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| PARTIES: | GARY LIONEL BYNDER |
| | v |
| | NOEL JOHN GOKEL |
| TITLE OF COURT: | FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | REFERENCE FROM THE SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION |
| FILE NO: | JA 137 of 1997 (9718507) |
| DELIVERED: | 29 September 1998 |
| HEARING DATES: | 15 May 1998 |
| JUDGMENT OF: | Kearney, Bailey and Priestley JJ |

## CATCHWORDS:

Courts – Inferior Courts of Record – Juvenile Court – Jurisdiction – statutory tribunal – limited nature of jurisdiction –Whether powers can arise by "necessary implication" – Whether powers can arise out of an "inherent jurisdiction"-

Juvenile Justices Act 1983 (NT), ss.14, 15, 53(1), Long Title to the Act
Juvenile Justices Amendment Act 1998 (NT), No.12 of 1998
Supreme Court Act 1979 (NT), s.21
Sentencing Act 1995 (NT), s.4

*Grassby v R* [1989] 168 CLR 1 at 16 – considered
*Palmer v Clark* (1989) 19 NSWLR 158 at 167 – considered
*John Fairfax & Son Ltd v Police Tribunal of New South Wales & Anor* (1986) 5 NSWLR 465 at 476 – considered
*Ex parte Currie; Re Dempsey* (1969) 91 WN (NSW) 34 at 38 – considered.
*Consolidated Press Holdings Ltd v Wheeler* (1992) 84 NTR 42 – considered.

Courts – Juvenile Court – Jurisdiction – Sentencing – Statutory Interpretation – Whether Juvenile Court has a general power to "backdate" a sentence of detention – Whether such a discretionary power is required for the effective exercise of the Juvenile Court's express jurisdiction to order detainment or imprisonment – Lack of applicability of sections 51 and 63(5) Sentencing Act to the Juvenile Court – Whether the Juvenile Court can take into account time already spent in custody in relation to provisions for minimum mandatory detention for property offenders – Whether anomalies arise in sentencing adult offenders under the Sentencing Act and repeat juvenile property offenders under the Juvenile Justice Act – Whether there is a need for legislative review-

Juvenile Justice Act 1983 (NT), ss.29,53(1)(g), 53AE(2)
Sentencing Act 1995 (NT), ss.4,51,63(5), 78A
*Braun and Ebatarintja v R* (1997) 6 NTLR 94 at 103, 106 – followed.

Courts – Juvenile Court – Jurisdiction – Statutory Tribunal – Sentencing – Whether the Juvenile Court has a general power to impose cumulative or consecutive sentences of detention – Lack of applicability of sections 51 and 63(5) Sentencing Act to the Juvenile Court – Whether Juvenile Court has inherent jurisdiction to impose cumulative sentences – Whether Juvenile court has power to impose cumulative sentences arising by "necessary implication" –

Criminal Law Act 1827 (UK), s. 0
Crimes Act 1914 (Cth), s 16A
Crimes Act 1958 (Victoria), s 535
Juvenile Justice Act 1983 (NT), ss 25(4), 53, 53(1)(b), 53(1)(g), 53(1)(j), 53(2), 53AE(2A), 91(2)
Sentencing Act 1995 (NT), ss 4, 51, 63(5)

*R v Wilkes* (1769) 19 St. Tr 1075 at 1132-3; [1558-1774] ALL ER 570 – considered.
*Castro v R (*1881) 6 App Cas. 229 at 237-8; [1881-5] ALL ER 570 – considered.
*R v Martin* [1911] 2 KB 450 – distinguished.
*R v Greenberg* [1943] 1 ALL ER 504 – distinguished.
*R v Judge Frederico Ex.p. AG* [1971]VR 425 – distinguished.
*R v Rajacic [*1973]VR 636 – distinguished.
*Said Khodor El Karhani* (1990) 51 A Crim R 123 – distinguished.
*Braun & Ebatarintja v R* (1997) 6 NTLR 94 at 103, 106 – followed.
*Button & Arabie v Pryce & Gray CSM,* Unreported, Northern Territory Supreme Court, 12 November 1997, Thomas J, at p9 – not followed.

Courts – Juvenile Court – Jurisdiction – Statutory Tribunal – Sentencing – Statutory interpretation – Whether Juvenile court can generally sentence a juvenile to a term of detention or imprisonment exceeding 12 months – Whether the maximum period of detention or imprisonment applies in respect of each charge proven – Whether the maximum period of detention or imprisonment was intended to be the aggregate maximum sentence in respect of all charges proven at a single appearance in the Juvenile Court – Whether the Supreme Court is constrained by the 12 month maximum period of detention or imprisonment – Whether there is a need for the legislature to review the relationship between the Juvenile Justice Act and the Sentencing Act

Interpretation Act 1978 (NT), s 24(b)
Juvenile Justice Act 1983 (NT), ss 25(4), 36, 38(2), 39, 52, 53, 53(1), 53(1)(g), 53(2), 53(7), 53 AE(2A), 91(2)
Sentencing Act 1995 (NT), s 52

