PARTIES:	THE QUEEN
	v
	CLIVE WANAMBI
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	190 of 1996 (9612720) 199 of 1996 (9612715)
DELIVERED:	13 February 1998
HEARING DATES:	26 September and 1 October 1997
JUDGMENT OF:	Kearney J

CATCHWORDS:

Criminal Law and Procedure – Jurisdiction, practice and procedure – Jurisdiction – Failure to make order pursuant to *Sentencing Act* (NT), s64(2) – Whether sentencing error – Meaning of "the court by which the person is sentenced" – Whether non-compliance with s64(2) renders sentence imposed for subsequent offence beyond power – Effect of order under s64(2) upon term of imprisonment and non-parole period –

O'Brien v MacSkimin (1994) 101 NTR 1, (1994) 118 FLR 83, followed.
Craig v South Australia (1995) 184 CLR 163, distinguished.
Ertan v Hurford (1986) 11 FCR 382, considered.
R v Barra (unreported, Supreme Court (NT) (Martin CJ), 14 August 1997), considered.
Mitchell v Maley (unreported, Supreme Court (NT) (Bailey J), 17 June 1997), considered.

Parole of Prisoners Act (NT), s5(8), 11
Sentencing Act 1995 (NT), ss15(1), 43(1) and (2), 64(2), 111(1), 112(1)(b)
Sentencing Act 1991 (Vic), s104(1)

REPRESENTATION:

Counsel:

Applicant:	A. Fraser, T. Austin
Respondent:	C.F. Thomson

Solicitors:

Applicant:	Office of the Director of Public Prosecutions
Respondent:	NAALAS

Judgment category classification:	A
Judgment ID Number:	kea98006
Number of pages:	16

kea98006

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

No. 190 of 1996 (9612720)
No. 199 of 1996 (9612715)

IN THE MATTER OF the *Sentencing Act*

AND IN THE MATTER OF an application under s64(2) of the Act and an application for a declaration

BETWEEN:

THE QUEEN
Applicant

AND:

CLIVE WANAMBI
Respondent

AND

BETWEEN

CLIVE WANAMBI
Applicant

AND

THE QUEEN
Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 13 February 1998)

The applications

On 1 October 1997, I heard and determined two applications, for reasons to be later stated. These are those reasons.

The first application was by the Crown, seeking an order in relation to Clive Wanambi (herein "the respondent") pursuant to s64(2) of the *Sentencing Act* (NT) ("the *Sentencing Act*). After hearing submissions I ordered in terms of s64(2), that the respondent "be imprisoned for the term that [he] had not served when [he] was released from prison" on parole on 17 February 1996; he had at that time served 7 months of a total sentence of 15 months imprisonment. I further ordered, in terms of s64(2), that that term of imprisonment "commence at the expiration of the term of imprisonment to which he [was] sentenced … for [a] later offence", on 7 April 1997.

In the second application, made orally, the respondent sought a declaration that as a matter of right he was presently eligible to be considered for parole by the Parole Board. After hearing submissions, I made the declaration sought; as a result the respondent was then eligible to be considered for parole in relation to the sentence imposed on 7 April 1997 which he is currently serving, together with the additional term of imprisonment imposed on 1 October.

The factual background

On 19 July 1995, the respondent was convicted in the Court of Summary Jurisdiction at Alyangula of various offences; he was sentenced to an effective term of 15 months imprisonment from 18 July 1995 for those offences, a non-parole period of 7 months being fixed. He was paroled at the expiration of the parole period, on 17 February 1996. The parole order was to expire 8 months later, on 17 October 1996. It was a condition of his parole that he be of good behaviour and not violate the law during the parole period. He breached that condition within some 3 months when he committed further offences on 14 May 1996.

On 7 April 1997 the respondent was convicted in this Court of the offences of 14 May 1996. He was sentenced to an aggregate sentence of 21 months imprisonment, with a non-parole period of 11 months; it was ordered that the sentence be deemed to have commenced on 12 June 1996. It can be seen that as far as this sentencing went, he was eligible for parole on 11 May 1997.

