IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S113 of 2014

BETWEEN:

PHILLIP CHARLES KENTWELL
Appellant

AND

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1 This submission is in a form suitable for publication on the internet.

Part II: Issues Presented by the Appeal

2 **Issue One:** What is the test to be applied under s10 *Criminal Appeal Act* 1912 in granting an extension of time to appeal against sentence?

3 **Issue Two:** Does an applicant for such an extension of time have to satisfy the court that *"if an extension of time were refused, substantial injustice would result"*?

4 **Issue Three:** If so, can an assessment of whether "*substantial injustice would result*", including the question posted by s 6(3) of the *Criminal Appeal Act* 1912, whether any other sentence is warranted in law, be conducted in a "*summary fashion*"?

Part III: Considerations of s78B Notices

5 The appellant is of the view that notices under s 78B *Judiciary Act* 1903 are not required.

Part IV: Citation of the Reasons for Judgment

6 The citation of the reasons for judgment of the intermediate court is *Kentwell v R* [2013] NSWCCA 266 ("CCA"). The reasons for judgment of the primary judge (Johnstone DCJ) are unreported: *R v Phillip Charles Kentwell* (20 February 2009) ("ROS").

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Part V: Narrative Statement of the Facts

7 On 15 September 2008, the appellant was convicted of five offences contrary to the *Crimes Act* 1900 (NSW) ("*Crimes Act*"). The appellant, then 34 years old, had been in a domestic relationship with the complainant, then 54 years old. On the afternoon of 29 October 2007 he violently assaulted her, including by smashing a bottle over her head, kicking her in the chest and ribs, pulling her by the hair and hitting her with a metal bracket. The appellant also threw objects within his reach, including a glass candleholder which was smashed. That evening, he repeatedly asked the complainant for sex. She refused but after several hours said "If you do it just get it over and done with quickly." She experienced severe pain and begged the appellant to stop. He continued having vaginal sexual intercourse until he ejaculated: CCA [13]-[20].

8 On 2 November 2008 X-rays confirmed the complainant had fractures to multiple ribs. That afternoon, the appellant applied the flame of a cigarette lighter to the complainant's forearm (so that the heat was felt by her arm, Crown summary of facts, Annexure A to Ex C at [11]), slapped her five or six times about the head, twisted her arm, and grabbed her and held her up against the wall, during which time he yelled insults at her. Shortly after this he asked the complainant for sex. After repeated refusals she said "Just get it over and done with please and hurry". Experiencing severe pain she said she didn't want to, couldn't do it anymore and had broken ribs, but the appellant continued until he ejaculated: CCA [24]-[30].

9 On 15 September 2008, following a jury trial in the District Court of New South Wales the appellant was found guilty of five offences contrary to the *Crimes Act*, namely:

> Count 1: On 29 October 2008, did recklessly cause grievous bodily harm to the complainant, by breaking her ribs, contrary to s 35(2) (maximum penalty 10 years);
>
> Count 3: On October 2008, did maliciously destroy a glass candleholder the property of the complainant contrary to s 195(1)(a) (maximum penalty 5 years);
>
> Count 4: On 29 October 2008, did have sexual intercourse with the complainant without her consent knowing that she was not consenting contrary to s 61I (maximum penalty 14 years, standard non-parole period 7 years);
>
> Count 5: On 2 November 2008, did assault the complainant contrary to s 61 (maximum penalty 2 years);

> Count 7: On 2 November 2008, did have sexual intercourse with the complainant without her consent, knowing that she was not consenting contrary to s 61I (maximum penalty 14 years, standard non-parole period 7 years).

Count 2 was an alternative to count 1, and the appellant was found not guilty of a further act of malicious damage the subject of count 6.

10 On sentence, the Crown put the appellant's criminal and custodial history and a victim impact statement (Ex A), written submissions, annexing the Crown statement of facts (Ex C), and JIRS statistics (Ex D) before the sentencing judge. The appellant also put submissions and JIRS statistics before the sentencing judge (Ex 1), as well as two psychiatric reports from Dr Allnutt (Ex 2 and Ex 6), a psychiatric report from Ms Angela Thorpe (Ex 3), a Pre-Sentence Report prepared in relation to an earlier sentencing (Ex 4), and the facts prepared in relation to an earlier sentencing (Ex 5).

11 The appellant was born in Broken Hill to Aboriginal parents. He did not know his natural parents and was adopted by a non-Aboriginal family when he was 12 months old. There was evidence that he felt like he was "a black fella in a white fella's world", and had trouble in school due to his Aboriginality (Ex 4 p 1). He would drink alcohol because he felt out of place at school, suffered from a drinking problem from the age of 15, and was asked to leave home when he was 17 years old due to his drinking and fighting (Ex 4 p 1-2). He lived an itinerant life as an adult (Ex 3 p 7). By about 1997 he had been diagnosed with alcohol dependence and drug induced psychosis or schizophrenia, and was prescribed antipsychotic medication before or in 2001 (Ex 6 p 3-4). He attempted suicide in about 2004 (Ex 6 p 4).

