NEW SOUTH WALES COURT OF CRIMINAL APPEAL

CITATION: Regina v Togias [2001] NSWCCA 522

FILE NUMBER(S):
60242/01

HEARING DATE(S): Friday 10 August 2001

JUDGMENT DATE: 14/12/2001

PARTIES:
Regina v Nikolitsa Togias

JUDGMENT OF: Spigelman CJ Grove J Einfeld AJ

LOWER COURT JURISDICTION: District Court

LOWER COURT FILE NUMBER(S): 00/11/0195

LOWER COURT JUDICIAL OFFICER: Woods DCJ

COUNSEL:
D.G. Staehli (Crown/Appellant)
S.J. Odgers SC with I.H. McClintock (Respondent)

SOLICITORS:
Commonwealth DPP (Crown/Appellant)
Murphy's Lawyers (Respondent)

CATCHWORDS:
CRIMINAL LAW AND PROCEDURE
SENTENCE
IMPORTATION OF COMMERCIAL QUANTITY OF NARCOTICS (MDMA)
COURIER ACTING FOR FINANCIAL GAIN
OFFENDER BECOMING PREGNANT AFTER ARREST AND CHARGE
APPEARING FOR SENTENCE AT A TIME WHEN NEWBORN APPARENTLY BEING BREASTFED
INSUFFICIENCY OF EVIDENCE OF POTENTIAL CONTACT BETWEEN MOTHER AND CHILD IF MOTHER IN CUSTODY
THREE YEARS IMPRISONMENT WHOLLY SUSPENDED
CROWN APPEAL
MANIFEST INADEQUACY
APPROPRIATE COURSE TO REMAND AND RECEIVE EVIDENCE ENABLING ASSESSMENT THAT CIRCUMSTANCES OF CUSTODY WILL BE HUMANE IN RESPECT OF CONTACT BETWEEN MOTHER AND CHILD

EXCEPTIONAL CIRCUMSTANCES REQUIRED TO GIVE SUBSTANTIAL WEIGHT
PROBABLE EFFECT OF SENTENCE ON FAMILY OR DEPENDANTS PURSUANT TO s16A(2)(p) CRIMES ACT 1914
APPLICABLE LIMITATIONS ON AVAILABILITY OF PERIODIC DETENTION AND HOME DETENTION NOT REMOVED FOR FEDERAL OFFENCES BY s20AB(1A) CRIMES ACT 1914
RELEVANCE OF INTERNATIONAL CONVENTIONS
OBSERVATIONS CONCERNING CONVENTION ON THE RIGHTS OF THE CHILD;INNOCENTI DECLARATION ON THE PROTECTION, PROMOTION AND SUPPORT OF BREASTFEEDING AND CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN
FINDINGS BY SENTENCING JUDGE
(PER SPIGELMAN CJ & GROVE J, EINFELD AJ CONTRA) DESIRABILITY OF RESENTENCE BY DIFFERENT JUDGE ON REMITTER TO TRIAL COURT

LEGISLATION CITED:
Crimes (Sentencing Procedure) Act 1999 (NSW)
Crimes Act 1914 (Cth)
Crimes Legislation Amendment Act (No 2) 1990
Crimes Regulations 1990 (Cth)
Customs Act 1901 (Cth)
Justices Act 1902
The Human Rights Act 1998 (Imp)

DECISION:
APPEAL ALLOWED
REMITTED TO DISTRICT COURT FOR RESENTENCE

JUDGMENT:

IN THE COURT OF

CRIMINAL APPEAL

60242/01

SPIGELMAN CJ

GROVE J

EINFELD AJ

Friday 14 December 2001

REGINA v NIKOLITSA TOGIAS

JUDGMENT

1 SPIGELMAN CJ: The facts and issues are set out in the judgment of Grove J which I have read in draft. The Respondent to this Crown appeal acted as a courier for a substantial quantity of the narcotic known as ecstasy. The amount of almost one kilogram was double the commercial quantity. The Respondent pleaded guilty to a charge of importation pursuant to s233B(1)(b) of the *Customs Act* 1901 (Cth) and was convicted and sentenced accordingly.

Whether Sentence Manifestly Inadequate

2 In the present case a substantial custodial sentence was called for, unless the case was exceptional. There was a plea of guilty and the subjective circumstances advanced on the part of the Respondent were of moderate strength. The consideration of particular force was the fact that at the time of sentence the Respondent had recently given birth to a child.

3 I agree with Grove J that the sentence of three years was a manifestly inadequate sentence. The Crown presented to the Court a detailed schedule of sentences for ecstasy and other mid-range narcotics. The Respondent did not challenge the proposition that the schedule was reasonably representative of sentencing practice. Putting aside the occasional exceptional case of a very large shipment or substantial assistance to authorities, the schedule suggests a sentencing range for persons low in the hierarchy of five to nine years, with non-parole periods from three to six years. The lower end of the range was applicable to traffickable quantities, often quite small amounts.

4 By s16A(1) of the *Crimes Act* 1914 (Cth), a court sentencing for a Commonwealth offence "must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence". A sentence of three years failed to comply with this mandatory requirement.

5 Furthermore, the order suspending the sentence could not be justified on the basis that the Respondent would be separated from her child for an unknown period. His Honour could, and should, have deferred sentencing until the Respondent had been assessed, so that the Court knew whether or not there would be any separation. (For a NSW offence the order would be made under s11(1)(c) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW)). A suspended sentence was manifestly inadequate in the circumstances of this case.

6 I agree with Grove J that his Honour should have deferred sentencing pending an assessment. The High Court decision in *R v Griffiths* (1977) 137 CLR 293 is often cited as authority for the existence of power to proceed by way of a common law bond – which came to be called a *"Griffiths"* remand – permitting behavioural assessment of an offender. However, the Court's power to defer sentencing is not confined to such a circumstance. Subject to any statutory requirement, a Court may defer sentencing for any proper purpose affecting the sentencing task. (See e.g. *Griffiths* at 321-323, 335, 338-339.)

7 In an appropriate case, the inability of the prison authorities to provide for detention in a humane manner will justify a court refusing to impose a custodial sentence. That was not shown to be the case here. His Honour was correct to conclude that the evidence from the Department of Corrective Services revealed a process that involved unacceptable delays so that the probable separation of mother and baby could be regarded as inhumane. However, his Honour failed to have regard to the fact that, by deferring the sentencing task, he may have been able to ensure that, with the co-operation of the authorities and subject to a positive assessment, there would be no such separation. In view of the seriousness of the offence, his Honour erred in failing to take that course.

8 By s16A(2) of the *Crimes Act* (Cth), the court must take into account a list of matters being such of the matters "as are relevant and known to the court". As a joint judgment of this Court of Fitzgerald JA, Abadee and Barr JJ said in *R v Capper* [2000] NSWCCA 63 at [8]:

"Some of the matters specified in subs 16A(2) would, in appropriate circumstances, favour leniency, while others point in the opposite direction. ...

The diversity of the specified factors and the tension between them emphasise the broad discretionary nature of the sentencing process."

9 Of particular relevance in the present case is s16A(2)(p) which provides, as one of the list of matters:

"the probable effect that any sentence or order under consideration would have on any of the person's family or dependants."

10 It is of some significance that the Parliament has identified this matter in terms of a "probable effect", not merely a "possible effect".

