HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

MARTIN LEACH APPELLANT

AND

THE QUEEN RESPONDENT

Leach v The Queen
[2007] HCA 3
6 February 2007
D10/2006

ORDER

Appeal dismissed.

On appeal from the Supreme Court of the Northern Territory

Representation

I R L Freckelton with R R Goldflam for the appellant (instructed by Legal Aid Commission of the Northern Territory)

T I Pauling QC, Solicitor-General for the Northern Territory with R J Coates for the respondent (instructed by Director of Public Prosecutions (Northern Territory))

CATCHWORDS

Leach v The Queen

Statutes – Acts of Parliament – Sentencing legislation – Interpretation – Mandatory sentence of life imprisonment with no non-parole period passed upon the appellant in 1984 in respect of each of two convictions for murder – The *Sentencing (Crime of Murder) and Parole Reform Act* 2003 (NT) ("2003 Act") provided that life sentences for murder were taken to include a 25 year non-parole period – Section 19(1) of the 2003 Act empowered the Supreme Court of the Northern Territory, on the application of the Director of Public Prosecutions, to revoke the statutory non-parole period, and, in accordance with s 19(5), to refuse to fix a non-parole period – Whether the discretion granted to the Supreme Court under s 19(5) of the 2003 Act required the Court to consider "ordinary sentencing principles", including questions of the prisoner's rehabilitation – Meaning of the word "may" in s 19(5) – Whether primary judge must be satisfied "beyond reasonable doubt" of the basis for the decision before making an order under s 19(5).

Words and phrases – "may".

Criminal Code (NT).
Criminal Law Consolidation Act (NT), s 5.
Parole of Prisoners Act (NT), s 4.
Sentencing (Crime of Murder) and Parole Reform Act 2003 (NT), ss 17-21.
Sentencing Act (NT), s 53A.

1 GLEESON CJ. This appeal is from a decision of the Court of Criminal Appeal of the Northern Territory[1] which, by majority (Mildren and Riley JJ, Southwood J dissenting), dismissed an appeal from the Chief Justice of the Supreme Court of the Northern Territory[2] in a matter of sentencing. The proceedings before Martin CJ concerned provisions of the *Sentencing (Crime of Murder) and Parole Reform Act* 2003 (NT) ("the Act") relating to persons who were serving life sentences at the time of the commencement of the Act. The appellant was serving three life sentences; two for murder, and one for rape.

The appellant's custodial history

2 The sentences of direct relevance were for two murders committed on 20 June 1983.

3 In May 1979, the appellant, then aged about 20, was living in Darwin. He broke and entered a dwelling house and raped a female resident after threatening her with a knife. He was sentenced to imprisonment for three years, with a non-parole period of one year and six months. He was released from custody in June 1982.

4 On 20 June 1983, the appellant, in an area of bushland in the Northern Territory, saw two young women, aged 18 and 15, swimming in a pool. Armed with a knife, he approached the women and forced them to accompany him to a nearby gully. He cut their clothing from them and used it to bind and gag the younger woman. He stabbed the older woman in her side, then bound and gagged and raped her. He then stabbed and killed the younger woman. He stabbed the older woman again, and left the area, leaving her fatally wounded. The sentencing judge described his conduct as "entirely pitiless and cruel".

5 After a trial, the appellant was convicted of two offences of murder, and one of rape. At the time of sentencing, the mandatory sentence for murder was imprisonment for life. The Court was not empowered to fix a non-parole period. That remained the position in the Northern Territory until the Act commenced in 2004. Although a new Criminal Code came into effect in January 1984, shortly before the appellant was sentenced, s 164 of that Code provided that a sentence of life imprisonment remained mandatory for murder, and there was no power to fix a non-parole period in respect of such a sentence. The trial judge, Muirhead J, in respect of each of the counts of murder, sentenced the appellant to imprisonment for life. In relation to the offence of rape, Muirhead J also sentenced the appellant to imprisonment for life. He said the appellant "suffered

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1 *Leach v The Queen* (2005) 16 NTLR 117.

2 *R v Leach* (2004) 145 NTR 1; 14 NTLR 44; 185 FLR 189.

a severe sociopathic personality disorder of an aggressive type". At the time, and until the coming into force of s 53 of the *Sentencing Act* (NT) in 1996, there was no power to fix a non-parole period where a sentence of life imprisonment was imposed for a crime other than murder. After 1996, there was a power to fix a non-parole period in respect of a life sentence for a crime other than murder, but, until 2004, there was still no such power in the case of a sentence for murder. Release from prison could occur only by way of executive clemency.

The 2003 legislation

6 The Act came into effect on 11 February 2004. It amended the *Sentencing Act* (NT). It introduced s 53A, which provided for the fixing of non-parole periods in respect of sentences of life imprisonment for murder imposed after 11 February 2004.

