

**COURT:** SUPREME COURT OF TASMANIA (FULL COURT)

**CITATION:** *Director of Corrective Services v Nguyen* [2020] TASFC 11

**PARTIES:** BOURNE, Kristy Lee in her capacity as  
THE DIRECTOR OF CORRECTIVE SERVICES  
v  
NGUYEN, Duc Van

**FILE NO:** 1933/2020

**DELIVERED ON:** 9 December 2020

**DELIVERED AT:** Hobart

**HEARING DATE:** 9 October 2020

**JUDGMENT OF:** Blow CJ, Estcourt J, Geason J

**CATCHWORDS:**

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*Corrections Act 1997* (Tas), ss 70(a), 71.

Aust Dig Criminal Law [3419]

**REPRESENTATION:**

*Counsel:*

**Applicant:** J Rudolf

**Respondent:** F Cangelosi

*Solicitors:*

**Applicant:** Solicitor-General

**Respondent:** Bold Lawyers

**Judgment Number:** [2020] TASFC 11

**Number of paragraphs:** 81

**KRISTY LEE BOURNE in her capacity as THE DIRECTOR  
OF CORRECTIVE SERVICES v DUC VAN NGUYEN**

**REASONS FOR JUDGMENT**

**FULL COURT  
BLOW CJ  
ESTCOURT J  
GEASON J (Dissenting)  
9 December 2020**

**Orders of the Court**

- 1 Declaration that s 71 of the *Corrections Act 1997* applies to the calculation of when the respondent will be eligible for parole.
- 2 Declaration that the non-parole period in respect of the sentence imposed upon the respondent by the Hon Justice Brett on 11 May 2020 commenced on 8 January 2019.
- 3 Declaration that the non-parole period in respect of that sentence continued without interruption when the respondent was released on parole.

**KRISTY LEE BOURNE in her capacity as the DIRECTOR  
OF CORRECTIVE SERVICES v DUC VAN NGUYEN**

**REASONS FOR JUDGMENT**

**FULL COURT  
BLOW CJ  
9 December 2020**

1 This application relates to the interpretation of provisions in the *Corrections Act 1997* in relation to parole. It concerns a situation in which a prisoner was sentenced to imprisonment, released on parole, and subsequently sentenced to imprisonment for a second time, with an order permitting parole. The application raises a question as to when the second parole ineligibility period commences. Does it commence upon the expiration of the first parole ineligibility period, or upon the imposition of the second sentence, or upon the completion of the first sentence? Because the judge who imposed the second sentence, Brett J, expressed a view as to this point, the application has been heard by the Full Court, sitting at first instance.

2 The sequence of relevant events was as follows:

- In 2018, Slicer AJ sentenced the respondent to four years nine months' imprisonment with effect from 23 August 2016, and ordered that he not be eligible for parole until he had served half of that sentence.
- As a result he became eligible for parole on 8 January 2019. He was released on parole on that day.
- The respondent re-offended. His parole was revoked on 5 April 2019, restored on 18 April 2019, and revoked again on 11 July 2019.
- On 11 May 2020 Brett J sentenced the respondent to three years six months' imprisonment, cumulative to the sentence imposed by Slicer AJ, and ordered a parole ineligibility period of two years three months. His words were, "I order that you not be eligible for parole until you have served a period of two years and three months *of the sentence imposed by me.*" [My emphasis.] However his Honour went on to make it clear that he believed that period would commence upon the expiry of the non-parole period ordered by Slicer AJ, and that it would continue during the periods when the respondent was released on parole. It is clear that the intended meaning of his order was that the respondent was not to be eligible for parole until the expiry of a period of two years and three months *in respect of* the sentence that he was imposing.

3 The Director of Corrective Services contends that the parole ineligibility period ordered by Brett J commenced on the date that he sentenced the respondent, namely 11 May 2020. The respondent contends that Brett J was correct, and that the relevant parole ineligibility period commenced on 8 January 2019.

4 All of the relevant legislation is set out in the judgments of the other members of the Court, as are the detailed arguments of both parties.

5 The Director's contentions are based on an interpretation of the definition of "designated sentence" in s 71(1) of the *Corrections Act*. That definition reads as follows:

**"designated sentence** means –

- (a) a sentence of imprisonment to which a non-parole period is applicable or in respect of which the prisoner is ineligible for parole by operation of section 17(3A) of the Sentencing Act 1997; or

(b) a sentence of imprisonment to which an order under section 17(2)(a) of the Sentencing Act 1997 is applicable."

6 Paragraph (b) of that definition is of no relevance to this case. No orders were made under s 17(2)(a) of the *Sentencing Act* 1997.

7 As to par (a) of the definition, the Director contends that a non-parole period ceases to be "applicable" to a sentence of imprisonment as soon as that period expires. However the respondent contends that the expiry of a non-parole period does not result in a sentence of imprisonment ceasing to be a "designated sentence".

