

The Queen v Tyday [2006] NTSC 29

PARTIES: THE QUEEN

v

TYDAY, MARK THOMAS

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
APPELLATE JURISDICTION

FILE NO: Nos. SCC 20300981, 20300983,
20301263, 20301264, 20301266,
20301267, 20300982, 20219299 and
20301258

DELIVERED: 4 APRIL 2006

HEARING DATES: 30 MARCH 2006

JUDGMENT OF: ANGEL J

CATCHWORDS:

CRIMINAL LAW - SENTENCING - Application for an extension of time to re-open sentences of imprisonment – Court may re-open proceedings where sentence is not in accordance with the law or Court failed to impose a sentence that should have been imposed – Revocation of parole by subsequent convictions — Prisoner to serve term not served at time of release from parole - Court to take this into account in sentencing for subsequent convictions – s5(2)(p) and s112 Sentencing Act (NT).

REPRESENTATION:

Counsel:

Applicant: R Coates

Respondent: P. Dwyer

Solicitors:

Applicant: Director of Public Prosecutions

Respondent: North Australian Aboriginal Justice
Agency

Judgment category classification: B

Judgment ID Number: Ang200608

Number of pages: 8

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

The Queen v Tyday [2006] NTSC 29
Nos. SCC 20300981, 20300983, 20301263,
20301264, 20301266, 20301267, 20300982
20219299 and 20301258

BETWEEN:

THE QUEEN

Applicant

AND:

MARK THOMAS TYDAY

Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 4 April 2006)

- [1] This is an application by the Director of Public Prosecutions for an extension of time within which to re-open sentences of imprisonment pursuant to s 112 Sentencing Act (NT).
- [2] On 4 August 2004 the prisoner pleaded guilty to six counts of aggravated unlawful entry of commercial premises at night, one count of attempted aggravated unlawful entry of commercial premises at night, four counts of stealing, 3 counts of unlawful use of motor vehicles and two counts of unlawful damage.

[3] On 6 August 2004 the prisoner was sentenced to imprisonment for a total of seven years with a non-parole period of three years and six months backdated to take account of time spent in custody.

[4] As I said in the course of passing sentence:

“In summary, between 23 November 2002 and 22 December 2002, the prisoner committed six aggravated unlawful entry of commercial premises at night, one attempted aggravated unlawful entry of commercial premises at night, four counts of stealing (a total of \$64,455.80 worth of other people’s property), three counts of unlawful use of motor vehicles (causing in all \$78,581.85 loss to others), and two counts of unlawful damage totalling \$46,233.00.

In all, Tyday’s crimes of stealing, unlawful use of motor vehicles and unlawful damage, caused \$189,270.65 direct loss to others. Of course there are consequential losses and inconvenience as well.”

[5] The offences for which the prisoner was sentenced were committed whilst he was subject to a parole order under the Parole of Prisoners Act (NT). For reasons unexplained neither counsel for the Crown nor counsel for the prisoner brought that fact to the Court’s attention at the time of sentencing. The prisoner had previously been sentenced to a term of four years and ten months in relation to a number of offences including 14 unlawful entries and 15 stealing counts. He was released from prison on parole on 21 August 2001. Two years and three months of the head sentence was unserved at the time of his release on parole.

[6] By reason of the convictions and sentence passed in respect of the 2002 offences the parole order was deemed to be revoked: s 5(8) Parole of Prisoners Act (NT). Therefore, in accordance with s 64 Sentencing Act

(NT) the Court was required to order the prisoner to be imprisoned for the term that the prisoner had not served at the time he was released from prison on parole. On 6 August 2004 s 64 Sentencing Act (NT) required the Court to order the prisoner to be imprisoned for the term of two years and three months that he had not served at the time when he was released on parole, such term of two years and three months to commence at the expiration of the term of imprisonment passed with respect to the 2002 offences.

Furthermore, in fixing a head sentence in respect of the 2002 offences, in accordance with s 5(2)(p) Sentencing Act (NT) the Court had to take account of the fact that the prisoner was liable to serve the two years and three months because of the revocation of the parole order.

[7] The Court may re-open proceedings on the application of a party to the proceedings within 28 days after the sentence was imposed, or such further time as the Court allows: s 112(3)(b)(i) and (ii) Sentencing Act (NT). The Court may re-open proceedings where it has imposed a sentence that is not in accordance with the law or if it has failed to impose a sentence that the Court legally should have imposed: s 112(1) (a) and (b) Sentencing Act (NT).

[8] Both counsel for the Crown and the prisoner submitted the Court had power under s 112 to re-open the proceedings and counsel for the prisoner supported the Director of Public Prosecutions' application for an extension of time to do so. No excuse was proffered either as to why the Court was not informed of the outstanding sentence and revoked parole order or why

there had been such a delay in bringing the present application.

Nevertheless both counsel submitted that the application was warranted in order to do justice to the whole case and in particular justice to the prisoner. I notice that in the event the application to re-open is refused, the prisoner, having served his present sentence, would remain immediately liable to arrest upon a warrant issued pursuant to s 7 Parole of Prisoners Act (NT) to serve the outstanding two years and three months imprisonment. Counsel for the prisoner's support of the application is therefore understandable.

