PARTIES:	BRAUN, Jason Joseph v THE QUEEN and EBATARINTJA, Eric v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CASE STATED BY SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	Nos CA 23 of 1996 & CA 22 of 1996
DELIVERED:	14 March 1997
HEARING DATES:	8 October 1996
JUDGMENT OF:	KEARNEY, MILDREN & THOMAS JJ

CATCHWORDS:

CRIMINAL LAW AND PROCEDURE – Jurisdiction, practice and procedure – basis of criminal jurisdiction of Supreme Court – effect of *Sentencing Act* (NT) 1995, s 4 on sentencing powers – whether sentencer of a juvenile may exercise powers available under both *Sentencing Act* (NT) 1995 and *Juvenile Justice Act* (NT) 1983

Juvenile Justice Act (NT) 1983, s 39; s 53
Sentencing Act (NT) 1995, s 4
Supreme Court Act (NT) 1979, s 14(1)(b); s 14(1)(c)

CRIMINAL LAW AND PROCEDURE – Jurisdiction, practice and procedure – *Juvenile Justice Act* (NT) 1983, s 3 definition of "juvenile" – whether offender under 17 at time of offence may be sentenced by Supreme Court as a "juvenile" if aged 17 at time of sentencing – need for legislative reform

Sentencing Act (NT) 1995, s 4
Juvenile Justice Act (NT) 1983, s 3

Seears v Oldfield (1985) 36 NTR 65, affirmed
R v Williams (1992) 109 FLR 1, referred to

CRIMINAL LAW AND PROCEDURE – *Sentencing Act* (NT) 1995, s 4 – statutory interpretation – meaning of "jurisdiction" – distinction between "jurisdiction" and "powers"

Sentencing Act (NT) 1995, s 4

Garthwaite v Garthwaite [1964] P 356, followed
Harris v Caladine (1990-1991) 172 CLR 84, followed (per Toohey J)
Hookham v The Queen (1994) 125 ALR 23, followed (per Toohey J)
In re McC [1985] AC 528, referred to

WORDS AND PHRASES – *Sentencing Act* (NT) 1995, s 4 – meaning of "jurisdiction"

Sentencing Act (NT) 1995, s 4

Garthwaite v Garthwaite [1964] P 356, followed
Harris v Caladine (1990-1991) 172 CLR 84, followed (per Toohey J)
Hookham v The Queen (1994) 125 ALR 23, followed (per Toohey J)
In re McC [1985] AC 528, referred to

REPRESENTATION:

Counsel:

Appellant:	R P Noble
Respondent:	M J Little

Solicitors:

Appellant:	Director of Public Prosecutions
Respondent:	North Australian Aboriginal Legal Aid Service

Judgment category classification:	A
Judgment ID Number:	tho96023
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Question of law referred by stated case

Question: Does the *Sentencing Act*, which came into force on 1 July 1996 and which does not apply to the Juvenile Court or the Supreme Court acting under or in pursuance of the *Juvenile Justice Act*, apply in this case?

Answer: Section 4 of the *Sentencing Act* excludes the provisions of that Act from the sentencing of a juvenile only where the sentencing judge deals with the juvenile pursuant to the special powers vested in the Supreme Court under the *Juvenile Justice Act*. If the sentencing judge does not deal with the juvenile by exercising those special powers, the Judge may exercise the provisions of the *Sentencing Act* when dealing with him. In the result, the sentencing judge in dealing with the juvenile may exercise the powers available under either the *Sentencing Act* or the *Juvenile Justice Act*, but may not exercise a combination of the powers available under both Acts.

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

CA 23 of 1996 and CA 22 of 1996

IN THE MATTER of Section 408 of the Criminal Code

AND IN THE MATTER of a question of law referred by the Honourable David Normal Angel, a Judge of the Supreme Court, for the consideration of the Court of Criminal Appeal by way of stated case

BETWEEN:

BRAUN, Jason Joseph
Appellant

AND

THE QUEEN
Respondent

AND BETWEEN:

EBATARINTJA, Eric
Appellant

AND

THE QUEEN
Respondent

CORAM: KEARNEY, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 14 March 1997)

Kearney & Thomas JJ:

[1] These are two cases stated by Angel J under s 408 of the Criminal Code, reserving a question of law for the consideration of the Court of Criminal Appeal. The same question arose in two separate cases which came before his Honour for sentencing: that is, whether the *Sentencing Act* (NT) 1995 applied to the sentencing of the accused on the charges to which they had pleaded guilty. The question was answered on 20 December 1996, in the terms set out on p 15; we publish reasons today.

