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

IN THE MATTER OF the Justices Act

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

No. JA33 of 1994

BETWEEN:

STEVEN ROY TRUEMAN
Appellant

AND:

GOTTLIEB THOMAS SVIKART
Respondent

No. JA34, 35 and 36 of 1994

BETWEEN:

STEVEN ROY TRUEMAN
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 17 March 1995)

I rule today on 4 appeals against the severity of 11 terms of imprisonment imposed by the Court of Summary

Jurisdiction at Darwin on 8 September 1994. The appeals were heard together on 9 March.

The sentences and the commitment for breach of bond

It is desirable to set out the various sentences and the orders made by the Court as to how they were to be served. There was some understandable lack of clarity in this respect during the hearing of the appeals. The first 10 sentences were imposed following convictions after pleas of guilty to 10 offences; the breach of recognizance which resulted in a committal to prison (see item (5) at pp5-6) was acknowledged.

(1) Appeal no. JA33 of 1994: 5 sentences

By Notice of Appeal dated 10 October 1994 the appellant appealed against the following 5 sentences imposed on him by the Court:-

(a) 12 months imprisonment for unlawfully entering a dwelling house at No. 5 Savannah Drive, Leanyer, on 21 February 1994 with intent to steal. This is contrary to s213 of the Criminal Code and carries a maximum punishment of 10 years imprisonment. It was ordered that this sentence be served cumulatively upon the term of 11 months for which he was committed to prison following his breach of recognizance (see p5).

(b) 3 months imprisonment for stealing property from those premises on 21 February 1994; this is contrary to s210 of the Code and carries a maximum punishment of 7 years. This sentence was directed to be served concurrently with the sentence in (a) above.

(c) 3 months imprisonment for unlawfully trespassing in the residential premises No.2 Goshawk Court, Leanyer later on 21 February 1994. This is contrary to s55 of the Trespass Act and carries a maximum punishment of 6 months imprisonment. This sentence was directed to be served concurrently with the sentences in (a) and (b) above.

(d) 3 months imprisonment for unlawfully damaging property (a flywire) at the above premises on 21 February 1994 to the value of $75. This is contrary to s251 of the Code and carries a maximum punishment of 2 years imprisonment. This sentence was directed to be served concurrently with the sentences in (a), (b) and (c) above.

(e) 3 months imprisonment for unlawfully trespassing in the yard of No.3 Goshawk Court, Leanyer on 21 February 1994 before going on to No.2. This sentence was

directed to be served concurrently with the sentences in (a), (b), (c) and (d) above.

(2) Appeal no. JA34 of 1994: 3 sentences

By a separate Notice of Appeal also dated 10 October 1994 the appellant appealed against the following 3 sentences of imprisonment imposed on him by the same Court on the same day:-

(a) 18 months imprisonment for the offence of unlawfully entering a dwelling house, No.11 Lambell Terrace, Larrakeyah on 7 March 1994 with intent to steal. It was directed that this sentence be served cumulatively upon the sentence of 12 months imprisonment imposed in (1)(a) on p2.

(b) 3 months imprisonment for the offence of stealing property valued in all at $58 from the above premises on 7 March 1994, It was directed that this sentence be served concurrently with the sentence in (a) above.

(c) 3 months imprisonment for unlawfully trespassing on 7 March 1994 on premises No.23 Lambell Terrace, Larrakeyah, before going to No.11. It was directed this sentence be served concurrently with the sentences in (a) and (b) above.

(3) Appeal no. JA35 of 1994

By the same Notice of Appeal as in (2) above the appellant appealed against a sentence of 15 months imprisonment imposed on him by the Court on the same day, for unlawfully entering a dwelling house at No.24 Melastoma Drive, Palmerston on 18 July 1994, with intent to steal. This sentence was ordered to be served cumulatively upon the 18 months sentence of imprisonment imposed in (2)(a) on p4.

(4) Appeal no. JA36 of 1994

In the same Notice of Appeal as in (2) on p4 the appellant appealed against a sentence of 6 months imprisonment imposed upon him by the Court on the same day for having received stolen goods valued at $1500, an offence he admitted to the police on 18 May 1994. This is an offence under s229 of the Code and carries a maximum punishment of 7 years imprisonment. This sentence was directed to be served concurrently with the sentence of 18 months imprisonment imposed in respect of (2)(a) on p4.

