

R v Puruntatameri; R v Anthony [2007] NTSC 62

PARTIES: THE QUEEN

v

PURUNTATAMERI, Peter

FILE NO: 20427083

AND

THE QUEEN

v

ANTHONY, Jeremy

FILE NOS: 20326538/20716004

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY
EXERCISING TERRITORY
JURISDICTION

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JUDGMENT OF: MARTIN (BR) CJ

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CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE

Judgment and punishment – sentence – breach of suspended sentence – whether partial restoration of sentence discharges the order made at first instance – partial restoration does not discharge sentence or bring the operational period of sentence to an end.

Sentencing Act 1995 (NT), s 40, s 41, s 42, s 43 and s 53

Nettlefold Advertising Pty Ltd v Nettlefold Signs Pty Ltd (1998) 160 ALR 184, applied.

Walker v The Queen [2001] NTSC 69; *The Queen v Haji-Noor* [2007] NTCCA 7; *Roper v Dore* [2000] NTCA 2; *R v Buckman* (1988) 47 SASR 303; *Lawrie v The Queen* (1992) 59 SASR 400; *R v Holcroft* [1997] 2 Qd R 392; *R v Bowen* [1997] 2 Qd R 379; *R v Holley, ex parte Attorney-General* [1997] 2 Qd R 407; *R v Scott* [1993] QCA 280, considered.

REPRESENTATION:

Counsel:

Applicant:	R Coates
Respondent:	P Dwyer

Solicitors:

Applicant:	Office of the Director of Public Prosecutions
Respondent:	North Australian Aboriginal Justice Agency

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

R v Puruntatameri; R v Anthony [2007] NTSC 62
Nos. 20427083; 20326538/20716004

BETWEEN:

THE QUEEN
Applicant

AND:

PETER PURUNTATAMERI
Respondent

AND

THE QUEEN
Applicant

AND

JEREMY ANTHONY
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 9 November 2007)

Introduction

- [1] The Director of Public Prosecutions (“the Director”) has applied for an order restoring the unserved balance of partially suspended sentences imposed upon the respondents. Prior to the current applications, as a consequence of each respondent breaching conditions of suspension the periods held in suspense had been partially restored. Previous partial restoration having

occurred, a question has arisen as to whether the order of suspension survived the partial restoration or was discharged by that order.

- [2] For the reasons that follow, in my view the operational period continued to operate after partial restoration and the unserved balance of the period held in suspense remained in suspense on the conditions imposed by the sentencing Judge.

Background

- [3] Mr Anthony was convicted of Dangerous Act Causing Death. The learned sentencing Judge imposed a sentence of three years imprisonment, commencing 15 March 2005. His Honour ordered that the respondent be released after serving 12 months and that the balance of two years be suspended on conditions including supervision. Pursuant to s 40(6) of the Sentencing Act (“the Act”), his Honour fixed an operational period of the suspension of two years and four months commencing 21 December 2005.
- [4] The respondent was released in March 2006. On 15 August 2006 I found that the respondent had breached a condition of the suspension and ordered that three months of the balance of two years be restored from that date. The balance of one year and nine months remained suspended. In addition, I extended the operational period of the suspension by six months.
- [5] Having served the restored three months, the respondent was released from prison on 14 November 2006. Subsequently he again breached conditions of

suspension and the Director has applied for an order that the entire balance of one year and nine months be restored.

- [6] The respondent Mr Puruntatameri was sentenced to three years and nine months imprisonment for the crime of Sexual Intercourse without Consent. The learned sentencing Judge directed that the respondent be released after serving 18 months and that the balance of two years and three months be suspended on conditions including supervision. The operational period of the suspension was three years commencing 4 September 2006.
- [7] The respondent served 18 months and was released on 4 September 2006. Following a breach of conditions of suspension, on 4 October 2006 I restored six months of the balance of two years and three months leaving a balance of one year and nine months suspended. I also made an order purporting to extend the operational period of suspension to 18 months following release. In fact that order had the effect of reducing the operational period.
- [8] After serving the restored period of six months the appellant was released on 27 March 2007. In April 2007 he again breached the conditions of suspension and the Director has applied for an order that the entire balance of one year and nine months be restored.

