CITATION:	*The Queen v GK & Anor (No 2)* [2022] NTSC 44
PARTIES:	THE QUEEN v GK And CHIEF EXECUTIVE OFFICER, DEPARTMENT OF HEALTH
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21914404
DELIVERED:	10 June 2022
HEARING DATES:	7, 8, 13 December 2021; 1, 15 March 2022; 13 May 2022
FURTHER WRITTEN SUBMISSIONS:	13, 20 May 2022
JUDGMENT OF:	Blokland J

CATCHWORDS:

MENTAL HEALTH – Forensic patient – Non custodial supervision order - Application to convert to custodial supervision order – Whether care in remote community satisfactory in terms of public safety – Less restrictive care appropriate and available – *Criminal Code Act 1983* (NT) s 43 – Part IIA

REPRESENTATION:

Counsel:

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Supervised Person:	T Collins
CEO:	C McGrath/ E Farquhar/ L N Ha

Solicitors:

Crown:	Office of the Director of Public Prosecutions
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Judgment category classification:	B
Judgment ID Number:	BLO2202
Number of pages:	30

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v GK (No 2) [2022] NTSC 44
No.21914404

BETWEEN:

THE QUEEN

AND:

GK

AND:

**CHIEF EXECUTIVE OFFICER,
DEPARTMENT OF HEALTH**

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 10 June 2022)

Background and Procedural History

[1] On 15 April 2021 the Court ordered GK be subject to a non-custodial supervision order (NCSO) under Part IIA of the *Criminal Code 1983* (NT) *'Criminal Code'*. Initially, a custodial supervision was sought by the Chief Executive Officer of the Department of Health.[1]

1 *The Queen v GK* [2021] NTSC 35.

[2] In brief, the terms of the NCSO ordered on 15 April 2021 required GK to remain under the care of, and receive treatment from the Chief Executive Officer and staff of the Department of Health and the Urapuntja Health Service, who together were referred to in the NCSO as ‘the treating team’.

[3] During the operation of the NCSO, GK was to:

a) comply with all reasonable directions of the treating team;

b) receive and take all medications prescribed by his treating team and submit to all blood tests and other medical examinations that may be ordered by his treating team as adjuncts to those medications;

c) participate to the best of his ability in appointments, assessments, therapy, counselling, and positive behaviour and psychoeducational interventions, offered and recommended by the treating team;

d) he must not purchase, possess or consume alcohol, cannabis or any dangerous drug or volatile substance and must comply with any reasonable directions given to him by the treating team to ensure compliance with this condition including random or scheduled testing for alcohol or illicit substances;

e) reside at Boundary Bore Utopia or as approved by the treating team;

f) not contact MB or her children directly or indirectly; and

g) not travel to Alice Springs except in a medical or dental emergency or for court appearances, or with the prior permission of and on the terms as stipulated by the treating team.

[4] The NCSO also authorised Northern Territory Police to apprehend GK pursuant to s 43ZF of the *Criminal Code*.

[5] Under s 43ZG of the *Criminal Code* the Court set the notional or indicative term of imprisonment for nine months, commencing on 11 April 2019. The relatively short term set under s 43ZG reflects the overall circumstances of

the original offending. Although the offending was of concern, it was not in the higher range of offences of that kind, nor in the higher range of offences in the *Criminal Code* which are categorised 'Offences against the person and related matters'.[2] That is not to suggest the offending was not a frightening experience for the victim (MB). Clearly it was and her safety and security must be protected.

[6] The offending against MB took place on 18 March 2019. GK was arrested for that offending on 11 April 2019. He was charged with assault with two circumstances of aggravation, namely that the victim suffered harm and was female.

[7] In brief, the facts of offending were that he approached MB outside of the Todd Tavern, charged at her in an angry state and yelled "I am gonna kill you". She tried to escape and sought refuge in the Todd Tavern. GK blocked her, grabbed her by the shirt, and punched the back of her head which caused pain. She tried to defend herself by pushing GK. She broke free. An elderly male intervened and told GK to leave. GK released MB and ran off. As a result MB suffered scratches under her neck, upper chest and swelling to the back of her head.

[8] In her victim impact statement MB said she felt fear. She felt nervous being alone in public; she was scared she could not protect her son; she wanted

2 *Criminal Code*, Part VI.

GK to stay away from her and wanted him to go to gaol so he would learn to stop making trouble for her.

[9] When the notional sentence was set, GK had the following relevant previous convictions and sentences which were taken into account: In 2005, aggravated assault (m/f), imprisonment for four months, fully suspended; In 2011, aggravated assault (m/f), imprisonment for two months; In 2017, armed with an offensive weapon, imprisonment for seven days and in 2018, threatening behaviour in public and damage property, two months imprisonment, partially suspended. There has not been any further offending alleged, since the offending against MB.

