The Director of Public Prosecutions v Bakewell [2007] NTSC 49

PARTIES:	THE DIRECTOR OF PUBLIC PROSECUTIONS v BAKEWELL, JONATHAN PETER
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

SENTENCING – Sentencing (Crime of Murder) Parole Reform Act 2003 (NT) - application by the Director of Public Prosecutions pursuant to s 19(3) – provision for Supreme Court to fix longer period or refuse to fix any period – strike out application of respondent on jurisdictional grounds – prisoner transferred interstate - application dismissed

Sentencing (Crime of Murder) Parole Reform Act 2003 (NT)
Prisoners (Interstate Transfer) Act (NT)
Prisoners (Interstate Transfer) Act 1982 (SA)
Northern Territory (Self-Government) Act 1978 (Cth)

The Queen v Albury [2004] NTSC 59; *Bermingham v Corrective Services Commission (NSW)* (1988) 15 NSWLR 292; *Colpitts v Australian*

Telecommunications Commission (1986) 9 FCR 52; *R v Cornwell* (1972) 2 NSWLR 1; *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113; *Lawrence v The King* [1933] AC 699; *Leach v The Queen* (2007) 81 ALJR 598; *Lipohar v The Queen* (1999) 200 CLR 485; *Port MacDonnell Professional Fishermen's Association v South Australia* (1989) 168 CLR 340; *Pearce v Florenca* (1976) 135 CLR 507; *R v Rajacic* [1973] VR 636; *Szelagowicz v Stocker* (1994) 35 ALD 16, cited

REPRESENTATION:

Counsel:

Applicant:	M Grant QC; S Brownhill
Respondent:	M Hunter

Solicitors:

Applicant:	Office of the Director of Public Prosecutions
Respondent:	Robert Welfare

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

The Director of Public Prosecutions v Bakewell [2007] NTSC 49
No 8815904

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS
Applicant

AND:

JONATHAN PETER BAKEWELL
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 5 October 2007)

Introduction

[1] Jonathan Peter Bakewell is a prisoner in South Australia who is serving a sentence of imprisonment for life for the crime of murder which he committed in the Northern Territory. He asks the court to strike out or permanently stay an application which the Director of Public Prosecutions has filed under s 19(3) of the Sentencing (Crime of Murder) and Parole Reform Act 2003 (NT).

[2] The Director of Public Prosecutions filed his application on 25 June 2007. He seeks orders that the court revoke Mr Bakewell's non-parole period of 20 years and fix a longer non-parole period of 25 years.

[3] On 26 May 1989 the Supreme Court sentenced Mr Bakewell to imprisonment for life for the crime of murder, to imprisonment for 10 years for the crime of rape, to imprisonment for four years for the crime of unlawfully entering a dwelling house and to imprisonment for one year for the crime of stealing. The court ordered that the sentences of imprisonment be served concurrently. The court did not fix a non-parole period for the sentence of imprisonment for life for the crime of murder. It had no power to do so.

[4] On 7 January 2004 the Sentencing (Crime of Murder) and Parole Reform Act (NT) was assented to by the Administrator. The Act commenced on 11 February 2004. Under s 18(a) of the Act the sentences of imprisonment of all prisoners serving sentences of imprisonment for life for a single conviction for the crime of murder were taken to include a non-parole period of 20 years imprisonment. The non-parole period of 20 years was subject to the Director of Public Prosecutions making an application to the court under s 19 of the Sentencing (Crime of Murder) and Parole Reform Act (NT) for orders that the non-parole period of 20 years be revoked and either a longer non-parole period be fixed or the court refuse to fix a non-parole period.

[5] As a result of the enactment of s 18 of the Sentencing (Crime of Murder) and Parole Reform Act (NT), as at 11 February 2004 Mr Bakewell's sentence of imprisonment for life for the crime of murder was taken to include a non-parole period of 20 years.

[6] On 15 April 2005, in the interests of his welfare, Mr Bakewell was transferred from the Darwin Correctional Centre to Yatala Labour Prison in South Australia. He was transferred under s 5 of the Prisoners (Interstate Transfer) Act (NT). He has remained in prison or on periodic conditional release in South Australia since 15 April 2005.

[7] The basis of the Director of Public Prosecutions' application for a longer non-parole period is that the act which caused the murder victim's death was part of a course of conduct by Mr Bakewell that constituted a sexual offence against the victim. Under s 19(3) the court must fix a non-parole period of 25 years or more if the act that caused the victim's death was part of a course of conduct by the prisoner that included conduct that would have constituted a sexual offence against the victim.

