CITATION:	*Flynn v Apuatimi* [2019] NTSC 1
PARTIES:	FLYNN, Steven
	v
	APUATIMI, Shaun Emmanuel
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 49 of 2018 (21813112)
DELIVERED ON:	2 January 2019
HEARING DATE:	20 December 2018
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – PROPERTY OFFENCES – JUDGMENT AND PUNISHMENT

Whether error in imposing community custody order – imposition of the community custody order not ancillary to suspension of a term of imprisonment or otherwise contrary to legislative scheme – whether sentence manifestly inadequate – appropriate head sentence cannot be reduced on basis that period to be served by way of community custody order – sentence imposed must reflect the objective seriousness of offence – there must be reasonable proportionality between the sentence passed and circumstances of the crime – mitigating subjective factors cannot operate to lead to sentence disproportionate to the crime – sentence manifestly inadequate – appeal allowed – matter remitted to Local Court for sentence in accordance with law.

Criminal Code (NT) s 210, s 213, s 241
Local Court (Criminal Procedure) Act (NT) s 163

Sentencing Act (NT) s 5, s 48A, s 48B, s 48E, s 48F, s 48L, s 48M, s 63, s 78B

Bara v The Queen [2016] NTCCA 5, *Edmond & Moreen v The Queen* [2017] NTCCA 9, *Muldrock v The Queen* (2011) 244 CLR 120, *Pearce v The Queen* (1998) 194 CLR 610, *R v Dodd* (1991) 57 A Crim R 349, *R v Grant Moore* (Unreported, Supreme Court of the Northern Territory, Martin J, 3 June 2016), *R v McNaughton* (2006) 66 NSWLR 566, *R v Riley* (2006) 161 A Crim R 414, *R v Scott* [2005] NSWCCA 152, referred to.

REPRESENTATION:

Counsel:

Appellant:	DR Dalrymple
Respondent:	J Ker

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Northern Territory Legal Aid Commission

Judgment category classification:	B
Judgment ID Number:	GRA1901
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Flynn v Apuatimi [2019] NTSC 1
LCA 49 of 2018 (21813112)

BETWEEN:

STEVEN FLYNN
Appellant

AND:

SHAUN EMMANUEL APUATIMI
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 2 January 2019)

[1] This is an appeal brought by the complainant pursuant to s 163(1) of the *Local Court (Criminal Procedure) Act* (NT) from an order or adjudication of the Local Court involving sentence and an asserted error or mistake on the part of the Local Court on a question of law.

The sentence imposed

[2] On 29 August 2018 the Local Court convicted the respondent of the following offences:

(a) Unlawfully entering a building at night with the intent to commit an offence therein contrary to s 213 of the *Criminal Code* (NT).

The maximum penalty for that offence is imprisonment for 14 years.

(b) Stealing $72,860 in Australian currency, prepaid phones, prepaid phone cards, prepaid fuel cards, groceries, clothing and sports bags, cheques, DVDs, video games and a quartz watch with a total value of $82,949.46, contrary to s 210 of the *Criminal Code*. The maximum penalty for that offence is imprisonment for seven years.

(c) Intentionally or recklessly causing damage to property in the form of various store fixtures and chattels contrary to s 241 of the *Criminal Code*. The maximum penalty for that offence is imprisonment for 14 years.

[3] The Local Court sentenced the respondent to imprisonment for two months backdated to 26 August 2018 to be served as a community custody order from 29 August 2018.

Grounds of appeal

[4] The grounds of appeal are:

(a) that the sentencing judge erred in imposing a sentence which was manifestly inadequate in all the circumstances of the offending and the offender; and

(b) that the sentencing judge erred in imposing a community custody order as a sentencing disposition ancillary to the suspension of a term of imprisonment.

[5] During the course of oral submissions in the hearing of the appeal, the second ground was expanded to include the contention that even if there was no element of suspension involved, it was not open to the sentencing court to backdate the sentence to a time before a pre-sentence report was received, or to backdate the sentence to take account of time served with the effect that the sentence was in that part actual imprisonment and thereafter "converted" to service by way of community custody order from the date of sentence.

[6] It is convenient to deal first with the ground of appeal asserting error in the imposition of the community custody order.