[10] At the time of the offending against MB the Court was told the following about GK. He was 46 years old at the time. He is an Alyawarr man from Boundary Bore in the Utopia region. He has many siblings and extended family in the Utopia area. He has little schooling and has not held regular employment.

[11] The material before the Court when the NCSO was made on 15 April 2021, showed that GK had received extensive psychiatric treatment as an outpatient. Several psychiatrists confirmed an established diagnosis of schizophrenia with prominent auditory hallucinations and erotomanic delusions. When he is unwell, there are risks of violence and suicide.

[12] One of the particular aspects of GK's delusional illness in terms of its difficulty to treat, is GK's belief that MB is his wife. He believes they have

children together. His insight into this delusional thinking was and continues to be poor. His compliance with medication was considered variable to poor during some periods before the NCSO was ordered, although his compliance improved late in 2020 as a result of his greater engagement with the treating team. He missed, for example, scheduled psychiatric appointments on May 1 and 15 May 2020 and 10 July 2020.[3]

[13] He was largely compliant with bail conditions which were set on 28 February 2020 when he was found unfit to plead and found not guilty by reason of mental impairment. He remained on bail from 28 February 2020 until the NCSO was made on 15 April 2021 and he became subject to the conditions under that order. [4]Although largely compliant, when he was previously on bail, (between 28 February 2020 and 15 April 2021) he returned a positive urine drug screen when admitted as an inpatient at Alice Springs Hospital on 15 July 2020 and was thought to be affected by cannabis at a medical appointment earlier on 24 April 2020.[5]

The major review – application to revoke the NCSO

[14] The major review under s 43ZG of the *Criminal Code* commenced on 27 October 2021. The review was adjourned to 28 February 2022 to allow the Department of Health to file the appropriate reports. The NCSO was

3 Report, Dr Calvin, 28 August 2020 at 1.

4 *The Queen v GK & Anor* [2021] NTSC 35 [23]-[43].

5 Report, Dr Calvin, 28 August 2020 at 4-5.

amended to allow GK to reside at either Boundary Bore or Mosquito Bore or as approved by the treating team.[6]

[15] An application to revoke the NCSO was made on 4 November 2021. The Director of Public Prosecutions supported the application for revocation. The application was made principally on the basis of information contained in MB's statutory declaration of 29 October 2021.

[16] In that statutory declaration MB stated that on 20 October 2021 she saw GK walking across the road towards her in Alice Springs near the Westpac Bank. She was scared of him as she has a personal violence order against him.[7] He said to her "where are the kids?" MB confirmed she has no children with GK and she has not been in a relationship with him. She was worried about this incident and walked towards the Tangentyere Women's Safety Group on Gregory Terrace. GK followed her. He did not speak to her again and stayed for an unspecified time while she was in the office. She reported the incident to Alice Springs police the same day.[8]

[17] On 27 October 2021, after finishing her shopping, MB stated she walked to the shopping centre car park and saw GK in the distance looking around the car park. She did not think he had seen her but she was frightened. She went back inside and told security officers who notified police.[9] A warrant was

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6 Condition 3(e) of the NCSO, 15 April 2021.

7 Exhibit 3; Statutory Declaration of MB, 29 October 2021 at [2].

8 Exhibit 3; Statutory Declaration of MB, 29 October 2021 at [2]-[4], [7].

9 Exhibit 3; Statutory Declaration of MB, 29 October 2021 at [5]-[7].

issued for the apprehension of GK on the basis of that information. GK was apprehended by police on or about 13 December 2021. The Court revoked the NCSO and he was remanded in the interim pending the finalisation of the major review and the application to revoke the NCSO and convert it to a custodial supervision order.

Principles to be applied

[18] Given the history of orders made in this matter, it is clear GK continues to remain subject to the Part IIA *Criminal Code* for supervision as he has been found not guilty by way of mental impairment *and* was found unfit to plead.[10] Under the *Criminal Code* he is either liable to supervision or is to be released unconditionally.[11] Once a person is declared liable to supervision, the Court must make either a custodial supervision order or a NCSO.[12]

[19] Under Part IIA of the *Criminal Code*, the Court *must not* make a custodial supervision order *unless* it is satisfied that there is no practicable alternative given the circumstances of the person.[13]

[20] As the imposition of the nominal sentence under s 43ZG(1) on 25 January 2021 of 9 months imprisonment was backdated to 11 April 2019, GK also entered into a major review which was adjourned under s 43ZG(5A) of the *Criminal Code*. Following a major review, the Court must apply s 43ZG(6)

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10 *The Queen v GK* [2021] NTSC 35.

11 *Criminal Code*, s 43XB.

12 *Criminal Code*, ss 43Z, 43ZA(1).

