PARTIES:	JAMIE WAYNE MCDONALD v SHERIDEN APPEL
AND:	JAMIE WAYNE MCDONALD v LEONARD DAVID PRYCE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY AT ALICE SPRINGS
FILE NO:	JA 44 and 45 of 1996
DELIVERED:	27 September 1996
HEARING DATES:	19 September 1996
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Appeal - Appeal against sentence under provisions of the Justices Act for unlawful entry contrary to s 213 of the Northern Territory Criminal Code and theft contrary to s 210 of the Northern Territory Criminal Code.

Appeal - Whether sentence manifestly excessive - Antecedent history of prisoner relevant to show whether offence is uncharacteristic - Legitimacy of taking criminal history into account - Weight to be given to general and personal deterrence.

Criminal Law (Conditional Release of Offenders) Act.

Course to be taken in relation to breach of bond - Magistrate's power in relation to imposing a sentence for breach of bond s 6(3) of the Criminal Law (Conditional Release of Offenders) Act - No power to sentence a prisoner who has already been sentenced wholly or in part - Interpretation of "or" in s 6(3)(e) of the Act - Warrant of commitment - Powers under s 5(1)(b) and s 5(1)(c) of the Act - Does court have power to make period of imprisonment cumulative s 405(3) of the Northern Territory Criminal

Code - Undesirability of a different magistrate dealing with the same matter - Totality principle - Courts discretion in length of sentence and relevant factors to be taken into consideration.

CASES

Veen v Queen (No 2) (1988) 154 CLR followed
Dixon v Pryce (delivered 26th September 1996 Mildren J. mentioned
Bnaird v The Queen 104 FLR 113 followed
The Queen v Williams unreported Mildren J 8 July 1994 followed
R v Roper (1990) 70 NTR 1 mentioned
R v Blow (1963) QWN 1 mentioned
Mullholland v The Queen (1991) 1 NTLR 1 mentioned

LEGISLATION

Justices Act
Criminal Code
Criminal Law (Conditional Release of Offenders) Act
Parole of Prisoners Act
Sentencing Act

REPRESENTATION:

Counsel:

Appellant:	Mr Howden
Respondent:	Mr Rowbottom

Solicitors:

Appellant:	NTLAC
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	MIL96024
Number of pages:	16

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. JA 44 of 1996
(9411494)

BETWEEN:

JAMIE WAYNE MCDONALD
Appellant

AND:

SHERIDEN APPEL
Respondent

No. JA 45 of 1996
(9510257)

BETWEEN:

JAMIE WAYNE MCDONALD
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT
(Delivered 27 September 1996)

These are appeals against sentence under the provisions of the *Justices Act*.

In matter number 9510257, the appellant pleaded guilty to two charges as follows:

1. That on 22 May 1995 at Alice Springs he unlawfully entered a dwelling house with intent to commit therein a crime, namely stealing.

Contrary to s 213 of the Criminal Code.

2. That on 22 May 1995 at Alice Springs he did steal cash to the value of $50.

   Contrary to s 210 of the Criminal Code.

At the time of the offences the appellant had been released on a fully suspended sentence of twenty months imprisonment which had been imposed upon him on 8 September 1994 upon his entering into a recognisance self in the sum of $1,000 to be of good behaviour for a period of two years and subject to other conditions. By force of s 6(3) of the *Criminal Law (Conditional Release of Offenders) Act* the learned Magistrate, Mr Donald SM, was called upon to deal with the question of what course he should take in relation to the breach of the good behaviour bond (matter number 9411494).

After hearing evidence and submissions by counsel, the learned Magistrate dealt with these matters as follows:

1. In relation to the conviction for entering a dwelling with intent, he convicted the appellant and sentenced him to six months imprisonment.

2. In relation to the stealing charge, the appellant was convicted and sentenced to three months imprisonment.

   Both of these sentences were ordered to be served concurrently.

   The learned Magistrate also ordered that the sum of $150 restitution be paid, in default one days imprisonment for each $50 outstanding, no time to pay.

3. In relation to breach of bond, the learned Magistrate “sentenced” the appellant to serve the twenty months imprisonment which had been

suspended and ordered that that twenty months be served cumulatively upon the total of six months previously ordered.

