



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B11/2024

B11/2024

BETWEEN:

RODNEY MICHAEL CHERRY
Plaintiff

and

STATE OF QUEENSLAND
Defendant

DEFENDANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet publication

1. This outline of oral submissions is in a form suitable for publication on the Internet.

Part II: Propositions to be advanced in oral argument

A The plaintiff's minor premise is wrong

The legal operation and effect of the non-parole period

2. The order made by Dutney J in 2002 sentenced the plaintiff to life imprisonment and set a period during which he was not to be released on parole.
 - Verdict and judgment record [**SCB 1, Tab 4, 32**]
 - *Criminal Code*, s 305 [**B2, Tab 8, 293-4**].
3. The order did no more than that. It said nothing about whether the plaintiff would ever be released on parole. Rather, Dutney J's order provides a 'factum' by reference to which the statutory scheme for parole operates: **Defendant's submissions ('DS')** [**18**]-**[28]**.
4. It was not an element of Dutney J's order that the parole board would have power to consider granting the plaintiff parole: cf **Plaintiff's submissions ('PS')** [**38**]-**[40]**. That power derived from statute: *Corrective Services Act 2000*, ss 134-6 [**B2, Tab 6, 232-4**]; *Corrective Services Act 2006*, s 180, s 193 [**A1, Tab 4, 103-4, 116-7**]. Likewise, it was not part of Dutney J's order that the plaintiff have the ability to *apply* for parole.
5. Nothing in the statutory scheme displaced the ordinary principles concerning the operation and effect of judicial orders setting non-parole periods, established by this Court in a succession of cases.
 - *Crump v New South Wales* (2012) 247 CLR 1, 19 [35]-[36] (French CJ), 26-7 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) [**C3, Tab 18, 624, 631-632**].
 - *Knight v Victoria* (2017) 261 CLR 306, 323 [27]-[28] (The Court) [**C4, Tab 28, 1268**].
 - *Minogue v Victoria* (2019) 268 CLR 1, 3-4 (submissions of Horan QC), 12 [3], 15 [13], 16-7 [15]-[17] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) [**C5, Tab 34, 1515-1516, 1524, 1528-1529**].
6. Those cases did not turn on the ability of the plaintiff, in each case, to make a futile application for parole: cf **PS** [**38**]-**[41]**, **Plaintiff's amended reply ('PR')** [**16**]. They turn on the principle that the only legal effect of an order setting a non-parole period is to set a period within which a prisoner may not be released on parole.

7. A corollary of that principle is that changes to the conditions on which parole is granted following expiry of a non-parole period do not ‘alter’ a sentence either legally or practically: **DS [32]**, cf **PR [10]**.
 - *Crump* (2012) 247 CLR 1, 19 [36] (French CJ), 20-1 [41], 26-7 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) [**C3, Tab 18, 624-626, 631-632**].
 - *Minogue* (2019) 268 CLR 1, 20 [30]-[32] (Gageler J) [**C5, Tab 34, 1532-1533**]

No cooperation declarations – s 175L

8. An executive decision not to consider an application for parole until a prisoner cooperates does not make a prisoner ineligible for parole: **DS [27]**. No cooperation declarations are not more restrictive than the schemes in *Crump*, *Knight* and *Minogue*.
9. The plaintiff’s reliance on Edelman J in *Minogue* is misplaced: **DS [32]-[34]**, cf **PS [36]-[37]**. Among other things, the denial of parole, which is a privilege, does not make a sentence ‘more punitive or burdensome to liberty’: *Knight* (2017) 261 CLR 306, 323-234 [29] (the Court) [**C4, Tab 28, 1268-1269**], *Minogue* (2019) 268 CLR 1, 18 [21] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) [**C5, Tab 34, 1530**].
10. In any event, the object of the no-body, no-parole scheme is to recover for the victim’s family all of the victim’s body or remains: **DS [41]-[49]**. This object is consistent with the ordinary purposes of granting parole (to reward good behaviour): **DS [48]**.
 - *Armitage v Parole Board Queensland* [2023] QCA 239, [34], [43] (Flanagan JA, Mullins P and Boddice JA agreeing) [**D6, Tab 38, 1657, 1659**]; and
 - ss 175B (definitions ‘commissioner’s report’ and ‘cooperation’), 175C, s 175L, 175P(4), [**A1, Tab 4, 87, 88, 94, 97**].
11. The possibility that in some circumstances a prisoner may face a dilemma in deciding whether to cooperate does not make the purpose of a no cooperation declaration punitive: cf **PR [18]**.
12. The submission at **PR [19]** is irrelevant: a system of parole is not a means of addressing miscarriages of justice: **DS [49]**.

Restricted prisoner declarations – s 175E

13. A prisoner in respect of whom a restricted prisoner declaration is made may apply for exceptional circumstances parole: s 176A. *Crump, Knight, and Minoque* are therefore indistinguishable.

14. The fact that, in a particular case, the president might choose to give weight to the seriousness of the prisoner’s offence does not make the statutory scheme ‘punitive’: cf **PS [45], [47]**. The power is to be exercised ‘in the public interest’.

15. The object of the statutory scheme is not punitive; it is to limit the re-traumatisation of victims’ families and protect the community: **DS [47]-[59]**; *Neyens v President, Parole Board of Queensland* [2024] QCA 208, [8], [25(F)], [30] (Bond JA, Boddice JA and Callaghan J agreeing) [**D6, Tab 43, 1785**]; *Neyens v President, Parole Board of Queensland* [2023] QSC 296, [17]-[19] (Bowskill CJ) [**D6, Tab 42, 1766-1767**].

B The plaintiff’s major premise is unnecessary to consider

16. The Court should not consider the plaintiff’s major premise (**PS [30]**) unless his minor premise is established.

17. If it is to be considered, the major premise cannot be accepted. The example of the prerogative of mercy demonstrates that the plaintiff’s major premise must be substantially qualified or is wrong: **DS [9], AG(NT) [13]-[23]**; cf **PR [5]**.

18. There are other circumstances in which it is permissible to alter a sentence other than on appeal: *Baker v The Queen* (2004) 223 CLR 513, 529 [33] (McHugh, Gummow, Hayne and Heydon JJ) [**C3, Tab 15, 469**].

C If no cooperation declarations are invalid, previous scheme enlivens

19. The plaintiff accepts that if s 175L of the *Corrective Services Act 2006* is invalid, the previous ‘no body no parole’ scheme will revive: **PS [49]**; see further **DS [61]-[62]**; *Roach v Electoral Commissioner* (2007) 233 CLR 162, 202-3 [97] (Gummow, Kirby and Crennan JJ) [**C5, Tab 36, 1592-3**].

20. So much demonstrates the extent to which the plaintiff’s case rests on matters of form rather than substance.

Dated: 4 February 2025

**Gim Del Villar KC SG****Felicity Nagorcka****Gabriel Perry**