

The Queen v Liddy [2001] NTSC 26

PARTIES: THE QUEEN

v

CHRISTOPHER JOHN LIDDY

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY exercising Territory jurisdiction

FILE NO: 57 of 1995

DELIVERED: 18 April 2001

HEARING DATES: 26 March 2001

JUDGMENT OF: THOMAS J

CATCHWORDS:

Application for review of sentence – grant of remissions – parole period

Sentencing Act 1995 (NT), s 112; *Prisons (Correctional Services) Act 1980* (NT), s 92(2); *Parole of Prisoners Act 1971* (NT), s 3, s 12(2), s 14 and s 15

R v Mulholland (1991) 1 NTLR 1, referred to.

REPRESENTATION:

Counsel:

Applicant: Self Represented

Respondent: R Wild QC

Director of Correctional Services

by leave: B O'Loughlin

Solicitors:

Applicant: Self Represented

Respondent: Office of the Director of Public Prosecutions

Director of Correctional Services

by leave: Hunt & Hunt

Judgment category classification: C

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

The Queen v Liddy [2001] NTSC 26
No. 57 of 1995

BETWEEN:

THE QUEEN
Respondent

AND:

CHRISTOPHER JOHN LIDDY
Applicant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 18 April 2001)

- [1] This is an application by Christopher John Liddy for review of a sentence.
- [2] The power to review a sentence is set out in s 112 of the Sentencing Act 1995 (NT) which provides as follows:

“112. Court may reopen proceeding to correct sentencing errors

(1) Where a court has in, or in connection with, criminal proceedings (including a proceeding on appeal) -

- (a) imposed a sentence that is not in accordance with the law; or
- (b) failed to impose a sentence that the court legally should have imposed,

the court (whether or not differently constituted) may reopen the proceedings unless it considers the matter should more appropriately be dealt with by a proceeding on appeal.

(2) Where a court reopens proceedings, it -

- (a) shall give the parties an opportunity to be heard;
 - (b) may impose a sentence that is in accordance with the law; and
 - (c) may amend any relevant conviction or order to the extent necessary to take into account the sentence imposed under paragraph (b).
- (3) A court may reopen proceedings -
- (a) on its own initiative at any time; or
 - (b) on the application of a party to the proceedings made not later than -
 - (i) 28 days after the day the sentence was imposed; or
 - (ii) such further time as the court allows.
- (4) An application for leave to make an application under subsection (3)(b)(ii) may be made at any time.
- (5) Subject to subsection (6), this section does not affect any right of appeal.
- (6) For the purposes of an appeal under any Act against a sentence imposed under subsection (3)(b), the time within which the appeal must be made starts from the day the sentence is imposed under subsection (2)(b).
- (7) This section applies to a sentence imposed, or required to be imposed, whether before or after the commencement of this section.”

[3] On 20 November 1995, I sentenced Mr Liddy as follows (t/p 42):

“For the reasons stated, I make the following orders: firstly, in respect of the offence of unlawful carnal knowledge, Mr Liddy is convicted and sentenced to 8 years imprisonment. Pursuant to section 12 subsection (2) of the Parole of Prisoners Act, I order that he undergo imprisonment for the term that he had not served when he was released from prison in pursuance of the parole order, and that the term of imprisonment commence at the expiration of the term of imprisonment to which he is being sentenced for the later offence.

I further order that there be a non-parole period of 6 years, during which the accused will not be eligible for parole; and finally, I make an order that the head sentence and non-parole period date from 28 December 1994, to take account of the time that Mr Liddy has already spent in custody.”

- [4] Mr Liddy was advised it would be in his own interests to seek legal representation with respect to the application. There was no formal application before the court. The matter was listed following receipt of a letter from Mr Liddy raising certain concerns with respect to remissions earned on a previous sentence imposed on 4 December 1986 and other issues relevant to each of the sentences imposed on him. Mr Liddy elected to represent himself in these proceedings.
- [5] At the initial hearing Mr Wild QC on behalf of the Crown appeared to assist the court. Mr Wild QC made certain submissions with respect to Mr Liddy's complaints. Subsequently, the Crown sought and were granted leave to withdraw. Leave was then granted to the Director of Correctional Services to appear and make submissions with respect to the concerns raised by Mr Liddy. I appreciated the assistance provided by Mr Wild QC. However, Mr Wild did not have the benefit of hearing the submissions made on behalf of the Director of Correctional Services. In particular, the effect of s 92 of the Prisons (Correctional Services) Act 1980 (NT) and the information provided by the Director of Correctional Services that as at the date of the letter dated 15 September 1995, Mr Liddy had not in fact been granted remissions. For reasons to be outlined I have accepted the submissions made on behalf of the Director of Correctional Services.
- [6] The history of this matter can be summarised as follows:

