PARTIES:	**PAULINE BIRDWOOD**
	v
	RAYMOND MICHAEL MURPHY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	JUSTICE'S APPEAL
FILE NO:	JA 54 of 1997 (9705727)
DELIVERED:	3 SEPTEMBER 1997
HEARING DATES:	5 AUGUST 1997
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Appeal - s163 *Justices Act* - s210 *Criminal Code* - Police Bail - own recognisance $500 - Bail estreated and no evidence offered - magistrate's discretion where making or enforcing a forfeiture order -whether natural justice need be afforded before bail is estreated or forfeiture order enforced.

Bail - whether an appeal lies from an order of a magistrate in relation to questions of bail.

Bail Act is a code - magistrate when dealing with matters of bail is not acting as a court of summary jurisdiction.

Legislation

Bail Act
Criminal Code
Justices Act
Criminal Law Consolidation Act

Cases

Schoenmakers (1991) 58 A Crim R 38 followed;
Mesiti [1984] WAR 21; (1983) 12 A Crim R 249 approved;
Regina v Southhampton Justices; ex parte Green [1976] 1 QB 11 distinguished;
Sweatman v Le Griffin (1987) 35 A Crim R 133 followed;
R v Central Criminal Court ex parte Medni Naraghi and Shirim Binji (1980) 2 Crim AR (S) 104 distinguished;
Green v Lynch (1983) 21 NTR 1 doubted;
Panagiotidis v Jakacic (1986) 41 SASR 591 approved;
Rigney (1989) 40 A Crim R 325 approved;
Gray v Sweatman (1987) 45 SASR 517 approved.

REPRESENTATION:

Counsel:

Appellant:	C Gibson
Respondent:	A Fraser

Solicitors:

Appellant:	KRALAS
Respondent:	Director of Public Prosecutions

Judgment category classification:	A
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. JA 54 of 1997 (9705727)

BETWEEN:

PAULINE BIRDWOOD
Appellant

AND:

RAYMOND MICHAEL MURPHY
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 3 September 1997)

This is an appeal pursuant to s163 of the *Justices Act*.

The appellant was charged on information that on the 13th day of March 1997 at Katherine she did steal a can of corned beef and a packet of ham valued at $4.57 the property of Woolworths Pty Ltd, contrary to s210 of the *Criminal Code*. The appellant had been bailed to appear at the Katherine Court House in the sum of $500 in her own recognizance at 10.00 am on the 1st of April 1997. She did not answer her bail. The prosecutor indicated to the court that he would offer no evidence and asked that the bail be estreated. The learned Magistrate made an order forfeiting the recognizance in the sum of $500 and ordered that a warrant of commitment issue for $500 or for 10 days' imprisonment. The information was dismissed.

The grounds of appeal are as follows:

"1. That the learned Magistrate erred in ordering the bail be estreated without giving the appellant an opportunity to be heard.

2. That the learned Magistrate erred in that he failed to give any or any proper consideration to the suspension or mitigation of forfeiture as provided in s41 of the *Bail Act.*

3. That the learned Magistrate erred in that he failed to give the appellant any or any reasonable time to pay the sum ordered to be paid.

4. That the learned Magistrate erred in that he failed to give any weight to the fact that the Prosecution had offered no evidence in support of the charge that she had been bailed to appear."

The relevant provisions of the *Bail Act* are to be found in s39, 40 and 41.

S40 is as follows:

"40. ENFORCEMENT OF BAIL UNDERTAKINGS &c.

(1) Where -

(a) an accused person fails to comply with his bail undertaking; and

(b) he or another person has entered into an agreement pursuant to a bail condition to forfeit an amount of money,

the court before which the accused person was required to appear in accordance with his bail undertaking may order that the amount referred to in paragraph (b) be forfeited and paid to the Territory.

(2) Notwithstanding section 4(1) of the *Claims by and against the Government Act*, where security or an amount of money

has been deposited under an agreement entered into as a condition of the grant of bail to an accused person, a court may, when making an order under subsection (1), make a further order that the security or amount of money so deposited be applied in or towards payment of the amount ordered to be forfeited.