It was critical to both applications that the offences in respect of which the respondent was sentenced on 7 April 1997 were committed while he was on parole. By reason of s5(8) of the *Parole of Prisoners Act* (NT) ("the *Parole Act"*), his parole order of 1996 was "deemed … to have been revoked as from the time immediately before the expiration of the parole period" – that is, immediately before 17 October 1996 – upon his being sentenced on 7 April 1997 to "a term of imprisonment in respect of [the offences] committed during

the parole period". It was this deemed and immediate revocation of the parole order on 7 April 1997 under s5(8) which counsel for the Crown submitted brought s64(2) of the *Sentencing Act* into operation.

The first application: s64(2) of the *Sentencing Act*

Section 64 (2) of the *Sentencing Act* provides, as far as material:

"Where –

(a) a person has been sentenced … in the Territory to a term of imprisonment for an offence committed while a parole order under the *Parole of Prisoners Act* is or was in force in relation to the person; and

(b) the parole order is, by reason of that sentence …, deemed to have been revoked by virtue of section 5(8) of that Act,

the court by which the person is sentenced … shall order the person to be imprisoned for the term that the person had not served at the time when the person was released from prison under the parole order, which term of imprisonment shall commence at the expiration of the term of imprisonment to which the person is sentenced … for the later offence." (emphasis added)

It is clear that s64(2) applies when the two conditions (a) and (b) are met. It is apparent from the statement of facts on p3 that each of these conditions was met in this case; it follows that s64(2) was enlivened on 7 April 1997.

It can be seen that where s64(2) applies, the court sentencing a parolee for offences committed while he was on parole is *required* to order that he be imprisoned for the term that he had not served when he was released from prison under his parole order. There is no discretion. This term of imprisonment is by s64(2) to commence at the expiration of the term to which

he has been sentenced for his later offence(s); that is, it is to be served cumulatively upon that sentence.

An order in terms of s64(2) was not made on 7 April 1997 as it was *not* brought to the attention of the learned sentencing Judge at that time that the respondent was on parole when he committed the offences of 14 May 1996. Subsequently, this fact came to light. Counsel for the Crown submitted that it could *now* be seen, with the benefit of hindsight, that his Honour had not, when sentencing the respondent on 7 April 1997, observed the requirements of s64(2) of the *Sentencing Act*. What, if anything, was to be done about that now?

(a) Re-opening proceedings: the operation of s112(3)(b) of the Sentencing Act

Initially, on 26 September 1997, the Crown applied under s112(3)(b) of the *Sentencing Act* to re-open the criminal proceedings of 7 April, to correct what was alleged to be sentencing error at that time. Counsel submitted that the failure on that date to comply with the mandatory requirements of s64(2) constituted sentencing error within s112(1)(b), in that the learned sentencing Judge "failed to impose a sentence that the court legally should have imposed."

After some discussion, the further hearing of this application was adjourned until 1 October. At that time, the Crown abandoned its application

under s112(3)(b), and simply sought an order under s64(2). I should indicate, in passing, that I doubt if I would have reopened the proceedings, pursuant to s112. Section 112(1)(b) applies where "a court has in, or in connection with, criminal proceedings … failed to impose a sentence that the court legally should have imposed." Section 64(2) does not in my opinion involve the imposition of a "sentence", in the sense of that word in s112(1)(b); once the two preconditions in pars(a) and (b) of s64(2) are established, a matter involving simple factual enquiry, the sentencing court is *required* to make the order for imprisonment set out in s64(2). No element of discretion is involved; no imposing of sentence is involved, in any meaningful sense of a sentencing process.

(b) Interpretation of the phrase "the court by which the person is sentenced" in s64(2) of the Sentencing Act

Normally the Crown's application for an order under s64(2) would have been brought before the learned Judge who imposed sentence on 7 April 1997. That was impracticable in this case; the delay of about one month which it would have entailed could have resulted, on one view, in the respondent losing for at least that period of time a right to be considered for parole. Could another Judge of the Court entertain the application under s64(2)? This depends on the meaning of the phrase above.

Section 64(2) provides that it is "the *court* by which the person is sentenced" which "shall" make the order for imprisonment (emphasis added).

