John v Littman [2009] NTSC 15

PARTIES:	JOHN, Darren Lee
	v
	LITTMAN, Andrew Kevyn
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 62 of 2008 (20815917)
DELIVERED:	8 APRIL 2009
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JUDGMENT OF:	MARTIN (BR) CJ
APPEAL FROM:	Mr V Luppino SM

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST SENTENCE

Breach of home detention order – restoration of sentence – whether Magistrate erred – effect of bail on home detention conditions whilst awaiting appeal – appeal allowed.

Criminal Code, s 410; *Justices Act*, s 163; *Sentencing Act*, Div 5, Pt 8, s5, s 7, s 40, s 47, s 48, s 53 and s 113.

O'Brien v Quin (2003) 13 NTLR 122, referred.

Arnold v Trenerry (1997) 118 NTR 1; *R v Amesz* (Unreported, Supreme Court of the Northern Territory, Riley J, 10 August 2007); *R v Bice* (2000) 2 VR 364; *R v Haji-Noor* (2007) 21 NTLR 127, discussed.

REPRESENTATION:

Counsel:

Appellant:	S Barlow
Respondent:	R Coates

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Director of Public Prosecutions

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

John v Littman [2009] NTSC 15
No. JA 62 of 2008 (20815917)

BETWEEN:

DARREN LEE JOHN
Appellant

AND:

ANDREW KEVYN LITTMAN
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 8 April 2009)

Introduction

[1] This is an appeal against an order restoring a sentence of three months imprisonment ("the original sentence") which had been suspended on condition that the appellant enter into a home detention order. The original sentence was imposed following the appellant's plea of guilty to three property offences occurring on 11 June 2008. The restoration was ordered following a second breach of the condition of home detention.

[2] The grounds of appeal seek to revisit the original sentence and the order of variation made following the first breach of the condition of home detention. As to the order of restoration following the second breach, the appellant

complains that the learned Stipendiary Magistrate erred in failing to properly consider the appellant's plea of guilty and alternatives to actual imprisonment. The grounds of appeal also complain that the Magistrate erred in finding that, following revocation, his Honour could not partially suspend the restored sentence and that the restoration of the three month sentence was manifestly excessive.

Facts

[3] The offending for which the original sentence was imposed occurred at about 3:30am on Wednesday, 11 June 2008. The appellant was drinking at the Vic Hotel in the Smith Street Mall but, due to his unruly behaviour, was asked to leave and not return. A short time later the appellant threw a rock through one of the display windows of Alfred's Novelty Shop located at 320 Knuckey Street. He entered the shop through the broken window and took $94.50 from the cash register together with a large eel skin bag, eight knives and a Mag light. The total value of stolen property was $1,455.20. The appellant then left the premises and, a short time later, was apprehended by police. Following apprehension, but prior to being conveyed to the watch house, the appellant informed police of the whereabouts of the stolen property and it was returned to the owner. The eel skin bag and the Mag light both sustained damage.

[4] At the time of the offence the appellant was aged 18 years. He was in full time employment. On 17 July 2008 the appellant pleaded guilty to the

offending and, through his counsel, offered to pay full restitution to the victim. The appellant had previously committed property offences when he was a juvenile, but had never spent time in custody.

[5] The Magistrate made the following observations:

> "This offence is too serious to warrant [a community work order] especially in light of your record. The remaining options then are a part suspended sentence, home detention order or an actual term of imprisonment.
>
> With those constraints I'm leaning towards a home detention order. I'm not prepared to do anything such as a rising of the court type suspended sentence that, although treated as a proper suspended sentence is reserved for situations where it's warranted where some sort of exceptional circumstances exist and as I said that is not the case in this matter.
>
> A fully suspended sentence is out of the question. An actual term of imprisonment would likely cost you your job and despite the fact that you've not had regard for your job which going on this spree, I'll have regard to that and use a disposition that is available to me which will result in you being able to keep that job."