Invalid Orders

- [9] As I have said, in the case of Mr Anthony on 15 August 2006 I not only restored three months of his sentence, but I purported to extend the

operational period by six months. On 15 August 2006, in addition to the application pursuant to s 43(5) of the Act for restoration of the sentence, an oral application was made during the hearing pursuant to s 42 to vary the conditions of suspension. It is now uncertain whether, in extending the operational period, I acted under the application for restoration or the application to vary the conditions. As the application for restoration under s 43(5) did not permit me both to restore part of the sentence and to extend the operational period, and as I may have imposed a sentence that was not in accordance with the law, pursuant to s 112 of the Act I reopened the proceedings. I deleted the order purporting to extend the operational period by six months and on the application to vary I re-imposed that order on the same terms.

- [10] In the case of Mr Puruntatameri, in addition to the application to restore the sentence, an oral application was made to vary the conditions of suspension. In those circumstances I possessed the power both to restore part of the sentence and to extend the operational period, but the order had the unintended effect of reducing the operational period. I reopened the proceedings and deleted that part of the order of 4 October 2006 purporting to extend the operational period.

Scheme of Legislation

- [11] The critical question for determination is whether, part of a sentence held in suspense having been restored and served, the court is precluded from

making a further order restoring partially or wholly the unserved balance of the original sentence. In other words, does partial restoration have the effect of discharging the order made at first instance thereby relieving the offender of liability to serve the outstanding balance? In order to answer this question, it is necessary to consider the legislative scheme concerning suspension of sentences of imprisonment and their restoration.

[12] In common with jurisdictions throughout Australia, the Act confers a number of powers upon a court following a finding that a person is guilty of an offence. These include not recording a conviction and ordering the release of the offender (s 7) and releasing the offender on a bond with or without recording a conviction (ss 11 – 13). The court is also empowered to impose fines (s 16) and community work orders (ss 33A – 36).

[13] The powers to which I have referred all concern the imposition of sentences that do not involve an order that the offender be imprisoned. Division 5 of the Act deals with custodial orders and the power to impose a suspended sentence of imprisonment is found in s 40:

“Division 5 – Custodial Orders

Subdivision 1 – Suspended Sentences of Imprisonment

40. Suspended sentence of imprisonment

(1) A court which sentences an offender to a term of imprisonment of not more than 5 years may make an order suspending the sentence where it is satisfied that it is desirable to do so in the circumstances.

(2) An order suspending a sentence of imprisonment may suspend the whole or a part of the sentence and the order may be subject to such conditions as the court thinks fit.

(3) A court shall not impose a suspended sentence of imprisonment unless the sentence of imprisonment, if unsuspended, would be appropriate in the circumstances having regard to this Act.

(4) Where an offender is convicted of more than one offence in the same proceeding, a court may only make an order suspending a sentence of imprisonment imposed by it where the aggregate period of imprisonment imposed in respect of all the offences does not exceed 5 years.

(5) A wholly suspended sentence of imprisonment shall be taken to be a sentence of imprisonment for the purposes of all enactments except an enactment providing for disqualification for, or loss of, office or the forfeiture or suspension of pensions or other benefits.

(6) A court shall specify in an order suspending a sentence of imprisonment a period of not more than 5 years from –

- (a) if the whole of the sentence is suspended – the date of the order; or
- (b) if a part of the sentence is suspended – the date specified in the order,

during which the offender is not to commit another offence punishable by imprisonment if the offender is to avoid being dealt with under section 43.

(7) Where an offender is ordered to serve the whole or part of a wholly suspended sentence of imprisonment under section 43, then, for the purposes of any enactment providing for disqualification for, or loss of, office or the forfeiture or suspension of pensions or other benefits, the offender shall be taken to have been sentenced to imprisonment on the day on which the order was made under that section.

(8) A partly suspended sentence of imprisonment shall be taken, for all purposes, to be a sentence of imprisonment for the whole term stated by the court.

(9) For the purposes of this section, a suspended sentence of imprisonment imposed on an offender on appeal shall be taken to have been imposed by the appellate court.

(10) Notwithstanding subsection (9), where a suspended sentence of imprisonment is imposed on an offender on appeal, an application under this subdivision that may be made to a court may be made to the court whose order was appealed against and that court may deal with the offender notwithstanding that the court is not the court that imposed the sentence.”

