HIGH COURT OF AUSTRALIA

5 October 2011

MULDROCK v THE QUEEN

[2011] HCA 39

Today the High Court allowed an appeal from the Court of Criminal Appeal of the Supreme Court of New South Wales which had increased the non-parole period imposed on a mentally retarded sex offender from 96 days to six years and eight months.

Mr Muldrock pleaded guilty before the District Court of New South Wales to the offence of sexual intercourse with a child aged under 10 years. Mr Muldrock is mentally retarded. He was sentenced to nine years' imprisonment with a non-parole period of 96 days. The judge imposed a condition of parole that Mr Muldrock reside at a residential treatment facility with a program designed to assist intellectually handicapped individuals to moderate their sexually inappropriate behaviour until it was determined that he be discharged.

Mr Muldrock's application for leave to appeal against the severity of sentence was refused by the Court of Criminal Appeal and the respondent's appeal against the inadequacy of the length of the non-parole period was allowed. It was common ground that the sentencing judge's discretion had miscarried because he did not have the power to impose conditions on a parole order for a sentence of nine years' imprisonment. The Court of Criminal Appeal held that the non-parole period imposed upon Mr Muldrock was inappropriate and was critical of the sentencing judge's failure to consider the "objective seriousness" of the offence and the part that the standard non-parole period should play in determining the appropriate sentence. In doing so, the Court applied its earlier decision in *R v Way* (2004) 60 NSWLR 168 ("*Way*") on the application of Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW), which prescribed standard non-parole periods for specified offences. Mr Muldrock was re-sentenced to a non-parole period of six years and eight months. Mr Muldrock appealed to the High Court by special leave.

The High Court held that the Court of Criminal Appeal erred in refusing Mr Muldrock leave to appeal his sentence and that *Way* was wrongly decided with respect to the operation of standard non-parole periods. The High Court held that in sentencing for an offence to which standard non-parole periods applied a court is not required or permitted to engage in a two-stage approach and that the standard non-parole period should not have been determinative in sentencing Mr Muldrock. The High Court also held that, in re-sentencing Mr Muldrock, the Court of Criminal Appeal made various errors. In particular, the Court of Criminal Appeal did not take sufficient account of Mr Muldrock's mental retardation and erred in finding that Mr Muldrock would receive treatment in the prison system. The High Court held that the desirability of Mr Muldrock undergoing suitable rehabilitative treatment was capable of being a special circumstance justifying departure from the statutory proportion between the non-parole period and the term of the sentence and that the sentencing principles of punishment and denunciation did not require significant

emphasis in light of Mr Muldrock's limited moral culpability for his offence. The Court held that nine years' imprisonment was manifestly excessive. The Court further held that the availability of orders under the *Crimes (Serious Sex Offenders) Act* 2006 (NSW) was not relevant to sentencing Mr Muldrock.

- *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.*