

[SUPREME COURT (Court of Criminal Appeals)]

R v JARRETT

[2002] SASC 289

Nyland, Martin and Besanko JJ

11 December 2001, 9 September 2002

*Criminal Law — Appeal and new trial and inquiry after conviction — Pardon, commutation of penalty, reference on petition for pardon and inquiry after conviction murder — Sentencing — Appeal constituted by Attorney-General's reference following a petition for mercy — Reconsideration of non-parole period — Applicable standards.*

The petitioner was convicted by a jury of the murder of an elderly lady when he was 21 years old. He was sentenced to a mandatory life sentence. The sentencing judge fixed a non-parole period of 28 years and six months. On appeal by the Attorney-General, the Court of Criminal Appeal increased the non-parole period to 39 years, concluding that the crime fell within the worst category of murder. Both the sentencing judge and the Court of Criminal Appeal sentenced the petitioner before truth in sentencing laws came into force in August 1994, so the non-parole period was fixed in light of their knowledge that the petitioner would be entitled to automatic remissions of up to one-third on sentence under the legislation as it stood at the time and taking into account the transitional provisions in the truth in sentencing legislation. Those transitional provisions would have reduced the non-parole period fixed by the sentencing judge from 28 years and six months to 19 years and the non-parole period set by the Court of Criminal Appeal from 39 years to 26 years. Having failed in an application for special leave to the High Court, the petitioner then submitted a petition for mercy to the Governor. The Attorney-General, with the concurrence of the Director of Public Prosecutions, referred the petition to the Full Court, such that it constituted a fresh appeal to that Court pursuant to s 369(a) of the *Criminal Law Consolidation Act 1935* (SA).

**Held:** (1) The Court of Criminal Appeal had erred in considering the relevance of the petitioner's youth when fixing the petitioner's non-parole period and that therefore the non-parole period should be considered afresh. [5]

*Inge v The Queen* (1999) 199 CLR 295; *R v Murphy* (2002) 83 SASR 574, considered.

(2) An appeal court should be reluctant to increase the non-parole period fixed by a sentencing judge unless the court is convinced that that period was manifestly inadequate. [6]

*R v Murphy* (2002) 83 SASR 574, considered.

(3) Applying the standards that applied at the time, the appeal constituted by reference should be allowed and a non-parole period of 24 years, with a deduction of 18 months for time already held in custody at the time of original sentencing, should be substituted for the non-parole period of 28 years and six months fixed by the sentencing judge. [16]

(4) If the current standards applied, the non-parole period would be longer. [14]

APPEAL CONSTITUTED BY REFERENCE OF A PETITION FOR MERCY

G F Barrett QC and G P Mead, for the petitioner.



9 September 2002

1 NYLAND J. I agree that the appeal constituted by reference should be allowed for the reasons expressed by Martin J. I also agree with the non-parole period which he has proposed.

2 MARTIN J. The petitioner was convicted by a jury of the murder of an elderly lady. The crime was committed on 4 January 1992. The mandatory life sentence of life imprisonment was imposed and, on 3 June 1994, the learned sentencing judge fixed a non-parole period of 28 years and six months to commence on 3 June 1994. On 29 July 1994 the Court of Criminal Appeal granted leave to the Attorney-General to appeal against the non-parole period and allowed the appeal. A new non-parole period of 39 years was imposed. On 28 August 1995 the High Court refused an application for special leave to appeal against the decision of the Court of Criminal Appeal.

3 In August 2000 the petitioner submitted a petition to the Governor praying that the Governor should exercise Her Majesty's prerogative of mercy and remit the petitioner's sentence or refer the matter to the Full Court for reconsideration of the petitioner's non-parole period. Pursuant to s 369(a) of the *Criminal Law Consolidation Act 1935* (SA) the Attorney-General, with the concurrence of the Director of Public Prosecutions, referred the whole case to the Full Court. The duty of the court is to hear and determine the case "as in the case of an appeal by a person convicted". Thus the reference constitutes an appeal to this Court.

4 The circumstances in which this Court is now required to further consider the petitioner's non-parole period are the same as those involved in *R v Murphy* (2002) 83 SASR 574. The appeals were heard by the same court. Judgment in this matter has been delayed because the appeal in *Murphy* was delayed to facilitate the tendering of additional evidence.

5 In granting leave and allowing the Crown appeal with respect to the petitioner's non-parole period, in conjunction with other factors the Court of Criminal Appeal applied a principle as to the relevance of the petitioner's youth which subsequently met with the disapproval of the High Court in *Inge v The Queen* (1999) 199 CLR 295. As in *Murphy*, the precise impact of the error in fixing the petitioner's non-parole period is not clear. However, significant error by the Court of Criminal Appeal having been demonstrated, in my opinion this Court should now consider the non-parole period afresh.

6 For the reasons expressed in *Murphy*, although this Court is not constrained by the usual restrictions applicable on appeal, as a matter of fairness to the petitioner this Court should be reluctant to impose a non-parole period that, in its effect, is longer than the effective period fixed by the sentencing judge unless the court is convinced that the period fixed by the sentencing judge was manifestly inadequate.