(5) Commitment to prison for breach of recognizance

By virtue of the convictions on the charges set out in items (1)-(4) on pp2-5, his Worship found that the appellant was in breach of a recognizance he had entered into on 17 June 1993. On that day he had been sentenced by the Court of Summary Jurisdiction at Alice Springs to various sentences of imprisonment totalling 15 months, for

an unlawful entry into a dwelling house with intent to steal, stealing, and an attempt to obtain credit by deception by selling another person's radio, all on 3 February 1993. The Court suspended service of those terms on his entering into a bond in the sum of $100 to be of good behaviour for a period of 2 years. He had committed the offences in (1)-(4) on pp2-5 during the currency of this bond; he acknowledged the breach, and was dealt with for it on 8 September 1994, pursuant to s6(6)(b) and (3) of the Criminal Law (Conditional Release of Offenders) Act. His Worship dealt with him by committing him to prison for 11 months, pursuant to s6(3)(e) of that Act, that "being a term not exceeding" the effective 15-month sentence imposed on 17 June 1993. The severity of the 11-month sentence is attacked in the Notice of Appeal in (1) on p2.

In summary, the effect of the dispositions in (1)-(5) on pp2-6, and the fact that certain offences were directed to be served cumulatively, was that the appellant was required to serve an effective term of 56 months imprisonment, comprising the commitment for 11 months (item (5) above) plus sentences of 12 months (item (1)(a) on p2), 18 months (item (2)(a) on p4), and 15 months (item (3) on p4). A nonparole period of 18 months was fixed.

The grounds of appeal

The appellant relies on 5 identical grounds of appeal in each appeal, viz:-

(1) That the sentences imposed are manifestly excessive in all the circumstances;

(2) That his Worship did not give due consideration to the totality principle of sentencing, in accumulating the sentences;

(3) The learned Magistrate failed to give any consideration to the objective circumstances of each offence, viewed individually or all together *(The Queen v Dodd* [1991] 57 A Crim R 349, 354);

(4) The learned Magistrate misapprehended the role to be played in the setting of a nonparole period, of the factor of rehabilitation; and insofar as he did consider that factor, he gave insufficient weight to it (*R v Mulholland* (1991) 1 NTLR 1, at p8-9; *Power v The Queen* (1974) 131 CLR 623, 628); and

(5) The learned Magistrate gave undue weight to the fact that some offences were committed whilst the appellant was on bail and failed to apply the correct approach on this point, as set out in *R v Gray* [1977] VR 225, 230 - to which judgment the learned Magistrate referred. In this respect, he preferred to adopt the approach set out in *R v Richards* (1981) 2 NSWLR 464, 465 which suggested a need for the imposition of "severe deterrent

sentences" in circumstances such as this. *Richards* overstates the position and has not been followed elsewhere in any reported decision.

I should say that the terms of the grounds of appeal (3)-(5) were hurriedly formulated by counsel in Court, when leave was given to add them as additional grounds of appeal.

The facts relevant to the commission of the 10 offences

(a) The 5 offences in Appeal no. JA33 of 1994; see pp2-3

On Monday afternoon 21 February 1994 the appellant drank some beer. He later noted that no-one was home at No.5 Savannah Drive. He entered the premises through the rear gate, picked up a brick from the garden and smashed the rear glass sliding door. He entered the unoccupied house, went through the rooms, and placed about $35 in coins and $200 worth of jewellery and $15 worth of tools in a bag which he had with him. He then left the premises. When asked later why he had committed the crime he said "I have no idea, when I drink I just do the most stupid things."

He then walked into Goshawk Court and entered the yard of No.3, looked around and walked into the yard of No.2. He yelled out "Is anybody home?". He then went around to the side of the house, ripped open the flyscreen

and removed 6 louvres, entered through the window and searched the unoccupied house but did not take anything. When later asked why he committed this offence he said "I have no idea".

When apprehended by the Police, he made full admissions to the above offences, and expressed the desire to make full restitution in time and to seek counselling for his substance abuse.

(b) The 3 offences in Appeal no. JA34 of 1994; see p4

The appellant was drinking beer on the afternoon of 7 March 1994. He walked down the driveway of No.23 Lambell Terrace, and entered the carport. There he dropped a beer bottle that he was carrying. The owner of the premises heard the noise, and confronted the appellant who promptly left. The appellant then walked into the yard of No.11 Lambell Terrace, smashed 3 glass panels on the rear door and entered the unoccupied dwelling house. He went through several rooms and stole a quantity of property to a total value of $58. He then went outside and smashed some of that property on the footpath.

When interviewed on 8 March 1994 he said he had little recollection of the events. He could give no reason for entering the carport of No.23 Lambell Terrace or the house at No.11. He was intoxicated at the time of the offences.