## REPRESENTATION:

*Counsel:*

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| Applicant: | P. Loftus |
| Respondent: | J. M. Blokland |

*Solicitors:*

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| Appellant: | NAALAS |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | A |
| Judgment ID Number: | BAI98018 |
| Number of pages: | 28 |

BAI98018

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

No. 9718507

IN THE MATTER of
the Supreme Court Act

IN THE MATTER of
the Juvenile Justice Act

IN THE MATTER of
The Sentencing Act

AND IN THE MATTER of
a Special Case stated by
Her Honour Justice Thomas
in proceedings number JA 137 of 1997
for the opinion of the Court

BETWEEN:

**GARY LIONEL BYNDER**
Applicant

AND:

**NOEL JOHN GOKEL**
Respondent

CORAM: KEARNEY, BAILEY and PRIESTLEY JJ

REASONS FOR JUDGMENT

(Delivered 29 September 1998)

**KEARNEY J:**

I have had the benefit of reading the opinion of Bailey J. I concur in his Honour's conclusions, for the reasons he states.

I respectfully suggest that the legislature consider whether the beneficial provisions of the *Sentencing Act* should be made available to juveniles, so as to extend to them the same rights and protections before the law as apply under that Act to adults in similar circumstances. In particular, since the introduction of mandatory sentencing for certain property offences, the lack of power in the Juvenile Court to backdate a mandatory sentence of detention when the juvenile has already spent time in custody awaiting the hearing, is a glaring anomaly, when compared with the position of an adult in similar circumstances.

**BAILEY J:**

On 27 February 1998 Justice Thomas, pursuant to section 21 of the *Supreme Court Act* referred to the Full Court certain questions of law which had arisen in the course of Her Honour hearing an appeal from the Court of Summary Jurisdiction (JA 137 of 1997).

The relevant facts stated by Thomas J are in the following form:

"1. At all material times, Gary Lionel Bynder was, for the purposes of the *Juvenile Justice Act*, a juvenile aged 15 years ("the applicant").

2. On 31 January 1997, the applicant was dealt with in the Juvenile Court sitting at Darwin in relation to three files; file 9622468, two charges of unlawful entry and a charge of stealing; on file 9622243, a charge of unlawful entry, attempt unlawful entry, unlawful entry, unlawful entry and assault; and file 9623422, charges of unlawful entry, stealing and attempt unlawful entry, in addition to a schedule involving 43 charges ranging from interfere with a motor vehicle to trespass and stealing.

3. The Juvenile Court ordered that the applicant be detained in a detention centre for a period of 18 months to commence on 31 January 1997. It was also ordered that the applicant be released forthwith upon his entry into a recognisance for a period of two years ("the suspended sentence"). In addition to the suspended sentence, the applicant was ordered to perform 136 hours of community service.

4. On 9 May 1997, the applicant appeared before the Juvenile Court at Darwin in respect of his failure to complete the community service. The case was adjourned to 4 July 1997 to enable the applicant to complete the community service.

5. On 4 July 1997 the applicant appeared before the Juvenile Court by which time he had completed 35 hours of the community service ordered to be performed by him. The Juvenile Court ordered that, among other things, the applicant serve 28 days detention back-dated to 19 June 1997 and that the suspended sentence remain in place.

6. On 26 September 1997 the applicant appeared before the Juvenile Court at Darwin and was dealt with in respect of two offences of unlawful entry and stealing. That portion of the suspended sentence which had not already been served by the applicant (14 months and 16 days) was ordered to be restored and served by the applicant ("the restored term"). In addition, it was also ordered that he serve an aggregate period of detention of 3 months ("the accumulated term") for the two offences of unlawful entry and stealing to commence at the expiration of the restored term. In all, an effective term of 17 months and 16 days, to commence on 26 September 1997."

The questions of law for the opinion of the Full Court posed by Thomas J are in the following form:

"Having regard to the provisions of section 4 of the *Sentencing Act* and

section 53(1) of the *Juvenile Justice Act:*

(a) Can a Juvenile Court back-date any sentence of detention?

(b) Can a Juvenile Court order that any sentence of detention be served at the expiration of any other sentence of detention or any restored term?

(c) Can a Juvenile Court make any order where, in circumstances other than those set out in Section 53(2) of the *Juvenile Justice Act*, a juvenile is sentenced to an effective term, or terms, of detention exceeding 12 months?

(d) Was the order made on 26 September 1997 in excess of the jurisdiction of the Juvenile Court?"

The questions posed for this Court's consideration are drafted in the present tense. It is to be noted that after the date (27 February 1998) upon which the questions were referred to this Court the *Juvenile Justice Amendment Act* 1998 (No. 12 of 1998) was enacted and came into operation on 29 April 1998. As will appear from the reasons that follow, the amending Act of 1998 in my judgment has some relevance to the answers which should be given to the question numbers 2 and 3 posed by Thomas J, while having no relevance to the applicant's situation..

The four questions referred to this Court for consideration are each concerned with the powers (or jurisdiction) of the Juvenile Court. It is fundamental to any discussion of that court's powers and jurisdiction to emphasise the nature of the Juvenile Court as a statutory tribunal.

