(tho94009)

IN THE SUPREME COURT
IN THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS
JUSTICE APPEAL

SC N° 23 & 24 of 1994
(9406606)

BETWEEN:

BENJAMIN CLAYTON HUGHES
Appellant

AND:

SHERIDAN LARISSA APPEL
Respondent

BETWEEN:

BENJAMIN CLAYTON HUGHES
Appellant

AND:

JOHN HENRY CHUTE
Respondent

CORAM: THOMAS J

REASONS FOR DECISION

(Delivered 8 August 1994)

This is an appeal against the severity of sentences imposed by the Court of Summary Jurisdiction on 8 March 1994.

On 22 December 1993 the appellant appeared before the Court of Summary Jurisdiction and entered a plea of guilty to the following five charges:

1. "on the 12th day of November, 1993, at Alice Springs in the Northern Territory of Australia:

   did steal, cash to the value of $140.80:
   Section 210 Criminal Code.

2. - - - on the 13th day of November, 1993, at Alice Springs in the Northern Territory of Australia:

did steal, cash to the value of $188.40:
Section 210 Criminal Code.

3. - - - on the 14th Day of November, 1993, at Alice Springs in the Northern Territory of Australia:

did steal, cash to the value of $50.00:
Section 210 Criminal Code.

4. - - - on the 20th day of November, 1993, at Alice Springs in the Northern Territory of Australia:

did steal, cash to the value of $1,178.90:
Section 210 Criminal Code.

5. - - - on the 24th day of November, 1993, at Alice Springs in the Northern Territory of Australia:

did steal, cash to the value of $369.50:
Section 210 Criminal Code."

Pursuant to s210 of the Criminal Code, the maximum penalty for stealing is 7 years imprisonment. The maximum that can be imposed by a magistrate in a Court of Summary Jurisdiction by virtue of s121A(2) of the *Justices Act* is 2 years imprisonment or a fine of $2000. I note also the provisions of s129(3) of the *Justices Act*.

The facts in support of the five charges were admitted and were as follows:

> "- - - the defendant in this matter was employed by Cross Range, the owners of Wendy's ice-cream franchise in the Yeperenye Shopping Centre. In his capacity as duty manager, he was responsible on his shifts for the counting of moneys at the end of each shift and placing these moneys in banking bags to be banked the following day.
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> On Friday, 12 November 1993, at about 6 pm the defendant counted the day's moneys. He then removed $140.80 from those moneys and replaced the remainder in the day's bank bag. He subsequently spent this money gambling at Lasseters Casino. On Saturday, 13 November 1993, at about 6 pm the defendant counted the day's moneys and removed $188.40 from those moneys, placing

the remainder in the day's bank bag. He subsequently spent this money gambling at Lasseters Casino.

On Sunday, 14 November 1993, at about 6 pm the defendant counted the day's moneys. He removed $50 from those moneys and replaced the remainder in the day's bank bag. He subsequently spent this money gambling at Lasseters Casino. On Saturday, 20 November 1993, at about 6 pm the defendant counted the day's moneys, which came to an amount of $1178.90. He took this amount and, utilising the previous 2 days' takings, placed $400 from those days into Saturday's bank bag. He subsequently spent the $1178.90 at Lasseters Casino.

On Wednesday, 24 November 1993, at about 6 pm the defendant counted the day's moneys. He removed $369.50 from those moneys and placed the remainder in the day's bank bag. He subsequently spent this money gambling at Lasseters Casino. On Friday, 26 November 1993, at about 10.30 pm the defendant was located at Lasseters Casino, arrested and conveyed to the Alice Springs police station. He took part in an audio-taped record of interview in relation to the matters outlined and made full admissions.

When asked for a reason for committing each of the offences, he replied he was addicted to gambling and needed the money to gamble."

The total amount of money involved in respect of the five charges was $1,927.60.

The learned stipendiary magistrate found the offences proved following which the appellant admitted to being in breach of a bond which he entered on 13 July 1993.

On 13 July 1993, the appellant had been convicted by the Court of Summary Jurisdiction on a total of nine counts of dishonesty offences as follows:

Two offence of stealing (s210 Criminal Code).
Three offences of forgery (s258 Criminal Code).
Three offences of uttering forged documents (s260 Criminal Code).
One offence of obtain property by deception (s227 Criminal Code).

He was sentenced to a total of seven months imprisonment and released upon entering into a recognisance himself in the sum of $500 to be of good behaviour for a period of two years. There were further conditions that he "place himself under the supervision of a Delegate of the Director of Correctional Services and obey all reasonable directions as to employment, residence, associates and reporting and any counselling directed by the Probation Officer."

