IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S14 of 2014

BETWEEN:

ANDREW O'GRADY
Appellant

AND

10

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues Presented by the Appeal

20 2 **Issue One:** What is the test to be applied under s 10 *Criminal Appeal Act* 1912 in granting an extension of time to appeal against sentence?

3 **Issue Two:** Does an applicant for such an extension of time have to satisfy the court that *"if an extension of time were refused, substantial injustice would result"*?

4 **Issue Three:** If so, can an assessment of whether "*substantial injustice would result*", including the question posted by s 6(3) of the *Criminal Appeal Act* 1912, whether any other sentence is warranted in law, be conducted in a "*summary fashion*"?

30 ### Part III: Considerations of s 78B Notices

5 The appellant is of the view that notices under s 78B *Judiciary Act* 1903 are not required.

Part IV: Citation of the Reasons for Judgment

6 The citation of the reasons for judgment of the intermediate court is *O'Grady v R* [2013] NSWCCA 281 ("CCA"). The reasons for judgment of the primary judge (Judge Murrell SC) are unreported: *R v Andrew William James O'Grady* (17 September 2010).

Steve O'Connor, Deputy CEO
Legal Aid NSW, 323 Castlereagh St
Sydney NSW 2000, DX 5 SYDNEY

Telephone: 9219 5097
Fax: 9219 6344
Ref: Madeleine Schneider

Part V: Narrative Statement of the Facts

7 On 28 July 2010, the appellant was convicted of an offence contrary to s 112(3) *Crimes Act* 1900 (NSW) (specially aggravated break and enter, maximum penalty 25 years, standard non-parole period 7 years). The circumstance of aggravation was that the offence was committed in company, and the circumstances of special aggravation was that the victim was wounded at the time of the robbery. The appellant was sentenced on 17 September 2010 to a term of imprisonment of 9 years with a non-parole period of 5 years 6 months.

8 Having earlier consumed a substantial quantity of drugs and alcohol, the appellant, in company with two others, attended the victim's premises in order to "sort...out" a "bad drug debt": CCA [15]. The appellant used an implement to gain access to a secure residential block and when the victim opened his apartment door, he was pushed onto a couch. One of the men, probably the appellant, demanded "Where's the money? Where's the drugs?". The situation then "erupted" as the victim attempted to fend off the men, and a serious assault ensued which resulted in the victim losing consciousness: CCA [18]. A number of objects including a television and a DVD were taken from the apartment: CCA [19]. The victim was hospitalised for four or fives days, having suffered lacerations to his face and scalp, some of which required sutures, and fractures to the floor of his right orbit: CCA [11]. The CCA accepted that despite the seriousness of the wounding at the time, there were no long term consequences for the victim from the injuries he had sustained: CCA [22].

9 The circumstances particular to the appellant included that he was 23 years old at the time of the offence. He had only three prior "relatively minor" matters in his criminal history, namely possess prohibited drug, goods in custody and shoplifting: ROS [11]. He was on a bond for the latter offence at the time of this offence. At the time of the offence, he was suffering from post-traumatic stress disorder, anxiety and depression and commenced heavy drug use consequent on having witnessed his partner being stabbed to death ten months prior to the commission of the offence: CCA [21]. The illnesses he suffered were treatable, and he had good prospects of rehabilitation, particularly given he had started addressing the problems associated with the death of his partner and at the time of sentence, some three years after the offence, was living

with a new partner, expecting a child and working with some success: ROS [11], [20]. Her Honour also found special circumstances as the appellant had not previously been imprisoned and would require an extended period of supervision in the community: ROS [24].

10 Following his sentence, the appellant instructed his legal representatives to lodge a notice of intention to appeal against conviction and sentence, but the appeal proceeded as one against conviction only: CCA [6]. The appellant did not know why the sentence appeal did not proceed, but the inference is that aid was denied. This Court's decision in *Muldrock v R* [2011] HCA 39; (2011) 244 CLR 120 ("*Muldrock*") was delivered on 5 November 2011. Following a review of "*Muldrock*" cases by Legal Aid NSW, in February 2013 the appellant was advised there was likely merit in an application for leave to appeal against sentence on the basis of "*Muldrock* error". He applied for legal aid, and a notice of application for leave to appeal was filed on 28 June 2013: CCA [7].

11 On 18 December 2013, the CCA (per Bellew J, Hoeben CJ at CL and Johnson J agreeing) held that the primary judge had erred in adopting a "two-stage" approach to sentencing, by first determining the standard non-parole period, and then considering whether there were reasons for departing from it: CCA [25]. The respondent had conceded this error and the concession was a proper one: CCA [25], [27]. The CCA held that the error was "clearly a material one": CCA [27].

