



HIGH COURT OF AUSTRALIA

9 October 2014

KENTWELL v THE QUEEN
O'GRADY v THE QUEEN

[2014] HCA 37

[2014] HCA 38

Today the High Court unanimously allowed two appeals against decisions of the Court of Criminal Appeal of the Supreme Court of New South Wales refusing the appellants' applications to extend time within which to apply for leave to appeal against sentence.

In 2009, Mr Kentwell was convicted in the District Court of New South Wales of two offences which were subject to standard non-parole periods at the time at which they were committed. In 2010, Mr O'Grady was separately convicted in the District Court of one offence subject to a standard non-parole period. In each case, the sentencing judge sentenced the appellant conformably with the approach to sentencing for standard non-parole period offences laid down by the Court of Criminal Appeal in *R v Way* (2004) 60 NSWLR 168. Neither Mr Kentwell nor Mr O'Grady applied for leave to appeal against their respective sentences within the relevant time period required by the *Criminal Appeal Act* 1912 (NSW) and the Criminal Appeal Rules (NSW).

In 2011, in *Muldrock v The Queen* (2011) 244 CLR 120, the High Court held that *Way* was incorrectly decided. In turn, each appellant separately applied to the Court of Criminal Appeal for an extension of time within which to apply for leave to appeal against sentence, asserting, amongst other things, error of the kind identified in *Muldrock*.

The Court of Criminal Appeal separately dismissed each application. In each case, the Court approached the exercise of the discretion conferred by the Act and the Rules to extend time by applying a test formulated in *Abdul v The Queen* [2013] NSWCCA 247 for applications based on "*Muldrock* error". That test requires the court to ask whether refusal of the application would occasion substantial injustice. In each case, the Court found that the sentencing of the appellant was affected by material error, but nonetheless dismissed the application because the appellant had failed to demonstrate that substantial injustice was occasioned by the sentence.

By grant of special leave, Mr Kentwell and Mr O'Grady appealed to the High Court. The Court held that *Abdul* was wrongly decided. The wide discretion conferred on the Court of Criminal Appeal under the Act and the Rules is to be exercised by consideration of what the interests of justice require in the particular case. 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. In applying the *Abdul* test in the appellants' cases, the Court of Criminal Appeal wrongly confined its discretion. Accordingly, the High Court allowed the appeals, set aside the orders of the Court of Criminal Appeal and remitted the applications for extension of time to that Court for determination.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*