(3) A court shall endorse or cause to be endorsed on the bail undertaking of an accused person particulars of every order made under subsection (1) or (2).

(4) Where an order is made under subsection (1), it may be enforced under Division 6 of Part IV of the *Justices Act*.

41. SUSPENSION OR MITIGATION OF FORFEITURE

(1) A court may, when making an order under section 40(1), determine that the liability of all or any of the persons liable upon or in respect of an agreement referred to in section 40(1)(b) shall be remitted, suspended or reduced.

(2) Where an order has been made under section 40(1), the court may, at any time, order -

(a) that the order for forfeiture and payment to the Territory made under section 40(1) be cancelled or suspended; or

(b) that the liability of all or any of the persons liable upon or in respect of the agreement referred to in section 40(1)(b) shall be remitted, suspended or reduced, or both.

(3) The court, in making an order under subsection (2), may -

(a) impose such terms and conditions as it thinks fit; and

(b) make an order consequential on or incidental to such an order.

(4) An order made under this section shall not affect the validity of anything done to enforce the order under section 40(1) before making the first-mentioned order."

The prime submission of counsel for the appellant was that s41(1) provided a discretion in the court to remit suspend or reduce an amount which otherwise would be ordered to be forfeited. In order to exercise that discretion properly it is essential that the defendant be apprehended and brought before the court pursuant to a warrant issued under s39. This was essential because the provisions imply that the court is required to act in accordance with the principles of natural justice, which in the circumstances, means to give the appellant an opportunity to be heard before making a forfeiture order.

Counsel for the appellant submitted that this interpretation was supported by provisions of s62A of the *Justices Act* which provide as follows:

> "62A. PROCEDURE WHERE PERSON GRANTED BAIL FAILS TO APPEAR
>
> If a defendant who has been apprehended, whether under or without a warrant, and released on bail in accordance with the *Bail Act*, fails to appear in accordance with his bail undertaking, the Court, in addition to issuing a warrant under section 39 of that Act, may -
>
> (a) adjourn the hearing until the defendant is apprehended; or
>
> (b) subject to section 62AB, proceed *ex parte* to the hearing of the complaint and may adjudicate on the complaint as fully and effectually, to all intents and purposes, as if the defendant had appeared in accordance with his bail undertaking."

S4 of the *Justices Act* defines "complaint" to include "a charge of minor indictable offence, if, and when, the Court of Summary Jurisdiction proceeds to dispose of the charge summarily."

The charge which the appellant faced was one which the learned Magistrate had jurisdiction to hear and determine summarily vide s120 of the *Justices Act*.

The appellant also submitted that pursuant to s84 of the *Justices Act* the learned Magistrate had a discretion to order that the forfeiture be enforced either by distress, and in default of sufficiency of distress, by imprisonment, or by imprisonment without distress: see s84. This also implied a right to be heard.

Counsel for the respondent submitted that although s40(1) of the *Bail Act* uses the word "may", and although there was a power under s41(1) to remit, suspend or reduce the amount ordered to be forfeited, there was no requirement in relation to forfeiture of bail that the accused be given an opportunity to be heard before the forfeiture order is made. The relevant remedy was provided by s41(2) which enabled the appellant to apply to the Magistrate at any time to cancel or suspend the forfeiture order or to remit suspend or reduce the amount ordered to be paid.

Further, counsel for the respondent submitted that there was no right of appeal from a forfeiture order pursuant to s163 of the *Justices Act*.

I consider that the submissions of the Counsel for the appellant are not supported by the language of the provisions of the *Bail Act* to which I have referred which are explicable if one bears in mind the common law provisions relating to bail.