12 However, despite conceding error in the appeal, the respondent opposed an extension of time being granted to the appellant [9]. Having made the above findings, the CCA then applied the test for an extension of time set out by the similarly constituted Court in *Abdul v R* [2013] NSWCCA 247 at [53] (CCA [29]):

> "Accordingly, when considering an application for extension of time based on '*Muldrock* error', all relevant factors need to be considered – the length of the delay, the reasons for the delay, the interests of the community, the interests of the victim and whether, if an extension of time were refused, substantial injustice would result. This last factor will inevitably require an assessment of the strength of the proposed appeal although as *Etchell* made clear, that assessment can be carried out in a 'more summary fashion' than would be done in an application for leave to appeal that was brought within time."

13 The CCA refused the application for an extension of time in which to seek leave to appeal (CCA [47]) on the basis that:

(a) the delay in excess of two years was substantial and largely explained on the basis of a change in applicable sentencing principles following *Muldrock*;

(b) there was no victim impact statement or evidence to suggest any added trauma for the victim; and

(c) an order to extend time would offend the principle of finality.

All of the matters in (a)-(c) were said to be "fairly evenly balanced", however, applying *Abdul,* on a summary view, no "substantial injustice" arose out of the sentence imposed and the appellant had not established (on a summary view) that "some other sentence is warranted in law": CCA [32], [46].

14 On this summary view, the CCA took into account a standard non-parole period of 8 years: CCA [4]. The standard non-parole period is 7 years.

Part VI: Appellant's Argument

Kentwell v R

15 The appellant adopts the submissions of the appellant Kentwell in the related matter in so far as they are applicable to the appellant's case. In particular, these submissions adopt but do not repeat those made by Kentwell in relation to the authorities relevant to extension of time that pre-date *Abdul* and the misapplication of some of those cases in *Abdul,* as well as the purported application of s 6(3) in a "summary fashion" on an application for extension of time. These submissions focus primarily on the language and intention of the legislation, and the reliance placed in *Abdul* upon the principle of "finality" and the English "change of law" cases.

Applicable provisions

16 A person convicted on indictment may appeal against the sentence passed with leave of the court: *Criminal Appeal Act* 1912 (NSW) ("the Act") s 5(1)(c). Notice of intention to apply for leave to appeal is ordinarily required to be given within 28 days of the sentence (the Act s 10), and is valid for 6 months from the date of filing: Criminal Appeal Rules (NSW) ("the Rules") r 3A. The court may "at any time, extend the time within which notice is required to be given" or dispense with the requirements: the Act s 10(1)(b).

17 If Notice of intention to apply for leave is not given, a Notice of application for leave to appeal may be given within 3 months of sentence, and this time may also be extended by the court: r 3B.

18 Section 6(3) of the Act then provides:

> " On an appeal under section 5 (1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

Statutory language and construction

19 There is no test of "substantial injustice" in the Act or the Rules. Neither the specific language of s 10 of the Act, nor the language of the Act and Rules generally, provide support for the proposition that an applicant for an extension of time in which to seek leave to appeal must demonstrate that substantial injustice "arises out of the sentence imposed" (CCA [46]) or "would result" if an extension of time were refused: *Abdul* at [9].

20 First, the language of s 10 does not support the proposition that there is a test on an applicant for leave to appeal of demonstrating substantial injustice as a pre-condition to obtaining an extension of time: *cf.* CCA [29], [32], [46], [47]. The CCA has not adhered to the terms of the statutory provision. It has grafted onto s 10 a test never intended by the legislature.

21 In *Weiss v R* [2005] HCA 81; (2005) 224 CLR 300 ("*Weiss*") at 312-313 [31], Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ held (footnotes omitted):

> "This Court has repeatedly emphasised the need, when applying a statutory provision, to look to the language of the statute rather than secondary sources or materials. In *Fleming v The Queen*, the Court said that "[t]he fundamental point is that close attention must be paid to the language" of the relevant criminal appeal statute because '[t]here is no substitute for giving attention to the precise terms' in which the relevant provision is expressed."

10

Many subsequent decisions of this Court have emphasized the fundamental point in *Weiss,* expressed in the following way in *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14; (2012) 246 CLR 92 at 105 [31]: "that the imposition of some taxonomy for the application of the proviso according to expressions – even judicially determined expressions – different from relevant statutory expression invites error".

22 Second, the language of the Act viewed as a whole does not support such a curtailment. Section 5(1)(b) provides that a person may, with leave of the court, appeal their conviction on any question that is not a question of law alone if it appears to the
20 court "to be a sufficient ground of appeal". "Leave of the court" in s 5(1)(c) can be read harmoniously with s 5(1)(b) as a ground of appeal that is "sufficient" (or reasonably arguable). Again, the test imposed by *Abdul* on the prospects of success under s 6(3) at the anterior stage presents a much higher obstacle than the grant of leave itself.

23 The *Abdul* test imposes a greater hurdle than the ultimate issue in s 6(3) of whether some other, lesser sentence is warranted in law, and, *a fortiori*, a higher test than the requirement for leave in s 5(1)(c), by imposing upon an applicant for an extension of time the burden of showing that it is apparent from a summary view that some other
30 sentence must be warranted in law. The appellant submits that the ultimate determination of whether a lesser sentence may be warranted in law is not relevant, at least to the extent it has been determined in a summary fashion, to an application for an extension of time in which to seek leave to appeal. However, the operation of s 6(3), as well as the proviso in s 6(1) relevant to conviction appeals, is relevant to the appellant's case before this Court in so far as it demonstrates that the *Abdul* test effectively inverts the appeal process.