12 The appellant had a lengthy criminal and custody history, although no offences of comparable "level" to those he was sentenced for in the present case (Proceedings on Sentence, 17 December 2008, T15.6). The appellant had been released from gaol a few months before the offences. He was seeing a mental health worker to assist him in abstaining from methamphetamine use, although he continued to use approximately $50 worth per day, as well as $20 worth of cannabis per day (Ex 6 p 2-3). He was also prescribed and taking an antipsychotic medication daily, and had been taking that medication for 1-2 months prior to the offences (Ex 6, p 2). Around the time of the

offences, as well as the time of sentencing, he was hearing voices coming from the television and in his head that were derogatory of the complainant, including that she was having sex with other people and had "dobbed him in" to police (Ex 6 p 4). He was paranoid and believed the police were following him (Ex 6 p 2-3). There was evidence that he was experiencing these delusional beliefs "compounded by auditory hallucinations and ideas of reference which incorporated his girlfriend" at the time the offences occurred (Ex 6 p 5).

13 On 20 February 2009 the appellant was sentenced by Johnstone DCJ to an overall period of imprisonment of 12 years with a non-parole period of 8 years. The individual sentences were as follows:

Count 1: Fixed term of 4 years to date from 6 April 2008;

Count 3: Fixed term of 1 month to date from 6 April 2008;

Count 4: Fixed term of 7 years to date from 6 August 2008;

Count 5: Fixed term of 3 months to date from 6 April 2008; and

Count 7: 12 years imprisonment with a non-parole period of 7 years to date from 6 April 2009.

The appellant's earliest date of release is 5 April 2016, with the total term expiring on 5 April 2020.

14 The appellant was represented by the Aboriginal Legal Service. He filed a notice of intention to appeal against conviction and sentence within time, however his case was then "transferred" to Legal Aid NSW due to a conflict of interest and he was informed that his application for legal aid was refused on 25 January 2011. This Court's decision in *Muldrock v R* [2011] HCA 39; (2011) 244 CLR 120 ("*Muldrock*") was delivered on 5 November 2011. On 31 August 2012 Legal Aid NSW determined that a merits advice should be sought in relation to "*Muldrock* error" in the sentencing judgment. An application for legal aid was lodged on behalf of the appellant in around February 2013 and after advice from counsel, a notice of application for leave to appeal was filed on 28 June 2013: CCA [7]-[9]. The respondent conceded error (CCA [35], [49]), however opposed both an extension of time and leave being granted.

15 In considering the application to extend time (having already found the material errors detailed above) Bellew J (Hoeben CJ at CL and Johnson J agreeing) relied upon the statement of the similarly constituted Court in *Abdul v R* [2013] NSWCCA 247 ("*Abdul*") at [53] (CCA at [67]):

> "Accordingly, when considering an application for extension of time based on '*Muldrock* error', all 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* 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."

16 Prior to applying the test in *Abdul*, the CCA had found three material errors in the sentencing judgment. First, the sentencing judge erred in that he "adopted a two stage sentencing process, and gave the standard non-parole period determinative significance" (i.e. "*Muldrock* error"): CCA [36]-[37]. The respondent conceded in oral submissions that it would be open to the CCA to hold that there had been such error: CCA [35]. It should be noted that this error was also made in respect of count 1; the sentencing judge had been misinformed that count 1 carried a SNPP of 4 years, which became the length of the fixed term he imposed on that count: CCA [46]. Second, his Honour erred in his finding that the appellant's mental illness (a psychotic disorder, delusional beliefs and auditory hallucinations: CCA [53]) had not contributed to the sexual offending in a material way, particularly given his Honour's apparent acceptance of uncontradicted psychiatric reports: CCA [64]. Third, his Honour erred in finding that the appellant was an appropriate vehicle for general deterrence given the psychiatric evidence: CCA [65].

17 The CCA was also satisfied that there were two further errors in the sentencing judgment. First, his Honour gave effect to his finding of special circumstances by extending the balance of the term of imprisonment on count 7, rather than by reducing the non-parole period. This error was considered not material because the overall sentence was consistent with a finding of special circumstances: CCA [44]-[45]. Second, his Honour erred in imposing a sentence contrary to law in respect of count 4 by setting a fixed term, as there was no discretion to decline to set a non-parole period

where a standard non-parole period was provided: CCA [49]. The respondent had conceded that the sentencing judge had erred in imposing this sentence: CCA [48]. The CCA held that this error was not material, the fixed term being said to "represent" the non-parole period: CCA [50].

