IN THE HIGH COURT OF AUSTRALIA

SYDNEY OFFICE OF THE REGISTRY **No. S 114 of 2014**

B E T W E E N: **ANDREW O'GRADY**

Appellant

and

THE QUEEN

Respondent

10 **RESPONDENT'S ANNOTATED SUBMISSIONS**

Part I: Publication

This submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues

1. In determining whether to grant an extension of time in which to apply for leave to appeal against sentence, is the existence of error in the original sentence a sufficient basis to grant the extension or should the court also take into account other relevant factors, including the length of the delay, the reasons for the delay, the interests of the victim(s), and of the administration of law generally, particularly, the principle of finality.

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Part III: Section 78B of the Judiciary Act

This appeal does not raise any constitutional question. The respondent has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903 (Cth).* No such notice is required.

Part IV: Statement of contested material facts

4. 1 The respondent does not contest the outline of the facts in the appellant's submissions.

PART V: Applicable Legislative provisions

10 The respondent agrees with the appellant's list of legislative provisions.

PART VI: Statement of Argument

6. 1 The respondent's submissions in the matter of **Kentwell** are adopted and, to avoid duplication, are not repeated in this matter.

Change of Law

6. 2 The present matter, unlike **Kentwell**, proceeded on ***Muldrock***[1] error alone.

6. 3 The general principles relating to extending time in 'change of law' cases as outlined in the respondent's submissions in **Kentwell** have particular application in the present case because the only basis for the appeal 2 years out of time was that the law as to sentencing for Standard Non-Parole
20 period offences had changed since the sentence was imposed.

6. 4 The appellant originally appealed the conviction but not the sentence. The Notice of Appeal filed on 15 June 2011 was against conviction only.

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[1] ***Muldrock v The Queen*** (2011) 244 CLR 120.

6. 5 The appellant suggests that the likely reason there was no appeal against sentence was that legal aid to appeal against sentence was denied (AWS at [10]). It seems likely that the appeal was lodged against conviction only because it was thought there was no merit in an appeal against sentence. That would seem the most likely explanation as no errors are alleged in the sentence even now in the Application for an extension of time. The only ground of appeal is that the law has changed.

6. 6 The appellant's conviction appeal was heard on 30 September 2011 and judgment was delivered on 13 April 2012; ***O'Grady v R*** [2012] NSWCCA 62.

6. 7 The decision in ***Muldrock*** was handed down on 5 October 2011. That was 5 days after the hearing of the conviction appeal in this matter but 6 months before judgment. No application was lodged within those 6 months while the matter was before the CCA raising a challenge to the sentence on the basis of the decision in ***Muldrock***.

6. 8 The Standard Non-Parole Period Review Team of the Legal Aid Commission was established in June 2012. The present matter was considered by that team and the application to extend time was filed one year later on 28 June 2013, 20 months after the decision in ***Muldrock***.

6. 9 The application to reopen the sentence proceedings 2 years and 8 months after they were completed because of the change in law engaged the issue of the retrospective effect of judicial decisions.

6. 10 As set out in the respondent's ***Kentwell*** submissions, the general approach has been that judicial decisions do not have absolute retrospectivity. Completed cases are not reopened simply on the basis that the understanding of the law may have changed since they were decided. There is usually a threshold issue to the grant of an extension of time. Whether expressed in terms of the interests of justice or in terms of substantial injustice, the test takes into account the interests of the applicant, the interests of victims, their families, witnesses, the interests of the community, and the administration of justice generally. Whichever

formulation is adopted, it must address the fundamental considerations affecting the administration of justice, in particular, finality and certainty.

6. 11 It is for these reasons that an application to reopen a completed case after a substantial delay on the basis that the law had changed some years earlier cannot be treated as if it were essentially an application for leave to appeal that has been filed late.

6. 12 The considerations that inform whether to grant leave to appeal, such as whether there is error, or arguable grounds of appeal, do not address the fundamental issues an application to extend time raises.

6. 13 The issue of whether an applicant is serving a sentence that is not warranted but for the error is clearly a significant matter which all the formulations, whether in terms of "exceptional circumstances", "substantial injustice" or "underlying justice", acknowledge.

6. 14 In the present case, as in the matter of **Kentwell**, the CCA determined whether to grant the extension of time on the basis that all relevant factors needed to be considered, including the length of the delay, the reasons for the delay, and the interests of the community (CCA at [29] – [31] AB198.20).

6. 15 The CCA found that there had been an error because the sentence had been determined on the basis of the accepted principles as applied before this Court's decision in ***Muldrock***.

6. 16 The matters which militated against an extension of time, including the principle of finality, were considered to be "fairly evenly balanced" (CCA at [31] AB198.40). The issue of whether to grant the extension of time depended on whether the appellant was serving an unwarranted sentence because of the ***Muldrock*** error.