24 In relation to conviction appeals, the Act applies the common form proviso in s 6(1), providing the court may "dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred". This is the only "test" using the word "substantial" that appears in the Act. The use of the word "substantial" in s 6 has been the subject of much authority in the context of the statutory language of the proviso: see, eg, *Weiss* at 308ff [18]ff and 317 [44]. It is distinct from and requires something significantly more than a "miscarriage of justice" to be established in the context of s 6(1) (see eg, *Weiss* at 308 [18]) although:

> "it is not right to attempt to formulate other rules or tests in so far as they distract attention from the statutory test. It is not useful to attempt that task because to do so would likely fail to take proper account of the very wide diversity of circumstances in which the proviso falls for consideration":

Weiss at 316 [42].

25 The test of "substantial injustice" proposed in *Abdul* has nevertheless been extended to applications for extension of time in which to bring conviction appeals: *Miles v R* [2014] NSWCCA 72. It is now said that the CCA must ascertain "whether a substantial injustice would result if the application for an extension of time to appeal [the conviction] were to be refused" (*Miles* at [59]), with prospects of success being analysed "more concisely" than if there were "no question of an extension of time": *Miles* at [61]. Additionally, it was held that "questions of whether a substantial miscarriage of justice has actually occurred can inform whether, on an application for an extension of time, an applicant can point to a substantial injustice": *Miles* [61], see also [180]. The result is that the proviso is exercised in a summary fashion as a precondition to an extension of time (*prior* to any question of leave). The word "no" is effectively removed from the s 6(1) test and the onus is on an applicant to satisfy the court of *substantial injustice*, on a summary view: See also *Outram v R* [2013] NSWCCA 329.

26 In contrast, there has never been an obligation on an individual to establish substantial miscarriage of justice prior to his appeal against sentence being upheld. It is incorrect to describe s 6(3) as the "analogue of the proviso in s 6(1)" as was held in *Miles* at [63]. The s 6(3) test is differently phrased and the purpose of the section does not have the same limiting purpose as, for example, Crown appeals.

27 The legislative purpose of s 6(3) is "the correction of judicial error in particular cases": *Green v R; Quinn v R* [2011] HCA 49; (2011) 244 CLR 462 at 465-466 at [1]. It is to be contrasted with s 5D (a Crown appeal) which has a legislative "limiting purpose" informed by reasons of fairness and justice: *cf Green* at 465-466, [1]; 477, [36]. The Crown has a right of appeal and never suffers such proof *before* the merits of its appeal are heard, despite the limiting purpose.

28 The legislative purpose of offenders' appeals against sentence is different to that of Crown appeals, because they generally involve consideration of arguments that some form of restraint on liberty, including periods of imprisonment, should be lessened or quashed. The correction of excessive punishment imposed on individuals in consequence of judicial error is fundamental to the administration of justice. The Act neither expressly nor by necessary intendment requires or authorises the refusal of an extension of time in matters pertaining to the liberty of subjects by imposition of a test of "substantial injustice" that has been described as a "not insignificant hurdle facing an appellant [sic] for leave to appeal": *Carlton v R* [2014] NSWCCA 14 per R A Hulme J at [12]. The legislative imperative behind s 10 was to impose a time limit, however retain the full discretion of the court to permit an extension of time where this is in the interests of justice. There is no necessary intention to impose a "substantial injustice" test on a grant of an extension of time for an applicant for leave to appeal against the severity of a sentence.

29 The Act also uses the phrase "exceptional circumstances" in s 5DB(6) and s 5DC(6) to describe the circumstances in which the Crown may rely on new evidence or information in a Crown appeal against a sentence imposed in either a "related summary offence" or in the Drug Court. There is no such language in s 5, s 6(3) or s 10.

30 The meaning of the words in s 6(3) was authoritatively determined in *Douar v R* [2005] NSWCCA 455; (2005) 159 A Crim R 154 per Johnson J at 176 [119]-[121] (McClellan CJ at CL and Adams J agreeing), and *Baxter v R* (2007) 173 A Crim R 284 by Spigelman CJ at 286 [7]-[10] (Latham J agreeing), who held:

