# REPORTS OF CASES

DETERMINED IN THE

# HIGH COURT OF AUSTRALIA

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[HIGH COURT OF AUSTRALIA.]

FLYNN . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1949. PERTH, *Sept.* 7

Latham C.J., Rich, Dixon and McTiernan JJ.

*Special Leave to Appeal—Habeas corpus—Prisoner under sentence of imprisonment for life—Remission of sentences—"Marks system"—No legal right to release—Prisons Act* 1903-1918 (*W.A.*) (*No.* 14 *of* 1903—*No.* 31 *of* 1918), *s.* 21 (8)—*Interpretation Act* 1918-1938 (*W.A.*) (*No.* 30 *of* 1918—*No.* 28 *of* 1938), *s.* 17—*Prison Regulations* (*W.A.*).

On 6th August 1935 the applicant was found guilty of manslaughter and was sentenced to imprisonment for life with hard labour. The *Prison Regulations* 1923 made under s. 21 (8) of the *Prisons Act* 1903-1918 (W.A.) were at this date in force and provided, *inter alia*, (*a*) by reg. 140, that prisoners were entitled to earn marks towards remission of sentences and (*b*) by reg. 155, that for the purpose of determining the time at which the prisoner might be released a life sentence should be deemed to be a period of twenty years, subject to reduction under the marks system.

In 1940 the *Prison Regulations* 1923 were repealed and reg. 140 was repeated as reg. 152 of the *Prison Regulations* 1940. Regulation 155 was not re-enacted. In 1943 reg. 152 was amended and it was then provided that the "marks system" should not apply to prisoners undergoing a sentence of imprisonment for life in whose case the marks system should apply only to determine whether or not the Royal Prerogative of mercy should be exercised.

The applicant was able to show that on 7th March 1949 he had served a sentence of twenty years subject to remissions under the "marks system." He claimed that he was for this reason being held in unlawful custody and obtained a writ of habeas corpus directed to the Comptroller General of Prisons.

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*Held*, (1) That reg. 155 conferred a power on gaolers to set prisoners at liberty upon the terms set out in the regulations. No right was thereby conferred upon a prisoner.

*Horwitz* v. *Connor* ( (1908) 6 C.L.R. 38) ; *Morriss* v. *Winter* ( (1930) 1 K.B. 243) referred to.

(2) That if reg. 155 were capable of creating a right in a prisoner, such right had not accrued to the applicant at the date upon which the regulation was repealed and s. 17 (*a*) of the *Interpretation Act* 1918-1938 (W.A.) could not be availed of.

APPLICATION for special leave to appeal from the Supreme Court of Western Australia.

On 6th August 1935 the applicant was at the Supreme Court Criminal Sittings at Perth convicted of manslaughter and sentenced to imprisonment with hard labour for life. At that time the management and control of the prisons of Western Australia was governed by the *Prison Regulations* 1923 made under s. 21 (8) of the *Prisons Act* 1903-1918 (W.A.). By reg. 140 (*a*) of these regulations it was provided that " All prisoners, including Naval and Military prisoners are entitled to earn marks towards remission of sentence, except where otherwise provided by the regulations (Gazetted 9th September, 1915)." By reg. 155 (*a*) of the same regulations it was provided that " For the purpose of determining the time at which under the prison regulations the prisoner may be released a life sentence or a death sentence commuted to one of life shall be deemed to be a period of twenty years, subject to reduction under the marks system. This regulation will not involve a limitation of but will be an addition to the right of a prisoner to petition under existing regulations."

In 1940 these regulations were repealed. Regulation 155 (*a*) was not remade. Regulation 140 (*a*) re-appeared as reg. 152 (*a*) of the *Prison Regulations* 1940.

In 1943 the following proviso was added to reg. 152 (*a*) of the *Prison Regulations* 1940 : " Provided that this paragraph shall not apply to prisoners undergoing a sentence of imprisonment for life in whose case the marks system established by this regulation shall apply only to enable the Governor in Council to determine whether or not the Royal Prerogative of mercy shall be exercised in favour of such prisoners."

The applicant contended that he was entitled to a total remission of sentence of 1822 days under the marks system and to a further 802 days remission for other reasons. These claims to remission accrued in part before and in part after the repeal in 1940 of the *Prison Regulations* 1923. The applicant contended that his sentence of imprisonment for life was, by reg. 155 (*a*) of the *Prison*

*Regulations* 1923, a sentence of twenty years' imprisonment and that his remissions of sentence gave him a legal right to be released on 8th March 1949. He relied upon s. 17 (*a*) of the *Interpretation Act* 1918-1938 (W.A.) to preserve this right after the repeal of the regulation upon which it was based. On the return of a motion for a writ of Habeas Corpus on 20th April 1949 the Supreme Court of Western Australia (Full Court) held that the applicant was in lawful custody and the writ was discharged.

