

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, KIRBY, HAYNE AND CALLINAN JJ

CHRISTOPHER ALEXANDER INGE

APPELLANT

AND

THE QUEEN

RESPONDENT

Inge v The Queen [1999] HCA 55
7 October 1999
A38/1998

ORDER

1. *Appeal allowed.*
2. *Set aside the order of the Court of Criminal Appeal of South Australia entered on 4 April 1997.*
3. *Remit the matter to the Court of Criminal Appeal of South Australia to deal with the appeal to that Court conformably with the reasons of this Court.*

On appeal from the Supreme Court of South Australia

Representation:

M E Shaw QC with C J Kourakis QC for the appellant (instructed by Wallmans)

W J Abraham QC with J M Woithe for the respondent (instructed by Director of Public Prosecutions (South Australia))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Inge v The Queen

Criminal law – Sentencing – Murder – Mandatory life sentence – Parole – Minimum term during which prisoner not eligible for parole – Whether appellant's youth counts against him in determining non-parole period.

Words and phrases – "imprisonment for life".

Correctional Services Act 1982 (SA), ss 67(6), 70.

Criminal Law Consolidation Act 1935 (SA), s 11.

Criminal Law (Sentencing) Act 1988 (SA), ss 32(1)(a), 32(1)(b), 32(5)(c).

1 GLEESON CJ, GAUDRON, HAYNE AND CALLINAN JJ. This appeal concerns an aspect of the relevance of the age of an offender, who has been convicted of murder, under a sentencing regime which fixes imprisonment for life as the mandatory sentence, but gives the sentencing judge power to determine a non-parole period. Age may have a bearing upon a number of considerations involved in a decision whether to fix a non-parole period, and in a determination of the length of any non-parole period¹. The particular question which arises in the present case is whether, in a determination of the length of a non-parole period in the case of a relatively young offender, his youth counts against him.

2 The facts, and the relevant legislative provisions, appear in the reasons for judgment of Kirby J.

3 Section 11 of the *Criminal Law Consolidation Act* 1935 (SA) provides that a person who commits murder shall be imprisoned for life. The length of time for which such a sentence will run depends upon the time for which the offender will live. That, in turn, may depend upon a number of factors including, but not limited to, the offender's age at the time of sentencing. So seriously is the taking of human life regarded that, in a number of Australian jurisdictions, including South Australia, a sentencing judge has no discretion in relation to fixing a sentence for murder; imprisonment for life is mandatory, regardless of any of the considerations that arise when a sentencing discretion is exercised.

4 However, a sentencing judge has a discretion in relation to the matter of parole. Under the *Criminal Law (Sentencing) Act* 1988 (SA), in a case such as the present, the judge may fix, or decline to fix, a non-parole period². Such a period is the minimum time which the offender must serve in prison before being eligible for release on parole. If a sentencing judge fixes a non-parole period in the case of a person serving a sentence of life imprisonment, at any time after the expiration of that period the offender may be released on parole if the Parole Board makes such a recommendation to the Governor, and the recommendation is accepted³. If that occurs, the offender will continue on parole for a recommended period of between three and ten years, at the expiration of which the sentence will be taken to have been wholly satisfied⁴. The combined discretionary powers of the

1 *R v Denyer* [1995] 1 VR 186; *R v Coulston* [1997] 2 VR 446; *R v Lowe* [1997] 2 VR 465.

2 *Criminal Law (Sentencing) Act* 1988 (SA) ss 32(1)(a) and (b), 32(5)(c).

3 *Correctional Services Act* 1982 (SA) s 67(6).

4 *Correctional Services Act* 1982 (SA) ss 67(6), 70.

2.

sentencing judge, to fix a non-parole period, and the Executive, to release a prisoner on parole, together with the statutory consequences of release on parole, mean that the proposition that the penalty for murder in South Australia is mandatory life imprisonment is an incomplete statement of the true position. Of course, fixing a non-parole period does not mean that parole will be granted, either at the expiration of that period, or at all.

5 The origin of the suggested principle that, other things being equal, a non-parole period fixed in the case of a relatively young offender, (or, perhaps more accurately, an offender with a relatively long life expectancy), should be somewhat longer than would otherwise be the case, appears to lie in what has been seen as the logical conclusion to be drawn from two premises⁵. The first premise is that there should always be due proportionality between a head sentence and a non-parole period. The second premise is that, as the mandatory sentence for murder is life imprisonment, the greater the life expectancy of the offender, the greater is likely to be the effective period of the head sentence. Thus, as was said in the present case, when it comes to determining the appropriate non-parole period for a relatively young man, "his relative youth counts against him". That is not to say, of course, that age is the only matter to be taken into account, or that it can only work to the disadvantage of the offender. It is acknowledged that there may be other respects in which youth may work in his favour, such as by enhancing prospects for rehabilitation, or by mitigating some aspects of the offence. However, at least in one respect, youth is regarded as a factor which tends to increase the length of any non-parole period, even though there may also be countervailing considerations to be taken into account. To fail to recognise this, some judges have said, would be to fail to respect the legislature's decision that life imprisonment is mandatory in the case of all murders, regardless of the objective circumstances of the offence or the subjective features of the offender.

6 The principles which inform the exercise of a judicial discretion in fixing a non-parole period were considered in *Bugmy v The Queen*⁶, a case of murder, and of a prisoner who had originally been subject to a mandatory sentence of life imprisonment. They direct attention to matters which include the rehabilitative purpose of parole, the need to protect the community, and the difficulty of predicting, a long time in advance, the facts which may affect a judgment as to whether parole should be granted, refused or postponed. To what extent, if at all, do those principles yield to the logic of the argument summarised above?

5 See, for example, *R v Bricis* (1996) 186 LSJS 217 at 220.

6 (1990) 169 CLR 525.

3.

7 Both of the premises upon which the argument proceeds require qualification.

8 As to the first premise, it is true that there are authoritative judicial statements which refer to the need for an appropriate relationship, or an appropriate proportionality, between a head sentence and a minimum term or non-parole period. For example, in *Lowe v The Queen*⁷ Gibbs CJ said⁸:

"No doubt there should be an appropriate relationship between the sentence imposed on an offender and the minimum term after which he becomes eligible to be released on parole."

