HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, BELL, GAGELER AND KEANE JJ

PHILLIP CHARLES KENTWELL APPELLANT

AND

THE QUEEN RESPONDENT

Kentwell v The Queen
[2014] HCA 37
9 October 2014
S113/2014

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 14 November 2013.*

3. *Remit the application dated 26 June 2013 to the Court of Criminal Appeal for determination.*

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with J L Roy for the appellant (instructed by Legal Aid NSW)

J H Pickering SC with T L Smith for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Kentwell v The Queen

Criminal law – Appeal – Application to extend time within which to apply for leave to appeal against sentence – Principles to be applied in determining whether extension of time should be granted – Whether applicant required to demonstrate that refusal of application would occasion substantial injustice – Relevance of principle of finality – Relevance of prospect of success should extension be granted – Whether extension of time should be granted.

Criminal law – Appeal – Appeal against sentence – Appellate court's power to re-exercise sentencing discretion – Where error of the kind identified in *House v The King* (1936) 55 CLR 499 established – Whether appellate court must form positive opinion that some other sentence is warranted in law before intervening.

Words and phrases – "*Abdul* test", "principle of finality", "substantial injustice", "warranted in law".

Criminal Appeal Act 1912 (NSW), ss 6(3), 10(1)(b).
Criminal Appeal Rules (NSW), rr 3A, 3B.

1 FRENCH CJ, HAYNE, BELL AND KEANE JJ. The appellant is presently serving sentences that were imposed on him in the District Court of New South Wales (Johnstone DCJ) on 20 February 2009. The sentencing judge sentenced for the offences for which a standard non-parole period is prescribed[1] in the manner explained in *R v Way*[2]. Subsequently, this Court held that *Way* was incorrectly decided[3]. In light of the principles explained in *Muldrock v The Queen*[4], it is apparent that the sentencing for the standard non-parole period offences was flawed.

2 On 28 June 2013, the appellant applied to the Court of Criminal Appeal of the Supreme Court of New South Wales (Hoeben CJ at CL, Johnson and Bellew JJ) for an extension of time in which to apply for leave to appeal against sentence ("the application"). The correctness of the principles applied by the Court of Criminal Appeal to the determination of the application is the issue in the appeal.

3 The Court of Criminal Appeal approached the exercise of the discretion conferred by the *Criminal Appeal Act* 1912 (NSW)[5] ("the Act") and the Criminal Appeal Rules (NSW)[6] ("the Rules") to extend time by applying a test formulated in *Abdul v The Queen*[7] for applications based on "*Muldrock* error". The test, drawn from English decisions involving a "change of law", requires the court to ask whether refusal of the application would occasion substantial injustice. The Court of Criminal Appeal found that the sentencing of the appellant was affected by material error[8]. Nonetheless, it dismissed the application because the

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1 *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("Sentencing Act"), Pt 4, Div 1A.

2 (2004) 60 NSWLR 168.

3 *Muldrock v The Queen* (2011) 244 CLR 120 at 131 [25]; [2011] HCA 39.

4 (2011) 244 CLR 120.

5 Section 10(1)(b).

6 Rules 3A and 3B (made under the *Supreme Court Act* 1970 (NSW)).

7 [2013] NSWCCA 247 at [53].

8 *Kentwell v The Queen* [2013] NSWCCA 266 at [69].

appellant had failed to demonstrate that substantial injustice was occasioned by the sentence[9].

4 On 16 May 2014, Hayne and Bell JJ granted the appellant special leave to appeal. For the reasons to be given, the Court of Criminal Appeal erred in confining the exercise of its discretion by the "substantial injustice" test. The order dismissing the application must be set aside and the application remitted to the Court of Criminal Appeal for determination.

The sentence hearing

5 The appellant was tried on an indictment containing seven counts. He was convicted of the first, third, fourth, fifth and seventh counts[10]. These counts charged the appellant with the following offences – count one: recklessly causing grievous bodily harm[11]; count three: maliciously destroying property[12]; count four: sexual intercourse without consent knowing that the victim was not consenting ("sexual intercourse without consent")[13]; count five: assault[14]; and count seven: sexual intercourse without consent.