His Worship then made an order suspending the total of twenty-six months imprisonment after the appellant had served twelve months upon his entering into a bond to be of good behaviour in the sum of $2,000 for two years subject to certain conditions.

The grounds as appear in the notice of appeal are as follows:

"1. That in all the circumstances of the offence and the offender, the sentence imposed is manifestly excessive.

2. That the Learned Sentencing Magistrate erred in placing excessive weight on considerations of specific and general deterrence.

3. That the Learned Sentencing Magistrate erred in placing insufficient weight on the rehabilitation of the defendant.

4. That the Learned Sentencing Magistrate failed to give weight to the totality principle.

5. That the Learned Magistrate erred in imposing a sentence in respect of the breach of bond which he could not in law impose."

The Crown facts as alleged and admitted by the appellant were that at about 3.00 pm on Monday, 22 May 1995, the appellant rode his push bike up The Fairways and on to the nature strip outside 34 The Fairways where he parked his bike. He then walked to number 30 and up the driveway. He went through the side entrance gate and approached the sliding glass door of the premises. He tried the handle, knocked on the glass and peered inside. There was nobody home. He then went to the next side sliding door and did the same

thing. These actions were seen by the next door neighbour who rang the police. The appellant went through the rear side gate to the rear of the premises where he used some unknown implement and broke open the rear sliding door. He entered the house and took $15 in cash from a bedroom and removed a wallet from a handbag. The wallet contained $35 in notes. After taking the wallet he then departed the premises and went down a drain at the rear, took the $35 from the wallet and threw it and the rest of the contents into the storm water drain pipe. He then walked through the golf course boundary around number 36 back onto the roadway and returned to where he had left his push bike. He was then approached by a police officer and questioned about the offences. When spoken to by the police he denied entering the premises and said that he merely cut through the area to go looking for lost golf balls. He was subsequently arrested. The prosecutor sought an order that the appellant pay $50 restitution for the money stolen and $100 for restitution for the damage to the door.

The appellant had a number of previous convictions. On 23 January 1992 he was convicted for stealing and trespass and released on a good behaviour bond for twelve months under supervision. On 10 March 1992 he was convicted of attempted criminal deception and one count of criminal deception and again was released on a good behaviour bond with supervision.

On 10 August 1992 he was brought before the Court of Summary Jurisdiction to be dealt with for breaching his recognisances. The breaches

were proven but no action was taken. He had not committed any offences on this occasion.

On 8 September 1994 he was convicted of at least forty-three counts, mostly for stealing and unlawful entry with intent to commit a crime and criminal deception. On that occasion the Court of Summary Jurisdiction imposed a total sentence of twenty months imprisonment but he was released forthwith upon conditions as I have noted previously.

He was dealt with by way of plea for the breach of bond and the current matters on 3 May 1996, almost twelve months after the offences had been committed. By that time the appellant was twenty-one years of age and had not committed any further offences since his release on bail. I infer from the fact that none of the sentences were backdated that he was released upon bail immediately after his arrest.

Counsel for the appellant called the appellant's aunt to give evidence before the learned Magistrate. Essentially her evidence was that the appellant's mother had treated the appellant cruelly as a child and punished him severely for the most minor of disciplinary matters. The appellant was not permitted to visit his grandmother or his aunt and if he did he was withheld privileges, refused food and beaten. Although the appellant did seem to be doing reasonably well at school, he was given no encouragement and no love from his mother and during the whole of his upbringing was not even afforded a birthday party. As a result, the appellant grew up lacking self esteem. Yet

despite the treatment handed out to him by his mother, he apparently loved his mother deeply and could not bring himself to criticise her in any way. When he was about sixteen or seventeen years of age, his mother forced him to leave home. It is not entirely clear, but it is a reasonable inference that these forty-three odd offences occurred after he had left home. Following the imposition of the suspended sentences, he came to Alice Springs from Darwin to live with his aunt, who arranged for him to see a psychologist. He also went back to school to resume his education. His aunt said that he was behaving himself for quite a while and then, all of a sudden, the appellant stopped going to school. He was spoken to by his aunt and uncle, the end result of which was that he was asked to leave residing with them. He had not physically left his uncle and aunt's home at the time of the offences in May 1995, but the aunt felt that his re-offending was probably a reaction to the fact that he was going to have to live on his own and look after himself, and what he may have perceived as the fact that no one seemed to care about him.

