Olsen v Sims [2010] NTCA 8

PARTIES:	OLSEN, James
	v
	SIMS, Erica Ann
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 5 of 2010 (20632016)
DELIVERED:	30 NOVEMBER 2010
HEARING DATES:	20 OCTOBER 2010
JUDGMENT OF:	MILDREN, SOUTHWOOD & BLOKLAND JJ
APPEAL FROM:	RILEY J

CATCHWORDS:

CRIMINAL LAW & PROCEDURE – statutory interpretation – offence committed against repealed statute provided for mandatory minimum sentence – new Act gave Court a discretion for substantially same offence – whether Court of Summary Jurisdiction obliged to impose a mandatory minimum sentence of imprisonment – whether penalty imposed was greater than allowed by new Act – *Criminal Code Act 1983* (NT), s 14; *Interpretation Act* (NT), s 12

STATUTES – statutory interpretation – *Criminal Code Act 1983* (NT), s 14; *Interpretation Act* (NT), s 12

Criminal Code (NT); s 14; s 14(1); s 14(2)
Criminal Code (Qld); s 11; s 11(2)

Domestic and Family Violence Act 2007; s 4; s 120(1); s 121**;** s 121(1); s 121(2); s 121(3); s 121(3)(b); s 121(7); s 123(1)
Domestic Violence Act; s 4; s 10(1); s 10(1A)
Interpretation Act; s 3(3); s 12; s 12(2)*;* s 12(c); s 12(d)
Penalties and Sentences Act 1992 (Qld); s 9(2); s 9(2)(a); s 9(6A); s 9(6B); s 161B
Sentencing Act; s 5(1)(a); s 6A; s 121; s 121(2)*;* s 130(1)

Hoare v The Queen (1989) 167 CLR 348; *Veen v The Queen (No 2)* (1988) 164 CLR 465; followed

Baumer v The Queen (1988) 166 CLR 51; *Breeze* (1999) 106 A Crim R 441; *Cobiac v Liddy* (1969) 119 CLR 257; *Hansford v His Honour Judge Neesham* (1995) 2 VR 233; *Nguyen v The Queen* (2003) 13 NTLR 62; *Olsen v Sims* (2010) 239 FLR 405; *R v Carlton* (2009) 197 A Crim R 220; *R v Mason & Saunders* (1998) 2 Qd R 186; *R v Melville* (2003) 27 WAR 224; (2003) 142 A Crim R 38; *R v Morton* [1986] VR 863; *R v Pham* (2009) 197 A Crim R 246; *R v Truong* (2000) 1 Qd R 663; *Scott v Cawsey* (1907) 5 CLR 132; *Siganto v The Queen* (1997) 141 FLR 73; (1997) 97 A Crim R 60; *Siganto v The Queen* (1998) 194 CLR 656; *Sillery v The Queen* (1981) 180 CLR 353; *Trenerry v Bradley* (1997) 6 NTLR 175; *International Covenant on Civil and Political Rights*, Article 15.1; referred to

REPRESENTATION:

Counsel:

Appellant:	J Tippett QC
Respondent:	M Grant QC and S Brownhill

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	A
Judgment ID number:	mil10475
Number of pages:	42

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

Olsen v Sims [2010] NTCA 8
No AP 5 of 2010 (20632016)

BETWEEN:

JAMES OLSEN
Appellant

AND:

ERICA ANN SIMS
Respondent

CORAM: MILDREN, SOUTHWOOD & BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 30 November 2010)

MILDREN J:

[1] This appeal raises a question of the true construction to be given to s 14 of the *Criminal Code* and its interaction with s 12 of the *Interpretation Act* in the context of the repeal of the *Domestic Violence Act* and the enactment of the *Domestic and Family Violence Act*.

The facts

[2] On 15 March 2006, a restraining order was made against the appellant under s 4 of the *Domestic Violence Act* (the former Act). The duration of the order was for a period of 12 months. A copy of the order was served on the appellant the following day. On 17 March 2006, the appellant was

convicted of failing to comply with a previously imposed restraining order made under the former Act (the first offence). On 27 December 2006, the appellant was charged with failing to comply with the terms of the order made on 15 March 2006, which was an offence against s 10(1) of the repealed Act (the second offence). The second offence was alleged to have occurred on 14 December 2006. As at 14 December 2006 and until the former Act was repealed, s 10(1A) of the former Act provided:

> Despite the *Sentencing Act*, where a person is found guilty of a second or subsequent offence against subsection (1), the Court must sentence the person to imprisonment for not less than 7 days but not more than 6 months.

[3] On 1 July 2008, the former Act was repealed and replaced by the *Domestic and Family Violence Act* (the current Act). Because the appellant did not answer his bail, he did not come to be dealt with in respect of the charge until 9 February 2010. The conduct constituting the alleged breach of the restraining order was that the appellant attended at the residence of the protected person in contravention of a condition of the order.[1] The learned Magistrate, sitting in the Court of Summary Jurisdiction at Wadeye, determined that the sentencing provisions under the former Act had application to the appellant's circumstances and that he was bound to impose a minimum sentence of at least seven days imprisonment given his previous conviction. Accordingly, he imposed a conviction and sentenced him to seven days imprisonment, backdated to take into account time

[1] It may be that he also breached a condition that he was not to act in a provocative or offensive manner towards the protected person, but this is not clear.

already spent in custody. On the same day, a Notice of Appeal against conviction and sentence was filed and the appellant was granted bail.

[4] On appeal, Riley J (as he then was) held that the appellant was liable to be convicted because of the operation of s 12 of the *Interpretation Act*. There is no appeal from that part of his Honour's decision. His Honour also held that the learned Magistrate did not fall into error in the sentence which he imposed and he dismissed the appeal against sentence as well. The appeal to this Court relates only to the question of whether the Court of Summary Jurisdiction was obliged to impose a mandatory sentence of imprisonment in these circumstances.

The legislation

[5] The current Act provides for what are called Domestic Violence Orders or DVO's rather than restraining orders, although they are similar in effect. As Riley J correctly pointed out, the current Act operates to expand the range of people who could be protected under a Domestic Violence Order and expands the range of people who could be subjected to such an order. It defines the grounds upon which an order might be granted by reference to some criteria not found in the former Act. So far as is relevant to this case, the operative provision of the current Act which creates an offence for a breach of a DVO is s 120(1) which provides:

> A person commits an offence if:
>
> (a) a DVO is in force against the person; and

(b) the person engages in conduct that results in a contravention of the DVO.

[6] By virtue of the definition sections contained in s 4 of the current Act, it is plain that a DVO means a Domestic Violence Order made under the current Act.[2] It is also to be observed that the appellant was not charged with an offence against s 120(1) of the current Act, but with an offence against s 10(1) of the former Act.

[7] Section 121 of the current Act provides for the applicable penalties available on a finding of guilt. It is not necessary to set out the whole section. The relevant provisions are as follows:

> **121 Penalty for contravention of DVO – adult**
>
> (1) If an adult is found guilty of an offence against section 120(1), the person is liable to a penalty of 400 penalty units or imprisonment for 2 years.
>
> (2) The court must record a conviction and sentence the person to imprisonment for at least 7 days if the person has previously been found guilty of a DVO contravention offence.
>
> (3) Subsection (2) does not apply if:
>
> (a) the offence does not result in harm being caused to a protected person; and
>
> (b) the court is satisfied it is not appropriate to record a conviction and sentence the person under the subsection in the particular circumstances of the offence.