9 However, he went on immediately to add:

"What is appropriate must depend very much on the circumstances of the case, and the exact relationship between those two periods is something that has to be determined in the exercise of a wide discretion."

10 Where, as in the present case, a court is dealing with an offender who might, in the ordinary course, live for another 50 years or more, an attempt to achieve what would, in other cases, be regarded as a due proportion between a non-parole period and the term of the offender's natural life, becomes a somewhat unrealistic and artificial exercise.

11 As to the second premise, it appears to depend upon relating average or typical life expectancy to that of an individual; a process which is acceptable in fixing insurance premiums, but incongruous in the sentencing process. Furthermore, it leaves out of account the fact that the prescription of life imprisonment for murder is qualified by other aspects of the legislative scheme referred to above. The system of parole ameliorates the apparent inflexibility of s 11 of the *Criminal Law Consolidation Act*.

12 The seriousness of the offence which has been committed, and the severity of the mandatory penalty provided by statute, are matters to be taken into account in fixing a non-parole period, but it does not follow, either as a matter of logic, or as a matter of the proper exercise of the discretion considered in *Bugmy*, that the relative youth of an offender counts against the offender.

7 (1984) 154 CLR 606 at 610.

8 (1984) 154 CLR 606 at 610.

Gleeson CJ
Gaudron J
Hayne J
Callinan J

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- 13 It is not clear that, in the present case, if the principle in question had been left out of account, the result would have been different. That is a matter for the Court of Criminal Appeal to decide.
- 14 We agree with the orders proposed by Kirby J.

15 KIRBY J. In confirming the sentence imposed on the appellant, the leading judgment in the Court of Criminal Appeal⁹ observed that he was 23 years of age when he committed the offence and that "his relative youth counts against him in determining the appropriate non-parole period".

16 On the basis of this comment the appellant complains that the determination of his appeal¹⁰ against sentence miscarried. Alternatively, he submits that the non-parole period fixed in his case was manifestly excessive and such as ought to have been reduced by the Court of Criminal Appeal. By special leave, he appeals to this Court. The point of importance in the appeal concerns the relevance of the consideration of age to the judicial determination of a non-parole period under South Australian law in a case in which the sentencing judge was obliged to impose a sentence of life imprisonment.

The facts

17 When the appellant, Mr Christopher Inge, pleaded guilty to the charge of murder, it became the responsibility of the sentencing judge (Millhouse J) to find the facts relevant to the sentence to be imposed on him. A great deal of evidentiary material was placed before the judge. There was no oral evidence. The material included statements taken by police from members of the family and friends of the appellant and of his co-accused, Mr John Schultz, postmortem and scientific reports concerning the deceased and his home, psychiatric reports about the appellant, victim impact statements written by two sisters of the deceased and two letters written by the appellant. One of these letters was a note by the appellant to his girlfriend, expressing remorse, said to have been written in connection with a suicide attempt by him late on the day of the offence. The other was a letter written to the sentencing judge at the time that the appellant's sentence was under consideration.

18 On 4 December 1995 the appellant, his sister T and Mr Schultz, spent the day drinking beer and rum. By late in the evening they were all heavily intoxicated. At about midnight, T left the party, went for a walk and returned to her room crying. Mr Schultz extracted from her details of certain sexual misconduct which she alleged against the deceased. She said that it had been committed at a time when she was 8 or 9 years old. T stated that she and her sister had been left in the care of the deceased by their parents. The deceased was their neighbour. T said that various sexual acts of the deceased performed upon them and in their presence were eventually drawn to the notice of the parents, who allegedly confronted the

9 *R v Schultz and Inge* unreported, Court of Criminal Appeal (SA), 4 April 1997 at 9 per Perry J with whom Cox J and Williams J agreed (the latter with respect to the present appellant only) ("Appeal judgment").

10 By leave earlier granted by Williams J on 24 February 1997.

deceased. He denied any misconduct. This led to an estrangement which was subsequently repaired. T did not describe all of her allegations to Mr Schultz, as she later did to police. But she told him enough to cause him to go to the deceased's home to "sort the matter out with him"¹¹.

19 Mr Schultz drove the appellant to the deceased's premises in his car. They arrived at about 1 o'clock on the morning of 5 December 1995. The deceased was living alone. He was described as a man of 68 years, small in stature. The appellant called out to the deceased to let him in. The latter refused, telling the appellant to go away. Instead, the appellant removed a flyscreen from a window and climbed inside followed by Mr Schultz. The deceased armed himself with a piece of wood, obviously inferring violent intentions on the part of the intruders. The appellant took the wood from the deceased. He began hitting him with it and later with a claw hammer until the deceased was "well and truly dead"¹².

20 According to the postmortem report, the deceased was struck at least 12 times. Death was attributed to traumatic brain damage. The appellant also poured petrol over the deceased's body and lit it, resulting in extensive burns to the body. The appellant and Mr Schultz decamped, taking with them the piece of wood, the hammer and flyscreen which they later threw away.

21 The sentencing judge appears to have accepted the statements of T and of the appellant concerning the sexual abuse alleged against the deceased. Although the mother of the appellant and of T deposed in her police statements to complaints by T about sexual misconduct, the father stated that he had "never heard of any allegations that [the deceased] had been sexually molesting my children until after [his] murder". One of the sisters of the deceased wrote of him as a "kind loving quiet man" and a "loving brother and uncle" to her children. She expressed disbelief that a man "so protective to my children" had been guilty of abuse. Certainly, he was never found guilty of such misconduct by a court of law.

22 The sentencing judge described how he had felt sickened by the descriptions of the way the deceased had been killed. But he was prepared to sentence the appellant on the footing that the allegations of sexual abuse were true. This appears from various statements made by him during his remarks on sentencing. There was no contradictor to the allegations and they tended to mitigate the seriousness of the offence. The judge was entitled to proceed as he did. However, the fact

11 *R v John Andrew Schultz and Christopher Alexander Inge* unreported, Supreme Court of South Australia, 23 December 1996 at 2 per Millhouse J ("Sentence"); cf Appeal judgment at 5 per Williams J.

12 Sentence at 2.

remains that the deceased was never afforded a chance to rebut the belated allegations before he was killed.