8 If the respondent is correct, then the parole ineligibility period for his second sentence commenced immediately upon the expiry of the parole ineligibility period in respect of his first sentence. A non-parole period constitutes a "minimum term" for the purpose of s 71 of the *Corrections Act*. By virtue of s 71(2)(a), the minimum terms relating to two cumulative sentences "are to be cumulative upon ... each other in like manner as the sentences to which they relate". Section 71(5) then goes on to provide as follows:

"(5) If, under subsection (2), the minimum term in relation to a designated sentence is cumulative upon the minimum term in relation to another such sentence, the later minimum term is to be taken to commence upon the expiration of the earlier minimum term, notwithstanding that the earlier sentence has not been completed."

9 On the basis of those provisions, the respondent contends that the "minimum term" or "non-parole period" of the second sentence is, pursuant to s 71(5), "to be taken to commence upon the expiration of the earlier minimum term, notwithstanding that the earlier sentence has not been completed".

10 In my view that reasoning is correct, and there is a fundamental flaw in the reasoning relied upon by the Director. If a sentence of imprisonment ceased to be a "designated sentence" upon the expiration of its non-parole period, then there could never be a situation to which s 71(5) applied. As soon as a designated sentence ceased to be a designated sentence, s 71(5) would become inapplicable.

11 One naturally thinks of a non-parole period as a period that forms part of the sentence to which it relates. The concept of a non-parole period commencing before the sentence to which it relates would ordinarily be regarded as very strange. However s 71(5) expressly provides for such a situation to arise. Significantly, there is nothing in the language of the provisions relating to parole in the *Corrections Act* that reflects an assumption or premise that a non-parole period is to commence at the same time as the sentence to which it relates.

12 Further, there is nothing in the history of the legislation to suggest that a non-parole period can never commence before the sentence to which it relates. Sections 70 and 71 of the *Corrections Act* are in practically identical terms to ss 12A and 12B of the *Parole Act* 1975. Those sections were introduced by the *Parole Amendment Act* 1987 which, for the first time, gave sentencers a discretion to determine the length of non-parole periods. Before the commencement of that Act, the length of non-parole periods was fixed by statute.

13 If the Director were correct in contending that the respondent's first sentence ceased to be a "designated sentence" upon the expiry of the non-parole period applicable to it, then it would follow that s 71 would not apply, and that s 70(a) would apply. Section 70(a) would require the respondent "not to be released on parole before the completion of ... the non-parole period applicable to the prisoner's sentence". If the Director's contentions were correct, it is by no means clear whether the non-parole period for the second sentence would commence upon its imposition or upon the completion of the first sentence. There is no express provision in the *Corrections Act* that would govern the situation. If s 71(5) were inapplicable, there would be no reason to conclude that it was implicit in the legislation

that the non-parole period could commence on the date of the imposition of a cumulative sentence when an earlier sentence had not been completed. One could reasonably take the view that it was implicit in the legislation that the non-parole period would not commence until the prisoner commenced to serve the sentence to which it related.

14           It is true that the interpretation of the definition of "designated sentence" contended for by the respondent can have surprising consequences in certain situations. Geason J has referred to those consequences in his reasons. There can be a situation in which a prisoner is released on parole for so long a period that, after re-offending and receiving a short cumulative sentence, the date of the expiry of the second non-parole period is earlier than the date of the imposition of the second sentence. That is to say, there can be a situation in which a prisoner becomes eligible for parole in respect of a sentence immediately upon its imposition. In that situation, the sentencing judge would have no power to fix a future date before which the prisoner would not be eligible for parole. As a matter of principle, a sentencing judge should have that power but, for practical purposes, only the Parole Board has that power in that situation.

15           However such a situation can be avoided by imposing a concurrent sentence rather than a cumulative one. It is true that there are legislative provisions that prohibit or restrict the imposition of concurrent sentences in certain circumstances: *Corrections Act*, s 76(2); *Sentencing Act* 1997, s 14(2) and (3). However it may well be open to a sentencing judge to conclude that such a situation involves "special circumstances" for the purposes of s 76(2) of the *Corrections Act*, warranting a concurrent sentence for an offence committed while on parole, or "exceptional circumstances" for the purposes of s 15(3) of the *Sentencing Act*, warranting a concurrent sentence for a prison offence.

16           Finally, it is necessary to consider whether the periods when the respondent was on parole are to be counted as part of his second non-parole period. There is no legislation that requires those periods not to be counted. Not counting those periods would be inconsistent with s 71(2)(a) of the *Corrections Act*, which simply requires the minimum terms to be cumulative upon each other. Section 14(3) of the *Sentencing Act*, which allows periods when a sentenced offender is at large not to be counted in calculating the term of imprisonment to be served, does not apply since it applies only to periods after the imposition of the relevant sentence. It follows that the parole ineligibility period in respect of the respondent's second sentence continued without interruption when he was released on parole.