[14] The following points should be noted:

- The power to suspend a sentence of imprisonment is limited to sentences of not more than five years.
- The court may suspend the whole or only part of a sentence.
- The Legislature has directed the court not to impose a suspended sentence of imprisonment unless imprisonment, if unsuspended, would be the appropriate sentence.
- A wholly suspended sentence is taken to be a sentence of imprisonment for all purposes except for limited purposes concerned with disqualification for office or loss of certain benefits.
- A partially suspended sentence is, for all purposes, taken to be a sentence for the whole term.

- In suspending the sentence, the court is required to specify a period during which the offender is not to commit another offence punishable by imprisonment “if the offender is to avoid being dealt with under s 43” (“the operational period”).

[15] Section 41 provides that an offender is liable to serve a sentence held in suspense only if ordered to do so pursuant to s 43. Power to vary or cancel an order suspending a sentence is found in s 42.

[16] The consequences of breaches of orders suspending sentences of imprisonment are found in s 43. For present purposes, the relevant provisions of s 43 are as follows:

“43. Breach of order suspending sentence

- (1) Where –
 - (a) while an order suspending a sentence of imprisonment under section 40 is in force; or
 - (b) within the period of 2 years after the expiry of the operational period of a suspended sentence,

it appears to a prescribed person or a member of a prescribed class of persons that, during the operational period, the offender committed another offence against a law in force in the Territory or elsewhere that is punishable by imprisonment, he or she may apply, in the prescribed form, to the court which sentenced the offender for an order under this section.

- (2) Where it appears to a prescribed person, or a member of a prescribed class of persons, that an offender has breached a condition to which an order suspending a sentence imposed on the offender is subject, he or she may apply, whether or not the order is

still in force, in the prescribed form, to the court which sentenced the offender for an order under this section.

...

(4A) Where –

- (a) an offender appears before a court –
 - (i) while an order made by the court suspending a sentence of imprisonment under section 40 is in force in respect of the offender; or
 - (ii) within the period of 2 years after the expiry of the operational period of a suspended sentence imposed by the court on the offender; and
- (b) the court is satisfied that, during the operational period of the suspended sentence, the offender committed another offence against a law in force in the Territory or elsewhere that is punishable by imprisonment,

the court may of its own motion make an order under this section.

(4B) Where a court is satisfied that an offender who is before the court has breached a condition to which an order made by the court suspending a sentence imposed on the offender is subject, the court may of its own motion make an order under this section.

...

(5) Where –

- (a) on the hearing of an application under subsection (1) or on the hearing of its own motion under subsection (4A), a court is satisfied, by evidence on oath or by affidavit or by the admission of the offender, that, during the operational period of the suspended sentence, the offender committed another offence against a law in

force in the Territory or elsewhere that is punishable by imprisonment; or

- (b) on the hearing of an application under subsection (2) or on the hearing of its own motion under subsection (4B), a court is satisfied, by evidence on oath or by affidavit or by the admission of the offender, that the offender has breached a condition of the order,

the court may –

- (c) subject to subsection (7), restore the sentence or part sentence held in suspense and order the offender to serve it;
- (d) restore part of the sentence or part sentence held in suspense and order the offender to serve it;
- (e) in the case of a wholly suspended sentence, extend the operational period to a date after the date of the order suspending the sentence;
- (ea) in the case of a partially suspended sentence – extend the operational period to a date after the date specified in the order suspending the sentence; or
- (f) make no order with respect to the suspended sentence.

(6) Where a court orders an offender to serve a term of imprisonment that had been held in suspense, the term shall, unless the court otherwise orders, be served –

- (a) immediately; and
- (b) concurrently with any other term of imprisonment previously imposed on the offender by that or any other court.

(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.”

[17] The powers of the court upon an application to restore all or part of a sentence held in suspense are found in s 43(5). That provision confers a number of mutually exclusive powers where, during the operational period, an offender has breached a condition of suspension or committed an offence punishable by imprisonment. As the powers contained in s 43(5)(c) – (f) are mutually exclusive, pursuant to s 43(5) the court is not able both to restore part of a suspended sentence and to extend the operational period. I agree with the submissions of both counsel that the word “or” at the end of s 43(5)(ea) is used disjunctively. Section 43(5) is to be read as if the word “or” appeared at the end of each paragraph: *Pearce and Geddes*, Statutory Interpretation in Australia, 6th ed at [12.2] and [12.3]; *Nettlefold Advertising Pty Ltd v Nettlefold Signs Pty Ltd* (1998) 160 ALR 184 per Wilcox J at 200 and Tamberlin J at 201.

