HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HEYDON AND CRENNAN JJ

JASON CHARLES BUCKLEY APPELLANT

AND

THE QUEEN RESPONDENT

Buckley v The Queen
[2006] HCA 7
8 March 2006
B86/2005

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 7 May 2004.*

3. *Remit the matter to the Court of Appeal of the Supreme Court of Queensland for further consideration in accordance with the reasons of this Court.*

On appeal from the Supreme Court of Queensland

Representation:

P E Smith for the appellant (instructed by Terry Fisher & Company)

L J Clare for the respondent (instructed by Director of Public Prosecutions (Queensland))

CATCHWORDS

Buckley v The Queen

Criminal Law – Sentencing – Indefinite sentence – Appellant pleaded guilty to serious violent and sexual offences – Whether the sentencing judge observed the correct principles in exercising the power to impose an indefinite sentence.

Criminal Law – Sentencing – Whether the sentencing judge made material errors of fact requiring reconsideration of the sentencing discretion.

Penalties and Sentencing Act 1992 (Q), Pt 10.

1 GLEESON CJ, GUMMOW, KIRBY, HEYDON AND CRENNAN JJ. The appellant, having entered pleas of guilty to serious charges arising out of three violent attacks on women, was sentenced in the District Court of Queensland. An indefinite sentence was imposed, pursuant to s 163 of the *Penalties and Sentences Act* 1992 (Q) ("the Act"). The principal issue in this appeal is whether, in imposing that sentence, the sentencing judge observed the principles to be applied in the exercise of the power conferred by such legislation. Those principles have been stated in a number of decisions, including decisions of this Court. A subsidiary issue is whether the sentencing judge made material errors of fact requiring reconsideration by the Court of Appeal of Queensland of the sentencing discretion.

Indefinite sentences

2 In *R v Moffatt*[1], Hayne JA pointed out that legislative provisions providing for the preventive detention of habitual or dangerous offenders have a long history in jurisdictions which derive their legal systems from England. That case was concerned with Victorian legislation enacted in 1991. Victoria had an *Indeterminate Sentences Act* in 1907, and similar provisions were contained in later Victorian legislation. Reference was made to legislation providing for indefinite or preventive detention in several other States and the Northern Territory. The corresponding Western Australian legislation was considered by this Court in *Chester v The Queen*[2] and *McGarry v The Queen*[3]. The history of similar New Zealand legislation was examined in *R v Leitch*[4]. In *Fardon v Attorney-General (Qld)*[5], this Court, in upholding the validity of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q), discussed some of the issues involved in preventive detention. New South Wales legislation relating to sentencing of habitual criminals was considered in *Strong v The Queen*[6].

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1 [1998] 2 VR 229 at 251-252.

2 (1988) 165 CLR 611.

3 (2001) 207 CLR 121.

4 [1998] 1 NZLR 420.

5 (2004) 78 ALJR 1519; 210 ALR 50.

6 (2005) 79 ALJR 1171 at 1177 [28], 1182-1183 [57]-[62]; 216 ALR 219 at 226, 233-236.

3 Part 10 of the Act is headed "Indefinite sentences". Section 163 provides that a court may, instead of imposing a fixed term of imprisonment, impose an indefinite sentence on an offender convicted of a violent offence. Rape, by definition, is a violent offence (s 162). Such a sentence may be imposed by the court of its own initiative, or on an application made by counsel for the prosecution (s 163(1)). An application by counsel for the prosecution requires the written consent of the Attorney-General (s 165).

4 In imposing an indefinite sentence, the court must state the term of imprisonment (the nominal sentence) that it would have imposed had it not imposed an indefinite sentence (s 163(2)). The indefinite sentence must be reviewed within six months after an offender has served 50 per cent of the nominal sentence, and subsequently (while it subsists) at intervals of not more than two years (s 171(1)). An offender may make an application for review at any time after the first review (s 172). There are provisions relating to the conduct of such reviews (ss 172C, 176), and for appeals (s 177). Upon a review, unless it is satisfied that the offender is still a serious danger to the community, the court must order that the indefinite sentence be discharged, and sentence the offender for the violent offence for which the indefinite sentence was imposed (s 173(1)). Such a sentence is taken to have started on the day the indefinite sentence was originally imposed, and must be not less than the nominal sentence (s 173(3)). A prisoner so sentenced may apply to be released to a re-integration program (s 174).

