PARTIES:	THE QUEEN v EARL SHANE CLEMENTS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	9500170
DELIVERED:	11 June 1997
HEARING DATES:	25 March 1997
JUDGMENT OF:	Kearney J

CATCHWORDS:

Criminal law and Procedure – Jurisdiction, practice and procedure – Bail and Recognizances – Recognizance under *Criminal Law (Conditional Release of Offenders) Act* 1971 (NT) (repealed) – Breach of – Whether breach could be dealt with under repealed Act or must be dealt with under *Sentencing Act* 1995 (NT) –

Criminal Law (Conditional Release of Offenders) Act 1971 (NT) (repealed) – s6(3)(e).
Sentencing Act 1995 (NT) – s130(2).

REPRESENTATION:

Counsel:

Applicant:	J.W. Adams
Respondent:	D. Beckett

Solicitors:

Applicant:	Office of the Director of Public Prosecutions
Respondent:	Northern Territory Legal Aid Commission

Judgment category classification:	C
Judgment ID Number:	kea97012
Number of pages:	8

kea97012

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

No. 9500170

IN THE MATTER OF the Sentencing Act

AND IN THE MATTER OF an application for an order under Section 43(5) of the Act

BETWEEN:

JOHN WILLIAM ADAMS
Applicant

AND:

EARL SHANE CLEMENTS
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 11 June 1997)

The application

An oral application was made on 25 March 1997 under s43 of the *Sentencing Act* (herein 'the Act') for the respondent to be dealt with for his admitted breach of an order (made prior to the Act) suspending service of part

of a sentence of imprisonment imposed on him on 9 May 1995. The breach had occurred when he committed an offence punishable by imprisonment during the period of a recognizance to be of good behaviour, his entry into which had been a precondition to the suspension of the service of part of his sentence.

The background

On 5 January 1995 Police searched a property 60km from Katherine where the respondent was employed as a rouseabout. They located 139 cannabis plants in the course of cultivation, 6.1 grams of cannabis seeds, and 227.8 grams of cannabis leaf. The respondent admitted he had been cultivating the plants, had been in possession of cannabis in a public place in Katherine, and had there unlawfully supplied cannabis to another person. On 9 May 1995 he pleaded guilty in this Court to charges of cultivating, possessing and supplying cannabis, under the *Misuse of Drugs Act (NT).* The learned sentencing judge sentenced him to an effective term of two years' imprisonment and pursuant to s5(1)(b) of the *Criminal Law (Conditional Release of Offenders) Act* (herein "the *CL(CRO) Act"*) then in force, directed that he be released after serving two months of that sentence, upon entering into a recognizance in the sum of $3000 to be of good behaviour for a period of three years. He entered into that recognizance on 5 July 1995.

On 15 October 1996, the respondent pleaded guilty in the Court of Summary Jurisdiction at Darwin to charges that on 31 January 1996, within the period of his 3-year good behaviour recognizance, he had assaulted Police,

resisted Police, and possessed cannabis. The offences were relatively minor; the assaulting and resisting Police consisted of swearing and pushing, and the cannabis in his possession weighed 1 gram. The respondent was fined for assaulting Police and possessing cannabis, and sentenced to 1 month's imprisonment for resisting Police, suspended on his entering into a bond to be of good behaviour for two years.

The submissions on the application

The application was made at the sittings of this Court in Katherine in March 1997. The respondent admitted that he had committed the offences of 31 January 1996, had been convicted of them on 15 October and sentenced as indicated above. The applicant, a prescribed person under Reg.4(2) of the *Sentencing Regulations*, submitted that the respondent's admitted commission of the offences of 31 January 1996 constituted a breach of his recognizance of 5 July 1995, and that the application to deal with the breach fell to be dealt with under s43 of the Act. Mr Beckett of counsel for the respondent admitted the breach of the recognizance, submitted that there were good reasons for the suspended part of the sentence of imprisonment (the 22 months) not to be reactivated, and that the law governing the determination of the question what should be done was the *CL (CRO) Act*, not the Act.

Which Act regulates the consequences of the breach?

As to the latter point, Mr Beckett submitted that as the recognizance of 5 July 1995 was entered into pursuant to s5(1)(b) of the *CL (CRO) Act*, the respondent's failure to comply with the conditions thereof could and should be

dealt with under s5(3)(e) of that now repealed Act, and not under s43 of the Act. He submitted first that the 'breach' provision of the *CL (CRO) Act*, s6, is available in these circumstances notwithstanding the repeal of that Act; and second, that there is a discretion under the Act to apply that 'breach' provision.

In support of the submission that s6 of the *CL (CRO) Act* remained available, he relied on s12(c) of the *Interpretation Act* (NT) which provides, as far as relevant:

> "The repeal of an Act … does not -
>
> (c) affect a … liability … incurred under an Act … so repealed, or an investigation, legal proceeding or remedy in respect of that … liability; …"

Mr Beckett submitted that, in terms of s12(c), the defendant's entry into the recognizance of 5 July 1995 under the *CL (CRO) Act* gave rise to a 'liability [he had] incurred under' that Act, upon later breach of the recognizance. He submitted that the effect of s12(c) is that the repeal of the *CL (CRO) Act* does not 'affect' the continued existence of that 'liability', and hence the sanction provision of the repealed Act continues to apply.

