CITATION:	*Lorenzetti v Brennan* [2021] NTSCFC 3
PARTIES:	LORENZETTI, Christopher John v BRENNAN, Alexander
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	ON REFERENCE from the Supreme Court exercising Territory jurisdiction
FILE NO:	LCA 14 of 2020 (22013327); LCA 15 of 2020 (22014875); LCA 16 of 2020 (22016657)
DELIVERED:	21 May 2021
HEARING DATE:	3 December 2020
JUDGMENT OF:	Southwood, Kelly JJ and Riley AJ

CATCHWORDS:

Referral of questions of law to the Full Court of the Supreme Court pursuant to s 21(1) of the *Supreme Court Act*

Section 121(7) of the *Domestic and Family Violence Act* provides that the court must not direct a term of imprisonment imposed for a breach of a domestic violence order to be served concurrently with another sentence of imprisonment for any other offence – when sentencing an offender under s 121(7) for breach of a domestic violence order and another offence is the court obliged to give effect to the totality principle by lowering the individual sentences below what would otherwise be appropriate – held s 121(7) does not entirely abrogate the totality principle – the totality principle may be given effect by making sentences for other offences partially concurrent or by reducing sentences to the lower end of the

appropriate range for the particular offences – held further to lower the sentences below what would be appropriate for the objective seriousness of the particular offending would be to adopt impermissible artificial measures for the purpose of subverting the intention of the legislature expressed in s 121(7)

Section 121(5) of the *Domestic and Family Violence Act* provides that in sentencing an offender for a second or subsequent offence of contravening an domestic violence offence the court must not make an order which would result in the offender being released from the requirement to actually serve the term of imprisonment imposed – appellant sentenced to imprisonment for 28 months suspended after 10 months for a number of offences including second or subsequent breaches domestic violence orders – amount of time required to actually serve under s 121(5) and other mandatory sentencing provision was nine months – held the plain meaning of s 121(5) is to prohibit the court from suspending any part of a sentence for a second or subsequent offence of breaching a domestic violence order – the sentence imposed does not contravene that subsection provided the sentence for the subsequent breach of a domestic violence order was ordered to be served before any period of suspension

Section 163 of the *Local Court (Criminal Procedure) Act* confers a right of appeal to the Supreme Court from a conviction, order, or adjudication of the Local Court on certain grounds – conflicting Supreme Court authorities on whether a separate notice of appeal is required in relation to each order appealed from or each file or complaint – held that a separate notice of appeal is required in relation to each sentence or other order appealed from

Domestic and Family Violence Act 2007 (NT) s 120, s 121
Justices Act 1921-1943 SA s 51
Justices Act s 163 [now the *Local Court (Criminal Procedure) Act]*
Justices Act Amendment Act of 1943 s 6
Justices Act 1921-1975
Justices Ordinance 1928 (NT) s 51
Justices Ordinance 1961 (NT) s 7
Local Court (Criminal Procedure) Act (NT) s 51
Sentencing Act s 5, s 54
Supreme Court Act 1979 (NT) s 21

Commissioner of Taxation v Arnhem Air Engineering Pty Ltd (1987) 90 FLR I40; *Lawrie v Stokes* (Supreme Court of the Northern Territory of Australia, unreported, Kriewaldt AJ, 17 December 1951), affirmed

Lee v New South Wales Crime Commission [2013] HCA 39; (2013) 251 CLR 196; *Mill v The Queen* (1988) 166 CLR 59; *Postiglione v The Queen* (1997) 189 CLR 295; *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277, applied

Elliot v Harris (No2) (1976) 13 SASR 516; *Osmasich v Evans* (1980) 25 SASR 481; *Samuels v Leech* [1970] SASR 60, not followed

Court v Armstrong [2019] NTSC 38; *Reilly v Baker* (1989) 99 FLR 52; *TRH v The Queen* [2018] NTCCA 14; *Warford v Firth* [2017] NTSC 75, considered

Brown v Guerin [2016] NTSC 53; *Idai v Malagorski* [2011] NTSC 102; *Watson v Chambers* [2013] NTSC 7, referred to

REPRESENTATION:

Counsel:

Appellant:	S Robson SC
Respondent:	M Nathan SC with C Ingles

Solicitors:

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

Judgment category classification:	A
Number of pages:	33

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Lorenzetti v Brennan [2021] NTSCFC 3
No. LCA 14 of 2020 (22013327); LCA 15 of 2020 (22014875); LCA 16 of 2020 (22016657)

BETWEEN:

CHRISTOPHER JOHN LORENZETTI
Appellant

AND:

ALEXANDER BRENNAN
Respondent

CORAM: SOUTHWOOD, KELLY JJ and RILEY AJ

REASONS FOR JUDGMENT

(Delivered 21 May 2021)

Introduction

[1] A judge of the Supreme Court seized of an appeal against a sentence of the Local Court has referred three questions of law to the Full Court of the Supreme Court pursuant to s 21(1) of the *Supreme Court Act 1979* (NT).

Background

[2] On 31 July 2020, the appellant pleaded guilty to one count of aggravated assault, five counts of contravening a Domestic Violence Order ("DVO"), and one count of attempting to contravene a DVO. He was sentenced to a total effective sentence of imprisonment for 28 months, suspended after 10 months with an operational period of two years. In addition, two

suspended sentences, also for breaching DVOs, were restored and ordered to be served concurrently with the fresh sentences.

[3] No complaint is made about the individual sentences for the aggravated assault, for which the appellant was sentenced to imprisonment for eight months or the breach of one domestic violence order, for which the appellant was sentenced to imprisonment for six months. However, the appellant contends, on Ground 1, that the individual sentences for the other breaches of DVOs are manifestly excessive. (Ground 1 is based largely on factual contentions and is not the subject of this reference.)