23 Because the appellant pleaded guilty to the murder, the sentencing judge was obliged to, and did, impose on him the penalty provided by law¹³, namely imprisonment for life¹⁴. He fixed a non-parole period of 20 years. Mr Schultz was sentenced to imprisonment for 12 years, with a non-parole period of seven years¹⁵.

24 The appellant and Mr Schultz each appealed to the Court of Criminal Appeal against his sentence. Necessarily, the appellant's appeal was limited to a challenge to the non-parole period fixed in his case. By majority, Mr Schultz's appeal was allowed. A new sentence of imprisonment for seven years and six months with a non-parole period of five years was substituted. This Court has not been concerned with Mr Schultz's sentence. The appellant's appeal was dismissed. His appeal to this Court ultimately concerns the correctness of the non-parole period fixed in his case.

Reasons of the Court of Criminal Appeal

25 The decision of the Court of Criminal Appeal in the appellant's case was unanimous. The reasons of Perry J may be taken as those of that Court¹⁶. The reasons are quite brief. Like the sentencing judge, Perry J accepted, for the purpose of considering the non-parole period, that the appellant (and his sisters) had been sexually abused by the deceased in their childhood. But he noted that, in relation to the allegations made against the deceased, the "course of conduct was concluded some eight years before the murder was committed"¹⁷. Like the sentencing judge, Perry J stated that a "victim of sexual abuse has no warrant to kill the abuser"¹⁸. He noted the long record of prior convictions in the case of the appellant but the absence of convictions for offences of violence. He referred to the appellant's "borderline intelligence", possible brain damage and confirmed dependency on illicit substances and alcohol.

13 *Criminal Law Consolidation Act 1935 (SA)*, s 11.

14 Sentence at 1.

15 Sentence at 5.

16 The separate reasons of Williams J were chiefly concerned with Mr Schultz's appeal which he would have dismissed. Appeal judgment at 7 per Williams J.

17 Appeal judgment at 7.

18 Appeal judgment at 7.

26 Nevertheless, Perry J found it inescapable that the appellant had formed an intention to inflict grievous bodily harm on the deceased, sufficient to sustain the conviction of murder to which he had pleaded guilty¹⁹. He noted the very late plea, just before the trial, but that the appellant was entitled to credit for that plea²⁰. He then turned to the submissions placed before the Court of Criminal Appeal, and now before this Court, intended to compare the non-parole periods fixed in cases said to be comparable to the appellant's case. Perry J expressed the opinion that it was "difficult, if not impossible to make any useful comparison between non parole periods set for murder or any other offence"²¹. He ascribed this difficulty to the fact that such periods "must necessarily reflect idiosyncratic features personal to the defendant, to a greater extent than in the case of the head sentence"²². He then proceeded to address the issue of the appellant's age. He observed that counsel had conceded that age "was a factor which must be taken into account"²³. He cited from the opinion of Doyle CJ in *R v Bricis* the following passage, the correctness of which lies at the heart of the present appeal²⁴:

"...[W]hen fixing a non-parole period in relation to a life sentence, the age of the prisoner is material. The non-parole period must be an appropriate proportion of the balance of the prisoner's life. It necessarily follows from that that in the case of relatively young offenders the non-parole period will generally be of very considerable length. That is an inescapable consequence of the duty of the Court to maintain an appropriate proportionality between the length of the non-parole period and the duration of the head sentence."

19 Appeal judgment at 8.

20 Appeal judgment at 9.

21 Appeal judgment at 9.

22 Appeal judgment at 9.

23 Appeal judgment at 9.

24 (1996) 186 LSJS 217 at 220.

27 It was in this context that Perry J came to his conclusion now challenged²⁵:

"[The appellant] was 23 and his relative youth counts against him in determining the appropriate non-parole period. But I accept that, nonetheless, one can separately make some sort of allowance for youth in favour of the [appellant]. But, for the reasons identified in *Bricis*, it would be an unusual case in which that could cancel out the allowance to be made the other way.

This was a brutal assault on a frail old man of 68 years, alone in his house late at night. His life was battered out of him by the use of a piece of wood, which he had initially armed himself with in a futile attempt to defend himself, and a claw hammer. The incineration of the body of the deceased was a circumstance of aggravation.

In my opinion [the appellant] has failed to demonstrate that the non-parole period was manifestly excessive."

28 Nothing turns on the fact that the principle in *Bricis* was conceded in the Court of Criminal Appeal. As will be shown, *Bricis* was one of a number of statements to like effect in that Court. The present appeal affords an opportunity to review the correctness of such statements. There was no similar statement in the remarks of the sentencing judge. In so far as he considered the issue of the appellant's age, his reasons appear to indicate that he treated it as an element of amelioration. He said, addressing the appellant: "You are still only 24 years old."²⁶ Yet although the appellant's age did not loom large in the initial sentencing proceedings, the sentencing judge was bound by the statements of principle contained in the decisions of the Court of Criminal Appeal, including *Bricis*. In the absence of any indication to the contrary it should be inferred that, in fixing the appellant's non-parole period, the sentencing judge would have applied the established principles. In any case, in the review of the resulting order relating to the non-parole period, the appellant was entitled to have the Court of Criminal Appeal apply the correct principles²⁷, especially in a matter involving such a long non-parole period in the context of a life sentence²⁸. It would be inappropriate to dismiss the appeal on the footing that no error had been shown in the actual sentence.

25 Appeal judgment at 9-10.

26 Sentence at 5.

27 *Anderson v The Queen* (1993) 177 CLR 520 at 538-539.

28 *Lee Vanit v The Queen* (1997) 190 CLR 378 at 409.

The applicable legislation

29 The history lying behind the legislative provisions pursuant to which the non-parole period was fixed in the appellant's case is complex. It is unnecessary to review its entire meandering course.

30 The first provision permitting the release on licence of a person serving a sentence of life imprisonment was enacted in South Australia in 1954²⁹. It empowered the Governor, at any time, on the recommendation of the Comptroller of Prisons, to release on licence a person serving a period of imprisonment for life, subject to compliance with conditions and to recall to prison in accordance with an order of the Governor. The Bill for this Act was welcomed in Parliament as providing encouragement, particularly to a young prisoner, of the hope of obtaining earlier release³⁰.

31 It was not until 1969 that the Parole Board of South Australia was established. Part IVA of the *Prisons Act Amendment Act (No 2) 1969* (SA) empowered the Court, when sentencing a person to be imprisoned, to fix a period during which the prisoner "shall not be released upon parole"³¹.