> "6 The only support for the Crown's contention in *Douar*, and this Court, that additional evidence, including evidence of post-sentence conduct, is not admissible for purposes of formulating the opinion required by s 6(3) is the admixture of the present and past tenses in that subsection: ie the contrast between "*is* warranted in law", on the one hand, and "should *have been passed*", on the other hand.
>
> 7 In *Douar* at [119]-[121] Johnson J resolved this tension by stating that the text was ambiguous and the ambiguity should be resolved in favour of the practice of the Court to receive evidence of post-sentence conduct. In my opinion, his Honour's conclusion is correct.
>
> 8 The dominant and active verbs in s 6(3) are both in the present tense, i.e. if the Court of Criminal Appeal '*is* of opinion' and 'some other sentence ... *is* warranted in law'. The employment of the past tense in the phrase "should have been passed" is distinctly subsidiary. It is employed in order to reflect the fact that, when the Court of Criminal Appeal intervenes, it does so with effect from the date of the original sentence.
>
> 9 This interpretation is consistent with the reference in s 6(3) to s 5(1). That section permits an appeal 'against the sentence passed on the person's conviction'. The appeal is from the sentence that has been passed by the sentencing judge. However, the reference in s 6(3) should not be understood as saying 'should have been passed by the sentencing judge'. It should be understood as an institutional reference, i.e. 'should have been passed by the Court'.
>
> 10 When the Court of Criminal Appeal turns its mind to forming the opinion which s 6(3) requires, it must do so by reference to the facts as they exist at that time, insofar as the Court permits evidence of those facts to be placed before the Court."

31 Section 12 gives the Court of Criminal Appeal supplemental powers "if it thinks it necessary or expedient in the interests of justice". This is also inconsistent with a high threshold test for an extension of time at an anterior stage.

32 Finally, it might be noted that the statutory "gateway" to an inquiry into conviction or sentence under the *Crimes (Appeal and Review) Act* 2001 (NSW) has no "unduly narrow construction" (*Sinkovich v Attorney General of New South Wales* [2013] NSWCA 383, "*Sinkovich*", per Basten JA at [74], Bathurst CJ, Beazley P, Price and Beach-Jones JJ agreeing), and has an overriding purpose *"consistently with the high value placed on freedom of the individual and the unwillingness to allow that liberty to be infringed"* on the basis of a determination attended by doubt. It is difficult to see

how an application for an extension of time in relation to a sentence appeal (here, attended by doubt) is subject to a higher barrier than at the point of determining reference for inquiry or the examination of the whole case as an appeal.

Contrary to authority

33 The test of "substantial injustice" is novel. It does not appear in the Act or Rules, and was first imposed by the Court of Criminal Appeal in *Abdul*. The appellant submits that, in addition to finding no support in the legislation, the test is also wrong in principle. The appellant adopts the appellant Kentwell's submissions in the related matter, in particular at [23]-[30], to the effect that the case law considering the relevant provisions of the legislation prior to *Abdul* does not support the imposition of a test of "substantial injustice" or any test higher than the "interests of justice".

Finality and "change of law"

34 The Court of Criminal Appeal in *Abdul* inserted the "substantial injustice" test into the extension of time considerations relevant to (initially only) *Muldrock* error appeals, by drawing an analogy between *Muldrock* error cases and English "change of law" cases: *Abdul* at [46]-[47], [53]. The Court of Criminal Appeal there observed that the English Courts "in what they have described as 'change of law' cases, have enforced the principle of finality except where 'substantial injustice' would follow": *Abdul* at [53]. However, these "English cases" are distinguishable and in any case were determined by reference to legislation in a different jurisdiction, where sentence appeals are dealt with in a different manner. For example, under the *Criminal Appeal Act* 1968 (UK), the Registrar can refer an application for leave to appeal which does not show a "substantial ground of appeal" to the court for "summary determination"; however even then, the court may only dismiss the appeal summarily if (i) it is frivolous or vexatious and (ii) can be determined without adjourning it for a full hearing: s 20.

35 Moreover, *Muldrock* did not result in a "change of law", the "statutory provisions with respect to standard non-parole periods ... remained the same at all relevant times": *Sinkovich* at [11]. The Court of Appeal in *Sinkovich* did not adopt the approach suggested in *Montero v R* [2013] NSWCCA 214 ("*Montero*") per Leeming JA at [2], where it was first said that the concept of "change in law" might apply to an extension

of time threshold in relation to applications asserting *Muldrock* error: *cf. Abdul* at [42]-[43]. In any case, the suggested approach in *Montero* was not joined by the other members of the bench as the matter had not been raised by the Crown or subject to full argument: per R A Hulme J at [62]-[63].

36 Further, in *Montero,* Leeming JA did not consider *Young v R* [1999] NSWCCA 275 ("*Young*"), in which Smart AJ (Dunford and Studdert JJ agreeing) distinguished the 1977 decision of *R v Unger* 1977 2 NSWLR 990 at [38] as "of no assistance" and, being concerned with the invalidity of regulations previously thought valid, was "far removed" from a case of extension of time: at [38]. The conclusion in *Montero* that *Gregory v R* [2002] NSWCCA 199 ("*Gregory*") at [38]-[45] per Hodgson JA (with whom Levine and Simpson JJ agreed) and *Etchell v R* [2010] NSWCCA 262; (2010) 205 A Crim R 138 ("*Etchell*") per Campbell JA (with whom Latham and Price JJ agreed) were both authority for a test of "exceptional circumstances" (*Montero* [6]) was questionable and said by the CCA in *Abdul* to have been rejected: *Abdul* at [52]. The suggestion made at [2] that on a criminal appeal, even a change "whose effect is that a conviction would be quashed on appeal, is not of itself sufficient to warrant the granting on an extension of time" (that is, miscarriage of justice would not be sufficient) had been analysed and rejected in *Young,* and does not withstand the decision in *Sinkovich.* The suggested basis in *Abdul* of equivalence with "change of law" cases warranting imposition of a test akin to "exceptional circumstances", in which miscarriage of justice does not suffice, is erroneous, both having regard to the statutory language and the weight of authority pertaining to the provisions.