Counsel for the Crown submitted that this wording enabled this Court, though differently constituted to the Court which sentenced on 7 April, to make the order. Counsel further submitted that neither the *Sentencing Act* generally nor s64(2) specifically require that the order for imprisonment be made *at the time* of the sentencing for the offence committed while the parole order was in force; that is, the order did not have to be made on 7 April. Rather, it could be made at a date *later* than that sentencing. Both these submissions required that the "court" in the phrase "the *court* by which the person is sentenced" in s64(2) is this Court as established under s10 of the *Supreme Court Act* and constituted under s11(2) by a Judge or Judges, rather than this Court as constituted by the particular sentencing Judge who imposed sentence on 7 April in circumstances which brought s64(2) into operation.

I was referred to *O'Brien v MacSkimin* (1994) 101 NTR 1, (1994) 118 FLR 83 in support of this construction. It was there held that if a defendant has been convicted of an offence and sentenced to imprisonment by a Magistrate constituting the Court of Summary Jurisdiction with service of the sentence suspended on a bond, he may be brought before that Court, constituted by a different Magistrate, for breach of that bond; and the second Magistrate may further suspend service of the original sentence, upon the defendant entering into a home detention order. Martin CJ referred to various authorities and considered that their effect was to recognise:

> "[t]he distinction that is made between matters where the proceedings before the court are part heard and not determined, and there is a change

> in the constitution of the court, and [those] where a hearing has been completed and a determination made and a separate issue arises, which, although it could be said to arise from the earlier proceedings, are (sic) based upon a separate set of facts, or in respect of which different considerations are brought to bear". (101 NTR 1 at 4, 118 FLR 83 at 85).

That case was concerned with the interpretation of ss6(3)(e) and 19A of the (now repealed) *Criminal Law (Conditional Release of Offenders) Act* (NT). However, the distinction drawn by his Honour is equally applicable in the present context. When the respondent was sentenced on 7 April 1997 those particular criminal proceedings were thereby "completed and a determination made". The question of the application of s64(2) thereafter is properly categorized as a "separate issue … in respect of which different consideration are brought to bear". It is sufficient to attract the operation of s64(2) merely that the Court is satisfied that the prerequisite conditions in s64(2)(a) and (b) have been met.

Counsel also submitted that further support for this generalised interpretation of the phrase "the court by which the offender is sentenced" in s64(2) was to be derived from the *Sentencing Act* itself. Reference was made to ss15(1), 43(1) and (2), and 111(1). The essence of the argument was that in these provisions references to "the court which made the order", "the court which sentenced the offender" and "the sentencing court" respectively, were for the purpose of identifying the appropriate *court* to make the relevant order, in a jurisdictional sense (that is, as between the Supreme Court and the Court of Summary Jurisdiction), rather than referring to how the court was

constituted on the particular occasion. Consideration of those provisions supports that submission. That is to say, the wording in s64(2) is open to that generalised construction, on the analogy of those provisions.

On the other hand, I note that in s112(1) the power to re-open proceedings to correct sentencing errors is expressed to be that of "the court (whether or not differently constituted)". It is well accepted in statutory interpretation that the converse of the presumption that the same word used consistently throughout an Act bears the same meaning, is that where Parliament chooses a different word a different meaning is to be presumed; see the authorities cited in Pearce and Geddes, *Statutory Interpretation in Australia* (Sydney: Butterworths, 4th ed., 1996) at para4.4. However, it is noteworthy that s112(1) is the only provision in the *Sentencing Act* that takes this particular form; an unqualified application of the presumption would entail that on no other occasion in the Act could the powers of the "court" be exercised in a merely generic sense as in s112(1).

The presumption referred to is rebuttable. I consider it inherently unlikely that the Legislature intended that only in the context of reopening proceedings to correct sentencing errors (s112(1)), and not when dealing with the consequences of the breach of an order for release (s15(1)) or breach of an order suspending sentence (s43(1) and (2)), could the powers of the court be exercised in a merely generic sense. There is no particular difference in the

nature of these provisions which would warrant the drawing of such a distinction; nor would such an interpretation advance the efficient administration of justice, as the Legislature must have intended. Rather, it is far more likely that the phrase "whether or not differently constituted" appears in s112(1) because it would otherwise be expected that in the context of sentencing error with which s112 is concerned, any re-opening should be before the sentencer who imposed the allegedly erroneous sentence. Such an expectation is far less obvious in the context of the other provisions referred to, and in particular in relation to s64(2) where no sentencing discretion is vested in the court ordering imprisonment, once the matters in pars(a) and (b) of the provision are established.

