PARTIES:	THE QUEEN
	v
	JUSTIN MICHAEL HALLAM
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	Criminal
FILE NO:	9805501
DELIVERED:	17 September 1998
HEARING DATES:	23 July, 10 September 1998
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Criminal law – statutory interpretation – mandatory minimum sentencing regime for property offences – effect of amending acts – effect of lack of transitional provisions in *1998 Sentencing Amendment Act*.

Criminal law – statutory interpretation – mandatory sentencing – 15 property offences committed prior to 1988 amending act – sentencing after commencement of act – prisoner subject to effect of 1998 amendments.

Criminal law – statutory interpretation – mandatory sentencing – effect of statutory provisions re cumulative sentences – court will make single finding of guild even when multiple counts on single indictment or on separate indictments when all charges relate to same criminal enterprise – no availability of aggregate sentences for courts relating to same enterprise on separate indictments but court will make single finding of guilt resulting in order of one mandatory period – application of totality principle.

Legislation

Sentencing Act – s3(1); s121; s50; s51
Criminal Code – s12(2); s309(1) & (2)
Interpretation Act – s12(c), 12(d), s58; s62B
Sentencing Act Amendment Act (No 2) 1996 – s78A, B, C, D, E, F, G; s78A(3A); s78A(4); s78A(5)
Sentencing Amendment Act 1998

Cases

1) *Trenerry v Bradley* (1997) 115 NTR 1 referred

2) *Maxwell v Murphy* (1956-1957) 96 CLR 261 applied

3) *Yrttiaho v The Public Curator of Queensland* (1971) 125 CLR 228 applied

4) *Siganto v The Queen* (unreported, Court of Criminal Appeal, 3 October 1998) applied

5) *Newell v The King* (1936) 55 CLR 707 referred

6) *Schluter v The Queen* (1997) 6 NTLR 194, discussed

7) *D v Gokel and Others* (1998) 123 NTR 1, discussed

8) *Trenerry v Dowell* (unreported, Court of Summary Jurisdiction, Wallace SM, 9 July 1998) referred

REPRESENTATION:

Counsel:

Prosecution:	I Rowbottom
Defendant:	D Conidi

Solicitors:

Prosecution:	Director of Public Prosecution (NT)
Defendant:	NTLAC

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 9805501

BETWEEN:

THE QUEEN

AND:

JUSTIN MICHAEL HALLAM

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 17 September 1998)

MILDREN J:

The prisoner, Justin Michael Hallam, has pleaded guilty to three counts of unlawful aggravated entry of a building, ten counts of stealing and two counts of unlawful use of a motor vehicle. All fifteen counts are specified in the same indictment. The offences occurred between 30 September 1997 and 14 March 1998.

The *Sentencing Act* was amended by the *Sentencing Act Amendment Act (No 2) 1996* (the 1996 Act) which came into force on 8 March 1997. The 1996 Act introduced ss78A to 78G (inclusive) into the Act, which established a mandatory minimum sentencing regime for "property offences" for the first time. It is common ground that each of the offences in the indictment is a "property offence", as defined by s3(1) of the *Sentencing Act*, as amended. In *Trenerry v Bradley* (1997) 115 NTR 1, the Full Court held that the effect of these amendments was that a sentencing court was required, upon a finding of guilt to a property offence, to record a conviction and to impose at least the relevant mandatory minimum sentence of imprisonment demanded by s78A. The Court further held that, irrespective of the term of imprisonment imposed, no part of the sentence (including any part of the sentence which exceeded the mandatory minimum), could be suspended, and the Court had no power to fix a non-parole period. The effect of the decision, in short, was that the Court was required in every case to impose an actual sentence of imprisonment for all property offences, which could not be ameliorated in any way whatsoever.

The Act was further amended by the *Sentencing Amendment Act 1998*, (the 1998 Act) which came into force on 29 April 1998. The 1998 Act made a number of further amendments to the mandatory minimum sentencing regime introduced by the 1996 Act. Some of these amendments are arguably remedial in character, in that, for example, the legislature broadly intended to achieve the result that the conclusions reached in *Trenerry v Bradley*, *supra*, were to be confined only to that part of a sentence which did not exceed the mandatory minimum period. Thus the courts would henceforth have power to suspend the

whole or any part of a sentence which exceeded the relevant mandatory minimum period or fix a non-parole period in an appropriate case in respect thereof. However, not all of the amendments were of such an arguably remedial character. The sting in the tail included a new provision, s78A(3A) which was designed to further limit the Courts' powers to impose concurrent sentences. It will be necessary to refer to the precise wording of the provisions as they now stand in some detail later. For the moment, it is sufficient to observe three things: first, the 1998 Act contains no transitional provisions; secondly, the offences were all committed after the 1996 Act came into force but before the 1998 Act came into force; thirdly, the prisoner did not fall to be sentenced until after the 1998 Act came into force. These factors raise for consideration the question of whether the prisoner is to be sentenced in accordance with the Act as amended by the 1996 Act, or the Act as amended by the 1996 Act as further amended by the 1998 Act; further, as it was suggested by Mr Rowbottom that the prisoner maybe entitled to the benefit of the "remedial" provisions contained in the 1998 Act but not the burden of the other more restrictive provisions, the third possibility is that some of the provisions of the 1998 Act apply to him and some do not. Mr Conidi submitted that the 1998 Act applied to the prisoner. No argument was advanced by him that only the "remedial" provisions applied. In my opinion Mr Conidi is plainly right, albeit for reasons which differ from those he submitted.

