Director of Public Prosecutions v Ahwan [2005] NTCCA 21

PARTIES:	DIRECTOR OF PUBLIC PROSECUTIONS v JACOB AHWAN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	CA22/05 (8606704)
DELIVERED:	22 December 2005
HEARING DATES:	4 November 2005
JUDGMENT OF:	THOMAS, SOUTHWOOD JJ and MARTIN (BF) AJ

CATCHWORDS:

CRIMINAL LAW -- PARTICULAR OFFENCES -- MURDER -- APPEAL AFTER CONVICTION

Prisoner convicted and sentenced to life imprisonment for murder – offence included penetration of deceased victim's vagina after death – trial judge found that penetration occurred after death – trial judge found offending would not constitute a 'sexual offence' – aggravating circumstance attracted the operation of a 25 year non-parole period resulting from retrospective operation of legislation – does the penetration of victim's vagina with an implement post-mortem constitute an offence in accordance with sch 3 of the Sentencing Act (NT) 1995

STATUTES -- ACTS OF LEGISLATIVE ASSEMBLY -- NORTHERN TERRITORY

Interpretation – operation and effect of statutes – s 19(3)(b) Sentencing (Crime of Murder) and Parole Reform Act (NT) 2003 – "…act or omission that caused the victim's death was part of a course of conduct … either before or after the victim's death, that would have constituted a sexual offence against the victim" – operation of statutory non-parole period enlivened – retrospective operation of legislation – meaning of 'sexual offence'.

Sentencing (Crime of Murder) and Parole Reform Act (NT) 2003, s 19 (3)(b); Interpretation Act (NT) 1978, s 62A; Parole of Prisoners Act (NT) 1971, s 4; Criminal Code Act (NT) 1983, s 125B, s 125C, s 127, s 128, s 130, s 131, s 131A, s 132, s 134, s 138, s 188, s 188 (2)(k), s 192, s 192B, s 410(c), Sentencing Act (NT) 1995, s 5, sch 3.

Smith v Corrective Services Commissioner of New South Wales (1986) 33 ALR 25; *McLaughlin v Fosberry and Ors* (1904) 1 CLR 546; *Donaldson v Broomby* (1982) 40 ALR 525, considered.

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591; *In re Fish; Ingham v Raynor* [1894] 2 Ch 83, considered.

Powers v R (1974) 131 CLR 623; Beckwith v R (1976) 13 ALR 333, considered.

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384, applied.

REPRESENTATION:

Counsel:

Appellant:	T Pauling QC and S Brownhill
Respondent:	A Haesler SC and G Dooley

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	North Australian Aboriginal Legal Aid Service Inc

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

Director of Public Prosecutions v Ahwan [2005] NTCCA 21
No. CA22/05 (8606704)

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

AND:

JACOB AHWAN
Respondent

CORAM: THOMAS, SOUTHWOOD JJ and MARTIN (BF) AJ

REASONS FOR JUDGMENT

(Delivered 22 December 2005)

Thomas J

[1] This appeal involves an interpretation of s 19(3)(b) of the Sentencing (Crime of Murder) and Parole Reform Act 2003. This provision requires the Court to fix a non parole period of 25 years if "the act or omission that caused the victim's death was part of a course of conduct by the prisoner that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim". Section 19(3)(b) is in Part 5 of the Act – Transitional Provisions Division, "prisoners currently serving life imprisonment for murder". The provision is in identical terms

to the provisions of s 53A(3)(b) of the Sentencing Act which operates in relation to all sentences imposed for the offence of murder since 11 February 2004.

[2] Mr Pauling QC for the appellant, asserts the Judge at first instance erred in concluding that the relevant conduct of the respondent would not have constituted a "sexual offence" against the victim for the purposes of s 19(3)(b) of the Sentencing (Crime of Murder) and Parole Reform Act 2003. This section reads as follows:

> " (3) Subject to subsections (4) and (5), the Supreme Court must fix a non-parole period of 25 years if any of the following circumstances apply in relation to the crime of murder for which the prisoner is imprisoned:
>
> (a) .....
>
> (b) the act or omission that caused the victim's death was part of a course of conduct by the prisoner that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim;

[3] There is no challenge to the finding of facts made by the Judge at first instance. I have summarised these findings of fact as follows:

(a) The respondent was convicted of the crime of murder following completion of a trial before a judge and jury on 12 February 1990. He was sentenced to life imprisonment. No power existed at that time to fix a non parole period. There was a subsequent order made on 27 August 1999 backdating the prisoner's sentence to the date of his arrest on 23 December 1985.