[4] The appellant contends, on Ground 2, that the sentencing judge erred by failing to apply, or failing to apply properly, the principle of totality.

[5] It was not open to the sentencing judge to make any part of any of the sentences concurrent. Section 121(7) of the *Domestic and Family Violence Act 2007* (NT) provides:

> Despite section 50 of the *Sentencing Act 1995* , the court must not direct the term of imprisonment to be served concurrently with the other term of imprisonment mentioned in subsection (6)(a) or (b) (ie a sentence of imprisonment for any other offence).

[6] However, the appellant contended in written submissions:

> Subsection 121(7) of the DVFA cannot be taken to completely abrogate such a fundamental sentencing provision as totality. The provision effectively prohibits totality from being applied by making sentences partially or fully concurrent but does not otherwise preclude the

> achievement of totality by lowering the individual sentences below what would otherwise be appropriate.[1]

[7] The appellant relied on *Mill v The Queen*[2] to the effect that the preferred method of giving effect to the totality principle is to make the sentences partly concurrent but, where that is not practicable, it may be given effect to *"by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed."*

[8] The respondent said, in written submissions:

> The respondent accepts that the principle of totality is not displaced by the requirement to accumulate the sentences, and that totality can be achieved by reduction of the individual sentences in the situation that accumulation is legislatively required.[3]

[9] It appears that the sentencing judge acted on that principle. In sentencing the appellant his Honour said:

> Due to the nature of the legislation and other authority, I am bound to order some accumulation of these sentences and in fixing that and the period of suspension, I do take into account the overall sentence that I will be imposing upon you today. We do not want to impose a sentence that is crushing in all of the circumstances, but gives you some light at the end of the tunnel.[4]

[10] The view held by both appellant and respondent (and applied by the sentencing judge) is potentially in conflict with the decision of the Court of

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1 Appellant's submissions at [16].

2 (1988) 166 CLR 59.

3 Respondent's submissions at [13].

4 Transcript of 31 July 2020 at p 4.

Criminal Appeal in *TRH v The Queen*[5] in which the court made the following remarks:

> The appellant abandoned Ground 1 in written submissions provided before the hearing of the appeal. Counsel's major focus was the fact that, taking into account the Queensland sentence, the sentence imposed by the sentencing judge results in an overall effective non-parole period of 89% of the overall effective head sentence. Whilst the total sentence of 16 years five months and 22 days imprisonment was not said to be excessive, the appellant contended that the sentencing judge should have structured the sentence for the Territory offending in such a way as to avoid such a consequence.
>
> Counsel contended that this could have been done by not fixing a non-parole period at all, but by suspending part of his sentence under s 40 of the *Sentencing Act 1995*. Section 40(1) only permits a court to suspend all or part of a sentence of imprisonment if the term imposed is a sentence of not more than five years, but the appellant contended that the sentencing judge could have reduced the six year sentence to five years but ordered it to commence at some date later than 12 August 2014.
>
> It should be noted at the outset that the fact that the non-parole period ended up being approximately 89% of the head sentence is a mathematical artefact attributable in part to the fact that the head sentence for the Territory offences was made partly concurrent with the Queensland sentence. Further, we do not agree that the principle in *Mill v The Queen* requires a court to adopt convoluted measures designed to "get around" the requirements of the legislation and the restrictions on the court's discretion imposed by the legislature in the manner suggested by the appellant. Once the appellant abandoned, as he did, the contention that the overall sentence was manifestly excessive, it necessarily followed that the provisions in the legislation concerning a sentence of that length (namely that the sentence could not be partly suspended) needed to be given proper effect.

First Question:

[11] Therefore, the following question was reserved for the opinion of the Full Court:

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5 [2018] NTCCA 14 at [14]-[16].

QUESTION 1: When the Court is applying s 121(7) of the *Domestic and Family Violence Act* in sentencing an offender for a breach of a DVO and another offence or offences, is the court obliged to give effect to the totality principle by lowering the individual sentences below what would otherwise be appropriate?

[12] Both appellant and respondent have submitted that s 121(7) of the *Domestic and Family Violence Act* does not entirely abrogate the principle of totality. We agree.

[13] The Supreme Court has already considered whether ss 121(6) and (7) which require consecutive sentences to be imposed for each breach of s 120(1), displace the totality principle and has held that they do not.[6] These cases were correctly decided.

[14] The common law principle of totality requires a sentencing court to ensure that, when sentencing an offender for more than one offence, the total sentence imposed is a just and appropriate measure of the total criminality involved, and is not crushing such that all hope for a productive life post-sentence is erased.[7] It is a fundamental sentencing principle, rooted in the requirement for sentences to be fair, just and proportionate which is mirrored in the purposes set out in s 5 of the *Sentencing Act*, specifically proportionality and rehabilitation. The importance of the principle is reflected in the discussion in *Mill* at pages 62 and 63 and in the conclusion

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6 *Brown v Guerin & Ors* [2016] NTSC 53; *Watson v Chambers* [2013] NTSC 7; *Idai v Malagorski* [2011] NTSC 102.

7 *Postiglione v The Queen* (1997) 189 CLR 295 per McHugh J; *Mill v The Queen* (1988) 166 CLR 59 at p 62.

reached at pages 65 and 66, in particular that passage set out at pages 66 and 67.

[15] It is to be presumed that the legislature does not intend to "overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness".[8]

[16] In *Lee v New South Wales Crime Commission*,[9] the High Court endorsed the contemporary application of this principle of construction in the following terms:

> More recent statements of the principle in this Court do not detract from the rationale identified in *Potter*, *Bropho* and *Coco* but rather reinforce that rationale. That rationale not only has deep historical roots; it serves important contemporary ends. It respects the distinct contemporary functions, enhances the distinct contemporary processes, and fulfils the shared contemporary expectations of the legislative and the judicial branches of government.

