PARTIES:	ADAM JAMES TURNER v ROBIN LAURENCE TRENERRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from COURT OF SUMMARY JURISDICTION exercising Territory jurisdiction
FILE NO:	JA80 of 1996 JA81 of 1996
DELIVERED:	17 January 1997
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JUDGMENT OF:	Kearney J

CATCHWORDS

Criminal Law and Procedure – Appeal and new trial, pardon and inquiry subsequent to conviction – Appeal and new trial - Justices appeal– Dishonesty offences – Appeal against sentence – Whether manifestly excessive – 'Totality' principle - First offender – Principle of rehabilitation –

Vartozokas v Zanker (1989) 44 A Crim R 243, considered.
Yardley v Betts (1979) 22 SASR 108, followed.

REPRESENTATION:

Counsel:

Appellant:	M.J.McK.Grove
Respondent:	R. Noble

Solicitors:

Appellant:	Ward Keller
Respondent:	The Office of the Director of Public Prosecutions

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

No. JA80 of 1996
No. JA81 of 1996

IN THE MATTER of the Justices Act

AND IN THE MATTER of appeals against the severity of sentences imposed by the Court of Summary Jurisdiction in Darwin

BETWEEN

ADAM JAMES TURNER
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 17 January 1997)

These 2 appeals under s163(1)(a) of the *Justices Act*, heard together by consent, are against the severity of sentences imposed on the appellant by the Court of Summary Jurisdiction in Darwin on 11 October 1996. The sentences

in question are set out at p14. The sole ground of appeal is that they are manifestly excessive.

The background to the sentencing of 11 October

The pleas on 5 September

On 5 September 1996 the appellant had pleaded guilty before the learned Magistrate to charges of 4 associated offences he had committed on 23 June 1996. He consented to the charges being dealt with summarily. The charges were:

1. Stealing a cheque form, the property of one Graham Coveney. That is an offence under s210 of the *Criminal Code*. At the time the cheque was apparently already made out in the sum of $4638.

2. Forging the cheque, an offence under s258(d) of the Code. The forgery consisted in endorsing the back of cheque form, and signing it.

3. Uttering the forged cheque, an offence under s260 of the Code. The uttering consisted in the appellant's opening a bank account, and paying the forged cheque into it.

4. Stealing cash to the amount of $4638, the property of Graham Coveney. That is an offence under s210 of the Code. The stealing involved the appellant's withdrawing the cash from the bank, presumably after the amount on the cheque had been credited to his newly-opened account, and cleared.

Each of these 4 offences carries a maximum punishment of 2 years imprisonment or a fine of $2000, upon summary conviction. I had some doubt as to whether the plea to charge No.4 was properly accepted; on reflection I consider that it was. A credit in a bank account is a 'thing in action' in terms of the definition of "property" in s1, and may be stolen within the meaning of 209(1) of the Code. It reflects a debt owed by the bank to its customer, it is

capable of being stolen by the presentation of a forged cheque - being property appropriated, in terms of s209(1) - since the rights of the owner of the credit (Mr Coveney) are thereby being assumed. The stealing is complete when the transaction is completed; that is, when Mr Coveney's bank made the entries which transferred $4638 to the credit of the appellant's account from Mr Coveney's account. Of course, in the circumstances the bank was obliged to re-credit Mr Coveney's account; that is no doubt why his Worship ordered restitution of the money to be made to the *bank* (p14). I consider that the appellant did not steal the cash at the time he withdrew that sum from his bank through his own account; he had already stolen it in the form of Mr Coveney's credit. In any event, the appellant accepts that he stole the money.

His Worship called for a presentence report, and a home detention assessment of the appellant. Sentencing was postponed, meanwhile. There were apparently some matters put forward in mitigation by the appellant's then counsel, but there is no record of them.

The developments on 11 October

In due course, on 11 October 1996, the appellant again appeared before the Court. By that time his Worship had received the presentence report and home detention assessment, and clearly had afforded counsel an opportunity to examine them. Mr Grove then, as now, of counsel for the appellant handed up a character reference from a Mr Andre Gomez dated 4 October 1996.

