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| PARTIES: | JOHNNY WILSON<br><br>v<br><br>SHANE MICHAEL TAYLOR<br><br>AND<br><br>JOHNNY WILSON<br><br>v<br><br>ROBIN LAURENCE TRENERRY |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION |
| FILE NO: | JA17 AND JA18 OF 1997 |
| DELIVERED: | 9 April 1997 |
| HEARING DATES: | 25, 26 March 1997 |
| JUDGMENT OF: | Kearney J |

**CATCHWORDS**

Criminal Law and Procedure - Appeal and new trial, pardon and inquiry subsequent to conviction - Appeal and new trial - Justices - Appeal against sentence - Severity - Reactivation of suspended sentence for breach -

Sentencing Act 1995 (NT) - ss43(7), 130(2).

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procedure - Bail and recognizances - Recognizance under Criminal Law (Conditional Release of Offenders) Act 1971 (NT) (repealed) - Breach of - Whether

breach could be dealt with under repealed Act or must be dealt with under Sentencing Act 1995 (NT) -

Criminal Law (Conditional Release of Offenders) Act 1971 (NT) (repealed) - s6(3)(e) -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).

Criminal Law and Procedure - Jurisdiction, practice and procedure - Bail and recognizances - Recognizance - Breach - Whether breach should reactivate suspended sentence where subsequent offence is of a different character - Factors which may properly be taken into account when determining whether "unjust" to restore suspended sentence -

Sentencing Act 1995 (NT) - s43(7).

*Baird v The Queen* (unreported, Court of Criminal Appeal (NT), 9 May 1991), approved.
*Barton* [1972] Crim. L.R. 555, approved.
*Buckman* (1988) 47 SASR 403, approved.
*Lawrie* (1992) 59 SASR 400, approved.
*McElhorne* (1983) 5 Cr. App. R.(S) 53, approved.
*Marston* (1993) 65 A Crim R 595, approved.
*Walker* (1981) 3 A Crim R 200 at 203, approved.
*R v Wilson Jagamara Walker* (unreported, Supreme Court (NT), (Martin CJ), 1 September 1994), considered.
*Davies v Deverell* (1992) 1 Tas R 214, approved.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | S. O'Connell |
| Respondent: | J. Adams |

*Solicitors:*

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| Appellant: | KRALAS |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | B |
| Judgment ID Number: | kea97010 |
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kea97010

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

IN THE MATTER OF the Justices Act

AND IN THE MATTER OF appeals against the severity of sentences imposed by the Court of Summary Jurisdiction at Katherine

No. JA17 of 1997

BETWEEN:

**JOHNNY WILSON**
Appellant

AND:

**SHANE MICHAEL TAYLOR**
Respondent

AND BETWEEN

No.JA18 of 1997

**JOHNNY WILSON**
Appellant

AND:

**ROBIN LAURENCE TRENERRY**
Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 9 April 1997)

**The appeals**

The appellant appeals against the severity of sentences of imprisonment imposed or restored by the Court of Summary Jurisdiction at Katherine on 4 February 1997. On that day the Court sentenced him to 1 month's imprisonment for driving a motor vehicle on a public road on 24 January 1997 with a blood alcohol level greater than 0.08% (0.194%). The appellant's conviction for this offence meant that he was in breach of a 2-year good behaviour bond he had entered into on 3 May 1995. Because of that breach, his Worship restored part of the (suspended) sentence of imprisonment imposed on 3 May 1995 and ordered the appellant to serve it; he directed that the sentence of 1 month's imprisonment be served concurrently with the part sentence restored, which he calculated to be 4 2/3 months imprisonment. The appeals are against the imposition and restoration of these sentences.

**The background; the sentencing on 3 May 1995**

On 3 May 1995 the appellant had pleaded guilty to 6 charges, of which only the following 2 are presently relevant, viz:

> That on 15 and 16 April 1995 at Milikapiti he had unlawfully -
>
> (a) assaulted one Julie Patricia Neville; and
>
> (b) damaged property - 2 house doors and 82 louvres - valued at $1730, the property of Milikapiti Community Council.