[2] The provision which gives rise to the question of law reserved is s 4 of the *Sentencing Act*, which provides:

> "This Act applies to call courts *other than* Juvenile Court established under the *Juvenile Justice Act* and *the Supreme Court when exercising its jurisdiction under or in pursuance of that Act*." (emphasis added)

[3] The Court heard argument on both stated cases together, as they raise the same question; however, it is convenient to set them both out, as stated by his Honour.

The cases stated

(1) *The Queen v Jason Joseph Braun*

[4] In this case the accused faced eight charges. The Juvenile Court had jurisdiction to hear and determine all of those charges, provided the accused consented; he did not consent. The special circumstances set out in the case stated by his Honour are as follows:

"The accused in this matter is Jason Joseph Braun who was born on 15 April 1979. On 19 June 1996 [when aged 17 years and 2 months], Braun was arraigned and pleaded guilty before me (sitting as the Supreme Court of the Northern Territory) to the eight counts on the indictment presented that day. The eight counts comprised: on 2 March 1995 [aged 15 years], one count of unlawful entry with two aggravating circumstances and one count of stealing; on 20 March 1995 [aged 15 years], one count of unlawful entry with two aggravating circumstances and one count of stealing; on 12 July 1995 [aged 16 years], one count of unlawful entry with two aggravating circumstances and one count of stealing; on 6 November 1995 [aged 16 years], one count of unlawful entry with two aggravating circumstances and one count of stealing.

The offences charged on the indictment were committed between March 1995 and November 1995. At the time of the offending, the accused was a juvenile as defined in the *Juvenile Justices Act*; he was aged 15 and 16 at the relevant times. On 25 January 1996, the accused was arrested in relation to those charges; he was still a juvenile. He appeared on 22 March 1996 [aged 16 years], as a juvenile, in the Juvenile Court and upon his arraignment there pleaded guilty to the ten counts charged against him at that time. He did not consent to the jurisdiction of the Juvenile Court to hear these matters; see s 37 *Juvenile Justice Act.*

Between his arraignment and pleading in the Juvenile Court [on 22 March 1996] and his arraignment and pleading in the Supreme Court [on 19 June 1996], the accused had his 17th birthday. His 17th birthday was 15 April 1996, some two months prior to his pleading in the Supreme Court.

The *Juvenile Justice Act*, in s 35, empowers the Juvenile Court established under that Act to hear indictable offences summarily. That section is subject to ss 36, 37 and 38 of the *Juvenile Justice Act*. Section 36 of that Act provides:

'Committal for Trial in Certain Cases

Where a juvenile is charged before the court with an offence and –

(a) the court is not empowered to hear and determine the matter in a summary manner; or

(b) the court is so empowered but decides not to hear and determine the matter in a summary manner,

the court shall, subject to this Act, deal with the charge in accordance with the provisions of the *Justices Act* relating to indictable offences.'

Section 37 of the Act provides that when a juvenile is charged before the Juvenile Court with an indictable offence and the offence is such that, if the juvenile were an adult, the court would not be empowered to deal with it in a summary manner without the consent of the accused, the Juvenile Court shall not deal with the matter except with the juvenile's consent.

As I have said, after Braun's arraignment and plea of guilty in the Juvenile Court the accused declined the Juvenile Court's jurisdiction to hear the matter. The accused was arraigned and pleaded guilty in the Supreme Court [on 19 June 1996] where convictions were recorded and s 395 reports were consequently ordered. Prior to the collation of such reports the *Sentencing Act* (NT) 1995 came into force [on 1 July 1996]. Section 4 of the *Sentencing Act* provides:

> 'This Act applies to all counts other than the Juvenile Court established under the Juvenile Justices Act and the Supreme Court when exercising its jurisdiction under or in pursuance of that Act.'

The accused is currently on bail. I have postponed sentencing in this matter pending the Court's answer to *the question whether the Sentencing Act applies for sentencing purposes*." (emphasis added)

(2) *The Queen v Eric Ebatarintja*

[5] In this case the accused faced six charges; the nature of two of them was such that the Juvenile Court had no jurisdiction to hear and determine them, since the offences carried life imprisonment. The special circumstances as set out in the case stated by his Honour are as follows:

"The accused Eric Ebatarintja who was born on 28 July 1979, committed [6] offences whilst a juvenile [aged 16 years]. On 29 August 1996 [aged 17 years and 1 month], Ebatarintja pleaded guilty upon his arraignment before me to six counts charged against him. The six charges were as follows: on 4 February 1996, two counts of aggravated unlawful entry with a maximum of life imprisonment and two counts of aggravated assault; on 8 February 1996, one count of unlawful assault on a police officer and one count of possess a dangerous drug (cannabis). All were committed whilst he was a juvenile. He was arrested as a juvenile. His committal, held in Alice Springs on 24 March 1996, also occurred whilst he was a juvenile [aged 16 years]. Two of the offences charged against Ebatarintja carry a maximum penalty of life imprisonment. Section 35 of the *Juvenile Justice Act* states:

> '35. INDICTABLE OFFENCES TO BE TRIABLE SUMMARILY
>
> Subject to sections 36, 37 and 38, where a juvenile is charged before the Court with an offence which, if committed by an adult, is punishable by imprisonment for 12 months or longer, other than an offence punishable by imprisonment for life, the court shall hear and determine the matter in a summary manner.'