[6] The Magistrate adjourned the matter to enable the appellant to be assessed as to his suitability to be placed on home detention. Sentence was imposed on 11 August 2008. After dealing with a number of earlier matters, his Honour imposed an aggregate sentence of three months imprisonment for the property offence and ordered that the sentence be suspended upon the appellant entering into home detention for the same period. His Honour noted that the appellant had been warned about breaches.

[7] Sentence having been imposed on 11 August 2008, ten days later on 21 August 2008 the appellant breached the home detention order by consuming alcohol. In relation to the breach, on 19 September 2008 the Magistrate extended the home detention order to six months. His Honour warned the appellant in the following terms:

> "Do not breach this order again; do not fail to pay the restitution. For either breach you will not get any further chances. Indeed you're getting one that you don't deserve today."

[8] On the same occasion that the home detention was extended to six months, the Magistrate ordered that the appellant pay total restitution of $1,174.95 to the victims of his offending. His Honour observed that the appellant was only avoiding serving three months imprisonment because his Honour preferred that the appellant work and pay restitution.

[9] On 3 November 2008, the appellant committed a further breach of his home detention order. The appellant again consumed alcohol. He admitted drinking beer after work.

[10] On 11 December 2008, the breach proceedings were heard by the same Magistrate. His Honour found that the appellant yielded "to temptation for drinks at work … You yielded to that temptation in face of a very strict warning given to you only a short time before." The Magistrate noted that a "not insignificant quantity of alcohol was consumed", but also acknowledged the force of mitigating factors, particularly the appellant's "vital" role in supporting his mother and five siblings under the age of 12

years and his full time employment as an on site supervisor of 22 workers for a scaffolding firm. The appellant's employer provided an extremely positive reference for the appellant.

[11] In considering the order to impose for the breach, the Magistrate said:

> "… if I could partly restore I would, because I think that's probably the level of deterrence which would be sufficient in your case, but my options are to either not restore or to restore and they're the only options I have from that point of view. And I think that in your case, given the circumstances; given the chance you were given, given the warning that you were given, which of course was even more magnified by the fact that you were asked to sign an acknowledgement about that, about not consuming alcohol at the time that you were dealt with for the first breach, but in light of that I think it's imperative that the integrity of home detention orders as a viable sentencing option has to be maintained and that involves a revocation of the order."
>
> … A third chance for a disposition not involving at least some period of incarceration for the breach is inappropriate, as such."

[12] The Magistrate than revoked the home detention order and restored the original three month sentence.

Right of Appeal

[13] Grounds 1 and 2 complain of errors by the Magistrate in the original sentencing process on 11 August 2008 and when dealing with the first breach. No application was made for leave to extend the time within which to appeal against the original sentence or the order made following the first breach. Rather, the appellant relied upon s 113 of the *Sentencing Act* arguing that upon an appeal against an order for variation or breach of a

previous sentencing order, an appellant is entitled to revisit both the original sentencing order and the order made in respect of the first breach.

[14] The right of appeal from an order of the Court of Summary Jurisdiction is found in s 163 of the *Justices Act*. That section provides for a right of appeal to the Supreme Court from an "order or adjudication of the Court" on a ground which involves "sentence".

[15] The word "sentence" is not defined for the purposes of the Justices Act. It is arguable that orders made in proceedings for a variation or breach of a sentencing order ("breach proceedings") fall within the ambit of s 163 but, other than a passing reference to s 163, this issue was not the subject of submissions and it is unnecessary to decide it. The right of appeal against orders made in breach proceedings is plainly provided by s 113 of the *Sentencing Act*.

[16] The right of appeal against a sentence imposed by the Supreme Court is found in s 410 of the *Criminal Code* ("the Code") which provides as follows:

> "A person found guilty on indictment may appeal to the Court:
>
> (a) …
>
> (b) …
>
> (c) with the leave of the Court against the sentence passed on the finding of guilt."

