IN THE HIGH COURT OF AUSTRALIA

SYDNEY OFFICE OF THE REGISTRY **No. S 113 of 2014**

B E T W E E N: **PHILLIP CHARLES KENTWELL**

Appellant

and

THE QUEEN

Respondent

10 **RESPONDENT'S ANNOTATED SUBMISSIONS**

Part I: Publication

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

Part II: Concise statement of issues

1. In determining whether to grant an extension of time in which to apply for leave to appeal against sentence, is the existence of error in the original sentence a sufficient basis to grant the extension or should the court also take into account other relevant factors, including the length of the delay,
20 the reasons for the delay, the interests of the victim(s), and of the administration of law generally, particularly, the principle of finality.

Part III: Section 78B of the Judiciary Act

This appeal does not raise any constitutional question. The respondent has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903 (Cth).* No such notice is required.

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Part IV: Statement of contested material facts

4. 1 The respondent does not contest the applicant's outline of the facts.

PART V: Applicable Legislative provisions

The respondent agrees with the appellant's list of legislative provisions.

PART VI: Statement of Argument

Application for extension of time

6. 1 An application for an extension of time is not an application for leave to appeal.

6. 2 The different nature of each of those proceedings define the respective issues engaged.

6. 3 An application for an extension of time is concerned with the reasons why an application for leave to appeal should be considered out of time. In contrast, an application for leave to appeal against sentence is concerned with the merits of the proposed appeal.

6. 4 In determining whether to extend time, reference to the "substantial injustice" that would flow if an extension were refused is neither "novel" (AWS at [22]) nor does it set a higher threshold than determining what the interests of justice require (the test for which the appellant contends).

6. 5 It has long been accepted that "substantial reasons"[1] or "special reasons"[2] are required for an extension of time. This is merely a reference to the fact that an application for an extension of time is not essentially an application for leave to appeal that has been filed late. It engages the threshold problem that the case has been completed and closed. The decision to extend time and reopen a closed case is not a mere formality.

6. 6 The appellant submits that the relevant test for the grant of an extension of time is the same as that for leave to appeal, namely, whether the grounds are arguable or have merit (AWS at [32]). The test of substantial

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[1] ***R v Rigby*** [1923] Cr App R 111 at 112.
[2] ***R v R*** [2007] 1 Cr App R 150 at [30].

injustice is said to impose a much higher test, namely, whether a lesser sentence is warranted in law (AWS at [34]). The appellant contends this is an unnecessary hurdle, it is sufficient that there are arguable grounds of appeal (AWS at [27], [30], AWS ***O'Grady*** at [40]).

6. 7 That analysis may be apposite to an application for leave to appeal. However, it ignores the fact that an application to reopen a completed matter out of time raises different issues to an application for leave filed within time. The issue is not whether leave to appeal should be granted but whether an extension of time should be granted. That issue engages the principle of finality and, in the present case where a change of law ground is also pleaded, raises other considerations concerning the administration of justice, issues that are not engaged in an application for leave to appeal filed on time.

6. 8 The appellant refers to cases where the CCA has adopted the approach of considering whether there are arguable grounds before considering the question of extending time and contends that such an approach giving primacy to the merits of the appeal is correct. The fact that such an approach has been adopted in some cases does not mean that it is appropriate or necessary in all cases nor does it mean that addressing the grant of an extension of time as a significant threshold issue is an error.

The principle of finality

6. 9 Reopening closed cases undermines the fundamentality of the principle of finality.

6. 10 The principle of finality underpins the limitations on rights of appeal, in particular, the imposition of time limits. To allow a completed case to be re-opened at any time calls into question the finality and certainty of past decisions which has important repercussions for the administration of law. It is because of such considerations that the right of appeal is not unqualified. This is reflected in the limitations the *Criminal Appeal Act* imposes on the right of appeal, in particular, the time limit within which an appeal may be lodged.

6. 11 In both the UK and NSW that limit was originally 10 days and in both jurisdictions it was extended to 28 days[3].

6. 12 The fact that the time limit is not absolute and that the court has a discretion to extend it does not mean that it is only of nominal or symbolic significance. The discretion to extend time applies so as to allow flexibility in the consideration of out of time applications given the many possible reasons why an appeal may be out of time.

6. 13 The appellant is correct that the *Criminal Appeal Act* does not in terms impose a test of "substantial injustice" for extending time in which to appeal, however, the Act does impose a time limit. In ***Lesser***[4], the UK Court of Appeal considered that a person who has failed to appeal within the time allowed by statute has lost the right of appeal under the statute and that the extension of the stipulated time is not a mere matter of form.

