Scotty [2007] NTSC 27

PARTIES:	IN THE MATTER OF PART IIA OF THE CRIMINAL CODE v IN THE MATTER OF ANTHONY JABALTJARI SCOTTY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	9518080
DELIVERED:	23 April 2007
HEARING DATES:	17 November 2006
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CRIMINAL LAW – person subject to a deemed supervision order under transitional provisions – whether court needs to fix a term requiring a mandatory review – whether supervision order made previously by a court – whether court has power to fix term of imprisonment – order made on 17 November 2006 revoked – no review necessary

Statutes:

Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Act, s 6, s 6(2), s 6(3)

Criminal Code, Part IIA, Part 5, Divisions 6 and 7, s 43A, s 43B, s 43ZA, s 43ZA(1), s 43ZA(1)(a), s 43ZB, s 43ZD, s 43ZG, s 43ZG(1), s 43ZG(3), s 43ZG(5), s 43ZG(7), s 43ZH, s 43ZH(2)(a), s 43ZH(3), s 43ZH(3)(d), s 43ZK, s 382(2), s 382(3)

Prisons (Correctional Services) Act

References:

Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed, LexisNexis Butterworths, Sydney, 2006

Citations:

Referred to

Buresti v Beveridge(1998) 88 FCR 399; 158 ALR 445
DCT (NSW) v Mutton (1988) 79 ALR 509
Duperouzel v Cameron [1973] WAR 181
Hall v Jones (1942) 42 SR (NSW) 203
In the matter of The Fourth South Melbourne Building Society (1883) 9 VLR (Eq) 54
Scotty [2003] NTSC 98
Transport Accident Commission v Treloar [1992] 1 VR 447

REPRESENTATION:

Counsel:

Office of the Director of Public Prosecutions:	W J Karczewski QC
Anthony J Scotty:	W Smith, T Aickin
Department of Justice:	G McDonald
Department of Health and Community Services:	D Farquhar

Solicitors:

Office of the Director of Public Prosecutions	
Anthony J Scotty:	Central Australian Aboriginal Legal Aid Service
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Department of Health and Community Services:	Cridlands

Judgment category classification: B
Number of pages: 14

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

Scotty [2007] NTSC 27
No. 9518080

BETWEEN:

IN THE MATTER OF PART IIA OF THE CRIMINAL CODE

AND:

IN THE MATTER OF ANTHONY JABALTJARI SCOTTY

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 23 April 2007)

[1] On 14 October 1996, Anthony Scotty (Scotty) was arraigned upon indictment with the following charges:

Count 1	Murder of Rosemary McIntyre at Alice Springs on 15 August 1995
Count 2	Robbery on 15 August 1995
Count 3	Unlawful assault upon a female on 15 August 1995
Count 4	Attempted sexual intercourse without consent on 12 August 1995

[2] As at the time of his trial, Scotty had been held in remand since 15 August 1995.

[3] On 15 October 1996 a jury returned a verdict of not guilty on the ground of insanity to each count in the indictment. As was then required by s 382(2) of the Criminal Code, the trial judge ordered that Scotty be kept in strict custody at the Alice Springs Correctional Centre (the ASCC) until the Administrator's pleasure was known. He was then taken to the ASCC and has remained there ever since.

[4] On 27 September 2001, the Administrator ordered that the Director of Correctional Services be responsible for the safe custody of Scotty, that he be confined to a custodial institution and that the Prisons (Correctional Services) Act were to apply to him. Those orders were made pursuant to s 382(3) of the Code.

[5] On 15 June 2002, the Criminal Code was amended by the Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Act (the amending Act). The effect of the amending Act was to insert into the Code Part IIA of the Code, headed "Mental Impairment and Unfitness to be Tried". It will be necessary to consider these provisions in some detail later. The purpose of Part IIA is to establish a new regime dealing with persons who are charged with offences but who suffer from a mental impairment which excuses them from criminal responsibility for their actions or who are unfit to plead by virtue of a mental impairment. Instead of being held for the Administrator's pleasure or released into the community, the new regime envisages that the Court will commit the person to a prison or other appropriate place (a custodial supervision order) or make a non-custodial

supervision order which will enable the person to be released, usually subject to conditions. Where a person is subject to a supervision order, the amending Act requires the Court to fix a term which is to be subject to periodic review. The purpose of the periodic review is to ensure that only those persons whose safety remains at risk or who are a serious risk to the safety of the public remain subject to a custodial supervision order.

