CITATION:	*Attorney-General (NT) v JR* [2017] NTSC 40
PARTIES:	ATTORNEY-GENERAL OF THE NORTHERN TERRITORY v JR
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21721844
DELIVERED:	2 June 2017
HEARING DATES:	19 May and 1 June 2017
JUDGMENT OF:	GRANT CJ

CATCHWORDS:

ADMINISTRATIVE LAW – STATUTES – OPERATION AND EFFECT OF STATUTES – PREVENTATIVE DETENTION LEGISLATION – VALIDITY OF APPLICATION

Whether respondent a "qualifying offender" within the meaning of s 22 of the *Serious Sex Offenders Act* (NT) – application may only be validly made in respect of a "qualifying offender" – whether eight months' imprisonment imposed by the Court of Summary Jurisdiction was wholly concurrent with the term of nine years and three months imposed by the Court of Criminal Appeal – nothing in terms of order for service of sentence other than concurrently.

Criminal Code (NT) ss 192
Evidence (National Uniform Legislation) Act (NT) s 178
Local Court (Criminal Procedure) Act (NT) s 186
Sentencing Act (NT) s 50, s 59, s 137(2)
Serious Sex Offenders Act (NT) s 6, s 22, s 23, s 25, s 30, s 90, s 92

Attorney-General (NT) v EE (2013) 33 NTLR 102, *Attorney-General (NT) v JD* [2015] NTSC 28, *Hankin v The Queen* (2009) 25 NTLR 110, *Hofer v Anti-Discrimination Commissioner* (2011) 28 NTLR 154, *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, considered.

REPRESENTATION:

Counsel:

Applicant	T Anderson
Respondent	H Blundell

Solicitors:

Applicant	Solicitor for the Northern Territory
Respondent	Edmund Barton Chambers

Judgment category classification:	B
Judgment ID Number:	GRA1705
Number of pages:	19

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Attorney-General (NT) v JR [2017] NTSC 40
No. 21721844

BETWEEN:

ATTORNEY-GENERAL OF THE NORTHERN TERRITORY
Applicant

AND:

JR
Respondent

CORAM: GRANT CJ

REASONS FOR DECISION

(Delivered 2 June 2017)

[1] The Attorney-General has made application to this court in purported reliance on s 23 of the *Serious Sex Offenders Act* (NT) ("SSO Act") for a final continuing detention order or final supervision order in relation to the respondent.

[2] The application was filed on 5 May 2017. It came on for the first mention on 16 May 2017. At that time, the applicant sought an urgent preliminary hearing in pursuance of s 25 of the SSO Act to determine whether the matters alleged in the application would, if proved, satisfy the Court that the respondent is a serious danger to the community; and, if so, to set a date for the hearing of the application. The applicant

flagged its intention, in the event the court was satisfied of that matter, to seek an interim continuing detention order or interim supervision order in pursuance of s 30 of the SSO Act until final determination of the application.

[3] The matter came back before the court on 19 May and 1 June 2017 for submission. Two issues presented for preliminary determination. The first issue was whether the respondent was a "qualifying offender" within the meaning of s 22 of the SSO Act. The second issue was whether the application would be invalid in any event for non-compliance with the requirements of ss 90 and 92 of the SSO Act.

The operation of the SSO Act and "qualifying offender"

[4] The SSO Act commenced operation on 1 July 2013. This is only the fourth application to come before the court under the scheme.[1] The essential purpose, objects and operation of the SSO Act were described by Mildren AJ in *Attorney-General (NT) v JD* in the following terms:[2]

> [3] The Act seeks to remedy a concern that those prisoners who have committed very serious sexual offences are released back into the community in circumstances where there is an unacceptable risk that, upon their release, they will commit another serious sex offence. The Act represents a very important shift in the administration of justice because it impacts upon the fundamental principle that a person's liberty is not to be affected except upon proof of a criminal offence, and then only for so long as the sentence of the court in respect of that offence allows, and no longer. The scheme of the Act permits this Court in the exercise of its civil jurisdiction to make an order for

1 *Attorney-General (NT) v EE* [2013] NTSC 35; (2013) 33 NTLR 102; *Attorney-General (NT) v JD* [2015] NTSC 28; *Attorney-General (NT) v NH* (still in progress).

