PARTIES:	D
	v
	NOEL JOHN GOKEL, DAVID NICHOLAS PEACH and COLLEEN MARIE GWYNNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	Justices Appeal
FILE NO:	JA19 of 1998
DELIVERED:	26 May 1998
HEARING DATES:	20 May 1998
JUDGMENT OF:	ANGEL J

CATCHWORDS:

Statutory Interpretation – *Juvenile Justice Act* 1983 (NT) – Mandatory sentencing for property offences – Repeat offenders – "Once or more before been found guilty" – Duration of lapse of time between findings of guilt irrelevant

Juvenile Justice Act 1983 (NT) s53AE(2)
Schluter v R (1997) 6 NTLR 194 not followed

Statutory Interpretation – *Sentencing Act* 1995 (NT) – Mandatory sentencing for property offences – Repeat offenders – "Once before been found guilty" – Duration of lapse of time between findings of guilt irrelevant

Sentencing Act 1995 (NT) s78A(2)
Schluter v R (1997) 6 NTLR 194 not followed

Criminal Law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – *Juvenile Justice Act* 1983 (NT) – Mandatory sentencing for property offences – Repeat offenders – "Once or more before been found guilty" – Duration of lapse of time between findings of guilt irrelevant

Criminal Law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – *Sentencing Act* 1995 (NT) – Mandatory sentencing for property offences – Repeat offenders – "once before been found guilty" – Duration of lapse of time between findings of guilt irrelevant

REPRESENTATION:

Counsel:

Appellant:	Mr C Howse
Respondent:	Mr I Rowbottam

Solicitors:

Appellant:	North Australian Aboriginal Legal Aid Service
Respondent:	Director of Public Prosecutions

Judgment category classification:	A
Judgment ID Number:	ang98008
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ang98008

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

No. JA19 of 1998

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against severity of sentence imposed by the Juvenile Court of Summary Jurisdiction at Darwin

BETWEEN:

D

Appellant

AND:

NOEL JOHN GOKEL and
DAVID NICHOLAS PEACH and
COLLEEN MARIE GWYNNE

Respondents

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 26 May 1998)

This is an appeal from a decision of Mr Gillies SM, sitting in the Juvenile Court, sentencing the appellant to 28 days detention for unlawful use of a motor vehicle.

On 28 December 1997 the appellant unlawfully used a motor vehicle contrary to s218(1) of the *Criminal Code*. On 14 January 1998 the appellant, on two occasions, contravened that provision again. The appellant committed other offences related to these three offences, namely driving while unlicensed and giving a false name, but they can be disregarded for the purposes of this appeal. The appellant appeared before the learned Magistrate on 20 January 1998 in relation to the January offences. She pleaded guilty and the learned Magistrate found the appellant guilty accordingly and adjourned sentencing in anticipation of the compilation of a pre-sentence report. An interview between police and the appellant on 19 February 1998 revealed to the police for the first time the appellant's involvement in the December offences. The police issued a summons in respect of the December offences to be heard together with the sentencing in respect of the January offences. The summons and the outstanding sentencing came before the learned Magistrate on 13 March 1998. The appellant pleaded guilty to the December offences, the appellant was found guilty and the learned Magistrate sentenced the appellant to 28 days detention in relation to the December offences, pursuant to s53AE(2) of the *Juvenile Justice Act*. The appellant was also sentenced in relation to the other matters.

The notice of appeal relies upon a single ground of appeal:

> "His worship erred in law in his interpretation of section 53AE(2) of the *Juvenile Justice Act* in that a finding of guilt in the same proceeding does not count for the purposes of a ruling that the offender had been once before, or more, found guilty of a property offence".

The ground of appeal might have been expressed in clearer language. However, the issue for determination on appeal, as I understand the notice of appeal, is whether the previous finding of guilt on 20 January 1998 in relation to the January offences, by virtue of s53AE(2) *Juvenile Justice Act*, required the learned Magistrate to impose 28 days detention in respect of the December offence upon the finding of guilt on the 13 March 1998.

Section 53AE relevantly provides:

> "Division 3 – Repeat Property Offenders
>
> Subdivision 1 – Compulsory Detention
>
> S53AE. SENTENCING OF REPEAT PROPERTY OFFENDERS WHO HAVE ATTAINED THE AGE OF 15 YEARS
>
> (1) In this section, 'juvenile' means a juvenile who has attained the age of 15 years.
>
> (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.
>
> (3) Where a juvenile is found guilty of more than one property offence specified in the same information, complaint or indictment, the findings of guilt are, for the purposes of this section, to be taken as a single finding of guilt, whether or not all the offences are the same.
>
> (4) Where a juvenile is found guilty of more than one property offence as part of single criminal enterprise, all

> the property offences are together a single property offence for the purposes of this section, whether or not the offences are the same.
>
> (5) Where a juvenile is found guilty of a property offence, the offence is to be taken into account for the purposes of subsection (2) whether it was committed before or after the property offence in respect of which the juvenile is before the Court."

Mr Howse, for the appellant, submitted that the finding of guilt in relation to the January offences by the learned Magistrate on 20 January 1998 did not fall within the phrase "the juvenile has once or more before been found guilty of a property offence". Thus, it was said, the Juvenile Court was not required to sentence the appellant to 28 days detention on the strength of the finding of guilt of the December offences on 13 March 1998.

The argument advanced by the appellant rested primarily upon the decision of Martin CJ in *Schluter v R* (1997) 6 NTLR 194, where his Honour was called upon to construe s78A(2) of the *Sentencing Act,* the non-juvenile 'mirror provision' of s53AE(2).

Section 78A(2) provides:

> "Where a court finds an offender guilty of a property offence and the offender has once before been found guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 90 days."