5 Before imposing an indefinite sentence, a court must be satisfied that the offender is a serious danger to the community. In making that determination, the court must have regard to whether the nature of the offence is exceptional, and also to the offender's antecedents, age and character, any relevant psychiatric or other report, the risk of serious physical harm to members of the community if an indefinite sentence were not imposed, and the need to protect members of the community from such risk (s 163(3) and (4)). A court imposing an indefinite sentence must give detailed reasons for doing so (s 168).

6 We are not presently concerned with a case, such as *Chester v The Queen*[7], or *McGarry v The Queen*[8], where the offending would have attracted a

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7 (1988) 165 CLR 611.

8 (2001) 207 CLR 121.

finite or nominal sentence in the order of about three or four years. Nor are we concerned with a case where the available maximum penalty was plainly inadequate to serve a necessary protective purpose. On any view of the matter the appellant was facing a long sentence. Even so, it is important to bear in mind what was said in *Chester* and *McGarry* about the imposition of an indefinite sentence. Such a sentence involves a departure from the fundamental principle of proportionality. The statute assumes that there may be cases in which such a departure is justified by the need to protect society against serious physical harm; but a judge who takes that step must act upon cogent evidence, with a clear appreciation of the exceptional nature of the course that is being taken. Furthermore, as was pointed out in *McGarry*[9], the assessment of risk required by the statute may involve temporal issues requiring careful examination.

7 In *R v Leitch*[10], the New Zealand Court of Appeal said that, when considering the exercise of its discretion, a sentencing court "will ordinarily consider whether the protective purpose of preventive detention could reasonably be met by an available finite sentence of imprisonment". Similarly, in the recent Victorian case of *R v Davies*[11], Charles and Nettle JJA said that, before answering the critical question whether the case was of such exceptional rarity that an indefinite sentence should be imposed, it was necessary first to consider what fixed term of imprisonment would have been appropriate. The Queensland legislation applied in the present case requires a judge to specify a nominal sentence, which becomes relevant for purposes of review and for the consequences of decisions made on review. The significance of the nominal sentence, however, goes beyond that. In the first place, where a judge, sentencing a dangerous offender, is deciding whether the protection of society requires an indefinite sentence, the protective effect of a finite sentence, fixed according to ordinary sentencing principles, including the need to protect the public[12], is a matter to be weighed carefully. An indefinite sentence is not merely another sentencing option. Much less is it a default option. It is exceptional, and the necessity for its application is to be considered in the light of the protective effect of a finite sentence. Secondly, the available finite sentence sets the time frame by reference to which the temporal issues earlier mentioned are to be

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9 (2001) 207 CLR 121 at 129-130 [22]-[23].

10 [1998] 1 NZLR 420 at 429.

11 (2005) 153 A Crim R 217 at 238.

12 *Veen v The Queen [No 2]* (1988) 164 CLR 465.

examined. As will appear, in this case the sentencing judge set a nominal sentence of 22 years, having rejected a prosecution submission that it should be life. Since it was clear that, even if an indefinite sentence were not imposed, the appellant would be in custody for many years, estimations of future risk were being undertaken in a temporal context that necessarily gave rise to substantial uncertainty.