The Juvenile Court was established by the *Juvenile Justice Act* 1983, the Long Title of which provides:

> "An Act relating to the investigation of offences alleged to have been committed by juveniles, the establishment of the Juvenile Court, the procedures to be adopted in and in relation to proceedings against juvenile offenders, the punishment of juvenile offenders, the transfer of juvenile offenders between the Territory and the States, and for other purposes, with the intention that juveniles be dealt with in the criminal law system in a manner consistent with their age and level of maturity (including their being dealt with, where appropriate, by means of admonition and counselling) and to extend to juveniles the same rights and protections before the law as apply to adults in similar circumstances."

Section 14 of the 1983 Act establishes the Juvenile Court, the jurisdiction of which is to be exercised by a magistrate sitting alone (s15). The Act provides extensive provisions dealing with the Juvenile Court's jurisdiction, powers and proceedings, together with related matters such as appeals, juvenile detention centres, official visitors, medical treatment and interstate transfer of juveniles serving periods of detention and on probation. It is unnecessary to describe these provisions in any detail for present purposes. The principal attribute of the Juvenile Court which does require emphasis in the present context is its existence as entirely a creature of statute.

The limited nature of a statutory tribunal's jurisdiction and powers has frequently been the subject of judicial consideration. For example, Kirby P of the New South Wales Court of Appeal in referring to the District Court of New South Wales in *Palmer v Clark* (1989) 19 NSWLR 158 at 167 observed that:

> "…the authority for the acts of inferior courts and tribunals created by Parliament must be found in the powers and functions conferred upon them by their legislation. They have no inherent powers in the sense that the common law courts (the Courts of Common Pleas, Kings Bench and

Exchequer Chamber) enjoy by legal history."

A unanimous judgment of the New South Wales Court of Appeal, Herron CJ, Wallace P and Manning JA in *Ex parte Currie; Re Dempsey* [1970] 1NSWR 617 at 620 in relation to the Licensing Court (of New South Wales), held:

> "It is purely a statutory tribunal subject to the well recognized limitations of power of such a court. If the power does not flow from the Act as properly construed, it cannot exist. The jurisdiction of an inferior court is defined by the Act of Parliament by which it is constituted or such general provisions of Statutes which extend such jurisdiction. It is in connexion with jurisdiction that lie the chief distinctions between superior and inferior courts. Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court: *Halsbury's Laws of England*, 3rd ed., vol. 9, p.349. Such a tribunal is not invested with those powers which are commonly exercised by courts of supreme judicature such as the Supreme Court of this State or higher tribunals. Such powers have their origin in tradition and their procedures are often dictated by convention."

Similar judicial pronouncements may be found in numerous authorities. Nevertheless, Courts have recognised that powers of a statutory tribunal can arise by necessary implication. In *John Fairfax & Son Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, McHugh JA held:

> "Since the Tribunal is an inferior court of record created by statute, it can have no powers, jurisdictions or authorities other than those authorised by the Act: *Irving v Askew* (1870) LR 5 QB 208; *R v Hackett; Ex parte Cline* (1882) 8 VLR (L) 129;*Levoune v Bacoulis* (1935) AR (NSW) 126. The Tribunal has none of the powers inherent in the courts of the common law – the Common Pleas, the Kings Bench and the Exchequer Chamber. Nonetheless as Lord Morris of Borth-y-gest pointed out in *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1301 there 'can be no

doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction'. His Lordship said that he would regard such powers as **inherent powers**: see also *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7; *Taylor v Attorney-General* [1975] 2 NZLR 675 at 680, 682, 689; *Taylor v Taylor* (1979) 143 CLR 1 at 5-6. The source of this **inherent jurisdiction** is the implied authority conferred on the judiciary to uphold, protect and fulfil the judicial function by ensuring that justice is administered, both in a particular case and as a continuing process, according to law and in an effective manner: Jacob, 'The Inherent Jurisdiction of the Court' Current Legal Problems (1970) 23 at 27-28." (emphasis added)

More recently, Dawson J in the High Court case of *Grassby v R* (1989) 168 CLR 1 has rejected the notion of inferior courts having inherent powers or inherent jurisdiction, while recognising that such courts may have powers or jurisdiction arising by necessary implication. Thus, Dawson J (at p16) observed:

"…in my view, the nature of a magistrate's court is such that it has no powers which might properly be described as inherent even when it is exercising judicial functions. A fortiori that must be the case when its functions are of an administrative character. In *Reg. V Forbes; Ex parte Bevan* (39), Menzies J. pointed out that:

> ''Inherent jurisdiction' is the power which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorizing provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt. Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as 'inherent jurisdiction' which, as the name indicates, requires no authorizing provision. Courts of unlimited jurisdiction have 'inherent jurisdiction'.'

