HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, CRENNAN AND KIEFEL JJ

PNJ APPLICANT

AND

THE QUEEN RESPONDENT

PNJ v The Queen [2009] HCA 6
10 February 2009
A8/2008

ORDER

Special leave to appeal refused.

On appeal from the Supreme Court of South Australia

Representation

W J N Wells QC with H M Heuzenroeder for the applicant (instructed by George Mancini & Co)

M G Hinton QC, Solicitor-General for the State of South Australia with H H L Duong for the respondent (instructed by Director of Public Prosecutions (SA))

CATCHWORDS

PNJ v The Queen

Criminal law – Jurisdiction, practice and procedure – Stay of proceedings – Abuse of process – Applicant convicted of wounding with intent to cause grievous bodily harm and sentenced to 7 years' imprisonment with 4 years' non-parole period – Sentence and non-parole period to commence on date applicant first taken into custody – Victim since deceased – Applicant now charged with murder after serving most of sentence for wounding with intent to cause grievous bodily harm – Generally court must impose mandatory minimum non-parole period of 20 years if convicted – Whether proceedings on information alleging murder should be permanently stayed as abuse of process – Whether administration of justice brought into disrepute – Whether prosecution for murder unjustifiably oppressive – Whether conviction for murder would constitute double punishment for conduct – Whether double punishment to be determined by reference only to non-parole period – Fixing of non-parole period.

Criminal law – Jurisdiction, practice and procedure – Stay of proceedings – Abuse of process – Backdating sentence and non-parole period – Whether any double punishment alleviated or eliminated by exercise of any power to backdate – Whether non-parole period could be backdated to commence at date applicant first taken into custody – Whether "time in custody in respect of an offence" included time spent in custody for wounding with intent to cause grievous bodily harm – Whether backdating commencement of sentence for murder equivalent to ordering service of that sentence concurrently with sentence for wounding – Relevance of legislative intention.

Criminal law – Jurisdiction, practice and procedure – Stay of proceedings – Abuse of process – Court must impose mandatory minimum non-parole period of 20 years unless satisfied that "special reasons" exist for fixing shorter period – Court may have regard to a plea of guilty in deciding whether "special reasons" exist – Whether applicant denied free choice about plea in answer to murder charge, because if convicted on plea of not guilty, applicant subject to mandatory minimum non-parole period, whereas if convicted on guilty plea, applicant can argue "special reasons" exist for fixing shorter non-parole period.

Words and phrases – "special reasons", "time in custody in respect of an offence".

Criminal Law Consolidation Act 1935 (SA), s 11.
Criminal Law (Sentencing) Act 1988 (SA), ss 30, 32, 32A.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN AND KIEFEL JJ. In 2003, after a trial by judge alone in the Supreme Court of South Australia, the applicant was convicted of wounding with intent to cause grievous bodily harm. The trial judge found that the applicant had stabbed the victim in the head, causing the victim brain damage and serious disability. The applicant was sentenced to seven years' imprisonment to commence on the day in September 2002 he was first taken into custody. A non-parole period of four years was fixed and that period, too, was to commence on the day the applicant was first taken into custody.

2 The victim died in 2004. The applicant now stands charged with the murder of the victim. The year-and-a-day rule, which once fixed a temporal limit to criminal responsibility for homicide, was abolished in South Australia by the *Criminal Law Consolidation (Abolition of Year-and-a-day Rule) Amendment Act* 1991 (SA). The applicant's argument that he has a plea in bar to the charge of murder has been rejected at first instance[1] and on appeal to the Full Court of the Supreme Court of South Australia[2] sitting as the "Court of Criminal Appeal"[3] and an application for special leave to appeal to this Court was refused[4]. He now contends that proceedings on the information alleging murder should be permanently stayed as an abuse of process. This contention was rejected at first instance[5] and on appeal to the Full Court[6]. The applicant now seeks special leave to appeal to this Court. The application has been argued as on an appeal.

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1 *R v P, NJ* (2006) 174 A Crim R 1.

2 *R v P, NJ (No 2)* (2007) 99 SASR 1.

3 *Byrnes v The Queen* (1999) 199 CLR 1 at 12-13 [10]; [1999] HCA 38.

4 *PNJ v The Queen* [2007] HCATrans 691.

5 *R v P, NJ (No 3)* (2008) 254 LSJS 46.

6 *R v P, NJ (No 4)* (2008) 254 LSJS 302.

