The Queen v Hopkins [2008] NTSC 15

PARTIES:	THE QUEEN
	v
	LANCE MARTIN HOPKINS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS:	SCC 20630071, 20701927, 20701930, 20701932 and 20701937
DELIVERED:	18 March 2008
HEARING DATES:	15 February 2008
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – Sentencing – Crown application to reopen sentencing proceedings – non-parole period – aggregate sentence - the relationship between s 53(2) and s 55A of the Sentencing Act (NT) – whether the non-parole period fixed under s 53(2) of the Sentencing Act is subject to the provisions of s 55A of the Sentencing Act – Application allowed

Sentencing Act 1995 (NT)
Crimes (Sentencing Procedure) Act 1999 (NSW)

Bugmy v R (1990) 169 CLR 525; *R v Chan* (1994) 76 A Crim R 252; *Clinch* (1994) 72 A Crim R 301; *Deakin v R* (1984) 11 A Crim R 88; *R v EO* (2004) 8 VR 154; *CEV v The Queen* [2005] NTCCA 10; *Inkemala v The Queen*

[2005] NTCCA 6; *Kotis v The Queen* [2005] NTCCA 13; *R v Oancea* (1990) 51 A Crim R 141; *Power* (1974) 131 CLR 623; *R v Rajacic* [1973] VR 636; *R v Stewart* [1984] 35 SASR 477; *Tutchell* [1979] VR 248, referred to

Patman v Fletcher's Fotographics Pty Ltd (1984) 6 IR 471, followed

REPRESENTATION:

Counsel:

Applicant:	R Coates
Respondent:	J Lawrence

Solicitors:

Applicant:	Office of the Director of Public Prosecutions
Defendant:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Hopkins [2008] NTSC 15
Nos 20630071, 20701927, 20701930, 20701932 and 20701937

BETWEEN:

THE QUEEN
Applicant

AND:

HOPKINS, Lance Martin
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 18 March 2008)

The sentences imposed on the respondent

[1] On 30 January 2008 the respondent was convicted of four sexual offences and two drug offences and the court passed the following sentences of imprisonment on the respondent: for the crime of unlawful penile/vaginal sexual intercourse with SS, a child under the age of 16 years, which was committed between 14 December 2005 and 30 August 2006 at Borroloola, the respondent was sentenced to three years imprisonment; for the crime of unlawful penile/vaginal sexual intercourse with SY, a child under the age of 16 years, which was committed between 19 August 2006 and 6 November 2006 at Borroloola, the respondent was sentenced to three years imprisonment; one year of the sentence of three years imprisonment was

ordered to be served concurrently with the sentence of three years imprisonment that was imposed on the respondent for the crime of unlawful penile/vaginal sexual intercourse with SS; for the crime of having unlawful digital/vaginal sexual intercourse with SY, a child under the age of 16 years, which was committed between 19 August 2006 and 6 November 2006 at Borroloola, the respondent was sentenced to 18 months imprisonment; the sentence of 18 months imprisonment was ordered to be served wholly concurrently with the sentence of three years imprisonment that was imposed on the respondent for the crime of unlawful penile/vaginal sexual intercourse with SY; for a second crime of having unlawful digital/vaginal sexual intercourse with SY, a child under the age of 16 years, which was committed between 19 August 2006 and 6 November 2006 at Borroloola, the respondent was again sentenced to 18 months imprisonment; the sentence of imprisonment was ordered to be served wholly concurrently with the sentence of three years imprisonment that was imposed on the respondent for the crime of unlawful penile/vaginal sexual intercourse with SY; for the crime of supplying cannabis to SY, a child under the age of 16 years, the respondent was sentenced to six months imprisonment; the sentence of imprisonment was ordered to be served wholly concurrently with the sentence of three years imprisonment that was imposed on the respondent for the crime of having unlawful penile/vaginal sexual intercourse with SY; for the crime of supplying cannabis to JM, a child under the age of 16 years, the respondent was sentenced to six months imprisonment; the sentence of

imprisonment was ordered to be served wholly consecutively upon the sentence of three years imprisonment that was imposed on the respondent for the crime of having unlawful penile/vaginal sexual intercourse with SY.

[2] The respondent was ordered to serve an aggregate term of five years and six months imprisonment and the court fixed a non-parole period of three years. Both the sentence of imprisonment and the non-parole period were back dated to 11 October 2007 to reflect the time that the respondent had already spent in prison for his crimes.

[3] The total sentence of imprisonment imposed on the respondent by the court for the four sexual offences that he committed was five years imprisonment.

The application of the Crown

[4] The Crown applies to reopen the sentencing proceeding and asks the court to fix a non-parole period of three years and six months instead of the three year non-parole period that the court fixed. The application is made under s 112 of the Sentencing Act (the Act). The Crown says that the court erred in law when it fixed a non-parole period of three years because the non-parole period of three years that was fixed by the court is less than 70 percent of the total sentence of five years imprisonment that was imposed on the respondent for the four sexual offences that he committed.

