*R v Loader* [2002] NTSC 61

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| PARTIES: | THE QUEEN |
| | v |
| | DAVID KEVIN LOADER |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction |
| FILE NO: | (20110382) |
| DELIVERED: | 22 October 2002 |
| HEARING DATES: | 8 and 9 October 2002 |
| JUDGMENT OF: | GALLOP AJ |

**REPRESENTATION:**

*Counsel:*

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| Appellant: | R. Wild QC & G. Horton |
| Respondent: | J. Tippett QC & H. Spowart |

*Solicitors:*

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| Appellant: | Office of the Director of Public Prosecutions |
| Respondent: | Northern Territory Legal Aid Commission |

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| Judgment category classification: | C |
| Judgment ID Number: | gal200202 |
| Number of pages: | 8 |

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

*The Queen v Loader* [2002] NTSCCA 61
No. (2011382)

BETWEEN:

**THE QUEEN**
Appellant

AND:

**DAVID KEVIN LOADER**
Respondent

CORAM: GALLOP AJ

REASONS FOR JUDGMENT

(Delivered 22 October 2002)

[1] On 19 August 2002 the accused was arraigned on an indictment charging him with one offence of murder on 5 July 2001 at Wagait in the Northern Territory of Australia. Upon his arraignment he pleaded not guilty and his trial continued until 27 August 2002 when the jury returned a verdict of guilty. When he appeared for sentence on 8 October 2002, it was submitted on his behalf that the penalty provided for the crime of murder is discretionary up to a maximum of life imprisonment. It is necessary to rule upon that submission before proceeding to sentencing.

[2] The punishment for murder is set out in s 164 of the Criminal Code which reads:

> "Any person who commits the crime of murder is liable to imprisonment for life which cannot be mitigated or varied under this Code or any other law in force in the Territory."

[3] When the Criminal Code was enacted in 1984, s 164 was worded differently, that is:

> "Any person who commits the crime of murder is liable to imprisonment for life which cannot be mitigated or varied under section 390."

[4] Section 390(1) of the Criminal Code was in the following terms:

> "A person liable to imprisonment for life or for any other term may be sentenced to imprisonment for any shorter term."

[5] By Act No. 17 of 1996 the Criminal Code was amended so as to delete the words "section 390" and substitute the words "this Code or any other law in force in the Territory".

[6] The amendment of s 164 into its present form by the Sentencing (Consequential Amendments) Act 1996 as set out above gives some indication that the legislature intended that the punishment of imprisonment for life for murder should be mandatory rather than discretionary.

[7] It is well settled law that if it is intended to provide a mandatory penalty, clear words can, and should be, used. See *Sillery v The Queen* (1994) 180 CLR 353 per Gibbs CJ at 357. Murphy J, in the same case, was a member of the majority. He stated the law in the following words (at 359):

> "The policy of maximum and not mandatory penalties is so pervasive that it should be presumed that any penalty is intended as a maximum; very clear words would be necessary to displace this presumption. The presumption is even stronger when a heavy penalty is applicable to a range of offences differing in nature and gravity so that although the maximum might be appropriate for some, it would be manifestly oppressive for others. Otherwise, the law would be Draconian. The Athenian lawmaker Draco is reputed to have imposed for all offences, even the most trifling, the penalty appropriate for the most severe so that there was only one punishment."

[8] In contradiction of the submission by counsel for the prisoner, the Director of Public Prosecutions submitted that s 164 is not ambiguous and clearly the intention of the legislature was to make the punishment for the crime of murder imprisonment for life which is mandatory.

[9] The Director of Public Prosecutions referred to the legislative framework in which the sentence for murder is imposed and submitted that that framework makes it clear that the only sentence that can be imposed is a term of imprisonment for life. He compared s 164 with s 167, which provides for the punishment of the crime of manslaughter:

> "s 167 Any person who commits the crime of manslaughter is liable to imprisonment for life."

It is to be noted that the additional words "which cannot be mitigated or varied" etc, do not appear in s 167.

[10] Section 120 of the Sentencing Act removes the rigorous effect of s 167 in respect of the punishment for manslaughter and all other offences where the

expression "liable to imprisonment for life" is used. Section 120 of the Sentencing Act reads:

> "Subject to anything to the contrary in this or any other Act, a court may, as it thinks fit in sentencing an offender, impose a shorter term of imprisonment or a lesser amount as a fine than that prescribed."

It is plain, or so it was submitted, that this provision does not apply to s 164. The conclusion is reinforced by the provisions of s 53(3) and s 56(4) of the Sentencing Act which specifically exclude the crime of murder from the parole provisions there contained.

