The Queen v Ahwan [2005] NTSC 47

PARTIES:	THE QUEEN
	v
	AHWAN, Jacob
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	SCC 8606704
DELIVERED:	18 August 2005
HEARING DATES:	29 June and 29 July 2005
JUDGMENT OF:	RILEY J

CATCHWORDS:

CRIMINAL LAW – SENTENCING – MURDER – LIFE IMPRISONMENT – NON-PAROLE PERIOD

Application by Director of Public Prosecutions for non-parole period of 25 years – Whether conduct "would have constituted a sexual offence against the victim" pursuant to s 19(3)(b) Sentencing (Crime of Murder) and Parole Reform Act (NT) – Interpretation of "sexual offence" – Legislation which bases future action on past events – "Sexual offence" to be interpreted in light of the law as it stands at time of the application – Penetration of the victim at the time she was deceased would not have constituted a "sexual offence" against the victim.

Sentencing (Crime of Murder) and Parole Reform Act (NT), s 19(3)(b)
Sentencing Act (NT), s 53A(3)(b)
Criminal Code (NT), ss 125B, 125C, 140(b), 192(3)
Crimes Act (Vic), s 34B

R v Leach (2004) 145 NTR 1, considered.
Craig Williamson Pty Ltd v Barrowcliff (1915) VLR 450 at 452, applied.
Fisher v Hebburn Ltd (1960) 105 CLR 188 at 194, considered.
Geraldton Building Co Pty Ltd v May (1977) 13 ALR 17, considered.
Robertson v City of Nunawading [1973] VR 819 at 824, applied.
Re A Solicitor's Clerk [1957] 1 WLR 1219, applied.
R v Crabbe (2004) 145 NTR 50, applied.
Commonwealth v Baume (1905) 2 CLR 405 at 414, applied.
Kingston v Keprose (1987) 11 NSWLR 404 at 423, applied.
Marshall v Watson (1972) 124 CLR 640 at 649, applied.

CONSTITUTIONAL LAW – JUDICIAL POWER

Whether s 19(3)(b) Sentencing (Crime of Murder) and Parole Reform Act (NT) incompatible with the exercise of judicial power – Commonwealth Constitution Ch III – Application is a sentencing exercise and principles governing such an exercise apply.

Sentencing (Crime of Murder) and Parole Reform Act (NT), s 19(3)(b)
Commonwealth Constitution Ch III

Bugmy v The Queen (1990) 169 CLR 525 at 536, applied.
R v Leach (2004) 145 NTR 1, applied.
R v Bernasconi (1915) 19 CLR 629, applied.
Fittock v R (2001) 11 NTLR 52 at 58, considered.
Fittock v R (2003) 197 ALR 1, considered.
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51, distinguished.
Fardon v Attorney- General (Queensland) (2004) 210 ALR 50, applied.
North Australian Aboriginal Legal Aid Service Inc v Bradley & Anor (2004) 206 ALR 315 at par 28 – 30, distinguished.

REPRESENTATION:

Counsel:

Applicant:	R. Wild QC with C. Heske
Respondent:	J. Lawrence

Solicitors:

Applicant:	Office of the Director of Public Prosecutions
Respondent:	North Australian Aboriginal Legal Aid Service

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Ahwan [2005] NTSC 47
No SCC 8606704

BETWEEN:

THE QUEEN
Applicant

AND:

AHWAN, Jacob
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 18 August 2005)

[1] The respondent was convicted of the murder of his wife. He was tried and convicted in 1986, however the conviction was quashed by the Court of Criminal Appeal on 22 March 1988 and a retrial ordered. Following the retrial the respondent was again convicted of the murder of his wife and, on 12 February 1990, sentenced to imprisonment for life. In accordance with the law as it then stood, no non-parole period was fixed. The sentence of imprisonment for life was subsequently ordered to have been deemed to have commenced on 23 December 1985.

[2] The Sentencing (Crime of Murder) and Parole Reform Act 2003 (the Act) commenced on 11 February 2004. The matter now before the Court is an application by the Director of Public Prosecutions pursuant to s 19(3)(b) of the Act for an order that a non-parole period of 25 years shall apply to the respondent.

