PARTIES:	ROSINA MCMILLAN
	v
	LEONARD DAVID PRYCE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT
FILE NO:	9707421
DELIVERED:	20 JUNE 1997
HEARING DATES:	22 MAY 1997
JUDGMENT OF:	MARTIN CJ, ANGEL AND MILDREN JJ

CATCHWORDS:

Special Case Stated - s 162 *Justices Act* - offences committed and proved prior to 8 March 1997 - offences committed prior to 8 March 1997 not dealt with until 13 March 1997 - s 78A and s 78B *Sentencing* Act - s 121 *Sentencing Act* - principles of statutory interpretation - meaning of "property offences" - retrospectivity presumption that the same meaning should be given to the same word wherever it appears - applies to the "sphere of operation" of a word.

Legislation:

Justices Act
Sentencing Act
Criminal Code
Sentencing Amendment Act (No. 2) 1996
Interpretation Act

Cases:

R v Austin [1913] 1 KB 551 considered.
Page v Winkler (1975) 12 SASR 126 considered.
Hoppo v Samuels (1978) 18 SASR 277 considered.
Staska v GMH Pty Ltd (1970) 123 CLR 673 considered.
Maxwell v Murphy (1956-57) 96 CLR 261 followed.
Rodway v The Queen (1996) 169 CLR 515 followed.

Murphy v Farmer (1988) 165 CLR 19 followed.
Trenerry v Bradley (unreported, Full Court 20 June 1997) applied.

REPRESENTATION:

Counsel:

Appellant:	R. Wild Q.C., A. Fraser
Respondent:	C. McDonald Q.C., P. McNab

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	MIL0009
Number of pages:	9

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

No. 970742

IN THE MATTER OF THE *SENTENCING ACT*
AND
IN THE MATTER OF A CASE STATED IN
SUMMARY PROCEEDINGS 9707421 FOR
THE OPINION OF THE COURT

BETWEEN:

ROSINA MCMILLAN
Applicant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: MARTIN CJ, ANGEL AND MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 20 June 1997)

MARTIN CJ

For the reasons given by Mildren J. I agree with the answers he proposes.

ANGEL J

I agree with Mildren J that it is unnecessary to answer the first, sixth and seventh questions raised in the stated case and that the answer to the second and third questions is "No". Indeed both parties submitted that those questions should be answered in the negative, and I agree.

I am, however, of the view that questions four and five should be answered "Yes". Property offences are defined by s3(1) of the *Sentencing Act* as those specified in the First Schedule. The First Schedule refers to offences by reference to sections in the *Criminal Code*. Those offences were known to the law before 8 March 1997 and were all able to be described as property offences before 8 March 1997. In my opinion the *Sentencing Act* draws no line between previous convictions before and previous convictions after 8 March 1997. None of this is to say that retrospective effect is to be given to the *Sentencing Act* amendments. A person sentenced under the new amendments is not being punished for having done an act which at the time of its commission was prescribed by a different sentencing regime. An offender found guilty of an offence that occurs after the *Sentencing Act* amendments came into operation may, if he has already been found guilty in the past, be punished as he could not have been before the amendments. The *Sentencing Act* amendments merely bring into play an offender's previous history in the event he offends after 8 March 1997. It has no retrospective operation. I think the matter is governed by such cases as *R v Austin* [1913] 1 KB 551; *Page v Winkler* (1975) 12 SASR 126, *Hoppo v Samuels* (1978) 18 SASR 277 and *Staska v GMH Pty Ltd* (1970) 123 CLR 673 at 675 (PC).

Unlike Mildren J, I do not think s78A is ambiguous in this regard. If I am wrong in this, and there is some ambiguity, I particularly note and agree with the reasoning of the Full Court of South Australia in *Hoppo v Samuels* (supra) at 280, which reasoning I think is applicable here.