7 The sentencing judge and the Court of Criminal Appeal regarded periods of 30 years and 40 years and six months respectively as appropriate. The petitioner had been in custody for a period of 18 months before the imposition of the non-parole period. That time in custody was deducted from what would

otherwise have been the non-parole periods fixed by the sentencing judge and the Court of Criminal Appeal.

The sentencing judge described the facts as follows:

"She was an elderly lady, aged 75 years, who lived alone in her house at Sarah Court, Pennington. You had met her during the previous year when you cleaned the roof of her house. Mrs Pitt was attacked in a most vicious and brutal way. She was forced to the ground, raped, and stabbed with a knife. Also a hose nozzle was inserted in her vagina while she was alive. Part of a towel was placed in her mouth. She must have suffered considerable pain and humiliation and she died of a heart attack.

Understandably, there is considerable community outrage at this appalling crime, which I regard as at the upper end of the scale of seriousness. You have consistently denied any involvement in the murder and so all of the circumstances of Mrs Pitt's death may never be known.

The case against you was very strong indeed, if not overwhelming. Nevertheless, you persisted in your denial, with the consequence that no credit may be given to you in the sentencing process on account of your plea or because of co-operation with the authorities.

It is impossible to know why you committed such a serious crime in such an appalling manner. You took a television set and some money, but that has not explained why you brutally attacked and raped Mrs Pitt.

Nothing has been put before me by way of mitigation of your crime."

The petitioner was aged 21 years at the time of the murder. He had previous convictions for matters which were not particularly serious. Although the petitioner experienced an unsettled period during his adolescence as a consequence of his parents separating, there was nothing in the petitioner's background which could be advanced as containing significant weight in mitigation.

The circumstances of the petitioner's crime were appalling. All judges of the Court of Criminal Appeal expressed the view that the crime was properly classified as falling within the category of the worst type of murder. I agree with their observations. There was no hint of any contrition or remorse and nothing to suggest that the petitioner had prospects of successful rehabilitation.

The fixing of the non-parole period on 3 June 1994 was attended by the uncertainty of a change in the relevant legislation. At the time of sentencing, the law provided that the non-parole period was reduced by remissions of up to one-third for good behaviour and that a prisoner was to be released on parole at the end of the non-parole period. The judge was aware of legislation, not then in force, which abolished remissions and provided that release on parole after the expiry of the non-parole period was to be at the discretion of the Parole Board. The sentencing judge observed that despite the impending changes, the petitioner had asked him to fix a non-parole period on the basis of the existing law and not on the basis of the law as it was likely to be. His Honour acceded to that request. He bore in mind that the petitioner may not have been entitled to automatic release at the end of the non-parole period and that the period which he fixed was likely to be reduced by operation of the transitional provisions. Those provisions would have reduced the non-parole period to 19 years.



- 1 NYLAND J. I agree that the appeal constituted by reference should be allowed for the reasons expressed by Martin J. I also agree with the non-parole period which he has proposed.
- 2 MARTIN J. The petitioner was convicted by a jury of the murder of an elderly lady. The crime was committed on 4 January 1992. The mandatory life sentence of life imprisonment was imposed and, on 3 June 1994, the learned sentencing judge fixed a non-parole period of 28 years and six months to commence on 3 June 1994. On 29 July 1994 the Court of Criminal Appeal granted leave to the Attorney-General to appeal against the non-parole period and allowed the appeal. A new non-parole period of 39 years was imposed. On 28 August 1995 the High Court refused an application for special leave to appeal against the decision of the Court of Criminal Appeal.
- 3 In August 2000 the petitioner submitted a petition to the Governor praying that the Governor should exercise Her Majesty's prerogative of mercy and remit the petitioner's sentence or refer the matter to the Full Court for reconsideration of the petitioner's non-parole period. Pursuant to s 369(a) of the *Criminal Law Consolidation Act 1935* (SA) the Attorney-General, with the concurrence of the Director of Public Prosecutions, referred the whole case to the Full Court. The duty of the court is to hear and determine the case "as in the case of an appeal by a person convicted". Thus the reference constitutes an appeal to this Court.
- 4 The circumstances in which this Court is now required to further consider the petitioner's non-parole period are the same as those involved in *R v Murphy* (2002) 83 SASR 574. The appeals were heard by the same court. Judgment in this matter has been delayed because the appeal in *Murphy* was delayed to facilitate the tendering of additional evidence.
- 5 In granting leave and allowing the Crown appeal with respect to the petitioner's non-parole period, in conjunction with other factors the Court of Criminal Appeal applied a principle as to the relevance of the petitioner's youth which subsequently met with the disapproval of the High Court in *Inge v The Queen* (1999) 199 CLR 295. As in *Murphy*, the precise impact of the error in fixing the petitioner's non-parole period is not clear. However, significant error by the Court of Criminal Appeal having been demonstrated, in my opinion this Court should now consider the non-parole period afresh.
- 6 For the reasons expressed in *Murphy*, although this Court is not constrained by the usual restrictions applicable on appeal, as a matter of fairness to the petitioner this Court should be reluctant to impose a non-parole period that, in its effect, is longer than the effective period fixed by the sentencing judge unless the court is convinced that the period fixed by the sentencing judge was manifestly inadequate.
- 7 The sentencing judge and the Court of Criminal Appeal regarded periods of 30 years and 40 years and six months respectively as appropriate. The petitioner had been in custody for a period of 18 months before the imposition of the non-parole period. That time in custody was deducted from what would

