IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 113 of 2014

BETWEEN:

PHILLIP CHARLES KENTWELL
Appellant

AND

THE QUEEN
Respondent

APPELLANT'S REPLY

Part I: Certification: This submission is in a form suitable for publication on the internet.

Part II: Reply

1. The appellant does not accept the respondent's statement of issues (**RS**) at [1], as it makes no reference to "substantial injustice" or to the "summary fashion" in which the CCA considered s 6(3) of the *Criminal Appeal Act* 1912 (NSW).

2. The respondent does not appear to defend the "substantial injustice" test as it was applied by the Court of Criminal Appeal (**CCA**). Rather, it submits that the CCA's choice of words was not significant and was equivalent to a test of "what justice requires", the "underlying justice of the case", what is necessary to remedy "injustice", "good reasons" or "special circumstances" (RS [6.32]-[6.33], [6.57] and [6.14]). The respondent concedes that the factors relevant to an extension of time will vary, and that the CCA's discretion to extend time should be flexible (RS [6.12], [6.14]). It does not defend the CCA's "summary fashion" approach, nor dispute that the CCA's "summary" assessment of whether a lesser sentence was warranted in law was the result of a misapplication of *Etchell v R* (2010) 205 A Crim R 138 at 145 [25] (AWS [32], [34). Finally, the respondent concedes that the established errors identified in ground 4 of the appellant's appeal would, in the ordinary course, "have resulted in a longer sentence" (RS [6.50]) and that, as the CCA found that the appellant's sentence contained a number of errors, the correct approach was to consider whether a lesser sentence was warranted in law (RS [6.43]-[6.44]).

3. The appellant does *not* submit that there is no difference between an application for leave to appeal and an extension of time, that the only relevant question is whether there are arguable grounds of appeal or that the decision to extend time is a mere formality (*cf* RS [6.5]-[6.6]). Rather, as the respondent correctly states, the "discretion to extend time applies so as to allow flexibility in the consideration of out of time applications given the many possible reasons why an appeal may be out of time": RW K [6.12]. The relevant considerations will vary in the circumstances. An application one day out of time may require no or very little explanation, while an application more

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substantively out of time may require explanation and, if it is lacking, an examination of the merits may be warranted.[1] Other factors may be relevant, and may impact upon the significance of each other. For example, in *Yates v R* (2013) 247 CLR 328 the delay of 25 years contributed to the miscarriage of justice (at 342 [38]).

4. The respondent's submission that "substantial injustice" is equivalent to the "interests of justice" (RS [6.4]) and consistent with the approach in *R v Gregory* [2002] NSWCCA 199 (*Gregory*) (RS [6.38]) ignores the deliberate way in which the expression was adopted in *Abdul* following a review of the NSW and UK authorities ([46]-[49], [53], [59] and [72]). The CCA could have adopted the "interests of justice" tests formulated in earlier cases, but did not.

5. In *Gregory* the "interests of justice" were determined by balancing the "interests" of the applicant (not whether a "substantial injustice" would result to him) together with those of the Crown and the administration of law generally (at [42]). That is, each of the relevant considerations fed into an ultimate determination of what the interests of justice demanded. By contrast, the *Abdul* test relegates "justice" considerations to a subset to be weighed *against* the interests of the victim and community. Even then the "justice" considerations are only taken into account if they are so significant that it is evident on a summary view that failing to remedy the material error would work a substantial *in*justice to the appellant. It is submitted that this is an erroneous approach (*cf* **AB 287** [67]-[68], **AB 293** [90]), and additionally, is not manner in which the test of "substantial injustice" is applied by the English Courts.

6. Further, as formulated in *Abdul*, it is conceivable that substantial injustice could be found but counterbalanced by the other considerations such that an applicant does not meet the test for an extension of time. These other considerations are not taken into account summarily, and it is assumed and it is assumed that they do not align with the interests of justice. It is not clear what legitimate interests the victim and community can have *against* the interests of justice in any event. The community does not have a legitimate interest in an unjust outcome; be it in a person wrongly convicted or erroneously sentenced.

7. The outcome in the present case also demonstrates that the test of "substantial injustice" involves a much "higher threshold than the test of what justice requires" (*cf* RS [6.32]). The appellant, who *has never been sentenced according to law*, not least because the impact of his mental illness was not understood or properly taken into account, was unable to bring an appeal within time because he lost the representation of the Aboriginal Legal Service and was then denied legal aid. Fortuitously, this Court's decision in *Muldrock* prompted his sentence to be re-examined and the material errors (since accepted by the CCA) were identified.

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[1] It is noted that the prescribed form only seeks reasons for delay: Criminal Appeal Rules Form V.

