PARTIES:	MICHAEL PATRICK TURBITT
	v
	LEONARD DAVID PRYCE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA60 of 1997
DELIVERED:	21 January 1998
HEARING DATES:	16 and 19 December 1997
JUDGMENT OF:	Kearney J

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Criminal Law and Procedure – Appeal and new trial, pardon and inquiry subsequent to conviction – Appeal and new trial – Justices – Appeal against sentence – Sentence manifestly excessive – offence committed before conviction for prior offence not 'a second or subsequent offence'– Need for statistical material in sentencing –

Domestic Violence Act (NT) – s10(1), (1A), 'second or subsequent offence'
Sentencing Act 1995 (NT) – s43(6)(b), and s58

McInerney (1986) 28 A Crim R 318, applied.
Ellis v Maley (unreported, Supreme Court (NT), Angel J, 24 May 1996), considered.
O'Hara v Harrington (1962) Tas. S. R. 165, applied.
Donlan v Appleton; ex parte Appleton (1989) 1 QR 274, distinguished.
Schluter v Trenerry (unreported, Supreme Court (NT), Martin CJ, 21 August 1997), considered.

REPRESENTATION:

Counsel:

Appellant:	G.A. Georgiou
Respondent:	J.W.A. Birch

Solicitors:

Appellant:	NTLAC
Respondent:	Office of the Director of Public Prosecutions

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kea98003

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

No. JA60 of 1997

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against a sentence imposed by the Court of Summary Jurisdiction at Alice Springs

BETWEEN:

MICHAEL PATRICK TURBITT
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 21 January 1998)

The appeal

This is an appeal pursuant to s163(1)(a) of the *Justices Act* against the severity of a sentence of 2 months imprisonment imposed on the appellant by the Court of Summary Jurisdiction at Alice Springs ("the Court") on 10 October 1997, and directed to be served cumulatively upon a sentence of 3

years and 9 months imprisonment imposed by the Supreme Court on 19 September 1997. The offence of 26 March 1997 for which the sentence was imposed was said to be the appellant's third failure to comply with the terms of a restraining order apparently of 31 October 1996, under s6 of the *Domestic Violence Act* ('the Act').

The proceedings in the Court

On 10 October 1997 the appellant pleaded guilty to a number of charges, in 3 separate summonses. It is informative to examine the first two sets of charges, before coming to the relevant proceedings, no.9707828.

(a) Proceedings no.9624152

The appellant was convicted of 4 offences committed on 1 November 1996. Two were failures to comply with the restraining order; the other two were firearms offences. For failing to comply with the restraining order, the appellant was sentenced to 4 months imprisonment; it was directed that he serve this sentence concurrently with an effective sentence of 3 years and 9 months imprisonment imposed on him by the Supreme Court on 19 September 1997 for 9 other offences he committed on 1 November 1996 - aggravated unlawful entry, aggravated unlawful assault, stealing and 6 counts of assaulting police officers. His Worship took account of the principle of totality when imposing the concurrent sentence of 4 months imprisonment, on the basis that the failures to comply with the restraining order constituted part of an overall criminal episode on 1 November 1996, which had resulted in the Supreme Court sentence of 3 years and 9 months imprisonment.

For the firearms offences, the appellant was fined $600 with $40 victims' levy, in default 13 days imprisonment.

The 4 offences arose from the earlier stage of what ultimately became a 'siege' situation on 1 November 1996; the admitted facts were as follows:

