*Hales v O'Neill* [2000] NTSC 31

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| PARTIES: | PETER WILLIAM HALES |
| | v |
| | SHANE ROBERT O'NEILL |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction |
| FILE NO: | JA 21/00 & JA22/00 (9928774 & 20004246) |
| DELIVERED: | 22 May 2000 |
| HEARING DATES: | 12 May 2000 |
| JUDGMENT OF: | THOMAS J |

**CATCHWORDS:**

APPEAL – APPEAL AGAINST SENTENCE

Appeal from Court of Summary Jurisdiction – sentenced respondent to six months imprisonment – suspended after three months – appeal – on grounds that manifestly inadequate and failure to take into account period in custody for breach of bail – basis of appeal is that Magistrate's sentencing discretion miscarried – took into account subjective features – inadequacy of the sentence is apparent or plain – appeal allowed

*Sentencing Act 1995* (NT), s 40 (1), (2) and (6), s 43

*Thompson v Mamarika* Supreme Court of the Northern Territory Martin CJ unreported 23 December 1993; *Leaney v Bell* (1992) 108 FLR 360; *R v Mulholland* (1991) 1 NTLR 1; *Lade v Mamarika* (1986) 83 FLR 312; *Blackman v Police* Supreme Court of South Australia Bleby J unreported 1 6 March 1998; *R v Henry* (1999) 46 NSWLR 346; *Everett v The Queen* (1994) 181 CLR 295, referred to.

*Gokel v Silverthorne* Supreme Court of the Northern Territory Martin CJ unreported 14 April 2000, considered.

*R v Tait* (1979) 24 ALR 473, applied.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | I Rowbottam |
| Respondent: | D Conidi |

*Solicitors:*

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

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| Judgment category classification: | C |
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| Number of pages: | 18 |

IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Hales v O'Neill* [2000] NTSC 31
JA22/00 (9928774 & 20004246)

BETWEEN:

**PETER WILLIAM HALES**
Appellant

AND:

**SHANE ROBERT O'NEILL**
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 22 May 2000)

[1] This is an appeal from a decision of Mr Loadman SM who on 31 March 2000 sentenced the respondent to a total period of six months imprisonment backdated to 25 February 2000. The sentence of six months imprisonment was suspended after the respondent had served three months and his Worship specified a period of two years during which the offender was not to commit an offence punishable by imprisonment if the offender was to avoid being sentenced to serve the balance of the three months imprisonment.

[2] The appeal by the Crown is on the following grounds:

(1) that the sentence was manifestly inadequate.

(2) that there was a failure to properly take into account period in custody for breach of bail.

[3] A third ground of appeal – that the learned stipendiary magistrate failed to comply with s 52 of the *Sentencing Act 1995* (NT) was withdrawn on the day of the hearing of the appeal.

[4] A schedule of the actual charges was usefully prepared by counsel for the appellant as part of the Crown's written summary of submissions on behalf of the appellant. I reproduce that schedule hereunder:

**"File 9928774**

| **Count** | **Date** | **Charges** | **Max Penalty** | **Amount** |
|---|---|---|---|---|
| 1 | 16/12/99 | Stealing | 7 years | $ 3,325.00 |

**File 20004246**

| **Count** | **Date** | **Charges** | **Max Penalty** | **Amount** |
|---|---|---|---|---|
| 1<br><br>2 | 2.2.00 | Aggravated Unlawful Entry (W/Intent)<br>Stealing | 10 years<br><br>7 years | <br><br>$ 10,500.00 |
| 3<br><br>4 | 2.2.00 | Aggravated Unlawful Entry (W/Intent)<br>Stealing | 10 years<br><br>7 years | <br><br>$ 7,000.00 |
| 5<br><br>6 | Between 8-10.2.00 | Aggravated Unlawful Use M/Vehicle<br>Drive Unlicensed | 10 years | |
| 7 | 10.2.00 | Stealing | 7 years | $ 2.50 |
| 8<br><br>9 | 11.2.00 | Aggravated Unlawful Entry (W/Intent)<br>Stealing | 10 years<br><br>7 years | <br><br>$ 248.60 |
| 10 | 21.2.00 | Aggravated Unlawful Entry | 10 years | |