2 *Attorney-General (NT) v JD* [2015] NTSC 28 at [3]-[6].

continued detention or supervision beyond expiration of the Court's sentence imposed in relation to a criminal sentence even though no further offence has been committed, albeit only in very limited circumstances.

[4] The objects of the Act are expressed in s 3:

> **3 Objects of Act**
>
> (1) The primary object of this Act is to enhance the protection and safety of victims of serious sex offences and the community generally by allowing for the control, by continued detention or supervised release, of offenders who have committed serious sex offences and pose a serious danger to the community.
>
> (2) The secondary object of this Act is to provide for the continuing rehabilitation, care and treatment of those offenders.

[5] The words "serious sex offence" are defined by s 4 of the Act to mean any of the offences listed in Schedule 1 of the Act (including an offence that was in Schedule 1 at the time it was committed), an offence which substantially corresponds to such an offence which has since been repealed or is a law from another jurisdiction, or an attempt, a conspiracy or incitement to commit such an offence. The offences listed in Schedule 1 include sexual intercourse and gross indecency without consent including a range of other sexual offences where the maximum penalty is seven years or longer.

[6] The expression "serious danger to the community" is defined by s 6(1) of the Act if there is an "unacceptable risk" that the person "will commit a serious sex offence unless he or she is in custody or subject to a supervision order".

[5] So far as is relevant for these purposes, s 23 of the SSO Act provides that the Attorney-General may apply to the Supreme Court for a final continuing detention order or final supervision order in relation to a "qualifying offender". On a proper construction of the legislative scheme, an application may only be validly made in respect of a

"qualifying offender". As Mildren AJ observed in *Attorney-General (NT) v JD*:[3]

> The jurisdiction of this Court to entertain the application requires proof that the respondent is a "qualifying offender". That expression is defined in s 22(1):
>
> (1) A person is a qualifying offender if:
>
> (a) he or she has been convicted of a serious sex offence; and
>
> (b) either:
>
> (i) he or she is under sentence of imprisonment for that offence; or
>
> (ii) subsection (4) applies to him or her.
>
> Subsection (4) provides for persons who have served their sentence for the serious sex offence but are still in custody for any other reason other than under a continuing detention order.

[6] The extended definition contained in subs (4) has no application to these circumstances. At the time of the application, the respondent was neither under a sentence of imprisonment for another offence nor in custody[4] for any other reason.

[7] It is plain that in *Attorney-General (NT) v JD* the court approached the matter on the basis that its jurisdiction to entertain an application under the SSO Act was not enlivened unless the respondent was a "qualifying offender". While qualification was not in issue in the matter, that conclusion should be accepted for reason that the purpose of the legislation must necessarily be to effect a continuation of detention or

---

3 [2015] NTSC 28 at [7].

4 The term "custody" in that context must be read to mean lawful custody.

supervision of a person who remains in lawful custody at the time the application is made.

[8] The scheme does not contemplate that application may be made after release from or cessation of lawful custody. Although the matter does not depend necessarily or solely upon whether the relevant provision is couched in mandatory or directory terms,[5] it may be noticed in this respect that s 23(2) of the SSO Act provides relevantly that "an application cannot be made unless the offender … is due to cease to be a qualifying offender within 12 months". That formulation does not contemplate that application may validly be made after cessation. The relevant purpose of the legislation is that an application made in breach of that provision is invalid.[6]

The commission of a "serious sex offence"

[9] It is not in dispute that the respondent has been convicted of a qualifying offence. In particular, in July 2008 the respondent was convicted of sexual intercourse without consent contrary to s 192(3) of the *Criminal Code* (NT). The victim of the offence was the respondent's 10-year-old stepdaughter.

---

5 *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [93]; *Hofer v Anti-Discrimination Commissioner* [2011] NTSC 20; 28 NTLR 154 at [21]-[22].

6 The same considerations, but a different result, would apply to the question whether an application would be invalid for non-compliance with the requirements of ss 90 and 92 of the SSO Act. For reasons that will become apparent, however, that is not a question which requires determination in these proceedings.

