CITATION:	*MB v Masani* [2024] NTSC 71
PARTIES:	MB
	v
	MASANI, Kolisi
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 23 of 2023 (22300934)
DELIVERED:	3 September 2024
HEARING DATE:	31 July 2024
FURTHER WRITTEN SUBMISSIONS FILED:	11 August 2024
JUDGMENT OF:	Brownhill J

CATCHWORDS:

CRIMINAL LAW – Appeals – Appeal from Youth Justice Court – Youth re-sentenced pursuant to s 121(6) of the *Youth Justice Act* – Appeal against sentence – Appeal dismissed.

CRIMINAL LAW – Appeals - Whether sentencing Judge misapplied youth sentencing principles – Court must impose sentence of detention only as a last resort – Rehabilitation as the primary sentencing factor for youth offenders – Focus on rehabilitation over deterrence is mediated by matters subjective to the offender – Rehabilitation afforded less weight where an offender has previously failed to modify behaviours – Sentencing Judge considered rehabilitation in the sentencing exercise – Sentence to detention

was the only reasonable alternative in the circumstances –Ground of appeal dismissed.

CRIMINAL LAW – Appeals – Whether sentencing Judge failed to apply the principle of totality – Presumption of concurrency under the *Youth Justice Act* – Presumption of concurrency is rebuttable – Previous sentences were served by the time of re-sentencing – Totality principle applied even though the two sentences had been served – Sentencing Judge did not make express reference to totality within the Reasons – Implicit within Reasons that the Sentencing Judge took into account earlier sentences – No material error made by the Sentencing Judge – Ground of appeal dismissed.

Sayer v The Queen [2018] VSCA 177, *TM v The Queen* [2017] NTCCA 3 referred to.

Youth Justice Act 2005 (NT) s 126.

REPRESENTATION:

Counsel:

Appellant:	A McCowan
Respondent:	T Gooley

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions
Judgment category classification:	B
Judgment ID Number:	Bro2407
Number of pages:	23

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

MB v Masani [2024] NTSC 71
No. LCA 23 of 2023 (2230094)

BETWEEN:

MB
Appellant

AND:

KOLISI MASANI
Respondent

CORAM: BROWNHILL J

REASONS FOR DECISION

(Delivered 3 September 2024)

[1] The issue in this appeal is whether the sentence of detention for six months imposed by the Youth Justice Court when re-sentencing the appellant pursuant to s 121(6) of the *Youth Justice Act 2005* (NT) ('Act') for the offences of unlawful entry of a building, stealing and property damage was infected by specific error, namely a failure to apply the sentencing principles applicable to youths and a failure to apply the principle of totality.

Procedural background

[2] On 2 March 2023, the Youth Justice Court sentenced the appellant, following pleas of guilty to the offences of unlawful entry of a building

(contrary to s 213 of the *Criminal Code*), stealing (contrary to s 210 of the *Criminal Code*) and property damage (contrary to s 241 of the *Criminal Code*). The appellant received an aggregate sentence of 12 months' detention, suspended after four months, with supervision and other conditions for 12 months from the date of release. That sentence was backdated to 7 December 2022.

[3] At the same time, the appellant was also sentenced for numerous offences on six other files, the offences being unlawful entry, property damage, stealing and the like. The appellant was also re-sentenced for breaches of an earlier suspended sentence. The aggregate sentences on each file ranged from two months' to four months' detention. All the sentences imposed, including for the offences the subject of this appeal, were backdated to 7 December 2022 and were ordered to be served concurrently.

[4] The circumstances of the offending the subject of this appeal were that during the early hours of 22 October 2022, the appellant and a co-offender unlawfully entered the business premises of Lutheran Care in Alice Springs by smashing a window near the back door causing damage to the property with a cost of $1,600 to repair. Once inside the premises, the appellant and his co-offender broke into two safes damaging them in the process with a cost of $3,000 to repair. They then used stolen car keys to steal a vehicle valued at $60,000, to which they caused significant damage whilst driving.