7 Section 53A provided:

> "(1) Subject to this section, where a court ('the sentencing court') sentences an offender to be imprisoned for life for the crime of murder, the court must fix under section 53(1) –
>
> (a) a standard non-parole period of 20 years; or
>
> (b) if any of the circumstances in subsection (3) apply – a non-parole period of 25 years.
>
> (2) The standard non-parole period of 20 years referred to in subsection (1)(a) represents the non-parole period for an offence in the middle of the range of objective seriousness for offences to which the standard non-parole period applies.
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> (3) The circumstances referred to in subsection (1)(b) are any of the following:
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> (a) the victim's occupation was police officer, emergency services worker, correctional services officer, judicial officer, health professional, teacher, community worker or other occupation involving the performance of a public function or the provision of a community service and the act or omission that caused the victim's death occurred while the victim was carrying out the duties of his or her occupation or for a reason otherwise connected with his or her occupation;
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> (b) the act or omission that caused the victim's death was part of a course of conduct by the offender that included conduct,

either before or after the victim's death, that would have constituted a sexual offence against the victim;

(c) the victim was under 18 years of age at the time of the act or omission that caused the victim's death;

(d) if the offender is being sentenced for 2 or more convictions for unlawful homicide;

(e) if the offender is being sentenced for one conviction for murder and one or more other unlawful homicides are being taken into account;

(f) at the time the offender was convicted of the offence, the offender had one or more previous convictions for unlawful homicide.

(4) The sentencing court may fix a non-parole period that is longer than a non-parole period referred to in subsection (1)(a) or (b) if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.

(5) The sentencing court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole.

(6) The sentencing court may fix a non-parole period that is shorter than the standard non-parole period of 20 years referred to in subsection (1)(a) if satisfied there are exceptional circumstances that justify fixing a shorter non-parole period.

(7) For there to be exceptional circumstances sufficient to justify fixing a shorter non-parole period under subsection (6), the sentencing court must be satisfied of the following matters and must not have regard to any other matters:

(a) the offender is –

(i) otherwise a person of good character; and

(ii) unlikely to re-offend;

(b) the victim's conduct, or conduct and condition, substantially mitigate the conduct of the offender.

(8) In considering whether the offender is unlikely to re-offend, the matters the sentencing court may have regard to include the following:

(a) whether the offender has a significant record of previous convictions;

(b) any expressions of remorse by the offender;

(c) any other matters referred to in section 5(2) that are relevant.

(9) The sentencing court must give reasons for fixing, or refusing to fix, a non-parole period and must identify in those reasons each of the factors it took into account in making that decision.

(10) The failure of the sentencing court to comply with this section when fixing, or refusing to fix, a non-parole period does not invalidate the sentence imposed on the offender.

(11) This section applies only in relation to an offence committed –

(a) after the commencement of the *Sentencing (Crime of Murder) and Parole Reform Act 2003*; or

(b) before the commencement of that Act if, at that commencement, the offender has not been sentenced for the offence.

(12) In subsection (3) –

'unlawful homicide' means the crime of murder or manslaughter."

8 Of direct present relevance are the transitional provisions of the Act. They were contained in Pt 5 Div 1, concerning "[p]risoners currently serving life imprisonment for murder". They provided as follows:

"**17. Application of Division**

This Division applies in relation to a prisoner who, at the commencement of this Act, is serving a sentence of imprisonment for life for the crime of murder.

18. Sentence includes non-parole period

Subject to this Division –

(a) the prisoner's sentence is taken to include a non-parole period of 20 years; or

(b) if the prisoner is serving sentences for 2 or more convictions for murder – each of the prisoner's sentences is taken to include a non-parole period of 25 years,

commencing on the date on which the sentence commenced.

19. DPP may apply for longer or no non-parole period

(1) The Supreme Court may, on the application of the Director of Public Prosecutions –

(a) revoke the non-parole period fixed by section 18 in respect of the prisoner and do one of the following:

(i) fix a longer non-parole period in accordance with subsection (3) or (4);

(ii) refuse to fix a non-parole period in accordance with subsection (5); or

(b) dismiss the application.

(2) The Director of Public Prosecutions must make the application –

(a) not earlier than 12 months before the first 20 years of the prisoner's sentence is due to expire; or

(b) if, at the commencement of this Act, that period has expired – within 6 months after that commencement.

(3) Subject to subsections (4) and (5), the Supreme Court must fix a non-parole period of 25 years if any of the following circumstances apply in relation to the crime of murder for which the prisoner is imprisoned:

(a) the victim's occupation was police officer, emergency services worker, correctional services officer, judicial officer, health professional, teacher, community worker or other occupation involving the performance of a public function or the provision of a community service and the act or omission that caused the victim's death occurred while the victim was carrying out the duties of his or her occupation or for a reason otherwise connected with his or her occupation;

(b) the act or omission that caused the victim's death was part of a course of conduct by the prisoner that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim;

(c) the victim was under 18 years of age at the time of the act or omission that caused the victim's death;

(d) at the time the prisoner was convicted of the offence, the prisoner had one or more previous convictions for the crime of murder or manslaughter.