(b) On 22 December 1985, the respondent and his wife were drinking alcohol with a group of persons at the home of the respondent's mother. During the course of the evening and in different rooms of the house, the respondent punched his wife and physically assaulted her with a cricket bat, a broom, which he broke into two pieces and a flagon bottle. After taking his wife to the shower room he put her in the shower, punched her again to the cheek, placed a sheet around his wife's neck and strangled her. His deceased wife was in the shower lying on her back with her legs slightly apart. The respondent retrieved the pieces of the broken broom handle and used that handle to penetrate her vagina.

(c) The respondent participated in a record of interview with police on 23 December 1985. He made admissions to killing his wife and that he had used the broom handle to penetrate the vagina of his deceased wife. Other evidence was given at his trial by a forensic pathologist and the investigating police officer to support these admissions. The Director of Public Prosecutions conceded that, on the available information, it could not be established beyond reasonable doubt that the penetration occurred before death. The Judge at first instance found beyond reasonable doubt that the respondent penetrated the vagina of the deceased to some extent with a blunt, rounded handle of a broomstick shortly after her death.

[4] The issue then addressed by his Honour was whether the respondent's conduct was such that it would have constituted a sexual offence against the victim. His Honour concluded that the conduct of the respondent would not

have constituted a sexual offence against the victim for the purpose of s 19(3)(b) of the Act. His Honour stated as follows in paragraphs 43-46 of his reasons for judgment:

> "[43] I am unable to accept the suggested interpretation. In my view, the meaning of the words used is plain enough. The conduct of the respondent must be of a kind that "would have constituted a sexual offence against the victim" and it matters not whether the conduct occurred "either before or after the victim's death". The fact that there is no relevant identified "sexual offence" in the circumstances of the present matter where, at the time of the conduct the victim was deceased, does not justify placing a strained interpretation on the words to accommodate that circumstance. There are circumstances where a "sexual offence" may be committed in relation to a deceased person, for example, as acknowledged in the submissions, an offence under s 125B of the Criminal Code. Accepting that to be so, contrary to the submission made, the identified words would not be superfluous. There would be no breach of the presumption that words used in a statute are not used without meaning and are not superfluous: *The Commonwealth v Baume* (1905) 2 CLR 405 at 414.
>
> [44] To have the effect for which the Director contends the words "had the victim been alive at the time of the conduct" or something similar would need to be implied into the provision. However such implication is not a matter which must be dealt with to ensure the purpose of the Act is to be achieved: *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423. The purpose of this provision of the Act is to ensure that a minimum non-parole period of 25 years is applied in some circumstances. That continues to be the case in respect of a narrower range of circumstances than would follow from an acceptance of the submissions made by the Director.
>
> [45] The Director relied upon the expression "would have" as indicating an intention to relieve the "inconsistency" that would follow from the plain meaning of the words. In my view, as expressed in par 14 above, the words "would have" are employed simply to relate the conduct of the respondent at the time of offending to the definition of "sexual offence" contained in the legislation.

> [46] The definition of "sexual offence" may not, at present, include any offence that applies to conduct such as occurred in this case after the victim's death. However, if the scope of what constitutes a "sexual offence" in this context is to be broadened, the remedy lies with the legislature and not with the courts. For example, s 34B of the Crimes Act of Victoria makes it an offence to intentionally "interfere sexually or commit an indecent act with a corpse of a human being". It is not for the court to usurp the legislative function "under the thin disguise of interpretation": *Marshall v Watson* (1972) 124 CLR 640 at 649."

[5] Mr Pauling QC, on behalf of the appellant, referred to the purposes of the Sentencing (Crime of Murder) and Parole Reform Act 2003 as set out in s 3, the relevant parts of which read as follows:

> "The purposes of this Act are –
>
> (a) to confirm the crime of murder is punishable by a mandatory penalty of life imprisonment;
>
> (b) to permit the fixing of a non-parole period for the crime of murder;"

and also to the Second Reading Speech the relevant passage of which is set out in paragraph 42 of his Honour's reasons for judgment as follows:

> "Crimes of murder that are occasioned also by a sexual assault, are also recognised as deserving an increased non-parole period. Where a victim has been sexually assaulted and then killed, either as a result of the assault or some subsequent act or omission, I believe that factor places the offence, quite rightly in the minds of the community, in a more serious category of offence. Likewise, an offence in which the victim is killed, and then their body subjected to sexual degradation post-mortem, is considered to be a more serious example of the crime of murder."