No lesser sentence warranted

6. 17 The ***Muldrock*** error of applying a two stage approach commencing with an assessment of the objective seriousness of the offence and then

determining whether there were reasons for imposing a longer or shorter period than the standard non-parole period (***Muldrock*** at [28]) did not necessarily produce a longer sentence. That staged approach was an error but the SNPP remained an important guidepost in the assessment of the appropriate sentence.

6. 18 It may be that sentences were generally higher after the introduction of the SNPP provisions but that was not because they were wrongly inflated but because, as this Court explained in ***Muldrock*** (***Muldrock*** at [31]), the SNPP specified for the relevant offence was an added consideration bearing on the determination of the appropriate sentence.

6. 19 The appellant submits that the CCA made 3 main errors in determining whether a lesser sentence was warranted in law.

6. 20 One error was that the CCA had regard to a SNPP of 8 years when the correct period was 7 years (AWS at [41]).

6. 21 The appellant is correct that Bellew J stated the incorrect SNPP of 8 years in the early part of the judgment (CCA at [4] AB193.20). That was clearly an oversight.

6. 22 The trial judge had applied the correct SNPP of 7 years. In dealing with the ground of appeal, the ***Muldrock*** error, Bellew J quoted that portion of the Remarks on Sentence where his Honour stated that the applicable SNPP was 7 years (CCA at [24] AB197.25) and concluded that His honour had wrongly approached that SNPP. The parties' submissions also referred to the correct SNPP.

6. 23 The statement of the incorrect SNPP in the second paragraph of the judgement appears to have been a slip, probably a typographical error. It was reasonably clear on a fair reading of the judgment where the correct SNPP was quoted as having been applied by the sentencing judge that this was not a case where the Court had proceeded on a misapprehension as to the correct penalty.

6. 24 The second error is said to be that the CCA did not expressly mention the appellant's affidavit describing events that had occurred since he had been sentenced, such as his conduct in gaol, the courses he had undertaken and the birth of his son. The CCA is said to have only made a passing reference to these matters in general terms as "the matters advanced on behalf of the applicant" in the second last paragraph (CCA at [46] AB201.38) and this was an inadequate consideration of how these matters impacted upon "a fresh exercise of the sentencing discretion" (AWS at [42]).

6. 25 The third error, similar to the second, refers to the inadequate consideration of a relevant matter, namely, the sentencing statistics which showed that the sentence was at the upper end of the range (AWS at [43]).

6. 26 The reason the CCA did not discuss these matters at greater length as if undertaking "a fresh exercise of the sentencing discretion" as on appeal is that the Court was not considering an appeal, or even an application for leave to appeal. This was an application for an extension of time which did not require the Court to undertake a fresh sentencing exercise.

6. 27 The CCA took into account the mitigating factors which were said to make the subjective case "compelling" (CCA at [39] AB200.10), namely, that the appellant was 23 at the time of the offence, that he had a relatively minor criminal history and that he had witnessed the death of his former partner which led him to suffer post-traumatic stress disorder and increased drug dependence but did not consider those circumstances compelling.

6. 28 The conclusion that no lesser sentence was warranted was based on the finding that the appellant was the orchestrator of the offence, as the sentencing judge had found, and that he had sought out the victim, had identified the premises where he lived and had equipped himself with a screwdriver or similar implement to force entry into the premises (CCA at [41] - [42] AB200.30). These findings were not challenged on appeal (CCA at [42] AB200.45). It was an aggravating feature that the appellant was on conditional liberty at the time of the offence.

6. 29 It was also considered significant that the victim was seriously injured in the assault, including facial lacerations and a fractured right orbital floor (CCA at [11] AB194.35). He was rendered unconscious and hospitalised for several days (CCA at [41] AB200.34).

6. 30 The appellant pleaded not guilty and showed no remorse or contrition for the offence (CCA at [40] AB200.28).

6. 31 The CCA considered that the seriousness of the offence was underscored by statements in a number of previous authorities emphasising that offences involving attacks on victims in their own homes merited condign punishment (CCA at [43] – [45] AB200.50 – 201.30).

6. 32 Even if the appellant were correct that the sentence could be characterised as stern on the basis that it was in the upper range indicated by the sentencing statistics that did not mean that it was wrong or unwarranted.

6. 33 The issue on the application to extend time was whether the sentence should be reopened 2 years and 8 months out of time on the basis that the law had changed since it was imposed. That issue depended largely on whether it could be established that the appellant was serving an unwarranted sentence because of the ***Muldrock*** error.

6. 34 In the particular circumstances of this case it was well open to the CCA to regard the offence as serious and to conclude that, even giving full weight to the subjective features, the sentence originally imposed was not unwarranted such as to require the matter be reopened.

PART VIII: Time Estimate

It is estimated that oral argument will take 1 hour.

Dated: 11 July 2014

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