17           For the reasons stated, the questions asked in the originating application should be answered as proposed by Estcourt J. I would make declarations accordingly.

**KRISTY LEE BOURNE in her capacity as THE DIRECTOR  
OF CORRECTIVE SERVICES v DUC VAN NGUYEN**

**REASONS FOR JUDGMENT**

**FULL COURT  
ESTCOURT J  
9 December 2020**

**The application**

18 The applicant, the Director of Corrective Services, by originating application, seeks answers to the following questions:

- "(a) Upon the proper construction of the *Corrections Act 1997* (the Act), s 71, does it apply to the calculation of when the Respondent, Duc Van Nguyen, will be eligible for parole?
- (b) If it does, when does (or did) the Respondent begin to serve the non-parole period imposed upon the Respondent by the learned Brett J on 11 May 2020?
- (c) If the answer to (b) is upon the expiry of the Respondent's previous non-parole period (around 8 January 2019), is the Respondent to be taken as having been continuously serving the non-parole period since then (even when he was released on parole)?"

19 The application has been referred to this Court for determination.

**The background**

20 On 11 May 2020, Brett J made the following comments on passing sentence upon the respondent:

"You were sentenced to imprisonment in respect of those crimes for a term of four years and nine months, commencing from 23 August 2016. The sentence included a non-parole period of one half of that term. You were released on parole on 8 January 2019, which on my calculation must have been almost precisely coincident with the end of the non-parole period. At that time, the parole expiry date was in May 2021. However, on 30 March 2019, you committed offences which included driving a motor vehicle with a prescribed illicit drug present in your body, and possession and use of controlled drugs, including methylamphetamine. Your parole was revoked on 5 April 2019 and you returned to custody for a very short time. You were again released on parole on 18 April 2019 ...

Your counsel also submitted that the sentence I impose should be backdated, so that you are able to apply for parole at an appropriate time. There are some points that should be made about this submission. Firstly, s 76 of the Corrections Act provides that where a prisoner is sentenced to imprisonment for an offence committed during the period of his release on parole, as this one was, the sentence must be cumulative to the remainder of the sentence in respect of which he was released on parole, unless the Court is of the opinion that special circumstances make it desirable to order whole or partial concurrency. I am not of the opinion that special circumstances exist in your case. This was separate offending committed after your release from prison. I would, in any event, have concluded that a cumulative sentence was appropriate. Further, a cumulative sentence will not unreasonably delay your ability to apply for parole. My intention is to fix a non-parole period in respect of the sentence I am about to impose. Section 71 of the Corrections Act makes it clear that that non-parole period will be cumulative upon the non-parole period relevant to the earlier sentence. Under s 82 of that Act, you may be granted parole again, despite the earlier revocation of parole. Accordingly, you will become eligible for parole after the accumulated non-parole period, although whether you are granted parole will, of course, be a matter for the

Parole Board. I will say something further about the length of the non-parole period relevant to this sentence shortly.

- 1 You are convicted of the crimes to which you have pleaded guilty.
- 2 You are sentenced to a global term of three years and six months' imprisonment, which will be cumulative upon the sentence currently being served by you. Pursuant to s 17(2) of the Sentencing Act, I order that you not be eligible for parole until you have served a period of two years and three months of the sentence imposed by me. I have fixed the non-parole period at this length to accord with what I consider is the minimum time that you should spend in prison having regard to the circumstances of the crimes and your personal circumstances. I have also taken into account the practical effect of s 71 of the Corrections Act. The mandatory effect of this section is that the non-parole period relevant to the sentence I impose, will commence from the date of expiry of the non-parole period relevant to the sentence imposed by Slicer AJ on 7 March 2018, which is around 8 January 2019. The non-parole period relevant to this sentence will therefore include the time that you were on release on parole, which includes the time that you were committing these crimes. On my calculation, the non-parole period I have imposed will expire in April 2021, and this, in my view, is the minimum time you should actually remain in prison ...".

## The legislation

21 Section 17 of the *Sentencing Act 1997* provides as follows:

### "17 Court may bar or limit eligibility for parole

(1) This section does not apply to a sentence of imprisonment for the term of an offender's natural life.

(2) A court that imposes a sentence of imprisonment on an offender, either on the conviction of the offender or on the determination of an appeal, or, on appeal, confirms the imposition of such a sentence, may order —

- (a) that the offender is not eligible for parole in respect of that sentence; or
- (b) that the offender is not eligible for parole in respect of that sentence before the expiration of such period as is specified in the order.

(2A) A court that imposes a sentence of imprisonment on an offender may not make an order under subsection (2)(b) in respect of the offender if the court —

- (a) makes in respect of the offender a community correction order; and
- (b) orders that the operational period, within the meaning of section 42AM, of the community correction order is to commence at the end of the sentence of imprisonment.

(3) The period specified in an order under subsection (2)(b) is not to be less than one-half of the period of that sentence.

(3A) Where a court imposes a sentence of imprisonment and does not make an order under subsection (2), the offender is not eligible for parole in respect of that sentence.