[17] The right of appeal pursuant to s 410 of the Code is limited to an appeal against the original sentence "passed on the finding of guilt". Section 410 does not extend to an appeal against orders made in breach proceedings. That right of appeal is provided by s 113 of the *Sentencing Act*.

[18] Section 113 comprises Pt 8 of the *Sentencing Act* and is as follows:

> "**PART 8 - APPEALS AGAINST SENTENCE IMPOSED ON VARIATION OR BREACH**
>
> **113 Appeal against sentence imposed on variation or breach**
>
> A person sentenced by a court in a proceeding for variation or breach of a sentencing order has a right of appeal against sentence as if -
>
> (a) the court had immediately before imposing it found the person guilty, or convicted the person, of the offence in respect of which the sentencing order was originally made; and
>
> (b) the sentence was a sentence imposed on that finding of guilt or conviction."

[19] In my opinion, the right of appeal provided in s 113 is a right limited to appealing against an order made in breach proceedings. The legislature did not intend to undermine the finality of sentencing orders by providing an offender with a right to revisit the original sentence when appealing only against an order made in breach proceedings. On the appellant's construction, if an earlier appeal against an original sentence pursuant to s 163 of the *Justices Act* or s 410 of the *Criminal Code* has been instituted and determined, nevertheless, on a subsequent appeal pursuant to s 113 of

the *Sentencing Act* in relation to an order made in breach proceedings, the appellant would be entitled to revisit the order made by the appellate court in respect of the original sentence.

[20] The scheme of the legislation and the ordinary meaning of the words in part 8 lead inevitably to the conclusion that s 113 does not extend in the manner for which the appellant contended. It is limited to appeals against orders made in breach proceedings.

[21] As I have said, the appellant has not sought leave to extend the time within which to appeal against the order made following the first breach which extended the home detention order to six months. There is no appeal on foot with respect to that order.

Plea of Guilty

[22] Ground 3 complains that in revoking the home detention order the Magistrate failed to properly consider and give effect to the appellant's plea of guilty to the breach of that order. Counsel relied upon s 5(2)(j) of the *Sentencing Act* which provides:

> "(2) In sentencing an offender, a court shall have regard to –
>
> …
>
> (j) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so …"

[23] The appellant accepted that there were no direct authorities to support his contention. However, counsel referred to the philosophy underlying the recognition of a plea of guilty in the exercise of the sentencing discretion at first instance which he submitted applied with equal force to orders made in breach proceedings. Counsel contended there should be no distinction between the approach taken when sentencing at first instance and making orders in breach proceedings. This includes giving an identified reduction in penalty as occurs when sentencing at first instance.

[24] Section 5 is a provision of general operation in sentencing proceedings. It is headed "Sentencing Guidelines" and subs (1) identifies the "only purposes for which sentences may be imposed on an offender …". Subsection (2) commences with the words "In sentencing an offender, a court shall have regard to …".

[25] As a matter of its place in the sentencing scheme, s 5 appears to be aimed more at sentencing at first instance than subsequent proceedings for a breach of a sentencing order. However, the purposes set out in s 5(1), and many of the factors set out in subs (2), are likely to have relevance to a determination of the appropriate order following a breach of an original sentencing order. It should be noted, however, that as a matter of strict application, s 5(2)(j) speaks of whether an offender pleaded guilty "to the offence". In breach proceedings, the offender does not plead guilty to an "offence". The offender acknowledges or admits a breach of the original sentencing order.

[26] Regardless of the operation of the *Sentencing Act*, and speaking generally, the fact that an offender has pleaded guilty to a breach of a sentencing order may be a factor to be taken into account. The plea assists in the administration of justice from a practical point of view and may reflect an attitude on the part of the offender which is relevant to a determination as to the appropriate order. It may reflect an acknowledgement of responsibility and amount to a positive indicator of rehabilitation.

