HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, BELL, GAGELER AND KEANE JJ

ANDREW O'GRADY APPELLANT

AND

THE QUEEN RESPONDENT

O'Grady v The Queen
[2014] HCA 38
9 October 2014
S114/2014

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 18 November 2013.*

3. *Remit the application dated 27 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 G A Bashir 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

O'Grady 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.

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

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

1 FRENCH CJ, HAYNE, BELL, GAGELER AND KEANE JJ. This appeal was heard together with the appeal of Phillip Charles Kentwell[1]. It raises the same issue as to the correctness of the principles applied by the Court of Criminal Appeal of the Supreme Court of New South Wales in the determination of applications to extend the time in which to apply for leave to appeal against a sentence on the ground of "*Muldrock* error"[2]. These reasons are to be read with the reasons in *Kentwell*.

2 The appellant was convicted following a trial in the District Court of New South Wales (Murrell DCJ and a jury) of an offence of specially aggravated breaking and entering[3]. The offence is subject to a maximum penalty of 25 years' imprisonment and a standard non-parole period of seven years' imprisonment[4]. On 17 September 2010, Murrell DCJ sentenced the appellant to a non-parole period of five years and six months' imprisonment with a balance of term of three years and six months. The appellant will be eligible for release on parole on 22 November 2015.

3 Murrell DCJ (as her Honour then was) found that the offence was in the middle of the range of objective seriousness for offences of this description. Her Honour said that the sentence was "largely governed" by that finding. Conformably with the approach to sentencing for standard non-parole period offences laid down by the Court of Criminal Appeal in *R v Way*[5], her Honour considered whether the aggravating and mitigating factors justified a departure from the standard non-parole period.

4 On 5 October 2011, judgment was delivered in *Muldrock v The Queen*[6] holding that *Way* was incorrectly decided.

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1 *Kentwell v The Queen* [2014] HCA 37.

2 *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39.

3 *Crimes Act* 1900 (NSW), s 112(3).

4 *Crimes (Sentencing Procedure) Act* 1999 (NSW), Pt 4, Div 1A, Table, Item No 13.

5 (2004) 60 NSWLR 168.

6 (2011) 244 CLR 120 at 131 [25].

5 On 28 June 2013, the appellant applied for an extension of time in which to apply for leave to appeal against his sentence ("the application"). The notice of grounds of appeal filed with the application contained a single ground: that Murrell DCJ erred in her approach to the standard non-parole period in light of the principles identified by this Court in *Muldrock*.

6 Three affidavits affirmed by the appellant were filed in support of the application. In two of them, he gave an account of his progress while in custody since the sentence hearing. In the third, he gave an explanation for the delay in applying for leave to appeal. He said that he had instructed his lawyers to lodge a notice of intention to appeal against conviction and sentence and that he believed such a notice had been filed. He had later been informed by his lawyers that his matter had been prepared as a conviction appeal only. He was unable to recall why the application for leave to appeal against sentence had not been pursued. His conviction appeal was dismissed on 13 April 2012[7]. In November 2012, the appellant became aware that Legal Aid NSW was reviewing the sentences of prisoners who had been sentenced for a standard non-parole period offence. In February 2013, he applied to Legal Aid NSW for a grant of aid to challenge his sentence.

7 An affidavit by a solicitor employed by Legal Aid NSW was also filed in support of the application. This disclosed that an application for legal aid had been made by the appellant's lawyers in connection with his earlier foreshadowed application for leave to appeal and that legal aid had been refused.

8 The Court of Criminal Appeal (Hoeben CJ at CL, Johnson and Bellew JJ) dismissed the application[8]. On the hearing of the application before the Court of Criminal Appeal, the respondent conceded that Murrell DCJ had erred in her approach to sentencing the appellant in light of the principles explained in *Muldrock*[9].

9 The Court of Criminal Appeal dealt with the application by applying the principles set out in *Abdul v The Queen*[10] for the determination of extension

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7 *O'Grady v The Queen* [2012] NSWCCA 62.

8 *O'Grady v The Queen* [2013] NSWCCA 281.

9 *O'Grady v The Queen* [2013] NSWCCA 281 at [26].

10 [2013] NSWCCA 247 at [53].

applications based upon "*Muldrock* error". Bellew J, giving the leading judgment, first addressed the relevant factors identified in *Abdul*. His Honour said that the delay in bringing the application was "substantial"[11]. He observed that there was no evidence to suggest that an extension of time would be likely to occasion added trauma to the victim[12]. Bellew J considered that nonetheless the grant of the extension would "offend the principle of finality"[13]. His Honour concluded that the factors of the length of delay, reasons for delay, interests of the community and effect on the victim were "fairly evenly balanced"[14].

10 Next, Bellew J considered the prospects of success were the appeal to be entertained. This assessment was carried out in the summary fashion approved in *Abdul*. His Honour said that the appellant's submissions related to matters that had all been taken into account by Murrell DCJ[15]. His Honour concluded that none of the matters advanced by the appellant supported a conclusion that "substantial injustice arises out of the sentence imposed, or that some other sentence is warranted in law"[16].

11 On 16 May 2014, Hayne and Bell JJ granted the appellant special leave to appeal from the order of the Court of Criminal Appeal.

12 As is explained in *Kentwell*, in circumstances in which the appellant is serving the sentence, which is acknowledged to have been imposed following a flawed exercise of discretion, it was an error to treat the principle of finality as a discrete factor weighing against the extension of time. So, too, was it an error to

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11 *O'Grady v The Queen* [2013] NSWCCA 281 at [30].

12 *O'Grady v The Queen* [2013] NSWCCA 281 at [31]. The offence was particularised as the breaking and entering of an apartment building and the commission of a serious indictable offence therein, namely, the robbery of Brett Davis. The circumstance of aggravation particularised was that at the time of the robbery the appellant wounded Brett Davis.

13 *O'Grady v The Queen* [2013] NSWCCA 281 at [31].

14 *O'Grady v The Queen* [2013] NSWCCA 281 at [31].

15 *O'Grady v The Queen* [2013] NSWCCA 281 at [40].

16 *O'Grady v The Queen* [2013] NSWCCA 281 at [46].

assess the merits of the proposed appeal by observing that matters favourable to the appellant had been taken into account by Murrell DCJ.

13 For the reasons given in *Kentwell*, it was an error to confine the discretion conferred under the *Criminal Appeal Act* 1912 (NSW)[17] and the Criminal Appeal Rules (NSW)[18] by requiring the appellant to demonstrate that refusal of the application would occasion substantial injustice. The application was to be determined by consideration of the interests of justice. The statement that no matter advanced by the appellant established that substantial injustice was occasioned by the sentence is best understood as a conclusion that, upon summary review, the sentence did not impress 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, that a lesser sentence is warranted in law.

Orders

14 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 18 November 2013.

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

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17 Section 10(1)(b).

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