PARTIES:	CAREY SLATTERY v GEOFFREY IAN DAVIS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
FILE NOS:	No. 9 of 1993
DELIVERED:	At Alice Springs, 19 February 1993
HEARING DATES:	16 and 17 February 1993
JUDGMENT OF:	Kearney J

CATCHWORDS:

Appeal - General Principles - Justices appeal - parties to appeal - Notice of Appeal signed by solicitor - whether appeal competent

Justices Act, ss29, 163, 172 and 203
Justices Regulations, Form 63
Supreme Court Rules 83.03(a) and 83.05(1)

Appeal - General Principles - Justices appeal - Federal offence - appeal against conditional release - whether appeal competent

Justices Act, s163
Crimes Act 1914 (Cth), par20(1)(a) and s20(3)
Bantick v Blunden (1981) 58 FLR 414, distinguished
R v Abedsamad [1987] V.R. 881, distinguished

Fraud - "dole cheating" - principles of sentencing

Sentencing - Crown appeal - general principles

R v Wilton (1981) 4 A Crim R 5, followed
R v Ireland (1987) 49 NTR 10, applied
R v Bird (1988) 56 NTR 17, applied

Sentencing - whether sentence manifestly inadequate - principles applicable - guidelines to determine adequacy

R v Hall (1979) 28 ALR 107, applied
R v Flaherty (1981) 28 SASR 105, followed
R v Osenkowski (1982) 30 SASR 211, referred to
R v Anzac (1987) 50 NTR 6, applied
R v Bird (1988) 56 NTR 17, applied
Griffiths v The Queen (1989) 167 CLR 372, applied

Sentencing - whether sentence manifestly inadequate - desirability of warning before substantially departing from current standard of penalties - approach to increasing penalty

Yardley v Betts (1979) 22 SASR 108, followed
R v Peterson (1983) 11 A Crim R 164, followed
Breed v Pryce (1985) 36 NTR 23, applied
Poyner v The Queen (1986) 66 ALR 264, applied

Sentencing - "dole cheating" - applicable sentencing guidelines - "need" or "greed" guide - use of tariff schedule - desirability of consistency in sentencing throughout Australia - significance of increasing prevalence of offence - social importance of heavy penalties

Graham v Bartley (1984) 57 ALR 193, followed
Laxton v Justice (1985) 38 SASR 376, followed
R v Scherf (1985) 18 A Crim R 209, followed
Johnstone v Gibson (1987) Tas.R. 14, referred to
R v Watene (1988) 38 A Crim R 353, followed
R v Medina (unreported, Court of Criminal Appeal (NSW), 28 May 1990), followed
Glenwright v Growden (unreported, 27 September 1990), followed
R v Winchester (1992) 58 A Crim R 345, followed

Sentencing - non-appearance of complainant at adjourned hearing - entitlement to inspect and address upon presentence report - whether Court required to further adjourn prior to sentencing - responsibility of legal practitioner as to attendance in Court

R v Webb [1971] VR 147, followed
R v Carlstrom [1977] VR 366, followed
Stanton v Dawson (1987) 3 A Crim R 104, followed

REPRESENTATION:

Counsel:

Appellant:	C.J. Stirk
Respondent:	R. Allen

Solicitors:

Appellant:	McBride & Stirk
Respondent:	N.T.L.A.C.

Judgment Category Classification: CAT A

Court Computer Code:

Judgment ID Number: kea93005J

Number of pages: 21

General Distribution

kea93005J

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. 9 of 1993

IN THE MATTER of the Justices Act

AND IN THE MATTER of an appeal from a decision of the Court of Summary Jurisdiction at Alice Springs

BETWEEN:

CAREY SLATTERY
Appellant

AND:

GEOFFREY IAN DAVIS
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 19 February 1993)

The appeal

This is an appeal against an order made by the Court of Summary Jurisdiction at Alice Springs on 19 January 1993. The proceedings were instituted by the appellant by Summons charging the respondent with offences under para239(1)(b) of the Social Security Act 1947 (Cth) (herein "the Act"). The Court convicted the respondent and, pursuant to para20(1)(a) of the Crimes Act 1914 (Cth),

directed that he be released without being sentenced, on his entering into a Recognizance in the sum of $1000 to be of good behaviour for a period of 2 years.