Section 19(3)(b) of the Sentencing (Crime of Murder) and Parole Reform Act 2003

[3] The Act introduced significant reforms to the sentencing regime applicable to sentences of life imprisonment imposed for the crime of murder. It included amendments to the Criminal Code, the Sentencing Act and to the Parole of Prisoners Act. In *R v Leach* (2004) 145 NTR 1 BR Martin CJ provided a detailed history of the law relating to sentences for murder leading up to the introduction of the legislation with which I am now concerned. The new sentencing regime continued to provide a mandatory penalty of life imprisonment for murder but introduced standard non-parole periods of 20 years or 25 years depending upon the presence or otherwise of certain criteria. The court is also able to fix longer non-parole periods or refuse to fix a non-parole period in identified circumstances.

[4] The Act includes transitional provisions dealing with the circumstances of a prisoner who was serving life imprisonment for murder at the time the Act was implemented. Those provisions apply in the circumstances of this case.

[5] In the present case questions arise as to the interpretation of s 19(3)(b) of the Act, which is one of the transitional sections, and is in the following terms:

> "3. Subject to subsections (4) and (5), the Supreme Court must fix a non-parole period of 25 years if any of the following circumstances apply in relation to the crime of murder for which the prisoner is imprisoned:
>
> (a) …;
>
> (b) the act or omission that caused the victim's death was part of a course of conduct by the prisoner that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim;"

[6] Whilst that section is part of the transitional provisions and applies only to prisoners who at the commencement of the Act were serving a sentence of imprisonment for life for the crime of murder, the section is also replicated in s 53A(3)(b) of the Sentencing Act. Section 53A(3)(b) applies to prisoners who are sentenced to imprisonment for life for murder after the commencement of the Act.

[7] The section relates to situations in which the act or omission which caused the victim's death was part of a course of conduct that included conduct that would have constituted a "sexual offence" against the victim.

[8] On 22 December 1985 when the respondent in this case committed the offence of murder there was no relevant definition of the term "sexual offence". The definition was introduced into the law of the Northern

Territory in 1999 by way of amendment to the Sentencing Act. The amendment defined "sexual offence" by reference to a range of sections of the Criminal Code. By the time of the commencement of the Sentencing (Crime of Murder) and Parole Reform Act 2003 on 11 February 2004 the definition of "sexual offence" was in place. It applies throughout the relevant legislation including to s 19(3)(b) and also to s 53A(3)(b): *Craig Williamson Pty Ltd v Barrowcliff* (1915) VLR 450 at 452.

[9] The submission of the respondent was that the effect of s 19(3)(b) of the Act "is clearly retrospective" and the definition should therefore be interpreted "as regards the law at the time of the murder".

[10] The definition of "sexual offence" within the Sentencing Act incorporates the identified sections of the Criminal Code. Some of those sections are in their original form from 1984 and some have been amended. By way of example, the manner in which the Criminal Code deals with sexual assaults has changed significantly. Part of the change has been the incorporation of a much wider meaning to the expression "sexual intercourse" following amendments to the Act in 1994. Conduct that is presently an offence under s 192(3) of the Criminal Code may have been dealt with quite differently under the Code as it applied in 1985.

[11] The legislation with which I am concerned is, in an overall sense, beneficial. It allows a person convicted of murder to have the benefit of an identified non-parole period. Prior to the passing of the Act that was not the case.

However, within that beneficial regime different consequences are attached to different classes of conduct for the purpose of determining the applicable non-parole period. The starting point within the transitional provisions is that the prisoner will be subject to a non-parole period of 20 years unless he or she is serving sentences for two or more convictions for murder (s 18). The respondent in the present case is therefore taken, prima facie, to have a non-parole period of 20 years. However that situation may change in circumstances where the Director of Public Prosecutions makes application pursuant to the terms of s 19 of the Act for a longer non-parole period. In particular, for present purposes, following an application by the Director a non-parole period of 25 years is to be set where the conduct identified in s 19(3)(b) is found to have been present.

[12] There is a general principle of statutory interpretation that amending legislation is to be construed as having prospective operation only. It is prima facie to be construed as not attaching new legal consequences to facts, or events, which occurred before its commencement: *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194 and *Geraldton Building Co Pty Ltd v May* (1977) 13 ALR 17. However a distinction must be drawn between legislation having a prior effect on past events and legislation basing future action on past events: see generally Pearce & Geddes: *Statutory Interpretation in Australia*, 5th ed at 10.4. In *Robertson v City of Nunawading* [1973] VR 819 at 824 the Full Court of the Supreme Court of Victoria said:

> "(The) principle is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and it does no more than that."

