SULLIVAN v R.
RIGBY v R.

Court of Criminal Appeal of the Northern Territory of Australia

O'Leary CJ, Kearney and Maurice JJ.

5 May and 7 July 1987 at Darwin.

Criminal law - Appeal - Against sentence - Decision by court not to fix a non-parole period - When justified - Court to consider nature of offences and offender's antecedents - Relevance of remission system - Parole of Prisoners Act 1971 (NT): s.4(1) and (3).

Statute - Interpretation - Parole - Circumstances in which court not obliged to fix non-parole period - Court to consider nature of offences and offender's antecedents - Whether "and" disjunctive or conjunctive - Parole of Prisoners Act 1971 (NT): s. 4(3).

Cases considered:

Deakin v R. (1984) 54 ALR 765
Dickes (1983) 10 A. Crim. R. 88
Garlett v R. (1975) W.A.R. 129
Ugle v Ruthven (1974) W.A.R. 184

Cases followed:

Beck v R. (1984) W.A.R. 127
House v The King (1936) 55 C.L.R. 499
Power v R. (1974) 131 C.L.R. 623
R. v Paivinen (1985) 158 C.L.R. 489

Cases not followed:

R. v Bruce (1971) V.R. 656
R. v Rajacic (1973) V.R. 636

Cases referred to:

Camden Park Estate Pty. Ltd. v O'Toole 72 S.R. (N.S.W.) 188; [1969] 1 N.S.W.R. 784
Re the Licensing Ordinance (1968) 13 F.L.R. 143
R. v Chairman of the Parole Board; Ex parte Patterson (1986) 43 N.T.R. 13

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IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN
TERRITORY OF AUSTRALIA

No. CA 1 of 1987
No. CA 2 of 1987

ON APPEAL FROM THE SUPREME
COURT OF THE NORTHERN
TERRITORY OF AUSTRALIA

SCC No. 461 & 462 of 1986

BETWEEN:

MICHAEL BERNARD SULLIVAN

Appellant

AND:

THE QUEEN

Respondent

AND:

CRAIG BADEN PATRICK RIGBY

Appellant

AND:

THE QUEEN

Respondent

CORAM: O'LEARY CJ, KEARNEY and MAURICE JJ.

REASONS FOR JUDGMENT
(delivered 7 July 1987)

THE COURT: On 13 November 1986 the appellants pleaded guilty to 2 counts of unlawful entry at night with intent to steal and one count of stealing. They were sentenced by the Supreme Court to 3 years imprisonment on each count, the

sentences to be served concurrently and to commence from the day they were taken into custody: 3 September 1986. The sentencing judge declined to fix a non-parole period. From these sentences they seek leave to appeal, claiming 3 years was manifestly excessive in the circumstances and that they ought to have been given a chance of applying for release on parole. Both prisoners are in their late 30's and have known each other since they met at the Westbrook Boys Home in Queensland some 20 years ago. They are chronic drug abusers: Rigby includes heroin and Sullivan pethidine amongst the drugs to which he has been addicted in the past. Each has a long criminal record dating back to boyhood. Up until shortly before these offences, both had been working as prawn fishermen on vessels operating in the Gulf of Carpentaria.

The 3 offences arose out of the one transaction. On the evening of 1 September 1986 the appellants were drinking together at the Stella Maris Club, a licensed facility near the waterfront in Darwin apparently catering primarily for seamen. Sullivan had casual employment there as a doorman during daylight hours. Both had recently returned from the Gulf and spent all their money on what appears to have been a succession of drinking binges. On the evening in question they embarked on another drinking session at the Club. While there they decided to return

after it closed to steal more liquor for their own consumption. They left, apparently went to drink at a hotel, and returned sometime after midnight when the Club's premises were locked and unoccupied.

Sullivan gained access to the downstairs area of the premises after Rigby removed some metal louvres using a tyre lever. He passed out bottles of spirits and cartons of beer to Rigby. As well, one or other of them removed a can containing donations for the Club's Christmas party. The booty obtained thus far was placed in a plastic garbage container the two men found on the premises.

Realising they needed a vehicle to carry away what they had stolen, the appellants went up the street and caught a taxi to a female friend's place in the northern suburbs. They borrowed her car and returned to the Club. It was then decided to force entry into the upstairs section. This was done by levering off a padlock. Once inside, a storeroom door was broken open using a shovel. The appellants removed more alcohol as well as tobacco and money from a till from the upstairs area. This together with what had been taken from downstairs was placed in the borrowed car and the two men drove to Nakara. According to the indictment the stolen property consisted of 2 cartons of cigarette tobacco, 1 carton of cigarette papers,

approximately 10 cartons of beer, approximately 70 bottles of assorted spirits and about $200 in cash. The total value was approximately $2,100.00.