From this decision the applicant sought special leave to appeal to the High Court.

*Curran* (with him *Walker*), for the applicant. The applicant has a legal right to be released. The word "may" appearing in reg. 155 of the *Prison Regulations* 1923 is mandatory. The granting of a power implies a duty to exercise it (*South Australia Harbours Board* v. *South Australian Gas Co.* (1); *Kraljevich* v. *Lake View and Star Ltd.* (2)). The regulations must not be construed so as to interfere with vested rights unless no other interpretation is possible (*Craies Statute Law*, 4th ed. (1936), 254; *Julius* v. *Lord Bishop of Oxford* (3); *Interpretation Act* 1918-1938, s. 17 (*a*)). A judge sentencing a prisoner in 1940 must have had in mind the regulations as they then stood, which regulations said that imprisonment for life was imprisonment for twenty years.

*Nevile*, for the respondent: The judgment of the Full Court was obviously right (*Horwitz* v. *Connor* (4)). The word "may" as used in reg. 155 implies a discretion (*De Laessoe* v. *Anderson* (5)). The marks system is merely an indulgence and creates no rights in the prisoner. If the regulation is mandatory then it is ultra vires the Act. In any event no right had accrued to the applicant at the time when the regulation was repealed.

*Curran* in reply.

The following judgments were delivered:—

LATHAM C.J. This is an application for special leave to appeal from a judgment of the Court of Criminal Appeal. The applicant is Stanley Thomas Flynn, who was sentenced to imprisonment for life for manslaughter in the year 1935. The applicant claims that he has a right to a reduction of his sentence by virtue of certain Prison Regulations. The *Prison Regulations* as they were promulgated in 1923 applied to him in 1935 and up to the time of the

(1) (1934) 51 C.L.R. 485.
(2) (1945) 70 C.L.R. 647, at pp. 650, 652,
(3) (1880) 5 App. Cas. 214.
(4) (1908) 6 C.L.R. 38.
(5) (1942) 59 T.L.R. 149.

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repeal of those regulations in 1940. He contends that under those 1923 regulations a life sentence was in effect reduced to a sentence of twenty years and was further made subject to a marks system whereby by good conduct a prisoner could earn a reduction of his sentence. In fact the marks earned by the prisoner were calculated by the prison authorities and, if he had a right to be released upon the basis that the sentence was a twenty-year sentence subject to reduction in accordance with the marks system, he would have been entitled to be released in March of this year.

Section 287 of the *Criminal Code* (W.A.) provides that the punishment for manslaughter shall be imprisonment for life. Regulation 155 (*a*) of the *Prison Regulations* 1923 is in the following terms :— "For the purpose of determining the time at which under the prison regulations the prisoner may be released a life sentence or a death sentence commuted to one of life" [these latter words were omitted by a subsequent amendment] "shall be deemed to be a period of twenty years, subject to reduction under the marks system. This regulation will not involve a limitation of but will be an addition to the right of a prisoner to petition under existing regulations." Regulation 155 (*b*) contains provisions for reports as to the conduct, mental and physical condition of all such prisoners at periods of five, ten and fifteen years. That provision fits in perfectly well with the provision that a life sentence thereafter is to be deemed to be a sentence of a period of twenty years. The terms of reg. 155 (*a*) are that a prisoner "may be released." It introduces the provision that a life sentence shall be deemed to be a period of twenty years subject to reduction under the marks system. I quote the initial words of reg. 155 (*a*)—"For the purpose of determining the time at which under the prison regulations the prisoner may be released." Regulation 140 of the 1923 regulations provides for the marks system. It provides that prisoners are entitled to earn marks towards remission of sentence. In par. (i) it is provided—"To determine a sentence, the following method will be employed :—Reduce sentence to days, multiply by six (6) for number of marks to be earned" and further arithmetical calculations are prescribed. The application of the marks system in determining the length of imprisonment therefore depends upon the initial act of reducing a sentence to days—that is the basis of the calculation which par. (i) requires. It is obviously impossible to reduce a sentence for life to days, as the period of no man's life can be determined in advance of death. Accordingly, the marks system as prescribed by reg. 140 can be applied to a life sentence only if there is some such provision as that contained in

reg. 155 (*a*), which provides a fixed period of imprisonment in substitution for life. Regulation 155 existed in the 1923 regulations, but when in 1940 the regulations were repealed reg. 155 was not re-enacted.