> "…on Wednesday 30 October 1996 the [appellant] was at his flat at Bradshaw Drive. [He] spent the day drinking there. At about 4.30 pm [his] de facto, one Krisha Prior, came home from work. [They] began to argue about the future of their relationship, which she wanted to end. The [appellant] pushed her a number of times and commenced to throw some furniture around the flat. Ms Prior contacted police while the [appellant] continued to throw some furniture around the flat. The police attended a short time later. He was spoken to and agreed to keep the peace.
>
> The [appellant], once the police had departed, again began to act aggressively, and throw objects around the flat. As Ms Prior was attempting to call the police he pulled the telephone cord out of the telephone. [She] then attempted to leave the area in her motor vehicle. The [appellant] lay under the back rear tyres of the vehicle. She then alighted from the vehicle and ran to her flat to call the police. While she was doing this, the [appellant] removed the spark leads from the vehicle. The police re-attended a short time later and the [appellant] was again cautioned. [Ms Prior] was counselled by the police in relation to domestic violence options, but chose not to take any action at that time, if the [appellant] calmed down.
>
> [Ms Prior] then left the flat for a short time; when she returned she noticed the telephone cord had been cut. The [appellant] then began to abuse and push [her] again. He put his arm around her neck and began to choke her. [She] moved on to the balcony outside the flat; the [appellant] forced her against the balcony rail. He would not allow her to move.
>
> At this point in time a friend of [theirs] arrived. The friend told the [appellant] to let [Ms Prior] go, which he did. He was extremely agitated at the time. The [appellant] then went to [Ms Prior's] car and kicked [a] window, smashing it. [Ms Prior] left the flat with the friend and went to

the police station. As [she] left the flat the [appellant] began to try and smash the windscreen on her car.

During Thursday 31 October, [Ms Prior] and the [appellant] were again at the Bradshaw Drive flat and were arguing over some furniture and bond money. About 7.40 pm on that day the [appellant] again became agitated and threatened to smash the windows in the flat. [Ms Prior] then attempted to call the police on her mobile phone, but the [appellant] took it from her. [He] then left the flat and drove off in a motor vehicle. [Ms Prior] contacted the police because she was scared the [appellant] would return and carry out his threat to smash the windows of the premises.

[She] was conveyed to the police station. Police applied for a section 6 restraining order under the Domestic Violence Act which was granted by the magistrate. *At 10.30am on Friday 1 November the [order] was served on the [appellant] by police. [It prevented] him from approaching [Ms Prior] at the Bradshaw Drive premises.*

At about 6.30 pm on Friday 1 November the [appellant] went to Mobil Larapinta [garage where Ms Prior] had taken her car for repairs. Before [she] returned to the garage] the [appellant had] paid the repair bill and [taken] the keys of [her] car. He then waited for her to attend, to collect the car. When she arrived the [appellant] refused to give her the car keys, unless she talked to him. [She] eventually got the keys, with the assistance of a third person. She then began to drive off. The [appellant] followed her in his own car; she drove to the police to report the matter. The [appellant] drove to the Bradshaw Drive flat, where he left a note for [Ms Prior] on the front door, [which] asked [her] to meet him at a local club the next day." (emphasis added)

I note that this appears to be the first alleged breach of the terms of the restraining order. Continuing with the admitted facts:

"[Ms Prior] returned to the flat and noticed that the note was on the door. She then decided to return to the police station. As she drove out from the flat [the appellant] arrived in his vehicle. He then followed her as she drove towards the police station … to the intersection of the Stuart Highway and Larapinta Drive; [he] then desisted.

Sometime during the evening of the 1 November the [appellant] went to flat number 3, 4 Undoolya Road, where he had been staying, and stole a .22 bolt action rifle which was unregistered and unlicensed. [Ms Prior] returned to the flat [at Bradshaw Drive] at about 7.30 pm with a police

> officer, as she was scared the [appellant] would return to the flat. The officer remained at the flat until 9.30 pm. At about 9.45 pm the [appellant] returned to the flat at Bradshaw Drive, and asked [Ms Prior] if he could speak to her. She said 'no', and called the police. The [appellant] then left the flat. Police re-attended, but they were unable to locate him in the area.
>
> At about 10.44 pm the [appellant] returned to the flat [at Bradshaw Drive] in his vehicle, and parked it in the car park next door … . He opened the door to the flat with a set of keys that he had. At the time he was carrying the rifle. [Ms Prior] attempted to hold the door shut, but the [appellant] forced his way in and grabbed her; she managed to run out of the flat and went to a nearby public phone and contacted the police."