37 It might also be noted that in *Yates v The Queen* [2013] HCA 8; (2013) 247 CLR 328 ("*Yates*"), this Court did not apply a "change of law" analogy to Mr Yates' application for special leave to appeal sought 25 years out of time. Mr Yates' appeal to the Court of Appeal (WA) was decided in 1987. In 1988, the High Court decided *Chester v The Queen* [1988] HCA 62; (1988) 165 CLR 611, which had the effect of clarifying that the evidence before the sentencing judge had not supported the making of the indefinite detention order under which Mr Yates was held. Justice Gageler in separate reasons stated (at [44]): "The misfortune of the applicant is that Chester had not been decided at the time that the Court of Criminal Appeal gave its judgment in 1987." Having reviewed the merits of the arguments, this Court determined that

notwithstanding "the great delay in bringing the application, the interests of the administration of justice require that special leave to appeal be granted": *Yates* at [38]. The appellant acknowledges that the circumstances of Mr Yates are significantly different to his, however the decision is further support for rejection of an analogy with "change of law" English cases in this jurisdiction.

38 Finally, to the extent "finality" may be a relevant consideration, its significance is heavily counter balanced by the purpose of the statutory scheme to correct errors that impact directly upon the liberty of offenders. As was held in *Sinkovich*:

> "[43] The importance of finality should not be overstated…
>
> [46] …to talk of the principle of finality as 'an inseparable feature of the rule of law' without referring to other principles which are also features of the rule of law may create a distorted picture…Although appeals are, on one view, an affront to the principle of finality, rights of appeal are not narrowly confined. Nor is the supervisory power confined within strict limits: rather the contrary. The history of judicial response to privative clauses (which are the legislature's attempt to enact finality) is one of antipathy. Part 7 is inherently an exception to the principle of finality…
>
> [47] The administration of criminal justice is an area where Lord Atkins' aphorism, 'finality is a good thing but justice is a better', has ready application: *Ras Behari v King-Emperor* (1993) 50 TLR 1 at 2…As between the state and an offender against the criminal laws, a high value is placed on fair procedure and correct outcome. …there can be no presumption against derogation from a principle of finality by a statutory scheme which has that as its primary purpose."

"Summary fashion"

39 The appellant submits that the test actually imposed by the CCA, namely whether it appears on an assessment conducted in a "summary fashion" that if an extension of time were refused "substantial injustice would result" (CCA [29]) or that "substantial injustice arises out of the sentence" (CCA [46]), imposes an unwarranted and unjust fetter on the discretionary power provided by the legislature. The appellant adopts the submissions of the appellant Kentwell in the related matter, in particular at [32]-[37].

40 The acceptance that there was material error in the present case (CCA [28]) should have been more than sufficient to indicate the proposed ground of appeal had merit and that it was in the interests of justice for an extension of time to be granted, in

accordance with established principles. The s 6(3) exercise should then have been conducted in accordance with *Baxter* and *Douar* on the merits of the appellant's case, and not summarily. However, as both the exercise conducted (CCA [32] –[46]) and the order made (CCA [47]) show, the exercise of the s 6(3) discretion was not engaged and a sentence vitiated by material error was permitted to stand, despite the probable effect being that the offender's claim to earlier liberty was denied.

41 The danger of assessing an applicant's appeal in a summary fashion is that not all relevant considerations will be taken into account. This is demonstrable in the appellant's case whereby the CCA erred in having regard to an incorrect standard non-parole period. Justice Bellew relied upon "a standard non-parole period of 8 years imprisonment" when determining (in a summary manner) whether the appellant had established that a lesser sentence was required in order that "substantial injustice" not result: CCA [4], [29], [46]. The standard non-parole period is 7 years: *Crimes (Sentencing Procedure) Act* 1999 (NSW) Division 1A Table item 13. The sentencing court is required to have regard to the standard non-parole period as a guide-post: *Crimes (Sentencing Procedure) Act* s 54B, *Muldrock* at 132 [27]. The CCA in this case cannot have accurately assessed whether a more or less severe sentence was warranted in law when it had regard to a higher standard non-parole period than was provided by the legislature. The relativity between the non-parole period imposed (5 years 6 months) and the proper standard non-parole period (7 years) was significantly less than that between the non-parole period and the erroneous "guidepost" of 8 years. The "summary" analysis of whether a lesser sentence was warranted in law, was based on an erroneous assumption that the appellant's non-parole period was 2 years and 6 months less than the standard non-parole period when it was in fact only 1 year 6 months less.