It is contended, however, for the applicant that at the time of the repeal in 1940 a right or privilege under the existing 1923 regulations had been acquired and had accrued. Section 17 of the *Interpretation Act* 1918-1938 provides that the repeal of regulations shall not, unless the contrary intention appears—" (*a*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any regulations so repealed." Upon that provision the argument is founded that the applicant had a right measured by the number of marks earned to be released when he had completed the sentence of twenty years under reg. 155 of 1923. But at the time in 1940 when the repeal took place the applicant was only on the way towards acquiring a right to release. He had not then acquired a right to release. Neither had he acquired a right to have the regulations continued in operation in respect of himself. The applicant is not assisted by s. 17 of the *Interpretation Act*.

It is an essential part of the applicant's argument that the regulations give a right to release subject to the application of the marks system. The regulations are made under the *Prisons Act* 1903-1918 (W.A.) s. 21 (8). That provision is " The Governor may make regulations for all or any of the following purposes (that is to say) :—. . . (8) Providing for the ordinary remission of portions of sentences, and for extraordinary remission for special services, and for the forfeiture of remission for misconduct." The regulations authorized include regulations providing for ordinary remission of portions of sentences. This provision does not authorize a regulation reducing the sentence imposed by a court in accordance with a statute. Section 21 (8) authorizes only a regulation for remission of sentences and not for the imposition of another sentence than that imposed by a court. If reg. 155 were interpreted as itself reducing all life sentences to sentences for twenty years, the validity of the regulation would be doubtful. But it is not necessary to decide this question because reg. 155 does not purport to give any right to a prisoner. The word which is used in reg. 155 is the word " may." The prisoner *may* be released. The provision is not that the prisoner *shall* be released, and s. 32 of the *Interpretation Act* at least assists the argument that " may " should be interpreted here as conferring a power, and not as granting a right.

But, as is said in the judgment of the Full Court of the Supreme Court, the terms of reg. 155 are (apart from the point last-mentioned)

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not apt to create a right, because the provision relating to the release of the prisoner after twenty years is a provision which is made only for the purpose of determining the time at which he may be released subject to the marks system. It is not a provision to the effect that the prisoner may be released after a certain period or when certain conditions have been fulfilled. The regulations are regulations relating to the discipline and the management of the gaol, and the provision as to twenty years in reg. 155 is a provision which is introduced simply for the purpose of applying the marks system. There are no words in the regulations which are sufficiently clear to confer a right upon a prisoner to release, even though he has earned full marks. A similar view was taken of prison regulations which are not in identical terms but which are very similar in substance in *Horwitz* v. *Connor* (1) and *Morriss* v. *Winter* (2).

Finally, in 1943 an amending regulation was made which referred to the provision in the 1940 regulations which corresponded to paragraph (i) in reg. 140 of the 1923 regulations. The regulation introduced in 1943 was this :—" The abovementioned Prison Regulations, 1940, are amended as follows :—

1. Regulation 152 is amended by adding at the end of paragraph (*h*) thereof a proviso as follows :—' Provided that this paragraph shall not apply to prisoners undergoing a sentence of imprisonment for life in whose case the marks system established by this regulation shall apply only to enable the Governor in Council to determine whether or not the Royal Prerogative of mercy shall be exercised in favour of such prisoners '." Upon the view which I have expressed that the regulations do not alter the term of any sentence but only provide for remissions of a sentence by way of indulgence the applicant now before the Court is still a prisoner undergoing a sentence of imprisonment for life. Indeed, the provision which reduces a life sentence to twenty years has been repealed, and he is clearly a prisoner undergoing a sentence of imprisonment for life. Accordingly the 1943 regulation applies to him and in his case the marks system established by the current regulation applies only to enable the Governor in Council to determine whether or not the Royal Prerogative of mercy shall be exercised in favour of him. The position, therefore, is this : although independently of the repeal and amendment of the regulations the prisoner would in the normal course have been released in March last, now his only chance of obtaining release depends upon the exercise of the prerogative of mercy by the Governor in Council. In my opinion

(1) (1908) 6 C.L.R. 38. (2) (1930) 1 K.B. 243.

he has no legal right to obtain release, and therefore the application must be refused.

RICH J. I agree.

DIXON J. This is an application for special leave to appeal from an order of the Supreme Court refusing a writ of habeas corpus to a prisoner who is held in custody in purported execution of a sentence imposed upon him after conviction for manslaughter.