On 22 December 1993, two psychological reports dated 12 July 1993 and 18 December 1993 prepared by Mr Michael Tyrrell were tendered. The learned stipendiary magistrate called for a pre-sentence report and the matters were adjourned to 8 March 1994. On 8 March 1994 the learned stipendiary magistrate sentenced the appellant as follows:

> "- - - Well, Mr Hughes I take into account what has been put to me. I adjourned this matter so that I could have a report on you because of your prior conduct followed by this. Now, what you have done was known, up to a few years ago, as larceny servant and one thing you do not do is bite the hand that feeds you. All right? And it is recognised that such conduct should attract imprisonment unless there are very, very extenuating circumstances, which there are not in your case.
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> I have read the report, I have listened to what has been said to me by counsel on your behalf. Turning firstly to the breach of bond. You are convicted on that and you are ordered to serve 7 months' imprisonment imposed on 13 July 1993 and that sentence is to date from 29 November 1993. Turning to the five matters of stealing before me, on the first count you are convicted and sentenced to 4 months' imprisonment cumulative. On the second count you are convicted and sentenced to 4 months' imprisonment cumulative. On the fourth count you are convicted and sentenced to 4 months' imprisonment cumulative. On the sixth count you are convicted and sentenced to 6 months' imprisonment cumulative and on the last count you are convicted and sentenced to 4 months' imprisonment cumulative. Now that's a total of 29 months and I am going to order a non-parole period of 16 months. I am also going to recommend that you receive certain treatment whilst you are in custody."

The grounds of appeal lodged by the appellant are as follows:

"1. The total period of imprisonment of 29 months is excessive in all the circumstances.

2. The non-parole period of 16 months is excessive in all the circumstances.

3. The Learned Magistrate erred by failing to apply the principle of totality in arriving at the total head sentence and non parole period.

4. That the Learned Magistrate erred by failing to place sufficient weight on the particular background and circumstances of the Appellant."

The appeal was heard on 15 June 1994 at which date the appellant had been in custody since 29 November 1993, a period of approximately six months and three weeks.

I agree with the learned stipendiary magistrate that these offences called for a period of imprisonment. Indeed, Mr Smith, counsel for the appellant, did not seek to argue otherwise. The submission by counsel for the appellant is as follows:

> "- - - Effectively the appellant asserts that the sentence imposed by the magistrate was excessive; that in fact he failed to take into consideration the elements of totality in applying the sentencing principles; that the non-parole period was excessive and that he failed to give appropriate weight to the subjective and personal factors that were in fact put to him by the appellant's counsel in the court below."

The appellant's counsel further submitted that in relation to the five counts of larceny, the sentences imposed should be concurrent rather than cumulative. That although they are five separate charges, they are part of a continuing criminal enterprise. Counsel for the appellant submitted that "where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive" D.A. Thomas "Principles of Sentencing" 2nd Edition.

On the hearing of the appeal, the psychological report and pre-sentence report before the learned stipendiary magistrate were tendered and marked Exhibit P1. The record of prior convictions, which was also before the learned stipendiary magistrate, was tendered and marked Exhibit P2.

The prior record sets out the nine offences of dishonesty for which the appellant was convicted on 13 July 1993 and sentenced to seven months imprisonment suspended upon his entering into a recognisance to be of good behaviour for a period of two years.

On 31 December 1992, the appellant appeared before the Children's Court in Western Australia and received fines and good behaviour bonds for offences of unlawful possession, stealing as a servant and stealing.

On 5 May 1988, the appellant appeared before the Juvenile Court in Alice Springs on an offence of stealing in which the offence was found proved and dismissed without conviction.

At the time of the commission of the offences in November 1993, the appellant was 18 years of age. He will turn 19 years of age on 23 June 1994. The appellant is a young man who has not previously served a term of imprisonment. Both of these factors are relevant to the question of sentence.

The psychological report of Mr Tyrrell dated 18 December 1993, refers to Mr Hughes "having some problem as a pathological gambler". The report further states:

> "Due to his being in relatively early stages in his gambling career it is better to consider him a gambling abuser at high risk of becoming an entrenched gambling addict at this stage."

The report further refers to the psychological causes of stealing and the fact that he suffered attention deficit disorder as a child. This condition has related learning difficulties which the appellant experienced at school. Mr Tyrrell's report dated 12 July 1993, provides details as to the appellant's background, his

work history, relationships and personality issues. It is Mr Tyrrell's recommendation that the appellant undertake psychological counselling therapy. The pre-sentence report dated 24 February 1994 provides a very thorough summary of the appellant's background, his education, employment, state of health and relevant attitudes. The appellant presented a difficult sentencing exercise for the learned stipendiary magistrate because of the appellant's reluctance, as expressed through the pre-sentence report, to accept conditional liberty or supervision and his expressed desire to serve his time in gaol and not have "time hanging over his head". The pre-sentence report details some of the unsatisfactory aspects about the appellant's previous period under supervision, in particular, the appellant's apparent failure to keep all of his appointments with the psychologist for counselling sessions. The general tenor of the pre-sentence report is that psychological counselling and therapy could assist the appellant in rehabilitating himself and he has expressed a willingness to undertake such counselling, however, ultimately it is only the appellant himself who can ensure that his own participation in the counselling sessions is effective.