(4) In exercising its discretion under subsection (2), a court may have regard to such matters as it considers necessary or appropriate and, without limiting the generality of this, may have regard to all or any of the following:

- (a) the nature and circumstances of the offence;
- (b) the offender's antecedents or character;
- (c) any other sentence to which the offender is subject.

(5) An order under subsection (2) forms, for all purposes, part of the sentence to which it relates.

(6) An offender in respect of whom —

- (a) an order has been made under subsection (2)(a) ; or
- (b) subsection (3A) applies —

is not eligible to be released on parole in respect of his or her sentence.

(7) A court must give reasons for making an order under subsection (2).

(8) If the whole or part of a sentence of imprisonment is suspended, only the operative sentence is to be taken into account for the purposes of this section.

(9) In subsection (8),

*operative sentence* means that part of a sentence of imprisonment which has not been suspended."

22

Sections 70, 71, 76 and 82 of the *Corrections Act 1997* (the Act), provide as follows:

**"70 Where prisoner eligible for parole**

Subject to section 71, a prisoner is not to be released on parole before the completion of —

- (a) the non-parole period applicable to the prisoner's sentence; or
- (b) a continuous period of imprisonment of 6 months —

whichever is the greater, unless, in the opinion of the Board, there are exceptional circumstances warranting the earlier release on parole of the prisoner.

**71 Prisoner subject to more than one non-parole period or other minimum term**

(1) In this section —

*designated sentence* means —

- (a) a sentence of imprisonment to which a non-parole period is applicable or in respect of which the prisoner is ineligible for parole by operation of section 17(3A) of the *Sentencing Act 1997*; or
- (b) a sentence of imprisonment to which an order under section 17(2)(a) of the *Sentencing Act 1997* is applicable;

*minimum term*, in relation to a designated sentence, means —

- (a) in the case of a sentence to which a non-parole period is applicable, that non-parole period; or
- (b) in any other case, the sentence itself.

(2) If, at any time, a person is subject to 2 or more designated sentences —

- (a) the minimum terms relating to those designated sentences, subject to subsections (3) and (4), are to be cumulative upon, or concurrent with, each other in like manner as the sentences to which they relate; and
- (b) the completion by a person of the non-parole period applicable to a sentence to which the person is subject is not to be taken into account for the purposes of section 70 if, at the time of completion of that non-parole period, the person has not completed the minimum term relating to any other designated sentence to which the person is subject.

(3) For the purposes of subsection (2), if, at any time, a person is subject to 2 or more sentences that are to be served concurrently, being sentences to each of which, but for this subsection, a non-parole period would be applicable under section 68, those sentences are to be taken to be collectively subject to a single non-parole period.

(4) The single non-parole period referred to in subsection (3) is to be ascertained in accordance with section 68 as if the sentences to which the person is subject comprised a single sentence of imprisonment for a period equal to the total period of imprisonment to which the person is sentenced as a result of those sentences being served concurrently.

(5) If, under subsection (2), the minimum term in relation to a designated sentence is cumulative upon the minimum term in relation to another such sentence, the later minimum term is to be taken to commence upon the expiration of the earlier minimum term, notwithstanding that the earlier sentence has not been completed ...



## **76 Sentences for offences committed during release on parole**

(1) If a prisoner is sentenced to imprisonment for an offence committed during the period of his or her release on parole, that sentence is, subject to subsection (2) , to be cumulative on the remainder of the sentence in respect of which the prisoner was released on parole.

(2) If the court is of the opinion that special circumstances make it desirable to do so, it may order that the whole or part of the sentence of imprisonment for an offence committed during the period of a prisoner's release on parole is to be concurrent with the remainder of the sentence in respect of which the prisoner was released on parole...

## **82 Power of Board to release prisoner on parole after previous revocation**

The Board may release a prisoner on parole notwithstanding that on any previous occasion the prisoner's release on parole has been revoked."

### **Discussion**

23 As can be seen, there are three types of "designated sentence" for the purposes of the Act, s 71(1), the first being one in respect of which a non-parole period was ordered under s 17(2)(b) of the *Sentencing Act*, the second being one in respect of which it was ordered under s 17(2)(a) of the *Sentencing Act*, that the offender was not to be eligible for parole, and the third being one where no non-parole order was made and s 17(3A) of the *Sentencing Act* is engaged so that the offender is not eligible for parole in respect of that sentence.

24 And, there are two types of "minimum term" for the purposes of the Act, s 71(1), the first being, in the case of a sentence to which a non-parole period is "applicable", that non-parole period, and the second being "in any other case", "the sentence itself".

25 The applicant's primary argument is predicated on the basis that there is a third species of sentence. Namely, one where a non-parole period was ordered and was thus "applicable" to the sentence but in respect of which the "minimum term" metamorphosed from the non-parole period and ceased to be "applicable" to the sentence itself, because the non-parole period had been served but the sentence had not.