[His Honour set out para20(1)(a) of the Crimes Act and continued:]

In the Notice of Appeal the appellant contends that in making the order for post-conviction conditional release the learned Magistrate erred in two respects, viz:-

> "1. - - - in imposing a sentence without giving opportunity to the complainant to make submissions on the pre-sentence report.
>
> 2. The sentence is manifestly inadequate".

Is the appeal competent?

(a) Notice of Appeal signed by solicitor for the appellant

The Notice of Appeal was signed by a legal practitioner "for and on behalf of the Australian Government Solicitor". It is not in issue that it was signed as solicitor for the appellant; it was therefore in accord with r83.05(1) of the Supreme Court Rules. However, these Rules regulate appeals under the Justices Act only "to the extent that no other procedure is provided" in that Act; see r83.03(a). Section 172 of the Justices Act deals with notices of appeal, s203 is a regulation-making power, and Form 63 in the Justices Regulations sets out the form of Notice of Appeal to be used. It indicates that the Notice of Appeal should be signed by the appellant. Section 163(1) of the Justices Act, which gives a "party" the right of appeal, is set out below. Mr Stirk ultimately relied on s29

of the Justices Act as authorizing the solicitor to sign the Notice of Appeal. Section 29 provides:-

> "Every party to any proceeding before Justices shall be at liberty to conduct his case or to make his application or his full answer to the charge or complaint (as the case may be) and to have the witnesses examined and cross-examined, by a legal practitioner: - - -" (emphasis mine)

I consider that the better view is that s29 does not apply to the appeal process and that the Notice of Appeal should have been signed by the appellant, as required by Form 63. However, the respondent does not take the point and, in the circumstances, it is of a formal nature and I do not consider it renders the appeal incompetent.

(b) Does appeal lie from a conditional release before sentence?

The right of appeal to this Court is contained in s163 of the Justices Act which provides, as far as material:-

> "(1) A party to proceedings before the Court may appeal to the Supreme Court from a conviction, order, or adjudication of the Court - - - on a ground which involves -
>
> (a) sentence;
> - - -
>
> as hereinafter provided, in every case, - - -."

In this case no "sentence" was imposed, in terms of s163(1), and so on the face of it no appeal lies; cf *Bantick v Blunden* (1981) 58 FLR 414 and see *R v Abedsamad* [1987] V.R. 881 and the authorities cited therein. Mr Stirk submitted that s20(3) of the Crimes Act nevertheless allowed an appeal against the order for conditional release; it provides, as far as material:-

"(3) Where a person is released in pursuance of an order made under subsection (1) without sentence being passed on him, there shall be such rights of appeal in respect of the manner in which the person is dealt with for the offence or each offence in respect of which the order is made as there would have been if the manner in which he is dealt with had been a sentence passed upon his conviction for that offence."

It is clear that s20(3) has the effect for which Mr Stirk contends. The appeal against the order for conditional release is competent.

Background to the proceedings

In August 1992 the appellant, an officer of the Department of Social Security (herein "the Department"), caused a Summons to issue under the Justices Act, charging that the respondent had committed 25 offences under para239(1)(b) of the Act, in 1989 and 1990. Para239(1)(b) of the Act provides, as far as material:-

"A person shall not -

- - -

(b) knowingly obtain payment of - - an instalment of - - a - - benefit - - part of which is not payable;

- - -."

Charge no.6 is typical of these 25 charges which differ only as to dates, the same basis - non-disclosure of a de facto partner's earning - being alleged in each, viz:-

"(6) - - on or about 16th day of November 1989 at Alice Springs - - did knowingly obtain an instalment of a Benefit part of which was not payable in that he applied for and was paid Unemployment Benefit for the period 3 November 1989 to 16 November 1989 which he knew was not payable because his partner had

earned income during that period, which he did not declare.

Contrary to paragraph 239(1)(b) of the Social Security Act 1947."

This offence is commonly known as "dole cheating". It has become increasingly prevalent over the years; particularly as economic times are hard and the legitimate demands of those truly in need upon the limited social security safety net increase, it is necessary that sentences for this offence be seen to reflect an element of stern general deterrence.

The proceedings in the Court of Summary Jurisdiction

When the charges came on before the Court on 20 November 1992, both parties were represented. By leave, the first 5 charges were withdrawn.

