Reid v Rowbottam [2005] NTSC 7

PARTIES:	REID, Reginald
	v
	ROWBOTTAM, Helen
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 74 of 2004 (20410079)
DELIVERED:	1 March 2005
HEARING DATES:	11 February 2005
JUDGMENT OF:	MARTIN (BR) CJ, RILEY & SOUTHWOOD JJ

CATCHWORDS:

CRIMINAL LAW

Appeal – Justice Appeal – Justices Act 1928 (NT), appeal on sentence – *Sentencing Act* (NT) s 78BA – proper construction – one or more times before been found guilty – general deterrence – violent crimes against women and children – rehabilitation – appeal allowed.

Ryszawa v Samuels [1969] SASR 158; *O'Hara v Harrington* [1962] Tas SR 165; *Samuels v Mackenzie* (1979) 23 SASR 595; *Clark v Glover* (1992) 58 SASR 571; *Police v Nowak* (2000) 76 SASR 551, applied.

Kennan v Mears (unreported, Supreme Court of Victoria, delivered 25 January 1990); *Carter v Denham* [1984] WAR 123, referred to.

Schluter v R (1997) 6 NTLR 194; *Turbitt v Pryce* (unreported, Kearney J, delivered 21 January 1998), approved.

D v Gokel (1998) 123 NTR 1, overruled.

R v Hallam (Mildren J, unreported, delivered 17 September 1998); *Davis v Howley* (2003) NTSC 6, considered.

REPRESENTATION:

Counsel:

Appellant:	G Dooley
Respondent:	M Carey

Solicitors:

Appellant:	NAALAS
Respondent:	DPP

Judgment category classification:	A
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IN THE FULL COURT OF
THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Reid v Rowbottam [2005] NTSC 7
No. 74 of 2004 (20410070)

BETWEEN:

REGINALD REID
Appellant

AND:

HELEN ROWBOTTAM
Respondent

CORAM: MARTIN (BR) CJ, RILEY and SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 1 March 2005)

Martin (BR) CJ:

Introduction

[1] This is an appeal against a sentence imposed by a Magistrate. The appeal involves consideration of the proper interpretation of s 78BA of the Sentencing Act in respect of which Judges of the Supreme Court have expressed different views. In those circumstances the appeal was referred by a single Judge to this Court.

[2] On 17 August 2004 the appellant pleaded guilty before a Magistrate to unlawful assault and to the circumstance of aggravation that the victim of the assault was a female and the appellant a male. The learned Magistrate

sentenced the appellant to four months imprisonment and directed that the sentence be suspended after the appellant had served 14 days. The appellant appeals against the sentence alleging that the sentence is manifestly excessive and that the Magistrate erred in a number of respects.

[3] At the hearing of the appeal, counsel for the respondent properly conceded that the appeal should be allowed and that this Court should impose sentence. Upon an intimation as to the sentence the Court had in mind, both counsel indicated that they had no objection to the proposed sentence. In those circumstances the Court ordered that the order of the Magistrate be set aside and that a sentence of three months imprisonment be imposed. The Court further ordered that the sentence of three months be suspended immediately upon conditions that the appellant sign the necessary documentation at the office of the Sheriff within 14 days and that the appellant be under the supervision of the Director of Correctional Services for a period of 12 months from 11 February 2005. Further conditions were imposed that the appellant obey the reasonable directions of the Director or the Director's nominee as to the appellant's residence and employment and as to the appellant undertaking any course or counselling aimed at his rehabilitation. It was ordered that the operative period for the purposes of the Sentencing Act be 12 months commencing on 11 February 2005. The Court indicated it would deliver reasons later and I now set out my reasons.

Facts

[4] The offence occurred on 3 May 2004 when the appellant was aged 20 years. At that time the appellant and the victim were in the final stages of a rapidly deteriorating relationship. For some hours prior to the assault the appellant and the victim had been arguing. The appellant became agitated. He began calling the victim names and behaving in a provocative manner towards her. Eventually the appellant asked the victim to take him for a drive in her car so that he could visit his boss. While driving through the Darwin area the appellant continued to call the victim derogatory names.