Prior to 3 May 1995 the appellant had a record of prior offending. He had appeared before courts on 5 occasions in the 10½ years between April 1984 and November 1994, and had been convicted of 13 offences. In 1984 he

was convicted of an unlawful assault, assaulting Police, and disturbing the peace; in 1989 and 1994 he was convicted of driving with blood alcohol levels exceeding 0.08% (.110% and .207%, respectively); in 1993 he was convicted of assaulting Police, resisting Police, and fighting in a public place. Significantly for the sentencing on 3 May 1995, on 15 November 1994 he was convicted of assaulting a woman, resisting arrest, and assaulting Police; he was sentenced to 3 months imprisonment on the charge of assaulting Police, his service of this sentence being suspended on his entering into a bond in the sum of $500 to be of good behaviour *for 12 months*. That is, he then undertook to be of good behaviour until 12 November 1995.

On 3 May 1995 he was convicted of the 2 offences of 15 and 16 April indicated on p2. It can be seen that these offences were committed only 5 months after he had undertaken to be of good behaviour for 12 months. Accordingly, the convictions in May 1995 for those offences meant that he was in breach of his bond of 15 November 1994. As to that, his Worship on 3 May pursuant to s6(3)(e) of the *Criminal Law (Conditional Release of Offenders) Act* (now repealed) committed the appellant to prison to serve the sentence of 3 months imprisonment which had been imposed on him on 15 November 1994. For each of the 2 offences of 15 and 16 April he sentenced the appellant to 5 months imprisonment, to be served concurrently; his Worship directed - correctly, in accordance with the analysis of Code s405(3) in *Kuiper v Svikart* (1994) 96 NTR 1 - that service of those sentences commence at the expiry of the earlier sentence of 3 months imprisonment. It can be seen that, in all, the sentences imposed (5 months) and restored

(3 months) on 3 May 1995 totalled 8 months imprisonment. His Worship then directed pursuant to s5(1)(b) of the *Criminal Law (Conditional Release of Offenders) Act* that the appellant be released after serving 1 month of that effective sentence of 8 months imprisonment, service of the remaining 7 months being suspended on his entering into a recognizance in the sum of $1000 to be of good behaviour for a period of 2 years, on various conditions. The appellant entered into the bond, thereby undertaking to be of good behaviour until 3 May 1997.

It can be seen that the appellant has now again breached an undertaking he has given: his offence of 24 January 1997 was committed some 20½ months after he undertook on 3 May 1995 to be of good behaviour for 24 months. It was on the basis of that undertaking that service of 7 months of the sentence of imprisonment imposed on him on 3 May 1995 was suspended. On 4 February 1997 he fell to be dealt with for breach of his bond on 3 May 1995, as well as for the offences of 24 January 1997.

**The sentencing on 4 February 1997**

When sentencing the appellant on 4 February 1997, his Worship in ex tempore remarks observed:

> "Johnny Wilson has pleaded guilty to driving with a blood alcohol of .194 on Dick Ward Drive in Darwin on 24 January this year. He went up there for the perfectly proper and laudable purpose of collecting his wife and children off a plane on their return from school holidays in New South Wales. Unfortunately he got into bad company with his own countrymen. He has not been drinking, he says, for about 18 months, which is … the length that he has served, out of the two year bond [of 3 May 1995] that he is on.

He had not been drinking for that time [that is, 20½ months from 3 May 1995]. He had been to FORWAARD [a condition of his bond of 3 May 1995]. He is a senior health worker, so he knows all about the problems of alcohol. Now there was a group of countrymen who were in town for the meeting on euthanasia. … And Johnny Wilson had a beer or two with them.