[27] In proceedings for a breach of a home detention order or a suspension of a sentence not involving a home detention order, the court does not revisit the original sentence. It determines whether the home detention order is to be revoked or the sentence under suspension should be restored. In these types of situations there is simply no occasion to recognise a plea of guilty through a reduction of the sentence that would otherwise be imposed. However, this does not exclude the relevance of the plea of guilty in the way I have described. For example, a plea of guilty reflecting acceptance of responsibility might be a factor to be taken into account in determining whether to restore a suspended sentence or, if a period is restored, the length of that period.

[28] In the matter under consideration, rather than revoking the home detention order, pursuant to s 48(9) of the *Sentencing Act*, the Magistrate possessed the discretion to direct that the order continue in force and to vary the terms and conditions of the order. Many factors come into play in the determination of these questions, including the circumstances of the breach

and the appellant's progress or otherwise by way of rehabilitation. A plea of guilty may be a factor relevant to these questions. Whether the plea of guilty should be given any weight is a matter to be determined according to the circumstances of the particular case, but I emphasise that the way in which a plea of guilty operates in breach proceedings will usually be different from its operation when sentence is imposed at first instance. This will include the extent to which, from a practical point of view, the plea has assisted in the administration of justice. Most breach proceedings are relatively straightforward and proof of a breach would engage relatively little time and resources.

[29] In the breach proceedings before the Magistrate, no mention was made by counsel or the Magistrate of the appellant's plea of guilty. This is not surprising. It has not been the practice to urge courts in breach proceedings to have regard to an offender's plea of guilty. Rather, emphasis tends to be placed upon the circumstances of the breach and the offender's progress or otherwise by way of rehabilitation. In most cases, the fact of the plea of guilty would add little, if any, weight to the plea in mitigation.

[30] Although the Magistrate did not specifically refer to the plea of guilty, a reading of his Honour's remarks in their entirety demonstrates that his Honour was well aware of the appellant's good progress in his rehabilitation and of the positive matters of mitigation. It is clear that his Honour's favourable view of the appellant caused his Honour significant anxiety because he was facing the prospect of making an order that would require

the appellant to serve three months imprisonment. The fact of the plea did not add any weight to the matters of mitigation. Nor did it possess any significant weight in determining whether the home detention order should be revoked.

[31] In the particular circumstances, if the Magistrate did not take into account the plea of guilty that failure was of no consequence and no miscarriage of justice has occurred by reason of it. This ground of appeal is not made out.

Alternative to Revocation

[32] Ground 4 complains that the Magistrate failed to properly consider the alternative of extending the home detention order rather than revoking it. I do not agree. When regard is had to the sentencing remarks as a whole, it is apparent that the Magistrate gave anxious consideration to the possibility of not revoking the home detention order. His Honour had regard to all relevant circumstances and reached the view that declining to revoke the order and extending its period of operation was not an appropriate course. This view was open to his Honour. It was in the context of having decided that extension was not an appropriate disposition that his Honour spoke of the options being limited to restoring or not restoring the sentence.

[33] The views I have expressed are also relevant to ground 6 which is a complaint that the revocation of the home detention order and restoration of the three month sentence was a manifestly excessive result.

[34] As at 11 December 2008, the appellant had completed four months on home detention and he was facing an additional three months in prison. This dual aspect of the penalty is a necessary consequence of the sentencing scheme and the express words of s 48(6). Nevertheless, regard must be had to the overall result in determining whether that result is manifestly excessive. Notwithstanding significant matters of mitigation, against the background of the previous breach of the home detention order, in my opinion it was within the range of the Magistrate's discretion to order that the home detention order be revoked. As at the time of revocation on 11 December 2008, while the resulting total penalty was severe, it was not manifestly excessive.

Partial Suspension

[35] Ground 5 raises an issue not previously determined. The appellant submitted that when the Magistrate revoked the home detention order, notwithstanding that s 48(6)(b) provides that upon revocation "the offender must be imprisoned for the term suspended …", nevertheless the Magistrate retained a discretion to wholly or partially suspend the original sentence.