[6] On the submissions made on behalf of the appellant, the purpose of the Act means s 19(3)(b) should be read with the following words added: "if the victim was alive at the time".

[7] Mr Haesler SC, on behalf of the respondent, submits that it is not for the Court to read into an Act a section foreshadowed in the Second Reading Speech, which does not appear in the Bill. He argues that the wording of s 19(3)(b) is clear and does not require the application of s 62B(1)(a) or (b) of the Interpretation Act to consider extrinsic material to cure an asserted ambiguity.

[8] Counsel for the respondent supported the Judge's finding that on a proper interpretation of s 19(3)(b), the respondent's conduct in penetrating his wife's vagina with a broken broom handle, after her death, was not conduct that amounted to a sexual offence.

[9] Sexual offence is defined in s 3 of the Sentencing Act. It is an offence specified in Schedule 3. Schedule 3 specifies certain sections of the Code which are included in the definition of sexual offence. These include s 125B or s 125C of the Criminal Code which deal with possession of child abuse material and publication of indecent articles, respectively. These are offences that can be committed in circumstances where the victim is not alive at the relevant time. Section 140(b) of the Criminal Code makes it an offence to improperly or indecently interfere with or offer any indignity to

any dead human body. Section 140(b) is not included in the schedule of offences that are sexual offences.

[10] I would agree with the submission on behalf of the appellant that to read into the section the added words "if the victim was alive at the time" clearly promotes the purpose of the legislation. It is beneficial legislation in that it enables persons, convicted of murder and sentenced to life imprisonment, to apply for parole after a certain period. Previously there had been no power to fix a parole period. The period of parole is 20 years, or in certain circumstances including the case of a conviction for murder accompanied by a sexual offence, 25 years.

[11] I consider it is quite clear that the intent and purpose of the legislation was that convictions for murder accompanied by sexual offending attract a longer minimum non parole period.

[12] In these circumstances it cannot be the case that the words "either before or after the victim's death", would be superfluous and without meaning, because s 125B and s 125C are two sexual offences that may be committed in relation to a deceased person. The section cannot be aimed at such a limited category of post death offences. Particularly where both of these offences do not involve any form of physical contact or physical proximity and would be extremely unlikely to cause the victim's death.

[13] I accept Mr Haesler's submission that there must be strict construction of a penal statute (*Smith v Corrective Services Commissioner of New South*

Wales (1980) 33 ALR 25 at 29; *McLaughlin v Fosbery & Ors* (1904) 1 CLR 546 at 559; *Donaldson v Broomby* (1982) 40 ALR 525 at 526). However, I do not accept that the Sentencing (Crime of Murder) and Parole Reform Act 2003 is a penal statute as contemplated by the authorities referred to above. It is essentially beneficial legislation which enables a person previously convicted of murder, which carries a mandatory life imprisonment, to obtain parole where there was previously no provision for parole.

[14] The interpretation urged upon the Court by the appellant does accord with the clear legislative intent and purpose – *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 Brennan CJ, Dawson, Toohey and Gummow JJ at 408:

> "It is well settled that at common law, apart from any reliance upon s15AB of the Acts Interpretation Act 1901 (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."

[15] I note also the provisions of s 62A of the Interpretation Act which provides as follows:

> "62A. Regard to be had to purpose or object of Act
>
> In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object."

[16] I am satisfied beyond reasonable doubt, that the relevant conduct of the respondent did constitute a sexual offence against the victim within s 19(3)(b) of the Act.

[17] I would allow the appeal and fix a non parole period of 25 years in respect of the respondent's sentence of life imprisonment.

[18] I note that the matters the subject of contention by the respondent have not been argued.

Southwood J:

Introduction

[19] On 22 December 1985 the respondent murdered his wife by strangulation. After he killed his wife the respondent penetrated her vagina with a broken broom handle that he had used to beat her with prior to her death. On 12 February 1990 the Supreme Court sentenced the respondent to imprisonment for life for the murder of his wife.

[20] A sentence of imprisonment for life is a mandatory sentence that must be imposed by the Supreme Court when a person has been convicted of the crime of murder: s 164 Criminal Code. At the time that the respondent was sentenced to imprisonment for life for the murder of his wife, a sentence of imprisonment for life meant imprisonment for the term of a person's natural life. Until 11 February 2004, the Supreme Court did not have the power to mitigate a sentence of imprisonment for life by fixing a non-parole period: s 4 Parole of Prisoners Act.