The offences

8 In the Court of Appeal, Holmes J set out in her reasons for judgment the following succinct account of the three episodes leading to the charges against the appellant:

> "The [appellant] committed the offences for which he was sentenced between 6 March 1999 and 21 January 2000. The first two rapes were committed on a 20 year old woman who was walking alone to her home in Dalby at about 4am. The [appellant] grabbed her from behind and forced her to the ground. He then used the strap of her shoulder bag around her neck to choke her and force her to an area where he anally and vaginally raped her, causing what was described in a medical report as 'major anal trauma' and other less serious genital injuries. At the end of the assault he threatened to kill the complainant if she moved as he left.
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> The second series of assaults was committed on a 67 year old woman. At about 5am one morning, the [appellant] broke a window to get into the bedroom where the victim was sleeping. He tried to sodomise her inside the bedroom and then dragged her out of the house into the backyard, where he attempted to put his penis into her mouth. He then sodomised her while placing his fingers in her vagina. Those events gave rise to rape and indecent assault charges.
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> The third set of offences was committed on a 15 year old girl whom the [appellant] attacked as she walked alone in a Toowoomba city street at about 1am. He chased her, and then knocked her to the ground from behind, causing her in the fall to suffer a fractured femur. Notwithstanding her plea that she thought her leg was broken, he raped her vaginally and anally. At one stage when he thought she had looked at him he slapped her on the face and head."

9 The appellant was arrested on 27 April 2000, and taken into custody, where he has remained. A DNA sample implicated him in the three attacks. A question arose as to his fitness to plead. On 1 March 2001, the Mental Health

Tribunal found that the appellant was fit to plead. After some further delays for reasons that are not presently relevant, the appellant, in June 2003, entered pleas of guilty to the following charges: five counts of rape, each of which carried a maximum penalty of imprisonment for life; one count of burglary with violence, which also carried a maximum penalty of imprisonment for life; one count of indecent assault, which carried a maximum penalty of imprisonment for 10 years; and one count of inflicting grievous bodily harm, which carried a maximum penalty of imprisonment for 14 years. In September 2003, the appellant came for sentence before Judge Howell.

The appellant's background

10 The appellant was born at Cunnamulla in September 1971. He left school at the age of 13. He worked in various occupations in rural Queensland, including kangaroo shooting and professional boxing. At the time of his arrest he had been working for three years as a leading hand on an oil rig. Prior to his conviction for the offences the subject of this appeal, he had a relatively minor criminal history, involving a number of summary offences such as wilful damage, assault of police, and occasioning bodily harm. More significantly, there were offences involving voyeurism.

11 In August 2000, Dr Moyle, a psychiatrist engaged by the appellant's solicitors, wrote a report that included information received from the appellant and the appellant's mother. The appellant complained of a background of victimisation and physical abuse at school. He received many head injuries from fights which were said to be "associated with rage". His mother attributed a change for the worse in his behaviour to injuries he received in a fight when he was 19. However, there was a history of violent outbursts before then. Such violence was sometimes associated with alcohol abuse.

The psychiatric evidence

12 At the time of Dr Moyle's first report, there were unresolved questions as to whether there would be a plea of insanity, whether the appellant was fit to plead, and whether, in the event of a guilty plea, there were considerations that could be urged in mitigation of penalty. The appellant was found fit to plead, and he entered pleas of guilty. The psychiatric evidence was ultimately regarded, not as a matter of mitigation, but as a reason for imposing an indefinite sentence. The appellant had been under police surveillance before his arrest. The record does not show why this was so, or why his sanity was questioned. However, much of what concerned the sentencing judge emerged, over time, in information given by the appellant to a number of psychiatrists. The reliability of that

information was not in contest during the sentencing proceedings, and the judge took it at face value. In argument in this Court, we were not invited to do otherwise.

13 In his August 2000 report, Dr Moyle, under the heading "Sex and Marriage", recorded conversations with the appellant about his sexual experiences. The appellant displayed "body language ... associated with quite intense feelings". The appellant recounted a long history of voyeuristic behaviour. Then he described "another paraphilia". This involved a sexual encounter with a dog during the appellant's childhood. Dr Moyle said:

> "He has experienced fantasies of sexual sadism. This never reached the extent where killing women was sexually exciting behaviour. However he can recall dreams involving violence to women as well as degradation. He proudly states that he has never mistreated any females nor has he demonstrated any violence towards females. He does acknowledge however a growing thought of torturing women in later years."