On 11 October the appellant was facing 3 further charges, arising from offences he had allegedly committed on 4 July 1996. On the morning of 11 October and prior to the appellant being charged with the alleged offences of 4 July, his Worship observed in relation to the offences of 23 June, in an exchange with Mr Grove:

> "It would seem from all those matters and also the letter from Mr Gomez that home detention isn't a viable option, because home detention is, in my view, just that. It's home detention; it is not to travel around interstate or overseas on business. Nor is it for the purpose of allowing people to go interstate to deal with other matters or have access to children which is also a matter referred to in the [presentence] report, *so I don't think that home detention is an option*." (emphasis added)

The reference to "all those matters" is a reference to the fact that his Worship had just been informed that there was to be a mention before a court in Queensland on 20 October 1996 of committal proceedings in which the appellant was said to be facing a charge of being an accessory before the fact to an attempted robbery in Queensland in March 1996. The "letter from Mr Gomez" of 4 October stated in part:

> "I have known Adam Turner since July 1996 when he joined Australian Investments as Director and equal partner of Finance. His duties includes securing finance for our clients for projects, developments, land, business, homes, vehicles and personal finance.
>
> This position requires the flexibility to travel Intrastate, Interstate and Internationally. *Travel arrangements made for the 14th to the 20th of October* are to visit clients, Finance Brokers, Financiers and Developers in Brisbane, Sydney, Singapore and Hong Kong."

It will be recalled that this was Friday 11 October, a day for sentencing, yet his Worship was being informed that the appellant had plans for international travel commencing 3 days later on Monday 14 October.

His Worship's remarks on p4 are not surprising! On the afternoon of 11 October the appellant pleaded guilty to the charges of offences of 4 July 1996. The facts relating to those offences which he admitted to be correct were as follows:

> In early July 1996 he approached the manager of Darwin Auto Wholesalers about purchasing a Honda car on display in the car yard. He said he wished to arrange finance, to effect the purchase. He was told that his application for finance would need to be accompanied by a letter confirming that he was employed and stating his income.
>
> On 4 July he went to a Darwin secretarial service. He provided the proprietor with a handwritten draft letter and requested it be typed. The letter was headed 'To whom it may concern'. The text included the statement: 'Adam Turner is employed by North Westurn Consolidated as a finance broker for the Northern Territory and south-east Asian regions and is earning a gross income of approximately $75,000 per annum'. He provided paper bearing as letterhead the name 'North Westurn Consolidated' to the secretarial service; he had the letter printed on this paper. The signature block on the letter bore the name 'George Stack' and the title 'Managing Director', in accordance with his handwritten draft. He then took this letter away and later signed the name 'George Stack' above the signature block.
>
> Later that same day, 4 July, he took this signed letter to the office of Darwin Auto Wholesalers. He presented it to the manager, stating that it was the evidence of his employment and his income. He then completed a form of application to obtain finance from Esanda, for the purchase of the car. The letter was transmitted by fax to Esanda, in support of his application for a loan of $24,224, the full purchase price of the car.
>
> The facsimile of the letter was received by an Esanda finance officer, John Vincent. He accepted it as genuine, believing that it had been signed by the person named therein, George Stack. He also believed from reading the letter that George Stack was an officer of North Westurn Consolidated.
>
> The letter bore a Brisbane address and telephone number. Mr Vincent telephoned that number and spoke to George Stack; he simply wanted to verify the income figure of $75,000 per annum stated in the letter. A copy of the letter was subsequently faxed to Mr Stack who advised, verbally and in writing, that he had not signed the letter and that he was

> not an officer of North Westurn Consolidated. As a result, the appellant's application for finance was declined by Esanda.
>
> Mr Stack is in fact the managing director of a Brisbane-based accountancy service, the principal business of which is obtaining development finance. That service had signed an agency agreement with the appellant in June 1996 by which he was to act as a finance broker in the Northern Territory. At that time the appellant was in Brisbane but was about to move to Darwin. Under the agency agreement he was to be paid a commission on any finance secured for clients whom he referred to the service. He was to be paid only by way of commission; he had not referred any clients to the service as at 4 July.
>
> He had provided the name 'North Westurn Consolidated' to Mr Stack as his own business name; this name was entered on their agency agreement. Mr Stack took this to be the legitimate trading name of the appellant under which he would operate. Inquiries with the State and Territory Business Names Registers of the Australian Securities Commission show that the name 'North Westurn Consolidated' does not exist either as a company or a registered business name anywhere in Australia.
>
> The result is that the letter drafted, signed and presented to Darwin Auto Wholesalers by the appellant stated that he was employed by North Westurn Consolidated on a salary of $75,000 and purports to be signed by George Stack as its managing director. This was false. George Stack did not sign the letter, is not an officer of North Westurn Consolidated, and could not attest to the defendant's salary. North Westurn Consolidated is neither a legitimate business name or a company.
>
> The appellant was interviewed by Police in relation to the matter on 10 July. He denied forging the signature of Mr Stack and claimed that the letter in question, which in fact bears an original ink signature, was a fax he had received.

