PARTIES:	HALES, David Lawrence AND PRYCE, Lenord David
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	Nos JA 12, 13, and 14 of 1996
DELIVERED:	Darwin, 8 July 1996
HEARING DATES:	31 May 1996
JUDGMENT OF:	Martin CJ.

CATCHWORDS:

Appeal - Justices - Appeal against "manifestly excessive" sentence - Driving whilst disqualified offences - Prior convictions for related offending - Relevance of antecedent criminal history - Preservation of private interests not permitted to override sanctions imposed by Parliament or by court order - Breach of penalty imposed by statute no less serious than penalty imposed by court in exercise of a discretion - Regard to be had to the totality principle.

Criminal Code Act (NT), s390(2) -
Traffic Act (NT), s39, Schedule I -

Oldfield v Shute (1992) 107 FLR 413, considered.
Veen (No 2) (1987-88) 164 CLR 465, followed.

Appeal - Justices - Appeal against sentence - Committal to prison for breach of bond - Whether circumstances of breach demonstrate an intention to disregard obligation under the bond.

Baird v R, unreported Court of Criminal Appeal, 9 May 1991, referred to.

REPRESENTATION:

Counsel:

Applicant: Mr G Georgiou
Respondent: Mr C Roberts

Solicitors:

Applicant: NTLAC
Respondent: DPP

Judgment category classification: B
Judgment ID Number: mar96012
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IN THE SUPREME COURT OF
THE NORTHERN TERRITORY
OF AUSTRALIA

Nos 12, 13, 14 of 1996

BETWEEN

DAVID LAWRENCE HALES
Appellant

AND:

LENORD DAVID PRYCE
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 8 July 1996)

On 5 March 1996 before the Court of Summary Jurisdiction at Alice Springs the appellant was:

1. Convicted of driving a motor vehicle whilst disqualified on 19 December 1995 and sentenced to three months imprisonment.

2. Convicted of driving a motor vehicle whilst

disqualified on 17 January 1996 and sentenced to four months imprisonment.

3. Committed to prison for three months for breach of an undertaking to be of good behaviour for twelve months upon a sentence of imprisonment for three months being suspended.

The breach was constituted by the two convictions. It is not clear whether the appellant's licence had been cancelled or whether he had been disqualified from holding a licence, but the distinction is not material in this case.

His Worship ordered that the sentences be cumulative and be served after expiry of the period of commitment. In all then, the appellant was sent to gaol for ten months. He says that that was manifestly excessive, that his Worship placed excessive weight on considerations of specific and general deterrence; placed insufficient weight on rehabilitation, failed to pay regard to the "totality" principle and failed to give weight or sufficient weight to the appellant's pleas of guilty.

On the hearing of the appeal this Court was urged by counsel for the appellant to consider making a home detention order as a sentencing option, and the report required under

s19B of the *Criminal Law (Conditional Release of Offenders) Act* was sought. I said at the time that the appellant should not think that in so doing I was giving any indication of my thinking about the outcome of the appeal. The pre-sentence report was received recently and has been published, neither party seeks to further address the Court thereon. It indicates that in every respect the appellant is a suitable person in respect of whom such an order might be made.

The appellant is now aged 42 and has not suffered any convictions until February 1993. He was then convicted for driving an uninsured and unregistered motor vehicle, for which he was fined, and as well for driving a motor vehicle with a blood alcohol level of .155. For that he was fined, but also "disqualified" from holding a driver's licence for twelve months. Two months later he was again convicted for driving with an excess of alcohol in his blood, .129, and for driving whilst disqualified. He was sentenced to two months imprisonment, suspended upon his entering into a bond to be of good behaviour for twelve months. His period of "disqualification" from holding a driver's licence was extended to two years from that date. He suffered no conviction during that period. However, on 24 October 1995 he was again convicted on a charge of driving with an excess of alcohol in his blood, .147. He was sentenced to imprisonment, this time for three months, but the period was suspended upon

his entering into a bond to be of good behaviour for twelve months. He was disqualified from holding a driver's licence for fifteen months. It will be recalled that he breached the law in that regard on two occasions within three months of that disqualification.

As to the first offence, the appellant was detected by police driving an Escort panel van along a street in Alice Springs at about 12.20pm. He was stopped and apprehended, and when asked if he was disqualified from driving, readily admitted it. When asked his reason, he said: "For business". He acknowledged that he was in trouble, and after being arrested and conveyed to the police station, he was charged and bailed. As to the second offence, at about 7.05pm on the day in question he was again driving on streets in Alice Springs in the Escort panel van and was recognised by members of the police, apprehended and spoken to. On that occasion, he gave a false name, and when challenged, again denied his identity. He was again arrested and taken to the police station and when asked why he supplied the false name replied that he had no one else to drive for his business. It will be noted that (apart from the false name) it is not suggested that he had committed any other offence when he was found to be driving whilst disqualified.

