SUPREME COURT OF VICTORIA

APPEAL DIVISION

COURT OF CRIMINAL APPEAL

177/94

THE QUEEN

v.

RAYMOND EDMUNDS

JUDGES: CROCKETT, HAMPEL and HANSEN, JJ.

WHERE HELD: Melbourne

DATE OF HEARING: 8 November 1994

DATE OF JUDGMENT: 24 November 1994

CATCHWORDS:
Criminal law - Appeal against sentence - Murder - Refusal to fix non-parole period for life sentences must be exceptional - Must show specific error vitiating exercise of discretion or that its exercise was plainly wrong - Application dismissed.

APPEARANCES:	Counsel	Solicitors
For the Crown	Mr. G. Flatman	Mr. P.C. Wood Solicitor for Public Prosecutions
For the Applicant	Mr. A. Shwartz	Legal Aid Commission of Victoria

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CROCKETT, J.:
HAMPEL, J.:
HANSEN, J.: On 10th February 1966 the applicant murdered Abina Margaret Madill and Garry Charles Heywood at Shepparton. The crimes were not detected until the applicant was arrested in 1985 and a fingerprint taken from him was compared with prints found in relation to the 1966 murder. Between 1971 and 1977 the applicant committed three offences of rape and two of attempted rape.

In April 1986 he was sentenced to a total of 30 years' imprisonment for the sexual offences and to life imprisonment in relation to each of the murders. The 30 year sentence was concurrent with the life sentences and the sentencing judge indicated that were he to fix a minimum term in respect of the sexual offences it would be one of 25 years. Subsequently, in December of 1993, the Court of Criminal Appeal fixed a non-parole period for the offences of rape and attempted rape of 16 years and eight months. The applicant applied for the fixing of a non-parole period in relation to the life sentences pursuant to s.13(2) of the Sentencing Act. That application was refused and it is from that refusal that the applicant now seeks leave to appeal.

It is necessary to refer to the course of the proceedings before the learned judge who refused the application because they are relevant to the grounds of appeal. The application was dated 23rd September 1992 and came on before the court on 15th March 1994. As certain reports were not then available and the material was incomplete the matter was adjourned until the 26th

April. On that day the applicant's counsel sought an adjournment for four years which the judge considered inappropriate. He also refused to allow the application to be withdrawn. His Honour, however, allowed more time and the further hearing was adjourned until the 1st June 1994. It next came on for hearing on 18th July. It was heard on that day, on the 22nd July, the 1st and 2nd August and was determined on the 5th August 1994.

The grounds of the present application are:

1. The learned sentencing judge erred in both as a matter of law and in the exercise of his discretion in refusing to adjourn the application for the fixing of a minimum term.
2. The learned sentencing judge erred in both as a matter of law and in the exercise of his discretion by refusing the applicant leave to withdraw his application for the fixing of a minimum term.
3. The learned sentencing judge erred in both as a matter of law and in the exercise of his sentencing discretion in refusing to set a minimum term.

Clearly grounds 1 and 2 are not valid grounds of appeal because neither an order refusing an adjournment nor one disallowing the withdrawal of the application is a "sentence" within the meaning of s.566 of the Crimes Act. Counsel for the applicant before us, when faced with the reality of the problem with grounds 1

and 2, then relied on the refusal to adjourn or allow withdrawal of the application as matters going generally to the exercise of the sentencing discretion and therefore included those matters in his arguments under ground 3.

His Honour had available to him a considerable number of reports which dealt with the applicant's background, his personality and his behaviour in custody. On the basis of that material which was the subject of much discussion during the hearing, his Honour concluded that the applicant has behaved well in prison with one significant exception, namely, an attempted escape from Pentridge in June of 1992.

A matter which loomed large during the application was the question of the circumstances in which the two murders were committed. The prosecution contended that the young couple were abducted at gun point, that the female victim was raped before she was shot and that she and the male victim were shot with the applicant's gun. His Honour found that the applicant had previously sought to minimize the nature of his conduct on the night of the murders maintaining that the killing was unpremeditated, that it was Heywood's gun from which the shots were fired and that he, the applicant, had consensual intercourse with the female victim before the shootings. His Honour pointed out that it was only after the application had been adjourned in early 1994 and was relisted in April that the applicant admitted that the gun used to kill the deceased was his gun.

The circumstances surrounding these killings were described by his Honour succinctly in his sentencing remarks:

> "The murders committed by the applicant were of two innocent young people: Gary Heywood, then aged 18 years, and Abina Madill, then aged 16 years.
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> On the evening of Thursday, 10 February 1966, a group of young friends in Shepparton, including Gary Heywood and Abina Madill, assembled at Lake Victoria and then at the Shepparton Civic Centre. They were drinking. Sexual activity occurred amongst them. Outside the Shepparton Civic Centre Mr Heywood, whose Holden vehicle was the vehicle in which the group were driven around that evening, said that he intended to drive Miss Madill back down to the lake. As a token of their intention to return to drive home the other young people, he and she left some personal possessions with their friends. Mr Heywood and Miss Madill then departed. They were never again seen alive.
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> Mr. Heywood's car was found at 5 a.m. the next morning near Lake Victoria, Shepparton. A large scale search for the two young persons was commenced. The following day, 13 February, Abina's white handbag was found in the dry bed of Castle Creek, adjacent to the Goulburn Valley Highway, south of Shepparton. Two weeks later on Saturday, 26 February 1966, the bodies of the two deceased were found in a dense copse of trees in a state forest off River Road, Murchison East, 23 miles south of Shepparton. The clothed body of Mr. Heywood lay flat on his back. Through his skull was one single bullet hole. Three metres from his body was one fired .22 cartridge case. Mr Heywood had died from one .22 bullet which was found in his skull. Three hundred metres away was the body of Abina Madill. The top half of her body was clothed; the lower half was not. That body, too, was flat on its back. The legs were apart. Miss Madill had been battered to death and had died from a fractured skull. 64 metres west of Miss Madill's body two women's stockings were found. Each had been tied tightly in a loop forming a circumference of 50 centimetres. Fibres found in Mr. Heywood's trousers matched those found on the stockings, indicating that his legs had been tied with those stockings.