(c) The offence in JA35 of 1994; see pp4-5

On the afternoon of Monday 18 July 1994 the appellant was drinking alcohol at his residence at 25 Melastoma Drive. That afternoon he entered the premises of No.24 Melastoma Drive through the back gate, smashed a hole in the laundry door and entered the unoccupied house. He went through the bedrooms, tipping items from the drawers and rummaging through them. He took a carry-bag and put a "Sony" stereo in it; he also took a Winchester 15-shot rifle, wrapping it in a pink towel together with a pair of earrings. He then returned to his residence with the stolen items, but later took them to an address in Woodroffe. He left the items there and returned to his residence; later he went back to the address in Woodroffe, collected the items, and returned them to their owner at No.24 Melastoma Drive. Police were there and he was arrested. He made admissions but could give no reason for his actions, saying that he could not remember the unlawful entry or the stealing, although he could remember prior and subsequent events. The value of the property stolen was $1470; the value of the property recovered was $1270.

(d) The offence in Appeal no. JA36 of 1994; see p5

When the appellant was spoken to by Police on 18 May 1994 about certain alleged unlawful entries and stealings on 9 February 1994 and 3 March 1994 he admitted that he had received stolen goods knowing them to have been

stolen, to a value of $1500. He pleaded guilty to this on 8 December. Of these goods, he had property to a total value of $800 in his possession reasonably believed to have been stolen, 30 compact discs and a 'Sony' Walkman radio.

The facts relevant to the offences for which he had been given a bond in Alice Springs; see pp5-6

On 2 February 1993 the appellant removed a flyscreen from a residence at No.4 Kurrajong Crescent, opened the unlocked window, climbed inside, went through certain rooms, and removed property including a 'Sony' radio, a T.V. set and a video recorder. Next day he attempted to sell the 'Sony' radio at the Alice Bazaar. The day following he was arrested by Police, made full and frank admissions and gave as his explanation: "I don't know. I was drunk, and didn't know what I was doing."

The appellant's previous criminal record

The appellant appeared before Courts of Summary Jurisdiction in South Australia and the Northern Territory on 9 occasions from October 1983. He was convicted of 16 offences, mainly of the unlawful entry and stealing type, though there were some minor charges of possessing Indian Hemp and cannabis in 1984-85; he has 12 priors for offences similar to the present offences. On 10 February 1987 he appeared before the Supreme Court of South Australia in Adelaide and was convicted of robbery with violence, forge and utter, unlawful possession, and housebreaking; he was

also dealt with for breach of a recognizance. He received an effective sentence of 4 years and 10 months imprisonment with a nonparole period of 4 years. He had received his first sentence of imprisonment in October 1983 - 12 months with a nonparole period of 6 months, for breaking out of an office after committing a felony therein. On 30 July 1984 he received an effective sentence of 21 months imprisonment with a nonparole period of 9 months, for housebreaking, larceny and unlawful possession. Thereafter his next sentences of imprisonment were on 10 February 1987. I have already referred to the suspended sentences totalling 15 months which he received in Alice Springs on 17 June 1993; see p5.

The Court proceedings of 8 September 1994

(a) The submissions and the exchanges

On that day Mr Kitchener the then counsel for the appellant made various submissions in mitigation of punishment. The appellant appeared to have a promising relationship with a young woman. He proposed to attend an alcohol rehabilitation course. His earlier record was "almost primarily - - - substance abuse." He had prospects of obtaining permanent work; his work history usually involved "very short term positions", because of his incarcerations.

His Worship informed Mr Kitchener that he was considering imposing "a lengthy period of imprisonment"; he noted that the appellant had offended whilst on bail and as

to the significance of that fact he cited *R v Richards* (1981) 2 NSWLR 464 at p465, per Street CJ:-

> "As the lists of persons awaiting trial on serious criminal charges continue to lengthen, there are at large within the community an increasing number of persons on bail. Many of those persons will in due course plead guilty to, or be found guilty of, the offences for which they are awaiting trial. The community must be protected as far as possible from further criminal activities by persons who take advantage of their liberty on bail to commit further crimes. The only means open to the criminal courts to seek to provide this protection is to pass severely deterrent sentences upon those who thus abuse their freedom on bail. This will ordinarily involve a significant accumulation of the sentences for any subsequent offences on top of the sentence proper to be passed for the original offence. It must be made abundantly plain that persons at large on bail cannot expect to commit further crimes "for free". On the contrary, they will receive salutary penalties for the very reason that they have abused their freedom on bail by taking the opportunity to commit further crimes." (emphasis mine)

Mr Kitchener then responded to that intimation of what his Worship was considering, submitting that in the Territory the approach outlined by Street CJ in *R v Richards* (supra) which required the imposition of "severely deterrent sentences" in such cases, had not been strictly adhered to. He suggested that one reason for that might be that in New South Wales the "Bail Act is much more rigorously applied". He submitted that a "heavily deterrent sentence" was not appropriate in this case. The appellant was 28 years of age, and his record of prior offending was "not by any means as extensive" as that of some others who had committed offences whilst on bail.