[17] Section 121(7) does not set out a clear intention to entirely abrogate the principle of totality. Section 121(7) does prevent the principle of totality from being applied by means of making the sentences for breaches of DVOs concurrent or partially concurrent with other sentences. However, in cases where there are, for example, more than one assault charge, there is nothing to stop the principle from being applied by means of concurrency of the sentences for the assaults.

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8 *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277 (8 October 1908) per O'Connor J at p 304.

9 [2013] HCA 39; (2013) 251 CLR 196 at [312] per Gageler and Keane JJ.

[18] The other method of applying the principle of totality, albeit not the generally preferred method, is by adjusting the length of the sentences – both the head sentence and time to serve.[10] The appellant contends that where necessary to give effect to the totality principle, the court can, and should, reduce the sentences imposed for breaches of DVOs (and/or related offences) below what would otherwise be appropriate to the extent that, if necessary, individual sentences should be imposed that may be inadequate to reflect the seriousness of the individual offences.

[19] However, the respondent contends that an application of the principle in the way contended for by the appellant would be an illegitimate attempt to subvert the intention of the legislature in enacting s 121(7) to prohibit sentencing courts from making sentences for breach of DVOs concurrent. The second reading speech for the Bill which introduced s 121(7) reads in part:

> "The aim of section 121 is to ensure that any sentence for a contravention of a DVO is served in addition to other terms of imprisonment. ….. The bill amends section 121 in order to ensure that persons who are found guilty of contravening a DVO, and who are sentenced to a term of imprisonment, will serve that term of imprisonment. The amendment ensures that if a person is already serving a term of imprisonment, any sentence they receive for contravening a DVO will need to be served and cannot be served concurrently – they will be locked up longer as a result of the contravention."[11]

10 *Mill v The Queen* at pp 62 and 64.

11 *Northern Territory, Parliamentary Debates, Legislative Assembly*, 20 October 2010, 6431, (Lawrie, Justice and Attorney-General).

[20] The respondent contends that in light of the evident legislative intention, the only scope for the application of the totality principle when sentencing for breaches of DVOs is for the court to lower the sentences to the lower end of the appropriate range of sentences for the particular offences. It would not be permissible to lower the sentences below what would be appropriate sentences for the objective seriousness of the particular offending. To do so would be to adopt artificial measures for the purpose of subverting the intention of the legislature expressed in the subsection and expounded in the second reading speech. We agree with the respondent's contention, noting that the High Court in *Lee v New South Wales Crime Commission* placed a rider on the application of the general principle set out at [14] above:[12]

> Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of fundamental principles and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature. *[emphasis added]*

12 at [313] per Gageler and Keane JJ.

[21] The Court in *Mill* made it clear that where it is necessary in order to achieve the objectives of the totality principle, the Court should impose head sentences which might otherwise be considered inadequate, saying:[13]

> It is true that the lower head sentence will fail to reflect adequately the seriousness of the crime in respect of which it is imposed. That is unfortunate. However, it is to be preferred to the injustice involved in the imposition of a longer head sentence because of the inadequacy of the law to cope satisfactorily with the intervention of State boundaries.

[22] However, *Mill* was concerned with a situation in which there was a lack of statutory authority to back date sentences to take into account sentences for related offending imposed in another jurisdiction. It was not concerned, as we are here, with a positive statutory prohibition. There is scope for the application of the totality principle by ordering concurrency of other sentences imposed at the same time (eg sentences for assault) and by reducing the sentences imposed for breaches of DVOs and other sentences imposed at the same time to the lower end of the range of appropriate sentences available given the objective seriousness of the breaches. However, to impose inadequate individual sentences to give effect to the totality principle in the face of the legislative prohibition on concurrency aimed at ensuring offenders serve the sentences imposed and are "locked up for longer" because of their contraventions would, in our view, constitute an illegitimate attempt to subvert the legislative intention of the sub-section.

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13 at p 67.

Second Question

[23] Subsection 121(5) of the *Domestic and Family Violence Act* provides:

> The court must not make an order for a person who has previously been found guilty of a DVO contravention offence if the order would result in the release of the person from the requirement to actually serve the term of imprisonment imposed.

[24] When the appellant appeared before the Local Court on 31 July 2020, to be sentenced for the matters the subject of this appeal, he had previously been found guilty of a DVO contravention offence. On 14 April 2020, he was found guilty of a DVO contravention offence committed on 11 April 2020. The matter is complicated by the fact that three of the five counts which are the subject of this appeal pre-date that finding of guilt. (They occurred on 7 February, 7-8 March and 26 March 2020.) However, two of the matters for which the appellant was sentenced on 31 July 2020, and which are the subject of this appeal, post-date the finding of guilt on 14 April ("the subsequent offences"). (The subsequent offences were committed on 19 April and 6 May 2020.)

[25] The sentencing judge ordered the appellant's sentence to be suspended after he had served 10 months. The respondent to the appeal has cross-appealed contending that the effect of s 121(5) was to prohibit the sentencing judge from making an order suspending any part of the sentence imposed in relation to the subsequent offences.

[26] As a result, the following question was referred to the Full Court for determination.

> QUESTION 2: Did s 121(5) of the *Domestic and Family Violence Act* prohibit the sentencing judge from making an order suspending any part of the sentence in respect of the subsequent offences?

[27] The plain meaning of s 121(5) is to prohibit the court from suspending any part of a sentence imposed for a second or subsequent offence of breaching a DVO. However, in this case, when the sentence is analysed, it does not appear as though the sentencing judge has done so, provided the sentence has been structured such that the sentences for the subsequent offences are served in full before the period of suspension begins.