[5] During the drive the appellant saw a vehicle belonging to a friend parked near the intersection of Casuarina Drive and Trower Road. At the request of the appellant the victim stopped next to the other vehicle. The appellant asked the victim to accompany him to a mangrove area in search of his friend but, fearing for her safety, the victim declined. The appellant got back into the vehicle, slammed the door and verbally abused the victim. The appellant's aggressive behaviour frightened the victim and she was hesitant to begin driving. The appellant raised his right hand and struck the victim in the left cheek area with a forceful backhander.

[6] The blow was witnessed by plain clothed police officers who were driving an unmarked police vehicle along Casuarina Drive. They parked behind the victim's car and alighted with the intention of apprehending the appellant. Fearing for her safety and still dazed by the blow, the victim started her vehicle and drove away from the officers. After a short distance over which

the police followed and activated emergency sirens and beacons, the victim stopped her vehicle.

[7] The appellant was apprehended and informed that he was under arrest for assault. He struggled forcefully. Both officers and the appellant fell to the ground where the appellant was finally overpowered and handcuffed.

[8] When asked about the incident, the appellant said he thought the police had taken it the wrong way. He said he did not hit the victim. Rather he was putting his bum bag in the back of the vehicle and it flicked the victim in the face. As to why he resisted the officers, the appellant said he did not like the manner in which he had been grabbed as it was "like I had done something wrong against my missus".

[9] As a consequence of the assault the victim sustained tenderness and pain to her jaw. The victim impact statement demonstrates that the victim has suffered emotionally as a consequence of the assault.

[10] As mentioned, the offence occurred in May 2004. At that time, although the appellant had previously committed relevant offences, he had not yet been found guilty of those offences. The previous offences were committed on 11 October and 12 December 2003, but it was not until 7 July 2004 that the appellant was convicted of those offences. On 7 July 2004 a Magistrate sentenced the appellant to a period of imprisonment which was suspended on home detention conditions.

[11] When the appellant came before the Magistrate in August 2004 in respect of the May 2004 offence, by reason of his prior offending the appellant was not entitled to mitigation by way of prior good character. The Magistrate correctly took into account the plea of guilty indicating that the appellant was entitled to limited benefit because of the lateness of the plea. The reasons of the Magistrate demonstrate that he took into account all relevant matters, including the impact of the sentence upon the sentence imposed in July 2004 to which I have referred. Apart from an issue involving s 78BA of the Sentencing Act to which I now turn, there is no apparent error in the approach of the Magistrate.

Section 78BA

[12] Section 78BA of the Sentencing Act is as follows:

> "***Division 6A – Imprisonment for violent offences***
>
> 78BA. Imprisonment for violent offences
>
> (1) Where a court finds an offender guilty of a violent offence and the offender has one or more times before (whether prior to or after this section commencing) been found guilty of a violent offence, the court must record a conviction and must order that the offender serve -
>
> (a) a term of actual imprisonment; or
>
> (b) a term of imprisonment that is suspended by it partly but not wholly.
>
> (2) Nothing in subsection (1) is to be taken to affect the power of a court to make any other order authorised by or under this or any other Act in addition to an order under subsection (1)."

[13] For the purposes of s 78BA, a violent offence includes the offence of assaulting a police officer contrary to s 189A of the Criminal Code. Three of the offences committed in 1993 in respect of which the appellant was found guilty in July 2004 were offences of assaulting police officers.

[14] Before the Magistrate in August 2004 the prosecutor argued that as the appellant had been found guilty in July 2004 of assaulting a police officer the Magistrate was obliged by s 78BA to order that the appellant serve a term of actual imprisonment or a term of imprisonment that was suspended partly but not wholly. Counsel for the appellant indicated he was not sure about the operation of s 78BA, but suggested that it was contrary to principle and unfair that the appellant should be subject to the operation of that section. Counsel pointed out that if in July 2004 the appellant had also pleaded guilty to the May 2004 assault, s 78BA would not have applied.

