

HIGH COURT OF AUSTRALIA

GAUDRON, KIRBY AND HAYNE JJ

JASON ANTHONY THOMPSON

APPLICANT

AND

THE QUEEN

RESPONDENT

Thompson v The Queen [1999] HCA 43
2 September 1999
P60/1998

ORDER

1. *Extend time to apply for special leave to appeal until 10 December 1998.*
2. *Grant special leave to appeal and treat the appeal as instituted and heard instantanter.*
3. *Set aside the order of the Court of Criminal Appeal of Western Australia made on 19 October 1998 dismissing the appeal to that Court.*
4. *In lieu thereof, allow the appeal to that Court in part, set aside the indefinite sentence imposed on the applicant on 20 March 1998 by the District Court, and remit the matter to the Court of Criminal Appeal to be dealt with conformably with the reasons for these orders.*

On appeal from the Supreme Court of Western Australia

Representation:

D Grace QC for the applicant (instructed by Gunning)

R E Cock QC with J W M Foulsham for the respondent (instructed by Director of Public Prosecutions (Western 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

Thompson v The Queen

Criminal law and procedure – Sentencing – Indefinite sentence imposed by trial judge – Presentence and psychological reports relied on by trial judge inadequately prepared – Appeal against indefinite sentence to Court of Criminal Appeal (WA) – Whether Court of Criminal Appeal erred in commissioning further psychological reports on appeal – Right of defendant to be fully heard where defendant being resentenced – Circumstances in which indefinite sentence should be imposed.

Appeal – Court of Criminal Appeal (WA) – Application for leave to appeal against sentence – Sentence included order of indefinite sentence – Defects in materials relied on by sentencing judge – Appellate court secures fresh psychological reports in course of disposing of grounds of appeal – Whether appellate procedure miscarried – Whether new reports only relevant to resentence of prisoner after appeal upheld and original sentence set aside.

Sentencing Act 1995 (WA), s 98.

Criminal Code (WA), s 697.

1 GAUDRON AND HAYNE JJ. In this matter, the respondent opposed neither the extension of time for the bringing of this application for special leave to appeal nor the grant of such leave. In the event that special leave was granted, the respondent consented to the allowing of the appeal on the basis that the material before the sentencing judge who imposed an indefinite sentence on the applicant was, and was found by the Court of Criminal Appeal to be, inadequate.

2 In our opinion, the finding by the Court of Criminal Appeal that "the pre-sentence and psychological reports relied upon by [the sentencing judge] were prepared in some haste with the further consequence that the psychological assessment which was carried out was not comprehensive" leads inevitably to the conclusion that the decision of the sentencing judge miscarried. Accordingly, the appeal to the Court of Criminal Appeal should have been allowed to the extent that it was concerned with the imposition of an indefinite sentence.

3 Given the respondent's concession, the appropriate course is to extend time, grant special leave to appeal, allow the appeal, set aside the order of the Court of Criminal Appeal dismissing the appeal to it and, in lieu, order that the appeal be allowed in part, the indefinite sentence imposed on the applicant on 20 March 1998 be set aside and the matter be remitted to the Court of Criminal Appeal to be dealt with conformably with these reasons.

4 In remitting the matter to the Court of Criminal Appeal, this Court is not to be taken as expressing any view as to whether that Court can or should deal with the matter or can or should remit it to a single judge.

5 KIRBY J. In *Chester v The Queen*¹, commenting on the precursor² to s 98 of the *Sentencing Act* 1995 (WA) ("the Sentencing Act") which provides for a convicted offender to be imprisoned indefinitely, this Court observed that the exercise of such a power "should be confined to very exceptional cases where the exercise of the power is demonstrably necessary"³.

6 In *R v Moffatt*⁴, where the history of such legislation in Australia and elsewhere was examined, the reasons for such an approach were elaborated. It was explained that the approach was required because an indefinite sentence goes beyond punishing the offender to an extent proportionate to the crime of which the offender has been convicted. The power conferred upon the Court is therefore exceptional, as are the cases warranting the exercise of such power⁵.

7 More recently in *Lowndes v The Queen*⁶, in an appeal concerning s 98 of the Sentencing Act, this Court, reiterating what was said in *Chester* and *Moffatt*, emphasised the need for appellate courts to proceed in compliance with the rules governing them when asked to review a sentence passed on a prisoner at trial and to substitute for that sentence an order of indefinite imprisonment. *Lowndes* was a case heard and decided after the orders challenged in these proceedings were made.

A sentence of indefinite imprisonment and appeal

8 The present proceedings originally came before the Court as an application by Mr Jason Thompson (the applicant) for special leave to appeal from that part of the judgment and orders of the Court of Criminal Appeal of Western Australia which concerned his sentence. After a trial by jury in the District Court of Western Australia upon one count of entering a house with intent to commit an offence and another of attempted child stealing, the applicant was found guilty of both counts and convicted. He was sentenced by the primary judge (Yeats DCJ) to a term of ten years imprisonment in respect of the first count and five years imprisonment in respect of the second. Her Honour ordered that the two sentences be served concurrently. Pursuant to s 98 of the Sentencing Act, she also ordered that the

1 (1988) 165 CLR 611.

