

IN THE SUPREME COURT )  
OF WESTERN AUSTRALIA )

*February* 1953/A-C  
Heard: 14th February, 1977

Delivered: 18th March, 1977

THE FULL COURT

COURT OF CRIMINAL APPEAL

CORAM: BURT C.J., WICKHAM J., WALLACE J.

C.C.A. Nos. 2 & 3 of 1977.

B E T W E E N:

THE QUEEN

Applicant

-and-

MICHAEL DAVID HAABJOERN and  
JOHN ROBERT CHESTER

Respondents

Mr. R. D. Wilson, Q.C., with him Mr. D. G. Rodway,  
represented the Crown.

Mr. P. V. Batros appeared for the respondent Chester.

Mr. I. D. Temby appeared for the respondent Haabjoern.

Authorities cited -

Radich (1954) N.Z.L.R. 86  
Power (1974) 131 C.L.R. 623  
Browne v. Smith (1974) 4 A.L.R. 114  
Kane (1974) V.R. 759  
Williscroft (1975) V.R. 292  
Australian Coal & Shale Employees' Federation, 94 C.L.R. 627  
Chappell & Wilson: Australian Criminal Justice System  
Faulkner (1972) 56 Cr.A.C. 594

BURT C.J.

These are two appeals brought by the Crown pursuant to s. 688(2)(d) of the Criminal Code against sentences imposed upon each of the respondents by Jones J.. The respondents were jointly charged on one indictment containing four counts, as follows:

- (1) That between 9th April 1976 and 13th April 1976, at Maddington they broke and entered the building of Bell Bros. Pty. Ltd. and therein stole 16 cartons of gelignite, a quantity of detonating cord, a quantity of detonators, a blasting galvanometer, a dynamo condenser exploder the property of Bell Bros. Pty. Ltd.

- (2) That on 19th July 1976, at Bunbury they wilfully caused by an explosive substance named gelignite an explosion of a nature likely to cause serious injury to property.
- (3) That on 19th July 1976, at Bunbury they with intent to cause by an explosive substance an explosion of a nature likely to cause serious injury to property wilfully and unlawfully placed a quantity of gelignite at the base of a loading gantry; and
- (4) That on 19th July 1976, at Bunbury, they unlawfully detained one Morrit in a room against his will.

The respondents appeared before Jones J. in the Supreme Court sitting at Bunbury on 23rd November 1976, and each then pleaded guilty to each count and each was convicted on his plea. His Honour called for a pre-sentence report and having received that report he heard further submissions by counsel on sentence in Perth on 20th December 1976, and he sentenced the respondents on 22nd December 1976, as follows :

- (1) On the first count, for which the maximum sentence under the Criminal Code is 14 years imprisonment (s. 403) - 3 years imprisonment.
- (2) On the second count, for which the maximum sentence under the Criminal Code is imprisonment with hard labour for life (s. 454) - 7 years imprisonment.
- (3) On the third count, for which the maximum sentence under the Code is 14 years imprisonment (s. 455) - 5 years imprisonment. And -
- (4) On the fourth count, for which the maximum sentence under the Code is 10 years imprisonment (s. 333) - 12 months imprisonment.

His Honour ordered that the sentences be served concurrently and he fixed a period of 10 months as the time to be served before being eligible for parole.

The circumstances were most unusual and should be shortly stated. Each respondent lives close by to Manjimup and close by to the area of forest where of recent times has been established a wood chipping mill. Each for reasons, which are certainly capable of intellectual acceptance, is violently opposed to this activity. In this they do not stand alone. There are, it seems, many people who share their opinion. There are many who do not. Whether the industry should by law be allowed to continue is a political question which at all material times had been answered in the affirmative. Each respondent felt so strongly about this issue that they resolved that they would by force bring the industry to a halt for a period of time sufficiently long to enable the public generally to see the issue as they saw it, to accept their opinion upon it and to cause action to be taken upon that opinion so that the activity could be stopped altogether or, if not stopped altogether, then to be restricted and so controlled that the evils as they saw them or supposed them, to be could be averted.

The first overt act taken by them to put that resolution into effect was to break into a building at a quarry. This they did between 9th and 13th April, and from that building they stole the explosives and associated equipment referred to in the first count in the indictment. They took this equipment to a shed which they had built in the bush near Manjimup. Thereafter they experimented with the explosives with the idea of making a time bomb. They purchased car batteries and alarm clocks for this purpose and by July they had created devices which they thought would be suitable for the purpose which they had in mind. That purpose, expressed generally, was to so damage the wood chip loading terminal at Bunbury as to put it out of operation for a long period of time. Expressed more specifically, although the details do not matter, the idea was to blow out the foundations of the wood chip stacking gantry and to blow two legs of the loading gantry so causing that machine to fall into the harbour.