I note that this incident about 10.44pm appears to be the second breach of the terms of the restraining order. I should add that from his Honour's sentencing remarks on 19 September 1997 it appears that when the police came the appellant refused to yield up the rifle; walked about the flat with the rifle under his chin threatening to kill himself; later pointed it at police officers with threats to kill; later fired a shot into the roof; and later, outside, was shot in the lip, captured, and hospitalized for 11 days.

(b) Proceedings no.9523674

On 20 February 1996 a sentence of 6 months imprisonment had been imposed on the appellant following his conviction for knowingly obtaining payment of an allowance contrary to the *Social Security Act* 1991 (C'wlth); service of the sentence was directed to be suspended upon his entering into a bond to be of good behaviour, for a period of 2 years. It was submitted to his Worship on 10 October 1997 that the appellant's offences of 30 October

and 1 November 1996, detailed earlier, constituted a breach of his bond. His Worship considered that no action should be taken in relation thereto.

(c) The relevant proceedings no.9707828

The appellant was charged with having failed on 26 March 1997 to comply with the terms of the restraining order of 31 October 1996. The admitted facts in relation to this offence were as follows:

> "… on 1 November [1996] the [appellant] was served with the Domestic Violence Order restraining him from approaching or contacting Ms Prior. Following the events of 1 November, the [appellant] was injured and on his release from hospital he was detained in custody.
>
> [Some time] since December 1996 [and while still in custody] he wrote three letters and two poems and placed them in an envelope and forwarded this to another person to deliver to Ms Prior. At about 2.45 pm on Wednesday 26 March [1997] the envelope was dropped off at the National Australia Bank, which is where Ms Prior worked at the time, and the letters and poem were given to her by another bank employee. The [appellant] was later spoken to by police and when asked whether he was the author of the documents he replied: 'Yes, I wrote it.' When asked why he sent the letter the [appellant] replied: 'I know that I was wondering if there was a chance that maybe [Ms Prior and I] could talk about it. Maybe I could apologise in person. Maybe I was driving myself deeper into me problems and I had to know for 'meself' that there was a chance or there wasn't.' When asked who forwarded the letter on his behalf he declined to answer.

On conviction, his Worship imposed the cumulative sentence of 2 months imprisonment, the subject of this appeal.

The remarks on sentence

His Worship proceeded to sentence, immediately after hearing submissions. In relation to the offence of 26 March 1997 he said:

"… I do not accept your counsel's submissions that this should be dealt with in the same way. [The submission had been that the punishment for this breach, "not … particularly serious" in its nature, should not result in an "accumulation of penalty" beyond the sentence of 3 years and 9 months imprisonment which the appellant was presently serving]. This is a charge that arose … nearly 5 months after the initial offences [of 1 November 1996]. *You had already committed [on 1 November 1996] the offence of breaching the restraining order. You knew [as at 26 March 1997] the seriousness of failing to comply with the restraining order.* I have no doubt that the victim in this matter was quite terrified following the events of November and October 1996. And she deserves, and the community deserves, to be protected from those who will flout restraining orders, albeit for perhaps a reasonable reason in the mind of the person who's flouting those orders. She, I feel quite sure, wishes to feel protected in relation to the restraining order. And this court, by way of an indication to you and to others that may be minded to breach such orders, will impose an additional term of imprisonment. I do take account, however, of course of the long term [of 3 years and 9 months] that you're serving. And so it does no good to impose a lengthy [additional] period.

I take into account the abolition of remissions. As I've indicated, *this is quite a separate, a distinct offence*. Whilst you were in gaol you arranged for various communications to be passed to the victim in this matter. Those communications being passed after the history of violence and terror that we've heard related to the court this morning.