[21] On 11 February 2004 the Sentencing (Crime of Murder) and Parole Reform Act 2003 (the Act) commenced. Subsection 18(a) of the Act applies to a prisoner who at the commencement of the Act is serving a sentence of imprisonment for life for the crime of murder. The subsection provides that the prisoner's sentence is taken to include a non-parole period of 20 years. The enactment of s 18(a) of the Act meant that on 11 February 2004 the respondent's sentence of imprisonment for life was taken to include a non-parole period of 20 years.

[22] On 11 April 2005 the appellant made an application pursuant to s 19(1)(a)(i) of the Act seeking orders that in accordance with s 19(3)(b) of the Act the Supreme Court revoke the non-parole period of 20 years fixed by s 18(a) of the Act and fix a non-parole period of 25 years. Subsection 19(3)(b) of the Act requires the Supreme Court to fix a non-parole period of 25 years if the act or omission that caused the victim's death was part of a course of conduct, either before or after the victim's death, that would have

constituted a sexual offence against the victim. The appellant argued that, had the victim been alive, the respondent's act of penetrating her vagina with the broken broom handle would have constituted a sexual offence against the victim. On 18 August 2005 the Supreme Court dismissed the appellant's application. The Supreme Court concluded that the act of the respondent penetrating the victim's vagina with the broken broom stick after her death would not have constituted a sexual offence against the victim for the purposes of s 19(3) of the Act. On 15 September 2005 the appellant appealed the decision of the Supreme Court dismissing his application.

The appeal

[23] The appeal is brought pursuant to s 20 of the Act. It is argued by the appellant that the Supreme Court fell into error in concluding that the conduct of the respondent would not have constituted a "sexual offence" against the victim for the purposes of s 19(3)(b) of the Act.

[24] The general principles applicable to an appeal against sentence are applicable to this appeal: s 20 the Act, s 410(c) Criminal Code. The appellant must demonstrate that error occurred in that the Supreme Court acted on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the facts.

The issue

[25] The principal question in this appeal is did the Supreme Court err in the interpretation and application of s 19(3)(b) of the Act? In my opinion the Supreme Court correctly interpreted s 19(3)(b) of the Act. The Supreme Court correctly concluded that the conduct of the respondent would not have constituted a sexual offence. There is no such sexual offence in the Northern Territory.

[26] The task of courts is to interpret the words used by Parliament. It is not to divine the intent of parliament: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* AG [1975] AC 591; *In re Fish; Ingham v Raynor* [1894] 2 Ch 83. As Chief Justice Spigelman has stated, "In an era where a purpose approach to interpretation is emphasised, and required by statute, the distinction between interpretation and divination is not always observed: JJ Spigelman CJ, *"The poet's rich resource: issues in statutory interpretation"*, (2001) 21 Aust Bar Rev 224.

The Act

[27] The primary purpose of the Act is to permit the fixing of non-parole periods for the crime of murder: s 3. The Act achieves its purpose by amending s 164 of the Criminal Code, introducing s 53A of the Sentencing Act, amending various provisions of the Parole of Prisoners Act and by enacting transitional provisions that fix non-parole periods for prisoners who were

already serving a sentence of imprisonment for life for the crime of murder at the time that the Act commenced.

[28] Rather than provide for the Supreme Court to consider individually if and if so what non-parole period should be fixed for each prisoner already serving a sentence of imprisonment for life for the crime of murder at the time that the Act commenced, Parliament has stipulated a 20 year non-parole period for those prisoners who have committed a single murder and a 25 year non-parole period for those prisoners who have committed multiple murders. Parliament has left it to the Director of Public Prosecutions pursuant to s 19 of the Act to make an application to the Supreme Court for orders that a non-parole period fixed by the Act be revoked and either increased or declined.

Subsection 19(3)(b) of the Act

[29] Subsection 19(3)(b) of the Act provides as follows:

> "Subject to subsections (4) and (5), the Supreme Court must fix a non-parole period of 25 years if any of the following circumstances apply in relation to the crime of murder for which the prisoner is imprisoned:
>
> (b) the act or omission that caused the victim's death was part of a course of conduct by the prisoner that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim; "

[30] The text of s 19(3)(b) of the Act is almost identical to the text contained in s 53A(1)(b) and s 53A(3) of the Sentencing Act and should be interpreted in

the same way. The provisions of these sections are not ambiguous or obscure. Subsection 19(3)(b) of the Act relates to situations in which the act or omission that caused the victim's death was part of a course of conduct that included conduct that would have constituted a "sexual offence" against the victim. If the offender's conduct involves such a situation the Supreme Court must fix a non-parole period of 25 years instead of a non-parole period of 20 years. It is an aggravating factor to engage in conduct at the time of the murder that would have constituted a "sexual offence".