Little of the property was recovered. Some of the spirits were apparently sold, some given away and some consumed.

Sullivan's criminal record dates back to when he was 14. From 1963 to 1980 he was before various courts in the Eastern States on 22 separate occasions, usually being convicted on multiple counts ranging from vagrancy to break enter and steal and including several assaults on police. His most serious offence was committed in Queensland in about early 1977 when he broke into nightclub premises and stole $3,500 from a safe. On 8 February, 1977 he was sentenced to 3½ years imprisonment for this offence. He was released from the Stuart Creek Gaol on 30 October 1979. His last conviction was in May 1980 when he was sentenced to 3 months for selling cannabis. From the limited information available in the copy of his criminal record tendered to the sentencing judge, there is nothing to indicate that he has ever failed to respond to his parole (if granted) or breached the conditions of a bond.

Sullivan is an alcoholic; many of the offences he has committed over the years he has done so whilst under the influence of intoxicating liquor. Towards the end of 1985 he was admitted to a detoxification unit in Queensland and thereafter spent some weeks in a rehabilitation unit. He was diagnosed at the time as suffering from "poly drug dependence syndrome".

Rigby began offending when he was 16 at which age he was sent to the Westbrook Boys Home as an uncontrollable child. He has had numerous convictions for street offences, offences involving dishonesty and, more recently, drug offences. In 1981 he was before the Supreme Court on multiple charges involving heroin and cannabis. He was sentenced to 3 years imprisonment but his release was ordered after 6 months upon his entering into a bond to be of good behaviour for 2 years. It was a condition of this bond he submit to the supervision of the director of Banyan House and obey the rules of that institution. In October 1982 he was fined in Townsville for possessing cannabis and in the following months he was fined on a breathalyser charge in Darwin. Neither of these offences (or any subsequent) prompted the authorities to deal with him for breach of bond. From this it may be inferred (in the absence of a pre-sentence report) they were not considered sufficiently serious to warrant doing so. In June 1983 he

was sentenced in Queensland to 6 and 12 months hard labour respectively for possession of an unlicensed firearm and stealing. Nothing was before the sentencing judge relating to the facts and circumstances of these offences.

In September 1984 Rigby was given 3 months hard labour and probation for 2 years by the Cairns Magistrates Court for possessing heroin. The prisoner points to the significance of the fact that the Court then thought he was a suitable prospect for probation. His next and last series of offences were dealt with by the Townsville Magistrates Court in May 1985. They included possessing cannabis and a further breathalyser offence. The highest of the penalties imposed was 9 months hard labour.

The most substantial points Rigby makes in relation to his argument that a non-parole period should have been fixed is that apart from the stealing and unlicensed firearm offence in 1983, he has had no convictions for offences involving dishonesty since 1979, and, with the exception of one or two minor offences, all his convictions since then have been to do with drugs.

From their antecedent reports and criminal records no-one could disagree with the sentencing judge's spontaneous observation about the appellants: "(N)either

has had an auspicious background that's ever given them much of a chance in life."

Having pronounced the sentence of 3 years his Honour said: "In view of your previous records, I think it inappropriate to fix a non-parole period." This prompted Rigby to interject: "Excuse me, does that mean we've got no chance of parole?" According to the transcript, the following interchange then took place between his Honour and Rigby:

"HIS HONOUR: Well, your counsel didn't address me on parole. Do you want him to say something to me about parole?

RIGBY: Well, I understood that we had a (inaudible) system, you see?

HIS HONOUR: Just let me say this. You know that there's a third remission applicable in this Territory, do you? Did you know that?

RIGBY: Yes, sir.

HIS HONOUR: I think Mr. Rigby, I've got to leave it like that. The reality is that I sentence you to 2 years. I can't do better than that with your record and what's happened; otherwise, as I said before, I'm inviting an appeal. I'd almost force the Crown to appeal. The maximum for 2 of these offences is 14 years, and neither of you have got a good record. Now, I wouldn't be doing you a favour if I did any lower than that. Do you understand me?

RIGBY: Yes, Sir."

It was argued by the appellants that these remarks indicate that in fixing head sentences, his Honour took into account the fact that the prisoners would almost certainly be released after 2 years under the remission system operating in the Northern Territory. We find no substance in this submission; the sentencing judge's reference to the remission system was prompted by Rigby's question about parole, not the length of the head sentences. It is not uncommon for a judge after passing sentence to explain its effect by reference to the prisoner's eligibility for remissions. It does not follow from his having done so he has imposed a longer head sentence than he otherwise would, nor would we lightly infer a departure from well established principle that eligibility for remissions is not to be taken account of in determining the length of a sentence of imprisonment (R. v Paivinen (1985) 158 C.L.R. 489 at 494 to 495).