11 In the present case, there was virtually no evidence before the court about the relevant circumstances. There was some suggestion in the materials before the court of a supportive relationship from the Respondent's mother and, it appears, that the father of the child was also supportive. None of this is to detract from the significance, particularly in the case of a baby, of a mother child relationship. However, evidence which would assist the court in determining the "probable effect" of the various sentencing options available to the court was available only to the Respondent

12 The evidence actually adduced was limited to a psychologist who gave evidence as to the strength and significance of the bond between mother and child, particularly in the early months. She described the effect of taking a child away from a mother while breastfeeding within the first three months as "absolutely traumatic". The expert witness also gave evidence as to the effects of separation from the mother after a three month period, which was the pertinent evidence in the light of the fact that, as at the date of sentence, the child was about three months old. I found this evidence somewhat difficult to understand.

13 His Honour approached the sentencing exercise on the basis that hardship to a child had to be classified as "exceptional" before it could be given substantial weight for the purposes of s16A(2)(p). Counsel for both the Appellant and the Respondent in this appeal accepted that his Honour was correct.

14 The necessity for such an "exceptional" effect has long been accepted for sentencing at common law. (See eg *R v Edwards* (1996) 90 A Crim R 510 per Gleeson CJ at 516-517).

15 The South Australian Court of Criminal Appeal held that legislation in that State to the same effect as s16A(2)(p) did not affect the application of the common law principle (*R v Adami* (1989) 51 SASR 229). The Western Australian Court of Criminal Appeal came to the same conclusion with respect to s16A(2)(p) (*R v Sinclair* (1990) 51 A Crim R 418 esp at 430-431). This was also the conclusion of the Court of Appeal in Victoria (*R v Matthews* (1996) 130 FLR 230 at 233). (See also *R v Carmody* (1998) 100 A Crim R 41 at 45).

16 Courts of Criminal Appeal in three States have interpreted s16A(2)(p) as not altering the common law. Exceptional hardship is required. It is important that Courts of Criminal Appeal adopt the same approach to the interpretation of national legislation. Some comments by Dunford J appear to express a different view (*R v Caradonna* [2000] NSWCCA 398 at [25]). However Gleeson CJ referred to the South Australian and Western Australian decisions without disapproval in *Edwards* supra at 517. Subsequently to

Caradonna, where he had agreed with Dunford J, Wood CJ at CL affirmed the authority of the earlier cases (*R v Ceissman* [2001] NSWCCA 73 at [36]).

17 If there is to be any change in this position, and that was not put in this case even on a formal basis, only the High Court can effect it.

Relationship between Commonwealth Law and New South Wales Law

18 By ss6 and 7 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW), the court is empowered to make orders by way of periodic detention or home detention, as an alternative to full time detention in the case of New South Wales offences. Those sections relevantly provide:

> *"6(1) A court that has sentenced an offender to imprisonment for not more than 3 years may make a periodic detention order directing that the sentence be served by way of periodic detention."*

> *"7(1) A court that has sentenced an offender to imprisonment for not more than 18 months may make a home detention order directing that the sentence be served by way of home detention."*

19 These sentencing options are available for Commonwealth offences by force of s20AB(1) of the *Crimes Act* (Cth) which provides:

> *"Where under the law of a participating State or a participating Territory a court is empowered in particular cases to pass a sentence or make an order known as a community service order, a work order, a sentence of periodic detention, an attendance centre order, a sentence of weekend detention or an attendance order, or to pass or make a similar sentence or order or a sentence or order that is prescribed for the purposes of this section, in respect of a State or Territory offender, such a sentence or order may in corresponding cases be passed or made by that court or any federal court in respect of a person convicted before that first mentioned court, or before that federal court in that State or Territory, of a federal offence."*

20 The section expressly refers to "a sentence of periodic detention". Regulation 6(g) of the *Crimes Regulations* 1990 (Cth), as amended, prescribes a home detention order made under Part 2 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW), for the purposes of s20AB of the *Crimes Act* (Cth). A home detention order may not be made with respect to some drug offences. This does not, however, include offences under s233B of the *Customs Act* (Cth).

21 Mr Odgers SC, who appeared for the Respondent in this Court, submitted that the restriction contained in the opening words of each of ss6(1) and 7(1) of the *Crimes (Sentencing Procedure) Act* (NSW), requiring that a court has "sentenced an offender to imprisonment for not more than" three years or eighteen months, in the cases of periodic detention and home detention respectively, does not apply to the orders of that character with respect to Commonwealth offences. Mr Odgers SC relied on s20AB(1A) of the *Crimes Act* (Cth), which provides:

> *"Where the law of a participating State or a participating Territory requires that before passing a sentence, or making an order, of the kind referred to in subsection (1) a court must first pass another sentence or make another order (whether or not that other sentence or other order is suspended upon the making of the first-mentioned sentence or order), then, a court is not required, before passing or making that first- mentioned sentence or order in respect of a person convicted by that court for a federal offence, to pass that other sentence or make that other order."*

22 The issue is whether the words "[a] court that has sentenced an offender to imprisonment for not more than" a period, satisfy the description found in s20AB(1A) of "a court must first pass another sentence".

23 Grove J has referred to par 125 of the Report of the Australian Law Reform Commission, Sentencing, being ALRC 44 which led to the insertion of s20AB(1A). The Commission's concern was to ensure that each sentencing option would be available for consideration on its own merits. It referred to a situation in which a community service order could only be made if the Court had found that the offender should be imprisoned. This is reflected in the terms of s20AB(1A) by the use of the word "requires" with reference to "must first pass another sentence", as a description of the relevant State or Territory law.

24 In my opinion, the introductory words of ss6 and 7 of the *Crimes (Sentencing Procedure) Act* (NSW) are not a 'requirement' of the character referred to in s20AB(1A). As a matter of substance, these introductory words are negative rather than positive in effect. Insofar as there is a 'requirement' it is that the Court must *not* have sentenced an offender to imprisonment for *more than* three years or eighteen months, respectively. This is not in my opinion a 'requirement' to the effect that the court "must first pass another sentence" within the meaning of s20AB(1A). Rather, it is a 'requirement' that the court must *not* first pass another sentence. I do not believe that s20AB(1A) should be read as if the words "requires that a court must first pass another sentence" encompass both a negative and positive formulation. Accordingly, I agree with Grove J that the submission made on the part of the Respondent in this regard should be rejected.

Relevance of an International Convention

25 The Respondent invoked article 9.1 of the United Nations *Convention on the Rights of the Child* (the Convention) which states:

> *"State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. ..."*

26 Article 9.4 makes reference to "imprisonment" as one of the circumstances in which the separation of a child can occur. It provides:

> *"Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the*

whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. ..."

27 Notwithstanding this reference to "imprisonment", it is not clear to me how a "separation" by way of imprisonment can ever be determined to be "for the best interests of the child" save where there has been a crime of child abuse.

28 The Respondent did not invoke article 3.1 of the Convention which provides:

"In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

29 Nor did the Respondent invoke the similar common law principle, to which Gaudron J referred in *Minister for Immigration and Ethnic Affairs v Teoh* (1994-1995) 183 CLR 273 at 304.

30 It was submitted that article 9 was a "particularly relevant matter", in support of the submission that it was open to his Honour to find the circumstances of the present case to be "exceptional", in the sense that that word is used in the line of authorities concerning the impact of a sentence upon an offender's family. In response to questioning from the Court, it was submitted that the Convention was "relevant to a sentencing discretion".

