# Sentencing for minor drug offences

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## Introduction

For many years I helped train magistrates, with a specific emphasis on consistency in sentencing. The current Chief Magistrate, and those before him, had a genuine commitment to the principle that, as much as humanly possible, like crimes ought to lead to like penalties. There was an overall recognition that where there was significant deviation from that principle, the standing of the court was ill-affected. Further, the administration of justice is best served by limiting appeals, especially those where lower courts stray from well-established sentencing guidelines.

Recently, I have been staggered to see the gross inconsistency in sentence for first offence drug possession charges. For most magistrates, a non-conviction is the order of the day. But for a significant minority that is not the case – and convictions with fines, bonds or even imprisonment are the result – even for cannabis.

The purpose of this paper is to provide some ammunition for defence lawyers and thinking prosecutors as to the consistent application of *R v Mauger [2012] NSW CCA 51* particularly for possession and minor supply charges in the Local Court.

## Some History

For me, this feels like an old old issue. Back in the 1980's and 1990's there was a magistrate who would never ever deal with drug possession matters without conviction. Mind you, drink driving and domestic violence were a different story. And so, we would always say to clients that the Local Court was just a dry run, and that on appeal to the District Court there would be no conviction. The District Court, then handled by a range of visiting judges from Sydney, would universally pile the drug conviction matters from that Local Court to a certain day and deal with them *en masse*, with hardly a submission needed from the defence. The DPP would never raise an eyebrow. All the other magistrates in the area dealt with first offenders without conviction, meaning that if you were caught in town X you were dealt with entirely differently than if you were in town Y. Occasionally, two magistrates would be sitting in the one courthouse on the same day, and of course the defence lawyers would do dances and shuffles to avoid one over the other.

When I was first appointed to Dubbo #2 circuit in 1998, I refused to deal with high range drink driving by non-conviction, almost without exception. I reasoned that the offence caused too much death and showed such a disregard for public safety that loss of licence and conviction was essential. After a year or so a Crown, who later became a magistrate himself, took me aside and said "you know there have been 27 appeals from your high range drink driving matters to 11 difference judges and every single one has led to no conviction". I thought about this long and hard. First, only those who could afford it managed to appeal – leaving those without funds stuck with my appealable, but punitive result. Secondly, I was clearly out of step with the higher court, and as a humble magistrate, maybe my opinion

needed to yield to the next layer up. After all, the doctrine of the hierarchy of the courts means nothing if the lower courts just ignore it. Third, even though the decisions in the District Court were not binding on me, they were ultimately profoundly persuasive. Technically, no sentencing decision is ever binding on a lower court, but in my view it was an error to ignore clear patterns or guidelines. Not just an error really, but a trifle arrogant. After all, if you cannot follow precedent, there is always a return to the profession.

Of course, history tells that shortly after my 'road to Damascus' there was a guideline judgment which slammed the non-conviction approach[1]. (Smugly, I told myself I was right after all).

**Guideline Judgments**

There is a guideline judgment for sentencing on drug matters. I can hear advocates reeling back in their office chairs saying 'no there is not'! However, guideline judgments do not just exist in the statutory scheme[2]. There are also common law guideline judgments.

Gleeson CJ explained the concept and purpose of guidelines in *Wong v The Queen (2001) 207 CLR 584* at [5]–[6]:

> The idea of guidelines
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> The expressions "guidelines" and "guidelines judgments" have no precise connotation. They cover a variety of methods adopted by appellate courts for the purpose of giving guidance to primary judges charged with the exercise of judicial discretion. Those methods range from statements of general principle, to more specific indications of particular factors to be taken into account or given particular weight, and sometimes to indications of the kind of outcome that might be expected in a certain kind of case, other than in exceptional circumstances.
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> One of the legitimate objectives of such guidance is to reduce the incidence of unnecessary and inappropriate inconsistency. All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.