[6] Section 6 of the amending Act is a savings and transitional provision which is relevantly in the following terms:

> "**6. Savings and transitional**
>
> (1) In this section –
>
> 'amended Code' means the Criminal Code as in force on an after 15 June 2002;
>
> 'repealed provisions' means sections 35, 36, 357 and 382 of the Criminal Code as in force before 15 June 2002.
>
> (2) A person, who was, before 15 June 2002, acquitted on account of insanity under the repealed provisions and ordered to be kept safe in custody during the Administrator's pleasure, is taken to be a supervised person held in custody on the same terms and conditions under a custodial supervision order within the meaning of Part IIA of the amended Criminal Code and, subject to subsection (3), that Part applies in relation to the person, and the person may be dealt with under that Part, as if he or she were a supervised person subject to a custodial supervision order.
>
> (3) The appropriate person (within the meaning of section 43A of the amended Criminal Code) in relation to a person referred to in subsection (2) must, within 6 months, prepare and submit to the court a report of a

kind described in section 43ZJ of the amended Criminal Code and the court must as soon as practicable after receiving the report commence a review in relation to the person under section 43ZH of that Act."

[7] Section 43A of the Code defines "supervised person" to mean "a person who is the subject of a supervision order". "Supervision order" is defined to mean "a custodial supervision order or a non-custodial supervision order made by a Court under Division 5". In Divisions 6 and 7 "supervised person" is defined by s 43B to mean "the person the supervision of whom is the subject of a hearing referred to in these divisions".

[8] By s 6(2) of the amending Act, Scotty is taken to be 'a supervised person held in custody on the same terms and conditions under a custodial supervision order within the meaning of Part IIA of the amended Criminal Code'. 'Custodial supervision order' means a supervision order referred to in s 43ZA(1)(a): see s 43A.

[9] Section 43ZA provides:

"**43ZA. Nature of supervision orders**

(1) A supervision order may, subject to the conditions the court considers appropriate and specifies in the order –

(a) if it is a custodial supervision order – commit the accused person to custody –

(i) subject to subsection (2) – in a prison; or

(ii) subject to subsection (3) – in any other appropriate place; or

(b) if it is a non-custodial supervision order – release the accused person.

(2) The court must not make a custodial supervision order committing the accused person to custody in a prison unless it is satisfied that there is no practicable alternative given the circumstances of the person.

(3) The court must not make a supervision order –

(a) committing the accused person to custody in an appropriate place; or

(b) providing for the accused person to receive treatment or other services in, at or from an appropriate,

unless the court has received a certificate from the chief executive officer of the Department of Health and Community Services stating that facilities or services are available in that place for the custody, care or treatment of the person."

[10] The reference in s 6(2) of the amending Act to "the same terms and conditions" refers to the terms under which the person is held in custody following the making of an order under s 382(2) or s 382(3) of the former Code. The terms and conditions in this case were those made by the Administrator on 21 September 2001 (see para [4] above).I note that Martin (BF) CJ reached the same conclusion in his Honour's judgment of 10 September 2003, para [6].

[11] As required by s 6(3) of the amending Act, Martin (BF) CJ conducted a review in relation to Scotty pursuant to s 43ZH. The review was conducted on 5 and 6 August 2003 and his Honour delivered judgment on 10 September 2003: *Scotty* [2003] NTSC 98. It is clear that there was delay caused by the failure of the Chief Executive Officer to file his report within the time limit fixed by s 6(2) of the amending Act. Delay was also caused because a number of reports which the Court needed to consider had not been prepared properly as a result of which Martin (BF) CJ observed (at para [15]):

> "… I should not let the occasion pass without observing that what has not been done and is proposed to be done should have been undertaken well before this. I can see no reason why executive power could not have been exercised to achieve the same result as is now to be exercised by the newly created judicial power."

[12] Section 43ZH of the Code provides:

> "**Periodic review of supervision orders**
>
> 1. After considering a report submitted by an appropriate person under section 43ZK, if the court considers it appropriate, the court may conduct a review to determine whether the supervised person the subject of the report may be released from the supervision order.
>
> 2. On completing the review of a custodial supervision order the court must –
>
> (a) vary the supervision order to a non-custodial supervision order unless satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order; or

(b) if the court is satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order –

(i) confirm the order; or

(ii) vary the conditions of the order, including the place of custody where the supervised person is detained."