(4) The Supreme Court may fix a non-parole period that is longer than a non-parole period referred to in section 18 or subsection (3) if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.

(5) The Supreme Court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole.

20. Appeals

(1) For Part X of the Criminal Code, a decision of the Supreme Court under section 19(1)(a)(i) or (ii) fixing or refusing to fix a non-parole period is taken to be a sentence passed by the Court.

..."

The Director's application

9 On 2 March 2004 the Director of Public Prosecutions, in respect of the sentences being served by the appellant for the two convictions of murder, applied under s 19 of the Act for the Supreme Court of the Northern Territory to revoke the non-parole period fixed by reference to s 18 and either to refuse to fix a non-parole period, in accordance with s 19(5), or, in the alternative, to fix a longer non-parole period in accordance with s 19(4).

10 The application was heard by Martin CJ, who made an order revoking the non-parole period fixed by reference to s 18 and refused to fix a non-parole period. The majority in the Court of Criminal Appeal upheld the decision of the Chief Justice. Southwood J, dissenting, would have revoked the non-parole period fixed by reference to s 18 and, pursuant to s 19(4), fixed a non-parole

period of 40 years, with the result that the appellant could be considered for parole at the age of 64 years.

The issues

11 The appellant submits that the reasoning of Martin CJ was affected by two errors of principle. First, it is said that Martin CJ failed to give effect, or full effect, to the discretion imported by the word "may" in sub-ss (1) and (5) of s 19. Secondly, it is said that Martin CJ failed to apply the appropriate standard of proof in coming to the state of satisfaction described in s 19(5).

The discretion issue

12 Martin CJ, and the three members of the Court of Criminal Appeal, accepted that the powers conferred by s 19(1) and s 19(5) of the Act were discretionary, although the nature and scope of the discretion were matters of some contention. Section 19(5) was said by Mildren J to have been modelled on s 61 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW). Section 61(1) provided that a court "is to impose" a life sentence if satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence. However, s 61(3) provided that nothing in s 61(1) affected s 21(1). Section 21(1) provided that, if by any provision in the Act an offender was made liable to imprisonment for life, a court may nevertheless impose a sentence of imprisonment for a specified time. In *R v Merritt*[3], Wood CJ at CL said of the New South Wales legislation:

> "There is an obvious tension between the apparent mandatory requirement to impose a life sentence where a case falls within s 61(1) ..., and s 61(3), which preserves the s 21(1) discretion to impose a lesser sentence. That tension ... has been resolved in favour of recognising the continued existence of the discretion, notwithstanding the fact that the s 61(1) criteria are met, where the offender's subjective circumstances justify a lesser sentence than one of life imprisonment."

13 We are presently not concerned with the New South Wales legislation. It may have inspired some of the Northern Territory provisions in question in this appeal, but there are differences. In the Court of Criminal Appeal in this case, Southwood J, in dissent, considered that, after it has been found that s 19(5) has been satisfied, there remains a question as to "the minimum term of incarceration that justice requires the prisoner must serve having regard to all of the

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3 (2004) 59 NSWLR 557 at 567 [36].

circumstances of the case". For reasons that will appear, that is not the correct approach.

14 Section 19 confers upon the Supreme Court a power to make an order which substitutes a discretionary judicial decision for the otherwise mandatory effect of s 18. The discretion, like the discretion conferred by certain provisions of s 53A, is not at large. It is confined by statutory prescriptions which, in a number of respects, modify the principles according to which a judge would otherwise fix a non-parole period. Sub-section (3) of s 19, for example, requires that, if the victim of a murder was a police officer, and the death occurred while the officer was carrying out his or her duties, the Court must fix a non-parole period of 25 years, subject to sub-ss (4) and (5). Sub-section (4) empowers the Court, in such a case, to fix a non-parole period of more than 25 years. Sub-section (5) empowers the Court to refuse to fix any non-parole period. Sub-section (3), as qualified by sub-ss (4) and (5), only comes into operation if the Court, on the application of the Director of Public Prosecutions, decides to revoke the non-parole period fixed by s 18. Sections 18 and 19 present a patchwork of legislative prescription and judicial discretion. The exercise of judicial discretion is constrained by legislative direction. A court cannot ignore the legislative context within which the judicial discretion is left to operate. In particular, a conclusion that, after all necessary or appropriate judicial decisions have been made within the scope of s 19, there remains an ultimate question as to the minimum term of incarceration that justice requires the prisoner to serve, is inconsistent with the legislative scheme.

