**O'GRADY v THE QUEEN (S114/2014)**

Court appealed from: New South Wales Court of Criminal Appeal
[2013] NSWCA 281

Date of judgment: 18 November 2013

Date of grant of special leave: 16 May 2014

In July 2010 the Appellant was convicted of an offence of specially aggravated break and enter, contrary to s 112(3) of the *Crimes Act* 1900 (NSW). That offence was committed in the company Mr Bradley Carter and Mr Robert Puha. The Appellant was subsequently sentenced by Judge Murrell to a non-parole period of 5 years and 6 months imprisonment, with an additional term of 3 years and 6 months.

In June 2013 the Appellant sought an extension of time in which to seek leave to appeal against sentence. (A separate appeal against conviction was dismissed on 30 September 2012.) The Appellant submitted before the Court of Criminal Appeal ("CCA") that Judge Murrell had made a *"Muldrock"* sentencing error (see *Muldrock v The Queen* (2011) 244 CLR 120. This was through her Honour's adoption of a two stage approach to sentencing in which, having determined the standard non-parole period, she considered if there were reasons to depart from it. Before the CCA, the Respondent conceded that Judge Murrell had in fact erred in the manner for which the Appellant contended.

On 18 November 2013 the CCA (Hoeben CJ at CL, Johnson & Bellew JJ) unanimously refused the Appellant's application for an extension of time in which to appeal against his sentence. This was despite their Honours accepting the Respondent's concession that a *"Muldrock"* error had been made out.

The CCA noted that Judge Murrell had considered the Appellant's youth and his (relatively) minor criminal history when she approached the issue of sentencing. Her Honour had also considered the leading, vicious role the Appellant had played in the offence (as compared to his accomplices), along with the strong subjective nature of his case. This latter point arose from the Appellant's witnessing of his partner's murder approximately 10 months prior to this offence being committed.

The CCA considered that these factors, when assessed in conjunction with the substantial delay in bringing the application for leave to appeal the sentence, did not warrant a lesser sentence being imposed. Their Honours found that in refusing time, no substantial injustice would result.

The grounds of appeal include:

- The Court of Criminal Appeal erred in:

    a) refusing leave to extend the time within which to seek leave to appeal against the severity of sentence under s 5(1) and s 10 *Criminal Appeal Act* 1912 (NSW) by imposing a test on the Appellant of establishing *"whether, if an extension of time were refused, substantial injustice would result"* (at [67], [90]);

    b) failing to grant an extension of time and leave to appeal where material error in the exercise of the sentencing discretion was found to have been established.