

PARTIES: O'BRIEN, Patrick John
v
MACSKIMIN, Vicki Ann
AND
TRENERRY, Robin Laurence
v
MACSKIMIN, Vicki Ann

TITLE OF COURT: SUPREME COURT (NT)

JURISDICTION: CRIMINAL; Special Case Stated
from Mr Wallace SM

FILE NOS: 180 of 1994
181 of 1994

DELIVERED: 22 DECEMBER 1994

HEARING DATE: 26 OCTOBER 1994

JUDGMENT OF: MARTIN CJ.

CATCHWORDS:

Criminal Law - Judgment and punishment - sentence -
Recognizances, probation and other non-custodial
orders - Breach of recognizance - Suspension of
sentence for breach of recognizance upon entering
into home detention order -

Criminal Law (Conditional Release of Offenders) Act,
ss5(1)(b), 6(3)(e) and 19A(1) -

Justices - Jurisdiction and procedure - Change in the
constitution of the court - Distinction as between
part-heard proceedings and proceedings arising from
separate set of facts -

Justices Act, ss41A, 43(1) and 45 -

R v Smith; ex parte Stellino [1952] QWN 37, referred to.
R v Hermes; ex parte V., [1963] SASR 81, referred to.
R v Marrington (1850) 1 SCR (NSW) App 11; Legge 643,
distinguished.
Ex parte Ryan (1864) 3 SCR (NSW) 221, distinguished.

REPRESENTATION:

Counsel:

Informant: Mr Cato
Defendants: Mr Sammon

Solicitors:

Informant: DPP
Defendants: Legal Aid

Judgment category classification:
Judgment ID Number: mar94021
Number of pages: 9

DISTRIBUTION: LOCAL

mar94021

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 180 of 1994

BETWEEN:

PATRICK JOHN O'BRIEN
Informant

AND:

VICKI ANN MACSKIMIN
Defendant

AND BETWEEN:

No. 181 of 1994

ROBIN LAURENCE TRENERRY
Informant

AND;

VICKI ANN MACSKIMIN
Defendant

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 22 December 1994)

This is a special case stated by Mr Wallace, Stipendiary Magistrate, reserving a question of law for consideration of the Supreme Court pursuant to s162 of the *Justices Act*.

The question of law upon which the case is stated for the opinion of this Court is:

"Whether, on the true construction of section 19A(1) of the *Criminal Law (Conditional Release of Offenders) Act* and of section 6(3) of that Act, the Court which makes an order pursuant to section 6(3)(e) committing a person to prison may direct pursuant to section 19A that the sentence upon which the person is so committed be suspended on the person entering into a home detention order?"

At the conclusion of argument I answered the question "No". However, it appeared that the question did not reflect the true nature of the matter upon which the opinion of the Court was sought, and it was considered that the question needed to be amended pursuant to subs(3) of s162 of the *Justices Act*.

The circumstances giving rise to the special case stated for the opinion of the Court are as follows:

1. On 13 January 1993 Mr Trigg SM in the Court of Summary Jurisdiction sitting at Darwin sentenced the defendant to 28 days imprisonment for an offence of possession of a trafficable quantity of a dangerous drug, contrary to s9 of the *Misuse of Drugs Act*. His Worship directed, pursuant to s5(1)(b) of the *Criminal Law (Conditional Release of Offenders) Act* ("the Act"), that she be released forthwith on her own recognizance in the sum of \$500 conditional that she be of good behaviour for 18 months. The defendant entered into that bond.

2. On 8 August 1994, before Mr Wallace SM in the Court of Summary Jurisdiction sitting at Darwin, the defendant pleaded guilty to a charge that on 3 March 1994 she unlawfully possessed a dangerous drug contrary to s9 of the *Misuse of Drugs Act* ("the 1994 offence"). On the application of counsel for the defendant, his Worship adjourned the hearing to permit the preparation of a report in accordance with s19B of the *Act* as to the defendant's suitability for home detention.
3. The defendant having been assessed as suitable, the hearing resumed and the defendant, through her counsel, whilst admitting that the commission of the 1994 offence breached the 1993 bond, submitted that it was open to his Worship to suspend the sentence of 28 days imprisonment imposed in relation to the 1993 offence on the defendant entering into a home detention order.

The relevant statutory provisions are as follows:

1. Section 5(1)(b) of the *Criminal Code (Conditional Release of Offenders) Act* provides relevantly that where a person is convicted of an offence against a law of the Territory, the Court by which he is convicted, may, if it thinks fit by order, sentence

the person to a term of imprisonment, but direct that the person be released upon his giving security, either forthwith or after he has served a specified part of the sentence imposed upon him.

2. Section 6(3)(e) provides that in circumstances where a person has been convicted of an offence committed during the period of good behaviour in a case where that person, having been sentenced, was released forthwith or after he had served a specified part of the sentence imposed on him - commit the person to prison to undergo imprisonment for such term, being a term not exceeding the sentence or the balance of that sentence, as the case may be, or make any order (including an order under section 5(1)) which the Court would, if he had then and there been sentenced for the offence of which he was originally charged, be empowered to make.

3. As to the making of the home detention order, section 19A provides that where an offender is convicted of an offence against the law of the Territory, the Court by which the offender is convicted may, if it thinks fit, by order sentence that offender to a term of imprisonment but direct that the sentence be suspended on the offender

entering into a home detention order.