[13] On two occasions since then Judges of this Court have received further reports vide s 43ZK and on each occasion the Judge concerned decided that it was inappropriate to conduct a review.

[14] The orders made by Martin (BF) CJ varied the conditions of his custodial supervision order so that a proposed treatment plan could be implemented. No request was made for the Court to fix a term appropriate for the offences under s 43ZG. The question is, should such a term have been fixed and, if so, when would the term run from.

[15] All counsel originally submitted that Martin (BF) CJ should have fixed a term of 15 years as required by s 43ZG(3) of the Code as it then stood.

[16] The first question is whether that submission is correct.

[17] Section 43ZG(1) provided at the relevant time that "when the Court makes a supervision order, the Court must fix the term during which the supervision order is, subject to this section and sections 43ZD and 43ZE, to be in force and specify the term in the order". The purpose of the term so fixed was to

mandate a compulsory review to determine whether to release the supervised person vide s 43ZG(5).

[18] If the Court determines not to order the release of a person, then the Court must either confirm the supervision order or vary the supervision order (including varying it to a non-custodial supervision order): see s 43ZG(7). However, there is no specific provision for a second mandatory review period. The Code does provide for periodic reports under s 43ZK at intervals of not more than 12 months which may or may not result in a review. A supervised person can at any time, upon the giving of proper notice, apply to the Court to vary or revoke a supervision order vide s 43ZD.

[19] The question therefore boils down to whether the order made by Martin (BF) CJ on 10 September 2003 was a "supervision order". I have already referred to the definition of that term. The order made by Martin (BF) CJ was made pursuant to s 43ZH. That section is within Part 5 of the Act. But I think it is clear that that order was not a "custodial supervision order" made under s 43ZA(1). Was it therefore not a custodial supervision order at all? The provision is not at all clear. If custodial supervision orders are confined to orders made only under s 43ZA(1), what if a court varies a non-custodial supervision order into a custodial supervision order under s 43ZH(3)? Surely it then becomes a custodial supervision order. The definition of "custodial supervision order" means a supervision order **referred** to in s 43ZA(1)(a), not a supervision order made pursuant to s 43ZA(1)(a). Normally the word "means" is used if the definition is intended to be exhaustive, but that rule is

subject to a contrary implication even though the words "unless the contrary intention appears" do not appear in the definition section: *In the matter of The Fourth South Melbourne Building Society* (1883) 9 VLR (Eq) 54; *Buresti v Beveridge*(1998) 88 FCR 399 at 401; 158 ALR 445 at 447; *Hall v Jones* (1942) 42 SR (NSW) 203; *Transport Accident Commission v Treloar* [1992] 1 VR 447 at 449. However the fact that the draftsman may have departed from the definition in s 43ZH(3) does not mean that there is another departure intended whenever the defined word appears. Evidence of the intended departure must appear from the context in which the defined word appears: see *Duperouzel v Cameron* [1973] WAR 181; *DCT (NSW) v Mutton* (1988) 79 ALR 509 at 512, where Mahoney JA said:

> "It is, I think, not necessary that what is laid down by the section in question be impossible of operation; it is sufficient if the result of the application of the definition to a section results in the operation of the section in such a way which clearly the legislature did not intend."

[20] I think it is clear that in this case there was never a custodial supervision order made under s 43ZA(1) by a Court. Section 6(2) of the amending Act deemed Scotty to be a person subject to a custodial supervision order. Does that mean that when the Court varied the deemed order on 10 September 2003 and made an order for the first time, that the order was or was not a custodial supervision order? At the hearing before me on 17 November 2006, I accepted the submission of all of the parties that that order was a custodial supervision order and that therefore s 43ZG applied. Having got that far, the question arose as to from when the period of 15 years was to

run. Was it from (a) the date Scotty went into custody on 15 August 1995?; (b) the date of the jury's verdict of not guilty on 15 October 1996?; (c) the date the amending Act came into force and he was deemed to have been subject to a custodial supervision order, i.e. 15 June 2002?; (d) the date the former Chief Justice varied the order on 10 September 2003?; or (e) the date when I fixed the term of 15 years on 17 November 2006? After receiving submissions on that question I reserved my decision for further consideration.

[21] Subsequently I considered that I may have been in error to fix the term because I doubted whether I had power to do so, because s 43ZG may not apply to this case. I therefore indicated my tentative conclusions to the parties and sought further written submissions on that question.