Therefore, the Juvenile Court had or has no power to hear such offences punishable by imprisonment for life. After the committal, the accused had his 17th birthday; his 17th birthday being on 28 July 1996. *The question is, does the Sentencing Act, which came into force on 1 July 1996 and which does not apply to the Juvenile Court or the Supreme Court acting under or in pursuance of the Juvenile Justice Act, apply in this case?*

The accused is currently remanded in custody. I have postponed sentencing in this matter pending the Court's answer to *the question whether the Sentencing Act applies for sentencing purposes*." (emphasis added)

Summary of submissions made on behalf of the accused

[6] The general submission by Ms Little of counsel for each accused is that in terms of s 4 of the *Sentencing Act* the Supreme Court is "exercising its

jurisdiction under or in pursuance of [the *Juvenile Justice*] *Act*" when sentencing them; and accordingly the effect of s4 is that the *Sentencing Act* does *not* apply to their sentencing, and the applicable sentencing legislation is the *Juvenile Justice Act*. Her supporting submissions were as follows.

[7] For sentencing purposes each accused is a "juvenile" within the meaning of s 3 of the *Juvenile Justice Act*, which defines a juvenile as:

> "(a) a child who has not attained the age of 17 years; or
>
> (b) in the absence of proof as to age, a child who apparently has not attained the age of 17 years."

[8] It is not disputed that both accused were under the age of 17 years at the times they committed all their respective offences; hence they were juveniles at those times, falling within the definition if s 3(a). It is also not disputed that when they appeared before the Juvenile Court, they were both still juveniles. It is not so readily apparent that they are now to be treated by the Supreme Court as juveniles, since admittedly they had both "attained the age of 17 years" by the time they appeared before that Court.

[9] To determine this point, it is instructive first to examine the jurisdiction of the Juvenile Court, in similar circumstances. Section 19 of the *Juvenile Justice Act* sets out that jurisdiction. It provides in part:

> "Subject to this Act, the Court shall year and determine –
>
> (a) all charges, both of a summary or indictable nature, against a juvenile for having committed an offence …"

No problem arises where the accused is a juvenile when he appears before the Juvenile Court to be dealt with; the Court's jurisdiction to "hear and determine" is clear. Is the Court's jurisdiction affected if the accused has "attained the age of 17 years" by the time he appears before it charged with offences he committed before he attained the age of 17? That question was squarely posed and answered by Muirhead J 11 years ago in *Seears v Oldfield* (1985) 36 NTR 65. His Honour said at 70:

> "Having considered the matter and the authorities, I am satisfied that the age of the person charged when he or she committed the alleged offence is the critical test of the jurisdiction of the Juvenile Court."

So the Juvenile Court retains jurisdiction and its dispositive powers in respect of offences committed by juveniles, even though they have ceased to be juveniles by the time they appear before that Court. See also *Pryce v Ashfield* (unreported, Supreme Court (NT) (Nader J), 25 June 1986).

[10] Ms Little submitted that the same approach applies in relation to the Supreme Court: it retains its dispositive powers under the *Juvenile Justice Act* in relation to offences committed by persons who were juveniles by the time they appeared before the Supreme Court. She relied on *R v Williams* (1992) 109 FLR 1, a case directly in point in the Supreme Court; Mildren J said at p 9:

> "I take into account that at the time of this offence you were a juvenile and are still entitled to be treated as if you were a juvenile for sentencing purposes notwithstanding that you are now 17 years of age."

In support, his Honour referred to *Seears v Oldfield* (supra), and to *R v Lui* (unreported, Supreme Court (NT) (Kearney J), 18 October 1990). See also *R v Deluca* (unreported, Supreme Court (NT) (Mildren J), 31 May 1994).

[11] Ms Little next submitted that, accepting that the law was as stated in *R v Williams* (supra), the *jurisdiction* of the Supreme Court to hear and determine the charges against each accused was to be found in the *Juvenile Justice Act*. This submission was said to be supported by considerations stemming from ss 35 and 36 of that Act.

[12] Ms Little first noted a distinction between the two cases stated, which stemmed from the nature of the charges. Section 35 of the *Juvenile Justice Act* is set out at p 4. As some of the charges to which the accused Mr Ebatarintja has pleaded guilty were offences "punishable by imprisonment for life", the effect of s 35 is that those charges were never capable of being heard by the Juvenile Court. They lie outside the jurisdiction given it by s 19. We also note that it appears that Mr Braun has been formally convicted, while Mr Ebatarintja's plea may not as yet have been accepted; for present purposes these distinctions are not material.