31 The jurisprudential basis upon which the asserted "relevance" could be supported, was not further elucidated. The Court was not referred to the line of authority in the High Court on the use to be made in Australian law of international legal instruments. The Court was not referred to any authority in which a court anywhere in the world has applied treaty obligations in the sentencing process.

32 Some support for such use of article 9 was said to arise from the coincidence that the same word "exceptional" also appears in the pre-Convention United Nations General Assembly resolution, entitled Declaration of the Rights of the Child, 1959, which relevantly included in its "Principle 6":

"... a child of tender years shall not, save in exceptional circumstances, be separated from his mother."

How this is pertinent, is not clear to me.

33 International treaties and conventions to which Australia is a party, but which have not been incorporated in Australian law, have been invoked in Australian legal reasoning. Such international obligations:

· Are an appropriate influence on the development of the common law (*Mabo v Queensland (No 2)* (1991-1992) 175 CLR 1 at 42 per Brennan J; *Dietrich v The Queen* (1992) 177 CLR 292 at 360 per Toohey J; 372-3 per Gaudron J; *Minister for Immigration and Ethnic Affairs v Teoh* per Mason CJ and Deane J).

· May be used to resolve an ambiguity in a statute (*Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69 per Latham CJ, 77 per Dixon J, 80-81 per Williams J; *Teoh* supra at 287 per Mason CJ and Deane J; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at [97] per Gummow and Hayne JJ).

· May create a legitimate expectation about executive decision making (*Teoh* supra especially at 291 per Mason CJ and Deane J).

34 The Respondents did not invoke any of these circumstances. Indeed, I would have thought that the provisions of the Convention would support an argument against requiring "exceptionality" as a test for s16A(2)(p), rather than, as propounded by the Respondent, as reinforcing the application of such a test.

35 The issue has arisen, so far as I have been able to determine, in Australia on three occasions before a single judge of a state supreme court. Perry J has treated the Convention as a relevant consideration in the context of s16A(2)(p) of the *Crimes Act* 1914 (Cth) and also in the context of the similar provision in South Australian legislation. (See *Walsh v Department of Social Security* (1996) 67 SASR 143 at 146; *Bates v Police* (1997) 70 SASR 66 at 70.) Bleby J, without reference to the earlier decisions of Perry J, rejected the proposition that treaty obligations can be invoked in this manner (*R v Smith* (1998) 98 A Crim R 442 at 448).

36 Difficult questions arise. (See eg *Baker v Canada* (1999) 174 DLR (4th) 193 at [69]-[70] and cf [78]-[81]; *Rajan v Minister of Immigration* [1996] 3 NZLR 543 at 550-552.) The Court has not received the kind of assistance required for the determination, for the first time, of the important principles involved. It is not appropriate to determine these matters on this occasion.

37 Woods DCJ made a finding of exceptional circumstances. He did not invoke article 9 of the Convention. It is unnecessary for this Court to do so in the light of the orders proposed by Grove J, with which I agree. I also agree that it would not be appropriate for Woods DCJ to rehear the matter.

38 GROVE J: On 7 October 1999 the respondent, aged twenty one, arrived at Sydney Kingsford Smith Airport from Bali, Indonesia. She was travelling alone. A customs officer detected a bulky item around her waist and, questioned about its nature she said "No, I don't know. You know that German guy, you know he raped me. He put this on." Examination disclosed that she was carrying 8,282 tablets later determined to be a drug commonly referred to as ecstasy. The purity was rated at 44.7% resulting in 967.5 grams of methylene dioxymethamphetamine (MDMA). She was charged with importing not less than the commercial quantity of prohibited import and after one week in custody she was released to bail.

39 On 31 March 2000 the respondent pleaded guilty before a magistrate and was committed for sentence to the District Court pursuant to s51A of the Justices Act 1902. On 4 September 2000 she appeared before Woods DCJ where counsel applied for remand until after she was delivered of an expected child. His Honour expressed the view that the application was appropriate. The Crown Prosecutor applied to have noted that the fact of pregnancy was not disputed but that the application for adjournment was opposed. It was granted and the sentence hearing adjourned to 2 March 2001. At the adjourned hearing his Honour found that the child had been born on 7 January 2001. He expressed a requirement that he be satisfied that (in the event of a custodial sentence being imposed) there was "some mechanism by which there can be a continuity of contact between the mother and the child" and sought that evidence be obtained from an appropriate source, in particular the Department of Corrective Services.

40 On 30 March 2001 Mr Kailis the acting program manager at Mulawa Corrective Centre and Ms Loy (transcribed at times as Ms Lloyd or Ms Morely) the coordinator of the mothers and childrens program for the department and Ms Warren, a psychologist, one of whose specialties was interaction of young children with their mothers, gave evidence. The learned judge sentenced the respondent to three years imprisonment to date from that day but ordered her release forthwith upon giving security by entering a recognizance herself in the sum of $5,000 to be of good behaviour for three years.

41 On 23 April 2001 the Director of Public Prosecutions lodged this appeal contending that the sentence was manifestly inadequate.

42 His Honour's remarks on sentence were very much focussed upon his concerns about the welfare of the child and maternal contact. He appears to have accepted that the respondent had succumbed to the blandishments of a German whom she met in Bali and consequently was contacted by some Asian people who supplied her with the contraband and the means of its transport. He found that her role in the importation was that of a courier. After arrest the respondent exercised her right, on the advice of her solicitor, to decline to be interviewed. However on 22 March 2000 shortly before entry of her plea of guilty in the Local Court, she supplied a statement to the Australian Federal Police upon which his Honour's findings seem to be based. No mention was made of rape in this statement but she described a German named Stefan who proposed that she take some drugs into Australia. The "plan" was foolproof and someone would meet her "on the other side" (of Australian customs) to whom she should deliver the drugs for which she would receive in exchange $5,000. She never saw Stefan again after making this arrangement. She was visited in her hotel by Asian men. She expressed reluctance about continuing but was persuaded that the power of a "magic ring" supplied by one of them to her would keep her "safe". During the flight to Australia she vacillated about abandoning the drug on the aircraft and decided not to because the "collector" might have been watching her from somewhere on the plane. One of the Asian males was known to her as Wawan. On the issue of assistance, the content of the statement was assessed as of very minimal value to the Australian Federal Police. The respondent's assertions were not supported by testimony.

43 Aside from the circumstances pertaining to the newborn infant, the respondent presented an additional significant subjective case. She had no prior conviction. A number of favourable testimonials were presented. She was undertaking and in fact completed a course through which she attained tertiary qualifications in biotechnology.

44 Woods DCJ expressly found that "fears which she expresses of sexual molestation are, in her case, very real" and he based this explicitly on his acceptance of "the inference" that Dovey J drew. This reference should be explained. The respondent did not give evidence and hence did not testify to these fears. Mention of her fears (of molestation if in custody) appears in a report from a psychiatrist Dr Roberts whom she saw on several occasions between October 1999 and 12 July 2000 and whose first report is dated 18 July 2000. Attached to this report is the transcript of a judgment of Dovey J in proceedings between the respondent's parents in 1984. Contained therein is a comment that the wife had suspended access of the husband because of an allegation of sexual interference with "one or other or both of the two children of the marriage" in respect of which allegation the judge (Dovey J) said that he had "grave suspicion" but he made no positive finding. The respondent was one of the children referred to.

