evidence that in the light of the applicant's criminal record he would have some concerns for the safety of a visiting nurse if the applicant was released on conditions requiring him to stay at Mamadawerre outstation. Mr Camp's

evidence was that it was likely the nurse appointed to visit the outstation would be female. No applications had been received from male nurses. Mr Camp suggested that the proposed arrangements for a lone female nurse to visit and camp overnight at Mamadawerre outstation might have to be reviewed if the applicant was released to live at that community. He would be willing to discuss appropriate arrangements for providing security for a visiting nurse with the senior elders of the outstation. With respect to the provision of medical services to the applicant, Mr Camp considered that the applicant's heart condition posed no particular or unusual difficulties. He noted that many persons in the region suffered medical conditions as bad as, or worse, than the applicant.

[67] Mr McDougall is the general manager of the Demed Association. In that capacity, he has operational responsibility for the provision of public services to outstations, including Mamadawerre, in the Oenpelli region. Mr McDougall's evidence was to the effect that, in view of the applicant's criminal history, he would feel obliged to inform staff members visiting Mamadawerre of the applicant's past offending and the potential risk to their personal safety. However, Mr McDougall acknowledged that it was commonplace for offenders to be released from imprisonment on parole and required to stay at remote outstations for a particular period. In this regard, Mr McDougall considered that the possible release of the applicant from prison with a requirement to stay at Mamadawerre outstation was not an issue of particular concern.

Submissions and Decision

[68] The applicant sought and was granted leave to apply for recommendations in the alternative for the discharge of the declaration of the applicant as an habitual criminal or his release on licence. Having regard to the manner in which the proceedings developed, I think it is fair to say that, while not formally abandoning the application for a recommendation for discharge, Ms Cox did not press this aspect of the application with any vigor. In practical terms, the applicant's case and the proceedings as a whole were directed to securing his release on strict conditions requiring him to stay at the dry community of Mamadawerre outstation for a period of three years. I approach the matter on that basis. For the avoidance of doubt, I will simply add that, having regard to the whole of the evidence, it would be entirely unrealistic to recommend that the applicant's declaration as an habitual criminal be discharged and that he be released unconditionally from imprisonment. Such a recommendation would be an affront to the community generally having regard to the dearth of evidence supporting reformation of the applicant and the absence of any evidence supporting such a recommendation.

[69] Ms Cox conceded, correctly in my view, that the applicant bears the onus (on a balance of probabilities) that he has "sufficiently reformed or for some other sufficient reason" should be released on licence.

[70] In Ms Cox's submission, there was some evidence of the applicant's reformation, albeit she submitted that this was a difficult matter to determine while the applicant remained in a prison environment with no date fixed for his release and where he was subject to constant and unrelenting scrutiny of his actions and behaviour.

[71] Ms Cox emphasised the opinion of Dr Lester Walton that the applicant does now, in contrast to the past, acknowledge his wrongdoing and express remorse. Dr Walton also considers that the applicant's commitment to remain alcohol-free is genuine and that the applicant's state of health, coupled with his intelligence, is such for the applicant to clearly appreciate that a lapse into alcohol abuse and the offending so often associated with it would in all likelihood see him die in prison.

[72] Ms Cox submitted that the applicant's participation in rehabilitative programmes in 1999 and 2000 (anger management, ending offending and domestic violence) demonstrated a very significant change in the applicant's behaviour and attitudes. Ms Cox also submitted that the fact that the applicant had been convicted of only one offence during nearly twelve years imprisonment (aggravated assault conviction of 13 June 1997) was further evidence of the applicant's reform.

[73] It was submitted that evidence of the applicant's reformation in combination with other "sufficient reasons" for his release on licence would justify a favourable recommendation to the Administrator.

[74] Leaving to one side other "sufficient reasons" alleged to warrant the applicant's release on licence, I agree with Mr Wild's characterisation of any sign of reform in the applicant as "faint". The annual reports to the Minister of Correctional Services over a period of ten years paint a picture of the applicant as manipulative, threatening, aggressive, socially disruptive and a constant source of irritation, or worse, to both fellow inmates and Correctional Services Officers. None of the factual material or the assessments included in the annual reports was the subject of challenge by the applicant.

