HIGH COURT OF AUSTRALIA

3 June 2020

CUMBERLAND v THE QUEEN
[2020] HCA 21

On 15 April 2020, the High Court made orders allowing an appeal from the Court of Criminal Appeal of the Supreme Court of the Northern Territory ("the CCA"), setting aside the orders of the CCA and ordering that the appeal to that Court be dismissed. Today, the High Court published its reasons for making those orders.

The appellant pleaded guilty to six offences relating to the supply of drugs. He was sentenced in the Supreme Court of the Northern Territory (Blokland J) on 11 April 2018 to an aggregate term of four years and six months' imprisonment, to be suspended after two years. The Crown brought an appeal to the CCA on the ground that the sentence was manifestly inadequate. At the hearing on 18 July 2018, while the appellant argued the sentence was not inadequate, it was not submitted that any factor engaged the Court's residual discretion to dismiss the Crown appeal notwithstanding a conclusion that the sentence was erroneously lenient. On 31 July 2018, the appellant's counsel contacted the CCA to request an order for a report on the appellant's progress in prison ("the prison report"). On 1 August 2018, counsel was advised by return email that "the decision" was to be handed down the following morning and that the matters raised in the 31 July 2018 email could be addressed then. Later that day, the appellant's counsel sent a further email raising an issue relating to the operation of newly introduced provisions concerning minimum non-parole periods and suggested that those provisions may bring the residual discretion "into play".

On 2 August 2018, the CCA announced that the Crown appeal was to be allowed and that it was likely to impose a revised sentence exceeding five years' imprisonment. Their Honours informed the parties that, before doing so, the question concerning the construction of the minimum non-parole provisions was to be referred to a five-member Bench. It was envisaged that, once the five-member Bench had delivered judgment, the CCA would make orders for the prison report. On 17 June 2019, the parties were advised that the decision of the five-member Bench was to be delivered two days later and, on 19 June 2019, the decision was handed down. Immediately following delivery of that judgment, without prior notice to the parties, the CCA re-constituted and delivered a decision re-sentencing the appellant to an aggregate sentence of eight years' imprisonment with a non-parole period of five years, five months and one week. The appellant's counsel was not afforded an opportunity to request a prison report or to make submissions on re-sentence or exercise of the residual discretion.

Before the High Court, the respondent conceded that the CCA denied the appellant procedural fairness by failing to give an opportunity to present further material prior to re-sentencing, such that the appeal to the High Court must be allowed. However, it was submitted that the matter should be remitted to the CCA for the appellant to be re-sentenced, and that Blokland J's orders should not be reinstated in full, as the exercise of the residual discretion had not been "in play" before the CCA. The High Court held that in circumstances where: (1) the CCA was on notice of the appellant's desire to make a submission concerning the residual discretion; (2) there was a marked delay of

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eleven months between the relevant hearing and re-sentencing; and (3) at all times the respondent bore the onus of negating the existence of any reason why the CCA should not exercise the residual discretion, the CCA erred in deciding to allow the appeal before being in a position to make final orders, and further, by the time of re-sentencing in June 2019, the discretionary factors against allowing the Crown appeal were overwhelming. This was because at that stage, the appellant was within one week of automatic release under Blokland J's orders, and as preparation of the prison report, which would have taken two weeks, should have been ordered, the appellant would have been released by the time the CCA came to make final orders. Ultimately the respondent's concessions necessitated the setting aside of the CCA's orders, and consequently the release of the appellant nine and a half months after the date specified in Blokland J's orders. It followed that remittal to the CCA for re-sentencing, as contended for by the respondent, would have been futile as the only proper exercise of discretion at this stage was to dismiss the Crown appeal.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*