13 *Criminal Code*, s 43ZA(2).

of the *Criminal Code* which states: "[u]nless the Court considers that the safety of the supervised person or the public will or is likely to be seriously at risk if the supervised person is released, the Court must release the person unconditionally".[14] Under s 43ZG(7) of the *Criminal Code*, if the Court considers that the safety of the supervised person or the public will or is likely to be *seriously at risk* if the supervised person is released unconditionally, the Court must:

> (a) Confirm the supervision order; or
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> (b) Vary the conditions of the supervision order (including, if the supervision order is a custodial supervision order, the place of custody where the supervised person is detained); or
>
> (c) If the supervision order is a non-custodial order – vary the supervision order and impose the conditions on the order that the Court considers appropriate; or
>
> (d) If the supervision order is a custodial order – vary the supervision order to a non-custodial order and impose the conditions on the order that the Court considers appropriate.

[21] Further, s 43ZM of the *Criminal Code* provides that the Court must apply the principle that restrictions on a supervised person's freedom and personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community.

[22] The statutory regime has been described as creating "[a] strong legislative presumption in favour of the liberty of the subject".[15] Chief Justice Riley

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14 *Criminal Code*, s 43ZG(6).

15 *R v KMD* [2015] NTSC 31 at [37].

described the balancing of competing considerations in the following way which I respectfully adopt:[16]

> "The likelihood of the person being a danger to herself or another person and the need to protect others must be balanced against the desire to ensure the liberty of the individual. The consequences for the individual who, it must be remembered, has been found not guilty of criminal activity by virtue of mental impairment, may be quite serious including ongoing detention or living under onerous supervision. The risk assessment must reflect both the likelihood of conduct of concern occurring and the magnitude of the harm that may result from any such conduct. The legislation calls for an assessment of the degree of likelihood of the occurrence of the risk along with the nature of the risk and its consequences. Some level of risk will, almost always, be present. The extent of the risk must be weighed in the balance in determining the nature of the supervision order to be imposed."

[23] The matters the Court must have regard to when making an order are set out in s 43ZN *Criminal Code* and include:

(a) whether the accused person is likely to endanger himself or another person because of his mental impairment, condition or disability;

(b) the need to protect people from danger;

(c) the nature of the mental impairment, condition or disability;

(d) the relationship between the mental impairment, condition or disability and the offending conduct;

(e) whether there are adequate resources available for the treatment and support of the supervised person in the community;

(f) whether the accused person is complying or is likely to comply with the conditions of the supervision order; and

(g) any other matters the court considers relevant.

[24] There is no significant dispute between the parties about the principles to be applied.

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16 *R v KMD* [2015] NTSC 31 at [39].

Further discussion of the evidence and submissions

[25] When the non-custodial supervision order was originally made, substantial reliance was placed on the cooperation of GK's family in the Utopia region and the cooperation of the Urapuntja health service to ensure he received his medication and importantly was not in breach of the non-custodial supervision order. While there have been some breaches of the order, I am satisfied as result of the evidence currently before the Court that there is greater knowledge and understanding by the Urapuntja Aboriginal Corporation and the Urapuntja health service of the nature of the Court orders and support for GK, which includes giving him assistance to comply with any order.

[26] The following breaches were alleged in these proceedings:

a. Residing at Mosquito Bore in breach of condition 3(e) of the NCSO dated 15 April 2021;
b. Cannabis usage, confirmed via positive Urine Drug Screen taken on 3 September 2021, in breach of condition 3(d) of the NCSO;2
c. Undated and unknown number of attendances at Alice Springs prior to 14 October 2021 in breach of condition 3(g) of the NCSO;3
d. Attendance at Alice Springs and interaction with MB on 20 October 2021 in breach of conditions 3(g) and (f) of the NCSO;4 and
e. Attendance at Alice Springs on 27 October 2021 in breach of condition 3(g) of the NCSO.

[27] In my view, with regard to breach (a), although proven, this was previously dealt with by the Court by varying the NCSO to deal with the reality of GK staying in different places within the Utopia region, yet well away from

Alice Springs. Currently, this breach is of marginal relevance, if any. In relation to (b), cannabis use was proven by the urine drugs screen. It is fair to infer that GK has from time to time had access to cannabis which is harmful in the context of his mental state and may contribute to its deterioration. In terms of (c), the "undated and unknown number of attendances in Alice Springs". This allegation is too vague to act on in these proceedings, bearing in mind the burden of proof that is on the Chief Executive Officer of the Department of Health which engages the *Briginshaw* principles. However, clearly GK did attend Alice Springs on 20 October 2021 and 27 October 2021 and had the interaction with MB described above on the 20th of October 2021. I find breaches (a), (b), (d) and (e) proven. Of those, (d) and (e) are in a relatively serious category as the victim became apprehensive, however GK did not commit any violent act towards MB.