[2] See s 4, definition of **domestic violence order** or **DVO** and the definition of **court DVO.**

[8] It was not alleged that the breach of the restraining order resulted in harm to the protected person and it was submitted that the appellant would have been entitled to the benefit of s 121(3) of the current Act if he had been charged under s 120(1) of the current Act.[3]

[9] Section 14 of the *Criminal Code* provides as follows:

> **14 Effect of changes in law**
>
> (1) A person cannot be found guilty of an offence unless the conduct impugned would have constituted an offence under the law in force when it occurred; nor unless that conduct also constitutes an offence under the law in force when he is proceeded against for that conduct.
>
> (2) If the law in force when the conduct impugned occurred differs from that in force at the time of the finding of guilt, the offender cannot be punished to any greater extent than was authorized by the former law or to any greater extent than is authorized by the latter law.

[10] Sections 12(c) and 12(d) of the *Interpretation Act* relevantly provide that the repeal of an Act does not:

> (c) affect a right, privilege, obligation or liability acquired, accrued or incurred under an Act or the part of the Act so repealed, or an investigation, legal proceeding or remedy in respect of that right, privilege, obligation or liability; or
>
> (d) affect a penalty, forfeiture or punishment incurred in respect of an offence against the Act or part of the Act so repealed, or an investigation, legal proceeding or remedy in respect of that penalty, forfeiture or punishment,

---

[3] The *Domestic and Family Violence Act 2007* contains transitional provisions in Part 7.2, but it is not in contention that those provisions do not specifically deal with the issues in the case.

and the investigation, legal proceeding or remedy may be instituted, continued or enforced, and a penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been made.

[11] Section 3(3) of the *Interpretation Ac*t provides:

> (3) In the application of a provision of this Act to a provision, whether in this Act or in another law, the first-mentioned provision yields to the appearance of an intention to the contrary in that other provision.

Contentions of the parties

[12] The main argument of counsel for the appellant, Mr Tippett QC, was that in the circumstances of this case, s 14(2) of the *Criminal Code* operated so that the learned Magistrate was not compelled by s 10(1A) of the former Act to impose a mandatory minimum sentence of seven days imprisonment. His argument was that the Magistrate was not authorised under the current Act to impose a mandatory sentence of imprisonment if the appellant had been charged under that Act and, therefore, the mandatory seven day minimum no longer applied, because, to so apply it, the appellant was punished to a greater extent than was authorised under the current Act. The argument of counsel for the respondent, Mr Grant QC, was that in respect of a breach of s 120(1) of the current Act, the learned Magistrate could have imposed any sentence ranging from a finding of guilt without recording a conviction to a sentence of imprisonment for two years, that the sentence actually imposed was authorised under the current Act and was not greater than that authorised under the former Act. Under the current Act, the learned Magistrate had a discretion and was authorised to impose a sentence of

imprisonment for seven days after considering discretionary factors. The abolition of the discretion contained in the former Act to impose a lesser penalty did not constitute an increase in penalty.

[13] Mr Grant QC's submission is that although it may amount to sentencing error for a Magistrate not to consider his discretion under s 121(3)(b) in appropriate circumstances, he was nevertheless authorised to impose a sentence of seven days imprisonment under the current Act. In support of this construction, he argued that s 14(2) of the *Criminal Code* did not apply merely because a discretion to impose a lesser penalty under the current Act had been enlivened. In support of this argument, Mr Grant QC referred the Court to a number of authorities which I will now consider.

[14] In *Siganto v The Queen*,[4] the appellant had been found guilty of rape, the offence having occurred in 1994. In 1996, the *Sentencing Act* was amended to increase the mandatory minimum non-parole period from 50 per cent of the head sentence to 70 per cent of the head sentence. Section 130(1) of the *Sentencing Act* specifically provided that the Act applied to sentences passed after the commencement of that section in 1996, irrespective of when the offence was committed. The maximum penalty for rape (imprisonment for life) had not changed, nor had the section of the Code constituting the offence. The Court of Criminal Appeal held that s 14(2) of the *Criminal Code* had no application because "the law in force" referred to in sub-section (2) is the same law in force referred to in sub-section (1): "That law

[4] (1997) 141 FLR 73; (1997) 97 A Crim R 60.

is the law constituting an offence, and that law did not change from the time of the commission of the offence to the time of conviction". The decision is clearly distinguishable because in this case, the law in force constituting the offence had changed.

[15] Mr Grant QC referred the Court to a passage in the judgment where the Court considered s 121(1) of the *Sentencing Act* which provided that "Where an Act, including this Act… increases the penalty or the maximum or minimum penalty for an offence, the increase applies only to an offence committed after the commencement of the provision affecting the increase". The Court said:[5]

> In common parlance a penalty is a punishment imposed for violation of the law and it is in that sense that it is used in s 121. The abolition or reduction of a possible benefit having the effect of reducing the term of imprisonment imposed by way of a penalty does not amount to an increase in penalty.

[16] Section 121(2) of the *Sentencing Act* provides:

> Where an Act, including this Act, or an instrument of a legislative or administrative character reduces the penalty or the maximum or minimum penalty for an offence, the reduction extends to an offence committed before the commencement of the provision effecting the reduction for which no penalty had been imposed at that commencement.

[17] It was not contended before us that s 121 applies to the circumstances of this case. Riley J held that it did not assist the appellant, because "the incorporation of a discretion by which a mandatory minimum sentence may

[5] (1997) 141 FLR 73 at 80; (1997) 97 A Crim R 60 at 67.

be avoided in certain circumstances does not constitute a reduction in penalty".[6] In any event, s 121 is not enlivened in circumstances where the Act or section containing the offence is repealed and replaced with a new Act or section creating a substantially similar offence. The words "an offence" assume that the offence has not changed, as was the case in *Siganto*.

[18] The decision in *Siganto* was successfully appealed to the High Court on other grounds and special leave to appeal on grounds relating (presumably) to s 121 and s 14(2) was refused, the majority decision of the High Court noting that "parliament intended the new sentencing regime to apply to person in the position of the appellant", which is presumably a reference to s 130(1) of the *Sentencing Act*.[7] It is clear that neither the Court of Criminal Appeal's decision nor the High Court's decision in *Siganto* to refuse special leave is binding authority on the present question.[8]

[19] In *R v Mason & Saunders*,[9] the Queensland Court of Appeal considered whether Part 9A of the *Penalties and Sentences Act 1992* (Qld) applied to offences committed before 1 July 1997, when that Part came into force. The effect of s 161B, which was in Part 9A, was to increase the period during which an offender would serve a sentence in actual custody. Section 11 of the *Criminal Code* (Qld) is in very similar terms to s 14 of the *Criminal Code* (NT). The Court held that s 11(2) (which is the equivalent of s 14(2)

6 *Olsen v Sims* (2010) 239 FLR 405 at [30].
7 *Siganto v The Queen* (1998) 194 CLR 656 at 662 [13] per Gleeson CJ, Gummow, Hayne & Callinan JJ.
8 See also the discussion in *R v Truong* (2000) 1 Qd R 663 at 667-669 (de Jersey CJ, Thomas JA & Mackenzie J).
9 (1998) 2 Qd R 186.

of the NT provision) applied so that Part 9A did not apply. Davies and Pincus JJA said:[10]

> The main effect of the application of Part 9A to offences is that the offender is not eligible for release on parole until he has served 80 per cent of the term of imprisonment imposed on him…The removal of that prospect, in our view, punishes the offender to a greater extent than was authorised by the former law, within the meaning of s 11(2) and increases the penalty for the offence within the meaning of s 20C(3) of the *Acts Interpretation Act*.[11] …In our view neither s 11(2) nor s 20C(3) should be given a narrow technical construction.