26 That argument is, in summary, that in the respondent's circumstances, s 71 of the Act does not apply, because he is not subject to two or more "designated sentences", because he has already completely served the first non-parole period, and it is thus no longer "applicable" to the first sentence. Thus, it is said, although the respondent is subject to two sentences, he is only subject to one "designated sentence".

27 I find myself unable to accept that argument.

28 A court ordered non-parole period always remains "applicable" to a sentence in respect of which it was imposed, because it underpins, and remains essential for, the ongoing formulaic operation of s 71(5) of the Act, which provides, by the device of defined terms, that if the "minimum term" in relation to a "designated sentence" is cumulative upon the "minimum term" in relation to another "designated sentence", the later "minimum term" is taken to commence upon the expiration of the earlier "minimum term", notwithstanding that the earlier "sentence" has not been completed.

29 The non-parole period ordered always remains "applicable" to the sentence because, as noted by Brett J, pursuant to s 82 of the Act, the Parole Board may release a prisoner on parole notwithstanding that on a previous occasion the prisoner's parole had been revoked. That provision could not operate on a sentence to which a non-parole period was not "applicable", for the obvious reason that if there were no applicable non-parole period, there could be no release from prison until the prisoner's sentence had been fully served.

30 In the alternative, the applicant argues that if her interpretation of "designated sentence" is not accepted, then while s 71 of the Act allows for a non-parole period to effectively start to be served before the sentence of imprisonment to which it relates begins to be served, it does not extend so far as to allow a non-parole period to begin "before the sentence itself was imposed". In other words, s 71 does not allow for the commencement of the non-parole period of a sentence to effectively be back-dated.

31 I find myself unable to accept that argument.

32 By its terms, s71 clearly does allow for a second non-parole period to commence before the second sentence commences to be served. That is the purpose of the section in providing that, where the "minimum term" in relation to a "designated sentence" is cumulative upon the "minimum" term in relation to another such sentence, the later "minimum term" is to be taken to commence upon the expiration of the earlier "minimum term", "*notwithstanding that the earlier sentence has not been completed*". [My emphasis.]

33 There can be no sensible distinction drawn between a subsequent "minimum term" taken to commence upon the expiration of an earlier "minimum term", in the case of two "designated" sentences imposed on the same day and two such sentences imposed consecutively on different days. So long as a second "designated sentence" is imposed prior to the earlier "designated sentence" being fully served, the prisoner has the benefit of s 71(5). It is a matter for the sentencing judge to determine whether in those circumstances it is appropriate to set a non-parole period, and if so what non-parole period, in the case of the subsequent sentence.

34 I accept the applicant's submission that s 71(5) of the Act would lead to an incongruous and irrational result if that section inevitably operated so as to include a period during which the prisoner had been released on parole in respect of the first "designated sentence". However that is not the case.

35 In a case, such as the present, where a prisoner is released on parole and that parole is suspended or revoked at the time of the second "designated sentence", the new non-parole period would ordinarily be calculated by the sentencing judge so as to reflect the minimum time the prisoner should actually remain in prison, taking into account time spent on parole.

36 As I read Brett J's comments on passing sentence, that is exactly what his Honour did.

37 Because the respondent's crimes were committed whilst on parole, Brett J was aware that he was required by s 76 of the Act, unless he was satisfied as to the existence of special circumstances (which he was not), to impose a sentence which was cumulative upon the remainder of the sentence in respect of which the respondent had been released on parole. His Honour, being also conscious of the operation of s 71(5), then arrived at an appropriate head sentence and calculated the non-parole period so that it would expire in April 2021, which was, in his view, the date until which the respondent should actually remain in prison.

38 I do not accept the applicant's argument that such balancing as his Honour achieved will not always be possible. It is open to a sentencing judge in all such cases, to order, if desired, that the subsequent sentence is to commence at the expiration of a sentence of imprisonment currently being served, and to order that the prisoner *not* be eligible for parole in respect of the subsequent sentence. In such a case, the minimum term of the subsequent sentence is the sentence itself. That such term is commenced to be served from the expiration of the non-parole period of an earlier, substantially longer, sentence is an unavoidable consequence of the beneficial effect of s 71(5) in allowing minimum terms to be served cumulatively upon each other and not cumulative as and from the time an earlier sentence has been fully served.

39            If that was not the intent of the legislature, and there is nothing in the second reading speech to the *Parole Amendment Bill 1987* to suggest that it was not, then it is a matter for the Parliament. This is not a case where, to my mind, it can be said that, focussing on the text to be interpreted taken in the context of the provision, and bearing in mind its object and purpose, a literal interpretation of s 71 of the Act leads to a result that would defeat the apparent object of s 71(5). The section merely throws up another consideration which must be taken into account by sentencing judges in arriving at a fair and just result.