[28] The conduct which constitutes the breaches must be seen against the background of periods of general compliance over a relatively lengthy period, including previous compliance with bail. There have been previous breaches which are a risk to GK's own health and potentially elevate the risk to MB if he does not comply with his medication regime. From 15 July 2020 until 6 August 2020 he suffered a relapse as a result of a failure to take medication. However, in my view, the totality of the evidence points to the conclusion that he should be released on an appropriate non-custodial supervision order. A number of fair points have been made by counsel for

the Chief Executive Officer of the Department of Health. First, that there has been less than ideal compliance with the non-custodial supervision order and second that the Urapuntja clinic is not within the Northern Territory Department of Health's supervision. Balanced against this is the fact that there are also periods of regular compliance and the distance between GK's residence and Alice Springs provides some protection. The fact that the Urapuntja health service has more recently confirmed assistance with his medication regime, with assistance from the remote health team, all point to appropriate management of the risk in the community.

[29] I will address the factors listed in 43ZN of the *Criminal Code*.

(a) Whether the accused person or supervised person concerned is likely to, or if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability.

[30] The evidence clearly shows that GK is a danger to himself due to his mental condition if he is untreated. Less so a danger to others, although he is some risk to MB while the mental illness manifests in the delusion that MB is his wife and that they have children. His diagnosis is schizophrenia with prominent auditory hallucinations and erotomanic delusions. His condition deteriorates with substance abuse. Although some of the medical opinion suggests his cognitive functions are relatively intact,[17] more recent opinion

17 Transcript, *The Queen v GK*, 25 January 2021 at 16.

suggests his cognitive function is in the impaired range.[18] In terms of the risk to himself, he has in the past expressed suicidal ideation and in 2014 attempted suicide by hanging.[19] When his mental state has deteriorated in the past, he has posed a significant risk. The delusional thought content is of a potentially dangerous nature to himself and others.[20]

[31] Dr Sullivan applied a violence risk assessment tool, the HCR-20-V3. The result placed GK in a *moderate-high risk* category for future violence which reflects the need for case planning, which Dr Sullivan stated would occur with him being subject to a Supervision Order and Community Management Order.[21]

[32] Dr Sullivan discussed three risk scenarios. The first was of an assault on another person due to undertreated mental illness. He described this as unpredictable and "[n]ot clearly likely, and his recent conduct in the community does not suggest the risk is significant." The second possibility is of inadvertent contact with MB, should he travel to Alice Springs. GK has limited insight into the conditions of the order and is in part reliant on others to ensure he complies. In that event there is a potential risk to MB. The third possibility is if GK develops an increasing preoccupation with MB and travels to Alice Springs to seek her out. In those circumstances, the risk

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18 Report, Dr Sullivan, 13 February 2022.

19 Alice Springs Hospital Report, Dr Brightman, 12 March 2021 at 1.

20 Alice Springs Hospital Report, Dr Brightman, 12 March 2021 at 1 and 3. In terms of risk to himself, see also the 'Institutional Report', 9 May 2022: between May 2017 and February 2020 there were 10 'At Risk' episodes although none in the current remand episode.

21 Report, Dr Sullivan, 13 February 2022 at 8.

to MB is significantly escalated. There is limited indication that this third possibility is likely to occur as GK currently has a relatively stable mental state, is compliant with medication and lives geographically separate from Alice Springs.[22] Although the risk, or its potential to materialise is serious, it is a somewhat confined risk in the circumstances.

(b) The need to protect people from danger

[33] Given Dr Sullivan's report on risk as described above, it is clear the person in need of protection from danger is MB. Other risks are less acute. The danger to MB has previously been managed by the requirement that GK continue treatment, reside in outstations in the Utopia region and not enter Alice Springs. There have been two clearly known breaches of travelling to Alice Springs found proven. Although there was no violence directed to MB, she was frightened and understandably feels threatened if GK were to be in Alice Springs.

(c) The nature of the mental impairment, condition or disability and the offending conduct

[34] GK suffers from chronic schizophrenia and likely cognitive impairment. He experiences intermittent auditory hallucinations and holds persistently

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22 Report, Dr Sullivan, 13 February 2022 at 8.

delusional beliefs that he is married to MB and has children with her.[23] The conditions directly resulted in the offending of 18 March 2019.

(e) Whether there are adequate resources available for the treatment and support of the supervised person in the community. This will be considered with s 43ZA(2). The court must not make a custodial supervision order committing the accused to custody in a custodial correctional facility unless it is satisfied that there is no practicable alternative given the circumstances of the person.

