

HIGH COURT OF AUSTRALIA

GORDON, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

KMD

APPELLANT

AND

CEO (DEPARTMENT OF HEALTH NT) & ORS

RESPONDENTS

KMD v CEO (Department of Health NT)
[2025] HCA 4

Date of Hearing: 11 February 2025

Date of Judgment: 27 February 2025

D2/2024

ORDER

- 1. Appeal allowed.*
- 2. Set aside orders 1, 2 and 4 of the Court of Criminal Appeal of the Supreme Court of the Northern Territory made on 23 July 2024.*
- 3. Remit the matter to the Court of Criminal Appeal of the Supreme Court of the Northern Territory for hearing by a bench differently constituted for reconsideration of the first respondent's supplementary notice of appeal dated 16 February 2024 filed in proceeding no CCA 6 of 2023 in accordance with these reasons.*
- 4. Subject to any further order of the Court of Criminal Appeal of the Supreme Court of the Northern Territory, orders 1 and 3 of the Supreme Court of the Northern Territory made on 5 July 2023 be stayed until 14 days after the date of this order.*

On appeal from the Supreme Court of the Northern Territory

Representation

KMD appeared in person

S J Free SC with L S Spargo-Peattie and M Thompson for the first respondent
(instructed by Solicitor for the Northern Territory)

Submitting appearances for the second and third respondents

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

KMD v CEO (Department of Health NT)

Criminal law – Appeals – Mental impairment – Where appellant is liable to supervision under supervision order – Where court conducted periodic review of custodial supervision order and released appellant on non-custodial supervision order – Whether court's review of custodial supervision order miscarried by reason of appellant's refusal to cooperate with medical experts – Standard of review on appeal from finding that court not satisfied that safety of appellant and of public will be seriously at risk if appellant released on non-custodial supervision order – Whether Court of Criminal Appeal erred by confirming custodial supervision order without addressing requirements of *Criminal Code Act 1983* (NT), Sch I, Pt IIA, Divs 5 and 7.

Words and phrases – "appeals against supervision orders", "custodial supervision order", "non-custodial supervision order", "not reasonably open", "periodic review", "standard of review", "supervision order".

Criminal Code Act 1983 (NT), Sch I, ss 43Z, 43ZA, 43ZB, 43ZG, 43ZH, 43ZK, 43ZL, 43ZLA, 43ZM, 43ZN.

Introduction

1 On 23 July 2024 the Court of Criminal Appeal of the Northern Territory ("the NTCCA") (Reeves and Burns JJ, Blokland J dissenting) allowed an appeal from a non-custodial supervision order ("NCSO") made by Brownhill J under Pt IIA, Div 5 of Sch I to the *Criminal Code Act 1983* (NT) ("the *Code*").¹ The effect of the NCSO was to release KMD from custody on 12 July 2023 on conditions.² The NTCCA ordered that the NCSO be set aside and a previous custodial supervision order ("CSO") be confirmed. The result of the NTCCA's orders was that KMD returned to custody after approximately 12 months in the community.

2 By a grant of special leave to appeal, KMD appeals to this Court on four grounds, which, stated broadly, are that the NTCCA: (1) applied the wrong standard of appellate review; (2) denied KMD procedural fairness; (3) erred in confirming the CSO without receiving evidence of KMD's progress during the period she was released pursuant to the NCSO; and (4) erred in finding that the primary judge's review of the CSO had "miscarried" because KMD refused to engage with medical experts.

3 This appeal can be resolved by upholding the fourth ground of appeal and dealing with such issues raised by the remaining grounds as may affect the disposition of the proceeding on its remittal to the NTCCA. In relation to the fourth ground, as explained below, the majority in the NTCCA erred in concluding that the primary judge's review of KMD's CSO miscarried because KMD did not cooperate with medical experts whose reports and evidence were considered by the primary judge. Having made that error, the NTCCA further erred in confirming the CSO without addressing the requirements of Pt IIA, Divs 5 and 7 of the *Code*, which was necessary in determining whether to make that order, which, in substance, amounted to making a supervision order in substitution for the NCSO.

Divisions 5 and 7 of Pt IIA of the *Code*

4 Following a verdict of not guilty because of mental impairment at a special hearing by judge and jury in the Supreme Court of the Northern Territory ("the

1 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8.