14 This is a curious passage. The appellant's statement to Dr Moyle that he had never mistreated any females and never demonstrated any violence towards females was recorded by Dr Moyle after the three attacks on women which had resulted in his being in custody. Whether it was obvious to Dr Moyle at the time is not clear, but it is now obvious that, at least in that respect, what the appellant was telling Dr Moyle was false, if it was intended to include all of the appellant's past conduct. Perhaps, in the context, it was only intended to refer to his conduct before the present offences. It will be necessary to return to Dr Moyle's opinion, but it is convenient for the present to trace the development of the information given by the appellant to other psychiatrists.

15 In October and November 2000, the appellant was examined, at the request of the Mental Health Tribunal, by Dr Fama, who had read Dr Moyle's report. Dr Fama recorded "a family history of mental disorder of an uncertain kind". Dr Fama concluded that the appellant was not suffering from paranoia or affective psychosis, and that he was fit to plead. He could not exclude the long-term possibility that the appellant might come to display a florid mental illness, but considered that he did not need to be in hospital.

16 In October and December 2000, Professor Yellowlees examined the appellant at the request of the Mental Health Tribunal. He had read the reports of Dr Moyle and Dr Fama. The appellant described to Professor Yellowlees "a very much more extensive history of severe paraphiliac and violent behaviour than

that given to either Dr Moyle or Dr Fama". The appellant told Professor Yellowlees that, between the ages of 15 and 26, he conducted "regular sexual relationships with animals, mainly horses, but also cattle and goats". He would sometimes shoot the horses before having sexual connection with them. He "used to think horses were better than some of the women". The feelings of excitement and power when he raped women were "like the animals". This led Professor Yellowlees to conclude that the appellant exhibited zoophilia and sexual sadism.

17 In June 2003, Dr Kingswell was asked by the Director of Public Prosecutions to review the appellant's criminal history and the reports of Dr Moyle, Dr Fama and Professor Yellowlees. Dr Kingswell noted that the history given to Dr Moyle was materially different from that given to Professor Yellowlees. He accepted that the history given to Professor Yellowlees was true and, by implication, that the history given to Dr Moyle was at least incomplete.

18 Professor Yellowlees, in June 2003, reviewed the earlier reports and provided a supplementary report. In July 2003, Dr Moyle interviewed the appellant, and provided a further report. Dr Moyle said that it was not surprising that the history of bestiality given to Professor Yellowlees went beyond what had been told to him. He said it was normal for details of paraphilia to increase with time. He saw no reason to doubt the accuracy of the history given to Professor Yellowlees. He disagreed with a diagnosis of anti-social personality disorder, but found the diagnosis of sexual sadism the most relevant and worrying.

19 At the sentencing proceedings before Judge Howell, there was oral evidence from Professor Yellowlees, Dr Kingswell and Dr Moyle. Evidence and argument proceeded on the basis that everything the appellant told the psychiatrists was true, and that, to the extent to which the history he gave to Professor Yellowlees went beyond the history he gave to Dr Moyle, then the history given to Dr Moyle was incomplete. Presumably, that reflected the appellant's instructions to his legal representatives. The appellant himself did not give evidence. The reports of the psychiatrists were tendered without objection.

20 Professor Yellowlees, with whom Dr Kingswell substantially agreed, was of the opinion that the appellant "falls into the category of the most high risk offender". He has "an anti-social personality disorder". The issues of sexual sadism and zoophilia were regarded as of special concern. In his June 2003 report, he said:

> "From the clinical perspective I believe, that were [the appellant] ever to be released from corrective custody it would be essential that he be very carefully monitored, and most probably treated in a mandatory [manner] with a drug such as cyproterone acetate, or whatever is the best mode of treatment in a number of years time. The only alternative to this is, of course, an indefinite sentence."