In those circumstances you will be convicted on this count and sentenced to 2 months imprisonment. That is to be cumulative on that term [of 3 years and 9 months] currently being served by you". (emphasis added)

The grounds of appeal

Mr Georgiou of counsel for the appellant was granted leave to rely on amended grounds of appeal, alleging that his Worship erred in that:

(1) the sentence was in all the circumstances of the case manifestly excessive;

(2) he gave undue weight to the principle of general deterrence;

(3) he did not give sufficient weight to the circumstances of mitigation relied on by the appellant; and

(4) he imposed a sentence which was disproportionate to the seriousness of the circumstances of the offence.

The submissions on appeal

Ground (1) – sentence manifestly excessive

Mr Georgiou advanced 6 submissions.

(a) The 'manifestly excessive' ground was encompassed by the other 3 grounds (pp7-8), in the sense that any of those errors, if established, would mean that the sentence was manifestly excessive. However, there were other reasons the sentence was manifestly excessive. I consider that Grounds (3) and (4) are identical in substance with Ground (1).

Failing to comply with an order under s6 of the Act is an offence under s10, carrying a maximum penalty of 6 months imprisonment. However the *minimum* penalty is 7 days imprisonment, *if* the offence of 26 March 1997 was a *second or subsequent* failure to comply – see s10(1A). There was some doubt as to whether it was a "second or subsequent" failure to comply, in terms of s10(1A); this is dealt with at p16.

(b) Section s58 of the *Sentencing Act* applied, as his Worship recognized, and was relevant to this ground. A sentence of 2 months imprisonment meant that his Worship considered that the appropriate sentence

was 3 months imprisonment; this became 2 months only because of s58. A sentence of 3 months, to be served cumulatively, was manifestly excessive.

(c) The subjective and objective features of the offence of 26 March 1997 indicated that the sentence was manifestly excessive. The prohibited contact with Ms Prior, effected as it was on this occasion by the communication to her of a bundle of three letters and two poems, took place in circumstances lacking violence, intimidation, threats, coercion or harassment. Furthermore, the appellant was in custody at the time of that contact.

I accept that much of that is true; but sending this material to Ms Prior, against the background of the facts set out at pp3-5, constituted significant harassment of her. The contents of the letters and poems were not before his Worship, but their *purpose* was - whether the appellant might be permitted to apologise to Ms Prior in person, and whether their former relationship had any prospects of being rebuilt.

Mr Georgiou submitted that his Worship acknowledged that this breach was not serious when he stated (p7):

> "… she deserves, and the community deserves, to be protected from those who will flout restraining orders, *albeit for perhaps a reasonable reason in the mind of the person who's flouting those orders."*
> (emphasis added)

This acknowledgment was not however reflected in the sentence.

I do not accept that his Worship was here acknowledging that the breach was not serious.

(d) The subjective features of the appellant were before his Worship – including his difficult early life as a victim of parental breakdown, his subjection to physical abuse, his alcohol abuse, and his limited education. Despite these difficulties, the appellant had almost always maintained employment. His known criminal record was not extensive, as his Worship had noted. The appellant was genuinely remorseful for the effects of his conduct on Ms Prior.

(e) His Worship's sentencing remarks emphasized at p7 showed error. The submission was that when the appellant committed the offence on 26 March 1997, he had not *then* had the benefit of the court's admonition for any previous breach of the restraining order, by way of punishment following conviction. Accordingly, the fact that on 1 November 1996 he had "already committed" a breach of the restraining order was an inadequate basis for concluding that he *knew* on 27 March 1997 of "the seriousness of failing to comply" with it. Mr Georgiou relied in support on *McInerney* (1986) 28 A Crim R 318, a decision applied in this jurisdiction in cases such as *Driver v The Queen* (1989) 97 FLR 23 at 29. I note that in *McInerney* (supra) King CJ said at 319:

> "As to convictions recorded after the offence for which sentence is being imposed, for offences committed before that offence, it is pertinent to

observe that *the Full Court has treated admitted offences for which there has been no conviction, as operating to impair the good character for which the offender could otherwise have been allowed credit. Carbone* (1984) 36 SASR 306 at 310, 315; 15 A Crim R 126 at 130, 134, per White J.

