CITATION:	*The Queen v Bennett* [2021] NTCCA 2
PARTIES:	THE QUEEN v BENNETT, Corey Shane
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	No. CA 13 of 2020 (21937479)
DELIVERED:	1 April 2021
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JUDGMENT OF:	Grant CJ, Southwood and Brownhill JJ

CATCHWORDS:

CRIME – Appeals – Appeal against sentence – By Crown on error of law

STATUTORY INTERPRETATION – Legislative purpose – *Interpretation Act 1978* (NT), s 62A

Whether the power in s 44 of the *Sentencing Act 1995* (NT) to sentence an offender to a period of home detention can be exercised by a partially suspended sentence of imprisonment – What constitutes 'entering into' a home detention order for the purposes of s 44 – Whether the absence of the words 'wholly' or 'partially' affects the construction of s 44 – Whether the absence of the words 'the sentence or part sentence' affects the construction of s 48 – Whether ss 78DG, 78DH and 78F of the *Sentencing Act* support a construction of s 44 that allows home detention orders to be made in relation to part of the term of imprisonment – Legislative history of s 44 – On proper construction, s 44 permits a court to sentence an offender to a term of imprisonment partially suspended on the offender entering into a home detention order – Appeal dismissed.

Jongmin v McMaster (2004) 34 NTLR 144; *O'Brien v Quin* (2003) 13 NTLR 122; *O'Connor v Ryan* [2001] NTSC 112; *R v Rudd* (2015) 34 NTLR 131; *Ross v Toohey* [2006] NTSC 92, distinguished.

K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309; *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569; *Owners of Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 ; *Weinstock v Beck* (2013) 251 CLR 396, referred to.

Sentencing Act 1995 ss 3, 5, 7, 11, 13, 34, 39A, 40, 43, 44, 45, 47, 48, 78B, 78BA, 78BB, 78C, 78CA, 78D, 78DA, 78DB, 78DC, 78DD, 78DE, 78DF, 78DG, 78DH, 78F, 78K, 102A
Supreme Court Rules 1987 r 81A.41
Interpretation Act 1978 s 62A

REPRESENTATION:

Counsel:

Appellant:	DM Castor
Respondent	M Chalmers

Solicitors:

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

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

The Queen v Bennett [2021] NTCCA 2
No. CA 13 of 2020 (21937479)

BETWEEN:

THE QUEEN
Appellant

AND:

COREY SHANE BENNETT
Respondent

CORAM: GRANT CJ, SOUTHWOOD & BROWNHILL JJ

REASONS FOR DECISION

(Delivered 1 April 2021)

THE COURT:

[1] This is a Crown appeal against the sentence imposed following a guilty plea to a charge of committing an act of gross indecency contrary to s 192(4) of the *Criminal Code Act 1983* (NT) ('*Criminal Code*'). The sentencing Judge imposed a sentence of 18 months' imprisonment, suspended after the respondent served one month of actual imprisonment and on the respondent entering into a home detention order pursuant to s 44 of the *Sentencing Act 1995* (NT) ('*Sentencing Act*'), for a period of 12 months.

[2] The issue in the appeal is whether the sentencing Judge erred in finding that the power in s 44 of the *Sentencing Act* to sentence an offender to a period of home detention can be exercised by a partially, rather than a wholly, suspended sentence of imprisonment.[1] It is a question of statutory construction. Determination of the issue depends essentially upon the text of the relevant statutory provision considered in light of its context and purpose.[2] Where the text read in context permits of more than one potential meaning, the choice between those meanings may ultimately turn on an evaluation of the relative coherence of each with the scheme of the statute and its identified objects or policies.[3]

[3] The appellant says there is no power in s 44 to partially suspend a sentence of imprisonment, with the consequence that home detention is only available as a sentencing option if the sentence of imprisonment is wholly suspended. This would preclude home detention as an option where the mandatory sentencing provisions in the *Sentencing Act* require an offender to serve an actual term of imprisonment. The appellant does not suggest there is any particular issue of principle at stake, beyond the need to have the proper operation of the provision authoritatively determined.

