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CASE SUMMARY

Muldrock v The Queen

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Case Citations: *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120; 212 A Crim R 254; 85 ALJR 1154; 281 ALR 652; [2011] ALMD 5413; [2011] ALMD 5433; [2011] ALMD 5434; [2011] ALMD 5438; [2011] ALMD 5439

Name of the Appellant: Mr. Derek Muldrock

Name of Respondent: The Queen

State: NSW

Court: High Court

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1 FACTS

Background

Mr. Muldrock was 30 years of age at the time of the offence and he is mentally disabled. His IQ is 62 which positions his intellectual abilities lower than 99% of the population and his language ability is at the level of a 5-and-a-half-year-old. At school, he was placed in special classes. He had a driver's license and had been previously been employed, however, he had trouble maintaining employment.

As a child, Mr. Muldrock was sexually assaulted by a man. A psychologist reported that this event caused him to develop an attraction to young boys. Mr. Muldrock was previously convicted of a similar offence to the offence in this case. A psychologist reported that Mr. Muldrock's condition meant that he had limited ability to control his impulses and actions. After his first sexual offence, a psychiatrist prescribed him a testosterone suppressant which lowers sex drive. Later, he went off the drug.

Events Leading Up to the Offence

Mr. Muldrock befriended a 9-year-old boy. The boy's bike was broken and Mr. Muldrock fixed it. He then offered to go for test a ride with the boy and the boy's mother agreed. "When [Mr. Muldrock] and the boy were alone together, [he] asked the boy if he wanted to go to the lake to see the animals. They cycled a distance of one or two kilometres to the lake. They decided to go swimming. The boy had no swimming costume or underwear and he went into the lake naked. [Mr. Muldrock]

joined him, wearing his underpants or Speedos."

The Offence

"He repeatedly tried to touch the boy's penis and bottom, but each time the boy pushed him away. Eventually he succeeded in touching the boy's bottom and the area around his penis." [33]

"The boy got out of the water and [Mr. Muldrock] pushed him to the ground, pinning him down by kneeling on his legs. He sucked the boy's penis twice for about 10 seconds. The boy kicked him in the shoulder or chest and [Mr. Muldrock] fell back. The boy got dressed and rode off. [Mr. Muldrock] yelled out, "Come back, you wussy. You're just too scared to come back". The boy rode to a nearby house. He was in a very distressed state and he told the occupant, Mr Fuzzard, that a man had touched his private parts. Mr Fuzzard drove him home, by which stage the boy was "sobbing hysterically and shaking". A short time later, the mother answered a knock at the door and saw [Mr. Muldrock] standing there, holding a bike pump. She closed the door on him and contacted the police." [34]

Mr. Muldrock's Response

Mr. Muldrock told the police that the boy had falsely accused him and that he had been 'set-up'. Nevertheless, Mr. Muldrock pleaded guilty in court. He was convicted for sexual intercourse with a child under the age of 10 years old.

2 PRELIMINARY MATTER

In response to *Muldrock v The Queen* [2011] HCA 39, the *Crimes (Sentencing Procedure) Act 1999* (NSW) was amended by the *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013*. This means, the legislation today is different to the legislation which the court used at the time. The previous legislation was the following:

Section 54A(2):

> For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division.

Section 54B:

> (2) When determining the sentence for the offence, the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.
>
> (3) The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A.
>
> (4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account.

Section 21A:

> In determining the appropriate sentence for an offence, the court is to take into account the following matters:
>
> (a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,
>
> (b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,

(c) any other objective or subjective factor that affects the relative seriousness of the offence. The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law."

3 RATIO DECIDENDI

The following is a compilation of principles and the case extracts which form the principle. Note that this judgment was unanimous.

A *Principles in Relation to Div 1A Offences*

Principle: *R v Way* (2004) 60 NSWLR 168 was wrongly decided and is overruled. When sentencing an offender for Div 1A offences, the court is not required to a take two staged approach.

The court unanimously determined that *R v Way* (2004) 60 NSWLR 168 was wrongly decided. At [25]:

> It follows from that acceptance that Way was wrongly decided ... it was an error to characterise s 54B(2) as framed in mandatory terms. The court is not required when sentencing for a Div 1A offence to commence by asking whether there are reasons for not imposing the standard non-parole period nor to proceed to an assessment of whether the offence is within the midrange of objective seriousness.

And at [26]:

> It is a mistake to give primary, let alone determinative, significance to so much of s 54B(2) as appears before the word "unless".

Lastly at [32]:

> The Court of Criminal Appeal erred by treating the provision of the standard non-parole period as having determinative significance in sentencing the appellant.

The legislation at issue was section 54B(2) which stated at the time:

> When determining the sentence for the offence, the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.

The court held that Div 1A offences do not require a two-stage approach when sentencing. The two-stage approach was 1) assess whether the offence falls in the middle range of objective seriousness, then 2) if the offence does, determine whether the offender requires a longer or shorter standard non-parole period.

At [28]:

> Nothing in the amendments introduced by the Amending Act requires or permits the court to engage in a two-stage approach to the sentencing of offenders for Div 1A offences, commencing with an assessment of whether the offence falls within the middle range of objective seriousness by comparison with an hypothesised offence answering that description and, in the event that it does, by inquiring if there are matters justifying a longer or shorter period.

Principle: When sentencing the offender for Div 1A offences, section 54B(2) read with sections 54B(3) and 21A, requires the court to identify all the factors that are relevant to the sentence, discuss their significance and then make a value judgment as to what is the appropriate sentence given all the factors of the case.