If an offence for which no conviction is recorded has that effect, it must follow that *the same offence must have the same effect where there is a conviction but that conviction is subsequent to the offence for which sentence is being passed.*

In my opinion the true rule is that a sentencing court may take into account in an appropriate way and for appropriate purposes, offences committed by an offender whether such offences were committed before or after the commission of the offence for which sentence is being passed and whether the convictions for such offences occurred before or after the commission of the offence for which sentence is being passed." (emphasis added)

Cox J considered the authorities in detail and said at 327 and 329:

327 "The sentencing court will look at all relevant aspects of a defendant's behaviour up to the time when he is sentenced. That has evidently been the practice in England for at least 200 years … The case for declaring the law in this State to be the same in this respect as the law in England, New South Wales and Victoria would seem, therefore, to be very strong."

329 "… the sentencing judge may have regard, within the limits of practicability, to all of the defendant's behaviour, favourable or unfavourable, prior to sentence. Archbold, *Pleading, Evidence and Practice,* (42nd ed, 1985), par 4-472 states the principle thus: 'The court may consider the acts of the defendant subsequent to the trial and up to the date of sentence' and cites *Withers* (1789) 3 TR 428; 100 ER 657 as the authority. This accords with the common sense of the matter, as it seems to me, and also, I suspect, with the practice of many judges, particularly with respect to subsequent convictions for prior offences. To ignore relevant subsequent convictions would be, as the Victorian judges said, artificial and unmeritorious, and in some cases it could lead to quite absurd results. There is no reason why the courts should voluntarily accept an arbitrary restraint of this kind, which really relates to a matter of practice, and we were not referred to any South Australian statute on the subject. I think that *Rainbird v Samuels* [(1972) 4 SASR 187] should be regarded as having been overruled on this point.

> That is not to say, of course, that subsequent convictions will necessarily be taken into account in the same way as previous convictions. Whether the offences were committed before or after the offence for which the defendant is being sentenced may make a difference in some cases. The fact that it was not a first or isolated offence, that the defendant's recent history shows a procession from one offence to another, may well be important, but the conviction itself adds a significant dimension. *A conviction is a formal and solemn act marking the court's, and society's disapproval of a defendant's wrongdoing, so that a prior offence may not assume quite the same significance as a prior offence coupled (by the time the instant offence is committed) with a prior conviction."* (emphasis added)

Mr Birch of counsel for the respondent submitted in reply that since the restraining order had been served on the appellant on 1 November 1996, clearly thereafter he knew, or ought to have known, of the seriousness of breaching an order of the court. That, however, does not address the basis of Mr Georgiou's attack on his Worship's reasoning: the appellant was dealt with for all 3 failures to comply with the restraining order – the earlier two of 1 November 1996 and the subject failure of 26 March 1997 - *at the same time* (10 October 1997).

I consider that his Worship's remark about the appellant's knowledge as at 26 March 1997 of the seriousness of a breach, insofar as the remark may have been based on the effect of a conviction for breach prior to 26 March 1997, would involve factual error, but was not of serious importance.

(f) Although Mr Georgiou submitted that a 'tariff' approach does not apply to sentencing for breaches of restraining orders, as the acts which

constitute breaches vary enormously, he detailed the penalties in 19 cases of breaches of restraining orders by the Court over the 3½ month period 1 September - 12 December 1997. He submitted that, by comparison, the appellant's sentence was clearly at the upper end of these penalties. Further, he invited comparison with *Ellis v Maley* (unreported, Supreme Court (NT), Angel J, 24 May 1996) where the appellant was sentenced for 6 breaches of a restraining order; they arose from 4 telephone calls, an unintentional meeting in traffic in which he motioned the victim to wind down her window, and an attendance at her residence. The appellant had been convicted of an assault-type breach, 14 days before the current breaches, which were punished by concurrent and cumulative sentences, an effective sentence of 49 days imprisonment. The appeal was dismissed. His Honour noted that "the persistence in the offending was an obvious telling factor" in the sentencing, as was the need for general deterrence. Mr Georgiou submitted that by comparison the present isolated breach, of the type it was, had resulted in a relatively heavy sentence.