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1 See *The Queen v Bennett* [2020] NTSC 49.

2 *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at [20] per Kiefel CJ, Bell and Nettle JJ, at [41] per Gageler J, at [64] per Edelman J.

3 Ibid.

The relevant statutory provisions

[4] Part 3 of the *Sentencing Act* is headed "Sentences". Section 7 provides that where a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence and Part 3, make one or more of the following sentencing orders: (relevantly) (g) record a conviction and order that the offender serve a term of imprisonment that is suspended by it wholly or partly; (h) record a conviction and order that the offender serve a term of imprisonment that is suspended on the offender entering into a home detention order; and (k) impose any sentence or make any order authorised by this or any other Act.

[5] Division 5 of Part 3 is headed "Custodial orders". Subdivision 2 of Division 5 deals with home detention orders. Relevantly, s 44 is in the following terms:

> **44 Home detention order**
>
> (1) A court which sentences an offender to a term of imprisonment may make an order suspending the sentence on the offender entering into a home detention order where it is satisfied that it is desirable to do so in the circumstances.
>
> (2) A court must specify in the order the premises or place … at which the offender is to reside or remain and the period, not exceeding 12 months, that the order is to remain in force.
>
> (3) A home detention order may be subject to such terms and conditions as the court thinks fit including, but not limited to, that the offender:
>
> (a) not leave the premises or place specified in the order except at the times and for the periods as prescribed or

as otherwise permitted by the Commissioner or a probation and parole officer; and

(b) wear or have attached an approved monitoring device in accordance with the directions of the Commissioner, and allow the placing, or installation in, and retrieval from, the premises or place specified in the order of such machine, equipment or device necessary for the efficient operation of the monitoring device; and

(c) obey the reasonable directions of the Commissioner.

…

[6] Section 45 provides that a court may make a home detention order only if: (a) it receives a report from the Commissioner stating that suitable arrangements for the offender's residence are available, the residence is suitable for the purposes of a home detention order and the making of the order is not likely to inconvenience or put at risk other persons; and (b) the offender consents to the making of the order.

[7] Section 47(1) permits a court, on application by the Commissioner or the offender, to discharge the order; revoke the order and either confirm the sentence of imprisonment imposed on the offender or order the sentence of imprisonment to be quashed and deal with the offender as if they had come before the court for sentence for the offence in respect of which the home detention order was made; or vary the terms and conditions of the order.

[8] Section 48 deals with breaches of home detention orders. Section 48(1) identifies actions of the offender which constitute a breach.

Section 48(6) provides that, where a court is satisfied that an offender has breached a home detention (subject to s 48(9)): (a) the court must revoke the order if it is still in force; or (b) the offender must be imprisoned for the term suspended by the court on the making of the order as if the order had never been made and despite any period they have served under the order. The latter consequence applies if, after the expiry of the home detention order, the offender is found guilty of an offence committed during the period of the order (s 48(7)). For certain types of breach or offending, the court is permitted to: (a) direct that an order still in force continues, and may vary the terms and conditions of the order; or (b) if the order is no longer in force, make another order suspending the sentence on the offender entering into a home detention order (s 48(9)(c), (d)).

Judicial consideration of s 44

[9] In *O'Brien v Quin*[4], the Full Court of the Supreme Court considered an appeal against a sentence of six months' imprisonment suspended after three weeks, on the condition that the offender be the subject of a home detention order for the period of six months from the date of release. The Court construed (at [1], [5]) the sentence as an order partially suspending a sentence on condition under s 40 of the *Sentencing Act*, namely on the condition that the offender enter a home detention order under s 44. On the submissions of both parties,

4 *O'Brien v Quin* (2003) 13 NTLR 122.

the Court allowed the appeal, concluding (at [6]) that Subdivision 1 and Subdivision 2 of Division 5 of Part 3 provide for sentencing regimes that are both separate and distinct.