8. Contrary to the respondent's submission that the delay in relation to the three non-*Muldrock* error grounds was not explained ([6.40]), it was explained both by the above problems with representation, and with the course then adopted in relation to legally aided cases involving "*Muldrock* error". The appellant's application for an extension of time in which to appeal was filed in accordance with the approach to "*Muldrock* error" sentences which had been taken by Legal Aid (NSW) in consultation with the Director of Public Prosecutions, the Public Defender's Chambers, the private bar and the Supreme Court. Extension of time applications were not brought in *Muldrock* cases until the CCA had determined the test case for the availability of relief in *Muldrock* error cases under s 43 of the *Crimes (Sentencing Procedure) Act* 1999 (*Achurch v R (No 2)* (2013) 84 NSWLR 328, "*Achurch*"). The decision in *Achurch* was handed down 14 months after the test application had been filed, and the appellant's application for an extension of time was filed just over one month later, as was that in O'Grady, Abdul and others.

9. In the present case, considerations such as the length and reason for the delay, the interests of the victim and the interests of the community, were given full weight and consideration to the extent they told *against* the grant of an extension of time (**AB 287** [68]-[69]). However the potential "substantial injustice" to the appellant (not, as in *Gregory*, the mere "interests" of the applicant), was only considered by reference to whether, on a summary view, which did not take into account the material errors in the sentence *or* post-sentence circumstances, another sentence was warranted in law. Thus, despite finding multiple material errors, at least one of which the respondent concedes would ordinarily result in an increased sentence, an extension of time was refused (**AB 293** [90], RS [6.50]). Had the CCA actually adopted the reasoning of Hodgson JA in *Gregory,* in which his Honour specifically noted that future punishment, in particular "a future period of imprisonment... would be a factor generally in favour of the applicant" (at [42]), an extension of time would likely have been granted.

10. Despite the Court of Appeal's statement in *Sinkovich v Attorney General (NSW)* [2013] NSWCA 383 (*Sinkovich*) at [46]-[47] that "there can be no presumption against derogation from a principle of finality by a statutory scheme which has that as its primary purpose" (and the respondent has not submitted that *Sinkovich* was wrongly decided) the CCA gave it determinative significance.

11. It should also be noted that neither *Gregory* nor *R v Unger* [1977] 2 NSWLR 990 (*Unger*) nor any of the UK authorities relied upon by the respondent concerned a sentence appeal in which the applicant remained in custody serving a sentence accepted to be affected by material errors. *Young v R* [1999] NSWCCA 275 (*Young*) was "far removed" from *Unger* not only because *Unger* involved invalid regulations (RS [6.23]), but also because, just as in this case, the *sentence* application in *Young* did not involve "prejudice to the Crown... the subjective facts and objective features [were]

clear. There [was] no need for further investigation or further evidence… [other than] a limited amount of evidence for … re-sentencing" (*Young* at [49]).

12. The respondent also mistakenly and repeatedly uses the terms "re-opening" or "re-opening closed cases" or "re-opening a completed case" in the context of an application for leave to appeal against sentence. The use of the words "reopening" in *R v Hawkins* [1997] 1 Cr App R 234 (*Hawkins*), and subsequent English authorities pertain to convictions and is to be contrasted with the respondent's broad use of this term. In NSW, a conviction appeal which challenges the finality of a conviction entered upon a guilty plea, requires an examination of whether the plea was entered in circumstances amounting to a miscarriage of justice, and, if invoked, the proviso (see eg. *R v Wilkes* (2001) 122 A Crim R 310). As noted in the Reply in O'Grady, the statutory context is different in the UK, the question since 1995 in the UK being limited to whether a conviction is "unsafe". The term "re-opening" as an aspect of finality is, in any case, qualified by an appeal: "The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system (*D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17 [35]; *Sinkovich* at [42]-[49]).

13. Further, an inquiry into a sentence under Pt 7 of the *Crimes (Appeal and Review) Act* 2001 *is* effectively a re-opening of an appeal. *Sinkovich* determined that the presence of *Muldrock* error in a sentence in relation to which appeal rights have been exhausted is sufficient to enliven the discretion under Pt 7 to refer the sentence to the CCA for an inquiry. Part 7 application made on the basis of *Muldrock* error have since resulted in the "whole case" being referred to the CCA to be determined "as if" an appeal. It is anomalous that "finality" does not prevent an applicant who has already had an appeal from having the whole of their sentence re-assessed by the CCA *because* they had been sentenced and their appeal was determined according to the erroneous interpretation set out in *Way v R* [2004] NSWCCA 131; (2004) 60 NSWLR 168 (*Way*); whereas an applicant who did not seek leave to appeal *because Way* was thought to be correctly decided cannot apply for leave unless they can demonstrate that, on a summary view, a substantial injustice will arise if they are not given an extension of time, and this restriction is imposed *because* of the principle of finality.

14. The appellant otherwise adopts the submissions of the appellant O'Grady in the related matter.

Dated: 25 July 2014

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