[20] The latest consideration by the Queensland Court of Appeal of the effect of s 11(2) of the Queensland Code are the recent decisions of *R v Carlton*[12] and *R v Pham*.[13] The decision in *Pham* concerned an offender who pleaded guilty to four charges relating to the distribution and possession of child exploitation material. At the time of each of those offences, s 9(2) of the *Penalties and Sentences Act 1992* (Qld) (the "PSA") provided that in sentencing an offender, a court was required to have regards to principles that a sentence of imprisonment was to be imposed as a last resort and that a sentence which allows an offender to stay in the community is preferable. Subsequent to the offending, but at the time of sentence, the *Criminal Code and Other Acts Amendment Act 2008* (Qld) inserted s 9(6A) and s 9(6B) into the PSA to the effect that sub-section 9(2)(a) does not apply to certain offences (which included the offences of which the offender was convicted)

---

[10] (1998) 2 Qd R 186 at 189, per Davies & Pincus JJA, de Jersey J concurring. Affirmed in *R v Truong* (2000) 1 Qd R 663 at 669 and in *R v Pham* (2009) 197 A Crim R 246.

[11] Section 20C(3) of the *Acts Interpretation Act* (Qld) provided: "If an Act increases the maximum or minimum penalty, or the penalty, for an offence, the increase applies only to an offence committed after the Act commences.

[12] (2009) 197 A Crim R 220.

[13] (2009) 197 A Crim R 246.

and provided that in sentencing an offender for those offences, the Court must have regard primarily to other specified criteria. On appeal, the offender originally sought to appeal against the primary Judge's decision to apply the new provisions when sentencing him. The point was in fact abandoned, but the Court decided the issue anyway as it had been comprehensively addressed by the respondent. Chesterman JA (with whom Keane JA agreed, Wilson J dissenting) after referring to *Mason & Saunders; Siganto;* and *Truong* as well as other authorities said that there was no conflict between these authorities and all were correct for the propositions which they decided. The nub of his Honour's reasoning is in paragraphs [56]-[59] where he said:

> [56] Part 9A was held not to be retrospective because its provisions effectively increased the punishment for the offences to which it applied and retrospectivity was prohibited by s 11(2) of the *Code* and s 20C of the *Interpretation Act.* The amendments to s 9, by contrast, did not increase the penalties; the prohibitions did not apply, the changes were to a procedural statute with the usual presumption that they were retrospective; and there was nothing to displace the operation of s 204 as affected by s 14H of the *Interpretation Act.*
>
> [57] This application is concerned with amendments to s 9 not with any provision which has increased penalties for the offences committed by the applicant…
>
> [59] The point made was that 'laws relating to the matters taken into account in determining the level of sentence are…substantive", or arguably so. This is to suggest that a change to s 9 is a change to substantive law. I respectfully disagree …the change is to procedure. What the section does is to identify factors (but not all factors) to which a court must have regard when imposing a sentence. The actual

> imposition of a sentence is an exercise of discretion. Section 9 seeks to regulate the manner in which the discretion is to be exercised by an identification and weighting of factors to be taken into account and balanced out. A change to the factors, or a reordering of their priorities is not, in my opinion, properly described as changing a substantive law. It affects only the manner in which judges go about exercising the discretionary power of sentencing.

[21] The point which told against the application of s 11(2) of the Queensland Code in *Pham* was that the changes to the law were procedural only and not substantive. It is not always easy to decide whether a law is to be regarded as procedural. The difference between what is procedural and what is substantive was discussed by McMurdo P in *Carlton*,[14] where her Honour said:

> Procedural law is the body of rules setting out the manner, form and order in which matters may be dealt with and enforced in a court. It includes the formal steps in an action including pleadings, process, evidence and practice. On the other hand, substantive law creates, defines and regulates people's rights, duties, powers and liabilities, and contains the actual rules and principles administered by courts, both under statute law and common law… I agree with the observations made in *Breeze*[15] that s 9, which deals with the legal principles to be applied by judges when sentencing those found guilty of criminal offences, is actually substantive not procedural law.

[22] The decision in *Carlton*, which was remarkably similar factually to *Pham*, produced the same result. The leading judgment was delivered by Chesterman JA with whom Mullins J agreed, McMurdo P dissenting. The passages in Chesterman JA's judgment in *Carlton* on whether or not s 11(2) of the Queensland Act applied are virtually word for word what his Honour

---

[14] (2009) 197 A Crim R 220 at [35] and [37].

[15] *Breeze* (1999) 160 A Crim R 441 at 443-444 per Pincus & Davies JJA & Denmack J.

said in *Pham*. The point of disagreement between the majority and the dissenting opinions was whether or not the new provisions were or were not procedural provisions.

[23] Despite what Chesterman JA said in *Carlton* and *Pham*, it is not possible to reconcile all that was said by this Court in *Siganto* with the conclusion reached in *Mason & Saunders*. The first point of difference is that this Court decided in *Siganto* that "the law in force" in s 14(2) of the *Criminal Code* (NT), is the same "law in force" referred to in subs (1).[16] As I understand this part of this Court's decision, s 14(2) only operates in the circumstances described in s 14(1). It is not necessary to explore this difference, because there is no doubt that the provisions of s 14(1) of the Code have application to this case. The second obvious difference is that this Court regarded the imposition of a non-parole period as a "benefit", whereas the Queensland Court of Appeal seems to have taken quite a different view.

[24] The only other decision to which we were referred which dealt with a provision similar to s 14(2) was *R v Melville*.[17] That case dealt with whether the District Court still had jurisdiction to hear charges of rape in circumstances where the offence of rape, which carried a maximum penalty of life imprisonment, was repealed and replaced with a new offence called aggravated sexual assault with a new maximum penalty of imprisonment for

[16] (1997) 141 FLR 73 at 80; (1997) 97 A Crim R 60 at 67.
[17] (2003) 27 WAR 224; (2003) 142 A Crim R 38.

20 years. The District Court did not have jurisdiction to try offences carrying life imprisonment. The offences occurred before the amending statute came into force. The Western Australian Court of Criminal Appeal held that the effect of the equivalent provision in that State had the result that the accused was not liable to a maximum penalty of imprisonment for life and therefore the District Court had jurisdiction to try those offences. The reasoning in that case is of no assistance to the circumstances with which we are dealing.

[25] It is interesting to observe that in *Pham* and *Carlton*, the Court specifically held that the decision in *Mason & Saunders* was correctly decided. Thus, a law, which increased the mandatory minimum period before which a person could be eligible for parole, was not classified as a procedural law. The differing views as to what is substantive and what is not may be compared and contrasted with the situation in this case. It could not be said that the repeal of an Act and the enactment of an entirely new provision is a mere procedural change to the law. Nor could it be said that the fixing of a new maximum penalty is merely procedural. Similarly, I do not see how it could be said that a law requiring a mandatory minimum sentence is procedural. A change from that position to confer a discretion is therefore not properly characterised as procedural in nature and all the more so when the discretion is only enlivened if the Court finds that the breach does not result in harm. That is quite different in nature to a provision which merely regulates the

manner in which a discretion is to be exercised by the identification and weighting of factors relevant to the exercise of the discretion.

