



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S37/2024
File Title: The King v. Hatahet
Registry: Sydney
Document filed: Form 27F - Respondent's Outline of oral argument
Filing party: Respondent
Date filed: 14 May 2024

Important Information

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

BETWEEN:

The King
 Appellant
 and
Fayez Hatahet
 Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Publication

1. This outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced at hearing

Analysis by reference to Part 1B

2. Part 1B *Crimes Act 1914* applies to the sentencing of federal offenders for federal offences. A sentencing court must impose a sentence that is of a severity appropriate in all the circumstances of the offence: s 16A(1) (Joint Book Authorities (**JBA**) **31**)).
3. In doing so, the court must take into account the matters in sub-s (2) in addition to any other matters: Respondent's submissions (**R**) [21]-[22]; s 16A(1),(2) (**JBA** **31-32**).
4. Section 16A accommodates the application of some judicially developed general sentencing principles – as opposed to peculiarly local or state statutory principles of sentencing – because those principles give relevant content to “of a severity appropriate in all the circumstances of the offence” and some of the expressions in sub-s (2): *Hili v The Queen* (2010) 242 CLR 250 at [25] (**JBA** **252**); *Johnson v The Queen* (2004) 78 ALRJ 616 at [15] (**JBA** **366**).
5. At common law, the onerosness of an offender's period of imprisonment is a relevant factor for a sentencing judge to take into account when determining the duration of that imprisonment. There must be a relationship between the period of actual imprisonment and onerosness. Section 16A accommodates this. As well as to “severity appropriate in all the circumstances of the offences”, it may, depending on the circumstances of the case, also be relevant to the forward-looking matters in sub-s (2), in particular sub-ss (j), (ja), (k), (m) (age, physical or mental condition), (n) and (p): **R** [21]-[22], [30] cf Reply (**Rep**) [6]-[8].

6. Here, Mr Hatahet had been in custody at the HRMCC, in conditions which were extremely onerous and significantly more so than for the general prison population: **R [5]**; (Core Appeal Book) (**CAB**) **80 [26]**; see also **CAB 45, 47, 57**. The onerousness of this custody was specifically found to be relevant to Mr Hatahet's prospects of rehabilitation and specific deterrence: **R [7]-[8]**; **CAB 79 [23]**; **CAB 56-57**.
7. The Attorney-General is precluded from making parole orders in relation to persons covered by sub-s (2) unless satisfied of "exceptional circumstances": s 19ALB (**JBA 67**). Even if not limited to compassionate grounds not directly related to questions of rehabilitation (as posited by Basten AJA), the circumstances engaging the purposes of parole will not suffice, unless there is some matter specific to the circumstances of the offender: **CAB 87 [46]** cf **99 [83]**.
8. This legislated, demanding test for parole cannot be equated to remission schemes and policies of parole boards and the like; see further below.
9. Indeed, a high degree of certainty of refusal was demonstrated for Mr Hatahet: **R [10]-[14], [30]**; **CAB 87-88 [46]-[47], 94 [67]-[68], 98 [80], 99 [83]**. As a consequence, Mr Hatahet would continue to suffer considerably more onerous conditions of custody: **R [14]**; **CAB 72 [2], 99 [84]**. This was a relevant consideration when determining the sentence to be imposed upon Mr Hatahet, including as it bore on the forward-looking matters identified above: **R [27], [30]**.
10. This is not to say that the existence of s 19ALB and its potential consequences will necessarily affect the sentence for all offenders subject or potentially subject to it. The Court of Criminal Appeal's judgment did not determine that they would: **R [35]**.

Hoare and other authorities

11. It is not entirely clear what the prosecution means by its Reply at [2]. It is disputed that *Hoare v The Queen* (1989) 167 CLR 348 and the other authorities upon which the prosecution rely have much or any utility. The difficulty with the prosecution's reliance upon *Hoare* and the authorities supposedly reflecting the three identified rationales is that they are not directed towards Part 1B but arose from the specific regimes in issue in them: **R [15]-[18]**; cf *Hoare* at 349-350 (**JBA 271-272**) (It is not practicable to go through all the authorities footnoted by the prosecution, so what appear to be the main ones should suffice to show this: *R v Bruce* [1971] VR 656 at 657 (**JBA 373**); *Attorney-General v Morgan* (1980) 7 A Crim R 146 at 152, 155-156

(**JBA 351, 354-355**); *R v Yates* [1985] VR 41 at 43-46 (**JBA 376-379**); *The Queen v Brennan* (1984) 36 SASR 78 at 78-80 (**JBA 401-403**); *Sikaloski v The Queen* [2000] WASCA 387 at [16]-[19] (**JBA 391-393**).

12. Further, the three propositions the prosecution derives from these authorities do not survive consideration as against Part 1B: **R [19]**.
13. *First*, is the proposition that the prospects of an offender being granted parole are not relevant to the sentencing task because they do not bear upon the appropriate sentence to be imposed for the offence: Appellant's submissions (**A [30]-[31], [46], [50]**). But all components of a sentence must reflect the appropriate sentence for the offence: **R [20]-[22], [30]**; s 16A (**JBA 31-32**). See above at [4]-[5].
14. *Secondly*, is the proposition that it is too speculative for a sentencing judge to take the prospects of parole into account and that safe predictions cannot be made: **A [32]-[38], [50]-[52]**. But, as above, there is a much greater degree of certainty of refusal of parole in the context of s 19ALB than for other offenders; and if unable to make a safe prediction, a sentencing judge could decline to take any matter pertaining to the prospects of parole into account: **R [23]-[26], [30], [47]-[49]**. This is an assessment based on evidence viz about whether there are or will be exceptional circumstances pertaining to the offender (as is the assessment about onerousness of custody): cf **Rep [13]-[14]**.
15. *Thirdly*, is the proposition that taking the prospects of parole into account can subvert the relevant legislative scheme for parole: **A [39], [53]**. The purpose of s 19ALB may be accepted: **A [54]**. That does not mean that it is then neutral in effect upon other considerations relevant to determining the appropriate sentence: **R [27]**.

Dated 14 May 2024



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