[15] During submissions the Magistrate indicated that he had heard such contentions on previous occasions, but was satisfied by reason of the "explicit nature" of the provision that there was no interest in the order of convictions and the section applied to the circumstances before his Worship. In his reasons for sentence, referring to s 78BA his Worship expressed the following view:

> "It is clear that Parliament, in passing that section thought that the courts were being unduly mild towards violent offenders. I can't see any other reason why such a provision would be passed and it is clear that Parliament intended that persons who come up a second time for violent offences, whatever order their offences are dealt with, whether their offences related to the dim and distant past, back to

> 1994 or preceding week, would have to be sent to gaol and do some actual time in gaol."

[16] When the appellant appeared before the Magistrate on 17 August 2004, as a matter of fact he had previously been found guilty of a violent offence. That previous finding of guilt occurred in July 2004. On that basis, read literally s 78BA of the Sentencing Act would apply. In my opinion, however, for the reasons that follow such a literal interpretation should not be given to s 78BA.

[17] The relevant common law principle of construction was explained by Hogarth J in *Ryszawa v Samuels* [1969] SASR 158. His Honour was concerned with pleas of guilty on the one occasion to a number of offences contrary to s 19 of the Apprentices Act (SA) 1950. Section 19 of that Act provided for a penalty not exceeding $2 for a first offence and, for any subsequent offence, a penalty not exceeding $10. Hogarth J observed that the Magistrate who imposed penalty:

> "probably read the section literally as authorising the higher maximum penalty for an offence committed on a day subsequent to the first offence, even though at the time of the commission of the subsequent offence no conviction had been recorded in respect of the first offence."

His Honour continued (159):

> "While a literal reading of the section would seem to justify this approach, it has been long established in other jurisdictions that a person cannot be convicted as for a second offence unless that offence was committed after the conviction for the earlier offence against the same law. See, for example, *Christie v Bricknell* [(1895) 21 VLR 71]; *O'Connor v Bini* [(1908) VLR 567]; *Farrington v*

Thomson [(1959) VR 286]; *O'Hara v Harrington* [(1962) Tas SR 165]; and *Joyce v Smith* [(1962) Tas SR (NC) 11]. These decisions stem from a principle laid down by Coke which has developed into a general principle in the interpretation of statutes that where the legislature imposes an increased penalty for a "second offence", that expression bears the technical meaning of "an offence committed after conviction of a first offence", unless there is some indication in the particular Act under review which raises an inference to the contrary."

[18] The principle laid down by Lord Coke to which Hogarth J referred in *Ryszawa* was explained by Burbury CJ in *O'Hara v Harrington* [1962] Tas SR 165 in the following terms (168):

> "Lord Coke, that great seventeenth century judicial defender of the rights of the individual, said over three centuries ago that a man may not lawfully be subjected to an increased statutory penalty as for a second offence unless he had deliberately broken the law again after being convicted and receiving punishment for a first breach of it (2 Inst 468). The law has been taken to be so settled ever since.
>
> This three century cannon of construction of penal provisions of this kind is broadly based on principle and does not depend upon the precise language used in a statute. It ought not to be excluded unless the Legislature has plainly said so."

[19] In *Ryszawa*, Hogarth J was concerned with multiple convictions recorded on the one occasion before a Magistrate. The principle of construction upon which his Honour relied is, however, a principle of construction of general application.

[20] The same view was taken by Mitchell J in *Samuels v Mackenzie* (1979) 23 SASR 595. On a case stated her Honour considered the applicability of a section in the Road Traffic Act 1961 (SA) which provided for increased penalties for second and subsequent offences. For that purpose the section

directed the court to take into account "any previous offence" for which the defendant had been convicted.

[21] In the circumstances before Mitchell J, the defendant was facing penalty for an offence committed on 21 July 1979 of which he was convicted on 29 August 1979. The issue as to whether that conviction was for a first or subsequent offence arose because several hours earlier on 29 August 1979 and in a different Court of Summary Jurisdiction, the defendant had pleaded guilty to an offence committed on 12 June 1979.