There the Court said:

> "If Mr Mangan's submission were correct, it would mean that in enacting the 1976 amendments Parliament intended to wipe the slate clean in respect of offences against the three sections which had been committed during the five years immediately preceding the commencement of the amending Act. This result militates against the policy evident in the amendments, namely to deter drinking drivers by visiting offences against these sections with more severe penalties. Even, therefore, if there were any ambiguity in the construction of the legislation, this consideration would lead us to reject the construction put forward to Mr Mangan. In our view, however, there is no ambiguity in the legislation. We emphasize that what are to be taken into account are 'offences previously committed" against the respective sections; and, as we have pointed out, the offences are the same, whether committed before or after 1st March, 1976. We would be of this opinion even if the form of the amending legislation had been to repeal and re-enact the respective subsections.".

I would answer the questions reserved as follows:

1. Unnecessary to answer.

2. No.

3. No.

4. Yes.

5. Yes.

6. Unnecessary to answer.

7. Unnecessary to answer.

MILDREN J

On 3 April 1997, the respondent laid an information against the applicant containing two charges, the first being a charge of unlawful entry of a dwelling house with intent to commit an offence therein (contrary to s 213 of the *Criminal Code*), and the second being a charge of unlawful damage to property, (contrary to s 251 of the *Criminal Code*). Both of these offences were committed on 2 April 1997. The applicant pleaded guilty before the learned Magistrate who found the offences proved. The maximum sentences available are 2 years imprisonment for each of these offences.

In December 1995 and March 1996, the applicant committed 5 offences which included two offences of unlawful entry with intent to commit a crime (s 213), and three stealing offences (s 210). These offences were not dealt with until 13 March 1997. On that date another Magistrate recorded convictions in respect of those offences and imposed community service orders.

On 8 March 1997, the *Sentencing Amendment Act (No. 2) 1996* came into force. The amending Act introduced a mandatory minimum sentencing regime for certain kinds of property offences, vide ss 78A and 78B. Those provisions have already been discussed in this Court's decision in *Trenerry v Bradley* (unreported, delivered the same time as this one).

Following the findings of guilt, the learned Magistrate stated a case to the Supreme Court which raises the following questions.

1. "Whether, on a true construction of s 78A of the *Sentencing Act*, the phrase "order the offender to serve a term of imprisonment", (thrice used) precludes the making of further orders suspending the term wholly or partly, or suspending the term on the offender entering into a Home Detention Order?"

2. "Whether on a true construction of Section 78A of the *Sentencing Act*, the term "property offence" [where first appearing in sub-sections (1), (2), (3) and (4)] includes an offence committed before 8 March 1997?"

3. "Whether, on a true construction of Section 78A of the *Sentencing Act*, the term "property offence" [where first appearing in sub-sections (1), (2), (3) and (4)] includes an offence committed before 8 March 1997 for which the defendant was found guilty on or after 8 March 1997?"

4. "Whether on a true construction of Section 78A of the *Sentencing Act*, the words "before been found guilty of a property offence" may include an offence committed before 8 March 1997 and for which the defendant was found guilty before 8 March 1997?"

5. "Whether on a true construction of Section 78A of the *Sentencing Act*, the words "before been found guilty of a property offence" may include an offence committed before 8 March 1997 for which the defendant was found guilty on or after 8 March 1997?"

6. "Whether the doctrine of issue estoppel prevents the informant from characterising the two convictions on 13 March 1997 as "property offences" for the purposes of Section 78A of the *Sentencing Act*."

7. "To what extent, if any, in the circumstances of this case is the *Sentencing Amendment Act (No. 2) 1996* retrospective?"

S 78A of the Act provides as follows:

"78A. IMPRISONMENT FOR PROPERTY OFFENDERS

(1) Where a court finds an offender guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 14 days.

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

(3) Where a court finds an offender guilty of a property offence and the offender has 2 or more times before been found guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 12 months.

(4) Where an offender is found guilty of more than one property offence specified in the same information, complaint or indictment, the findings of guilt are, for the purposes of this section, to be taken as a single finding of guilt, whether or not all the offences are the same.

(5) Where an offender is found guilty of more than one property offence as part of a single criminal enterprise, all the property offences are together a single property offence for the purposes of this section, whether or not the offences are the same.

(6) Where an offender is found guilty of a property offence, the offence is to be taken into account for the purposes of subsection (2) or (3) whether it was committed before or after the property offence in respect of which the offender is before the court."

The first question is unnecessary to answer, as that question has already been decided by this Court's decision in *Trenerry v Bradley*.