No transcript of the proceedings before his Worship on 5 September 1996 is available, but it is common ground on the appeal that his Worship set out accurately the facts relating to the offences of 23 June in his remarks on sentence of 11 October; see pp8-9.

Mr Grove then made submissions in mitigation of punishment, for both sets of offences, of 23 June and 4 July. He submitted that the appellant had committed the 7 offences, "in a period of time [in his life] when something went awfully awry"; as to the offences of 4 July, the appellant who "until this particular stage" had "no dishonesty priors whatsoever" had gone "completely off the rails for some reason", as to which "no-one seems to know exactly why". He noted that the appellant was currently employed as a 'finance dealer' in Darwin. He submitted that the appellant's behaviour "seems to be in explicable", but possibly it had been due to "the pressures of wanting to get ahead". He relied on the contents of the reference by Mr Gomez of 4 October; in it he describes the appellant as "of excellent character", "very intelligent, gets on well with all clients and staff", a person who "works hard and is diligent", possessing qualities of "trust and confidentiality", one who has shown "good nature and trust", the "offences he has been charged with" being "totally out of character". His Worship rightly said that he would not "be able to give that much weight" to this reference, because Mr Gomez had known the appellant only since July 1996, less than 3½ months.

His Worship said that he considered that the appellant was facing "serious dishonesty charges". He drew to Mr Grove's attention the following matters: "the level of sophistication" of the offences of 4 July; the appellant's denials when interviewed by the Police on 10 July about those offences; and the following sentence in the presentence report of 2 October relating to the offences of 4 July which he considered was indicative of the appellant's misplaced conception of the seriousness of what he had done -

> "In conclusion, Turner asserted "nothing came of it" but *conceded that he had probably acted inappropriately*." (emphasis added)

In response, Mr Grove noted that in any event the appellant had now pleaded guilty; he submitted that he "had come to a realisation that it's time to face up to these matters".

The sentencing of 11 October

His Worship then proceeded immediately to sentence the appellant. He said:

> "I take into account your pleas of guilty in relation to the [7 charges]. The [7 charges] involve some serious offending in my view. You are a person who is aged 30 and yet *you come before the court with no priors alleged against you*. Accordingly, *up until this time you have been of good character and I give you full credit for that*.
>
> I am told that you have some charges pending in Queensland arising out of incidents in March of this year. I do not take that into account as you are presumed to be innocent until found otherwise in relation to that matter; and I therefore do not take that into account in relation to my sentence upon you today, and *I deal with you as if this is your first time before the courts*.
>
> I also take into account that *the offending* which has brought you before the court *was over a relatively short period of time*, a period of about two weeks. *The incidents [of 23 June and 4 July] are separate incidents*; they are unrelated and … although *serious dishonest … offences*, *they are of different types*.
>
> The first offending on 23 June 1996. You were staying with a person whom you described as your stepfather and a friend of his. You saw a cheque which had been made out to the friend. You stole it. The cheque was … for $4638. You stole the cheque - that was your first act of dishonesty - but having stolen the cheque you then had a choice as to what to do with it. You could have returned it; you could have lost it; but you opened an account and you paid it into your account and prior to doing that you endorsed the back of the cheque and signed it, to make it payable to yourself. That endorsing the back of it was your second act of

> dishonesty; paying it into your own account was a third act of dishonesty because you presented the cheque and pretended that you were entitled to it. Then, not being satisfied with that, you then withdrew a large part of the money and applied it to your own purposes." (emphasis added)

It can be seen from his Worship's analysis in the last paragraph that he regarded each of 4 offences of 23 June, as a "separate act of dishonesty". As will be seen (p14) this approach became significant when he sentenced for those offences. His Worship continued:

> "In relation to what you did with the money. When you appeared before me [on 5 September 1996] and submissions were put on your behalf I was told you spent it on a hire car for the business and airline tickets to Melbourne for the purpose of business connections. In your presentence report [it is reported that] you -
>
> > 'admitted that in addition to paying debts out of the misappropriated funds [you] also bought a return airline ticket to Melbourne and went there for three days. *[You] attested that [you] went there (Melbourne) to "raise money" after "I realised what I'd done*" [on 23 June]'.
>
> That's somewhat different to what was put to me [on 5 September 1996] in relation to the purpose [of going to Melbourne] - or what you used the money for." (emphasis added)

The significance which his Worship gave to these two "somewhat different" accounts by the appellant does not clearly appear, but he probably treated it (see p11) as adverse to the honesty of the appellant. I consider that his Worship should have raised the matter with Mr Grove before sentencing to enable him to address it, as he had the other matters at pp7-8.