[35] Counsel for the Chief Executive Officer of the Department of Health submitted that in accordance with s 43ZA(2) of the *Criminal Code*, there were no practical alternatives to custody and under s 43ZN(e) adequate resources are not available. Counsel points to the report of David Tymms, Registered Mental Health Nurse from the Remote Mental Health Team.[24] Mr Tymms had been GK's case manager. His practice covers the Utopia Region of Central Australia, including Mosquito Bore and Boundary Bore, plus a further 14 outstations. He stated that GK has been residing in the Utopia region and living with family members at Soapy Bore, Boundary Bore, Arlparra and Tomahawk. He stated that GK's family come across as supportive of him but that they did not have the capacity to restrict his

23 Report, Dr Brighton, Alice Springs Hospital, 20 October 2021 at 5 and 6; Report, Dr Danny Sullivan, 13 February 2022 at 6.

24 Report, David Tymms, 1 November 2021.

movements or interactions. At the time of writing the report, GK was residing with his sister at Arlparra.

[36] Mr Tymms set out GK's different residences over the past 15 years.[25] He reported there was no supportive or supervised accommodation in the Utopia region that is available to the Central Australian Health Services and there was no appropriate supportive or supervised accommodation for GK in Central Australia. He also noted that Utopia is GK's homeland where his family have lived for generations and to find alternative accommodation outside of Utopia, away from his family and homeland would be culturally inappropriate and there would then be an issue of family visiting him in other homelands.[26] Mr Tymms initially said the current best available option for GK would be the cognitive behaviour unit in Darwin. He qualified that opinion and said in evidence that he knew nothing about the cognitive behaviour unit in Darwin. He agreed that was not his own opinion but he had adopted it from the consultant psychiatrist.[27]

[37] Mr Tymms gave evidence that he would go out to see GK each four to six weeks. He would be in Utopia for up to three days as it covers a large area.[28] He would see GK for 20 to 40 minutes. He would generally see him with a regional mental health practitioner and either a site registrar or consultant. Mr Tymms agreed that none of the people who attend with him at Utopia are

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25 Report, David Tymms, 1 November 2021.

26 Report, David Tymms, 1 November 2021 at 3.

27 Transcript, *The Queen v GK*, 7 December 2021, at 8.

28 Transcript, *The Queen v GK*, 7 December 2021 at 5-6.

specialist forensic mental health staff. He agreed GK does not speak English well. He said there is an Aboriginal mental health practitioner who comes out with him and speaks the same language as GK, although he did not know which language he spoke.[29]

[38] Mr Tymms was asked about the letter from Ms Niejalke, the clinic nurse manager and registered nurse at the Urapuntja health service.[30] In that letter it was suggested that his residence needed to be broadened to the Utopian region. Mr Tymms agreed he had seen the letter and he would support that suggestion.

[39] In part, Mr Tymm's evidence indicates there is a lack of resources, however he also demonstrated that on many occasions he has seen GK and that he and the team attend the Utopia region and they are able to allocate time to GK.

[40] Michael Graevener, the Chief Executive Officer of Urapuntja Aboriginal Corporation, a social worker by training gave general evidence about the Utopia Homelands, the available services and general makeup of the different areas and emphasized the disadvantage that people face.[31]

[41] He knows GK and spoke in positive terms about him and his own interactions with him. He said he was not aware GK was on a court order until December 2021, when he realised he had gone to gaol.[32] He said they

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29 Transcript, *The Queen v GK*, 7 December 2021 at 8.

30 Exhibit 2.

31 Transcript, *The Queen v GK*, 15 March 2022, 4-5.

32 Transcript, *The Queen v GK*, 15 March 2022, at 5.

had no idea there was a court order that stated he could not go to Alice Springs. He thought when people were going to Alice Springs, GK would go for the ride. He said since they have learnt about the order, they have informed people it is not an option for GK to go to Alice Springs. He identified an email of 7 December 2021 when he received the email and a copy of the NCSO. Before that, he said there were only rumours and gossip.[33] He told the Court he became alarmed for the victim and GK, and started educating people about the consequences of GK going to Alice Springs. He said there were 25 people employed by the Urapuntja Aboriginal Corporation. None are medically trained or trained in psychiatry or psychology. The Urapuntja clinic would sometimes call the Aboriginal Corporation when they were looking for patients. He acknowledged he did not receive notification from the Urapuntja Health Service about GK being 10 days overdue for his medication, in December 2021.

[42] He acknowledged the road to Alice Springs from Utopia is a well-driven path. He understood GK would be related in some way to practically everyone in Utopia.[34] He agreed that orders were important and accepted there had been a lack of coordination and that he was not fully aware of the order. Once he became aware, he had meetings with staff and family members to the effect that under no circumstances are they to give GK a lift

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33 Transcript, *The Queen v GK*, 15 March 2022, 6-7; Exhibit 7.

