PARTIES:	SCHLUTER, Scott Nathan
	v
	TRENERRY, Robin Laurence
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA69 & 70 of 1997
DELIVERED:	21 AUGUST 1997
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JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

Criminal law - Appeal and new trial and inquiry after conviction - Appeal - Appeal against sentence - Appeal by convicted person - Interpretation of Sentencing Act - Whether a finding of guilt on the same day as a separate and later finding of guilt does not count for the purposes of a ruling that the offender had once before been found guilty of a property offence - Meaning of “once before” -

Sentencing Act (NT) 1995, ss78A(1),(2),(3),(4) & (6).

Criminal law - Appeal and new trial and inquiry after conviction - Appeal - Appeal against sentence - Appeal by convicted person - Interpretation of Sentencing Act - Purpose of criminal sanctions - Protection of society - Deter an offender from committing offences of the same kind - Lesson to offender on first or subsequent occasion that comes before the Court -

Channon v R (1978) 20 ALR 1, referred to.

Criminal law - Appeal and new trial and inquiry after conviction - Appeal - Appeal against sentence - Appeal by convicted person - Interpretation of Sentencing Act - General policy of legislation - Parliamentary intention - Not that maximum penalty must be starting point where offender before Court facing charges for property offences for first time and charges contained in two or more informations, when the least minimum penalty would prevail were all charges contained in one -

Sentencing Act (NT) 1995, s78A.

Statutes - Acts of parliament - Interpretation - Rules of construction - Literal and grammatical meaning - Where such interpretation does not give effect to the purpose of the legislation - Gives way to a construction which will promote underlying purpose or object of that part of the Act.

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297 at 305 & 321, applied.

REPRESENTATION:

Counsel:

Appellant:	Mr C McDonald QC with Mr Goldflam
Respondent:	Mr R Wild QC with Ms Whitbread

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Director of Public Prosecutions

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

No. JA69 & 70 of 1997

BETWEEN:

SCOTT NATHAN SCHLUTER
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 21 August 1997)

These two appeals against sentence imposed upon the appellant in the Court of Summary Jurisdiction at Darwin go to the question of what is meant by the words "and the offender has once before been found guilty of a property offence" in s78A(2) *Sentencing Act* (NT) 1995.

The circumstances giving rise to the appeal are these. When the appellant appeared before the Court of Summary Jurisdiction on 26 June he was

originally facing a number of charges brought on informations and complaint (the informations). Some of the charges were for "property offences" as defined in s3 and Sch1 of the Act. The compulsory imprisonment regime contained in s78A is as follows:

> "(1) Where a court finds an offender guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 14 days.
>
> (2) Where a court finds an offender guilty of a property offence and the offender has once before been found guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 90 days.
>
> (3) Where a court finds an offender guilty of a property offence and the offender has 2 or more times before been found guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 12 months.
>
> (4) Where an offender is found guilty of more than one property offence specified in the same information, complaint or indictment, the findings of guilt are, for the purposes of this section, to be taken as a single finding of guilt, whether or not all the offences are the same.
>
> (5) Where an offender is found guilty of more than one property offence as part of a single criminal enterprise, all the property offences are together a single property offence for the purposes of this section, whether or not the offences are the same.
>
> (6) Where an offender is found guilty of a property offence, the offence is to be taken into account for the purposes of subsection (2) or (3) whether it was committed before or after the property offence in respect of which the offender is before the court."

During the course of the proceedings and by consent, the single count on one of the informations was withdrawn, but added by amendment to another of the informations, thus reducing the initiating process to two. The appellant

pleaded guilty to each charge on the separate informations as it was put to him. At the conclusion of the plea, the learned Magistrate found the appellant guilty of all charges in one of the informations and proceeded to convict him and sentence him to 14 days imprisonment. He then passed on to the second information, and having again found the appellant guilty of all charges thereon, proceeded to conviction and sentenced the appellant to 90 days imprisonment. He ordered that the sentences be served accumulatively. That process was followed after submissions upon his Worship's understanding of what was required when applying the provisions of ss78A(1) and 78A(2). In his Worship's view, once he had first found the appellant guilty of a property offence and proceeded as directed in s78A(1), the next finding of guilt of a property offence invoked the operation of s78A(2), the appellant having once before been found guilty of a property offence, albeit on the same day. In this case just a minute or two before.

The simple ground of appeal is that his Worship erred in law in his interpretation of s78A(2) in that a finding of guilt on the same day as a separate and later finding of guilt does not count for the purposes of a ruling that the offender had once before been found guilty of a property offence. Counsel for both the appellant and respondent before this Court were agreed as to the outcome of the appeal, and at the conclusion of argument I allowed it, ruling, extempore, and perhaps not in the most felicitous language, as follows:

> "The words "once before" in section 78A(2) of the *Sentencing Act* mean, or have reference to, a day prior to the day on which the court finds an offender guilty, as referred to in that subsection - that is, a finding of

> guilt of a property offence on the one day as the finding of an offender guilty of another property offence on the same day is not a finding of guilt within the meaning of the words "once before" in subsection (2)."