32 In 1976, capital punishment was abolished in South Australia. By s 6 of the *Statutes Amendment (Capital Punishment Abolition) Act 1976* (SA), s 11 of the *Criminal Law Consolidation Act 1935* (SA) was amended in order to substitute imprisonment for life as the mandatory sentence to be imposed on any person convicted of murder. It was pursuant to the last-mentioned provision that the sentence of life imprisonment was imposed on the appellant.

33 In 1988, following various other amendments to the scheme of the legislation, the *Criminal Law (Sentencing) Act 1988* (SA) was enacted. Section 10 of that Act, in force at the time sentence was passed on the appellant, obliges the Court sentencing a prisoner (including in fixing a non-parole period)³² to have regard to a number of factors, one of which is the offender's age³³. The provision

29 *Prisons Act Amendment Act 1954* (SA), s 5 inserting s 42a into *Prisons Act 1936* (SA).

30 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 21 September 1954 at 639.

31 See s 42(i).

32 *Criminal Law (Sentencing) Act 1988* (SA), s 3 (definition of "sentence").

33 *Criminal Law (Sentencing) Act 1988* (SA), s 10(1).

does not specify the precise influence which age is to have upon the sentence. Section 32(5)(c) of that Act states:

"a court may, by order, decline to fix a non-parole period in respect of a person sentenced to imprisonment if the court is of the opinion that it would be inappropriate to fix such a period because of -

- (i) the gravity of the offence or the circumstances surrounding the offence; or
- (ii) the criminal record of the person; or
- (iii) the behaviour of the person during any previous period of release on parole; or
- (iv) any other circumstance."

34 It would therefore have been open to the sentencing judge to decline to fix a non-parole period in the case of the appellant. In the course of argument, this Court was informed that such an approach had been taken in recent times, but only in one case. Having, by inference, rejected that course in the present case, it became the judge's duty to fix the period during which the appellant would not be released on parole. Apart from general provisions, the statute affords no specific guidance to the judge as to the precise length of that non-parole period. But it is to be ordered in a statutory context in which it is now made clear that remissions for good conduct no longer apply to reduce the period so fixed. Even when that period expires there is no automatic release on parole.

35 Where, as here, Parliament has not spelt out all of the considerations which are to inform the decision of the judge in fixing a non-parole period, the common law fills the gap. It does so by implication from the subject matter, scope and purposes of the legislation³⁴. That is why it is important, in deriving the powers and obligations of a judge in circumstances such as the present, to have a full understanding of the terms of the applicable legislation, the context in which the power or discretion in question arises and the history of any relevant predecessor provisions which may give a clue as to the function which the legislature contemplated that the judge would perform.

34 cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40.

South Australian judicial authority

36 A line of authority in the Court of Criminal Appeal of South Australia must be noticed in order to understand the context of the comment of Perry J challenged by the appellant in this appeal. In saying what he did, Perry J was endeavouring to give expression to what, in a number of South Australian decisions, has sometimes been described as the "*von Einem* factor". This is a reference to the later understanding of remarks made by King CJ in considering the sentencing aspects of the Crown's appeal in *R v von Einem*³⁵. That was a case in which the prisoner, aged 38 years at the date of his conviction, who had pleaded not guilty at his trial, was convicted of crimes involving abduction and homicide described as being "at the top of the scale of categories of murder"³⁶. In accordance with statute, the accused was sentenced to imprisonment for life. The trial judge had fixed 24 years as the non-parole period applicable to his case. At the time, that period was liable to be reduced by remissions.

37 Explaining why a non-parole period of 24 years was manifestly inadequate, King CJ referred first to uncontroversial considerations such as the need to satisfy, the "punitive, deterrent and preventive purposes of punishment"³⁷. He then went on in words which have proved influential³⁸:

"A sentence of imprisonment for life means a sentence of imprisonment for the term of the prisoner's natural life. This is the only sentence which the law, which Parliament has enacted, permits for the crime of murder. The stringency of this mandatory sentence is mitigated to some extent by the power entrusted to the courts to fix a non-parole period, having the effect that the prisoner will be released on parole at the expiration of that period if he accepts the conditions attached to his parole by the Parole Board. A non-parole period should always bear a relation, which is appropriate in the circumstances, to the head sentence. Where the head sentence is the term of the prisoner's natural life, regard should be had, in my opinion, in fixing the non-parole period, not only to the number of years which will be spent in prison by reason of the non-parole period, but to the relationship of the non-parole period to the normal span of life. This involves some consideration of the age of the prisoner. To ignore the last-mentioned factor, would be to fix the non-parole period as though it were related to a determinate sentence and

35 (1985) 38 SASR 207 (Jacobs J and Olsson J agreeing); cf *R v Tio and Lee* (1984) 35 SASR 146 at 148 per King CJ; *R v Creed* (1985) 37 SASR 566 at 568 per King CJ.

36 (1985) 38 SASR 207 at 218.

37 (1985) 38 SASR 207 at 218.

38 (1985) 38 SASR 207 at 220.

would to that extent negate the mandate of Parliament that the sentence for murder is imprisonment for life."

38 The foregoing statement by King CJ has been applied in many cases since. So it was in *Bricis*³⁹, the decision to which Perry J referred in his reasons in the present case. In *Bricis*, the appellant, a man of 22 years of age when sentenced, was, upon his conviction of two counts of murder, sentenced to life imprisonment with a non-parole period of 20 years. Like the present appellant, he had had a troubled life as a boy and young man. He also had a history of drug and alcohol abuse. He was of low intelligence and subject to being led by a person of purposeful action. He pleaded guilty and complained to the Court of Criminal Appeal, unsuccessfully, that the non-parole period was excessive. Doyle CJ expressed the view that when sentencing a prisoner of such an age, his age was material⁴⁰, as set out earlier in my reasons.

39 The approach in *Bricis* has been applied in a number of later appeals to the Court of Criminal Appeal. In *R v Murphy*⁴¹, the prisoner was 19 years of age at the time of the murder of his mother and her de facto husband. The offences occurred in circumstances of premeditation and brutality. The non-parole period was increased in his case from 18 years to 25 years. The increase was ordered notwithstanding the prisoner's relative youth and good record⁴².