[28] The sentence imposed on the appellant was imprisonment for 28 months suspended after 10 months. The sentence was made up as follows:

(a) eight months for the aggravated assault;

(b) six months for one of the breaches of the DVO;

(c) two sentences of two months each and two sentences of four months each for the other breaches of the DVO; and

(d) two months for the attempted breach of the DVO.

[29] Sub-section 121(7) requires the sentences for each of the five counts of contravening a DVO to be served cumulatively upon each other and upon the

sentence for the aggravated assault and the sentencing judge, accordingly, made all of the sentences cumulative.

[30] The aggravated assault required a mandatory minimum sentence of three months actual imprisonment. The two subsequent offences attracted sentences of two months and four months, which, under s 121(5) could not be suspended in whole or in part. Therefore, the total amount of time that the legislation required the appellant to actually serve – ie that part of the sentence which could not be suspended – amounted to nine months in total. The sentencing judge suspended the sentence imposed after 10 months.

[31] This court does not have any information about how the sentence was structured. Provided it was structured such that the sentences for the subsequent offences were imposed first, so that they were served in full before the suspended part of the sentence took effect, there will have been no contravention of s 121(5).

[32] On the hearing of the reference, the parties also addressed submissions to the question whether s 121(5) also precluded a sentencing court from fixing a non-parole period. The appellant contended that it did not and the respondent contended that it did.

[33] That question is not the subject of a reference to the Full Court. Moreover, should the appeal be successful, there is no prospect of the question arising on a resentence. The total existing sentence for the two subsequent offences is six months. There is no possibility of any resentence exceeding that total

for those two offences, and the minimum non-parole period which is able to be fixed is eight months.[14] The question would therefore be purely hypothetical and we decline to amend the reference and to consider the question.

Question 3:

[34] The respondent contends that the appeal is incompetent because the appeal was instituted by filing a single notice of appeal against the sentences for five offences across three different files: count 3 on file 22016657, count 1 on file 22014875, and counts 1, 2 and 8 on file 22013327.

[35] There have been conflicting statements of principle in decisions of this Court on the question of whether separate notices of appeal are required when an appellant wishes to appeal against a sentence imposed in relation to a number of matters which were heard together. As a consequence, the following question has been referred to the full court:

> QUESTION 3: Is the appeal incompetent in relation to some or all of the offences the subject of the appeal as a consequence of only one notice of appeal having been filed?

Summary of Northern Territory authorities:

[36] The first Territory case on the issue, *Lawrie v Stokes*,[15] placed emphasis on the need for separate notices of appeal for matters on different complaints,

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14 *Sentencing Act*, s 54(2).

15 (Supreme Court of the Northern Territory of Australia, unreported, Kriewaldt AJ, 17 December 1951).

but that case was decided at a time when the Northern Territory legislation only permitted one matter to be charged on a complaint. That case was followed by *Commissioner of Taxation v Arnhem Air Engineering Pty Ltd*,[16] in which Asche J accepted the argument that the Act gives a right of appeal from "a" conviction, order or adjudication and so contemplates separate notices of appeal against every sentence or order from which it is desired to appeal. Hence it is defective to file one notice of appeal which relates to more than one appeal. The clear implication of this line of reasoning is that a separate notice of appeal is required in relation to each sentence or conviction even where the offences in question were charged on the same complaint. In the later cases of *Court v Armstrong*[17] and *Warford v Firth*[18] the court held in each case, on the facts before it, that separate notices of appeal were required. In each of those cases, the appellant was purporting to appeal against orders made in relation to matters charged on more than one complaint. In each case, the court left open the question of whether more than one notice of appeal was required when the appeal related to offences which had been charged on the same complaint.

16 (1987) 90 FLR 140 per Asche J.

17 [2019] NTSC 38 at [10].

18 [2017] NTSC 75 at [4].

***Lawrie v Stokes*:**

[37] In *Lawrie v Stokes*[19] four separate complaints were laid against the appellant for dangerous driving, offensive behaviour, resisting arrest and assault. The charges arose out of the same incident and were heard together by consent. He was convicted of all four charges, fined in relation to two, and sentenced to imprisonment in relation to two. He purported to appeal against the two sentences of imprisonment. He filed only one notice of appeal, and that notice did not contain the required recognizance. (It was established that there was only one notice of appeal by examining the files and noting that there was no notice of appeal on one of them.)

[38] Kriewaldt AJ held that two notices of appeal were required. His Honour noted[20] that in none of the cases to which he referred in his review of the authorities was there any legislation analogous to s 51 of the *Justices Act 1921-1943* (SA),[21] which specifically permits the joinder of a number of offences in one complaint if the charges arise out of the same set of circumstances. At the time *Lawrie v Stokes* was decided, the *Justices Ordinance 1928* (NT) did not permit the joinder of more than one charge on a complaint. Section 51 of that Ordinance provided:

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19 (Supreme Court of the Northern Territory of Australia, unreported, Kriewaldt AJ, 17 December 1951).

20 at p 90.

21 as enacted by section 6 of the *Justices Act Amendment Act* of 1943. That section read:

Section 51 (1): A person may be charged with any number of summary offences in the same complaint (either cumulatively or in the alternative) if the charges arise from the same set of circumstances or from a series of circumstances of the same or similar character.

