The Queen v Mungatopi [2009] NTSC 58

PARTIES:	THE QUEEN
	v
	MUNGATOPI, Gonzales
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	26 of 1990 (9003999)
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JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

Criminal law – Parole – Non Parole Period – Application to increase pursuant to *Sentencing (Crime of Murder) and Parole Reform Act 2003* (NT) s 19.

Criminal law – "sexual offence" – for purposes of *Sentencing (Crime of Murder) and Parole Reform Act 2003* (NT) s 19(3)(b) "sexual offence" includes an offence against *Criminal Code Act 1984* (NT) s 192, as stated in *Sentencing Act 1995* (NT) Schedule 3 – on evidence Crown proven beyond reasonable doubt that "act that caused the victims death was part of a course of conduct by the prisoner that included conduct before the victims death which would have constituted a sexual offence" – application allowed – non parole period increased to 25 years.

Criminal Code Act 1984 (NT) s 192(3)
Sentencing Act 1995 (NT) s 53A
Sentencing (Crime of Murder) and Parole Reform Act 2003 (NT) s 19(3)(b)

R v Ahwan (2005) 194 FLR 1; *Beckwith v R* (1976) 135 CLR 569; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, followed.

Bakewell v The Queen [No 3] (2008) 22 NTLR 174; *R v Leach* [2004] 14 NTLR 44; *Ahwan v The Queen* [2005] 17 NTLR 1, considered.

Repatriation Commission v Vietnam's Veterans Association of Australia NSW Branch Inc (2000) 48 NSWLR 548, applied.

REPRESENTATION:

Counsel:

Applicant:	R Coates
Respondent:	J B Lawrence

Solicitors:

Applicant:	Office of the Director of Public Prosecutions
Respondent:	

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

The Queen v Mungatopi [2009] NTSC 58
No 26 of 1990 (9003999)

BETWEEN:

THE QUEEN
Applicant

AND:

GONZALES MUNGATOPI
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Published 10 November 2009)

Introduction

[1] This was an application by the Director of Public Prosecutions ("the Director") pursuant to s 19 of the *Sentencing (Crime of Murder) and Parole Reform Act 2003* ("the Act") to revoke a non-parole period fixed by s 18 of the Act and fix a new non-parole period of 25 years in accordance with ss (3)(b) and 19(7) of that statute.

[2] On 14 August 1990 the respondent Gonzales Mungatopi appeared before the Supreme Court of the Northern Territory at Darwin and pleaded not guilty to a charge that, on or about 1 November 1989 at Milikapati, he murdered Thecla Tipungwuti ("the victim").

[3] The matter proceeded to trial in the Criminal Court. On 24 August 1990, by the unanimous verdict of a jury, the respondent was found guilty of the offence charged. A conviction was duly recorded and he was sentenced to life imprisonment. At that time, parole was not available to him under the statutory provisions then in force.

[4] On 29 October 2001 a judge ordered that the sentence was deemed to have commenced on 2 November 1989.

[5] By reason of the provisions of s 18(a) of the Act, when it came into operation in 2003, the respondent's sentence was deemed to include a non-parole period of 20 years.

[6] That non-parole period was therefore due to expire on 2 November 2009.

[7] So stood the situation until the passage of the *Sentencing (Crime of Murder) and Parole Reform Amendment Act 2008* ("the 2008 Amendment"), which effectively mandated the making of the present application by the Director, if he was of the opinion that the respondent's offence had been committed in a circumstance of aggravation stipulated in s 19(3) of the Act.

[8] The present application was brought on the footing that the Director was of the opinion that the evidence led at the trial of the respondent established beyond reasonable doubt that the act that caused the victim's death was part of a course of conduct by the respondent that included conduct before the

victim's death, which would have constituted a sexual offence against the victim, as defined in Schedule 3 to the *Sentencing Act*.

The relevant legislative scheme

[9] In *R v Ahwan*[1] Riley J expressed the view that :

> " ….. the legislation provides for the future and does so based on 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.
>
> 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.
>
> 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 the light of the definition provided in the *Sentencing Act* which refers to the law as it stands at the time of the application."

[1] (2005) 194 FLR 1 at 5.