[10] That conclusion was founded primarily (at [7]) on the different and inconsistent outcomes each subdivision provides for breach of an order made under that subdivision, which were held (at [11]) to "strongly indicate" that the regimes are not intended to operate together. The Court was there expressly dealing with the situation where a court imposed both a suspended sentence with an operational period (under Subdivision 1) and a home detention order (under Subdivision 2). The Court considered (at [13]) the sentence before it to be the same as the sentence rejected by Mildren J in *O'Connor v Ryan*[5], namely a suspended sentence under s 40 subject to the condition requiring the payment of a fine. The inconsistent enforcement regimes for suspended sentences and non-payment of fines led his Honour to conclude a fine could not be imposed as a condition of a suspended sentence.

[11] In *O'Brien v Quin*, the Court recorded (at 14]) the submissions of the parties, which were similar to those advanced by the appellant in this appeal, and recorded (at [15]) an alternative argument based on the

5 *O'Connor v Ryan* [2001] NTSC 112.

text of s 7 of the *Sentencing Act*. At [18], the Court observed as follows:

> It is not entirely clear whether the learned sentencing magistrate made the home detention order as a condition of imposing a suspended sentence under s 40 or whether he imposed a home detention order on a partly suspended sentence under s 44 of the Act. In our opinion, whichever approach was adopted, the learned sentencing magistrate erred. It would be an error to impose a sentence that involved making a home detention order as one of the conditions of a suspended sentence. If, as has also been suggested, his Worship sought to impose a home detention order on a partly suspended sentence, he would be in error.

[12] The first sentence in this paragraph does not reflect the clear characterisation on which the Court had earlier concluded that the sentence had been imposed in error; that is, as an order made pursuant to s 40 of the *Sentencing Act* partially suspending a sentence on condition that the offender enter a home detention order. That, and the fact that the passage at [18] was in response to a suggestion, renders the last sentence of this paragraph[6] *obiter dicta*. The present appeal does not involve a sentence under s 40 with a condition the offender enter into a home detention order under s 44. Consequently, the view expressed in the last sentence of [18] does not, in accordance with the principles of judicial comity, bind us in the determination of this appeal. Even if it did, for the reasons which follow, we consider it to be plainly wrong.

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6 And the words "whichever approach was adopted" in the second sentence.

[13] In *Jongmin v McMaster*[7], the appellant had been sentenced to five months' imprisonment suspended on entering into a home detention order for three months under s 78B(3) of the *Sentencing Act*. He appealed on the basis that the period of home detention must be the same as the period of suspended imprisonment. Section 78B(3) then provided (as now) that a court which orders an offender to serve a term of imprisonment under s 78B(2)(a) (which required a sentence of a term of imprisonment for an aggravated property offence) may only wholly suspend the sentence on the offender entering into a home detention order. Justice Bailey held (at [28]-[30]) that nothing in the *Sentencing Act* required the period of a home detention order to equate to the period of the sentence held in suspense. His Honour observed (at [21]) that the Full Court in *O'Brien v Quin* had held that a court has no power to make a home detention order in connection with a partly suspended sentence under Subdivision 2 of Division 5. In purported conformance with that decision, his Honour went on to observe (at [26]) that:

> The essence of the provisions for home detention orders under Subdiv 2 of Div 5 is to provide for a sentence of imprisonment to be *fully* suspended on a particular basis. If an offender breaches a home detention order, he is at risk of having to serve his entire head sentence (not part of it) in custody or in some circumstances of having the period of his home detention order (not his sentence of imprisonment) extended.

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7 *Jongmin v McMaster* (2004) 34 NTLR 144.

[14] This paragraph is *obiter dicta*. The former observation rests upon the Full Court's decision in *O'Brien v Quin*, which has been dealt with above. The latter observation is, with respect, not consistent with the text of s 48(6) and (7) of the *Sentencing Act* for reasons which are discussed further below.