40 In later cases, two variations began to emerge in judicial reasoning. Particular judges took into consideration life expectancy tables in order to estimate the likely time that the prisoner would spend in custody if his life sentence were not made subject to parole⁴³. In other decisions⁴⁴, the remarks of Cox J in *R v Moyle*⁴⁵ were applied so that the offender's "comparative youth" could be set off "at least to some extent" against the "von Einem factor". In *R v Bednikov Olsson J* expressed what he saw as having been the "real issue" in *von Einem*. This, he said, was whether "the Court was justified in permitting the release of the prisoner on

39 (1996) 186 LSJS 217 per Doyle CJ (Millhouse J and Williams J agreeing).

40 (1996) 186 LSJS 217 at 220. As set out above at [26].

41 (1996) 66 SASR 406 per Doyle CJ (Olsson J and Perry J agreeing).

42 (1996) 66 SASR 406 at 419.

43 *R v Shaw* unreported, Supreme Court (SA), 19 July 1996 at 3 per Williams J; *R v Macrae* unreported, Supreme Court (SA), 4 July 1997 at 5 per Williams J.

44 These cases include *R v Bascombe* unreported, Supreme Court (SA), 28 May 1998 at 6; *J* (1998) 102 A Crim R 157 at 163, 164.

45 (1996) 186 LSJS 462 at 462 (dissenting).

parole in his old age, or whether he ought to be left, almost inevitably, to die in prison."⁴⁶ He pointed to the fact that he had been a concurring member of the Court in *von Einem* and suggested that what had been said by King CJ in that case had sometimes been misinterpreted⁴⁷:

"It cannot be stressed too strongly that, in adverting to a need to consider the age of the person sentenced, King CJ was not implying that a non-parole period was to be arrived at simply by some broad mathematical formula. Indeed, to do so would not only be to ignore the fundamental principles [of sentencing] ... and a balanced application of them, but also would produce quite capricious and anomalous comparative tariffs for crimes of a similar nature committed by persons of widely differing ages. ...

The question of age of the offender is but one consideration. It may be of critical practical importance in the case of older offenders, where a merciful approach may warrant some moderation of an otherwise justified non-parole period."

Arguments of the parties

41 The appellant challenged the statement of Perry J that "his relative youth counts against him in determining the appropriate non-parole period". In support of his challenge, a number of arguments were advanced.

42 First, it was submitted that such an approach was inconsistent with the individualisation of punishment envisaged by the applicable law. It introduced a discriminatory factor into sentencing which, unless reversed, would effectively involve the increase in sentence for acts of like criminality simply because an offender was young. This was a point to which Olsson J had referred in *Bednikov*⁴⁸. His remarks were embraced by the appellant.

43 Secondly, the appellant suggested that undue attention had been given to the fact that life imprisonment was the mandatory punishment required by Parliament upon conviction of murder. Whilst it was true that statute so provided, statute also provided for the release of life prisoners on parole. Therefore, the mandatory sentence had to be understood in that wider context. It left much work for the sentencing judge to perform when considering the non-parole period. It was here

46 (1997) 193 LSJS 254 at 284.

47 (1997) 193 LSJS 254 at 284 referring to *Yook & Sung* (1995) 84 A Crim R 432 at 436.

48 (1997) 193 LSJS 254 at 284.

that flexibility was permitted, keeping in mind the general purposes of sentencing⁴⁹.

44 Thirdly, the appellant submitted that undue attention to the mandatory sentence of life imprisonment in fixing a non-parole period was not warranted given the broad range of circumstances that would attract that sentence. Thus it would be applicable to a case involving the consensual termination of the life of a spouse in extenuating circumstances of great suffering⁵⁰, as much as to a gruesome case of multiple murder. This consideration made it clear that proportionality to the prisoner's natural life was an inapposite application of reasoning which was appropriate for determinate sentences for other, lesser, offences but not for a mandatory sentence of life imprisonment.

45 Fourthly, the appellant argued that, at common law, youth (and age) had traditionally been mitigating factors in the diminution of punishment. They were not circumstances of aggravation as the application of the "*von Einem* factor" had come to require in the case of a prisoner's youth in South Australian non-parole decisions.

46 Fifthly, the appellant criticised the way in which the logic of the reasoning in *von Einem*, *Bricis* and other cases had led to the use of actuarial life tables and the assumption that such a degree of precision could be brought into the calculation of a non-parole period based on such data.

47 Sixthly, he submitted that such precision had led to extremely high sentences, including in his case. Following the abolition of the system of remissions, by the truth in sentencing legislation, a sentence, such as that imposed upon the appellant, was equivalent to a much longer non-parole period under the previous regime.

48 Seventhly, picking up the remarks of Olsson J in *Bednikov*, the appellant contended that subsequent cases had misunderstood the basic reasons behind the decision in *von Einem* which had been to keep the prisoner in that case in custody for something only a little short of his natural life. Such reasons did not apply to every case. They did not apply to the appellant's circumstances.

49 Eighthly, the appellant argued that life imprisonment in South Australia and elsewhere meant, in practice, something substantially less than the natural life of

49 *Postiglione v The Queen* (1997) 189 CLR 295 at 335-343.

50 *R v Johnstone* unreported, Supreme Court (SA), 21 January 1987 where a non-parole period of 10 days was fixed by the sentencing judge on a prisoner aged 62 years. An appeal was dismissed by the Court of Criminal Appeal of South Australia: (1987) 45 SASR 482.

the prisoner⁵¹. The average period served by prisoners sentenced to life in South Australia was given as 13 years 3 months imprisonment. Even allowing that such an average is somewhat uninformative, having regard to the variation of circumstances and offences and offenders from which it was derived, it was argued that it demonstrated the mistake of attributing to the statutory provision for life imprisonment an expectation that the ordinary prisoner would actually remain in custody for the term of his natural life. Yet only that assumption warranted the calculation of the non-parole period by reference to such a consideration.

50 Ninthly, the appellant argued that the approach which had been followed in the South Australian cases evidenced a departure from the legislative scheme and the basic purpose of providing for release of prisoners on parole, including in the case of those sentenced to a mandatory term of life imprisonment for murder. The basic purpose of parole was to foster rehabilitation of the prisoner and his restoration to law-abiding society⁵². The fixing of a non-parole period in the case of a young prisoner sentenced to life imprisonment which allowed that prisoner's youth to "count against him" would undermine, so it was said, the rehabilitative objects of the statutory regime. It would give undue weight to the mandatory sentence of life imprisonment. It would assign insufficient weight to the object of the legislation governing release on parole.