[10] Given that concept, the approach to be adopted to an application of the present nature is that discussed by the Court of Criminal Appeal in *Bakewell v The Queen [No 3]*.[2] The Chief Justice there commented:

> "As to the effect of the 2008 Amendment with respect to the processes of the court, first the court must determine whether any of the prescribed circumstances of aggravation have been 'established'. No constraint is placed upon the decision-making process which is to be carried out in the normal way. The burden of establishing the existence of a prescribed circumstance of aggravation rests upon the Director.
>
> If the court determines that no prescribed circumstance of aggravation has been established, the court may dismiss the application or exercise other powers with respect to fixing a longer non-parole period or declining to fix a non-parole period. Again, this determination is to be made in the normal way and the processes and discretion of the court in this regard are unconstrained.
>
> It is only if the court determines, in the exercise of its unfettered discretion, that a circumstance of aggravation has been established that the court is directed as to the consequences."

[11] As to the question of standard of proof, I note what fell from the Chief Justice in his earlier judgment in *R v Leach*.[3] He there said:

> "Although the respondent has previously been sentenced, on an application by the Director pursuant to s19 of the Act, essentially the court is required to undertake a sentencing exercise. Unless excluded by the Act the, the well-settled principles and provisions of the *Sentencing Act* governing the exercise of the sentencing discretion apply……. 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."

[2] (2008) 22 NTLR 174 at 184.
[3] [2004] 14 NTLR 44 at58.

[12] However, counsel for the respondent submitted that the reasoning of Riley J in *Ahwan*, as above recited, was erroneous and ought not to be followed.

[13] He argued that, particularly bearing in mind what he described as the 'benevolence' of the Act in according persons such as the respondent a non-parole period had been severely tempered, if not removed, by the 2008 Amendment, the provisions of s 19(2)(b) of the Act should be interpreted strictly and thus be taken as a reference to the law as it stood in 1990.

[14] He went on to contend that, as at that time, because the *Sentencing Act* did not exist and the then *Criminal Code* did not recognize the concept of "*sexual offence* " as later defined in the *Sentencing Act*, the only potentially relevant offences were those set out in s 192 of the *Criminal Code*, as then in force.

[15] That section bore the generic heading "Sexual Assaults", and encompassed assaults with intent to have carnal knowledge and assaults with intent to commit an act of gross indecency.

[16] The then Code defined "carnal knowledge" as meaning sexual intercourse, sodomy or oral sexual intercourse and was said to occur as soon as there is penetration.

[17] Mr Lawrence, of counsel for the respondent, stressed that, unlike the situation in the case of *Bakewell*,[4] where the accused had been charged with

[4] See, for example, *Bakewell v The Queen [No 3]* (2008) 22 NTLR 174.

the multiple offences of murder, unlawful assault with intent to have carnal knowledge and other offences, the respondent in this case had only ever been charged with and convicted of the offence of murder.

[18] He submitted that it is significant that s 19(3)(b) is not expressed as touching on an act that would currently constitute a sexual offence against the victim. It refers to a course of conduct that included conduct that "*would have* constituted a sexual offence against the victim".

[19] Accordingly, he said, as the relevant injuries relied on by the Crown in this case did not meet the definition of carnal knowledge, the 2008 Amendment could have no practical application to the situation of the respondent.

[20] He also invited attention to the fact that, when, at trial, the prosecution had sought to raise an alternative issue of so-called felony murder on the basis of assault with intent to commit an act of gross indecency, the trial judge had unequivocally ruled[5] that such a course was not permissible in the circumstances. The reasoning of the learned trial Judge is best extracted from the final summary of his ruling[6] where he said:

> "It seems to me that this is all part of an assault which, if the Crown case is accepted, caused death and which was committed by the accused. Apart from the very nature of the injuries themselves, there is nothing to differentiate them from the other injuries as being something different in the course of a violent assault. Obviously, they indicate a frenzy or some total lack of self-control; but they do not necessarily, to my mind, in the circumstances of the course of a violent assault here, indicate a distinct sexual connotation."

[5] trial transcript 504-506.
[6] trial transcript 506.

[21] It must, of course, be accepted that the provisions of the 2008 Amendment had the practical effect of narrowing the otherwise beneficial operation of the Act as it had previously applied. However, that does not mean that it has to be "strictly interpreted" in the manner contended for by Mr Lawrence.

[22] The modern principle to be applied is that expressed by Gibbs J, as he then was, in *Beckwith v R*.[7]

> "In determining the meaning of an enactment of the nature of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful, the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences (or, relevantly in the instant case, the potential application of a penal provision)."

[23] That said, the ordinary principles of statutory construction mandate that, as was said in the plurality judgment in *Project Blue Sky Inc v Australian Broadcasting Authority*.[8]

> "… the duty of the court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

[7] (1976) 135 CLR 569 at 576.
[8] (1998) 194 CLR 355 at 384.