- [9] Section 112 Sentencing Act (NT) is a beneficial provision which should be given a broad interpretation: *Staats v The Queen* (1998) 123 NTR 16, at 26; *Melville v The Queen* (1999) 9 NTLR 29, at 43. In the present case the sentence was passed in error. It was passed in ignorance of the status of the prisoner and the legal consequences thereof which directly had a bearing on the appropriate sentence. If a Court passed a sentence upon a prisoner as an adult unacquainted with the fact the prisoner was a juvenile in my opinion the proceedings could be re-opened under s 112 Sentencing Act (NT). So here. The legal consequences flowing from the revocation of the parole order and the requirement of s 64(2) Sentencing Act (NT) that the prisoner be imprisoned for the term he had not served when released on parole and that that term be served cumulatively upon the other sentence – there being no discretion in the matter: *Wanambi* (1998) 143 FLR 216 (at 218) – amply justify re-opening the sentence passed on 6 August 2004.

- [10] Accordingly there will be an extension of time within which to bring the present application and the proceedings will be re-opened to correct the previous sentence in such manner as is required to take account of the revoked parole order.
- [11] Counsel agree that some discount or allowance should be made to take account of the fact that two years and three months is to be accumulated to any sentence imposed with respect to the 2002 offences. Whilst I agree with that submission there is also to be taken into account that the seven year net sentence passed with respect to the 2002 offences took no account of the fact that all the offending occurred in breach of a parole order. That circumstance must offset to some extent the discount allowed.
- [12] I shall not reiterate my former sentencing remarks. I simply note the gravity of the offending and the large number of individual offences involved, the bad prior record of the offender, and the fact the 2002 offending was all the more grave given the prisoner's extensive past criminal history: *Ziderman v Dental Council* [1976] 1 WLR 330 (PC) at 334A per Lord Diplock:

“ ... an offence which is committed by a person who has offended before is graver than a similar offence committed by a person who offends for the first time.”

See, also, *Veen (No 2)* (1988) 164 CLR 465 at 477–8 and *Mulholland* (1991) 1 NTLR 1 at 14.

[13] The 2002 offences were dealt with in two indictments, one dated 23 February 2004, the other dated 27 July 2004. In respect of each indictment I passed an aggregate sentence of three years and six months, to be served cumulatively, making a net head sentence of seven years imprisonment. I fixed a non-parole period of three years and six months. In the circumstances I will set aside those sentences and re-sentence the prisoner in respect of each indictment to three years imprisonment to be served cumulatively. That makes a net head sentence of six years imprisonment. To that is to be added the two years and three months unserved portion of the sentence at the time of his release on parole.

[14] There remains the question of fixing a non-parole period. Counsel for the Crown did not seek any increase in the non-parole period previously fixed, that is the period of three years and six months. Counsel for the prisoner did not submit that the non-parole period of three years and six months should be altered, either up or down. A question arose as to whether the fixing of a non-parole period pursuant to s 53 Sentencing Act (NT), by reason of s 54 of the Sentencing Act (NT), required a non-parole period of not less than 50% of the new sentence of six years imprisonment or 50% of the new period together with the accumulated two years and three months ordered to be served pursuant to s 64 Sentencing Act (NT), that is, 50% of eight years and three months. Some argument ensued as to whether Kearney J in *Wanambi* (supra) was correct in holding that an order under s 64 Sentencing Act (NT) was not the imposition of a sentence. I do not find it

necessary to decide the question. The mere fact no exercise of discretion is involved in making an order under s 64 does not, it seems to me, of itself mean no sentence is passed or imposed. Mandatory life imprisonment for murder is a sentence imposed albeit without the exercise of any discretion. However that may be, in the present case it is clear that s 57(1) Sentencing Act (NT) does not apply to the situation as the non-parole period fixed with respect to the prisoner's former offending had lapsed and the non-parole period fixed at the time of the imposition of the sentence in respect of the 2002 offences does not supercede any previous non-parole period.

[15] Contrary to my decision in *The Queen v Roy Carson* (SCC No 15 of 1994, transcript of proceedings 29 July 1994) the term of revoked parole should be included in the warrant of commitment as it is an integral part of the total effective sentence. Rule 81A.41 of the Supreme Court Rules provides that a warrant of commitment shall comply with form 81A-G. The term of revoked parole is part of the total effective period of imprisonment. It should therefore be included in the warrant of commitment which contains an entry advising the Sheriff and the officer in charge of the relevant correction centre of the total effective period of imprisonment.

[16] For these reasons there will be orders as follows:

1. Extend time within which to bring an application pursuant to s 112 Sentencing Act (NT) to re-open the sentences passed upon the prisoner on 6 August 2004.

2. Order re-opening of the proceedings.
3. Set aside the sentences and orders of 6 August 2004.
4. In respect of the indictment dated 23 February 2004 the prisoner is sentenced to three years imprisonment.
5. In respect of the indictment dated 27 July 2004 the prisoner is sentenced to three years imprisonment.
6. Direct that the two sentences of three years imprisonment be served cumulatively.
7. Pursuant to s 64 Sentencing Act (NT) order the prisoner to be imprisoned for a term of two years and three months to commence at the expiration of the sentences of imprisonment previously referred to.
8. Direct a non-parole period of three years and six months.
9. The net head sentence of eight years and three months imprisonment and the non-parole period of three years and six months are each backdated to 26 January 2003 to take account of time already spent in custody.