

The Queen v Burton [2003] NTSC 104

PARTIES: THE QUEEN

v

BURTON, Joe

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY EXERCISING TERRITORY
JURISDICTION

FILE NO: SCC 20300755

DELIVERED: 27 October 2003

HEARING DATES: 30 July 2003

JUDGMENT OF: MARTIN CJ

REPRESENTATION:

Counsel:

Appellant: S Geary
Respondent: M O'Reilly

Solicitors:

Appellant: DPP
Respondent: CAALAS

Judgment category classification: C

Judgment ID Number: mar0342

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

The Queen v Burton [2003] NTSC 104
No SCC 20300755

IN THE MATTER OF the Sentencing Act

AND IN THE MATTER OF a question of
law under s 112 of the Sentencing Act

BETWEEN:

THE QUEEN
Appellant

AND:

JOE BURTON
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 24 October 2003)

- [1] This is an application under s 112 of the Sentencing Act upon a submission that the court has imposed a sentence that is not in accordance with the law and seeking that the proceedings be re-opened.
- [2] It is submitted that there was an error of law in regard to the structuring of the sentence I imposed on the prisoner on 30 July 2003. At that time he was in custody in prison serving the balance of a term of imprisonment previously imposed. He had been released on parole but the parole order

had been revoked on 2 December 2002, during the parole period, for breach of parole conditions. He had 18 months to serve.

- [3] The offence for which he was sentenced on 31 July, a dangerous act with circumstances of aggravation, had been committed just a few days prior to the parole order being revoked on other grounds. For that he was sentenced to a term of imprisonment of 4 years and 6 months.
- [4] In the course of sentencing him, the question arose as to the law regarding the orders to be made concerning the service of the term for which he was then in prison and the new sentence. In the course of considering that question I erroneously referred to s 12 of the Parole of Prisoners Act. It had been repealed.
- [5] I also referred to s 51 of the Sentencing Act which provides as follows:

“Cumulative orders of imprisonment

(1) If an offender is –

- (a) serving, or has been sentenced to serve, a term of imprisonment for an offence; and
- (b) sentenced to serve another term of imprisonment for another offence,

the term of imprisonment for the other offence may be directed to start from the end of the term of imprisonment for the first offence or at an earlier date.

(2) Subsection (1) applies whether the term of imprisonment for the first offence is being served concurrently with or cumulatively on the term of imprisonment for another offence.”

[6] I also said that I would fix a non-parole period by reference to the total term of imprisonment to be served.

[7] It was ordered that the term of 4 years and 6 months commence from 2 September 2003 (some copies of the transcript wrongly record 2 September 2002), that is, earlier than the date upon which the term he was then serving was due to expire. I calculated the total time to be served at 5 years and 3 months, being 9 months of the term he was then serving plus the period of the sentence then imposed. I fixed a non-parole period of 3 years and 3 months.

[8] The prisoner contends that in addition to the error in referring to the repealed s 12 of the Parole of Prisoners Act, s 51 of the Sentencing Act has no application to the circumstances. It was put that the applicable provisions are those to be found in s 59:

“Order of service of sentences of imprisonment

(1) Where an offender has been sentenced to several terms of imprisonment in respect of any of which a non-parole period was fixed, the offender shall serve –

(a) the term or terms in respect of which a non-parole period was not fixed;

(b) the non-parole period; and

(c) unless and until released on parole, the balance of the term or terms after the end of the non-parole period,

in that order.”

- [9] I do not accept that s 59 applies. By its terms it operates where “several terms of imprisonment” are imposed. The word “several” means more than two (Oxford English Dictionary), the word “any” supports that interpretation. That is not this case.
- [10] I adhere to the view that s 51 Sentencing Act can apply. The prisoner was serving a term of imprisonment for an offence (s 51(1)(a)), being the balance of the term in respect to which parole had been revoked (see s 11 and s 14(2) Parole of Prisoners Act) and he was sentenced to serve another term of imprisonment for another offence, that was committed in November 2002 (s 51(1)(b)).
- [11] However, I consider that an error was made in the fixing of the non-parole period. The provisions of s 53 do not meet the situation. Under s 53(1) the non-parole period could only be fixed in respect of the sentence for the dangerous act, and s 53(2) does not apply because the sentence in respect of which he breached the parole order was imposed in the Court of Summary Jurisdiction and the order revoking parole was made in that court.
- [12] Accordingly, the partial cumulation of the term being served with the term of the fresh sentence leads to the result that the court was not authorised to fix a non-parole period. Further, in theory, at least, the Parole Board could

have released the prisoner prior to 2 September 2003 pursuant to s 13 of the Parole of Prisoners Act.

[13] The prisoner should not be deprived of the opportunity to be released on parole prior to the expiry of the sentence for the dangerous act. I consider that can only be achieved by revoking the order made in relation to the partial cumulation of the two terms and allowing s 50 of the Sentencing Act to run its course, that is, for the term of imprisonment he was then serving and the sentence imposed for the dangerous act to be served concurrently. It is then open to fix a non-parole period in respect of the sentence of 4 years and 6 months pursuant to s 53(1).

[14] If there had been no error in the sentences originally constructed, the term of 4 years and 6 months would have commenced from 2 September 2003. The non-parole period of 3 years and 3 months was fixed in relation to the term of imprisonment of 5 years and 3 months. An adjustment should now be made so that that period approximately relates to the term of 4 years and 6 months.

[15] The parties are agreed that although it was not raised before me when dealing with the prisoner for the dangerous act offence, a further adjustment should be made in favour of the prisoner by ordering that the sentence imposed in July 2003 should have been taken to have commenced on 5 June 2003. He had expected to be dealt with on that day in relation to the charge but the matter did not proceed on that day, through no fault of his.

ORDER

[16] The sentence imposed and the non-parole period fixed by this court on 31 July 2003 are revoked. In lieu thereof the prisoner is sentenced to imprisonment for a term of 4 years and 6 months in respect of the offence committed on 27 November 2002. That sentence is to be served concurrently with the term of imprisonment he is serving consequence upon the revocation of the Parole Order by the Parole Board. The period during which he will not be eligible to be released on parole is fixed at 2 years and 9 months. The sentence and non-parole period are taken to have commenced on 5 June 2003.