[26] In the end result, for the purposes of this case, there are only two relevant propositions which flow from a consideration of the authorities. First, changes to the procedural law are not within the purview of s 14(2). For the reasons which I have endeavoured to express, the relevant changes in this case are not procedural, but substantive. The second proposition is that the approach in Queensland in construing the equivalent to s 14(2) is that it should not be given a narrow technical construction and the Court looked at the practical effect of the amending legislation, whereas the reasoning in *Siganto* suggests that, as Chesterman JA put it, this Court "applied a more rigorous legal analysis to the provisions in question".[18] For the reasons I have already expressed, I do not agree with Chesterman JA, when referring to *Siganto* that "the refusal of special leave on this point may indicate its correctness".[19]

[27] Mr Grant QC also submitted that it was the intention of the legislature, to be inferred from the drafting of the transitional provisions contained in Chapter 7 of the current Act, that the appellant was to be sentenced according to the provisions of the former law. None of the transitional provisions deal with a breach of an order before the current law came into force. The situation is quite different from that in *Siganto* where there was a specific provision

[18] *R v Pham* (2009) 197 A Crim R 246 at [52].
[19] *R v Pham* (2009) 197 A Crim R 246 at [52].

dealing with the issue. I do not consider that any inference can be drawn from the transitional provisions.

[28] Neither party was able to refer us to any decision directly on point. The resolution of the question of construction begins with the language of s 14(2) itself aided by rules of statutory construction and any decisions on similar provisions which may throw some light on the question.

[29] Section 14(2) requires consideration of two preliminary questions. First, what was the extent of the punishment authorised under the former Act? The answer to this question is imprisonment of not less than seven days and not more than six months. No other punishment, such as a fine, could have been imposed. The second question is what was the extent of the punishment authorised under the current Act? The answer to this question is that the extent of the punishment could be as little as a finding of guilt and the recording of a conviction without any additional punishment and a sentence of imprisonment for two years. The next and critical question is whether a mandatory minimum sentence of seven days is a punishment "to any greater extent than is authorised by the current law". The appellant's contention is that because the Magistrate had a discretion to impose a lesser sentence than seven days under the current Act and had no such discretion under the former Act, a mandatory sentence of seven days confers on the appellant a punishment "to a greater extent than is authorised by the current law".

[30] The meaning of the word "extent" as found in the Shorter Oxford Dictionary is "(1) the space over which a thing extends; (2) the width or limits of application; scope". The Macquarie Dictionary gives several meanings, but relevantly for this discussion is "(1) the space or degree to which a thing extends; length, area or volume". Thus, the punishment available under the current law is greater in extent than the former law both in respect of the maximum and minimum punishments available. The word "authorised" is defined by the Shorter Oxford Dictionary to mean "possessed of authority…or legally or duly sanctioned or appointed". The Macquarie Dictionary defines "authorise" to mean "to give authority or legal power to; empower (to do something)". The appellant's argument is that the learned Magistrate was not given authority or power to impose a mandatory minimum penalty under the current Act where no harm was caused if the Court was satisfied in terms of s 121(3)(b). As the learned Magistrate did not consider that subsection, he was not authorised to impose a sentence of seven days imprisonment.

[31] The question of construction in this case is not easy to resolve. Both constructions are reasonably open. On the one hand, there is no doubt that s 14(2) of the Code applies when the maximum penalty is changed. But that does not necessarily mean that that is the only change which s 14(2) contemplates. In my opinion, the road to the correct solution is to ask what is the purpose of the legislature in enacting s 14? It seems to me that the purpose of s 14(2) is to ensure that an individual in the position of the

appellant is not to be punished more severely than the extent of the punishment that the lesser of the two laws would allow and that this interpretation favours the construction of the appellant. I have no doubt that in ordinary parlance, a law which allows a court to impose a sentence which is less than a mandatory sentence of seven days imprisonment would be regarded as a law which provides for a lesser punishment. To use the words of the section, the extent of the punishment authorised by the former Act is greater than the extent of the punishment authorised by the current law. That is consistent with the policy of the legislature as expressed in s 121(2) of the *Sentencing Act*, albeit that that provision does not strictly apply to the circumstances of this case.

[32] I would therefore allow the appeal, set aside the sentence imposed and remit the matter back to the Court of Summary Jurisdiction for re-sentence.

SOUTHWOOD J:

Introduction

[33] On 9 February 2010, the appellant was convicted by the Court of Summary Jurisdiction of breaching a restraining order contrary to s 10 (1) of the *Domestic Violence Act* (1992). He was sentenced to a period of seven days imprisonment.

[34] The appellant appeals against his sentence and the dismissal of his appeal by the appellate Judge. There are two grounds of appeal. First, the learned appellate Judge erred in concluding that s 121(3) of the *Domestic and*

Family Violence Act (2007) did not apply to the appellant in circumstances where the provision conferred a benefit upon the appellant so that any presumption against the retrospective operation of the Act is outweighed and the appellant is entitled to that benefit. Secondly, the learned appellate Judge erred in concluding that s 14(2) of the *Criminal Code* did not apply to the circumstances of the case so as to permit the appellant to contend that he came within the provisions of s 121(3) of the *Domestic and Family Violence Act* and thereby be relieved of the imposition of a period of mandatory imprisonment.

[35] The principal issue in the appeal is: did the sentencing Magistrate, punish the appellant to a greater extent than was authorised by the *Domestic and Family Violence Act*? In my opinion, he did. The sentence imposed on the appellant by the sentencing Magistrate was a greater punishment than that authorised by s 121 (1) and (3) of the *Domestic and Family Violence Act* because the sentence exceeded that which could be justified as proportionate to the gravity of the offence. As a result, the sentencing Magistrate failed to sentence the appellant in accordance with s 14(2) of the *Criminal Code*.

Background facts

[36] The background facts are as follows.

[37] On 16 March 2006, the appellant was served with a restraining order under the *Domestic Violence Act* which restrained him from contacting his partner, BG. On 14 December 2006, after consuming an unknown quantity of

alcohol, the appellant breached the restraining order by visiting BG at her home. While the appellant was there, he had an argument with her and he became enraged. No harm was caused to BG. After this the appellant and BG went outside and he was approached by the police who had been called by BG. This was the appellant's second breach of a restraining order.

[38] On 22 December 2006, the appellant was charged with committing an offence contrary to s 10(1) of the *Domestic Violence Act*. However, there were significant delays and the appellant did not appear before the Court of Summary Jurisdiction until 11 November 2009 when he pleaded guilty to the offence. The matter was then adjourned for legal argument. On 9 February 2010, the appellant again appeared in the Court of Summary Jurisdiction. He pleaded guilty and he was convicted and sentenced to seven days imprisonment under s 10(1A) of the *Domestic Violence Act*.

[39] The sentencing Magistrate acknowledged that under the *Domestic Violence Act* he was bound to sentence the appellant to no less than seven days imprisonment. He considered he should impose the minimum sentence available to him, and no more, because the appellant had only one previous conviction for breaching the restraining order, the appellant's second breach occurred with the consent of the protected person, and no harm was done to her.