The starting point is that legislation acts prospectively, unless the legislature specifically provides that it is to be retrospective. What is meant by "prospective", is that it does not affect

> …facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events,…:

Maxwell v Murphy (1956-1957) 96 CLR 261 at 267 per Dixon CJ. But, at common law, this did not apply to changes in the law which dealt with the manner in which rights or liabilities are enforced or their enjoyment is to be secured by judicial remedy: *Maxwell v Murphy, ibid*. Thus changes to matters of practice and procedure are not affected, (as this does not affect accrued rights or liabilities): see, for example, *Yrttiaho v The Public Curator of Queensland* (1971) 125 CLR 228. The same reasoning applies to the interpretation to be given to s12(c) of the *Interpretation Act*: see *Yrttiahio, supra*.

So far as s12(d) of the *Interpretation Act* is concerned, which provides that the:

> …repeal of part of an Act…does not affect a penalty, forfeiture or punishment incurred in respect of an offence against the Act or part of the Act so repealed…

the penalty fixed by the Act in question (the *Criminal Code*) is not affected by the amendments made by the 1998 Act.

It is clear that, at the time of the offences, the prisoner had not acquired any right or incurred any liability, so far as the criminal law is concerned, until at least he was convicted and sentenced: *Siganto v The Queen* (Court of Criminal Appeal, unreported, 3 October 1997), except perhaps for certain fundamental rights, such as the right to trial by jury, which may have accrued at an earlier time had he been arraigned before a jury and pleaded not guilty before he was convicted: see *Newell v The King* (1936) 55 CLR 707. There is no suggestion that rights of that kind existed in this case.

I also consider that s121 of the *Sentencing Act* and s12(2) of the *Criminal Code* have no application for the same reasons as fell from the Court of Criminal Appeal in *Siganto v The Queen*, at pps 13-16 of the joint judgment. In short, the penalty has not been affected by the 1998 amendments. Accordingly, the 1998 amendments apply to this case.

The next question depends upon the interpretation to be given to the provisions of the Act as amended, and in particular to s78A(3A). As it is necessary to construe an amending Act with the original Act (*Interpretation Act*, s58) it is necessary to set out s78A and s78B in full:

> Division 6 – Minimum Mandatory Imprisonment for Property Offenders
>
> 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 ground 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.

(3A) Despite sections 50 and 51, the mandatory period of a term of imprisonment imposed in pursuance of subsection (1), (2) or (3) is not to be served concurrently with the term of imprisonment for another offence (whether that other offence is a property offence or not).

(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 findings of guilt are together a single finding of guilt 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.

(7) Nothing in this section is to be taken to affect the requirement under section 5(2) that a court must have regard to the maters specified in that section before –

(a) ordering an offender to serve a term of imprisonment that exceeds the mandatory period; or

(b) making any additional order in pursuance of section 78B in respect of an offender.

78B. ADDITIONAL ORDERS FOR PROPERTY OFFENDERS

(1) In addition to the order required to be made under section 78A, the court may make a punitive work order or any other order it may make under this Act.

(2) An order referred to in subsection (1) cannot be made if its effect could be to release (whether conditionally or unconditionally) the offender from the requirement to serve the mandatory period as a term of actual imprisonment.

The defendant already has a previous conviction for a property offence. It is not disputed that s78A(2) applies to him. The question is, however, whether the effect of s78A(3A) is that he is to accumulate mandatory minimum periods of imprisonment for the fifteen counts to which he has pleaded guilty on this indictment. If so, there is the possibility that, for Count 1, he must receive a mandatory term of not less than 90 days; for Count 2 not less than 12 months; for Count 3 not less than 12 months, and so on, and that none of these periods can be ordered to be served concurrently, with the consequence that the prisoner faces a mandatory minimum sentence of 14 years and 3 months. This is such an astounding result that I find it difficult to suppose that this is what the legislature intended, but the argument cannot be swept aside quite that simply. There is also the possibility that what is meant is that for each count there must be a mandatory minimum term of 3 months which cannot be served concurrently, with the consequence that the mandatory minimum period is not less than 45 months.