The Respondent's Argument

[8] Mr Bakewell relies on three grounds in support of his application to strike out the application filed by the Director of Public Prosecutions. First, s 23(1)(a) of the Prisoners (Interstate Transfer) Act (NT) is ultra vires the legislative power of the Northern Territory Parliament. Secondly, s 23(1)(a) of the Prisoners (Interstate Transfer) Act is not applicable to the application filed by the Director of Public Prosecutions. Such an application is neither an appeal against nor review of a sentence passed by a court of the Territory. Thirdly, the court has no jurisdiction to hear an application under s 19(3) of the Sentencing (Crime of Murder) and Parole Reform Act (NT) if

the prisoner is not before the court at the time that the application is heard by the court.

[9] Mr Bakewell also sought to argue that the application filed by the Director of Public Prosecutions should be struck out as an abuse of process because the application was oppressive. However, consideration of this ground was deferred pending the court's determination of the grounds referred to above.

[10] For the reasons set out below, it is my opinion that Mr Bakewell's strike out application should be dismissed.

Is section 23(1)(a) of the Prisoners (Interstate Transfer) Act (NT) ultra vires?

[11] Section 23(1)(a) of the Prisoners (Interstate Transfer) Act (NT) provides as follows:

> (1) Where pursuant to an order of transfer a prisoner is conveyed to a participating State or another Territory specified in the order, then from the time the prisoner arrives in the participating State or that other Territory every Territory sentence of imprisonment imposed upon the prisoner, including a translated sentence, ceases to have effect in the Territory except –
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> (a) for the purpose of an appeal against *or review of* a conviction, finding of guilt, judgment or *sentence made, imposed or fixed by a court of the Territory;*

[12] The purpose of s 23(1)(a) of the Prisoners (Interstate Transfer) Act (NT) is to enable the courts of the Territory to retain jurisdiction over an appeal against or review of a conviction, finding of guilt, judgment or sentence made, imposed or fixed by a court of the Territory. Such jurisdiction is not

lost when a prisoner is transferred from a prison in the Territory to an interstate prison. The retention of jurisdiction is consistent with one of the purposes of the Act being that a prisoner should stand in the same position after transfer as the prisoner stood before transfer in respect of both sentence and minimum term: *Bermingham v Corrective Services Commission (NSW)* (1988) 15 NSWLR 292 per Hope JA at 298.

[13] The provisions of s 28(2) and (3) of the Prisoners (Interstate Transfer) Act 1982 (SA) recognise that the courts of the Territory are to retain jurisdiction over an appeal against or review of a sentence passed on a prisoner by a court of the Territory before he or she was transferred to South Australia. The subsections provide as follows:

> (2) Where a translated sentence or a minimum term deemed under subsection (1) to have been fixed by a corresponding court of South Australia –
>
> (a) is varied or quashed on a review by or appeal to a court of the participating State where the sentence or minimum term was imposed or fixed, the sentence or minimum term shall be deemed to have been varied to the same extent, or to have been quashed, by a corresponding court of South Australia; or
>
> (b) otherwise is varied or ceases to have effect as a result of action taken by any person or authority in that participating State, the sentence or minimum term shall be deemed to have been varied to the same extent, or to have ceased to have effect, as a result of action taken by an appropriate person or authority in South Australia.
>
> (3) Nothing in this Act operates to permit a court in South Australia any appeal against or review of any conviction, judgment, sentence or minimum term made, imposed or fixed in relation to a person by a court of a participating State.

[14] The provisions of s 23(1)(a) of the Prisoners (Interstate Transfer) Act (NT) are within the power of the Territory Parliament to enact. Under s 6 of the Northern Territory (Self-Government) Act 1978 (Cth) the Territory Parliament has power, with the assent of the Administrator or the Governor-General, to make laws for the peace, order and good government of the Territory. The subsection does not have an extra-territorial effect. It merely preserves the jurisdiction that the court exercises when it hears an appeal against or review of a conviction, finding of guilt, judgment or sentence made, imposed or fixed by a court of the Territory in circumstances where the prisoner has been transferred interstate.

[15] Alternatively, if s 23(1)(a) of the Prisoners (Interstate Transfer) Act (NT) does have extra-territorial effect then the subsection is still valid: *Pearce v Florenca* (1976) 135 CLR 507 at 520; *Port MacDonnell Professional Fishermen's Association v South Australia* (1989) 168 CLR 340. There is a sufficient nexus between the operation of the subsection and the Territory. The subject matter of the appeal or review contemplated by s 23(1)(a) of the Prisoners (Interstate Transfer) Act (NT) is a decision of a court of the Territory which has been made in relation to a crime committed in the Territory.

Is the non-parole period of 20 years fixed by s 18 of the Sentencing (Crime of Murder) and Parole Reform Act (NT) a sentence which was imposed or fixed by a court of the Territory?