[75] Dr Walton's success in extracting acknowledgements of past wrongdoing and expressions of remorse under expert questioning does not, in my view, either provide any convincing evidence of a genuine appreciation by the applicant of the enormity of his past behaviour or indicate some genuine resolve to mend his ways for the future. Dr Walton's observation that rather than spontaneous utterance of remorse "conversation repeatedly turns to regarding himself as being a victim of injustice" is much more to the point. This is consistent with the observations of Correctional Services Officers over many years and consistent with the oft-repeated assessments that the applicant regards himself as superior to others and "above the law".

[76] The applicant's participation in rehabilitation programmes in 1999 and 2000 is a small positive sign in his favour. However, of much greater significance, in my view, is the applicant's refusal to participate in the sex offenders' treatment program because of a reluctance to discuss his past

wrongdoing. Ms Cox speculated that such reluctance may stem from cultural values or reasons, but there has been no explanation from the applicant himself. In the applicant's case, the general community would undoubtedly consider it a crucial matter in considering the applicant's possible release as to whether he had received treatment for his past pedophilic conduct and with what result.

[77] Ms Cox referred to the case of *O'Shea v DPP* (1998) 71 SASR 109 which concerned an application for discharge or release on licence by a man serving an indeterminate sentence by reason of his capacity to control his sexual instincts. There, in the context of legislation very different from the present case, Perry J held that where the risk of offending is more than "slight" other factors such as the length of detention and the futility of further detention may swing the balance in favour of discharge. Perry J also held that whilst the interests of the community must be recognised, this does not mean that a person who poses a risk must be detained until the risk is removed. While I would not dissent from such propositions, it is important to recognise that almost the entire weight of medical opinion in *O'Shea* was to the effect that there was no realistic prospect of effective treatment for the applicant. There the applicant had participated extensively in sex offender treatment programmes. In the present case, the applicant has refused to participate and there is no expert evidence as to the likelihood of the applicant committing further sexual offences against children. There is also no evidence from the applicant as to the veracity of his assertions to

Dr Walton and others that he will abstain from alcohol for life and not commit further offences.

[78] I am satisfied that the applicant falls woefully short of having established that he has "sufficiently reformed" to warrant a recommendation for release on licence.

[79] At paragraph [39] above, I referred to the July 2000 report of Superintendent Williams and his assessment that:

> "Signs are that he can perform at an acceptable level and he can distinguish what is acceptable behaviour and that which is not acceptable … He understands that it is up to him to maintain a consistent acceptable standard if he wishes to progress through the classification streams eventually achieving the lowest security rating available for his length of sentence and status."

[80] The applicant, if he wishes to establish that he has "sufficiently reformed" to warrant a recommendation for discharge or release on licence would do well to achieve and maintain that "lowest security rating" for an extended period, coupled with active participation in the sex offenders' treatment programme and other relevant rehabilitation programmes. As things presently stand, evidence of the applicant's reformation is minimal, bordering on the non-existent. The opportunity and capacity to change that assessment lies exclusively in the applicant's hands.

[81] I turn now to the "other sufficient reasons" advanced on behalf of the applicant in support of a favourable recommendation for his release on licence. I observe immediately that Mr Wild QC, while contesting that the

applicant had demonstrated any substantial reform, did submit that there was more substance in the other matters advanced on the applicant's behalf.

I think it is fair to say that the respondent accepted that there are significant reasons to recommend the applicant's release, but only on the basis of strict conditions for the applicant's supervision and control for a period of at least three years.

[82] The submissions of Ms Cox on behalf of the applicant were advanced under a variety of headings that overlapped to a considerable degree. In broad terms, the submissions can be canvassed under the interests of the applicant and the public interest. Section 399(2) (repealed) of the *Criminal Code* provides no guidance for assessing what "other sufficient reasons" would justify a favourable recommendation for discharge or release on licence. The breadth of the discretion provided by the legislation is such that it would not be helpful, if indeed possible, to attempt to specify an exclusive list of criteria for a favourable recommendation.