> Every complaint shall be for one matter of complaint only and not for two or more matters.[22]

[39] In considering the question of whether two notices of appeal were required Kriewaldt AJ said:

> The appellant, I shall assume, consented to the four charges being heard together. His counsel seems to have treated the four complaints as amounting together to one "case" and on that assumption gave only one Notice of Appeal. It is implicit from what I have said that although the charges were heard together there were nevertheless four distinct matters before the Court. There were four complaints, four convictions, and four separate penalties were imposed. The fact that the four complaints were heard together did not convert them into one charge of four offences. It follows that if the appellant desired to appeal against all four convictions he was bound to give four separate Notices of Appeal, and similarly if he desired to appeal against two convictions, he was bound to give two separate Notices of Appeal.

[40] The underlined portion of this extract from the judgment appears to place the emphasis on the fact that there were four separate complaints, keeping in mind that, at that time, only one offence could be charged on a complaint. Would a complaint charging four offences be "one charge of four offences"?

[41] The subsequent Northern Territory cases on this issue were all decided after the Northern Territory legislation was amended to provide that more than one charge could be laid on the same complaint if the charges arose out of the same circumstances.

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22 The section was amended by s 7 of the *Justices Ordinance 1961* to read:

Section 51 (1): Charges for any number of offences may be joined in the same complaint, if the charges arise from the same set of circumstances.

This is now s 51(1) of the *Local Court (Criminal Procedure) Act*.

Commissioner of Taxation v Arnhem Air Engineering Pty Ltd

[42] *Commissioner of Taxation v Arnhem Air Engineering Pty Ltd*[23] was a Crown appeal (or purported appeal) against inadequacy of sentence on a number of convictions. The respondents were two separate companies. By agreement in the Court of Summary Jurisdiction in Darwin all charges were heard together; and argument relating to the validity of the appeals was likewise heard together.

[43] The respondents to the appeal argued that the appeals were incompetent by reason of a number of defects one of which was that only one notice of appeal was filed and served for each respondent. In upholding that challenge to the appeal, Asche J (as he then was) said:

> There is one notice of appeal in each case, i.e. where Arnhem Aircraft Engineering Pty Ltd is the respondent and where Arnhem Air Charter Pty Ltd is the respondent. In fact in each case the appeal relates to three separate charges and, presumably therefore the notices of appeal are meant to encompass appeals against six separate convictions and fines.
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> It is submitted by Mr Mildren QC for the respondents that the Act contemplates separate notices of appeal against every sentence or order which it is desired to appeal from. This, it is said, can be the only reasonable inference which can be drawn from the expression in s 163 which gives a right of appeal from "a" conviction, order or adjudication and the requirement for the appeal to be on a ground which involves sentence or error or mistake "in every case":
>
> ……..
>
> I accept the arguments for the respondent that it is defective to file one notice of appeal which relates to more than one appeal.

[44] The focus in this judgment is not on how many complaints there were, but on how many appeals, as Asche J accepted the submission by Mr Mildren

23 (1987) 90 FLR 140 at [10] per Asche J.

QC (as *he* then was) that on its true construction, the Act required a separate notice of appeal in relation to "every sentence or order which it is desired to appeal from". It is not even made clear whether there was more than one complaint (as distinct from more than one charge) for each respondent. As the case was decided after the 1961 amendment to s 51, it is possible that all three charges against each company were charged on the same complaint.

Reilly v Baker

[45] In *Reilly v Baker*[24] the appellant appealed against a sentence imposed in the Court of Summary Jurisdiction. The appellant was convicted of seven offences charged on one complaint and three offences charged on a separate complaint of the same date. By consent the two complaints containing the total of 10 charges were heard together. The magistrate imposed a single fine of $20,000 in respect of all 10 offences and ordered the appellant to pay costs in the sum of $6,416. The appellant contended that the fine was manifestly excessive and that the award of costs involved an error of law.

[46] Counsel for the respondent submitted that separate notices of appeal should have been lodged, one in respect of the fine and one in respect of the costs. Kearney J said:

> I do not think that is necessary. In *Lawrie v Stokes* (1951) NTJ 66 Kriewaldt J held that there should be a separate notice of appeal in respect of each conviction sought to be appealed, but that is a different point which I will deal with later.

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24 (1989) 99 FLR 52 at 55.

[47] When he came to deal with the issue raised in *Lawrie v Stokes*, Kearney J said:[25]

> Mr Tiffin submitted that in fact only one appeal had been instituted, purportedly in relation to the sentence on the 10 charges contained in the two complaints; he submitted that this was not permissible since there had to be a separate notice of appeal for each conviction appealed. He relied on what was said by Kriewaldt J in *Lawrie v Stokes* (at 80), followed by Asche J (as he then was) in *Commissioner of Taxation (Cth) v Arnhem Aircraft Engineering Pty Ltd* (1987) 90 FLR 140 at 144. It is unnecessary for me to rule upon this submission since I consider that in fact two notices of appeal were lodged.[26] In my view, where appeals are lodged against convictions or sentences imposed in respect of *several counts in a complaint* which are heard together, there should only be one notice of appeal: see *Samuels v Leech* [1970] SASR 60, where the question is discussed by Hogarth J (at 61-62).

Kearney J went on to refer to South Australian authorities in which it had been held that only one Notice of Appeal was necessary even when charges on *different* complaints were heard together.[27]

[48] Kearney J determined that two notices of appeal had been filed because two identical notices had been filed – and presumably one copy placed on each file (ie there were two copies of one notice of appeal – one for each file).

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25 At pp 54-55.

26 Kearney J noted:

> "On 19 June the appellant filed two notices of appeal; although they are, understandably, in identical terms, I consider that it is clear that one relates to the complaint of 22 May relating to seven offences, while the other relates to the complaint of the same date relating to three offences. I note that the appellant entered into separate Recognisances to prosecute each of these two appeals."

27 *Elliot v Harris (No2)* (1976) 13 SASR 516*; Samuels v Leech* [1970] SASR 60 per Hogarth J; and *Osmasich v Evans* (1980) 25 SASR 481.