His Worship noted the details of the appellant's prior record (see pp11-12), and considered that he had already received "very strong warnings" in the form of sentences of imprisonment. Mr Kitchener stressed that the appellant came from a "broken home", and had been "institutionalized at a very early age". Accordingly, any such "strong warnings" may have had little practical effect on a person with such a background.

His Worship considered it was "an aggravating feature" for a person to commit an offence while on bail, and such a person "was not entitled to any leniency" in sentencing. He then referred to the "slightly different approach" to that in *R v Richards* (supra) when taking this factor into account on sentence, set out in *R v Gray* [1977] VR 225 at p230, viz:-

> "Prima facie, the quantum of sentence is dependent on the circumstances of the commission of the crime and its immediate consequences, and should not be increased by reference to events occurring after the offence has been committed. But just as conduct subsequent to the commission of the offence which indicates a clear intention to reform is a matter which the offender is entitled to have taken into account in his favour, so also conduct tending in the other direction, i.e. showing that the offender is unlikely to reform, or has at least not yet reformed, is a matter relevant to the sentencing discretion, if or in so far as it suggests that to extend clemency would serve no useful purpose or that leniency is likely to be abused."
> (emphasis mine)

Applying this approach, his Worship considered that if the appellant -

> "- - - was [now] leniently dealt with, he could very well abuse that leniency because he has committed offences whilst on bail."

Mr Kitchener responded that while the fact that an offender had committed his offence when on bail was an "aggravating circumstance" for sentencing purposes, in this jurisdiction it did not attract a "severe or very heavy punitive sentence, to deter". He "strongly" submitted that in the present case "a heavy punitive sentence is not appropriate, based on the background of this particular person."

The exchange then turned to the length of a nonparole period. His Worship referred to *Power v The Queen* (1974) 131 CLR 623; he did not have that authority in front of him but he stated from memory that -

> "- - - it basically says that - - - when you're setting a non-parole period you don't take into account rehabilitation. [In] setting a non-parole period you're supposed to specify the minimum amount of time that justice dictates that the person serve, which I have some conceptual difficulties with; because if I'm going to send a person to gaol it's for the minimum amount of time I feel [he] should go to gaol anyhow. I don't give them any extra, because it's wrong to give them extra, you just give them the minimum amount of time."

Mr Kitchener responded that he did not believe that *Power v The Queen* (supra) "says that you are bound not to take those matters [that is, rehabilitation] into consideration." He noted that the bond which the appellant had broken on 21 February 1994 had been a 2-year good

behaviour bond and he had not breached it for some 8 months. He noted that when the appellant was released on a bond on 17 June 1993, the Magistrate had also fixed a nonparole period of 8 months; he said that "we could not cavil if that was a jumping-off point in relation to [dealing with the breach of the bond]". The suggestion seems to have been that commitment for 8 months should be considered. I note in passing that it is not competent for a Court which releases a person on a bond under s5 of the Criminal Law (Conditional Release of Offenders) Act to fix a nonparole period at the same time; see *R v Brusch* (1986) 11 FCR 582.

Mr Kitchener submitted that a nonparole period would "rarely [be] any more [in length] - - - [than] between one third and one half of the head sentence in these particular circumstances."

(b) The sentencing of the appellant

His Worship then proceeded to sentence, immediately. First he noted that the appellant had spent some 82 days in custody, a period which he treated as the "equivalent of a sentence of 123 days" bearing in mind remissions on sentence. It became clear that he was making this calculation for the purpose of dealing with the question of the length of the period of commitment for the breach of the recognizance of 17 June 1993; he said:-

> "So what I propose to do is to subtract 123 days, or I'll round it up to 4 months, from the 15 months [that being the effective sentence imposed on the appellant in Alice Springs on 17 June 1993]; so he will be committed to prison for 11

> months, which dates from today. - - - So that's why I'm embarking on this exercise of deducting 4 months from the 15 months, to take into account the period of time that he's spent in custody."