And then some of those others wanted to visit friends on Minmarama Park, which is off Dick Ward Drive. The defendant thought he would be all right to drive; he felt all right. He thought he would be under the limit. *And there was nothing wrong with his driving*. So far as we know, he was picked up on a random breath testing station. But as we also know, he was .194. He has got to lose his licence; he knows that. He is going to be at a disadvantage at work. …

He had got through more than 18 [in fact, some 20½] months of the good behaviour bond [of 3 May 1995] until this happened. He is 'paying his way' in the community; he earns about $900 a fortnight. Mr Wilson's problems stem from alcohol. I say that, on the basis that his very first appearance in 1984 in the Tennant Creek Children's Court, resulted in a bond which included a condition not to consume liquor at the Elliott Hotel until he was 18. And then it has been offences which, although [they] can be committed sober, rarely are; [driving] plus .11 in 1989, plus .207 in 1994, plus consume/possess liquor in restricted areas. And he has had [a] bond in 1984 which he got through.

He has had fines. He has had [a] suspended sentence [of 3 months] and [a] bond in 1994, which he did not get through. And on [3 May] 1995 … he got five months gaol for criminal damage, five months for aggravated assault and three months for breach of bond [of 15 November 1994], making a total of eight months. And that was suspended [on 3 May 1995] after one month on yet another bond, to attend FORWAARD. So that *he has had a great deal of leniency extended to him for offences which are alcohol related*, clearly - otherwise he would not have gone to FORWAARD this time - which have involved violence to other people. And he has also committed these offences - three now, [in 1989, 1994 and 1997] in which he has driven a vehicle, said by some courts to be 'lethal weapons', while in drink.

*So the question really does arise whether this is a case in which it would be 'unjust' [in terms of s43(7) of the Sentencing Act] to activate the remaining period of this bond [of 3 May 1995]. He has got through most of it [that is, he had complied with the bond for 20½ months of its 24 month period]. It is not for the very same type of offence [as the offences*

*of April 1995] that he is here for, now.* In fact, one has to admit that criminal damage and aggravated assault are far removed from driving under the influence, if one looks only at the acts which constitute the offence. *They are connected, in that they are usually all committed by drunks or people who are on their way to being drunks*. And that is a strong logical connection, I believe.

*Under [s43(7) and s43(5)(c) of] the [Sentencing] Act, unless I think it is 'unjust', I ought to ... revive the suspended [part of the] sentence [that is, the 7 months]*. And in the words of the old Act [s6(3)(a) of the *Criminal Code (Conditional Release of Offenders) Act*], I ought to commit to prison for the unserved balance [that is, 7 months]. *I have given this careful consideration this afternoon. I have been especially concerned that we have got bond after bond* - the possibility of [a new] bond after bond [of 3 May 1995] after bond [of 15 November 1994]. There is ample authority of Supreme Courts in this country against that sort of proposition; against losing sight of the public interest, in favour of the individual defendant.

It has been put to me that all I need to do for the .08 is something less than a suspended sentence; and certainly, many people have got away with a fine for a third offence for .08. Probably not so many who have got the sort of record that Mr Wilson has got, as Mr Wilson, for a man in a responsible senior position, has got a woeful record. And I mean, recently; I mean since 1993. I believe I have got cynical about the value of our penalties for drink drivers over the years and I know that *I have frequently in the early 1990s, imposed suspended sentences for second offences. And I know that many magistrates will send to gaol for a third offence.*

*I believe that my duty calls me in this case, Mr Wilson, to activate that unserved term* [of 7 months, service of which was suspended on 3 May 1995]; that is, in terms of [ss43(7) and 43(5)(c) of] the new *Sentencing Act*. And I believe the best I can do is to impose a term of imprisonment and a disqualification for the new matter [of 24 January 1997], which will be concurrent with that [restored sentence of 3 May 1995]. The exceed .08: you are convicted and sentenced to one month imprisonment and disqualified from driving for two years. And for the breach of bond [of 3 May 1995] you are committed to prison to serve the unserved balance of the term [of 8 months] imposed on 3 May 1995. That [unserved balance] appears to me to be four and two-third months [after deducting from the 7 months a one-third remission to which the appellant would have been entitled had he served out the sentence of 3 May 1995 when it was imposed]. So that is the term you will actually serve. You will not drive during the next two years. Think of it this way, Mr Wilson; you have had it on the line for a long time now." (emphasis added)