[22] In that context, Mitchell J cited with approval the remarks of Hogarth J in *Ryszawa* to which I have referred. Her Honour held that the same principle of construction applied unless a different construction was required by the Act in question. Mitchell J rejected the proposition that the Act required a different construction and held that the offence for which the defendant was convicted later on 29 August 1979 was a "first" offence for the purposes of the Road Traffic Act. The offence of 21 July 1979 was a "first" offence because, at the time that offence was committed, the offender had not been found guilty of the offence committed on 12 June 1979.

[23] Perry J applied the same principle in *Clark v Glover* (1992) 58 SASR 571. His Honour was concerned with offences under the Fisheries Act 1982 (SA) and provisions that provided for an increased penalty if the offender had previously been convicted of a prescribed offence.

[24] The consistent approach of single judges in South Australia was approved by the Full Court of that State in *Police v Nowak* (2000) 76 SASR 551. The Court was concerned with driving offences committed on 17 January and 26 March 1999. The Road Traffic Act 1961 (SA) provided for a scale of increasing penalties depending upon whether the offence was a first, second or subsequence offence. Section 47B(4) of the South Australian Act provided that for the purposes of determining whether an offence is a first, second or subsequent offence "any previous offence" against specified legislation "for which the defendant has been convicted will be taken into account ...". The Magistrate who convicted the respondent of both offences on the one occasion followed the single judge authorities to which I have referred and treated both offences as a first offence.

[25] On an appeal by the prosecution Doyle CJ, with whom Debelle and Bleby JJ agreed, acknowledged that the relevant provision could be read as the appellant read it. His Honour then referred to *Ryszawa v Samuels* and *Samuels v Mackenzie* and made the following observations (553 [13] – [15]):

> "I am reluctant to depart from such a long-settled interpretation of a statute, particularly when a similar approach has commended itself to courts in other States.
>
> No particular reason was advanced why the Court should depart from the settled interpretation, other than the fact that the meaning that it gives to s 47B is wrong, and does not advance the intention of Parliament to punish second and subsequent offences more severely. But the second of those reasons really assumes the correctness of the submission as to the true meaning of the provision.

> I accept that the submission that the settled view of s 47B is wrong has some force. But the submission is by no means compelling. The settled view also has merit. In my opinion there is no good reason to depart from the settled view, that view being reasonably open. Nor is the settled view productive of inconvenience. The rule that it lays down is clear. The interpretation advanced by the appellant could give rise to some anomalies. Offenders in a position like that of the present respondent might be tempted to defer the disposition of their "first offence", and to have the "second offence" dealt with first, to avoid the consequences of the meaning that the appellant would give to s 47B(4). Complications that might arise from that sort of manoeuvring are unlikely to arise under the settled meaning."

[26] The common law principle adopted in South Australia has also been applied in other States in the context of road traffic legislation: *Kennan v Mears* (unreported, Supreme Court of Victoria, delivered 25 January 1990; *Carter v Denham* [1984] WAR 123.

[27] Martin CJ had occasion to consider this issue in *Schluter v R* (1997) 6 NTLR 194. In the context of the compulsory sentencing regime previously contained in the Northern Territory Sentencing Act, Martin CJ adopted the approach reflected in the authorities to which I have referred. His Honour was concerned with the operation of the now repealed s 78A(2) of the Sentencing Act which provided as follows:

> "Where a court finds an offender guilty of a property offence and the offender has once before been found guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment for not less than 90 days."

[28] The appellant had pleaded guilty before a Magistrate to a number of property offences contained on two informations. After finding the appellant guilty of the offences contained on the first information, and

having imposed penalty for those offences, the Magistrate found the appellant guilty of the offences contained in the second information and sentenced the appellant to 90 days imprisonment in respect of those offences. The Magistrate determined that as he had already found the appellant guilty of a property offence in respect of the first information, s 78A(2) applied and the minimum penalty was 90 days imprisonment.