His Worship then observed that "despite the offers of restitution" none had been made. At that point in the sentencing Mr Grove informed his Worship that he already held a cheque from Mr Gomez in order to make

restitution, but “it [had] just slipped my mind”. In the light of that his Worship continued:

> “*I note that restitution is now to be paid in full. … I take it into account, and as a result of that I am altering and have altered the sentence which I was just about to pass upon you*, to *give you credit for that*. …
>
> …
>
> Turning to the facts on the first charge [the 4 offences of 23 June 1996], *that behaviour* by you *was unusual behaviour. It seems to have come out of the blue;* [there] seems to have been nothing leading up to it; and *it is,* as I say, *quite serious dishonesty,* because it involves some thought, but it was dishonesty which [it] was somewhat inevitable [would] catch up with you, in that *having paid the money into your own account, the cheque would be very easily traced. It was more*, therefore, *an offence somewhat of stupidity than planned and serious dishonesty that was likely to go challenged* [sic, unchallenged].” (emphasis added)

I note that the appellant is quoted in the presentence report as putting a similar construction on his modus operandi on 23 June, viz:

> ‘He also added that if he had planned to be dishonest “I would have known better than to open a cheque account in my own name”.’

It is clear that his Worship also approached the matter in broadly the same way; though the dishonesty was clear, it was of the stupid rather than the “planned and serious” type, which would have been an aggravating feature. His Worship continued:

> *“The second matter [the 3 offences] on 4 July* is of a different character and in my view *is probably even more serious.* You wanted to buy a car, not just any car; you wanted to buy quite an expensive car. You wanted to buy a car which was worth about $25,000. It seems to flow from what was in the presentence report ,that you have this desire to succeed in business and [on] that day you may therefore have [had] problems seeing beyond that desire and acting honestly in relation to fulfilling it. On this occasion you desired this $25,000 car. You had no money at all to put

> towards it.
>
> You were told that you would have [to] get a letter from your employer certifying your income. You went to a secretarial agency and had a letter typed up. You used them so that it clearly would look professional. You provided one of your own letterheads, which was a letterhead which you had had made up for a business name which did not exist and had not been registered any wherein Australia. It was, effectively, a false letterhead.
>
> You then asserted in that [letter] a number of false statements. You asserted that this 'George Stack' was an officer of that business, which was never the case; you asserted that you were employed by the business, which was never the case; you asserted that you were a finance broker employed by them, which was not the position; and you asserted that you earned a gross salary of $75,000, which was clearly never the case and was false.
>
> *There were a number of deliberate falsehoods in that letter, clearly designed to give you the air of respectability and to create in the mind of Esanda the fact that you were genuine and that you were a good security risk.* But for the representative of Esanda ringing up to check up, purely on the quantum of your salary, you may well have been successful and have received the money." (emphasis added)

It is in its essence correct to say that the appellant would by his dishonesty "have received the money", though of course Darwin Auto Wholesalers would have received the actual money, and the appellant the Honda car. His Worship continued:

> "*It was a serious matter* in my view. There's no indication before me that you had any salary or anything along those lines. In relation to your involvement with Mr Stack it was on a 'commission only' basis and you had not presented any work and not given [sic, earned] any commission at all with Mr Stack prior to the letter [of 4 July].
>
> *When* you were *interviewed by the police* on 10 July 1996 *you lied to them.* You denied it was a forgery and you claimed that the letter had been sent to you by Mr Stack by facsimile. *That* was untrue and *is further evidence of the fact that you are not necessarily an honest person*, even when you were speaking to the author of the presentence report … dated 2 October 1996.

[The senior caseworker who wrote the presentence report] says that in that [report] at page 3:

> 'In relation to the forgery, uttering and deception offences that occurred in July 1996, Turner claimed to have been originally promised a letter of referral by the managing director of the Brisbane accounting service with whom he had signed an agency agreement. He claimed that at the time he urgently "needed a car for business" and "I thought I was doing the right thing by this agency". In conclusion, Turner asserted "nothing came of it" but conceded that he had probably acted inappropriately".