**The grounds of appeal**

In his Notice of Appeal of 4 February 1997 the appellant contended first that the sentencing above was manifestly excessive; second, his Worship had erred in concluding that s43(7) of the *Sentencing Act* -

> "required him, in the circumstances of this case, to order that the [appellant] be committed to imprisonment for the unserved part of a previously suspended sentence [imposed on 3 May 1995]."

Section 43(7) provides:

> "(7) A court *shall make an order* under subsection (5)(c) *unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen* since the suspended sentence was imposed, including the facts of any subsequent offence and, if it is of that opinion, the court shall state its reasons." (emphasis added)

It can be seen from his Worship's sentencing remarks (p6) that he addressed the "unjust" issue raised by s43(7).

Section 43(5)(c) provides that where the Court is satisfied that during the period of what was formerly a bond (now 'the operational period') the offender has committed another offence punishable by imprisonment, it may:

> "subject to subsection (7), restore the sentence or part sentence held in suspense and order the offender to serve it."

This is clearly what his Worship ultimately decided to do, reducing the unserved 7 months to 4 2/3 months by taking into account the abolition of the former entitlement to remission; cf.s58 of the *Sentencing Act*.

**The submissions on appeal**

Mr O'Connell of counsel for the appellant first addressed the second ground of appeal (p7). He first submitted that his Worship was *not obliged* to act under s43(5)(c), and should have acted under one of the 3 alternatives to that provision, s43(5)(f), which provides that the court may:

> "make no order with respect to the suspended sentence."

I note that his Worship was clearly aware of this; that was why he first addressed the "unjust" issue raised by s43(7).

Second, Mr O'Connell referred to the repealed *Criminal Law (Conditional Release of Offenders) Act* which provided in s6(3)(e) that in such circumstances as obtained here the Court could:

> "…commit the person to prison to undergo imprisonment for such term, being a term not exceeding … the balance of that sentence, … or make any order (including an order under section 5(1)) which the court would, if he had then and there been sentenced for the offence of which he was originally charged, be empowered to make."

It may be noted that this discretion was less trammelled than the more limited discretion created by s43(7) of the Sentencing Act. Mr O'Connell submitted that his Worship had erred as to the ambit of his powers in the present situation, in that he was *not* constrained to act in accordance with s43 of the *Sentencing Act*, but could still have exercised any of the powers set out in s6(3)(e) of the repealed *Criminal Law (Conditional Release of Offenders) Act.*

That submission rests upon an interpretation of s130(2) of the *Sentencing Act*, part of the savings and transitional provision of that Act, which provides, as far as material:

> "Where, immediately before the commencement of this section, an order under the *Criminal Law (Conditional Release of Offenders) Act* ... was in force in respect of a person, the person continues to be subject to the requirements of the order … in all respects as if this Act has not commenced but the order … 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 O'Connell relied on the words "continues to be … has not commenced" as indicating that a failure to comply with the order could continue to be dealt with under the repealed Act. To my mind those words do not have that effect; they are simply intended to ensure that the repeal of the Act under which the order was made does not affect the efficacy of the order. It remained in force, and the appellant remained "subject to [its] requirements". The words emphasized above in s130(2) deal specifically with the consequences of a failure to comply with the order, and are clear in their meaning and effect; any such failure is to be dealt with under the *Sentencing Act*, on an "as if" basis. The words "may be dealt with under this Act" are not permissive in the sense that they leave it open to deal with a failure either under s6(3)(e) of the repealed Act or s43 of the *Sentencing Act*. They are words of empowerment. What the words emphasized mean is that if any failure to comply with an order is to be dealt with at all, it *must* be dealt with under the *Sentencing Act*. I reject Mr O'Connell's second submission.