The community custody order

[7] The unlawful entry and property damage charges were "aggravated property offences" within the meaning of s 78B of the *Sentencing Act* (NT). That section provides that where a court records a conviction against an offender for an aggravated property offence it must order the offender to serve a term of imprisonment or order the offender to participate in an approved project under a community work order unless there are exceptional circumstances in relation to the offence or the offender. There was no finding of exceptional circumstances in

this case. The section goes on to provide that where a term of imprisonment is imposed the court may only wholly suspend that sentence on the offender entering into a home detention order.

[8] In the circumstances of this case, the respondent was arrested on 19 March 2018 and spent three days in custody before he was granted bail. He remained on bail through to the date of the sentencing proceedings on 29 August 2018. That period of imprisonment for three days, once incorporated into the ultimate sentencing disposition, was enough to satisfy the requirement in s 78B of the *Sentencing Act* for the imposition of a term of imprisonment. That rendered it unnecessary in the circumstances to enter into any consideration of whether a community custody order could be characterised as a "term of imprisonment" within the meaning of s 78B(2)(a) of the *Sentencing Act*, or a "community work order" within the meaning of s 78B(2)(b) of the *Sentencing Act*.

[9] The scheme for community custody orders is created under Part 3, Division 5, Subdivision 2A of the *Sentencing Act*. Subject to certain exceptions in relation to sexual and violent offences, where a court determines to impose a sentence of imprisonment on an offender of not more than 12 months the court may order that the sentence of imprisonment be served by way of a community custody order.[1] The

1 *Sentencing Act*, ss 48A(1), 48B(1).

court must not make a community custody order if it makes an order suspending the sentence.[2] The clear purpose of that provision is to require an offender who is subject to a community custody order to serve the whole of the sentence of imprisonment subject to the conditions of the order. Those conditions are discussed further below. In effect, the making of a community custody order is a counterpart and an alternative to an order suspending sentence, and the two dispositions cannot be combined.

[10] In addition, if the offender is convicted of more than one offence in the same proceeding, the court may make a community custody order only if the total period of imprisonment imposed for all the offences does not exceed 12 months.[3]

[11] Community custody orders are subject to statutory conditions, including in relation to good behaviour; the performance of community work for 12 hours each week; reporting and visitation conditions at least twice during each week the order is in force or for such shorter period as may be specified; the requirement to advise a probation and parole officer of any change of address or employment within two clear working days; the requirement that the offender not leave the Territory except with the permission of a probation and parole officer; and a requirement to comply with all lawful directions given by a probation

2 *Sentencing Act*, s 48B(2).

3 *Sentencing Act*, s 48B (3).

and parole officer.[4] In addition to those statutory conditions, the court may also impose conditions in relation to undertaking prescribed programs, the consumption or purchase of alcohol or a drug, the requirement to reside at a specified place, and the requirement to wear an approved monitoring device.[5]

[12] In the event of the breach of the condition not to commit any further offence punishable by imprisonment, the court must sentence the offender to imprisonment for the unexpired term of imprisonment under the order as at the date of breach unless it would be unjust to do so because of exceptional circumstances.[6] If the court is satisfied the offender has breached some other condition of the order, the court may confirm the order, vary the conditions of the order, take no further action or sentence the offender to imprisonment for the unexpired term of imprisonment under the order, depending upon whether the order remains in force at that time.[7]

[13] In the present case, the Local Court sentenced the respondent to two months' imprisonment backdated to 26 August 2018 to take account of the three days he had spent in custody before being granted bail, with that term of imprisonment to be "converted or to be enforced as a community custody order … on and from 29 August [2018]". The

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4 *Sentencing Act*, s 48E.

5 *Sentencing Act*, s 48F.

6 *Sentencing Act*, s 48L.

7 *Sentencing Act*, s 48M.

community custody order was subject to the statutory conditions, supplemented to authorise a probation and parole officer to impose a curfew and to require the respondent to undertake counselling or treatment, including in relation to the misuse of alcohol and other drugs.