At [26] – [27]:

> Section 54B applies whenever a court imposes a sentence of imprisonment for a Div 1A offence. The provision must be read as a whole. It is a mistake to give primary, let alone determinative, significance to so much of s 54B(2) as appears before the word "unless". Section 54B(2), read with ss 54B(3) and 21A, requires an approach to sentencing for Div 1A offences that is consistent with the approach to sentencing described by McHugh J in *Markarian v The Queen*:

> "[T]he judge identifies *all* the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case." (emphasis added)

Section 54B(2) and s 54B(3) oblige the court to take into account the full range of factors in determining the appropriate sentence for the offence.

Principle: In relation to section 54A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the objective seriousness of an offence is to be determined by the nature of the offending. Objective seriousness is not to be assessed by reference to matters personal to a particular offender or class of offenders.

At [27]:

> Meaningful content cannot be given to the concept by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.

Principle: Section 54B(4) does not require the court to "attribute particular mathematical values to matters regarded as significant to the formation of a sentence that differs from the standard non-parole period, or the need to classify the objective seriousness of the offending."

At [29]:

> The reference in s 54B(4) to "mak[ing] a record of its reasons for increasing or reducing the standard non-parole period" is not to be understood as suggesting either the need to attribute particular mathematical values to matters regarded as significant to the formation of a sentence that differs from the standard non-parole period, or the need to classify the objective seriousness of the offending.

At the time, section 54B(4) stated:

> (4) The court must make a record of its reasons for increasing or reducing the standard non-

> parole period. The court must identify in the record of its reasons each factor that it took into account.

Principe: For all Div 1A sentences, whether the offence falls within the low, middle, or high range, section 54B(4) requires the court "identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed."

At [29]:

> The reference in s 54B(4) to "mak[ing] a record of its reasons for increasing or reducing the standard non-parole period" … does require the judge to identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed. The obligation applies in sentencing for all Div 1A offences regardless of whether the offender has been convicted after trial or whether the offence might be characterised as falling in the low, middle or high range of objective seriousness for such offences.

At the time, section 54B(4) stated:

> (4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account.

B *Principles in Relation to Section 3A*

Principle: Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) does not establish a ranking of priorities of the purposes of punishment.

At [20]:

> It should also be noted that the introduction of standard non-parole periods was accompanied by the incorporation of a statutory statement of the purposes of sentencing. The purposes there stated are the familiar, overlapping and, at times, conflicting, purposes of criminal punishment

> under the common law. There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in *Veen v The Queen* [No 2] in applying them.

Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) stated at the time of judgment:

> The purposes for which a court may impose a sentence on an offender are as follows:
>
> (a) to ensure that the offender is adequately punished for the offence,
>
> (b) to prevent crime by deterring the offender and other persons from committing similar offences,
>
> (c) to protect the community from the offender,
>
> (d) to promote the rehabilitation of the offender,
>
> (e) to make the offender accountable for his or her actions,
>
> (f) to denounce the conduct of the offender,
>
> (g) to recognise the harm done to the victim of the crime and the community.

Principle: Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) does not depart from the principle explained in *Veen v The Queen* (No 2) [1988] HCA 14.

At [20]:

> It should also be noted that the introduction of standard non-parole periods was accompanied by the incorporation of a statutory statement of the purposes of sentencing. The purposes there stated are the familiar, overlapping and, at times, conflicting, purposes of criminal punishment under the common law. There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in *Veen v The Queen* [No 2] in applying them.

The principles referred to in *Veen v The Queen* (No 2) [1988] HCA 14 are at [13]:

> …sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution

and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.

Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) stated at the time of judgment:

> The purposes for which a court may impose a sentence on an offender are as follows:
>
> (a) to ensure that the offender is adequately punished for the offence,
>
> (b) to prevent crime by deterring the offender and other persons from committing similar offences,
>
> (c) to protect the community from the offender,
>
> (d) to promote the rehabilitation of the offender,
>
> (e) to make the offender accountable for his or her actions,
>
> (f) to denounce the conduct of the offender,
>
> (g) to recognise the harm done to the victim of the crime and the community.

C *Principles in Relation to the Mentally Disabled*

Principle: When sentencing offenders with a mental illness or an intellectual handicap, general deterrence should be given very little weight.

At [53] – [54]:

> Black DCJ's finding, expressed in lay terms, that the appellant's intellectual disability is "significant", was apt. It was an error for the Court of Criminal Appeal to reject the finding, if that is what it did. Alternatively, it was an error for the Court to find that Black DCJ's determination, that general deterrence had no place in sentencing the appellant, was not justified by the evidence. One purpose of sentencing is to deter others who might be minded to offend as the offender has done. Young CJ, in a passage that has been frequently cited, said this:
>
> > "General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is

not an appropriate medium for making an example to others."

In the same case, Lush J explained the reason for the principle in this way:

> "[The] significance [of general deterrence] in a particular case will, however, at least usually be related to the kindred concept of retribution or punishment in which is involved an element of instinctive appreciation of the appropriateness of the sentence to the case. A sentence imposed with deterrence in view will not be acceptable if its retributive effect on the offender is felt to be inappropriate to his situation and to the needs of the community."

The principle is well recognised. It applies in sentencing offenders suffering from mental illness, and those with an intellectual handicap. A question will often arise as to the causal relation, if any, between an offender's mental illness and the commission of the offence. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community.

Principle: When sentencing offenders who are mentally disabled, the sentencing purposes of denunciation and retribution will often be inappropriate.

At [54]:

> The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community.

4 ORDERS

Appeal allowed and Mr. Muldrock was sent back to the Criminal Court of Appeals to be re-sentenced.