Inherent jurisdiction is an elusive concept and the proposition that it

arises from the nature of a court has been described as metaphysical. See *Yale Law Journal*, vol. 57 (19947) 83, at p85, cited by Jacob, 'The Inherent Jurisdiction of the Court', *Current Legal Problems*, vol. 23 (1970) 23, at p27. But it is undoubtedly the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power. In the discharge of that responsibility it exercises the full plenitude of judicial power. It is in that way that the Supreme Court of New South Wales exercises an inherent jurisdiction. Although conferred by statute, its powers are identified by reference to the unlimited powers of the courts at Westminster. On the other hand, a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise (ubi aliquid conceditur, condeditur et id sine quores ipsa esse non potest). Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent. The distinction between inherent jurisdiction and jurisdiction by implication is not always made explicit, but it is, as Menzies J. points out, fundamental."

His Honour observed, further, at p17:

"It would be unprofitable to attempt to generalize in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'".

In the Northern Territory, the observations of Dawson J referred to above have been applied by Mildren J in holding that the Work Health Court had implied power to entertain an application for summary judgment in the absence of express statutory provision (see *Consolidated Press Holdings Ltd v Wheeler* (1992) 84 NTR 42).

It is against the background of the limitations applicable to an inferior court's jurisdiction and powers that I turn to consider the questions referred for the consideration of this Court.

The first two questions query the power of the Juvenile Court to "back-date" a sentence of detention and to impose cumulative (or consecutive) sentences of detention.

There is no express provision in the *Juvenile Justice Act* to back-date a sentence of detention. This is in contrast to the position which applies under the *Sentencing Act*, which provides in section 63(5):

> "(5) Where an offender has been in custody on account of his or her arrest for an offence and the offender is convicted of that offence and sentenced to imprisonment it may be ordered that such imprisonment shall be regarded as having commenced on the day on which the offender was arrested or on any other day between that day and the day on which the court passes sentence."

The *Sentencing Act* also provides (s51 – subject to section 78A providing for minimum mandatory imprisonment for property offenders) a general provision for Courts to order that sentences of imprisonment be served wholly or partly on a cumulative basis. The *Juvenile Justice Act* provides no similar general provision albeit the Act includes certain provisions (to which reference is made later in these reasons) which either permit or require cumulative sentences of detention in particular circumstances.

Sections 51 and 63(5) of the *Sentencing Act* can have no application to the Juvenile Court in view of the majority decision of the Court of Criminal Appeal in *Braun and Ebatarintja v R* (1997) 6 NTLR 94. In that case, the Court of Appeal considered the extent of the Supreme Court's powers in the sentencing of juveniles having regard to section 4 of the *Sentencing Act*.

Section 4 of the *Sentencing Act* provides:

> "This Act applies to all courts other than the Juvenile Court established under the *Juvenile Justice Act* and the Supreme Court when exercising its jurisdiction under or in pursuance of that Act."

A majority of the Court of Criminal Appeal (Kearney and Thomas JJ) held in answer to a question of law referred by stated case (at p103):

> "Section 4 of the *Sentencing Act* excludes the provisions of that Act from the sentencing of a juvenile only where the sentencing judge deals with the juvenile pursuant to the special powers vested in the Supreme Court under the *Juvenile Justice Act*. If the sentencing judge does not deal with the juvenile by exercising those special powers, the judge may exercise the provisions of the *Sentencing Act* when dealing with him. In the result, the sentencing judge in dealing with the juvenile may exercise the powers available under either the *Sentencing Act* or the *Juvenile Justice Act*, but may not exercise a combination of the powers available under both Acts".

In the same case, Mildren J (dissenting) observed (at p106) that it would seem to follow from the reasons of the majority:

> "…that the Juvenile Court could not backdate a sentence, order that sentences be served cumulatively, or exercise a number of other powers contained only in the *Sentencing Act*: see for example ss58, 60 and 61."

Neither counsel for the applicant nor the respondent takes issue with the observation of Mildren J that in consequence of the majority's construction of section 4 of the *Sentencing Act* (and in the absence of express power in the *Juvenile Justice Act*) the Juvenile Court has no power to back-date a sentence in a manner similar to that provided by section 63(5) of the *Sentencing Act.*

In my view, having regard to the majority's reasons in *Braun and Ebatarintja*, the tentative conclusion of Mildren J (that the Juvenile Court has no power to back-date a sentence) is correct. Such a power is not required for the effective exercise of the Juvenile Court's express jurisdiction to order that a juvenile be detained at a detention centre or imprisoned (s53(1)(g) of the *Juvenile Justice Act*).

In the usual course of events, it would be open to the Juvenile Court in sentencing a juvenile offender to take into account time spent in custody as relevant to the calculation of the actual term of detention or imprisonment to be imposed. Thus the Juvenile Court could avoid potential injustice to an offender consequent upon the lack of a power to back-date a sentence by reducing the sentence it would otherwise have imposed by the period during which an offender had been in custody on account of his or her arrest for the offence with which it was dealing. Such an approach, however, could not be employed where the provisions for minimum mandatory detention for property offenders are applicable.

Section 53AE(2) of the *Juvenile Justice Act* provides;

> "(2) Where the Court finds a juvenile guilty of a property offence and the juvenile has once or more before been found guilty of a property offence, the Court shall record a conviction and order the juvenile to be detained at a detention centre for not less than 28 days."