2 *R v KMD [No 6]* [2023] NTSC 51.

Gordon J
Steward J
Gleeson J
Beech-Jones J

2.

Court") conducted under Div 4 of Pt IIA of the *Code*,³ s 43X(2) of the *Code* requires the Court to either declare that the accused person is liable to supervision under Pt IIA, Div 5 of the *Code* or order that they be released unconditionally. A declaration is an "order" within the meaning of Pt IIA, Div 7.⁴ As such an order, ss 43ZM and 43ZN apply to the making of the declaration. Section 43ZM provides:

"In determining whether to make an order under this Part, the court must apply the principle that restrictions on a supervised person's freedom and personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community."

5 Section 43ZN provides:

"(1) In determining whether to make an order under this Part, the court must have regard to the following matters:

- (a) whether the accused person or supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability;
- (b) the need to protect people from danger;
- (c) the nature of the mental impairment, condition or disability;
- (d) the relationship between the mental impairment, condition or disability and the offending conduct;
- (e) whether there are adequate resources available for the treatment and support of the supervised person in the community;
- (f) whether the accused person or supervised person is complying or is likely to comply with the conditions of the supervision order;
- (g) any other matters the court considers relevant.

3 *Code*, ss 43A (definitions of "court" and "special hearing"), 43R(3).

4 *Code*, s 43ZLA.

3.

- (2) The court must not make an order under this Part releasing a supervised person from custody (whether conditionally or otherwise) or significantly reducing the supervision to which a supervised person is subject unless:
- (a) the court has:
- (i) obtained and considered 2 reports, each report being prepared by a person who is a psychiatrist or other expert (but the same person must not prepare both reports); and
- (ii) considered the reports submitted to the court under sections 43ZJ and 43ZK and received by the court under section 43ZL, if any; and
- (b) subject to subsections (3) and (4), the court is satisfied that each of the following persons was given reasonable notice of the proceedings concerned:
- (i) the victim of the offence concerned;
- (ii) if the victim concerned is deceased – the victim's next of kin;
- (ia) the next of kin of the supervised person concerned;
- (iii) if the supervised person concerned is a member of an Aboriginal community – the Aboriginal community.
- (3) Notice is not required to be given to a person referred to in subsection (2)(b) if the person cannot be found after reasonable inquiry.
- (4) Notice is not to be given to a person referred to in subsection (2)(b)(i) or (ii) who has given notice to the court that he or she does not wish to be notified of any hearings in relation to the supervised person concerned and has not withdrawn that notice."

6

By s 43ZA of the *Code*, a supervision order may be a CSO, committing the subject of the order to custody, or an NCSO, releasing the subject of the order into the community. The Court must not make a CSO committing an accused person to custody in a custodial correctional facility unless it is satisfied that there is no

Gordon J
Steward J
Gleeson J
Beech-Jones J

4.

practicable alternative given the circumstances of the person.⁵ Both a CSO and an NCSO are orders to which Div 7 applies and are thus subject to the principles stated in ss 43ZM and 43ZN.⁶

7 Subject to ss 43ZD, 43ZE and 43ZG of the *Code*, a supervision order is for an indefinite term,⁷ although the Court must fix a nominal term that is appropriate by reference to the offence carrying the longest maximum period of imprisonment.⁸ At least three months (but not more than six months) before the expiry of the nominal term, the Court is required to conduct a "major review" to determine whether to release the supervised person from the supervision order.⁹

8 Following the making of a CSO, the appropriate person (in this case, the first respondent) is required, at intervals of not more than 12 months, to prepare and submit a report to the Court on the treatment and management of the supervised person's mental impairment, containing the details specified by s 43ZK(2) of the *Code*.¹⁰ After considering such a report, the Court is empowered, if it considers it appropriate, to conduct a review to determine whether the supervised person may be released from the CSO under s 43ZH(1) of the *Code* ("periodic review"). Section 43ZH(2) provides:

"On completing the review of a [CSO], the court must:

- (a) vary the supervision order to a[n] [NCSO] unless satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a[n] [NCSO]; or
- (b) if the court is satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a[n] [NCSO]:

5 *Code*, s 43ZA(2).

6 *Code*, s 43ZLA(e); see also s 43A (definition of "supervision order").