[31] The relevant definition of "sexual offence" is contained in the Sentencing Act where "sexual offence" is defined to mean an offence specified in Sch 3 of the Sentencing Act. The offences specified in Sch 3 of the Sentencing Act at the time the appellant's application was heard by the Supreme Court were: an offence against s 125B or s 125C of the Criminal Code where the offender is an individual; an offence against s 127, s 128, s 130, s 131, s 131A, s 132, s 134 or s 138 of the Criminal Code; an offence against s 188 of the Criminal Code, where the circumstances of aggravation specified in s 188(2)(k) exists; and an offence against s 192 or s 192B of the Criminal Code. For the elements of s 19(3)(b) of the Act to be proven by the appellant it is necessary for the appellant to establish that the act or omission that caused the victim's death was part of a course of conduct by the offender that included conduct that would have constituted one of the offences specified in Sch 3 of the Sentencing Act.

[32] The course of conduct to be considered for the purposes of s 19(3) is the course of conduct that included the act or omission that caused the victim's death. The conduct that would have constituted a sexual offence against the victim may have occurred before the victim's death, or after the victim's death. Whether it occurred before or after the death of the victim the "included conduct" must amount to an offence specified in Sch 3 of the Sentencing Act for it to be conduct "that would have amounted to a sexual offence" for the purposes of s 19(3)(b). The clause, "that would have constituted a sexual offence against the victim", which commences with the demonstrative adjective, "that", is a dependent adjectival clause that modifies and amplifies the phrase, "included conduct". The clause does not amplify or modify the phrase, "either before or after the victim's death". The phrase, "that would have", is used to apply the definition of sexual offence contained in the Sentencing Act to the "included conduct" which may have occurred at a time when the definition of sexual offence contained in the Sentencing Act was not in force. This is clear from the punctuation and grammatical structure of the subsection.

[33] The reason that the phrase, "that would have", is used to apply the definition of sexual offence contained in the Sentencing Act to the "included conduct" is to identify the past conduct of the prisoner which will lead to the Supreme Court fixing a non-parole period of 25 years. The imposition of a non-parole period of 25 years is based on whether the past conduct of the prisoner fits within the definition of sexual offence as the law, the

Sentencing Act, stands at the time the application pursuant to s 19(1)(a)(i) and s 19(3)(b) of the Act is heard by the Supreme Court. If the past conduct of the offender would have constituted a sexual offence against the victim if it had been committed at the time of the hearing then a non-parole period of 25 years must be fixed by the Court. As his Honour Riley J stated in the court below, "When the respondent committed the crime of murder there was no relevant definition of the term "sexual offence". The definition was introduced into the law of the Northern Territory in 1999 by way of an amendment to the Sentencing Act. By the time of the commencement of the Act the definition of "sexual offence" was in place. It applies throughout the relevant legislation including to s 19(3)(b) and also s53A(3)(b) of the Act": *Craig Williamson Pty Ltd v Barrowcliff* (1915) VLR 450 at 452.

[34] The Supreme Court correctly determined that before it could revoke the non-parole period fixed by s 18(a) it would have to find beyond reasonable doubt that the respondent's act of penetrating the victim's vagina after her death with the broken broom handle would have constituted one of the offences listed in Sch 3 of the Sentencing Act. As the respondent's act clearly would not have constituted any of the offences listed in Sch 3 of the Sentencing Act the Supreme Court correctly dismissed the appellant's application.

[35] The above interpretation is consistent with the purpose of the Act which is to permit the fixing non-parole periods for the crime of murder. The Act does so by fixing standard minimum non-parole periods and by giving the Supreme Court a discretion subject to certain express provisions contained

in s 53A and s 19 of the Act and s 5 of the Sentencing Act to fix a minimum term of imprisonment that justice requires an offender must serve having regard to all the circumstances of the case.