These are the reasons which for that ruling I indicated would be given later.

For an offender to be been found guilty "once before" it is necessary that he or she should have been before a court once before. "Once before" means "one time before". The draftsman has used the alternative means of expression in s78A(3) - "2 or more times before". That would indicate a time other than on the same day.

It is clear that the general policy of this Division of the Act is to provide for minimum punishment and an increase in minimum punishment tied to the number of times an offender has been before a court and found guilty of a property offence or offences. Successive findings of guilt in respect of a number of property offences charged upon the one information, complaint or indictment, are to be taken to be a single finding of guilt (s78A(4)), and it does not seem to matter over what period of time the offences were committed, or whether dealt with by a court at the one time or not. Provided the offender is before the court by a procedure whereby he or she is to meet a number of charges brought upon the one information, complaint or indictment, then the ameliorating provision is available. In such a case it is the appearance before

the court which is regarded by the legislature as being the touchstone upon which the operation of s78A depends. Similarly, s78A(6) makes the offender's appearance before the court (and a finding of guilt) the fact which is to be taken into account when considering whether there has been a prior finding of guilt, not the dates upon which the several offences were committed (apparently contrary to the common law, see *O'Hara v Harrington* [1962] Tas SR 165).

It is clear that the parliamentary intention is that an offender should not be subjected to compulsory imprisonment pursuant to ss78A(2) or (3) unless the offender has first been dealt with by a court under ss78A(1) or (2) as the case may be. The purpose is obvious. Offenders are to realise that upon being brought to a court for a property offence or offences they will suffer a mandatory term of imprisonment, the minimum length of that term depending upon the number of times they have been previously before the court. Amongst the purposes of criminal sanctions are those to protect society to the extent necessary to achieve that purpose, and a sentence intended to deter an offender from committing offences of the same kind serve such a purpose (*Channon v R* (1978) 20 ALR 1).

The theory is that the appropriate lesson will have been learnt on the first or subsequent occasion upon which the offender is dealt with by the court, and he or she, having suffered the punishment, will then be deterred from

offending in like manner again. The objective of deterrence, based upon escalating periods of actual imprisonment, would be open to grave doubt, if, when before a court for the first time, an offender would be liable to incarceration for a period in excess of that applicable for a first finding of guilt, simply because he or she then stood charged with more than one property offence which happened to be joined on separate informations. The justification for increasing the term of imprisonment on the second finding of guilt would be missing as the offender would not have been previously subjected to punishment aimed at deterrence. There would be no opportunity for the multiple offender, not previously charged, to become aware of the certainty of the severity of punishment for the proscribed criminal behaviour.

If it be right that imprisonment is a deterrent for offending, then it could not have been the intention of the parliament that an offender should feel the full weight of a mandatory term of compulsory imprisonment, unless the offender had first passed through the previous stage of punishment.

All this implies that apart from the finding of guilt, the court has also proceeded to convict and sentence the offender as required. Clearly, if a finding of guilt only has been made, and the court has not moved to the next stages of the process, perhaps waiting on a pre-sentence report or further submissions, the full effect of the compulsory imprisonment regime will not have been brought home to the offender. This case does not raise that point

for consideration, but it is an aid to the interpretation of the words in question to recognise that the whole process of the finding of guilt conviction and passing of sentence would, in the ordinary course, be done at the one time.

In my opinion it could not have been the intention of parliament when enacting s78A that the maximum minimum penalty must be the starting point where an offender is before the court facing charges for property offences for the first time and the charges are contained in two or more informations, whether fortuitously or by design, when the least minimum penalty would prevail had all the charges been contained in one.

In the course of argument, reference was made to *R v Miller* (1986) 2 Qd R 518 in which mention was made of the common law rule that judicial acts relate back to the earliest moment of the day in which they are done, referred to also in the High Court in *Miller v Teale* (1954) 92 CLR 406 at p411. Here there were two findings of guilt, judicial acts, and although both relate back to the earliest moment of the day on which they were done, priority may be given by finding which of them was the earlier in point of time to the other. That is not difficult in this case, and the rule is no assistance in solving the issue. The two findings of guilt are still to be taken as having occurred on the one day, one earlier than the other.

I have approached this case upon the basis that the literal or grammatical meaning of the words in question does not give effect to the purpose of the legislation and thus cannot be given the "ordinary meaning". They must therefore give way to the construction which will promote the underlying purpose or object of that part of the Act. See *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 per Gibbs CJ. at 305 and Mason and Wilson JJ. at 321.

Since his Worship erred in his approach to the sentencing in the manner explained above, it is not necessary for me to go into the issue as to whether it was appropriate to order that the sentence be served cumulatively; nor whether the law requires that where it is to be alleged that there have been previous findings of guilt, it is necessary to specifically charge that fact as a "circumstance of aggravation" (*Criminal Code*(NT) 1983, definition s1; R v De Simoni (1981) 147 CLR 383).