[13] It will be noted that s 35 is expressed to be subject, inter alia, to s 36, which provides:

> "Where a juvenile is charged before the Court with an offence and –
>
> (a) the Court is not empowered to hear and determine the matter in a summary manner; or

(b) the Court is so empowered but decides not to hear and determine the matter in a summary manner,

the Court shall, subject to this Act, deal with the charge in accordance with the provisions of the *Justices Act* relating to indictable offences."

Ms Little submitted that, since the Juvenile Court had committed the two accused for trial, the provisions of ss 35 and 36 of the *Juvenile Justice Act* had been invoked in each case; and that this meant, in terms of s 4 of the *Sentencing Act*, that the Supreme Court was accordingly now "exercising its jurisdiction under or in pursuance of" those provisions of the *Juvenile Justice Act*, and so s 4 applied, with the result that the *Sentencing Act* did not apply to their sentencing. We note in passing that the reference to the *Justices Act* in s 36 of the *Juvenile Justice Act* does not bear upon the jurisdiction of the Supreme Court to hear and determine a charge, but is a reference to the machinery by which the Juvenile Court is to "deal with the charge" (by way of committal).

[14] Ms Little adverted to s 39 of the *Juvenile Justice Act* which provides:

"(1) Where a juvenile is found guilty before the Supreme Court of an offence, *the Supreme Court* –

(a) *has, in addition to its powers, the powers of the Juvenile Court;*

(b) may order that the juvenile be detained in a detention centre for a period not exceeding the period of imprisonment for which such an offence, if committed by an adult, is punishable; or

(c) may remit the case to the Juvenile Court and that Court may deal with the juvenile in any way in which it might have dealt with him if he had been convicted of the offence in that Court.

(2) Without limiting its power under subsection (1)(b), *where a juvenile is found guilty* before the Supreme Court of the offence *of murder, the Supreme Court may*, notwithstanding section 164 of the *Criminal Code, sentence the juvenile to life imprisonment or such shorter period of imprisonment as it thinks fit*." (emphasis added)

Ms Little submitted that the Supreme Court had jurisdiction under the *Juvenile Justice Act, apart from* that set out in s 39. She referred to the definition of "court" in s 3, viz:

> "'Court' means the Juvenile Court … and, where the context so requires, includes the Supreme Court exercising its jurisdiction under or in pursuance of this Act."

She submitted that in various provisions of the Act empowering "the Court" – for example, the power in s 55 to order restitution, the power in s 52 to require that an investigation be carried out, and the application of certain standards of proof of certain matters in s 50 – the reference therein to "the Court" included the Supreme Court. In general, she submitted that unless the Supreme Court was specifically excluded, it was embraced within "the Court" wherever that expression occurred in the Act; we note that that sweeping submission cannot be accepted – for example, references to "the Court" in Part IV of the Act, and in ss 30(a), 32(1), 33, 35-38, 45(1), 57B, 58, 60 and 61, clearly apply only to the Juvenile Court.

[15] Ms Little submitted, importantly, that once proceedings had commenced under the *Juvenile Justice Act*, they had to be dealt with under that Act. The Act applies to the juvenile, and the jurisdiction of the Supreme Court to deal with the juvenile is to be found *only* in that Act. The *Sentencing Act* has no application to the sentencing of a juvenile. Ms Little conceded that if her submission was accepted, it would follow that if the Supreme Court imposed a sentence of imprisonment on a juvenile, it could not fix a non-parole period, or backdate the sentence, since its power to do so is to be found only in the *Sentencing Act*.

Summary of submissions made on behalf of the Crown

[16] The essence of the Crown submissions on the question of law reserved was that the Supreme Court may, when sentencing a juvenile, exercise the sentencing powers vested in it by legislation other than the *Juvenile Justice Act*, as well as the sentencing power vested in it by that Act, without restriction. Mr Noble observed that there are sentencing options available under the *Sentencing Act* which may be favourable to a particular juvenile and which are not available under the *Juvenile Justice Act*. He submitted that the Legislative Assembly could not have intended to deprive the Supreme Court of its powers under the *Sentencing Act* when dealing with a juvenile. He did not seek to controvert the approach indicated in *R v Williams* (supra) (p 8).