To explain how these possibilities arise it is necessary to read s78A(3A) with ss50 and 51, to which that subsection refers. These sections provide:

> 50. IMPRISONMENT TO BE SERVED CONCURRENTLY UNLESS OTHERWISE ORDERED
>
> Unless otherwise provided by this Act or the court imposing imprisonment otherwise orders, where an offender is –
>
> (a) serving, or has been sentenced to serve, a term of imprisonment for an offence; and
>
> (b) sentenced to serve another term of imprisonment for another offence,
>
> the term of imprisonment for the other offence is to be served concurrently with the first offence.
>
> 51. CUMULATIVE ORDERS OF IMPRISONMENT
>
> (1) Subject to section 78A, where an offender is –
>
> (a) serving, or has been sentenced to serve, a term of imprisonment for an offence; and
>
> (b) sentenced to serve another term of imprisonment for another offence,
>
> the term of imprisonment for the other offence may be directed to start from the end of the term of imprisonment for the first offence or an earlier date.
>
> (2) Subsection (1) applies whether the term of imprisonment for the first offence is being served concurrently with or cumulatively on the term of imprisonment for another offence.

The argument is that the effect of s78A(3A) is that there can be no concurrency of the sentences to be imposed in this case.

Some further light is thrown upon the matter by s52 of the Act, (which was also amended by the 1998 Act). That section now provides:

> 52. AGGREGATE SENTENCES OF IMPRISONMENT
>
> (1) Where an offender is found guilty of 2 or more offences joined in the same information, complaint or indictment, the court may impose one term of imprisonment in respect of both or all of those offences but the term of imprisonment shall not exceed the maximum term of imprisonment that could be imposed if a separate term were imposed in respect of each offence.
>
> (2) A court shall not impose on term of imprisonment under subsection (1) where one of the offences in respect of which the term of imprisonment would be imposed is an offence against section 192(3) of the Criminal Code.
>
> (3) Subject to section 78A, a court must not impose one term of imprisonment under subsection (1) where one of the offences in respect of which the term of imprisonment would be imposed is a property offence.

In order to understand the reasoning for the argument that the minimum term in this case is 14 years and 3 months imprisonment it is necessary to refer to two judgments of single justices of this Court. The first decision is that of Martin CJ in *Schluter v The Queen* (1997) 6 NTLR 194. In that case, the defendant was charged with two sets of property offences on two different informations, in circumstances where s78A(5) did not apply. Both informations were heard in the Court of Summary Jurisdiction at the same time. The learned Magistrate imposed a sentence of 14 days imprisonment for the offences on the first information and then proceeded to impose a sentence

of 90 days imprisonment for the offences on the second information, and ordered the sentences to be served cumulatively, on the basis that the defendant had "once before been found guilty of a property offence" (see s78A(2)) albeit only moments before. On appeal, the learned Chief Justice held that this was in error, and that "once before" meant that the offence should have been before the Court at a time other than on the same day. The second case is the decision of Angel J in *D v Gokel and Others* (1998) 123 NTR 1. In that case, where similar considerations arose, Angel J declined to follow *Schluter v The Queen*. His Honour was of the opinion that it was the finding of guilt which triggered the operation of the section, rather than the conviction or sentencing. The decision in *D v Gokel* was not published until after the 1998 Act came into effect, but the decision in *Schluter v The Queen* preceded it. One possibility is that s78A(3A) was enacted to alter the result in *Schluter*. However, the point is more that if in this case I find the prisoner guilty of each of the charges and I were to do so at separate moments in time, if the reasoning in *D v Gokel* is correct, the mandatory minimum period would be 14 years and 3 months, notwithstanding that all the offences are on the same indictment.

I have been referred to the decision of Mr Wallace SM in *Trenerry v Dowell* (unreported, Court of Summary Jurisdiction, 9 July 1998). In that case the defendant had pleaded guilty to eight property offences all of which had been laid on a single information. His Worship considered the amendments introduced by the 1998 Act. His Worship appears to have concluded that where there are multiple property offences on the same information, the

defendant having no prior convictions for property offences, the mandatory minimum period was 14 days rather than 112 days. His Worship also concluded that he could still impose an aggregate sentence. The sentence he actually imposed was an aggregate sentence of imprisonment for 4 months, which was suspended after 14 days. Some of the discussion in that case I have found useful.

In my opinion it is significant to look at s78A(4) and (5). I note that s78A(5) was amended by the 1998 Act. The purpose of that amendment was clearly to ensure that the language of s78A(5) conformed with the language of s78A(4). In both the instances dealt with in those subsections, the statute now provides that all of the findings of guilt are to be treated as a single finding of guilt for the purposes of s78A. I think this clearly disposes of the argument based upon the reasoning in *D v Gokel*. As, in this case, the findings of guilt must be deemed to be a single finding of guilt there can therefore be no suggestion that if I were to find the defendant guilty on each count at separate moments of time, the effect is a minimum term of 14 years 3 months. Such a result could be easily avoided in any event by the Court simply announcing, in respect of each charge on the indictment "I find the defendant guilty on each count." I should add that *D v Gokel* was not, in any event, a case where s78A(4) or (5) applied. I do not think it is any authority for the proposition that each count on an indictment results in a separate mandatory minimum term.