[36] Section 48 of the *Sentencing Act* sets out the circumstances in which an offender will breach a home detention order and the consequences of a breach. Subsection (6) is as follows:

> "(6) Where a court is satisfied that an offender has breached a home detention order, subject to subsection (9) -
>
> (a) if the order is still in force, the court must revoke the order; and

(b) whether the order is revoked under paragraph (a) or is otherwise no longer in force, the offender must be imprisoned for the term suspended by the court on the making of the order as if the order had never been made and despite any period that the offender may have served under the order."

[37] Section 48(9) identifies the circumstances in which the court may decline to revoke a home detention order and direct that the order continue in force with, or without, a variation of the conditions of the order. The terms of subs (9) are not relevant for present purposes.

[38] The first difficulty facing the appellant's construction is the sentencing scheme created by the legislation, coupled with the wording of s 48(6). The *Sentencing Act* provides a range of sentencing options which, in general terms, are set out in s 7. They range from proceeding without recording a conviction and dismissing the charge to recording a conviction and ordering that the offender serve a term of imprisonment. Two of the options provided by s 7 are to order that the offender serve a term of imprisonment that is suspended wholly or partly or is suspended on the offender entering into a home detention order.

[39] The two forms of suspended sentence are separate and distinct "sentencing regimes".[1] The power to impose a suspended sentence without home detention is found in Div 5(1) of the *Sentencing Act*. The provisions in subdiv (1) also deal with breaches of suspended sentences. Significantly, the specific powers conferred on a court to deal with a breach of a

[1] *O'Brien v Quin* (2003) 13 NTLR 122 at [6].

suspended sentence include restoring the whole or only part of the sentence held in suspense.

[40] Home detention orders are dealt with in subdiv (2) of Div 5. Section 44(1) provides that a court which sentences an offender to a term of imprisonment "may make an order suspending the sentence on the offender entering into a home detention order …". In other words, before a home detention order is made, the sentencing court has undertaken a sentencing exercise that involves determining that a sentence of imprisonment is required but should be suspended. The option of suspending the sentence imposed has not only been considered, it has been exercised.

[41] The consequences of a breach of a home detention order imposed as a condition of suspending a sentence of imprisonment are dealt with in s 48. Subsection (9) provides an option of allowing the home detention order to continue in force with or without variations of the conditions attached to the order. However, if the power contained in subs (9) is not exercised, and if the home detention order is still in force, subs (6) directs that the court "must revoke the order" and the offender "must be imprisoned for the term suspended by the court on the making of the [home detention] order as if the [home detention] order had never been made and despite any period that the offender may have served under the [home detention] order".

[42] The language of s 48(6) is plain. In the context of a previous order suspending service of a term of imprisonment, upon revocation of a home

detention order the offender "must be imprisoned" and imprisoned "for the term suspended". Further, the offender must be imprisoned for the term suspended as if the home detention order "had never been made" and "despite any period of home detention that the offender may have served under" that order. According to the plain meaning of the words in subs (6) in the context in which they appear and in the context of the sentencing scheme in its entirety, an offender having received the benefit of suspension of service of a term of imprisonment upon condition involving home detention, when that condition is breached and the court determines to revoke the home detention order, the only option available to the court is the direction of the legislature that the offender "must be imprisoned for the term suspended". Unlike the express provision in s 43 that enables a court to partially restore a sentence previously suspended without home detention, s 48(6) contains no express alternative to imprisonment for the term suspended.

[43] Notwithstanding these difficulties, counsel for the appellant contended that upon revocation the court is empowered to suspend service of the suspended term. The power to do so, argued counsel, is found in s 40(1) which is in the following terms:

> "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."

[44] The appellant submitted that when a home detention order is revoked and an offender is imprisoned for the term suspended, the court "sentences" the offender to a term of imprisonment for the purposes of s 40. This proposition is said to follow from the decision of the Northern Territory Court of Criminal Appeal in *R v Haji-Noor*[2] in which it was held that upon restoration of a suspended sentence (not involving a home detention order), a court imposes sentence for the purposes of s 53 of the *Sentencing Act*. Section 53 requires that if the sentence is for 12 months or longer, the court shall fix a non-parole period.