The learned Chief Justice made the following observations (at 197-198):

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

It is clear than the general policy of this Division of the Act is to provide for minimum punishment and an increase in minimum punishment tied to the number of times an offender has been before a court and found guilty of a property offence or offences. Successive findings of guilt in respect of a number of property offences charged upon the one information, complaint or indictment, are to be taken to be a single finding of guilt (s78A(4)), and it does not seem to matter over what period of time the offences were committed, or whether dealt with by a court at the one time or not. Provided the offender is before the court by a procedure whereby he or she is to meet a number of charges brought upon the one information, complaint or indictment, then the ameliorating provision is available. In such a case it is the appearance before the court which is regarded by the legislature as being the touchstone upon which the operation of s78A depends. Similarly, s78A(6) makes the offender's appearance before the court (and a finding of guilt) the fact which is to be taken into account when considering whether there has been a prior finding of guilt, not the dates upon which the several offences were committed (apparently contrary to common law, see *O'Hara v Harrington* [1962] Tas SR 165).

It is clear that the parliamentary intention is that an offender should not be subjected to compulsory imprisonment pursuant to ss78A(2) or (3) unless the offender has first been dealt with by a court under ss78A(1) or (2) as the case may be. The purpose is obvious. Offenders are to realise that upon being brought to a court for a property offence or offences they will suffer a mandatory term of imprisonment, the minimum length of that term depending upon the number of times they have been previously before the court. Amongst the purposes of criminal sanctions are those to protect society to the extent necessary to achieve that purpose, and a sentence intended to deter an offender from committing offences of the same kind serve such a purpose (*Channon v The Queen* (1978) 33 FLR 433; 20 ALR 1).

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

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

All this implies that apart from the finding of guilt, the court has also proceeded to convict and sentence the offender as required. Clearly, if a finding of guilt only has been made, and the court has not moved to the next stages of the process, perhaps waiting of a pre-sentence report or further submissions, the full effect of the compulsory imprisonment regime will not have been brought home to the offender. This case does not raise that point for consideration, but it is an aid to the interpretation of the words in question to recognise that the whole process of the finding of guilt conviction and passing of sentence would, in the ordinary course, be done at the one time.

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

The genesis of the learned Chief Justice's ruling appears to have been on agreement between counsel for the parties before him (see, at 196, 197).

However, with all due respect for the opinion of the learned Chief Justice the language used in s78A is simply not capable of supporting an interpretation that it is the appearance before the court and a finding of guilt *on a previous day* which invokes subsection (2). All that needs to be established before that subsection is invoked is that 'the offender has once before been found guilty of a property offence'. Those words are unambiguous. The subsection does not in any way qualify the pre-requisite of a prior finding of guilt by specifying that such a finding must have been made on a previous day. Once there has been a prior finding of guilt of a property offence, irrespective of the length of any lapse in time between those findings, the subsection applies. What is more, the legislature has chosen a finding of guilt as the event triggering the subsection rather than conviction or sentencing. The legislature must be taken to be aware of not only the discrete steps making up the criminal process, but also that those steps are not necessarily taken in the one hearing.

Furthermore, the learned Chief Justice identified the purpose of s78A as being one of teaching a first, or second offender, a lesson by providing for an escalating sentencing regime, thus deterring him from offending again. Such a purpose is inconsistent with subsection (6) which specifically provides that the chronological order in which in the offences were committed is irrelevant for the purposes of the section. Parliament has expressly provided that where an

offender has committed a property offence before another property offence, and a finding of guilt has been made in relation to the one occurring later in time, the subsequent finding of guilt in relation to the offence occurring earlier in time is capable of invoking subsection (2). The sentencing regime, when operating by virtue of subsection (6), can therefore not be said to be teaching the offender a lesson, because the earlier offence had already been committed when he was sentenced in respect of the later offence. Rather, the overall purpose of the section is to punish and deter multiple property offending, and Parliament has dictated the number of property offences of which an accused has been found guilty in the past as the factor dictating the minimum sentence.

An indication of the legislature's awareness of the wide scope of subsection (2) is the inclusion of subsections (4) and (5). It is apparent that subsections (2) and (3) operate upon consecutive findings of guilt where a number of property offences are charged on the same complaint, information or indictment and where a number of property offences had been committed as part of a single criminal enterprise.

There is no reason why this view in relation to the *Sentencing Act* should not apply with equal force to s53AE(2) and (3) of the *Juvenile Justice Act*. The provisions are *in pari materia*. There is no material difference between the meanings of the phrases 'has once or more before been found guilty' and 'once before been found guilty'. Therefore, the instant a juvenile has been found guilty of a property offence he or she is immediately exposed to the mandatory sentence of detention contained in subsection (2).

It is true that this construction of the two Acts has the effect of exposing an offender to significant terms of actual imprisonment or detention where they are found guilty of two or more property offences, charged, for whatever reason, in separate complaints, informations or indictments, irrespective of whether they are heard together or on separate occasions. However, the language of the legislation is clear and without ambiguity and it is therefore the duty of this Court to give effect to it. That this may leave offenders at the mercy of the manner of prosecution is to be regretted, but the language of the section is not, in my view, capable of carrying any other construction. As Lord Macnaughten said in *Vacher & Sons Ltd v London Society of Compositors* [1912] AC 107 at 118:

> "Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act or Parliament, or to pass a covert censure on the Legislature."

Having arrived at that interpretation of s53AE(2) it follows that the appeal must be dismissed. The appellant committed a property offence on 28 December 1997 and a further two property offences on 14 January 1998. She was found guilty of the January offences on 20 January 1998 and she was found guilty of the December offences on 13 March 1998. Consequently, the

learned Magistrate was right in holding himself bound to sentence the appellant to 28 days detention in relation to the December offence.

The appeal is dismissed.