The respondent then pleaded guilty to charges nos.6-25. He admitted that he had lodged the 20 claims for unemployment benefits at the Department's Alice Springs Regional Office at various times in the period 16 November 1989 to 17 October 1990, when he was not entitled to all of those benefits (for the reasons set out above), and that his claims had been granted and monies paid to him at the prescribed single rate. He was then convicted of these 20 offences.

Pursuant to s16BA of the Crimes Act 1914 (Cth) he admitted he had committed 30 similar offences between 31 October 1990 and 11 December 1991, as detailed on the

appropriate form, and asked that they be taken into account when he was sentenced.

Ms Cory of counsel for the complainant submitted that a useful rough guide to be applied in deciding when a sentence of imprisonment may be appropriate in terms of s17A(1), was whether the offence was committed for reasons of "need or greed". If the Court considered that the respondent had committed the offences mainly out of "greed", the authorities showed that a sentence of imprisonment could be appropriate. I observe that it is regarded as a common mitigating factor in cases such as this that the offender "was in real financial need and was not motivated by greed"; see *Graham v Bartley* (1984) 57 ALR 193 at 198. Ms Cory submitted that the present case fell within a "grey area", the continuum between a clear case of "need" and one of "greed". See also *R v Scherf* (1985) 18 A Crim R 209, on these concepts.

Ms Cory handed up a "tariff schedule". This sets out brief details of the facts of the 59 offences under para239(1)(b) of the Act which have been dealt with by Courts of Summary Jurisdiction in the Territory in the 2 years between November 1990 and November 1992.

[His Honour then set out an analysis of the schedule, the submissions in mitigation, and continued:]

When the Court resumed on 19 January, no-one appeared for the complainant-appellant. I am told that Ms Johnston was engaged in another court at that time, but his Worship was not informed of that and proceeded to

sentence in her absence. A presentence report of 7 January 1993 which had been received was passed to Ms McCrohan who submitted that it was "very similar to my submissions" and asked that the Court "particularly take into account the recommendation".

[His Honour set out the observations in the presentence report and continued:]

His Worship proceeded to sentence as follows:-

> "- - - I take into account all that's been put to me. I also take account of the 30 offences that you've asked me to take into consideration in dealing with this. I've read the [presentence] report and I take particular note of that report. I'm going to take an unusual step in as much as normally in cases such as this you would be looking at imprisonment, all right. But you understand now your obligations. [His Worship had previously checked with Ms McCrohan that the respondent was prepared to enter into a bond and was making repayment at $100 per week.] What I propose to do is to proceed under section 20, sub-section 1(a) of the Crimes Act. I'm going to convict you on all offences. I'm not going to pass sentence. I'm going to release you in the sum of $1000 in your own recognizance with a condition that you be of good behaviour for 2 years". (emphasis mine)

His Worship then explained to the respondent his obligations under the Recognizance and concluded:-

> "Now as I say it's a step which courts do not usually take because a fraud on the public revenue is considered a serious matter, but in light of what has been put to me, in particular in the pre-sentence report, I'm going to proceed as I've told you." (emphasis mine)

The appeal

The complainant appealed by Notice of Appeal dated 25 January 1993 on the 2 grounds set out at p2.

(a) The appellant's submissions

(i) The first ground of appeal (see p2)

As to the first ground, Mr Stirk filed by leave an affidavit by Ms Johnston, in which she explained that she had been at the Courthouse on 19 January 1993 at 10 am, and there:-

> "- - - spoke to the orderly who was dealing with the main list and was informed that [his Worship] would be dealing with this matter in Court 2. I advised her that I had a number of matters to attend to that morning and requested that she have me called prior to the matter being called on. Notwithstanding this, I was later advised that the matter had been dealt with in my absence."

Mr Stirk submitted that what had then occurred highlighted a need to review the use made by courts of presentence reports. It was clear that in this case his Worship had paid great regard to what was in the report, when sentencing; I accept that. All parties were entitled to know what was in such a report, and to have an opportunity to correct any mis-statements of facts or opinions therein which they wished to challenge, prior to the case being disposed of. I accept that. He referred to *R v Webb* [1971] VR 147, where the use of presentence reports and the extent to which their contents may be challenged on appeal was dealt with. In that jurisdiction, pursuant to certain statutory provisions, the Judge has a discretion whether or not to disclose a presentence report to the parties. The Full Court at p152 was of the view that if the Judge decided to disclose the report to the parties this should be done -

> "- - - before the sentence is pronounced in order that the parties may have an opportunity at that stage of dealing, if they so desire, with any of the matters stated in the report. If the report is only made available, as apparently it was in this case, after judgment has been delivered, then difficult and deep-seated questions of policy are likely to arise if it is sought, upon appeal, to adduce evidence relating to matters stated in the report."