[5] The Crown argues that s 55A of the Act required the court to fix a minimum non-parole period of three years and six months. The Crown acknowledges that there is no minimum non-parole period in respect of each of the

sentences of six months imprisonment that were imposed on the respondent for the two drug offences that he committed. It is not necessary to fix a non-parole period for a sentence of imprisonment that is less than 12 months.

The principal issue

[6] The principal question in the application is as follows – is the non-parole period that the court is required to fix under s 53(2) of the Act, in respect of the aggregate period of imprisonment imposed by the court, subject to the provisions of s 55A of the Act? In my opinion, for the following reasons, s 53(2) of the Act is subject to s 55A. The application of the Crown should be allowed and the court should fix a non-parole period of three years and six months.

The relationship between s 55A and s 53 of the Sentencing Act

[7] The Crown's application involves the interpretation of s 53(2) of the Act and in particular a consideration of the meaning of the words - "a period fixed under subsection (1)" which appear in the subsection and a consideration of the provisions of s 55A of the Act.

[8] Section 53 of the Act provides as follows:

> 53. Fixing of non-parole period by sentencing court
>
> (1) Subject to this section and sections 53A, 54, 55 and 55A, where a court sentences an offender to be imprisoned –
>
> (a) for life; or

(b) for 12 months or longer, that is not suspended in whole or in part,

it shall, as part of the sentence, fix a period during which the offender is not eligible to be released on parole unless it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate.

(2) Where a court sentences an offender to be imprisoned in respect of more than one offence, a period fixed under subsection (1) shall be in respect of the aggregate period of imprisonment that the offender is liable to serve under all the sentences then imposed.

[9] Subsection 53(1) of the Act is essentially a facultative provision. Unless the court considers that the fixing of a non-parole period is inappropriate, the subsection requires the court, when sentencing an offender, to fix, as part of the sentence to be imposed on an offender for a single offence, a period during which the offender is not eligible to be released on parole.

[10] Such a period is otherwise known as a non-parole period. The purpose of a non-parole period is to provide for mitigation of the punishment of the prisoner in favor of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum term of imprisonment that justice requires he must serve having regard to all of the circumstances of the case: *Deakin v R* (1984) 11 A Crim R 88 at 89; *Bugmy v R* (1990) 169 CLR 525; *R v Oancea* (1990) 51 A Crim R 141; *R v Stewart* [1984] 35 SASR 477 at 477.

[11] A purpose but not the only purpose in fixing a non-parole period is to assist the prisoner's rehabilitation through conditional freedom. The non-parole

period also has a punitive aspect: *R v Chan* (1994) 76 A Crim R 252 at 255. Subject to s 53A, s 54, s 55 and s 55A of the Act, the non-parole period is a minimum period of imprisonment to be served by a prisoner because the sentencing judge considers that, in all of the circumstances of the case, the crime committed calls for such punishment: *Power* (1974) 131 CLR 623 at 627 629; *Deakin* (supra) at 89. The punitive aspect of fixing a non-parole period is sometimes referred to as the penal element: *R v EO* (2004) 8 VR 154 at 169. This element must appropriately reflect the importance of such principles as retribution, protection of the community and specific and general deterrence: *R v EO* (supra) at 169.

[12] The non-parole period is part of the sentence; it is not a separate sentence: *R v Rajacic* [1973] VR 636.

[13] Section 55A of the Act prescribes that for certain offences against children under the age of 16 years the court must fix a minimum non-parole period of 70 percent of the term of imprisonment that the offender is to serve under a sentence. The section states as follows:

> (1) Subject to this section, if –
>
> (a) a court sentences an offender to be imprisoned for an offence against section 127, 130, 131, 131A, 132, 134, 177(a), 181, 184, 186, 186B, 188 or 192(4) of the Criminal Code;
>
> (b) the offender was an adult when the offence was committed;
>
> (c) the offence was committed on a person who was under the age of 16 years; and

(d) the sentence is not suspended in whole or in part,

the court must fix a period under section 53(1) of not less than 70% of the period of imprisonment that the offender is to serve under the sentence.

(2) Subsection (1) does not apply where under section 53(1) the court considers that the fixing of a non-parole period is inappropriate.

The respondent's argument

[14] Counsel for the respondent submitted that s 53(2) of the Sentencing Act was not subject to s 55A of the Act. His argument was based on the following grounds. First, unlike s 53(1), s 53(2) is not expressed to be subject to s 55A. Secondly, the words – "a period fixed under subsection (1)", appearing in s 53(2) are merely a reference to the "period during which the offender is not eligible to be released on parole", that is, to the non-parole period which is required to be fixed by the court and the words do not import a reference to s 53A, s 54, s 55 and s 55A of the Act. Thirdly, the wording of s 55A of the Act applies to single sentences and not to aggregate sentences. Fourthly, s 55A(1) of the Act expressly refers to the period to be fixed under s 53(1) of the Act only. No reference is made to the non-parole period to be fixed under s 53(2) of the Act nor does s 55A of the Act make any reference to aggregate sentences of imprisonment.