2 *Criminal Code* (WA), s 662.

3 (1988) 165 CLR 611 at 618.

4 [1998] 2 VR 229.

5 *Moffatt* [1998] 2 VR 229 at 255 per Hayne JA.

6 (1999) 73 ALJR 1007; 163 ALR 483.

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applicant be imprisoned indefinitely after completing the foregoing terms of imprisonment.

9 The applicant appealed to the Court of Criminal Appeal of Western Australia against his conviction. He also sought leave to appeal against the sentence imposed upon him. The appeal against conviction was dismissed⁷. That aspect of the matter has not concerned this Court. In respect of the application for leave to appeal against sentence, the Court of Criminal Appeal ordered that leave be granted but that the appeal be dismissed⁸. The applicant's application for special leave to appeal against so much of the orders of the Court of Criminal Appeal as concerned his sentence was filed a few weeks out of time. An affidavit was filed explaining this delay. No point was made by the Crown about the delay. It consented to the extension of time. Such an extension should be granted.

10 As originally filed, the applicant's application repeated grounds argued in the Court of Criminal Appeal but found against him. Those grounds concerned the interpretation of s 98(1) of the Sentencing Act, the application of the section to the circumstances of his case and the availability to the sentencing judge of consideration of convictions entered against him in 1986 when he was a "young person" within the meaning of s 189(2) of the *Young Offenders Act* 1994 (WA).

11 However, in addition to the foregoing, in the Court of Criminal Appeal, the applicant relied on two grounds which concerned the procedures that had been followed when he stood for sentence. Those grounds, as expressed in the application to the Court of Criminal Appeal, were:

"(v) The presentence and psychological reports were prepared in insufficient time, and the conclusion that the Appellant was [sic] a high risk of reoffending was based almost exclusively on reports from 1986 together with short interviews with the Appellant.

(vi) The conclusion in the psychological report that the Appellant was [sic] a high risk of reoffending was made without undertaking any psychological evaluation and accordingly could not be relied upon as cogent evidence that he would be a constant and continuing danger when released."

7 *Thompson v The Queen* unreported, Court of Criminal Appeal of Western Australia, 19 October 1998 at 16 ("Appeal judgment").

8 Appeal judgment at 30.

Procedures and decision of the Court of Criminal Appeal

- 12 The reasons for the orders of the Court of Criminal Appeal were given by Steytler J, with whom Kennedy and Wallwork JJ agreed. In the course of those reasons, and addressing the grounds last specified, Steytler J said⁹:

"The appellant ... attacked the cogency of the pre-sentence and psychological reports which were obtained upon the basis that these were inadequately prepared having regard to prevailing time constraints.

There is, in this respect, no doubt that the learned sentencing Judge was, at the time of sentencing, labouring under time constraints, about which she could do little and through no fault of her own, due to her impending departure for a period of extended leave. This had the consequence that the pre-sentence and psychological reports relied upon by her were prepared in some haste with the further consequence that the psychological assessment which was carried out was not comprehensive.

In those circumstances this Court commissioned further psychological and psychiatric assessments in respect of the applicant on the hearing of the appeal."

- 13 When the application for special leave was called for hearing in this Court, concern was expressed about the procedure which had been followed. Counsel representing the appellant had not appeared before the primary judge nor in the Court of Criminal Appeal. He was unable to answer some of the questions asked by this Court. The hearing of the application was therefore interrupted to permit the Crown to place before the Court transcript and other materials to indicate how the commissioned reports came to be received by the Court of Criminal Appeal in the hearing and disposition of the application for leave to appeal before it against the sentence imposed upon the appellant.

- 14 When the hearing of the application before this Court resumed, the transcript and materials provided made it clear that the course adopted by the Court of Criminal Appeal, and initiated by it, elicited no objection at the time from counsel then appearing for the applicant. Moreover, the commissioned reports were provided by the associate to the presiding judge both to the applicant and to the Crown with an invitation for further written submissions. Such further written submissions were received by the Court of Criminal Appeal and exchanged between the parties but no further oral hearing was sought or took place. Counsel appearing before this Court was unaware of these events. However, it was

9 Appeal judgment at 25.

accepted that no suggestion could be made that the Court of Criminal Appeal had acted on materials of which the applicant had been unaware¹⁰.

Amendment of the grounds of appeal to the High Court

15 Nevertheless, counsel for the applicant sought to enlarge the grounds of the application for special leave to appeal to include objections to the procedure which had been followed by the Court of Criminal Appeal. The Crown raised no objection to this enlargement of the grounds. The Court permitted the application to be amended for that purpose. In substance, the applicant's additional complaints were that the Court of Criminal Appeal lacked the power under the *Criminal Code* or otherwise to obtain the new reports in the course of disposing of an application for leave to appeal against sentence and that the Court of Criminal Appeal had erred in law in relying upon such reports in deciding the appeal. It was submitted that the Court had acted as it did in circumstances where it was plainly concerned about the adequacy of the procedures followed, and the evidence received, by the sentencing judge¹¹. It had telescoped the steps necessary to the proper consideration of the evidence relevant to the sentence imposed upon the applicant by the primary judge and the discharge of its own function as an appellate court. For the applicant it was submitted that the Court of Criminal Appeal should first have considered whether, on the evidence received at first instance, error had been shown in the sentencing procedures¹². If it concluded that question in the affirmative, it then had to consider whether it was appropriate to set aside the sentencing orders of the primary judge, to remit the matter for resentencing or to proceed to resentence the applicant itself¹³. Only if the last decision had been made would it have been permissible to receive fresh evidence of such a kind.