[15] *Ross v Toohey*[8] concerned an appeal against a sentence of three months' imprisonment suspended after one month for three driving offences. Justice Mildren allowed the appeal on the ground that the sentencing Magistrate failed to take into account home detention as a sentencing option. His Honour observed (at [19]), in making some general comments about the home detention regime, that the legislature has seen fit to provide that, in the case of violent offences, there must be a period of actual imprisonment, which has the effect that a home detention order is not an option. Again, this comment was *obiter dicta*. The interaction between the home detention regime and the mandatory sentencing provisions applicable to violent offences is also discussed further below.

[16] *R v Rudd*[9] involved an appeal against a sentence of two years and six months' imprisonment fully suspended on entry into a home detention order for 12 months. The Crown appealed on various grounds, including on the basis, previously argued and rejected in *Jongmin v*

8 *Ross v Toohey* [2006] NTSC 92.

9 *R v Rudd* (2015) 34 NTLR 131.

McMaster, that a home detention order under s 44 was only available to offenders sentenced to 12 months' imprisonment or less, and had to be for the same duration as the sentence of imprisonment. The Full Court upheld the appeal but rejected this ground (at [20]-[23]), approving Bailey J's decision in *Jongmin v McMaster*.

[17] None of the authorities referred to above have faced or addressed the particular issue the subject of this appeal. The *obiter* comments are of only marginal assistance in the process of statutory construction required for the determination of this appeal.

The text of s 44 of the *Sentencing Act*

[18] The sentencing Judge held in the reasons for judgment dated 28 July 2020 (at [16]) that there is nothing in the language used by the legislature in relation to home detention orders that justifies a reading down of the power to make such an order by confining it to circumstances where the offender has not already served, or will not be required to serve, some form of actual imprisonment.

[19] The order which is made under s 44(1) of the *Sentencing Act* is "an order suspending the sentence on the offender entering into a home detention order". By those words, the sentence is suspended from the time of "the offender entering into a home detention order". Section 7(h) confirms this, providing that the order is that "the offender serve a term of imprisonment that is suspended on the offender entering into

a home detention order". There is no provision describing the process of the offender "entering into" the home detention order. It might be argued to be the time at which the offender consents to the making of the order, but that must necessarily be *before* the court makes it, because s 45(1)(b) provides that a court can make a home detention order only if the offender consents to the making of it.

[20] In conformance with that provision, the form of the order made in relation to the appellant in this matter includes a declaration by him that he fully understands the terms and conditions of the order and consents to the making of it and that he shall comply with any reasonable directions given by the Director of Correctional Services.[10]

[21] The form of the order is required by Rule 81A.41(6) of the *Supreme Court Rules* (NT), which refers to Form 81A-M. It may be noted that the form prescribed by Rule 81A.41(3) for suspended sentences under s 40 is Form 81A-I, which includes an acknowledgement by the offender that the conditions of the order suspending sentence have been explained and the offender understands and consents to them. This is so notwithstanding that none of the provisions regarding suspended sentences made under s 40 make any reference to the offender "entering into" the order. Indeed, the only references in the

10 Appeal Book, 138.

Sentencing Act to a person "entering into" an order relate to a person entering into a home detention order.[11]

[22] In any event, the form of the order chosen by the Supreme Court in its rules of court cannot determine the proper construction of the provisions under which such orders are made. It does not follow, therefore, that the signing of the order by the offender (to indicate consent and an intention to abide by its terms) necessarily constitutes what the statute contemplates as the offender "entering into" the home detention order.

[23] It might alternatively be argued to be the time at which the offender enters into the custodial arrangement provided for by the home detention order; that is, when the offender becomes subject to the home detention order and is required to reside and remain at the premises or place to which it refers. Such a construction is open on the words of s 44(1) and is not precluded by any of the other words of s 44.

[24] On that construction, the power in s 44(1) would be to make an order suspending the sentence of imprisonment on the offender becoming subject to the home detention order and being required to reside and remain at the premises or place to which it refers, which could be at any time during the period of the sentence of imprisonment. In other

11 See ss 7(h), 44(1),48(9)(d), 78B(3).

words, s 44(1) would authorise an order imposing a sentence of imprisonment partially suspended after the offender has actually served some part of it, with the offender to then enter home detention for a period not exceeding 12 months under a home detention order.