7 *Code*, s 43ZC.

8 *Code*, s 43ZG(1) and (4).

9 *Code*, s 43ZG(5).

10 *Code*, s 43ZK. See also s 43A.

5.

- (i) confirm the order; or
- (ii) vary the conditions of the order, including the place of custody where the supervised person is detained."

9 Appeals from supervision orders are dealt with by s 43ZB of the *Code*, which provides:

- "(1) A supervision order (including a supervision order varied under section 43ZD or 43ZE) is subject to the same rights of appeal as a sentence.
- (2) In addition to appeals referred to in subsection (1), the CEO (Health) may appeal to the Court of Criminal Appeal against a supervision order if he or she considers that:
 - (a) a different supervision order should have been made; and
 - (b) an appeal should be brought in the public interest.
- (3) On an appeal under subsection (2), the Court of Criminal Appeal may confirm the supervision order or quash the supervision order and make another supervision order in substitution for it."

Primary judge's review of KMD's CSO

10 KMD has been in custody since being charged with offences on 7 May 2013. KMD was found unfit to be tried and it was determined that she was not likely to become fit to stand trial within a 12 month period.¹¹ Following a "special hearing" under Div 4 of Pt IIA of the *Code*,¹² she was found not guilty of various offences by reason of mental impairment.¹³ On 4 July 2014, Riley CJ declared that she was liable to be supervised under Div 5 of Pt IIA of the *Code*.¹⁴ On 3 June 2015, the Chief Justice made a CSO committing her to custody in a custodial

11 *Code*, s 43R(1).

12 *Code*, s 43R(3).

13 *Code*, s 43X(2).

14 *Code*, s 43X(2)(a).

Gordon J
Steward J
Gleeson J
Beech-Jones J

6.

correctional facility,¹⁵ and fixed a nominal term of 16 years dating from 7 May 2013 as appropriate for the offences concerned.¹⁶ In 2017 and 2021, KMD's CSO was subject to a periodic review by Hiley J.¹⁷ On both occasions, Hiley J confirmed the order.¹⁸

11 On 15 November 2021, the primary judge (Brownhill J) commenced a third periodic review of KMD's CSO. In conducting the review, the primary judge received three reports submitted by the first respondent pursuant to s 43ZK of the *Code*, being reports from Dr Das, a consultant forensic psychiatrist with the Northern Territory Department of Health Forensic Mental Health Team ("the FMHT"), dated 30 July 2021, 1 March 2022 and 9 March 2022. Additionally, her Honour heard oral evidence and received additional written evidence, including evidence considered by Hiley J in his second review of the CSO.

12 On 2 September 2022, the primary judge published reasons in which her Honour set out preliminary findings to the effect that, while KMD posed a risk:¹⁹

"whether the safety of KMD or the public will be seriously at risk if she is released on a[n] [NCSO] depends significantly upon the terms of any such order and the mechanisms in place to support KMD to live in the community in compliance with such terms."

13 The primary judge referred to evidence from Dr Das that KMD refused to engage with the FMHT or receive any treatment for her mental condition.²⁰ Noting that the court was precluded from making an order releasing KMD from custody without satisfying the requirements of s 43ZN(2), her Honour made orders for the filing of expert reports,²¹ reports from victims of the original offending²² and

15 *Code*, s 43ZA(1)(a)(i).

16 *Code*, s 43ZG.

17 *Code*, s 43ZH(1).

18 *Code*, s 43ZH(2)(b)(i).

19 *R v KMD [No 5]* [2022] NTSC 69 at [144].

20 *R v KMD [No 5]* [2022] NTSC 69 at [31], [32], [57], [139].

21 *Code*, s 43ZN(2)(a)(i).

22 *Code*, s 43ZL.

7.

reports from KMD's next of kin and Aboriginal community,²³ and adjourned the periodic review.²⁴

14 The primary judge continued the review on 7 and 8 March 2023 and received further written and oral submissions. On 16 June 2023, her Honour delivered a further judgment in which she addressed the requirements of s 43ZN(2)(a) and (b).²⁵ In accordance with s 43ZN(2)(a)(i), her Honour considered reports from Professor Ogloff, a registered psychologist with endorsements in clinical and forensic psychology, tendered by the first respondent; and Janet Guy, a clinical social worker, tendered by KMD. KMD refused to be interviewed by Professor Ogloff for the purpose of the preparation of his report. In relation to s 43ZN(2)(a)(ii), the primary judge noted that, in addition to the three reports from Dr Das, she had received a further joint report of Dr Das and Yvonne Roberts, a registered mental health nurse, dated 6 January 2023.