42 Justice Bellew's review of the appellant's submissions in a summary fashion did not encompass an assessment of the appellant's case for re-sentence within the framework of the relevant statutory requirements and sentencing principles. For example, his Honour made no reference to the appellant's affidavit tendered in anticipation of the s 6(3) exercise which outlined his current circumstances, and which were relevant to his likelihood of reoffending and further rehabilitation. This evidence included his treatment for depression and bereavement while in custody, the birth of his son in

2011, his occupation while in custody in a position of responsibility as "Head Cook" for seven days a week, commencement of studies at TAFE in furtherance of his goal to become a fully qualified chef, the completion of further multiple courses available to him and his good conduct in custody (Affidavit of Andrew O'Grady affirmed 20 September 2013). His Honour referred only in general terms when summarising the appellant's submissions to the "matters contained in the lengthy written submissions" (CCA [33]) and later concluded, in the application of the *Abdul* test, that "none of the matters advanced on behalf of the applicant support a conclusion that... substantial injustice arises out of the sentence imposed, or that some other sentence is warranted in law": CCA [46]. This was not a proper exercise of the s 6(3) discretion or merits determination. His Honour did not consider how, if at all, the above matters may have impacted upon a fresh exercise of the sentencing discretion.

43 Similarly, his Honour made no reference to the appellant's reliance on statistical material which indicated that despite his youth and positive personal circumstances, the appellant received a sentence at the upper end of severity of sentences previously imposed for offences of specially aggravated break and enter and commit an indictable offence (in the appellant's case robbery). The sentencing judge had found that the offence was in the mid-range of seriousness for s 112(3) *Crimes Act* offences: ROS [15]. Such offences included varying degrees of special aggravation and varying indictable offences the object of the break and enter. In the material before the CCA, for example, only 2 of 100 other offenders sentenced for the same offence received greater head sentences: Appellant's submissions before the CCA at [29]. The limitations of statistical material is acknowledged. However such records stand as a yardstick against which to examine a sentence, albeit they do not fix the boundaries within which future judges must sentence: *Hili v R* [2010] HCA 45; (2010) 242 CLR 520 at 537 [54]-[55]. They may have been relevant in support of the appellant's arguments that the standard non-parole period had been given primary or determinative weight by the sentencing judge, and also an assessment of whether the appeal was arguable, including as to prospects on the s 6(3) question: *cf. Sinkovich v R* [2014] NSWCCA 97 at [26]-[28] (following a reference subsequent to Court of Appeal judgment in *Sinkovich*).

Test to be applied to the appellant

44 In cases such as the present, in which an applicant for an extension of time is still serving a sentence imposed under erroneous principles, the consequences of refusing an application to seek leave to appeal out of time are that the applicant will continue to serve a sentence vitiated by error. Justice Hodgson took into account similar considerations in *Gregory*: at [38], [42]. The underlying justice of the case must be at the heart of a determination for an extension of time and leave to appeal. The interests of the administration of justice in all the circumstances, rather than a test which requires the applicant to positively establish "substantial injustice", is the appropriate approach. It is the function of an intermediate court of appeal to correct injustice, not to permit injustice to stand unless it is shown to be "substantial".

45 Turning to the other *Abdul* "factors" or criteria, they are to be contrasted with the application of an "interests of justice" test. In *Gregory* harm to the applicant from future imprisonment was a consideration to be taken into account: "If there is still future punishment from the conviction, notably a future period of imprisonment, that would be a factor generally in favour of the applicant": at [42]. This is to be contrasted with the approach of the CCA in the application of the *Abdul* test, which gave weight to assumed harm to the victim but did not take into account harm to the applicant of future imprisonment and imposed a "substantial injustice" test to arguments in favour of him receiving a lesser sentence (ie. his argument for freedom). The delay was also said to weigh against the offender, even though it was out of his control that he was sentenced in accordance with *Way v R* [2004] NSWCCA 131; (2004) 60 NSWLR 168 ("*Way*"), and only granted aid to appeal against his sentence post-*Muldrock,* when his original complaint against severity was identified as having merit. Those who abided by the statements of the CCA in *Way* and did not lodge or press an application for leave to appeal should not now be disadvantaged by not having run an application foredoomed to failure at an earlier point in time. Delay on the basis that legal aid has only now been granted is a reason in favour of granting an extension of time, not refusing it.

46 The length of the delay, counted as a separate factor, and given full weight, does not necessarily say anything about the justice of the case or the merits of the argument. The interest of the community in the correction of a sentence imposed on the basis of "material error" (*cf.* CCA [32]) was not taken into account: CCA [29]-[32]. The statutory language of the discretion does not support such a test being imposed on offenders often in custody and frequently at the mercy of increasingly restricted grants of legal aid.