[45] The wording of s 53 directs that a non-parole period be fixed "where a court sentences an offender to be imprisoned" for 12 months or longer (that is not suspended in whole or in part). As Southwood J pointed out in *Haji-Noor*, "sentence" is not defined in the *Sentencing Act* and has a variety of meanings which depend upon the context in which the word is used. His Honour agreed with Riley J that the fixing of a non-parole period and the availability of parole "are integral parts of the sentencing options available to a court" and it would be "most unlikely that the legislature intended to deprive a prisoner of the possible benefit of parole where a court restores a sentence or a portion of a sentence that has been held in suspense".[3] Mildren J expressed the same view as to the intention of the legislature and Thomas J observed that the entitlement to consideration of the fixing of a

[2] *R v Haji-Noor* (2007) 21 NTLR 127.
[3] *R v Haji-Noor* (2007) 21 NTLR 127 at [197].

non-parole period "should not be taken away in the absence of a clear statement to that effect in the legislation".[4]

[46] In *R v Amesz*,[5] the offender was before Riley J in relation to a breach of a home detention order imposed as a condition of suspending a sentence of two years imprisonment. Although his Honour determined not to revoke the home detention order and ordered that it be extended by one month, his Honour considered the question of whether, should he revoke the order and the offender be imprisoned for two years, he should fix a non-parole period pursuant to s 53. In reaching the conclusion that a non-parole period should be fixed, after referring to the judgments in *Haji-Noor* and the policy of the legislation with respect to the fixing of non-parole periods, his Honour said:

> "However, the position is tolerably clear. In relation to a breach of the terms of a home detention order an offender 'must be imprisoned' as if the order had never been made. A court sentences the offender to be imprisoned 'for the term suspended by the court on the making of the order'. That being so, the parole provisions of the Act, and in particular section 53, have application. Whilst the Court cannot revisit the head sentence because of the terms of the section, a non parole period may be fixed in an appropriate case because the imposition of the sentence is the first occasion on which that question falls to be considered: *R v Bice* (2002) 2 VR 364 at paragraph 16."

[47] Riley J referred to the question as to whether the restored sentence of two years could be partially suspended pursuant to s 40 but, as the matter had not been fully considered, expressly declined to comment on whether such a course was available.

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[4] *R v Haji-Noor* (2007) 21 NTLR 127 at [106].
[5] *R v Amesz* (Unreported, Supreme Court of the Northern Territory, Riley J, 10 August 2007).

[48] In my opinion, when a court revokes a home detention order and s 48(6) operates to direct that the offender must be imprisoned for the term suspended, a court is not sentencing the offender for the purposes of s 40. First, s 48(6) does not direct the court to "sentence" the offender to the term suspended. It directs that the offender "must be imprisoned for the term suspended". In this context I note that s 53 operates to require the fixing of a non-parole period "where a court sentences an offender to be imprisoned" for 12 months or longer. Section 40 applies where a court "sentences an offender to a term of imprisonment" of not more than five years.

[49] Secondly, as Riley J pointed out in *Amesz*, when a suspended sentence is imposed, with or without a home detention order, no consideration is given to the question of a non-parole period because a non-parole period cannot be imposed when a sentence is suspended. In these circumstances, as the judgments in *Haji-Noor* reveal, given the importance of the non-parole period in the sentencing scheme, when a suspended sentence is restored there are strong policy considerations favouring a construction that permits a court to fix a non-parole period in respect of the restored sentence. The same considerations do not apply, however, to the question of whether a court can wholly or partially suspend a sentence restored following revocation of a home detention order. As I have said, the power to suspend has already been considered and exercised. In these circumstances there are strong policy considerations favouring a construction that does not permit a court to consider suspension, wholly or in part, for a second occasion. As

Callaway JA observed in *R v Bice*,[6] "The concept is a suspended sentence, not suspended sentencing".