It follows that, in the absence of a power to back-date a sentence, the Juvenile Court would be required to order a juvenile to be detained "for at least 28 days" regardless of how long the juvenile had spent in custody pending determination of a charge in the case of an alleged property offence. In the usual course of events, proceedings in the Juvenile Court are to proceed by summons (see s29 of the *Juvenile Justice Act*) and even where the circumstances are such as to justify departure from such an approach, it is likely that a juvenile will be released on bail. However, this is not invariably so. In the case of juvenile repeat property offenders, the lack of a power to back-date a sentence in the Juvenile Court leaves open the possibility of injustice where the Juvenile Court is of the view that the minimum period of mandatory detention is the appropriate sentence and the offender is then, or has been, in custody consequent upon his arrest for the relevant property offence.

The potential injustice which may arise in the case of repeat juvenile property offenders from the lack of power in the Juvenile Court to back-date a sentence of detention or imprisonment does not persuade me that such a power arises by necessary implication, either generally or specifically in relation to repeat juvenile property offenders. The power to back-date a sentence in the

*Sentencing Act* is discretionary, as is a Court's decision whether to take into account time already spent in custody in calculating an appropriate sentence. It cannot be said that the unavailability of such discretions detracts from the effective exercise of the Juvenile Court's power to order detention or imprisonment of a juvenile in the case of offences generally or property offences in particular. Nevertheless, this is a matter which the legislature might wish to address. The present situation in relation to those convicted of property offences is such that an adult offender has at least the possibility (and in practice, a high probability) of receiving credit for time already spent in custody – a benefit not available to repeat juvenile property offenders.

In *Braun and Ebatarintja,* supra, Mildren J in his dissenting judgment also expressed the tentative view that a consequence of the majority's reasons was that the Juvenile Court could not order that sentences be served cumulatively.

Counsel for the applicant, Mr Loftus, again submits that His Honour's tentative view is correct, subject to the qualification that the *Juvenile Justice Act* makes provision for cumulative sentences of detention or imprisonment in limited circumstances: see sections 25(4), 53(2), 53AE(2A)and 91(2) of the *Juvenile Justice Act.*

Section 53AE(2A) (dealing with minimum mandatory detention for property offences) and section 91(2) (dealing with discretionary sentences of detention or imprisonment for the offence of escaping from lawful detention)

expressly require that relevant sentences be served on a cumulative basis to other sentences of detention or imprisonment. Neither section 25(4) nor section 53(2) refers in terms to a power of the Juvenile Court to impose cumulative sentences. However, the effect of section 53(2) (dealing with a juvenile who pursuant to section 53(1)(b) has been discharged without penalty following a period of adjournment and is subsequently found guilty of an offence during the period of adjournment) is to empower the Juvenile Court to impose penalties which in aggregate exceed the maximum period of detention or imprisonment (12 months) which may be imposed on a juvenile pursuant to section 53(1)(g).

It is a necessary implication of section 53(2) that where that provision is applicable, the Juvenile Court has power to impose cumulative sentences with respect to offences committed by a juvenile during the period of an adjournment granted pursuant to section 53(1)(b) and the original offence in respect of which proceedings were adjourned.

Section 25(4) of the *Juvenile Justice Act* provides:

> "(4) Nothing in this section affects the operation of sections 20 to 29 inclusive of the *Traffic Act* and Part XVII of the Traffic Regulations and, subject to section 53, a juvenile may be dealt with under those sections as if he were an adult."

The power of the Juvenile Court to deal with a juvenile "as if he were an adult" is sufficiently wide to apply relevant provisions of the *Sentencing Act* (including section 51 dealing with the imposition of cumulative sentences) notwithstanding section 4 of that Act. However, it is to be noted that section 25(4) of the *Juvenile Justice Act* is expressed to be "subject to section 53" – including section 53(1)(g) (providing that the maximum period of detention or imprisonment which may be imposed on a juvenile is 12 months). The combined effect of section 25(4) and section 53 of the *Juvenile Justice Act* is such that cumulative sentences may be imposed for relevant traffic offences, provided the aggregate of penalties imposed does not exceed 12 months.

While not relevant to the issues in the present case stated, it is to be noted that the reference in section 25(4) of the *Juvenile Justice Act* to "sections 20 to 29 inclusive of the *Traffic Act* and Part XVII of the Traffic Regulations" produces a curious anomaly. The provisions of the *Traffic Act* and Regulations referred to in section 25(4)are in the main not offence-creating provisions. Such provisions are, for the most part, concerned with evidentiary matters relevant to breath and blood testing in connection with driving under the influence of intoxicating liquor or drugs or with a high alcohol content. Section 20A of the *Traffic Act* also provides for the immediate suspension of a driving licence in certain circumstances. However, the only offence-creating provisions in sections 20 to 29 of the *Traffic Act* and Part XVII of the Traffic Regulations are sub-sections (1) and (3) of section 20. These provisions create

offences of refusing or failing to submit to a breath analysis or give a blood sample. As I have indicated, the effect of section 25(4) of the *Juvenile Justice Act* is such that a juvenile may be sentenced to cumulative penalties (up to an aggregate maximum 12 months detention or imprisonment) for such offences. However, it would appear anomalous that section 25(4) of the *Juvenile Justice Act* makes no reference to section 19 of the *Traffic Act*: the principal offence-creating provision for driving under the influence of intoxicating liquor, drugs or with a high alcohol content. It may be queried why it should be thought necessary to provide for sentencing of a juvenile offender "as if he were an adult" (including the power to impose cumulative sentences) for failing to submit to breath analysis or provide a blood sample, but not for the equally (or more) serious offences provided by section 20 of the *Traffic Act.*