[13] To similar effect, and perhaps more akin to the circumstances in this case, was the decision in *Re A Solicitor's Clerk* [1957] 1WLR 1219 where a solicitor's clerk had been convicted on charges of larceny but, as the law then stood, no order could be made excluding him from being employed as a solicitor's clerk because he had not stolen from his employer or his employer's client. The relevant legislation was subsequently amended to allow such an order to be made and the court held that this was legislation that had future operation only, even though the conduct upon which that operation depended had taken place in the past.

[14] In my opinion the present matter is not a case of retrospectivity in the sense suggested by the respondent. This is a situation where the legislation provides for the future and does so based upon past events. It allows a person to be considered for parole when parole had not previously been available. It identifies the time at which such a person may be considered for parole by reference to past events. In order to identify the conduct which will lead to a minimum 25 year non-parole period the legislature has referred to conduct "that *would have* constituted a sexual offence against the victim". In so doing it has categorised the conduct by reference to the law as it now stands. The respondent is not being penalised again for his conduct at the time of the offending but, rather, the quality of the benefit

available to him under the new legislation is to be assessed by reference to that conduct.

[15] The reference to a "sexual offence" in s 19(3)(b) of the Act is for the purpose of defining the nature of the conduct which will lead to the section having application. It is a convenient way for the legislature to have identified the criteria, the existence of which provides the basis for increasing the standard non-parole period from 20 to 25 years. In my opinion the use of that concept is not designed or intended to relate back to the state of the law at the time of the offending. Rather it is to identify, by reference to objective circumstances, at the time of the application, conduct on the part of the offender which requires a court to determine that a 25 year non-parole period is to apply.

[16] In my view the submission of the respondent to the effect that the definition of "sexual offence" should be interpreted "as regards the law at the time of the murder" is not to be accepted. It is to be interpreted in light of the definition provided in the Sentencing Act which refers to the law as it stands at the time of the application.

Procedure

[17] In this matter there is no dispute that the Director has commenced proceedings in compliance with the requirements of the Act. He bears the onus of proof in satisfying the Court as to the presence of the applicable criteria and must do so beyond reasonable doubt. In the circumstances of

the case it has been sought to do so by relying upon material from the trial of the respondent. This approach is consistent with that adopted in *R v Leach* (supra) and also in *R v Crabbe* (2004) 145 NTR 50.

[18] The applicable principles were identified in *Crabbe* in the following terms (55):

> "Although the respondent has previously been sentenced, on an application by the Director pursuant to s 19 of the Act, essentially the Court is required to undertake a sentencing exercise. Unless excluded by the Act, the well settled principles and the provisions of the Sentencing Act governing the exercise of the sentencing discretion apply. These include the principles enunciated by the High Court in *R v Olbrich* (1999) 199 CLR 270. … The Court may take into account facts adverse to the interests of the respondent only if those facts are agreed or have been proved beyond reasonable doubt. If the respondent seeks to establish facts in mitigation, the respondent bears the burden of establishing those facts on the balance of probabilities."

Facts

[19] On 22 December 1985 the respondent and his wife were in Pine Creek. On that day the respondent went to the Pine Creek Hotel at about 9 am and was drinking with friends. As he and his friends were departing the hotel at about 11 am he met up with his wife and an argument developed. The respondent and his companions moved to the house of a person named Kevin and then on to the home of the mother of the respondent at lot 164 Phillip Street in Pine Creek.

[20] During the course of the day those present watched a video. At one stage they went back to the hotel and purchased further alcohol and then returned

to Phillip Street and continued watching the video and consuming alcohol. The respondent again went to the hotel and this time purchased a flagon of wine which he placed in a bedroom. The group continued drinking in the lounge room.

[21] Late in the afternoon the deceased and two others arrived at the house. They joined in the drinking and were playing cards. The respondent continually asked the deceased where she had stayed the previous night. He then punched her to the head/facial area. At the time of being punched the deceased was sitting on the floor. The respondent stood up and retrieved a cricket bat from outside the house. He hit the deceased with the cricket bat to the back of her head and on her back a number of times. During this assault she placed her hands over her head to fend off the blows but she was unsuccessful. She was bleeding and crying. The respondent threw the cricket bat out of the lounge room.

[22] The respondent and the deceased then walked towards one of the bedrooms (bedroom 2) in the house and, on the way, the respondent obtained a broom from the corridor area. Once they were in the room the deceased sat on the bed and the respondent hit her twice on the back. He broke the broom into two pieces and hit her again near the neck and shoulder region. He then put the broom pieces down.