[10] On 9 July 2008, the respondent was sentenced to imprisonment for six years with a non-parole period of four years and six months. That term was backdated to 8 July 2007, to take account of the fact that the respondent had been in custody in respect of the offence since that time.

[11] On 27 November 2008, the Northern Territory Court of Criminal Appeal increased the sentence to imprisonment for nine years and three months with a non-parole period of seven years.

Proceedings before the Court of Summary Jurisdiction

[12] In the interim period, the respondent was dealt with by the then Court of Summary Jurisdiction for the offences of unlawful assault and breaching a domestic violence order. On 8 August 2008, the magistrate sentenced the respondent to imprisonment for eight months for the unlawful assault and fined the respondent $600 (plus a victims' assistance levy of $40) for the breach of the domestic violence order.

[13] There are two possible scenarios in relation to the respondent's total effective period of imprisonment arising from those sentences, *viz*:

- the eight months' imprisonment imposed by the Court of Summary Jurisdiction was wholly concurrent with the term of nine years and three months imposed by the Court of Criminal Appeal, with the effect that the term expired on 7 October 2016 such that the respondent was not under a sentence of imprisonment at the time the application was made on 5 May 2017; or

- the eight months' imprisonment imposed by the Court of Summary Jurisdiction was concurrent as to one month and cumulative as to seven months with the term of nine years and three months imposed by the Court of Criminal Appeal, with the effect that the term expired on 7 May 2016 such that the respondent was under a sentence of imprisonment at the time of the application was made on 5 May 2017.

[14] At the material time, s 59 of the *Sentencing Act* provided:

> **Order of service of sentences of imprisonment**
>
> (1) Where an offender has been sentenced to several terms of imprisonment in respect of any of which a non-parole period was fixed, the offender shall serve –
>
> (a) the term or terms in respect of which a non-parole period was not fixed;
>
> (b) the non-parole period; and
>
> (c) unless and until released on parole, the balance of the term or terms after the end of the non-parole period,
>
> in that order.
>
> (2) Where, during the service of a sentence of imprisonment, a further sentence of imprisonment is imposed, service of the first-mentioned sentence shall, if necessary, be suspended in order that the sentences may be served in the order referred to in subsection (1).

[15] Section 59(2) was repealed in 2015 with the passage of the *Sentencing Legislation Amendment Act* 2015.[7]

---

7 That repeal was made subject to the operation of the savings provision in s 137(2) of the *Sentencing Act*.

[16] It is necessary for these purposes to read s 59 in conjunction with s 50 of the *Sentencing Act*, which provided then and now:

> **Imprisonment to be served concurrently unless otherwise ordered**
>
> Unless otherwise provided by this Act or the court imposing imprisonment otherwise orders, where an offender is –
>
> (a) serving, or has been sentenced to serve, a term of imprisonment for an offence; and
>
> (b) sentenced to serve another term of imprisonment for another offence,
>
> the term of imprisonment for the other offence is to be served concurrently with the first offence.

[17] The magistrate made the following relevant comments during the course of sentencing submissions:

> See, I don't believe I can [make the sentence cumulative on the Supreme Court sentence]. I'm not sure that the *Sentencing Act* actually empowers me to add any sentence to the six years he has already received. (Transcript, p 4)
>
> …
>
> And for the life of me, I can't [see] anything in the *Sentencing Act* that would specifically give this court the power to do that. (Transcript, p 5)
>
> …
>
> Now, I'm still not convinced that I can add on a sentence to the six years, because my understanding is because the Supreme Court has fixed a non-parole period, that is the impediment. What I believe can happen is that any sentence I impose today will postpone the operation of the non-parole period. And so [in] other words, it's suspended for the length of the sentence I impose.
>
> So whatever sentence I give him in relation to this matter will in effect extend his non-parole period … but not his head sentence. (Transcript, p 6)
>
> …
>
> My power's limited to imposing a sentence somewhere between today and prior to the expiry of the non-parole period. But if I do any of those two, then it will in effect extend his non-parole period. (Transcript, p 11)
>
> …

