

**SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL**

Case Title: R v Lee

Citation: [2016] ACTCA 69

Hearing Date: 31 October 2016

Decision Date: 15 December 2016

Reasons Date: 15 December 2016

Before: Murrell CJ, Refshauge and Rangiah JJ

Decision: Appeal dismissed.

Catchwords: **APPEAL** – JURISDICTION, PRACTICE AND PROCEDURE – Appeal against sentence – whether good behaviour order can commence before associated sentence of imprisonment – interpretation of “any longer period” – *Crimes (Sentencing) Act 2005* (ACT) s 12 – appeal dismissed

Legislation Cited: *Crimes (Sentence Administration) Act 2005* (ACT) 40, 42, 86, 110
Crimes (Sentencing and Restorative Justice) Amendment Act 2016 (ACT) s 2
Crimes (Sentencing) Act 2005 (ACT) 11, 12, 13
Criminal Code 2002 (ACT) s 603
Legislation Act 2001 (ACT) 138, 139, 140, 141
Supreme Court Act 1933 (ACT) ss 37E, 37O

Cases Cited: *Everett v The Queen* [1994] HCA 49; 181 CLR 295
Green v The Queen [2011] HCA 49; 244 CLR 462
Griffiths v The Queen [1977] HCA 44; 137 CLR 293
House v The King (1936) 55 CLR 499
Miller v Commissioner of Police [2004] NSWCA 356
Parkinson v Alexander [2016] 11 ACTLR 190
Project Blue Sky Inc v ABA [1998] HCA 28; 194 CLR 355
R v Duffy [2014] ACTCA 53
R v Harrington [2016] ACTCA 10; 11 ACTLR 215
R v Lee [2015] ACTSC 415
R v Pumpa [2015] ACTSC 177
Victims Compensation Fund Corporation v District Court of New South Wales [2002] NSWCA 355

Texts Cited: Explanatory Statement, *Crimes (Sentencing) Bill 2005* (ACT) cl 12

Parties: The Queen (Appellant)
Huy Huu Lee (Respondent)

Representation:**Counsel**

Mr J White SC (Appellant)

Mr M Kukulies-Smith (Respondent)

Solicitors

ACT Director of Public Prosecutions (Appellant)

Kamy Saeedi Law (Respondent)

File Number:

ACTCA 3 of 2016

Decision under appeal:

Court: ACT Supreme Court

Before: Burns J

Date of Decision: 15 December 2015

Case Title: R v Lee

Citation: [2015] ACTSC 415

THE COURT:

1. The appellant appealed against a sentence imposed on the respondent by Burns J (the sentencing judge) on 15 December 2015 for the offence of trafficking in a trafficable quantity of cannabis contrary to s 603(5) of the *Criminal Code 2002* (ACT) (*Criminal Code*): *R v Lee* [2015] ACTSC 415.
2. The respondent was sentenced to 13 months' imprisonment to commence on 15 December 2015 and end on 14 January 2017. The period 15 December 2015 to 14 June 2016 was to be served by way of periodic detention. The balance of the sentence was suspended. The sentencing judge made a good behaviour order with conditions for a period of 20 months commencing on 15 December 2015, the day upon which the sentence was imposed.
3. The appellant appealed on the ground that a good behaviour order under s 12(3) of the *Crimes (Sentencing) Act 2005* (ACT) (*Sentencing Act*) cannot commence before the date from which the associated sentence of imprisonment is suspended.
4. When the sentencing judge handed down the sentence, the prosecutor suggested that commencement of the good behaviour order should not commence before the suspended portion of the sentence. The sentencing judge observed that, under s 12(3), a sentencing court was empowered to make a good behaviour order for the period during which the sentence was suspended "or for any longer period that the court considers appropriate." His Honour stated:

That does not necessarily, on the face of it, mean a longer period beyond the expiration of the suspended sentence as opposed to commencing before the period of the suspended sentence.... In my view, there is much to be said for the proposition that there should be a period of supervision whilst somebody is serving a periodic detention order. They are only in detention for two days a week, meaning there are then five days a week during which they are not in detention and not under any supervision.