15 The Director of Public Prosecutions will make an application under s 19 where it is considered that there may be a case for lengthening the non-parole period fixed by s 18. The Court may dismiss the application, in which event s 18 will continue to apply. If the application succeeds, and the Court revokes the non-parole period fixed by s 18, it does so for the purpose either of fixing a longer non-parole period or of refusing to fix any non-parole period. An order made under s 19 will not be to the prisoner's advantage. Its effect will be to displace the period otherwise fixed by s 18 in order to lengthen the period or to deprive the prisoner altogether of the benefit of a non-parole period. That is the statutory context of the discretions conferred within s 19. Sub-sections (1), (4) and (5) present the Court with a range of possibilities: leave s 18 to apply; increase the non-parole period; or refuse to fix any non-parole period. In the present case, all four judges agreed that the non-parole period fixed by s 18 was inadequate. One judge thought it should have been increased to 40 years. The other three judges thought that no non-parole period should be fixed.

16 It may be remarked in passing that the conclusion reached by Martin CJ and the majority in the Court of Criminal Appeal made it unnecessary for them to deal with a problem not addressed by s 19, that is, the life sentence being served for rape. It was not clear from the argument of the appellant in this Court what

relevance that sentence was said to have, if any, for the decision to be made about the non-parole period proposed in relation to the murders.

17 Leaving to one side cases within s 19(3), a decision not to dismiss an application under s 19 will be made if the Court is at least satisfied, in terms of sub-s (4), that a longer non-parole period than that fixed by s 18 is warranted. That state of satisfaction will be reached having regard to any objective or subjective factors affecting the relative seriousness of the offence. By hypothesis, the offence may have occurred in the relatively distant past. The present appellant had been in prison for about 20 years when the Act came into force. The discretionary power conferred by sub-ss (1)(a) and (4) of s 19 is conditioned upon a certain satisfaction about matters affecting the relative seriousness of the offence. That does not deny the possibility that, having regard to events that have occurred over the potentially lengthy period since original sentencing, including a prisoner's progress towards rehabilitation, a court might dismiss the Director's application. The Court may revoke the s 18 non-parole period, and fix a longer period, if it is satisfied, because of the matters referred to in s 19(4), that a longer non-parole period is warranted, that is, is called for in all the circumstances. The Court will not revoke the s 18 non-parole period unless it is satisfied that a longer non-parole period is warranted. The relative seriousness of the offence may warrant such a conclusion, or it may not. The Court is entitled to have regard to all relevant circumstances in considering whether the conclusion is warranted. Its attention is directed specifically to the seriousness of the offence, but whether the seriousness of the offence warrants a longer non-parole period depends upon a consideration of all matters relevant to fixing a non-parole period. Sub-section (5) involves a possible further step on the way to a final outcome. It deals with an extreme case: a case where the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, protection and deterrence can only be met by incarceration for life. The words "can only be met" in sub-s (5) are the reflex of the words "is warranted" in sub-s (4). A non-parole period longer than the s 18 period may be set where the Court is satisfied that the longer period is warranted. However, the Court may conclude, not merely that a longer period is warranted, but that the removal of any non-parole period is demanded, because that is the only way of meeting the community interest. The level of culpability in the commission of an offence may be so extreme that not only is it necessary to intervene to set aside the period fixed by s 18 but, in addition, the community interest demands that there be, not merely a longer non-parole period, but a refusal to fix any non-parole period.

18 The provisions of sub-ss (1), (4) and (5) of s 19 call for an exercise of discretionary judgment within a wider context of legislative prescription. They are different aspects of a single decision-making process. They do not require a court to disregard the consequences for the prisoner of the orders that may be made. They do not require a court to disregard events that have occurred over the period since original sentencing, including rehabilitation. They empower the

Court to set aside the legislatively prescribed non-parole period for the purpose either of increasing the period or of removing the possibility of parole. They condition the power to make orders in substitution for the legislative provision by reference to a judgment made about culpability. The highest level of culpability is that described in sub-s (5). It is a level of culpability such that the community interest in the matters referred to can only be met by, (that is, the community interest demands), incarceration for life.

19 This, as it appears to me, is the correct approach to s 19, and the approach that was followed in the reasoning of Martin CJ. Considerations relevant to sentencing, and fixing non-parole periods, are relevant because what is involved in s 19 is a sentencing exercise. Events that have occurred since the original sentencing, to the extent to which they bear upon such considerations, may be taken into account. These considerations and events are taken into account within the framework of s 19. Ultimately the Court asks itself whether the level of culpability is so extreme that the community interest identified in the statute demands incarceration for life. The nature of that question is such that, if it is answered in the affirmative, the answer will dictate an order under sub-s (5) rather than an order under sub-s (4), or a dismissal of an application.