Mr Georgiou also referred to the case of *Anthony Poharama*, dealt with by the Court on 11 December 1997 for 2 breaches of a restraining order. When sentencing the defendant, who had a prior conviction for breach of the restraining order, his Worship reluctantly – because "I am unable to find any way around it" - imposed the mandatory minimum sentence of 7 days imprisonment under s10(1A), for a breach constituted by the defendant asking

another person to thank the victim for checking out a possible intruder to his residence. The defendant's second current breach consisted of his following in the same direction, when the victim left a building, and directing a question at her. For that breach his Worship imposed a sentence of 7 days imprisonment to be served concurrently with the earlier sentence of 7 days. His Worship said:

> "Domestic violence orders are there to protect the victim. I know nothing of the circumstances which caused the orders to come into existence. But there is absolutely no doubt in my mind that these incidents that I've found proved … are at the very bottom of the scale. There was no threat, there was no harassment that I could find, there was no actual assault. There was (sic) no repeated attempts at contact."

His Worship there was indicating that the moral culpability of a particular breach should be reflected in the sentence for it. I respectfully agree with that basic sentencing principle. The moral culpability of a particular breach must be assessed in the light of the surrounding circumstances.

Ground (2) – undue weight given to general deterrence

Mr Georgiou's submissions were as follows. The error was manifested by the direction that the sentence imposed be served *cumulatively* upon the Supreme Court sentence; his Worship stated:

> "…[Ms Prior] … wishes to feel protected [by] the restraining order. And this court by way of an indication to you and to others [who] may be minded to breach such orders, will impose an *additional* term of imprisonment." (emphasis added)

Mr Georgiou submitted that "additional" referred to the direction that the sentence be served cumulatively. I consider that that is correct. He noted that

where a suspended sentence is later directed to be served for breach of a condition, s43(6)(b) of the *Sentencing Act* reflects a legislative intention that it be served concurrently with any current sentence "unless the court otherwise orders"; so there is no presumption there that the sentence should be served cumulatively upon any current sentence, to meet the needs of general deterrence. By analogy, Mr Georgiou submitted there is no requirement or necessity to reflect the need for general deterrence by directing that the sentence for failing to comply with a restraining order be served consecutively upon a current sentence. I consider that whether there is a need to provide for such deterrence by directing accumulation of the sentence for breach, is a matter for the facts of the particular case. I note in passing how his Worship dealt with the breach of the terms of suspended sentence of 20 February 1996 (pp5-6). Mr Georgiou submitted that the need for general deterrence could be properly reflected in this case by a concurrent sentence.

Mr Birch submitted that his Worship was entitled to look at the totality of the relationship between the parties, when determining the seriousness of any breach. Accordingly, in considering the present breach, his Worship could take account of the earlier breaches, and the 'siege' situation itself. In effect, the prior terror experienced by the victim at the hands of the appellant was relevant to evaluating the seriousness of the present breach by way of written communication. I consider that this submission is correct.

Was the breach of 26 March 1997 a "second or subsequent offence" in terms of s10(1A)?

Subsections 10(1) and (1A) of the Act provide, as far as relevant:

> "(1) A person against whom a restraining order is in force who has been served with a copy of the order … and who contravenes or fails to comply with the order is, subject to subsection (3), guilty of a regulatory offence.
>
> Penalty: For a first offence - $2,000 or imprisonment for 6 months.
>
> (1A) Notwithstanding the *Sentencing Act*, where a person is found guilty of *a second or subsequent offence* against subsection (1), the Court *shall* sentence the person to imprisonment for not less than 7 days but not more than 6 months and shall not make any other order if its effect would be to release the offender from the requirement to actually serve the term of imprisonment." (emphasis added)

Mr Georgiou submitted that if the breach of 26 March 1997 did *not* in law constitute "a second or subsequent offence", under s10(1A) it was possible that his Worship, wrongly believing that it did, had been misled as to the minimum penalty he could impose, and this had affected his approach to sentencing; see s10(1) and 10(1A). Under s10(1) his Worship could have chosen not to impose a sentence of imprisonment; cf s10(1A). Mr Georgiou's submission was that his Worship wrongly believed that s10(1A) applied, and that therefore he had to impose *some* period of imprisonment, and this misapprehension had led to a sentence which was manifestly excessive.