Conclusions

[17] We accept for the purpose of these proceedings the approach to dealing with accused persons who have 17, first expressed by Muirhead J in relation to the Juvenile Court in *Seears v Oldfield* (supra), and adopted as regards the Supreme Court in *R v Williams* (supra) and the other authorities mentioned (p 8). We do so because neither party sought to challenge that line of authority; absent argument, we express no view as to whether it is correct. Clearly, the topic should be dealt with by specific legislation, as in other jurisdictions; see, for example, the comprehensive approach to "Child offenders who become adults" in Division 9 of Part 4 of the *Juvenile Justice Act* 1992 (Q'land), ss 103-107. We commend the question of legislative reform to the Legislative Assembly. For present purposes, both accused are to be treated as juveniles by the Supreme Court, when sentencing them.

[18] The Supreme Court has general criminal jurisdiction; see s 14(1)(b) and (c) of the *Supreme Court Act*. In effect, it has jurisdiction to try offences charged by the presentation of an indictment. This is not qualified or limited in any way by the *Juvenile Justice Act*, except s 19. Its sentencing powers are now consolidated in the *Sentencing Act*.

[19] We consider that s 39 and other provisions of the *Juvenile Justice Act* vest certain *powers* in the Supreme Court, when dealing with a juvenile found guilty before it, which are additional to the general sentencing powers vested in the Court by the *Sentencing Act*. Section 39(1)(a) is expressed in terms of "powers"; we consider that the phrase "in addition to its powers"

refers to the powers of the Court wherever found. We consider that s 39(1)(b) and (c), and s 39(2) are also clearly powers of disposition. We do not think that s 39 vests any "jurisdiction" in the Supreme Court, in the strict sense of that word. We conclude that if, in dealing with a juvenile it has found guilty, the Supreme Court exercises any of the additional sentencing powers spelled out in s 39 or in other provisions of the *Juvenile Justice Act*, s 4 of the *Sentencing Act* operates to exclude the provisions in the *Sentencing Act* from the sentencing of the juvenile.

[20] We note that s 39(1)(b) gives the Supreme Court, when sentencing a juvenile, dispositive power beyond the power given by the Juvenile Court by s 53(1)(a). We consider that, for example, the exercise of the power in s 39(1)(b) would clearly attract the provisions of s 4 of the *Sentencing Act*. We also consider that if the Supreme Court sentences by using "the powers of the Juvenile Court" vested in it by s 39(1)(a), that also would attract the provisions of s 4 of the *Sentencing Act*. In both instances, the Supreme Court would be "exercising its jurisdiction under or in pursuance of [the *Juvenile Justice Act*]" after "a juvenile is found guilty" before it.

[21] It cannot be said, in our opinion, that simply because a juvenile is committed for trial by the Juvenile Court, the court of trial – the Supreme Court – is ipso facto "exercising its jurisdiction under or in pursuance of" the *Juvenile Justice Act*.

[22] We note in passing that s 7(k) of the *Sentencing Act* provides:

> "Where a court finds a person guilty of an offence, it may, subject to any specific provisions relating to the offence and this Part, make one or more of the following sentencing orders:
>
> (k) impose any sentence or make any order *authorised by* this or *any other Act*". (emphasis added)

However, we consider that this has no application when the Supreme Court exercises its additional powers under the *Juvenile Justice Act*, in view of s 4 of the *Sentencing Act*.

[23] It is implicit in what we have said that to determine the question reserved, it is necessary to ascertain what s 4 of the *Sentencing Act* means when it refers to the "Supreme Court when exercising its *jurisdiction* under or in pursuance of [the *Juvenile Justice*] *Act*". It is desirable to examine briefly the signification of the word "jurisdiction" in this context. First, some authorities.

[24] In *Garthwaite v Garthwaite* [1964] P356 the question was whether a court in England had jurisdiction to entertain an application for a declaration that a marriage remained valid after a purported divorce in Nevada. Diplock LJ said at 387:

> "*In its narrow and strict sense*, the "jurisdiction" of a validly constituted court connotes *the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference* (1) to the subject matter of the issue or (2) to the persons between whom the issue is joined or (3) *to the kind of relief sought*, or to any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its powers to hear and determine issues which fall within its "jurisdiction" (in the strict sense) or as to the circumstances in which it will grant a particular kind of relief

> which it has "jurisdiction" (in the strict sense) to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances." (emphasis added)

An example of "jurisdiction" in the sense of (3) above is seen in the discussion in *Riley McKay Pty Ltd v McKay* (1982) 1 NSWLR 264 as to whether the Court had jurisdiction to grant a "Mareva" injunction.