21 All of the psychiatrists found it difficult to predict the level of danger to the community if the appellant were imprisoned for a lengthy period, such as 20 or 25 years, and then released into the community. Professor Yellowlees referred to the possibility of drug treatment which, of course, would have to be examined in the light of what was then available. He said he would expect the risk of offending to decline over the next 15 to 20 years. Dr Moyle pointed out that the appellant's response to programmes of treatment and counselling while in prison would provide a useful indication of the prospects of re-offending upon release. The other psychiatrists did not disagree with that.

22 The transcript of the sentencing proceedings reveals that, in one respect, Judge Howell misunderstood a portion of the evidence, and that his misunderstanding was reinforced by the prosecutor. In the course of the prosecutor's address, the judge referred to the "particularly chilling connotation" of evidence that the appellant had sex with animals and later killed them. That caused him to wonder whether a human victim might suffer a similar fate. The prosecutor said that was a concern. This was a topic to which the judge returned in his reasons. It was taken up in the Court of Appeal. The misunderstanding related to the sequence of events as described by the appellant to Professor Yellowlees.

The reasons of the sentencing judge

23 In his reasons, the sentencing judge made no specific reference to any of the authorities dealing with the imposition of indefinite sentences, or to the principles established by those authorities.

24 The judge began by setting out the facts relating to the offences. Then he referred to the evidence of the psychiatrists. All, he said, agreed that the risk of the accused re-offending is moderate to high and that there are real difficulties in being able to predict with any confidence whether a particular individual will or might re-offend. He said, inaccurately, that it was a matter of concern to Professor Yellowlees that, on occasions after sexual acts with animals the appellant would kill the animals. (According to what the appellant told Professor Yellowlees, any killing occurred before the sexual acts.) The judge

then said: "One cannot speculate on whether, if the accused had not been arrested and there were further incidents, ... the life of a complainant might have been at risk". The judge also referred, accurately, to Professor Yellowlees' concerns about sexual sadism.

25 The judge made a passing reference to an issue which he himself had raised in the course of evidence, concerning a "somewhat simplistic" possibility that the appellant might have attempted to blame alcohol for his misconduct. There was some confusion in the judge's reference to the evidence on the point, but he went on to say:

> "To state the obvious the problem is much more deep-seated than that. If that were a view to be held or to be persisted in it shows a worrying lack of insight. It is also relevant arguably to the matter of remorse and that might arguably not bode well for successful treatment."

26 Matters raised in mitigation were then considered. A suggestion that there was evidence of substantial remorse was not accepted. However, the pleas of guilty, involving co-operation with the administration of justice, and the sparing of the complainants of the need to give evidence, were treated as "not insignificant" matters for "allowances". Queensland cases dealing with a guilty plea as a mitigating factor were discussed. The judge recorded a submission by the prosecutor that, if an indefinite sentence were not to be imposed, a life sentence would be appropriate. He then recorded, with approval, an alternative submission that, allowing for the pleas of guilty, if there were to be a finite sentence less than life imprisonment, it should be in a range between 20 and 25 years. Under Queensland statute law, as a serious violent offender, the appellant, on that basis, would have to serve at least 80 per cent of such a term in custody.

27 The judge, in considering whether he should impose an indefinite sentence said:

> "One looks at the matters that one has to take into account. I have already referred to the bases of the opinions of Professor Yellowlees and Dr Kingswell, which are supported on certain matters by Dr Moyle, but, as I have made clear, if there is a difference in opinion I prefer the opinion and evidence of Professor Yellowlees and Dr Kingswell.
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> When one looks at the very offences themselves, the background of the accused, including his abnormal, deviant sexual behaviour over quite a period of time, most importantly the evidence of the psychiatrists, I come

to the firm view that there would be very real risk of serious physical harm to members of the community if an indefinite sentence were not imposed, and the need to protect members of the community from the said risk would require an indefinite sentence.