45 Dr Roberts reported that the respondent adverted to sexual behaviour between herself and her father but that she had "no recollection that this occurred".

46 The respondent informed a probation and parole officer who prepared a report in July 2000 that the holiday to Bali was encouraged by her mother but made possible by her father who was an airline employee and able to assist with the ticket. That does not suggest a likely history of misconduct by father towards daughter. She told Dr Roberts that the cost was $100 and that she had been to Bali in all on three occasions where she "sunbakes and buys clothes". Her history of sexual assault to the probation and parole officer was that, a few days after her eighteenth birthday, an uncle tried to sexually assault her but she was eventually able to push him away.

47 No express challenge to his Honour's finding that the respondent's fears were real was made but the material, upon analysis, would scarcely support it.

48 Senior counsel for the respondent sought to place particular weight on the respondent's psychologically vulnerable nature with particular reference to "sexual abuse as a child" and he noted that recently before travelling to Bali she had attempted suicide. The latter is the subject of contradictory material as to whether it occurred three months or three years beforehand. Dr Roberts reports a history of suicide attempt three months prior to the journey to Bali "with 40 panadeine forte". The probation and parole officer reported that she attempted to take her life consuming "a large number of pills" not long after

the incident with the uncle shortly after her eighteenth birthday when she became depressed and unable to cope.

49 His Honour took into account the "psychological and personal circumstances" of the offender. He did not elaborate. If the remarks are referable to the subject matter of counsel's submission, the evidence leaves the issue in obscurity.

50 In a written submission senior counsel for the respondent accepted the correctness of the recognition by his Honour that participation as a courier in the importation of a commercial quantity of ecstasy would "normally require a significant period of full time custody". That statement is endorsed.

51 Few things are so widely promulgated, not only in Australia but many other parts of the world, that trafficking in illicit drugs will attract severe penalty. The respondent's history to Dr Roberts was that she had herself "never tried" the use of any drugs. Her motive in doing what she did was purely financial gain. Her appreciation of the sinister aspects of her participation was plainly conveyed in her belated statement to police which included "Wawan explained how they were going to hide the drugs on me. He also told me to go the next day to buy a corset, which would be used to hide the drugs, which I did". She did not check herself out of the hotel in Bali in response to a representation by the Asian males that they would finalise her hotel bill. Her statement of belief that, if she disposed of the tablets on the aircraft, the person waiting to collect them would "do something terrible" to her was unreferenced to anything said or done in Bali during her encounter with the promoters of the importation.

52 Unless there be some exceptional reason the sentence imposed accompanied by immediate release order must be categorized as inadequate, and to such an extent as to attract the intervention of this court and the imposition of an appropriate sentence.

53 Woods DCJ found exceptional reason and, after an historical reference which his Honour said demonstrated "tenderness of the law towards pregnancy and childbirth ……. on a continuing basis", he concluded:

> *"…… the law will generally be robust and take a view that imposition of a sentence of imprisonment almost inescapably can damage family relationships and have an impact on other persons. But the case of a child feeding at the breast, it seems to me, is special and exceptional and in taking into account s16A (of the Crimes act 1914) it calls for particular attention to subsection (2)(p).*
>
> *In this case the misbehaviour (sic) certainly would normally call for a significant sentence of full time custody. Nevertheless, in the circumstances as I have described them, notwithstanding the best endeavours of those concerned with the administration of the women's prison, a very grave and extraordinary impact would occur in relation to the infant if a full time sentence were imposed."*

54 It will be necessary to examine some detail of the circumstances of prison administration adverted to by his Honour but I should say at the outset that my reading of the evidence leads me to a conclusion which restrains me from joining in the compliment implicit in the expression "best endeavours".

55 I should collate some details about the respondent's situation. At the time she appeared for sentence the latest probation and parole report recorded that she resided with her mother, sister and seven week old daughter in the family home. She had been in a steady relationship for three years and intended to wed after "court matters have been resolved". She and her partner were self employed selling "sports supplements to gymnasiums and health clubs" from which they derived their sole (unstated) income. Given

the date of birth of the child, it can be inferred that she became pregnant about March 2000, that is to say some four to five months after being arrested and charged.

56 Not only, as already noted, did the respondent not avail herself of the opportunity to testify, neither did her partner or any member of her family. There is, of course, no obligation to call such evidence and adverse inference is not to be founded on its absence but neither can positive finding soundly arise.

57 His Honour was entitled to act upon material put before him by way of documents such as the probation report and the medical opinion, however there was no detectable evidential source for his central finding that the infant was currently being breastfed by the respondent. I am, of course, aware that in a busy sentencing court matters which are not in dispute are frequently advanced by counsel with some informality. However, in the present case where the circumstance that the infant was being breastfed was critical and central to the course which his Honour decided to adopt he ought to have insisted upon adequate proof either by evidence or formal agreement as to fact.

58 The assumption (of breastfeeding) had effect in the context of the evidence of the Corrective Service officers and Ms Warren.

59 His Honour had been provided with a letter (concerning a different person) to which there was attached a pamphlet detailing the mothers and childrens program of the Corrective Services Department but that document contained repeated emphases that there could be no guarantee of approval into the program and that the Commissioner would make the final decision taking into account "many variables". The lastmentioned were not defined. Length of sentence was a suggested factor but how it was to be applied remained unclear.

60 I will summarize some matters emerging from the evidence of Mr Kailis and Ms Loy in a little more detail.

61 Jacaranda Cottages are part of a facility at Emu Plains Correctional Centre which can include a child and mother living together (at the centre) full time. Mr Kailis testified that there was no facility for a mother (and child) to go immediately into custody at Jacaranda Cottages. A mother under sentence would be received into Mulawa and after assessments (psychologist and drug and alcohol worker) would have her classification determined at a case management meeting. If not initially classified to category 2 it would normally take six months to achieve reduction from category 3 by review but perhaps three months in "extraordinary circumstances". How long initial classification takes was left obscure but even on arrival at Emu Plains it would take around two months (in the main gaol) before Jacaranda Cottages were in prospect. Of course, in any event, even if all the assessments were favourable, ultimate decision had to await final exercise of discretionary power by the Commissioner.

62 Absent Jacaranda Cottages and approval of full time care, Mr Kailis stated that other "facilities" for women with children were visits on one day per week (10am – 2pm) between the mother and children only, and three visits per week of one and half hour duration on other days with family members at which the children could again be "brought along".

63 Ms Loy commenced her evidence by "reiterating what Mr Kailis was saying". I infer that she was present during his testimony. She then stated "that everything depends on the sentence" and added "it's one year, it's obviously easier to get them into Jacaranda Cottages. If it's five, ten years, it's obviously longer". I regret that why the time it takes to assess and approve a mother for entry into the program should extend by reason of length of sentence to be served in the future is not obvious to me.

64 She added that "paperwork" could take six to eight weeks or longer and that sometimes it has taken four to six months for her to get "a baby with their mum for all sorts of reasons".

65 Counsel had asked Ms Loy whether it was possible to have the child brought in (to prison) once a day and she replied that she "wouldn't be doing that assessment". However his Honour suggested that in practical terms one would not have a child being brought back and forth to prison and Ms Loy agreed although her answer "It's not good for the child, and the carers, the carers are – the carers are able to come, you know, twice a day, or once a day. It's not very practical" seems to focus mainly on the carers. The issue was not explored further.