[40] Subsections 10(1) and (1A) of the *Domestic Violence Act* state:

(1) Subject to subsections (1B) and (3), a person is guilty of a regulatory offence if:

(a) there is a restraining order in force against the person;

(b) the person has been served with a copy of the order;

(c) the person contravenes the order.

Maximum penalty: for a first offence - $2,000 or imprisonment for six months.

(1A) Despite the Sentencing Act, where a person is found guilty of a second or subsequent offence against subsection (1), the court must sentence the person to imprisonment for not less than seven days but no more than six months.

The Repeal of the *Domestic Violence Act*

[41] The law in force when the appellant pleaded guilty and was sentenced differed from the law in force when he breached the restraining order for the second time. The *Domestic and Family Violence Act* commenced on 1 July 2008. The Act repealed the *Domestic Violence Act*. However, under s 12 of the *Interpretation Act* and subject to s 14(2) of the *Criminal Code*,[20] prosecutions for offences committed against the *Domestic Violence Act* while it was still in force were still maintainable at the time the appellant was convicted and sentenced.

[42] Subsection 120(1) of the *Domestic and Family Violence Act* creates a similar offence to that which was created by s 10 of the *Domestic Violence Act*. Subsection 120(1) of the *Domestic and Family Violence Act* states:

[20] *Nguyen v The Queen* (2003) 13 NTLR 62 at [10].

A person commits an offence if:

(a) a DVO is in force against the person; and

(b) the person engages in conduct that results in a contravention of the DVO.

[43] Subsections 121(1), (2) and (3) of the *Domestic and Family Violence Act* stipulate the penalties that may be imposed for a breach of s 120 of the Act. Subsections 121(1), (2) and (3) state:

(1) If an adult is found guilty of an offence against section 120(1), the person is liable to a penalty of 400 penalty units or imprisonment for 2 years.

(2) The court must record a conviction and sentence the person to imprisonment for at least 7 days if the person has previously been found guilty of a DVO contravention offence.

(3) Subsection (2) does not apply if:

(a) the offence does not result in harm being caused to a protected person; and

(b) the court is satisfied it is not appropriate to record a conviction and sentence the person under the subsection in the particular circumstances of the offence.

[44] Subsection 121(7) of the *Domestic and Family Violence Act* states that s 121 applies despite the *Sentencing Act*. The purpose of this subsection is to ensure that the minimum mandatory sentence stipulated by s 121(2) of the *Domestic and Family Violence Act* prevails over any provision to the contrary in the *Sentencing Act*.

[45] The appellant claims to be entitled to the benefit of the ameliorating provisions of s 14(2) of the *Criminal Code* and s 121(3) of the *Domestic and Family Violence Act*.

Section 14(2) of the *Criminal Code*

[46] Subsection 14(2) of the *Criminal Code* states:

> If the law in force when the conduct impugned occurred differs from that in force at the time of the finding of guilt, the offender cannot be punished to any greater extent than was authorised by the former law or to any greater extent than is authorised by the latter law.

[47] The effect of s 12 of the *Interpretation Act* and s 14(2) of the *Criminal Code* is that although the appellant could be prosecuted and sentenced under the provisions of the repealed *Domestic Violence Act* for his second breach of the restraining order, he could not be punished to any greater extent than was authorised by both the *Domestic Violence Act* and the *Domestic and Family Violence Act*.

[48] Under s 10(1) and s 10(1A) of the *Domestic Violence Act* a sentencing Court must impose a penalty of between seven days and six months imprisonment for a second or subsequent offence. The provisions of s 10(1A) are set out in par [40] above. Subsection 10(1A) requires the Court to sentence a person who is found guilty of a second or subsequent offence to a sentence of not less than seven days imprisonment. The subsection specifies a mandatory minimum custodial sentence.

[49] The provisions of s 121(1) and s 121(3) of the *Domestic and Family Violence Act* are set out in par [43] above. Under s 121(1) and s 121(3), the maximum sentence is increased to two years imprisonment. However, no mandatory minimum custodial sentence is applicable if the second or subsequent offence does not result in harm being caused to the protected person and the court is satisfied it is not appropriate to record a conviction and sentence the person under s 121(2) of the Act in the particular circumstances of the offence. A sentencing Court may discharge an offender and impose no penalty, or impose a range of penalties up to a maximum penalty of imprisonment for two years.

[50] The purpose of fixing a maximum penalty is to provide a guide to the seriousness with which the community should view the offence and a directive to the Court on how to weigh the gravity of this kind of offending. The penalty of two years imprisonment specified by s 121(1) of the *Domestic and Family Violence Act* is not a mandatory penalty and the Court has discretion to impose a penalty less than that specified in s 121(1) of the Act. The sentencing discretion granted to the Court is a discretion which must be exercised according to law. Fundamental to the exercise of the sentencing discretion is the principle that any sentence imposed by the Court should never exceed that which can be justified as proportionate to the gravity of the crime in the light of its objective circumstances.[21]

[21] *Hoare v The Queen* (1989) 167 CLR 348 at 354; *Veen v The Queen* (No 2) (1988) 164 CLR 465 at 472, 485-486, 490-491 and 496.

Remarks of the Appellate Judge

[51] As to s 14(2) of the *Criminal Code* the appellate Judge made the following remarks:[22]

> It was submitted on behalf of the appellant that s 14(2) of the *Criminal Code* has application in the circumstances. The subsection provides that, if the law in force when the conduct impugned occurred differs from that in force at the time of the finding of guilt, 'the offender cannot be punished to any greater extent than was authorised by the former law or to any greater extent than is authorised by the latter law'.
>
> This subsection does not assist the appellant. There is no suggestion that the appellant has been punished to any greater extent than was authorised by the repealed Act and there is no suggestion that he has been punished to any greater extent than authorised by the *Domestic and Family Violence Act*. The Court was authorised to impose a term of imprisonment of seven days under both Acts. The inclusion of the discretion to avoid that consequence under the *Domestic and Family Violence Act* does not mean that the sentence was not authorised.

[52] In my opinion, his Honour erred in so doing.

The appellant's submissions about s 14(2) of the *Criminal Code*

[53] The appellant's principal submission was that the sentencing Magistrate failed to sentence the appellant in accordance with s 14(2) of the *Criminal Code*. The imposition of the mandatory minimum custodial sentence of seven days imprisonment was an imposition of a punishment of greater extent than that authorised by the *Domestic and Family Violence Act* because it exceeded that which could be justified as proportionate to the gravity of the offence committed by the appellant. Under the provisions of s 121(3) of the *Domestic and Family Violence Act*, the sentencing Magistrate

[22] *Olsen v Sims* (2010) 239 FLR 405 at pars [23] and [24].

was not required to sentence the appellant to a custodial sentence of at least seven days imprisonment and would not have done so.

[54] Both the stipulation of a maximum penalty and a mandatory minimum penalty in an Act of Parliament are part of the substantive law. Such provisions are not procedural provisions. The mere fact that the specification of a mandatory minimum sentence restricts the sentencing dispositions available to a sentencing judge and thereby his or her discretion does not mean that such provisions are procedural provisions. The fixing of a maximum sentence also places a known and legally defined limit on judicial discretion in imposing punishment for a particular offence.[23] The specification of a mandatory minimum custodial sentence by the legislature requires a court to impose a custodial sentence of at least the minimum duration specified by the legislature. Such a provision is plainly a substantive provision.