[11] It was next submitted that in the 20 years of operation of the Criminal Code, the meaning of s 164 has not previously been questioned. Its constitutionality was attacked in *R v Fittock* (2001) 11 NTLR 52, where at p 58 the Court of Criminal Appeal held:

> "Ground 4 seeks to argue that s 164 of the Criminal Code, which obliged the learned Trial Judge to impose a mandatory sentence of imprisonment for life, is unconstitutional because it offends the inviolable doctrine of the separation of powers and interferes with the integrity and independence of the judiciary and is therefore contrary to Ch III of the Constitution. It appears that the applicant would wish to argue the application of the decision in *Kable v DPP (NSW)* (1996) 189 CLR 51 in order to support this contention. Counsel for the applicant conceded that this Court is bound to reject this argument because there is binding authority of the High Court on the point stemming from *R v Bernasconi* [(1915) 19 CLR 629]. In addition, it was conceded that the Court of Appeal in *Wyndbyne v Marshall* (1997) 7 NTLR 97 rejected the same argument. We observe that leave to appeal to the High Court from the Court of Appeal was refused. We note the applicant's contention, but as this Court could not allow the appeal on this ground, leave to appeal on that ground must be refused."

The Director submitted that the effect of s 164 was accepted in *R v Fittock* (supra).

[12] Having considered counsel's arguments, the legislative history of s 164 and its plain words, I am of the opinion that a sentence of imprisonment for life is the only sentence which this court can impose in respect of the crime of murder.

[13] I move to the relevant considerations affecting the sentence of the prisoner. Ordinarily, where there is only one penalty that the Court can impose, it would not be necessary to dilate upon the facts of the offence or the personal circumstances and background of the prisoner. However, it may be of some assistance to the executive in the future, if I make reference to those matters.

[14] The facts of the crime are not very complicated. The prisoner and the deceased were well known to each other and were on good terms, living in the Wagait area. On Thursday, 5 July 2001, they came together at the local supermarket and some conversation took place between them about the deceased having had an argument with shop staff and making some threats. The prisoner and the victim had a few beers and then moved to the prisoner's camp, which was a bush camp some few kilometres away. At the camp they drank large quantities of alcohol, replenishing the supply by a visit to the supermarket during the course of the day. Much of what happened between the two men came from the record of interview which the

prisoner made a few days later after his arrest at Mt Isa and extradition back to Darwin. In that record, the prisoner did not relate any argument or bad feeling between the two men. To the contrary, he told the police that they were on good terms although, obviously, drunk. When the prisoner awoke from a state of drunkenness, he did not know where the victim was, but he found him in the fire, burning. The prisoner departed from the camp and told some friends in the Wagait area that he had killed the victim. He went to the hotel and bought some more Bourbon and cola cans and a carton of beer, went down to the beach and went to sleep. He went back to the camp the next morning to where the victim had been burnt on the fire. He then proceeded to burn out his own camp and departed.

[15] The next day, a friend of the victim, not having seen the victim that day as was the usual set of circumstances, and after making some efforts to find the victim himself, reported to the police what the prisoner had told him the night before about having killed the victim. The police then set up a search for the prisoner and he was eventually found the following Tuesday in Mt Isa. He admitted to the police that immediately after the killing he had left the Mandorah district, hitchhiked down the track and across to Mt Isa where he had arrived on the Tuesday morning. He was arrested and returned to Darwin the next day.

[16] At the invitation of the Court, counsel for the prisoner put some submissions about the facts of the offence to assist the Court in fixing the offence itself in the scale of offences of murder so as to determine the offence's relative

criminality. It was submitted that the prisoner and the victim were, to all intents and purposes, on good terms and the evidence did not disclose any bad feeling between them. There was certainly no evidence of lengthy premeditation and none of the elements of torture or sexual assault, or contract or serial killing. It was further submitted that both men must have been heavily intoxicated.

[17] Counsel relied upon the remorse expressed by the prisoner to the police soon after the offence and indeed before the prisoner left the Mandorah area.

[18] The Crown conceded that the killing was not in the worst case scenario, but nevertheless was a senseless killing. The Crown submitted that the burning was callous and cruel and that the accused had really shown little remorse immediately after the offence or before the Record of Interview was taken. The Crown also referred to the prisoner boasting about what he had done while he was on remand in Berrimah Gaol.

[19] One view of the evidence is that the prisoner had burnt the victim in an endeavour to cover up the evidence.

[20] I agree that the case is not one of the worst of its kind in the crime of murder. I come to that view on the whole of the circumstances and nevertheless have to impose the sentence of imprisonment for life. I turn to the personal factors about the prisoner.

[21] The prisoner is 41 years of age, having been born on 5 April 1961. He was unemployed at the date of the offence, indeed he has never worked in any serious job in his life. He told the police that he had been on a disability pension all his life because he is schizophrenic. There was no medical evidence about the prisoner's medical condition. He has a long list of previous convictions which were in evidence before me (Exhibit AB) dating back to Children's Court matters from 1974 onwards.

[22] It is not necessary to specify his convictions for criminal offences, it is sufficient to observe that he is no stranger to gaol. There is nothing about his personal circumstances which would warrant leniency.

[23] The sentence of the Court is that the prisoner be imprisoned for life to date from 10 July 2001 which is the date on which the prisoner was first taken into custody.

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