[5] When sentencing the appellant, the sentencing Judge observed that, overall, the appellant's offending was 'a serious example of this kind of behaviour', was 'not particularly out of character' for him, and was aggravated by the fact that much of it occurred when he was on a suspended sentence. In relation to the offending the subject of this appeal, the sentencing Judge observed that it had been appropriately characterised by both parties as 'the most serious of all of this trouble', and that he was satisfied that a period of detention was warranted because of the seriousness of the matters. The sentencing Judge also observed that the appellant's compliance with the earlier suspended sentence had not been 'particularly good'.

[6] The appellant was released from detention on 6 April 2023, with eight months of the 12 month sentence suspended, and a 12 month operational period.

[7] On 11 April 2023, the appellant was found to have breached the suspended sentence by committing an offence of trespass on 9 April 2023. The operational period of the suspended sentence was extended to 30 June 2024. The appellant was also sentenced to one month detention for the trespass offence, backdated to 10 April 2023. He was released from detention on 9 May 2023.

[8] On 23 May 2023, the appellant was found to have breached the suspended sentence by not complying with the drug testing condition.

The suspended sentence was varied to impose a new condition requiring engagement with alcohol and drug counselling as directed.

[9] On 25 August 2023, the appellant was found to have breached the condition requiring abstinence from drugs by testing positive for cannabis. No action was taken. The appellant was also found guilty of theft and property damage committed on 20 June 2023. He was sentenced to two months' detention, backdated to 23 June 2023. He was released from detention on 22 August 2023.

[10] On 14 September 2023, the appellant was charged with an offence of theft and taken before the Youth Justice Court. The allegation was that he went into a supermarket with two other youths, took a bottle of soft drink and a pie from the shelves, concealed the items and left without paying. The value of the items stolen was $9.50. The appellant was remanded in custody.

[11] On 20 September 2023, the matter was mentioned and the appellant was remanded in custody.

[12] On 21 September 2023, a breach application was filed with a compliance report that stated the appellant was not suitable for further supervision, but made a recommendation that, should he be ordered to undergo supervision, he attend the BushMob residential rehabilitation program.

[13] On 25 September 2023, the matter was mentioned and the appellant was remanded in custody.

[14] On 26 September 2023, the appellant pleaded guilty to the charge on the basis of the alleged facts referred to above. The Youth Justice Court found the charge proven and otherwise dismissed it. The breach application was adjourned.

[15] On 27 September 2023, a report about the appellant's suitability for supervision was provided to the Court. It stated, *inter alia*, that the appellant was found unsuitable for the BushMob program due to a lack of engagement in the assessment process, that Saltbush would be unable to assess the appellant for suitability until 5 October 2023, that the appellant was not suitable for supervision, and that the appellant faced a real prospect of homelessness upon his release from detention.

[16] On 28 September 2023, the appellant was re-sentenced in relation to the three offences committed in October 2022 pursuant to s 121(6) of the Act. The sentence imposed was six months' detention backdated to 14 September 2023. This sentence is the subject of this appeal.

[17] Pursuant to s 144 of the Act, which applies the provisions of the *Local Court (Criminal Procedure) Act* (NT), the appellant has appealed against the sentence on the grounds that it involves specific errors – firstly, a failure to apply the sentencing principles relating to youth offenders, and secondly, a failure to apply the principle of totality.

Ground 1 – Failure to apply the sentencing principles applicable to youths

[18] The appellant was 15 years old at the time of the offending, and 16 years old at the time of initial sentencing and re-sentencing.

[19] At the time of the initial sentence, he had been dealt with by the Youth Justice Court on three prior occasions, for four instances of unlawful entry or trespass, one instance of unlawful use of a motor vehicle, one instance of stealing, one instance of property damage, and one instance of unlawfully possessing property. He had been sentenced to various terms of detention, the longest being a term of four months. He also had three instances of failing to comply with an order of the Court.