[14] On a fair reading of the reasons as a whole, the nature and effect of that disposition was the imposition of two months' imprisonment permissibly backdated by three days in the application of s 63(5) of the *Sentencing Act*, with the balance of the term to be served as a community custody order. In drawing that conclusion, I consider that the stipulation in s 48B(1) of the *Sentencing Act* that the court "may order the sentence of imprisonment be served by way of [a community custody order]" is broad enough to accommodate the mechanism adopted in this case.

[15] The appellant's contention that it was not open to the sentencing court to backdate the sentence to a time before a pre-sentence report was received is based on the terms of s 48B(1) of the *Sentencing Act*, which provides:

> The court may order the sentence of imprisonment be served by way of an order under this Subdivision (a ***community custody order***) only if it receives a pre-sentence report.

[16] The court in this case received a pre-sentence report on 29 August 2018 prior to the imposition of sentence. There is nothing in s 48B(1)

of the *Sentencing Act*, either express or by way of necessary intendment, which precluded backdating the sentence to a time prior to the receipt of the pre-sentence report. As counsel for the respondent observed, there are a number of circumstances in which a particular type of sentencing disposition may only be made on receipt of some form of report or assessment.[8] That requirement does not preclude backdating to a time prior to the receipt of the report or assessment, and sentences are routinely backdated in those circumstances.

[17] Further, no element of suspension was involved. First, for reasons I will come to in the consideration of the ground of appeal asserting manifest inadequacy, service under a community custody order is the service of a sentence of imprisonment without suspension. Secondly, as counsel for the respondent submitted, the sentence was not attended by the ordinary incidents of a suspension such as the fixing of an operational period.

[18] Although the sentencing judge used some infelicitous language concerning the suspension of the term of actual imprisonment on the respondent entering into a community custody order, that was the product of a misplaced fixation on the requirement in s 78B(3) of the *Sentencing Act* that a court may only wholly suspend a sentence to imprisonment on the offender entering into a home detention order.

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8 See, for example, *Sentencing Act*, s 103; *Youth Justice Act* (NT), s 69.

The sentencing judge was at unnecessary pains to characterise the disposition as something other than a wholly suspended term of imprisonment. For the reasons given above, the respondent had already served a period of imprisonment which satisfied the mandatory minimum requirement in s 78B of the *Sentencing Act*, and on proper characterisation there was no element of suspension involved in the sentence imposed.

[19] For these reasons, the imposition of the community custody order in this case was not a disposition ancillary to the suspension of a term of imprisonment, or otherwise contrary to the legislative scheme for community custody orders, and this ground of appeal is not made out. I turn then to consider the ground asserting manifest inadequacy.

Manifest inadequacy

[20] A number of preliminary observations need to be made about the regime for community custody orders.

[21] First, a community custody order is only available where the court decides to impose a sentence of imprisonment on the offender of not more than 12 months.[9] That requires in the first instance an assessment of the appropriate head sentence having regard to the circumstances of the offender and the offending. Only when that has been done in the application of ordinary sentencing principles, and it has been

9 *Sentencing Act*, s 48A(1)(b).

determined that a head sentence of not more than 12 months is warranted, may the court then go on to order that the sentence of imprisonment imposed be served by way of community custody order.

[22] Secondly, the community custody order must be for the duration of the sentence so fixed, which period may not be suspended.[10] The effect of that requirement is to subject the offender to relatively onerous conditions, including in relation to reporting and performing community work, for the whole period of the sentence. Although onerous, service under those conditions is a more lenient disposition than actual incarceration and, with the exception of the mandatory performance of community work, similar to the circumstances which often present under an order suspending sentence subject to conditions in relation to residence, reporting, electronic monitoring and good behaviour. Although no element of suspension is involved, service of a community custody order is in that sense akin to service of a wholly suspended sentence subject to intensive supervision and onerous conditions. The disposition must be viewed in that light.

[23] The relevant operation of the legislation does not permit the appropriate head sentence, once fixed, to be reduced or ameliorated on the basis that the period is to be served by way of community custody order. That is the essential nature of the scheme. Equally, it is not

10 *Sentencing Act*, s 48B(2).

permissible to fix a head sentence of lesser duration than would otherwise be appropriately imposed on the basis that service of a longer period under a community custody order would be unduly onerous.