16 It is not necessary in these proceedings finally to answer the question whether, in the foregoing circumstances, the Court of Criminal Appeal had the power to commission "further psychological and psychiatric assessments ... on the hearing of the appeal"¹⁴. The *Criminal Code*¹⁵ affords that Court powers which are expressed in broad terms. It is conceivable that in some circumstances, it might be permissible and appropriate for a Court of Criminal Appeal to receive new

10 cf *R v Lucky* (1974) 12 SASR 136 at 139; *R v Carlstrom* [1977] VR 366 at 367; Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed (1999) at 161.

11 Appeal judgment at 25.

12 cf *Lowndes v The Queen* (1999) 73 ALJR 1007 at 1014-1015; 163 ALR 483 at 493.

13 *Criminal Code* (WA), s 689(3).

14 Appeal judgment at 25.

15 *Criminal Code* (WA), s 697.

reports, not as fresh evidence but as argumentative material, in order to test a proposition, advanced by a party in its submissions, that particular evidence earlier adduced for the purposes of sentencing was inadequate, ambiguous or otherwise in need of clarification. However, this was a case in which the Court of Criminal Appeal obviously, and rightly, considered that the procedures of sentencing, as conducted by the primary judge, had been unsatisfactory. Clearly, Steytler J concluded that the judge had proceeded to her sentence "in some haste" and with the consequence that "the psychological assessment which was carried out was not comprehensive"¹⁶. These were the circumstances in which the initiative was taken to commission the further psychological and psychiatric assessments. But they would only have been relevant, the inadequacies at first instance being exposed, to procedures appropriate to the resentencing of the applicant. Upon such proceedings, where the applicant was facing the possibility of an order of indefinite imprisonment, it was essential that he be fully heard. It would ordinarily have been desirable that submissions on resentencing should involve an oral hearing specifically directed at that purpose, before any such order was made by the Court of Criminal Appeal in his case. It was not permissible to compress the appellate procedures as was done by that Court.

- 17 When this Court made clear to the parties its concerns about what had occurred, we were invited by the Crown to grant special leave and to treat the hearing as the hearing of the appeal but confined to the procedural questions raised by the added grounds of appeal. This, it was argued, would ensure the prompt and full reconsideration of the sentence proper to the case. Counsel for the applicant elected to accept that course rather than to persist with the grounds of the application as originally framed. It was in these circumstances that the Court indicated the orders which it proposed to make, as announced 6 August 1999. Those orders proposed that the orders made by the Court of Criminal Appeal should be set aside, the appeal to that Court allowed to the extent of the order of indefinite imprisonment, and the matter remitted to the Court of Criminal Appeal. Such orders would leave it to that Court to determine whether it could or should proceed itself to resentence the applicant or remit the proceedings to the District Court of Western Australia for resentencing of the applicant.

Requirement of scrupulous procedures in such a case

- 18 I am conscious that in commissioning the further psychological and psychiatric assessments of the applicant at the hearing of the proceedings before it, the Court of Criminal Appeal was endeavouring to repair the inadequacies in the original sentencing proceedings which had occurred, including in the order of indefinite imprisonment. I am also aware that counsel then appearing for the applicant raised no objection to what was done. It may well be that the learned sentencing judge was subject to time constraints. However, there were other

16 Appeal judgment at 25.

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options open to her. These would have included sentencing the applicant to the determinate sentence which she provided and adjourning to a later time or another court the consideration of the imposition of an indefinite sentence. Where there was any possibility that an order of indefinite imprisonment might be made, it was essential that the procedures observed should be regular and scrupulously thorough and that the materials, including the pre-sentence reports, should be as adequate and complete as fairness to the prisoner required¹⁷.

19 The same must be said in relation to the procedures adopted by the Court of Criminal Appeal in such a case. As Hayne JA pointed out in *Moffatt*¹⁸, it is fundamental that the power to order indefinite imprisonment should be sparingly exercised and then only in clear cases. I would add that it is fundamental that it should only be exercised following a most careful hearing in which all relevant material is before the judge or judges responsible for making such an order. It is not something to be hurried. It is not a course to be dealt with on materials known to be incomplete or otherwise insufficient.

20 The foregoing are my reasons for joining in the proposed orders foreshadowed by Gaudron J at the conclusion of the hearing on 6 August 1999 and now to be made.

17 cf *R v Rose* noted (1978) 52 *Australian Law Journal* 98 cited Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed (1999) at 160.

18 [1998] 2 VR 229 at 255; cf Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed (1999) at 658-662.