In support, Mr Georgiou referred to *O'Hara v Harrington* (1962) Tas. S. R. 165 per Burbury C.J. at p167:

> "… It is clear law that where the legislature imposes an increased penalty for a 'second offence' that expression bears the technical meaning of 'an offence committed *after conviction* for a first offence.' (emphasis added)

His Honour reviewed the authorities which established "this settled canon of construction", traced it back to Coke (2 Inst. 468), and concluded at 169:

> "This three century old canon of construction of penal provisions of this kind is broadly based on principle and does not depend upon the precise language used in a statute. *It ought not to be excluded unless the legislature has plainly said so."* (emphasis added)

Mr Georgiou submitted that this pointed to the proper construction of the words "a second or subsequent offence" in s10(1A). The offence of 26 March 1997 was not "committed after conviction" for the two earlier breaches of 1 November 1996; the convictions for those breaches took place on 10 October 1997, only minutes before the conviction for the breach of 26 March 1997. Accordingly, in terms of s10(1A), the offence of 20 March 1997 was not "a second or subsequent offence", and did not fall to be dealt with under that mandatory minimum sentencing provision.

Mr Georgiou very properly drew to attention what he submitted was authority contrary to this proposition, *Donlan v Appleton; ex parte Appleton* (1989) 1 QR 274. That case concerned s16(1)(d) of the *Traffic Act* 1949-1985 (Qld); at 277 de Jersey J said:

> "Section 16(1)(d) provides that if, within the period of five years prior to such a conviction, the offender has been twice previously convicted under s16(1), the magistrate shall in respect of that offence impose imprisonment. An offender is to be regarded as 'previously convicted' *whether 'the offence the subject of the subsequent conviction, was committed before the prior conviction or after it'.* See s16(5)." (emphasis added)

No authority was cited, no doubt because the meaning of s16(5) emphasized above was clear, and left no scope for the application of the principle referred to in *O'Hara v Harrington* (supra). I do not consider that *Donlan* (supra) says anything contrary to the canon of construction set out in *O'Hara* (supra); it simply applied a particular (clear) statutory definition. In support of the canon of construction referred to in *O'Hara* (supra), see *Farrington v Thomson and anor* [1959] VR 286 and the cases cited at 288, *Carter v Denham* [1984] WAR 123 and the cases cited at 126, and *Rivera v Maher* (1992) 1 Tas R 228. I consider that the canon of construction in *O'Hara* (supra) applies to s10(1A).

In reply, Mr Birch submitted that the net result of Mr Georgiou's submissions was that at the time of sentencing the appellant for the breach of 27 March 1997 his Worship's sentencing discretion was not confined by the minimum sentencing requirement in 10(1A). Under s10(1) of the Act the maximum sentence was 6 months imprisonment; he submitted that the sentence of 2 months imprisonment imposed represented an appropriate exercise of the sentencing discretion.