| | | | | |
|---|---|---|---|---|
| 11 | | (W/Intent, Dwelling)<br>Stealing | 7 years | $ 250.00 |
| 12<br><br>13 | 24.2.00 | Aggravated Unlawful Entry<br>(W/Intent, Dwelling)<br>Stealing | 10 years<br><br>7 years | $ 400.00 |
| 14 | 16.2.00 | Stealing | 7 years | $ 40.00 |
| 15 | 25.2.00 | Stealing | 7 years | $ 156.00 |
| 16 | 25.2.00 | Unlawful Possession Property | | |
| 17<br><br>18 | 14.2.00 | Aggravated Unlawful Entry<br>(W/Intent)<br>Stealing | 10 years<br><br>7 years | $ 356.00 |
| 19 | 25.2.00 | Agg. Unlawful Possession<br>- Cannabis (Public Place) | 2 years/<br>$5000 fine | |
| | | | **TOTAL** | **$ 22,278.10** |

[5] The respondent entered a plea of guilty to all the above charges.

[6] The Crown facts admitted by the respondent in respect of the one offence found proved in the Court of Summary Jurisdiction File 9928774 are as follows (t/p 9 – 10):

> "…. At approximately 2.30 pm on Thursday 16 December 1999, the defendant entered the Cash Converters store, Bagot Road, Coconut Grove, with the intent to steal property. He entered the stock room where there is public access, at the rear of the premises via an open roller door. The defendant approached shelving containing stock and removed the following items; a Hitachi video camera, a Nokia mobile phone and an Aser(?) lap top computer. Total value of the property was $3325.
>
> The defendant placed the items into a black carry bag and left the store, again through the open roller door at the rear of the premises.
>
> …..
>
> ….. The defendant was located by Cash Converters staff in the vicinity of Dings and Things crash repairs in Delatour Street, Coconut Grove. The two Cash Converters staff members confronted the defendant and requested the return of the property. The defendant handed the property to the staff members. He was then

escorted back to Cash Converters where he was later arrested by police and conveyed to the Peter McAulay Centre. He was held due to his intoxication. At 10.43 pm the defendant participated in an audio taped record of interview making no admissions.

When asked his reason for stealing the property, the defendant replied, 'I can't remember much about that day. I kind of spun out, then bang, I woke up here'. At no time did the defendant have permission to steal the property listed above, being the property of Cash Converters, Coconut Grove. All of the property was recovered, … During the interview, the defendant made admissions to consuming 6 Rohypnol and had no recollection of the day's events.

[7] The Crown facts admitted by the respondent in respect of the 19 offences found proved on Court of Summary Jurisdiction File 20004246 are as follows (t/p 5 – 8):

"…. on 2 February 2000 at approximately 6 pm, the defendant entered Energy House at 18 Cavenagh Street, Darwin. The defendant travelled up to each floor, exiting the elevator and walking around. He went to the office of Transport and Works and entered the office area which is not open to the public and removed the following property: black Toshiba lap top computer valued at $4500 and another black Toshiba lap top computer valued at $6000. The defendant placed the computers into custom designed bags and left the building.

The defendant took the computers to an unknown person in the car park of Woolworths Nightcliff and sold them for $300 each. The whereabouts of the computers is not known. The defendant spent the money he received on the purchase of drugs. The defendant did not have permission to enter the office area of Transport and Works or to remove property. He was interviewed by police and the reason given for these offences was, 'I needed cash to buy drugs'.

….. on 2 February 2000, at approximately 6 pm again, the defendant entered Energy House at 18 Cavenagh Street, Darwin. This time he went to the Power and Water Authority area and entered the office area where the public are not permitted access and removed the following property: an IBM lap top Thinkpad computer valued at $3500 and a Toshiba lap top computer valued at $3500. The defendant took the computers to the car park at Woolworths Nightcliff and sold them to an unknown person for $300 each also.