47 The discretion to grant an extension of time should be exercised according to the interests of justice. In the present case, the subjective factors relevant to this assessment were the appellant's explanation for delay (*Arja v R* [2010] NSWCCA 190 per Basten JA at [5]), namely that the relevant error was widely thought, at the time, to reflect correct sentencing procedure and therefore resulted in a refusal of aid; the merits of the proposed ground of appeal (*Arja* at [5], *Etchell* at 144 [24]), which the CCA accepted were made out; and the "degree of future harm to the applicant" (*Gregory* at [42]), namely that the appellant was still imprisoned, serving a sentence that had been imposed based, at least in part, on material error. Difficulties and considerations relevant to a retrial after a long delay had no relevance to a sentence appeal: *Etchell* at 144 [23].

48 The appellant submits that the CCA erred in refusing his application for extension of time for leave to appeal against his sentence.

Part VII: Applicable statutes and regulations

49 46 The following provisions, annexed to these submissions, are applicable and still in force: *Criminal Appeal Act* 1912 (NSW), s 5, s 6 and s 10; Criminal Appeal Rules, rr 3A-3C.

Part VIII: Orders Sought

42 (1) The appeal is upheld;

(2) The order made by the Court of Criminal Appeal is set aside;

(3) The application for an extension of time to seek leave to appeal to the Court of Criminal Appeal is granted;

(4) Leave to appeal is granted;

(5) The appeal against sentence is remitted to the Court of Criminal Appeal to be dealt with in accordance with law.

Part IX: Time Estimate

43 It is estimated that oral argument will take no longer than 2 hours together with the related matter of Kentwell v The Queen.

Dated: 20 June 2014

10

T A Game
Forbes Chambers
Tel: (02) 9390 7777
Facsimile: (02) 9261 4600
Email: rcoleiro@forbeschambers.com.au

G A Bashir
Forbes Chambers
Tel: (02) 9390 7777
Facsimile: (02) 9261 4600
Email: rcoleiro@forbeschambers.com.au

Part 3 Right of appeal and determination of appeals

5 Right of appeal in criminal cases

(1) A person convicted on indictment may appeal under this Act to the court:

(a) against the person's conviction on any ground which involves a question of law alone, and

(b) with the leave of the court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal against the person's conviction on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal, and

(c) with the leave of the court against the sentence passed on the person's conviction.

(2) For the purposes of this Act a person acquitted on the ground of mental illness, where mental illness was not set up as a defence by the person, shall be deemed to be a person convicted, and any order to keep the person in custody shall be deemed to be a sentence.

5AA Appeal in criminal cases dealt with by Supreme Court or District Court in their summary jurisdiction

(1) A person:

(a) convicted of an offence, or

(b) against whom an order to pay any costs is made, or whose application for an order for costs is dismissed, or

(c) in whose favour an order for costs is made,

by the Supreme Court in its summary jurisdiction may appeal under this Act to the Court of Criminal Appeal against the conviction (including any sentence imposed) or order.

(1A) An appeal against an order referred to in subsection (1) (c) may only be made with the leave of the Court of Criminal Appeal.

(2) For the purpose of this Act, a person acquitted on the ground of mental illness, where mental illness was not set up as a defence by the person, shall be deemed to be a person convicted, and any order to keep the person in custody shall be deemed to be a sentence.

(3), (3A) (Repealed)

(4) The Court of Criminal Appeal, in proceedings before it on an appeal under this section, may confirm the determination made by the Supreme Court in its summary jurisdiction or may order that the determination made by the Supreme Court in its summary jurisdiction be vacated and make any determination that the Supreme Court in its summary jurisdiction could have made on the evidence heard on appeal.

(5) Section 7 (4) applies to an appellant on an appeal under subsection (1) in the same way as it applies to an appellant on an appeal under section 5 (1).

(6) Provisions shall be made by rules of court for detaining an appellant on an appeal under subsection (1) who has been sentenced to imprisonment until the appeal has been determined, or for ordering the appellant into any former custody.

(7) This section applies to and in respect of the District Court in its summary jurisdiction in the same way as it applies to and in respect of the Supreme Court in its summary jurisdiction.

(7) A person may not appeal to the Court of Criminal Appeal under this section against an interlocutory judgment or order if the person has instituted an appeal against the interlocutory judgment or order to the Supreme Court under Part 5 of the *Crimes (Local Courts Appeal and Review) Act 2001*.

5G Appeal against discharge of whole jury

(1) The Attorney General, Director of Public Prosecutions or any other party to a trial of criminal proceedings before a jury may appeal to the Court of Criminal Appeal for review of any decision by the court to discharge the jury, but only with the leave of the Court of Criminal Appeal.

(2) The Court of Criminal Appeal is to deal with an appeal as soon as possible after the application for leave to appeal is lodged.

(3) The Court of Criminal Appeal:

(a) may affirm or vacate the decision appealed against, and

(b) if it vacates the decision, may make some other decision instead of the decision appealed against.

(4) If leave to appeal under this section is refused by the Court of Criminal Appeal, the refusal does not preclude any other appeal following a conviction on the matter to which the refused application for leave to appeal related.

(5) This section does not apply to the discharge of a jury under section 51, 55E, 56 or 58 of the *Jury Act 1977*.