6 Each of the offences of violence was committed against the same victim, with whom the appellant had been involved in an intimate relationship. The property that the appellant maliciously destroyed belonged to that victim. The offences charged in counts one, three and four occurred on or about 29 October 2007. The offences charged in counts five and seven occurred on or about 2 November 2007. All the offences occurred while the victim was in her home. On each occasion, the sexual offence was preceded by prolonged, drunken acts of violence against the victim.

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9 *Kentwell v The Queen* [2013] NSWCCA 266 at [90].

10 No verdict was taken on count two, which was an alternative count. The appellant was acquitted of the offence charged in count six.

11 *Crimes Act* 1900 (NSW), s 35(2).

12 *Crimes Act*, s 195(1)(a).

13 *Crimes Act*, s 61I.

14 *Crimes Act*, s 61.

7 The appellant is Aboriginal. He was adopted by a non-Aboriginal family when he was 12 months old. He led evidence of his long-standing addiction to illegal drugs and alcohol. Two reports by a forensic psychiatrist, Dr Allnutt, were tendered in his case. Dr Allnutt considered that, at the time of the offending, there was evidence to support the conclusion that the appellant was experiencing delusional beliefs, compounded by auditory hallucinations and ideas of reference.

8 The sentencing judge said that Dr Allnutt's opinion was almost entirely dependent upon the history given by the appellant. His Honour expressed a degree of scepticism concerning that history. Nonetheless, as Dr Allnutt had not been required for cross-examination, his Honour accepted his evidence. However, he concluded that the appellant's mental condition did not have any connection to the sexual offending. Nor did his Honour consider that the appellant's mental illness made it inappropriate to apply principles of general deterrence in sentencing him.

9 The offence of sexual intercourse without consent has a standard non-parole period of seven years[15]. The offence of recklessly causing grievous bodily harm was not subject to a standard non-parole period at the date of the appellant's offence[16]. The sentencing judge was informed, wrongly, that the offence was subject to a four year standard non-parole period. His Honour sentenced for this offence and the two offences of sexual intercourse without consent by considering whether there were good reasons for not imposing the standard non-parole period. Subject to consideration of totality, his Honour concluded that there were no such reasons for a departure. His Honour found that the appellant's mental condition and history of drug and alcohol abuse amounted to special circumstances which justified a departure from the statutory proportion between the non-parole period and the term of the sentence[17].

10 The appellant was sentenced to an aggregate term of 12 years' imprisonment with a non-parole period of eight years made up of the following sentences – count one: a fixed term of four years' imprisonment to date from

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15 Sentencing Act, Pt 4, Div 1A, Table, Item No 7.

16 Schedule 1, item 9 of the *Crimes (Sentencing Procedure) Amendment Act* 2007 (NSW), which commenced on 1 January 2008, amended the Sentencing Act and imposed a standard non-parole period of four years for recklessly causing grievous bodily harm.

17 Sentencing Act, s 44(2).

6 April 2008; count three: a fixed term of one month's imprisonment to date from 6 April 2008; count four: a fixed term of seven years' imprisonment to date from 6 August 2008; count five: a fixed term of three months' imprisonment to date from 6 December 2008; and count seven: a non-parole period of seven years to date from 6 April 2009 and to expire on 5 April 2016 with an additional term of four years to date from 6 April 2016 and to expire on 5 April 2020.

Extending time under the Act and the Rules

11 A person convicted on indictment may appeal to the Court of Criminal Appeal against the sentence with the leave of the Court[18]. Notice of intention to apply for leave to appeal is required to be given within 28 days after the sentence[19]. The notice is valid for six months after the date of filing[20]. If notice of intention to apply for leave is not given, a notice of application for leave to appeal may be given within three months after the sentence[21]. The Court may extend the period of three months before or after the expiry of the period[22].

12 The power to extend the time within which a notice of intention to apply for leave to appeal is required to be given to the Court under the Act is wide[23]:

> "The court may, at any time, extend the time within which the notice [of intention to apply for leave to appeal] is required to be given to the court or, if the rules of court so permit, dispense with the requirement for such a notice."

13 So, too, wide discretion is conferred by the Rules to extend the period for which a notice of intention to apply for leave to appeal has effect[24] or to extend the period of three months, in a case in which no notice of intention to apply for

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18 *Criminal Appeal Act* 1912 (NSW), s 5(1)(c).

19 *Criminal Appeal Act*, s 10(1)(a).