[24] The so-called purposive approach to statutory interpretation which is enshrined in s 62A of the *Interpretation Act* is applicable to circumstances in which the intention of the legislature is, for whatever reason, doubtful.[9]

[25] It is important to note that the Act was directed to effecting cohesive amendments to the *Criminal Code*, the *Sentencing Act* and the *Parole of Prisoners Act* so as, *inter alia*, to permit the fixing of a non-parole period for the crime of murder. In setting out to achieve this it first inserted the present s 53A into the *Sentencing Act* to provide for a standard non-parole period of 20 years and a non-parole period of 25 years in respect of crimes of murder involving aggravated circumstances of the nature of those set out in subsection (3) of that section. These provisions were plainly applicable to offences committed after the coming into operation of the new section.

[26] Having done so, the Act then proceeded to erect transitional provisions designed, *inter alia*, to cater for the situation of prisoners currently serving a sentence of life imprisonment for murder who did not have the benefit of a non-parole period. It achieved that result by a deeming provision, which was later qualified by the 2008 amendment.

[27] Under the original transitional provisions the deemed non-parole period was 20 years in respect of a single conviction for murder. A discretion was vested in the Director to apply for fixation of a non-parole period of 25 years in relation to circumstances in which the crime committed had

[9] see *Repatriation Commission v Vietnam's Veterans Association of Australia NSW Branch Inc* (2000) 48 NSWLR 548 at 577-578.

involved the same circumstances of aggravation as referred to in s 53A of the *Sentencing Act*.

[28] The effect of the 2008 amendment was, relevantly, to make it mandatory upon the Director to apply for the fixation of a 25 year non-parole period where he formed the opinion that one or more of the prescribed circumstances of aggravation could be established in relation to the original offence of murder.

[29] It is to be noted that, in both s 53A of the *Sentencing Act* and s 19(3)(b) of the Act, the legislature has employed the phrase "*sexual offence*", a phrase that is employed and expressly defined in the *Sentencing Act*. Bearing in mind that the Act was intended to be read and applied in conjunction with the *Sentencing Act* and to achieve a parity of treatment of all offenders convicted and who had previously been convicted of the crime of murder, the inevitable conclusion to be drawn -- indeed the only logical conclusion -- is that such a phrase was employed deliberately and intended to bear the same connotation and attract the same definition in both statutes.

[30] In my opinion, the reasoning of Riley J in *Ahwan* plainly recognizes that situation and gives effect to it.[10] To hold otherwise would be to substantially render the legislation irrelevant and, in large measure, ineffective. Moreover, as was pointed out by the Director, such an approach necessarily underpinned the decision of the Court of Criminal Appeal in

[10] see *Ahwan* (2005) 194 FLR 1at 4

Ahwan[11] and was specifically embraced by Southwood J in his reasons in that case.[12]

[31] With respect, I am in entire agreement with the conclusion come to by Riley J and propose to adopt it in relation to the present application.

The evidence led at trial

[32] The factual circumstances revealed by the Crown evidence led at the trial of the respondent are conveniently summarised in the judgment of the Court of Criminal Appeal delivered on 23 December 1991 in relation to an appeal against his conviction.

[33] In the course of that judgment, the court pointed out that the Crown evidence as to cause of death given by Dr Cummings, a forensic pathologist, had not been disputed at trial. The summary of that evidence, as expressed in the judgment, was said by the Court either to not have been in dispute, or to have constituted that version of the facts most favourable to the respondent.

[34] Having made the point that it was evident that the deceased victim had been very severely beaten and having described the general lacerations, bruising and abrasions that had been noted by the pathologist, the Court embarked upon the following detailed summation of certain specific injuries in these terms:

[11] [2005] 17 NTLR 1.
[12] Ibid at 12.