34 Transcript, *The Queen v GK*, 15 March 2022, 12-13.

to Alice Springs.[35] He explained that although none of his staff were medically trained, he would contact the Urapuntja Health Service. He said he has a good relationship also with police but has never had to contact them about GK.[36]

[43] The letter from the clinic nurse manager at Urapuntja health service, Ms Niejalke states GK is well known to the health service and the service manages his schizophrenia and other medical conditions. He attends the clinic on a regular basis for routine check-ups and to receive his monthly depot injection for the management of his schizophrenia. She finds him to be compliant. She states GK often enquires with staff himself about when the next depot injection is due. She states that if he is not present, he is usually easy to locate, and freely attends when reminded. Ms Niejalke included the notes from the GP who saw GK on two occasions in August 2021, which present GK in a positive light. She also recalled a negative aspect GK's presentation in April 2020 when she said he was affected by marijuana. She said there was no recent evidence to suggest he had been engaging in alcohol or marijuana use when in Utopia. Her belief was the requirement in the NCSO to stay only in Boundary Bore failed to acknowledge the transient lifestyle of Alywarre people between the various outstations, although still within the Utopia area.

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35 Transcript, *The Queen v GK*, 15 March 2022, 15-16.

36 Transcript, *The Queen v GK*, 15 March 2022, 17.

[44] Ms Niejalke stated she witnessed GK at a recent funeral for an elder and he was behaving appropriately. She said she has seen him at the clinic with a group of men involved in the men's business ceremony. He is friendly towards her outside of the clinic or outside of a clinical setting. She stated, "Urapuntja Health Service remain committed to managing Mr Kunoth's condition and supporting him and his family as best we can, and I happy to remain as part of the treating team for the purpose of his order. We advocate for the importance for Mr Kunoth to remain 'on country' around family and language group, but acknowledge this must be done lawfully."

[45] Dr Brightman, the consultant psychiatrist with the Central Australian Mental Health Service provided a report dated 21 October 2021.[37] Dr Brightman confirmed she became a fellow of the Royal Australian and New Zealand College of Psychiatrists in January 2021, but was not a forensic psychiatrist. She said she was trained in risk assessment in general but not forensic risk assessment *per se*. She agreed the Central Australian Mental Health services had no expert forensic psychiatrist based in Central Australia.
Dr Brightman's recommendation was that GK be managed either in the Alice Springs correctional centre or the complex behavioural unit of the Darwin correctional centre. Dr Brightman agreed the Urapuntja health service indicated GK had been compliant with his medications and that to their knowledge he was not using alcohol or other substances. However, she

37 Exhibit 4.

said the Urapuntja health service had not been conducting urine testing and not specifically asking GK questions about that.

[46] Dr Brightman said when she assessed GK on 17 August 2021, she suspected he had been either using cannabis or alcohol. She said the conversation was conducted in 50 percent English, and around 50 percent in Alywarre. An Aboriginal health worker assisted with the Alywarre language. She said the Aboriginal health worker assisted when she could not clarify things and they switched to language. She understood GK to speak basic English and that he can understand them when they speak to him in English. Dr Brightman concluded that GK had not been telling the truth when he told her he had not been smoking cannabis. She agreed she based that on GK saying on one day, "I'm not smoking cannabis" and some days later there being a finding of cannabis in his system as a result of testing.

[47] Dr Brightman said she considered the complex behaviour unit in Darwin Correctional Centre had an element of therapeutic care as part of the unit and was distinct from the rest of the prison. Asked if GK was most at risk when put in an environment such as prison, Dr Brightman said "yeah, there have been instances in the past where he has threatened self-harm, and gestured hanging attempts, and tried to hang himself when incarcerated."[38] She said she did not agree the risk was necessarily any greater in prison as if he was in the Alice Springs correctional centre or in the community he

38 Transcript, *The Queen v GK*, 8 December 2021 at 20.

would still be at risk of harm to himself, through misadventure, medication non-adherence and a range of other things. She agreed there was no evidence of suicide ideation while GK was in the Utopia region. She said she did not completely agree that his risk was heightened in custody as on the previous occasions when he was declared ‘at risk’ he had not been diagnosed and was not properly medicated. Dr Brightman did not agree with the proposition that Dr Tabart had given in previous evidence to the effect that GK’s risk to himself would be elevated in the complex behavioural unit. She agreed it would be distressing for GK to be placed in the complex behaviour unit but could not predict the level of risk that it would involve and that whether it would increase his risk of self-harming or attempting suicide is very hard to predict.

[48] Dr Brightman said she would not use the powers under the *Mental Health and Associated Services Act* 1998 (NT) to detain GK involuntarily as his current mental state is stable and he is not acutely responding to auditory hallucinations. In terms of whether GK going into custody in Darwin would interfere with his current stable mental state, she explained there may potentially be scope in a supervised environment to try other things and GK would have increased access to forensic psychiatry. She said he would have closer monitoring in the complex behaviour unit and if he develops side-effects associated with changes in the medication regime, they could be

dealt with.[39] She agreed the risk of GK to MB would be reduced if the family could ensure he did not travel to Alice Springs.