It may be that the anomaly to which I have referred was unintentional. Section 25 of the *Juvenile Justice Act* is headed "Juveniles not to be interviewed in certain circumstances". The provision imposes restrictions on members of the Police Force interviewing juveniles in the absence of a parent, guardian, other acceptable person or legal practitioner. It would appear that the primary purpose of sub-section (4) of Section 25 was to ensure that juveniles were subject to the compulsory breath analysis and blood testing provisions of the *Traffic Act* and Regulations rather than to apply the provisions of the *Sentencing Act* to juvenile offenders.

In the applicant's submission, the power of the Juvenile Court to impose cumulative sentences is limited to those provisions of the *Juvenile Justice Act* to which I have referred above: sections 25(4), 53(2), 53AE(2A) and 91(2). Mr Loftus for the applicant submits that in the absence of any more general power to impose cumulative sentences of detention or imprisonment the Juvenile Court, as a statutory tribunal, has no power to impose such sentences.

For the respondent, Ms Blokland notes that in *Button and Arabie v Pryce and Gray CSM*, Supreme Court (NT) unreported 12 November 1997, Thomas J held (at p9) that the Juvenile Court:

> "…had the power, which originates in s53(1)(j) of the *Juvenile Justice Act*, to make orders for cumulative sentences…"

Ms Blokland does **not** seek to support her submission by reference to section 53(1)(j) which grants the Juvenile Court power to:

> "(j) make such other order in respect of the juvenile under the relevant law that it could have made if the juvenile were an adult convicted of that offence under that law."

Ms Blokland submits that the reference in section 53(1)(j) to the "relevant law" cannot extend to the general power to impose cumulative sentences provided by section 51 of the *Sentencing Act* having regard to the majority's decision in *Braun and Ebatarintja v R*, supra, as to the construction of section 4 of the *Sentencing Act*. In her submission, section 53(1)(j) of the *Juvenile*

*Justice Act* must be considered as impliedly repealed by (the subsequently enacted) section 4 of the *Sentencing Act* to the extent of the inconsistency between the two Acts. Ms Blokland submits that section 53(1)(j) must now be read as referring to orders other than those available in the *Sentencing Act*. In my view, no other conclusion is possible in the light of the majority's reasons in *Braun and Ebatarintja v R.*

Rather than section 53(1)(j) of the *Juvenile Justice Act*, Ms Blokland submits that there is authority for the proposition that courts have an inherent power to impose cumulative sentences. In support of this submission, Ms Blokland referred to authorities canvassed by Thomas J in *Button and Arabie v Pryce and Gray, CSM* supra: *R v Rajacic* (1973 VR 636; *R v Greenberg* (1943) 1 All ER 504 and *Said Khodor El Karhani* (1990) 51 A Crim R 123. In my view, such authorities do not assist the respondent's submissions. Each was concerned with a question of statutory interpretation. *Greenberg* concerned section 10 of the *Criminal Law Act* 1827 (UK); *Rajacic* concerned section 535 of the *Crimes Act* 1958 (Victoria) and *Said Khodor El Karhani* concerned section 16A of the *Crimes Act* (Cmth) (a provision far removed from a power to impose cumulative sentences). Other authorities concerning a court's power to impose cumulative sentences include *R v Judge Frederico Ex p. AG* [1971] VR 425 and *R v Martin* [1911] 2 KB 450. However, the common thread of these authorities, as with those cited by Ms

Blokland, is their subject matter is one of statutory construction rather than recognition of any “inherent” power to impose cumulative sentences.

*Rajacic*, supra, contains an historical analysis of judicial power to impose cumulative sentences. Smith ACJ (Full Court of the Supreme Court of Victoria) refers to *R v Wilkes* (1769) 19 St. Tr 1075 at pp 1132–3; [1558 – 1774] All ER 570 and *Castro v R* (1881) 6 App Cas 229at pp237–8; [1881–5] All ER 429 for the proposition that at common law, trial courts had power to impose cumulative sentences (wholly or partly) with respect to misdemeanours but had no such power in the case of felonies (since the punishment originally was death). It would appear, at its highest, the common law might support an inherent jurisdiction in superior courts to impose cumulative sentences for misdemeanours, but not felonies. However, whatever be the true position in relation to superior courts, for the reasons to which I have referred concerning the nature of statutory tribunals, it is clear that the Juvenile Court can have no **inherent** power or jurisdiction to impose cumulative sentences.

Further, I am not persuaded that, considering the *Juvenile Justice Act* as a whole, a power to impose cumulative sentences can be said to arise by necessary implication. As counsel for the applicant submits, the legislature has made specific provision for the imposition of cumulative sentences in particular provisions of the Act – sections 25(4), 53(2), 53AE(2A) and 91(2). If the Juvenile Court was intended to have some more general power to impose

cumulative sentences it would have been a simple matter to include such a power expressly in section 53 of the *Juvenile Justice Act*.