All of the psychiatrists stated if the accused were to undergo successfully such programs as the sexual offenders unit provides, and other such courses whilst in custody, that would be a helpful indicator and would lessen the risk of recidivism.

Dr Kingswell said bad pointers would be if the accused were to offend in custody, or if he failed to complete the sexual offenders program.

Dr Moyle referred, in relation to the programs, the most worrying of all is the person who commences a program and does not complete it, a person who drops out. Of the three categories that person would be in the highest risk category.

That the second highest is the one who did not undergo or enter a course at all and the best would be the one who successfully completed the courses.

Dr Kingswell's relevant opinion thereon inter alia is that the accused had no moral awareness of his wrongdoing. I have not referred to certain of the statistics when Dr Kingswell was referring to, say, research showing a 40 per cent rate of recidivism.

The ultimate conclusion I firmly come to is that within the very tests set down by the legislation, the Crown has met the test here.

The legislation provides pursuant to section 169 that the prosecution has the onus of proving that an offender is a serious danger to the community and, in section 170, 'The Court may make such finding if it is satisfied by acceptable cogent evidence', and then referring to the standard of proof, 'and to a high degree of probability.' As I said, I firmly come to that view at least to a high degree of probability.

I therefore, on each charge, impose an indefinite sentence. I am required to state the finite sentence I would impose if there were not an indefinite sentence.

> In relation to the finite sentence for each of the charges, in relation to counts 1, 2, 4, 7 and 8, the sentence is imprisonment for 22 years; in relation to count 3, the sentence is 10 years' imprisonment; in relation to count 6, the sentence is seven years' imprisonment; in relation to count 5, the sentence is four years' imprisonment.
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> I declare that presentence custody of 1,233 days – namely, from the 27th of April 2000 to today, the 11th of September 2003 – be imprisonment already served under the sentence."

28 The nominal sentences were obviously intended to be concurrent, having regard to the context of the whole of the reasons for judgment, and s 155 of the Act.

The Court of Appeal

29 The appellant sought leave to appeal to the Court of Appeal. By majority (de Jersey CJ and Davies JA), leave was refused. The third member of the Court, Holmes J, would have granted leave to appeal but would have dismissed the appeal. It is convenient to begin with the reasons of Holmes J, because the other members of the Court gave only brief reasons explaining why they differed from her as to the order to be made.

30 The principal ground of the application, which was considered and rejected by Holmes J, was that the sentencing judge, in his reasons, had failed to refer to, or take sufficient account of, the exceptional nature of the power he was exercising. The argument was the reasons "did not demonstrate consideration of whether this was one of the 'very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm'". The words quoted by Holmes J were taken from the Western Australian case of *Narrier*[13]. Holmes J said, with respect to this argument:

> "If the judgment on appeal in *Narrier* was intended to mandate pronunciation of a formula in every case as to its exceptional nature, however obvious that might be, I would not agree with it; but I do not think it was. In any event, it does not seem to me that it was incumbent on the learned judge here expressly to state that this was an exceptional case,

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13 (2000) 111 A Crim R 405 at 411.

> when there was no requirement for him to do so, and the facts and the expert opinion he accepted spoke for themselves."

31 The Chief Justice and Davies JA agreed with this.

32 However, Holmes J considered that the sentencing judge had made three material errors of fact. The first concerned the confusion about the sequence of events involving sexual acts with and killing of animals. The second concerned a statement that the appellant had been boastful about his crimes. Holmes J said this was not supported by the evidence. The third concerned an apparent finding by the sentencing judge that the appellant had attempted to blame alcohol for his conduct. Her Honour saw nothing in the evidence to suggest any such attempt.