66 I can understand a reluctance to impose a sentence of full time custody in the light of that evidence but his Honour was well equipped to take steps to remedy any perceived deficiency. It was erroneous, in my opinion, to fail to do so. A Court has power to adjourn the sentencing of an offender with or without conditions for a purpose affecting the exercise of sentencing discretion. **Griffiths v the Queen** (1977) 137 CLR 293. That authority confirmed the law in Australia as recognizing a power analogous to that of the then existent Court of Quarter Sessions in England articulated by Pickford J. in **R v Spratling** 1911 1 KB 77:

> *"It was not, and could not be, denied that that Court had power to sentence him at the time he was convicted. We think it equally clear that it had power to postpone sentence till a future day. It also had power to release him on bail on his own recognizances. To bind him over to appear for sentence when called upon is only to postpone sentence, and in the meanwhile release the prisoner on bail. This power has constantly been acted upon, and we see no reason to doubt that it exists, and that the jurisdiction to pass sentence still remains in the Court. We must not, however, be taken to decide that the Court can postpone sentence sine die against the will of the prisoner."*

67 Adjournment sine die is not contemplated but a limited delay to obtain useful information. What was required was firm evidence of what conditions would pertain in relation to this respondent and her child in the event that an order committing her to prison were to be made. The evidence tendered was limited to generalities. No attempt was made to obtain focussed information. It is possible that a response in particular terms may not be forthcoming from Corrective Services but such a situation would need to be taken into account if it arose. His Honour elected to proceed without knowing what the situation was in this regard.

68 The Court was taken by counsel to a collection of authorities to some of which I will now refer but none of them offers direct application to the present case.

69 In **R v Stewart** 1994 72 A Crim R 17 the Court of Criminal Appeal of Western Australia upheld sentences ranging up to twenty two months imprisonment upon a woman aged twenty five years who pleaded guilty to possessing quantities of cannabis and cannabis resin which she was deemed to have within intent to supply. At the time of sentence she had three children and was three months pregnant. In **R v Carmody** 1998 100 A Crim R 41, a thirty year old mother was sentenced to imprisonment for various offences including being knowingly concerned in the importation of a traffickable quantity of heroin. New material received by the Court of Appeal of Victoria indicated that her child was chronically prone to attacks of febrile convulsion and was particularly reliant on his mother's care and comfort and would be likely to be appreciably disadvantaged by a separation from her. Although sentence was reduced from a higher level, a minimum term of eighteen months imprisonment was imposed by the appellate court.

70 In **R v SLR** 2001 116 A Crim R 150 a sentencing judge imposed sentences effectively confining the offender for minimum terms dating from 29 October 1999 until 28 August 2000. She was due to deliver a child in June 2000 and this was known when sentence was imposed on 29 October 1999. On appeal, the sentences were left undisturbed save the making of an order that after the birth of the expected child, the offender be transferred from a juvenile detention centre to an adult prison. It appears that the Court had been advised of the existence of the mothers and childrens program available in the latter but not the former. It does not appear that the Court was made aware of the administrative delays canvassed in the present case.

71 In **R v Niga** CCA NSW unreported 13 April 1994 a Crown appeal against the inadequacy of a sentence of three years imprisonment to be served by periodic detention was dismissed in the exercise of residual discretion, Kirby P (as he then was) remarking *"we should leave this case with a clear indication that that sentence was not on the face of things adequate ……."*. The offence was supplying a commercial quantity of heroin, however it was noted that findings were open that the offender was a relatively minor player in a significant drug dealing and was a single mother supporting two children.

72 In **R v White** [1999] NSWCCA 60 Simpson J (Smart AJ agreeing) observed that the applicant for leave to appeal, as at the date of release eligibility pursuant to sentence imposed in the District Court, would have a child *"aged less than seven months. While one can appreciate that this may not be the ideal start in life, it does not, in my view, qualify under the* ***Edwards*** *((1996) 90 A Crim R 510) test as 'highly exceptional' hardship"*. The Court had been informed that the policy of the corrective services authorities was to permit children born in prison to remain with their mothers to the age of five years.

73 In **R v Tiki** CCA NSW unreported 24 August 1994 an offender became pregnant after arrest and charge for offences of dishonesty and gave birth to a child who was aged five and half months when the mother was committed to custody on 24 May 1994. Although sentence was reduced on appeal, full time custody was imposed for nine months commencing from the lastmentioned date.

74 In **R v Luong** [2000] NSWCCA 139 the offender was arrested when six months pregnant and charged with "deemed" supply of a commercial quantity of heroin. Her husband was a co-offender. The child had been taken away from the mother almost immediately after birth and the Court was informed that there was no provision for a woman in custody on remand to keep her baby. The offender had not been admitted to bail pending trial. Upon conviction she was sentenced to a minimum term of eight months imprisonment with an additional term of two years ten months and was thereby eligible for release about five weeks after the conclusion of the trial. She was in fact released about two weeks after her eligibility date. A Crown appeal against inadequacy of sentence was dismissed, it being remarked that, as she had been at liberty for six and half months before the appeal was heard, the discretion of the Court would be invoked to dismiss the appeal in any event.

75 The Court of Appeal of Victoria suspended two years of a two and half year custodial term in **R v La Mude** [2001] VSCA 33 where a woman engaged in low level trafficking in amphetamines over a period of three months. However she had a background which the Court described as extraordinary in its misfortune. It was observed:

> *"Her father suicided when she was only six years old, and her paternal grandmother also suicided at some stage. The father of her first child suicided when that child was two years old. The son of the father of the applicant's second child committed suicide when he was only 14, which was early in the course of that relationship, and that second partner, himself the subject of psychiatric care, committed suicide when the applicant brought the relationship to an end. In the course of the two relationships that led to the birth of her children, the applicant was subject to domestic violence, and, it was said on the plea, she was introduced to amphetamines by her third partner, a truck driver. Given her history, her counsel said her recourse to using drugs herself was scarcely surprising.*
>
> *At the time of sentencing, the applicant's son was 14 years old and her daughter eight. Both of them had then to be cared for by others, mainly her sister and her elderly mother, the latter with her own problems in that she was having to care for her own partner who was suffering from bowel cancer and had undergone a triple bypass operation in 1999.*

Further, according to the applicant's sister on the plea, and indeed the psychologist in her report which went into evidence, the applicant's eight year old daughter had developed significant anxiety about any separation from her mother, no doubt precipitated in part by her own father's suicide which happened after the applicant was charged over the present offending."

76 **Nguyen v The Queen** [2001] WASCA 72 concerned a woman (convicted with her husband at a joint trial) sentenced to eight years imprisonment with a non parole period of three years seven months for possession of a traffickable amount of heroin imported contrary to the Customs Act and attempting to obtain possession of a traffickable quantity of the same drug. The first instance court had neither been given nor sought any information to enable compliance with s16A(2)(p) of the Crimes Act 1919, a provision which is applicable to the present case. It requires a sentencing court to take into account:

"(p) the probable effect of the sentence or order under consideration would have on any of the persons, family or dependants".