Accordingly, while the matter is not free from doubt, I consider that the better view is that "the court" in the phrase "the court by which the offender is sentenced" in s64(2) of the *Sentencing Act* extends beyond the court as constituted at the time of sentencing, and refers generically to the court of which that particular sentencer was a member at the time.

In accordance with this view, on 1 October 1997 I held that I had authority to deal with the respondent pursuant to s64(2). I noted earlier in these reasons that upon the facts of this case, the conditions precedent to the application of s64(2) were clearly met. I accepted the submission of counsel

for the Crown that once those conditions were met, the Court is required to make the order specified in that provision.

(c) The ambit of s111(1) of the Sentencing Act

Before turning to the respondent's application (p2), I note that both counsel submitted, for different reasons, that this was an appropriate case for the exercise of s111 of the *Sentencing Act.* Section 111(1) provides for the correction of sentences, in certain circumstances, by this Court. It provides:

> "Where –
>
> (a) a person has been sentenced (whether at first instance or on appeal) by a court (including the Supreme Court) for an offence; or
>
> (b) the sentencing court was the Court of Summary Jurisdiction, application is made to the Supreme Court for relief or remedy in the nature of certiorari to remove the proceeding into the Supreme Court,
>
> and the Supreme Court determines that the sentence imposed was beyond the power of the sentencing court or its own power, if it was the sentencing court, it may, instead of quashing the sentence, amend the sentence by substituting for the sentence imposed a sentence which the sentencing court had power to impose."

Limited judicial guidance currently exists as to the intent of this provision, which is closely modelled on s104(1) of the *Sentencing Act* 1991 (Vic). In so far as it extends the powers of this Court in certiorari proceedings arising from sentencing by the Court of Summary Jurisdiction, it implements the legislative reform suggested in *R v Hannan; ex p. Abbott* (1986) 83 FLR 177 at 182. In so far as it provides for this Court to amend a sentence imposed by *this* Court, it appears to be a novel legislative addition to the usual appeal process. Possibly it was intended to constitute a 'slip rule' in that respect;

however, that seems to be provided for by s112. I respectfully commend to the Legislature the question whether s111 should be clarified.

For present purposes, s111(1) applies only where it is determined that "the sentence imposed [by the Supreme Court] was beyond [its] power". I see no occasion for the application of this provision, in the circumstances of this case. The sentence imposed on 7 April 1997 was in no sense beyond the power of this Court to impose. As noted earlier (p6), I do not consider that s64(2) involves the imposition of a "sentence", in any meaningful sense. If that is right, the non-application of s64(2) in circumstances where (with the benefit of hindsight) it should have been applied, cannot of itself mean that "the sentence imposed [on 7 April] was beyond the power" of this Court to impose. I was referred by counsel for the Crown to *Craig v South Australia* (1995) 184 CLR 163 at 177, in support of the submission that the failure on 7 April 1997 to make an order pursuant to s64(2) meant that his Honour's sentence was beyond power. However, I can find nothing in that discussion, which deals with jurisdictional error by an inferior court, that would support the submission.

Counsel for the respondent, likening the effect of the procedure in s111(1) to certiorari proceedings in respect of a decision of an inferior court, submitted that the sentence imposed on 7 April was beyond the power of the learned sentencing Judge to impose, because there was a failure to take into account relevant considerations. As noted earlier, the circumstances which enlivened s64(2) – the fact that the respondent was on parole when he

committed the offences for which he was sentenced on 7 April - were not brought to his Honour's attention at that time. The common law ground to review for failure to take into account a relevant consideration in the exercise of a power is also provided for under the *Administrative Decisions (Judicial Review) Act* 1977 (C'wth). In that context, it is clear that the obligation to take into account a relevant consideration is limited to those matters known (whether actually or constructively) to the decision-maker at the time of the decision; see *Ertan v Hurford* (1986) 11 FCR 382 at 388. If a parallel may be drawn with certiorari proceedings or those under the *Administrative Decisions (Judicial Review) Act*, I consider that the operation of s111(1) in relation to a sentence imposed by the Supreme Court would be similarly limited. No question of the learned sentencing Judge on 7 April having the relevant knowledge, actual or constructive, arises here. The circumstances of this case provide no basis to claim a failure to take account of a relevant consideration, if this were otherwise sufficient to bring the sentencing of 7 April within s111(1).