20 Criminal Appeal Rules (NSW), r 3A(1)(b).

21 Criminal Appeal Rules, r 3B(1)(b).

22 Criminal Appeal Rules, r 3B(2).

23 *Criminal Appeal Act*, s 10(1)(b).

24 Criminal Appeal Rules, r 3A(2).

leave to appeal has been filed[25], before or after expiry of the relevant period. The discretion to extend time under the Act and the Rules may be exercised by the Registrar[26].

The history following the sentence hearing

14 The appellant was represented by the Aboriginal Legal Service at the sentence hearing. A notice of intention to appeal was completed on the appellant's behalf and filed in the Registry of the Court of Criminal Appeal on 23 February 2009. It appears that extensions to the notice of intention to appeal were granted during the period when the Aboriginal Legal Service was acting for the appellant. At some time before March 2010, the Aboriginal Legal Service identified a conflict of interest in continuing to act for the appellant and it transferred his file to Legal Aid NSW. On 24 March 2010, the appellant applied for a grant of legal aid. On 25 January 2011, the appellant was advised that his application had been refused. There matters stood until February 2013, when a solicitor from Legal Aid NSW contacted the appellant and invited him to complete a further application for legal aid. Legal Aid NSW identified the appellant's case in the course of carrying out a review of sentences which may have been affected by a "*Muldrock* error".

15 The appellant made a further application for legal aid and, following receipt of that application, Legal Aid NSW set about obtaining a transcript of the proceedings on sentence and exhibits. Counsel was briefed and, on 28 June 2013, the application was filed in the Registry of the Court of Criminal Appeal.

16 The application was supported by an affidavit affirmed by a solicitor employed by Legal Aid NSW setting out the procedural history and by two affidavits affirmed by the appellant. The first of the appellant's affidavits gave details of his progress in custody. This included that a psychiatrist had commenced him on fortnightly injections of a drug named Risperidone and that the appellant had been free of illegal drugs while in custody. In his second affidavit, the appellant confirmed that a notice of intention to appeal had been completed on his behalf on the day he was sentenced and that he had subsequently been refused legal aid to pursue the appeal.

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25 Criminal Appeal Rules, r 3B(2).

26 Criminal Appeal Rules, r 3C.

17 A notice of grounds of appeal was filed with the application. It contained four grounds of appeal, which in summary contended:

(1) error in application of sentencing principle respecting the standard non-parole period in light of the decision in *Muldrock*;

(2) error in increasing the balance of term of the sentence imposed on count seven to reflect the finding of special circumstances[27];

(3) error in imposing fixed terms of imprisonment for the offences which carried a standard non-parole period; and

(4) error in the consideration of the psychiatric evidence.

The Court of Criminal Appeal

18 The Court of Criminal Appeal found that each of the errors identified in the grounds of appeal was established.

19 As to ground one, the Court of Criminal Appeal said that the sentencing judge had used the standard non-parole period as a starting point in determining the appropriate sentences for the offences of sexual intercourse without consent and in so doing had given it determinative significance[28]. This was a material error in that it "clearly had the capacity to infect the exercise of the sentencing discretion"[29].

20 As to ground two, the Court of Criminal Appeal found there was an inconsistency between the finding of "special circumstances" and the structure of the sentence imposed on count seven[30]. This was not a material error because the

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27 Section 44(2) of the Sentencing Act provides that "[t]he balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision)".

28 *Kentwell v The Queen* [2013] NSWCCA 266 at [36].

29 *Kentwell v The Queen* [2013] NSWCCA 266 at [37].

30 *Kentwell v The Queen* [2013] NSWCCA 266 at [44].

finding of special circumstances was reflected in the structure of the aggregate sentence[31].

21 As to ground three, the Court of Criminal Appeal said the fixed term sentence imposed on count four was contrary to s 45(1) of the Sentencing Act, which does not permit the court to decline to set a non-parole period when sentencing an offender to imprisonment for an offence for which a standard non-parole period is specified[32]. In light of the structure of the aggregate sentence, the Court of Criminal Appeal said that this was not a material error[33].