[23] The deceased asked the respondent to help her and he walked her to the bathroom to wash the blood from her head and hair. Once they were in the

bathroom he put her in the shower and again punched her, this time to the right cheek. He then took her back to bedroom 2 and placed her on the bed. He went to the other bedroom in order to get the flagon of wine that he had earlier placed there. He then went outside. He subsequently returned and moved the deceased from one bedroom to another so that she could have a drink. They were drinking in the bedroom when the respondent hit her twice on the left rear shoulder with the flagon bottle. The flagon either broke into small pieces in the course of this action or did so when he threw the flagon against the wall.

[24] The respondent then took the deceased back to the original bedroom where he placed her on the bed. He went to the kitchen to get a tin of fish. On his return he took her to the bathroom and put her in the shower and again punched her on the right cheek. He then retrieved a sheet from the corridor between the bathroom and the bedroom and went back into the bathroom. He positioned the deceased so that she was facing away from him and he placed the sheet around her neck and strangled her. She struggled for a period and then died.

[25] At this time the deceased was in the shower lying on her back with her legs slightly apart. The respondent retrieved the pieces of broken broom handle and used that handle to penetrate her vagina. He then dragged the deceased's body from the bathroom to the bedroom, placed her on the bed and put a blanket over her body up to her neck area. He tried to wipe bloodstains caused by the assault at various points around the house.

[26] Between 10 pm and 10.55 pm the respondent went to a house belonging to Mr and Mrs Coleman and spoke with his mother in the presence of Mr Coleman. He requested that she go to the house because he was unsure whether he had killed the deceased. Mr Coleman sought assistance from the police and eventually the deceased was found in the bedroom in the house.

[27] The respondent participated in a record of interview with police on 23 December 1985 and made admissions as to killing his wife. Included in those admissions was an admission that he had used the broom handle to penetrate the deceased's vagina.

[28] The significant issue of fact for present purposes is whether the respondent did penetrate the vagina of the deceased with the broken broom handle and, if so, whether that act occurred before or after death.

[29] The evidence of penetration came from the respondent in the course of his record of interview and was confirmed by the evidence of the forensic pathologist, Dr Lee. In the record of interview the question of penetration was introduced by the interrogating officer at question 436. The exhibit, which was before the jury, records the following:

> "Q436 I have been told that she has been penetrated, what do you say to that?
> A SILENCE. I did it.
>
> Q437 What with?
> A Broomstick. The one here INDICATES "F". Broken one, broomhandle.
>
> Q438 What did you do with it?

A I put it in her here. INDICATES FRONTAL PELVIC AREA.

Q439 What do you call that?
A ****.

Q440 What did you use?
A The red broom handle, the broken one.

Q441 What part?
A The handle, this long INDICATES 30 CM.

Q442 The smooth or sharp end?
A Smooth end.

Q443 Why did you do that?
A She made me wild.

Q444 Was this before or after you strangled her?
A After.

Q445 How long after?
A Short time."

[30] The respondent was asked where the deceased was when this occurred and he said that she was in the shower on her back. He was asked whether she was alive or dead and he responded "dead", and said that he knew that "because she wasn't breathing". This was a short time after he had strangled her. He was asked to demonstrate the depth to which the penetration occurred and is recorded as having indicated with his fingers a distance of approximately 12 centimetres. The respondent indicated that he had disposed of the stick by throwing it into the corridor outside of the bathroom. The investigating officer, Sergeant Tilbrook, gave evidence that a piece of the broken broomstick was found in that location.

[31] The other significant evidence on this issue was given by the forensic pathologist, Dr Kevin Lee. He examined the body of the deceased at the crime scene and then again on a later occasion. Of relevance for present purposes, he observed:

> "In the genital area there was a 2.4 centimetre oblique laceration, in other words, angled laceration, without surrounding bruising of the left lower vagina and the labia, which are the soft tissues surrounding the vagina, associated with a series of shallow smaller lacerations, the smallest of which was little more than a pinprick in size. These were situated on the labia minora."

[32] Dr Lee went on to say that the injury "would have been inflicted at around the time of death" and would have been caused by a "blunt-ended rather than sharp, it was a blunt object". The witness described the injury as being "peri-mortem, being produced at or around the time of death, and from my point of view, as a pathologist, there is no difference between an injury that is produced very shortly before death and one that is produced very shortly after death".