> "There were multiple abrasions over the front of both lower thighs, the knees and both legs. Externally there was a ragged irregular laceration measuring some 8 x 3 centimetres on the right labia majora extending from the upper and outer aspect of the vagina upwards past the orifice of the ureter, ending in a subcutaneous track some 5.5 cm in length and up to 1 cm in diameter which extended upwards and outwards to the right, ending blindly in the soft tissue of the Mons. There was also a second tear measuring some 1.4 x 0.4 cm situated just below that tear, extending upwards and backwards for a distance of about 2.8 cm. There were a number of internal injuries, some of which were inflicted after death. One series of injuries not so inflicted was to the rectum, which had four internal injuries at the level of the junction of the anus and the rectal mucosa. On the left posterior aspect of the rectum there were two irregular roughly circular perforations. One of these measured 1.5 x 1.4 cm and extended into a track which passed upwards along the interior or front surface of the rectum and along the back of the vagina, some 11 cm above the entrance of the vagina. The second injury measured 2 x 1.5 cm and was associated with a blind track some 3 cm in length. There were tears and tracks associated with tears in the front wall of the vagina and the base of the bladder. The top of the track in the root of the mesentery was 26.5 cm in length from the opening of the vagina. There were also two tears in the front wall of the vagina, one situated 8 cm from the opening and the other situated 9 cm above the opening. The liver showed extensive lacerations involving the full thickness of the left lobe. There was a perforation about 1.2 cm in diameter in the base of the bladder which communicated with a 3 cm laceration in the front wall of the mid-line of the vagina. ……. Dr Cummings concluded that death was caused by shock and haemorrhage due to multiple injuries and that the injuries which were most liable to have contributed to the death were the injuries to the rectum, the vagina and to the bladder. The description of the internal injuries is consistent only with an instrument of some kind being employed. Death occurred before the attack had ceased, as a number of injuries occurred after death."

[35] Given the situation as so summarised by the Court of Criminal Appeal, which is plainly supported by the relevant trial transcript of evidence, the Director submits that the jury could not have properly convicted the respondent had it not been satisfied beyond reasonable doubt that he had used some type of implement to cause the internal injuries described.

[36] Moreover, he argued, the only and compelling inferences to arise from the evidence were that the injuries noted were caused during a course of conduct that amounted to a savage beating of the victim by the respondent and that the victim had not consented to the penetration of her anus or vagina by any implement or object. As he put it, any contrary finding would necessarily be inconsistent with the jury verdict.

[37] So it was that he invited me to find beyond reasonable doubt that the murder of the victim must have been the product of a course of conduct that, in part, constituted the offence of having sexual intercourse with the victim without her consent, in the sense of the extended meaning of the phrase "sexual intercourse" as defined by of the *Criminal Code*, in its present form. That offence, being an offence constituted by s 192 of the *Criminal Code*, falls within the category of a ‘sexual offence’ as prescribed by Schedule 3 to the *Sentencing Act*.

[38] Mr Lawrence disputed the propriety of such a conclusion.

[39] He submitted that, to arrive at this conclusion, the court had to be satisfied beyond reasonable doubt, on the evidence before it, that all of the elements of the crime of having sexual intercourse with another person without that person's consent. i.e. the Director had to discharge that onus of establishing that, on the occasion in question, the respondent in fact had sexual intercourse with the victim without her consent and also that he had positively intended to do so.

[40] He argued that the Director had failed to discharge the requisite onus in two respects.

[41] First, he said that, on the material before the court, it could not be satisfied beyond reasonable doubt of the existence of the requisite intention.

[42] Second, he contended that, on all the material, a reasonable hypothesis consistent with innocence of such an offence necessarily remained.

[43] Mr Lawrence took as his commencement point that, unlike the situation in *Bakewell*, the respondent had never been charged with any offence other than murder and that the alleged commission of any sexual offence had not been an issue at trial. The only issue as to intention had been whether, in doing what he may have done, the respondent had intended either to kill or cause grievous harm to the victim.

[44] He pointed out that the case against the respondent had been of a circumstantial nature, the Crown asserting that the jury should conclude that the respondent had repeatedly bashed and furiously assaulted his then partner.[13] (In his address to the jury the Crown prosecutor spoke of the force and ferocity used by the respondent in causing the injuries to the vagina and the rectum and the obvious aim of the respondent to hurt the victim very badly indeed.)[14]

[13] trial transcript 289.
[14] trial transcript 531-532.

[45] Mr Lawrence conceded that, in the course of his record of interview, the respondent had admitted to hitting the victim on the head with a rock about three times, delivering multiple punches to her, pulling her by the hair and kicking her. However, he pointed out that, when cross-examined by the Crown prosecutor, the respondent denied the proposition that he had shoved some object up the victim's arse (as it was put to him).[15]

[46] At trial,[16] Dr Cummings had expressed himself in these terms:

> "The injuries which are most liable to have contributed to this woman's death would be the injuries in the rectum, the injuries in the vagina and the injuries in the bladder. The tissues in these areas are very richly supplied with a large number of blood vessels, both arterial blood vessels and veins, and tears in these areas can result in very extensive bleeding".