77 The offender was responsible for four children aged sixteen, fourteen, twelve and six. Whilst she was in custody the eldest, a daughter, went to live with a boyfriend. Malcolm CJ observed:

"In my opinion, given that the appellant has already spent approximately seven months in prison and that the pre-sentence report demonstrates her acceptance of her responsibility for the children, I have reached the conclusion that, in the particular and exceptional circumstances of this case, it would be in the best interests of the community in the longer term if she were conditionally released in order that she could be reunited with and care for her children. The alternative would seem to be for them to be taken into State care at State expense, in circumstances where the prospects of obtaining appropriate foster care for them appear to be remote."

78 The Chief Justice referred to two decisions of the English Court of Criminal Appeal (**R v Vaughan** (1982) 4 Cr App R(S) 83, and **R v Haleth** (1982) 4 Cr App R(S) 178) in each of which sentence was varied to enable immediate release to care for sick child, however, he applied an ultimate test of requiring the case to fall within the category of exceptional within the meaning of the authorities dealing with the effect of imprisonment on those upon whom children are dependent for both emotional and physical wellbeing.

79 Wallwork J quoted with apparent approval:

"Professor Fox and Professor Freiberg in 'Sentencing: State and Federal Law in Victoria', 2nd ed(1999) state:

"The circumstances may be regarded as exceptional if the imprisonment of a parent leaves a child without parental care, if a dependant will suffer <u>overwhelming</u> hardship because of the imprisonment of the offender, ... Where all the features of the case point to a custodial sentence and there is evidence of <u>extreme</u> hardship, a court <u>may</u> take into account the <u>extraordinary</u> features of the case by suspending the sentence of imprisonment. Alternatively, the sentence may be shortened, or the non-parole period decreased."

80 Provided the emphases (which I have added) are duly observed, I would endorse that excerpt from the text as correctly stating the law, applicable both at common law and by virtue of s16A (2)(p) of the Crimes Act 1914. Such a conclusion is compatible with the principles underlying the cases which I have above referenced.

81 The respondent sought to support the sentence below by pointing to the very particular circumstances of the newborn child in the context of the Declaration of the Rights of the Child.

82 A submission was made in these terms:

> *"A particularly relevant matter in this regard is the Declaration of the Rights of the Child, to which Australia is a party, which provides, in Article 9:*
>
> > *'1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.*
>
> *The United Nations General Assembly, in proclaiming this right, among others, called upon Governments to recognize it and strive for its observance by legislative and other measures progressively taken in accordance with the following principle (among others):*
>
> > *'Principle 6. ... A child of tender years shall not, save in exceptional circumstances, be separated from his mother'. "*

83 Counsel for the Crown has pointed out:

> *"The respondent's submissions actually recite part of Article 9 of the Convention on the Rights of the Child (not the similarly titled and earlier Declaration) adopted by the UN General Assembly on 20 November 1989 and which came into force on 2 September 1990. Australia signed the Convention on 22 August 1990 and it was ratified on 17 December 1990. On 22 December 1992, the Attorney-General made the Convention an international instrument within the meaning of the Human Rights and Equal Opportunity Commission Act 1986, replacing the Declaration of the Rights of the Child in the schedules to the Act."*

84 It is also notable that Article 9(4) recognizes that parents and children may be separated as a result of imprisonment of the former:

> *"Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State*

Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned."

85 The ratification of the declaration and its classification as an international instrument do not operate to impose it as binding Australian law. Its proclamation and discernible aims are available to be considered in a sentencing exercise and should be so considered in an appropriate case. The availability of these for consideration does not, in my view, extend or diminish the requirements of the common law and/or s16A(2)(p) of the Crimes Act 1914 in determining that exceptional circumstances must exist to attract amelioration of generally applicable sentence assessments. This appeal is not in my view an appropriate vehicle for elaboration upon the possible range of affect of international covenants such as the convention generally.

86 As some reference was made at the hearing of the appeal, I should mention the apparent situation in the United Kingdom. The Human Rights Act 1998 (Imp) incorporated Article 8 of the European Convention on Human Rights and a provision therein made it unlawful for a public authority (which includes a sentencing court) to act incompatibly with a convention right.

87 Article 8 is in the following terms:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

88 The United Kingdom position is self-evidently not in its terms applicable in New South Wales but it is difficult to perceive that any different result would follow from adherence to the principle as stated by Fox and Freiberg which I have endorsed or the application of those terms.

89 I return to the present case.

90 In my opinion the objective seriousness of the importation of a commercial quantity of illicit drug inspired by promise of payment is such that a sentence of full time custody ought be imposed. That objective seriousness is not outweighed by subjective considerations including the existence of the dependent infant. The assessment of three years imprisonment for this offence was so far below the lower extreme of sound discretionary sentence as to manifest error. Suspending the entire term was a compounding error.

91 That opinion is amply supported by reference to cases, a schedule of which was supplied to the court. It will suffice to make reference to just some of these where the offender's activity was broadly comparable with that of the respondent. In each of the cases that I will mention the drug was MDMA and the case was dealt with in this court.

92 **DIZEL** (23 Aug 96): Arrived from Bali with narcotics concealed internally. Weight of pure drug 41 grams. To receive $5,000. Plea of guilty but prior imprisonment in Japan for importing cocaine. Sentenced to ten years imprisonment with seven and half years non parole period.

93 **BENAIS** (26 July 99): Recruited in India but flew Holland to Australia with drugs concealed internally and in luggage. Weight of pure drug 61 grams. To be paid $7,000. Early guilty plea, prior good character, genuinely contrite, devoted to care and support of mother. Sentenced to six years imprisonment with three years non parole period.

94 **OSBORNE** (6 Nov 97): Arrived from UK with narcotics secreted on body. Weight of pure drug 240 grams. More than a "bare" courier but precise role unable to be better identified. Prior good character. Belated plea of guilty. Sentenced to eight years imprisonment with five and half years non parole period.

95 **BUSHELL** (7 Aug 98): Arrived from UK with narcotics in false bottom of suitcase. Pure MDMA plus analogue thereof totalling 332 grams. Plea of not guilty. No prior convictions but some assistance of slight value to authorities. Sentenced to seven years imprisonment with four years non parole period.

96 **SPILLANE** (16 Sept 99): Arrived from Singapore with narcotics concealed in luggage. Weight of pure drug 447 grams. Dealt with as courier. Record for dishonesty but no drug convictions. Plea of guilty. A chronic alcoholic. Sentenced to six years imprisonment with three and half years non parole period.

97 **BOWERS** (20 July 97): A courier arriving from London with narcotics attached to body. Weight of pure drug 719 grams. To be paid $10,000. Admitted guilt when detected by customs. Plea of guilty and no prior convictions. Sentenced to eight and half years imprisonment with four and half years non parole period.

98 **BEHAR** (14 Oct 98): Arrived from Fiji with narcotics concealed on body. Weight of pure drug 1,231 grams. Courier to be paid $18,000. No prior convictions and good rehabilitation prospects. Plea of guilty and 50 percent discount for future cooperation with authorities. Crown appeal and double jeopardy a factor. Sentenced to six years imprisonment with two and half years non parole period.

99 **SOONIUS** (29 May 98): Arrived from UK with narcotics concealed in suitcase. Weight of pure drug 3,340 grams. Courier for reward. No prior convictions and judgment impaired by depression. Some assistance to police. Plea of not guilty. Sentenced to nine years imprisonment with five and quarter years non parole period.