18 Despite these findings, upon application of the test in *Abdul*, the CCA refused the appellant's application for an extension of time to seek leave to appeal his sentences. Justice Bellew noted that the delay in this case was substantial, and that several grounds would have been apparent prior to this Court's judgment in *Muldrock,* although he acknowledged that the appellant's failure to bring an appeal "may have been the result of a change in his representation (which was not a matter of his choosing) and the significant delay in assessing his application for legal aid (which was not his fault)": CCA [68]. His Honour held that it was "at least possible that an extension of time may have an impact upon the victim" and "would also offend against the principle of finality": CCA [68]. Having found a number of material errors, his Honour held it necessary to "assess the prospects of success of the application for leave to appeal", which he framed as the question: "whether some lesser sentence is warranted in law?": CCA [69]. His Honour concluded that "none of the matters advanced on behalf of the applicant, including the applicant's mental illness, support a conclusion that there has bee a substantial injustice arising out of the sentence imposed, or that some other sentence is warranted in law": CCA [90].

Part VI: Appellant's Argument

O'Grady v R

19 It is assumed that the reader will have read the appellant O'Grady's submissions in the related matter prior to reading these submissions. The appellant adopts the submissions of O'Grady in so far as they are applicable to the appellant's case. In particular, these submissions adopt but do not repeat those made by O'Grady in relation to the language and intention of the legislation, and the reliance placed in *Abdul* upon the principle of "finality" and the English "change of law" cases. These submissions focus primarily on the authorities relevant to extension of time that pre-date *Abdul* and the

misapplication of some of those cases in *Abdul,* as well as the purported application of s 6(3) in a "summary fashion" on an application for extension of time.

Applicable provisions

20 A person convicted on indictment may appeal against the sentence passed with leave of the court: *Criminal Appeal Act* 1912 (NSW) ("the Act") s 5(1)(c). Notice of intention to apply for leave to appeal is ordinarily required to be given within 28 days of the sentence (the Act s 10), and is valid for 6 months from the date of filing: Criminal Appeal Rules (NSW) ("the Rules") r 3A. The court may "at any time, extend the time within which notice is required to be given" or dispense with the requirements: the Act s 10(1)(b).

21 If Notice of Intention to Apply for Leave is not given, a Notice of Application for Leave to Appeal may be given within 3 months of sentence, and this time may also be extended by the court: r 3B. On appeal, if the court is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, it "shall quash the sentence and pass such other sentence in substitution therefore": the Act s 6(3).

Statutory language and construction

22 The appellant adopts the submissions made on behalf of the appellant O'Grady in the related matter at [19]-[32], to the effect that neither the specific language of s 10 of the Act, nor the language of the Act and Rules generally, provide support for the proposition that an applicant for an extension of time in which to seek leave to appeal must demonstrate that substantial injustice "arises out of the sentence imposed" (CCA [90]) or "would result" if an extension of time were refused: *Abdul* at [9]. The test of "substantial injustice" is novel. It does not appear in the Act or Rules, and was first imposed by the Court of Criminal Appeal in *Abdul.* The appellant submits that, in addition to finding no support in the legislation, the test is also wrong in principle.

Authorities on extension of time prior to *Abdul*

23 In *Young v R* [1999] NSWCCA 275, Smart AJ (Dunford and Studdert JJ agreeing) held:

"35 Section 10(3) confers an unfettered discretion upon the court to extend the time where it is just under the circumstances that such an order should be made. Regard must be had to all the circumstances. It is impossible to foresee all the various circumstances. Illustrations can be given as to when it is desirable or permissible to exercise the power in a particular way but the fundamental principle earlier mentioned must be kept in mind when exercising the discretion. In recent years if there has been a miscarriage of justice in the verdict or the sentence imposed that has often been sufficient.

...

48 The cases make it clear that both in relation to an extension of time and leave to withdraw a notice of abandonment the question of a miscarriage of justice is important if there is not an adequate or reasonable explanation for the delay or for lodging the notice of abandonment. It is not the only consideration but a miscarriage is of itself often sufficient.

49 In sentence applications there will often be no prejudice to the Crown. That is the case here. The subjective facts and the objective features are clear. There is no need for further investigation or further evidence. On occasions there may be a limited amount of evidence for the purpose of re-sentencing.

50 Conviction appeals may involve different considerations. For example, witnesses may no longer be available or willing to give evidence. After the trial they may have tried to put the events out of their mind. After a substantial delay witnesses in identification cases may not be able to recall precisely what and whom they saw. No relevant objections to the summing-up may have been taken. On the other hand fresh or new evidence may emerge which puts an entirely new light on the case. As is obvious, much depends on all the circumstances of the particular application."

24 Having considered an argument by the Crown that where there is a long delay exceptional circumstances must be established before extending time, his Honour referred to the power of the Court of Criminal Appeal to "go behind" r 27 (Abandonment of appeal) in the case of a dismissal of an appeal that had not been heard on the merits, to "ensure that a miscarriage of justice did not go unremedied": *Young* at [41]. The adoption of a test of "miscarriage of justice" in *R v Cartwright* [1989] 17 NSWLR 243, *R v Bell* (1987) 8 NSWLR 311 at 315, *R v Brandy* (unreported, CCA, Hunt CJ at CL, Ireland J and Bell AJ agreeing, 28 October 1996), and *R v Coombe* (unreported, CCA, Hunt CJ at CL, Smart and McInerney JJ agreeing, 24 April 1997) was relevant to his Honour's rejection of a test of exceptional circumstances.