15 After making detailed findings about the additional evidence, the primary judge concluded that, on the available evidence, she was not satisfied that the safety of the public, or KMD's safety, will be seriously at risk if KMD is released on an NCSO ("the safety risk finding").²⁶

16 Having made the safety risk finding, in accordance with s 43ZH(2) but subject to the requirements of ss 43ZM and 43ZN, the primary judge was required by s 43ZH(2)(a) to vary the CSO to an NCSO. On 5 July 2023, the primary judge made orders revoking the previous CSO and instead made the NCSO including numerous conditions, with effect from 12 July 2023. KMD was released from custody on 12 July 2023 in accordance with the NCSO.

The orders and reasons of the NTCCA

17 On 7 July 2023, the first respondent appealed to the NTCCA against the NCSO. The first respondent's first ground of appeal to the NTCCA contended that the primary judge's safety risk finding was "not reasonably open" on all the available evidence. It is unnecessary to set out the other grounds of appeal.

23 Code, s 43ZN(2)(b).

24 *R v KMD [No 5]* [2022] NTSC 69 at [153]-[156].

25 *R v KMD [No 6]* [2023] NTSC 51.

26 *R v KMD [No 6]* [2023] NTSC 51 at [147], [167].

Gordon J
Steward J
Gleeson J
Beech-Jones J

8.

18 The majority in the NTCCA upheld that ground of appeal²⁷ and also stated that their reasons would lead them to uphold the other grounds of appeal.²⁸

19 In dissent, Blokland J concluded that the conditions of the NCSO were sufficiently demanding and strict that the public would not be seriously at risk from KMD, accepting that the risk could never be fully eliminated.²⁹ Blokland J considered that the findings that led to the primary judge's safety risk finding were open on the evidence and observed that she "would not disagree" with the primary judge's conclusions.³⁰

20 The majority (Blokland J agreeing on this point) correctly identified that the appeal was an appeal by way of rehearing,³¹ where the court conducts a "rehearing on the materials before the primary Judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error".³² The task of a court on an appeal by way of rehearing is the correction of error.³³

27 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [194].

28 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [196].

29 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [4].

30 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [50].

31 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [2] (Blokland J), [77]-[78] (Reeves and Burns JJ).

32 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [77]-[78], citing *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 596-597 [57].

33 *Allesch v Maunz* (2000) 203 CLR 172 at 180 [23]; *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at 435 [22]; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 596-597 [57].

Standard of review

21 The majority (again with Blokland J agreeing) identified the "correctness standard"³⁴ as the applicable standard of appellate review.³⁵ Under that standard, the appellate court determines for itself the correct outcome on the relevant issue while making due allowance for such advantages as may have been enjoyed by the primary judge.³⁶

22 The written submissions filed on behalf of KMD in this Court contended that the NTCCA erred in concluding that the appropriate standard of review was the correctness standard. As the question of what standard should be applied may arise on remittal it is appropriate to record that, in so far as the issue on appeal is whether or not the primary judge erred in determining whether the "safety of the supervised person or the public will be seriously at risk if the person is released on a[n] [NCSO]",³⁷ their Honours were correct to so find.

Miscarriage of primary judge's review of CSO?

23 The majority's reasons emphasised KMD's apparent refusal to engage with Dr Das or Professor Ogloff and the implications of that refusal for the primary judge's review of the CSO. Their Honours' finding on that topic included findings that: (1) the "process was effectively rendered nugatory" by KMD's refusal to be examined by Professor Ogloff because that refusal "made it effectively impossible for the primary judge to make a proper assessment of KMD's current mental state and any risk she may present to the public if she were released from custody";³⁸ (2) there was no reason why KMD should be protected from the consequences of

34 See *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 559-560 [41], 560-561 [43], 562-563 [46], 563 [48]-[49].

35 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [2]-[3] (Blokland J), [85] (Reeves and Burns JJ).