[33] In describing the injury he said:

> "I noted that there was no deep damage present in the vaginal canal, so that the damage that I have referred to on my external examination was only on the outside and not deep within."

[34] He went on to accept that there was not deep penetration of the vagina and there was "no evidence of deep trauma within the vagina". He then provided a diagrammatic representation of the injury and that was with the jury. The form of the questions and the nature of the responses make it

clear that there was no dispute that the respondent had in fact penetrated the vagina of the deceased at about the time of her death.

[35] Counsel for the respondent did not take me to other evidence which might cast this evidence in a different light, nor did he suggest that there was anything to contradict the evidence to which I have referred.

[36] Counsel had a legitimate concern with the evidence as to the timing of the alleged penetration and, in particular, whether penetration occurred before or after death. This is no longer an issue of concern because the Director of Public Prosecutions correctly conceded that, on the available information, he could not establish beyond reasonable doubt that the penetration occurred before death.

[37] The issue now before the Court is whether there was penetration of the vagina of the deceased. Counsel for the respondent emphasised the unsatisfactory nature of the exercise I am obliged to undertake. This issue is to be addressed some 20 years after the events occurred and is necessarily based upon a review of the transcript of the earlier proceedings. No fresh evidence was sought to be called by either party. The difficulties that arise are not just that there has been a substantial delay involved but also because of the difference between the nature of the inquiry now to be undertaken and that which was before the court in 1990. In 1990 the issue was whether or not the respondent was guilty of murder. He was not charged with any sexual offence. He was not charged with an offence of misconduct towards

a corpse. Although evidence was led of his assault with the broomstick upon the deceased shortly after her death, that was not a focus of the proceedings. That event was incidental to the question of whether the respondent was guilty of murder by strangulation of his wife. It was submitted that counsel for the respondent at the hearing in 1990 would not have had in his mind that what occurred after the death would become a matter of separate significance years later. Counsel had conducted his case according to the issues that were significant at the time. It was argued that in the circumstances it was possible there was no proper challenge to the evidence suggesting that events occurred as described by the respondent in his record of interview and confirmed by Dr Lee on his subsequent examination of the deceased.

[38] I accept the submission of counsel for the respondent that dangers do arise in the circumstances in which the Court must operate. I remind myself that I must be able to find that penetration occurred in the manner described to the level of being so satisfied beyond reasonable doubt. Notwithstanding the matters raised by counsel for the respondent, having reviewed the evidence, I am able to find beyond reasonable doubt that the respondent penetrated the vagina of the deceased to some extent with a blunt, rounded handle of a broomstick shortly after her death. The evidence of the respondent and that of the forensic pathologist is clear and mutually corroboratory on this issue. There is nothing that raises any reasonable doubt as to the reliability and accuracy of that evidence.

Was this a sexual offence?

[39] Accepting that, at a time when the victim was deceased, the respondent took a broken broom handle and penetrated her vagina, the question arises whether his conduct was such that it would have constituted a sexual offence against the victim.

[40] The obvious offence with which the respondent may have been charged would have been pursuant to s 140(b) of the Criminal Code which makes it an offence to improperly or indecently interfere with or offer any indignity to a "dead human body". However, that section is not a sexual offence for the purposes of the definition contained in the Sentencing Act.

[41] The submission of the Director was that penetration after death is a sexual offence for the purposes of s 19(3)(b) of the Act and, by extension, s 53A of the Sentencing Act. It was submitted that the correct interpretation of those sections is to treat an act "which would have" constituted a sexual offence but for the death of the victim as a sexual offence for the purposes of the section. Such an interpretation is necessary, it was said, to give meaning to the words "before or after the victim's death". It was pointed out that, save for offences against s 125B and s 125C (which deal with possessing child abuse material and publishing indecent articles) there are no offences listed within the definition that would create a sexual offence in circumstances where the victim was not alive at the relevant time. If the interpretation suggested by the Director is not adopted then, in the majority of cases, there

would only be a sexual offence in circumstances where the victim was alive at the relevant time. It was submitted there would be no need for the section to include the words "before or after the victim's death" as, apart from those exceptions, there is no relevant "sexual offence" where the victim is deceased at the time of the conduct.