It can be seen that his Worship was in substance committing the appellant to prison in execution of the sentence passed on 17 June 1993, for the full term of 15 months to which he had then been sentenced.

His Worship then proceeded to sentence for the 10 offences. He considered that -

> "This [case] in many respects is not a difficult [sentencing] matter; it - - - calls for a deterrent sentence or condign punishment, and that's the case because [the appellant] has committed offences first of all whilst subject [to] a recognizance - a promise that he be of good behaviour, for a similar offence - and then because 2 of the offences he committed - - - were committed whilst he was on bail."
> (emphasis mine)

His Worship then recounted the facts relating to the offences, briefly. He observed that after the appellant had committed the offences of 21 February 1994 he was apprehended and released on bail. Thereafter he committed his offences on 7 March 1994, 2 weeks later, while on bail awaiting the hearing of charges for the offences of 21 February 1994. He was arrested on 8 March for the offences of 7 March, and spent 30 days in custody before being released on bail. Accordingly, he committed the offence of 18 July 1994 while on bail for the offences of 21 February and 7 March.

His Worship noted that he did not have the "benefit of victim impact statements" so he was not aware whether the "victims in these matters have been traumatised or not traumatised." He noted that the "unlawful entry charges have another common feature, consumption of alcohol beforehand." He considered that -

> "If [the appellant] knew that he did stupid things when he drank, he [should] be at pains either not to drink, or to drink in the company of others so that they could control him."

He considered that comment was "especially relevant" in light of the fact that the appellant had committed offences whilst on bail since -

> "- - - one would think he would be on his best behaviour, to try so hard again not to put himself in the situation where if he drank he'd do stupid things."

He said that when he heard the facts relating to the offences he was concerned that the appellant "was a hopeless case", in the sense "that perhaps he was a person who was brain damaged". However, he noted that "it's clear that he's not brain damaged", citing a report by a Mr Walsh of 2 September 1994.

He considered that this was a "sad case" in that -

> "[The appellant has] got a terrible background, separated family, ward of the State. - - - incarceration is no stranger to him and - - - probably - - - he derives a form of comfort from being incarcerated. - - - It's clear that he's lacked as a child and as an adolescent a loving upbringing.

> I also feel that [the appellant] has some likeable aspects about him - - - he seems to be responsive, he seems to have an idea of what's going on. He seems to be - - - a pleasant person. However - - - it must be brought home that pleasantness is no indicator of criminality or lack of criminality. - - - Still, it's a sad case."

His Worship then referred again to the decision in *R v Richards* (supra). He repeated his earlier view (see p16):-

> "- - - that a - - - severely deterrent approach has to be taken."

He accepted what Street CJ said in *R v Richards* (supra) at p465, citing the passage emphasized on p12. He continued:-

> "[Street CJ in *R v Richards* (supra)] to my mind has expressed that very simply, very clearly, [in very easy-to-understand language], and I feel that that is the course that has to be adopted here. I have to take into account that the defendant has committed offences whilst on bail. I have to take into account the fact that he committed the offences whilst he was subject to a bond.
>
> I'm also concerned - - - that his prospects of rehabilitation are not good.
>
> - - -
>
> [The appellant's] had the warnings. He's been on bail twice and he's continued to get on the grog and to go out and commit - - - offences involving damage, inconveniencing other people. His activities sound a clear warning to the community, that [the appellant] is a person who has to be watched closely, or watched carefully, and that clear warning is sounded because he didn't take advantage of the warnings that bail offers him.
>
> One would expect if you're on bail you stay out of trouble. In this case, as I've indicated, I

> feel that severely deterrent sentences have to be imposed. Having said that, I take into account the fact that in relation to the unlawful entry on 18 July [see p9] the property was returned, and his sentence will be reduced a little [it was ultimately 15 months imprisonment], to take that fact into account - - - [it will be] reduced in comparison to the sentence for the unlawful entry on 7 March [for which 18 months imprisonment was ultimately imposed].
>
> The question of a non-parole period is a vexed one. - - - I have some difficulties with the concept of imposing a non-parole period for such a length as the justice of the case dictates [see his views expressed at p15]. - - - There should be avenue[s] of sufficient flexibility in the fixing of a non-parole period to take into account the defendant's prospects of rehabilitation. As I say, I'm not sure that [those prospects are] good, but he's got a girlfriend and anything can happen with the love of a good woman, and secondly, he does have prospects of work.
>
> - - -
>
> I suppose you could say that - - - I'm going to impose a non-parole period that will take into account prospects of rehabilitation. - - - I feel that something has to be done to give the person - - - some light at the end of the tunnel to show that they can rehabilitate themselves."