So, a guideline judgment can be delivered independent of the statutory scheme. All that it takes is for the higher court to express that it is a guideline. An example of a non-statutory

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[1] Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002) [2004] NSWCCA 303

[2] Crimes (Sentencing Procedure Act) 1999 - ss 36 to 42A

guideline in the drug law sphere was the long line of authority that a person who is substantially involved in supply must receive a full-time custodial sentence unless there are exceptional circumstances: *R v Clark (unrep, 15/3/90, NSWCCA)*; *Young v R [2007] NSWCCA 114* at [22]; (since abandoned in *Parente v R [2017] NSWCCA 284*)

I should note that in s36 of the *Criminal Procedure Act 1999*, a guideline judgment is defined as follows:

> "guideline judgment" means a judgment that is expressed to contain guidelines to be taken into account by courts sentencing offenders, being-
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> (a) guidelines that apply generally, or
> (b) guidelines that apply to particular courts or classes of courts, to particular offences or classes of offences, to particular penalties or classes of penalties or to particular classes of offenders (but not to particular offenders).

The only reason that *Mauger* does not fall into the category of a statutory guideline judgment is that the court does not seem to have complied with s37A(2):

> Guideline judgments on own motion
> (1) The Court may give a guideline judgment on its own motion in any proceedings considered appropriate by the Court, and whether or not it is necessary for the purpose of determining the proceedings.
> (2) The Court is to give the Senior Public Defender, Director of Public Prosecutions and Attorney General an opportunity to appear as referred to in sections 38, 39 and 39A before giving a guideline judgment.

In any event, the distinction is probably academic, in the sense that neither statutory or other guideline judgments are binding on lower courts. They are however, just about as persuasive as one can get. In *R v Whyte (2002) 55 NSWLR 252* Speigelman CJ said at [114]–[116]:

> As mentioned above, in *Henry* at [31], after stating that guidelines are only an indicator, I added:
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> "Nevertheless, where a guideline is not to be applied by a trial judge, this Court would expect that the reasons for that decision be articulated, so that the public interest in the perception of consistency in sentencing decisions can be served and this Court can be properly informed in the exercise of its appellate jurisdiction."

**R v Mauger [2012] NSW CCA 51**.

*Mauger* was clearly a guideline judgment. The actual word was used at [16] (my emphasis)

> The Crown acknowledged that the primary purpose of a Crown appeal against sentence was to lay down general principles for the governance and ***guidance*** of courts having the duty of sentencing convicted persons…

Nor is *Mauger* an aberration – for example it has been applied in the Court of Criminal appeal in *Veith v R [2018] NSWCCA 284* and the Court of Appeal in *Cheng v Farjudi [2016] NSWCA 316*.

Nor is *Mauger* an example where the proviso was applied or a finding was made that the original sentence was inadequate although not manifestly so. Indeed, there was a specific finding that the sentence was adequate at [39–40] (my emphasis):

> The Crown's contention in this case is based upon the assumption that the imposition of a good behaviour bond subject to conditions is not an adequate penalty, or is not adequate in the absence of the recording of a conviction. It seems to me on the contrary, in the particular circumstances of this case, to be ***completely adequate***. In terms of the relative criminological and social consequences for the respondent on the one hand and society on the other hand, the recording of a conviction for the offence in this particular case is of little or no practical or theoretical consequence to the good order of the community but is by way of contrast potentially of great importance to the respondent. As Spigelman CJ said in *R v Ingrassia (1997) 41 NSWLR 447* at 449, in a comment directed to a consideration of the impact of a conviction upon an individual offender, "[t]he legal and social consequences of being convicted of an offence often extend beyond any penalty imposed by a Court"…
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> The purposes of sentencing described in s 3A of the Act are in my opinion ***properly and adequately achieved*** by the imposition of a conditional bond.

In *Mauger*, the defendant had pleaded guilty to supply 5.1 grams (20 tablets) of ecstasy. The maximum penalty was 15 years imprisonment. A charge of possession of a small quantity of cannabis was taken into account on a Form 1. The quantity of ecstasy was four times the indictable amount. The defendant was placed on a s10(1)(b) bond for a period of two years in the District Court. He told the police that he would be taking two of the tablets, and sharing the rest with his friends at the festival. He had not put his mind to whether he would be paid by his friends. The defendant was aged 32 years and had recently suffered a relationship break-up and some psychological challenges. The original sentencing court took into account that the defendant's employment could be terminated as a result of a conviction including restricting his ability to travel overseas for work. He had excellent referees, earned $300,000 per annum and supported various charities.