Warford v Firth

[49] In *Warford v Firth*[28] two charges of aggravated assault (on information) and two charges of breach of a DVO (on complaint) were all heard together. The appellant filed a single notice of appeal – out of time.

[50] Southwood J held that the Act required there to have been separate notices at least in respect of the convictions for the charges on information and the convictions for the charges on complaint. His Honour said at [4]:

> The original Notice of Appeal was filed out of time. It was filed three days late. In addition to being out of time, the Notice of Appeal was defective. The solicitors for the appellant had impermissibly joined in the same Notice of Appeal - the appeal from the convictions for the two aggravated assaults, and appeals from convictions for two charges of breaching a domestic violence order contrary to s 120 of the *Domestic and Family Violence Act* (NT). All four charges were summarily tried together in the Local Court.

[51] In a footnote, Southwood J cited *Commissioner of Taxation v Arnhem Air Engineering Pty Ltd* (1987) 90 FLR 140, 47 NTR 8 and *Lawrie v Stokes* (1951) NTJ 66 as authority for the proposition that the appeals had been impermissibly joined in the one notice of appeal; noted the contrary views in *Reilly v Baker* (1989) 99 FLR 52 and *Elliott v Harris (No 2)* (1976) 13 SASR 516 and added:

> It is preferable, and the Act requires, there to have been separate notices at least in respect of the convictions for the charges on information and the convictions for the charges on complaint.

28 [2017] NTSC 75 at [4].

[52] This left open the question of whether separate notices of appeal were necessary when the offences in question were charged on the same complaint.

Court v Armstrong

[53] In *Court v Armstrong*[29] the appellant was charged with a number of offences laid on information on one file and charged with other offences, some laid on information and some on complaint, on a separate file, all heard together. He was found guilty and purported to appeal against all of the sentences in a single notice of appeal. Mildren J focused on the fact that the one notice of appeal referred to two files. He said:

> The appellant purported to appeal against all of the sentences in a single notice of appeal which referred to both file numbers.[30]
>
> ……
>
> Objection was taken by Mr. Dane, counsel for the respondent, that the notice of appeal was bad because only one notice of appeal was filed, whereas there should have been separate notices of appeal filed for each file. Furthermore, the 4 charges on file number 21812446 were laid on separate information, and the charges in relation to file number 21848910 were contained in an information and a complaint.[31]
>
> …….
>
> After hearing submissions, I ruled that there was only one notice of appeal filed and that there should have been two. I called upon the appellant to elect as to which of the two files he intended to appeal. The appellant elected to appeal file number 21848910 and sought leave to amend the notice of appeal. Leave was granted.[32]

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29 [2019] NTSC 38 at [10].

30 at [6].

31 at [9].

32 at [8].

[54] It should be noted that although the notice of appeal, as amended to refer to only one file, related to a number of offences, it was an appeal against a single sentence imposed in relation to those offences – and hence was an appeal against a single order.[33] Mildren J left open the question whether a separate notice of appeal was required when there was more than one order relating to offences charged on the same complaint – for example when the appellant sought to appeal against convictions for more than one offence charged on the same complaint. In giving reasons for the decision His Honour said:

> "where there are quite distinct matters, the subject of two separate Local Court files, and those matters are not connected as arising out of the same circumstances or form or are part of a series of offences of the same or a similar character the position is different, and if it is desired to appeal each of the sentences, at least two notices of appeal are necessary."

[55] This appears to be a reference to s 51 of the *Local Court (Criminal Procedure) Act* which provides that charges for any number of offences may be joined in the same complaint, if the charges arise out of the same set of circumstances. The underlined portion of Mildren J's judgment seems to leave open the possibility that if the matters in question arose out of the same circumstances and so were charged on the same complaint, only one notice of appeal would be necessary, even if the appeal was against more

33 There was an issue relating to the file that was struck from the amended notice of appeal, namely that an aggregate sentence was imposed when that was not permitted under the Sentencing Act. That did not affect the amended notice of appeal.

than one order – eg an appeal against multiple convictions on the same complaint.

South Australian Cases

[56] In *Samuels v Leech*[34] Hogarth J in the South Australian Supreme Court held that where appeals are brought against orders of a court of summary jurisdiction on separate counts on the same complaint, it is permissible, and desirable, that appeals against all the orders made on that complaint be instituted in the same notice of appeal.

[57] In *Elliott v Harris (No 2)*[35] (which involved an appeal against a number of convictions on *separate* complaints) Bray CJ held that, in that case, only one Notice of Appeal was necessary. Part of the rationale for that decision was as follows.

> In *Samuels* v *Leech* [1970] S.A.S.R. 60, Hogarth J. held that there was no objection to appeals against several convictions on several counts in one complaint being instituted by one notice of appeal, and, indeed, that it was preferable that this should be done. With respect I agree, in the circumstances of that case. It is true that his reasoning does not in terms apply to an appeal against several convictions of the same defendant arising out of different complaints heard concurrently, but I think the logic of the decision does apply. Section 163 gives the right of appeal to this Court "from every conviction, order, and adjudication of a court of summary jurisdiction ... or an order dismissing a complaint of a simple offence". The appeal is against the conviction, not against the complaint. If one notice can cover several convictions arising out of one complaint, so, it seems to me, by parity of reasoning it can cover several convictions arising out of different complaints. ….

34 [1970] SASR 60.

35 (1976) 13 SASR 516 at 519; See also *Okmasich v Evans* (1980) 25 SASR 481.