20 Martin CJ began by rejecting an argument that the power given by s 19(5) required an identification of the "worst of the worst" cases. He said, rather, that the legislature had recognised that a court would contemplate declining to fix a non-parole period only in those cases falling within the most serious category. He accepted that, in deciding whether to intervene pursuant to s 19, a court was entitled to have regard to events that have occurred since the original sentencing, including progress to rehabilitation and, further, that a court was required to consider the impact on a prisoner of orders of the kind that could be made under s 19. He considered at length the objective and subjective matters relevant to the appellant's culpability, psychiatric evidence before the trial judge, later psychiatric reports, and evidence relating to progress towards and prospects of rehabilitation. In assessing the present level of danger to the community he considered recent psychiatric assessments. He said:

> "I am left in no doubt that the respondent's level of culpability in the commission of the offence[s] is extreme. Notwithstanding that finding, it does not automatically follow that I should refuse to fix a non-parole period. The community, through Parliament, has recognised that even in cases falling within the worst category of cases of murder, and even where the culpability of the offender is extreme, nevertheless the court should not inflict the dreadful punishment of imprisonment for natural life without the possibility of release on parole unless satisfied that the level of culpability is 'so extreme' that the community interest in retribution, punishment, protection and deterrence can 'only' be met by such dreadful punishment."

21 He considered each of the specific aspects of community interest referred to in s 19(5) and ultimately came to the conclusion that he should refuse to fix a non-parole period.

22 The reasoning of Martin CJ was in conformity with the statute, and involved no error of approach.

The standard of proof issue

23 The satisfaction described by s 19(5) involves an exercise of judgment, based upon a finding of relevant facts, and an evaluation of relevant discretionary considerations as outlined above. What is involved in that judgment is aptly described in the paragraph from the reasons of Martin CJ quoted above. Findings of disputed facts adverse to the prisoner are to be made to the criminal standard of proof[4]. This was accepted by Martin CJ. He applied the criminal standard, for example, to his decision about the dangerousness of the appellant. Correctly, he rejected an argument that all aspects of the satisfaction described in s 19(5) had to be entertained beyond reasonable doubt. The discretionary judgment involved in the application of sub-ss (1), (4) and (5) of s 19 may rest upon findings of fact which are amenable to the application of differing standards of proof, but the evaluation of the demands of community interest referred to in sub-s (5), for the purposes of such a judgment, is not.

Conclusion

24 The appeal should be dismissed.

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4 *R v Olbrich* (1999) 199 CLR 270.

25 GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. In the 1980s, the only sentence that could be passed upon a person convicted in the Northern Territory of the offence of murder was imprisonment for life. At the time of the appellant's offending in 1983, the *Criminal Law Consolidation Act* (NT) provided[5] that the mandatory sentence for murder was life imprisonment with hard labour. Both that Act and the *Criminal Code* (NT), which came into force on 1 January 1984, provided that the sentence for murder could not be mitigated or varied. If a sentence of life imprisonment was imposed, the *Parole of Prisoners Act* (NT)[6] precluded the fixing of a non-parole period.

26 The *Sentencing (Crime of Murder) and Parole Reform Act* 2003 (NT) ("the 2003 Act") changed this sentencing regime. By the 2003 Act the *Sentencing Act* (NT) ("the NT Sentencing Act") was amended to provide, by s 53A, that when sentencing a prisoner to life imprisonment for murder, a court must, except in certain circumstances, fix a non-parole period. If a non-parole period was fixed it had to be not less than 20 years or, if certain aggravating circumstances applied, not less than 25 years. Section 53A(5) provided that a court might refuse to fix any non-parole period "if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole".

27 Transitional provisions were made, in Div 1 of Pt 5 (ss 17-21) of the 2003 Act, in respect of prisoners, like the appellant, who were then serving sentences of life imprisonment for murder. Section 18 provided that, subject to the other provisions of the Division, the sentence of a prisoner, who at the commencement of the 2003 Act was serving a sentence of life imprisonment for murder, "is taken to include a non-parole period of 20 years" or, if the prisoner was serving sentences for two or more convictions for murder, "each of the prisoner's sentences is taken to include a non-parole period of 25 years".

28 Section 19 permitted the Director of Public Prosecutions to apply to the Supreme Court to revoke the non-parole period set by s 18 and to fix a non-parole period longer than the 20 or 25 years specified by s 18, or to refuse to fix any non-parole period. Section 19(5) prescribed the circumstances in which the Supreme Court "may refuse" to fix a non-parole period in terms identical to

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5 s 5.

6 s 4(3)(b).

those identified in s 53A(5) of the NT Sentencing Act. That is, the Court may refuse to fix a non-parole period "if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole".