In the early hours of the morning of 19th July, they drove into Bunbury in a car which they had unlawfully obtained and to which were affixed false number plates. They cut through the security fence surrounding the wood chip harbour installation and so gained entry to it. They each wore a black stocking over his head and each wore gloves. The respondent Chester had a .303 rifle. When they were close to the door of the sample room they bumped into the night watchman. They took him at gunpoint into the sample room where they taped his arms behind his back. Chester stood guard over him while Haabjoern went out and as it subsequently appears planted one bomb containing 5 cartons of gelignite at the base of the stacking gantry and a bomb each containing 2 cartons of gelignite at the base of two of the legs of the loading gantry. In the meantime Chester had done nothing to harm the watchman but he did tell him that the purpose which they had in mind was to "blow the place sky high" taking such care as they could to avoid personal injury. When the bombs had been placed in position they drove off, one of them driving the car in which they had come and one driving the watchman's car with the watchman as a passenger. Before leaving they erected two signs on the roadway - one read "Danger Separate Explosions" and the other "Danger Explosive Charges Ahead". They drove out to Australind and left the watchman there in his car with his hands still bound behind his back. Shortly afterwards, and it seems by the merest chance, the watchman who had managed to get out of his car although his hands were still bound stopped a passing motorist and the police were contacted. It was then about 5 o'clock in the morning. The bombs were timed to go off at 5.30 a.m.. As it happened the bomb placed at the base of the stacking gantry exploded at 5.25 a.m. and each of the other two bombs failed to detonate. The explosion which did occur was, as one can imagine, of considerable magnitude. It did serious damage to the stacking gantry and it hurled debris for a considerable distance. The respondents were interviewed by the police at Manjimup about one week later and after some questioning each admitted the part played by him in the events as I have related them. They showed the police where the car used by them was hidden and they also took the police

to the shed where the balance of the stolen explosives were stored. Generally thereafter the respondents can be said to have been co-operative with the police, each then taking the view that they were justified in doing what they did.

The respondent Chester is aged 28 and the respondent Haabjoern is aged 29. Haabjoern has no previous convictions and Chester has some record but it is not of much consequence. His Honour expressly dealt with each of them as a first offender and no complaint is made of his doing that although it is said that the facts could not possibly support the value judgment which his Honour made of Chester, it being that for some considerable time he had been an "admirable citizen".

If one has regard to the admitted objective facts and for the moment without regard to any question of motive, what is revealed is the commission by the respondents of four very serious crimes. They were crimes planned over a considerable period of time and they were carried out with great determination and thoroughness. Three of them were crimes of violence and involved the use of explosives and of a firearm. In the absence of mitigating circumstances a substantial custodial sentence, even for a first offender, was, one would think, inevitable and as I understand the remarks of the trial Judge made by him at the time of passing sentence, he would agree that such was the case.

The Solicitor General in his argument before us submitted that the finite sentence passed with respect to each offence was too short; that the sentence imposed upon the first count should not have been made concurrent with the other sentences and that the minimum term, that is to say the period of imprisonment ordered to be served before being eligible for parole, was too short. It was, however, emphasised by him - and in my mind rightly - that the important thing to keep in mind was the overall result of all the sentences including the minimum term. That result was seven years with a 10 months or, if regard be had to the period during which the respondents had been in custody prior to sentence, then with a 15 months period of imprisonment before being eligible for parole.



That result, it was submitted, failed to give proper weight to the deterrent and retributive aspects of sentencing. The sentences if considered separately or if considered together and together with the minimum term were, it was submitted, manifestly inadequate.

Central to the argument as it was presented to us on behalf of the respondents and it was central too to the submissions made on their behalf to the trial Judge, was the motivation of the respondents which was said to be a mitigating factor of great weight. It would appear from what the learned trial Judge said when passing sentence that he accepted that submission, particularly it seems to have influenced him in fixing the minimum term. His finding was that "you were sincerely motivated by an ideal in doing what you did" and one reason given by him for fixing a minimum term recognised by him to be "considerably shorter than it would be if I were dealing with the ordinary type of criminal" was "your motivation" that being, in the opinion of each of the respondents, to save the forest from wholesale destruction.

It is of course dangerous to generalise and to say that the motive for crime can never be relevant to the sentence to be imposed for the crime when committed. Such is clearly not always the case. But in the particular circumstances of this case I do not think that too much weight should be placed upon it. This was a case, expressed in general terms, of an attempt by the use of violence to change the law and if the motivation is expressed in that way then it could be said to be a circumstance of aggravation and to remain so notwithstanding the honest belief of the respondents that the existing law was a bad law. Such conduct represents a far greater threat to a free society than does the use of explosives to blow a safe. All of which, in passing, is not to say that in the face of such conduct a free society through its institutions and more particularly through its courts should impose Draconian sentences and so meet violence with violence. The idea of retribution should be applied with moderation it often being necessary for the Court to stand between a convicted person and an outraged community.