[15] There is considerable force in the respondent's argument. Some of the arithmetic exercises that the court has undertaken in the past in accordance with the Crown's construction of s 53(2) of the Act have been quite

convoluted and bear no particular relationship to any sentencing principles and s 53(2) of the Act is expressed in different terms to provisions such as s 53(1) of the Crimes (Sentencing Procedure) Act (NSW) which provides that:

> Multiple sentences of imprisonment
>
> (1) When a court imposes more than one sentence of imprisonment on an offender, *the court must comply with the requirements of this Division in relation to each sentence* (emphasis added).

[16] Further, the interpretation of s 53(2) contended for by the respondent is consistent with the principle of totality and the argument that severity of sentence is an exponential, not linear function: RG Fox and A Freiberg, Sentencing State and Federal Law in Victoria (2nd Ed Oxford University Press) at 727. In *Clinch* (1994) 72 A Crim R 301 at 306 Malcolm CJ stated:

> … the severity of a sentence increases at a greater rate than any increase in the length of the sentence. Thus a sentence of five years is more than five times as severe as a sentence of one year. Similarly, while a sentence of seven years may be appropriate for one set of offences and a sentence of eight years may be appropriate for another set of offences, each looked at in isolation, where both sets were committed by the one offender a sentence of 15 years may be out of proportion to the degree of criminality involved because of the compounding effect on the severity of the total sentence of simply aggregating the two sets of sentences.

[17] Likewise in *Tutchell* [1979] VR 248 at 252 to 253 the Full Court stated:

> An important consideration in making this decision is the seriousness of the 10 offences considered separately and in the aggregate. If imprisonment is decided to be the appropriate form of sentence, the judge would then impose a sentence on each count. In considering the orders of concurrency to be made and the effective sentence to

> result from those orders, the judge would consider the individual offences and sentences and also the offences and sentences in the aggregate. Similarly in deciding on the minimum period to be served before becoming eligible for parole the judge would consider the individual offences and sentences and also consider them as a whole. At each of the stages of deciding whether to impose custodial sentence or not, what concurrency orders are to be made, and what minimum sentences to be imposed, the weighting given to each offence is most important.

[18] There is an argument that the legislature intended to give the court the widest discretion under s 53(2) of the Sentencing Act so that due weight could be given to the principle of totality.

[19] However, for the reasons set out below I prefer the argument of the Crown.

Conclusion

[20] Subsection 53(2) must be read in the context of s 53 as a whole and s 53 should be read in the ordinary way, that is, from the beginning of the section onwards. In *Patman v Fletcher's Fotographics Pty Ltd* (1984) 6 IR 471 at 474 to 475 Priestley JA stated:

> ... I see no reason why the Act should not be read in the ordinary way in which a document is read, that is, from the beginning onwards. In the ordinary course of reading, s 4, although of course it must be read with both what precedes it and follows it, must be read after s 3 and further, in the ordinary course it seems to me that it must be read in the light of section 3. It is preposterous, in the literal sense, to read s 4, make assumptions concerning its purpose based on its language, without reference to what preceded it and then to read s 3 in the light of the purpose thus discerned in s 4. A much sounder way of reaching what the draughtsman's purpose was is to read his Act in the sequence in which you wrote it.

[21] When s 53(2) of the Act is read in light of s 53(1) of the Act it is apparent that s 53(1) is the leading provision and that s 53(2) is subordinate to s 53(1). Under s 53(1) of the Sentencing Act the period during which the offender is not eligible to be released on parole is a period which varies in accordance with the provisions of s 53A, s 54, s 55 and s 55A of the Act. Accordingly, the "period fixed under subsection (1)" which is referred to in s 53(2) of the Act must be a period that varies in accordance with the provisions of s 53A, s 54, s 55 and s 55A of the Act. Otherwise, it would mean that theoretically the court could fix a shorter non-parole period under s 53(2) of the Act than it could under s 53(1) of the Act.

[22] Such an interpretation of s 53(2) is consistent with the intention of the legislature that the minimum term of imprisonment that justice requires an offender must serve is greater for some offences than it is for others. It is also consistent with the practice of the court in numerous cases including *CEV v The Queen* [2005] NTCCA 10; *Inkemala v The Queen* [2005] NTCCA 6; *Kotis v The Queen* [2005] NTCCA 13; the sentencing remarks of Martin CJ in *The Queen v Kyle Horace* SCC 20425514 (22 March 2007); the sentencing remarks of Thomas J in *The Queen v Heritage* SCC 2051205 (1 August 2006); and the sentencing remarks of Thomas J in *The Queen v LL* SCC 20613271 (13 October 2006).

Orders

[23] Accordingly I make the following orders:

1. The Crown's application is allowed.

2. The non-parole period of three years that was fixed by the court on 30 January 2008 is set aside.

3. I fix a non-parole period of three years and six months. The non-parole period is back dated to 11 October 2007.