6. 14 Because of the importance of the principle of finality which underpins the imposition of the time limit its extension cannot be regarded as a formality to be dispensed with lightly. As the Court of Appeal noted, where the delay is within a narrow margin[5], a matter of days[6], the encroachment on finality is relatively minor, and an extension of time will generally by granted when a satisfactory explanation is provided and there appears to be merit in the grounds of appeal. But "good reasons"[7] or "special circumstances"[8] are required where it is sought to re-open closed cases after many years.

Change of Law

6. 15 Change of law cases raise additional issues than mere delay.

6. 16 'Change of law' in this context is a reference to the situation where a subsequent decision of a superior court has determined that a previously

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[3] The effective time limit may be longer because a notice of appeal or notice of application for leave to appeal in respect of conviction or sentence may also be filed within 3 months of the conviction or sentence: rule 3B(1)(b) *Criminal Appeal Rules*. Therefore, where no notice of intention to appeal is filed, the effective limit is 3 months.
[4] ***R v Lesser*** [1939] Cr App R 69 at 71.
[5] ***R v Bestel*** [2014] 1 WLR 457 at [9].
[6] ***R v Hawkins*** [1997] 1 Cr. App. R. 234 at 237.
[7] ***R v Hawkins*** [1997] 1 Cr. App. R. 234 at 237.
[8] ***Alofa v Dept. of Labour*** [1980] 1 NZLR 139 at 146.

accepted principle is misconceived or wrong[9]. It does not refer, as the appellant suggests, to a change in legislation (AWS ***O'Grady*** at [35]).

6. 17 "Change of law" appeals raise the prospect that all cases decided on previously accepted principle could be set aside and reopened. It would be an "alarming consequence" for the administration of justice[10] if judicial decisions had such absolute retrospectivity. There is a "continuing public imperative" that, as far as possible, there be finality and certainty in the administration of justice. The administration of justice can only operate on the basis that the courts apply the law as it is[11]. The general rule has been that the fact that the law has changed or been corrected or developed by a later decision is not sufficient reason to warrant an extension of time in which to appeal[12]. Judicial decisions do not have such retrospective effect on closed cases subject to the qualification of the need to avoid substantial injustice[13].

6. 18 In ***Unger*** Street CJ explained that it would inhibit the evolution of the common law if each new development revived all past decisions[14]. For these reasons, Street CJ accepted the UK approach that change of law was not a sufficient basis to extend time. His Honour accepted that all the facts and circumstances of the particular application had to be considered as well as the more general consequences to the administration of the law (***Unger*** at 995B). The general principle was that, the trial having concluded and the time for appeal expired, the matter was regarded as at an end (***Unger*** at 995D).

6. 19 Similarly, the UK Court of Appeal has consistently held that a change of law "does not afford a proper ground for allowing an extension of time"[15]. The "very well established practice" has been that extensions of time were

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[9] ***In re Berkeley*** [1945] Ch 1 at 4.
[10] ***R v Ramsden*** (1972) Cr. L. Rev. 547 at 548; ***R v Unger*** (1977) 2 NSWLR 990 at 995B.
[11] ***R v Cottrell*** [2007] 1 WLR 3262 at [42].
[12] ***R v Cottrell*** [2007] 1 WLR 3262 at [46].
[13] ***R v Bestel*** [2014] 1 WLR 457 at [31].
[14] ***R v Unger*** (1977) 2 NSWLR 990 at 995G.
[15] ***R v Mitchell*** [1977] 1 WLR 753 at 757.

only granted in such cases where "substantial injustice" would otherwise be done to the appellant[16].

6. 20 Contrary to the appellant's contention that the "substantial injustice" formulation is "novel", the review of the authorities in ***R v R***, ***R v Cottrell***, and ***R v Bestel***, demonstrates that it is in fact well accepted and of long standing. It does not derive from ***Abdul*** as a response to ***Muldrock*** appeals (AWS **O'Grady** at [33] – [34]). As Murray CJ stated in ***A v Governor of Arbour Prison***[17]: " *No one has ever suggested that every time there is a judicial adjudication clarifying or interpreting the law in a particular manner which could have had some bearing on previous and finally decided cases, civil or criminal, that such cases can be reopened or the decisions set aside.*

38. It has not been suggested because no legal system comprehends such an absolute or complete retroactive effect of judicial decisions. To do so would render a legal system uncertain, incoherent and dysfunctional. Such consequences would cause widespread injustices."

6. 21 The exception to this general principle was where "*some extreme feature"... ... "for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice*" might require the verdict to be overturned[18].