3 It is not possible to describe exhaustively what will constitute an abuse of process[7]. It may be accepted, however, that many cases of abuse of process will exhibit at least one of three characteristics[8]:

(a) the invoking of a court's processes for an illegitimate or collateral purpose;

(b) the use of the court's procedures would be unjustifiably oppressive to a party; or

(c) the use of the court's procedures would bring the administration of justice into disrepute.

In this case the applicant placed chief weight upon the third of these characteristics but also submitted that he will be subjected to oppression if he is required to plead in answer to the charge.

4 The applicant alleges that if he is convicted of murder he will be doubly punished for his conduct. He alleges that he would be doubly punished because when sentenced for murder he would have largely served the term of imprisonment for wounding with intent to cause grievous bodily harm to the victim and any non-parole period fixed upon his conviction for murder could not be fixed to begin at the time that he began the sentence for wounding with intent. He further alleges that he is denied a free choice about his plea in answer to the charge of murder because, if he pleads not guilty but is convicted, he must be sentenced in a way that fixes a non-parole period of not less than 20 years whereas, if he pleads guilty, he may argue for a shorter non-parole period.

5 The applicant's arguments directed attention to what will happen if he is convicted of murder. That is, the premise for his arguments was that it may be established at trial, or by his entering a plea of guilty, that the applicant caused the death of the victim by his assault upon him with intent to cause at least grievous bodily harm. His complaint is that, having been sentenced to, and

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7 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 265-267 [9]-[15] per Gleeson CJ, Gummow, Hayne and Crennan JJ; [2006] HCA 27.

8 *Rogers v The Queen* (1994) 181 CLR 251 at 286 per McHugh J; [1994] HCA 42. See also *Batistatos* (2006) 226 CLR 256 at 267 [15] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

having served the greater part of, a term of seven years' imprisonment for his wounding the victim, he should not now be prosecuted for murder because, if he is guilty of murder, he will suffer the punishment that is fixed by law for that crime.

6 Consideration of the arguments about double punishment which the applicant agitates in this matter must begin from an examination of the operation of several intersecting legislative provisions. First, s 11 of the *Criminal Law Consolidation Act* 1935 (SA) provides that "[a]ny person who commits murder shall be guilty of an offence and shall be imprisoned for life". Next it is necessary to take account of amendments made in 2007 to the *Criminal Law (Sentencing) Act* 1988 (SA) ("the Sentencing Act") by the *Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act* 2007 (SA) ("the 2007 Act").

7 The amendments made by the 2007 Act apply whether the offence to which a sentence of imprisonment or non-parole period relates was committed before or after the commencement of the relevant amendments[9]. The amendments made by the 2007 Act included amendments to s 32 of the Sentencing Act prescribing a mandatory minimum non-parole period in respect of certain offences. In the case of a person sentenced to life imprisonment for an offence of murder, the mandatory minimum non-parole period was fixed[10] as 20 years. Section 32A of the Sentencing Act (as introduced by the 2007 Act) provides that a mandatory minimum non-parole period prescribed in respect of an offence represents the non-parole period for an offence "at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies"[11].

8 Under the Sentencing Act, as amended by the 2007 Act, a court can fix a non-parole period that is shorter than the prescribed period only "if satisfied that special reasons exist" for doing so[12]. The Sentencing Act, as amended, further

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9 *Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act* 2007 (SA), s 11.

10 s 32(5)(ab).

11 s 32A(1).

12 s 32A(2)(b).

provides that in deciding whether special reasons exist, the court must have regard to only three matters[13]:

> "(a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;
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> (b) if the offender pleaded guilty to the charge of the offence — that fact and the circumstances surrounding the plea;
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> (c) the degree to which the offender has co-operated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such co-operation".

9 The applicant submitted, in summary, that:

(a) "the minimum non-parole period of 20 years ... would result in irremediable double punishment of the applicant";

(b) the double punishment thus imposed could not be alleviated by the exercise of any power to backdate the commencement of the non-parole period, or at least any backdating to a time before the victim died; and

(c) on his arraignment the applicant would be denied the exercise of a free choice as to his plea because he would be denied the opportunity of alleging the existence of "special reasons" to fix a shorter non-parole period unless he pleaded guilty.

10 The applicant's contentions about double punishment assumed that the only relevant aspect of any sentence passed upon him would be the fixing of a non-parole period of not less than 20 years. That assumption may not be right. The better view would appear to be that questions of double punishment may not be determined by having regard to only part of the sentence that is imposed.