36 *Moore (a pseudonym) v The King* (2024) 98 ALJR 1119 at 1124 [14]; 419 ALR 169 at 173, citing *Warren v Coombes* (1979) 142 CLR 531 at 552 and *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23].

37 *Code*, s 43ZH(2).

38 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [187].

Gordon J
Steward J
Gleeson J
Beech-Jones J

10.

her refusal to engage;³⁹ and (3) KMD's refusal to engage "skewed the focus of the review" to a focus on KMD's interests because that refusal ensured "that evidence relevant to the public interest was not contemporary and of questionable weight".⁴⁰

24 Having made these findings, the majority concluded:⁴¹

"The result was that the review conducted by the primary Judge fundamentally miscarried, despite the primary Judge's commendable efforts to do justice to KMD on the limited material available.

In our opinion, it was not reasonably open to the primary judge to find that the safety of the public would not be seriously at risk if KMD were placed on a[n] [NCSO]. Where the review miscarried by reason of KMD's conduct, the position regarding KMD's mental condition and risk assessment had not fundamentally changed since the reviews conducted by Hiley J. In the unusual circumstances that attended the review conducted by the primary Judge, greater weight should have been given to the evidence in those earlier reviews and to the conclusions reached by Hiley J, based on unchallenged expert testimony."

25 As expressed, the majority's conclusion that the safety risk finding was not reasonably open to the primary judge is premised upon a conclusion that the review of the CSO "miscarried" because of KMD's failure of cooperation. That premise involves error because KMD was under no statutory obligation to cooperate with the medical experts whose reports were provided pursuant to ss 43ZK and 43ZN(2)(a). While it may be informative for a review of a CSO, and even in the best interests of persons such as KMD to cooperate with experts whose reports inform a review, nothing in those provisions or any other provision of Pt IIA makes such cooperation a prerequisite to the preparation of their reports, much less the conduct of the review under s 43ZH. The primary judge was required to decide, on the available evidence, whether she was satisfied that the safety of the public,

39 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [191].

40 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [193].

41 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [193]-[194].

or KMD's safety, will be seriously at risk if KMD is released on an NCSO.⁴² That question required an evaluation of the available evidence, which included, in this case, evidence of KMD's non-cooperation; the necessary evaluation was not precluded by the failure of cooperation. It follows that the fourth ground in KMD's notice of appeal, that the majority erred by holding that the review miscarried and by allowing that finding to influence its treatment of the evidence, must be upheld.

Appeals against supervision orders

26 The conclusion that the fourth ground of appeal must be upheld is sufficient for this Court to allow the appeal, set aside the orders of the NTCCA and remit the proceeding to the NTCCA for reconsideration according to law. KMD sought an order that the first respondent's appeal to the NTCCA be dismissed. However, such an order is beyond the scope of the appeal to this Court. The effect of this Court's findings is that the first respondent's appeal to the NTCCA has not yet been properly determined and must be reconsidered by that Court in accordance with these reasons.

27 As the matter will be remitted to the NTCCA for reconsideration of the first respondent's appeal to that Court, it is appropriate to refer to the third ground of appeal, which contends that the majority erred by ordering that the CSO be confirmed without any evidence relevant to risk arising from KMD's year in the community on the NCSO.

28 As already noted, the NTCCA's powers on appeal are enlivened by the identification of error. If no such error is identified, the NTCCA must dismiss the appeal. However, if error is established, the NTCCA may remit the proceedings to a judge at first instance,⁴³ make an order confirming the supervision order under appeal (in this case, the NCSO) or quash that supervision order and make another supervision order in substitution for it.⁴⁴ An order making a supervision order under s 43ZB(3) is an order within the meaning of Pt IIA, Div 7.⁴⁵

29 Where error is demonstrated, the powers conferred on and exercised by the NTCCA under s 43ZB must be read and exercised consistently with the powers and functions conferred by s 43ZH. Thus, if the NTCCA is satisfied in terms of

42 *Code*, s 43ZH(2).

43 *Code*, ss 43ZB(1), 406(1), 407 and 411(4).

44 *Code*, s 43ZB(3).

45 *Code*, s 43ZLA.

