HIGH COURT OF AUSTRALIA

8 August 2018

DL v THE QUEEN
[2018] HCA 32

Today the High Court unanimously allowed an appeal from the Court of Criminal Appeal of the Supreme Court of New South Wales.

Following a trial before a jury, the appellant was convicted of the murder of a 15-year-old school girl, TB. The appellant was 16 years old at the time of the offence. The offence took place shortly after TB alighted from her school bus as she was making her way home. TB suffered 48 stab wounds, including to the head, face, chest and back. In interviews, the appellant either denied involvement in the murder or stated he had no memory of it. No defence of mental illness or partial "defence" of substantial impairment by abnormality of mind was run at trial.

At the sentencing hearing, psychiatric evidence was led by both the prosecution and the appellant. An expert called by the appellant opined that, at the time of the offence, the appellant had been in an early phase of schizophrenia. The evidence led by the prosecution considered that there might be another, non-psychotic but irrational, reason for the offence. The primary judge favoured the evidence adduced by the appellant, finding that it was probable that the appellant was acting under the influence of some psychosis at the time of the offence. The primary judge found that the evidence did not prove beyond reasonable doubt that the killing was intentional or premeditated, finding instead that there was "much irrationality about what occurred". The appellant was sentenced to a term of 22 years' imprisonment, with a non-parole period of 17 years.

The appellant appealed to the Court of Criminal Appeal on the basis that the primary judge had erred in giving primary significance to the standard non-parole period in the determination of the appropriate sentence to be imposed. That error was conceded and the Court of Criminal Appeal's power to re-sentence was enlivened. At the hearing before the Court of Criminal Appeal the parties tendered further evidence on "the usual basis" – a reference to the practice of receiving new evidence on a sentence appeal to enable the Court to assess the offender's progress towards rehabilitation in the period since the original sentencing. The prosecution did not seek to disturb the primary judge's factual findings on the appeal. However, in re-sentencing the appellant, the Court of Criminal Appeal (by majority) proceeded on the footing that it was not bound by those findings and might take into account the new evidence in assessing the appellant's criminality for the offence. While noting that the primary judge's findings had been open, the Court of Criminal Appeal rejected them and found that the appellant intended to kill TB. In the circumstances, the Court of Criminal Appeal concluded that no lesser sentence was warranted and the appeal was dismissed.

By grant of special leave, the appellant appealed to the High Court. The High Court found that the Court of Criminal Appeal had denied the appellant procedural fairness in failing to put him on notice that it was minded to depart from the primary judge's factual findings and give him an opportunity to deal with the matter by evidence or submissions. In the absence of such an indication, the High Court said it was reasonable for the appellant to act on the assumption that the prosecution's concession, that it did not seek to disturb the primary judge's findings, would be accepted and acted upon. The failure to accord procedural fairness to the appellant was held to

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amount to a miscarriage of justice. The appeal was allowed and the matter remitted to the Court of Criminal Appeal for consideration of the re-sentencing of the appellant.

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.