[29] Martin CJ found that for an offender to have been "once before" found guilty, it was necessary that the offender had been before a court "one time before". Although the circumstances before Martin CJ were different from those under consideration, his Honour made observations concerning the purposes of the legislation which are of general application (197):

> "It is clear that the parliamentary intention is that an offender should not be subjected to compulsory imprisonment pursuant to s 78A(2) or (3) unless the offender has first been dealt with by a court under s 78A(1) or (2) as the case may be. The purpose is obvious. Offenders are to realise that upon being brought to a court for a property offence or offences they will suffer a mandatory term of imprisonment, the minimum length of that term depending upon the number of times they have been previously before the court. Amongst the purposes of criminal sanctions are those to protect society to the extent necessary to achieve that purpose, and a sentence intended to deter an offender from committing offences of the same kind serves such a purpose ... .
>
> The theory is that the appropriate lesson will have been learnt on the first or subsequent occasion upon which the offender is dealt with by the court, and he or she, having suffered the punishment, will then be deterred from offending in like manner again. The objective of deterrence, based upon escalating periods of actual imprisonment, would be open to grave doubt, if, when before a court for the first time, an offender would be liable to incarceration for a period in excess of that applicable for a first finding of guilt, simply because he or she then stood charged with more than one property offence

> which happened to be joined on separate informations. The justification for increasing the term of imprisonment on the second finding of guilt would be missing as the offender would not have been previously subjected to punishment aimed at deterrence. There would be no opportunity for the multiple offender, not previously charged, to become aware of the certainty of the severity of punishment for the proscribed criminal behaviour.
>
> If it be right that imprisonment is a deterrent for offending, then it could not have been the intention of the parliament that an offender should feel the full weight of a mandatory term of compulsory imprisonment, unless the offender had first passed through the previous stage of punishment." (citation omitted).

[30] The decision of Martin CJ in *Schluter* was delivered on 21 August 1997. In January 1998 Kearney J was required in *Turbitt v Pryce* (unreported, delivered 21 January 1998) to consider offences against the Domestic Violence Act ("the DVA"). Section 10(1)(A) provided for mandatory imprisonment for a second or subsequent offence in the following terms:

> "(1A) Notwithstanding the Sentencing Act, where a person is found guilty of a second or subsequent offence against subs (1), the court shall sentence the person to imprisonment for not less than seven days but not more than six months and shall not make any other order if its effect would be to release the offender from the requirement to actually serve the term of imprisonment."

[31] The offender had committed two offences in November 1996, but convictions for those offences did not occur until 10 October 1997. In the interim, on 26 March 1997 the offender committed another offence, the conviction for which occurred on 10 October 1997 minutes after the convictions for the offences that were committed in November 1996. Kearney J adopted the canon of construction as explained by Burbury CJ in *O'Hara v Harrington* which is the construction adopted by the authorities to

which I have referred. His Honour discussed the decision of Martin CJ in *Schluter* and concluded that the thrust of the Chief Justice's reasoning was wholly consistent with that canon of construction.

[32] In *D v Gokel* (1998) 123 NTR 1, a decision delivered in May 1998, Angel J declined to follow the decision of Martin CJ in *Schluter*.

[33] The appellant in *D v Gokel* unlawfully used a motor vehicle on two occasions on 14 January 1998. She appeared before a Magistrate on 20 January 1998 and pleaded guilty. Sentencing was adjourned.

[34] Unbeknown to the prosecuting authorities and the Magistrate, the appellant had previously committed the offence of unlawfully using a motor vehicle on 28 December 1997. That offence came to light in February 1998 during an interview between the appellant and the police. On 13 March 1998 the appellant came before the Magistrate in respect of the January offences. On that occasion she pleaded guilty to the December offence and was sentenced to 28 days in detention.