See also *R v Carlstrom* [1977] VR 366 at 368.

Mr Stirk submitted that in this jurisdiction it was fundamental that except in exceptional circumstances a presentence report should be disclosed to counsel for the parties prior to sentence, and they should be afforded an opportunity to make submissions on it, as it constituted material which the Court could take into account when sentencing. As I say, I accept that proposition, which accords with the practice in the Territory. I also note *Stanton v Dawson* (1987) 3 A Crim R 104, referred to by Mr Allen of counsel for the respondent, which stresses that an accused person cannot be sentenced on the basis of material that is not known to him, and that his legal advisers ordinarily are required to convey to him any material known to them; clearly, that includes material in a presentence report.

Mr Stirk ultimately submitted that in the circumstances which obtained here, his Worship was required to desist from proceeding to sentence, and to adjourn proceedings until counsel for the complainant appeared. I do not accept that proposition. A party cannot complain that he was not afforded an opportunity to examine relevant material placed before the Court, when the reason for that lay in his own failure to appear in court at the appointed

time without properly first ensuring that the court was informed of the reason he was not there.

No doubt the informal, casual arrangement used in this case usually works satisfactorily in a small centre like Alice Springs, but responsibility clearly lies on a legal representative to ensure that any unavoidable inability to attend at the appointed hour is drawn to the Court's attention; this is often most conveniently done through the legal representative of the other party.

(ii) The second ground of appeal - manifest inadequacy

As to the general principles applicable on a Crown appeal against sentence, Mr Stirk relied on *R v Bird* (1988) 56 NTR 17 at 20-21, viz:-

> "The principles that apply to the consideration of a Crown appeal are now well established by decisions of this court and we need only refer to them briefly. They are to be found in *R v Allinson* (1987) 49 NTR 38 and *R v Anzac* (1987) 50 NTR 6 and in unreported decisions of this court in *R v Hogon* [now reported at (1987) 30 A Crim. R. 399]; *R v Yates* (11 December 1986) and *R v Scanlon* (20 November 1987). Those principles were earlier conveniently summarised by a Full Court of the Federal Court of Australia in *R v Tait & Bartley* (1979) 24 ALR 473 at 476 in these words:
>
> > "An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge 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 said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error (see generally, *Skinner v R* (1913) 16 CLR 336 at 339-40; *R v Withers* (1925) 25 SR(NSW) 382 at 394; *Whittaker v R* (1928) 41 CLR 230 at 249 *Griffiths v R* (1977) 15 ALR 1 at 15-17).

> Although an error affecting the sentence must appear before the appellate court will intervene in an appeal either by the Crown or by a defendant, a Crown appeal raises considerations which are not present in an appeal by a defendant seeking a reduction in his sentence. Crown appeals have been described as cutting across 'time honoured concepts of criminal administration' (per Barwick CJ, *Peel v R* (1971) 125 CLR 447 at 452; [1972] ALR 231 at 233). A Crown appeal puts in jeopardy 'the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal' (per Isaacs J, *Whittaker v R*, supra, at 248). The freedom beyond the sentence imposed is, for the second time, in jeopardy on a Crown appeal against sentence. It was first in jeopardy before the sentencing court.
>
> It must be always borne in mind that this court has a "wide discretion whether or not to interfere, even though it may reach the conclusion that another sentence should have been passed", see *Griffiths v R* (1977) 137 CLR 293 per Jacobs J at 326; 15 ALR 1 at 29-30". (emphasis mine)

This states the law on the subject in the Territory. See also *R v Wilton* (1981) 4 A Crim R 5 at p6; and *R v Ireland* (1987) 49 NTR 10 at p27.