I have been referred to and had the opportunity of reading the Reasons for Decision of Kearney J (unreported) in *Trevor Ernest Goddard and Trevor Howard Bell* No. AS 10 of 1993 and *Trevor Ernest Goddard and John Henry Chute* No. AS 11 of 1993 delivered 8 March 1994. In his Reasons for Decision Kearney J canvassed the authorities in respect of the two grounds of relevance in this matter: (1) lack of concurrency in sentence; and (2) totality principle.

In dealing with the totality principle, Kearney J stated:

> ". . . The cardinal principle is that the sentence must be proportionate to the gravity of the offence; see *Veen v The Queen* (1987-88) 164 CLR 465 at pp 472, 474, 486 and 491. As Deane J put it in *Channon v The Queen* (1978) 20 ALR 1 at p 18:-
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> > "In every case, there is but one ultimate question involved in the determination of sentence. That question is what is the appropriate punishment for the particular offence in the relevant circumstances."

This principle also applies when the question is the gravity

of the overall criminal conduct comprising several offences."

Kearney J then referred to the decision of *Mill v The Queen* (1988) 166 CLR 59 at pp 62-63:

> "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), pp 56-57, as follows (omitting references):
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> > "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 and 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'."
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> See also Ruby, *Sentencing*, 3rd ed. (1987), pp 38-41. 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 sentence 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.
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> The totality principle has been recognized in Australia. In *Reg. v Knight* (1981) 26 S.A.S.R. 573, at p 576 the Full Court of the Supreme Court of South Australia (Walters, Zelling and Williams JJ.) said, in a joint judgment:
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> > "it seems to us that when regard is had to the totality of the sentences which the applicant is required to undergo, it cannot be said that in all the circumstances of the case, the imposition of a cumulative sentence was incommensurate with the gravity of the whole of his proven

> criminal conduct or with his due deserts. To use the language of Lord Parker L.C.J. in *Reg. v Faulkner* (1972) 56 Cr. App. R. 594, at p 596, 'at the end of the day, as one always must, one looks at the totality and asks whether it was too much'."
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> See also *Reg. v Smith* (1983) 32 S.A.S.R. 219; *Ryan v The Queen* (1982) 149 C.L.R. 1, at pp 21, 22 - 23."

In considering the criminality of the offences together with the factors to be considered in mitigation I have come to the conclusion there has been an error in the totality of the head sentence and the non-parole period.

Accordingly, I accept the submission of counsel for the appellant that the total period of imprisonment of 29 months is excessive in all the circumstances and the non-parole period of 16 months is excessive in all the circumstances. For that reason the appeal is allowed.

In my opinion, the totality of the sentences should be reduced to 21 months and the non-parole period reduced to 9 months. This can best be achieved by making certain of the sentences concurrent, in the manner indicated below (*Goddard v Bell* and *Goddard v Chute* (supra)).

The appeals are allowed to the extent that while individual sentences are confirmed, the direction that they all be served cumulatively is set aside, in lieu, the following orders made:

(1) The sentence of 7 months imprisonment for breach of bond entered into on 13 July 1993 is confirmed.

With respect to the sentences for offences committed by the defendant in November 1993 the following orders are made.

(2) Sentences of 4 months imprisonment for offence of stealing on 12 November 1993 is confirmed; it is directed to be served cumulatively upon the sentence for breach of bond.

(3) The sentence of 4 months imprisonment for the offence of stealing on 13 November 1993 is confirmed; it is directed to be served cumulatively upon the sentence for 12 November 1993.

(4) The sentence of 4 months imprisonment for the offence of stealing on 14 November 1993 is confirmed; directed to be served concurrently with the sentence imposed on (3) above but cumulative upon the sentence in (2) above.

(5) The sentence of 6 months imprisonment for the offence of stealing on 20 November 1993 is confirmed; directed to be served cumulatively upon the sentence for stealing on 13 and 14 November 1993.

(6) The sentence of 4 months imprisonment for the offence of stealing on 24 November 1993 is confirmed; it is directed to be served concurrently with the sentence imposed on (5) above but cumulative upon the sentence in (4) above.

That is a total of 21 months imprisonment. I set aside the non-parole period of 16 months and fix a non-parole period of 9 months.

The sentences are to date from 29 November 1993.

I endorse the recommendation made by the learned stipendiary magistrate concerning treatment.

I recommend that the appellant receive psychological counselling whilst in custody and that if considered appropriate by his parole officer that this also be a condition of his parole.