

## **KENTWELL v THE QUEEN (S113/2014)**

Court appealed from: New South Wales Court of Criminal Appeal  
[2013] NSWCCA 266

Date of judgment: 14 November 2013

Date of grant of special leave: 16 May 2014

On 15 September 2008 the Appellant was convicted of the following offences:

- (i) recklessly causing grievous bodily harm to the Complainant, contrary to s 35(2) of the *Crimes Act* 1900 (NSW) ("the Act") (Count 1);
- (ii) maliciously destroying a glass candle holder, the property of the Complainant, contrary to s 195(1)(a) of the Act (Count 3);
- (iii) having sexual intercourse with the Complainant without her consent, contrary to s 61I of the Act (Count 4);
- (iv) assaulting the Complainant, contrary to s 61 of the Act (Count 5);
- (v) having sexual intercourse with the Complainant without her consent (on another date), contrary to s 61I of the Act (Count 7).

On 20 February 2009 Judge Johnstone sentenced the Appellant to a non-parole period of 8 years imprisonment, with an additional term of 4 years. Upon appeal, the Appellant submitted that Judge Johnstone made a so-called "*Muldrock error*" (see *Muldrock v The Queen* (2011) 244 CLR 120 with respect to his sentencing. As a preliminary however, he also required an extension of time in which to seek leave to appeal.

On 14 November 2013 the Court of Criminal Appeal (Hoeben CJ at CL, Johnson & Bellew JJ) unanimously agreed that Judge Johnstone had committed a *Muldrock error* with respect to the sentencing of counts 4 and 7. (They also agreed that there were additional, immaterial errors made with respect to those counts.) Their Honours further found that the trial judge had erred in his conclusion that the Appellant's mental illness had not contributed to his offending.

Despite these material errors however, the Court of Criminal Appeal still refused the Appellant's application for an extension of time in which to appeal his sentence. This was after it had considered all of the relevant factors. These included the reason for the delay, the interests of the Complainant and whether a substantial injustice would result if an extension of time were refused. The Court of Criminal Appeal concluded that, although material error had been established, none of the matters advanced on behalf of the Appellant supported a conclusion that there had been a substantial injustice arising out of the sentence imposed, or that some other sentence was warranted in law.

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 several material errors in the exercise of the sentencing discretion were found to have been established.