[36] The provisions of s 19 of the Act are plainly penal. Prior to the application of the provisions of s 19 of the Act, Parliament has by the enactment of s 18 mitigated the offender's sentence of imprison for the term of his natural life by fixing a non-parole period of 20 years. To increase a non-parole period of 20 years to 25 years is clearly to provide for greater punishment: *Powers v The Queen* (1974) 131 CLR 623 at 627 to 629. To the extent that the language of a penal provision remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences: *Beckwith v The Queen* (1976) 13 ALR 333 at 339. Provisions such as s 19(3)(b) must be strictly construed: *Smith v Corrective Services Commission of New South Wales* (1980) 33 ALR 25 at 29; *McLaughlin v Fosbery & Ors* (1904) 1 CLR 546 at 559; *Donaldson v Broomby* (1982) 40 ALR 525 at 526. To do so is perfectly consistent with the purpose of the Act which is otherwise beneficial. Beneficial legislation may contain penal provisions which must be interpreted according to the ordinary principles of statutory interpretation applicable to such provisions.

[37] The fact that Sch 3 of the Sentencing Act only contains a very limited number of offences that apply to conduct that may be engaged in by an offender after the death of a murder victim is not a basis for construing s 19(3) in a different manner. The phrase, "after the victim's death", has

work to do. The limited application of the phrase is not a valid basis for altering the interpretation of s 19(3)(b).

The argument of the appellant

[38] On behalf of the appellant the Solicitor General argues that s 19(3)(b) should be construed as if the words, "if the victim were alive at the time", were added at the end of s 19(3)(b) of the Act. The argument is based on the following statements that were made by the Attorney-General during the Second Reading Speech of the Bill that became the Act:

> This bill identifies particular factors that aggravate the seriousness of the offence and set, for those cases, an non-parole period of 25 years. These factors include cases where the victim is in a particular category of occupation, which provides for the safety and protection of other members of the community, and which, as a consequence, may place them personally at risk. Where such persons have been targeted as a result of their duties, or the offence occurs while they are carrying out their duties, this factor is considered deserving of a heightened non-parole period. This provision will apply to victims who are police officers, emergency service workers, correctional services officers, judicial officers, health professionals, teachers and community workers in particular are part of this identified class of victims.
>
> Similarly, the taking of the life of a child, one of the most vulnerable members of our society, is deserving of recognition of increased objective seriousness. Crimes of murder that are occasioned also by sexual assault are also recognised of deserving an increased non-parole period. Where a victim has been sexually assaulted and then killed, either as a result of the assault or some subsequent act or omission, I believe that that factor places the offence, quite rightly in the minds of the community, in a more serious category of offence. Likewise, an offence in which the victim is killed, and then post mortem their body subjected to sexual degradation, is considered to be a more serious example of the crime of murder. Multiple convictions and prior convictions for homicide are also recognised as

being aggravating factors that should increase the minimum non-parole period.

[39] The appellant's argument was developed by the Solicitor General as follows. The above statement by the Attorney-General expresses the purpose of the Act and Parliament's intention in relation to s 19(3)(b) of the Act. In accordance with the provisions of s 62A of the Interpretation Act, s 19(3)(b) of the Act should be construed in a manner that is consistent with the statements made by the Attorney-General. The Act is beneficial in nature and an expansive approach should be adopted to the construction of s 19(3)(b). Without such a construction the phrase, "either before or after the victim's death", has no work to do and is redundant.

[40] The appellant's argument cannot be sustained. The purpose of the Act is expressly stated in s 3 of the Act. So far as is relevant it is to permit the fixing of a non-parole period for the crime of murder. Parliament has been merciful. By granting the non-parole periods stipulated in the Act, Parliament has provided for mitigation of the punishment of a prisoner serving a sentence of imprisonment for life for the crime of murder in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the time stipulated by s 18(a). The strict construction of s 19(3)(b) is consistent with and promotes the relevant purpose of the Act.

[41] The words of s 19(3)(b) of the Act are not ambiguous or obscure. There is no need to interpret s 19(3)(b) of the Act as if the words, "if the victim were

alive at the time", were added at the end of the subsection. A section of a statute should not be construed as if certain words appeared in the statute unless it is necessary to reflect in express form the true construction of the words actually used. The primacy of the text is the first rule of interpretation. Extrinsic materials are subordinate to the text itself. While it is true that contextual materials must not be downgraded and that consideration must be given to all relevant contextual material in order to decide what different meanings the text is capable of letting in and what is the best interpretation amongst competing solutions, the court's task is interpretation not interpolation: Steyn LJ, *"The Intractable Problem of The Interpretation of Legal Texts"*, [2003] SydL Rev 1. The intention under consideration is one targeted on the meaning of the language contained in the section. The only relevant intention of parliament can be the intention of the composite body to enact the statute as printed.