51 For its part, the Crown, whilst not necessarily supporting the way in which Perry J had expressed himself in this case, supported the line of authority traced to *von Einem*. It upheld the elaboration of that principle, as applicable in the case of relatively young offenders, as stated in the decision in *Bricis*. It suggested that these statements of principle were really self-evident. They derived from the decision of the South Australian Parliament that a mandatory sentence of life imprisonment must be imposed upon a person convicted of murder. Views might be held which were critical of such provisions, indeed of indeterminate sentences in general⁵³. In this regard, other Australian jurisdictions have rejected the approach adopted in South Australia. But whilst the Act was so expressed, it was

51 Freiberg and Biles, *The Meaning of 'Life': A Study of Life Sentences in Australia* (1975) at 53-59; Potas, "Life Imprisonment in Australia", in Wilson (ed) *Issues in Crime, Morality and Justice* (1992) 73 at 84-85; cf *Lee Vanit v The Queen* (1997) 190 CLR 378 at 401 and *Yook & Sung* (1995) 84 A Crim R 432 at 436 per Gleeson CJ.

52 *R v Shrestha* (1991) 173 CLR 48 at 69.

53 Wood, "The Abolition of Mandatory Life Imprisonment for Murder: Some Jurisprudential Issues", in Strang and Gerull (eds), *Homicide: Patterns, Prevention and Control* (1993) 237 at 252-253; cf *Lee Vanit v The Queen* (1997) 190 CLR 378 at 401-402.

submitted that it was not for judges, by fixing non-parole periods, to ignore the legislative requirement or override the will of Parliament.

- 52 The Crown was willing to accept that mathematical precision in such matters was an illusion; that the use of life tables was mistaken; and that, in appropriate cases, the youth (or age) of the prisoner would be relevant to reduce, and not increase, the length of the non-parole period. The basic point made for the Crown was simple. In all sentencing, including the fixing of a non-parole period, it was necessary for a court to take into account considerations concerning the offence and also those concerning the offender. Amongst the matters personal to a young offender was the inescapable fact that a mandatory life sentence would, unless relieved by earlier release on parole, usually result in the prisoner's serving a longer term of imprisonment in fact than would be served by an older prisoner. On the footing that a non-parole period should be fixed in a way proportional not only to the offence but also to the circumstances of the offender⁵⁴, the Crown argued that the reasoning in *von Einem*, *Bricis* and the other cases had been correct. At most, an error had sometimes occurred in the expression of the applicable approach. But in the present case, any such infelicity of expression had not led to error in the confirmation of the non-parole period fixed by the sentencing judge. It was one open to that judge having regard to the brutal circumstances of the offence and the considerations relevant to the offender. It was therefore open to the appellate court to confirm the sentence.

The proper approach

- 53 In order to resolve the question presented by the arguments of the parties, it is necessary to remember a number of basic considerations. They will yield the answer for the present appeal.
- 54 First, a judge ordering a non-parole period, where it has been determined that it is appropriate to do so, is exercising a statutory power. Such a power must be exercised for the purposes for which it has been afforded by Parliament. It must not be exercised for extraneous or irrelevant purposes⁵⁵. The judge is not entitled to exercise the power influenced only by feelings of horror which the circumstances of the offence may excite. Nor is the judge entitled to exercise the power by reference only to consideration of humanity or compassion which the life of the offender may enliven. Where Parliament has not expressly stated the considerations which are to govern the exercise of powers conferred by it on a court, it is necessary to infer such considerations from the language, purpose, structure and, if relevant, history of the legislation. Such legislation is generally written against a background of changing strategies of sentencing policy, differing

54 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 472, 485, 490-491.

55 cf *Wu v The Queen* [1998] HCA 52 at [70].

provisions to govern the respective functions of the courts and the agencies of the Executive Government and a general understanding that criminal punishment has a number of purposes which, in particular cases, may overlap and sometimes even be in conflict⁵⁶.

55 Secondly, when the history of the legislation in question here is examined a number of points emerge. The mandatory sentence of life imprisonment is the successor to the mandatory sentence of death⁵⁷. It reflects the specially high value placed by Parliament upon the protection of human life. It derives from a belief that homicide should be marked by the imposition of punishment, both symbolic and real, which indicates society's special condemnation of the taking of human life. Although it is true that other legislation provides for judicial orders in the case of a prisoner convicted of murder which may result in that prisoner's eventual release on parole, such provisions are to be read in the context set by the provision for the mandatory punishment of life imprisonment in such cases.

56 If anything, the legislative history demonstrates the reinforcement by the South Australian Parliament of its will in this regard. The earlier power of the Parole Board⁵⁸ to release a life prisoner short of the non-parole period fixed by a judge has been abolished⁵⁹. Remissions have been abolished⁶⁰. They no longer apply to reduce the non-parole period fixed by the court. On the expiry of the non-parole period fixed, there is no longer an automatic release on parole. With respect to life prisoners, the Parole Board now has no authority itself to order release of the prisoner. That is reserved, once again, to the Governor who would act on the advice of the Executive Council⁶¹. The applicable legislative history, therefore, tends to reinforce the importance of the judicial non-parole order. That order is to be made within a legislative regime in which Parliament has expressed its will that

56 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476; *AB v The Queen* [1999] HCA 46 at [101]; *R v Williscroft* [1975] VR 292 at 300.

57 *Statutes Amendment (Capital Punishment Abolition) Act* 1976 (SA), s 4; *Criminal Law Consolidation Act* 1935 (SA), s 11.

58 *Prisons Act* 1936 (SA), s 42k(7) as inserted by *Prisons Act Amendment Act (No 2)* 1969 (SA).

59 *Prisons Act* 1936 (SA), s 42(k) as amended by *Prisons Act Amendment Act* 1981 (SA), s 12.

60 *Statutes Amendment (Truth in Sentencing) Act* 1994 (SA), s 18 repealing *Criminal Law (Sentencing) Act* 1988 (SA), s 12.