Mr Birch very properly drew attention to *Schluter v Trenerry* (unreported, Supreme Court (NT), Martin CJ, 21 August 1997). That case involved the meaning of the words "once before" in the phrase "the offender has once before been found guilty of a property offence" in s78A(2) of the *Sentencing Act;* such an offender has to be sentenced to "not less than 90 days"

imprisonment for his (current) property offence. In this case, on the only day he had appeared before a court the appellant faced several charges of property offences, laid in two Informations. He was found guilty of those offences. He was first sentenced on the property charge in the first Information; when he stood for sentence on the property charge in the second Information, his conviction minutes before was regarded as attracting s78A(2), and he was sentenced to 90 days imprisonment. Did s78A(2) apply, in those circumstances? The Chief Justice held that it did not. His Honour considered that "once before" in s78(2) meant that the earlier finding of guilt must have been made on 'a day prior to the day' of the current finding of guilt. The offender's appearance before the court was "the touchstone upon which the operation of s78A depends". The requirement that he had been before a court 'once before', meant 'one time before', and excluded a prior appearance on the same day. His Honour reasoned that the rationale of the compulsory imprisonment provision in s78A(2) was that it was to be activated only when "the offender has first been dealt with by a court" and thereby should have learned "the appropriate lesson"; and that the deterrent effect of the consequences of the required earlier finding of guilt "would be open to grave doubt", if the offender on his first actual appearance before a court had to receive a sentence of mandatory imprisonment simply because the charges of property offences "happened to be …in separate Informations …whether fortuitously or by design". *Schluter* (supra) is a case which turns on the

interpretation of particular words in a statute, but the thrust of his Honour's reasoning is wholly consistent with the canon of instruction in *O'Hara* (supra).

I consider it probable from his Worship's sentencing remarks emphasized on p7, that he considered that the breach of 26 March 1997 was a "subsequent" offence in terms of s10(1A), and hence a mandatory minimum period of imprisonment must be imposed. For the reasons earlier stated (pp16-18), I consider that that would be erroneous. Whether any such misapprehension that s10(1A) applied in this case led to the imposition of a manifestly excessive sentence is, however, another question; in this case, there is nothing to suggest that it did.

Conclusions

Where practicable, where the ground of appeal is that a sentence is manifestly excessive, an appellate court should be provided with current adequately-detailed statistical material relating to sentencing for that offence in the court below. This assists the appellate court in ascertaining whether the sentence under appeal falls outside any sentencing range disclosed by that material. I have mentioned this aspect in some recent appeals; see *Amagula v White*, 7 January 1998, at 15; *Golder v Pryce*, 24 December 1997, at 6-8 and 16; *Mawson v Nayda*, 31 October 1995, at 10-11. See also *Rory* (1992) 64 A Crim R 134 at 138; *Ryan and Vosmaer* (1988) 33 A Crim R 288 at 293; *R v Bird* (1988) 91 FLR 116 at 130-1; and *Yardley v Betts* (1979) 1 A Crim R 329 at 331-2. The capacities of IJIS should be examined to see whether that

computerized information system can provide such sentencing information, essential both for sentencers and on appeal, routinely, cheaply and readily.

I consider that the statistical material provided by Mr Georgiou (pp13-14) convincingly demonstrates that the appellant's sentence of 2 months imprisonment, was at the higher end of the current range of punishment for this offence where the offender had been previously *convicted* of a prior breach.

That was not the case here, although the appellant had committed 2 previous breaches. Nevertheless, I accept his Worship's conclusions that his written communications of 26 March 1997 from prison were directed by the appellant to a victim "quite terrified" by his earlier behaviour (see pp3-5); that the victim is a person who "deserves", as does the community, "to be protected from those who will flout restraining orders"; and that the significance of the communications in question can only properly be appreciated in the light of "the history of violence and terror" which had been related to the Court. Bearing these matters in mind, I consider that the application of the principle of totality renders the sentencing manifestly excessive, in the direction for the accumulation of the whole of the sentence imposed; Ground 1 succeeds, only to that extent. The appeal is allowed; the sentence of 2 months imprisonment is affirmed; the direction that it be served cumulatively upon the Supreme Court sentence of 19 September 1997 of 3 years and 9 months imprisonment, is quashed and set aside; in lieu thereof I direct that 1 month of the 2 month

sentence be served concurrently with that sentence of 3 years and 9 months, and 1 month be served cumulatively upon it. The existing non-parole period of 2 years fixed on 19 September 1997, will remain unchanged.

Orders accordingly.

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