Counsel for the Crown submitted that, at least in this case, reference in s111(1) to the "Supreme Court" was a reference solely to the judge of this Court who imposed the sentence. I touched on this aspect in the context of s64(2) at pp6-10. In the context of s111(1), it seems clear enough that only the sentencing judge, knowing the particular circumstances of the case, could properly act under s111(1) to amend the sentence. However, in the light of my conclusion that s111(1) does not apply in this case, I express no concluded view on this submission.

Effect of the order under s64(2) of the *Sentencing Act* upon the term of imprisonment

Assuming that I had power to make the order sought under s64(2), a question arose as to the effect of such an order upon the term of imprisonment to be served by the respondent.

Pursuant to s64(2), the order to be made is that " the person … be imprisoned for the term that the person had not served at the time when the person was released from prison under the parole order, which term of imprisonment shall commence at the expiration of the term of imprisonment to which the person is sentenced or committed for the later offence". This provision reflects the now repealed s12 of the *Parole Act*. Counsel for the respondent submitted that the terms of the order set out above conflict with those of s11 of the *Parole Act* which provides that where a parole order in relation to a person is revoked "and the person is taken into custody in pursuance of this Act", the person is deemed to be serving the term of imprisonment remaining at the commencement of the parole period "during any period in which he is in custody in pursuance of this Act".

Whatever may otherwise be the situation, I do not accept that any conflict arises in this case. Section 11 of the *Parole Act* expressly states that its application is limited to those occasions where the person is taken into and held in custody "in pursuance of this Act". In the circumstances of this case, the respondent was not in custody "in pursuance of" the *Parole Act* when

sentenced on 7 April. In fact, the Director of Public Prosecutions was not then aware that the respondent was on parole when he committed the offences for which he was sentenced that day. Section 5(8) of the *Parole Act* certainly does nothing to take him into custody in pursuance of that Act. It merely provides for the deemed revocation of his parole order.

Since there was no conflict with s111, and in view of the other matters I have referred to, I made orders on 1 October 1997 as set out in the second paragraph on p2.

The effect of an order under s64(2) of the *Sentencing Act* upon the non-parole period

The respondent's oral application (p2) gave rise to a further issue: whether an order made under s64(2) of the *Sentencing Act* had, or should have, an effect upon the non-parole period fixed on 7 April 1997. I considered that justice pointed to all conditions precedent in the Rules by way of the giving of notice, being waived to the extent necessary to enable the respondent's application being entertained immediately.

As at the hearing on 1 October 1997, the respondent had been eligible for almost 5 months for consideration for parole, in relation to the sentence imposed on 7 April. The non-parole period of 11 months then fixed was computed from 12 June 1996, and rendered the respondent eligible for

consideration for parole on and after 11 May 1997. The question was whether this was, or should be, affected by the making of an order under s64(2).

Counsel for the Crown submitted that there was some support in the reasoning in *R v Barra* (unreported, Supreme Court (NT) (Martin CJ), 14 August 1997) for the proposition that a defendant eligible for consideration for parole remains so eligible notwithstanding the making of an order under s64(2). That submission has some force. The proposition derives further support from *Mitchell v Maley* (unreported, Supreme Court (NT) (Bailey J), 17 June 1997). In that case, his Honour at 11-12 criticised the Magistrate's fixing of a non-parole period in respect of a prisoner ordered to serve the balance of an unexpired term of a sentence of imprisonment following the deemed revocation of a parole order under s5(8) of the *Parole Act*. His Honour noted that the absence of legislative provision or authority for his Worship's action was "not surprising given the existence of s14 of the Parole of Prisoners Act … (i.e. a person may be (re-) released on parole notwithstanding that a previous parole order has been deemed to have been revoked)".

Having heard submissions, I considered that an order under s64(2) had no effect upon the non-parole period fixed on 7 April 1997, and made the declaration set out at the final paragraph on p2.

These are the reasons for the orders made on 1 October 1997.

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