The second mitigating circumstance which was put to us, as it was to the trial Judge, is that the respondents took such care as they could to avoid injury to persons. I accept that to be the fact but again and with great respect to those who think otherwise and while recognising it is a matter which should be taken into consideration, I do not find it to be a mitigating factor of great weight. The charge to which this plea is specifically directed was count (2) - to cause an explosion of a nature likely to cause serious injury to property - and it seems to be not of great relevance to the appropriate punishment for that offence to observe that care was taken so not to commit another offence, it being to cause an explosion of such a nature as to be likely to endanger life - s.299 of the Criminal Code.

The other two mitigating circumstances to which his Honour had regard were that the respondents when questioned by the police and thereafter were co-operative and that as at the time of sentence they had seen the error of their ways and were not likely to offend again. The basis for that prognosis may be somewhat flimsy but I am not prepared to disagree with it and I would agree that such matters are proper to be taken into consideration.

I return now to a consideration of the particular submissions put to us in support of the general submission that overall the sentence regarded as a single sentence for what counsel described as "the catalogue of offences" and including within the sentence the minimum term was manifestly inadequate.

The sentence of 7 years on the second count, which was of course the dominant sentence in the overall result, was said to be of itself manifestly inadequate. One's response to that submission and to the reasons advanced in support of it is not, I think, capable of being rationalised in such a way as to produce a definitive answer. The question for us is not what each of us would have thought the appropriate sentence to have been had we been the sentencing judge. The question for us is whether the sentence imposed, confining it for present purposes to the finite term, was so far outside the range of a sound discretionary judgment as to enable us to say that it was wrong and having given the matter the

best consideration I can I am unable to say that such is the case. Others may disagree but to say that is only to emphasise the point - we are all reasonable men and reasonable men may disagree. I have reached the same conclusion with respect to each of the other finite terms.

The next major submission made in support of the appeal was that the trial Judge should not have made the sentence imposed by him on the 2nd, 3rd and 4th counts concurrent with the sentence on the 1st count, the reason being that that offence was an offence of an entirely different type committed some months before the others and unconnected with them except in terms of purpose. I recognise the weight of this submission but again we are being asked to overturn the discretionary judgment of the trial Judge and this I think we ought not to do.

Finally, the Crown says that the trial Judge fell into error in fixing a minimum term of 10 months to be served before being eligible for parole. Certainly at first blush that does seem to be a very short minimum term to attach to a finite term of 7 years, particularly when that finite term is but one sentence with which others of shorter length are being served concurrently. As I read his Honour's reasons as they appear in the remarks made by him when passing sentence, he fixed the finite terms as being "severe deterrent sentences". In doing that he was clearly thinking of the general impact of the sentences or, more accurately, of that part of the sentences as a deterrent to others. He then turned his attention to the respondents as individuals. Of them he said: "I do not think, therefore, that in your individual cases any deterrence is necessary against your similarly offending....". And then, having regard to "your previous excellent history, your motivation, your present state of mind and I believe, your unlikelihood of offending again", he fixed the minimum term of 10 months "which will represent just punishment to you for what you have done...".



In my opinion the trial Judge fell into error in fragmenting the sentence in that way, that is to say, by regarding the finite term as being a deterrent to others and the minimum term as being a just punishment for the respondents. There is but one sentence and the non-parole period is a term of it. The provisions of the Offenders' Probation and Parole Act, 1963-1971, clearly recognise the importance of rehabilitation as one object to be achieved within the general idea of punishment. It is an object of great importance. But it has not elbowed out all other considerations. The just punishment for some offences, of which the present can serve as examples, requires that the idea of deterrence, general and particular, and the idea of retribution, although to a lesser extent, find some expression. The length of the non-parole period in so far as deterrence is an object of imprisonment is within that objective and to the extent to which the sentence is simply punishment the length of the non-parole period is relevant to that as well. Both points emerge from the joint judgment of Barwick C.J., Menzies, Stephen and Mason JJ. in Power v. The Queen, (1974) 131 C.L.R. 623 at p. 628:

"Confinement in a prison serves the same purposes whether before or after the expiration of a non-parole period and, throughout, it is punishment, but punishment directed towards reformation. The only difference between the two periods is that during the former the prisoner cannot be released on the ground that the punishment has served its purpose sufficiently to warrant release from confinement, whereas in the latter he can. In a true sense the non-parole period is a minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention.

Nor do we understand how it is said that the fixing of a non-parole period is not concerned with deterring either the prisoner himself or others from crime. Surely the requirement that a prisoner must stay in confinement for some period seen by a judge to be appropriate in all circumstances, would operate more as a deterrent than to allow the prison gates to be opened almost as soon as they have closed, that is, when the paroling authority has had time to consider whether the sentence should be served in confinement. To the extent to which deterrence is an object of imprisonment, then imprisonment without a chance of release for a longer time, rather than for a shorter time, is within that objective."