The whereabouts of the computers is not known and again, the defendant spent the cash received on drugs. The defendant did not have permission to enter and remove property from the office area of the Power and Water Authority, which is not open to the public. Again, the reason given was he needed money to buy drugs.

….. on 8 February 2000, at approximately 7 am, the defendant was at a flat in Eden Street, Stuart Park with other persons, including the victim in this matter. The defendant approached the victim and asked if he could borrow his vehicle; a blue Commodore sedan WA registered 8KE-429, valued at $2000. The defendant stated he was going to be 10 minutes and he was going to pick up his girlfriend and return to that address. The defendant did not return to Eden Street and drove the vehicle around the Darwin, Casuarina, Palmerston and Humpty Doo areas. The defendant abandoned the vehicle on 10 February 2000 at approximately 3.40 pm, near the Palms Hotel, McMinn Street, Darwin, when it ran out of fuel.

The defendant did not contact the owner to tell him of the whereabouts of his vehicle, which he had had for over 48 hours. The defendant did not have permission to keep the vehicle for any longer than the 10 minutes agreed to by the owner. At the time of the offence, Eden Street, Stuart Park was a public street, open to and used by the public. The traffic was light, it was day time, the weather was clear and fine. At the time of the offence, the defendant did not hold a licence to drive a motor vehicle in the Northern Territory or any other state of Australia.

…..

….. On 10 February 2000, at approximately 10 am, the defendant entered Woolworths, Smith Street, Darwin and went to the area of the bakery located inside the Woolworths complex. The defendant selected two cakes, valued at $2.50 from the bakery and consumed them in the store. The defendant was approached by an employee and left the store without offering payment for the cakes. The defendant drove off in the Western Australian registered blue Holden Commodore sedan. At the time of the offence, the defendant had no money in his possession to make payment for the goods. He did not have permission to consume the cakes without making payment. The reason given; 'I was hungry'.

….. on 11 February 2000 at approximately 9 am, the defendant entered the Novotel Hotel on the Esplanade with the intention of stealing property. He approached the bar and started a conversation with the bar person. After about 10 minutes, the bar person went to the back of the bar area. The defendant entered the bar from a rear access door and opened the till with a set of keys located next to the

till. The defendant removed $248.60 from the till and left the bar through the same rear entrance, before leaving the hotel complex.

The defendant spent the money on drugs from an unknown source. He did not have permission to enter the bar area, to which the public are not permitted access, nor to remove $248.60 from the till behind the bar. Reason given; 'I went in there to ask for a job and when the bar bloke walked away, I thought I might take the money'.

….. on 21 February 2000, at approximately 9 am, the defendant entered the Centra Motel complex with the intention to steal property. The defendant walked around for a short period of time before entering the housekeeper's office on the first floor. The defendant removed a black purse from a handbag, the property of Linda Searby(?), valued at approximately $250. The defendant left the complex and walked down the Esplanade and removed $150 cash from the purse, discarding the remaining items in an unknown spot.

The defendant then spent the cash on the purchase of drugs from an unknown source. He did not have permission to enter the housekeeper's office, which the public are not permitted access to, nor to remove the purse owned by Linda Searby. The reason given was; 'I went in there to see if I could get some cash'.

On 24 February 2000, at approximately 10 am the defendant went to the Don Hotel, Cavenagh Street, Darwin. He went to room 28 and knocked on the door. When there was no answer, the defendant opened the window next to the door and entered the room, causing no damage. The defendant forced open a suitcase inside the room, with a knife, and removed $400 cash in $50 notes. The defendant then left the room through the door and closed the window he had entered through.

The defendant spent the cash on drugs and a room at the Cherry Blossom Motel for the night. The defendant did not have permission to enter room 28 at the Don Hotel, which was occupied by Vicki Marmstring(?) at the time. When arrested on 25 February, the defendant had personal papers and Commonwealth credit cards in his possession. The reason given - - -

…..

….. The reason given was to get some cash.