[25] On this construction, the sentencing option of a suspended sentence under Subdivision 1 of Division 5 would be "separate and distinct" from the sentencing option of a suspended sentence with home detention under Subdivision 2 of Division 5, as *O'Brien v Quin* determined. This construction is also consistent with the breadth of the discretion conferred by s 44(1), namely where the court "is satisfied that it is desirable to do so in the circumstances".

Other statutory provisions and arguments of context

[26] Consistent with the basic proposition that the text of a statutory provision must be construed in the context of the other provisions and the Act as a whole,[12] the parties made a number of arguments about the proper construction of s 44 by reference to other provisions of the *Sentencing Act*.

Express references to partial suspension in s 40

[27] The appellant argued that a construction of s 44 which would permit an order partly suspending a sentence of imprisonment is precluded by

12 See, for example, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] per McHugh, Gummow, Kirby and Hayne JJ; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 per Mason J; *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449 at 455 per Isaacs and Rich JJ.

the express references to suspension "wholly" or "partly" and "in whole" or "in part" in the provisions in Subdivision 1 of Division 5 of Part 3, which deal with suspended sentences of imprisonment, and the absence of any such language in Subdivision 2. It was said the absence is an indication of a legislative intention not to confer power to partially suspend a sentence of imprisonment under s 44. The same point was made about the presence of similar words in s 7(g) and their absence from s 7(h).

[28] Relevantly, s 40 is in the following terms:

> **40 Suspended sentence of imprisonment**
>
> (1) A court which sentences an offender to a term of imprisonment of not more than 5 years may make an order suspending the sentence where it is satisfied that it is desirable to do so in the circumstances.
>
> (2) An order suspending a sentence of imprisonment may suspend the whole or a part of the sentence and the order may be subject to such conditions as the court thinks fit.
>
> …

[29] The power in s 44(1) is to "make an order suspending the sentence". The word "partially" is absent from that conferral of power and there is no equivalent to s 40(2). The same can be said, however, of the word "wholly". The absence of both words cuts both ways, and goes nowhere. It cuts both ways because the absence of the word "wholly" could as equally be an indication that the power only extends to partial suspension, just as the absence of the word "partially" is said

to indicate that the power only extends to whole suspension. It goes nowhere because, on the available construction that the time at which the offender enters the home detention order is when the offender becomes subject to the custodial arrangement under the order, there is no need to include any reference in ss 7(h) or 44 to the words "wholly or partly" or "in whole or in part" as appears in ss 7(g) or 40(2) and the other provisions relating to suspended sentences.

[30] That construction explains the absence of those words; they are simply unnecessary because the suspension occurs "on the offender entering into the home detention order", whenever the court orders that to be. Orders suspending sentences under s 44 are unlike orders suspending sentences under s 40 in that respect, because the power in s 40(1) is expressed only as to "make an order suspending the sentence". That formulation gives no indication as to the time from which the suspension may take effect, requiring it to be made clear by s 40(2) that the sentence may be suspended in whole or in part; that is, that the sentence may be suspended at any time across the period of the sentence of imprisonment.

Comparison of breach provisions

[31] The appellant makes a similar comparison between the breach provisions applicable to suspended sentences in Subdivision 1, Division 5, Part 3 and the breach provisions applicable to home detention orders in Subdivision 2. The appellant notes that, where the

court is satisfied that an offender has committed an offence during the operational period or breached a condition of an order suspending sentence:

(a) s 43(5)(c) permits the court to restore "the sentence or part sentence held in suspense" and order the offender to serve it; and

(b) s 43(5)(d) permits the court to restore "part of the sentence or part sentence held in suspense" and order the offender to serve it.