**Disposition**

40            I would answer the questions as follows:

- (a) Upon the proper construction of the Act, s 71 *does* apply to the calculation of when the respondent will be eligible for parole.
- (b) The respondent began to serve the non-parole period imposed upon him by Brett J on 11 May 2020, *upon the expiry of the respondent's previous non-parole period on 8 January 2019*.
- (c) The respondent is to be taken as having been continuously serving the non-parole period imposed by Brett J, *since 8 January 2019* (including when on parole release).

**KRISTY LEE BOURNE in her capacity as THE DIRECTOR  
OF CORRECTIVE SERVICES v DUC VAN NGUYEN**

**REASONS FOR JUDGMENT**

**FULL COURT  
GEASON J  
9 December 2020**

**Introduction**

41           The issue in this appeal is whether a sentence in respect of which a non-parole period has been specified, continues to be a designated sentence as defined in s 71(1) of the *Corrections Act* 1997 ("the Act") after the non-parole period has been served.

42           It arises because the respondent is subject to two sentences of imprisonment in respect of which a non-parole period was specified. The first non-parole period has been served, though the sentence to which it relates has not been completed. The second sentence is cumulative to the first, commencing once the first has been served. However, the non-parole period applicable to the second sentence was specified to commence at the conclusion of the non-parole period for the first sentence.

43           This was because Brett J considered that s 71(2) of the Act required the non-parole period applicable to the sentence to begin at the conclusion of the non-parole period specified for the first sentence. His Honour took the view that upon imposing sentence, the respondent was subject to two designated sentences as defined in s 71(1) of the Act.

44           Section 71 of the *Corrections Act* is in these terms:

**"71 Prisoner subject to more than one non-parole period or other minimum term**

(1) In this section —

*designated sentence* means —

- (a) a sentence of imprisonment to which a non-parole period is applicable or in respect of which the prisoner is ineligible for parole by operation of section 17(3A) of the Sentencing Act 1997; or
- (b) a sentence of imprisonment to which an order under section 17(2)(a) of the Sentencing Act 1997 is applicable;

*minimum term*, in relation to a designated sentence, means —

- (a) in the case of a sentence to which a non-parole period is applicable, that non-parole period; or
- (b) in any other case, the sentence itself.

(2) If, at any time, a person is subject to 2 or more designated sentences —

- (a) the minimum terms relating to those designated sentences, subject to subsections (3) and (4), are to be cumulative upon, or concurrent with, each other in like manner as the sentences to which they relate; and
- (b) the completion by a person of the non-parole period applicable to a sentence to which the person is subject is not to be taken into account for the purposes of section 70 if, at the time of completion of that non-parole period, the person has not completed the minimum term relating to any other designated sentence to which the person is subject.

(3) For the purposes of subsection (2), if, at any time, a person is subject to 2 or more sentences that are to be served concurrently, being sentences to each of which, but for this subsection, a non-parole period would be applicable under

section 68, those sentences are to be taken to be collectively subject to a single non-parole period.

- (4) The single non-parole period referred to in subsection (3) is to be ascertained in accordance with section 68 as if the sentences to which the person is subject comprised a single sentence of imprisonment for a period equal to the total period of imprisonment to which the person is sentenced as a result of those sentences being served concurrently.
- (5) If, under subsection (2), the minimum term in relation to a designated sentence is cumulative upon the minimum term in relation to another such sentence, the later minimum term is to be taken to commence upon the expiration of the earlier minimum term, notwithstanding that the earlier sentence has not been completed."

## The legislation

45 Non-parole periods are defined in s 3 of the *Corrections Act*<sup>1</sup>.

46 When imposing a custodial sentence under the *Sentencing Act* 1997 ("the Sentencing Act"), the court may order that an offender is not to be eligible for parole in respect of that sentence<sup>2</sup>: s 17(2)(a). Alternatively the court may order that the offender is not eligible for parole *before* the expiration of a specified period: s 17(2)(b). Such period must not be less than half of the period of the sentence imposed: s 17(3). If no order is made an offender is not eligible for parole in respect of that sentence: s 17(3A).

47 Such sentence is a "designated sentence" as defined by s 71(1) of the Act, and the non-parole period, where specified, is the "minimum term".

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<sup>1</sup> Non-parole period, in relation to a sentence of imprisonment, means –

- (a) in a case to which section 17(2)(a), 17(3A) or 18(1)(a) of the *Sentencing Act* 1997 applies, the whole of the period of the sentence; or
- (b) in a case to which section 17(2)(b) or 18(1)(b) of the *Sentencing Act* 1997 applies, the period specified in the order made under that section; or
- (c) in any other case, the non-parole period specified in section 68(1).

