ACHURCH v THE QUEEN (S276/2013)

Court appealed from: New South Wales Court of Criminal Appeal
[2011] NSWCCA 186 & [2013] NSWCCA 117

Dates of judgments: 16 August 2011 & 22 May 2013

Special leave granted: 8 November 2013

In 2008 Mr Brian Achurch was convicted of the following offences:

a) that on 7 March 2007 he supplied a prohibited drug (MDMA) (108.7 grams) contrary to section 25(1) of the *Drug Misuse and Trafficking Act* 1985 (NSW) ("the Drug Trafficking Act");

b) that on 7 March 2007 he supplied a commercial quantity of a prohibited drug (MDMA) (270 grams) contrary to section 25(2) of the *Drug Trafficking Act*;

c) on 30 May 2006 he supplied a large commercial quantity of a prohibited drug (methylamphetamine) (2.6 kg) contrary to section 25(2) of the *Drug Trafficking Act.*

On 26 May 2010 Judge Woods sentenced Mr Achurch to 14 years imprisonment with a non-parole period of 6 years. The Respondent then appealed against the manifest inadequacy of that sentence, arguing that Judge Woods had failed to sentence Mr Achurch in accordance with Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Sentencing Act"). This was because both offences b) and c) attracted standard non-parole periods of 10 and 15 years respectively.

On 16 August 2011 the original bench of the Court of Criminal Appeal (Macfarlan JA, Johnson & Garling JJ) upheld the Respondent's appeal and resentenced Mr Achurch to 18 years imprisonment, with a non-parole period of 13 years.

Following judgment of this Court in *Muldrock v The Queen* [2011] HCA 39, Mr Achurch applied to have his appeal re-opened in March 2012. He alleged that the original bench of the Court of Criminal Appeal had imposed a penalty contrary to law. Mr Achurch further submitted that the Crown appeal (and the subsequent resentencing) had proceeded upon an erroneous application of sentencing principles. He submitted that the appropriate course was to re-open the proceedings and consider whether, in light of *Muldrock,* the Respondent's appeal should have been allowed, and if so, whether some lesser sentence should have been imposed.

On 22 May 2013 an enlarged bench of the Court of Criminal Appeal (Bathurst CJ, McClellan CJ at CL, Johnson, Garling and Bellew JJ) dismissed Mr Achurch's application. After considering all of the facts of the case, their Honours held that it was not only correct that the Crown appeal be allowed, but they also held that no lesser sentence was warranted.

Concerning only the judgment dated 22 May 2013, the grounds of appeal are:

- Having found error in its earlier decision dated 16 August 2011, the Court of Criminal Appeal erred in:

    a) its interpretation and application of section 43 of the Sentencing Act;

    b) in rejecting the application to re-open the appeal proceedings on the basis that the sentence could, in accordance with correct principle, have been lawfully imposed by the Court.