There's nothing before me to suggest that any of that material [in the report] is true. There's nothing to suggest that Mr Stack knew anything about this at all and nothing has been put to me to suggest that Mr Stack had ever promised you anything … and even if he had promised you something, he could not possibly have signed any letter anything like the one you did. It shows that, in my view, *up until 2 October [the date of the presentence report] and up until your eventual plea of guilty today* for the first time in relation to these charges *you have been extremely evasive in relation to your criminality, and I consider that you have shown no contrition up until the time today when you have actually pleaded guilty. That is the first indication of any contrition by you in relation to these offences".* (emphasis added)

I note that, in context, his Worship's remarks last emphasized can clearly relate only to the offences of 4 July 1996; the appellant had pleaded guilty to the charges of 23 June on 5 September. His Worship then turned to the question of sentence, viz:

"You're not a young person. You're aged 30. But *you are a first offender.* I therefore take into account the authorities, which tell me that *generally in relation [to] first offenders a custodial period should be avoided.* I also bear in mind that *a sentence of imprisonment is and must always be the sentence of last resort* and must only be imposed where all other sentences have been considered and discharged as being inappropriate. *I have gone through that process.*

I consider that in relation to your overall offending - and one must bear in mind the totality of your offending in setting sentences [for the 7 offences] I [sic, to] ensure that the sentences and the total [of the]

sentences I impose reflect my view of your overall criminality. *In my view a sentence of imprisonment is the only sentence which is appropriate for me to impose.*

The next question then is what I should do with that sentence of imprisonment. The options are that: I could suspend it totally and simply direct you to not reoffend for a certain period; I could suspend it and stand it down for you to consent to entering into a bond, and the conditions which I would need to impose on the bond under the Sentencing Act; the other option is, I could suspend it in relation to home detention and order some home detention. Another option is that I could suspend it in relation to home detention and order some home detention. Another option is that I could suspend part of it and/or you serve some of it.

In my view *there is a need for personal deterrence* in your case. *There is also a need for general deterrence in cases of this sort.* But *my main concern is your personal deterrence* and *I consider that [to] fully suspend the operation of the sentence of imprisonment would not be appropriate in your case.*

I have considered the question of home detention. I have *a home detention report* before me which *says that you are appropriate for home detention.* Although I note the contents of the report [I] also note the letter from Australian Investments, Mr Gomez, which says that your position with your current employer "requires the flexibility to travel intrastate, interstate, and internationally" and that travel arrangements have been "made for the 14th to the 20th" of this month - namely, as of Monday - for you to travel to "Brisbane, Sydney, Singapore and Hong Kong". *That sort of travel*, in my view, *is totally inappropriate for home detention.*

Also I note the contents of the [presentence] report in relation to your attitude to home detention, where you "intimated some concern about this option due to possible absences from Darwin for business trips and travel to Brisbane for court attendance and access rights to his son". In my view, *I don't think you fully realise the seriousness of these matters and the seriousness of home detention and what it entails.*

I have considered, despite all that, giving you the chance to enter home detention instead of actually going into prison; but in the end result, in the exercise of my discretion, *I have decided that is not appropriate [to do that]. I consider that a period of actual imprisonment is necessary for your personal deterrence."* (emphasis added)

His Worship then sentenced for the 4 offences of 23 June, viz:

> "On [the charges of the offences of 23 June 1996]: on charge 1 [stealing the cheque] you will be found guilty, convicted and sentenced to be imprisoned for *six months;* on charge 2 [forging the cheque] you'll be found guilty, convicted and sentenced to be imprisoned for *eight months, concurrent* with charge 1; on charge 3 [uttering the forged cheque] you'll be found guilty, convicted and sentenced to be imprisoned for *eight months, concurrent* with charges 1 and 2; on charge 4 [stealing $4638 in cash] you'll be found guilty, convicted and sentenced to be imprisoned for *eight months, cumulative on [the sentences for] charges 1, 2 and 3. That makes a total head sentence of 16 months [for the 4 offences of 23 June].*
>
> Further, on charge 4 [stealing $4638 in cash] I order the defendant to make restitution in the sum of $3802.78, to be paid to the Clerk of Courts, Darwin, to be paid out to the Commonwealth Bank. …" (emphasis added)

I interpose to note that the $3802.78 was paid into Court that day.