[32] The appellant contrasts those provisions with s 48(6)(b), which provides that, where a court is satisfied that an offender has breached a home detention order (subject to s 48(9)), "the offender must be imprisoned for the term suspended by the court on the making of the order as if the order had never been made". The appellant's point is that there are no equivalents to the references in s 43(5)(c) and (d) to "the sentence or part sentence", which confirm that the sentence under s 40 may have been wholly or partially suspended. So much may be accepted.

[33] However, as the sentencing Judge noted (at [16(e)])[13], the phrase "the term suspended by the court on the making of the [home detention] order" in s 48(6)(b) (which also appears in s 48(7)) is not only capable of capturing the situation where the court has partially suspended the sentence, but is also indicative that it does so. If a sentence could only

13 See *The Queen v Bennett* [2020] NTSC 49.

be wholly suspended under s 44, the provision could simply have said "the offender must be imprisoned for the term of the sentence as if the order had never been made". Reference to "the term suspended" indicates that the term suspended may be something other than the whole term of the sentence.

Mandatory sentencing provisions – violent offences

[34] Division 6A, Part 3 of the *Sentencing Act* is headed "Mandatory imprisonment for violent offences". The term "violent offence" is defined by s 78C, which refers to the offences against the provisions of the *Criminal Code* listed in Schedule 2 of the *Sentencing Act* or offences substantially corresponding thereto. Section 78CA categorises violent offences into levels of offences, ranging from a "level 1 offence" to a "level 5 offence" depending upon the seriousness of the offence and whether the victim suffered physical harm as a result of the offence, with a level 5 offence being the most serious.

[35] Subdivision 2, headed "Mandatory imprisonment", prescribes certain minimum sentences of actual imprisonment for level 5 offences in certain circumstances (ss 78D, 78DA); a minimum sentence of actual imprisonment for all level 4 offences (s 78DB); a minimum sentence of actual imprisonment or a requirement for a term of actual imprisonment for level 3 offences in certain circumstances (ss 78DC, 78DD); a requirement for a term of actual imprisonment for all level 2

offences (s 78DE); and a requirement for a term of actual imprisonment for level 1 offences in certain circumstances (ss 78DF). Sections 78DG and 78DH are in the following terms:

> **78DG Imposition of term of actual imprisonment**
>
> If a court is required to ***impose a term of actual imprisonment*** in relation to an offender, the court:
>
> (a) must record a conviction against the offender;
>
> (b) must sentence the offender to a term of imprisonment; and
>
> (c) may make an order under section 40 or 44 in relation to part, but not the whole of, the term of imprisonment.
>
> **78DH Imposition of minimum sentence**
>
> (1) If a court is required to ***impose a minimum sentence*** of a specified period of actual imprisonment in relation to an offender, the court:
>
> (a) must record a conviction against the offender;
>
> (b) must sentence the offender to a term of imprisonment of not less than the specified period; and
>
> (c) cannot make an order under section 40 or 44 in relation to the imprisonment for the specified period.
>
> …

[36] The sentencing Judge found (at [13])[14] support for his construction of s 44 in ss 78DG(c) and 78DH(1)(c) because they expressly contemplate that orders under s 44 may be made in relation to part of the term of imprisonment. The respondent submits that these provisions are an indication that s 44 confers power to make an order partially suspending a sentence of imprisonment for a home detention

14 See *The Queen v Bennett* [2020] NTSC 49.

order. The appellant accepts that these provisions permit the court to make an order for a home detention order under s 44 following service of a mandatory term of imprisonment for a violent offence, but says that is as far as they go.