[42] Some limited support for the interpretation suggested by the Director is to be found in the Second Reading Speech which included the following:

> "Crimes of murder that are occasioned also by a sexual assault, are also recognised as deserving an increased non-parole period. Where a victim has been sexually assaulted and then killed, either as a result of the assault or some subsequent act or omission, I believe that factor places the offence, quite rightly in the minds of the community, in a more serious category of offence. Likewise, an offence in which the victim is killed, and then their body subjected to sexual degradation post-mortem, is considered to be a more serious example of the crime of murder."

[43] I am unable to accept the suggested interpretation. In my view, the meaning of the words used is plain enough. The conduct of the respondent must be of a kind that "would have constituted a sexual offence against the victim" and it matters not whether the conduct occurred "either before or after the victim's death". The fact that there is no relevant identified "sexual offence" in the circumstances of the present matter where, at the time of the conduct the victim was deceased, does not justify placing a strained interpretation on the words to accommodate that circumstance. There are circumstances where a "sexual offence" may be committed in relation to a deceased person, for example, as acknowledged in the submissions, an

offence under s 125B of the Criminal Code. Accepting that to be so, contrary to the submission made, the identified words would not be superfluous. There would be no breach of the presumption that words used in a statute are not used without meaning and are not superfluous: *The Commonwealth v Baume* (1905) 2 CLR 405 at 414.

[44] To have the effect for which the Director contends the words "had the victim been alive at the time of the conduct" or something similar would need to be implied into the provision. However such implication is not a matter which must be dealt with to ensure the purpose of the Act is to be achieved: *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423. The purpose of this provision of the Act is to ensure that a minimum non-parole period of 25 years is applied in some circumstances. That continues to be the case in respect of a narrower range of circumstances than would follow from an acceptance of the submissions made by the Director.

[45] The Director relied upon the expression "would have" as indicating an intention to relieve the "inconsistency" that would follow from the plain meaning of the words. In my view, as expressed in par 14 above, the words "would have" are employed simply to relate the conduct of the respondent at the time of offending to the definition of "sexual offence" contained in the legislation.

[46] The definition of "sexual offence" may not, at present, include any offence that applies to conduct such as occurred in this case after the victim's death.

However, if the scope of what constitutes a "sexual offence" in this context is to be broadened, the remedy lies with the legislature and not with the courts. For example, s 34B of the Crimes Act of Victoria makes it an offence to intentionally "interfere sexually or commit an indecent act with a corpse of a human being". It is not for the court to usurp the legislative function "under the thin disguise of interpretation": *Marshall v Watson* (1972) 124 CLR 640 at 649.

[47] I conclude that the conduct of the respondent would not have constituted a sexual offence against the victim for the purposes of s 19(3)(b) of the Act. The application must be dismissed.

Constitutional issue

[48] In the course of proceedings the respondent gave notice of a constitutional matter. The relevant notice was served pursuant to the terms of s 78B of the Judiciary Act. No-one has sought to intervene. I will proceed to deal with the issue notwithstanding the conclusions I have reached above.

[49] The constitutional matter, as described in the notice, is as follows:

> "Whether the transitional provision of the legislation (Sentencing (Crime of Murder) and Parole Reform Act 2003 NT), namely s 19(3)(b) which purports to retrospectively increase a deemed non-parole period of 20 years by at least five years on the basis of fulfilling a criteria, namely 'the act that caused the victim's death was part of a course of conduct by the offender that included conduct, either before or after the victim's death that would have constituted a sexual offence on the victim'. That is for the serving prisoner, a finding of guilt and an increase in sentence of five years imprisonment without charge or trial is:

(a) capable of offending Chapter III of the Australian Constitution; and

(b) justiciable for the purpose of determining whether it offends Chapter III of the Australian Constitution."

[50] In the course of submissions the respondent made it clear that his challenge is solely to s 19(3)(b) of the Act. He makes no complaint regarding the remaining provisions of s 19(3) of the Act.

[51] The submission of the respondent was that the "real effect" of s 19(3)(b) is to have a citizen found guilty of a criminal offence and consequently imprisoned for a mandatory period of at least five years without charge or trial. The submission was that the respondent is "effectively being tried (for the offence) of sexual intercourse without consent based on evidence called in his murder trial which is unchallengeable here". It was submitted that the Court was called upon to find the person "guilty of that crime and increase his present term of imprisonment by five years". This, it was submitted, is incompatible with the exercise of judicial power. The respondent submitted that he had not ever been charged with any sexual offence and, if he was to be found guilty of such a crime, then "he should be dealt with in accordance with the fundamental principles which exist within our criminal justice system which include natural justice, due process and the rule of law".