Mr Stirk also referred to p32 of *R v Bird* (supra), which deals with considerations which apply when it is sought to contend that a sentence was manifestly inadequate, viz:-

> "That the manifest inadequacy of a sentence could be relied upon as a ground of appeal was first suggested by Dixon, Evatt and McTiernan JJ in the High Court in *Cranssen v R* (1936) 55 CLR 509 at 520, viz: "- - - it is not necessary that some definite or specific error should be assigned. The nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the [sentencing] discretion has been unsound."
>
> Since the Crown relied only on the ground of manifest inadequacy, ex hypothesi Mr Gardner did not seek to pinpoint a specific error to show that the sentencing discretion had been improperly

> exercised. In the absence of an identified error, an appeal against sentence cannot succeed unless "upon the facts it [the sentence] is unreasonable or plainly unjust"; see the same three judges of the High Court two days earlier than the judgment in *Cranssen*, supra, in *House v R* (1936) 55 CLR 499 at 505. What yardstick is to be used to determine whether the sentence imposed was unreasonable or plainly unjust, and thus manifestly inadequate, when considered in relation to the offence and the circumstances of this case?
>
> The yardstick was identified by Barwick CJ in *Griffiths v R*, supra. Having referred to consistency in sentencing as a desirable feature of criminal administration, the Chief Justice said (137 CLR at 310; 15 ALR at 17): "Gross departure from what might in experience be regarded as the norm may be held to be in error in point of principle" (emphasis ours).
>
> The yardstick, then, upon which the Crown could normally rely as a measure of manifest inadequacy of sentence is evidence that the sentence imposed is well below the existing sentencing pattern for the particular type of the offence charged. This connotes the existence of something in the nature of a tariff". (emphasis mine)

Again, this states the law in the Territory. See also *R v Hall* (1979) 28 ALR 107. As to guidelines for determining manifest inadequacy, Sangster J in *R v Flaherty* (1981) 28 SASR 105 at 107-8 said:

> "To determine whether a sentence is erroneous in the sense of being manifestly excessive or manifestly inadequate, it is necessary to consider it against the maximum sentence prescribed by law for the offence, the standards of sentencing customarily followed by the judges dealing with such offences, the place which the offender's conduct in the case under review occupies in the scale of seriousness of offences of that kind, and the personal circumstances of the offender,- - -."

I respectfully agree.

Mr Stirk submitted that his Worship should have made an order for the repayment of the monies obtained by the respondent on the basis that a reparation order is

usually made in cases of this type, as part of the sentencing process, at least when such an order can apparently be complied with by a respondent. The tariff schedule shows that in fact some 15 percent of the 59 offenders were ordered to pay reparation; in some other cases repayment had been voluntarily made or was in the course of being made, sometimes by deductions from benefits to which the offender was legitimately entitled. In some cases it may not have been practicable to seek an order for reparation.

Mr Stirk submitted that the tariff schedule showed that the norm for the disposition of cases such as this - that is, cases involving the obtaining of fairly large amounts, the fraudulent conduct extending over a fairly lengthy period - was a custodial sentence, which could be suspended on appropriate terms depending on the particular circumstances of the offender. He conceded that such a sentence could have been suspended in this case, in the light of the matters relied on by Ms McCrohan. Mr Stirk also submitted that this appeared to be the sentencing norm in other courts throughout Australia which deal with breaches of s239(1)(b) of the Act; however, no statistical material was adduced to support this proposition.

For sentencing principles which should be applied, Mr Stirk referred to the frequently-cited case of *Laxton v Justice* (1985) 38 SASR 376, an appeal by the Director of Public Prosecutions against a sentence on the basis it was manifestly inadequate. The defendant had committed 17

breaches of s138 of the Act, (a provision corresponding to s239, the Act having been amended and renumbered), the making of untrue statements in an application for unemployment benefit. He thereby obtained $1802. He had a bad prior record and had been sentenced to 4 months imprisonment, to be released after 28 days. Olsson J said at p381:-

> "Unfortunately little material was placed either before the learned Magistrate or this Court as to the degree of continued prevalence of this type of offence or of statistics indicating current sentencing tariff trends. All that can be said with confidence is that the offence has become prevalent in recent years and that there has been a developing trend towards imposing custodial sentences, for first offences, in absence of substantial mitigating circumstances. Even so it is difficult to perceive any particular consistency of tariff. It seems to me that, until some greater degree of stability of sentencing approach evolves, the prosecution should supply sentencing magistrates with as much information upon the above topics as is reasonably feasible.
>
> For present purposes there are three decisions which are of some assistance. They are, sequentially, *Taormina v Cameron* (1980) 24 SASR 59, *Scott v Cameron* (1980) 26 SASR 321 and *Payne v Bartley* (unreported, Prior J., 26 November, 1984.). It is possible to distil the following propositions from those authorities:
>
> (1) Offences of this type are now prevalent. The offence is difficult to detect and penalties should reflect a concern for the protection of the revenue.
>
> (2) Frauds of this kind must be viewed seriously because they threaten the basis of the social security system which is designed to provide financial security for those in the community who are in need. A deterrent penalty is called for.
>
> (3) It is relevant to regard a continuing series of frauds of this type as increasing the moral blameworthiness of the offender's deceits by way of contrast with single or short term offences.