[42] Words should only be "read into a statute" if three conditions are fulfilled. First the court must know from a consideration of the legislation read as a whole, precisely what the mischief was that it was the purpose of the legislation to remedy. Secondly, the court must be satisfied by inadvertence Parliament has overlooked an eventually which must be dealt with if the purpose of the legislation is to be achieved. Thirdly, the court must be able to state with certainty what words parliament would have used to overcome the omission if its attention had been drawn to the defect: *Mills v Meeking* (1990) 169 CLR 214 at 244. The last two conditions have not been fulfilled

and as I have said the mischief intended to be remedied was the inability to fix non-parole periods for the crime of murder prior to the Act commencing. For the reasons stated above the court cannot be satisfied that Parliament has overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved. Further, the words sought to be read into the section would only apply when the "included conduct" occurred "after the victim's death". They make no sense if the "included conduct" occurred "before the victim's death". The construction contended for by the appellant requires words to be read into the Act on one occasion but not on another occasion.

Conclusion

[43] I would dismiss the appeal.

Martin (BF) AJ:

[44] This appeal lies against the judgment of the learned sentencing Judge whereby his Honour dismissed the appellant's application under s 19(1) of the Sentencing (Crime of Murder) and Parole Reform Act 2003 ("the reform Act").

[45] The appellant's application to the Court arises in the context of recently reformed law relating to sentences for life imprisonment for murder. Heretofore there was no provision for fixing of a minimum sentence nor any period prior to which a prisoner would not be eligible to be released on

parole. A prisoner sentenced to life imprisonment for murder could have only been released from prison upon the exercise of a prerogative of mercy.

[46] Under the Reform Act it is provided that in relation to a prisoner who is serving a sentence of imprisonment for life for the crime of murder the prisoner's sentence is normally taken to include a non-parole period of 20 years. But the appellant may apply to this Court to fix a longer non-parole period in certain circumstances, including if "the act or omission that caused the victim's death was part of a course of conduct by the prisoner that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim" (s 19(3)(b)). If that application is successful then this Court is obliged by the legislation to fix a non-parole period of 25 years.

[47] It is put that his Honour erred in concluding that the conduct of the respondent, relied upon by the appellant in its application under s 19 of the reform Act, would not have constituted a "sexual offence" for that purpose. The appellant seeks an order that the decision appealed against be set aside and that the Court of Criminal Appeal fix a non-parole period of 25 years in respect of the respondent's sentence of life imprisonment.

[48] The respondent was convicted of the murder of his wife, the sentence of imprisonment for life being ordered to have been deemed to commence on 23 December 1985. When the respondent committed the offence there was no relevant definition of "sexual offence", it was introduced into the

Sentencing Act by way of amendment in 1999. The term is defined by reference to a number of specific provisions contained in the Criminal Code which have been amended from time to time.

[49] His Honour took the view, which is not challenged on appeal, that the legislation based future action on past events, referring to *Pearce and Geddes "Statutory Interpretation in Australia"* 5th Ed at 10.4. The obligation of a prisoner sentenced to life imprisonment for murder to serve the whole of the sentence is altered by the reform Act such that he may be released prior to expiry of the sentence in the circumstances prescribed. The amendments are, as his Honour rightly pointed out, with respect, "beneficial".

[50] His Honour found (beyond reasonable doubt) on evidence presented to him that the respondent "penetrated the vagina of the deceased to some extent with a blunt, rounded handle of a broomstick shortly after her death". That finding is not in question.

[51] The submission of the appellant, rejected by his Honour, was that penetration after death is a sexual offence for the purposes of s 19(3)(b) of the Act. His Honour summarised the submission as being that the correct interpretation of the subsection is to treat an act "which would have" constituted a sexual offence but for the death of the victim as a sexual offence for the purposes of the section.

[52] A narrow view of the grammatical meaning of the words in question leads to an examination of the definition of "sexual offences", with a view to determining whether any could be constituted by a course of conduct after the victim's death.

[53] The only offences so identified deal with possessing child abuse material and publishing indecent articles contained in s 125B and s 125C of the Criminal Code. With respect, I am unable to agree with his Honour that there being offences within the definition of sexual offences, which may be committed in relation to a deceased person, the reference in the reform Act to conduct that would have constituted a sexual offence against the victim after the victim's death is identified; the words are not superfluous.

[54] The difficulty I find with this view is the unlikelihood of any of the conduct described in s 125B or s 125C forming part of a course of conduct by the prisoner which included an act or omission which caused the victim's death. Section 125B relates to a person "who possesses, distributes, adduces, sells or offers or advertises for distribution or sale child abuse material". Section 125C relates to a person "who publishes an indecent article". Although the maximum penalty for an offence under s 125B is imprisonment for 10 years, that for an offence under s 125C is but two years. In the latter case it seems unlikely that the Parliament intended that if it was that conduct which was alleged to have constituted a sexual offence that it should carry the consequence of extending the non-parole period by five years.