[20] The maximum penalties for the offences the subject of this appeal were imprisonment for 14 years each for the unlawful entry and property damage offences, and seven years for the stealing offence.

[21] Section 83(1) of the Act set out the sentencing dispositions available to the Youth Justice Court. Section 83(2)(b)(i) of the Act provided that, if the Court orders a youth to serve a term of detention or imprisonment, the term must not exceed two years for a youth who is 15 years of age or more.

Section 121(6)(a) of the Act provided that, if the Youth Justice Court is satisfied that a youth has breached an order, the Court may, if the order is still in force (as the suspended sentence was in this case): (i) confirm

or vary the order; or (ii) revoke the order and deal with the youth under s 83 as if it had just found him guilty of the relevant offences. Section 121(7) provided that, in determining how to deal with the youth under s 121(6), the Court must take into account the extent to which the youth had complied with the order before the breach application was made. Further, s 121(8) provides that the Court must not impose on the youth a penalty greater than the maximum penalty it could have imposed in respect of the original offence.

[22] Specifically, the appellant's first ground of appeal referred to two youth sentencing principles. The first was the principle in ss 4(c) and 81(6) of the Act that the Court must impose a sentence of detention on a youth 'only as a last resort' and for the shortest appropriate period of time. The second principle is that rehabilitation of a youth is, generally speaking, the primary sentencing factor. The appellant argued that, inconsistently with these principles, the sentencing Judge failed to exclude all reasonable alternatives before re-sentencing the appellant to a term of actual imprisonment.

[23] The sentencing Judge did not impose a term of imprisonment; he imposed a term of detention. Consequently, the words at the end of s 81(6) of the Act, 'and a sentence of imprisonment only if there is no appropriate alternative' have no operation in this appeal.

[24] In *TM v The Queen* [2017] NTCCA 3, the Court of Criminal Appeal held (at [25]) that in the case of youthful offenders, and particularly first offenders, rehabilitation is usually far more important than general deterrence. However, it is not correct to say that rehabilitation will necessarily be the 'paramount' sentencing consideration in all cases, or that rehabilitation will necessarily be more important than other sentencing purposes. The Court held (at [26]) that the focus on rehabilitation over deterrence is directed to the offender's capacity to alter his or her behaviour so as not to reoffend, and to ensure the youth is dealt with in a way that acknowledges his or her needs and will provide him or her with the opportunity to develop in socially responsible ways. Rehabilitation may carry far less weight in respect of a repeat offender who has previously been afforded a number of opportunities to modify his or her behaviours through the imposition of non-custodial dispositions, but has failed to do so and has committed a very serious criminal offence.

[25] These observations indicate that the weight to be given to rehabilitation of a youth as against other sentencing considerations can be affected by whether the youth is a first offender or a repeat offender who has previously been afforded numerous opportunities to modify their behaviours through the imposition of, for example, suspended sentences. As the Court observed (at [27]), the balance between rehabilitation and the other sentencing purposes is guided by a

consideration of both the seriousness of behaviour and the prior criminal history.

[26] When deciding to re-sentence the appellant to a term of detention which was not suspended, the sentencing Judge said that he had considered the most recent breach, the compliance report and an 'expansive' supervision assessment. He said he had been prepared to consider a further suspended sentence 'if a further suitable supervised option was available', and BushMob (or another program akin to it) was the obvious place that would enable rehabilitation, but the appellant had been found unsuitable for that program. The sentencing Judge said that for the appellant to be permitted to return to the community unsupervised with his present behaviour would mean he would be back on the streets with a drug problem and with a 'lifestyle problem which would involve, almost certainly, re-offending'. Consequently, the sentencing Judge held that the only option was to re-sentence the appellant taking into account that he had been 'under some restriction of a supervised order' and that there were eight months unserved on the initial sentence. The sentencing Judge told the appellant that he hoped he would get 'rehabilitative help' whilst in custody, and that he had not taken the opportunities that were given to him so he would have a sentence of actual detention imposed.