It was also submitted that the head sentences did not fall within the normal range appropriate for offences of this kind. We disagree. Although the learned sentencing judge quite properly treated them as one transaction, two separate sections of the premises were forcibly entered from outside by the prisoners, with a time interval of what must

have been at least 30 minutes - probably more - in between. They took cash as well as liquor and much more liquor than they could hope to consume. The second break-in could have had nothing to do with obtaining liquor to satisfy their immediate needs. As we have mentioned, both had long records for a variety of offences including offences of this sort.

Sub-sections 4(1) and 4(3) of the Parole of Prisoners Act provides:

> "4(1) Where a court sentences an offender to a term of imprisonment of 12 months or longer, or to terms of imprisonment that aggregate 12 months or longer, it shall specify a lesser term of imprisonment during which the offender so sentenced is not eligible to be released on parole in pursuance of this Act.
>
> ...
>
> (3) Sub-section (1) does not apply -
>
> (a) if the court considers that the nature of the offence or offences and the antecedents of the offender do not warrant the specifying of the lesser term of imprisonment; or
>
> (b) if the offender is sentenced to imprisonment for life."

In our view, these provisions are so structured as to create a prima facie obligation on the sentencing court to specify a non-parole period; it should not be declined except on substantial grounds of the character referred to in sub-section 4(3). In this case there was nothing about the nature of the offences to justify not fixing a non-parole period, nor do we understand the sentencing judge in taking the course he did to have relied upon the nature of the offences. He expressly founded himself upon the offenders' antecedents.

Section 4(3)(a) is similar to corresponding provisions in the parole legislation of Victoria, Western Australia and the Australian Capital Territory in that it applies when the Court considers that the nature of the offence and the offender's antecedents are such that the fixing of a non-parole period is not warranted. By way of contrast, in the corresponding New South Wales parole legislation of 1966 the word "or" appeared instead of "and"; accordingly, the Courts in that State could rely on either the nature of the offence or the antecedents as a basis for declining to fix a non-parole period. A question arises as to the effect of "and" in s.4(3)(a); it has not been previously considered in this jurisdiction.

Two cases dealing with the corresponding Victorian provision appear to indicate that in that State "and" may be read disjunctively so that, as in New South Wales, it is sufficient if only one of the two relevant factors warrants the non-fixing of a non-parole period. There is the dicta of the Full Court in R. v Bruce (1971) V.R. 656 at 657; and the views of Smith A.C.J. in R. v Rajacic (1973) V.R. 636 at 643 with which the other judges of the Full Court agreed.

In Western Australia the authorities are clear that "and" in the provision corresponding to s.4(3)(a) is conjunctive. However they differ as to its effect; there are two lines of authority. One line treats "and" as meaning "in addition to", so that consideration of the cumulative effect of the two factors (nature of the offence plus the antecedents) is required. The other line of authority treats "and" as meaning "side by side with", so that while both factors must be considered, each considered separately must warrant a conclusion that a non-parole period should not be fixed, before s.4(1) is excluded. Burt J. (as he then was) took the former view in May 1975 in Garlett v R. (1975) W.A.R. 129 at 130-1, and again in August 1983 in Dickes (1983) 10 A. Crim. R. 88 at 90. Jackson C.J. took the latter view in April 1974 in Ugle v Ruthven (1974) W.A.R. 184; and this view was also taken, definitively, by the Court of Criminal Appeal in

September 1983 in Beck v R. (1984) W.A.R. 127, and now represents the law in Western Australia. It may be that in May 1984 the High Court in Deakin v R. (1984) 54 ALR 765, by considering separately the independent effects of the two factors, and by not specifically assessing their cumulative effect, tacitly took the latter view, though that is far from clear; it is highly improbable, however, that the Court treated "and" as disjunctive.

While "and" may sometimes be read as "or", we think that to read it in that way in s.4(3)(a) would be to do violence to plain English; see the analysis of the usage of "and" by Blackburn J. in Re the Licensing Ordinance (1968) 13 F.L.R. 143 at 146-7. We consider that "and" in s.4(3)(a) has conjunctive effect. In the interests of comity and conformity of decision and for the reasons stated by the Court of Appeal in Camden Park Estate Pty. Ltd. v O'Toole 72 S.R. (N.S.W.) 188 at 190, we adopt the approach in Beck v R. (supra), as there are no relevant statutory differences between the Western Australian and Territory provisions.