- [7] On 4 December 1986, Mr Liddy was convicted by Asche J on four counts of unlawful carnal knowledge. These offences consisted of two acts of rape upon two different women.
- [8] The first series of events occurred on 23 January 1986. The second series of events took place on 19 May 1986. Mr Liddy was sentenced on all four offences to a total of 14 years imprisonment with a non parole period of seven years. The sentence to commence from 1 March 1986.
- [9] On 22 December 1988 at the Darwin Court of Summary Jurisdiction, Mr Liddy was sentenced to four months imprisonment for social security fraud contrary to subparagraph 174(1)(a)(i) of the Social Security Act 1947 (Cth) and s 5 of the Crimes Act 1914 (Cth). This sentence was made cumulative upon the sentence he was then serving.
- [10] Mr Liddy was released on parole on 31 March 1993. On 28 December 1984 he committed an offence of sexual intercourse without consent to which he pleaded guilty on 15 November 1995. On 20 November he was sentenced to eight years imprisonment and in accordance with the order set out in full at the commencement of these Reasons for Judgment ordered to undergo imprisonment for the term that he had not served when he was released from prison in pursuance of the parole order, and that the term of imprisonment commence at the expiration of the term of imprisonment to which he is being sentenced for the later offence.

- [11] A non parole period of six years was fixed and the sentence backdated to 28 December 1994.
- [12] Having heard the arguments and submissions put forward by Mr Liddy, they all relate to the method undertaken by the Director of Correctional Services to calculate his remissions on sentence.
- [13] Accordingly, I agree with the submission made by Mr O'Loughlin who appeared as counsel for the Director of Correctional Services that this proceeding does not fit within the ambit of s 112 of the Sentencing Act as this Court did not impose a sentence that was not in accordance with law, nor did it fail to impose a sentence that it should have imposed.
- [14] I agree that this Court does not have a jurisdiction under s 112 of the Sentencing Act to deal with Mr Liddy's application.
- [15] Nevertheless I did indicate that for the benefit of Mr Liddy I would make some comments on the concerns he has raised. These comments are as follows:
- [16] Mr Liddy became eligible for consideration for parole on 28 December 2000. Mr Liddy has applied for parole. I am informed this application has been deferred for further consideration at the Parole Board meeting in May 2001.

[17] A summary of the significant dates in respect of Mr Liddy's term of imprisonment as calculated by the Director of Correctional Services is as follows:

- | | | |
|-------|---|------------------|
| (i) | Date of Eligibility for Parole | 28 December 2000 |
| | Consideration deferred to | May 2001 |
| (ii) | Date of absolute release with remission
if parole is not taken | 17 October 2002 |
| (iii) | Date of termination of parole
supervision, if parole is taken | 28 March 2010 |

[18] Mr Liddy does not have any dispute with the date in (i) and (ii) stated above. The concern Mr Liddy has expressed is with the calculation of the date of 28 March 2010 as the date of termination of parole supervision. Mr Liddy calculates the termination of his period under supervision as considerably earlier than 28 March 2010.

[19] In my Reasons for Sentence dated 20 November 1995, I stated as follows (t/p 38):

“Mr Liddy was released on parole on 31 March, 1993. A copy of the parole order and a letter from the Department of Correctional Services was tendered and marked exhibit P2. This offence occurred approximately 21 months after he had been released on parole in respect of previous offences of unlawful carnal knowledge.

In a letter dated 15 September 1995, which is exhibit P2, the Department of Correctional Services advises that Christopher Liddy has 1,354 days outstanding on his parole order. This is a period of a little over 3½ years that Mr Liddy will have to serve in addition to the sentence for this offence.”

[20] Mr O'Loughlin agreed that the letter referred to in the abovementioned Reasons for Sentence, which was tendered and marked Exhibit P2, made it appear that remissions had already been granted. That is the way it was interpreted by the Court and by counsel appearing at the time of the submissions on sentence on 15 November 1995. It was also understood by Mr Liddy to mean remissions had already been granted. This misunderstanding could have been avoided if the letter dated 15 September 1995 from the Director of Correctional Services (Exhibit P2) had made it clear on the face of the letter that this was subject to remissions being granted which had not occurred as at the date of this letter.

[21] Remissions on sentence were not in fact granted until 22 October 1998. On 22 October 1998, Mr Liddy was granted a one third remission on his sentence (Exhibit P5). This grant shows his date of release with remissions if he is not granted earlier parole as being 17 October 2002. The actual grant of remissions on 22 October 1998, corrected any misplaced presumption by the author of the letter dated 15 September 1995 that remissions had been granted.