25 It is implicit in the reasoning of Smart AJ at [48] that, where there is an adequate explanation for the delay, the question of miscarriage of justice may not be important. The approach in *Young* has been applied, *inter alia*, in *Douar v R* [2005] NSWCCA 455; (2005) 159 A Crim R 154 ("*Douar*") per Johnson J at 163 [53] (McClellan CJ at CJ and Adams J agreeing), *Edwards v R* [2009] NSWCCA 199 per Johnson J at [8], [13] (Allsop P and Kirby J agreeing), *Etchell v R* [2010] NSWCCA 262; (2010) 205 A Crim R 138 per Campbell JA at 143-144 [18]-[24] (Latham and Price JJ agreeing) and in *Ng v R* [2011] NSWCCA 227; (2011) 214 A Crim R 191 per Bathurst CJ, James and Johnson JJ at 194 [5].

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26 In *Arja v R* [2010] NSWCCA 190, Basten JA noted that the power to extend time is discretionary and unfettered, and rejected a requirement of "exceptional circumstances": at [4]. Although explanation for delay and the merits of the proposed grounds of appeal will be critical in most cases, his Honour was of the view that "reference to 'exceptional circumstances' will usually be undesirable as it suggests the imposition of a fetter on the exercise of discretion which is not to be found in the statutory scheme": *Arja* at [5].

27 In *Etchell,* Campbell JA conducted a thorough review of the relevant authorities and
20 expressly noted that "exceptional circumstances" are *not* part of the statutory scheme: at [24]. Rather, he determined that the statutory scheme required "something beyond the presence of factors that would be sufficient to result in a sentence being varied if an application ... were brought within time": at 144 [24]. Here his Honour was referring to the whole of the applicant's application, including *inter alia* reasons for delay. His Honour was not suggesting that something more was required of the *merits* of the proposed grounds of appeal than would be required if the applicant were within time: *cf. Abdul* at [52]. His Honour also noted that some interests of justice considerations telling against an extension of time to appeal a conviction do not apply to an application to extend time to seek leave to appeal against sentence: at [23].

30

28 In *R v Gregory* [2002] NSWCCA 199, Hodgson JA (with whom Levine and Simpson JJ agreed) held at [38]: "I accept that an important consideration as to whether an extension of time for an appeal should be granted is the consideration of what justice

requires in all the circumstances." Relevant to this determination on an application to extend time to appeal a conviction was "the degree of future harm to the applicant ... If there is still future punishment from the conviction, notably a future period of imprisonment, that would be a factor generally in favour of the applicant": at [42].

29 The appellant submits that the statements of Smart AJ in *Young* and Hodgson JA in *Gregory* are correct statements of principle. The imposition of a "substantial injustice" test is tantamount to, and indeed more onerous than, an "exceptional circumstances" test, and is contrary to authority.

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30 In *Abdul*, the CCA held that the analysis in *Young* and *Arja* was persuasive, and that there was "some force in the applicant's submission that there is no justification for imposing a test of 'exceptional circumstances' before the principle of finality can be displaced": [52]. It concluded that "a better test...is that set out by Campbell JA in *Etchell*" at [24], namely that "something beyond the presence of factors that would be sufficient to result in a sentence being varied if an application for leave to appeal against sentence were brought within time": *Abdul* at [52]. However, as noted above, in *Etchell*, Campbell JA was not referring to something more being required of the grounds of appeal, nor was he advancing a test of "exceptional circumstances" or

20 "substantial injustice" to be determined by a summary review.

Finality and "change of law"

31 The appellant adopts the submissions of the appellant O'Grady in the related matter at [34]-[38] to the effect that neither the principle of finality nor the principles said to be applicable to "change of law" cases in England and Wales support the imposition of a test of "substantial injustice" on an application for an extension of time in which to seek leave to appeal.

Section 6(3) in a "summary fashion"

30 32 The CCA's "summary fashion" assessment of whether *a lesser sentence is warranted in law* (s 6(3)) was the result of the misapplication of *Etchell* in *Abdul*: see *Abdul* at [53]. In *Etchell*, Campbell JA stated that the *grounds of appeal* may be considered "in a more summary fashion" when considering whether to grant leave to appeal out of

time: [25]. That is, it is the merit of the *proposed grounds* that may be assessed in a more summary fashion, not, as the CCA has done, a summary assessment of the ultimate outcome of the appeal. The question relevant to granting *leave to appeal* is whether the grounds are arguable or have merit, and not whether, if it re-exercised the sentencing discretion the Court of Criminal Appeal would arrive at a different sentence (hence the common outcome: leave to appeal granted, appeal dismissed). Similarly, as was held in *Etchell*, the question of "merit" relevant to an application for an extension of time in which to seek *leave to appeal* should be whether it appears, on a summary view, that the grounds may be reasonably arguable.