In the case of *Schoenmakers* (1991) 58 A Crim R 38 Foster J referred to the position at common law at pages 42-43:

> "It seems quite clear that, at common law, recognisances, including recognisances relating to bail, were automatically forfeited upon breach of any of their terms and conditions with the result that the amount of the recognisance became due and payable to the Crown. The court dealing with the matter had no discretion other than to declare the forfeiture upon proof of breach and order that the recognisance be estreated. The early procedure is referred to in *Blackstone's Commentaries* (17th Ed., 1830) Vol. 4, p252, as follows:
>
> > ".... if the condition of such recognizance be broken ... the recognizance becomes forfeited or absolute; and being *estreated* or extracted (taken out from among the other records) and sent up to the Exchequer, the party and his sureties, having now become the Kings absolute debtors, are sued for several sums in which they are respectively bound." [Original emphasis.]
>
> In *Jowitt's Dictionary of English Law* (2nd ed. 1977), p727, "estreat" is defined as "a copy of a record of the court" and it is said that:

> "the word is now, however, used only in connection with fines, forfeitures and recognisances. If a condition of a recognisance is broken, the recognisance is forfeited, and, on its being estreated, the cognisors becomes debtors to the Crown for the sums in which they are bound (*Fines Act*, 1933). Formerly a recognisance was estreated (that is, extracted) by a copy being made from an original and sent to the proper authority to be enforced; thus estreated recognisances in a superior court and courts of assize were sent into the Exchequer, while those before the justices of the peace were sent to the sheriff, with writs of execution to enable him to levy the amounts …."""

The Court of Exchequer had the power to mitigate debts arising upon recognizances and to enter satisfaction of part of the judgment for the amount of the recognizance: see *Mesiti* [1984] WAR 21; (1983) 12 A Crim R 249, at 24 and at 251.

In my view, the word "may" in s40(1) does not confer a discretion on the court notwithstanding the power in s41(1) to remit, suspend or reduce the amount. This is consistent with the history of the estreating of recognizances, established authority and the language of s41(1). As to the word "may" in s40, there are a number of authorities which have interpreted that word, in the context of forfeiture provisions for breach of recognizance as not conferring a discretion; see *Mesiti*, *supra*, where they are discussed by Kennedy J. Further, s41(1) provides that the court "may" when making an order under s40(1), determine that the liability of all or any of the persons liable upon or in respect of an agreement referred to in s40(1)(b) shall be remitted, suspended or reduced. The language of the sections suggests that the forfeiture order to be

made under s40 is for the full amount but that there is a discretion under s41 to remit, suspend or reduce the amount. This is rather similar to the powers previously exercised by the Court of Exchequer.

There is authority in England where the Court of Appeal has held that the word "may" does confer a discretion in relation to the breach of recognizances: see *Regina v Southhampton Justices, ex parte Green* [1976] 1 QB 11 at 19 per Lord Denning, M.R. However the provisions there being interpreted were quite different from the provisions of ss40 and 41 of the *Bail Act*. There the relevant provisions of the *Magistrates Act 1952*, s96(1) and (3) provided relevantly:

> "(1) Where a recognizance ... is conditioned for the appearance of a person before a magistrates' court ... and the recognizance appears to the court to be forfeited, the court may, *subject to the next following subsection*, declare the recognizance to be forfeited and adjudge the persons bound thereby, whether as principal or sureties, or any of them, to pay the sum in which they are respectively bound." (Emphasis mine).
>
> "(3) The court which declares the recognizance to be forfeited may instead of adjudging any person to pay the whole sum in which he is bound, ad judge him to pay part only of the sum or remit the sum."

The relevant difference between the provisions of the *Bail Act* and the provisions of the *Magistrates' Courts Act 1952* is that s96(1) of the latter Act was specifically made subject to subsection (3), which showed that the court had a discretion.

Nevertheless, I accept the argument of counsel for the appellant that the court certainly had a discretion under s41(1). However I do not consider that this implies that before making an order under s40(1) that the appellant is entitled to be heard. In my view s41(1) is facilitative. There are two circumstances under which it might operate. First, the court may have issued a warrant and brought the defendant before the court before making the forfeiture order. Alternatively, even if the defendant had not been arrested, either because no warrant was issued or because the defendant is unable to be found, the surety or the sureties may be in attendance.