[55] There is an established sanction hierarchy. Custodial sanctions are at the top of the hierarchy. The stipulation of a mandatory minimum custodial penalty for an offence raises the punishment ceiling. The stipulation of a mandatory minimum custodial penalty constitutes an increase in the severity of the penalty prescribed for an offence and therefore an increase in the extent of the punishment which parliament has provided for the offence.

[23] *Hansford v His Honour Judge Neesham* [1995] 2 VR 233 at 236.

[56] Both s 10(1A) of the *Domestic Violence Act* and s 121(2) of the *Domestic and Family Violence Act* provide a more severe penalty and therefore a greater punishment in the circumstances specified by each subsection. They do so by specifying a custodial sentence of at least seven days imprisonment for second and subsequent offences. Otherwise, proportionate sentencing prohibits enlarging the punishment for second or subsequent offences, beyond what its gravity requires, because of previous convictions.[24]

[57] Likewise, the repeal of a mandatory minimum custodial penalty for an offence constitutes a decrease in the severity of a penalty which parliament has provided for the offence and therefore a decrease in the extent of punishment which parliament has provided for the offence. If parliament has reduced the severity of a penalty for an offence by repealing the mandatory minimum custodial penalty for the offence, the imposition of the mandatory minimum custodial penalty by a sentencing court may constitute the imposition of a punishment which is of greater extent than that authorised by parliament.

[58] When parliament repealed s 10 of the *Domestic Violence Act* and enacted s 121 of the *Domestic and Family Violence Act*, parliament reduced the severity of the penalty and therefore the extent of the punishment which may be imposed for a non-harmful second or subsequent breach of a domestic violence order. Parliament lowered the punishment ceiling. Under s 121 of the *Domestic and Family Violence Act* a sentencing court is no longer

[24] *Veen v The Queen* (No 2) (1988) 164 CLR 465 at 477; *Baumer v The Queen* (1988) 166 CLR 51 at 57.

authorised to impose a mandatory minimum custodial sentence of seven days imprisonment for a second or subsequent non-harmful breach of a domestic violence order if a sentence of seven days imprisonment exceeds that which is justified as proportionate to the gravity of the offending having due regard to the maximum penalty of two years imprisonment. Consequently, the imposition of a mandatory minimum custodial sentence of seven days imprisonment on the appellant means that the appellant has been punished to a greater extent than is authorised under the *Domestic and Family Violence Act* in the circumstances of this case.

[59] The reason why parliament did not expressly provide that the provisions of s 121(3) of the *Domestic and Family Violence Act* applied to an offence contrary s 10(1) of the *Domestic Violence Act* is that it was unnecessary to do so. Parliament is taken to have been aware of s 14(2) of the *Criminal Code*.

The respondent's submissions about s 14(2) of the *Criminal Code*

[60] The respondent relied on two arguments to rebut the submissions of the appellant about s 14(2) of the *Criminal Code*. First, Mr Grant QC, submitted that the penalty imposed by the sentencing Magistrate complied with the provisions of s 14(2) of the *Criminal Code*. He developed this argument as follows.

[61] Under s 10 of the *Domestic Violence Act* the sentencing Magistrate was expressly authorised to impose a penalty of between seven days

imprisonment and six months imprisonment. The sentencing Magistrate imposed a sentence of seven days imprisonment. He imposed the minimum mandatory custodial sentence on the appellant. Such a penalty was within the scope of the authority granted by parliament under that Act.

[62] Under s 121(1) and (3) of the *Domestic and Family Violence Act*, the sentencing Magistrate was expressly authorised to impose a custodial sentence of up to two years imprisonment. While a sentencing Court was not required to impose a sentence of at least seven days imprisonment for a non-harmful second or subsequent breach of a domestic violence order, a sentencing Court nonetheless had authority to do so. Indeed the sentencing Court could only exercise its discretion to impose a lesser sentence than seven days imprisonment for a non-harmful second or subsequent breach of a domestic violence order if the court was satisfied that it was not appropriate to record a conviction and sentence the person under s 121(2) in the particular circumstances of the offence.

[63] The removal of a requirement to impose a sentence equal to or greater than the mandatory minimum sentence of seven days imprisonment and the granting of a wider discretion to the sentencing court did not mean that the sentencing court was no longer authorised to impose a sentence of seven days imprisonment. The sentence of seven days imprisonment imposed by the sentencing Magistrate on the appellant was not a punishment of a greater extent than was authorised by the *Domestic and Family Violence Act*.

[64] In my opinion, the respondent's first argument cannot be sustained because it ignores the nature of the sentencing discretion and therefore the limited scope of the authority granted to a sentencing court under s 121(1) and s 121(3) of the *Domestic and Family Violence Act*.

[65] Secondly, and in the alternative, the respondent submitted that s 14(2) did not apply to this case because s 121(3) of the *Domestic and Family Violence Act* was a procedural provision. The provisions of s 121(3) of the *Domestic and Family Violence Act* did not reduce the penalty imposed by s 121(2) of the Act or s 10(1A) of the *Domestic Violence Act*. Subsection 121(3) of the *Domestic and Family Violence Act* simply provided a sentencing court with discretion to impose a lesser penalty than that specified by s 121(2) of the Act.

[66] In this regard the respondent relied on the following remarks of the appellate Judge:[25]

> A further submission presented on behalf of the appellant in relation to the interpretation of s 121(2) of the Sentencing Act should be addressed. The appellant observed that, with the passing of the DFVA, the maximum penalty for the offence of contravening a domestic violence order was increased. It is clear that the increase in penalty does not apply to the appellant because his offence was not committed after the commencement of the provision affecting the increase. However, it was argued that, for the purposes of s 121(2) of the Sentencing Act, the passing of the DFVA also reduced the minimum penalty for the offence by the introduction of a discretion permitting the court to impose a sentence which does not include the mandatory term of imprisonment previously required. In my opinion the incorporation of a discretion by which a mandatory minimum

[25] *Olsen v Sims* (2010) 239 FLR 405 at pars [30] to [32].

sentence may be avoided in certain circumstances does not constitute a reduction in penalty.

A similar issue was addressed by the Full Court in *Siganto v R* where the court dealt with an applicant found guilty, after trial, of rape. After the offences were committed, but before the trial commenced, the relevant legislation changed to require the sentencing court to set a minimum non-parole period of 70% of the head sentence for offences of the kind under consideration in that case. In addition, other legislation abolished remissions which had previously applied. The court said:

> The applicant does not derive any benefit from s 121. There was no Act or instrument of a legislative or administrative character which increased the penalty for rape between the time of the offence and the conviction. It remained imprisonment for life, subject to the powers of the court to impose a shorter term (s 120). The applicant is aggrieved that by the time he came to trial, and was convicted and sentenced, the law had been changed so that that he did not receive the prospect of benefit of the remission and the possibility of a lesser period being fixed prior to which he would not be eligible to be released upon parole. The word "penalty" is not defined in the Sentencing Act or in the Interpretation Act … In common parlance a penalty is a punishment imposed for violation of the law and it is in that sense that it is used in section 121. The abolition or reduction of a possible benefit having the effect of reducing the term of imprisonment imposed by way of a penalty does not amount to an increase in the penalty.