At [34], the court found that

> The respondent is undeniably a person of good character with no criminal antecedents. I accept that his age is for all present purposes irrelevant. His health and medical condition are also of little if any present relevance. Nor are there any extenuating circumstances in which the offence was committed. Although minds may differ on the question, it is also not correct to characterise the offence as trivial. So much is apparent from the maximum penalty that applies to it.

The court specifically considered that there are significant differences between conviction and non-conviction at [28]:

> The respondent's employer may terminate his employment if charged with a criminal offence that the employer reasonably opined may negatively impact upon his ability to perform his duties or upon the employer's reputation. It is not difficult to imagine a circumstance where the fact of a charge unaccompanied by a conviction would not trouble a reasonable employer but where in contrast the fact of a conviction may do so. In my opinion the prospect that a conviction for this offence could have possibly detrimental consequences for the respondent's employment was definitively something that her Honour was entitled to take into account and that was proper for the Court to consider pursuant to s 10(3)(d) of the Act when deciding whether or not to make an order pursuant to s 10(1) of the Act.

At 37, the court considered the punishment inherent in a bond to be of good behaviour, even without conviction:

> Whilst that contention is understandable as a general proposition, it is important that it not be permitted in this case to dilute or to downgrade the significance of the imposition of a bond. If the seriousness of the present offence and the need for denunciation and general deterrence are important considerations, they are to my mind more than adequately contemplated in this case by both the terms and the duration of the bond that has been imposed. The respondent has been made subject to a judicially sanctioned requirement that he be of good behaviour for a period of two years. There are onerous consequences that apply if he fails to observe that requirement. That fact alone would in my view impress the seriousness with which the Court was treating the respondent's conduct upon an objective and reasonable member of the community…It is wrong in my view to assume that the decision to not record a conviction is automatically or necessarily coextensive with the imposition of an inadequate, or even a particularly lenient, sentence.

If any criticism was to be found of the lower court, it was placing too much emphasis on the risks of international travel without adequate evidence. Earlier at [30] this was said:

> The Crown contended that the nature or extent of any restrictions upon the respondent's ability to travel to the USA were not supported by the evidence and his ability to travel to other countries was irrelevant and should have been given no or little weight. I agree."

**Magistrates should follow the CCA**

In the case of *DPP v Pelletier [2014] NSWLC 9*, involving sentencing for negligent driving occasioning death, Chief Magistrate Henson found at [51]:

> In the course of sentencing submissions I raised the decision of Howie J in *Bonsu v R [2009] NSWCCA 316* at [19] and [24] in particular. Therein the Court said at [19] that "little regard or insufficient regard is being paid in the Local Court or the District Court on appeal to the fact that the offender being sentenced has caused the loss of life", and at [24] that "the range of penalties being imposed, at least in the Local Court, is inadequate".
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> Counsel for the offender submitted that his Honour's words are obiter and not binding on the Court. The response of this Court is, and must be, that when the

> Court of Criminal Appeal expresses a view in relation to consistency on sentencing and identifies a lack of appropriateness in the penalties being imposed, it behoves an inferior court to take heed lest it creates an environment whereby a Crown appeal predicated on inadequacy of sentence becomes an inevitable consequence.

In my view, the same principles apply where the Court of Criminal Appeal specifically finds a sentence adequate on an inadequacy appeal, and indicates that the primary purpose is to lay down general principles for the guidance of lower sentencing courts. It 'behoves' an inferior court to take heed lest it create an environment where defence appeals become an inevitable consequence.

**Possession Charges**

Possession of prohibited drugs is a far less serious offence than supply prohibited drugs – the former carries a maximum penalty of two years imprisonment. It is inconceivable that in the where there is a first offence charge of possession of prohibited drugs, and there is evidence that a conviction could have an impact on actual or potential employment or other significant affect that it would not be dealt with without conviction. To find otherwise is clearly and unequivocally appealable error.