[35] The issue for determination by Angel J was whether the previous findings of guilt made on 20 January 1998 in respect of the offences committed on 14 January 1998 required the Magistrate to impose detention for the December 1997 offence (notwithstanding that when the appellant committed the December offence she had not previously been convicted of the same offence). The relevant section was the now repealed s 53AE(2) of the Juvenile Justice Act. That section provided as follows:

"Division 3 – Repeat Property Offenders

Subdivision 1 – Compulsory Detention

53AE.SENTENCING OF REPEAT PROPERTY OFFENDERS WHO HAVE ATTAINED THE AGE OF 15 YEARS

(1) In this section, "juvenile" means a juvenile who has attained the age of 15 years.

(2) Where the Court finds a juvenile guilty of a property offence and the juvenile has once or more before been found guilty of a property offence, the Court shall record a conviction and order the juvenile to be detained at a detention centre for not less than 28 days.

(3) Where a juvenile is found guilty of more than one property offence specified in the same information, complaint or indictment, the findings of guilt are, for the purposes of this section, to be taken as a single finding of guilt, whether or not all the offences are the same.

(4) Where a juvenile is found guilty of more than one property offence as part of a single criminal enterprise, all the property offences are together a single property offence for the purposes of this section, whether or not the offences are the same.

(5) Where a juvenile is found guilty of a property offence, the offence is to be taken into account for the purposes of subsection (2) whether it was committed before or after the property offence in respect of which the juvenile is before the Court."

[36] Counsel for the offender relied upon the decision of Martin CJ in *Schluter* in submitting to Angel J that, for the purposes of imposing sentence in respect of the December offence for which the offender was convicted in March 1998, the findings of guilt on 20 January 1998 in respect of the offences committed on 14 January 1998 did not fall within the phrase "the juvenile has once or more before been found guilty of a property offence". After citing the remarks of Martin CJ to which I have referred, Angel J made the

following observations and declined to adopt the reasoning of Martin CJ (p 4 and 5):

> "The genesis of the learned Chief Justice's ruling appears to have been on agreement between counsel for the parties before him: see, at 196, 197.
>
> However, with all due respect for the opinion of the learned Chief Justice the language used in s 78A is simply not capable of supporting an interpretation that it is the appearance before the court and a finding of guilt *on a previous day* which invokes subs (2). All that needs to be established before that subsection is invoked is that "the offender has once before been found guilty of a property offence". Those words are unambiguous. The subsection does not in any way qualify the prerequisite of a prior finding of guilt by specifying that such a finding must have been made on a previous day. Once there has been a prior finding of guilt of a property offence, irrespective of the length of any lapse in time between those findings, the subsection applies. What is more, the legislature has chosen a finding of guilt as the event triggering the subsection rather than conviction or sentencing. The legislature must be taken to be aware of not only the discrete steps making up the criminal process, but also that those steps are not necessarily taken in the one hearing.
>
> Furthermore, the learned Chief Justice identified the purpose of s 78A as being one of teaching a first, or second offender, a lesson by providing for an escalating sentencing regime, thus deterring him from offending again. Such a purpose is inconsistent with subs (6) which specifically provides that the chronological order in which the offences were committed is irrelevant for the purposes of the section. Parliament has expressly provided that where an offender has committed a property offence before another property offence, and a finding of guilt has been made in relation to the one occurring later in time, the subsequent finding of guilt in relation to the offence occurring earlier in time is capable of invoking subs (2). The sentencing regime, when operating by virtue of subs (6), can therefore not be said to be teaching the offender a lesson, because the earlier offence had already been committed when he was sentenced in respect of the later offence. Rather, the overall purpose of the section is to punish and deter multiple property offending, and parliament has dictated the number of property offences of which an accused has been found guilty in the past as the factor dictating the minimum sentence.

An indication of the legislature's awareness of the wide scope of subs (2) is the inclusion of subss (4) and (5). It is apparent that subss (2) and (3) operate upon consecutive findings of guilt where a number of property offences are charged on the same complaint, information or indictment and where a number of property offences had been committed as part of a single criminal enterprise.