His excuse on each occasion was that he was going about his work as a cleaning contractor. Normally, he was driven to and from the jobs by an employee, but on neither of these occasions was anyone available for that task. He could not use a taxi as he needed to take equipment to carry out his contracts. It was not disclosed whether the absence of a driver was temporary or of a longer standing, but he can only be dealt with on the basis of the offences as particularly charged. The business had been purchased with borrowed funds and he still owed $5,000 which was being paid from the proceeds of the business. Failing to keep up with his business commitments because of lack of transport could mean loss of work and diminished capacity to repay the loan. The same result might be expected to follow if he was imprisoned. His Worship was told that a person employed in the business since 20 January last was not capable of running the business in the appellant's absence, and his defacto wife was not able to assist in that regard.

Until his offending of recent years he has led an unblemished life, and appears to have been a man with nothing adverse to his character. A submission was made to his Worship that he consider making a home detention order whilst at the same time recognizing the need for deterrence. It was stressed that these offences were not accompanied by any other illegal activity.

During his remarks on sentence his Worship often spoke of the offending conduct being a matter of "choice" for the appellant. No doubt it was, but I do not understand the import of that standing alone. Anyone who drives without a licence does so as a result of making a choice as to whether to drive or not. Perhaps his Worship was drawing a distinction between an emergency situation in which a driver may be more or less compelled to drive without a licence, and one where those circumstances do not exist. His Worship concluded his remarks on sentence:

> "You have chosen to ignore the order of this court in committing these offences, and as I say, there is a very real need for a general deterrent and personal deterrent and there is a very real public interest in ensuring that these laws relating to driving disqualified are enforced. In all the circumstances I believe that a term of actual imprisonment is warranted. I should make it clear that you are not being punished for any prior offences. I do take into account your prior convictions and sentences solely for the purpose of noting that this is not an offence which is out of character - or these are not offences which are out of character - and for the purpose of looking at what sentences have been imposed in the past and the effects of those sentences upon your later conduct".

I turn first to the committal to prison for beach of the bond. The bond was entered into upon suspension of a sentence of imprisonment imposed for drink driving. The offences which are said to have breached that bond are the driving whilst disqualified, the disqualification being

consequent upon the conviction. They are in one sense quite different offences, and that may have an affect on the course which should be taken in considering the outcome of a breach. On the other hand, the disqualification was part of the armory available to protect the public against drivers who can not be trusted to not drink and drive. There is a real risk that in approaching the task of sentencing in these circumstances there will be a degree of impermissible doubling up in the course of the imposition of a penalty for the fresh offence and committal to prison for the breach. Each case must depend on its own circumstances and there may be occasions when a relatively severe punishment may be inflicted on each account, but I do not consider that this is one of them. The principal purpose of the bond was to keep the appellant to good behaviour by deterring him from drink driving and that objective had not been breached on either of the occasions giving rise to the fresh offences. I do not consider that the circumstances of the breach demonstrate an intention to disregard the obligation under the bond (generally see *Baird v R*, unreported Court of Criminal Appeal, Gallop, Nader & Angel JJ., 9 May 1991 at 491).

As to the offences, they were undoubtedly serious in all the circumstances, mitigated only by the perceived necessity arising from a desire to preserve business interests. The appellant knew that driving whilst

disqualified was not treated lightly by the courts as he had been convicted and sentenced to a suspended two months term of imprisonment, there were two offences and he was on bail after being charged for the first when he committed the second. Preservation of private interests cannot be permitted to override the sanctions imposed by the Parliament or by order of a court. If it was intended that a disqualification from driving could be on terms, then the Parliament would have so provided. Instead, it has said that there will be an automatic cancellation or disqualification (depending on the circumstances - *Traffic Act* s39, Schedule I). It is only when it is considered that the period of disqualification provided for in the *Act* and Schedule is insufficient that a court has a discretion to increase the period. The maximum penalty which could be imposed for driving disqualified was 12 months imprisonment or a fine of up to $5,000 (as to the fine, see *Criminal Code* s390(2)).

The question of penalty for this type of offending has been considered in a number of reported cases and undoubtedly applied in many unreported cases. They are usefully brought together by Mildren J. in *Oldfield v Shute* (1992) 107 FLR 413. I agree with his Honour that there is no hard and fast rule that imprisonment is the outcome upon conviction except in exceptional circumstances. What must be understood, however, is that breach of the penalty imposed by

operation of the statute is no less serious a matter than one imposed by the court in the exercise of a discretion. It is a serious matter. It is the more serious here because, as his Worship recalled, the appellant has previously been convicted of the same offence and had the benefit of a suspended sentence of two months imprisonment. His Worship was sufficiently aware of the principles to be applied in those circumstances as his remarks demonstrate. In *Veen (No 2)* (1987-88) 164 CLR 465 at 477 Mason CJ., and Brennan, Dawson and Toohey JJ. said

> "The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind."

Those consideration are apt to be applied in this case.

However, and leaving aside the question of committal to prison for breach of the bond, a cumulative sentence of seven months imprisonment for the two offences is, in my view, manifestly excessive. I cannot but think that his Worship

failed to stand back and look at the result and consider the totality principle. There can be no doubt that a sentence to imprisonment was within the discretion of the Court of Summary Jurisdiction, but I think it likely that insufficient regard was paid to the circumstances of each offending and the end result.

For the reasons given the order committing the appellant to prison for breach of his bond is quashed. No action should be taken for those breaches. The separate sentences of three months and four months respectively for the two offences of driving whilst disqualified are confirmed, but it is ordered that they be served concurrently, an effective sentence of four months imprisonment.