….. on 16 February 2000, at approximately 3 pm, the defendant entered Rossetto's sports store in Smith Street Mall. He went to a stand containing T-shirts and removed a black Richmond Tigers sports shirt. The defendant secreted it in his bag and left the store without offering payment. At the time of the offence, the defendant did not have sufficient funds to pay for the shirt, which

was valued at $40. He did not have permission to remove the T-shirt without offering payment. At the time the defendant was arrested on 25 February, he was in possession of the shirt. Reason given was, 'just did it'.

On 25 February 2000, at approximately mid-day, the defendant again entered Rossetto's sports store in Smith Street Mall. He selected a pair of size 4 Nike cross trainers valued at $140 and placed them on his feet. Then left his old Masseur sandals in their place, then walked around with the shoes on and selected an Adidas bum-bag valued at $16. The defendant walked from the store without offering payment for the shoes and bum-bag. The total value being $156. The defendant did not have permission to remove the above items without offering payment. Reason given, 'I had money on me, but I thought I'd take them anyway'.

….. on 25 February 2000 at approximately 11.30 am, the defendant was arrested and taken into custody in Darwin city. When his property was searched the following items were located; one pair of sport shorts valued at $25, one pair of baggy beige trousers valued at $60, a set of room keys owned by Judith Knipe(?) valued at $10 and a gold plated manicure set valued at approximately $100. Total value of that property $195. When asked by police, the defendant could not provide ownership details of the items listed above, stated that he had stolen the clothing from Casuarina a couple of weeks ago and the other items he didn't know whose it was. No reason given, …

….. on 14 February 2000 at approximately 11 am, the defendant entered the Woolworths shopping complex, Smith Street, Darwin. He walked around for a while, then entered the Mac's Liquor section which being a Sunday, was closed. The defendant went to the store room area and removed a box of 12 700 ml bottles of Cougar Bourban (sic) valued at $356. He then walked from the Woolworths store through the checkouts without offering payment for the alcohol. The defendant was not stopped by security or staff.

…..

….. The defendant took the bottles and sold 10 of them to persons unknown in the Darwin area for varied prices. The defendant spent the cash received from the sale of bottles on drugs. He did not have permission to enter Mac's Liquor which was closed and not open to the public, nor to remove the box of alcohol without offering payment. The reason given, 'there was a lot of people in the store and it seemed pretty easy. I thought about it before I went in to Woolworths'.

….. on 25 February 2000 at 11.30 am, the defendant was arrested in Darwin city, was found in possession of a plastic bag

which contained cannabis. The material was removed from the defendant and exhibited for analysis. When asked, the defendant stated that it was marihuana and he had it for his personal use. The defendant at the time, knew it was an offence to possess a dangerous drug in a public place.

.....

..... the weight of the cannabis was 1.9 grams. ....."

[8] On 31 March 2000 the learned stipendiary magistrate delivered reasons for his decision at the conclusion of which he made the following formal order (t/p 41):

"In the circumstances, the sentences that I formally impose on you are as follows. Firstly, I deal with the matter of 9928774, which with all of the property offences on 20004246, I'm entitled to treat and dispose of on a single finding of guilt and in respect of that file, I simply endorse that for sentence, reference must be had to 20004246. In relation to that latter matter, I formally pronounce the sentence: (a) on a single finding of guilt with 9928774 and on the charges in this matter – 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 16, 17 and 18 – I convict you and in sentence you to an aggregate term of 5 months' imprisonment which I backdate to 25 February.

(B) on 6, 7, 14, 15 and 19 which are not property offences, I also convict you and I sentence you to a period of imprisonment of 1 month. I must, because of the legislation which I'm bound by, make that cumulative on the 5 months, which results in a total period of imprisonment of 6 months. In respect of that 6 months' imprisonment, as I've already said, the effective 5 is backdated to 25 February. I order that the sentence be suspended after you have served 3 months. I'm not sure precisely when that calculates you being granted your liberty.

I specify though, for a period of 2 years, the sentence is suspended on condition that if you commit another offence, any kind of offence, for which imprisonment is a prospect of penalty, then that 3 months in the language of the legislation, must be restored unless it be unjust. Which means in lay terms, if you do the crime, you'll do the time. Go back to gaol for 3 months."