[83] I think it is clear that s 399(2) requires essentially a balancing exercise between the interests of the applicant and those of the community generally. The reference to "other sufficient reasons" for a favourable recommendation as an alternative to the applicant "having sufficiently reformed" indicates that it is not a prerequisite to an exercise of discretion in favour of an applicant that the court must be satisfied that there is no risk to the community of further offending if the applicant is released. On the other hand, the level of risk of re-offending is obviously a matter of major

relevance in considering whether to recommend a release on licence on the basis of "other sufficient reasons". In this respect, the applicant's burden in persuading the court to recommend a release on licence may well be substantially less than that to warrant a recommendation for discharge. This follows from the discretion to recommend conditions for an applicant's release that would minimise or at least substantially reduce the applicant's opportunities for further offending.

[84] In the applicant's case, the interests of the applicant which weigh in favour of a recommendation for his release on licence include the length of time he has spent in prison and the state of his health.

[85] The applicant has been imprisoned since 23 July 1989 – that is a period little short of twelve years. He has been detained as an habitual criminal at the Administrator's pleasure since July 1995 (the expiry of the six year sentence imposed by Nader J) aside from a period of ten months (as a result of his 1997 conviction for aggravated assault). It cannot be doubted that the applicant has served a sentence substantially longer than any sentence that realistically could have been imposed for the offences dealt with by Nader J.

[86] In a sense the length of the applicant's detention is both the strongest point in favour of a recommendation for his release and, having regard to his conduct during that detention, the strongest point against such a recommendation. I agree with the submission of Ms Cox that the purpose of a declaration under s 397 (repealed) of the *Criminal Code* is preventative

not punitive. However, having regard to the lack of any substantial sign that the applicant has embarked on reforming himself, this is not a case where continued imprisonment is futile. The weight of the evidence is that the applicant is capable of acceptable and law-abiding behaviour but over the years of incarceration has chosen to ignore prison rules and regulations, ignore the rights of others and relentlessly pursue his own selfish objectives. He has consistently failed to avail himself of available opportunities to demonstrate his rehabilitation by, for example, achieving a low security rating and participating in the sex offenders' treatment programme. There can be little faith in hearsay declarations by the applicant to lead an alcohol-free and law-abiding life in the face of the applicant's persistent refusal to abide by prison rules and regulations and to engage in conduct which is socially disruptive, abusive, threatening and manipulative. In relation to the latter, I emphasise again that there was no attempt by the applicant to challenge the contents of the annual reports about the applicant's progress in prison.

[87] Ms Cox speculated that the applicant's behaviour and attitudes may improve once he is removed from the restrictions of prison life where he is subject to constant surveillance. Mr Pethick fairly conceded that this was a possibility. However, it is not unreasonable to question how realistic it is to suggest that the applicant will adopt a law-abiding life in the wider community when he has chosen for years to disregard what is required of him in a closely supervised environment. It is clear from all the available

evidence that Correctional Services Officers have not succeeded in successfully managing the applicant in an alcohol-free environment. I have little or no confidence that the senior elders of the applicant's own community are likely to fare any better if the applicant was to be released into their care and guidance.

[88] It was submitted that the applicant's health was a factor militating in favour of a recommendation for his release on licence. Ms Cox submitted that the onset of the applicant's cardiac condition was a significant change in his circumstances. Ms Cox referred to the applicant's fear of dying in prison and stressed the observations of Dr Walton that the applicant realises the potential fatal consequences of future alcohol abuse. It was submitted that such a realisation would be a powerful inducement to lead a life free of alcohol and crime in the knowledge that a failure to reform would almost certainly result in an early death behind bars.

[89] Such evidence as is available (in particular Mr Pethick's references to Dr Wake's medical reports in Exhibit 4) does not support the contention that the applicant's condition is of particular seriousness. The applicant suffers from stable angina and non cardiac chest pain. His health is reported to be stable and the applicant is reported to be well medicated and subject to regular review. The annual reports prepared during the applicant's imprisonment suggest that while the applicant's state of health has had an effect on what work is available to him, the major impact of the applicant's

condition has been to provide a basis for manipulating the prison system to meet his own ends.

[90] I am not satisfied that the applicant's state of health provides a substantial reason to recommend his release on licence. It may amount to a small factor in favour of a favourable recommendation but cannot be determinative of the present application.