Similarly, in the present case, the subsequent inclusion of a discretion by which a mandatory minimum sentence may be avoided in certain circumstances did not constitute a reduction in penalty. Overall the maximum penalties for offending of the kind were increased. The amendment providing for the discretion did not, in itself, change the penalty but rather provided a power to ameliorate the penalty.

[67] Mr Grant sought to support his latter submission by reference to the following authorities: *R v Carlton* (2009) 197 A Crim R 220; *R v Mason & Saunders* (1998) 2 Qd R 186; *R v Melville* (2003) 27 WAR 224; *R v Pham*

(2009) 197 A Crim R 246; *R v Truong* (2000) 1 Qd R 663; and *Siganto v The Queen* (1997) 141 FLR 73.

[68] With regard to the latter submission, I have had the benefit of reading a draft of Mildren J's reasons for decision and I agree with his Honour's reasons for decision that the submission cannot be sustained. In my opinion, the repeal of a mandatory minimum custodial sentence is not a procedural change. It is a substantive change. The manner in which s 121(3) is drafted does not alter the fact that a court is no longer required to impose a mandatory period of imprisonment for a second or subsequent breach of a domestic violence order where no harm is caused to the protected person.

Consideration of the application of s 14(2) of the *Criminal Code*

[69] In determining the correct application of s 14(2) of the *Criminal Code*, it is necessary to start with the text of the subsection and then go on and consider the text of the relevant provisions of the *Domestic and Family Violence Act*. When interpreting a provision such as s 14(2) of the *Criminal Code*, a court should be specially careful to ascertain and apply the actual commands of the legislature.[26] Critical to the resolution of this appeal is the statement in s 14(2) of the *Criminal Code* that, "the offender cannot be punished to any greater extent than is authorised by the latter law". Subsection 14(2) of the *Criminal Code* expressly refers to notions of 'punishment' and 'authority'. Had Parliament chosen to do so it could have stated, "the offender cannot be sentenced to a greater sentence than the maximum penalty specified by the

[26] *Scott v Cawsey* (1907) 5 CLR 132 at 155.

latter law". It did not do so. The Macquarie Dictionary definition of "authorise" is "to give authority or legal power to; empower (to do something)".

[70] Under s 121(1) and (3) of the *Domestic and Family Violence Act* a sentencing court is expressly empowered to impose a sentence of imprisonment up to a maximum of two years imprisonment. However, the authority or power to impose a punishment within the sentencing range specified by the maximum penalty of two years imprisonment is an authority to impose a sentence which does not exceed that which is proportionate to the gravity of the offence. The "particular circumstances of the offence" referred to in s 121(3) of the *Domestic and Family Violence Act* must include the objective circumstances of the offence. So while it is true that a sentencing court may impose a sentence of seven days imprisonment on a person for a non-harmful breach of a domestic violence order, it is only authorised to punish a person to that extent if such a sentence does not exceed that which is proportionate to the gravity of the offence.

The first ground of appeal

[71] The appellant's first ground of appeal cannot be sustained. The case of *R v Morton*[27] was decided according to the express provisions of s 52 of the *Interpretation of Legislation Act* 1984 (Vic) and s 4 of the *Penalties and Sentences Act 1985* (Vic) in circumstances where there was no repeal of any relevant legislative provision. The decision has no application in this appeal

[27] [1986] VR 863

because of the application of s 12 of the *Interpretation Act* (NT) in circumstances where the *Domestic Violence Act* was repealed by the *Domestic and Family Violence Act*. In *R v Morton*, the Full Court of the Supreme Court of Victoria had no cause to consider any equivalent provision to s 12 of the *Interpretation Act* (NT). However, as I stated earlier, s 12 of the *Interpretation Act* must be read subject to the provisions of s 14(2) of the *Criminal Code*.[28]

Conclusion

[72] In the circumstances, the appeal against sentence should be allowed, the sentence imposed on the appellant by the Court of Summary Jurisdiction should be set aside and the matter referred back to the Court of Summary Jurisdiction so that the appellant may be re-sentenced.

BLOKLAND J:

Introduction

[73] I have had the benefit of reading earlier drafts of the reasons prepared by both Mildren J and Southwood J. I respectfully agree with and adopt their Honours' summaries of facts and arguments before this Court and their general consideration of the issues to be determined. All relevant statutory provisions relied on by the parties and considered by the Court are set out in their Honours' reasons. I will not reproduce those provisions in these reasons.

---

[28] *Nguyen v The Queen* (2003) 13 NTLR 62 at [10].

[74] At the commencement of the hearing of this Appeal, leave was granted, (with the consent of the respondent), to amend the Notice of Appeal to include the following ground:

> The learned appellate court erred in concluding that s 14(2) of the Criminal Code did not apply to the circumstances of the case so as to permit the appellant to contend that he came within the provisions of s 121(3) of the Domestic and Family Violence Act and thereby be relieved of the imposition of a period of mandatory imprisonment.

[75] This became the primary ground argued. For the reasons that follow, I have concluded the Appeal should be allowed on this ground.

The Nature of a Mandatory Conviction and Mandatory Minimum Term of a Sentence of Imprisonment

[76] As the question will ultimately require a consideration of the *extent* of the sentence the learned Magistrate was authorized to pass on the appellant, I have found it useful to revisit the nature of a mandatory conviction and mandatory minimum term of imprisonment and the circumstances in which a Court is authorized to pass such a sentence.

[77] Northern Territory sentencing law requires courts to punish offenders only *to an extent or in a way that is just in all the circumstances*.[29] A Court is not authorized to impose a minimum mandatory sentence of imprisonment unless the legislature displaces this and other fundamental principles derived from the common law and now enshrined in the *Sentencing Act* (NT). To effectively displace this principle the legislature must do so clearly and

[29] *Sentencing Act* (NT) s 5 Sentencing guidelines. (1) The only purposes for which sentences may be imposed on an offender are: (a) to punish the offender to an extent or in a way that is just in all the circumstances;

unambiguously.[30] The sole purpose of prescribed mandatory minimum sentences has been said to "require sentencers to impose heavier sentences than would be proper according to the justice of the case".[31]

[78] The appellant committed the offence when the *Domestic Violence Act* (NT) (DVA) clearly mandated the Court impose a conviction and a minimum term of seven days imprisonment in his circumstances.[32] Section 10(1A) DVA clearly displaced the principles enshrined in the *Sentencing Act* by providing the punishment was to be imposed "Despite the *Sentencing Act*". Although s 121(7) DVFA provides s 121 DVFA applies "despite the *Sentencing Act"*, s 121(3) DVFA releases the sentencing court from the restriction of s 121(2) and allows full consideration of all sentencing options. To determine the sentence once it is decided that the s 121(2) DVFA penalty does not apply, the only recourse is to the *Sentencing Act*.

[79] On the repeal of the DVA and the commencement of the *Domestic and Family Violence Act* (NT) (DVFA), the question is whether the sentencing Court retained the necessary statutory authorisation to impose a mandatory sentence in the circumstances of the appellant, that is, "Despite the Sentencing Act" or whether the Court was bound by virtue of the operation of s 14(2) *Criminal Code* (NT) to impose a sentence no greater than that provided by the "latter law", being s 121 DVFA.

---

30 *Trenerry v Bradley* (1997) 6 NTLR 175; *Cobiac v Liddy* (1969) 119 CLR 257 at 269; *Sillery v The Queen* (1981) 180 CLR 353.

31 *Trenerry v Bradley* per Mildren J at 187.