61 *Statutes Amendment (Truth in Sentencing) Act* 1994 (SA), s 11 amending *Correctional Services Act* 1982 (SA), s 67(6).

persons convicted of murder must be sentenced to life imprisonment. The judicial exercise of the power to fix a non-parole period starts from that point.

57 Thirdly, in fixing the period that is to be served before a possibility of parole arises, it is necessary for the judge to decide when it will first be appropriate to contemplate the steps that may lead to the prisoner's conditional freedom in the form of a release on parole. This must be done viewed from the moment of sentencing, unaware of what may later occur and conscious of the importance of the decision both for the prisoner and for society. In *Deakin v The Queen*⁶², this Court explained that this point would be reached "once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence". That consideration has been reinforced by later decisions of this Court⁶³. The Court's approach in *Deakin* constituted a rejection of the view that all the judge was doing was to fix a minimum term after which it would be proper to transfer the evaluation of the prisoner's prospects of rehabilitation to agencies of the Executive Government⁶⁴. The rejection of that approach by this Court is reinforced, in the case of South Australia, by the legislative history which I have outlined.

58 However, the considerations that are relevant to the decision address the mind of the decision-maker not only to the "circumstances of the offence" but also to the "justice" of the case. This requires that consideration be given to the matters personal to the offender: those which tend to mitigate the seriousness of the offence in that offender's case and those which tend to enhance the prospects of rehabilitation that release on parole aims to encourage and thus to reduce the length of the non-parole period. But it also requires attention to be given to the considerations personal to the offender which may exacerbate the seriousness of the offence (such as past convictions). Consideration must also be given to circumstances which may increase the impact of the sentence imposed upon the prisoner. Thus, it is relevant to consider the age of the offender, whether the offender may have to be kept in protection⁶⁵ and whether the offender suffers from an illness or other condition which may render the punishment especially severe in his or her case⁶⁶.

62 (1984) 58 ALJR 367 at 367; 54 ALR 765 at 766.

63 *Lowe v The Queen* (1984) 154 CLR 606 at 625; *R v Paivinen* (1985) 158 CLR 489 at 495; *R v Watt* (1988) 165 CLR 474 at 481; *Bugmy v The Queen* (1990) 169 CLR 525 at 536.

64 Rejected in *Power v The Queen* (1974) 131 CLR 623.

65 *AB v The Queen* [1999] HCA 46 at [105].

66 *R v Smith* (1987) 44 SASR 587 at 589; *McDonald* (1988) 38 A Crim R 470.

59 Fourthly, the non-parole period must necessarily bear a relationship to the sentence of imprisonment which is imposed. Obviously, it cannot exceed the maximum period of that sentence⁶⁷. It represents that portion of the sentence which, in the opinion of the court imposing the sentence, must actually be served in custody by the prisoner⁶⁸. In the ordinary case, where a head sentence comprises a determinate period in prison, the non-parole period will constitute a substantial part of that sentence⁶⁹. Where the sentence is, by law, one of life imprisonment "the appropriateness of the non-parole period [has] to be considered in relation to that circumstance"⁷⁰. The achievement of a proper proportionality between the head sentence and the non-parole period is a judicial obligation⁷¹. However, even in the majority of cases where the head sentence is one for a determinate period it is recognised that proportionality is something that cannot be reduced to a mathematical formula. In *Lowe*, Gibbs CJ observed⁷²:

"No doubt there should be an appropriate relationship between the sentence imposed on an offender and the minimum term after which he becomes eligible to be released on parole. What is appropriate must depend very much on the circumstances of the case, and the exact relationship between those two periods is something that has to be determined in the exercise of a wide discretion."

In the same case, Dawson J remarked⁷³: "Having regard to the purpose to be served by the fixing of a non-parole period, it is obvious that it should not be made disproportionate to the full term."

60 Fifthly, the rehabilitative purposes of parole⁷⁴ may, depending on the circumstances of the case, make it appropriate in fixing a non-parole period to take

67 *Hoare v The Queen* (1989) 167 CLR 348 at 356.

68 *Criminal Law (Sentencing) Act* 1988 (SA), s 32; cf *Pight v The Queen* (1995) 64 SASR 215 at 218.

69 *R v Tio and Lee* (1984) 35 SASR 146 at 148.

70 *Bromley v The Queen* (1986) 161 CLR 315 at 321 per Gibbs CJ (Mason, Wilson, Brennan and Dawson JJ agreeing).

71 cf *Bugmy v The Queen* (1990) 169 CLR 525 at 532; *Lowe v The Queen* (1984) 154 CLR 606 at 610, 619-620, 624-625.

72 (1984) 154 CLR 606 at 610.

73 (1984) 154 CLR 606 at 625.

74 *R v Shrestha* (1991) 173 CLR 48 at 69.

into account, in a way favourable to the prisoner, his or her age. Thus, in the case of a prisoner of advanced years, it may be appropriate to fix a non-parole period shorter than would otherwise be the case in order to hold out the hope of release, to encourage good conduct in prison and to overcome the contemplation that the prisoner will die in custody. In the case of a relatively young prisoner, regard may be had to the immaturity of the offender, the prospect of reform and the common experience of courts that, with greater age, there is often a decline in at least some types of criminal offending. Because non-parole periods may, by law, be fixed in the case of prisoners sentenced to a mandatory life imprisonment, it can be taken that Parliament meant considerations such as the foregoing to be taken into account by a court which decides that it is appropriate to fix a non-parole period in a particular case. No formula, derived from actuarial tables or judicial estimation of life expectancy could defeat the operation of these considerations. Once a non-parole period is fixed, its duration must be open to the influence of all considerations. Age is one such consideration in South Australia both by statute⁷⁵ and by the common law. Age is not necessarily a consideration which "counts against" a prisoner, including a life prisoner.

Conclusion: the error of the "*von Einem* factor"

61 In my opinion the appellant is entitled to succeed. The error of South Australian sentencing practice, demonstrated in the cases analysed, includes the presupposition that the non-parole period, in the case of a person subject to the mandatory sentence of life imprisonment, may be calculated with precision by reference to the presumed or proved life expectancy of that prisoner. I agree with the comment of Olsson J in *Bednikov*⁷⁶ that more was probably read into the decision of the Court of Criminal Appeal in *von Einem* than was intended by King CJ by his reasons in that case. There was nothing in those reasons to support the search for a mathematical formula to which the so-called "*von Einem* factor" has sometimes given rise.