This is supported by the provisions of subsection (2) which empower the court at any time to cancel or suspend an order made under s40(1) or remit, suspend or reduce the liability of all or any of the persons liable upon or in respect of the agreement referred to in s40(1)(b). Such a provision would have little purpose if the court was always obliged before making an order under s40 to hear the defendant or the defendant's sureties.

I am supported in my conclusions by the judgment of Cox J in *Sweatman v Le Griffin* (1987) 35 A Crim R 133 at 142-143. S19(1), of the *Bail Act* (SA) was in similar terms to s40(1) of the *Bail Act* (NT) and s19(3) of the former Act was similar to s41(2) of the latter. At pp 142-143 Cox J said:

"In the case of many statutory provisions that empower a court or tribunal, in its discretion, to make an order against someone for the payment or forfeiture to the State of a sum of money, an adverse order could not be made without first giving the person concerned the right to be heard on the matter. Such a right would usually be implied, if it did not appear in the Legislation in so many words: see, for example, *Southhampton Justices, ex parte Green* [1976] QB 11; c.f. s39(2) of the *Justices Act*. The power of a court to order the forfeiture of a bail bond, however, does not readily lend itself to that kind of interpretation. It is usually the failure of the defendant to appear at court that makes the forfeiture order appropriate, and would frustrate the purpose of the bond if an order could not be made against him and his guarantor in his absence. A forfeiture order under subs (1) of s 19 therefore, will generally be made, at least against a missing defendant, forthwith on the ex parte application of the Crown, if not on the courts own motion; c.f. the proviso to the repealed s 39(2). Given the safeguard provided by subs (3), an ex parte order against a guarantor will not usually produce any injustice, although I am far from criticising the course that was taken here of giving the guarantor, on the court's own initiative, the opportunity of showing why a forfeiture order should not be made against her. However, the point for present purposes is that it is the likelihood of a forfeiture order being made ex parte that makes subs (3) necessary. In other circumstances, as I have said, one would expect that the statutory forfeiture provision would be qualified by a "show cause" mechanism; the court or tribunal, having giving the person concerned the right to be heard, would make an appropriate order and that would be the end of the matter. No-one would argue in such a case that there was a power in one party or the other to re-open the matter later. I think that the special provision in subs (3) of s 19 in the *Bail Act* should be seen as a necessary complement to a forfeiture power that will in the nature of things usually be exercised in the defendant's absence; in other words, the subsection, in effect, gives the defendant the right to make submissions that would ordinarily be expressed or implied in a power to order the forfeiture of the sum of money to the Crown. There is no reason, in my view, to suppose that Parliament intended to go further than that and give a defendant, with respect to his bail bond, an advantage, in the form of a right to make repeated applications, that Parliament does not ordinarily bestow. The argument in this respect is less cogent if one considers the case of the guarantor in isolation, but it is understandable that Parliament should have made the same provisions for both classes of persons amendable to a forfeiture order under s 19."

I note in this respect the different approach in England in *Regina v Southhampton Justices ex parte Green* (*supra*), and in *R v Central Criminal Court ex parte Medhi Naraghi and Shirim Binji* (1980) 2 Crim A R (S) 104, but I think that the judgment of Cox J is compelling and should be followed.

As to the argument based upon s62A of the *Justices Act*, whilst it is true that that provision does not specifically provide a power in the Justices to proceed ex parte in relation to the recognizance, I think that it is clear that no such provision is necessary, as the provisions of s40(1) are mandatory. For similar reasons I do not consider that the learned Magistrate was required to afford natural justice to the appellant before making an order under s84 of the *Justices Act* in enforcement of the forfeiture order.

This is sufficient to dispose of the appeal, but I consider that I should deal with the question of whether or not the appeal is competent. There is authority in this jurisdiction that an appeal does lie from an order of an magistrate in relation to questions of bail pursuant to s163 of the *Justices Act* see *Green v Lynch* (1983) 21 NTR 1 per O'Leary J. It is interesting to note that although the *Bail Act* commenced on the 29th of June 1982, his Honour did not refer to its provisions in arriving at his conclusion. In any event it is my view that later authority, which establishes that there is no appeal pursuant

to s163 of the *Justices Act* from a decision made by a magistrate in relation to bail is to be preferred.