Parties contentions

[58] The appellant in this case has submitted that only one notice of appeal was necessary and that the approach in the South Australian cases referred to by Kearney J in *Reilly v Baker*[36] is to be preferred, noting that the provisions of the *Justices Act 1921-1975* (SA) under consideration in those cases are essentially identical to the appeal provisions in the *Local Court (Criminal Procedure) Act*. Counsel relied, in particular, on the following remarks of Bray CJ in *Elliott v Harris (No 2):*[37]

> Section 163 gives the right of appeal to this Court "from every conviction, order, and adjudication of a court of summary jurisdiction … or an order dismissing a complaint of a simple offence." The appeal is against the conviction, not against the complaint. If one notice can cover several convictions arising out of one complaint, so, it seems to me, by parity of reasoning it can cover several convictions arising out of different complaints ….
>
> Accordingly I think the notice is good, but, of course, there is nothing to stop an appellant from giving a separate notice of appeal from each conviction. In the circumstances of *Samuels v Leech* Hogarth J thought that the preferable course was for there to be only one notice of appeal, and, as I have said, I respectfully agree with that. In other circumstances it might be preferable that there should be separate notices. Indeed, in some cases, as if there were absolutely no nexus at all between the various convictions, it might be an abuse of process of the Court if there were not several notices.

[59] Mr Robson SC for the appellant pointed out that the present appeal was against the total effective sentence applied across charges on three separate complaints; that the notice of appeal identifies each of the three complaints by their file numbers; and that, although error is contended for in relation to

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36 (1989) 99 FLR 52 at 55.

37 (1976) 13 SASR 516 at 519.

sentences for discrete offences, it is the final order giving rise to the total effective sentence which is ultimately being appealed against. He submitted that the manner in which the notice has been drafted would seem perfectly apposite to the nature and circumstances of the appeal.

[60] Counsel for the respondent contended that, notwithstanding the obiter remarks of Mildren AJ in *Court v Armstrong*, the result in that case was that the Court held that separate notices were required, following long standing precedent in *Lawrie v Stokes* and *Federal Commissioner of Taxation v Arnhem Aircraft Engineering*. Counsel pointed out that the practice of amending the notice of appeal to restrict the appeal to one file had been followed in a recent Crown appeal before Southwood J in *Beams v Tilmouth*.[38]

[61] On the hearing of the reference, junior counsel for the respondent, Ms Ingles, pointed out that there was a difference in wording between the South Australian legislation under consideration in *Samuels v Leech* and *Elliott v Harris (No 2)* and the Northern Territory legislation. The South Australian legislation provides for an appeal "from **every** conviction, order, and adjudication of a court of summary jurisdiction" whereas the Northern Territory equivalent gives a right of appeal "from **a** conviction, order, and adjudication of a court of summary jurisdiction", wording which formed the

38 *Beams v Tilmouth* LCA 3 of 2020 (21912441); LCA 4 of 2020 (22001316); LCA 5 of 2020 (22002323); LCA 6 of 2020 (22006410).

basis of the reasoning in *Federal Commissioner of Taxation v Arnhem Aircraft Engineering*.

[62] Ms Ingles pointed out that there are practical difficulties with both positions. In the Local Court (and the Youth Justice Court) it commonly occurs that multiple complaints are heard supposedly seriatim but in reality simultaneously, followed by the imposition of a single total sentence. Quite often the appeal is focused on whether the total effective sentence is manifestly excessive (or inadequate) and may involve issues such as whether the sentence should have been partly suspended or a non-parole period fixed. In those circumstances, it may seem absurd, or at least wasteful of effort, for the appellant to be required to file multiple notices of appeal all essentially saying the same thing. Further, courts are generally reluctant to deny a party an opportunity to be heard on what is essentially a technicality.

[63] On the other hand, Ms Ingles pointed out that the approach set out in the passage from Bray CJ's judgment in *Elliott v Harris (No 2)* would involve the appeal court exercising a discretion whether to allow a single notice of appeal or require separate notices and that is likely to lead to uncertainty and to arguments on almost every appeal where there are multiple convictions, or sentences on multiple files on one notice of appeal, about the exercise of the discretion and the nexus. Ms Ingles submitted that when dealing with an inferior court with a high volume of matters, commonly matters where there are multiple complaints and multiple offences charged on each complaint, it is far more efficient, sensible and certain to have a

known and certain requirement for separate notices of appeal. The South Australian approach whereby there is a discretion to allow single notices of appeal in some circumstances, would simply add to the workload of all parties involved, including the court.

Conclusion

[64] We agree that no sufficient reason exists to justify this Court overturning long standing precedent in the Northern Territory, in *Lawrie v Stokes* and *Federal Commissioner of Taxation v Arnhem Aircraft Engineering*, which have been followed in subsequent cases, in order to follow the approach adopted in the South Australian cases.

[65] The rationale for requiring separate notices of appeal, clearly articulated in *Federal Commissioner of Taxation v Arnhem Aircraft Engineering*, is that s 163 of the *Justices Act* [now the *Local Court (Criminal Procedure) Act*] gives a right of appeal from **"a"** conviction, order or adjudication. This requires there to be a separate notice of appeal for every sentence or other order sought to be appealed. This is consistent with *Lawrie v Stokes* in which Kriewaldt JA said:

> It follows that if the appellant desired to appeal against all four convictions he was bound to give four separate Notices of Appeal, and similarly if he desired to appeal against two convictions, he was bound to give two separate Notices of Appeal.

Although elsewhere in the judgment Kriewaldt JA seemed to focus on the need for separate notices in relation to separate complaints, this was at a time when only one charge could be laid in a complaint.

[66] An alternative approach would be to require a separate notice of appeal in relation to matters charged on separate complaints. This was the approach adopted by Kearney J in *Reilly v Baker* though without explicitly specifying the basis in principle for doing so; and left open as a possibility in *Warford v Firth* and *Court v Armstrong*.