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33 Prior to *Abdul*, the determination of merit for the purposes of extension of time was made after full argument. In *Diaz v R* [2013] NSWCCA 277 ("*Diaz*"), a decision handed down some days after *Abdul* but without reference to it, the Court of Criminal Appeal granted leave to appeal out of time after a full determination of the merits, noting also that "since October 2011 this Court has not, to my knowledge refused to entertain a ground founded on 'Muldrock error' on the basis of an effluxion of time...I consider that the grounds are at least arguable. In all the circumstances, I consider that leave should be granted": at [102]-[104] per Button J (Macfarlan JA and Adams J agreeing).

20

34 Put another way, the "summary fashion" review of whether the proposed grounds of appeal are reasonably arguable (as distinct from the other factors that may be relevant to the extension of time, such as explanation for delay) proposed in *Etchell* means that the proposed grounds of appeal face a lesser hurdle of showing an arguable or *prima facie* case (or something similar) of *House* error at the point of an application for an extension of time. However, the effect of the CCA's application of the test in *Abdul*, misapplying *Etchell,* is that the *merits* of the grounds of appeal as well as the potential re-exercise of the sentencing discretion under s 6(3) face a greater hurdle at the point of an application for an extension of time than is ultimately faced on the appeal proper,

30 by requiring the applicant to show, on a *summary glance*, that the grounds *will* succeed and are so significant that some other sentence must clearly, on this *summary view*, be warranted in law, such that it would be "*substantially unjust*" for the applicant's sentence to remain unchanged.

35 Even if the prospects of success under s 6(3) were relevant to the discrete determination of an application to extend time in which to seek leave to appeal, it is difficult to see how s 6(3) could be conducted summarily without in effect conducting a test of manifest excess on a summary view; and manifest excess is not a precondition to the exercise of s 6(3): *Baxter v R* [2007] NSWCCA 237; (2007) 173 A Crim R 284 ("*Baxter*") at 286-287 [14]-[16]. Even when resentencing would only produce relatively small changes to the sentence, this is not good reason to dismiss an applicant's appeal given "the interests of liberty of the offender": *Hillier v DPP (NSW)* (2009) 198 A Crim R 565 per Basten JA at 576-577 [47] (Johnson J agreeing).

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36 In circumstances in which *House* error other than manifest inadequacy or excess has been shown, it is not possible to determine in a "summary fashion" whether a more or less severe sentence may be warranted in law. In the event of *House* error, s 6(3) involves an exercise of original jurisdiction where the court sentences in accordance with instinctive synthesis taking into account all relevant statutory requirements and sentencing principles at the time of the s 6(3) exercise: *Douar* at 176-178 [121]-[124], see also *Simpson* [2001] NSWCCA 534; (2001) 53 NSWLR 704 at 720-721 [79]. In *Baxter* Spigelman CJ held at 286-287 (Latham J agreeing):

20 "14 ... *Dinsdale* [*v R* (2000) 202 CLR 321] affirmed that a Court of Criminal Appeal must re-exercise the sentencing discretion.

...

19 The import of para [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
30 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."

37 It is not in the interests of justice to approach applications for extension of time to seek leave to appeal conviction *or* sentence, constituted mainly by appeals by individuals sentenced to imprisonment, in a "more summary fashion", and is contrary to principle. In *Young* (see [30]), *Douar* (see 163 [58], 181 [144]) and out of time applications

brought as a result of *Muldrock* determined prior to *Abdul* (see eg *Diaz* at [100]-[104], *Bolt v R* [2012] NSWCCA 50 and *Williams v R* [2013] NSWCCA 168 at [17]-[19]) the substantive merits of the application were dealt with before determining the application for an extension of time. However, unlike the cases heard after *Abdul*, there was no suggestion that this was done in a "summary fashion", nor was analogy drawn to "change of law" cases or a test of "substantial injustice" imposed. Since *Abdul*, the "substantial injustice" test conducted in a "summary fashion" has been held to apply not only to all matters brought on the basis of "*Muldrock* error", all sentence appeals and all conviction appeals, but also potentially to "the discretionary aspect of Pt 7 determinations" (these are administrative determinations of applications for inquiries into conviction or sentence under the *Crimes (Appeal and Review) Act* 2001 (NSW)): *Carlton v R* [2014] NSWCCA 14 per R A Hulme J at [29] (Ward JA and Harrison J agreeing). In that case, R A Hulme J also remarked that the *Abdul* test is regarded as "a not insignificant hurdle facing an appellant [sic] for leave to appeal": at [12].

38 Rather than re-exercising the sentencing discretion (which in any event the appellant submits is not a process apposite to the application for an extension of time in which to seek leave to appeal), in the present case Bellew J conducted a summary review of the appellant's submissions before stating that these matters (including the accepted material errors) did not "support a conclusion that there has been substantial injustice arising out of the sentence imposed, or that some other sentence is warranted in law": CCA [90]. The consequence of this approach is that significant matters were overlooked by his Honour. The inappropriateness of a "summary" approach to the s 6(3) task is thereby readily demonstrated.