[22] Counsel for the Director of Public Prosecutions submitted that, contrary to earlier submissions, the Court did not have power to fix a term pursuant to s 43ZG(1) and s 43ZG(3). Counsel drew attention to the fact that, when conducting a review under s 43ZG(5), the Court must release the person unconditionally unless the Court considers that safety of the supervised person or the public will or is likely to be seriously at risk if the supervised person is released; whereas, when conducting a review under s 43ZH, the Court's powers are more limited. In the latter case, if the person is subject to a custodial supervision order, the best outcome that the person can hope for is for an order varying the supervision order to a non-custodial supervision order: see s 43ZH(2)(a). However, I note that if the Court has at

some previous time down-graded the supervision order under s 43ZH(2)(a) to a non-custodial supervision order, the Court could revoke the order unconditionally and order the supervised person to be released unconditionally: see s 43ZH(3)(d). As supervision orders are subject to annual review under s 43ZK, that course of events is a distinct possibility.

[23] Mr Karczewski QC also drew my attention to the Minister's second reading speech when the Minister said:

> "Transitional provisions provide that the existing Administrator's pleasure detainees are deemed to be subject to a custodial supervision order and, within six months of the commencements of the legislation, must be brought before the Court for a major review."

[24] It was submitted that, when referring to "major review" the Minister was referring to the review mandated by s 43ZG(5) and that the reference to s 43ZH in s 6(3) of the amending Act was a drafting or typographical error. However, the words "major review" do not appear in the Act and therefore do not have any precise meaning. I accept that where the Court is satisfied that there has been an obvious drafting error the Court should read the legislation in accordance with what was the obvious intention, having regard to the context of the Act and the purpose of the legislation: see generally Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed, LexisNexis Butterworths, Sydney, 2006 at para 2.24 and the cases therein cited. However, I do not think that there was a drafting error in this case, although I accept the thrust of Mr Karczewski's submissions that the intention of the legislature was to mandate a "major review". But "major review" in my

opinion does not mean anything more than a compulsory review. Section 43ZH does not require a compulsory review; the Court is only required to conduct a review, if, after receiving a report by the appropriate authority, it considers it appropriate to conduct a review. However, s 6 of the amending Act provides that the Court must commence a review in cases such as this. That it seems to me, is compulsory, notwithstanding s 43ZH(1), and indicates what the Minister meant by the expression "major review".

[25] Counsel for the chief Executive Officer of the Department of Justice adopted the same argument as that Mr Karczewski QC and need not be considered further.

[26] Counsel for Mr Scotty submitted that the Court did have power to fix a term under s 43ZG. The submission fails *in limine* because s 43ZG applies only when *a court* makes a supervision order. Of course a Court may make many supervision orders. Whenever the Court, whilst conducting a review, changes a custodial supervision order to a non-custodial supervision order, it may be said to make a new supervision order. But I think that s 43ZG was intended to apply only to orders made by a Court and not to deemed orders under s 6 of the amending Act and only to the first or initial order, as otherwise the compulsory review process could potentially come into question more than once.

[27] I am satisfied that the order made by the former Chief Justice was not a supervision order, because it was not a custodial supervision order referred

to in s 43ZA(1). I do not consider that any hardship to Scotty flows from this result. I think that s 6(3) of the amending Act provided for the compulsory review of the deemed order and that this was required to be done as soon as practical after the report was received from the appropriate person. There was therefore no need to fix a time for a compulsory review, because that review has already taken place. That is consistent with what the Minister referred to as a "major review". It is clear that there is only ever one compulsory review under s 43ZG. It should come as no surprise that those subject to the transitional provisions only get one compulsory review. There is no hardship to Scotty. A judge will receive a report each year and, if the Judge thinks it appropriate, he or she will conduct a review. At the next review under s 43ZH, the Court may down-grade the supervision order to a non-custodial supervision order, which may eventually result in an order for release under s 43ZH(3)(d). Scotty can in any event apply for the order to be varied or revoked at any time under s 43ZD. If a Judge refuses such an application, Scotty has certain limited rights of appeal to the Court of Criminal Appeal under s 43ZB. My conclusion is supported further by the fact that there is no specific legislative provision specifying the commencement date from which the 15 year period (or other relevant period) would run if the intention was that s 43ZG(5) applied and the reference to s 43ZH was in error. That is a matter for which I expect the Legislature would have specifically provided if that were the intention.

[28] I order that the orders of 17 November are revoked. Pursuant to s 43ZH(1) I consider that no review is necessary.