[37] The appellant's position must be that, while the court has no general power under s 44 to make an order partially suspending a sentence of imprisonment for a home detention order, it has power to do so only if the sentence of imprisonment is a mandatory sentence imposed under Subdivision 2, with the source of the power being found in ss 78DG(c) and 78DH(1)(c). There are four difficulties with that position. The first is that the subsections refer back to s 44, indicating that the source of the power to make home detention orders is that section rather than ss 78DG and 78DH. The second is that the subsections refer in exactly the same way to s 40, which does contain power to partially suspend a sentence. The third is that this would be an oblique way to confer power on the court to make home detention orders where the primary source of power does not allow it. The fourth is that it is difficult to identify the legislative policy for making a home detention order available after an offender has served or will serve actual imprisonment *only* where the imprisonment is mandatory. It would effectively provide the court with a discretion to make a home detention order where the court's sentencing discretion as to imprisonment is significantly confined (by the mandatory sentencing

provisions), but deny the court any discretion to make a home detention order where the court's sentencing discretion as to imprisonment is not so confined. These difficulties, individually and cumulatively, make the appellant's submission untenable.

Mandatory sentencing provisions – sexual offences

[38] Division 6B of Part 3 of the *Sentencing Act* is headed "Imprisonment for sexual offences". The term "sexual offence" is defined by s 3(1) to mean an offence specified in Schedule 3 of the *Sentencing Act*. Section 78F is in the following terms:

> **78F Imprisonment for sexual offences**
>
> (1) Where a court finds an offender guilty of a sexual offence, the court must record a conviction and must order that the offender serve:
>
> (a) a term of actual imprisonment; or
>
> (b) a term of imprisonment that is suspended by it partly but not wholly.
>
> (2) Nothing in subsection (1) is to be taken to affect the power of a court to make any other order authorised by or under this or any other Act in addition to an order under subsection (1).

[39] The sentencing Judge held (at [16(f)])[15], in effect, that s 78F does not preclude the making of a home detention order under s 44 on a partially suspended sentence.[16]

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15 See *The Queen v Bennett* [2020] NTSC 49.

16 In the context of that conclusion, his Honour's observation at [14] of the reasons for judgment dated 28 July about the "replacement" of s 78BB with s 78F is of no moment.

[40] It may be noted that, by comparison with the text of s 7(k), s 78F(2) omits reference to sentences and speaks only of other orders. That may be an indication of the scope of the operation of s 78F(2). However, it is not necessary to determine that scope because s 78F(1)(b) contemplates a term of imprisonment that is partly suspended. If s 44 permits a partially suspended sentence and home detention order, such an order can be made for sexual offences. If s 44 only permits wholly suspended sentences, then home detention orders are not available for sexual offences. Again, this would be a somewhat oblique way to deny a power to make home detention orders; if the legislative policy was that home detention is not available for sexual offences, one would expect the legislation to say so directly.[17] Given that home detention offers, after any period of actual imprisonment under the suspended sentence, a greater degree of protection to victims and the community generally than a s 40 suspended sentence on conditions, it is difficult to accept the existence of such a policy.

Legislative history

[41] The appellant also made reference to the legislative history of parts of the *Sentencing Act* to make two submissions. First, that s 44(1) of the *Sentencing Act* has been unchanged since the commencement of its operation, and its predecessor was in essentially similar terms. This history was said to support the appellant's construction of s 44.

17 As it does in relation to, for example, community based orders – see s 39A(1)(a).

Secondly, that the mandatory sentencing provisions for violent offences and sexual offences had begun life in identical terms, but the mandatory sentencing provisions for violent offences had been replaced, while the provisions for sexual offences remained the same. This history was said to support the appellant's submission that ss 78DG(c) and 78DH(1)(c) are an exception to the operation of s 44 otherwise.

[42] The first provision for home detention orders was made by Part IVA of the *Criminal Law (Conditional Release of Offenders) Act 1979* (NT), which was inserted into that Act by the *Criminal Law (Conditional Release of Offenders) Amendment Act 1987* (NT). The relevant inserted section, section 19A(1), provided that the court which convicts an offender may "by order sentence that offender to a term of imprisonment but direct that the sentence be suspended on the offender entering into a home detention order". Section 19A(4) provided that a court by which a home detention order is made "shall, forthwith after the order is made" cause the order to be reduced to writing signed by the Master or clerk, who were to cause a copy to be "given to the offender before the offender is entitled to leave the precincts of the court by which the order is made".