22 As to ground four, the Court of Criminal Appeal found that the sentencing judge's consideration of the psychiatric evidence contained three errors. First, there was objective evidence of the appellant's disturbed mental condition dating from January 1995[34]. It followed that the sentencing judge's conclusion that Dr Allnutt's opinion was based almost entirely upon the history given by the appellant was wrong[35]. Secondly, the acceptance of Dr Allnutt's opinion could not be reconciled with the sentencing judge's conclusion that mental illness had not contributed to the sexual offending in a material way[36]. Thirdly, it was wrong to give weight to general deterrence in sentencing the appellant given that Dr Allnutt's opinion supported the conclusion that the appellant suffers from a "serious mental illness"[37]. The Court found that each of the errors in the consideration given to the appellant's psychiatric condition was a material error.

The *Abdul* test

23 In *Abdul v The Queen*, the Court of Criminal Appeal formulated the following principles to be applied to the determination of an application to

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31 *Kentwell v The Queen* [2013] NSWCCA 266 at [45].

32 *Kentwell v The Queen* [2013] NSWCCA 266 at [49].

33 *Kentwell v The Queen* [2013] NSWCCA 266 at [50]-[51].

34 *Kentwell v The Queen* [2013] NSWCCA 266 at [61].

35 *Kentwell v The Queen* [2013] NSWCCA 266 at [62].

36 *Kentwell v The Queen* [2013] NSWCCA 266 at [64].

37 *Kentwell v The Queen* [2013] NSWCCA 266 at [65] citing *Muldrock v The Queen* (2011) 244 CLR 120 at 139 [55].

extend the time within which to apply for leave to appeal against a sentence on a ground asserting "*Muldrock* error"[38]:

> "[A]ll 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*[39] 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."

24 Applying these principles to the appellant's case, the Court of Criminal Appeal addressed the relevant factors, characterising the delay as "substantial" and the reasons for the delay as "largely unexplained"[40]. This second factor took into account that grounds two, three and four were unconnected to "*Muldrock* error" and could have been challenged timeously. The Court acknowledged that the appellant's failure may have been the result of the change in his legal representation and the significant delay in the assessment of his legal aid application. It noted that the appellant was not at fault in either of these respects. The Court considered that it was "at least possible" that an extension of time may affect the victim. Finally, the Court said that an extension of time would "offend the principle of finality". It concluded that the majority of relevant factors were against the grant of an extension of time[41].

25 The Court proceeded to assess the prospects of success should the extension be granted. Conformably with the statements in *Abdul*, this consideration was carried out in a more summary way than had the Court been determining an application for leave to appeal that was brought within time. The Court concluded that although material error had been established, none of the matters advanced on the appellant's behalf, including his mental illness,

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38 *Abdul v The Queen* [2013] NSWCCA 247 at [53].

39 *Etchell v The Queen* (2010) 205 A Crim R 138.

40 *Kentwell v The Queen* [2013] NSWCCA 266 at [68].

41 *Kentwell v The Queen* [2013] NSWCCA 266 at [68].

supported the conclusion "that there has been substantial injustice arising out of the sentence imposed, or that some other sentence is warranted in law"[42].

The submissions

26 The appellant's principal challenge is to the adoption of the *Abdul* test of "substantial injustice". In addition, he challenges the Court of Criminal Appeal's conclusion that a majority of relevant factors were against the grant of the extension sought. The reasons for the delay were explained: the appellant had been refused legal aid to pursue the challenge to his sentence. The fact that his grounds of challenge were good suggested that Legal Aid NSW's assessment of his application had been wrong, but this was not his fault. Next, the appellant submits that the possibility that his victim may be affected by the prospect of the sentence being re-opened must be balanced against the interests of justice in reviewing a sentence that is acknowledged to be attended by material error and that is still being served. Finally, the appellant submits that the assessment of merit should be confined to the *grounds* of the proposed appeal.

27 The respondent counters that the last-mentioned submission conflates the principles that apply to the determination of an application to extend time with those that apply to the determination of an application for leave to appeal brought within time. The respondent submits that it has long been accepted that "substantial reasons"[43] or "special reasons"[44] are required before the grant of an extension of time to appeal or to apply for leave to appeal against a conviction or sentence. The need for substantial or special reasons reflects that the proceedings are closed following the expiration of the time within which to apply for leave to appeal against sentence and that the grant of an extension is not a mere formality. The test of "substantial injustice" is suggested to encapsulate the importance of the principle of finality to the determination. The respondent submits that, in its practical application, the test of "substantial injustice" imposes no higher threshold than a test expressed as "what justice requires".