[50] In *Bice*, the offender had been sentenced to a period of imprisonment which was wholly suspended. Following a breach of the suspended sentence, the Judge restored the sentence but ordered that the respondent serve it by way of intensive correction in the community ("an intensive correction order"). The Crown appealed on the basis that the order amounted to a variation of the sentence held in suspense and, once restored, necessarily the sentence had to be served in prison.

[51] In a judgment with which Ormiston JA and Smith AJA agreed, Callaway JA drew a distinction between fixing a non-parole period on restoration of a sentence and varying a sentence following breach of suspension by allowing service of the sentence through an intensive correction order. His Honour observed that on restoration of a sentence, although the head sentence cannot be revisited, "a non-parole period may be fixed in an appropriate case, because the restoration of the sentence is the first occasion on which that question falls to be considered".[7] By way of contrast, his Honour noted that if the task of sentencing at first instance is "properly performed, there is no occasion to perform it again or to reconsider the sentencing disposition

[6] (2000) 2 VR 364 at [18].
[7] *R v Bice* (2000) 2 VR 364 at par 18 at par 16

on breach". This was an explanation for why only limited options were provided for disposition following breach. His Honour continued:[8]

> "It would be anomalous if the judge could engage in resentencing to the limited extent of substituting a combined custody and treatment order or an intensive correction order but no other disposition."

[52] These observations apply with force to the circumstances under consideration. If the appellant's construction is correct, having revoked the home detention order and ordered imprisonment for the term previously suspended, the court could undertake a new sentencing exercise and, for the second time, fully suspend the sentence or partially suspend it. In the case of a suspended sentence not involving home detention, specific statutory authority is given to the court on revocation to partially restore the sentence held in suspense. No such statutory authority is given upon revocation of a home detention order. To permit the question of suspension to be revisited would be contrary to the very firm terms in which s 48(6) is expressed, namely, that the offender "must be imprisoned for the term suspended".

[53] In my opinion, the conclusion I have reached is supported a consideration of the statutory scheme which provides two distinct sentencing regimes. Section 40 is in subdiv (1) of Div 5, which subdiv is concerned with suspended sentences that do not involve a condition of home detention. As the Full Court observed in *O'Brien*, the separate and distinct sentencing

[8] *R v Bice* (2000) 2 VR 364 at [15] (citations omitted).

regimes found in subdivs (1) and (2) of Div 5 of the *Sentencing Act* "are not intended to operate together".

[54] In addition, the conclusion I have reached accords with the view expressed by Mildren J in *Arnold v Trenerry*[9] when his Honour referred to the need for care in fixing the length of the head sentence, suspended on home detention, because the offender might be required to serve the whole of that sentence. His Honour said:[10]

> "Nevertheless, because of the rigorous consequences of a revocation order, and the fact that except in the circumstances envisaged by s 48(9) a court is bound to revoke a home detention order upon proof of a breach of the order, the court imposing the order must be careful to ensure that the consequences of revocation are not too draconian, and this is best gauged by considering the length of the order, the length of the head sentence and the fact that the whole period of home detention can be served yet the offender may still be required to serve the whole of the sentence held in suspense. Where the period of home detention exceeds the head sentence, the larger the gap between the head sentence and the period of home detention, the more likely it is that the punishment will be excessive."

[55] For these reasons, once the Magistrate revoked the home detention order, in my opinion his Honour was left with no option but to order that the appellant be imprisoned for three months. The Magistrate did not possess the power to wholly or partially suspend the restored sentence.

[56] Upon the hearing of the appeal, the appellant was given leave to add a further ground of appeal that the Magistrate failed proper to consider the application to review the home detention order pursuant to s 47 of the

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[9] (1997) 118 NTR 1.
[10] *Arnold v Trenerry* (1997) 118 NTR 1 at 5.