32 s 10(1A) DVA, having been found guilty of a second or subsequent offence.

[80] Section 121(3) DVFA does not authorise the imposition of a mandatory minimum term of seven days imprisonment, although clearly seven days imprisonment *may*, in a particular case, be ordered in the exercise of the sentencing discretion given the maximum penalty is two years imprisonment. Despite s 121(7) DVFA, the principles the sentencing court applies when it sentences under s 121(3) DVFA are to be found in the *Sentencing Act*, displaced only as necessary as the section as a whole makes plain. The principles of the *Sentencing Act* apply once it has been determined that it is not "appropriate" to sentence the person to the term specified in s 121(2) DVFA.

[81] In my respectful view, s 121(3) DVFA does not authorise the sentencing Court to sentence on the basis that its starting point is a conviction and seven days imprisonment unless that penalty is "appropriate" and is *just in all the circumstances*.

Application and Construction of s 14(2) *Criminal Code* (NT)

[82] Highly persuasive arguments, finely balanced, have been submitted on behalf of both the appellant and the respondent on the correct construction and application of s 14(2) *Criminal Code* (NT). Relevantly s 14(2) *Criminal Code* (NT) provides "the offender cannot be punished to any greater extent than is authorised by the latter law". The respondent argues (given the maximum penalty of two years imprisonment available under s 121(1) DVFA), the sentencing Court was clearly *authorized* to impose a sentence of seven days imprisonment, hence, it is argued, the appellant has not been

punished *to any greater extent than is authorized by the latter law*. This was submitted on behalf of the respondent to be the correct position even if the sentencing Court was in error in failing to consider the discretion granted and the statutory direction *not* to impose the seven day sentence in the circumstances provided by s 121(3) DVFA.

[83] The argument on behalf of the respondent was partly supported by reference to the limited authority available in both the Northern Territory and in comparable jurisdictions. It was however, acknowledged by Mr Grant QC for the respondent, that most relevant authorities admitted readily of distinction. In a novel question such as this, it is not surprising there is no authority quite on point.

[84] Section 14(2) *Criminal Code* has been held to have no application to cases where the offence has not been altered but the later penalty has.[33] In the context of s 121 *Sentencing Act* (NT), (extending reductions in penalty to offences committed before the commencement of the statute altering penalty), it was also held the abolition or reduction of a possible benefit having the effect of reducing the term of imprisonment actually served does not amount to an increase in penalty.[34] Section 121 *Sentencing Act* (NT) has no application to the circumstances of this matter as the offence itself has changed.

---

[33] *Signato v The Queen* (1997) 141 FLR 73, increasing the imposition of a minimum non-parole period for sexual offences.

[34] *Signato* at 80.

[85] The Queensland Court of Criminal Appeal has held the comparable provision, s 11(2) *Criminal Code* (Qld), read with *s* 20C(3) *Acts Interpretation Act* (Qld) applies to increases in non parole periods with the effect that offences committed prior to the statutory increase do not attract the higher non-parole period.[35] Although not a precisely analogous situation, importantly, Davies and Pincus JJA were of the view ss 11(2) *Criminal Code* and 20C(3) *Acts Interpretation Act* should not be given a "narrow technical construction".[36] Their Honours were prepared to examine the "real effect" of the statutory provision altering the penalty.[37]

[86] In *R v Pham,*[38] the CCA (Qld) held amendments to certain offences excluding the principle of imprisonment as a last resort did not increase the penalties but only regulated the exercise of the sentencing discretion in relation to balancing the various relevant factors according to statute.[39] The result being the new regime was applied to the appellant Pham who had committed the offences prior to the commencement of the amending Act. This too is a different set of circumstances than those confronting the parties and the Court here. This is a defined mandatory minimum term expressly excluding fundamental principles enacted in the *Sentencing Act* (NT)[40] being replaced by a provision restoring the full sentencing discretions for a person who fulfils the criteria in s 121(3) DFVA. In my view the removal of a

---

35 *R v Mason & Saunders* (1998) 2 Qd R 186.
36 *R v Mason and Saunders* at 189.
37 *R v Mason and Saunders* at 189.
38 (2009) 197 A Crim R 246.
39 *R v Pham* at 248.
40 As discussed in paras [76] and [77] above.

mandatory minimum term is of a much more substantive nature than a re-arrangement of sentencing discretions where privilege is no longer given to one or a number of sentencing principles.

[87] The respondent's argument at first blush has significant force: it is clearly the case a sentencing Court proceeding under s 121(3) DFVA may still impose a sentence of seven days by virtue of the Court being authorised to impose a maximum sentence of two years imprisonment under s 121(1) DFVA. Against that, however it is clear that when a Court is dealing with a person who fulfils the criteria under s 121(3) DVFA, the Court is expressly not authorized under the DVFA to impose the mandatory minimum sentence of seven days. The Court's starting point cannot be seven days. When the s 121(3) DVFA criteria is met, the sentencing Court must proceed to sentence the person according to usual sentencing principles and is therefore able to make all variety of orders open, under and in accordance with the Sentencing Act (NT). When s 121(3) applies, the Court is authorized to impose a sentence of seven days only when it concludes seven days imprisonment is the proper sentence in compliance with *s* 5(1)(a) Sentencing Act (NT), that is, *a punishment to an extent or in a way that is just in all the circumstances*. The sentencing court is not authorised to depart from this principle when sentencing under s 121(3) DFVA.

[88] Despite some tangential support in some authorities,[41] in my view there is little or no direct support to conclude that s 14(2) *Criminal Code* can only provide relief when the maximum penalty is changed but not when the minimum penalty is altered. There is no warrant for such an interpretation which would detract from the purpose of a general provision such as s 14(2) *Criminal Code*. The imposition of a mandatory minimum term is widely acknowledged as an increase in penalty.[42] Consequentially its removal should be viewed as a reduction.

Conclusion

[89] The removal of the mandatory minimum sentence coupled with an approach to the interpretation of s 14(2) *Criminal Code* that is not overly technical and examines the "real effect",[43] leads me to the conclusion that the correct position is the "latter law" does not authorise the Court to impose a mandatory sentence of seven days imprisonment as it is not authorised to disregard sentencing principles, in particular s 5(1)(a), *Sentencing Act* (NT).

[90] The learned sentencing Magistrate concluded he was bound to apply the mandatory minimum term under s 10(1A) DVA.[44] The sentence imposed on the appellant was not, in my view, authorised in the sense of s 14(2) *Criminal Code*.

---

[41] Discussed in paras [84]-[86].
[42] See also paras [76] and [77] above, Mildren J in Trenerry.
[43] *R v Mason and Saunders* at 189.
[44] AB 027.

[91] The approach taken here coincides or resonates with widely accepted principles both within the Northern Territory, nationally and internationally in relation to persons charged with an offence being able to benefit from subsequent reductions in penalty.[45] I would allow the principal ground of appeal.[46] I would dismiss the remaining ground.

Orders

[92] I agree the orders should be that the appeal is allowed. The sentence should be quashed and the matter be remitted to the Court of Summary Jurisdiction for re-sentence.

---

[45] Eg. s 121 *Sentencing Act* (NT) concerning alterations to penalty involving the same offence; s 11 *Criminal Code* (Qd); the principle in *R v Morton* [1986] VR 863. Article 15.1 *International Covenant on Civil and Political Rights*. "…if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby".

[46] Set out at para [74] above.