[27] It is sufficiently clear from the sentencing Judge's reasons, that the sentencing Judge decided that there was no reasonable alternative to a

period of actual detention, given: (a) the seriousness (including clear prevalence) of the initial offending as reflected in the initial sentence of 12 months' detention, of which eight months was unserved; (b) the extent to which the appellant had complied with the initial suspended sentence, which included four instances of breach including by way of re-offending, which conduct led to an assessment of a very high likelihood of further offending; and (c) the appellant had been found unsuitable for a residential rehabilitation program because he did not engage with the assessment process. Further, the sentencing Judge had expressly selected the period of six months on the bases that the initial sentence was for 12 months, of which the appellant had served four months, leaving eight months unserved, with some five months after the sentence was imposed where he was under its restrictions.

[28] On the basis of those reasons, I reject the appellant's submission that the sentencing Judge failed to apply the principles relating to sentencing youths. Expressly, the sentencing Judge considered detention to be the only appropriate option in the circumstances. Clearly, the sentencing Judge considered the appellant's rehabilitation (understood in the way described in *TM v The Queen* and set out above) as a, if not the, primary sentencing factor, because the sentencing Judge found the appellant to be unsuitable for residential rehabilitation and, consequently, supervision, and that there was a very high

likelihood of further offending if the appellant were to be permitted to return to the community unsupervised.

[29] The appellant argued that the sentencing Judge's failure to order a report under s 51 of the Act, and failure to wait another week for the Saltbush suitability assessment, were demonstrative of the failure to give primacy to the appellant's rehabilitation, and impose a sentence of detention only as a last resort. I reject that submission.

[30] Section 51 of the Act applies if the Court believes a youth charged with an offence is or may be a child in need of protection or there is a risk to the wellbeing of the youth. Section 51(2) permits the Court to require the youth's circumstances to be investigated and for appropriate action to be taken to promote the wellbeing of the youth. Section 51(3) provides that, if the Court requires the investigation and action under s 51(2), a report must be provided to the Court on the youth's circumstances and any action taken in relation to the youth regarding those circumstances.

[31] The Court was asked to order a report under s 51 on 25, 26 and 28 September 2024 and refused to do so, instead ordering a report under s 71 of the Act about the appellant's suitability for supervision. That report stated the following:

(a) The appellant's aunty had been his primary carer since he was 'little' and she was the only family member willing to look after

him. She was frustrated with his behaviour and did not want him back in her home until he had done some alcohol and drug rehabilitation.

(b) The appellant was found unsuitable for the BushMob residential rehabilitation program because he did not engage in the assessment process, did not appear to have any interest in rehabilitation and it was doubted that he would be able to complete the program.

(c) A full assessment for the Saltbush residential rehabilitation program could not be completed until 5 October 2023. Saltbush expressed concerns about the appellant 'given the multiple incidents he was involved in during previous stays at the facility' and that he might 'negatively influence other young people in their care'.

(d) The appellant's overall compliance with the YORET had been poor.

(e) The appellant had been 'non-compliant' with his aunty, YORET, and all providers who have attempted to work with him. He appears unwilling or unable to comply with any reasonable direction given in his best interest.

(f) The appellant would benefit from alcohol and other drug residential treatment however, given his non-compliance and disinterest in participation, it was not seen how that could be delivered.

(g) The appellant faces the real prospect of homelessness on release from detention, given his aunty's wishes, the lack of any residential rehabilitation program being willing to accept him and the inability to identify an alternative residential address.