The test of substantial injustice

28 The Court in *Abdul* drew on a line of English decisions that are concerned with re-opening a conviction in consequence of the correction by a court of

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42 *Kentwell v The Queen* [2013] NSWCCA 266 at [90].

43 *Rigby* (1923) 17 Cr App R 111 at 112.

44 *R v R* [2007] 1 Cr App R 10 at 161 [30].

authority of a misconception as to the state of the law[45]. In cases of this kind, the Court of Appeal asks whether refusal of an extension of time would occasion "substantial injury" or "substantial injustice" to the applicant[46]. The same test is applied to applications to challenge convictions in light of the *Human Rights Act* 1998 (UK) jurisprudence[47]. In *R v R*, the Court took into account that, while the applicants' convictions for conspiracy to engage in money laundering could not stand, their own cases at trial, taken with the verdicts, established that they had committed one or more substantive money laundering offences. This was against finding that substantial injustice would be occasioned by refusing the applications[48]. A similar consideration was noted in *Hawkins*, although it was not determinative[49].

29 The reliance in *Abdul* on the English line of authority was misplaced. The interests of justice in the review of a sentence that has been imposed upon wrong sentencing principle and that is still being served are to be distinguished from the interests of justice in the review of a stale conviction. The review of an old conviction may raise consideration of the capacity to hold a new trial that is fair to both sides[50]. For example, witnesses may no longer be available and exhibits may have been lost or destroyed. Re-opening a conviction for an offence of violence may occasion acute stress to the victim, including by the prospect of being required to give evidence again[51]. This appeal does not provide the

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45 *Abdul v The Queen* [2013] NSWCCA 247 at [46]-[49].

46 *Hawkins* [1997] 1 Cr App R 234 at 240-241; *R v R* [2007] 1 Cr App R 10 at 161 [30]; *R v Jawad* [2013] 1 WLR 3861 at 3873 [29]; *R v Bestel* [2014] 1 WLR 457 at 475 [31].

47 *R v R* [2007] 1 Cr App R 10 at 162-163 [33] citing *R v Benjafield* [2003] 1 AC 1099.

48 *R v R* [2007] 1 Cr App R 10 at 164 [39].

49 *Hawkins* [1997] 1 Cr App R 234 at 240-241.

50 *R v Gregory* [2002] NSWCCA 199 at [42]. See also *R v Unger* [1977] 2 NSWLR 990; Spencer, "Criminal Appeals Founded on a Change in Case-Law", (2014) 73 *Cambridge Law Journal* 241.

51 Chapter 6, Pt 5, Divs 3 and 4 of the *Criminal Procedure Act* 1986 (NSW) provide for the admission of the record of the original evidence of the complainant at the re-trial of a person for a prescribed sexual offence or in new trial proceedings for such an offence.

occasion to consider the issues raised by an application to extend time in which to challenge a conviction on the ground that a misconception as to the law has been removed by later authoritative decision.

30 In *R v Young*, the Court of Criminal Appeal observed that it is impossible to foresee all of the circumstances that may bear on the determination of an application to extend time in which to seek leave to appeal against a sentence[52]. Correctly, the Court refrained from formulating any guideline for the exercise of the discretion, holding that the application was to be determined by asking whether "it is just under the circumstances that such an order should be made"[53]. The wide discretion conferred on the Court of Criminal Appeal under the Act and Rules is to be exercised by consideration of what the interests of justice require in the particular case. *Abdul* was wrongly decided. It was an error to introduce in applications for an extension of time based on asserted "*Muldrock* error" consideration of whether refusal of the application would occasion substantial injustice.

31 The respondent's submission that, in its application, the test applied by the Court of Criminal Appeal in the appellant's case amounted to no more than the determination of "what justice requires" must be rejected. Before turning to the principal reason for that rejection, something should be said about the Court of Criminal Appeal's treatment of the relevant factors. The weighing of the factors of the length of the delay, the reasons for it and the possibility of adverse effect on the victim were matters of judgment. However, the Court went on to identify as a discrete factor against the grant of the extension that it would "offend the principle of finality"[54].

32 The Act confers a right to appeal against conviction in stated circumstances[55] and provides for an appeal against conviction[56] and/or sentence[57]

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52 [1999] NSWCCA 275 at [35].