The appellant's convictions and sentences

29 On 16 May 1984, the appellant was convicted in the Supreme Court of the Northern Territory on two counts of murder and one count of rape. It is unnecessary to recount the circumstances of the murders, or the rape of one of the murder victims before she was killed. It is enough to say that the crimes were horrific and that the appellant showed no remorse for what he had done. On each count of murder the appellant was sentenced, in accordance with the law as it stood at the time of his offences, to be imprisoned for life with hard labour. On the count of rape, he was sentenced to the maximum sentence then provided for that offence[7]: imprisonment for life with hard labour.

Application under the 2003 Act

30 After the 2003 Act came into force, the Director of Public Prosecutions applied to the Supreme Court of the Northern Territory for an order that no non-parole period be fixed in respect of the appellant's sentences for murder. The primary judge, Martin CJ, revoked the non-parole period of 25 years fixed by s 18 of the 2003 Act in respect of each of the sentences of life imprisonment imposed on the appellant for the crime of murder, and refused to fix a non-parole period[8].

31 No application was, or could have been, made in respect of the sentence of life imprisonment imposed upon the appellant for the crime of rape. No submission was made in this Court, and no submission appears to have been made in the courts below, that the life sentence imposed on the appellant for rape was relevant to the determination of the application under the 2003 Act. It is not necessary to examine the correctness of any assumptions that may underpin this approach to the matter.

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7 *Criminal Law Consolidation Act* (NT), s 60.

8 *R v Leach* (2004) 145 NTR 1.

32 The appellant appealed to the Court of Criminal Appeal of the Northern Territory against the orders of the primary judge revoking the non-parole period fixed by the 2003 Act. By majority, the Court of Criminal Appeal (Mildren and Riley JJ, Southwood J dissenting) dismissed the appeal[9]. Southwood J would have allowed the appeal and would have fixed a non-parole period of 40 years.

The issues in this Court

33 By special leave the appellant appealed to this Court. He contended that the Court of Criminal Appeal erred in two respects. First, he submitted that s 19(5) of the 2003 Act required the issues presented to be considered in two distinct stages and second, he contended that the primary judge could not refuse to fix a non-parole period unless satisfied beyond reasonable doubt of the basis for that decision. Both of these submissions should be rejected. The appeal should be dismissed.

The 2003 Act

34 The appellant's submissions require close consideration of the relevant provisions of the 2003 Act, particularly s 19. Section 19, so far as presently relevant, provided:

> "(1) The Supreme Court may, on the application of the Director of Public Prosecutions –
>
> (a) revoke the non-parole period fixed by section 18 in respect of the prisoner and do one of the following:
>
> (i) fix a longer non-parole period in accordance with subsection (3) or (4);
>
> (ii) refuse to fix a non-parole period in accordance with subsection (5); or
>
> (b) dismiss the application.
>
> ...
>
> (3) Subject to subsections (4) and (5), the Supreme Court must fix a non-parole period of 25 years if any of the following circumstances

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9 *Leach v The Queen* (2005) 16 NTLR 117.

apply in relation to the crime of murder for which the prisoner is imprisoned:

(a) the victim's occupation was police officer, emergency services worker, correctional services officer, judicial officer, health professional, teacher, community worker or other occupation involving the performance of a public function or the provision of a community service and the act or omission that caused the victim's death occurred while the victim was carrying out the duties of his or her occupation or for a reason otherwise connected with his or her occupation;

(b) the act or omission that caused the victim's death was part of a course of conduct by the prisoner that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim;

(c) the victim was under 18 years of age at the time of the act or omission that caused the victim's death;

(d) at the time the prisoner was convicted of the offence, the prisoner had one or more previous convictions for the crime of murder or manslaughter.

(4) The Supreme Court may fix a non-parole period that is longer than a non-parole period referred to in section 18 or subsection (3) if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.

(5) The Supreme Court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole."

35 The relevant aspects of the provisions made by the 2003 Act may be described as follows. First, if no application was made by the Director of Public Prosecutions, the sentence of a person, who at the commencement of the 2003 Act was serving a sentence of imprisonment for life for murder, was taken to

include a non-parole period of either 20 years or 25 years[10]. Secondly, if the Director of Public Prosecutions made an application under s 19, there could be one of three outcomes: the Court could revoke the non-parole period fixed by s 18 and fix a longer period[11]; the Court could revoke the non-parole period fixed by s 18 and refuse to fix any non-parole period[12]; or the Court could dismiss the Director's application[13]. Dismissing the Director's application would leave the statutorily determined non-parole period (in this case the period of 25 years) unaffected. The statutory non-parole period could be revoked, and a longer non-parole period fixed, only if the conditions described in s 19(4) were met. The Court could revoke the statutory non-parole period and refuse to fix a non-parole period, with the consequence that the prisoner would be imprisoned for life, only if the conditions described in s 19(5) were met.

Two stages of consideration?