The possible effect of s3(3) of the *Interpretation Act* upon this submission was also dealt with. It provides, as far as presently relevant, that in its application to the Act, s12(c) yields to any contrary intention apparent in

the Act. Mr Beckett submitted that no such contrary intention appears in the relevant provision of the Act, s130(2), viz:

> "(2) Where, immediately before the commencement of this section, an order under the *Criminal Law (Conditional Release of Offenders) Act* or a sentence was in force in respect of a person, the person continues to be subject to the *requirements* of the order or sentence *in all respects* as if this Act had not commenced but the order or sentence may be cancelled or varied and *any failure to comply with it may be dealt with under this Act as if it were made or imposed after the commencement of this section".* (emphasis added)

Mr Beckett emphasized the words "in all respects" and submitted that one of the 'respects' in which the respondent 'continues to be subject' to the order made under the *CL (CRO) Act* is how he is to be dealt with when in breach of that order.

As to his second submission, that there is a discretion under the Act to apply the 'breach' provision of the *CL (CRO) Act* in the present circumstances, Mr Beckett submitted that in s130(2) the fact that the word 'may' is used in the passage last emphasized above, and not 'shall', gives the Court such a discretion; 'may' imported a discretion, and meant that it was *permissible* to apply the breach provisions of the Act to the breach of an order under the *CL (CRO) Act*. This in turn connoted, logically, that there must be *another way* to deal with such a breach; he submitted that the wording of s130(2) indicated that the 'breach' provisions of the *CL (CRO) Act* were preserved in a situation such as this, and constituted the other way in which the Court could deal with the breach of the 1995 recognizance.

In reply, Mr Adams submitted that 'may' in the passage in s130(2) last emphasized above is permissive only, in the sense that it gives the court power to take or not to take such action on a breach as it sees fit, provided that it acts in accordance with s43 of the Act.

Conclusions

I note that the practical distinction between the sanctions for breach in the *CL (CRO) Act* and the Act is that the Court has an untrammelled discretion under s6(3)(e) of the former Act, whereas under ss43(5)(c) and (7) of the Act its discretionary power as to reactivation of the original sentence (or part sentence) suspended is limited.

I reject Mr Beckett's submission that in terms of s130(2) of the Act one of the 'requirements' of the order of 9 May 1995 is the mode of dealing with a breach of it. The order of 9 May 1995 made under s5(1)(b) of the *CL (CRO) Act* is preserved and kept in force by s130(2) "as if [the Act] had not commenced", but that order is distinct from the sanctions for failure to comply with it in s6(3)(e) of the repealed Act. The first part of s130(2) is concerned with preserving such an order in force so that the respondent remains subject to it; the second part of s130(2), commencing "but the order", is directed to the consequences of breach.

As to the second part of s130(2), I consider that the word 'may' is used in the sense of "shall be lawful". It confers an enabling and discretionary power

in this context, empowering the doing of something which otherwise could not lawfully be done. It provides that failure to comply with the terms of a recognizance under the *CL (CRO) Act* still carries a sanction despite the repeal of that Act where the sanction was formerly to be found; it is now to be found in, and only in, the Act. See generally *Julius v Bishop of Oxford* (1880) 5 App. Cas. 214 at 222 per Earl Cairns L.C., *Mitchell v The Queen* (1995-96) 184 CLR 333 at 345-6, and *Massy v Council of the Municipality of Yass* (1922) 22 SR (NSW) 494 at 497 and 499 per Cullen CJ. That is the effect of the 'asifism' in the passage last emphasized in s130(2) on p5. It means that the sole sanction for the breach of the recognizance of 5 July 1995 on 31 January 1996 is now to be found in s43(5) of the Act; the breach provisions of the *CL (CRO) Act* no longer exist, and they are not resurrected, Lazarus-like, by s130(2). The provisions in s12(c) of the *Interpretation Act* have no application because, in terms of s3(3) of that Act, the passage last emphasized in s130(2) of the Act clearly indicates "an intention to the contrary". Consequently, in dealing with the admitted breach, the court has the options available under s43(5)(c), (d), (e) or (f) of the Act, provided that s43(7) does not apply.

It will be noted that s43(7) mandates the making of an order under s43(5)(c) unless the court "is of the opinion that it would be unjust to do so in view of all the circumstances which have [later] arisen." As I indicated on 25 March, in accordance with s43(7), the respondent's offences of 31 January

1996 were not serious enough to warrant restoration of the part of his sentence suspended on 9 May 1995 (22 months), and an order that he serve that term. In terms of s43(7) it would be "unjust" to make such an order. On 25 March, in accordance with s43(5)(f), I ordered that there be no order with respect to the suspended sentence; the recognizance of 9 July 1995 remains in force. These are the reasons for the ruling that the applicable statute under which the order of 25 March 1997 was made is the Act and not the *CL (CRO) Act*.

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