[25] *Harris v Caladine* (1990-91) 172 CLR84 concerned the validity of a consent order made by a Registrar of the Family Court exercising judicial power delegated to him under the *Family Law Rules*. By majority, the High Court held that the order was valid. Brennan and Toohey JJ, dissenting, considered that the exercise of judicial power involved was non-delegable, because of Chapter III of the Constitution. Toohey J said at 136:

> "*The distinction between jurisdiction and power is often blurred,* particularly in the context of "inherent jurisdiction". But the distinction may at times be important. *Jurisdiction is the authority which a court has* to decide the range of matters that can be litigated before it; *in the exercise of that jurisdiction a court has powers* expressly or impliedly conferred by the legislation governing the court and "such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred": *Parsons v Martin* (1984) 5 FCR 235 at 241; see also *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, at 630-631." (emphasis added)

This analysis points up very clearly the distinction between the "jurisdiction" of a court, and its "powers"; the latter constitute the "teeth" which enable it effectively to exercise its jurisdiction. In *Hookham v The Queen* (1994) 125 ALR 23, Toohey J drew the same distinction succinctly at 29:

> "Jurisdiction is the authority which a court has to decide matters litigated before it; in the exercise of that jurisdiction a court has certain powers, whether express, implied or inherent; *Harris v Caladine* (1991) 172 CLR 84 at 136; 99 ALR 193."

[26] We respectfully adopt this analysis. The "jurisdiction" of a court is its *authority* to take cognizance of, and to decide, proceedings brought before it; its jurisdiction delimits its area of competence and authority. The concept is one of authority or capacity; and the essence of an inquiry into "jurisdiction" in this sense is as to limits – whether a court has power to hear and determine the particular case. See *The Commonwealth v Krelinger & Fernau Ltd* (1926) 37 CLR 393 at 408, per Isaacs J.

[27] However, the word "jurisdiction" is not always used in its strict sense; in particular, as Toohey J said in *Harris v Caladine* (supra), the "distinction between jurisdiction and power is often blurred". *In re McC* [1985] AC 528 (H.L.) involved an action against justices for damages for false imprisonment, where they had acted without jurisdiction. Lord Bridge of Harwich said at 536:

> "There are many words in common usage in the law which have no precise or constant meaning. But *few, I think, have been used with so many different shades of meaning in different contexts* or have so freely acquired new meanings with the development of the law *as the word jurisdiction*." (emphasis added)

[28] We interpret "jurisdiction" in s 4 of the *Sentencing Act* to mean that the *powers* vested in the Supreme Court by the *Sentencing Act* apply when it sentences a juvenile found guilty before it, except when the Court deals with

the juvenile by exercising the additional powers vested in it by the *Juvenile Justice Act*. This entails reading the word "jurisdiction" in s 4 as "powers"; we consider that that is what it clearly means in its context, and in light of our view that the Supreme Court is not vested with jurisdiction (in its strict sense) under or in pursuance of the *Juvenile Justice Act*.

[29] We would answer the question of law reserved for consideration (p 4) as follows.

[30] "Section 4 of the *Sentencing Act* excludes the provisions of that Act from the sentence of a juvenile only where the sentencing judge deals with the juvenile pursuant to the special powers vested in the Supreme Court under the *Juvenile Justice Act*. If the sentencing judge does not deal with the juvenile by exercising those special powers, the judge may exercise the provisions of the *Sentencing Act* when dealing with him. In the result, the sentencing judge in dealing with the juvenile may exercise the powers available under either the *Sentencing Act* or the *Juvenile Justice Act*, but may not exercise a combination of the powers available under both Acts".

Mildren J:

[31] I have had the opportunity of reading a draft of the judgment of Kearney and Thomas JJ. It is not necessary for me to set out in full the relevant circumstances, the legislation or the arguments of counsel which adequately are canvassed by their Honours.

[32] However, I wish to briefly comment upon a few of the provisions of the *Juvenile Justice Act*. Section 53 of the Act, which deals with "Disposition by the Court" is affected by a number of confusing amendments made by Acts 18 of 1996, 23 of 1996 and 30 of 1996. At one stage ss 53(9) and (9A) made specific reference to the *Sentencing Act*, which was to apply in certain circumstances, notwithstanding anything in that Act; see the amendments to the Act made in the Schedule to the *Sentencing (Consequential Amendments Act* 1996 (No 17 of 1996). Before Act 17/96 came into force, ss 53(9) and (9A) were repealed by Act 23 of 1996 (which came into force on 25/6/96). Then Act 30 of 1996, which came into force on 28/6/96, repealed the amendments to those sections effected by Act 17 of 1996. The end result is that s 53 makes no reference to the *Sentencing Act*, and provides in some detail for the various sentencing options available in the case of a juvenile. It is necessary to refer to some of those options. Section 53(1)(g) places a maximum limit of 12 months' imprisonment or detention. Section 53(10) prevents the Court from ordering under subsection (1)(g) the imprisonment of a juvenile unless the juvenile has attained the age of 15 years. Section 53(7) provides:

> "Nothing in this section shall be construed as limiting the power of the Supreme Court to impose on a juvenile a sentence it could otherwise than under this section impose on him."