[24] It is necessary then to consider the adequacy of the head sentence which was imposed on the respondent. The bare circumstances of the offending may be summarised as follows.

[25] At about 3:30 on the morning of 12 March 2018 the respondent was in the vicinity of the general store in Wurrumiyanga. He was 18 years old at the time. Two of his associates, who were juveniles at the time, called out to him and apparently suggested they break into the store together. The respondent and those two juveniles then formed a common purpose to break into the store for the purpose of stealing property. They gained entry to the building by pulling back a steel security grille on an extension to the building. They then gained entry to the store proper by kicking in an internal wall panel. They remained in the store for in excess of an hour and stole the property described at the outset of these reasons in the total value of $82,949.46.

[26] In the course of doing so, and in addition to the damage to the grille and wall panel at the time of entry, the respondent and his co-offenders destroyed an automatic teller machine, broke cigarette cupboards,

smashed windows, broke security mesh, and damaged CCTV and alarm PIN pads. That damage was in the amount of $11,000.

[27] The respondent and his co-offenders were captured on CCTV. Each of them was holding some sort of covering over their heads to partially obscure their faces. At approximately 8:00 that morning one of the co-offenders went to the airport at Wurrumiyanga carrying $55,000 in cash, three prepaid phones and $650 in prepaid phone cards. The other co-offender returned to his residence at Milikapiti where he was subsequently arrested. Approximately one week after this offending took place, the respondent's father attended at the Wurrumiyanga police station and stated that the respondent had made partial admissions to the offending. Later that morning the respondent attended at the police station and was arrested. Police were able to recover some of the property stolen from the store from the respondent's possession. The moneys in the possession of the co-offender were recovered, but almost $20,000 in cash remained unrecovered. The respondent maintained that he was only given and spent $1,000 of the cash that was stolen.

[28] On the basis of those matters, and the prosecution's concession that one of the other co-offenders was the "ringleader", the sentencing judge assessed the respondent's moral culpability as lower than that of his co-offenders. While that assessment may properly have been open in the circumstances and up to a point, there was no basis on which to

draw any great distinction between their relative moral culpabilities given their common purpose and the respondent's equal and active participation in the looting of the store on the night in question.

[29] The store is privately owned. It is not a government business venture or a community undertaking. During the course of the sentencing proceedings the court below received a Victim Impact Statement from the owner of the store. In that statement the owner speaks of his distress at the loss of cash and stock, and the extensive damage to the store and its fittings. The victim said that the incident had caused him stress, sleepless nights and anxiety.

[30] So far as the respondent's personal circumstances were concerned, he was a young offender, he had no prior criminal record, and he had problems with cannabis and alcohol misuse. He was also entitled to some reduction in his head sentence in recognition of his assistance to the investigating authorities and for his pleas of guilty (substantially tempered by the fact that they came very late in the proceedings).

[31] The principle of proportionality requires the fixing of sentences which are proportionate to the gravity and totality of the offending. Matters personal to an offender are irrelevant to the assessment of the objective gravity, which is to be determined by reference to the nature of the offending.[11] The objective circumstances will include such matters as

11 See *Muldrock v The Queen* (2011) 244 CLR 120 at [27].

the maximum statutory penalties, the degree of harm caused, the method by which the offence was committed and the offender's culpability.[12] Those matters define the upper limit of a proportionate sentence.

[32] Mitigating subjective factors cannot operate to lead to a sentence which is disproportionate to the crime. The sentence imposed must ultimately reflect both subjective factors and the objective seriousness of the offence committed, and in striking the balance there must still be a reasonable proportionality between the sentence passed and the circumstances of the crime.[13] The sentence cannot be less than the objective gravity of the offence requires.[14] Otherwise, the sentencing purposes of just punishment and denunciation will not be satisfied.[15] There will be circumstances in which a disproportionate emphasis on subjective considerations will cause inadequate weight to be given to objective circumstances and the achievement of reasonable proportionality between the sentence imposed and the circumstances of the crime.[16] For the reasons which follow, this is clearly such a case.

[33] There is a wide range of sentencing outcomes for these types of offending.

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12 See *Edmond & Moreen v The Queen* [2017] NTCCA 9 at [6].