53 *R v Young* [1999] NSWCCA 275 at [35]. See also *R v Gregory* [2002] NSWCCA 199 at [41].

54 *Kentwell v The Queen* [2013] NSWCCA 266 at [68].

55 *Criminal Appeal Act*, s 5(1)(a).

56 *Criminal Appeal Act*, s 5(1)(b).

57 *Criminal Appeal Act*, s 5(1)(c).

with the leave of the Court. These provisions (among others) are exceptions to finality in the trial and sentencing of offenders. The principle of finality finds expression in the prescription of the time limit within which an appeal or an application for leave to appeal may be brought. The discretionary power to extend the time limit is a legislative recognition that the interests of justice in a particular case may favour permitting an appeal or an application for leave to appeal to be heard, notwithstanding that it was not brought within time. The interests of justice will often pull in different directions. As earlier noted, they may include consideration of the adverse effect on the victim, or on the community generally, occasioned by re-opening a concluded criminal proceeding. However, at least in the case of an out-of-time challenge to a sentence that is being served, the principle of finality does not provide a discrete reason for refusing to exercise the power.

33 Relevant to the determination of the interests of justice on an application to extend time is the prospect of success should the extension be granted. Contrary to the appellant's submission, the Court of Criminal Appeal's acceptance that his grounds of appeal were established did not conclude its consideration of the merits of the appeal. As the appellant acknowledged on the hearing of the appeal, notwithstanding conceded "*Muldrock* error", a sentence may be so demonstrably lenient that the Court of Criminal Appeal concludes that there is no prospect that a lesser sentence would be imposed were the appeal to be entertained.

34 Consideration of the merits of an appeal against sentence is addressed by reference to s 6(3) of the Act:

> "On an appeal ... 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."

35 The history of the provision is touched on in *Lacey v Attorney-General (Qld)*[58]. Notwithstanding the breadth of its language, it was settled at an early stage that the appellate court's authority to intervene is dependent upon demonstration of error[59]. The significance to the function of the appellate court of the distinction between specific error, of any of the kinds identified in *House v*

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58 (2011) 242 CLR 573; [2011] HCA 10.

59 *Skinner v The King* (1913) 16 CLR 336 at 340; [1913] HCA 32.

The King[60], and the conclusion of manifest excess or inadequacy is explained by Hayne J in *AB v The Queen*[61]. In the case of specific error, the appellate court's power to intervene is enlivened and it becomes its duty to re-sentence, unless in the separate and independent exercise of its discretion it concludes that no different sentence should be passed. By contrast, absent specific error, the appellate court may only intervene if it concludes that the sentence falls outside the permissible range of sentences for the offender and the offence.

36 In supplementary submissions filed by leave after the hearing of the appeal, the respondent contends for an intermediate step between the identification of specific error and the re-exercise of the sentencing discretion. On this analysis, the appellate court, having identified error, considers whether the sentence passed by the court of first instance is nonetheless warranted in law in that it is within the permissible range. The argument is constructed on a passage in the joint reasons in *House*, in which their Honours, speaking of the identification of specific error, state that "[the sentencing court's] determination should be reviewed and the appellate court may exercise its own discretion in substitution for [the sentencing court's] if it has the materials for doing so"[62]. The point being made by their Honours is that the power to intervene is not enlivened by the fact that judges composing the appellate court consider that, had they been in the position of the sentencing judge, they would have taken a different course[63]. The verb "review" is not employed to posit an intermediate step between identification of specific error and the engagement of the appellate court's sentencing discretion. It is the latter to which their Honours refer in speaking of the "special or particular power to review sentences imposed upon convicted persons"[64].

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60 (1936) 55 CLR 499; [1936] HCA 40.

61 (1999) 198 CLR 111 at 160 [130]; [1999] HCA 46. See also at 151-153 [104]-[107] per Kirby J.

62 (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.

63 (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.

64 (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.

37 The respondent's argument calls in aid decisions of the Court of Criminal Appeal that were decided before *AB*[65] and *Dinsdale v The Queen*[66]. In *R v Oastler*[67], the Court said that the specific errors it found:

> "[did] not mean necessarily that the appeal should be upheld on the ground that the sentence is excessive. The question which then remains for the court under section 6(3) of the Criminal Appeal Act, is whether the sentence in fact left by the sentencing Judge, is excessive or to use the words of the section ... whether another sentence is 'warranted in law'."