[33] Therefore the Supreme Court could impose on a juvenile a sentence of imprisonment in excess of one year, whether or not the juvenile had attained the age of 15 years, but the Juvenile Court's powers are limited by

s 53(1)(g) and s 53(10). There are no specific provisions in the Act dealing with the fixing of non-parole periods, conferring a power to backdate a sentence to take into account time already spent in custody, or requiring a court to take into account remissions. However, s 53(1)(j) empowers a court to:

> "make such other order in respect of the juvenile under the relevant law that it could make if the juvenile were an adult convicted of that offence under that law."

[34] The *Sentencing Act* 1995, which came into force on 1 July 1996, provides for the various sentencing options available to the courts. The *Sentencing (Consequential Amendments) Act* 1995 repealed a number of legislative provisions dealing with the courts' sentencing powers which were previously contained in the *Criminal Code*, and the *Parole of Prisoners Act*, and repealed remissions provided by the *Prisons (Correctional Services) Act*. In addition, the *Sentencing Act* 1995 repealed the *Criminal Law (Conditional Release of Offenders) Act*.

[35] Section 4 of the *Sentencing Act* provides:

> "This Act applies to all courts other than the Juvenile Court established under the *Juvenile Justice Act* and the Supreme Court when exercising its jurisdiction under or in pursuance of that Act."

[36] The stated cases give rise to the following questions:

1. Are the accused in each case still "juveniles"?
2. If yes, to what extent, if at all, does the *Sentencing Act* apply to them?

Are the accused still juveniles?

[37] The definition of "juvenile" does not specify that there is a relationship between the age of the offender and some other time, whether it be the time of the offence, the time of conviction, or the time of sentence. Taken at face value, a person's status as a juvenile could therefore change at any time in relation to the proceedings. For example, a juvenile who is almost 17, could turn 17 half-way through a hearing. If the court trying the case was the Juvenile Court, this could mean that suddenly that court would lose its jurisdiction to try the juvenile.

[38] Considerations of this nature have led single Judges of this court to the conclusion that the *Juvenile Justice Act* applied throughout to all proceedings brought against a person if that person was a juvenile at the time of committing the offence: see *Seears v Oldfield* (1985) 36 NTR 65, per Muirhead ACJ; *Pryce v Ashfield* (unreported, Nader J, 25/6/86); *R v Lui* (unreported, Kearney J, 18/10/90); *R v Williams* (1992) 109 FLR 1 (Mildren J); *R v Traintafillou* (No 87 of 1994, unreported, Mildren J).

[39] I see no reason to depart from those decisions. In *Seears v Oldfield*, Muirhead ACJ at pps 70 and 71 specifically requested that his reasons be transmitted to the Attorney-General and to the Minister for Community Welfare in order that consideration could be given to this question. The *Juvenile Justice Act* has been amended many times since then, and the Parliament must be taken to have known the rulings of this court on this question. One of the problems identified by Muirhead ACJ at p 70-71 was

later rectified by the Parliament by specific legislation: see Act 58/1987 which enacted ss 57A, 57B, 57C and 57D. It is therefore of some significance that no amendment was made to alter the effect of His Honour's ruling. In *R v Lui* Kearney J followed *Seears v Oldfield* after extensively considering the question again. His Honour identified another problem with the Act (at p 9 of the judgment) which again Parliament remedied by amendments to ss 53(1), (6) and (6A) by Act No 18 of 1995. Parliament has not sought to amend the definition of a "juvenile", or to otherwise alter the Act to make it clear that an individual's status as a juvenile is to be determined at some time other than the time of the commission of the offence. I am not satisfied that *Seears v Oldfield* was wrongly decided. In these circumstances this court ought to affirm it: *Platz v Osborne* (1943) 68 CLR 133 AT 137, 141, 144-5, 146-7; cf *Re Alcan Australia Ltd & others; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106-107. I should add that neither counsel sought to argue that *Seears v Oldfield* was wrongly decided.

Does the *Sentencing Act* apply?

[40] The next question depends upon the construction to be given to s 4 of the *Sentencing Act*. Assuming that Angel J will, when sentencing each accused, be exercising jurisdiction "under or in pursuance of the *Juvenile Justice Act*," a question I do not think it is necessary to decide, does s 4 of the *Sentencing Act* preclude the provisions of the *Sentencing Act* from applying to each case? If the answer to that question be "yes", it flows that s 4 of the

Sentencing Act has impliedly repealed s 53(1)(j) of the *Juvenile Justice Act*, as well as the words "in addition to its powers" in s 39(1)(a) and effectively made s 53(7) meaningless: see *Goodwin v Phillips* (1908) 7 CLR 1 per Griffith CJ at 7.