[43] When the *Sentencing Act 1995* commenced operation, s 44(1) commenced in the same terms as it is presently. Section 44(4) provided that where a court makes a home detention order, the

offender shall not leave the precincts of the court until he or she signs the order. Section 44(4) was repealed by s 54 of the *Justice Portfolio (Miscellaneous Amendments) Act 2005* (NT). Section 56 of that Act also inserted a new s 102A into the *Sentencing Act*, which initially applied to orders made under ss 11, 13, 34, 40, 44 and 78K and provided that, on the making of the order, the offender must not leave the precincts of the court without signing the order. Section 102A is relevantly in essentially the same form currently.

[44] None of that history sustains, or even supports, the appellant's construction of s 44. It does not demonstrate, for example, that the phrase "on the offender entering into a home detention order" is a reference to the offender signing the home detention order (as opposed to becoming subject to the requirements of the order), because an offender sentenced to a suspended sentence under s 40 must sign their order before they leave the precincts of the court, just as an offender sentenced to a home detention order must do. Offenders on partially suspended sentences under s 40 leave the precincts of the court to serve their terms of actual imprisonment, and they must sign the order before they go. This is so, notwithstanding the absence of any language in s 40 to the effect that the sentence is suspended on the offender "entering into" the order.

[45] When initially inserted into the *Sentencing Act* by the *Sentencing Amendment Act (No 2) 1999* (NT), Divs 6A and 6B of Part 3, which

contained ss 78BA and 78BB respectively, were both in identical terms, save that s 78BA referred to a violent offence and a finding of guilt of commission of an earlier violent offence, and s 78BB referred to a sexual offence. Div 6A was repealed and replaced by the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (NT), enacting Div 6A essentially in its current form, but Div 6B was left unchanged (but s 78BB was renumbered as s 78F). This history does not support the appellant's argument that ss 78DG(c) and 78DH(1)(c) confer power otherwise absent from s 44 to make a home detention order on a partially suspended sentence following mandatory actual imprisonment for a violent offence. In particular, this history does not address the difficulties set out in paragraph [37] above, or the fact that the text of s 78F(1) can contemplate a partially suspended sentence.

Limitation of jurisdiction, the principle of legality and purpose

[46] It is a long-standing principle of statutory construction that provisions conferring jurisdiction or granting powers to a court should not be construed by making implications or imposing limitations which are not found in the express words.[18]

18 See *Weinstock v Beck* (2013) 251 CLR 396 at [55] per Hayne, Crennan and Kiefel JJ, citing *Owners of Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421 and other authorities.

[47] The principle of legality favours a construction, if one be available, which avoids or minimises the statute's encroachment upon personal liberty.[19]

[48] A construction that promotes the purpose or object underlying the *Sentencing Act* is to be preferred to a construction that does not do so.[20] Broadly stated, the purposes of the *Sentencing Act* can be seen in the sentencing guidelines set out in s 5, which include that the purpose of a sentence is to both punish the offender to an extent or in a way that is just in all the circumstances and to provide conditions in the court's order that will help the offender to be rehabilitated. The availability of home detention as a sentencing option in circumstances in which it is just and would help the offender to be rehabilitated is consistent with that purpose.

[49] Each of these principles points against the appellant's construction of s 44(1).

Conclusion and disposition

[50] Consistently with its terms read in context, and for the reasons set out above, the proper construction of s 44(1) of the *Sentencing Act* is that it permits a court to sentence an offender to a term of imprisonment and to make an order suspending the whole or a part of that term of

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19 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [11] per French CJ, Kiefel and Bell JJ.

20 *Interpretation Act 1978* (NT), s 62A.

imprisonment on the offender becoming subject to and bound by (entering into), either:

(a) forthwith (in the case of a wholly suspended term); or

(b) after service of part of the term (in the case of a partially suspended term),

a home detention order within Subdivision 2, Division 5, Part 3.

[51] The sentencing Judge made no error. The appeal is dismissed.