His Worship then sentenced for the second set of offences, on 4 July:

> "On [the charges of the 3 offences of 4 July 1996]: on charges 1, 2 ,and 3 you'll be found guilty on each and convicted of each and sentenced to be imprisoned for *12 months on each, concurrent* with each other, *but cumulative on the sentences imposed [for the 4 offences of 23 June 1996]."* (emphasis added)

His Worship then concluded his sentencing, viz:

> "In summary [*for all 7 offences] I impose a total head sentence of 28 months. I order that that sentence be suspended after serving three months,* and I specify, pursuant to section 40(6) [of the *Sentencing Act*], a period of four years from the date hereof during which the offender is not to commit another offence punishable by imprisonment, if the offender is to avoid being dealt with under section 43. In relation to [this sentencing] *I specifically reduce [to 3 months] the time that you are to serve, to take into account the full restitution*." (emphasis added)

The submissions on appeal

The sole ground of appeal in the Notice of Appeal was that the effective sentence of 28 months imprisonment with a direction that after 3 months in prison service of the remaining 25 months be suspended, was manifestly excessive. However, the submissions ranged more widely, without objection. It is highly desirable that all errors in sentencing sought to be relied on, be specified in the Notice of Appeal by the time the appeal is heard; see *Supreme Court Rules* 83.06(c), 83.15(1); *Freeman v Pulford* (1988) 92 FLR 122, and the authorities there cited; and *R v Ollis* (1986) 21 A. Crim.R. 256.

Mr Grove made 6 submissions, as follows (pp15-20).

(1) His Worship had noted (p10) that the offences of 23 June constituted "unusual behaviour" for the appellant, who hitherto had a crime-free background. Yet his Worship considered his "main concern" in sentencing the appellant was the need for his personal deterrence (p13). His Worship wrongly did not take into account when sentencing, other objectives as well as personal deterrence; particularly rehabilitation, since the appellant as a first offender was a good prospect.

Mr Noble of counsel for the respondent submitted that it was clear from his Worship's sentencing remarks that he had considered the guidelines in s5 of the *Sentencing Act.* I accept that.

I consider that his Worship clearly had other sentencing objectives in mind - personal deterrence was his "*main* concern", not his *only* concern. I do

not consider that his only other concern as regards the length of the head sentence was general deterrence (see p13). There is however a question as to whether he gave the other objectives of sentencing - particularly the rehabilitation of a first offender - sufficient weight, but that is best dealt with when considering the 'manifestly excessive' submission at (5); see pp18-19, and 22.

(2) The need for personal deterrence could have been met by an order for home detention, rather than a sentence of immediate imprisonment.

I note that this may be so, but his Worship clearly carefully considered the "question of home detention" at p13, and it is *his* sentencing discretion which is involved. It is not to the point that this Court may consider that a different sentencing disposition was *preferable*; the question on appeal is whether a sentence of immediate imprisonment, in all the circumstances of the offender and his offending, lay within the proper sentencing discretion of the Magistrate. See *House v The King* (1936) 55 CLR 499 at 505.

(3) In considering at p13 whether to impose home detention, his Worship should not have held against the appellant the remarks by Mr Gomez (p4) on the need for the appellant to have "flexibility to travel", and the appellant's own remarks about that, as quoted in the presentence report (p13). In putting these considerations into the balance against the appellant, his Worship had rejected the option of home detention for the wrong reasons.

I note that his Worship was clearly influenced by these matters (p13). It seems however that he stressed them because they indicated that the appellant did not "fully realise the seriousness" of the offences he had committed. In any event, it is clear from his Worship's remarks at p13 that "despite all that" he had considered home detention, but rejected it because "actual imprisonment is necessary for your personal deterrence". In other words, any error he made in relying on those remarks, was completely immaterial to his ultimate rejection of home detention.

(4) A sentence of immediate imprisonment was warranted only as a 'last resort'; his Worship had resorted to it too quickly, before he had considered and discarded the other sentencing options.

I note that it is true that courts should seek to sentence in such a way as to keep offenders out of prison, if that is possible - particularly first offenders. The imposition of a term of actual imprisonment is rightly termed 'a last resort'. That is clear from the ascending order of sentencing dispositions in s7 of the *Sentencing Act,* where it appears at (j) as the last of the specific dispositions, from the ascending order of custodial dispositions in Division 5 of Part 3 of the Act, and from the common law on sentencing to the extent it is not affected by the Act.