11 In South Australia no sentence can be passed for the crime of murder except life imprisonment. A court may, but need not, fix a non-parole period. It was not disputed that this was a case in which, if the applicant is convicted, a non-parole period should be fixed. In fixing a non-parole period the court must determine the period which must in any event be served in prison as proper

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13 s 32A(3).

punishment for the crime committed[14]. But here the legislation prescribes the shortest period which, in the absence of those limited circumstances which the Act identifies as "special reasons", may be fixed. It may greatly be doubted that the punishment imposed on an offender is sufficiently described by identifying only the term which the court fixes as the least period of actual incarceration that must be served. Rather, the punishment imposed on an offender will be better identified, at least for most purposes, as both the head sentence (here, life imprisonment) and the non-parole period that is fixed, for it is always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed.

12 It is not necessary to examine these questions further in the present matter. Nor is it necessary to do more than notice the particular provisions made by s 70 of the *Correctional Services Act* 1982 (SA) for satisfaction of a sentence of life imprisonment upon completion of a period of release on parole without the parole being cancelled or suspended. Rather, if, as the applicant submitted, it is necessary to focus attention only upon how the provisions for mandatory minimum non-parole periods would apply in his case, then, contrary to his submissions, those provisions will not require him to serve a non-parole period that is any longer than if he had been prosecuted only for murder. The non-parole period may be fixed to begin at the date the applicant was first taken into custody.

13 Section 30 of the Sentencing Act provides:

> "(1) Where a court imposes a sentence of imprisonment and does not suspend the sentence, the court must specify the date on which, or the time at which, the sentence is to commence or is to be taken to have commenced.
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> (2) If a defendant has spent time in custody in respect of an offence for which the defendant is subsequently sentenced to imprisonment, the court may, when sentencing the defendant, take into account the time already spent in custody and—
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> (a) make an appropriate reduction in the term of the sentence; or

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14 *Bugmy v The Queen* (1990) 169 CLR 525 at 538; [1990] HCA 18.

(b) direct that the sentence will be taken to have commenced—

(i) on the day on which the defendant was taken into custody; or

(ii) on a date specified by the court that occurs after the day on which the defendant was taken into custody but before the day on which the defendant is sentenced.

...

(4) Where a court fixes a non-parole period, the court must specify the date on which the non-parole period is to commence or is to be taken to have commenced.

(5) Where a court directs that a sentence of imprisonment is to be taken to have commenced on the day on which the defendant was taken into custody, any non-parole period fixed by the court in respect of that sentence will be taken to have commenced on that day."

14 All members of the Full Court held[15] that a judge passing sentence on the applicant has power under s 30 of the Sentencing Act to fix the commencement date of both the head sentence (life imprisonment) and the non-parole period (20 years, unless "special reasons" were established) as the date upon which he was first taken into custody following his assault on the victim.

15 There is no reason to doubt the Full Court's conclusion that the sentencing judge has power to fix the date on which both the head sentence of life imprisonment and the non-parole period should be taken to have begun in this way.

16 Principal emphasis was given by the majority in the Full Court to the operation of s 30(1). That provision had been held in *R v Colson*[16] to provide

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15 (2008) 254 LSJS 302 at 308-309 [32] per Duggan J, 323 [96] per Gray J, 327 [118] per White J.

16 (1999) 73 SASR 407.

what, in the present case, Duggan J described[17] as "a general power to backdate a sentence or to order that a sentence commence at a future date". And in *Colson*, Doyle CJ, speaking for the Full Court, had concluded[18] that earlier decisions of the Full Court[19] had treated s 30(1) or its legislative predecessor as conferring "a general power to direct that a sentence is to commence at an earlier date or time than the time at which it is imposed".

17 In the particular circumstances of this case, however, it may be that the power to backdate any sentence passed on the applicant (and to backdate the commencement of a non-parole period) is to be found in s 30(2)(b) rather than the general powers conferred by s 30(1)[20]. The expression used in s 30(2), about which the relevant operation of par (b) would hinge, is "[i]f a defendant has spent time in custody in respect of an offence for which the defendant is subsequently sentenced to imprisonment". No narrow construction should be given to the words "time in custody in respect of an offence". The better view may be that they are words that in this case would encompass the time the applicant has spent in custody following his arrest for and awaiting trial for the wounding, and the time he has spent in custody serving the sentence imposed on him for the wounding.