In order to answer the remaining questions, it is necessary to refer to certain other provisions of the Act. First, the words "property offence" are defined to mean "an offence specified in Schedule 1 of the Act." The offences referred to in the Schedule include offences against ss 213 and 251 of the *Criminal Code*. Some, but not all, offences against s 210 of the *Criminal Code*

are included in the Schedule. It is not possible to ascertain whether the stealing convictions in respect of the offences committed in December 1995 and March 1996 fall within the class of stealing offences included in the Schedule, but for present purposes I shall assume they are so included. Secondly, there are no transitional provisions contained in the *Sentencing Amendment Act (No. 2) 1996*. Thirdly, s 130(1) provides that the *Sentencing Act* applies to a sentence imposed after the commencement of the principal Act, irrespective of when the offence was committed. The principal Act came into force on 1 July 1996. Fourthly, s 121(1) provides:

> "Where an Act, including this Act, or an instrument of a legislative or administrative character increases the penalty or the maximum or minimum penalty for an offence, the increase applies only to an offence committed after the commencement of the provision effecting the increase."

Clearly, in view of s 121(1), an offence which would otherwise be a property offence, if committed before 8 March 1997, would not attract the minimum sentences provided for by s 78A, regardless of whether the conviction for that offence occurred before or after 8 March 1997. The same result is dictated by reference to s 12 of the *Interpretation Act*, and by reference to common law principles of statutory interpretation exemplified by such authorities as *Maxwell v Murphy* (1956-57) 96 CLR 261 and *Rodway v The Queen* (1990) 169 CLR 515. Both parties submitted that questions 2 and 3 should be answered in the negative. I agree.

The main area of dispute between the parties relates to the answers to be given to questions 4 and 5. The submission of Mr Wild Q.C., who appeared for the respondent, is that any offence committed after the *Criminal Code* came into force on 1 January 1984, and which falls within the description of a property offence as contained in the Schedule, is an offence which is able to be characterised as being encompassed by the words "before been found guilty of

a property offence" to be found in ss 78A(2) (3) and (6) of the Act. In other words, if the offender was found guilty of a property offence committed after 8 March 1997, the sentencer was obliged to consider all previous property offences regardless of when they were committed, and regardless of whether the finding of guilt was made before or after 8 March 1997. Mr Wild Q.C. acknowledged that this meant that the words "property offence" first appearing in ss 78A(2) and (3) have a different sphere of operation than the words "property offence" secondly therein appearing. He submitted, however, that the meaning to be given to "property offence" remains the same in each case. Accordingly, he submitted that the general rule of construction that the same words appearing in a provision should be given the same meaning, has no application.

The general rule of construction is that there is a presumption that the same meaning should be given to the same word wherever it appears in a statute. The presumption is not of very much weight; it all depends on the context: *Murphy v Farmer* (1988) 165 CLR 19 at 27 per Deane, Dawson and Gaudron JJ. I do not see why the presumption should not apply to the "sphere of operation" of a word. If the words "property offence" first used in the sub-sections are to apply only to property offences committed after 8 March 1997, it is logical to assume that the draftsman intended that the words "property offence" secondly used in the same sub-section would be subject to the same qualification. The "sphere of operation" of a word or expression is part of the quality of the word or expression which elucidates its meaning.

Further, the question of construction falls to be considered in the light of the principles discussed in *Trenerry v Bradley*. S 78A of the *Sentencing Act* provides for a minimum mandatory sentencing regime. The Act does not, by unmistakable and unambiguous language, make it plain that offences against the sections referred to in the Schedule which were committed prior to

8 March 1997 were intended to be regarded as coming within the ambit of the general words in the expression "been found guilty of a property offence". Consequently that expression should be interpreted in favour of the liberty of the subject, unless the effect would be to deprive the expression of all meaning. Clearly the interpretation contended for by the applicant does not have that result.

Accordingly, I would answer questions 4 and 5, "No.". In the light of the answers given to the first five questions, I do not consider that it is necessary to answer questions 6 and 7.

In conclusion, I would answer the questions reserved as follows:

1. Unnecessary to answer.
2. No.
3. No.
4. No.
5. No.
6. Unnecessary to answer.
7. Unnecessary to answer.