[9] The principles governing the determination of Crown appeals against inadequacy of sentence, have been established by the Court of Criminal Appeal in *The Queen v Raggett & Ors* (1990) 50 A Crim R 41; *The Queen v ANZAC* (1987) 50 NTR 6 at 11 – 12; *R v Nagas* (1995) 5 NTLR 45 at 50 – 52.

[10] These principles have been applied to appeals from the Court of Summary Jurisdiction (*Thomson v Mamarika* JA 162 of 1993 (unreported) decision of Martin CJ, delivered 23 December 1993; *Gokel v Silverthorne* JA 2 of 2000 (unreported) Martin CJ delivered 14 April 2000).

[11] The essential basis of the appeal is not that the learned stipendiary magistrate erred in law but that his sentencing discretion miscarried because he took into account certain subjective features in respect of the respondent and imposed a sentence which on the face of it is manifestly inadequate and without due regard to the seriousness of the offending or the aspect of specific and general deterrence.

[12] The respondent was before the Court as a young man of 21 years with a quite substantial history of prior offending in another state of Australia. His record of prior convictions was Exhibit 1 before the Court of Summary Jurisdiction and was also tendered on this appeal.

[13] An analysis of this document reveals the respondent had convictions for certain matters in the Childrens Court in New South Wales. Whilst the document setting out his criminal history is quite lengthy, many of the matters referred to in 1998 and 1999 relate to failures to appear in court. On 1 January 1999 he failed to appear in the Newcastle District Court on charges of using an offensive weapon to prevent lawful detention, driving a conveyance without consent, drive in manner dangerous and drive without licence. A warrant has issued for his arrest.

[14] On 7 August 1999 he was convicted of maliciously destroy or damage property and fined $400.

[15] Whilst he did spend periods of time in custody as a juvenile for stealing motor vehicles and other dishonesty charges, his offending as an adult appears to be less extensive and mostly for traffic related offences including driving under the influence of alcohol. Much of his record as an adult deals with his failure to appear in court and matters for which no conviction has been recorded.

[16] There are certain objective facts which make these offences serious.

1) The offence on Court of Summary Jurisdiction File 9928774 was committed on 16 December 1999. The offences on Court of Summary Jurisdiction File 20004246 were committed over a period

in excess of three weeks between 2 February 2000 and 25 February 2000.

2) All the offences committed on Court of Summary Jurisdiction File 20004246 were committed whilst the respondent was on bail in respect of the offence committed on 19 December 1999 (*Leaney v Bell* (1992) 108 FLR 360).

3) The respondent has been committed to the District Court in Newcastle on the offences detailed earlier and a warrant exists for his arrest following his failure to appear before that court on 1 January 1999.

4) Almost all of the property on Court of Summary Jurisdiction File 20004246 amounting to a total of $22278.10 has never been recovered.

5) Counsel for the Crown submitted that the prior offending by the respondent was a circumstances of aggravation of the instant offences and was therefore deserving of greater punishment *(R v Mulholland* (1991) 1 NTLR 1. Whilst I accept the principle of law, I do not accept the record of prior convictions is as substantial as the Crown maintains, for the reasons I have already canvassed in paragraph 15. Nevertheless, the respondent does have a quite substantial number of convictions in the Childrens Court in New South Wales.

[17] I agree with the Crown submission that the imposition of the aggregate sentence of six months imprisonment does not reflect the totality of the criminality of the offender's conduct (*Lade v Mamarika* (1986) 83 FLR 312).

[18] There were a number of aspects relevant to the respondent which the learned stipendiary magistrate took into account particularly those matters relevant to the aspect of rehabilitation.

[19] The respondent arrived in Darwin in the latter part of 1999 with a desire to make a fresh start in life. However, on his own evidence, on the first day of his arrival he sought out drugs and obtained and administered morphine to himself (t/p 27).

[20] The respondent gave evidence before the learned stipendiary magistrate in which he expressed his remorse and his desire to change his lifestyle. He also gave evidence that he has been diagnosed with Hepatitis C whilst in gaol and this has had a very great impact on him and a substantial part of the reason he intends to change his lifestyle. His Worship took into account the fact the respondent had Hepatitis C, the respondent's expressions of remorse, his demeanor in the witness box when giving evidence and concluded that this justified a partially suspended sentence of imprisonment.

