THE MEANING OF 'LIFE': A STUDY OF LIFE SENTENCES IN AUSTRALIA

A POSTSCRIPT

ARIE FREIBERG

AND

DAVID BILES

AUSTRALIAN INSTITUTE OF CRIMINOLOGY
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ERRATA

Acknowledgements, line 13:

For 'Department of Corrective Services, South Australia'
Read 'Department of Correctional Services, South Australia'.

Page 57, Table 14:

For '1930-39 4 8 6'
Read '1930-39 5 8 6'.

For 'Total 36'
Read 'Total 37'.

Page 69, Figure 6:

For 'N = 36'
Read 'N = 37'.

Page 91, Table 18:

For 'Victoria 13 1'
Read 'Victoria 13 0'.

Page 104, Table 24:

For '(a) calculated on full term
(b) calculated on minimum term'
Read '(a) calculated on minimum term
(b) calculated on full term'.

In the few months since the publication of this report a number of interesting developments have occurred in Victoria, the State where capital punishment has been most recently abolished.

At page 10 herein it was argued that Section 3 of the Crimes Act 1958 (Victoria) as amended by the Crimes (Capital Offences) Act 1975 left some doubt as to whether the life sentence was a mandatory penalty for treason and murder. This point fell for consideration by the Court of Criminal Appeal in *R. v. Demirok*, (page 10, footnote 34), but as the applicant for leave to appeal was successful in having the conviction quashed no decision was necessary regarding the nature of the sentence. It is understood that the Crown is appealing against the decision of the Court of Criminal Appeal to the High Court of Australia, but the question of sentence will not arise at this stage.

However, on 30 September 1975 the Court of Criminal Appeal (Young C.J., Nelson and Harris JJ.) handed down judgment in the case of *R. v. Schultz*. The applicant for leave to appeal had been convicted of murder and sentenced to imprisonment for the term of his natural life. The application for leave to appeal against conviction was dismissed by the Court, which consequently had to consider the application against sentence.

The applicant submitted that under the Act a court does have a discretion in sentence following conviction for murder, arguing that the use of the words 'liable to' conferred such a discretion and that the life term is therefore only the maximum penalty. The opposing argument was that Section 3 should be construed as meaning 'shall be sentenced' to imprisonment for life and therefore mandatory.

The Court, although accepting the fact that other sections of the Crimes Act which conferred a

discretion used the words 'shall be liable' noted that this phrase is always followed by such words as 'imprisonment for a term of not more than' X years in those sections and in its view, it is this latter phrase which confers the discretion. The word 'liable' is, in essence, a neutral one which did not help to resolve this question.

The Court then discussed a number of other considerations which it thought supported its view that Section 3 confers no discretion. First there was the fact that the section speaks of 'the' term of his natural life and not 'a' term of natural life, and this could not be the subject of qualification. Secondly, as the section refers to the life of a person, a period of uncertain duration, it thus excluded any term fixed by reference to a term of years of certain duration. Finally the Court's view of the history of English and Victorian penal statutes was that the particular phrase used allows of no alternative to the life sentence. The argument by the Victorian Solicitor-General that the Court could have regard to the form of the original Bill and the debates (see herein page 9 footnote 33) to aid it in ascertaining Parliament's intention was not accepted by the Court.

It was noted by the Court that Sections 496 and 497 of the Crimes Act 1958 which authorised the Governor to extend mercy on condition had been repealed (see herein page 13). It stated that:

> 'With the repeal of those sections there is now no provision for the commuting of sentences by the Governor with the result that any person sentenced to imprisonment for the term of his natural life will have to serve that term . . . It is true that the Royal prerogative of mercy also remains but without specific statutory authorisation there would seem to be serious difficulties in exercising

> the prerogative in such a way as to substitute imprisonment for a term of years for imprisonment for the term of the natural life of a person convicted of murder. No machinery such as that contained in the repealed ss. 496 and 497 exists. But, of course, by the exercise of the Royal prerogative of mercy a prisoner may be released at any time.'

The Court summarised its conclusion thus:

> '. . . s.3 leaves the Court no discretion. The reason is that "the" term to which the person convicted is liable to be sentenced is the term of his natural life and such a term contains no alternative and admits of no qualification. Since no one can say how long the term of a person's natural life will last, the phrase is simply inapt to contain within itself any lesser term.'

It held further that the provisions of the Social Welfare Act 1970 relating to the fixing of a minimum term could have no application to such a sentence of imprisonment. Reviewing the effect of the change in the law generally, the Court said:

> 'The result of the foregoing is that as the law stands at present, subject to the prerogative of mercy, a boy of nineteen years of age who out of mercy murders a parent suffering great pain and in advanced years, would have to be sentenced to and serve imprisonment for the remainder of his natural life. In the absence of legislation authorising commutation of his sentence by the Governor, the present law might well be thought to operate more harshly in the overwhelming majority of cases than the provisions which it has replaced. If the law remains unaltered and if in fact persons convicted of murder are left in prison for the term of their natural lives it may be expected that juries will tend to recoil from returning verdicts of guilty of

murder. However, we are not to be taken as suggesting that the position should be met by the re-introduction of a commuting power. There may be serious objections to removing the power to determine the appropriate sentence for a crime from the judicial sphere, where the sentence must be pronounced in open court, and vesting in it the Executive where neither the reasons which have led to the determination of a particular sentence nor indeed the fact of the sentence itself are required by law to be subject to public scrutiny. But we are suggesting that the present provision may create significant difficulties in the administration of the criminal law and that it merits the further attention of the Legislature.'