There is no reason why this view in relation to the Sentencing Act should not apply with equal force to s 53AE(2) and 53AE(3) of the Juvenile Justice Act. The provisions are in pari materia. There is no material difference between the meanings of the phrases "has once or more before been found guilty" and "once before been found guilty". Therefore, the instant a juvenile has been found guilty of a property offence he or she is immediately exposed to the mandatory sentence of detention contained in subs (2).

It is true that this construction of the two Acts has the effect of exposing an offender to significant terms of actual imprisonment or detention where they are found guilty of two or more property offences, charged, for whatever reason, in separate complaints, informations or indictments, irrespective of whether they are heard together or on separate occasions. However, the language of the legislation is clear and without ambiguity and it is therefore the duty of this court to give effect to it. That this may leave offenders at the mercy of the manner of prosecution is to be regretted, but the language of the section is not, in my view, capable of carrying any other construction. As Lord Macnaghten said in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 118:

> Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the legislation."

[37] The difference of opinion between Martin CJ and Angel J was brought to the attention of Mildren J in *R v Hallam* (unreported, delivered 17 September

1998). Ultimately his Honour was not required to determine which reasoning was correct as he decided the issue before him on the basis of the particular statutory provisions under consideration. Nevertheless, Mildren J made an observation tending to suggest that he preferred the reasoning of Martin CJ. His Honour then added that he expressed no final opinion as the point did not arise in the matter under consideration.

[38] In *Davis v Howley* (2003) NTSC 6, Thomas J was concerned with the operation of s 39 of the Traffic Act which provided for an increasing scale of penalties according to whether the offence was a first, second or subsequent offence. Her Honour reached the view that the principles enunciated by Martin CJ in *Schluter* applied to the provision under consideration. It must be recognised, however, that the wording of s 39 of the Traffic Act was quite different from the wording under consideration in *Schluter* and *D v Gokel.*

[39] The proper interpretation of all the provisions that have been considered in the authorities to which I have referred was governed by the wording of the legislation and the context in which that wording appeared. Notwithstanding the differences between the various provisions, however, the principle of construction described by Burbury CJ in *O'Hara v Harrington* as emanating from Lord Coke is a principle of general application which has been consistently applied in numerous authorities. The critical question is whether the Legislature intended to displace that principle by the enactment of s 78BA.

[40] Section 78BA of the Sentencing Act has the ultimate purpose of protection of the public. In achieving that purpose, the deterrent aspect of which Martin CJ spoke is particularly important. The Legislature intended that an offender found guilty of and penalised for a violent offence should know that if the offender subsequently commits another violent offence, an actual term of imprisonment to be served must be imposed. That knowledge and the deterrent effect of it cannot exist if the second offence is committed before the offender has been found guilty of and penalised for the first offence.

[41] In my opinion the rule of construction to which I have referred has not been displaced. The Legislature cannot have intended that an offender who commits a second offence before being found guilty of the first offence should suffer the consequence of a mandatory term of imprisonment. The Legislature intended that such a consequence would follow only if an offender commits a second offence after being found guilty and sentenced in respect of the first offence. If an offender commits a second offence before being found guilty and sentenced in respect of a first offence, while the fact of the first offence remains a relevant fact when sentencing for the second offence, the mandatory provision of s 78BA does not apply.

[42] My view as to the intention of the Legislature is confirmed by the Second Reading Speech of the Deputy Chief Minister upon the introduction of the amendment which introduced s 78BA. In introducing the amendment, the Deputy Chief Minister made the following observations:

> "Where an adult offender is sentenced by a court for a second or subsequent time for a violent offence under the Criminal Code, the court must sentence the person to a period of imprisonment, some part of which must actually be served. In contrast to sexual offences, the amendments allow an offender one chance if he or she commits a violent offence, but one chance only. ... An offender who has already been found guilty of a violent offence *is therefore warned that if he or she commits another violent offence, he or she will go to gaol*" (my emphasis).

[43] The concept of a warning carries with it an assumption that an offender has been found guilty and sentenced before committing the second offence. It is after a finding of guilt and the imposition of sentence that an offender is on notice that a second offence will be met with harsher punishment. This is the purpose of the legislation and, in particular, the purpose of s 78BA. In the light of the rule of construction to which I have referred, an interpretation of s 78BA should be adopted that achieves this purpose.