In my opinion the application for special leave should be refused upon the ground that the prisoner is held in lawful custody. He claims that his custody is no longer lawful because of the provisions of the regulations relating to the management and control of the prisons of Western Australia. Regulations made in 1923 for that purpose provide that, in the case of a life sentence, for the purpose of determining the time at which under the prison regulations the prisoner may be released a life sentence or a death sentence commuted to one of life shall be deemed to be a period of twenty years subject to reduction under the marks system (reg. 155). Under the marks system all prisoners are entitled to earn marks towards the remission of sentence except where otherwise provided and to determine the sentence a method is prescribed which depends upon the sentence being for a fixed period. The prisoner claims that he has under those regulations earned sufficient marks to entitle him to release. The regulations were made under a provision of the *Prisons Act* 1903-1918, s. 21 (8), which enables the Governor in Council to make regulations providing for the ordinary remission of portions of sentences, and for extraordinary remission for special services, and for the forfeiture of remission for misconduct.

Even if the matter depended on the regulations of 1923 I think this application must fail. My reason for that opinion is that s. 21 (8) does not in my view authorize the Governor in Council to confer on prisoners a legal right to be set at liberty, but is concerned only with the management and discipline of the gaols and with conferring on gaolers an authority to set them at liberty upon the terms of the regulations made therein being complied with. The interpretation of a regulation-making power of this kind in relation to prisons is of some importance because the distinction between the execution of the sentence imposed upon a prisoner by the court and the exercise by the Crown, whether under the Prerogative alone or under the Prerogative as affected by provisions of legislation, of a power to remit sentences is one which the courts should be

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careful to maintain. It is pointed out in the case of *Horwitz* v. *Connor* (1) that if prisoners could resort to legal remedies to enforce gaol regulations responsibility for the discipline and control of prisoners in gaol would be in some measure transferred to the courts administering justice. For if statutes dealing with this subject matter were construed as intending to confer fixed legal rights upon prisoners it would result in applications to the courts by prisoners for legal remedies addressed either to the Crown or to the gaolers in whose custody they remain. Such a construction of the regulation-making power was plainly never intended by the legislature and should be avoided. An interpretation of the power to make prison regulations and of the regulations made thereunder as directed to discipline and administration and not to the legal rights of prisoners is in my opinion supported by the decision of this Court in *Horwitz's Case* (1) and the decision of *Horridge* J. in the case of *Morriss* v. *Winter* (2) and by the observations made upon the *Prison Regulations* by *Goddard* L.J. in *De Laessoe* v. *Anderson* (3) in the second column. On that ground I think that the custody in which the prisoner remains is lawful.

But there is a further ground which would result in the refusal of this application even if the opposite view were adopted. The regulations of 1923 were repealed before a sufficient period had elapsed to justify the applicant's release from his sentence under the marks system on the basis that twenty years had been substituted for life imprisonment. They were repealed by the *Prison Regulations* 1940. The policy of those regulations was apparently to put prisoners under life imprisonment outside the marks system. In 1943 the policy was somewhat revised because in that year by an amendment of the regulations such prisoners were put under the marks system, but only for the purpose of enabling them to appeal to the Royal Prerogative. The *Prison Regulations* 1940 would operate in my opinion to remove the foundation of his claim to a legal right under the regulations of 1923 to be released at the end of the period of twenty years or that period reduced under the marks system.

But s. 17 of the *Interpretation Act* was relied upon as a provision which preserved his rights under the reg. of 1923 to release at the end of twenty years or twenty years reduced by the marks system. In my opinion that provision is inapplicable, not only because the regulations conferred no rights, but because at the date of the repeal in 1940 of the 1923 regulations he was in the position of a

(1) (1908) 6 C.L.R. 38.
(2) (1930) 1 K.B. 243.
(3) (1942) 59 T.L.R. 149, at p. 150.

person who had not an accrued right. He had no accrued right to release, and his rights under the *Prison Regulations* 1923 were only accruing. I therefore think the application should be refused.

McTIERNAN J. I agree that the application should be refused. I think that the first and main obstacle to the success of the application is that the sentence of imprisonment for life at the time when it was imposed cannot be interpreted as being a sentence of twenty years' imprisonment. Regulation 155 does not, in my opinion, on its true construction, alter or purport to alter a sentence of imprisonment for life to twenty years. At the time when the application was made for a writ of habeas corpus the applicant was under sentence of imprisonment for life, and therefore he had no legal right to be released. But in addition to that, having regard to the authorities which have been cited, the applicant has no legal right to have awarded to him what are described in the regulations as marks for the purpose of calculating the duration of his sentence or for the purpose of effecting any legal reduction in the term of his sentence, whether that sentence is to be considered as one for life or, if my construction of reg. 155 is wrong, for twenty years. I agree with what has been said by the Chief Justice and my brother *Dixon*, and consequently I would refuse the application.

*Application refused.*

Solicitor for the applicant: *Fred Curran.*

Solicitor for the respondent: *R. V. Nevile*, Crown Solicitor for the State of Western Australia.

F. T. P. B.