> (4) Whilst it may be proper in cases of first offences of this type accompanied by mitigating circumstances to impose a fine, nevertheless a custodial sentence may well be appropriate in the case of serious frauds unaccompanied by substantial mitigating circumstances." (emphasis mine)

I respectfully agree with these propositions. In the intervening 7 years the offence has become increasingly prevalent. I understand that Magistrates in this jurisdiction are now routinely supplied in prosecutions of this type with tariff schedules such as the one tendered in this case. This has clearly enabled a desirable measure of consistency of sentencing within the Territory. It is important, however, where the offence is under a Commonwealth Act and is very frequently prosecuted all around Australia, that as far may be there is a measure of consistency in sentencing Australia-wide. This throws an additional burden on the prosecution; see the observations of White J in *R v Scherf* (supra) at 215-6. See also *R v Watene* (1988) 38 A Crim R 353 at 357, per Carruthers J; cf. Roden J at 355.

I note that it may be that sentencing for this offence in the Territory is currently somewhat more lenient than in the rest of Australia; if this be so, it may be corrected if prosecutors draw upon materials which go beyond the Territory limits of the existing tariff schedules. There is a social importance in visiting heavy penalties on those who commit social security frauds; see *R v Watene* (supra). Increasing prevalence of a particular type of offence is a

factor which may point to more severe punishment; cf. *Johnstone v Gibson* (1987) Tas. R. 14.

Mr Stirk submitted that in this case, bearing in mind the relatively large amount involved and the extensive period of time over which the offences were committed, the disposition under s20(1)(a) of the Crimes Act was manifestly inadequate, and the need for an element of deterrence required that there be a suspended sentence of imprisonment.

(b) The respondent's submissions

Mr Allen submitted that it was imprudent of the court not to have allowed defence counsel to address on the presentence report. The relevant part of the transcript, after Ms McCrohan had perused the report, (p13) is as follows:-

> "MS McCROHAN: Your Worship, I just need to confirm one or two points with Mr Davis about this pre-sentence report. It accords with all of his instructions to me but I'd just like to make him aware of a few matters.
>
> HIS WORSHIP: I don't think that's necessary.
>
> MS McCROHAN: Yes, Your Worship. Well in my submissions - - -
>
> HIS WORSHIP: Anything you want to put?"

Ms McCrohan then proceeded to address briefly on the report. Accordingly, there is no substance in the point taken. I agree that Ms McCrohan should have been permitted to consult with her client on the report, for the reasons indicated earlier, but in the circumstances it was immaterial.

Mr Allen rightly conceded that, as far as the tariff schedule went, there was no case where the amount involved was more than $10,000, where a defendant had not

received a suspended sentence. However, he submitted that his Worship had clearly canvassed the option of imprisonment and had consciously decided that it was not appropriate in the circumstances. It is clearly correct that his Worship did so. Mr Allen submitted that it was within his Worship's sentencing discretion to take that approach, and the disposition under s20(1)(a) of the Crimes Act was not manifestly inadequate.

Two decisions of this Court

At a late stage in the proceedings Mr Stirk located two unreported relevant decisions of this Court. *Glenwright v Growden* (unreported, 27 September 1990) was a case quite similar to this. It involved a much lower amount, $3269.04. *Laxton v Justice* (supra) was referred to; so was *R v Scherf* (supra). As to the sentencing principles applicable to offences of this type, the opinion of Clarke JA in *R v Medina* (unreported, Court of Criminal Appeal (NSW), 28 May 1990) was approved, viz:-

> "[The cases] make it clear that in the case of a fraud on the social security system a custodial sentence should be imposed unless there exist very special circumstances justifying some lesser order." (emphasis mine)

This approach was also followed in *R v Winchester* (1992) 58 A Crim R 345. I consider that it is a useful current sentencing guideline. To somewhat similar effect were observations of Olney J in *Buchanan v Bain* (unreported, Supreme Court of Western Australia, 9 October 1987), and of Neasey J in *Fisher v Gibson* (unreported, Supreme Court of Tasmania, 18 August 1986). In *Culverwell v Jongen*

(unreported, Supreme Court of Western Australia, 21 May 1982) Burt CJ pointed out that -

> "- - - compassion and common sense are not to be elbowed out altogether, and one must have regard for the circumstances which are personal to the person to be dealt with."