The material set forth in the special case stated by Mr Wallace SM indicates that he was troubled by two matters. The first was whether or not the Court of Summary Jurisdiction constituted by him could exercise a power under s19A of the *Act* where the Court was constituted by another stipendiary Magistrate when the defendant was convicted and sentenced. As to this, s6 of the *Criminal Law (Conditional Release of Offenders) Act* which deals with the failure of a person to comply with conditions of release, provides firstly for the method by which a person, alleged to have failed during a period of good behaviour to comply with the conditions specified in the order, might be brought before the Court of Summary Jurisdiction. Where a person appears before that Court and the Court is satisfied that the person has so failed, it may, depending upon the circumstances, exercise the power above described set out in subs(3)(e).

The Court of Summary Jurisdiction is established by s41A of the *Justices Act* and every matter of complaint has to be heard and determined by a Magistrate, if there is any Magistrate present who is competent and willing to act; or if there is no such Magistrate present, then by two or more Justices (s43(1)). It has been held that a Magistrate before whom a case has begun should complete the hearing and determination of it and, if the hearing is adjourned, no

Magistrate other than the one before whom the hearing commenced can adjudicate, the adjournment being an extension of the hearing of the case (*R v Smith; ex parte Stellino* [1952] QWN 37). On the other hand, in *R v Hermes; ex parte V.*, [1963] SASR 81 it was held that where an order had been made by a Magistrate forbidding the publication of the name of a party or witness "until further order", another Magistrate before whom the proceedings may come has power, in his discretion, to make an order terminating the prohibition of the publication of the name of the party or witness. This case is also distinguishable from the circumstances that arose in *R v Marrington* (1850) 1 S.C.R. (NSW) App 11; Legge 643 and in *Ex parte Ryan* (1864) 3 S.C.R. (NSW) 221 where the statute required that there be a hearing before two Justices and the same two Justices were not present during the whole of the trial. See s45 of the *Justices Act*. The distinction that is made is between matters where the proceedings before the Court are part heard and not determined, and there is a change in the constitution of the Court, and where a hearing has been completed and a determination made and a separate issue arises, which, although it could be said arise from the earlier proceedings, are based upon a separate set of facts, or in respect of which different considerations are brought to bare. In this case the proceedings originally brought in respect of the defendant were completed by Mr Trigg SM when he convicted and sentenced the defendant and proceeded to suspend the sentence upon the defendant entering into the good behaviour

bond. What was brought before Mr Wallace SM were proceedings arising from a breach of the bond. Although it may have been open for Mr Wallace SM to arrange for the matter of the breach of the bond entered into as a result of the order made by Mr Trigg SM to be referred to Mr Trigg SM, it was not necessary for him to do so.

All that was necessary for Mr Wallace SM to do was to be satisfied that the defendant having been sentenced by Mr Trigg SM, that that Magistrate had directed that the defendant be released upon her giving security either forthwith or after she had served a specified part of the sentence imposed upon her, that the bond had been entered into and that there had been a breach. In this case the breach would consist of her being convicted by Mr Wallace SM of the offence for which she was dealt with by him during the period of good behaviour.

It was then open to the Court constituted by Mr Wallace SM to exercise any of the power conferred under s6(3) (e), *Criminal Law (Conditional Release of Offenders) Act*.

Those powers are divided under two broad headings.

The first is to commit the person to prison to undergo imprisonment for such term, being a term not exceeding the sentence or balance of the sentence which was suspended, as the case may be. The sentence imposed originally in this case by Mr Trigg SM stands and the power is to commit the person to prison in respect of that sentence. Alternatively, the

Court as constituted by Mr Wallace SM, has power to make any order which it would have power to make if the defendant had then and there been sentenced for the offence for which she was originally charged. The offender is not sentenced again, the original sentence still standing. That is, in this case, a sentence to imprisonment for 28 days. But, for the purposes of conferring jurisdiction as to disposition consequent upon that sentence, the sentence is to be treated as if it had been passed then and there, that is, when the person appears before the Court in respect of the breach and the Court being satisfied of the necessary preconditions to the exercise of its powers in respect of the breach.

Turning then to s19A, read in conjunction with the powers under s6(3)(e), it is as if the sentence to imprisonment for 28 days was passed by Mr Wallace SM, and thus the Court constituted by him has power to direct that the sentence be suspended on the offender entering into a home detention order.

The options available to Mr Wallace SM are mutually exclusive. He can either commit the person to prison to undergo imprisonment in respect of the sentence passed by Mr Trigg SM, or if he does not do that he may make any order which the Court could make as if he had then and there sentenced the defendant himself. It would not be open to Mr Wallace SM to commit the defendant to prison and direct that the sentence upon which she is so committed be suspended upon her

entering into a home detention order as the question upon which the case is stated was put.

Taking into account the matters put in the special case stated by Mr Wallace SM the question of law upon which it was stated for the opinion of the Court, as amended by this Court, is:

"Whether, when a person has been convicted of an offence and sentenced by a Magistrate constituting a Court of Summary Jurisdiction to imprisonment, and that sentence has been suspended upon that person entering into a bond to be of good behaviour, and that person is brought before the Court constituted by a different Magistrate for breach of that bond, the second Magistrate may further suspend that sentence upon that person entering into a home detention order."

The answer to that question is "Yes".