PARTIES:	WILLIAMS, Lionie
	v
	PRYCE, Leonard David
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	AS 36 of 1997
DELIVERED:	23 February 1998
HEARING DATES:	18 February 1998
JUDGMENT OF:	Martin CJ

CATCHWORDS:

Criminal law and procedure – Appeal and new trial and inquiry after conviction – Appeal against sentence – Operation of s118 *Sentencing Act* – Whether operates in respect of convictions for property offences notwithstanding s78A and s78B *Sentencing Act*

Criminal Code 1983 (NT), s251
Sentencing Act 1995 (NT), ss78A(1), 78B & 118

Bennett v Minister for Public Works (NSW) (1908) 7 CLR 372 at 384 per Isaacs J., applied.
Healey v Festini [1958] VR 225 at 228 per Gavan Duffy J, at 230 per Hudson J, distinguished.
Rose v Hvric (1963-64) 37 ALJR 1 at 2, referred to.
Cobiac v Liddy (1969) 119 CLR 257 at 269 per Windeyer J., referred to.
Trenerry v Bradley (1997) 6 NTLR 175; 115 NTR 1, followed.

REPRESENTATION:

Counsel:

Appellant:	Mr M Brugman
Respondent:	Mr J Birch

Solicitors:

Appellant:	CAALAS
Respondent:	DPP

Judgment category classification:	C
Judgment ID Number:	mar98007
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mar98007

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

No. AS 36 of 1997

BETWEEN:

LIONIE WILLIAMS
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 23 February 1998)

Appeal against sentence. The appellant contends that s118 of the *Sentencing Act* 1995 (NT), enabling fines to be imposed instead of imprisonment, operates in respect of convictions for property offences, notwithstanding the provisions of ss78A and 78B of the Act. She was convicted before the Court of Summary Jurisdiction at Alice Springs for unlawfully damaging property contrary to s251 of the *Criminal Code* 1983 (NT), the learned Magistrate held that he was bound by s78A(1) and imposed a sentence of 14 days imprisonment. That was consistent with the requirements

of that section in the circumstances of the case, that is, that where a court finds an offender guilty of a property offence (of which unlawfully damaging property is one) the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 14 days. That provision and others were enacted by way of an amendment to the Act and came into operation on 8 March 1997. It deals with the particular subject matter, that is, sentencing offenders who are found guilty of property offences.

Other provisions of the legislation, as originally enacted, deal with the range of sentencing orders which may be made. As to fines, s7(e) enables the court to order the offender to pay a fine, with or without recording a conviction, but the whole of s7 is subject to any specific provision relating to the particular offence; similarly, s16 which provides that where a person is found guilty of an offence the court may, subject to any specific provision relating to the offence, fine the offender. The appellant, however, relies on s118 where it is provided that an offence which is punishable by a term of imprisonment is, unless the contrary intention appears, punishable in addition to or instead of imprisonment, by a fine determined in accordance with a formula.

It would be open to a court having sentenced an offender to imprisonment in accordance with s78A to make an additional order by way of imposing a fine (s78B(1)). But what the appellant contends is that in accordance with its express terms, s118 empowers a court to impose a fine instead of the prescribed imprisonment. The appellant relied upon what was said by Gavan

Duffy J. in *Healey v Festini* [1958] VR 225 commencing at 228. There the defendant had been convicted of a second offence of serving liquor without a licence and s161(1)(b) of the *Licensing Act* 1928 (Vic) made him liable to imprisonment for not less than six months. Relying on s71 of the *Justices Act* 1928 (Vic), the Magistrate imposed a fine. That section was as follows:

> "Except where otherwise expressly enacted when a court of petty sessions has authority under this or under any other Act now or hereafter in force to impose imprisonment for an offence punishable on summary conviction and has not authority to impose a penalty for that offence the court when adjudicating on such offence may notwithstanding if it thinks that the justice of the case will be better met by penalty than by imprisonment impose a penalty of not more than Twenty-five pounds."

It will be noted that the provision applies except where otherwise expressly enacted, and if the court thinks that the justice of the case would be better met by a monetary penalty.

His Honour concluded that there was not an express enactment that s71 of the *Justices Act* was not applicable in the case of a second conviction for selling liquor without a licence. On the face of s161(1)(b), that was clearly so, but his Honour went on to consider whether express words were necessary to constitute an express enactment. He answered that question in the negative, holding that the two provisions were not inconsistent. At p229 his Honour referred to what could be inferred as to the legislative intent, remarking that:

> "It may be said with some appearance of cogency that if, where imprisonment is made the only punishment the Legislature had intended that a fine might ever take its place it would not in the one section have provided for two alternative punishments, and in the other have not".

Hudson J. at p230 considered that within that legislative framework an enactment which "simply in positive terms provided for the imposition of imprisonment" does not evince an intention to exclude any other penalty.

The excepting expression in the operation of s118 of the *Sentencing Act* is materially different from than in Victoria. Here, what is called for is not an otherwise express enactment, but the appearance of a contrary intention. The expression "unless the contrary intention appears" only applies to previous acts, not later. "[I]f the later Act shows a contrary intention the earlier enactment cannot control it. But they remind us of the general rule" per Isaacs J. in *Bennett v Minister for Public Works* (NSW) (1908) 7 CLR 372 at 384 cited in *Rose v Hvric* (1963-64) 37 ALJR 1 at 2. His Honour proceeded in terms which I adapt for the purposes of this case. It is an inescapable conclusion that when the legislature, presumed to know that s118 provides for an alternative to imprisonment, enacted in plain and unequivocal terms that the punishment should be imprisonment and provided expressly for orders in addition to such a sentence, but that such an order could not be made if its effect would be to release the offender from the requirement to actually serve the term of imprisonment, evinced a contrary intention. There is a clear inconsistency between s118(1) and ss78A and 78B. Had it not been for s78B, the appellant may have had a stronger argument, but that section indicates expressly the powers which a court may exercise beyond those which it is obliged to exercise under s78A, and I consider it negates leaving with the court a power to substitute a penalty for that prescribed in s78A.

There is nothing in *Rose v Hvric* on this point which causes me to change my opinion arising from the consideration of *Healey v Festini*, which it affirmed. *Cobiac v Liddy* (1969) 119 CLR 257, to which the applicant also referred, considered the operation of a provision in one Act imposing a minimum penalty against one contained in another Act enabling the court to dismiss a charge without proceeding to conviction. The two provisions were held not to be inconsistent, the imposition of a penalty being dependent upon a conviction being first recorded. The remarks of Windeyer J. at p269 as to the likelihood that Parliament would intend to close all avenues of exception, in the face of a rule leading to serious consequences, provide guidance, but, in this case, I consider Parliament did intend to close all such avenues.

The Court of Criminal Appeal in *Trenerry v Bradley* (1997) 6 NTLR 175; 115 NTR 1, held that s78A was mandatory, and that by reason of s78B the Court could not exercise power to suspend the sentence or fix a non-parole period. The term of imprisonment imposed must be actually served in prison. It would be totally inconsistent with the reasons expressed in the decisions of the Court in that matter to now hold that instead of imposing the sentence required by s78A a court could substitute a fine.

The appeal is dismissed.