6 Determination of appeals in ordinary cases

(1) The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5 (1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal under section 5 (1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

6AA Appeal against sentence may be heard by 2 judges

(1) The Chief Justice may direct that proceedings under this Act on an appeal (including proceedings on an application for leave to appeal) against a sentence be heard and determined by such 2 judges of the Supreme Court as the Chief Justice directs.

(2) Such a direction may only be given if the Chief Justice is of the opinion that the appeal is not likely to require the resolution of a disputed issue of general principle.

(3) For the purposes of proceedings the subject of a direction under this section, the Court of Criminal Appeal is constituted by the 2 judges directed by the Chief Justice.

Part 4 Procedure

10 Method and time for making appeal

(1) The following provisions apply to an appeal, or application for leave to appeal, under this Act against a person's conviction or sentence:

(a) The person is required to give the court, in accordance with the rules of court, notice of intention to appeal, or notice of intention to apply for leave to appeal, within 28 days after the conviction or sentence.

(b) The court may, at any time, extend the time within which the notice under paragraph (a) is required to be given to the court or, if the rules of court so permit, dispense with the requirement for such a notice.

(c) The appeal, or application for leave to appeal, is to be made in accordance with the rules of court, which may include:

(i) provision with respect to any statement of grounds of appeal, transcripts, exhibits or other documents or things to accompany the appeal or application, and

(ii) provision with respect to the timely institution and prosecution of the appeal or application, and

(iii) provision with respect to the period during which the notice under paragraph (a) has effect.

(2) For the purposes of any other Act or statutory instrument (whether enacted or made before or after the commencement of this subsection):

(a) the period provided for making or lodging an appeal or notice of appeal to the court against a conviction or sentence is taken to be the period for giving the court notice of intention to appeal or notice of intention to apply for leave to appeal, or

(b) an appeal against a conviction or sentence is taken to be pending in the court if notice of intention to appeal or apply for leave to appeal has been duly given to the court (unless the appeal or application has not been made within any time it is required to be made by the rules of court).

11 Judge's notes and report to be furnished on appeal

The judge of the court of trial may, and, if requested to do so by the Chief Justice, shall, in case of any appeal or application for leave to appeal, furnish to the registrar the judge's notes of the trial, and also a report, giving the judge's opinion upon the case, or upon any point arising in the case:

Provided that where shorthand notes have been taken in accordance with this Act, a transcript of such notes may be furnished in lieu of such judge's notes.

12 Supplemental powers of the court

(1) The court may, if it thinks it necessary or expedient in the interests of justice:

(a) order the production of any document, exhibit, or other thing connected with the proceedings, and

(b) order any persons who would have been compellable witnesses at the trial to attend and be examined before the court, whether they were or were not called at the trial, or order any such persons to be examined before any judge of the court or before any officer of the court or other person appointed by the court for the purpose, and admit any deposition so taken as evidence, and

(c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable witness, and

(a) directly (the legal practitioner sends a communication in his or her own name), or

(b) indirectly (someone authorised by the legal practitioner sends a communication in the legal practitioner's name).

(3) A legal practitioner who authorises someone else to send a communication, as referred to in subrule (2) (b), is taken to have affirmed to the Court that he or she has actual knowledge of the contents of the communication.

Notices relating to appeals

3 Notices to be signed

(1) Subject to subrules (2) and (3), all notices with respect to an appeal or proposed appeal are to be signed by the appellant or the appellant's solicitor or counsel on the appellant's behalf.

(2) A notice of abandonment of appeal is to be signed by the appellant.

(3) If the appellant is unable to write, the appellant may affix his or her mark to the notice in the presence of a witness who is to attest by his or her signature that the mark is that of the appellant.

3A Duration of notices of intention

(1) The following notices have effect for 6 months after the day of filing of the notice:

(a) a notice of intention to appeal,

(b) a notice of intention to apply for leave to appeal.

(2) The Court may extend the period for which such a notice has effect, before or after the expiry of the period.

3B Time for filing notice of appeal or notice of application for leave to appeal

(1) A notice of appeal, or a notice of application for leave to appeal, in respect of a conviction or sentence may only be given:

(a) if a notice of intention to appeal or notice of intention to apply for leave to appeal has been given with respect to the conviction or sentence—within the period during which that notice of intention has effect, or

(b) if a notice of intention to appeal or a notice of intention to apply for leave to appeal has not been given with respect to the conviction or sentence—within the period of 3 months after the conviction or sentence.

(2) The period of 3 months referred to in subrule (1) (b) may be extended by the Court before or after the expiry of the period.

3C Registrar may exercise certain powers of Court

The power of the Court under section 10 (1) (b) of the Act or rule 3A or 3B to extend a period of time may be exercised by the Registrar.

4 Exclusion of certain matters as grounds for appeal etc

No direction, omission to direct, or decision as to the admission or rejection of evidence, given by the Judge presiding at the trial, shall, without the leave of the Court, be allowed as a ground for appeal or an application for leave to appeal unless objection was taken at the trial to the direction, omission, or decision by the party appealing or applying for leave to appeal.