100 Counsel, as I have mentioned, recognized that a significant period of full time custody would "normally" be required. Submission was made concerning possible alternatives. Specifically periodic and home detention were canvassed. The latter, although it is not mentioned in s20AB(1) of the Crimes Act 1914, we were informed by counsel for the Crown in the right of the Commonwealth that it had been made available for federal offenders by regulation. It was argued on behalf of the respondent that the limitation to three years for periodic detention (and, by analogy, eighteen months for home detention) had been removed in the case of such sentences for federal offenders.

101 New South Wales is a participating State under s20AB(1) of the Crimes Act 1914 which provides:

> *"20AB (1) Where under the law of a participating State or a participating Territory a court is empowered in particular cases to pass a sentence or make an order known as a community service order, a work order, a sentence of periodic detention, an attendance centre order, a sentence of weekend detention or an attendance order, or to pass or make a similar sentence or order or a sentence or order that is prescribed for the purposes of this section, in respect of a State or*

Territory offender, such a sentence or order may in corresponding cases be passed or made by that court or any federal court in respect of a person convicted before that first-mentioned court, or before that federal court in that State or Territory, of a federal offence."

102 The Crimes (Sentencing Procedure) Act 1999 does not authorize "a sentence of periodic detention". Power is vested in these terms:

"6(1) A court that has sentenced an offender to imprisonment for not more than 3 years may make a periodic detention order directing that the sentence be served by way of periodic detention."

103 Thus there is a two stage process, first the imposition of a sentence of imprisonment and second, an order for service by way of periodic detention.

104 By the Crimes Legislation Amendment Act (No 2) 1990 the Federal Parliament enacted s20AB (1A):

"20AB(1A) Where the law of a participating State or a participating Territory requires that before passing a sentence, or making an order, of the kind referred to in subsection(1) a court must first pass another sentence or make another order (whether or not that other sentence or other order is suspended upon the making of the first-mentioned sentence or order), then, a court is not required, before passing or making that first-mentioned sentence or order in respect of a person convicted by that court for a federal offence, to pass that other sentence or make that other order."

105 It would appear that the provision was intended to meet circumstances mentioned by the Law Reform Commission in the context of concern that sentencing options be separately considered. The Commission had reported:

"However, two matters should be mentioned. First, there should be no link of community service orders to imprisonment. In the Australian Capital Territory that is already the case. However, a court in a State or in the Northern Territory sentencing a federal offender to a community service order should not have to find, as a pre-condition to imposing that sentence, that the offender should be imprisoned. In accordance with the Commission's earlier recommendations, each sentencing option should be available for consideration separately on its own merits having regard to the circumstances of the offence and the offender. Community service orders may be appropriate where imprisonment is not. In addition, the Commission has recommended that imprisonment be eliminated as a sentence in some cases and it is inherent in that recommendation that all non-custodial options be available for consideration. The main role of community service orders (and other community based orders) is as a real substitute to prison. Secondly, the limits of community service orders should be uniform throughout the Commonwealth so far as federal offenders are concerned. For example, a federal offender in one jurisdiction should not face a maximum of 500 hours community service while a similar offender can be ordered to serve no more than 200 hours in another jurisdiction. The maximum limit for a community service order should be set at 500 hours, to be served over a period not exceeding two years. This figure, which is higher than any of the existing State or Territory limits, has been selected because of the Commission's view that the

severity of non-custodial options must be increased if they are to be used as a real alternative to imprisonment. This limit should also apply to Australian Capital Territory offenders." ALRC Report No 44 par 125.

106 The concept was maintained in the Explanatory Memorandum circulated with the Bill which introduced s20AB(1A):

"Proposed subsection 20AB(1A) provides that a court sentencing a federal offender that wishes to make an alternative sentence (eg community service order) under subsection 20AB(1) is not required to apply State or Territory laws that require the making of another order before an alternative sentence can be imposed (for example, that a suspended prison term be imposed prior to the making of the alternative sentencing order). Where there is such a requirement, the alternative to imprisonment cannot be prescribed for the purposes of the section."

107 I would reject the submission that s20AB(1A) has the effect of removing the restriction as to time. If approached in the way suggested an order, for example, "for service by way of periodic detention" need not be preceded by a sentence of imprisonment. Such an order, absent the sentence would be meaningless. The terms of s20AB(1A) remove requirements but this cannot and does not mean that a court may not proceed to impose effective sentences nor that the provisions vesting the power to impose them are rendered inapplicable.

108 The final matters are the orders which this court should make. The evidence before this court concerning the contact likely between mother and child is not advanced from the unsatisfactory state at which it stood in the court below and, as I have found, there ought there have been remand to enable proper and adequate investigation. I have also commented upon the lack of desirable detail as to the respondent's circumstances, particularly concerning her fiancé, business, family arrangements and the like. Self evidently, with the passage of time things may change and the breastfeeding, which his Honour assumed, may have ceased or it should be proved if it has not. Most important is enquiry of Corrective Services for positive information about the contact of the respondent, if in custody, with her child.

109 The matters requiring investigation, determination and assessment should be dealt with in a first instance court. It is undesirable that primary findings be made at appellate level and I consider that the issue of sentence should be remitted to the District Court for redetermination in the light of this judgment and any further evidence which is forthcoming. Given the apparent strength of his Honour's observations the matter, when returned, ought be dealt with afresh by another judge of the District Court.

110 In the interim, I would propose that the respondent be granted bail by a single judge of the Supreme Court on suitable conditions, those conditions to include a requirement that the respondent make herself available and cooperate with any request to attend or provide information to Corrective Services or relevant authority in connection with any assessment or procedure concerning her possible commitment to custody and contact thereafter with her child.

111 I propose the following orders:

(1) Crown appeal allowed.

(2) Sentence imposed in the District Court quashed.

(3) Matter remitted to the District Court for imposition of appropriate sentence.

112 EINFELD AJ: I agree with the orders proposed by Justice Grove albeit not entirely for the same reasons or with the same critique of the reasoning of the learned sentencing judge. In my opinion it was

open to his Honour on the evidence to conclude that the respondent was in real and significant fear of sexual misadventure while in custody and was otherwise susceptible to quite serious psychological adversity. I think that there was sufficient material on which to conclude that she had suffered sexual abuse in her youth from her father and uncle and that she had recently attempted to commit suicide, probably reflecting her desolate situation at this time.

113 However, as appears to have been recognized by his Honour, these facts would not support a non-custodial sentence for the serious offence in question here. The decision to bypass the term of imprisonment which would ordinarily be attracted was largely energised by the fact that at the time of sentencing the respondent's then 2+ months old baby was being breastfed and that the separation of mother and baby at such a time would create a serious interference with the child's wellbeing such as to create an exceptional circumstance.

114 I do not share the doubts expressed by Justice Grove that the respondent was in fact breastfeeding her baby at the time. It is true that the evidence on the matter was sparse and regrettably and quite surprisingly neither the respondent nor any family member gave evidence. But the inference does arise from documentary material placed before his Honour and does not seem to have been then challenged, as it was not challenged before this Court. I agree that having regard to its importance on the severity and category of sentence, evidence on the matter should have been called. But the failure to do so does not change the fact upon which the sentencing hearing was apparently conducted. That basis for sentencing should not now be discarded.