His Worship also referred to the desirability that the appellant spend time in a residential rehabilitation program and that whilst in gaol he undergo the "Ending Offending program". He then proceeded to convict the appellant and sentence him in the manner set out at pp2-6. His Worship concluded:-

> "I've directed my mind to the "totality principle" in all of this. I've made some [sentences] concurrent but when I step back and have a look, I consider that the period of time in custody [the effective sentence was 56 months, nonparole period 18 months] is a fair thing when I take into account that [the appellant] has

> offended whilst on a bond, offended whilst on bail and I take into account the fact that damage was caused, and when I take into account his age and the fact that he's not what the courts would call a "young man" any more, late teens, early 20's in that range, or that age group, where the courts bend over backwards to keep young people out of gaol."

Conclusions

There were 2 general matters raised as to the basis on which a Magistrate should approach sentencing when dealing summarily with indictable offences, pursuant to s121A of the Justices Act. I should state my views on them. First, although the maximum sentence which the Magistrate may impose in such a case is limited by s121A(2) to 2 years imprisonment, that term is not to be reserved for a "worst case" example of the offence in question; see *Sultan v Svikart* (1989) 42 A Crim R 15. As Stephenson J said in *R v Doyle* (1987) 30 A Crim R 1 at p4:-

> "- - - there may well frequently be occasions when [the Magistrate] will impose sentences of 2 years imprisonment or slightly less [in such a case]."

Second, in this case, since the appellant had been sentenced on 17 June 1993 in Alice Springs to terms of imprisonment aggregating 15 months for indictable offences, the provisions of s129(3) of the Justices Act applied; the effect was to remove the 2-year limit in s121A(2) and to enable his Worship to "inflict any punishment not exceeding the maximum fixed by law" for the particular offence. The convictions in South Australia of 10 February 1987 did not

have that effect, in light of the reference to "the" Court in s129(3).

Mr Robinson of counsel for the appellant advanced certain general submissions on all the appeals.

First, he submitted that the individual sentences were not proportionate to the objective circumstances of the particular offences; putting it another way, his Worship had failed to assess the true criminality and seriousness of each offence, or to state where that offence fell within the range of seriousness for offences of its type. Within the range where the maximum punishment was 2 years imprisonment the various sentences, especially those for what were ordinary run-of-the-mill unlawful entries, were too severe. I accept what was said by the Court of Criminal Appeal in New South Wales in *R v Dodd* (1991) 57 A Crim R 349 at p354, where the Court stressed that:-

> "- - - making due allowance for all relevant considerations, there ought to be a reasonable proportionality between a sentence and the circumstances of the crime, and we consider that it is always important in seeking to determine the sentence appropriate to a particular crime to have regard to the gravity of the offence viewed objectively, for without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place. Each crime - - - has its own objective gravity meriting at the most a sentence proportionate to that gravity, - - -" (emphasis mine)

Second, he submitted that his Worship had not referred to the objective circumstances of the offences, which he was required to take into account.

I think that the first submission may have proceeded on an assumption that the law was not as stated on p20 in *Sultan v Svikart* (supra). I consider that there is no substance in it. As to the second submission, a Magistrate's sentencing remarks are not to be read as if they were reserved reasons for decision. I consider that his Worship made a careful assessment of the objective circumstances of each offence, and took them into account. This is manifested both by his remarks on sentence, and from the structure of his sentencing itself.

Mr Robinson pointed to the very similar modus operandi in each unlawful entry and submitted that this showed that the difference in the sentences of 12 months (see (1)(a) on p2), 18 months (see (2)(a) on p4) and 15 months (see (3) on pp4-5) was unwarranted. I observe that the modus operandi was similar, a common feature with house breakers; but there were other circumstances which warranted the differential sentencing. For example, the 12 months for the unlawful entry on 21 February 1994 described at (a) on p8 was for the first of this crop of offences; the 18 months for the unlawful entry described at (b) on p9 was for the appellant's second offence, committed 2 weeks later on 7 March, while he was on bail following a charge for the first unlawful entry, and it was committed in very blatant circumstances; the 15 months sentence for the third unlawful entry 4 months later, described at (c) on pp9-10, was committed while he was on bail for the earlier offences, but his Worship specifically referred (at

p19) to the reason why he had imposed a slightly lesser sentence than that for the offence of 7 March. I consider that his Worship clearly gave careful consideration to the differing circumstances of the offences.