The aunt gave evidence that while she was willing to support him in any way she could, due to the attitude of her husband, the appellant would not be able to live with her again. By the time the matter came on for sentence before the learned Magistrate, the situation was that the appellant was living on his own at the White Gum Holiday Inn in Gap Road and he had been there since 1995. He had obtained casual work at the Rainbow Supermarket as a night packer, a position that he had held since just after Christmas 1995. He was continuing his studies at Centralian College and had put in an application

to universities in Adelaide to study accountancy. He was in receipt of Austudy and making some small casual wages as well.

Before passing sentence, the learned Magistrate reserved his decision. It is apparent from his remarks upon sentence that His Worship gave careful consideration to the matters which he was called upon to deal with. There is no suggestion that he misapprehended the facts or that he made any demonstrable error in the sentencing process which is evident from his sentencing remarks, apart from the matter which is dealt with in ground six of the notice of appeal, to which I will return shortly.

It is interesting to observe that counsel for the appellant did not attempt to put forward on behalf of the appellant what the appellant's motive was in committing the offences.

Counsel for the appellant submitted that the learned Magistrate did not give sufficient weight to rehabilitation and gave excessive weight to deterrence in relation to the two sentences of imprisonment which he imposed. It was submitted that the objective circumstances of the unlawful entry and of the stealing charges did not warrant a sentence of immediate imprisonment, notwithstanding the prior convictions of the appellant and notwithstanding that he committed these offences only a little over eight months after he had entered into the relevant bond. The way in which the learned Magistrate treated the appellant's prior convictions is unexceptional. He said:

> "It seems from a look at your record, prior convictions exhibit P1, that efforts in the past to prevent you from committing these crimes have been unsuccessful. You are not going to be punished again for your prior convictions, for the other things you did in the past, that would be quite wrong, but I do have regard to your record so that I can receive an indication of what punishments have been imposed in the past and so that I can try and fathom a way to stop this conduct in the future. I also look to your record to indicate to me whether this is an isolated incident deserving of some leniency by this Court but looking at your record it indicates to me that the offences on 22 May 1995 were in fact a continuation of a course of conduct."

His Worship also recited the appellant's history and the number of opportunities that he had been given by the courts when he was dealt with by way of suspended sentences and when the Court dealt with him leniently in relation to breaches of bonds.

The learned Magistrate rightly emphasised the need for both general and personal deterrence in sentencing the appellant but also acknowledged that having regard to the appellant's age and the fact that he had taken steps to improve his life since this offending, that there was a need for a "rehabilitation factor" in sentencing the appellant, which he proposed to do by partially suspending the total sentence which he had in mind.

I will not repeat the well known passage in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477-8, when the majority of the High Court observed that the antecedent criminal history of a prisoner is relevant to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law, and their Honours' view that, in the latter case

retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. I note also the observations that their Honours made about the fact that it is legitimate to take into account the criminal history when it illuminates the moral culpability of the offender in the instant case or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and others from committing further offences of a like kind. Those matters are discussed more fully in my reasons for judgment in *Dixon v Pryce* (delivered 26 September 1996). In my opinion, it could not be said that the learned Magistrate was wrong in giving emphasis to general and personal deterrence in this case. Having regard to those matters, the maximum penalties fixed by the legislature for these offence, namely ten years and seven years imprisonment respectively, as well as the mitigating factors that were put on behalf of the appellant, I am unable to conclude that the head sentences imposed in relation to these offences were manifestly excessive.

It was submitted by the appellant's counsel that the learned Magistrate erred in not considering a community service order. A community service order made under s 20 of the Act is made in lieu of a sentence of imprisonment. Alternatively, a community service order could have been made as a condition of a bond under s 5(1)(a) or (b) of the Act. I do not think that there is any substance to this submission. The mere fact that the learned Magistrate did not specifically refer to that option in his sentencing remarks does not mean that he did not consider it. Indeed, it is apparent that it was never suggested to him by counsel for the appellant that a community service

order was appropriate. What was suggested was either home detention or a suspended sentence and the learned Magistrate specifically asked counsel why he should make such an order in this case. Accordingly, I do not think that there is anything in this submission.