<sup>2</sup> **17 Court may bar or limit eligibility for parole**

- (1) This section does not apply to a sentence of imprisonment for the term of an offender's natural life.
- (2) A court that imposes a sentence of imprisonment on an offender, either on the conviction of the offender or on the determination of an appeal, or, on appeal, confirms the imposition of such a sentence, may order –
  - (a) that the offender is not eligible for parole in respect of that sentence; or
  - (b) that the offender is not eligible for parole in respect of that sentence before the expiration of such period as is specified in the order.
- (2A) A court that imposes a sentence of imprisonment on an offender may not make an order under subsection (2)(b) in respect of the offender if the court –
  - (a) makes in respect of the offender a community correction order; and
  - (b) orders that the operational period, within the meaning of section 42AM, of the community correction order is to commence at the end of the sentence of imprisonment.
- (3) The period specified in an order under subsection (2)(b) is not to be less than one-half of the period of that sentence.
- (3A) Where a court imposes a sentence of imprisonment and does not make an order under subsection (2), the offender is not eligible for parole in respect of that sentence.
- (4) In exercising its discretion under subsection (2), a court may have regard to such matters as it considers necessary or appropriate and, without limiting the generality of this, may have regard to all or any of the following:
  - (a) the nature and circumstances of the offence;
  - (b) the offender's antecedents or character;
  - (c) any other sentence to which the offender is subject.
- (5) An order under subsection (2) forms, for all purposes, part of the sentence to which it relates.
- (6) An offender in respect of whom –
  - (a) an order has been made under subsection (2)(a); or
  - (b) subsection (3A) applies –
 is not eligible to be released on parole in respect of his or her sentence.
- (7) A court must give reasons for making an order under subsection (2).
- (8) If the whole or part of a sentence of imprisonment is suspended, only the operative sentence is to be taken into account for the purposes of this section.
- (9) In subsection (8),
 

*operative sentence* means that part of a sentence of imprisonment which has not been suspended.

48 Once a non-parole period has been served, an offender is eligible for parole: s 70. An application for a grant of parole can be made to the Parole Board ("the Board").

49 The Board may grant parole, or refuse it: s 72(3), taking into account the matters specified in s 72(4). A parole order may be made subject to conditions: s 72(5) of the Act.

50 An offender who is on parole remains under sentence: s 78 of the Act. If parole is not revoked that sentence is taken to be served at the conclusion of the parole order: s 78(2) (subject to the exceptions in s 78(3)).

51 A parole order may be revoked by the Board: s 72(4), or s 79.

52 If a parole order is revoked, eligibility for parole is not forfeited, and the Board may grant parole again: s 82 of the Act.

53 If an offence is committed by a person on parole the sentence for that offence is required to be cumulative to the sentence to which the parole order relates: s 76(1) of the Act. If a court considers special circumstances exist which make it desirable to order that such sentence be served concurrently, it may so order: s 76(2)).

## **Facts**

54 On 7 March 2018, Slicer AJ sentenced the respondent to four years and nine months' imprisonment, backdated to 23 August 2016. His Honour specified a non-parole period of one half of that sentence. It ended on 8 January 2019.

55 The respondent was released on parole on that date. The parole order would have expired in May 2021, at which time that sentence would have been served.

56 However in March 2019 the respondent committed further offences, and on 5 April 2019 his parole was revoked.

57 On 18 April 2019 parole was granted again.

58 On 11 July 2019 the respondent was arrested and remanded in custody in relation to further offending.

59 On 11 May 2020 he was sentenced by Brett J for that offending. His Honour imposed a sentence of three years and six months' imprisonment, cumulative to the sentence imposed by Slicer AJ on 7 March 2018.

60 As such, the sentence imposed by Brett J begins in May 2021.

61 Brett J specified a non-parole period of two years and three months.

62 As noted above, his Honour announced that the non-parole period commenced on the expiry of the non-parole period applicable to the sentence imposed by Slicer AJ on 7 March 2018.

63 So expressed, it commenced on 8 January 2019.

64 The effect of his Honour's sentencing order is that the non-parole period specified for the sentence he imposed commenced *prior to the respondent's arrest and remand in custody for the offending* to which it related, even though the sentence itself did not.

## Discussion

65 The proposition that a non-parole period could commence prior to the sentence to which it relates arouses misgivings about an interpretation which leads to such result. That does not mean the interpretation is necessarily wrong. However upon consideration of the matter, my view is that the result is inconsistent with a proper interpretation of the section.

66 The non-parole period is the shortest period of a sentence which an offender must serve<sup>3</sup> before becoming eligible to complete the remainder of the sentence in the community. It operates as an embargo on an application for parole until that part of the sentence is served. It is apposite to speak of such period as *applying* to the sentence: there is an *applicable* non-parole period<sup>4</sup>.

67 Once that specified period elapses, the embargo on an application for parole is at an end. Thereupon it is *not* apposite to speak of the sentence as one to which a non-parole period *applies*. It is a sentence in respect of which it can be said there *was* an applicable non-parole period.

68 Once served, it has no further effect on the sentence. Parole may be sought, or not, in the offender's discretion.

69 Accordingly I construe "applicable" in s 71(1) to mean having application to the sentence, or being relevant to its operation. The non-parole period has no bearing upon the operation of the sentence (and thus no application to it) when it ceases to affect the matter of whether a prisoner is eligible to seek parole.