38 Statements to the like effect were made in *Astill (No 2)*[68]. The respondent submits these statements accord with the interpretation of s 6(3) in *R v Simpson*: specific error does not enliven the Court of Criminal Appeal's discretion to re-sentence; first it must form "a positive opinion" that some other sentence is warranted in law. The reference is to the last sentence in paragraph 79 of Spigelman CJ's reasons[69]:

> "Sentencing appeals in this Court frequently proceed as if the statutory trigger for the quashing of a sentence were expressed as follows: 'If it is of the opinion that error has occurred in the sentencing process'. That is not the statutory formulation. By s 6(3) this Court must form a positive opinion that 'some other sentence … is warranted in law and should have been passed'. *Unless such an opinion is formed, the essential pre-condition for the exercise of the power to 'quash the sentence and pass such other sentence in substitution therefor' is not satisfied*." (emphasis added)

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65 (1999) 198 CLR 111.

66 (2000) 202 CLR 321; [2000] HCA 54.

67 Unreported, Court of Criminal Appeal of the Supreme Court of New South Wales, 7 October 1992 at 9.

68 (1992) 64 A Crim R 289 at 304 per Lee AJ.

69 *R v Simpson* (2001) 53 NSWLR 704 at 720-721 [79].

39 The respondent's argument is reminiscent of its submission in *Douar v The Queen*[70]. The submission was rejected[71] taking into account the statements of principle in *House*, *AB* and *Dinsdale*. Applying those principles, Johnson J, giving the leading judgment, determined[72] that, error having been identified, the Court's discretion to re-sentence was enlivened with the consequence that evidence of events occurring since the sentence hearing was admissible because it was relevant to the determination of the statutory question of whether the Court "is of opinion that some other sentence ... is warranted in law".

40 In *Baxter v The Queen*[73], the Court of Criminal Appeal returned to a consideration of its function under s 6(3). Spigelman CJ took the opportunity to clarify the meaning of the last sentence in paragraph 79 of his reasons in *Simpson*[74]:

> "The import of [79] of *Simpson* was to ensure that submissions in the Court of Criminal Appeal did not proceed as if the identification of error created an entitlement on the part of an Applicant to a new sentence, for example, by merely adjusting the sentence actually passed to allow for the error identified. That would be to proceed on the assumption that the sentencing judge was presumptively correct, when the Court has determined that the exercise of the discretion had miscarried. Section 6(3) is directed to ensuring that the Court of Criminal Appeal does not proceed in that manner, but re-exercises the sentencing discretion taking into account all relevant statutory requirements and sentencing principles with a view to formulating the positive opinion for which the subsection provides."

41 The other members of the Court in *Baxter* expressed differing views respecting the interpretation of s 6(3). Kirby J said that where error is identified it is not incumbent on the applicant to demonstrate that the sentence appealed against is manifestly excessive; it is sufficient if the Court of Criminal Appeal infers that the error may have infected the reasoning of the sentencing judge such

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70 (2005) 159 A Crim R 154 at 174 [107]-[111].

71 (2005) 159 A Crim R 154 at 176 [120].

72 *Douar v The Queen* (2005) 159 A Crim R 154 at 178 [124].

73 (2007) 173 A Crim R 284.

74 *Baxter v The Queen* (2007) 173 A Crim R 284 at 287 [19].

that, absent the error, a lesser sentence may have been imposed[75]. Latham J agreed with Spigelman CJ's observations but confined error to those that are material in the sense that they have the capacity to infect the exercise of the sentencing discretion, regardless of whether it can be demonstrated that the error has in fact influenced the outcome[76].

42 Spigelman CJ's analysis in *Baxter* should be accepted. When a judge acts upon wrong principle, allows extraneous or irrelevant matters to guide or affect the determination, mistakes the facts or does not take into account some material consideration[77], the Court of Criminal Appeal does not assess whether and to what degree the error influenced the outcome. The discretion in such a case has miscarried and it is the duty of the Court of Criminal Appeal to exercise the discretion afresh taking into account the purposes of sentencing[78] and the factors that the Sentencing Act[79], and any other Act or rule of law, require or permit. As sentencing is a discretionary judgment that does not yield a single correct result, it follows that a range of sentences in a given case may be said to be "warranted in law". A sentence that happens to be within the range but that has been imposed as the result of a legally flawed determination is not "warranted in law" unless, in the exercise of its independent discretion, the Court of Criminal Appeal determines that it is the appropriate sentence for the offender and the offence. This is not to say that all errors in the sentencing of offenders vitiate the exercise of the sentencer's discretion. By way of example, s 44(1) of the Sentencing Act requires the court when sentencing an offender to imprisonment to first set the non-parole period and then set the balance of the term. Prior to 1 February 2003, a court was required to first set the term of the sentence and then specify the non-parole period. A court which sentences an offender to imprisonment after 1 February 2003 by first setting the term of the sentence commits legal error. Without more, the error does not affect the exercise of the sentencer's discretion.