I turn now to consider the submission that the learned Magistrate erred in imposing a sentence in respect of the breach of bond which he could not in law impose. This ground was conceded by Mr Rowbottom on behalf of the Director of Public Prosecutions in the light of the observations of the Court of Criminal Appeal in *Baird v The Queen* 104 FLR 113 and my own observations in the case of *The Queen v Williams* (unreported, 8 July 1994). Nevertheless, I think it is desirable that I should explain why it is that the learned Magistrate had no power to make the orders that he did in relation to the breach of bond matter.

Section 6(3) of the Act provides as follows:

> "(3) Where a person appears before a court in answer to a summons under subsection (1A)(d) or on committal under subsection (2A), the Court if it is satisfied that
>
> (a) the person has failed during the period of good behaviour to comply with the conditions specified in the order in accordance with section 5(1)(a)(ii);
>
> (b) the person has failed to pay, as provided in the order, the penalty or an instalment of the penalty for the payment of which he is given security;
>
> (c) the person has been convicted, whether within or outside the Territory, of an offence committed during the period of good behaviour,

may -

(d) in a case where the person is released without sentence having been passed on him - impose on the person any penalty which the Court would, if the person had then and there been convicted of the offence with which he was originally charged, be empowered to impose or make any order (including an order under section 5(1)) which the Court would, if he had then and there been convicted of the offence of which he was originally charged, be empowered to make; or

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

When the learned Magistrate came to deal with the bond, he said:

"I sentence the defendant to serve the twenty months imprisonment."

As has been explained in *Baird*, there is no power to sentence a prisoner who has already been sentenced, whose sentence has been suspended whether wholly or in part. If the Court decides that the appropriate course is the prisoner should be imprisoned, then the Court makes an order committing the prisoner to gaol, either for the whole of the balance of the unserved term or for some portion of it which the Court considers appropriate. If this course is taken, it seems to me that the Court cannot order that the whole or some part of the period of imprisonment which the Court has committed the prisoner to

serve can be suspended. I consider that the word "or" in s 6(3)(e) is truly disjunctive and cannot be interpreted to mean "and or".

When a judge or magistrate imposes a sentence of imprisonment before the prisoner is accepted by a prison, the practice is for the judge or magistrate to sign a warrant of commitment, addressed to the keeper of the relevant prison. This warrant is the authority of the keeper to accept and hold the prisoner. The warrant sets out the terms of the Court's sentence, and is expressed in the form of an order of the Court. This is what is meant in s 6(3)(e) by the expression "commit a person to prison to undergo imprisonment ...". The warrant is signed by the judge or magistrate in execution of the sentence imposed: see *Baird*'s case, p 117.

Under s 5(1)(b) of the Act, a sentencer, having passed sentence upon a prisoner, may "direct that the person be released ... either forthwith or after he has served a specified part of his sentence". Thus, in the case of a wholly suspended sentence, no warrant of commitment is brought into being. In the case of a partially suspended sentence, the warrant of commitment commits the prisoner to prison for the part of the sentence to be served, but then orders the prisoner's release upon his entering into the appropriate recognisance. In terms of s 5(1)(b), it is not possible (nor is it the practice) to commit a person to gaol for a term, but order his release before the term has expired. Indeed such a concept is a contradiction in terms. Clearly the draftsman of the Act was aware of this practice: see s 6(3)(e) and s 6(4).

There is one other matter that I should briefly mention. The learned Magistrate, if he had made a proper order committing the appellant to imprisonment, had no power to make that period of imprisonment cumulative upon the sentence which he had just imposed. The only power which was available to the learned Magistrate at the time to accumulate sentences in circumstances like this, is to be found in the former provisions of s 405 of the Criminal Code. Section 405(3) makes it plain that the learned Magistrate, if he had committed the appellant to imprisonment, could then have ordered the total sentences of six months to be served cumulatively, but not the other way around; see the discussion in *R v Roper* (1990) 70 NTR 1 and in *R v Blow* (1963) QWN 1.