[32] In those circumstances, to proceed to re-sentence the appellant without a further adjournment, after the matter had been mentioned numerous times, for offending that occurred over 11 months previously, was not demonstrative of a failure to give primacy to the appellant's rehabilitation or impose a sentence of detention only as a last resort. The appellant's failure to engage in the assessment process for BushMob, and the concerns identified by Saltbush, raised a strong likelihood that a further adjournment for an assessment for Saltbush would be futile. In circumstances where a further suspended sentence was not the appropriate disposition (for the reasons set out above), exploration of additional accommodation options for the appellant was unnecessary.

[33] As already addressed, it is apparent from the sentencing Judge's reasons as set out above that the appellant's rehabilitation was given

primacy, with the view that his rehabilitation would be served by a sentence to detention which was not suspended. It was clear that the sentencing Judge considered that the appellant's rehabilitation would most likely be hampered by the imposition of a suspended sentence because of the high likelihood of re-offending.

[34] The appellant's focus on the relatively minor nature of the re-offending which gave rise to the breach application under s 121(6) of the Act is misplaced. Contrary to the appellant's written submissions, this was not a restoration of a partially suspended sentence pursuant to s 45 of the *Sentencing Act 1995* (NT). In the re-sentencing exercise (as contemplated by s 121(6) of the Act), relevant matters include those set out in paragraph [28] above, including particularly, the seriousness of the offending the subject of the original sentence, which warranted an initial sentence to 12 months' detention.

[35] Ground 1 is not made out.

Ground 2 – Failure to apply the principle of totality

[36] The appellant argued that in re-sentencing the appellant to six months' detention, the Youth Justice Court failed to take into account, as required by the principle of totality, that the appellant had, during the suspended period of the sentence, been sentenced to and served a total of three months' detention for subsequent offending, noting that there is a 'presumption of concurrency' under s 126 of the Act.

[37] Section 126(1) of the Act provides that if a youth is serving, or has been sentenced to serve, a term of detention or imprisonment for an offence and is sentenced by the Court to serve another term of detention or imprisonment for another offence, the later term of detention or imprisonment must be served concurrently with the term of detention or imprisonment for the first offence. Section 126(2) provides (relevantly) that s 126(1) does not apply if the Court otherwise orders when imposing the later sentence.

[38] It is clear from the terms of s 126 that any 'presumption' of concurrency is readily rebutted by the Court simply ordering otherwise. It is also clear from the terms of s 126 that the 'presumption' of concurrency there set out had no application to the re-sentencing exercise because the sentences of one month's detention for an offence of trespass which commenced on 10 April 2023 and two months' detention for offences of theft and property damage which commenced on 23 June 2023 had all expired before the Youth Justice Court came to re-sentence the appellant on 28 September 2023.

[39] The appellant relied on *Sayer v The Queen* [2018] VSCA 177 ('*Sayer*') to argue that the principle of totality required the sentencing Judge, in re-sentencing the appellant for the offences committed in 2022, to take into account the sentences to detention imposed on and served by the appellant for offending committed after the 2022 offending.

[40] *Sayer* involved an appeal against a sentence imposed for a rape committed by the appellant some 30 years earlier when the appellant was 17 years old, after he had separately been sentenced to and served terms of imprisonment for two other rapes committed around the same time. The appellant argued that he had been effectively sentenced to a total of 21 years and six months imprisonment for a series of related offences committed over a five month period when he was a 17 year old. He argued that the sentence imposed on the last occasion failed to give proper regard to the principle of totality. This ground of appeal was dismissed because the Court was not satisfied that the sentencing Judge had erred in failing to take account of the principle of totality. Further, even if there had been error, the Court was not satisfied that any different sentence should be imposed.

[41] In its decision, the Court made the following observations:

(a) The *Sentencing Act 1991* (Vic) did not directly address, or require that specific account be taken of, sentences already served.[1]

(b) Nonetheless, the principles set out in that Act were not an exhaustive account of the circumstances in which the totality principle applies by reference to previously imposed sentences.[2]

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1 *Sayer* at [65] per the Court.

2 *Sayer* at [66], citing *Mill v The Queen* (1988) 166 CLR 59.