70 It is in this respect that the language in s 17 of the *Sentencing Act* is elucidative. Rather than being expressed as a right to parole accruing at a point in the sentence, the provision is framed in terms of a proscription expiring at a specified point in time. Had it been expressed in terms of a right which is acquired at a point in the sentence, a right which *continues to be applicable* to the sentence would be indicated. However expressed as a proscription which *ceases*, it references a state which, at that point, is no longer *applicable*.

71 The language of s 71 of the Act recognises that nuance, reflecting the formulation indicated by s 17 of the *Sentencing Act*.

72 The result is that once a non-parole period has been served the sentence is no longer a designated sentence because it is not one in respect of which such period is applicable.

73 Therefore when Brett J imposed sentence the respondent was not subject to two designated sentences. Section 71 did not apply.

74 This interpretation avoids the absurdity of a non-parole period referable to a second sentence, beginning before the commission of the offence attracting the second sentence, a result which is possible on the respondent's argument<sup>5</sup>. For that reason alone, even if an alternative construction were open, the

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<sup>3</sup> Considerations relevant to that judgment are not relevant here.

<sup>4</sup> For sentences under s 17(2)(a) or s 17(3A) of the *Sentencing Act* the preclusion on an application for parole is applicable to the whole of the sentence.

<sup>5</sup> For example an offender who receives a sentence of four years' imprisonment with a non-parole period of two years is granted parole after the non-parole period is served. A second offence is committed on parole, resulting in a cumulative sentence of two years' imprisonment with a non-parole period of one year. On the respondent's argument the non-parole period for the second sentence would begin before the second offence was committed. The State identified similarly absurd and potentially unjust results which flow from the respondent's argument. One of them: Annie is convicted of murder and sentenced to 21 years' imprisonment, with 10½ years non-parole. She is released on parole as soon as she becomes eligible. After 10 years on parole she commits another murder, for which she is sentenced to 18 years' imprisonment with 9 years non-parole. She would be immediately eligible for parole. If parole were granted she would effectively serve no time in prison for the second murder (apart from the few months that it might take to be granted parole).

interpretation which avoids that result should be preferred, because a construction which leads to an absurd result should be avoided: *Hall v Jones* (1942) 42 SR (NSW) 203, at 207–208.

75 This interpretation is not inconsistent with the purpose of s 71 of the Act. Slicer J in *Devine v The Queen* [2003] TASSC 52 at [18] said of the section:

"The enactment of the provision shows that whilst Parliament was concerned about community perception, it continued to pay regard to the issues of totality, consistency, and general fairness affecting convicted persons."

76 Section 71 is intended to ensure that where multiple sentences are imposed and operate cumulatively, each with its own specified and operational non-parole period, the non-parole period applicable to the first sentence is not rendered inoperative by reason of a subsequent sentence. This will arise when multiple sentences are imposed at the same time or close in time. Without s 71 an offender would be required to serve the whole of the first sentence if a subsequent sentence is cumulative to it, rendering futile the expression of a non-parole period for the first sentence. The result might be crushing. Section 71 dictates an approach which ameliorates that result by making effective the non-parole period in the first sentence, stringing it together with the subsequent non-parole periods.

77 This interpretation also avoids the result that the Parole Board might need to consider principles other than *suitability* for parole, and appropriate conditions directed to an offender's rehabilitation and re-engagement in the community. Sentencing considerations per se are not matters for the Parole Board. They are matters for the sentencing court to be considered in accordance with established sentencing principles, and reviewable by higher courts, unlike parole orders which are reviewable on limited bases only, and not on the basis that a refusal effects a result that is crushing.

78 This interpretation has no bearing on the right to seek parole after revocation. As noted s 82 of the Act confers that right. It is not necessary that a sentence be a designated sentence for that to occur, only that it *had been*. That is that the non-parole period has elapsed. That will always be so in cases to which s 82 of the Act applies.

79 Section 71(5) does not require a different interpretation because it has no work to do unless there are two designated sentences. It is not engaged if s 71(2) is not applicable.

80 I would answer as follows:

- 1(a) Upon the proper construction of the *Corrections Act 1997*, s 71, does it apply to the calculation of when the respondent will be eligible for parole? *No*.
- (b) If it does, when does (or did) the respondent begin to serve the non-parole period imposed upon him by Brett J on 11 May 2020? *Not necessary to answer*.
- (c) If the answer to (b) is upon the expiry of the respondent's previous non-parole period (around 8 January 2019), is the respondent to be taken as having been continuously serving the non-parole period since then (even when he was released on parole)? *Not necessary to answer*.

81 I would make a declaration as follows:

"That upon its proper construction, s 71 of the *Corrections Act 1997* does not apply to the calculation of the non-parole period imposed upon the respondent by the learned Justice Brett on 11 May 2020."