

**O'Brien v Quin**

**26 August 2003, 12 September 2003  
Martin CJ, Thomas & Riley JJ  
[2003] NTSC 99, 177 FLR 201**

The appellant pleaded guilty in the Court of Summary Jurisdiction (CSJ) to 4 counts of receiving property believing it to have been obtained by means of a crime. The CSJ imposed the following sentencing orders:

- (i) An aggregate term of imprisonment of 6 months suspended after 3 weeks. An operational period of 3 years from the date of the appellant's release was fixed.
- (ii) In addition, the appellant was to be subject to a home detention order (HDO) for 6 months from the date of his release.

The appellant appealed to the Supreme Court against severity of sentence. At the hearing of the appeal two further grounds were added, viz,

Ground 4

That the learned magistrate erred in imposing two sentences of imprisonment in an aggregate sentence, contrary to s 52 of the *Sentencing Act*; and

Ground 5

That the learned magistrate erred in imposing a sentence which was contrary to law in that neither s 40 nor s 44, nor any other provision of the *Sentencing Act*, authorised the partial suspension of the sentence of imprisonment upon condition that the appellant enter into a HDO.

As there already was a judgment of the Supreme Court which suggested that it was permissible to combine a partially suspended sentence with a HDO, the judge hearing the appeal referred it to the Full Court of the Supreme Court for determination pursuant to s.21 of the *Supreme Court Act*.

In the Full Court both parties submitted that the legislature intended suspended sentences as provided for in Subdivision 1 of Part 5 of the *Sentencing Act* (the Act) and HDOs as provided for in Subdivision 2 of Division 5 of the Act to be separate and distinct dispositions under the Act. In a unanimous judgment the court accepted these submissions as being correct. In upholding ground 5, the court noted that there were significant differences associated with the making and enforcement of the sentencing orders under consideration. The differences were most clearly seen when the consequences of a breach of an order under each Subdivision was considered.

When dealing with a breach of suspended sentence, the court is presented with a range of options including restoring the sentence in whole or in part, extending the operational period and making no order with respect to the suspended sentence. The consequences that flow from a breach of a HDO depend upon the nature and circumstances of the breach. Where an offender commits an offence against a law in force in the Territory or elsewhere during the term of the HDO, then the court "must

*revoke the order" and "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" (s. 48(6)).*

The Full Court concluded that if a court was permitted to impose both a suspended sentence with an operational period and a HDO, the offender would be subject to two separate and contradictory enforcement regimes, at least during the operation of the HDO. The Full Court questioned what would happen if the offender committed an act which was in breach of both orders.

In upholding ground 4, the Full Court held that s.52 of the Act permits a court to impose "*one term of imprisonment*" in respect of two or more offences joined in the same information, complaint or indictment. A partially suspended sentence of imprisonment is, by virtue of s. 40(8) of the Act, to be taken for all purposes to be a sentence of imprisonment. Similarly a fully suspended sentence of imprisonment coupled with a HDO is also a term of imprisonment. Section 52 permits the court to impose only one term of imprisonment in respect of all offences and, in proceeding as he did, the sentencing magistrate had erred in imposing an aggregate term of imprisonment which included two terms of imprisonment.

The sentences were quashed and the matter remitted to the CSJ to be dealt with according to law.