[21] Dr Walton, a practising psychiatrist, gave evidence before the learned stipendiary magistrate. Dr Walton had interviewed the respondent in gaol

and had prepared a report which was tendered in the Court of Summary Jurisdiction.

[22] Dr Walton was somewhat cautious about the respondent's prospects for rehabilitation and gave the following evidence in cross examination before the learned stipendiary magistrate on 31 March 2000 (t/p 11 – 12):

> "Now you mentioned various conditions for which dexamphetamine is commonly prescribed. Could I ask you, Doctor, in relation to your examination of Shane O'Neil, specifically what evidence you draw on to conclude that Shane O'Neil – and I am paraphrasing from your report and please correct me if I'm doing that incorrectly, myself – but what evidence you draw on to conclude that Shane O'Neil is at a point where he's prepared to make an alteration to – or I would describe it, Doctor as a vast alteration to his lifestyle?---Well, I'm reliant upon him, of course, as my source of information, in terms of that type of conclusion. And you will have noted that I express some reservations about his claims in that direction, but the salient thing that he highlighted himself was that this diagnosis that he's received of Hepatitis C – I mean it's – he, at least to some extent, seems to have come to the Northern Territory as some form of attempt to get control of his drug abuse, clearly unsuccessfully. Once incarcerated, he's been medically investigated, informed about this potentially life threatening illness which he has and that's what he highlights as motivating him towards reforming himself. As I said, it's not uncommon, of course, that to assess people in similar predicaments and they make grand promises about doing similar things and of course, a lot of them don't manage to sustain it. Although in my experience, it's a bit like giving up cigarettes. It often takes several attempts before a person can do it in the longer term and it's not necessarily indicative of a long term poor outcome, that someone might actually fail a time or two when attempting drug rehabilitation. But, yes, you'd have to have reservations about whether or not he could maintain his stated aspirations in the long term.
>
> And you have those reservations?---I do, yes. Just as a matter of general principle, in relation to persons with his type of addictive history."

[23] I agree that the respondent's prospects of rehabilitation were an important consideration (*Blackman v Police* Supreme Court of South Australia (unreported) SASC N° 6599 Bleby J delivered 16 March 1998.

[24] The learned stipendiary magistrate accepted "unequivocally" that drug addiction was not a mitigating circumstance anymore than drunkenness (*R v Henry* (1999) 46 NSWLR 346).

[25] The respondent entered a plea of guilty at a very early stage in the proceedings and had made full admissions to the police with respect to his offending.

[26] The respondent was 21 years of age at the time of the offending. Detailed submissions had been made to the learned stipendiary magistrate as to the respondent's unsettled upbringing, his parent's separation, that he left home at the age of 13 and that at the age of 17 years he began using heroin intravenously.

[27] The learned stipendiary magistrate took into account "the philosophies laid down in s 5 of the *Sentencing Act*". His Worship did take into account the aspects of specific and general deterrence and stated these must necessarily be balanced against the issue of rehabilitation.

[28] His Worship relied on the principles referred to by Kearney J in *Leaney v Bell* (supra) when considering the leniency to be extended to the respondent because of his expressed desire to change his lifestyle and the other factors

already referred to that were taken into account by the learned stipendiary magistrate.

[29] Whilst the appellant does not rely on any specific demonstrated error on the part of the learned stipendiary magistrate, the appellant asserts that the inadequacy of the sentence is obvious. I agree that the inadequacy of the sentence is apparent or plain (*Thomson v Mamarika* (supra)).

[30] I apply the principle expressed in *R v Tait* (1979) 24 ALR 473 at 476:

> "An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error (see generally, *Skinner v R* (1913) 16 CLR 336 at 339-40; *R v Withers* (1925) 25 SR (NSW) 382 at 394; *Whittaker v R* (1928) 41 CLR 230 at 249; *Griffiths v R* (1977) 15 ALR 1 at 15-17."