Sentencing Act. Section 47 provides that on application by the Director of Correctional Services or the offender, "having regard to circumstances which have arisen or become known since the home detention order was made", the Court may:

> "(a) discharge the order;
>
> (b) revoke the order and –
>
> (i) confirm the sentence of imprisonment imposed on the offender; or
>
> (ii) order that the sentence of imprisonment be quashed and deal with the offender as if the offender had come before the court for sentence for the offence in respect of which the home detention order was made; or
>
> (c) vary the terms and conditions of the order including, subject to subsection (5), the period the order is to remain in force."

[57] At the conclusion of submissions before the Magistrate by counsel for the appellant, in substance the prosecutor submitted that his Honour should revoke the home detention order. Almost as an afterthought, counsel for the appellant sought to raise "one more matter" and submitted it was open to the Magistrate to review the home detention order under s 47 to determine "whether or not this order is entirely, the length of the order and the conditions of that order are entirely appropriate to this particular case". After discussion about the onerous nature of the order of home detention and the requirement that an offender not consume alcohol, the Magistrate stated that he would not consider an application for review under s 47.

[58] Counsel for the appellant did not invite the Magistrate to discharge the home detention order. The emphasis was on the possibility of variation in some way as to avoid restoration of the sentence. The Magistrate declined the application and I am unable to say that it was beyond the proper range of his Honour's sentencing discretion to do so.

Home Detention Bail

[59] For the reasons I have given, in my view the individual grounds of appeal are not made out. However, there is an added complication that arose following revocation of the home detention order when the appellant instituted the appeal to this Court. Immediately after instituting the appeal, the appellant applied for bail and was granted bail by the same Magistrate on condition that he continue to comply with the terms of the home detention order. In substance, therefore, although the home detention order was revoked on 11 December 2008, the appellant has continued to be subject to home detention and will continue to be on home detention until the disposal of this appeal.

[60] At the time of delivery of these reasons, the appellant will have served almost eight months on home detention. In other words, he will have served five months longer on home detention than the period that the Magistrate originally regarded as the appropriate penalty.

[61] Importantly, if the appellant's appeal is dismissed and the Magistrate's order of revocation of home detention stands, not only will the appellant have

served eight months on home detention, he will then be required to serve an additional period of three months imprisonment. This would result in manifestly excessive punishment. As Mildren J observed in *Arnold v Trenerry*:[11]

> "Where the period of home detention exceeds the head sentence, the larger the gap between the head sentence and the period of home detention, the more likely it is that the punishment will be excessive."

[62] Mildren J expressed that view in the context of his earlier observation to which I have referred that an offender might be required to serve the entire period of home detention and the whole of the sentence held in suspense. In the case of the appellant, by reason of the first extension of the period of home detention, coupled with the additional period on bail subject to home detention conditions, to use the expression of Mildren J, the consequences of revocation would be "too draconian".

[63] In these circumstances, although the individual grounds of appeal have not been made out, I have decided to take the exceptional course of allowing the appeal and setting aside the order of revocation. The Magistrate originally envisaged that service of three months home detention was sufficient punishment for the appellant's criminal conduct. In view of the first breach, his Honour was of the view that the period on home detention should be extended to six months. The appellant has served nearly eight months on home detention and, in all the circumstances, service of that period is more

[11] *Arnold v Trenerry* (1997) 118 NTR 1 at 5.

than ample punishment for the appellant's offending. In addition strong reasons exist for allowing the appellant to continue in his employment. Imprisoning the appellant now would be counterproductive to his rehabilitation and would undermine the primary purpose of protecting the public today and in the future.

[64] For these reasons, the appeal is allowed and the orders of the Magistrate revoking the home detention order and imprisoning the appellant are set aside. As there was an application by the appellant before the Magistrate for a review of the home detention order pursuant to s 47 of the *Sentencing Act*, I am able to act upon that application. This requires me to have regard to circumstances which have arisen since the home detention order was made, including the fact that the appellant has now been on home detention for almost eight months.

[65] In these circumstances, pursuant to s 47 of the *Sentencing Act*, the interests of the community and the interests of justice will best be served by discharging the home detention order.