115 I also agree with respect with Justice Grove's expressed doubts about the adequacy of the evidence on the capacity of the correctional services system and facilities to be able to cope adequately with the situation which would be faced by the respondent were she to serve a term of imprisonment. Again, further evidence was desirable in the circumstances. However, again the sentencing hearing seems to have been conducted on the agreed basis that the system would, to say the least, not be ideal or even good for a very young baby being breastfed.

116 The 1990 Innocenti Declaration on the Protection, Promotion and Support of Breastfeeding issued by UNICEF after a long and detailed expert study stated that breastfeeding is a "*unique process that provides ideal nutrition for infants and contributes to their health growth and development*." The Declaration goes on to recognize that breastfeeding:

"

· *Reduces the incidence and severity of infectious diseases, thereby lowering infant morbidity and mortality;*
· *Contributes to women's health by reducing the risk of breast and ovarian cancer, and by increasing the space between pregnancies;*
· *Provides social and economic benefits to the family and the nation; and*
· *Provides most women with a sense of satisfaction when successfully carried out."*

117 The Innocenti Declaration established as a global goal that:

> *"... all women should be enabled to practise exclusive breastfeeding and all infants should be fed exclusively on breast milk from birth to 4-6 months of age. Thereafter children should continue to be breastfed (with solids and supplements) for up to two years of age or beyond."*

118 Governments were called upon to implement these and supporting policies. Australia supported the Declaration.

119 I will not repeat the references in the judgments of other members of this Court to provisions of the UN Convention on the Rights of the Child (the Children's Convention) and its relevance and use in Australia. This Convention is the most widely ratified and accepted international treaty in history, only two

countries (Somalia and the United States of America) not having ratified it. But this case is not a suitable vehicle to examine whether a different approach to international law in the Australian context is called for, even overdue, such as I discussed in **Minister for Foreign Affairs & Trade v Magno** 1992 37 FCR 298.

120 It is, however, important to add a reference to Articles 6 and 24 of the Children's Convention. Article 6 mandates States "*to ensure to the maximum extent possible the survival and development of the child*." Article 24 upholds the child's right to the highest attainable standard of health. It requires States Parties to take appropriate measures "*to ensure that all segments of society, in particular parents and children ...are supported in the use of basic knowledge of child health and nutrition, **the advantages of breastfeeding**, hygiene and environmental sanitation and the prevention of accidents.*" (my emphasis).

121 Furthermore, Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women, also ratified and in large measure legislated by Australia, requires States to supply "*appropriate services in connection with pregnancy, confinement and the post-natal period ... as well as nutrition during pregnancy and lactation.*"

122 Australia has also accepted the International Code of Marketing of Breastmilk Substitutes adopted by the World Health Organization in 1981. Paragraph 1 of the Code states its aims as being "*to contribute to the provision of safe and adequate nutrition for infants, by the protection and promotion of breastfeeding…*"

123 I find it difficult to accept that this substantial accumulation of solemn voluntary commitment by Australia to support a clear right for babies to be breastfed for a substantial period can be accorded no weight, or can have little effect, on the process of sentencing a breastfeeding mother. On the other hand, other than in the general nurturing sense, my researches have not detected a single case of the present kind having arisen under the European Convention on Human Rights, the United Kingdom or New Zealand Human Rights Acts, the Canadian Charter of Rights and Freedoms, or the South African or the United States of America's Bills of Rights, all of which contain general clauses that enshrine the health and wellbeing of infants and their mothers as important legislative objects.

124 I have looked at some American cases but they principally focus on the effects of mandatory sentencing on mothers with young babies. In **United States v Johnson** 908 F.2d 396, 399 (8th Cir.1990), it was explicitly recognized that the rationale for less than the mandatory minimum sentence was not that it decreased the defendant's culpability, but that "*we are reluctant to wreak extraordinary destruction on dependants who rely solely on the defendant for their upbringing.*"

125 Both before and after **Johnson**, numerous district court cases have granted departures for single mothers – for example, **United States v Gerard**, 782 F.Supp. 913, 914-15 (S.D.N.Y. 1992); **United States v Pokuaa** 782 F.Supp. 747, 747-48 (E.D.N.Y. 1992); **United States v Handy**, 752 F.Supp 561, 564 (E.D.N.Y. 1990); **United States v Mills** Nos. 88 CR 956 (CSH) & 89 CR 256 (CSH), 1990 WL 8081 (S.D.N.Y. Jan 17, 1990); **United States v Gonzalez** No S 88 CR 559 (CSH), 1989 WL 86021 (S.D.N.Y. Jul 27, 1989); **United States v Hon**, No 89 CR 0052 (RWS), 1989 WL 59613 (S.D.N.Y. May 31, 1989); **United States v Williams**, 88CR 144 (E.D.N.Y. 1988).

126 The other members of the Court have drawn attention to whatever authority exists in this country but in my respectful opinion those cases do not help to resolve this case. However, the cases show quite unequivocally that Australian Courts will not withhold imprisonment solely because to do so will separate mother and child.

127 I am respectfully unable to agree that in a given case, including perhaps this one, it would be entirely erroneous and inappropriate to suspend the whole of any custodial sentence imposed. For myself, I would at least not wish to fetter the re-sentence of this respondent because of a pre-decision of such a kind. Except that I respectfully agree that if a jail sentence were given, three years is insufficient, I agree in the orders proposed by Justice Grove essentially for other reasons.

128 The respondent became pregnant some five months after she was apprehended at Sydney Airport at about the time she gave her first public intimation that she would admit the offence and plead guilty to the charge in question. Even if she conceived her child before this time, certainly if the conception took place afterwards, she knew at the time of conception that she had committed the offence and would in all likelihood face a significant term of imprisonment. The time and circumstances of the conception are thus important. It would be a travesty of justice if by deliberately falling pregnant, a woman could escape a prison term which was otherwise called for. The District Court was given no evidence on this matter at all. In fact, the question does not even seem to have been raised in the sentencing process.

129 A second matter also arises. The respondent's child is now a little over eleven months old. Although no expert evidence was called on this matter, it seems at least arguable that the longer the period of breastfeeding, the less risky it is for baby and mother to cease the process. Whether the respondent is still breastfeeding is not known. In fact, no consideration seems to have been given to the possibility that the respondent commence to serve her custodial sentence at the end of her breastfeeding. And no reasons were given for not considering that option. Moreover, there was no evidence of the arrangements which would and could be made for the care and custody of this baby in the community if the respondent goes to prison after the breastfeeding stops.

130 All these unanswered queries point to the significance for a proper sentencing hearing in this case of sworn evidence capable of being fully tested and examined, and to the adverse consequences for the process so far undertaken in this case that no such evidence was given. I respectfully agree with Justice Grove that no unfavourable inferences may be drawn from the failure of the respondent to give evidence before the District Court. But the fact that she did not give evidence meant that the exceptional circumstances relied on by his Honour to justify his exceptional decision were left too much to inference and assumption. However these mechanisms for the resolution of difficult legal issues may be justifiable and necessary in other cases, they are not sufficient in this case when clear direct evidence was and would have been available but was deliberately or wrongly withheld.

131 When the matter returns to the District Court, it is my opinion that that Court should determine whether it should be heard by the same or a different judge. In the light of my views on the possibility of at least a partially non-custodial sentence, I cannot see why it must follow as a necessity that the re-sentencing be undertaken by another judge than undertook the task on this occasion.

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LAST UPDATED: 14/12/2001