[67] This Court invited further written submissions from the parties on the following question:

> *Assuming that one notice of appeal was insufficient, was there a requirement for 3 notices or 5 notices, given that the appeal related to 5 charges over 3 files: that is to say, is a separate notice required for each complaint or for each individual order appealed against?*

[68] Both the appellant and the respondent filed written submissions contending that only three notices were required. The reasons given were similar and can be summed up in the following passage from the submissions of Mr Robson SC for the appellant:

> *[T]here is no good reason to require an individual notice of appeal to be filed in relation to each and every order which is appealed against. Such an approach would only serve to increase the complexity and costs of Local Court Appeals when, in other jurisdictions, the approach has been more focused on allowing the appeal to be dealt with on the*

merits where there is no significant legal or practicable impediment to doing so."[39]

[69] Although we agree with the parties that the most practical and efficient result would be to require a separate notice of appeal for each file, we cannot see a principled basis for such a finding. It seems to us that the rationale for requiring separate notices of appeal articulated by Asche J – on the basis of the submission in that case by Mr Mildren QC – is compelling. There is no right of appeal other than as provided by statute. The *Local Court (Criminal Procedure) Act* gives a right of appeal from **"a"** conviction, order or adjudication. This requires there to be a separate notice of appeal for every conviction, sentence or other order sought to be appealed.

[70] Separate notices of appeal were required for each of the sentences appealed against. It is not clear from the material before this Court whether the Local Court imposed separate sentences for each of the five charges, in which case five notices of appeal would have been required, or whether that Court imposed one aggregate sentence for the charges on each file, in which case three notices of appeal were required.

[71] We agree that the most rational position would be to require a notice of appeal for each complaint and each information only including where there are multiple charges on a complainant or information. It is not uncommon for up to 10 charges to be on a single complaint and the Act as presently worded requires numerous notices of appeal where appeals are pursued in

39 The appellant cited to South Australian cases referred to above.

relation to multiple convictions or sentences. We recommend that Parliament give consideration to amending the Act to permit one notice of appeal per complaint and one notice of appeal per information to overcome the requirement for multiple notices of appeal which serve no practical purpose.

[72] An examination of the files in the present case reveals that a single notice of appeal appears on each file. As was the case in *Reilly v Baker*,[40] this means that, although the notices of appeal are identical, and each one contains reference to all three files, effectively the appellant has filed a separate notice of appeal for each file.

[73] We note that Mildren J reached a different factual conclusion in *Court v Armstrong* in which the Supreme Court received separate notices for both matters and two copies of the notice of appeal, one for each matter, one being a photocopy of the other. Mildren AJ held that "in those circumstances I am satisfied that only one notice of appeal was filed in the Local Court, and not two." However, this finding was in the context of that case in which some of the charges were on complaint and some on information and the appellant purported to include them all on the one notice. This factual finding may also have been affected by the need for separate recognizances and filing fees. In *Reilly v Baker,* the appellant filed two identical notices of appeal and entered into separate recognizances to

40 (1989) 99 FLR 52 at 55.

prosecute each of the two appeals, and Kearney J held that two notices of appeal had been filed. In the present case, the appeals being filed by NT Legal Aid, there was a waiver of the filing fees and no recognizances were required.

[74] The answer to the third question referred, therefore, is that separate notices of appeal were required for each sentence being appealed against. If the appeals relate to three sentences only, the appeals are not incompetent because that requirement has been met. If the appeals purport to relate to five individual sentences, then one or more of the notices of appeal will require to be amended by deleting the references to the surplus sentences.[41]

SUMMARY

[75] QUESTION 1: When the Court is applying s 121(7) of the *Domestic and Family Violence Act* in sentencing an offender for a breach of a DVO and another offence or offences, is the court obliged to give effect to the totality principle by lowering the individual sentences below what would otherwise be appropriate?

ANSWER

(a) Section 121(7) of the *Domestic and Family Violence Act* does not entirely abrogate the principle of totality.

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41 This was the remedy applied in *Court v Armstrong*.

(b) Section 121(7) does prevent the principle of totality from being applied by means of making the sentences for breaches of DVOs concurrent or partially concurrent with other sentences.

(c) However, in cases where there are other charges not subject to the restriction in s 121(7), for example, more than one assault charge, the sentencing court should, where it is appropriate, give effect to the totality principle by ordering concurrency or partial concurrency of those other sentences.

(d) A sentencing court should also give effect to the principle of totality, where it is appropriate, by reducing the sentences to the lower end of the appropriate range of sentences for the particular offences.

(e) It is not permissible for a sentencing court to lower the sentences below what would be appropriate sentences for the objective seriousness of the particular offending. To do so would be to adopt artificial measures for the purpose of subverting the intention of the legislature expressed in s 121(7).

[76] QUESTION 2: Did s 121(5) of the *Domestic and Family Violence Act* prohibit the sentencing judge from making an order suspending any part of the sentence in respect of the subsequent offences?

ANSWER

The plain meaning of s 121(5) is to prohibit the court from suspending any part of a sentence imposed for a second or subsequent offence of breaching a DVO. However, in this case, it does not appear as though the sentencing judge has done so, provided the sentence for the second or subsequent offence was directed to be served first. (If this is not the case, the error can be corrected by simply changing the order in which the sentences are to be served.)

[77] QUESTION 3: Is the appeal incompetent in relation to some or all of the offences the subject of the appeal as a consequence of only one notice of appeal having been filed?

ANSWER:

(a) Separate notices of appeal were required in relation to the appeal against each of the sentences imposed.

(b) The appellant has filed three notices of appeal by filing three identical notices, one copy of which was placed on each of the three files. Whether this is sufficient will depend upon whether the appellant is purporting to appeal against three separate sentences or five separate sentences.
