

YATES v THE QUEEN (P21/2012)

Court appealed from: Court of Criminal Appeal of the Supreme Court of Western Australia (no media neutral citation)

Date of judgment: 29 July 1987

Referred into Full Court: 16 November 2012

On 7 August 1986 the applicant was charged with one count of deprivation of liberty and one count of aggravated sexual assault upon a child under the age of 13 years. At the time the applicant was 25 years old.

On 13 March 1987 the applicant was found guilty of the offences. He changed his plea from not guilty to guilty during the course of the trial. He was sentenced to seven years imprisonment on each count to be served concurrently, followed by an indeterminate sentence imposed pursuant to s 662 of the *Criminal Code*.

The applicant appealed against the sentence imposed upon him on two bases: (1) that he had been given no credit for six months spent in custody awaiting trial; and (2) challenging the order for indeterminate sentence.

The Full Court (Burt CJ, Brinsden and Smith JJ) decided that the finite term of imprisonment be reduced to allow for time spent in custody on remand. In relation to the challenge to the order for indeterminate sentence, the appeal was dismissed by majority, Burt CJ dissenting. His Honour noted that the trial judge had told the applicant: "It may be that you can receive and accept counselling and treatment for your unfortunate deviant conduct whilst you are incarcerated and in that event earn your release upon a reasonable period of parole to be served within the community. That will be up to you." Burt CJ in relation to these remarks commented: "On the facts it would seem that the applicant's 'deviant behaviour' is caused by factors including brain damage which are permanent. They are beyond the reach of treatment. Hence when the applicant has served his finite sentence less remissions his condition is likely then to be as it is now and if that condition now justifies detention to protect the public it will continue to justify detention for evermore. And with respect, that cannot be right."

On 16 November 2012 Justices Hayne, Crennan and Bell referred this application for special leave to appeal to an enlarged bench, for argument as if on an appeal.

The questions of law said to justify the grant of special leave to appeal are:

- Is it appropriate to order that an indeterminate sentence be served following a finite term of imprisonment in circumstances where an accused person suffers from an intellectual disability and has little relevant prior criminal history?
- Is it appropriate that s 662 of the *Criminal Code* be used for the purpose of manipulating the period of time which an offender must serve on parole following the expiration of a future term?
- Had this offender "shown himself to be a danger to the public" which would justify an indeterminate sentence pursuant to s 662 of the *Criminal Code*?