[18] The underlying policy of the legislative scheme is readily apparent. Section 43(7) directs the court to restore the entire period held in suspense unless the court is of the opinion that it would be “unjust” to restore that entire period “in view of all the circumstances which have arisen since the suspended sentence was imposed ...”. This directive recognises the determination by the sentencing court at first instance pursuant to s 40(3) that a sentence of imprisonment, if unsuspended, would be appropriate in the circumstances. It contains an underlying assumption that at the time the

head sentence was imposed it would not have been unjust to require the offender to serve the full period of that sentence. It also reflects a policy that an offender having been given a last opportunity to avoid custody, if during the operational period the offender breaches a condition of suspension or commits an offence punishable by imprisonment, the offender will ordinarily be required to serve the whole of the period suspended. The exception to that policy is enlivened only if the court is of the opinion that, by reason of circumstances arising since the suspended sentence was imposed, it would be unjust to require service of the entire period held in suspense.

[19] The same underlying policy is found in similar sentencing regimes in other jurisdictions. Speaking of similar provisions in South Australia, in *R v Buckman* (1988) 47 SASR 303 at 304 King CJ observed that there is a “clear legislative policy that in general a breach of a condition of a recognisance upon which a sentence has been suspended, should result in the offender serving the sentence which was suspended.” His Honour continued:

“A sentence of imprisonment is imposed and suspended only where imprisonment is fully merited but the court considers it appropriate to give the offender a last chance to avoid imprisonment by leading a law-abiding life. It is intended to be a sanction suspended over the head of the offender which is to be activated if there is a lapse into non-law-abiding ways. The court will not lightly interfere with the ordinary consequence of a breach of the recognisance.

Parliament has recognised, however, that in some cases the rigorous application of the ordinary consequences of breach can be oppressive and even unjust. ...”

[20] Subsequently in *Lawrie v The Queen* (1992) 59 SASR 400, Perry J emphasised the need to avoid undermining the integrity of the system of suspended sentences by excusing breaches too readily. His Honour said (403):

“To excuse or vary the consequences of the breach of the 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.”

[21] Although s 43(7) of the Act directs the court’s attention to a determination as to whether it would be unjust to restore the entire sentence “in view of all the circumstances which have arisen since the suspended sentence was imposed”, necessarily the court’s consideration is not limited solely to matters which have arisen since the suspended sentence was imposed. As Fitzgerald P pointed out in *R v Holcroft* [1997] 2 Qd R 392 at 394, those subsequent circumstances “cannot be considered in a vacuum, divorced from other matters which bear upon the justice or injustice of an order that the whole of the suspended sentence be served”. His Honour added:

“The period of suspended imprisonment involved is directly relevant to what is just, and other considerations, including the circumstances of the offence for which the sentence of suspended imprisonment was imposed and factors personal to the offender, might provide an essential context for a consideration of the circumstances which have arisen since the suspended sentence was imposed and a decision whether, in those circumstances, an order that the whole of the suspended imprisonment previously imposed be served would be unjust.”

[22] The same view was taken by the Northern Territory Court of Appeal in *Roper v Dore* [2000] NTCA 2. In rejecting a submission that s 43(7) precluded consideration of circumstances arising prior to the suspended sentence being imposed, the court observed [10]:

“... To limit the consideration of the Court to the circumstances subsequent to the imposing of the sentence in isolation would be to consider those matters in a contextual vacuum. It would be an artificial exercise. It is only by a consideration of the whole of the surrounding circumstances that the events arising since the sentence was imposed can be given full colour and meaning and their true impact understood.”

[23] The first step is to form a judgment whether it would be unjust to require service of the full period held in suspense. A positive judgment to that effect having been made, the legislation does not place any explicit constraints upon the discretionary determination as to which of the mutually exclusive powers contained in s 43(5)(d) - (f) should be exercised and in what manner.