[41] It is well established that a later Act will impliedly repeal an earlier Act only if the two provisions are so inconsistent or repugnant that they cannot stand together (*Goodwin v Phillips*, supra at 10); *Hack v Minister of Lands (NSW)* (1906) 3 CLR 10 at 23. There is a strong presumption that Parliament does not intend to contradict itself, but intends that both Acts operate together within their given spheres: *Butler v Attorney-General (Victoria)* (1961) 106 CLR 268 at 276, 290; *Saraswati v The Queen* (1990-1991) 17-18. In *Seward v The "Vera Cruz"* (1884) 10 App Cas 59 at 68 Lord Selborne said:

> "… where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specifically dealt with by earlier legislation, you are not to hold that earlier and special legislation [was] indirectly repealed, altered, or derogated from merely by force of such general words, without any particular intention to do so."

[42] I consider that the words in s 4 of the *Sentencing Act* were not intended by Parliament to impliedly repeal the provisions in question.

[43] I consider that, when either the Supreme Court of the Juvenile Court considers a sentencing disposition in relation to a juvenile, the court should first look to its powers under the *Juvenile Justice Act*. In the case of the

Juvenile Court, there would not be much occasion to use s 53(1)(j) given the extensive powers of disposition given to that court, as well as the limitations placed upon its jurisdiction, except for such powers as the power to backdate a sentence, or the power to order cumulative or concurrent sentences, formerly to be found in s 405(2) and (3) of the *Criminal Code* (now repealed), now to be found in ss 63(5) and 51 of the *Sentencing Act*. There are other provisions of the *Sentencing Act* which must also clearly bind the Juvenile Court, notwithstanding s 4: see ss 49, 118, 119, 120 for example. So far as the Supreme Court is concerned, it retains the power to sentence a juvenile in accordance with the provisions of the *Sentencing Act*. If it were otherwise, important powers which are not to be found in the *Juvenile Justice Act* but exist only in the *Sentencing Act* could never apply to juveniles. I refer to the requirement to fix a non-parole period (s 53 of the *Sentencing Act*) as a prime example of why it is that the legislature did not intend to impliedly repeal the provisions of the *Juvenile Justice Act* already referred to. It is unlikely in the extreme that Parliament intended that the Supreme Court, which has the power to sentence a juvenile to the maximum penalty fixed by Parliament, did not also intend that juveniles would get the benefit of a parole system. This is reinforced in the case of a juvenile convicted of murder, by s 39(2) of the *Juvenile Justice Act*, which empowers the Supreme Court to impose a sentence otherwise than imprisonment for life. Can it be supposed that in such a case this Court was not empowered to fix a non-parole period? Yet, if the position be that the *Sentencing Act* can

never apply to juveniles, or, if it be that the Supreme Court may exercise either the sentencing powers contained in the *Juvenile Justice Act*, or in the *Sentencing Act*, but not both, this consequence must follow.

[44] In my opinion, these consequences are not supported by the wording of s 4 of the *Sentencing Act*. That section says that the Act "applies to all courts other than the Juvenile Court …", etcetera, which is quite a different thing from saying "the provisions of this Act shall not apply to the Juvenile Court", etcetera. If the latter words had appeared in s 4, the intention would be clear and unambiguous; the *Sentencing Act* would never apply. But the words used by the draftsman are not so clear and unambiguous. The wording of s 4 is only partly in mandatory terms. Courts (other than the Juvenile Court or the Supreme Court when exercising its powers under the *Juvenile Justice Act*) *must* apply the provisions of the *Sentencing Act*. That is quite a different thing from saying that the Juvenile Court or the Supreme Court *cannot* utilise the provisions of the *Sentencing Act* if there is a warrant to do so. In my opinion, the two Acts must be read as operating together and there is no implied repeal.

[45] Accordingly, I would answer the questions in the special stated cases as follows:

A Judge of the Supreme Court may apply the provisions of the *Sentencing Act* 1995 in relation to each of the accused by virtue of ss 39(1)(a), 53(1)(j)

and 53(7) of the *Juvenile Justice Act*, and, in an appropriate case, should do so.

[46] As I am in the minority, I respectfully consider it desirable that the attention of the legislature be drawn to the consequences of the answer given by Kearney and Thomas JJ to the special cases. It would appear to follow from their Honours' reasons, that not only could a non-parole period not be fixed by this Court when sentencing a juvenile convicted of murder, but that the court would have no power to backdate that sentence, or to order that sentences be served cumulatively, upon sentences imposed for other offences also involved. It would seem to follow also, (although their Honours do not specifically deal with this) that the Juvenile Court could not backdate a sentence, order that sentences be served cumulatively, or exercise a number of other powers contained only in the *Sentencing Act*: see for example, ss 58, 60 and 61.

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