43 After having identified specific error of the kind described in *House*, the Court of Criminal Appeal may conclude, taking into account all relevant matters,

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75 (2007) 173 A Crim R 284 at 294 [60].

76 (2007) 173 A Crim R 284 at 298 [83].

77 *House v The King* (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.

78 Sentencing Act, s 3A.

79 Sentencing Act, s 21A.

including evidence of events that have occurred since the sentence hearing[80], that a lesser sentence is the appropriate sentence for the offender and the offence. This is a conclusion that that lesser sentence is warranted in law. The result of the Court of Criminal Appeal's independent exercise of discretion may be the conclusion that the same sentence or a greater sentence is the appropriate sentence. In neither case is the Court required to re-sentence. Nor is the Court required to re-sentence in a case in which it concludes that a lesser sentence is appropriate for one or more offences, but that a greater sentence is appropriate for another or other offences, with the result that the aggregate sentence that it considers warranted in law exceeds the aggregate sentence that is the subject of appeal. The occasions calling for the Court of Criminal Appeal to grant leave, allow an offender's appeal and substitute a more severe sentence are likely to be rare. Were the Court to grant leave in such a case, convention would require that it inform the appellant of its intended course so that he or she might abandon the appeal[81].

44 In assessing the prospects that the appellant's appeal would succeed, it was wrong to determine that the appellant had failed to demonstrate that substantial injustice was occasioned by the sentence. This is best understood as a conclusion that the aggregate sentence did not impress the Court, upon summary review, as excessive. The appellant is entitled to be sentenced according to law. The issue for the Court's consideration was whether upon the hearing of the appeal it might conclude, taking into account the full range of factors including the evidence of the appellant's progress in custody and current mental state, that a lesser sentence is warranted in law.

45 The Court of Criminal Appeal wrongly confined its discretion by applying a test which required the appellant to demonstrate that substantial injustice would attend the refusal of the application. The appeal must be allowed. However, it is not appropriate to accede to the appellant's submission that this Court extend the time within which he may apply for leave to appeal and grant him that leave. The application should be remitted to the Court of Criminal Appeal for its determination.

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80 *Douar v The Queen* (2005) 159 A Crim R 154 at 178 [124]; *Baxter v The Queen* (2007) 173 A Crim R 284 at 287 [19] per Spigelman CJ.

81 *Neal v The Queen* (1982) 149 CLR 305 at 308 per Gibbs CJ; [1982] HCA 55; *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282 at 290 per Kirby P citing *Reischauer v Knoblanche* (1987) 10 NSWLR 40 at 45 per Kirby P (Samuels JA agreeing at 47, Priestley JA agreeing at 48).

Orders

46 The following orders should be made:

(1) Appeal allowed.

(2) Set aside the order of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 14 November 2013.

(3) Remit the application for extension of time to the Court of Criminal Appeal for determination.

47 GAGELER J. The error of the sentencing judge – the "*Muldrock* error" – was to proceed on an incorrect construction of a sentencing statute. Had he proceeded on the correct construction, the sentencing judge might have imposed a different sentence. That is common ground. The result was an error of law in the sentencing process sufficient to require the Court of Criminal Appeal to re-exercise the sentencing discretion in the appeal against sentence if an extension of time and leave to appeal were granted.

48 There is no occasion in this appeal to consider the significance, if any, of the differences in the more general explanations by members of the Court of Criminal Appeal in *Baxter v The Queen*[82] of the circumstances in which an identified error of law will be sufficient to require re-exercise of the sentencing discretion in an appeal against sentence.

49 Subject to that observation, I agree with the joint reasons.

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82 (2007) 173 A Crim R 284.