> Nearby a small pile of clothing was found which included Miss Madill's under clothing. The clothing had been neatly folded and placed together. Found nearby was a second fired .22 cartridge case and a small black plastic plug. The plug, the two spent cartridge cases and the bullets removed from the skull of Mr Heywood were all forensically examined. The forensic examination revealed they were all from the one weapon, a Mossberg self loading .22 rifle.

After carefully assessing the material before him and hearing extensive argument, his Honour concluded that he was satisfied beyond reasonable doubt that the applicant abducted the two deceased at gun point and that he raped Miss Madill before killing her. In support of ground 3 it was argued on behalf of the applicant that the factual scenario proffered by the prosecution and accepted by the judge as to the circumstances in which the killings occurred was in conflict with other facts and circumstances. Therefore there was insufficient basis upon which the judge could be satisfied to the required extent of such determinative factors as the abduction of the two young people and the rape of Miss Madill. See R. v. Chamberlain (1983) 2 V.R. 511. In our opinion the material before his Honour which included maps and photographs which we have had the advantage of examining, clearly permitted the findings which he made for the purpose of assessing the nature of the crimes committed and the circumstances in which they were committed. His Honour's examination of those circumstances and the conclusions based upon it were a relevant part of the exercise of his discretion in considering whether a non-parole period should be fixed.

It was submitted that s.11(1) of the Sentencing Act 1991 demonstrates a legislative intention that a non-parole period should be fixed by the Court "unless it considers that the nature of the offence or the past history of the offender make the fixing of such a period inappropriate". It was said that an exercise of the discretion not to fix such a period should be limited to the worst category of cases of which the present was not one. It was argued that the past history of the offender at the time of the commission of the two murders was that of a 21 years old man with no prior convictions. As he has been punished in respect of the subsequent sexual offences for which a minimum term has been fixed, it was said that to give weight to those offences in considering whether a non-parole period should be fixed for the murders would amount to double punishment. It was also submitted that the failure by the learned judge to allow the application to be withdrawn or alternatively to allow an adjournment for four years worked to the prejudice of the applicant because the applicant has not been given the opportunity to demonstrate sufficiently and for a long enough period the fact of his rehabilitation. It was contended that the right to apply to have a non-parole period fixed was a benefit conferred upon an applicant by the legislature and that an applicant should be entitled to present his application at a time most favourable to him when his conduct in prison, the extent of his rehabilitation and the question as to whether he presents a danger to the community may be best assessed.

After stating his findings as to the circumstances in which the murders were committed his Honour, in a careful judgment, referred to the benefit he obtained from examining a multitude of reports about the applicant. He referred specifically to those reports and concluded that they establish that the applicant suffers from no psychiatric illness, has no intellectual impairment and is above average intelligence. He suffers from a personality disorder with a psycho-sexual dysfunction. The learned judge pointed out that the applicant's prognosis was guarded. A later report by Mr. Joblin which gave a more positive prognosis and to some extent the other reports, were significantly minimised because they were based on the assumption which was now proved to be incorrect, that the killing was unpremeditated and committed by the use of Mr. Heywood's gun. His Honour obviously treated as significant the more recent admission by the applicant that it was his gun that was used and the finding by his Honour that his gun was used after the female victim was raped. His Honour correctly directed himself that he must not sentence the applicant again for the 1970's rapes and attempted rapes nor must he look upon the application for the fixing of a non-parole period in the context of preventative detention. The relevant cases were considered and cited. He also, we think, considered correctly that the rapes and attempted rapes were of significance on the application before him especially as he found that the murders were committed in the context

of a sexual crime against the female victim. Again, we think correctly, his Honour pointed out that this was an unusual case because the applicant was at large for nearly 20 years after the commission of the two murders so it was possible and relevant to look at his conduct during that time as well as his conduct both favourable and unfavourable whilst in custody.

His Honour considered the applicant's background, his age of 51 years and the non-parole period of 16 years and eight months already fixed in December 1993. He also considered the application by reference to a number of other cases in which the issue of the fixing of a minimum term had been considered by this Court particularly the recent case of Denyer.

It is not for this Court to re-exercise the discretion which was vested in the learned judge. In order to succeed the applicant must show that his Honour either made some specific error which vitiates the exercise of his discretion or that its exercise was plainly wrong. Before refusing the application his Honour noted that he was conscious of the fact that to refuse it is an exceptional course.

After examining the material which was before his Honour and reading his Honour's reasons for refusing the application we can find no error which would justify our interference. Nor are we of the opinion that the refusal to fix a non-parole period was a plainly wrong exercise of his Honour's discretion. The crimes of murder committed in the context of rape, were horrific

and the applicant had thereafter demonstrated himself to be a persistent dangerous rapist.

In all those circumstances the application must be dismissed.

CERTIFICATE

I certify that this and the 8 preceding pages are a true copy of the reasons for judgment of the Appeal Division, Court of Criminal Appeal (Crockett, Hampel, and Hansen, JJ.) of the Supreme Court of Victoria delivered on 24 November 1994.

DATED this 24th day of November 1994.

L. Branicki
Associate