Gordon J
Steward J
Gleeson J
Beech-Jones J

12.

s 43ZH(2)(a), then it may either confirm the NCSO made by the primary judge or quash that NCSO and make a different NCSO. If the NTCCA is satisfied in terms of s 43ZH(2)(b) then it may either quash the NCSO, confirm the (previous) CSO (s 43ZH(2)(b)(i)) and by doing so make another CSO in substitution of the NCSO (s 43ZB(3)), or quash the NCSO, vary the CSO (s 43ZH(2)(b)(ii)) and again, by doing so, make another supervision order in substitution of the NCSO (s 43ZB(3)).

30 It follows that, if error on the part of the primary judge is made out and the proceedings are not remitted then, in disposing of the appeal, the NTCCA must exercise the power under s 43ZH, and, in particular, "complet[e] the review" of the CSO by addressing the criterion in s 43ZH(2) by reference to the "evidence available" and the requirements of ss 43ZA(2), 43ZM and 43ZN. Those requirements mandate consideration of the position at the time that the power is exercised and will necessarily include consideration of what is known about the 12 months during which KMD was released into the community pursuant to the NCSO.⁴⁶

31 In this case, having found error on the part of the primary judge, the NTCCA did not comply with these provisions or take any of these steps before confirming the CSO. The NTCCA did not "complet[e] the review" of the CSO by reference to s 43ZH(2).

Orders

32 It follows that the appeal should be allowed and the orders made by the NTCCA set aside. The effect of setting aside the orders will be to restore the NCSO made by the primary judge. However, the orders of the primary judge made on 5 July 2023 setting aside the CSO and imposing an NCSO will be stayed for 14 days from the date of this Court's orders or such further period as the NTCCA allows. This period will facilitate the urgent resolution of the remitter by enabling the parties and the Director of Public Prosecutions to apply for any appropriate orders (such as a variation of the NCSO pursuant to s 43ZE(1)) and otherwise prepare and place before the NTCCA any additional materials said to be relevant to the final disposition of the appeal against the NCSO.

33 The appeal should be allowed. Orders 1, 2 and 4 made by the NTCCA on 23 July 2024 should be set aside. The proceeding should be remitted to the NTCCA for hearing by a bench differently constituted, for reconsideration of the first respondent's supplementary notice of appeal dated 16 February 2024 in accordance with these reasons. Subject to any further order of the NTCCA, orders 1 and 3 of

46 cf *Kentwell v The Queen* (2014) 252 CLR 601 at 619 [44].

Gordon J
Steward J
Gleeson J
Beech-Jones J

13.

the orders of the Supreme Court of the Northern Territory made on 5 July 2023 will be stayed for 14 days from the date of this order.

- 34 JAGOT J. It was not open to the majority in the Court of Criminal Appeal of the Northern Territory (Reeves and Burns JJ)⁴⁷ in this matter to set aside the non-custodial supervision order made by the primary judge (Brownhill J) in respect of KMD some 12 months earlier or order that the "previous" custodial supervision order⁴⁸ be "confirmed" other than in accordance with ss 43ZH(2), 43ZM and 43ZN of Sch I to the *Criminal Code Act 1983* (NT) ("the NT Criminal Code"). The Court of Criminal Appeal did not (and indeed could not) apply these provisions as required, because it did not have available to it contemporaneous evidence enabling it to form any meaningful state of satisfaction about the safety risk that KMD presented to herself or the public.

The statutory scheme

- 35 The NT Criminal Code contains in Pt IIA a detailed scheme for dealing with persons who have (or would have) committed an offence but suffer from a mental impairment meaning that they cannot stand trial or be convicted of the offence. The scheme requires the Supreme Court of the Northern Territory to make either a custodial or a non-custodial supervision order in respect of such persons in certain circumstances.⁴⁹ The scheme includes provisions for the periodic review of supervision orders. By s 43ZH(1), after considering a report submitted by an appropriate person under s 43ZK, "if the court considers it is appropriate, the court may conduct a review to determine whether the supervised person the subject of the report may be released from the supervision order". If the review is of a custodial supervision order then by s 43ZH(2) the Court must either: (a) "vary the [custodial] supervision order to a non-custodial supervision order unless satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order"; or (b) "if the court is satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order" confirm the order or vary the conditions of the order.

- 36 Further, by s 43ZLA an order "making, varying or revoking a supervision order" is an order to which ss 43ZM and 43ZN apply. Section 43ZM provides that:

"In determining whether to make an order under this Part, the court must apply the principle that restrictions on a supervised person's freedom and

47 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8. Blokland J in dissent would have dismissed the appeal.