62 More fundamentally, there are a number of fallacies in the logic which has led judges in South Australia to the approach to which the appellant objects. Whilst it is true that Parliament in South Australia has required that, in all cases involving a conviction of murder, a sentence of life imprisonment must be passed on the prisoner, that requirement cannot be read in isolation. It exists within a matrix of legislation. In more recent times such legislation has imposed upon judges the further duty, where appropriate, to fix a non-parole period in such cases⁷⁷. Such an order contemplates that the non-parole period will usually be

⁷⁵ *Criminal Law (Sentencing) Act* 1988 (SA), s 10(1).

⁷⁶ (1997) 193 LSJS 254 at 284.

⁷⁷ *Criminal Law (Sentencing) Act* 1988 (SA), s 32.

followed by release of the life prisoner on parole. That step, in turn, if the conditions of parole are observed, contemplates the prospect that after no more than ten years nor less than three years on parole, the prisoner's sentence, although originally one of life imprisonment, will be wholly satisfied⁷⁸.

63 Thus, in the scheme of the South Australian legislation, life imprisonment does not necessarily mean (and in most cases will not involve) imprisonment for the term of the prisoner's natural life⁷⁹. Accordingly, a foundation for the calculation of the non-parole period by reference to that consideration is knocked away. Given the wide variety of offences and offenders encompassed by the crime of murder, it is inevitable that this should be so. In the case of a determinate sentence, it is entirely appropriate to fix the non-parole period with reference to the head sentence. The latter should already contain within it a reflection of the considerations relevant both to the circumstances of the offence and of the offender. But no such considerations enter into a sentence of life imprisonment. It is simply required by the Act of Parliament. Only in an exceptional case will a life sentence result, in fact, in the prisoner's spending the rest of his or her life in prison. To calculate the non-parole period by reference to the supposed life expectancy of the prisoner is therefore to calculate it by reference to a factor that is irrelevant or misleading.

64 In so concluding, I do not cast doubt on the correctness of the actual decision of the Court of Criminal Appeal in *von Einem*. As Olsson J, a member of that Court, has remarked, that decision can be justified by other reasoning⁸⁰. The same might be said of other cases to which this Court was taken in which mention has been made of the "*von Einem* factor". But in the present appeal case, the appellant's appeal must be reconsidered by the Court of Criminal Appeal without reference to that consideration or its consequence that the appellant's comparative youth "counts against him".

65 The period that will be served in custody before any release on parole will, in the case of a life prisoner, commonly be longer than that served by prisoners sentenced to a determinate period of imprisonment. To the extent that this results in a consequence that a young prisoner is more likely to survive a long sentence in custody and not to die in prison than would be true in the case of an older prisoner, it may be correct to say, as a matter of fact, that "relative youth counts against him". But to the extent that the phrase picks up, as a matter of law, the reasoning in the series of cases where the "*von Einem* factor" has been applied, it is erroneous and should be corrected. Significantly perhaps, although in a number of Australian

78 *Correctional Services Act* 1982 (SA), s 67(6).

79 cf *Lee Vanit v The Queen* (1997) 190 CLR 378 at 401.

80 *R v Bednikov* (1997) 193 LSJS 254 at 284.

jurisdictions mandatory life sentences are provided by law⁸¹ and in other jurisdictions provision is made that life sentences may be imposed by the courts⁸², no similar reasoning could be found in the decisions of the Courts of Appeal and of Criminal Appeal which regularly consider such matters. This fact tends to confirm the foregoing conclusion. The appeal must therefore be allowed.

66 Both the appellant and the Crown placed before the Court schedules containing short details of life sentences and non-parole periods which they sought to use in support of their respective arguments. In light of my conclusion, it is unnecessary to consider the appellant's submissions except to say that, had that been the appellant's only argument it is unlikely that this Court would have granted special leave to review what is, at most, a submission that the non-parole period fixed was excessive. Generally speaking, this Court reserves its intervention in sentencing appeals to cases where an error of principle can be shown, although such an error may occasionally appear in a case of manifest excess or inadequacy of sentence⁸³. To the extent that the Crown, in this case, sought to justify the actual sentence imposed on the appellant, by reference to the schedule of allegedly comparable cases, it is preferable that those arguments should be considered by the Court of Criminal Appeal. That is where the expertise in such matters resides⁸⁴. That Court may conclude that, having regard to the extremely brutal circumstances of the offence and all of the considerations relevant to the offender, the non-parole period fixed by the sentencing judge was within his discretion and that no error has been shown. However, the appellant is entitled to have that Court's opinion freed from the "*von Einem* factor" which was reflected in the remark of Perry J that attracted the intervention of this Court.

81 In addition to South Australia, mandatory life sentences are provided by the law in Queensland: *Criminal Code* (Qld), s 305; Western Australia: *Criminal Code* (WA), s 282; and Northern Territory: *Criminal Code* (NT), s 164. As to parole see Queensland: *Penalties and Sentences Act* 1992 (Qld), s 157; *Sentencing Act* 1995 (WA), ss 90, 93. In the Northern Territory, there is no judicial involvement in parole.

82 Life sentences may be passed in: New South Wales: *Crimes Act* 1900, s 19A, see also ss 431B, 442; Victoria: *Crimes Act* 1958 (Vic), s 3; and Tasmania: *Criminal Code* (Tas) s 158. As to parole see *Sentencing Act* 1989 (NSW), s 5; *Sentencing Act* 1991 (Vic) s 11; *Sentencing Act* 1997 (Tas) s 18(1).

83 *Deakin v The Queen* (1984) 58 ALJR 367 at 367; 54 ALR 765 at 765; *Bugmy v The Queen* (1990) 169 CLR 525 at 530; *AB v The Queen* [1999] HCA 46 at [30, 104]; cf *R v Gardiner* [1982] 2 SCR 368 at 396, 404.

84 *AB v The Queen* [1999] 46 HCA at [30].

Orders

- 67 The appeal should be allowed. The order of the Court of Criminal Appeal concerning the appellant should be set aside. The matter should be returned to that Court to hear and determine the appellant's appeal to it conformably with the decision of this Court.