**Cannabis offences**

There is an oft quoted passage from *R v Dang [2005] NSWCCA* at 29 which points to the maximum penalty as the key factor in sentencing for particular drugs. In respect of cannabis, so the argument goes, because it carries the same maximum penalty for possession as other illicit drugs, there should be no distinction in sentencing.

The argument is faulty for two reasons. First there is a difference in maximum penalty for supplying cannabis and all other drugs, with the maximum penalty being 10 years as opposed to 15 years. The provisions relating to ongoing supply specifically do not apply to cannabis. Cannabis supply can be dealt with in the Local Court in circumstances where all other prohibited drugs must be dealt with on indictment. This is legislative recognition that offending with respect to cannabis is less serious than, for example, amphetamines, cocaine or heroin.

Second, cannabis is in a twilight zone being the only 'illicit' drug that is available by prescription. Indeed, there are now over 200,000 Australians with cannabis prescriptions[3]. Further, in NSW there is a Medicinal Cannabis Compassionate Use Scheme[4]. Adults with a terminal illness can register with the State Government and each registered person can nominate up to three carers. Registered adults with a terminal illness can possess cannabis and carers can supply cannabis to a registered adult at their usual place of residence, or any domestic residence. Under the heading of 'Where will eligible adults source cannabis?' the NSW government website helpfully advises;

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[3] "Access to medicinal cannabis products: SAS Category B approval statistics." Retrieved 20 April 2023, from https://www.tga.gov.au/access-medicinal-cannabis-products-1

[4] https://www.medicinalcannabis.nsw.gov.au/regulation/medicinal-cannabis-compassionate-use-scheme

> In line with the existing situation, sourcing cannabis is a matter for adults with a terminal illness and their carers.

Not only is possession permissible in such circumstances, but so is supply and self-administration.

Thirdly, the police have a discretionary scheme[5] for cannabis possessors whereby they can be cautioned up to three times before having to face court.

**Distinguishing Mauger.**

All sentencing decisions are ultimately distinguishable – no two factual scenarios are exactly the same. But the truth is, that those who seek to distinguish *Mauger* do so not on legal grounds but for one reason and one reason only – they don't agree with it. It is important to realise that the likely motivations are genuine – the sentencer believes that non-convictions send the wrong message to the community about the scourge of the abuse of drugs. They believe that cannabis leads to schizophrenia and that youth drug use would skyrocket if the courts let people off without conviction. They believe that s10 gives a licence to supply and kill people at festivals.

However in the end, this is nothing other than a form of judicial activism. The seminal definition of the term 'judicial activism' includes a wanton failure to follow higher authority, and results oriented judging[6]. Both are apparent in the flimsy excuses for failure to follow *Mauger*. 'Judicial Activism' is a term thrown around liberally by the right in seeking to temper progressive judicial officers. It is high time that where the term fits it is utilised to describe the actions of a conservative punitive rump.

I have heard Magistrates say 'in *Mauger* he would have lost his job, and in the absence of such clear evidence it ought be distinguished'. That is simply not correct. Actually, Mauger's employment contract gave his employer a discretion if was *charged* with a criminal offence, he had no proof that he would lose his job and the court recognised this at [6]:

> The respondent gave evidence. He said that he was employed by Perpetual Limited as a senior analyst. He regularly travelled to the United States of America for work. He had not told his employer about the charges because he was concerned about the ramifications.

Advocates for the defence and prosecution need to painstakingly read the judgment and be ready to correct such judicial misinterpretations.

**Conclusion**

It is staggering to believe that in 2023 two cleanskins charged with possession of cannabis (or indeed any illicit drug) could walk into different Local Courts in NSW and come out with

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[5] https://www.police.nsw.gov.au/crime/drugs_and_alcohol/drugs/drug_pages/drug_programs_and_initiatives

[6] Kmiec, K. (2004). The Origin and Current Meanings of "Judicial Activism". *California Law Review, 92*(5), 1441-1477.

differing results. This brings the law into disrepute, and comes about by a refusal of some Magistrates to heed the call of the highest criminal court in the State. *Mauger* is a guideline judgment, and whilst not binding in the strict technical sense, ought to be followed. Failure to do so is not just appealable error it is inherently unfair, brings the court into disrepute and is a pernicious form of judicial activism.

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