Restoration – Nature of the Process

[24] In determining whether the legislative scheme permits a second restoration of a suspended sentence, it is appropriate to consider the nature of the exercise being undertaken. Is the court imposing a sentence and, if so, is that sentence being suspended for the purposes of the Act?

[25] At least for the purposes of s 53 of the Act, it is now settled that in restoring the whole or part of a sentence held in suspense the court is sentencing an offender to be imprisoned. A difference of view on this issue was settled by

a specially convened Court of Criminal Appeal comprised of five Judges in *The Queen v Haji-Noor* [2007] NTCCA 7. By a majority the Court held that s 53 applies in these circumstances and followed the earlier decision of the Full Court in *Walker v The Queen* [2001] NTSC 69. On a reference the Court in *Walker* determined that when a court restores a sentence or part of a sentence and orders an offender to serve a period of 12 months or longer, s 53(1) applies and the court has power to fix a non-parole period.

[26] Three relevant consequences flow from the decisions in *Walker* and *Haji-Noor* that s 53 applies when a suspended sentence is wholly or partly restored. First, as s 53 applies only “where a court sentences an offender to be imprisoned”, it follows that in restoring all or part of a sentence held in suspense, for the purposes of s 53 the court is sentencing an offender to be imprisoned. The court is not revisiting the head sentence nor sentencing for the original offending, but the order of restoration amounts to the imposition of a sentence of imprisonment for the purposes of s 53.

[27] Secondly, s 53 only applies if the sentence imposed is “not suspended in whole or in part”. It was held in *Walker* that s 53 applies when the court restores only part of a suspended sentence. For the purposes of s 53, therefore, when a court restores only part of a period held in suspense, notwithstanding that a balance of the original suspended period remains unserved, a court is not imposing a sentence that is suspended in whole or in part.

[28] In respect of the second conclusion, I note the view of Riley J in *Haji-Noor* to the contrary. His Honour considered that as s 53 could only apply in respect of a sentence “that is not suspended in whole or in part”, s 53 could only apply where “the whole of the sentence has been restored” [135]. A contrary view was taken by Mildren J at [93] – [95] and Southwood J at [199]. Thomas J did not address this specific question. However, as Mildren J pointed out at [95], single Judges and Magistrates are bound by *Walker* which unambiguously determined that s 53 applies to a sentence restored in part.

[29] The third consequence flowing from the decisions in *Walker* and *Haji-Noor* is that for the purposes of s 53, the sentence of imprisonment imposed is the period restored. If that period restored is 12 months or longer, a non-parole period is fixed by reference only to that period. For these purposes, the balance of the original sentence remaining unserved is not part of the sentence imposed and is ignored in fixing a non-parole period.

The Issue

[30] The issue as to the effect of an order of partial restoration upon liability to serve the balance was raised by Mildren J in *Haji-Noor*. Apparently the Director had submitted that where a court makes an order restoring only part of a suspended sentence, once the period restored had been served there is no power to order any further period to be served. Observing that at first he thought this would amount to a surprising conclusion “in that the balance of

the sentence seemed to have disappeared into thin air”, his Honour indicated he was inclined to the view that the submission of the Director was correct.

Mildren J explained why he was inclined to that view [95]:

“... It seems to me that the purpose of s 43(5)(d) was to enable the Court to take into account the factors that are referred to in s 43(7) namely that it would be unjust to restore the whole of the sentence ‘in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence’. No doubt those circumstances would include the nature of the conditions of the suspended sentence, the nature and gravity of the breach of the conditions, whether the breach amounted to the commission of another offence, the length of time during which the offender observed the conditions, any moral pressures upon the offender to commit the breach as well as other matters. It follows from this that when only a part sentence is restored, the effect of the order is that the balance of the head sentence will never fall to be served, that balance having been treated as having been served in the community. However it is not necessary to reach any final conclusion on this subject as it does not arise in this case and that issue has not been fully argued. I would prefer to deal with that matter should it arise at a later time. For the moment I note that *Walker v The Queen* is binding authority on single Judges and Magistrates that a non-parole period can be fixed in respect of a sentence which is only restored in part.”

[31] The other Judges in *Haji-Noor* did not deal with this issue.