This submission must be rejected. At p12 his Worship expressly treated a sentence of immediate imprisonment as "the sentence of last resort" and

indicated that he had first considered and rejected all other sentencing dispositions. It is manifest that he did so.

(5) Even if no particular sentencing error could be discerned, the effective head sentence of 28 months imprisonment was manifestly excessive in the circumstances of the 7 offences and of the appellant; it should be reduced. Its manifestly excessive quality indicated that some sentencing error must have occurred, though it was not discernible. Factors relevant to the manifest excessiveness were that all 7 offences were committed within the space of 11 days, and the appellant was a first offender, who had made full restitution.

Mr Noble submitted that while the effective head sentence of 28 months imprisonment was "stiff", it was not manifestly excessive. He conceded, however, that it was "difficult to see" why the sentence of 8 months imprisonment for the fourth offence of 23 June had been directed to be served *cumulatively* upon the sentences for the first 3 offences that day, rather than concurrently with them (making a total sentence of 8 months imprisonment for the 4 offences instead of the present 16 months).

I think this concession was rightly made; the 4 charges of 23 June related to offences committed in the course of a single criminal transaction; together they constituted a single criminal scheme designed to obtain the proceeds of the cheque. As such, the only sentencing course properly open to his Worship was total concurrency of all 4 sentences. This flows both from the application

of the “totality” principle - ‘enough is enough’ - and the “one transaction” principle in sentencing, where multiple offences are involved; see D.A. Thomas ‘Principles of Sentencing’ (2nd ed. 1979, p52). Here there was one victim, and a single course of criminal conduct on one day, 23 June. The key factor in the application of the “totality” principle is its basic requirement of proportionality, which in the case of multiple offences requires that they be considered in the aggregate to see whether the overall effect of the individual sentences is proportionate to the whole series of offences committed. One test of that is to see if the sentence of 16 months is ‘crushing’. His Worship clearly bore the ‘totality’ principle in mind (see p12); however, I respectfully consider he erred in applying it.

In determining whether a sentence is “manifestly” excessive an appeal court -

> “… evaluates the permissible range of sentence in the light of all the admissible considerations affecting the case in hand, and drawing upon its own accumulated knowledge and experience.” *R v Holder* [1983] 3 NSWLR 245 at 254 per Street CJ.

The need that the sentence be “*manifestly*” excessive means that it must be seen to be not just *arguably* excessive, but so *obviously* excessive that it is unreasonable or plainly unjust. To assess whether the effective head sentence of 28 months is proportionate to the degree of criminality displayed by the appellant, requires an objective consideration of the potential total effect of that term: *Bowman v The Queen* (1993) 69 A Crim R 530, per Ipp J at 542. It has been said that whether or not a sentence is manifestly excessive is not susceptible to sustained argument; I respectfully agree.

(6) The requirement that the appellant serve 3 months of the head sentence was also manifestly excessive punishment. The proper direction was that the service of any sentence of imprisonment imposed should be fully suspended.

I note that the decision on suspension was within his Worship's discretion; the review of that discretion involves the application of the same principles as those which apply on an appeal against the sentence itself - see *R v Shueard* (1972) 4 SASR 36.

I consider that the very large gap between the head sentence of 28 months and the 3 months directed to be served was a consequence of his Worship seeking to attain two ends. The length of the head sentence was intended to reflect the perceived need for deterrence, the sentence being that which was thought to be appropriate to the "totality of the offending" and the appellant's "overall criminality" (p12), a sentence appropriate both to the crimes and the appellant. The 3 months to be served was intended to reflect the perceived need to take account of the fact that "white collar" criminals such as the appellant frequently have no prior criminal history and, having good prospects of rehabilitation (in the sense described in *Vartozokas v Zanker* (1989) 44 A Crim R 243 at 245 per King CJ), are unlikely to re-offend. In this connection I note that it is well-established that it is far easier to 'reclaim' an unhardened early offender *before* he is committed to prison rather than after because, amongst other reasons, as King CJ pointed out in *Yardley v Betts* (1979) 22

SASR 108 at 113 imprisonment "may increase a propensity to crime by placing him in the company of criminals". A further purpose of his Worship in fixing the early suspension was undoubtedly to avoid a "crushing" first period of imprisonment; I note that that factor is also relevant when determining the length of an effective head sentence.