13 See *R v Scott* [2005] NSWCCA 152 at [15].

14 See *R v McNaughton* (2006) 66 NSWLR 566 at [15].

15 See *Sentencing Act*, s 5(1)(a) and (b).

16 See *R v Dodd* (1991) 57 A Crim R 349 at 354.

[34] In *Bara v The Queen*[17], the Court of Criminal Appeal observed that a review of comparative sentences imposed by this Court for the crime of unlawful entry not involving offensive weapons reveals that it is not unusual for the Court to adopt a starting point of imprisonment for between two and four years before any discount for an early plea of guilty. The Court of Criminal Appeal was dealing specifically in that case with an unlawful entry which involved the circumstances of aggravation that the offence intended to be committed was the crime of stealing and that it occurred at night-time. Unlike the present case, the unlawful entry there under consideration also involved a dwelling house.

[35] In the matter of *R v Grant Moore*[18], Martin J observed that "the individual unlawful entries with intent to steal would attract sentences ranging from nine months to two and a half years, depending upon the circumstances of aggravation". That observation was made in relation to less serious unlawful entries, and was not directed to offences attended by the more grave types of aggravating circumstance. An examination of the sentences imposed by this Court bears out those observations in terms of range, if not standard. The bulk of matters involving unlawful entry in this jurisdiction also involve relatively young offenders. Most of those offenders are dealt with leniently for

17 [2016] NTCCA 5.

18 Unreported, Supreme Court of the Northern Territory, Martin J, 3 June 2016.

reason of their youth, and the range described by Martin J reflects that matter.

[36] When an unlawful entry is attended by property damage, as is frequently the case, an aggregate penalty is sometimes imposed. That aggregation may often have the effect of full concurrency, even though the sentence is not expressly structured in that manner. Subject to that qualification, the property damage in this case was to the value of $11,000 and in the ordinary run might have been expected to attract a sentence to imprisonment of something in excess of six months.

[37] The sentences imposed for stealing offences vary widely according to the circumstances and the value of the property stolen. Even where the property stolen is trifling in monetary value, and has no sentimental value, a sentence to imprisonment is almost invariably imposed in recognition of the inherent criminality of the conduct. By way of example, the theft of property worth less than $100 can attract a sentence of imprisonment for anything up to six months. Leaving aside embezzlement cases, the theft of property with lesser monetary value than the property stolen in this particular case can attract sentences of imprisonment for anything up to two years.

[38] While the sentencing judge in this matter imposed an aggregate sentence, that aggregation should broadly reflect the result that would have been achieved by the imposition of individual sentences subject to

appropriate orders for concurrency. For reasons of circumstance and temporality, some degree of concurrency would ordinarily have been expected between the sentence imposed for the stealing offence and the sentences imposed for the unlawful entry and property damage.

[39] That is particularly so given that the stealing offence and the unlawful entry offence had an element which in a sense overlapped, even allowing for the fact that those elements were not identical.[19] The former offence required a specific intent to steal particular articles, whereas the latter offence involved the general intention to commit the indictable offence of stealing in effecting the unlawful entry. Accepting that this was not a case in which a single act was an element of each of the offences[20], that commonality would still call for at least some degree of concurrency. However, this is not a case which would have called for concurrency in whole. The sentences imposed for the unlawful entry and property damage did not wholly reflect or subsume the criminality of the stealing offence.

[40] The wide range of sentencing outcomes evident from the foregoing discussion notwithstanding, those outcomes do comprise a general sentencing "standard" for the crimes for which the respondent was sentenced. It may be accepted that a sentencing standard is not a fixed range departure from which will necessarily found demonstrable error.

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19 **S**ee, for example, *Pearce v The Queen* (1998) 194 CLR 610 at [7].

20 Cf *Pearce v The Queen* (1998) 194 CLR 610 at [40]-[42].

Even allowing for that, the imposition of a head sentence of two months for this offending was plainly, obviously and grossly inadequate. The appellant's submission that in the ordinary course a starting point of something in the order of imprisonment for 24 months would have been within range may be accepted as a general proposition.