[16] Section 17 of the Sentencing (Crime of Murder) and Parole Reform Act (NT) states that Division 1 of Part 5 of the Act which includes s 18 applies in relation to a prisoner who, at the commencement of the Act, is serving a sentence of imprisonment for life for the crime of murder. Section 18 of the Act provides as follows:

> Subject to this Division –
>
> (a) the prisoner's sentence is taken to include a non-parole period of 20 years; or
>
> (b) if the prisoner is serving sentences for 2 or more convictions for murder – each of the prisoner's sentences is taken to include a non-parole period of 25 years,
>
> commencing on the date on which the sentence commenced.

[17] In my opinion the 20 year non-parole period fixed by s 18(a) of theAct is part of a sentence which attracts the operation of s 23(1)(a) of the Prisoners (Interstate Transfer) Act (NT). Such a finding is consistent with ordinary sentencing principles which recognise that a non-parole period is part of the sentence and is not a separate sentence: *R v Rajacic* [1973] VR 636 at 641. By its express terms s 18 of the Sentencing (Crime of Murder) and Parole Reform Act (NT) deems the non-parole period of 20 years to be part of the original sentence imposed by the court. Further, s 3(3) of the Prisoners (Interstate Transfer) Act (NT) states that for the purposes of the Act, a sentence of imprisonment imposed by the operation of an Act shall, except

as prescribed by regulations under the Act, be deemed to have been imposed by a court of the Territory.

Is an application under s 19(3) of the Sentencing (Crime of Murder) and Parole Reform Act (NT) a review within the meaning of s 23(1)(a) of the Prisoners (Interstate Transfer) Act (NT)?

[18] Subsections 19(1), (2) and (3)(b) of the Sentencing (Crime of Murder) and Parole Reform Act (NT) provide as follows:

> (1) The Supreme Court may, on the application of the Director of Public Prosecutions –
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> (a) revoke the non-parole period fixed by section 18 in respect of the prisoner and do one of the following:
>
> (i) fix a longer non-parole period in accordance with subsection (3) or (4);
>
> (ii) refuse to fix a non-parole period in accordance with subsection (5); or
>
> (b) dismiss the application.
>
> (2) The Director of Public Prosecutions must make the application –
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> (a) not earlier than 12 months before the first 20 years of the prisoner's sentence is due to expire; or
>
> (b) if, at the commencement of this Act, that period has expired – within 6 months after that commencement.
>
> (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;

[19] Significantly s 19(3) is expressed to be subject to subsections 19(4) and (5). The court has discretion when the court exercises the power granted under s 19(3) of the Act.

[20] I accept the Director of Public Prosecutions' argument that an application under s 19(3) of the Sentencing (Crime of Murder) and Parole Reform Act (NT) is properly characterised as a review of a sentence under s 23(1)(a) of the Prisoners (Interstate Transfer) Act (NT). The ordinary and natural meaning of the word "review" includes the revision of a sentence by a court. In *Colpitts v Australian Telecommunications Commission* (1986) 9 FCR 52 at 63 Burchett J stated:

> In the *Shorter Oxford English Dictionary* the first meaning given of the word "review" is "the act of looking over something (again), with a view to correction or improvement", but the meaning in law is also given: "Revision of a sentence, etc., by some other court or authority." It is the latter meaning, suggesting an independent tribunal with power to alter the result, which is significant. In *Ashfield Municipal Council v Joyce* [1978] AC 122 at 134 Lord Wilberforce said, citing *Pemsel's* case [1891] AC 531:
>
> "It is hardly necessary to add to this the reminder, from Lord Macnaghten, that `in construing Acts of Parliament, it is a general rule ... that words must be taken in their legal sense unless a contrary intention appears'." (See also *Pearce, Statutory Interpretation in Australia* (2nd ed), par 44).
>
> That the *Shorter Oxford English Dictionary* correctly defines the legal meaning of "review" is confirmed by the cases: see *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135

> CLR 616 at 620 citing *Phillips v Commonwealth* (1964) 110 CLR 347 at 350, where the High Court chose the word "review" to describe a rehearing which led to the pronouncement anew of the rights of the parties; *R v Nat Bell Liquors Limited* [1922] 2 AC 128 at 143 where Lord Sumner also chose the same word to express the breadth of the remedy conferred by a power of rehearing in contrast to the limited reach of certiorari; and *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 at 408 where Lord Diplock said: "Judicial review ... provides the means by which judicial *control* of administrative action is exercised" (emphasis added). Use of the word in this context is discussed in *Woss v Jacobsen* (1985) 60 ALR 313.

