HIGH COURT OF AUSTRALIA

12 June 2024

THE KING v HATAHET
[2024] HCA 23

Today, the High Court unanimously allowed an appeal against sentence from a judgment of the Court of Criminal Appeal of New South Wales. The appeal concerned whether the sentencing judge erred by not taking into account the likelihood (if any) of release on parole, by reason of s 19ALB of the *Crimes Act 1914* (Cth), in fixing a sentence of imprisonment. Section 19ALB provides that the Attorney-General must not make a parole order in relation to, relevantly, a person involved in, or convicted of, certain terrorist-related activities unless satisfied that exceptional circumstances exist to justify making a parole order.

The respondent pleaded guilty to, and was convicted of, the offence under s 6(1)(b) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) of engaging in hostile activity in a foreign State. In the District Court of New South Wales, the respondent was sentenced to imprisonment for five years with a non-parole period of three years. In sentencing the respondent, the sentencing judge took into account several factors under s 16A of the *Crimes Act* but did not take into consideration the likelihood (if any) of the respondent being released upon the expiration of his non-parole period. Parole was refused by the Attorney-General pursuant to s 19ALB of the *Crimes Act*.

In allowing an appeal against the sentence, the Court of Criminal Appeal (Basten A-JA, Davies and Cavanagh JJ agreeing) found that the likely application of s 19ALB to an offender was a relevant consideration when sentencing and therefore the sentencing judge erred in not taking this into account. The expectation, and reality, that parole would be refused, together with the respondent's previous more burdensome incarceration, meant that the respondent continued to suffer more onerous conditions of imprisonment, and this warranted a reduction in sentence of one year. He was resentenced to imprisonment for four years with a non-parole period of three years.

The issues before the High Court were first, whether the Court of Criminal Appeal erred in concluding that the sentencing judge should have considered the application of s 19ALB when sentencing the respondent, and second whether the expectation that parole would be refused due to an application of s 19ALB warranted imposing a lesser sentence. The plurality held that the Court of Criminal Appeal erred in taking into account the likelihood that parole would be refused under s 19AB. The power to grant parole is vested in the executive, not the judiciary and it is too speculative for a judge to make predictions about what might happen at the expiration of a non-parole period. The prospects of securing release on parole are not relevant to the judicial task of sentencing. To decide otherwise would lead to outcomes inconsistent with a core object of sentencing; namely, the need to ensure adequate punishment of an offender. It would also undermine the legislative purpose of s 19ALB**.** The Court allowed the appeal and the reduction in sentence was set aside.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.

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