The next matter that I should mention that it is very undesirable that a magistrate, who was not the magistrate who imposed the bond, deal with a breach. I appreciate the exigencies of this case; the Magistrate who imposed the bond in the first place was Mr Hannan SM who is in Darwin. One of the consequences, however, of another magistrate being called upon to deal with a breach of the bond is that he is not familiar with all of the circumstances of the offending which gave rise to the sentences in the first place. An examination of the Court of Summary Jurisdiction file shows that the appellant had served two months and twelve days in custody by the time he was sentenced, and no order was made backdating that sentence. It is relevant to note also that there is a note on the file that Mr Hannan SM had called for a pre-sentence report, but there is no copy of the pre-sentence report on file; nor is there a transcript of Mr Hannan SM's sentencing remarks; nor is there a

transcript of those proceedings; nor does it appear, from the learned Magistrate's notes on the file, precisely what the offending was, what matters were put in mitigation, and so on.

It is well established that the totality principle applies when a court is called upon to decide whether or not to commit an offender to imprisonment for breach of a bond as well as deal with the prisoner for the offences committed which result in the breach. It is difficult to see how a sentencing court is able to properly do its duty in the absence of the kind of material which I have referred to above.

Regrettably, I am in the same position as was Mr Donald SM, but having regard to the provisions of ss 175-176A, both inclusive of the *Justices Act*, which confine the material which I may consider on an appeal, it appears that there is little that I can now do about it.

Some matters that I have been able glean from the file is that the offences occurred over a period commencing from 18 May 1994 and ending on 17 June 1994 and that a number of the offences were committed whilst the appellant was on bail at the time. The rest of the notes of Mr Hannan SM are to me incomprehensible. In these circumstances I consider that I should proceed with caution, bearing in mind the sparse information available to me about the original offending.

In these circumstances it is unnecessary for me to consider the other grounds of appeal, and I am required to deal with this matter myself afresh. Some guidance is given in *Baird v The Queen*, supra, at p 119 of the relevant factors to be considered by a court in deciding whether or not to commit a person to prison and if so for how long. Clearly, the Court has a wide discretion. Relevant factors are the nature and gravity of the breach, whether the breach evinces an intention to disregard the obligation to be of good behaviour or to abandon any such intention, whether the breach amounted to the commission of another offence of the same nature as that which gave rise to the recognisance, the length of time during which the offender observed the conditions of the recognisance, the moral pressures upon the offender to commit the breach, whether the prisoner had been warned of the consequences of breaching the bond, as well as other factors which are relevant.

Having regard to the fact that the offences were committed on one occasion, almost some nine months after the appellant had entered into the bond, the appellant's past history as made known to the Court, the fact that he had just been told by his aunt and uncle that he would have to find somewhere else to live and the likely effect that this would have had on him, his age, his attempts to rehabilitate himself after the commission of the offence over a period of some almost twelve months by the time the learned Magistrate came to sentence him, I consider that the proper order is that the appellant should be committed to imprisonment for breach of his bond for a period of twelve months. However, as I have not interfered with the sentence imposed by the learned Magistrate in relation to the offences which he dealt with, for the

reasons explained above, I have no power to order that the period of committal is to be served cumulatively and I have borne this in mind in deciding on the period which I think is appropriate for the appellant to serve. Accordingly, the period of twelve months will be served concurrently with the sentences imposed by the learned Magistrate.

In these circumstances, I am further obliged to fix a non-parole period pursuant to s 4 of the *Parole of Prisoners Act* (see s 130(5) of the *Sentencing Act*).

Having regard to all of the circumstances of the case, including the fact that the prisoner will be entitled to remissions, and the principles enunciated by the Court of Criminal Appeal in *Mulholland v The Queen* (1991) 1 NTLR 1, I fix a period of six months, such period deemed to have commenced on 3 May 1996.

Accordingly, the appeal in relation to matter number 9510257 is dismissed. The appeal in relation to matter number 9411494 is allowed, the sentence of twenty months imprisonment, and the order that the appellant be released upon his entering into a bond after having served twelve months is set aside, and in lieu thereof, it is ordered that the appellant be committed to prison for a period of twelve months, to be served concurrently with the sentences imposed by Mr Donald SM in matter number 9510257. I fix a non-parole period of six months, commencing from 3 May 1996.

———————————————————