He went on to comment that death from haemorrhage was a cumulative effect from the overall amount of blood loss.[17]

[47] I here pause to record that Dr Cummings was only briefly cross examined and he was certainly not challenged as to the above opinions.

[48] Mr Lawrence stressed that the evidence at trial indicated that the respondent was severely intoxicated at the time of assaulting the victim and that trial counsel had also pursued the point that there had been some evidence of the sighting of an altercation between another man and a woman, albeit that the

[15] trial transcript 448.
[16] trial transcript 347.
[17] trial transcript 348.

description of the woman concerned did not entirely match with that of the victim.

[49] He submitted that the defence had been conducted on the basis that the jury could not be satisfied beyond reasonable doubt that the respondent had caused all the injuries sustained by the victim and particularly those to the rectum and vagina.

[50] Unsurprisingly, Mr Lawrence relied heavily on the ruling of the trial judge (to which I have already referred) declining to permit the Crown prosecutor to rely on felony murder. I took him to contend that this strongly supported the thesis that the Crown had not established the existence of any intention to commit a relevant sexual offence.

[51] So it was that it was submitted that, on such a basis alone, the Director had failed to prove the existence of a circumstance of aggravation required to found the present application.

[52] In my opinion these arguments cannot be upheld.

[53] First, it seems to me that, given the unchallenged evidence of the pathologist, the obvious commencement point is that the Director has clearly proved beyond reasonable doubt that the primary cause of death of the victim was blood loss arising from the injuries to her rectum and vagina.

[54] Second, given the state of evidence at trial, the jury verdict was only compatible with the thesis that it accepted, beyond reasonable doubt, that

the injuries to the rectum and vagina of the victim had in fact been inflicted by the respondent and that he had inflicted those injuries by the deliberate insertion of an object in the locations described by the pathologist with considerable force and in the course of what has been described as frenzied multiple assaults on the victim without her consent. The jury verdict is necessarily inconsistent with any thesis that the injuries in question could have been inflicted by some person other than the respondent.

[55] Third, when the trial judge declined to permit a felony murder issue to be raised, commenting that whilst, in the circumstances of the course of a violent assault, the injuries inflicted indicated a frenzy or total lack of self-control, they did not indicate a distinct sexual connotation, he was necessarily directing his mind to the provisions of the *Criminal Code*, as it then stood.

[56] In my opinion, such a view needs to be reassessed in the context of the definition of "*sexual intercourse*" as it now stands in the Code. i.e. It, *inter alia*, connotes the insertion to any extent by a person of any part of an object into the vagina or anus of another person -- a definition that did not exist at the time of the respondent's offending conduct.

[57] Once it is accepted that the jury concluded that the respondent inflicted the fatal injuries on the victim by means of deliberate multiple thrusts of some object into her rectum and vagina, it follows that the inevitable conclusion beyond reasonable doubt must be that he not only had sexual intercourse

with her, in the extended sense of that phrase as employed in the Code, but also that he did so with the specific intention of having such intercourse without her consent. As a matter of logic that conclusion follows as night follows day.

[58] Whilst it is true that, as Mr Lawrence points out, the defence had no understanding of the assertion of any sexual offence at the time of trial, nor any opportunity of repelling that, there is difficulty in perceiving how such a situation has resulted in prejudice to the respondent in the circumstances to which I have referred.

[59] The facts that the relevant object was never discovered, that the victim may not have died for several hours and could also have been assaulted by another person do not gainsay such a conclusion. Nor is it weakened by the fact that the defence cross examination at trial was not pitched at the alleged commission of a sexual offence or that the accused denied being the perpetrator of the relevant injuries and/or may have been so intoxicated that he had no memory of doing so.

[60] At the end of the day, the verdict returned necessarily connoted that the jury was satisfied beyond reasonable doubt that it was the respondent who inflicted the relevant injuries on the victim, that he positively intended to do so and that his actions would have constituted an offence pursuant to s 192(3) of the Code, as it presently stands.

[61] Accordingly, I have concluded that the Director established, beyond reasonable doubt, that the act that caused the victim's death was part of a course of conduct that included conduct, before the victim's death, which would have constituted a sexual offence against the victim.

[62] It follows that, by reason of the provisions of s 18 of the Act, I was bound to revoke the existing statutory non-parole period of 20 years and fix a non-parole period of 25 years in lieu of it, to run from the same date. Orders were made accordingly.

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