39 In considering whether some other lesser sentence may be warranted in law, his Honour failed to apply correct sentencing principles as required by *Baxter* at 287 [19]. Had he done so, he would have had to consider, *inter alia*, what impact the appellant's mental illness should have on any new sentence imposed, and taken into account the appellant's background and the correct standard non-parole period and maximum terms in accordance with *Muldrock*. Instead, his Honour merely considered the objective seriousness of the offence and the appellant's criminal history: CCA [76]-[89].

40 Further leave to appeal never having been granted, his Honour could not receive the evidence of the appellant's current circumstances which, *House* error having been established, were also required to be considered in coming to a conclusion as to whether another sentence *is* warranted in law: *Douar* 176 [119]-[121], *Baxter* at 286 [7]-[10]. If, contrary to the appellant's submissions, the merits of the proposed appeal are to be determined for the purposes of an application for extension of time by reference to the possible outcome of the ultimate s 6(3) exercise, this plainly cannot be done without reference to facts (of which evidence could be properly admitted) as they existed at the time of the appeal: *Douar* at 176 [121], *Baxter* at 286 [10]. In the appellant's case, these facts included that the appellant had self-referred for an anger management program, had applied to complete the sex offender program, had worked consistently and constructively in gaol, had kept in contact with Aboriginal welfare, had taken steps to address his alcoholism, had abstained from drugs, was receiving treatment and injected medication for his schizophrenia, and despite his evident life-long struggle with anger management and substance abuse, had no disciplinary charges since conviction: Affidavit of Phillip Kentwell affirmed 17 September 2013 [6]-[12]. These circumstances were not considered by the CCA.

41 Finally, Bellew J made no reference to several of the appellant's submissions that were especially relevant on a "summary" view of prospects, including statistics which indicated the appellant received sentences towards the upper end of severity of sentences previously imposed (Applicant's submissions before the CCA at [41]) and the fact the appellant was an Indigenous Australian born in Broken Hill who had been adopted out to a non-Indigenous family at age 12 months and since 1995 had reported with mental health problems including suicidal thoughts and auditory hallucinations, and significant substance abuse: [61], [72]. These additional circumstances should have, at the least, indicated to the CCA that closer attention than a "summary" approach was required, in the interests of justice.

42 The CCA's failure to take into account the facts as they existed at the time of the application, as well as the impact of the appellant's background and mental illness, most particularly as the latter was found to be erroneously ignored at first instance, is indicative of the inversion of the appeal process occasioned by the test in *Abdul.* Even

if s 6(3) may be relevant to the determination of the merits of the appeal for the purposes of considering an application for an extension of time, conducting such a determination in a summary fashion cannot, as the CCA's judgment in the present case demonstrates, produce an accurate forecast of whether a lesser sentence is likely to be imposed.

43 Finally, it is noteworthy that the CCA's conclusion that "none of the matters advanced on behalf of the applicant... support a conclusion that there has been a substantial injustice arising out of the sentence imposed, or that some other sentence is warranted in law" refers to "sentence" in the singular. This reveals that the CCA failed to give consideration to the effect of the material errors on each of sentences on each count, particularly counts 1, 4 and 7 in relation to which the standard non parole period had been erroneously imposed, and in determining that the imposition of those sentences in a manner contrary to law did not warrant an extension of time even in circumstances in which Count 4 was undeniably unlawful. Although regard must be had to the total effective sentence to see that it represents a proper period of incarceration for the totality of the criminality involved (*R v AEM Snr* [2002] NSWCCA 58 at [70]), this does not relieve the CCA of the obligation of exercising the sentencing discretion "taking into account all relevant statutory requirements and sentencing principles": *Baxter* at [19].

Test to be applied to the appellant

44 The discretion to grant an extension of time should be exercised according to the interests of justice. In the present case, the appellant demonstrated not only significant material error (*Arja* at [5], *Etchell* at 144 [24]), but had a reasonable explanation for the delay (*Arja* at [5]): due to a conflict of interest he lost the representation of the Aboriginal Legal Service, and Legal Aid refused his application for assistance. He was only granted aid to appeal against his sentence post-*Muldrock,* when his original complaint against severity was identified as having merit. Those who abided by the statements in *Way v R* [2004] NSWCCA 131; (2004) 60 NSWLR 168 and did not lodge or press an application for leave to appeal should not now be disadvantaged by not having run an application foredoomed to failure at an earlier point in time. Delay

on the basis that legal aid has only now been granted is a reason in favour of granting an extension of time, not refusing it.

