

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

N° 126 of 94
(9412502)

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS
Plaintiff

AND:

IAN LESLIE GRAY
First Defendant

CYRIL MODIKAN
Also Known As
CYRIL MODIKIN
Second Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 13 July 1994)

This is an application in the nature of Certiorari pursuant to Order 56 of the Supreme Court Rules to quash certain orders made by the learned Chief Stipendiary Magistrate on 1 March 1994 and seeking a declaration pursuant to s18 of the *Supreme Court Act*. The application by summons on originating motion between the parties seeks the following orders:

- "1. The Plaintiff seeks an order granting leave to extend the time for the commencement of this proceeding to the eighth day of July 1994.
2. The Plaintiff seeks a remedy in the nature of Certiorari pursuant to Order 56 of the Supreme Court Rules quashing:-

an order that sentences of imprisonment on offences of (1) aggravated criminal damage, one month (2) armed with an offensive weapon, one month; cumulative with (1) and (3) criminal damage concurrent with (1) be served **concurrently** with the balance of a sentence of

imprisonment, to be served in relation to a sentence of imprisonment imposed on the second defendant for aggravated assault on 5 March 1993.

and further quashing:-

an order that the first defendant be sentenced to ten months imprisonment calculated as being the unexpired balance of the sentence of imprisonment imposed on the second defendant for aggravated assault on 5 March 1993.

and further quashing:-

the Certificate of Proceedings, dated 29th June 1994, wherein the above orders are recorded.

and further quashing:-

the Certificate of Proceedings, dated 29th June 1994, in as far as it provides that the Court fixed a non-parole period of 10 months.

3. A declaration or order that the sentence of the Learned Magistrate be varied to require the sentence of two months cumulative on charges of aggravated damage and being armed with an offensive weapon (together with one week imprisonment concurrent on a charge of criminal damage) to be served prior to the prisoner Cyril Modikin undergoing imprisonment for the balance of the term that he is required to serve by law pursuant to Sections 12(2) and 14 of the Parole of Prisoners Act 1992 in relation to the balance of the term of imprisonment for aggravated assault for which he was committed on 1 March 1993 and sentenced to imprisonment for 18 months with a non-parole period of 8 months.
4. A further order that the Certificate of Proceedings, dated 29th June 1994, be quashed.
5. A further order that the existing warrant of imprisonment dated 1 March 1994 be quashed and a further order that a fresh warrant of imprisonment be issued.
6. Such further orders or other relief as is appropriate."

Mr Tiffin, counsel for the first defendant, appeared and advised the court that the first defendant submitted to the jurisdiction of this court.

Mr Lawrence, counsel for the second defendant, appeared and supported the application made by the plaintiff.

I have read the affidavit of Ms Channells sworn 29 June 1994 and the memorandum of counsel prepared by Mr Cato.

A reading of the transcript of the proceedings before the learned Chief Magistrate being annexure "A" to the affidavit of Ms Channells sworn 29 June 1994, discloses the learned Chief Magistrate imposed the following sentences:

(1) Aggravated criminal damage. One month imprisonment.

(2) Criminal damage. One week imprisonment concurrent with sentence on count (1).

(3) Armed with offensive weapon. One month imprisonment cumulative upon the sentence imposed on count (1).

A total effective sentence of two months imprisonment.

The learned Chief Magistrate then proceeded to impose sentence for breach of parole and made an order as follows:

"Having taken that into account, I propose to order that the two months sentence - which I've just announced - be served concurrently with the unexpired sentence to be served on parole which produces a net resulting sentence of 10 months. I make it fully concurrent really for totality reasons. I don't need to explain that any further to anybody here. That means that the effect of the order, unless Mr Modikan is later paroled by the board, is a 10 month sentence.

Now Mr Modikan, what that all comes down to in the end is that you've got a 10 month sentence to do. In other words you've got to serve out the rest of your sentence; understand? I've added to it but I've made the two months all part of it, so it's still 10 months. That's the net result at the end."

Counsel for the plaintiff submits that such an order is contrary to law, in particular s12(2) of the *Parole of Prisoners Act*. This is because the practical effect of the order is that the second defendant would be sentenced to serve a longer period of imprisonment than can be lawfully required.