I agree with Mr Wallace SM that s78A(3A) does not preclude a single aggregate sentence. S78A(3A) is not directed towards that. The power to impose an aggregate sentence is contained in s52. S52(3), which forbids aggregate sentences where one of the offences is a property offence, is expressly made subject to s78A. If there is a single finding of guilt, one may ask rhetorically, how can more than one sentence be imposed? I think the reference in s52(3) to s78A must be a reference to s78A(4). There is no other provision of s78A to which those words could apply. The implication is, that where s78A(4) applies, the Court is empowered to impose an aggregate sentence. This implication is reinforced by s51(1) which is expressed to be subject to s78A.

How does this sit with s78A(3A)? If the Court can – perhaps must – impose only one aggregate sentence in cases to which s78A(4) applies, there is no difficulty, because there being only one sentence of imprisonment, no question of concurrency of sentences arises. Even if no aggregate sentence is imposed, there is deemed to be, for the purposes of s78A, only one finding of guilt, which means, for the purposes of the mandatory minimum, only one mandatory minimum. However, if s78A(4) does not apply, then s78A(3A) still has work to do. Suppose on a particular day a person is sentenced to 14 days imprisonment pursuant to s78A(1) and then at a later time, whilst still serving that sentence, he is sentenced to a mandatory minimum term of 90 days imprisonment. The effect of s50 is that the sentences are to be served concurrently. The effect of s78A(3A) is that the *mandatory minimum terms*, at least, must be served cumulatively.

If the first offence is not a property offence – let us suppose for example, that at the time of sentence for a property offence the offender is serving a term of imprisonment for some other offence, the mandatory minimum term must be served after the completion of the whole term for the other offence.

If the offender is sentenced in circumstances such as are dealt with in *Schluter v The Queen*, there must be at least one period of 14 days imprisonment, or if Angel J is correct, one period of 14 days and one period of 90 days which cannot be served concurrently, if there are separate findings of guilt. It is not necessary for me to decide whether the reasoning in *Schluter v The Queen* is correct or the reasoning in *D v Gokel* is correct. I have already indicated how easy it would be to avoid the consequences of *D v Gokel* and achieve the same result as Martin CJ reached in *Schluter v The Queen* which tends to suggest that the reasoning of Martin CJ is to be preferred, but I express no final opinion on the point as the point does not arise in this case.

Not only does the language of the *Sentencing Act* suggest that the above approach is correct, but there are other considerations which point in the same direction. First there are the rules which limit the circumstances under which one or more offences may be joined on the same indictment: see *Criminal Code*, s309(1) and (2). The offences must be:

> …founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose.

Consequently, just because a person is to be charged with a number of property offences does not necessarily permit joinder on the same indictment. Of course, even then, the prosecutor has a discretion whether to charge the offences jointly or severally. The purpose of s78A(5) is to, in effect, prevent abuse of that discretion. If the prosecutor chooses to lay separate informations for offences which are part of a single criminal enterprise, it does not matter whether there is more than one indictment, there is still only one finding of guilt for the purposes of s78A. The general rule is that, where more than one offence is committed as part of a single criminal enterprise, the aggregate penalty imposed should not be more than the offending considered as a whole (the totality principle) and it is appropriate to order that the sentences be served concurrently. Because the offences are not on the same indictment, there can be no aggregate sentence, but if there is only one finding of guilt for the purposes of s78A, the end result is much the same; only one mandatory period is ordered. Mr Wallace SM discusses, in *Trenerry v Dowell*, some of the alternatives of how this may be achieved. The obvious answer is that there being only a single finding of guilt the mandatory minimum is imposed only once which logically must be in respect of both indictments, and if any further term is imposed on either indictment, it may be ordered to be served cumulatively or concurrently with any other relevant sentences to which ss50 or 51 would otherwise apply.

Secondly, if s78A(3A) does have the effect of providing a mandatory minimum of more than 90 days in a case such as this, it is difficult to see what

purpose ss78A(4) or (5) are designed to serve, as they would have no work to do.

Accordingly, in my opinion, the mandatory minimum period which the prisoner faces in this case is imprisonment for 90 days.

Finally, I should mention that I was referred to the Minister's Second Reading Speech as well as to the debates in Hansard as an aid to the construction to be given to s78(3A) pursuant to s62B of the *Interpretation Act*. Although I did not consider it necessary to refer to those materials, in my opinion they do not assist in the interpretation to be given to that subsection.