The absence of a general power in the Juvenile Court to impose cumulative sentences of detention or imprisonment is to some extent related to the third question raised by the case stated, namely whether the Juvenile Court may (in circumstances other than those referred to in section 53(2)), sentence a juvenile to a term of detention (or imprisonment)exceeding 12 months.

Section 53(1)(g) provides that the Juvenile Court may order that a juvenile

> "…be detained in a juvenile centre or imprisoned for a period not exceeding the maximum period that may be imposed under the relevant law in relation to the offence or 12 months whichever is the less."

In the course of submissions, the issue was raised as to whether the maximum period of detention or imprisonment was intended to apply in respect of each charge proven against a juvenile or was intended to be the aggregate maximum sentence in respect of all charges proven against a juvenile at a single appearance before the Juvenile Court. In the light of the conclusion which I have reached as to the Juvenile Court's lack of general power to impose cumulative sentences, a good deal of significance as to the third question in the case stated has dissipated.

The opening words of section 53(1) of the *Juvenile Justice Act* refer to the Juvenile Court's powers of disposition where the Court finds a "charge" proven. Notwithstanding section 24(b)of the *Interpretation Act* (providing that "words in the singular shall include the plural") I am of the view that the 12 month maximum period of detention or imprisonment provided by section 53(1)(g) is intended to apply in respect of each single charge. The *Interpretation Act* applies only in the absence of a contrary intention. The practice of criminal courts has for centuries been to sentence offenders with respect to individual charges or counts. Specific provision for the imposition of aggregate sentences on adults is made by section 52 of the *Sentencing Act*. I do not consider that the legislature could have intended to rely on the general provisions of the *Interpretation Act* to introduce (mandatory) aggregate sentencing for juveniles in the face of such a long-standing practice against such a form of punishment.

It follows from the lack of a general power in the Juvenile Court to impose cumulative sentences that, generally speaking, the maximum sentence which may be imposed upon a juvenile by the Juvenile Court is one of detention or imprisonment for 12 months – albeit that this maximum may encompass any number of concurrent sentences of 12 months or less. Section 53(2) provides an express exception to this maximum. However, the further question arises as to whether the Juvenile Court may exceed the 12 month maximum in those cases where it has power to impose cumulative sentences. Aside from section 53(2), the power to impose cumulative sentences is provided by sections 25(4), 53AE(2A) and 91(2). As I have noted previously,

section 25(4) is expressly subject to section 53 – including the maximum period of detention or imprisonment in section 53(1)(g). Accordingly, the Juvenile Court may not impose cumulative sentences pursuant to section 25(4) which exceed the 12 month maximum.

Sections 53AE(2A) and 91(2) are silent as to whether the cumulative sentences contemplated by those provisions may exceed in aggregate the 12 month maximum. In the case of section 53AE(2A) the imposition of a cumulative sentence is mandatory while under section 91(2) the imposition of any period of detention or imprisonment is discretionary – but once imposed is to be served on a cumulative basis in accordance with the terms of section 91(2). The legislature must, of course, be taken to have been aware of the provision for a 12 month maximum in section 53(1)(g) when sections 53AE (2A) and 91(2) were enacted. The legislature, in my view, must also be taken to have been aware that the provisions for cumulative sentences could, in the absence of restriction, result in the imposition of a sentence in excess of the 12 month maximum. If it was intended that sections 53AE(2A) and 91(2) were to be subject to section 53(1)(g), this could have easily been made express – as is the case for section 25(4). I consider that the omission was deliberate and that neither section 53AE(2A) nor 91(2) is intended to be subject to the 12 month maximum period of detention. In my view it follows that the Juvenile Court may order a juvenile to be detained or imprisoned for a period exceeding 12 months only where the provisions of sections 53(2), 53AE(2A) or 91(2) are applicable. In all other cases, the Juvenile Court is

restricted to the maximum period of 12 months – regardless of the number or seriousness of the charges it finds proven against a juvenile.

Before addressing the fourth and final question posed by the case stated, it is important to note that the general inability of the Juvenile Court to impose cumulative sentences or exceed the 12 month maximum period of detention or imprisonment does **not** mean that there is an absence of sufficient powers to sentence juveniles in serious matters which call for a sentence in excess of 12 months. In particular, the Juvenile Court has a discretion to commit a juvenile to the Supreme Court where the charge is one which it is not empowered to hear in a summary manner (see section 36). Further, the Juvenile Court may decline jurisdiction in the case of a juvenile charged with an indictable offence where it considers it appropriate to do so having regard to the matters set out in section 38(2) (including the seriousness of the offence and the suitability of the penalties available to the Juvenile Court). The Supreme Court in dealing with a juvenile is not constrained by the 12 month maximum period of detention or imprisonment applicable to the Juvenile Court (see section 39 and 53(7) of the *Juvenile Justice Act*).