The sentencing judge described the facts as follows:

"She was an elderly lady, aged 75 years, who lived alone in her house at Sarah Court, Pennington. You had met her during the previous year when you cleaned the roof of her house. Mrs Pitt was attacked in a most vicious and brutal way. She was forced to the ground, raped, and stabbed with a knife. Also a hose nozzle was inserted in her vagina while she was alive. Part of a towel was placed in her mouth. She must have suffered considerable pain and humiliation and she died of a heart attack.

Understandably, there is considerable community outrage at this appalling crime, which I regard as at the upper end of the scale of seriousness. You have consistently denied any involvement in the murder and so all of the circumstances of Mrs Pitt's death may never be known.

The case against you was very strong indeed, if not overwhelming. Nevertheless, you persisted in your denial, with the consequence that no credit may be given to you in the sentencing process on account of your plea or because of co-operation with the authorities.

...  
It is impossible to know why you committed such a serious crime in such an appalling manner. You took a television set and some money, but that has not explained why you brutally attacked and raped Mrs Pitt. Nothing has been put before me by way of mitigation of your crime."

The petitioner was aged 21 years at the time of the murder. He had previous convictions for matters which were not particularly serious. Although the petitioner experienced an unsettled period during his adolescence as a consequence of his parents separating, there was nothing in the petitioner's background which could be advanced as containing significant weight in mitigation.

The circumstances of the petitioner's crime were appalling. All judges of the Court of Criminal Appeal expressed the view that the crime was properly classified as falling within the category of the worst type of murder. I agree with their observations. There was no hint of any contrition or remorse and nothing to suggest that the petitioner had prospects of successful rehabilitation.

The fixing of the non-parole period on 3 June 1994 was attended by the uncertainty of a change in the relevant legislation. At the time of sentencing, the law provided that the non-parole period was reduced by remissions of up to one-third for good behaviour and that a prisoner was to be released on parole at the end of the non-parole period. The judge was aware of legislation, not then in force, which abolished remissions and provided that release on parole after the expiry of the non-parole period was to be at the discretion of the Parole Board. The sentencing judge observed that despite the impending changes, the petitioner had asked him to fix a non-parole period on the basis of the existing law and not on the basis of the law as it was likely to be. His Honour acceded to that request. He bore in mind that the petitioner may not have been entitled to automatic release at the end of the non-parole period and that the period which he fixed was likely to be reduced by operation of the transitional provisions. Those provisions would have reduced the non-parole period to 19 years.



12 The Court of Criminal Appeal also imposed the new non-parole period of 39 years at a time when the new legislation was not in force. However, the court was aware that the petitioner would still be entitled to remissions. The new legislation came into operation in August 1994. The transitional provisions reduced the new non-parole period to 26 years.

13 In essence, while acknowledging the gravity of the petitioner's criminal conduct, counsel submitted that under the current regime a non-parole period in the order of 20 years would not be manifestly inadequate. Counsel referred to the non-parole period of 36 years fixed by the Court of Criminal Appeal in *R v Von Einem* (1985) 38 SASR 207 for a crime of murder described as standing "at the top of the scale of categories of murder" and being of "unique seriousness". That was fixed in 1985 when remissions applied. It was subsequently reduced by the transitional provisions to 24 years.

14 This Court (must apply) the sentencing standards (applicable in 1992.) This creates a difficulty because of the change in the sentencing regime that occurred in August 1994 when truth in sentencing legislation came into operation. However, applying those standards as best they can be applied in the circumstances, I consider a non-parole period of 24 years would be appropriate. If today's standards were applied, the non-parole period would be longer. From that period 18 months must be deducted.

15 In arriving at a non-parole period of 24 years, I have borne in mind the period of 23 years fixed in *Murphy* for two crimes of murder. However, this petitioner's crime involved an elderly woman living alone who was subjected to appalling acts of depravity. In addition, the length of *Murphy*'s non-parole period was influenced by his mental illness and the fact that incarceration will bear more harshly upon him than upon a prisoner who does not suffer from a mental illness.

16 For these reasons, in my opinion the appeal constituted by reference should be allowed and the order of the Court of Criminal Appeal set aside. I would fix a non-parole period of 22 years and six months to date from 3 June 1994.

17 BESANKO J. I agree with the reasons of Martin J and with the orders which he proposes.

Solicitor for the petitioner: *G P Mead*.

Solicitor for the respondent: Director of Public Prosecutions (SA).

BEN ALLGROVE