33 Having found these errors of fact, Holmes J concluded that leave to appeal should be granted and that the Court of Appeal should decide the matter afresh. She then said:

> "Inevitably, having regard to what is known about the [appellant's] background, the gravity of the offences and the expert evidence, one comes to the conclusion that the [appellant] does present a serious danger to the community, both in terms of the likelihood of re-offending and the seriousness of any offence to be committed should he do so. I do not think one can draw much comfort from the proposition that the [appellant] will undergo treatment while in custody: neither Professor Yellowlees nor Dr Kingswell thought that that prospect offered any reassurance. There is plainly a need to protect members of the community from the serious risk posed by the [appellant] now, and, as far as can presently be determined, on his release. In light of all the evidence, particularly the psychiatric evidence, one cannot avoid the conclusion that an indefinite sentence was warranted."

34 The Chief Justice and Davies JA found it unnecessary to consider the matter afresh. In their view, the trial judge had not made the factual errors attributed to him by Holmes J. As to the sequential aspect of the sexual acts with and the killing of animals, de Jersey CJ, with whom Davies JA agreed, pointed out that the sentencing judge had said that one could not speculate on whether the life of a human victim might be at risk. As to the suggested boastfulness, he pointed to material in the psychiatric reports which he said was capable of being described in that way. As to the attribution of blame to alcohol, de Jersey CJ noted that the sentencing judge had expressed himself in a tentative and speculative manner. de Jersey CJ and Davies JA found no material error of fact in the reasons of the sentencing judge.

35 In the result, one member of the Court of Appeal (Holmes J) considered the question of sentencing discretion afresh, and came to the same conclusion as the primary judge. The majority, however, found it unnecessary to undertake that exercise. Leave to appeal was refused.

The need for appellate reconsideration of the exercise of discretion

36 If Holmes J were correct in finding that the sentencing judge made material errors in his appreciation of the facts relevant to the exercise of his sentencing discretion, then leave to appeal should have been granted, and all three members of the Court of Appeal should have considered afresh the sentence to be imposed on the appellant. The position is reinforced if the Court of Appeal should have held that all of the issues relevant to a decision to impose an indefinite sentence were not considered by the sentencing judge.

37 A problem in resolving the disagreement between Holmes J and the majority in the Court of Appeal is that, in relation to the first and third matters of fact to which Holmes J referred, it is difficult to know what finding, if any, the learned judge intended to make, and what significance it had for his ultimate conclusion. It is clear that his Honour was under a misapprehension about the sequence of events involved in the sexual acts with and killing of animals, and that he was concerned about what he understood to have been the appellant's practice of killing animals after abusing them. This concern had no foundation in the evidence of the psychiatrists, who did not share the judge's confusion about the sequence.

38 Whether the judge's reference, in his reasons, to his inability to speculate meant that he was dismissing the matter from his final consideration is not completely clear. Nevertheless, as Holmes J said, the misunderstanding appeared to have influenced the exercise of sentencing discretion. Similarly, the issue about an attempt by the appellant to blame alcohol for his conduct was one that was raised by the judge himself, and appears also to have been regarded as significant. As to the second matter, concerning the appellant's supposed boastfulness, when regard is had to the circumstances in which the appellant was speaking to the psychiatrists, to characterise his account of his activities as boasting seems harsh.

39 Holmes J was right to conclude that the sentencing judge's treatment of these factual issues required appellate reconsideration of the discretion[14]. There is, however, a more fundamental concern about the approach of the sentencing judge.

40 In the authorities earlier mentioned, courts, including this Court, have stressed, and the legislation to be applied in the present case recognises, the exceptional nature of the power to impose an indefinite sentence. A proper exercise of the power involves an understanding of why it is exceptional, and careful attention to the considerations that call for its exercise. The nominal sentence required by s 163(2) of the Act is significant not merely for purposes related to the review provisions of Pt 10. It has an important role in the decision to be made under sub-ss (3) and (4) of s 163. In particular, in considering the risk of serious harm to members of the community if an indefinite sentence were not imposed, a sentencing judge is required to consider the protective effect of the finite sentence that would otherwise be imposed.