Third, in submitting that the "failure to comply" should have been "dealt with" differently under the Sentencing Act, Mr O'Connell referred to several authorities. In *R v Wilson Jagamara Walker* (unreported, Supreme Court (NT), (Martin CJ), 1 September 1994) a sentence of imprisonment had been imposed for manslaughter, suspended upon the prisoner entering into a 2 year good behaviour bond. During the period of the bond he was convicted of other offences, and was brought before the Court to be dealt with for his non-compliance. His Honour discussed considerations relevant to whether the prisoner should now be "returned to prison, to serve out the balance of the suspended sentence for manslaughter." These considerations included: the offence for which he had initially been convicted; the period of the bond; and that part of the period of the bond which had elapsed before the further offences were committed (that is, the length of the period during which he had observed the obligations and conditions of his bond). His Honour observed at p7:

> "As with all options in regard to punishment, the Court must take into account that its end obligation is the protection of the community. Conditional release is usually allowed where it is considered that the offender ought to be permitted to serve part of the sentence in the community, partly upon the basis that there is not likely to be any further threat to the community, and further upon the basis of his or her prospects of rehabilitation; that they are likely to be improved by such a step. Both of those possible outcomes have not prevailed in your case. The community has not been totally protected. It has been further threatened by your subsequent criminal offending - though, and it is important to note, no harm has been done - and you have not demonstrated that you accept the need to behave in a responsible manner."

In that case one of the further offences was an offence committed in June 1994, of driving with a blood alcohol level in excess of 0.08% (.137%). His Honour described this as

> "… not an insignificant amount, but far from being very serious. It was not your driving that brought you to the attention of the authorities, but a random breath testing station."

In the result, his Honour decided not activate the suspended sentence, commenting that "I was on the verge of doing so". He observed at p10 that a factor -

> "… which must weigh with me, [is] that the offences for which you were convicted on these recent occasions had nothing to do with the type of offence for which you were convicted back in February."

Mr O'Connell submitted that the factor last-mentioned meant that the Court here should have restored the part initial sentence (7 months) *only* if the further offending of 24 January 1997 had been similar to that which had resulted in the initial sentence of 3 May 1995. I reject that submission. To uphold it, would be to put a gloss upon the statute. It is not *necessary* to show any relationship between the two offences (see *Barton* [1972] Crim. L.R. 555) though the nature of the further offending is relevant; see *Buckman* (1988) 47 SASR 403 and *Lawrie* (1992) 59 SASR 400, cases in South Australia where the relevant legislation is however different to the *Sentencing Act.* The question of restoring an initial sentence is to be considered in terms of s43, particularly s43(7), from which it is clear that "the facts of any subsequent offence" is *one* of the "circumstances" which must be taken into account when

deciding whether it would be "unjust" to restore the initial sentence. The fact that the further offence is different in its nature to the initial offence is not sufficient in itself to justify not restoring a sentence; such justification may exist, if the further offending is both of a different character from the initial offence, and relatively trivial, particularly where there is an appearance of gross disparity between the suspended sentence and the further offence. See *Clitheroe* (1987) 9 Cr. App.R.(S) 159, *Moylan* [1969] 3 All E R 783 and *Hales v Pryce* (unreported, Supreme Court (NT), (Martin CJ), 8 July 1996) at 7.

In general, a magistrate considering the application of s43(7) should address inter alia the following questions; whether the further offence warrants a custodial sentence in its own right - see *McElhorne* (1983) 5 Cr. App. R.(S) 53; whether it is sufficiently trivial to justify non-restoration of the suspended sentence (see *Marston* (1993) 65 A Crim R 595); and whether, if restored, the aggregate term which results would be excessive.

