

By Mark Hunter, SFNT

Trenerry v Bradley

Supreme Court No. JA 64 of 1996

Judgment of Martin CJ, Angel and Mildren JJ delivered 20 June 1997

CRIMINAL LAW - COMPULSORY IMPRISONMENT - ss88A and 78B SENTENCING ACT

A Judge stated a case to the Supreme Court for determination of questions of law relating to the proper construction of ss78A and 78B of the *Sentencing Act* ("the Act").

On 8 March 1997 these provisions came into operation as sub-division 1 of the Act which is entitled "Compulsory Imprisonment". The respondent was 17 years of age when sentenced by the Magistrate to 14 days after pleading guilty to charges of breaking a window at Toy World to steal goods to the value of \$579. Following his arrest five days after the offences, all the stolen property was returned to the owner. Full admissions were made by the respondent to police at the first opportunity. He had no prior criminal convictions.

s78A (1) of the Act states that a Court which finds a person guilty of a "property offence" (as defined) "... shall record a conviction and order the offender to serve a term of imprisonment of not less than 14 days". The section provides for longer mandatory terms of imprisonment for subsequent property offences.

s78B allows a Court to make work and other orders in conjunction with an imprisonment order so long as the effect of such orders is not to "... release the offender from the requirement to actually serve the term of imprisonment ordered under s78A".

HELD

In respect of the minimum period of imprisonment specified in s78A of the Act, a Court is precluded from suspending in whole or in part that period of compulsory imprisonment.

A Court is also precluded from fixing a period during which an offender ordered to serve a sentence of imprisonment under s78A is not eligible to be released on parole.

Mildren J (Obiter)

Magna Carta (1215) and the *Bill of Rights* (1688) recognised the fundamental duty of sentencing Courts "not to impose a punishment which exceeds that which justice demands in all the circumstances".

s5(1) of the *Sentencing Act* reflects the same principle. "Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences". Their "sole purpose... is to require sentencers to impose heavier sentences than would be proper according to the justice of the case".

His Honour referred to a paper presented to the 19th Australian Legal Convention in which Professor Norval Morris described such sentencing schemes as "unprincipled and morally insensitive... based on an absurd belief in the sentimental leniency of the judiciary, a belief fostered by some elements of the press..."

Angel J (Obiter)

"Parliament, it appears, intended that Courts impose the blunt instrument of imprisonment in lieu of other sentencing dispositions which might more truly reflect the circumstances of the offence and of the offender, in the hope or expectation of lessening property offences, and, perhaps, of making victims feel better - about something".

APPEARANCES

Appellant

Counsel: Wild QC

Solicitors: DPP

Respondent

Counsel: Wyvill/Cox

Solicitors: Withnall Cavanagh Maley

COMMENTARY

This decision is the subject of a special leave application to the High Court.

Law Council Saddened by the Loss of Sir Garfield Barwick

The Law Council of Australia has been saddened by the death of the Rt Hon. Sir Garfield Barwick, with the President of the Council saying he was one of the legal profession's finest representatives.

Sir Garfield was Chief Justice of the High Court of Australia from 1964 to 1981 and Commonwealth Attorney-General from 1958 to 1963.

For many years he was also involved in professional affairs, serving as President of the Law Council of Australia from 1952 to 1954, and President of the NSW Bar Association from 1950 to 1952 and again from 1955 to 1956.

"Sir Garfield Barwick was one of the greatest lawyers this country, or indeed the common law world, has produced this century," said the President of the Law Council, Mr Peter Short. "While he successfully turned his hand to politics, his greatest contribution was to the law."

"His influence on this country's law was immense, first as one of our greatest advocates and then, for seventeen years, as one of our great Chief Justices".

"Sir Garfield had an incredibly diverse life as a lawyer, a politician, and a sportsman. He also undertook work for charities, including the Royal NSW Institute for Deaf and Blind Children and the Australian Conservation Foundation."

"The loss of Sir Garfield marks the passing of one of this country's finest lawyers. He was an exceptional Australian."

"We extend our deepest sympathies to Lady Barwick and his family."

BALANCE

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