36 The appellant submitted that although the primary judge concluded that the level of culpability in the appellant's commission of the two murders was "so extreme the community interest in retribution, punishment, protection and deterrence" could only be met by the appellant being imprisoned for life without the possibility of release on parole, a discretion was conferred by s 19(5) of the 2003 Act which required the Court to consider separately, and give effect to, what were described as "ordinary sentencing considerations". In particular, the appellant submitted that this second and separate inquiry required consideration of questions about the prisoner's rehabilitation.

37 At once it can be seen that the appellant's submission would require reading s 19(5) as presenting a conundrum for the Court considering an application under s 19. Central to the appellant's contention was the proposition that the Court may be satisfied that "the community interest in retribution, punishment, protection and deterrence can *only* be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole", yet conclude that a non-parole period should be fixed. That proposition should be rejected. Section 19(5) is not to be read as requiring the Court to consider the exercise of some separate or additional discretion after, or

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10 s 18.

11 s 19(1)(a)(i).

12 s 19(1)(a)(ii).

13 s 19(1)(b).

despite, its having reached the conclusion that the level of the prisoner's culpability was as described in the provisions: "so extreme" that the community interest in the specified considerations could "only be met" by imprisonment for life.

38 It is true that s 19(5) says that the Court "may refuse to fix a non-parole period" if satisfied of the matters set out in the provision. But it by no means follows that, if the Court is satisfied of those matters, it then has to exercise a discretion. Rather, s 19(5) is a provision of the kind considered in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation*[14] and *Mitchell v The Queen*[15]. The word "may" is used, not to give a discretion, but to confer a power which is to be exercised upon the Court being satisfied of the matters described in the provision. As Windeyer J said in *Finance Facilities*[16]:

> "This does not depend on the abstract meaning of the word 'may' but [on] whether the particular context of words and circumstance make it not only an empowering word but indicate circumstances in which the power is to be exercised – so that in those events the 'may' becomes a 'must'. Illustrative cases go back to 16[93]: *R v Barlow*[17]. Today it is enough to cite *Julius v Bishop of Oxford*[18]; and add in this Court *Ward v Williams*[19]. But I select one other reference out of a multitude: *Macdougall v Paterson*[20]. There Jervis CJ said in the course of the argument[21] 'The word "may" is merely used to confer the authority: and

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14 (1971) 127 CLR 106.

15 (1996) 184 CLR 333.

16 (1971) 127 CLR 106 at 134-135.

17 (1693) Carth 293 [90 ER 773]; 2 Salk 609 [91 ER 516].

18 (1880) 5 App Cas 214.

19 (1955) 92 CLR 496 at 505-506.

20 (1851) 11 CB 755 [138 ER 672].

21 *Macdougall v Paterson* (1851) 11 CB 755 at 766 [138 ER 672 at 677].

the authority *must* be exercised, if the circumstances are such as to call for its exercise'. And, giving judgment, he said[22]:

> 'We are of opinion that the word "may" is not used to give a discretion, but to confer a power upon the court and judges; and that the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises.'"

39 It is therefore not necessary to consider some further questions that would be presented by the appellant's first submission. In particular, it is not necessary to consider what content or meaning would have to be assigned to the appellant's reference to "ordinary sentencing considerations". On its face the argument is one that would appear to require reference to the NT Sentencing Act rather than any consideration of judge-made law. That in turn may have presented questions about how the Sentencing Act provisions were to be applied to the separate statutory task given to the Supreme Court by s 19(5) of the 2003 Act. But these issues need not be examined further. Nor is it necessary to examine how questions of the appellant's past efforts at rehabilitation, or his future prospects of further rehabilitation, could remain for consideration, separate from the hypothesised conclusion that the community interest in a number of matters (of which one is protection) can only be met if the appellant is never to be released.

Satisfaction beyond reasonable doubt?

40 The second argument of the appellant was that a judge could exercise the power given by s 19(1)(a)(ii) and s 19(5) to revoke the non-parole periods fixed by s 18 in respect of the life sentences imposed on the appellant for murder, and refuse to fix a non-parole period, only if satisfied beyond reasonable doubt of the basis for the decision. This argument was said to be "the logical extension" of this Court's decision in *R v Olbrich*[23] and to reflect the decision of the Court of Criminal Appeal of New South Wales in *R v Merritt*[24]. It is convenient to begin consideration of the appellant's submission by reference to those two decisions.

41 The particular questions considered by this Court in *Olbrich* concerned what consequences for sentencing followed when the offender asserted the

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22 *Macdougall v Paterson* (1851) 11 CB 755 at 773 [138 ER 672 at 679].

23 (1999) 199 CLR 270.

24 (2004) 59 NSWLR 557.

existence of mitigating circumstances, but the sentencing judge was not persuaded that the assertion was true. The majority of the Court held[25] that the accused bore the burden of proving the matters submitted in mitigation but had failed to do so. The majority also concluded[26] that a sentencing judge may not take disputed facts into account in a way that is adverse to the interests of an accused unless those facts were established beyond reasonable doubt.