48 The custodial supervision order in respect of KMD made by another judge, Hiley J, on 10 March 2021.

49 NT Criminal Code, s 43Z.

personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community."

37 Section 43ZN(1) provides that in determining whether to make such an order the Court must have regard to certain matters, including, for example, "(a) whether the accused person or supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability". Section 43ZN(2) provides that the Court must not make such an order releasing a supervised person from custody or significantly reducing the supervision to which a supervised person is subject unless it has obtained and considered certain reports and is satisfied of certain matters.

38 Section 43ZB(1) provides that a supervision order is subject to the same rights of appeal as a sentence. Section 43ZB(2) provides that in addition to appeals referred to in s 43ZB(1) "the CEO (Health) may appeal to the Court of Criminal Appeal against a supervision order if he or she considers that" a different supervision order should have been made and an appeal should be brought in the public interest. By s 43ZB(3), on an appeal under s 43ZB(2) "the Court of Criminal Appeal may confirm the supervision order or quash the supervision order and make another supervision order in substitution for it".

The proceedings below

39 On 5 July 2023, having carried out a periodic review, the primary judge set aside the custodial supervision order to which KMD had been subject and ordered that KMD be subject to a non-custodial supervision order including conditions. KMD was released from custody on 12 July 2023 in accordance with the non-custodial supervision order. The CEO (Health) appealed under s 43ZB(2) seeking that the non-custodial supervision order be set aside and the previous custodial supervision order be confirmed. The Court of Criminal Appeal heard the appeal in February 2024 and delivered judgment in July 2024.

40 Although the transcript shows that the Court of Criminal Appeal was (rightly) troubled by the fact that it did not have available to it any evidence concerning KMD's time in the community since 12 July 2023, the majority decided that the review before the primary judge had miscarried because of KMD's refusal to engage with medical practitioners. According to the majority, "[w]here the review miscarried by reason of KMD's conduct, the position regarding KMD's mental condition and risk assessment had not fundamentally changed since the reviews conducted by Hiley J. In the unusual circumstances that attended the review conducted by the primary Judge, greater weight should have been given to

the evidence in those earlier reviews and to the conclusions reached by Hiley J, based on unchallenged expert testimony."⁵⁰

The majority's error

41 The majority's reasoning was impermissible. First, the provisions of the statutory scheme must be understood to operate together. Accordingly, if on an appeal the Court of Criminal Appeal decides to "make another supervision order" in substitution for a supervision order it wishes to quash (which it did in this case), the Court is making an order under Pt IIA of the NT Criminal Code and must comply with the provisions of that Part, including ss 43ZH(2), 43ZM and 43ZN. The majority, however, wrongly treated the Court of Criminal Appeal's powers on appeal under s 43ZB(3) as standing free from the balance of the provisions of Pt IIA.

42 Second, had the majority recognised that the Court of Criminal Appeal had to comply with ss 43ZH(2), 43ZM and 43ZN in quashing the non-custodial supervision order and making the custodial supervision order (by confirming the "previous" custodial supervision order Hiley J had made), they also would have recognised that it was not open to them to reason that because KMD had not engaged with the medical practitioners who were providing reports to the primary judge "the position regarding KMD's mental condition and risk assessment had not fundamentally changed since the reviews conducted by Hiley J".⁵¹ KMD had been released into the community some 12 months before the Court of Criminal Appeal had delivered judgment, pursuant to the non-custodial supervision order. In those circumstances the majority could not set aside the non-custodial supervision order and confirm the previous custodial supervision order because they could not comply with s 43ZH(2)(a) or (b), s 43ZM or s 43ZN in so doing. In the statutory scheme providing for the "periodic review" of supervision orders, in s 43ZH(2)(a) and (b) referring to "on the evidence available", in s 43ZM requiring the Court to apply the principle set out therein, and in s 43ZN requiring the Court to have regard to certain matters in determining whether to make such an order, it is to be understood that the Court is to ensure that it acts on the basis of "the most recent and accurate information"⁵² reasonably available to the Court.

43 In circumstances where it was common ground that KMD had been living in the community for some six months at the time of the hearing before the Court

50 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [194].