[52] In my opinion it is important to place the Reform Act in context to determine its impact and whether the manner in which the respondent seeks to characterise it is correct. Prior to the commencement of the Act the

sentence for murder was imprisonment for life and the court was not empowered to fix a non-parole period. The only possibility of release lay in the exercise of executive clemency. I am unaware of any occasion on which such clemency was granted. This regime applied to the respondent and others who were convicted of murder before the amending legislation came into effect on 11 February 2004.

[53] Following the amendments the courts were empowered to fix non-parole periods in respect of offenders imprisoned for life for the crime of murder. The mandatory penalty of life imprisonment remained but the opportunity to apply for parole was established and, as a part of that process, "standard" non-parole periods were identified. The transitional provisions, which apply to prisoners serving life imprisonment for murder at the commencement of the new regime, provided that "the prisoner's sentence is to be taken to include a non-parole period of 20 years". However the Director of Public Prosecutions was empowered to apply for an order that the court revoke the non-parole period of 20 years and impose a longer non-parole period or refuse to fix a non-parole period in certain circumstances. If the circumstances described in s 19(3)(b) were established then the court "must fix a non-parole period of 25 years". The present matter comes before the Court pursuant to such an application.

[54] Contrary to the submission made of behalf of the respondent the exercise is not one of increasing the term of imprisonment being served by the prisoner. The term of the imprisonment of the respondent remains the same, namely

imprisonment for life. What changes is that the respondent can seek parole. The application is made to determine the earliest time at which he may do so. He is deemed to be entitled to apply for parole after 20 years but that is subject to the power of the court, on the application of the Director, to order otherwise.

[55] In *Bugmy v The Queen* (1990) 169 CLR 525, Dawson, Toohey and Gaudron JJ said (at 536):

> "In *Iddon and Crocker v The Queen* (1987) 32 A Crim R 315, at 325-326, the Court of Criminal Appeal of Victoria said of the legislation with which this appeal is concerned: "The scheme of the legislation is plain enough. The intention of the legislature is that a minimum term is a benefit to the prisoner …" That benefit lies in providing the prisoner a basis for hope of earlier release and in turn an incentive for rehabilitation: see *Wardrope v The Queen*, referred to in *Iddon and Crocker*, at 327-328. The fact is, though, that the sentence remains, in the present case, one of life imprisonment."

[56] In presenting the argument, the respondent repeated the submission that the provisions purport to apply retrospectively. As I have observed earlier (paragraph 14), in my view the provision does not operate retrospectively. Rather it provides for the future and does so based upon past events. The respondent is not being penalised for his conduct at the time of committing the offence of murder but the quality of the benefit available to him under the Act is to be assessed by reference to that conduct and the surrounding circumstances.

[57] This is a sentencing exercise and the principles governing such an exercise apply: *R v Leach* (supra). The respondent is not being tried for a criminal

offence. No charge is laid. An application is made in open court where the prisoner is entitled to be legally represented and the onus rests upon the Crown to establish beyond reasonable doubt the facts upon which it relies to demonstrate that s 19(3)(b) of the Act has application. If it fails to do so (as here) then the standard non-parole period of 20 years will apply. In the event that the Crown is successful, a standard non-parole period of 25 years will apply. Whatever the outcome of the application, the head sentence of imprisonment for life remains the same.

[58] In any event, the submission of the respondent runs headlong into the decision of the High Court in *R v Bernasconi* (1915) 19 CLR 629 and the long line of authority that followed. That case has recently been applied by the Court of Criminal Appeal in *Fittock v R* (2001) 11 NTLR 52 at 58. Leave to appeal to the High Court from the decision of the Court of Criminal Appeal was refused: *Fittock v R* (2003) 197 ALR 1. Counsel acknowledged that this Court is bound by the line of authority commencing with *Bernasconi*. He proceeded to outline reasons for his submission that *Bernasconi* "is unsatisfactory, complex and not really settled". Other arguments were raised as to the approach which should be adopted to the particular circumstances in this case should the principle in *Bernasconi* be overturned. It is unnecessary to address those submissions as I am bound by the decision of the High Court.

[59] The respondent also sought to develop an argument based upon *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The principle

that emerged from *Kable* was expressed by Gleeson CJ in *Fardon v Attorney-General (Queensland)* (2004) 210 ALR 50 at par 15 as follows:

> "The decision in *Kable* established the principle that, since the constitution established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by state Supreme Courts, state legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid."