As to the commitment to prison for 11 months for the breach of bond it is clear that his Worship gave no reduction to take account of the fact that the appellant had kept out of trouble for 8 of the 24 months of his bond. Sentencing law did not require him to do so; see *Baird v The Queen* (1990-91) 104 FLR 113 at p119, viz:-

> "Section 6(3)(e) itself does not supply the criteria for deciding the matter, nor does any other provision of the Act, but one would expect that some of the kinds of things to be taken into account are fairly obvious. The Parliament having conferred a wide discretion, we do not think the courts ought effectively to restrict it. Like the art of sentencing itself, making orders under s6(3) involves the exercise of a wide discretion in a potentially infinite variety of circumstances.
>
> Consistent with the unfettered nature of the discretion under s6(3)(e), some general, and therefore not very helpful propositions are possible. It is axiomatic that the order should be a just one. A warning given by the judge imposing the original sentence as to the consequences of a breach may be relevant. The nature of the terms of the recognisance are relevant. The nature and gravity of the breach is a relevant factor. Whether the breach evinces an intention to disregard the obligation to be of good behaviour or to abandon any such intention would normally be relevant. For instance it would be an aggravating factor if 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 may be relevant. The moral pressures upon the offender to commit the breach may count. The possibilities are as potentially numerous as the factors that affect the ordinary sentencing process itself. But the materiality

> of any factor is determined by fairness and common sense." (emphasis mine)

There is nothing to suggest that his Worship failed to take account of these matters. He was well aware of the "aggravating factor" that the appellant had breached his bond by "the commission of [further offences] of the same nature as that which gave rise to the recognizance", and the "nature and gravity of the [repeated] breach[es]" which clearly evinced "an intention to disregard the obligation to be of good behaviour." I do not accept Mr Robinson's submission that the pervasive presence of alcohol in the appellant's offending constituted "moral pressures upon [him] to commit the breach[es]." It is wrong to expect that a Magistrate in his sentencing remarks will rehearse every factor which he takes into account when sentencing or when dealing with a breach of a bond; the law does not require him to.

Mr Robinson submitted that his Worship had at p15 fundamentally misapprehended what the High Court said in *Power v The Queen* (supra) as to the significance of the factor of rehabilitation when fixing the length of a nonparole period. I accept that submission; as Gallop J said in *R v Mulholland* (1991) 1 NTLR 1 at p7:-

> "In [*Power v The Queen*] the High Court put paid to the notion that the sentencing judge, in fixing the minimum term, approaches the task on the footing that he or she is <u>solely or primarily concerned</u> with the prisoner's prospects of rehabilitation."
> (emphasis mine)

See also *Bugmy v The Queen* (1990) CLR 525 at pp530-3, per Mason CJ and McHugh J, as to the relevance of prospects of rehabilitation when fixing a nonparole period. However, when his Worship came to the fixing of the nonparole period, it is clear from his remarks at p19 that he took rehabilitation into account as a relevant factor; I consider that he gave that factor appropriate weight in the circumstances.

Mr Robinson submitted that his Worship when sentencing gave undue weight to the aggravating factor that the unlawful entries of 7 March (item (b) on p9) and 18 July (item (c) on pp9-10) were committed while he was on bail. He submitted that this error was manifested by his Worship's stress on the need for a "strongly deterrent approach." I accept that in using those words his Worship had clearly followed *R v Richards* (supra). Mr Robinson submitted that Street CJ in that case had overstated the position; see the extract at p12. He submitted that although his Worship had later cited *R v Gray* (supra), which states the correct approach when weighing that aggravating factor, he had applied the approach in *R v Richards* (supra). Mr Robinson cited the passage in *R v Gray* (supra) which immediately follows the passage cited by his Worship at p14, viz:-

> "It follows, we consider, that the sentencing judge was entitled to take into account the fact that - - - [some of] the offences - - - were committed whilst the applicant was on bail or on probation. <u>What weight the sentencing judge was to assign to that circumstance was a matter for him</u>." (emphasis mine)

I consider that when the passage from *R v Richards* (supra) set out at pp12-13 is read carefully, it can be seen that what Street CJ was doing was setting out some guidelines for sentencing in such cases; note the reference to what is to be "ordinarily" involved. I do not consider, in light of his Worship's remarks at pp16 and 18 when sentencing, that his Worship felt himself bound to follow the approach in *R v Richards* (supra). I consider that in the exercise of his own sentencing discretion his Worship considered that what Street CJ stated in *R v Richards* expressed the correct approach to be taken in the circumstances of the case before him, viz: "a severely deterrent approach." Hence his Worship's remark at p18:-

> "- - - I feel that that is the course that has to be adopted here."