42 In *Merritt*, the Court of Criminal Appeal of New South Wales considered an appeal against life sentences imposed on the appellant for offences of murder. Section 61(1) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the NSW Act") provided that a court "is to impose" a sentence of imprisonment for life on a person convicted of murder:

> "if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence".

The similarities between this part of the provision of the NSW Act and the provisions of s 19(5) of the 2003 Act (and s 53A(5) of the NT Sentencing Act) are evident. But unlike the relevant Northern Territory legislation, s 61(2) of the NSW Act provided that "[n]othing in subsection (1) affects section 21(1)". Section 21 of the NSW Act provided a general power to reduce penalties. In particular, s 21 provided that:

> "(1) If by any provision of an Act an offender is made liable to imprisonment for life, a court may nevertheless impose a sentence of imprisonment for a specified term.
>
> ...
>
> (4) The power conferred on a court by this section is not limited by any other provision of this Part.
>
> (5) This section does not limit any discretion that the court has, apart from this section, in relation to the imposition of penalties."

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25 (1999) 199 CLR 270 at 281 [26].

26 (1999) 199 CLR 270 at 281 [27].

It follows that the NSW Act took a form radically different from s 19 of the 2003 Act, and s 19(5) in particular. Section 21(1) of the NSW Act has been construed[27] as demonstrating that even if the conditions described in s 61(1) are satisfied, a court sentencing an offender for murder retains a discretion to impose a sentence less than imprisonment for life.

43 In *Merritt*, Wood CJ at CL, who gave the principal reasons of the Court, said[28] that "the burden of proving that a case falls within s 61(1) of the [NSW] Act rests on the Crown, and that, in accordance with the decision in [*Olbrich*], the standard of such proof is beyond reasonable doubt". The consequences of these observations were not examined further in *Merritt*. In particular, there was no examination of what was intended, in the particular circumstances of that case, by the reference to the standard of proof being the criminal standard.

44 The appellant submitted that "the logical extension" of the reasoning of the majority in *Olbrich*, taken in conjunction with the well-known examination of standards of proof in *Briginshaw v Briginshaw*[29], was that the satisfaction that the Court acting under s 19(5) must reach for "the basis" for a decision "resulting in imprisonment for life without the potential for release ... must be at the highest level ... known to our law, namely beyond reasonable doubt".

45 The reference to satisfaction about "the basis" for a decision is ambiguous. It seeks to elide two aspects of the task presented by s 19(5). When that provision speaks of the Court being "satisfied the level of culpability in the commission of the offence is so extreme the community interest" in certain matters can only be met if the offender is imprisoned without the possibility of release on parole, it describes a result that requires judgment, not the application of separately defined legal principles to facts as found by the Court. The judgments to be made under s 19(5) include judgments about "level of culpability" and the "community interest" in certain matters. There may be disputed questions of fact or opinion that bear upon those judgments. In particular, questions about the offender's likely conduct, if he or she were to be released into the community, may tender issues of fact for decision by the Court. Consistent with *Olbrich*, any disputed question of fact which is to be taken into account in a way that is adverse to the offender's interests would have to be

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27 *R v Harris* (2000) 50 NSWLR 409.

28 (2004) 59 NSWLR 557 at 567 [35].

29 (1938) 60 CLR 336.

resolved according to the criminal standard of proof. But once the relevant facts have been found, a judgment would remain to be made about the level of culpability thus revealed and what the community interest in the specified matters then required. The appellant's submission sought to elide these separate aspects of the Court's task.

46 It was not submitted that, in the present case, the primary judge had had to decide any disputed question of fact. It was, therefore, not submitted that the primary judge had failed to apply the principles stated in *Olbrich*. Rather, as the appellant's submission frankly acknowledged, what the appellant sought in this appeal was an extension of those principles: to require that a standard of proof be applied to the determination of the ultimate question or questions of judgment required by the statute.

47 The submission should be rejected. The concept of a standard of proof, like the related concept of onus of proof, is apposite to the resolution of disputed questions of fact in issue in the litigation. Both onus and standard of proof concern the adducing of evidence at trial and the determination of which of the facts in issue are established by that evidence[30]. Standard of proof is not a concept that is apposite to the resolution of a contested question of judgment of the kind required by s 19(5), any more than it is apposite to the resolution of a disputed question of law.

48 The appeal should be dismissed.

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30 See, for example, *Cross on Evidence*, 7th Aust ed (2004) at [7005]; Stone, "Burden of Proof and the Judicial Process: A Commentary on *Joseph Constantine Steamship Ltd v Imperial Smelting Corporation Ltd*", (1944) 60 *Law Quarterly Review* 262.