

MULDROCK v THE QUEEN (S121/2011)

Court appealed from: New South Wales Court of Criminal Appeal
[2010] NSWCCA 106

Date of judgment: 14 May 2010

Date of grant of special leave: 11 March 2011

The Appellant pleaded guilty to one count of sexual intercourse with a child under 10 years of age, contrary to section 66A of the *Crimes Act* 1900 (NSW). Another offence of aggravated indecent assault on the same victim was also taken into account upon sentencing. At the time of his offending, the Appellant was 30 years old. In 2000 he had also been sentenced to a 12 month intensive supervision order for a similar offence.

The evidence on sentence indicated that the Appellant had a permanent disability and that he had himself been sexually abused as a child. According to the Crown's witness (a clinical psychologist), it also showed that he suffered from "maladaptive sexual behaviour which seems to have manifested as a result of his own childhood sexual abuse and mental retardation." The Appellant's own expert witness stated that the Appellant may not have access to appropriate treatment programs in jail which might otherwise reduce his risk of re-offending. The Court was also advised that a position in a secure (community-based) facility which specialised in the treatment of intellectually disabled sexual offenders was available, if considered appropriate.

On 28 July 2009 Judge Black sentenced the Appellant to nine years imprisonment, with a backdated non-parole period of 96 days. That non-parole period was due to expire on the day he was sentenced. It was a condition of the Appellant's parole was that he was to be taken to that secure community-based facility.

On 14 May 2010 the Court of Criminal Appeal (McClellan CJ at CL, Howie and Harrison JJ) unanimously allowed the Crown's appeal against sentence. Their Honours held that Judge Black had erred in imposing the 96 day non parole period. They found that section 51 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Act") gave a Court power to impose parole conditions only in cases of imprisonment for three years or less. In all other cases it was a matter for the parole board. The sentencing process had therefore miscarried.

The Court of Criminal Appeal then re-sentenced the Appellant to nine years imprisonment, with a non-parole period of six years and eight months. In doing so, their Honours were constrained by Judge Blacks' head sentence (which was not challenged on appeal) and they did not vary the 25 per cent discount for the guilty plea. They were not however persuaded that a finding of special circumstances was appropriate. The Court of Appeal further found that treatment for the Appellant's condition was available within the prison system.

The grounds of appeal include:

- The Court erred in its consideration of the standard non-parole period. The Court erred by having regard to cases which were incomparable.

- The sentencing judge had found that the Appellant was "significantly intellectually disabled". The Court erred in deciding that the finding "was not justified by the contemporary evidence."