(c) The totality principle does apply where 'relevant' sentences have already been served.[3]

(d) To the extent that the totality principle applies, it does so in a very distinct manner. This is not by seeking to identify what total sentence would have been imposed had all the offending been before the Court at the time when the person was first sentenced and then making adjustments to that sentence.[4]

(e) Rather, the fact of the sentence and its effects are highly relevant sentencing considerations, and it is proper to make some allowance, in a manner in which one cannot be precise, for the fact that a term of imprisonment has already been served for offences that are part of the same pattern of conduct.[5]

(f) The reference to the 'effects' of the served sentence is a reference to the rehabilitative effects of the served sentence on the offender.[6]

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3 *Sayer* at [69], citing *The Queen v Bruce* (1998) 71 SASR 536 at 541 per Doyle CJ (Pryor and Lander JJ agreeing).

4 *Sayer* at [71], citing *The Queen v Knott* (2007) 169 A Crim R 291 at [35] per Gray J (Doyle CJ and David J agreeing). At [76], the Court distinguished *Mill v The Queen* (1988) 166 CLR 59, in which the offender was treated as if he had been sentenced for all offending at the same time, because that case involved the deferment of sentence for one offence caused by the intervention of State boundaries which constituted a legal obstacle to the offender being sentenced on a single occasion.

5 *Sayer* at [71], citing *The Queen v Knott* (2007) 169 A Crim R 291 at [34] per Gray J (Doyle CJ and David J agreeing), in turn citing with approval *The Queen v Bruce* at 541.

6 I infer this from the finding at [82] that rehabilitation had been already substantially addressed by the intervening sentences, and the earlier references to rehabilitative effects when referring at [60] to *Mill v The Queen*, at [68] to *The Queen v Bruce* and at [70] to *The Queen v Knott*.

(g) The sentence previously imposed and served is a matter that the sentencing Judge is required to take into account as part of the instinctive synthesis.[7]

[42] The Court held (at [77]) that, accepting that the appellant would in all likelihood have received a lesser total sentence for the offence had he been sentenced for all of the offences on a single occasion, to sentence him now as if all crimes were being sentenced together would be wholly unrealistic and contrary to the factual circumstances in which the Court is required to sentence. However, the Court held (at [78]) that consistently with the authorities it had referred to, the prior sentences and time spent in custody were part of the appellant's circumstances which were required by the principle of totality to be taken into account.

[43] I find the reasoning of the Victorian Court of Appeal in *Sayer* to be persuasive and in accordance with the authorities referred to. The decision has been followed or cited with apparent approval in subsequent cases in the Victorian Court of Appeal and the Queensland Court of Appeal.[8]

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7 *Sayer* at [74], citing *Warwick v The Queen* [2016] NSWCCA 183 at [30]-[32] per Adamson J (Payne JA and RA Hulme J agreeing) and referring to *Wu v The Queen* (2011) 211 A Crim R 88.

8 See, for example, *Bidong v The Queen* [2022] VSCA 33 at [33] per Maxwell P and Kennedy JA; *Majed Al-Dimachki v The Queen* [2021] VSCA 98 at footnote 12 per Beach and McLeish JJA; *The Queen v CCT* [2021] QCA 278 at [228] per Applegarth J (Sofronoff P and McMurdo JA agreeing).

[44] The respondent relied on the decision of Grant CJ in *Nicholson v Andreou* [2018] NTSC 40 at [23] for the proposition that the principle of totality is to be considered where the sentences to be imposed by a court will overlap or operate cumulatively, with the overriding consideration being that the total sentence must not exceed the total criminality.[9] This case concerned an appeal from fully cumulative sentences imposed for four offences all committed on the same occasion. The sentencing Judge cannot be taken to be expressing the effect of the totality principle beyond its operation relevant to the case before him, or to be describing the limits of its operation. I do not consider that decision to bear on the matters the subject of this appeal.