[22] Mr Liddy had submitted that remissions must be granted in all cases and referred to the Prisons (Correctional Services) Act Determination No. 5, a copy of which Mr Liddy tendered (Exhibit 3). This is not a correct statement of law. Determination No. 5 outlines the general scheme for remissions it does use the word "shall" but it is not the legislation that deals with the actual grant of remissions in individual cases. The actual grant of

remissions occurred pursuant to s 92 of the Prisons (Correctional Services)

Act which provided (now repealed) as follows:

“(1) The Minister *may* make a determination specifying the amount of remission which may be granted to a prisoner, and the circumstances in which that remission may be granted.

(2) Subject to an order of a court, the Minister *may*, on the recommendation of the officer for the time being in charge of the prison, grant a prisoner serving a total term of imprisonment of more than 28 days periods of partial remission of the sentence in accordance with a determination under sub-section (1).

(3) Sub-section (2) applies when a person is in prison or on parole, and a partial remission granted under that sub-section shall be in addition to any other partial remission of sentence granted under this Act or any other law in force in the Territory.” (*italics mine*)

[23] Section 10 of the Prisons (Correctional Services) Amendment (No 2) is a transitional provision which preserves the Minister’s discretion to grant such remissions.

[24] Whilst it is usual for remissions to be granted it is nevertheless a matter which in accordance with s 92 of the Prisons (Correctional Services) Act is a matter for the discretion of the Minister on the recommendation of the officer for the time being in charge of the prison.

[25] The real point of contention between Mr Liddy and the Director of Correctional Services is whether the one third remissions reduce the supervisory period of his parole.

[26] The submission by Mr O’Loughlin on behalf of the Director of Correctional Services is that remissions do not reduce the supervisory period of his

parole. Mr O'Loughlin's argument is that the entire head sentence determines his supervisory period and that runs until 28 March 2010.

[27] From the date of the sentence delivered on 20 November 1995, the sentence Mr Liddy was to serve, not taking into account remissions, was eight years plus a further seven years remaining from his previous conviction for unlawful carnal knowledge plus three months from the conviction imposed by the Court of Summary Jurisdiction Darwin on 22 December 1998 for a Commonwealth offence. A total of 15 years and three months backdated to 28 December 1994. On calculations provided by the Director of Correctional Services which is calculated in days this sentence expires on 28 March 2010.

[28] Section 3 of the Parole of Prisoners Act 1971 (NT) defines "the parole period" to mean:

"(1) In this Act, unless the contrary intention appears -

.....

"the parole period", in relation to a person who has been released from prison on parole in pursuance of section 5, means the period that -

(a) commences on the day on which the person is released from prison; and

(b) ends on the day on which the term of imprisonment to which that person was sentenced expires, or, if the parole order in relation to the person is revoked or cancelled, on the date of the revocation or cancellation;"

- [29] Section 14 of the Parole of Prisoners Act deals with the effect of the parole order on sentence. Section 15 of the Parole of Prisoners Act deals with remissions already earned before a parole order is revoked or cancelled.
- [30] I would agree with the submission of Mr O’Loughlin that a lawful remission must be granted in accordance with s 92(2) of the Prisons (Correctional Services) Act.
- [31] At the time Mr Liddy was sentenced on 20 November 1995, Mr Liddy had not been granted remissions under s 92(2) of the Prisons (Correctional Services) Act and therefore had not “earned” remissions for the purposes of s 15 of the Parole of Prisoners Act.
- [32] I agree with the submission made by Mr O’Loughlin that remissions do not have the effect of reducing the supervisory period of the parole order (“the parole period”).
- [33] Mr Liddy tendered in the course of his submissions a copy of his sentencing card (Exhibit 1). This card was given to him by an officer of the Director of Correctional Services following the imposition of the sentence on 4 December 1986. This shows a discharge date of 26 June 1995. It is Mr Liddy’s argument that this also demonstrates remissions had previously been granted to him. I do not think he is entitled to draw that conclusion. Again it would be less confusing if it were made clear on this document given to him by the Director of Correctional Services that this was the discharge date subject to there being a grant of remissions.

