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SUPREME COURT OF SOUTH AUSTRALIA

R v ROBINSON & BARRETT

King CJ, Walters and White JJ

16, 25 October 1979 — (1979) 22 SASR 367

CRIMINAL LAW – SENTENCE – IMPRISONMENT – FIXATION OF NON-PAROLE PERIOD: *PRISONS ACT*, 1936-1976 (NO. 2305 OF 1936 – NO. 115 OF 1976), S42i.

In general a non-parole period should not be fixed of such a duration that, allowing for normal good conduct remissions, little or no scope would be left for the exercise of the Parole Board's discretion under the *Prisons Act* 1936-1976. If, however, a judge is satisfied that there are special circumstances associated with the offence or the offender, which make it improper to allow any scope for parole, he is entitled to give effect to that view and to fix a non-parole period equal to the length of the sentence less normal good conduct remissions.

KING CJ: (With whom Walters and White JJ agreed) The appellants were found guilty on their own confessions in the Supreme Court of the crime of armed robbery and the crime of shopbreaking and larceny, which crimes they committed jointly. They were each sentenced to imprisonment for eight years for armed robbery and two years for shop-breaking, the sentences to be served concurrently. The sentencing Judge fixed a non-parole period in the case of each appellant of five years. The ground of the appeal in each case is that the non-parole period is excessive. Robinson has a long record of serious crime, including a conviction for armed robbery in New South Wales which resulted in 1972 in a sentence of twenty years' imprisonment.

We were told, and the learned sentencing Judge was told, that he faces a long period of imprisonment in New South Wales when the present sentence expires. Barrett also has a bad record, including, a sentence of six years for robbery in New South Wales in 1973. He was released on parole, but broke the conditions of the parole by stealing a motor vehicle whereupon the parole order was revoked.

The statutory provisions as to parole are contained in the *Prisons Act* 1936, as amended. They were inserted into the Act in 1969. Section 42i provides:

> "42i. Where a person is convicted of an offence and sentenced to be imprisoned, the court may, if it thinks it desirable to do so, fix a period during which the prisoner shall not be released upon parole."

Under these provisions there is role both for the sentencing judge and the Parole Board. Obviously if sentencing Judges were to exercise their power to fix non-parole periods in such a way that no scope was left for the work of the Parole Board and were to do this as matter of course, the objects of the legislation would be nullified. As the result of the recent legislative innovation, therefore, the courts are faced with the task, where imprisonment must be imposed, not just of fixing a proper term, but of considering and resolving the question whether a non-parole period should or should not be imposed, and of formulating a duly proportioned and properly balanced sentence that is appropriate to meet all the circumstances of the case. In arriving at such a sentence the judge must bear steadily in mind the length of any non-parole period he is contemplating, and its bearing on the important work of the Parole Board and on the operation and effect of the current regulations governing remissions that are capable of being, and ordinarily will be earned by a prisoner who is of good behaviour during his detention. As matters now stand the nearer the non-parole period approaches two-thirds of the sentence actually imposed, the less scope there is for the Parole Board to exercise its functions, and to the extent that such a period exceeds that two-thirds it not only removes the normal power of the Parole Board to intervene, but also deprives the prisoner of the chance of earning the normal remissions that he is encouraged to earn by responding favourably to treatment.

He may believe that prospects of the offender's reformation may be enhanced by a stiff period of detention, although in this regard the Judge would doubtless have in mind the point made by Bray CJ in *R v Collingridge* (1976) 16 SASR 117 at p126, that the Parole Board is in a better position than the Court to estimate the effect of imprisonment on the offender and the extent to which release under supervision will promote his prospects of rehabilitation.

It is clear that the legislature intends that in the general run of cases there shall be proper scope for the exercise of the discretion of the Parole Board. It follows, I think, that in the general run of cases, the fixing of a non-parole period which, allowing for normal good conduct remissions, leaves little or no scope for the Parole Board's discretion, would be wrong. If, however, a Judge is satisfied that there are special circumstances associated with the offence or the offender, which make it improper to allow any scope for parole, he is entitled, in my opinion, to give effect to that view and to fix a non-parole period equal to the length of the sentence less normal good conduct remissions.

It is contrary to principle for the courts to endeavour to counteract the general application of legislative policy. I think that there are ample grounds for the virtual exclusion of parole in these two cases. The crime of armed robbery which the appellants committed was very serious and the judge was justified in attaching importance to punitive and deterrent factors. He was justified, moreover, having regard to the appellants' criminal records in considering that parole could play no realistic part in the sentence. I see no error in principle in the Judge's decision to fix a non-parole period which left only slight scope for parole, nor do I think that the non-parole period is excessive. The learned Judge would, in my opinion, have been fully justified in excluding parole altogether by fixing a non-parole period of two-thirds of the sentence. In my opinion, the appeals should be dismissed.