In the present case if his Honour when saying that 10 months, or if regard be had to the 5 months during which the respondents were in custody awaiting trial, that 15 months minimum term as ordered by him "will represent just punishment to you for what you have done" is to be taken literally, then I feel bound to say that I cannot agree with him. In my opinion it is an order which cannot be sustained. It should be set aside as falling outside the range of a fair discretionary judgment. The minimum term should be increased to 3½ years and in coming to that conclusion I have not overlooked the fact that the respondents were in custody for 5 months prior to sentence. To that extent the appeal should be allowed and the sentence of the court below should be varied accordingly.

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Respondents

WICKHAM J.

I am not satisfied that the sentences as a whole ~~are~~ manifestly inadequate. If, which is not certain, the prisoners are granted parole at the earliest date, they remain for some 6 years as convicts under sentence with all the disabilities and liabilities attached to that status including the self-operating sanction that if sentenced for another offence (even of a different kind) committed during the parole period the parole is automatically cancelled even though the parole period might then have expired. Further, parole may at any time be cancelled for any reason. In neither case does any period spent on parole count towards the service of the sentence (S.44 of the Act). Although the purely punitive aspect is a significant element in the minimum period set, that and other aspects, retribution, particular and general deterrence, prevention, and reform (all of which overlap) are spread with more or less emphasis over the total sentence.

I am not satisfied that His Honour overlooked any of the considerations mentioned by the Chief Justice or erred in any

way suggested. The case was not an ordinary one and was knowingly dealt with in a rather special way. A reading of the remarks on sentence, without being hyper-critical of isolated modes of expression, makes it clear that his Honour gave the matter deep thought, adverted to all relevant considerations with care, and decided with an awareness of what he was doing and why.

That he erred remains a matter of opinion and in the case of a political crime such as this opinions may vary widely. That the Court should come down on industrial sabotage for political purposes with exemplary punishment right at the start is a sound view, but there are other considerations as the Chief Justice has mentioned. Had I been sentencing, I am fairly certain that the sentences, perhaps less thoughtful, would have had an appearance of being although restrained more orthodox - very like the ones now proposed - but that is not a reason for saying that the sentences pronounced <sup>are</sup> ~~is~~ wrong and must be changed.

While I am acutely aware and respectful of other views, including opinions which the Solicitor-General told us had been expressed by some laymen, and of the concern of the Attorney too, I conclude that for reasons of general principle relating to the review of discretionary judgments the appeal must be dismissed.

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Mr. R. D. Wilson, Q.C., with him Mr. D. G. Rodway,  
 represented the Crown.

Mr. P. V. Batros, instructed by Gibson & Gibson,  
 appeared for the respondent Chester.

Mr. I. D. Temby, instructed by Northmore, Hale, Davy  
 & Leake, appeared for the respondent Haabjoern.

WALLACE J.

I would allow this appeal for the reasons given by the Chief Justice. Since the Court is not unanimous I should say, however, that in my own view the finite term for such a serious catalogue of offences should have been ten years. I reach that conclusion because I do not believe it to be correct to have made the sentence imposed for the offence of breaking entering and stealing the gelignite concurrent with the other offences. It was far removed in time and place and in my opinion could only be viewed as a separate depredation on the property of others. As I am in the minority hereon I accept the Chief Justice's opinion as to the finite term and agree also with the proposed minimum sentence since in fact it is but one month off the four years I would have imposed.



The relevant portion of the joint judgment of all members of the High Court in Harris v. The Queen, 90 C.L.R. 652, at pp. 655-6, delivered in October 1954, bears repetition:

"It is not enough that the members of the (appellate) court would themselves have imposed a less or different sentence, or that they think the sentence over-severe. There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised. This may appear from the circumstances which that court has taken into account. They may include some considerations which ought not to have affected the discretion, or may exclude others which ought to have done so. The court may have mistaken or been misled as to the fact, or an error of law may have been made. Effect may have been given to views or opinions which are extreme or misguided. But it is not necessary that some definite or specific error should be assigned. The nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the discretion has been unsound. In short, the principles which guide courts of appeal in dealing with matters resting in the discretion of the court of first instance restrain the intervention of this court to cases where the sentence appears unreasonable, or has not been fixed in the due and proper exercise of the court's authority". (The underlining is mine.)

In the end we are reviewing the value judgment of his Honour. That process must involve, inter alia, the formulation of a value judgment by each member of this Court. A consensus of sufficient variation from the conclusion reached by the sentencing judge having regard to the criteria set out above and included in the Chief Justice's reasons must result in the success of the appeal.