[44] My view as to the proper construction of s 78BA is confirmed upon consideration of s 62A of the Interpretation Act. That section provides as follows:

> "62A **Regard to be had to purpose or object of Act**
>
> In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object"

[45] As I have said, in my view the literal approach adopted by Angel J would not promote the purpose or object of the legislation and the approach of Martin CJ is to be preferred.

[46] For these reasons, in my opinion the decision of Angel J in *D v* Gokel is incorrect and should be overruled. It follows that the Magistrate erred in determining that s 78BA required his Worship to order that the appellant serve a term of actual imprisonment or a term of imprisonment that was suspended partly but not wholly. This error was a significant factor in the exercise of the sentencing discretion and, therefore, the sentencing discretion miscarried. In these circumstances it is appropriate that this Court exercise the sentencing discretion afresh.

[47] Physical violence of the type perpetrated by the appellant is all too common. Somewhere in the psychological makeup of male persons who inflict physical violence upon female partners is either a weakness which allows such persons to give in to impulses of anger or a conscious or subconscious belief that striking a female partner is, in some circumstances, permissible and justified. Whatever be the root cause, over many years the courts in the Northern Territory have been at pains to repeatedly emphasise that such violence is not justified and will not be tolerated by the courts. Unfortunately, the prevalence of this type of offence demonstrates that the message has not been getting through. General deterrence is a matter of particular importance.

[48] Until late 2003, the appellant had not committed any offences. He has had a good work and sporting record. It appears that his offending has occurred in the context of a break down of his relationship with the victim which was emotionally traumatic for him. After his arrest on 3 May 2004 the appellant

spent 15 days in gaol before he was bailed into the CAAPS programme. That incarceration was a massive shock to the appellant who, in the words of his counsel, "threw himself" into the CAAPS programme. In a real and practical sense, as a consequence of the violence that he perpetrated against his partner, a young man who had not previously been found guilty of any offence suddenly found himself in gaol for two weeks. This was a real punishment.

[49] There are further factors of significance. The appellant pleaded guilty and he successfully completed the three month home detention imposed as a condition of the suspension of the sentence ordered by a Magistrate on 7 July 2004. The Court was informed that the appellant has stayed out of trouble since completing that home detention. In these circumstances, I was satisfied that the appellant has demonstrated a positive and successful attitude to rehabilitation and that the respondent should be given the further opportunity of continuing with his rehabilitation without the interruption of a period of custody.

[50] In arriving at this decision, I was conscious of the importance of general deterrence in the sentencing process when crimes of violence are committed. If the sentencing process had not been attended by the error with respect to the application of s 78BA, I would not have interfered with the sentence. Although the sentence of four months imprisonment was a sentence at the upper end of the range for the particular crime and the particular circumstances of the appellant, it was not beyond the proper range of the

sentencing discretion. Similarly, I would not have interfered with the decision of the Magistrate to require that the appellant serve 14 days of that sentence. Those tempted to resort to physical violence, particularly against the more vulnerable members of our society, should understand that even if they are young offenders of previous good character they should expect to receive sentences of imprisonment including sentences to be served wholly or in part. Violence against women and children is far too prevalent and it is well within the range of the sentencing discretion to impose a sentence of imprisonment and require that part of the sentence be served.

[51] In the particular circumstances of the appellant, bearing in mind all the factors to which I have referred, including the fact that the appellant has spent a period in custody as a consequence of his offending and is continuing to make progress with his rehabilitation, I determined that the public interest is best served by imposing a short term of imprisonment and suspending the operation of that sentence immediately.

[52] For these reasons I reached the opinion that the appeal should be allowed and the sentence of three months imprisonment be imposed to be suspended immediately upon the conditions identified earlier in these reasons.

RileyJ:

[53] I agree with the Chief Justice.

Southwood J:

[54] I agree with the Reasons for Judgment of the Chief Justice.