[55] Although misconduct with regard to corpses constitutes an offence under s 140 of the Criminal Code, it is not defined as a "sexual offence" notwithstanding that it includes the improper or indecent interference with a dead human body.

[56] In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object (Interpretation Act s 62A). Extrinsic material capable of assisting in ascertaining the meaning of a provision of an Act may be considered to determine the meaning of the provision when the provision is ambiguous or obscure. The Minister's Second Reading speech is extrinsic material for the purposes of s 62B of the Interpretation Act.

[57] The purpose of the enactment is clear enough. The Parliament intended that where the act or omission that caused the victim's death was part of a proscribed course of conduct by the prisoner, either before or after the victim's death, then the prisoner would be compelled by the legislation, through an order of the court, to be imprisoned for a further period of five years before being eligible for consideration for release on parole.

[58] The difficulty in interpretation has arisen in determining the ambit of the words to describe the conduct, "a sexual offence against the victim", where the conduct, as here, was acted out after the death of the victim. In my view

a literal or grammatical construction raises a real doubt as to Parliament's intention.

[59] The limit of the strict application of the words when applied in these circumstances has been pointed out. The consequence would be that an offender who, by design or otherwise, so conducts him or herself as to perform many of the other acts constituting the offences described as "sexual offences", after the death of the murdered victim, is not caught by the provision in question. That raises a real doubt as to Parliament's intent, in which case a court is justified in refusing to give words their literal or grammatical construction (per McHugh JJA in *Kingston v Keprose Pty Ltd* (1978) 11 NSWLR 404 at 421).

[60] In similar vein if the grammatical meaning of the provision does not give effect to the purpose of the legislation then it cannot prevail, it must give way to the construction which will promote the purpose or object of the legislation (at p 423) – s 62A.

[61] In my view significant support for the interpretation suggested by the appellant is to be found in the Attorney-General's second reading speech which included the following:

> "Crimes of murder that are occasioned also by a sexual assault, are also recognised as deserving an increased non-parole period. Where a victim has been sexually assaulted and then killed, either as a result of the assault or some subsequent act or omission, I believe that factor places the offence quite rightly in the minds of the community, in a more serious category of offence. *Likewise, an offence in which the victim is killed, and then their body subjected to sexual*

> *degradation post-mortem, is considered to be a more serious example of the crime of murder.*" (Emphasis added)

[62] Leaving aside the redundancy in the passage emphasised, it is plain that the Attorney-General could not have been limiting his remarks to the offences isolated from the list of sexual offences which could have application after death. The Attorney's reference is to a "body subjected to sexual degradation" and nothing could be clearer than that.

[63] The purpose of the provision being clear, it is neither unreasonable nor unnatural to read words into the provision such that the conduct constituting a sexual offence against a deceased victim includes conduct that would have constituted a sexual offence against the victim before the victim's death or, by recasting the provision so as to read:

> "The act or omission that caused the victim's death was part of the course of conduct by the prisoner and included conduct that would have constituted a sexual offence before the victim's death or that would have constituted a sexual offence against the victim if the victim was alive after the victim's death."

[64] I have come to this view notwithstanding the well established principles of statutory interpretation that "there must be strict construction of a penal statute, or an Act which affects the personal liberty of the subject" (*Smith v Corrective Services Commissioner of New South Wales* (1980) 33 ALR 25 at 29). However, under the ordinary rules of construction that must be applied to the provision under consideration, it is only if the language of the statute "remains ambiguous or doubtful the ambiguity or doubt may be resolved in

the favour of the subject …. The rule is perhaps one of last resort", per Gibbs J in *Beckwith v R* (1976) 12 ALR 333 at 339. The provision of the Interpretation Act (above) obliges the court to follow the approach adopted in that and other cases cited in *Pearce and Geddes "Statutory Interpretation in Australia"* at par 9.9.

[65] I would allow the appeal and order that the non-parole period of 25 years be fixed in relation to the sentence of imprisonment for life being served by the respondent.

The Court

[66] The order of the Court is that the appeal be allowed.

[67] A non parole period of 25 years is fixed in relation to the sentence of imprisonment for life being served by the respondent.

[68] The non parole period commences on the same date as the sentence being 23 December 1985.

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