[60] It was submitted that Chapter III of the Australian Constitution and, in particular s 80 thereof, applies to the Northern Territory of Australia following that decision. With respect, that is to misunderstand the effect of *Kable*. Chapter III of the constitution does not apply as such in any of the states. It does not apply as such in the Northern Territory of Australia: *Bernasconi*. The situation is described by McHugh J in *Fardon* (supra at par 37) in the following terms:

> "Chapter III of the constitution, which provides for the exercise of federal judicial power, invalidates state legislation that purports to invest jurisdiction and powers in state courts only in very limited circumstances. One circumstance is state legislation that attempts to alter or interfere with the working of the federal judicial system set up by Ch III. Another is the circumstances dealt with in *Kable*: legislation that purports to confer jurisdiction on state courts but compromises the institutional integrity of state courts and affects their capacity to exercise federal jurisdiction invested under Ch III impartially and competently. Subject to that proviso, when the Federal Parliament invests state courts with federal jurisdiction, it must take them as it finds them."

[61] The basis of the submission on behalf of the respondent appeared to be the same as that presented in *North Australian Aboriginal Legal Aid Service Inc*

v Bradley & Anor (2004) 206 ALR 315 at par 28 to 30. In that case the majority (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) accepted the propositions that: (1) a court of the Territory may exercise a judicial power of the Commonwealth pursuant to investment by laws made by the Parliament; and (2) it is implicit in the terms of Chapter III of the Constitution, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal. The court then considered what it described as "the third step" in the argument which was the discernment of the relevant minimum characteristic of an independent and impartial tribunal. Reference was made to the statement of McHugh J in *Kable* that the boundary of legislative power:

> "… is crossed when the vesting of those functions or duties might lead ordinary reasonable members of the public to conclude that the [Territory] court as an institution was not free of government influence in administering the judicial functions invested in the court."

[62] The majority went on to conclude that, in the circumstances of that case, the integrity of the Territory magistracy or judicial system was not compromised or jeopardised and the circumstances did not render the magistracy of the Territory or the office of the Chief Magistrate inappropriately dependent on the legislature or executive of the Territory in a way incompatible with requirements of independence and impartiality.

[63] With respect to the submissions made on behalf of the respondent there is nothing in the present legislation which would offend against the principles discussed in *NAALAS v Bradley* (supra).

[64] The legislation dealt with by the High Court in *Kable* was extraordinary. It provided for the detention of only one person, namely Mr Kable. It was legislation ad hominem. The legislation, although "dressed up as a Supreme Court legal proceeding, had been enacted for the purpose of ensuring that Kable remained in prison when his sentence expired": *Fardon* per McHugh J at par 33. The majority of the High Court in *Kable* considered "the appearance of institutional impartiality of the Supreme Court was seriously damaged by a statute which drew it into what was, in substance, a political exercise": *Fardon* per Gleeson CJ at par 16.

[65] The legislation with which I am dealing is not of that ilk. This is not ad hominem legislation. The exercise is governed by settled principles of sentencing: *R v Leach* at par 48. The hearing is to be conducted in open court and in accordance with the ordinary judicial process. The respondent is entitled to legal representation. The rules of evidence apply. The case is to be determined on its merits. There is a right of appeal. As with the legislation considered by the court in *Fardon*, there is nothing to suggest that the Supreme Court of the Northern Territory is to act as a mere instrument of government policy. The Court is called upon to exercise judicial power. The onus of proof rests upon the Director of Public Prosecutions and that onus is to the standard of establishing matters beyond

reasonable doubt. The legislation is not designed to punish prisoners but rather is designed to permit them to seek parole after an identified period, a right not previously available to them.

[66] There is nothing in the legislation which would lead to a perception that the Supreme Court is to act as a mere instrument of government policy. There is nothing to suggest that the court is not acting independently of the legislature. There is nothing in the legislation which substantially impairs the institutional integrity of the court or which would make it "incompatible with its role as a repository of Federal jurisdiction".

Conclusion

[67] The challenge to the legislative provision on constitutional grounds must fail. The Court is bound by *Bernasconi* and this is not a case in which the principle in *Kable* has application. However the application of the Director fails because the conduct of the respondent would not have constituted a "sexual offence" for the purposes of s 19(3)(b) of the Sentencing (Crime of Murder) and Parole Reform Act.

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