[21] In *Leach v The Queen* (2007) 81 ALJR 598 at par [14] Gleeson CJ stated, "Section 19 confers upon the Supreme Court a power to make an order which substitutes a discretionary judicial decision for the otherwise mandatory effect of s 18." Such a power is a power of review. The fact that the court's exercise of judicial discretion is constrained by legislative direction does not mean that the power ceases to be a power of review. As Gleeson CL further stated:

> The Court is entitled to have regard to all relevant circumstances in considering whether the conclusion is warranted.
>
> …
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> The provisions of subss (1), (4) and (5) of s 19 call for an exercise of discretionary judgment within a wider context of legislative prescription. They are different aspects of a single decision-making process. They do not require a court to disregard the consequences for the prisoner of the orders that may be made. They do not require a court to disregard events that have occurred over the period since original sentencing, including rehabilitation. They empower the Court to set aside the legislatively prescribed non-parole period for the purpose either of increasing the period or of removing the possibility of parole.
>
> …

> Considerations relevant to sentencing, and fixing non-parole periods, are relevant because what is involved in s 19 is a sentencing exercise. Events that have occurred since the original sentencing, to the extent to which they bear upon such considerations, may be taken into account. These considerations and events are taken into account within the framework of s 19.

[22] In *The Queen v Albury* [2004] NTSC 59 at par [72] Martin CJ stated:

> The second observation relates to the duty of the court on the current application. Although the court is engaged in a sentencing exercise, it is not sentencing afresh. Nor is it in the position of a sentencing court determining the question of non-parole immediately following the conviction of an offender for murder. The court is considering an application by the Director in respect of a prisoner who has already been sentenced.

[23] I do not accept the argument made on behalf of Mr Bakewell that the word, "review", in s 23(1)(a) is confined to rights of judicial review existing at the time that the Prisoners (Interstate Transfer) Act (NT) commenced. The provisions of s 23(1)(a) were intended by the Parliament to be interpreted in accordance with contemporaneous expositions of the law. It is a principle of statutory interpretation that where the Parliament has chosen a formulation which is of indeterminate scope and of a high level of generality, a court should interpret the provision on the basis that the intention of the original enactment was that the particular application of the provision may vary overtime: *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113 per Spigelman CJ at 145; see also *Szelagowicz v Stocker* (1994) 35 ALD 16. On a fair construction an application under s 19 of the Sentencing (Crime of Murder) and Parole Reform Act (NT) falls within the provisions of s 23(1)(a) of the Prisoners (Interstate Transfer) Act (NT). Such a

construction is consistent with intention of the Prisoners (Interstate Transfer) Act (NT) that a prisoner should not be advantaged or disadvantaged as a result of being transferred interstate.

Is Mr Bakewell's presence required?

[24] I do not accept the submissions made on behalf of Mr Bakewell that the court's jurisdiction to entertain an application under s 19 of the Sentencing (Crime of Murder) and Parole Reform Act (NT) is contingent on his presence before the court. It is correct to say that it is an essential principle of the criminal law that a trial for an indictable offence is to be conducted in the presence of the accused and trial means the whole of the proceedings including sentence: *Lipohar v The Queen* (1999) 200 CLR 485 per Gaudron, Gummow and Hayne JJ at 514; *Lawrence v The King* [1933] AC 699 at 708; *R v Cornwell* (1972) 2 NSWLR 1 per Jacobs JA at p 3. The reason for this was that at common law there was no trial in absentia. However, the principle does not ordinarily extend to the hearing of an appeal against or a review of a sentence. Although the court is engaged in a sentencing exercise when it hears an application under s 19 of the Sentencing (Crime of Murder) and Parole Reform Act (NT) it is not sentencing afresh. Nor is the court in the position of a sentencing court determining the question of non-parole immediately following the conviction of an offender for murder.

[25] The jurisdiction of the court hearing an application under s 19 of the Sentencing (Crime of Murder) and Parole Reform Act (NT) is founded upon

proof of service of the application on the prisoner. If a prisoner who has been validly served with an application under s 19 remains in South Australia during the hearing of the application, any order made by a court of the Territory under s 19 is given effect by s 28(2)(a) of the Prisoners (Interstate Transfer) Act (SA).

[26] Whether procedural fairness requires the attendance of a prisoner at court when the court is hearing an application under s 19 of the Sentencing (Crime of Murder) and Parole Reform Act (NT) is a matter to be determined in the circumstances of each case. A prisoner's attendance in court may be required, for example, if he or she was either self-represented or unrepresented.

[27] If the personal attendance of a prisoner is necessary to facilitate the proper administration of justice then the court may make an order under s 16 of the Transfer of Prisoners Act (Cth). Should Mr Bakewell's attendance be required in the Northern Territory s 16A of the Transfer of Prisoners Act enables him to be returned to South Australia once the hearing of the application is completed.

Orders

[28] In my opinion the court does have jurisdiction to hear the application filed by the Director of Public Prosecutions. The respondent's strike out application is dismissed. I will hear the parties further as to whether the

presence of the accused is required and as to the argument that the application is oppressive.