[49] Dr Sullivan's consultant report was tendered.[40] Dr Sullivan is a consultant forensic psychiatrist. Although acknowledging some difficulties, he concluded GK should remain in the community.

[50] In answer to counsel for the Chief Executive Officer Department of Health's questions, Dr Sullivan said he was aware Urapuntja health service was not part of the Department of Health. He was asked why at paragraph 46 of his report he stated "it's not clear that there are adequate resources available for the treatment and support of Mr Kunoth". He said with the management of people with a serious mental illness, the gold standard is assertive community treatment. That means when a person does not attend an appointment, people go to their house and find them and consider whether or not compulsory treatment is required. He said it was clear there was a commitment from the health service to look after GK's health, but whether they would perceive themselves as having those powers is difficult to determine. He did not think they would have the power to transfer GK against his will if they thought it was necessary. He said what he clearly noted from both the statement of the GP and the discussion with the CEO of the Urapuntja Aboriginal Corporation was the community expressed a

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39 Transcript, *The Queen v GK*, 8 December 2021 at 26.

40 Exhibit 6, Report, Dr Sullivan, 13 February 2022. Report of Dr Sam Calvin, 28 August 2020, Exhibit 5.

commitment in maintaining GK on country. Asked about a statement in his report "They seem genuine, though some aspects of the support are aspirational and may not yet exist", he said the CEO informed him of two different programs; one for social and emotional well-being and the second being a facility to provide for people who were eligible for NDIS supports. They were not operational as yet.

[51] In terms of whether the CEO of Urapuntja Aboriginal Corporation, Mr Graevener, knew whether GK had entered Alice Springs multiple times and had interacted with MB, he said he understood he had not initially been aware of the prohibition and when informed of it he declared a willingness to work with other services and with the mental health service to reduce the likelihood of GK engaging in such behaviour. Dr Sullivan was not aware of when the CEO of Urapuntja Aboriginal Corporation had been made aware of the conditions of the NCSO. In his own discussions with the CEO of Urapuntja, Dr Sullivan said Mr Graevener did not consider GK had engaged in any problematic behaviour apart from some which was mildly problematic or potentially nuisance like. He denied GK been involved in any assaultive behaviour or significant disturbance at the Urapuntja community and its associated outstations. Asked if it was the case that some of the breaches of the order took place after September 2021 when Urapuntja Aboriginal Corporation were aware of the conditions, whether his opinion on the risk issues would change, Dr Sullivan said he would need to take it into account but his opinion was premised upon the commitment of the community

attempting to prevent GK from travelling to Alice Springs and also to reduce his access to substance use. Whether they are capable of policing that, he acknowledged remains another matter. Dr Sullivan said he is aware that family members and members of the community were relied upon to ensure the success of the supervision plan. He agreed it was not ideal that supervision be ceded to members of the community however, over the period of time that he had been visiting and assessing people in the Northern Territory and being aware that resources were scarce, he said shortcuts need to be made. He said it was not ideal, but there were contrasting demands of keeping people on country, maintaining their connection to community with providing health services and managing risk, so the gold standard treatment is not what is offered but rather a compromise.

[52] Asked about difficulties with changing medications and monitoring, Dr Sullivan said as a GP in the community he would seek telephone assistance from the mental health team about the dosage range or the frequency of long acting injectable antipsychotic. He said as a GP he would be reasonably comfortable providing moderate doses of oral antipsychotic or other adjunctive medication and adjust doses under telephone guidance of an expert. Dr Sullivan did not agree that changes to medication would be easier to monitor in a custodial environment. He said it should be done in a healthcare setting. He said in a prison setting the problem is that there are only visiting psychiatrists, regular nurses and sometimes no psychiatric nurses. Prisoners are locked into a cell for numbers of hours per day. He

said changing medication in prison settings can sometimes be actually more perilous than changing it in a community. Dr Sullivan also added that the actual benefits of treatment in a prison setting, are fairly limited, except for ongoing risk containment, if that were deemed necessary, and in his opinion he was not sure that GK's risk met that threshold.[41] He said for brief deterioration in his mental state it could be managed for a period of weeks to a month or two in a local setting in Alice Springs just as adequately in a less restrictive way and perhaps more effectively, because he would have access to greater mental health services than he would in the cognitive behaviour unit in Darwin.