[45] The Youth Justice Court was re-sentencing the appellant for the three offences of unlawful entry, theft and property damage committed in October 2022 as if it had just found him guilty of the three offences. Prior to the re-sentencing, the appellant had served one month's detention for an offence of trespass committed in April 2023 (six months after the first offending) and two months' detention for offences of theft and property damage committed in June 2023 (eight months after the first offending).

[46] In accordance with the principles set out above as extracted from *Sayer*, I consider that the provisions of the Act relating to sentencing

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9 *Nicholson v Andreou* [2018] NTSC 40 at [23] per Grant CJ, citing *Mill v The Queen* (1988) 166 CLR 59 at 63 per the Court.

where there are previously imposed sentences[10] are not an exhaustive account of the circumstances in which the totality principle applies to such sentences. By the same reasoning, nor are the terms of s 121(7) of the Act, which requires the Court to take into account the extent to which the youth has complied with the order. In any event, offending and any sentence to detention served as a consequence would fall within 'the extent to which the youth has complied with the order'.

[47] I consider that the relevant offending is part of the same pattern of conduct because the nature of the offences is essentially the same and they were all committed within eight months of each other, and within the operational period of the suspended sentence. Consequently, in accordance with the principles set out above as extracted from *Sayer*, I consider that the principle of totality did apply even though the two sentences to detention had been served, such that the fact of those sentences and its effects were relevant sentencing considerations and it was proper to make some allowance for them, in a manner in which one cannot be precise, and as part of the instinctive synthesis.

[48] In accordance with the principles set out above as extracted from *Sayer*, the rehabilitative effects (if any) of those sentences on the appellant was a relevant part of the consideration of the principle of totality.

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10 Such as s 87 (fixing a new non-parole period), s 127 (cumulative sentences) and s 130 (order of service of sentences).

[49] Like the sentencing decision appealed from in *Sayer*,[11] the attention of the sentencing Judge was not brought to the issue of totality and he did not refer to it in his sentencing remarks in those terms. Unlike the sentencing decision appealed from in *Sayer*, the sentencing Judge did not make any reference at all, in his re-senatencing remarks, to the earlier sentences.[12] This may be contrasted with his expressly taking into account that the appellant had been under 'some restriction on supervised order' and that there was eight months unserved on the sentence.

[50] However, I am unpersuaded that the sentencing Judge made any material error. The appellant's criminal history which included the further offending and the two sentences of detention were before the Court, and the sentencing Judge did refer, when hearing argument, to the appellant being before the Court for breach on 25 August 2023 (when one of those sentences was imposed), having then committed the further breach for which he was before the Court and re-offending. These matters indicate that the sentencing Judge did take into account the earlier sentences totalling three months' detention.

[51] The duration of the new sentence of six months supports that conclusion. It must be accepted that the sentence of 12 months' detention originally imposed for the three offences was the appropriate

11 *Sayer* at [79].
12 Ibid.

term for the offending. Four months of that sentence had been served in detention, leaving eight months suspended. In the five months that elapsed after the appellant's release from that detention, he spent three months in detention and two months in the community. The two months in the community involved a significant degree of non-compliance with the conditions of the suspended sentence and two separate instances of re-offending (three instances counting the re-offending the subject of the breach). The three months in detention obviously had little by way of rehabilitative effect. The re-sentence effectively credited the appellant with two months of detention (eight months left to be served of the original sentence reduced to the six months to be served under the new sentence) for that five month period characterised by non-compliance, re-offending and detention for three months. Taking into account the principle of totality in accordance with the principles in *Sayer*, it cannot be said that the period of six months' detention by way of re-sentence was excessive or outside of the range of appropriate sentences.

[52] Consequently, I am not persuaded that the sentencing Judge made a material error.

[53] Ground 2 is not made out.

Disposition

[54] The appellant's grounds of appeal have not been made out.

[55] The appeal is dismissed.