45 Further, that Legal Aid did not identify any non-*Muldrock* error grounds as having merit cannot be considered against the appellant's application in circumstances in which the CCA has found such errors, and determined that they were material: *cf* CCA at [68]. Finally, while the CCA in applying *Abdul* gave weight to the fact that "it is at least possible that an extension of time may impact upon the victim" and would "offend the principle of finality", and considered that the "majority of these considerations tend[ed] against granting an extension of time" (at [68]) no consideration was given to the "the degree of future harm to the applicant ... [from] a future period of imprisonment" as required by *Gregory*: at [42]. Even assuming, against the appellant's submissions, that the "substantial injustice" test is an acceptable barrier to an application for an extension of time in which to seek leave to appeal, it is difficult to understand how the injustice to the appellant of serving a term of imprisonment imposed, in the case of count 4, contrary to law, and in the case of all, infected by multiple material errors, can be said to be anything other than "substantial". Nor was the interest of the community in the correction of such a sentence considered by the CCA.

46 The appellant submits that the CCA erred in refusing his application for extension of time for leave to appeal against his sentence.

Part VII: Applicable statutes and regulations

47 The following provisions, annexed to these submissions, are applicable and still in force: *Criminal Appeal Act* 1912 (NSW), s 5, s 6 and s 10; Criminal Appeal Rules, rr 3A-3C.

Part VIII: Orders Sought

48 (1) The appeal is upheld;

(2) The order made by the Court of Criminal Appeal is set aside;

(3) The application for an extension of time to seek leave to appeal to the Court of Criminal Appeal is granted;

(4) Leave to appeal is granted;

(5) The appeal against sentence is remitted to the Court of Criminal Appeal to be dealt with in accordance with law.

Part IX: Time Estimate

49 It is estimated that oral argument will take no longer than 2 hours together with the related matter of O'Grady v R.

10 Dated: 20 June 2014

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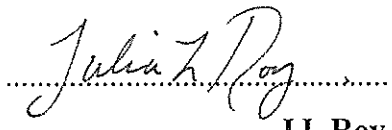

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Part 3 Right of appeal and determination of appeals

5 Right of appeal in criminal cases

(1) A person convicted on indictment may appeal under this Act to the court:

(a) against the person's conviction on any ground which involves a question of law alone, and

(b) with the leave of the court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal against the person's conviction on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal, and

(c) with the leave of the court against the sentence passed on the person's conviction.

(2) For the purposes of this Act a person acquitted on the ground of mental illness, where mental illness was not set up as a defence by the person, shall be deemed to be a person convicted, and any order to keep the person in custody shall be deemed to be a sentence.

5AA Appeal in criminal cases dealt with by Supreme Court or District Court in their summary jurisdiction

(1) A person:

(a) convicted of an offence, or

(b) against whom an order to pay any costs is made, or whose application for an order for costs is dismissed, or

(c) in whose favour an order for costs is made,

by the Supreme Court in its summary jurisdiction may appeal under this Act to the Court of Criminal Appeal against the conviction (including any sentence imposed) or order.

(1A) An appeal against an order referred to in subsection (1) (c) may only be made with the leave of the Court of Criminal Appeal.

(2) For the purpose of this Act, a person acquitted on the ground of mental illness, where mental illness was not set up as a defence by the person, shall be deemed to be a person convicted, and any order to keep the person in custody shall be deemed to be a sentence.

(3), (3A) (Repealed)

(4) The Court of Criminal Appeal, in proceedings before it on an appeal under this section, may confirm the determination made by the Supreme Court in its summary jurisdiction or may order that the determination made by the Supreme Court in its summary jurisdiction be vacated and make any determination that the Supreme Court in its summary jurisdiction could have made on the evidence heard on appeal.

(5) Section 7 (4) applies to an appellant on an appeal under subsection (1) in the same way as it applies to an appellant on an appeal under section 5 (1).

(6) Provisions shall be made by rules of court for detaining an appellant on an appeal under subsection (1) who has been sentenced to imprisonment until the appeal has been determined, or for ordering the appellant into any former custody.

(7) This section applies to and in respect of the District Court in its summary jurisdiction in the same way as it applies to and in respect of the Supreme Court in its summary jurisdiction.

(7) A person may not appeal to the Court of Criminal Appeal under this section against an interlocutory judgment or order if the person has instituted an appeal against the interlocutory judgment or order to the Supreme Court under Part 5 of the *Crimes (Local Courts Appeal and Review) Act 2001*.

5G Appeal against discharge of whole jury

(1) The Attorney General, Director of Public Prosecutions or any other party to a trial of criminal proceedings before a jury may appeal to the Court of Criminal Appeal for review of any decision by the court to discharge the jury, but only with the leave of the Court of Criminal Appeal.

(2) The Court of Criminal Appeal is to deal with an appeal as soon as possible after the application for leave to appeal is lodged.

(3) The Court of Criminal Appeal:

(a) may affirm or vacate the decision appealed against, and

(b) if it vacates the decision, may make some other decision instead of the decision appealed against.

(4) If leave to appeal under this section is refused by the Court of Criminal Appeal, the refusal does not preclude any other appeal following a conviction on the matter to which the refused application for leave to appeal related.

(5) This section does not apply to the discharge of a jury under section 51, 55E, 56 or 58 of the *Jury Act 1977*.

6 Determination of appeals in ordinary cases

(1) The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5 (1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal under section 5 (1) 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.