His Honour concluded that a s 12(3) good behaviour order could cover the periodic detention component of a sentence that preceded the suspension of the remainder of the sentence.

5. Accordingly, the good behaviour order that the respondent entered on 15 December 2015 stated:

The period to commence 15 December 2015 and end on 14 June 2016 is to be served by way of periodic detention.

The balance of the sentence is suspended forthwith upon the offender signing an undertaking to comply with the offender's good behaviour obligations under the *Crimes (Sentencing) Act 2005* (ACT) for a period of 20 months with the following conditions ...

Nature of the appeal

6. Under s 37E(2)(a) of the *Supreme Court Act 1933* (ACT) (*Supreme Court Act*), the Court of Appeal has jurisdiction to hear "appeals in relation to orders" of a single judge of the Court. Under s 37O, the Court of Appeal has wide powers in relation to the orders that it may make (or decline to make).
7. On an appeal against sentence, an appellant needs to show a specific error of fact or law, or an implied error: *House v The King* (1936) 55 CLR 499 at 504–505. In this case, the appellant said that there was a specific error of law relating to the construction of s 12(3) of the *Sentencing Act*.
8. The principles governing Crown sentence appeals are well established: see *Griffiths v The Queen* [1977] HCA 44; 137 CLR 293 at 310; *Everett v The Queen* [1994] HCA 49; 181 CLR 295; *Green v The Queen* [2011] HCA 49; 244 CLR 462. The purpose of a prosecution appeal is to lay down principles for the governance and guidance of sentencing courts: *R v Harrington* [2016] ACTCA 10; 11 ACTLR 215 at [8] per Murrell CJ. The principles were discussed in *R v Duffy* [2014] ACTCA 53.
9. As this appeal raises the correct interpretation of s 12(3) of the *Sentencing Act*, a matter about which judges have expressed different views, prima facie it is an appropriate matter for a prosecution appeal.
10. However, the outcome of the appeal will be of no practical relevance to the respondent. The respondent has completed the six-month periodic detention order and served a substantial part of the suspended sentence. It no longer matters to the respondent whether, while serving periodic detention, he was properly the subject of a good behaviour order. The appellant agreed that, if the appeal was upheld and the respondent was resentenced, the new sentence should have the same practical operation as the sentence under appeal.
11. Further, as the periodic detention provisions of the *Sentencing Act* have been removed with effect from 2 March 2016 (*Crimes (Sentencing and Restorative Justice) Amendment Act 2016* (ACT) s 2(1)), our decision can provide no guidance to judicial officers who may be contemplating the practical advantages of imposing a s 12(3) good behaviour order that runs concurrently with periodic detention. It is true that, in theory, a judicial officer may contemplate imposing a s 12(3) good behaviour order that runs concurrently with full-time imprisonment, but that would serve no purpose and is most unlikely to occur. Indeed, counsel were unable to identify any past occasion when a judicial officer has imposed a s 12(3) good behaviour order that was concurrent with a sentence of full-time imprisonment.
12. Consequently, the Court was troubled about whether the appeal raised a hypothetical issue or sought an advisory opinion. It is well-established that judicial power should not be used to answer questions that are "merely moot, theoretical, abstract, hypothetical

and advisory”: *Victims Compensation Fund Corporation v District Court of New South Wales* [2002] NSWCA 355 at [27] per Heydon JA (with whom Sheller JA and Einstein J agreed). A judicial determination must concern a controversy that is real, not academic: *Miller v Commissioner of Police* [2004] NSWCA 356 at [28] per McColl JA (with whom Mason P and Hamilton J agreed).

13. In this case, we were persuaded that, as the appeal concerned a sentence that was actually imposed and raised an issue of ongoing theoretical (if not practical) relevance to the interpretation of the *Sentencing Act*, we should entertain the appeal.

Sentencing Legislation

14. The issue is whether a good behaviour order made under s 12(3) of the *Sentencing Act* can commence prior to the commencement of the suspended portion of the sentence.