On that approach the nature of the offence (including the circumstances of the particular case) must be considered and it must, independently of the antecedents factor, be such as to lead the Court to consider that a non-parole period should not be fixed, before s.4(1) is

excluded. In this case the nature of the offence was not considered, when the decision not to fix a non-parole period was reached. It follows that there was error in reaching that decision, in that a material consideration was not taken into account. In accordance with the approach indicated by House v The King (1936) 55 C.L.R. 499 the decision should be reviewed; on that review this Court may exercise its own discretion if it has the materials to enable it to do so. As the nature of the subject offence clearly does not warrant by itself a decision not to fix a non-parole period, that decision must be reversed and a non-parole period fixed.

Some aspects of the parole system in the Northern Territory need to be clearly understood. First, in fixing a non-parole period, the sentencing judge is required to determine that minimum period for which in his judgment, according to accepted principles of sentencing, the prisoner should be imprisoned: Power v R. (1974) 131 C.L.R. 623 at 627. Given that there will rarely, if ever, be a case (life sentences apart) where there is only one period of imprisonment which a proper exercise of sentencing discretion will permit, a decision not to fix a parole period will almost certainly involve a judgment that the prisoner would not respond to appropriate conditions of parole. Second, in practice parole is never automatically

granted in the Territory; rather, when the non-parole period comes to an end, the prisoner's case is considered in the light of all the then known circumstances to see if his release on parole is justified. Frequently the Parole Board has much more information before it concerning a prospective parolee than had the sentencing judge. Contrary to a submission advanced by the Crown, we think the less information a sentencing judge has about a prisoner's antecedents the less inclined he should be to decline to fix a non-parole period. Third, the Parole Board is empowered under s.5 of the Act to subject the parolee to whatever conditions it thinks appropriate during the period of his parole. Fourth, as the Full Court pointed out in R. v Chairman of the Parole Board; Ex parte Patterson (1986) 43 N.T.R. 13 (special leave to appeal has since been granted by the High Court), breach of the conditions of his parole means that the parolee is liable to go back to prison to serve out the remainder of his sentence, without any credit whatsoever for the period spent on conditional release.

In Sullivan's case it is difficult to see any justification in his antecedents for not specifying a non-parole period. He had not had a conviction for over 6 years and his only conviction in the preceding 9½ years was for selling what must have been a small amount of cannabis. This coupled with other factors: his recent employment, his

alcoholism, the original motive for breaking into the Stella Maris Club, his apparent intoxication at the time - all make a case where a proper exercise of the area of discretion left by sub-section 4(3) required the specification of a parole period.

In these circumstances, it seems to us that there is a reasonable basis for the appellants' professed apprehension that in failing to specify a non-parole period for either prisoner, the learned sentencing judge was influenced not only by their antecedents, but by the fact that the remission system would ensure their release after 2 years. Extending merciful leniency in fixing head sentences (as the learned sentencing judge appears to have considered he was doing) does not relieve the court of the obligation to determine a non-parole period. That being so, there has been established a basis for thinking that the discretion in Rigby's case miscarried as well. In our view, it accords neither with principle nor authority for the sentencing judge to decline to fix a non-parole period because of the prisoner's eligibility for release on account of remissions: see R. v Paivinen (above) at 495. The only relevance of the remission system to the non-parole period is that there should be sufficient gap between the expiration of the latter and the time when the prisoner is eligible for unconditional release to provide an incentive to take on the

burden of parole, and, possibly, to encourage good behaviour during the non-parole period. Of course, on at least two scores the community has a real interest in seeing that the parole system works: one is the saving of cost and the other the enhanced prospects of individual rehabilitation.

It is clear that the criminal records of both men, particularly in the recent past, have much to do with a heavy dependence on drugs of one sort or another - in this instance, alcohol. If their antecedents are to be considered in determining whether to deprive them of the chance of parole, they have to be looked at in this light. It is a harsh judgment to conclude they are and will forever remain beyond the reach of rehabilitative measures in this regard.

In our opinion, the success of the parole system in the Northern Territory makes it desirable in the interests of society that parole remain an option wherever possible. In Sullivan's case, we think it appropriate to fix a non-parole period of 15 months. To mark the significant differences in their respective criminal records over recent years, in Rigby's case we think 18 months an appropriate period. Neither appellant should assume that when he has served that portion of his sentence he will automatically be released on parole, that is not how the system works here.

The Court thinks it worthwhile pointing out that if no parole period is fixed, both men will almost certainly be released unconditionally after two years. With what we propose, the Parole Board may release Sullivan on appropriate conditions after 15 months and Rigby, 18 months. If this course commends itself to the Board, then it may require both men subject themselves to suitable supervision as a condition of their release for the balance of their 3 year head sentences. Those sentences will not be discharged until they have gone the full 3 years without offending again. The desirability of keeping this option open, in our judgment, is clear.

We give each of the appellants leave to appeal. The appeals against failure to specify a non-parole period are upheld and the Court fixes the periods already mentioned. Otherwise the appeals are dismissed and the sentences imposed by Nader J. are confirmed.