6AA Appeal against sentence may be heard by 2 judges

(1) The Chief Justice may direct that proceedings under this Act on an appeal (including proceedings on an application for leave to appeal) against a sentence be heard and determined by such 2 judges of the Supreme Court as the Chief Justice directs.

(2) Such a direction may only be given if the Chief Justice is of the opinion that the appeal is not likely to require the resolution of a disputed issue of general principle.

(3) For the purposes of proceedings the subject of a direction under this section, the Court of Criminal Appeal is constituted by the 2 judges directed by the Chief Justice.

Part 4 Procedure

10 Method and time for making appeal

(1) The following provisions apply to an appeal, or application for leave to appeal, under this Act against a person's conviction or sentence:

(a) The person is required to give the court, in accordance with the rules of court, notice of intention to appeal, or notice of intention to apply for leave to appeal, within 28 days after the conviction or sentence.

(b) The court may, at any time, extend the time within which the notice under paragraph (a) is required to be given to the court or, if the rules of court so permit, dispense with the requirement for such a notice.

(c) The appeal, or application for leave to appeal, is to be made in accordance with the rules of court, which may include:

(i) provision with respect to any statement of grounds of appeal, transcripts, exhibits or other documents or things to accompany the appeal or application, and

(ii) provision with respect to the timely institution and prosecution of the appeal or application, and

(iii) provision with respect to the period during which the notice under paragraph (a) has effect.

(2) For the purposes of any other Act or statutory instrument (whether enacted or made before or after the commencement of this subsection):

(a) the period provided for making or lodging an appeal or notice of appeal to the court against a conviction or sentence is taken to be the period for giving the court notice of intention to appeal or notice of intention to apply for leave to appeal, or

(b) an appeal against a conviction or sentence is taken to be pending in the court if notice of intention to appeal or apply for leave to appeal has been duly given to the court (unless the appeal or application has not been made within any time it is required to be made by the rules of court).

11 Judge's notes and report to be furnished on appeal

The judge of the court of trial may, and, if requested to do so by the Chief Justice, shall, in case of any appeal or application for leave to appeal, furnish to the registrar the judge's notes of the trial, and also a report, giving the judge's opinion upon the case, or upon any point arising in the case:

Provided that where shorthand notes have been taken in accordance with this Act, a transcript of such notes may be furnished in lieu of such judge's notes.

12 Supplemental powers of the court

(1) The court may, if it thinks it necessary or expedient in the interests of justice:

(a) order the production of any document, exhibit, or other thing connected with the proceedings, and

(b) order any persons who would have been compellable witnesses at the trial to attend and be examined before the court, whether they were or were not called at the trial, or order any such persons to be examined before any judge of the court or before any officer of the court or other person appointed by the court for the purpose, and admit any deposition so taken as evidence, and

(c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable witness, and

(a) directly (the legal practitioner sends a communication in his or her own name), or

(b) indirectly (someone authorised by the legal practitioner sends a communication in the legal practitioner's name).

(3) A legal practitioner who authorises someone else to send a communication, as referred to in subrule (2) (b), is taken to have affirmed to the Court that he or she has actual knowledge of the contents of the communication.

Notices relating to appeals

3 Notices to be signed

(1) Subject to subrules (2) and (3), all notices with respect to an appeal or proposed appeal are to be signed by the appellant or the appellant's solicitor or counsel on the appellant's behalf.

(2) A notice of abandonment of appeal is to be signed by the appellant.

(3) If the appellant is unable to write, the appellant may affix his or her mark to the notice in the presence of a witness who is to attest by his or her signature that the mark is that of the appellant.

3A Duration of notices of intention

(1) The following notices have effect for 6 months after the day of filing of the notice:

(a) a notice of intention to appeal,

(b) a notice of intention to apply for leave to appeal.

(2) The Court may extend the period for which such a notice has effect, before or after the expiry of the period.

3B Time for filing notice of appeal or notice of application for leave to appeal

(1) A notice of appeal, or a notice of application for leave to appeal, in respect of a conviction or sentence may only be given:

(a) if a notice of intention to appeal or notice of intention to apply for leave to appeal has been given with respect to the conviction or sentence—within the period during which that notice of intention has effect, or

(b) if a notice of intention to appeal or a notice of intention to apply for leave to appeal has not been given with respect to the conviction or sentence—within the period of 3 months after the conviction or sentence.

(2) The period of 3 months referred to in subrule (1) (b) may be extended by the Court before or after the expiry of the period.

3C Registrar may exercise certain powers of Court

The power of the Court under section 10 (1) (b) of the Act or rule 3A or 3B to extend a period of time may be exercised by the Registrar.

4 Exclusion of certain matters as grounds for appeal etc

No direction, omission to direct, or decision as to the admission or rejection of evidence, given by the Judge presiding at the trial, shall, without the leave of the Court, be allowed as a ground for appeal or an application for leave to appeal unless objection was taken at the trial to the direction, omission, or decision by the party appealing or applying for leave to appeal.