15. Relevantly, s 12 provides:

- (1) This section applies if—
 - (a) an offender is convicted of an offence; and
 - (b) the court sentences the offender to imprisonment for the offence.
- (2) The court may make an order (a **suspended sentence order**) suspending all or part of the sentence of imprisonment.
- (3) If the court makes a suspended sentence order, the court must also make a good behaviour order for the period during which the sentence is suspended *or for any longer period* that the court considers appropriate.

Note A suspended sentence order may be part of a combination sentence together with other sentencing options (see pt 3.6).

...

- (6) This section is subject to the following provisions:
 - (a) section 13 (Good behaviour orders);
 - (b) chapter 5 (Imprisonment);
 - (c) chapter 6 (Good behaviour orders).(emphasis added)

16. Section 13 of the *Sentencing Act* deals with good behaviour orders. In part, it provides:

- (2) The court may make an order (a good behaviour order) requiring the offender to sign an undertaking to comply with the offender’s good behaviour obligations under the Crimes (Sentence Administration) Act 2005 for a stated period.

...

- (4) If the offence is punishable by imprisonment, a good behaviour order—
 - (a) may be made instead of imposing a sentence of imprisonment or as part of a combination sentence that includes imprisonment; and
 - (b) may apply to all or part of the term of the sentence.

...

17. Section 110 of the *Sentence Administration Act* applies when offender has breached his or her good behaviour obligations under a s 12(3) good behaviour order. It provides:

- (2) The court must cancel the good behaviour order and either—

- (a) impose the suspended sentence imposed for the offence; or
- (b) re-sentence the offender for the offence.

Legislative Interpretation

18. As this Court recently noted in *Parkinson v Alexander* [2016] ACTSCFC 1; 11 ACTLR 190, statutory interpretation requires the Court to take a textual and purposive approach: *Project Blue Sky Inc v ABA* [1998] HCA 28; 194 CLR 355.

19. Section 138 of the *Legislation Act* provides that:

working out the meaning of an Act means—

- (a) resolving an ambiguous or obscure provision of the Act; or
- (b) confirming or displacing the apparent meaning of the Act; or
- (c) finding the meaning of the Act when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or
- (d) finding the meaning of the Act in any other case.

20. Section 139(1) of the *Legislation Act 2001* (ACT) (*Legislation Act*) provides that “[i]n working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation.”

21. Section 140 of the *Legislation Act* provides that, “[i]n working out the meaning of an Act, the provisions of the Act must be read in the context of the Act as a whole”.

22. Section 141 of the *Legislation Act* provides that, in working out the meaning of an Act, material not forming part of the Act may be considered. In this case, the Explanatory Statement to the Crimes (Sentencing) Bill 2005 (ACT) does not explain why an associated good behaviour order may need to be longer than a suspended portion of the sentence. It states:

Clause 12 — Suspended sentences

A suspended sentence enables a court to sentence an offender to a term of imprisonment and then suspend the execution of that imprisonment on the basis that the offender complies with conditions set by the Court. The tool for setting conditions in this Bill is the good behaviour order. If the offender breaches the good behaviour order made in conjunction with a suspended sentence, the Court will have authority to execute the sentence or re-sentence the offender.

...

Clause 12(2) enables the Court to suspend all or part of the imprisonment. The offender will be imprisoned for the period of time not suspended by the Court.

Clause 12(3) requires the Court to make a good behaviour order for the period of the suspended sentence, and longer if the Court determines. In making a good behaviour order in conjunction with the suspended sentence the Court will impose conditions upon the offender that the Court requires the offender to meet to prevent the execution of the sentence.

...

Consideration

23. The meaning of the expression “or for any longer period” in s 12(3) is not immediately apparent from that provision and “longer” is defined in neither the *Sentencing Act* nor the *Legislation Act*.