Mr O'Connell stressed as a "very strong factor" pointing to the unjustness of restoration in this case, to the length of time (20½ months) for which the appellant had observed the conditions of his 24-month bond. He submitted that the further offence was an "aberration", stressing its nature and character, and submitting that the principal purpose of the bond of 1995 had been to deter the appellant from further drunken and violent offending. He noted that

his Worship had addressed this aspect, but submitted that it had not been given enough weight.

In this case a very substantial part of the period of the bond had elapsed before the commission of the further offence; in those circumstances his Worship would not necessarily have been justified in not restoring the initial sentence, but he may have given the appellant some credit by restoring only part thereof, though no mathematical reduction is involved. In fact, he reduced the period from 7 months to 4 and 2/3 months.

In support of his submission on the first ground of appeal (p7) that the sentence of 1 month for the further offence was manifestly excessive Mr O'Connell handed up details of 9 'exceed .08%' cases decided in Katherine in the 6 months between October 1996 and February 1997, by persons with prior offences of that type. He noted the factors affecting sentence which were taken into account. It is fair to say that those cases usually resulted in substantial fines being imposed; where some element of danger was apparent in the driving, a short term of imprisonment was imposed. The number of cases is too small to be used to determine a sentencing range. I do not consider that a sentence of 1 month's imprisonment for a third offence of driving in excess of .08% over 7 years, is manifestly excessive. I note that the offence carries a maximum of 12 months imprisonment.

His Worship's remarks (p6) about the undesirability of "bond after [broken] bond after [broken] bond" were very apposite; see the remarks of Wells J in *Walker* (1981) 3 A Crim R 200 at 203. I respectfully agree with the observations of Perry J in *Lawrie* (supra) at 403:

> "To excuse or vary the consequences of the breach of bond, the grant of which resulted in the suspension of a term of imprisonment, has a tendency to undermine the integrity of the sentencing process generally. It follows that the power to do so should be exercised sparingly, and only in cases where proper grounds have clearly been made out or where genuinely special circumstances exist."

Some of the factors relevant to the justice of restoring the initial sentence are set out in *Baird v The Queen* (unreported, Court of Criminal Appeal (NT), 9 May 1991), dealing with s6(3)(e) of the *Criminal Law (Conditional Release of Offenders) Act*, at 14:

> "A warning given by the judge imposing the original sentence as to the consequences of a breach may be relevant. The nature of the terms of the recognizance are relevant. The nature and gravity of the breach is a relevant factor. Whether the breach evinces an intention to disregard the obligation to be of good behaviour or to abandon any such intention would normally be relevant. For instance it would be an aggravating factor if the breach amounted to the commission of another offence of the same nature as that which gave rise to the recognizance. The length of time during which the offender observed the conditions of the recognizance may be relevant. The moral pressures upon the offender to commit the breach may count. The possibilities are as potentially numerous as the factors that effect the ordinary sentencing process itself. But the materiality of any factor is determined by fairness and common sense."

It must be kept firmly in mind that the primary aim in suspending service of a sentence of imprisonment is to provide an inducement to reform; see *Davies v Deverell* (1992) 1 Tas R 214 at 218-220. See generally as to when

the imposition of a suspended sentence is apposite *P* (1992) 64 A Crim R 381 at 390-1, *Leaney v Bell* (1992) 108 FLR 360 at 366-7, and *R v Kruger* (1977) 17 SASR 214 at 221.

**Conclusions**

I adhere to the approach I expressed in *Mason v Pryce* (1988) 53 NTR 1 at 7, as to the correct approach to an appeal against sentence under s163 of the *Justices Act*. I am not satisfied in this case that his Worship fell into error and improperly exercised his wide sentencing discretion. Neither the sentence of 1 months imprisonment nor the total effective sentence of 4 and 2/3 months is manifestly excessive. These are the reasons for dismissing the appeals and affirming the sentences imposed, on 4 April 1997.

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