[91] In addressing the applicant's length of imprisonment and lack of reformation, I have canvassed evidence relevant to the general community interest in the present application. I have referred to the evidence adduced on the applicant's behalf as to the attitude of members of his own community. The witnesses and makers of affidavits were unanimous in supporting the applicant's release on strict conditions. This is unremarkable given the fact that all such persons were members of the applicant's extended family. The report by Mr Pethick (Exhibit 4) suggests that support for the applicant's release is confined to members of the applicant's family. At paragraph [45] I have reproduced Mr Pethick's comments concerning community attitudes towards the potential release of the applicant. I have also addressed and rejected Ms Cox's objection to this part of Mr Pethick's report.

[92] I am satisfied that there is strong family support for the release of the applicant. It would be surprising if it was otherwise in the context of Aboriginal traditional family obligations. I accept that all of the applicant's

family members who gave evidence were genuine in their wish to see the applicant returned to his country and genuine in their commitment to provide him with support and guidance. However, a noteworthy feature of the evidence from family members was the almost complete lack of contact that any had had with the applicant since his imprisonment.

[93] Mukuguddu Nabegeyo gave evidence that he had seen the applicant when he was permitted to attend a family funeral some time ago and again in 2000 at Berrimah gaol. Andrew Marralngurra had not spoken to the applicant for 10 to 15 years, but had received a letter from him. Davidson Nawirridj had spoken to the applicant around two years ago at a funeral held in Oenpelli. Terry Marralngurra states in an affidavit that he has visited the applicant in prison during the last four to five months. Yvonne Margarula states in an affidavit that she has spoken to the applicant by telephone once a month during his time in prison. No other family member referred to any contact with the applicant during the last twelve years, let alone regular contact. In the circumstances, the confidence of family members that the applicant would accept their guidance and support in leading a law-abiding life must be open to doubt. The annual reports of Correctional Services support the view that the applicant is a person of strong personality who is prepared to resort to abuse, threats, violence and manipulation to achieve his own ends. In the absence of any evidence from the applicant that he would submit to the guidance and directions of community elders, I am not persuaded that

the family members would have any substantial moral authority or influence over the applicant.

[94] Mr Wild QC suggested a number of detailed conditions that might form the basis of a recommendation to release the applicant on licence. Such conditions would require the applicant to stay at Mamadawerre outstation for a period of three years (and not leave except for medical emergencies or with the permission of a probation officer), abstain from alcohol, obey lawful and reasonable directions of named senior elders and be subject to supervision of Correctional Services. I do not consider that it necessary to address the proposed conditions.

[95] I consider that, in the absence of any substantial indication that the applicant has reformed or is prepared to do so, the other reasons advanced on behalf of the applicant are not sufficient to warrant his release from imprisonment. In weighing the balance between the applicant's interests and those of the wider community, I am satisfied that the scales tip heavily in favour of continued detention of the applicant in the public interest. The public interest is not confined to the applicant's extended family nor the residents of the outstation to which it was proposed he be sent. On the materials presently available, the applicant has failed in discharging his burden of satisfying the court that he should be recommended for release. I am not satisfied that the length of the applicant's imprisonment, his state of health and the family support available to him is sufficient to outweigh the risk of further serious offending by the applicant. I am not satisfied that any

conditions which might be proposed to be attached to his release on licence would be sufficient to alleviate that risk of serious re-offending.

[96] Accordingly, the application for a recommendation to the Administrator that the applicant be discharged or released on licence is refused. I add that this decision should not be interpreted as an indication that the applicant should never be recommended for release. I hope it is apparent in the reasons that I have attempted to express that the principal reason for the refusal of the present application is the scant evidence of any genuine reformation by the applicant. The remedy to this deficiency lays largely in the applicant's hands. The applicant can choose to change his behaviour and attitudes with a view to achieving and maintaining a low security rating. The applicant can choose to participate in the sexual offenders' treatment programme. The applicant can choose to seek the guidance of senior members of his community by correspondence, telephone contact or encouragement of personal visits. The applicant can offer to undertake a residential alcohol abuse programme as a condition of his release on licence. If he adopts such measures, there can be little doubt that he would advance considerably his prospects of receiving a favourable recommendation in any future application for discharge or release on licence.