- [34] The document cannot be regarded as a grant of remissions in accordance with s 92(2) of the Prisons (Correctional Services) Act. It has no official status. The grant of remissions is a discretionary matter and that did not occur with respect to the sentence imposed on 4 December 1986 because Mr Liddy was released on parole prior to the necessity to consider whether or not to grant remissions.
- [35] Mr O'Loughlin submitted that the normal procedure by the Director of Correctional Services is to calculate remissions if they are to be granted a month or two prior to a prisoner having served two thirds of his sentence. I accept that very often there is no necessity to make a calculation for remissions as courts often give non parole periods of 50 percent of the sentence so that the one third remission becomes irrelevant.
- [36] Mr Liddy in his submissions is not in my opinion correct when he states that remissions must be granted as a matter of law. I have already given reasons why I have concluded remissions are a matter within the discretion of the Minister. I have also found that remissions are not granted until the procedure under s 92(2) of the Prisons (Correctional) Services Act has been completed. This had not occurred when Mr Liddy was released on parole after serving seven years of the sentence imposed on him on 4 December 1986. Accordingly, Mr Liddy's calculation that the unexpired portion of his parole period is two years and four months is fundamentally flawed. The sentencing card he was given at the time he entered the prison is no more than advice of a discharge date if certain other events occur. Whilst I would

agree this could be made clearer on the face of the document it does not amount to a grant of remissions.

[37] Mr Liddy also tendered the sentencing card he was given by the Director of Correctional Services following the imposition of his sentence on 20 November 1995 (Exhibit 9). This card states date of discharge as 17 October 2002. Mr Liddy also points to this card as being confirmation that his remissions had already been granted. This is not a correct assumption. There was no grant of remissions pursuant to s 92(2) of the Prisons (Correctional Services) Act until 22 October 1998. Again it would have been less confusing if the sentencing card had made it clear on its face that the discharge date would be 17 October 2002 if remissions were in fact subsequently granted.

[38] Mr Liddy made reference to the Criminal Court of Appeal decision in the matter of *R v Mulholland* (1991) 1 NTLR 1 and the concession made by the Crown in that case that the sentence would have to be adjusted because His Honour (the Trial Judge) had not taken into account remissions which the prisoner had earned on the portion of the head sentence that he had already served when he was released from prison. Mr Liddy submits that Eric Mulholland was granted remissions and that he, Mr Liddy, has been denied such remissions which is for him an unfair result.

[39] My reading of the decision in the matter of *R v Mulholland* (supra) is that the reference to not taking into account remissions is relevant to a situation

very different from Mr Liddy's. It appears in the matter of *R v Mulholland* (supra) the Trial Judge actually used the words four years in addition to the sentence of 14 years being the sentence he had imposed making a total of 18 years imprisonment. The Trial Judge had not used the words "... undergo imprisonment for the term that Eric Mulholland had not served when he was released from prison in pursuance of the parole order, and that the term of imprisonment commence at the expiration of the term of imprisonment to which he is being sentenced for the later offence ..." which would have accorded with the provisions of s 12(2) of the Parole of Prisoners Act. By actually specifying the period of four years the Trial Judge had precluded the calculation for remissions and that is why Eric Mulholland's sentence had to be adjusted.

[40] In imposing sentence on 20 November 1995, I used the words "I order that he undergo imprisonment for the term that he had not served when he was released from prison in pursuance of the parole order" rather than specify the period of seven years and three months which would have precluded a calculation for remissions. These calculations for remissions are not made by the court but by the Director of Correctional Services at, or shortly before, the time that they are earned and the actual grant of such remissions is in the discretion of the Minister (s 92(2) of the Prisons (Correctional Services) Act).

[41] In calculating the balance of his period of supervision on parole, Mr Liddy calculates the sentence of eight years plus what he owes from his previous

offence and submits that had remissions been taken into account he only owed 903 days giving him a head sentence of 10.5 years and a non parole period of six years. This calculation is based on the incorrect premise that he had been granted remissions as at 15 November 1995 and on the incorrect premise that remissions affect the length of the supervisory period.

[42] Mr Liddy made reference to my comment on the principle of totality when I imposed sentence on 20 November 1995. The principle of totality does not affect the fact that Mr Liddy is under supervision for the whole of the sentence and the granting of parole and remissions only affects the time he spends in actual custody.

[43] Mr Liddy submits that the total sentence for all the offences amounted to 22 years and four months and because of the way in which Correctional Services have interpreted his supervisory period he is being subjected to double jeopardy. I do not agree with the submission that there has been double jeopardy. Mr Liddy has been sentenced to a total of 22 years and four months imprisonment. That is the total period of time that he is to be under the supervision of the Director of Correctional Services. Orders with respect to non parole and the grant of remissions reduce the time he spends in actual custody but do not affect the time he is under supervision or parole. Remissions do not apply to parole periods. Remissions only operate to reduce time spent in custody.

[44] Accordingly, I do not consider there is any error in the calculations made by the Director of Correctional Services with respect to the date that Mr Liddy will be subject to supervision if he does elect to take parole, that date is 28 March 2010.