41 In this case, the prosecution argued, at first instance, for a life sentence. An examination of the sentencing judge's reasons indicates that he rejected that proposal mainly because of the pleas of guilty. On appeal, it was not argued that he erred in considering a nominal sentence of 22 years to be appropriate. Having identified 22 years as an appropriate nominal sentence, the learned judge was then required to consider, and explain in detail (s 168(1)), why a proper exercise of sentencing discretion called for the imposition of an indefinite sentence rather than such a lengthy finite term.

42 Serious violent offenders will commonly present a danger to the community. Protecting the community may be one of the purposes of the imposition of a lengthy custodial sentence. Such custodial sentences remain the norm for the punishment of offenders convicted of serious offences of violence. Indefinite sentences are not the norm. Part 10 of the Act proceeds upon the basis that there may be certain cases where the extraordinary step of imposing an indefinite sentence may be justified as a response to the risk of serious danger to the community. The risk to be weighed is the risk "if an indefinite sentence were not imposed" (s 163(4)(d)). Where the appropriate finite term, according to ordinary sentencing principles, is 22 years, then it is necessary to consider whether the protective purpose in contemplation could reasonably be met by such

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14 cf *Strong v The Queen* (2005) 79 ALJR 1171 at 1173-1174 [11], 1175-1176 [21]-[25], 1185 [72]; 216 ALR 219 at 222, 224-226, 238.

a term. If it were otherwise, the consequence would be the banalisation of indefinite imprisonment.

43 This is a case in which, on the available evidence, a sentencing court could properly have reached a conclusion that Pt 10 of the Act should be applied. On the other hand, there were important considerations of proportionality militating against such a conclusion. These included (1) the absence of any major criminal convictions, notably for any acts of violence, prior to the subject offences; (2) the appellant's pleas of guilty; (3) the fact that the subject charges, although extremely serious, all related to events that occurred within an interval of nine months and involved three happenings. The details of the sexual activities with animals were unproved. They had never been the subject of any criminal charges under the Code[15]. The appellant was not to be punished additionally in respect of those events[16]. Any feelings of distaste or revulsion concerning such activities should not enter into the sentencing process. The reasoning of the sentencing judge did not deal with the issues, including issues of predictability, involved in deciding why a sentence of 22 years should not have been imposed, having regard to relevant sentencing considerations, including the need to protect the community. One of the matters of particular difficulty in a case such as the present is the uncertainty that is necessarily involved in estimating the danger to the community of a person who, on any view, will be incarcerated for such a long time. The operation of the parole system, and the possibility of treatment while in prison, are matters that call for close attention. In a particular case, it may be that the system of review under Pt 10 provides the only appropriate method of relating the interests of the community to the requirements of justice to an individual offender. Nevertheless, the protective potential of the ordinary sentencing regime needs to be examined first and most closely before deciding to depart from it. Another difficulty raised by the present case, addressed in some detail by the psychiatrists, but referred to only briefly and without analysis in the reasons for sentence, is the relationship between the appellant's paraphilia and the level of risk that he would be likely to present in, say, 20 years time.

44 The Court of Appeal should have given leave to appeal, and reconsidered the exercise of sentencing discretion involved in the decision to apply Pt 10 of the Act. In doing so in accordance with the statute and accepted sentencing

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15 cf *Criminal Code* (Q), s 211.

16 *The Queen v De Simoni* (1981) 147 CLR 383.

principles, it could have upheld the sentencing judge's order of indefinite detention. However such an outcome was by no means inevitable. It is important to say once again, as Hayne JA said in *Moffatt*[17], that the power to impose an indefinite sentence is one "to be sparingly exercised, and then only in clear cases". This Court has repeatedly endorsed those remarks. From the reasons of the sentencing court it must be evident that they have been given their full weight whenever a sentence of indefinite detention is imposed.

Orders

45 The appeal should be allowed. The orders of the Court of Appeal should be set aside. The matter should be remitted to the Court of Appeal for further consideration in accordance with these reasons.

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17 [1998] 2 VR 229 at 255.