Competing Considerations

[32] Having had an opportunity to reflect upon the scheme of the legislation and to consider interstate authorities, contrary to the position taken before Mildren J the Director submitted that the operational period continues in operation notwithstanding partial restoration of the suspended sentence. He contended that a partial restoration will only have the effect of discharging liability to serve the balance if the operational period has expired or will

expire prior to completion of service of the period restored. Counsel for the respondents supported the submissions of the Director.

[33] At the heart of the construction for which the Director contended is the proposition that notwithstanding partial restoration, the operational period continues in force. In these circumstances it was said that the balance remaining after partial restoration can be the subject of further restoration, partial or total, if a relevant breach occurs during the remaining term of the operational period. The Director relied heavily upon Queensland and Victorian authorities.

[34] In *R v Scott* [1993] QCA 280, in allowing an appeal against full restoration the majority of the Queensland Court of Appeal restored two years of a suspended sentence of three years and directed that the remaining period of the sentence at first instance, namely, one year, “continue to be suspended for the period ... fixed by the sentencing Judge”. The relevant provisions of the Queensland legislation were in terms very similar to s 43(5) of the Act. There is no suggestion in the report that the issue under consideration was raised.

[35] On 29 November 1996 the Queensland Court of Appeal delivered three judgments concerning suspension and restoration of sentences of imprisonment. In *R v Bowen* [1997] 2 Qd R 379 the offender breached a suspended sentence of 18 months and was ordered to serve the entire period. On appeal, the Court determined it would be unjust to require the offender

to serve the whole of the period held in suspense. The Court ordered that the offender serve eight months leaving a balance of 10 months outstanding.

Lee J observed (386):

“... The 10 months remainder of the suspended sentence continues for the balance of the three years operational period ...: *R v Scott* There appears to be no reason why under Queensland legislation, the balance should not be subject to further proceedings if a further relevant breach offence occurs.”

[36] Fryberg J also observed that the “remaining 10 months continues to be suspended during the balance of the operational period” (391). Davies JA agreed with the orders requiring service of eight months.

[37] A similar course was followed in *R v Holley, ex parte Attorney-General* [1997] 2 Qd R 407. By a majority the Court set aside an order that the offender serve the whole of the period of 18 months previously suspended and substituted an order that only four months be served. Referring to *Scott* and *Bowen*, Lee J noted that the balance of 14 months “remains until the operational period expires ... ” (421).

[38] The same approach was taken in *Holcroft*. In allowing an appeal against an order that the whole of a suspended sentence be served, the majority ordered that the appellant serve nine months of the suspended period. Fryberg J expressly confirmed that the “remaining 15 months should continue to be suspended for the balance of the operational period ...” (406).

[39] The Victorian authorities to which counsel referred are of little assistance: *Director of Public Prosecutions v Newman* [1998] 1 VR 715; *R v P.A.S.* [1999] 1 VR 892; *R v Bice* (2000) 2 VR 364. In making orders of partial restoration, no comment was made as to the unserved balance or the continuation of the operational period.

[40] Relying primarily upon the Queensland authorities, counsel submitted that there was no reason why the operational period should not survive partial restoration. Thus a subsequent breach during the currency of that period could result in a second restoration, be it partial or full.

[41] On the other hand, in the context of the legislative scheme as discussed, the following points are capable of pointing in the direction of the alternative conclusion to which Mildren J was inclined:

- If the court is of the opinion that it would be unjust to require the offender to serve the sentence held in suspense, the court is given a number of mutually exclusive options. The Legislature contemplates two possibilities, namely, service of part of the sentence held in suspense or no service of any period in which event the order of suspension continues in force unaltered or altered only by an extension of the operational period.
- If the court orders that the offender serve part of the period held in suspense:

- (i) The court is imposing a sentence of imprisonment for the purposes of s 53.
- (ii) The sentence being imposed is the period restored.
- (iii) The court is not imposing a sentence that is suspended in whole or in part.
- (iv) If the sentence imposed, being the period restored, is a period of 12 months or longer, the court is required to fix a non-parole period unless, by reason of the matters set out in s 53(1), it considers that the fixing of such a period is inappropriate.
- (v) A non-parole period is fixed by reference only to the sentence imposed, namely, the period restored. The non-parole period is not related in any way to the balance of the original sentence left unserved after partial restoration.
- (vi) If the court determines to restore part only of the period held in suspense, the court becomes engaged in a sentencing exercise, but an exercise limited to determining how much of the period held in suspense should be served. The court is not sentencing for the original offence. Nor is the court revisiting the head sentence.
- (vii) In this limited sentencing exercise, while the Legislature has not placed any explicit constraints upon the sentencing discretion, nevertheless it is an exercise conducted in the context of the

legislative scheme of suspended sentences. That scheme dictates that service of the entire sentence held in suspense would not have been unjust at the time sentence was imposed and should ordinarily serve following a breach. The unjust exception is only enlivened by circumstances which have arisen since the suspended sentence was imposed.