24. The appellant submitted that, in the s 12 context, the natural meaning of “longer” applied, and “longer” referred to an extension of duration into the future, beyond the period of the suspended sentence. The respondent submitted that the natural meaning of “longer” is simply “of greater duration.”
25. While we agree with the latter submission – a period may be “longer” by bringing forward the commencement date, by extending the concluding date, or both – the meaning on any particular occasion will depend on the context.
26. In order to understand the meaning of “or for any longer period” in s 12(3) it is necessary to consider the purpose of enabling a sentencing court to impose a s 12(3) good behaviour order either for the period during which the sentence is suspended or for a longer period.
27. The suspended sentence provisions, including s 12(3), and the periodic detention provisions were introduced into the *Sentencing Act* at the same time. It is only recently that the periodic detention provisions have been removed from the *Sentencing Act*, with the consequence that, nowadays, the only question is whether a s 12(3) good behaviour order can run concurrently with the period of full-time imprisonment within a combined sentence comprising a period of full-time imprisonment followed by a period of suspension under s 12.
28. In *R v Pumpa* [2015] ACTSC 177, an offender came before Penfold J for breach of a good behaviour order that had been expressed to commence on the sentencing date, which made it concurrent with the periodic detention portion of a sentence of imprisonment. For the same reasons expressed by the sentencing judge in this case, her Honour had deliberately imposed the good behaviour order from the commencement of the sentence. However, on the breach proceedings, the prosecution argued that s 12(3) of the *Sentencing Act* does not permit a good behaviour order to commence before the commencement of the suspended portion of a sentence. Her Honour accepted this submission, stating at [32]:
- There is no good reason to conclude that the *Crimes (Sentencing) Act* is intended to allow good behaviour orders attached to suspended sentences to commence before the suspension takes effect, and good reason to conclude that such an approach introduces unnecessary complexity, including arguably constitutional uncertainty, into the sentencing process and accordingly should be rejected.
29. Under s 12, a suspended sentence must be “partnered” with a good behaviour order. The purposes of a s 12(3) good behaviour order include providing support for rehabilitation (for example, by the imposition of conditions requiring counselling or treatment for substance abuse), ensuring proper supervision of an offender who is serving the sentence in the community (by imposing a supervision condition) and providing stern consequences for breaching the privilege of serving a sentence in the community (under s 110 of the *Sentence Administration Act*, a breach will require the good behaviour order to be cancelled and may well result in the suspended portion of the sentence being served full-time). All these purposes are directly related to the suspended portion of the sentence rather than to any full-time or periodic detention component of the sentence. Similarly, the core conditions of any good behaviour order that are prescribed by s 86 of the *Sentence Administration Act* are obviously designed for persons who are in the community.

30. Under the periodic detention regime, a sentencing court may have considered it desirable that there be a “Sword of Damocles” should the offender misconduct themselves while in the community during the currency of the periodic detention order. However, it was not necessary for the sentencing court to achieve that result by resorting to the good behaviour order associated with the suspended portion of the sentence. Under s 11(5) of the *Sentencing Act* as it then was, when imposing a periodic detention order, a sentencing court had power to recommend any condition (not inconsistent with the *Sentencing Act* or the *Sentence Administration Act*) that it considered appropriate for the offender’s periodic detention, including a supervision condition, and the condition then became an additional condition of the offender’s periodic detention under ss 40 and 42(2)(c) of the *Sentence Administration Act* as it was at the time. These conditions could then be enforced under that Act in the same way as other periodic detention obligations.
31. If a good behaviour order ran concurrently with a periodic detention order then s 110 would interfere with the administration of the sentence of periodic detention; the corrective services authorities would be responsible for administering the periodic detention sentence but the court would be responsible for dealing with any breach of the good behaviour order, creating what Penfold J described as “constitutional uncertainty.” Similar problems would arise under the current sentencing regime if an offender was sentenced to full-time imprisonment and the sentencing court imposed a concurrent good behaviour order.
32. Taking a purposive approach and bearing in mind the need for constitutional certainty, we conclude that, where the expression “any longer period” is used in s 12(3) of the *Sentencing Act*, it refers to a period that starts on the date when the sentence is suspended but may extend for a period that is longer than the suspended portion of the sentence.
33. Although the appellant has established an error of law, the parties agree that it would be inappropriate for the Court to impose a sentence that changed the practical effect of the sentence imposed by the sentencing judge. Consequently, in the exercise of our discretion, we dismiss the appeal.

I certify that the preceding 33 [thirty-three] numbered paragraphs are a true copy of the Reasons for Judgment of the Court.

Associate: Anneke Bossard

Date: 16 December 2016