[31] I agree with the submission made by counsel for the appellant that the sentencing magistrate's discretion miscarried by placing too great an emphasis on the issue of rehabilitation and too little emphasis on the need for general and specific deterrence.

[32] The appeal is allowed.

[33] My attention has been drawn to the decision of *Gokel v Silverthorne* JA 2 of 2000 (unreported) decision of Martin CJ, delivered 24 March 2000. The case has a number of similarities with the appeal before this Court. It was a Crown appeal on the ground that the sentence was manifestly inadequate.

The respondent in that matter committed a series of unlawful entries with stealing, the total value of the property being $24222.50 although it appears that on appeal it was disclosed that the value of the property may actually have been $32407. There was also an offence of criminal damage amounting to $1000 and an offence of trespass and stealing goods to the value of $400. The goods stolen were readily saleable for cash and apart from an esky valued at $400 none of the property was recovered.

[34] The respondent in the matter of *Gokel v Silverthorne* was younger than the respondent who is the subject of this appeal. Philip Silverthorne turned 18 years of age during the period of time his offences were committed. He had prior convictions for similar offences and was in breach of a bond. Account was taken of the fact that Philip Silverthorne had entered a plea of guilty and made full admission to police. His Honour gave significant weight to the respondent's voluntary efforts to change his lifestyle even before he was detected by police. The sentence which had been imposed by the learned stipendiary magistrate was 12 months imprisonment suspended after three months with various conditions involving counselling and treatment. His Honour described the sentence imposed by his Worship as "merciful, but not so far beyond the exercise of sound judicial discretion as to be manifestly inadequate."

[35] His Honour the Chief Justice also commented "that there was a further factor which militated against increasing the sentence at this stage". At the time the appeal was heard the respondent had been discharged from custody

and to have him returned to prison to serve an additional sentence would be unjust in all the circumstances (*Everett v The Queen* (1994) 181 CLR 295 Brennan, Deane, Dawson & Gaudron JJ at 305).

[36] In the appeal before this Court the respondent was sentenced on 31 March 2000 to six months imprisonment backdated to 25 February and to be released after serving three months. The appeal was heard on 12 May 2000 and I reserved my decision in the matter. The respondent is eligible to be released on 24 May. The decision in respect of the appeal will be handed down on 22 May.

[37] Whilst the result of the appeal will be handed down before the respondent is released from custody, I do take into account that since 31 March 2000 he has had an expectation of release on 24 May 2000. I do not consider it unjust in all the circumstance that this period in custody is to be extended. However, I do reduce the sentence I would otherwise have imposed for this reason and also applying the principles of double jeopardy in respect of Crown appeals (*R v Tait* (supra) at 476 – 477).

[38] Having allowed the appeal for the reasons already stated, I will now proceed to re-sentence the respondent and make the following formal orders.

[39] I will approach the matters in the same way with respect to the aggregation of sentence as was adopted by the learned stipendiary magistrate.

[40] With respect to Court of Summary Jurisdiction File 9928774 the offence of stealing being Count 1 and the property offences on Court of Summary Jurisdiction File 20004246 being Counts 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 16, 17 and 18. I confirm the convictions and impose an aggregate sentence of 12 months imprisonment.

[41] With respect to charges 6, 7, 14, 15 and 19 on Court of Summary Jurisdiction File 20004246 which are not property offences, I confirm the conviction and the respondent is sentenced to two months imprisonment cumulative upon and to be served at the expiration of the sentence of 12 months imprisonment.

[42] Total 14 months imprisonment. Pursuant to s 40(1)(2) of the *Sentencing Act* this sentence is suspended after the respondent has served six months imprisonment on condition the respondent be of good behaviour.

[43] Pursuant to s 40(6) of the *Sentencing Act*, I specify a period of two years from 31 March 2000 being the date of the order made by the learned stipendiary magistrate during which the offender is not to commit another offence punishable by imprisonment if the offender is to avoid being dealt with under s 43 *Sentencing Act*.

[44] This sentence is to date from 25 February 2000.

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