[53] Where Dr Sullivan's and Dr Brightman's opinions differ on the conclusion on whether there are adequate resources available for treatment in the community and whether there is no practicable alternative to custody, I prefer Dr Sullivans', as he is the only forensic psychologist the Court has heard from and he has considered all of the material available, including evidence given in these proceedings. He has given detailed summaries of further collateral material obtained from witnesses and health professionals.[42]

[54] It is accepted Dr Brightman has treated GK over a period of time and has given accurate evidence of her observations and diagnoses. Dr Sullivan has assessed GK only once, however he has worked in the Northern Territory

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41 Transcript, *The Queen v GK*, 1 March 2022 at 21.

42 Report, Dr Sullivan, 13 February 2022 at [23]-[43].

and is aware of the lack of resources in very remote areas, yet understands that sometimes a compromise from a 'gold standard' is required. The compromise in terms of utilizing another health service and a community run organisation is not as significant in his view as placing a person in custody where the level of risk does not clearly warrant it. GK, in Dr Sullivan's view would not receive better treatment in custody. Despite some of the obvious problems, Dr Sullivan concluded GK's overall risk is manageable in the community.[43]

[55] While there may be some planning and coordination required, the Urapuntja Health Service knows GK well and are prepared to continue to support him, as is the CEO and staff of the Urapuntja Aboriginal Cooperation. Dr Sullivan envisaged the future management of GK as follows:[44]

> "If GK were to be managed on an NCSO in his remote community, this would be best with the collaborative input of the local health service and Aboriginal Corporation, along with the remote services of the Central Australian Mental Health Services. In the event of deterioration in mental state or increase in risk, this could be dealt with through admission to the local inpatient unit in Alice Springs in the first place, to ensure optimisation of antipsychotic medication in a therapeutic setting."

[56] I do not consider the level of risk required to commit JK to custody indefinitely is established.

(f) Whether the accused person or supervised person is complying or is likely to comply with the conditions of the supervision order.

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43 Report, Dr Sullivan, 13 February 2022 at [53].

44 Report, Dr Sullivan, 13 February 2022 at [53].

[57] Clearly there have been breaches of the NCSO. The most concerning involve travel to Alice Springs. Of some concern is the use of cannabis. With much heightened awareness in the community of what is required to reduce the risk of breach and some awareness by GK, albeit superficially given his mental and cognitive state, the risks are capable of being managed in a way that on balance should reduce non-compliance. It is not as though GK was constantly in breach, he also had periods of good compliance. I do not agree there is an obvious pattern of breaching or disregarding the orders. GK's counsel tells the Court "GK at a basic level understands that he has been placed in custody for coming to Alice Springs and seeing MB and that custody is a consequence of this behaviour. This can be used to reinforce with GK the importance of compliance with conditions in this regard."[45] It must be remembered he has been in custody for over five months which must have impacted GK in some way as suggested by his counsel.

(g) Any other matters the Court considers relevant

[58] There was some uncertainty expressed on whether or when GK could enter the cognitive behaviour unit at Darwin Correctional Centre, if a custodial supervision order was ordered. On 13 May 2022 counsel for the Chief Executive Officer of the Department of Health advised the Court the complex behaviour unit at Darwin Correctional Centre was no longer

45 Submissions of the accused person, 10 March 2022 at 45.

feasible and it was unknown whether GK could transfer from Alice Springs prison to the Darwin Correctional Centre.

[59] In a further submission from GK's counsel,[46] the Court was informed there was no equivalent facility in Alice Springs and GK would likely remain in a remand section and be treated no differently to those who had been found guilty of crimes. There would be no specialist assistance and the oversight of forensic mental health would be limited. If remanded, GK would not have the benefit of therapeutic interventions as understood by Dr Brightman. His quality of life would be reduced to 'meandering aimlessly around the Court yard of his dorm or sitting in a dining room'.[47]

[60] Counsel for the Chief Executive Officer of the Health Department has advised the Court of an update that the manager of the complex behaviour unit forwarded.[48] The unit is always at capacity as there are only 14 funded beds and many more in the main prison that are suited to be housed at the unit. However, it does not mean GK would not be able to be housed there as they are prioritising people on a custodial supervision order. He might need to stay in the main prison for a couple of days/week until somone moves out of the cognitive behaviour unit and space can be made.

[61] The evidence of Dr Sullivan was that the cognitive behaviour unit in any event is not therapeutic. There are limits on when patients see psychiatrists

46 Addendum submissions of the accused person, 13 May 2022.

47 Institutional Report, Alice Springs Correctional Centre, 9 May 2022.

48 Email, Long Nam Ha, 20 May 2022.

and nurses and for GK, when changing medications there may be more risks in custody than in the community. While I accept the staff of the cognitive behaviour unit would do their best to accommodate new cases, overall the hesitation as to when GK would be admitted provides another reason on why he should be in the community.

[62] The level of risk does not justify a custodial supervision order.

[63] I dismiss the application to convert the NCSO to a custodial order.

[64] I will hear counsel on appropriate terms for a NCSO.