The decision in *R. v. Schultz* seems now to have settled the doubt as to the status of the life sentence in Victoria, discussed herein at pages 9-12. However, while one welcomes the definitive ruling, the case does not shed much light on the interpretation of the still enigmatic phrase 'shall be liable' and it is disappointing that the Court did not examine the use of this same phrase in similar legislation both interstate and overseas to determine how it varies in context.

There are a number of other matters raised by this judgment which require some closer attention. The first is the example given by the Court of the boy aged 19 who commits euthanasia who would be sentenced to life imprisonment. Implicit in this statement seems to be the belief that a person aged less than 18 years would have a different sentence imposed. While it was true that under the repealed legislation a person under 18 years of age could be sentenced to be detained during the Governor's pleasure (see herein Appendix C page 171) it appears that presently with the repeal of Section 473 juveniles must be sentenced in the same way as their adult counterparts.

It may, however, be necessary for a Court to clarify the present state of the law.

Secondly there is the projected problem of juries declining to convict persons of murder if they know that that person will spend the rest of his life in gaol. It is submitted that this problem may become less significant when it becomes more widely known what in fact is the length of time served by life sentence prisoners in Victoria in particular and in other Australian jurisdictions generally. As was discussed at page 95 *et. seq.* and from Table 9, over the last few decades in Australia only about 10% of life sentence prisoners have died while in custody and if past experience is any guide most of those now sentenced in Victoria can look forward to release at some future date. This release is by the exercise of the Royal prerogative by the Governor-in-Council under Section 500 of the Crimes Act 1958 (as amended) and has the effect of allowing release on condition, and does not have the effect of altering the nature of the sentence at the start. How this fact is conveyed to juries however, and what precise effect it would have on their verdicts remains open at this stage.

This use of the Royal prerogative is to be contrasted with the third point raised by the judgment, ie, the view of the Court that the difficulties of the present position should not be ameliorated by a re-introduction of the commuting power at the initial sentencing stage. The use of the power at this stage has the effect of altering the nature of the sentence, eg, by changing a life sentence to a term of years. The Court's view is to be supported. As discussed at pages 12-21 herein the use of the Royal prerogative of mercy has many deficiencies and by indirectly endorsing the view of the Victorian Law Reform Commissioner in this respect, the Court has affirmed that primary sentencing responsibility should remain in the judicial sphere. Responding to the Full Court's decision, the

the Premier, Mr Hamer, is reported as saying that in his opinion the Governor's prerogative still remains and that mandatory life sentences could be reduced in suitable cases. (*The Age*, 1 October 1975, 'Court Wrong on Murder Sentences, says Hamer'). Such a dispute between the executive and judicial arms of government regarding the residual powers of the Crown is extremely serious and as recent political events in the federal sphere have shown, the extent of such residual powers can be wide indeed and should be elucidated at the earliest opportunity. (For a discussion of the extremely complex problem of the nature of the Royal prerogative see Brett, P. 'Conditional Pardons and the Commutation of Death' Sentences', (1957) 20 *Modern Law Review* 131).

Finally, it seems that the call by the Court for the further attention of the legislature has been heeded with regard to review and release procedures. (See also herein text accompanying footnote 15, page 133). Legislation introduced in the Legislative Council by the Labour (Opposition) Leader, Mr Galbally, provides for the judge to furnish a report to the Governor in writing, if he considers the convicted person should be eligible to be released on parole. The report would be made within three months of the sentence and would contain advice as to what sentence he would have imposed if he did not have to give the life sentence, his reasons for imposing that sentence and the minimum term he would have fixed. The Governor would consider the report and could fix the terms of the sentence, the minimum term of which would have to be equal to or less than the sentence advised by the judge in his report. This solution can be criticised on the ground that it essentially returns to a system where the Executive is involved, but it is unlikely that this Bill will become law, coming as it does from the Opposition. (See Melbourne *Herald*, 30 October 1975 for details of the Bill).

In a statement released by the State Attorney-General and the Minister for Social Welfare details were given of new procedures for the review of life sentence prisoners (See *The Age*, 12 November 1975). It said:

> 'The Adult Parole Board will undertake an initial review of each case within 12 months of the imposition of the sentence.
>
> This review is to be made in consultation with, or on the basis of reports obtained from, such persons as may be necessary.
>
> The purpose of the initial review is to enable the board to fix a time, not being more than 10 years ahead, when it will again review the case.
>
> On the second review, the board will determine the interval, not being greater than five-yearly, at which the case is to be further reviewed. The board may vary this interval from time to time.
>
> On the occasion of each review, the board will furnish a report and recommendation to the Minister for Social Welfare who may, in his discretion, require the board to furnish an additional report and recommendation at any time.
>
> Assuming the board eventually recommends the release of the prisoner and the Minister for Social Welfare concurs in its recommendation, the Attorney-General may recommend to the Governor that, by exercise of the Royal prerogative, the prisoner may be released on such terms and conditions as may be appropriate.'

Though this procedure is an improvement on the present non-existent provisions and goes some way to obviate the dangers adverted to herein at page 131, it is submitted firstly, that the period of 10 years between the first review and the second is still too long and secondly that it is unnecessary to retain the roles of the Attorney-General and the Governor (cf. South Australia page 136 herein). It is still unclear when the legislatio

to implement these changes will be introduced or whether these changes will be made administratively. It is understood that legislation is being considered in the meantime which will allow the Minister to call for a report on a life sentence prisoner at any time. If this is a first step to resolve the problem of review and release one also hopes that it will not be the last.

Canberra
December 1975

Arie Freiberg
David Biles