18 If a person is charged with an offence, taken into custody, and later convicted of that offence, there is no doubt that s 30(2) would apply. But if, as is often the case, the charge that is laid at the time of an offender's arrest is not the charge of which the offender is later convicted, it does not follow that the time served cannot be described as "time in custody in respect of an offence" of which the offender is later convicted. The question is whether the time in custody is "in respect of" (which is to say, is referable to) the offence in question. And where, as here, the applicant's *conduct* was complete when he was taken into custody but the *offence* of murder was not complete until the victim died, the expression "time in custody in respect of an offence" may be given the application that has been described.

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17 (2008) 254 LSJS 302 at 306 [20].

18 (1999) 73 SASR 407 at 412 [23].

19 *R v Garrett* (1978) 18 SASR 308; *R v Jamieson* (1988) 50 SASR 130.

20 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566; [2006] HCA 50.

19 It is not necessary to decide whether this construction of s 30(2) is right. If s 30(2) is not to be read in the way described, the Full Court was right to hold that s 30(1) would supply the power to backdate the sentence and the commencement of the non-parole period to the date the applicant was taken into custody. It is enough to make only two points. First, "[i]t is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words"[21]. Secondly, as noted earlier, the construction of s 30(1), adopted by the majority in the Full Court, applied that Court's earlier decision in *Colson*[22] and reflected well-established sentencing practice under the Sentencing Act not inconsistent with the practice adopted under earlier legislation[23]. This understanding of the powers of courts sentencing under the applicable South Australian legislation having stood unchallenged for as long as it has, there should be no departure from, or qualification to, the underlying question of construction of the relevant statute unless it is shown to be wrong, and it is not. Section 18 of the *Acts Interpretation Act* 1915 (SA) abrogates any presumption that re-enactment of a statutory provision constitutes parliamentary approval of the particular construction given to those words. The abrogation of that presumption is not relevant in this case. What matters here is the absence of demonstrated error in the construction given to s 30(1).

20 In these circumstances, if the applicant is convicted of murder, the sentencing judge will have power to fix commencement of that sentence, and of the non-parole period that is fixed, as the day on which the applicant was first taken into custody following his assault on the victim.

21 The applicant's further submission that backdating the commencement of both elements of his sentence to the date of his arrest did not prevent double punishment was advanced with particular reliance upon this Court's decision in

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21 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; [1994] HCA 5. See also *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472 at 488-489 [47] per McHugh ACJ, Hayne and Heydon JJ; [2004] HCA 59; *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at 492 [10]; [2006] HCA 38.

22 (1999) 73 SASR 407.

23 *R v Garrett* (1978) 18 SASR 308; *R v Thomas* (1986) 41 SASR 566; *R v Jamieson* (1988) 50 SASR 130; *R v Colson* (1999) 73 SASR 407 at 411-412 [22].

Pearce v The Queen[24]. The applicant submitted that backdating the commencement of a sentence for murder would be the same as ordering service of that sentence concurrently with the sentence for wounding, and constitute double punishment for the single act of inflicting grievous bodily harm on the victim. It was said, by the plurality in *Pearce*[25], that "[t]o the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common". But as the reasons went on to point out, that general principle must yield to contrary legislative intention.

22 In the present case, if the applicant is convicted of murder, a sentence of life imprisonment is mandatory and, absent "special reasons", no non-parole period less than 20 years may be fixed. For the sentencing judge to impose on the applicant the only sentence that the law permits cannot be said to be an abuse of process.

23 The applicant also argued that further prosecution of the information was oppressive because he will be denied free choice in deciding what plea to make in answer to the charge of murder. He submitted that this followed from the fact that the only basis upon which he could argue for the fixing of a non-parole period of less than 20 years would be if he pleaded guilty.

24 It may readily be accepted that the decision to foreclose the possibility of having a period less than 20 years fixed as a non-parole period is very difficult. There are, however, many cases in which an offender who pleads guilty is treated more leniently than one who does not. In such cases, to enter a plea of not guilty will forego those advantages. But the offender who is confronted by a choice of the kind which the applicant must make in this case is not deprived of freedom of choice about the plea to be entered. Once it is accepted, as it should be, that in this case the sentencing judge can decide to fix the date of the applicant's arrest for wounding as the date of commencement of the non-parole period that is determined, the matters affecting his choice of plea are no different from those confronting any person charged with that offence.

25 It is not arguable that further prosecution of the information for murder preferred against the applicant in the Supreme Court of South Australia would be

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24 (1998) 194 CLR 610; [1998] HCA 57.

25 (1998) 194 CLR 610 at 623 [40].

an abuse of process. Further prosecution of the charge is not unjustifiably oppressive to the applicant, would not bring the administration of justice into disrepute, and is not otherwise an abuse of process. Special leave to appeal should be refused.