> Yes, exactly because that means the non-parole period is going to drop like that. It doesn't operate from the moment I impose the sentence. He has to serve this sentence and then the non-parole period kicks in after he served the sentence. So it continues to – it's reactivated. So the time he's already served under the non-parole period counts. During the course of the sentence I impose today, that's suspended. But once he's served that, then the non-parole period kicks in again.
>
> Yes and say for example, if I gave him 12 months, I'm not saying I'm going to do that but if [I] did, that would in effect add 12 months to his non-parole period. (Transcript, p 13)
>
> …
>
> Well, you see, no, I don't think I can do that. What I do has the effect of an accumulation in relation to the non-parole period. It is probably not the right way of describing it but I can't order that the sentence be cumulative because that would mean that I'd be adding to the six years. I don't think I've got any power to do that.
>
> …
>
> Because he's got a non-parole period of 4 ½ years and I just don't think the *Sentencing Act* allows me to tack onto his six years. (Transcript, p 14)

[18] The magistrate made the following relevant comments during the course of the sentencing remarks:

> It may make a difference because the backdated period would not interfere with a non-parole period. I think there is a very strong argument that it does not. So, it might work to the defendant's advantage if I backdated to 9 July [2008].
>
> ….
>
> Although I am not prepared to backdate the sentence to a date earlier than 9 July [2008], I consider it appropriate to backdate that eight month sentence to 9 July [2008].
>
> ….
>
> It seems to be that from today onwards your non-parole period will be suspended. You will have to serve the rest of that eight months before your non-parole period starts again. That is my view of how things work though I must say that the gaol may take a different view as they have [on] prior occasions. However, in my view that is how s 59 [of the *Sentencing Act*] should operate in your case.

[19] The approach taken by the magistrate was that he could not extend the effective term of imprisonment imposed by the Supreme Court, and that he could not backdate the eight months' imprisonment to July 2007 when the respondent was first taken into custody. The first conclusion was apparently formed on the basis that the *Sentencing Act* precluded – or at least did not empower – the making of such an order. The second conclusion would seem to have been based on the notion that the Court of Summary Jurisdiction could make no order in respect of any period during which the respondent was on remand for the charge of sexual intercourse without consent, which was subsequently dealt with by the Supreme Court. The magistrate took the view that the earliest time to which the Court of Summary Jurisdiction could backdate any sentence was 9 July 2008, being the date on which the Supreme Court sentenced the respondent for the charge of sexual intercourse without consent. The statutory or other legal basis for those conclusions is not made explicit in the sentencing remarks, or otherwise apparent.

[20] The sentence ultimately imposed by the Court of Summary Jurisdiction did not incorporate a non-parole period. As is apparent from comments made during the course of sentencing submissions, the magistrate was of the view that s 59 of the *Sentencing Act* operated such that the term imposed by the Court of Summary Jurisdiction therefore had to be served first in time, and during that service the non-parole period imposed by the Supreme Court was suspended such that the non-parole period was

in effect served in cumulation rather than concurrently with the sentence imposed by the Court of Summary Jurisdiction. By way of qualification to that operation, the magistrate appeared to consider that the month backdated to 9 July 2008 did not operate to suspend the non-parole period imposed by the Supreme Court, with the consequence that it ran in effect concurrently with the non-parole period.

[21] Leaving aside the other difficulties manifest in the adoption of that approach, some of the magistrate's conclusions concerning the operation of s 59 of the *Sentencing Act* (NT) were subsequently rejected by the Court of Criminal Appeal (in an unrelated matter) in *Hankin v The Queen*.[8] In that matter the Court of Criminal Appeal determined:[9]

- the source of the power to order two or more terms of imprisonment to be served cumulatively is s 50 of the *Sentencing Act*, and that "[u]nless … the court … otherwise orders" the terms of imprisonment shall be served concurrently;
- s 59 of the *Sentencing Act* does not create an independent source of power to order accumulation; and
- s 59(2) of the *Sentencing Act* did not mandate the suspension of any existing sentence but, rather, was a machinery provision having application only if it was "necessary" for the purpose of ensuring

8 [2009] NTCCA 11; 25 NTLR 110.

9 At [72]-79], [113]-[121].

compliance with the order of priorities established in s 59(1) of the *Sentencing Act*.