Section 12(2) of the *Parole of Prisoners Act* provides as follows:

" (2) Where -

- (a) a person has been sentenced or committed in the Territory to a term of imprisonment for an offence committed while a parole order is or was in force in relation to him; and
- (b) that parole order is, by reasons of that sentence or committal, deemed to have been revoked by virtue of section 5(8),

the court by which the person is sentenced or committed shall order the person to undergo imprisonment for the term that the person had not served at the time when he was released from prison in pursuance of the parole order, which term of imprisonment shall commence at the expiration of the term of imprisonment to which he is sentenced or committed for the later offence."

I accept the submission of counsel for the plaintiff that the order made by the learned Chief Magistrate is contrary to law for the following reasons.

Pursuant to s12(2) of the *Parole of Prisoners Act* the sentence for the term that the second defendant had not served at the time when he was released from prison in pursuance of the parole order cannot be made concurrent with sentence of imprisonment for the other offences.

I also accept the submission by counsel for the plaintiff that it was contrary to law for the learned Chief Magistrate to specify the number of months imprisonment that the second defendant was required to serve following his breach of parole. The 10 month

sentence imposed did not take into account the remissions, the second defendant would be entitled to receive when he served a sentence of imprisonment. The effect of this being the second defendant was sentenced to serve a lengthier period of imprisonment than required by law.

Section 15 of the *Parole of Prisoners Act* provides as follows:

"REMISSION ALREADY EARNED BEFORE PAROLE ORDER REVOKED OR CANCELLED

Where -

- (a) a parole order in relation to a person is revoked or cancelled under this Act; and
- (b) before the revocation or cancellation, the person had earned under the Prisons (Correctional Services) Act or another law of the Territory a period of partial remission of the sentence of imprisonment in respect of which the parole order was made,

the period so earned shall, notwithstanding this or any other law of the Territory, be deducted from the term of imprisonment that remains to be served as a result of the revocation or cancellation of the parole order."

With respect to the application that this court quash;

(a) the Certificate of Proceedings dated 29 June 1994 wherein the above orders are recorded. Copy of which is annexure "E" to the affidavit of Ms Channells sworn 29 June 1994.

(b) The Warrant of Imprisonment dated 1 March 1994, copy of which is annexure "D" to the affidavit of Ms Channells sworn 29 June 1994.

I note the Certificate of Proceedings is incorrect in that it states inter alia:

"AND the Court fixed a non-parole period of TEN (10) MONTHS."

From a reading of the transcript of proceedings dated 1 March 1994 (Annexure "B" to the affidavit of Ms Channells sworn 29 June 1994) the learned Chief Magistrate did not make such an order.

I note also that the Warrant of Imprisonment does not correctly reflect the order made by the learned Chief Magistrate, in that it states the sentence on count (2) criminal damage was one month whereas the sentence imposed by the Chief Magistrate was imprisonment for "one week". The Warrant of Imprisonment also incorrectly states:

"AND it is ordered that the defendant shall not be eligible to be released on parole for a period of 10 months."

I note the application made by counsel for the plaintiff is supported by counsel for the second defendant.

Accordingly, I make orders in terms of the Minute of Order dated this 13th day of July 1994.

(tho94015)

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DRAFT MINUTES OF ORDER

1. That the time for commencement of these proceedings be extended to 8 July 1994.
2. That the orders made by the first defendant on 1 March 1994 in relation to the second defendant be varied as follows:
 - (a) By quashing that part of the order that required that the sentence of two months imposed by the first defendant on 1 March 1994 be served concurrently with the unexpired portion of the sentence imposed by the Court of Summary Jurisdiction at Port Keats on 5 March 1993.
 - (b) By quashing so much of the order as specified or affirmed a 10 month sentence of imprisonment.

3. That the Certificate of Proceedings relating to or based upon the orders made on 1 March 1994 by the first defendant in relation to the second defendant be quashed except where it relates to offence No. 4 the offence of disorderly behaviour.
4. That the Warrant of Imprisonment relating to the second defendant dated 1 March 1994 relating to convictions and orders imposed by the Court of Summary Jurisdiction at Port Keats on 1 March 1994 be quashed.
5. That the matter be remitted back to the Court of Summary Jurisdiction to be further dealt with according to law.
6. That there be no order as to costs.

Dated this 13th day of July 1994

JUSTICE S.G. THOMAS