(viii) Bearing in mind the need to avoid undermining the integrity of the system of suspended sentences as discussed earlier in these reasons, the fundamental purpose of the legislative scheme supports a construction that requires the court in these circumstances to direct the offender to serve so much of the sentence held in suspense as would not be unjust. In other words, the amount to be served is reduced below the full balance held in suspense by only so much as is necessary to result in service of a period that would not be unjust.

(ix) In determining the period to be served that would not be unjust, the circumstances of the original offending and matters personal to the offender that existed at the time the original sentence was imposed provide the context in which the subsequent circumstances are assessed. However, it is by reference to those circumstances occurring after sentence was imposed that the court determines the period which it would not be unjust to require the offender to serve.

- Approached in this way, a construction is open that the Legislature intended that service of so much of the period held in suspense as would not be unjust would discharge liability to serve the full period held in suspense notwithstanding that the offender serves a lesser period. Service of the lesser period is treated as full discharge of liability to serve the entire outstanding balance because, at the time the order is made, it would be unjust to require service of that outstanding balance and the “just” lesser period is substituted for the “unjust” balance.
- The alternative construction that a partial restoration leaves the operational period in force and the unserved balance held in suspense could have the undesirable consequence that a period on parole occurs during the operational period. This would leave the offender subject to two regimes of “probation” with different consequences flowing from a single event breaching both regimes.

Conclusion

[42] Notwithstanding the competing considerations which are capable of leading to the conclusion that a partial restoration brings the operational period to an end, I have concluded that the construction for which counsel contended is the preferred construction. At the time of restoration, the original sentence stands as the appropriate sentence for the crime committed by the offender having regard to the circumstances that existed at the time sentence was imposed. For all relevant purposes a wholly or partly suspended

sentence is taken to be a sentence of imprisonment for the whole term: s 40(5) and (8). Absent restoration of the entire period held in suspense, policy considerations centred on the integrity and purposes of the system of suspended sentences and on ensuring an offender who breaches conditions of suspension remains subject to the original conditions of sentence for the entire period contemplated by the sentencing Judge, strongly favour a continuation of the operational period after partial restoration. Suspension is usually accompanied by conditions of supervision aimed at securing rehabilitation and, in the event of partial restoration, it would undermine the purpose of the original sentencing order if the operational period ceased to have effect. For example, in respect of a sentence of five years, wholly suspended, it is not difficult to envisage circumstances in which a court might determine that only a small proportion of the five year period held in suspense should be restored. If restoration of a short period had the effect of discharging the order of the sentencing Judge and of bringing the operational period to an end, the purpose of the original sentence would be largely defeated. In addition, the circumstances which rendered service of the entire period of five years unjust might cease to have effect upon partial restoration. Such a result would severely undermine the integrity of the system of suspended sentences and bring the system of criminal justice generally into disrepute.

[43] As to the possibility that an offender could be the subject of two regimes of probation, namely, an operational period and a period on parole, obviously

in most circumstances it would be desirable to avoid such a consequence. This can be achieved by declining to fix a non-parole period in respect of the sentence restored if the court is of the view that because fixing a non-parole period would have that undesirable consequence, the “circumstances of the particular case make the fixing of such a period inappropriate”:
s 53(1). On the other hand, if a lengthy period is restored, a court might determine that notwithstanding the future practical difficulties caused by the concurrent operation of two probation regimes, a non-parole period is required. While this possible consequence is less than desirable, the regimes are not entirely incompatible and I do not regard this consequence as a sufficient reason for preferring the alternative construction.

[44] In respect of both respondents, in my view the previous partial restorations did not discharge the sentencing orders or bring the operational periods to an end. Both applications are well founded.