[22] It may also be noticed that in the circumstances of that case the Court of Appeal had regard to comments made in the course of sentencing submissions and in the sentencing remarks in order to discern the court's intention in imposing the sentence. The Court of Appeal concluded that even if the sentencing court was in error about the construction of s 59, if the intention was that all or part of the sentence was to be served cumulatively with a sentence previously imposed there was power under s 50 to make an order with that effect. The fact that the sentencing court might advert to some other provision, or none at all, would not invalidate that order.

Contentions

[23] The parties to this matter are in agreement that no specific form of words was required for the purpose of ordering accumulation in the exercise of the power conferred by s 50 of the *Sentencing Act*. The competing contentions may be summarised as follows.

[24] The applicant asserts that the effect of the magistrate's order was consistent with the provisions of ss 50 and 59 of the *Sentencing Act* as they then stood, in that backdating the eight month sentence to 9 July 2008 had the effect of making seven months of the sentence cumulative on the sentence previously imposed by the Supreme Court. It follows,

in the applicant's submission, that this result may be characterised as an order pursuant to s 50 of the *Sentencing Act* that the balance of seven months was to be served other than concurrently.

[25] Concerning the magistrate's express advertence to the cumulation of the sentence upon the non-parole period only, it is the applicant's contention that: the Local Court[10] has issued a Certificate of Proceedings reflecting the order made by the magistrate (discussed further below); the terms of that order operated to suspend the service of the non-parole period for seven months; on a proper construction of the legislation as it then stood there could be no suspension of the non-parole period without an attendant deferral of, or cumulation upon, service of the head sentence; and therefore the order must necessarily have operated to make the sentence imposed by the magistrate cumulative on the head sentence that had previously been imposed by the Supreme Court.

[26] It is said further by the applicant that s 186(2) of the *Justices Act* operated (and continues to operate)[11] such that no order of the Court of Summary Jurisdiction should be quashed or set aside (or otherwise denied effect) by reason of any matter of form or technical error, or any matter of description only, in the form of the minute or memorandum of order. It may be immediately noted that while the provision might

---

10 Formerly the Court of Summary Jurisdiction.

11 The provision continues in operation as s 186(2) of the *Local Court (Criminal Procedure) Act* (NT).

operate to address any asserted failure to make reference to s 50 of the *Sentencing Act* in either the sentencing remarks or the minute of the order, it does not answer the question whether there was an order that seven months of the sentence was to be served cumulatively upon the sentence previously imposed by the Supreme Court.

[27] Conversely, the respondent contends that the endorsement made by the magistrate provided only that the accused was "[c]onvicted and sentenced to 8 months imprisonment to commence 9/7/08". The Warrant of Imprisonment issued pursuant to that endorsement described the sentence as "8 month(s) commencing on 9 July 2008". The respondent asserts further that to the extent the Certificate of Proceedings issued by the Clerk of Courts on 17 May 2017 describes the order as having effect that "[f]rom 8 August 2008 the non-parole period will be suspended pending service of seven months remaining on Local Court file 20632997", it is an administrative act, document or record which cannot add to or otherwise change the content and effect of the order made by the court on 8 August 2008.

[28] Against that background, the respondent contends that given the failure of the magistrate to order any part of the sentence to be served other than concurrently, in any terms that might have been apt for that purpose, it must necessarily follow that the sentence was to be served wholly concurrently. That failure is said to be compounded, or perhaps confirmed, by the magistrate's advertence to the fact that the

correctional authorities might take a different view in relation to the relevant operation of the legislation so far as suspension, concurrency and cumulation were concerned.

[29] Finally, the respondent draws attention to two contextual matters. First, there is nothing in the transcript of proceedings which would suggest that the magistrate formed the view that the circumstances of the offending or of the respondent warranted an order that the sentence be served anything other than concurrently with the existing term. Secondly, the observations made by the magistrate during submission and sentencing were uniformly to the effect that the sentence was in its effect to run concurrently with the six-year head sentence imposed by the Supreme Court.