In my opinion the provisions of the *Bail Act* provide a code which deals with all questions relating to bail. It is important to note that the Act extensively deals with the subject of bail and all its incidents and provides in s4(2) that the Act applies in relation to the grant of bail to accused persons to the exclusion of any other law in force immediately before the commencement of the Act so far as any other such law made provision for or in respect of bail for accused persons. Part VI of the *Bail Act* provides an extensive system for the review of bail including review by the Supreme Court of the decision of a magistrate or of a justice or of the decision of the Supreme Court however constituted. S36(3) provides that the review of such a decision is to be by way of rehearing. There is no provision in the *Bail Act* providing for any appeal. As mentioned previously South Australia has a similar Act. In *Panagiotidis v Jakacic* (1986) 41 SASR 591 at 592 King CJ, with whom White and O'Loughlin JJ agreed, held that the *Bail Act* 1985 (SA) was a code for the grant and refusal of bail. At p 592, His Honour said:

> "It makes elaborate provision as to the persons eligible for bail, the authorities which may grant bail, applications for bail, procedures to apply in relation to such applications, the criteria to be applied in determining such applications, and bail agreements and guarantees. The Act is clearly intended to cover the whole field of law in relation to such matters and to exclude and supersede all other legal provisions relating to bail.

> The Act makes careful provision for review of bail decisions (Part IV), but makes no provision for appeals. The decisions which are made subject to review of decisions are bail authorities other than the Supreme Court. Decisions made by the Supreme Court are not subject to review ....
>
> There is in the above scheme of things no room, in my opinion, for an appeal against the decision on review, or indeed against a decision of a Supreme Court Judge on an original application for bail."

See also *Rigney* (1989) 40 A Crim R 325 at 333-334 where Perry J, following *Panagiotidis v Jakacic* held that there was no power to order payment of an amount forfeited by instalments, there being no specific provision in the *Bail Act* conferring such a power. It was argued before Perry J that the power existed pursuant to s300a of the *Criminal Law Consolidation Act* and that that power was grafted onto the powers conferred by s19 but His Honour held that the provisions of s300a of the *Criminal Law Consolidation Act* which allowed an order directing payment of a fine by instalments were to no avail and they should be regarded as being displaced and superseded by the provisions of the *Bail Act* .

Further in *Gray v Sweatman* (1987) 45 SASR 517 Bollen J held that an appeal by a guarantor against a decision of a magistrate refusing to reduce the amount of forfeiture stipulated in the guarantee agreement or alternatively to rescind the order forfeiting the amount so stipulated was incompetent. His Honour discussed in some detail the decision of O'Leary J in *Green v Lynch*

and declined to follow it. The essential reasoning of Bollen J appears to be based on two considerations: first there being no right of appeal to be found in the *Bail Act* no appeal exists as the *Bail Act* is a Code; secondly that in any event the magistrate when dealing with matters of bail is not acting as a court of summary jurisdiction and therefore the provisions of s163 of the *Justices Act* do not apply. With respect I consider that Bollen J is correct on both grounds. Nevertheless in a proper case *certiorari* may still lie: see *Regina v Southhampton Justices ex parte Green*, (*supra*).

Finally I should say something about the way in which the proceedings were disposed of. It is plain that the decision of the prosecutor to offer no evidence did not affect the obligation of the appellant to answer her bail. The practice adopted by the prosecutor is one of very long standing in the Northern Territory. The purpose of the practice is no doubt to relieve persons in the position of the appellant from both a forfeiture order as well as possibly a conviction and penalty for the offence. In minor matters this no doubt may be seen by a prosecutor as a suitable way of disposing of the matter. Any injustice caused to the appellant can be remedied upon the appellant making application to the court pursuant to s41(2) of the *Bail Act*. I note in passing, that the application must be made to the same court as made the forfeiture order: see also the definition of "court" in s3(1) of the *Bail Act*.

Accordingly the appeal is dismissed.