His Worship was clearly of the view that applying what was said in *R v Gray* (supra) at p14, the prior criminal record of the appellant showed that he "could very well abuse" any leniency now extended to him; see p14. I reject the submission that his Worship gave undue weight to the factor that the appellant had committed 2 of his unlawful entries while on bail. To the contrary, I consider his Worship gave that matter appropriate weight; those offences were committed in disregard of the fact that he was free on bail for a similar offence and indicated that "to extend clemency would serve no useful purpose"s; see *R v Gray* (supra), at p14.

As to the totality of the sentences, Mr Robinson submitted that on an overall view of the criminality involved in the offending, the effective term of imprisonment of 56 months was too high, and the nonparole period of 18 months was too long. I accept the submissions by Mr Fox of counsel for the respondent that the individual sentences were not manifestly excessive in the circumstances and that an accumulation of sentences was justified and proper. The offences and the offending were both serious. His Worship took all relevant sentencing factors into consideration. Although he made no specific reference to the prevalence of unlawful entries in Darwin, he did not have to do so; that prevalence is notorious.

As to totality, I respectfully adopt what Nader J said in *Lade v Mamarika* (1986) 83 FLR 312 at p316:-

> "It is, in my view, the overriding requirement that the aggregate sentence made up of the individual sentences should not lack proportion to the total criminality of the offender's conduct. This last can fairly be regarded as a true principle of law. To fail in this respect is to impose an unjust sentence: either too lenient or too severe. From the point of view of the prisoner and the community, the aggregate sentence is of paramount importance.
>
> The desirability that each component sentence should reflect the gravity of the conduct constituting the offence for which it was imposed and the desirability of complying with the practice of making sentences concurrent or cumulative according to the criterion referred to above must be subordinated to the principle that the aggregate sentence be a just one. In general, I think it is preferable, in order to achieve an aggregate sentence of just severity, to overlap or make concurrent appropriate individual sentences rather than to shorten them and make them cumulative. The latter course is more misleading, appearing on a criminal record,

than the former. Indeed, these desirable goals are often not reconcilable and have to be departed from in particular cases.

- - -

It appears to me that in grappling with the problem of giving weight to conflicting criteria concerning whether or not sentences ought to be accumulated, his Worship was distracted from the application of the true principle that the aggregate sentence should fairly and justly reflect the culpability of the respondent." (emphasis mine)

I respectfully note what was said in *Mill v The Queen* (1988) 166 CLR 59 at pp62-63:-

"The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas, Principles of Sentencing, 2nd ed. (1979), pp56-57, as follows (omitting references):

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with the specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong ']; 'when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

See also Ruby, Sentencing, 3rd ed. (1987), pp38-41. Where the principle falls to be applied in

> relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred.
>
> The totality principle has been recognized in Australia." (emphasis mine)

Bearing in mind the relevant sentencing factors, I consider that the aggregation of the sentences resulting in a total term of imprisonment of 4 years 8 months has resulted in an effective sentence which is manifestly excessive. I consider that the totality of the offending in question, bearing in mind the very limited leniency which can be extended to the appellant, merits a term of 44 months imprisonment. To arrive at that term I would vary his Worship's order for the accumulation of sentences, as follows:-

(1) Instead of the sentence of 18 months imprisonment being directed to be served wholly cumulatively upon the sentence of 12 months, 6 months of that sentence should be served concurrently with the sentence of 12 months, and the remaining 12 months of that sentence cumulatively upon it;

(2) Instead of the sentence of 15 months being served wholly cumulatively upon the sentence of 18 months, 6 months of that sentence should be served concurrently with the

sentence of 18 months, and the remaining 9 months should be served cumulatively upon it.

In the result, the aggregate of the terms will be 44 months imprisonment, made up as to 11 plus 12 plus 12 plus 9.

As to the nonparole period of 18 months, I consider that bearing in mind and applying the considerations proper to be taken into account when fixing the nonparole period, as set out in *Bugmy v The Queen* (supra) at pp530-3, the nonparole period fixed by his Worship is wholly appropriate and should remain unchanged despite the reduced effective head sentence.

Orders

I allow the appeals against the accumulation of the sentences to the extent of the variations set out in (1) and (2) on p29; except for those variations, the appeals against the individual sentences and the term of commitment are dismissed, and those sentences and the term of commitment and the various orders for service of sentences consecutively or concurrently as made on 8 September 1994, are affirmed.

Orders accordingly.