The operation of the order

[30] It is necessary to say something about the nature of an "order" for the purpose of s 50 of the *Sentencing Act*. The first point to be made is that an "order" for these purposes is the formal order made by the court which disposes of, or deals with, the proceeding then before it. What follows is that although it was unnecessary for the magistrate to make specific reference to s 50 of the *Sentencing Act* to order accumulation, the operation of the order will be strictly circumscribed by its terms. The second point to be made is that dialogue during submissions and the sentencing remarks do not form part of the order, although they may furnish the court's reason for the order and shed some light on the court's

intention in order to discern whether the order reflects the actual decision of the court. An order properly made will correctly express the intention with which it is made. If it does not, the question may then be whether there is any power of amendment in order to carry out the court's meaning or to make plain language which is doubtful.

[31] It is also necessary to say something about the Certificate of Proceedings issued by the Clerk of Courts on 17 May 2017. That certificate was presumably issued pursuant to s 178 of the *Evidence (National Uniform Legislation) Act* (NT). That provides, *inter alia*, that evidence of the sentencing of a person to any punishment or of an order by a court may be given by a certificate signed by the proper officer of the applicable court "showing the fact, or purporting to contain particulars, of the … order … in question". The provision operates as an exception to the hearsay rule. It does not operate as conclusive proof of either the terms of the order actually made or the operation and effect of the order.

[32] Against that background, the first question is whether the terms of the order made by the magistrate had the effect that the balance of seven months was to be served other than concurrently. On its face it does not. That the order was expressed to convict and sentence the respondent to eight months' imprisonment backdated to 9 July 2008 did not operate to stipulate that the sentence should be served either cumulatively or concurrently. In the absence of an order for cumulation there was nothing to require the sentence imposed by the magistrate to be served

in that manner and first in time, and so no occasion for the operation of s 59 of the *Sentencing Act*.

[33] The order did not take on that operation by reason of the magistrate's misapprehension that s 59 of the *Sentencing Act* necessarily required the sentence in respect of which no non-parole period was fixed (that is, the sentence imposed by the Court of Summary Jurisdiction) to be served first in time, and necessarily suspended the passage of the non-parole period that had previously been imposed by the Supreme Court. It may be concluded, then, that the order did not in its terms operate to require service of the sentence other than concurrently in any relevant sense.

[34] Even if it is accepted that comments made during the course of sentencing submissions and the sentencing remarks may be examined in order to discern the actual decision of the court, such an examination does not disclose that the court's decision was to order service of the sentence other than concurrently with the term of six years imposed by the Supreme Court (subsequently increased on appeal).

[35] First, the magistrate appears to have considered himself a passive agent whose hands were tied by the operation of the legislation. So much is apparent from the fact that the magistrate comprehended that the operation of the legislation determined matters of suspension, cumulation and concurrency, rather than those matters being determined actively by the terms of any order made by the court. It was in that

understanding the magistrate observed, "[i]t seems to be that from today onwards your non-parole period will be suspended" and went on to qualify that observation by saying it was a matter of statutory construction in respect of which the correctional authorities might take a different view.

[36] Secondly, the magistrate specifically considered there was no power to order cumulation so as to extend the head sentence. He considered that the only power available to him was the bald imposition of sentence which by operation of the legislation would suspend passage of the non-parole period while leaving the total effective period of imprisonment unaltered.

[37] Thirdly, the magistrate appeared to contemplate that but for the operation of the legislation he may have backdated the sentence to July 2007, in which case he presumably would have considered that sentence to run concurrently with the sentence imposed by the Supreme Court – again by operation of the legislation. The magistrate did not go on to consider that matter further because of the legislative constraints under which he erroneously considered he was operating. There is no consideration, for example, of whether the principle of totality properly required concurrency or cumulation, or in what proportions. This tells against any contention that the court was making an order for some result other than the default position of concurrency provided by s 50 of the *Sentencing Act*.

[38] The Certificate of Proceedings adds nothing to that analysis.

[39] It must be concluded that the eight months' imprisonment imposed by the Court of Summary Jurisdiction ran wholly concurrently with the term of nine years and three months imposed by the Court of Criminal Appeal. Accordingly, that term expired on 7 October 2016 and the respondent was not relevantly under a sentence of imprisonment at the time the application was made on 5 May 2017.

Disposition

[40] For these reasons, the respondent was not a "qualifying offender" within the meaning of s 22 of the SSO Act at the time the application was filed on 5 May 2017.

[41] I will hear the parties as to whether any further order is required in consequence of that finding.