The fourth question posed by the case stated queries whether the order made on 26 September 1997 by the Juvenile Court was in excess of that Court's jurisdiction.

The short answer in light of the above reasons is "Yes" – but it is not possible to give a complete answer on the basis of the circumstances set out in the case stated by Her Honour.

The order of the Juvenile Court on 26 September 1997 was, in summary, that:

(a) the portion of the suspended sentence (18 months detention in a detention centre imposed on 31 January 1997) which had not already been served by the applicant (14 months and 16 days) be restored and served by the applicant ("the restored term");

(b) the applicant be sentenced to an aggregate period of 3 months ("the accumulated term") for two offences of unlawful entry and stealing; and

(c) the restored term and the accumulated term be served on a cumulative basis (i.e. an effective term of 17 months and 16 days to commence on 26 September 1997).

The circumstances set out in the case stated indicate that the suspended sentence imposed upon the applicant on 31 January 1997 related to six charges of unlawful entry, two charges of attempted unlawful entry, two charges of stealing and one of assault. In addition, the Juvenile Court took into account a schedule involving a further 43 charges (presumably pursuant to section 90A of the *Juvenile Justice Act*). The circumstances set out in the case stated do not indicate how many (or which) charges the Juvenile Court found proved against the applicant nor how the sentence of 18 months detention was arrived at. However, it is clear that in light of the conclusions that I have reached as to the Juvenile Court's lack of general powers to impose either cumulative sentences or sentences in excess of 12 months detention, that (assuming that sections 53(2) and 91(2)of the *Juvenile Justice Act* were not applicable) the

Juvenile Court could not have had power to impose a sentence of 18 months detention however it was structured.

In arriving at this conclusion, I have not ignored the fact that among the offences with which the Juvenile Court was dealing on 31 January 1997 were ten property offences (which I have indicated above are required to be visited with a sentence cumulative to an existing sentence of detention and which may result in the total effective sentence exceeding the maximum period of 12 months detention provided by section 53(1)(g)). Section 53AE of the *Juvenile Justice Act* providing for minimum mandatory detention of repeat property offenders was not in force as at 31 January 1997. Accordingly, on any view, the Juvenile Court lacked power to impose a sentence of 18 months detention as at 31 January 1997 for the offences referred to in the case stated; and in consequence could not have had power to "restore" such a sentence on 26 September 1997.

Further difficulties arise in relation to the accumulated term imposed by the Juvenile Court on 26 September 1997 with respect to two offences of unlawful entry and stealing. It is not stated whether such offences were committed before or after the coming into force of section 53AE of the *Juvenile Justice Act* (8 March 1997). However, what is clear is that the "aggregate period of three months" detention was imposed before the coming into operation of section 53AE(2A) (requiring a sentence of detention for a repeat property offender to be made cumulative to an existing sentence of detention). Before the commencement of section 53AE(2A) on 29 April 1998

the Juvenile Court had no general power to impose cumulative sentences – and in particular no such power with respect to property offences (even if committed after 8 March 1997). Accordingly, there was no power in the Juvenile Court to impose a sentence of detention to be served on a cumulative basis with the (invalid) restored term.

I would answer the questions of law reserved for consideration as follows:

(a) No – the Juvenile Court cannot back-date any sentence of imprisonment

(b) No – the Juvenile Court cannot order any sentence of detention to be served at the expiration of any other sentence of detention or any restored term except to the extent permitted or required by sections 25(4), 53(2), 91(2) and (now) section 53AE(2A) of the *Juvenile Justice Act.*

(c) No – the Juvenile Court cannot make any order where a juvenile is sentenced to an effective term, or terms, of detention exceeding 12 months except to the extent permitted by sections 53(2), 92(2) and (now) section 53AE(2A) of the *Juvenile Justice Act.*

(d) Yes – the order made by the Juvenile Court on 26 September 1997 was in excess of jurisdiction.

Before leaving this matter, as with Mildren J in *Braun and Ebatarintja* supra, I respectfully consider it desirable, indeed necessary, that the attention of the legislature be drawn to the consequences of section 4 of the *Sentencing Act*. The difficulties in excluding the application of the *Sentencing Act* to the Juvenile Court were made abundantly clear by Mildren J in his minority judgment. The present judgment highlights some – but by no means all – of the problems flowing from section 4 of the *Sentencing Act*. The likely outcome of the present judgment is that prosecuting authorities and the Juvenile Court itself will feel obliged to have juveniles dealt with in the Supreme Court where it is considered that the sentencing options of the Juvenile Court are inappropriate or inadequate. The inevitable result will be increased costs and increased delay in resolving cases involving juveniles. Further, as I have indicated, there is a real potential for juveniles to receive harsher treatment than adults in relation to the provisions for minimum mandatory detention or imprisonment for (repeat) property offenders due to the absence of any power in the Juvenile Court to back-date a sentence.

With respect, I suggest that this is an urgent need to review the relationship between the *Juvenile Justice Act* and the *Sentencing Act*.

**PRIESTLEY J:**

I agree with Bailey J, and with his recommendation that the anomalies highlighted in his reasons be brought to the attention of the legislature – in my opinion, the sooner the better."

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