51 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [194].

52 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 44.

of Criminal Appeal and some 12 months before the Court of Criminal Appeal delivered its judgment, and (moreover) it was common ground that the parties had been periodically reporting back to the primary judge on KMD's compliance with the conditions of the non-custodial supervision order, the majority had two options once they had found error by the primary judge. Having found error, the majority could have required the parties to file further evidence providing the Court of Criminal Appeal with the most recent and accurate information relevant to ss 43ZH(2)(a) and (b), 43ZM and 43ZN and then made final orders. Alternatively, having found error, the majority could have remitted the matter to the primary judge for the primary judge to consider the most recent and accurate information relevant to ss 43ZH(2)(a) and (b), 43ZM and 43ZN on the correct basis and make further orders. That is, s 43ZB(3), in specifying orders that the Court of Criminal Appeal "may" make, does not exclude any other power of that Court, including its power of remittal.⁵³ The majority could not, however, use KMD's lack of co-operation as the basis for concluding that nothing had "fundamentally changed" since the review conducted by Hiley J. The Court of Criminal Appeal could not use KMD's lack of co-operation as a reason to deem a fiction (that nothing had fundamentally changed) when, in fact, KMD living in the community for 12 months under the non-custodial supervision order was a fundamental change that could not be ignored.

44 Third, in the circumstances as described, this was not a case where any reliance could be placed on supposed forensic decisions of the parties. There is no need to decide if KMD had a reasonable expectation based on the hearing before the Court of Criminal Appeal that she would be given an opportunity to adduce further evidence and the Court of Criminal Appeal thereby denied KMD procedural fairness. The approach of the majority in the Court of Criminal Appeal simply precluded them from complying with the statute.

45 Fourth, while the CEO (Health) may appeal under s 43ZB(2) based on the CEO (Health)'s evaluation of the broadly expressed criteria in s 43ZB(2)(a) and (b), on completing a review of a custodial supervision order under s 43ZH(2) the Court is faced with two binary options as specified in s 43ZH(2)(a) and (b). The Court must take one or other option. The option it takes, moreover, is not discretionary—it is dictated by the state of satisfaction it has or has not reached. It follows that the correctness standard applies to a conclusion of an error by a primary judge in an appeal to the Court of Criminal Appeal in respect of the application of s 43ZH(2)(a) or (b) of the NT Criminal Code,⁵⁴ not the *House v The*

53 *Supreme Court Act 1979* (NT), s 50A read with NT Criminal Code, ss 43ZB(1), 406(1), 407 and 411(4).

54 See, eg, *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 at 865-868 [16]-[23]; 414 ALR 635 at 642-645.

*King*⁵⁵ standard applicable to discretionary decisions. While the correctness standard is to be applied to the determination of error in the application of s 43ZH(2) based on the material before the primary judge, error is merely the foundation for the Court of Criminal Appeal to order that the appeal be allowed. The making of further orders as referred to in s 43ZB(3), as discussed, is a separate exercise required to be carried out in accordance with all applicable provisions of Pt IIA.

46 Fifth, and finally, the terms of s 43ZH(2)(a) and (b) expose why it cannot be the case that KMD's lack of co-operation with the medical practitioners who provided reports to the primary judge could make the review before the primary judge miscarry. The terms of s 43ZH(2)(a) and (b) reflect the principle in s 43ZM that the Court must apply in making any order under Pt IIA—that "restrictions on a supervised person's freedom and personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community". Consistently with this, on the Court completing a review of a custodial supervision order, the Court must vary the custodial supervision order to a non-custodial supervision order unless satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order (s 43ZH(2)(a)). It is only if the Court is satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order that the Court must confirm or vary the conditions only of the custodial supervision order (s 43ZH(2)(b)). That is, if not able to be satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order (irrespective of the cause, including a lack of co-operation by KMD) the Court must vary the custodial supervision order to a non-custodial supervision order. The Court cannot order that a person be kept in custody under a custodial supervision order unless it can form the positive state of satisfaction that s 43ZH(2)(a) requires. And in all cases the Court must apply the principle in s 43ZM.

47 For these reasons the orders proposed by Gordon, Steward, Gleeson and Beech-Jones JJ should be made.

55 (1936) 55 CLR 499 at 504-505.