The other case was *Morgan v Schrapel* (unreported, 4 October 1983) a case where the "greed" principle applied and Muirhead J considered that imprisonment was the only appropriate alternative.

Conclusions

I bear in mind that there is a strong presumption that the disposition attacked was correct, and that for the appellant to succeed it must be shown that a conditional release was clearly and obviously inadequate; see *R v Anzac* (1987) 50 NTR 6. I also bear in mind the cautionary note sounded by King CJ in *R v Osenkowski* (1982) 30 SASR 211 at 212-3. Appeals by complainants should not be allowed to circumscribe unduly the sentencing discretion of magistrates. I note in passing that in *R v Osenkowski* (supra) King CJ at p213 considered that the sentence should be increased to "vindicate and uphold the level of penalties which [the Court] has established as appropriate to this type of crime".

I consider that the disposition under par20(1)(a) of the Crimes Act, in the circumstances of the offences committed and of the offender, was manifestly inadequate. It fell well below the proper sentencing range, and constituted a gross departure from what experience shows was the sentencing norm. Clearly, his Worship was influenced by the content of the presentence report, which legitimately

took no account of the necessity for the disposition to reflect a need for stern general deterrence. I consider that the conditional release does not accord with the general moral sense of the community in that regard, and is unlikely to be a sufficient deterrence to like-minded persons, and militates against consistency in sentencing.

Accordingly, I uphold the appeal, quash the order made on 19 January 1993, and set aside the Recognizance entered into by the respondent. It is unnecessary to remit the case for re-sentencing; I proceed to sentence for the 20 offences of which the respondent was convicted, taking into account his other 30 offences. A single sentence may be imposed for all offences; I bear in mind that the aggregate sentence should justly and fairly reflect the total criminality of his conduct - see *Lade v Mamarika* (1986) 83 FLR 312.

I bear in mind the general sentencing principles in ss16A-D of the Crimes Act, and take into account such of the matters listed in s16A(2) as are relevant. I also bear in mind the restriction on imposing a sentence of imprisonment contained in s17A of the Crimes Act. I record that I have considered all other available sentences.

A sentence of immediate imprisonment would in my opinion be well warranted. However it is clear that that would not accord with the sentencing approach to offences of this seriousness, hitherto taken in the Territory. That no doubt is why the complainant did not seek a sentence of immediate imprisonment. It is desirable that a warning be given before any substantial departure is made from the

current standard of penalties imposed; see *Yardley v Betts* (1979) 22 SASR 108 at p114, per King CJ. This is to ensure some fairness and equality between persons sentenced for similar types of offences. Any "firming up" of sentencing should be by giving less weight than hitherto to mitigating factors, and greater relative weight to deterrence; see *R v Peterson* (1983) 11 A Crim R 164. I am also conscious that if, as a result of materials placed before them, Courts of Summary Jurisdiction conclude that penalties currently are too lenient, any correction should be by an upward trend; see *Breed v Pryce* (1985) 36 NTR 23, and *Poyner v The Queen* (1986) 66 ALR 264. Whether they are too lenient in comparison with the States, remains to be seen. Further, as this is a sentence imposed following a Crown appeal, the sentence should be less than would have been appropriate at a hearing before the Court of Summary Jurisdiction, for the reasons mentioned by Deane J in *Griffiths v The Queen* (1989) 167 CLR 372, at 381 and 386.

Bearing these matters in mind, I sentence the respondent to 9 months imprisonment as the aggregate sentence for the 20 offences of which he has been convicted. I direct that that sentence be suspended immediately, upon his entering into a Recognizance in the sum of $1000 to be of good behaviour for a period of 2 years. Pursuant to s239(7) of the Act I order that the respondent repay to the Department the sum of $14,291.53. I will hear counsel as to the details of suitable instalments of these reparations, and I will incorporate a provision for the payment of those

instalments as a condition of his bond under subpara20(1)(a)(ii) of the Crimes Act.