Conclusions

Some general observations, first. It is fundamental that a Magistrate's sentencing discretion not be disturbed on appeal, unless it is shown that he erred in exercising it. The presumption is that he did not err. See generally *R v Tait* (1979) 46 FLR 386 at 388, for the expression of this fundamental rule.

It is assumed that his Worship knew the law, in particular the courses open to him, his powers and the elementary rules of sentencing. It follows that any error relied on must *clearly* appear from his Worship's remarks, or from some other reliable source; see *R v Reiner* (1974) 8 SASR 102.

His Worship rightly took account here of the need for general deterrence (p13). Motor vehicles are commonly purchased by loans from financial institutions. This system of obtaining credit is very useful to society. The protection of this system of credit against the machinations of dishonest persons is a legitimate object of the criminal law; accordingly, sentences for this type of "white collar" crime should be such as to constitute an effective general deterrent.

After considerable reflection I have concluded that the sentencing on 11 October, carefully and thoroughly considered as it clearly was, was manifestly excessive. I consider that the reason probably was that insufficient weight was given to the fact that the appellant is a first offender (who had made full restitution); there is nothing to indicate that he is not a good candidate for rehabilitation. In such circumstances it is clear that in general the community will be best protected by a sentencing disposition which does *not* involve the immediate incarceration of such a person in prison. There was also the error of accumulating the sentence on the fourth charge of 23 June.

As to the effective head sentence for the 7 offences, the need for personal deterrence is, as his Worship rightly considered, the main concern. I allow the appeal on the ground that the sentencing was manifestly excessive and because of the specific error I have mentioned. I proceed to vary the sentencing of 11 October in the following manner, pursuant to s177(2) of the *Justices Act.*

The sentences imposed by his Worship (p14) for each of the 4 offences of 23 June are affirmed. The order that the sentence of 8 months imprisonment for the fourth offence of 23 June be served cumulatively upon the sentences for the other 3 offences committed that day, is set aside. In lieu thereof, it is directed that the sentence for the fourth offence be served *concurrently* with the sentences for the other 3 offences. All 4 sentences are to be served concurrently. That yields a total effective sentence of 8 months imprisonment for the offences of 23 June. His Worship’s order for restitution is affirmed.

The sentences imposed by his Worship (p14) for each of the 3 offences of 4 July are affirmed, as is his direction that they be served concurrently. That confirms the total effective sentence of 12 months imprisonment for those offences.

His Worship's direction that this effective sentence of 12 months imprisonment be served cumulatively upon the effective sentence for the offences of 23 June, is set aside. In lieu, and applying the totality principle, I direct that 8 months of the effective 12 months sentence be served cumulatively upon the 8 months effective sentence for the offences of 23 June, and 4 months of the 12 months sentence be served concurrently with the 8 months sentence. That yields a total effective head sentence of 16 months imprisonment for all 7 offences.

I am satisfied that it is desirable that the appellant be sentenced to a period of home detention, in lieu of serving some time in prison. In that regard, I note the satisfactory report of the Director of 2 October 1996. To that end, I propose to make the following order, subject to the appellant's consent. His Worship's order that the appellant serve 3 months of his effective sentence in prison, is set aside. In lieu, I direct that service of the effective sentence of 16 months imprisonment be suspended, on the appellant entering into a home detention order for 6 months from today. He is to reside during that period at Unit 15, 8 Phillip Street, Fannie Bay, NT 0820. During that period of 6 months he is not to leave those premises except at the times and for the periods permitted by the Director of Correctional Services or a

Surveillance Officer. He is to wear or have attached to him a monitoring device in accordance with the directions of the Director, and he is to allow the placing or installation in, and retrieval from, Unit 15 of such machine, equipment or device as is necessary for the efficient operation of the monitoring device. Further, during this period of 6 months, the appellant is to obey all the reasonable directions of the Director.

For the purposes of s40(6) of the *Sentencing Act* I specify a period of 4 years from today during which the appellant is not to commit another offence punishable by imprisonment, if he is to avoid being dealt with under s43 of the Act.

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Addendum

The appellant subsequently consented to the proposed home detention order at pp23-4, as required by s45(1)(b) of the *Sentencing Act.* However, I was then informed that he was presently in custody, on other charges. In those circumstances I directed that the word "today" on p23 be deleted and the words "from the date he is discharged from his present custody" be substituted. The appellant consented to this.

Orders accordingly.

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