[41] During the course of the proceedings below the sentencing judge remarked that a head sentence of six months was not in range, and later that "nothing approaching nine months would be an appropriate term of imprisonment to impose on [the respondent]". While it may well have been correct to consider that actual incarceration for that period would have been excessive in the circumstances, that observation was made in a context in which a juvenile co-offender's suspended sentence to nine months' detention was being discussed, and in circumstances where the first task of the sentencing court was to fix an appropriate head sentence. The view expressed in the remarks recorded above reflected a misunderstanding of sentencing standards in this jurisdiction for these types of offences, and it failed to have regard to the requirement for reasonable proportionality between the sentence passed and the circumstances of the crime.

[42] It can only be concluded that the sentencing judge fixed a manifestly inadequate head sentence by reason of a disproportionate emphasis on subjective considerations, and/or on the basis that he intended to order

its service under a community custody order and considered that any longer period subject to those conditions would be unduly onerous. For the reasons already described in relation to the operation of the scheme for community custody orders, that constituted a miscarriage in the exercise of the sentencing discretion.

[43] The sentence was manifestly inadequate even making full allowance for the fact that that in the case of youthful offenders, and particularly first offenders, rehabilitation is usually far more important than general deterrence. This recognises both that youthful offending is often the product of immaturity and that imprisonment has significant limitations as a rehabilitative tool. However, the principle of proportionality described above still requires that the sentence cannot be less than the objective gravity of the crime requires. The manner in which the balance is to be struck between rehabilitation and the other sentencing purposes is properly reflected in such matters as whether the sentence is custodial or non-custodial; and, if custodial, the length of the head sentence, whether a non-parole period or an order suspending sentence is imposed, and the minimum time to be served.

[44] There is no doubt that a sentence to imprisonment was required in this case. The purposes of punishment, denunciation and deterrence plainly required the imposition of a head sentence significantly and substantially longer than two months. The purpose of rehabilitation could be given effect by the imposition of a shorter but still

proportionate head sentence than would be imposed on a mature or recidivist offender for the same crimes, and/or by an order suspending sentence after a period of imprisonment of lesser duration than would otherwise have been required but for the offender's youth. It could also have been given effect by the imposition of a proportionate head sentence to be served by way of community custody order.

[45] As the courts have frequently observed, sentences which are so inadequate as to indicate error or departure from principle, and sentences which depart from accepted sentencing standards, constitute error in point of principle which the prosecution is entitled to have corrected on appeal.[21] That entitlement is subject to the exercise of the residual discretion. There is no countervailing factor which would warrant the exercise of the residual discretion in this matter.

Disposition and re-sentence

[46] Fixing the sentence to be substituted for the sentence imposed by the Local Court on 29 August 2018 presents a number of particular considerations. That process must necessarily take into account matters which have transpired since then, including the fact that the respondent did not comply with the conditions of the community custody order after the notice of appeal was filed and the fact that the respondent has been at large since that time.

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21 **S**ee *R v Barbara* (Unreported, New South Wales Court of Criminal Appeal, 24 February 1997), cited by the Northern Territory Court of Criminal Appeal in *R v Riley* (2006) 161 A Crim R 414 at [19].

[47] The substituted sentence will also need to take into account the fact that the respondent's juvenile co-offender was sentenced to detention for nine months subject to suspension. While that sentence has limited significance for parity purposes given that it was imposed on a juvenile under the *Youth Justice Act*, it does warrant the exercise of some restraint and parsimony in the sentence to be imposed on the respondent.

[48] Having regard to those considerations, a head sentence of somewhere in the order of 12 months is warranted, appropriately backdated and suspended subject to conditions and supervision for the balance of the sentence (or, alternatively, to be served under a community custody order). This Court is not in a position to deal with those matters as any order suspending sentence subject to supervision would require an assessment pursuant to s 103 of the *Sentencing Act*. The parties are in agreement that there are also logistical and other reasons why those matters are best dealt with by the Local Court in Wurrumiyanga.

[49] Accordingly, on 20 December 2018 I made the following orders with these reasons to be published at a later date:

1. The appeal is allowed on the basis of ground 1, and the sentence to imprisonment for two months which was imposed by the Local Court on 29 August 2018 is quashed.

2. The matter is remitted to the Local Court at Wurrumiyanga on 22 January 2019 for the respondent to be sentenced in accordance with law.