6. 22 Murray CJ's statement of the principle was quoted and applied by the UK Supreme Court in ***Cadder***[19]. In ***Cadder*** the previous law on the right to legal representation was overturned and it was held that admissions obtained by police from detainees questioned without legal advice were not generally admissible. This had the potential to effect a large number of pending cases, on one estimate up to 76,000 such cases[20]. There was some discussion about limiting the retrospective effect of the decision even for pending cases, although it was considered that the power did not

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[16] ***R v R*** [2007] 1 Cr App R 150 at [30].
[17] ***A v Governor of Arbour Prison*** [2006] 4 IR 88 at [37] – [38].
[18] ***A v Governor of Arbour Prison*** [2006] 4 IR 88 at [126].
[19] ***Cadder v HM Advocate*** [2010] 1 WLR 2601 at [60] – [61] per Lord Hope of Craighead DPSC, at [100] – [102] per Lord Rodger of Earlsferry JSC.
[20] ***Cadder v HM Advocate*** [2010] 1 WLR 2601 at [4].

exist[21]. However, there was no question that the decision did not have retrospective effect on completed cases.

6. 23 The appellant notes that in ***Young***[22] Smart AJ held that ***Unger*** was of "no assistance" because it was "far removed" from the situation in ***Young*** (***Young*** at [38]). That was correct for ***Young*** was not an appeal based on a change of law. ***Young*** involved the "twin hurdles" of a late appeal which was then abandoned and later sought to be revived (***Young*** at [5]).

6. 24 Young had filed an application for leave to appeal 19 days late. About a month later he filed a notice of abandonment of that application. Almost a year after that, he filed a new application for leave to appeal (***Young*** at [5]). That raised the question whether an extension of 19 days should be granted in relation to the original application and whether leave should be granted to withdraw the notice of abandonment (***Young*** at [43]). The basis of the appeal was manifest excess, there were no grounds relating to any specific error or change of law (***Young*** at [29]). Smart AJ was correct that the specific issues relating to the administration of justice which arise where closed cases are reopened because of a change in law were not engaged but that did not mean that the principle of finality was of no significance in the application to extend time.

6. 25 These principles have been applied in relation to conviction appeals which may raise specific difficulties in individual cases in relation to conducting re-trials after a long delay, a difficulty which does not arise on sentence appeals (***Young*** [48] – [49]). However, the effect on the victim and others involved in the case remains a matter to be considered. The distress and anxiety for those closely affected by the offence of having the sentence reopened, especially offences of personal violence, should not be under estimated. The reopening of closed sentence matters also raises a potentially greater impact on the administration of the criminal law generally because there are so many more sentence matters than trial

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[21] ***Cadder v HM Advocate*** [2010] 1 WLR 2601 at [56] – [59].
[22] ***Young v R*** [1999] NSWCCA 275.

matters and the potential impact on the system generally may be more far reaching.

6. 26 The present case involves one 'change of law' ground, the ***Muldrock*** ground, and 3 grounds averring specific errors. Those 3 grounds do not engage the particular considerations relevant to reopening for a change of law, they engage considerations of finality in the more general sense as they are mattes which could have been raised at any time.

Substantial Injustice

6. 27 The appellant submits that the decisions in ***Young*** and ***Gregory***[23] contain the correct statements of principle (AWS at [29]) which the appellant contends is that an extension of time should be granted if that is what justice requires in all the circumstances (AWS at [44], AWS ***O'Grady*** at [44], [47]).

6. 28 The respondent agrees that ***Gregory*** correctly states the principle although it should be noted that ***Gregory*** did not involve a change of law and did not address the particular issues such cases engage.

6. 29 As the appellant notes, Hodgson JA held that "an important consideration as to whether an extension of time should be granted is the consideration of what justice requires in all the circumstances" (***Gregory*** at [38]). His Honour explained that the interests of justice did not refer just to the interests of the applicant but also those of the Crown and the administration of the law generally, which included the "powerful" consideration of finality: "*As I have said, an important factor in a decision as to whether an extension of time should be granted is whether the interests of justice require it; but the interests of justice must take into account not just the interests of the applicant, but also those of the Crown (and the community represented by the Crown), and of the administration of law generally. There are many factors relevant to those matters, including the powerful considerations supporting the finality of judicial decisions.*" (***Gregory*** at [41]).

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[23] ***R v Gregory*** [2002] NSWCCA 199.

6. 30 ***Gregory*** was a fresh evidence case where the applicant sought to re-open his conviction 21 years out of time on the basis of new evidence. The fresh evidence ground was dismissed (***Gregory*** at [29]). The appellant had also raised additional grounds. Hodgson JA accepted that one of those grounds, a ground averring a misdirection in relation to the record of interview was established and that such error would "normally" have resulted in a retrial (***Gregory*** at [37]). That error having been established, the question became whether an extension of time should be granted so many years later.

6. 31 Hodgson JA noted that an application to extend time could not be determined merely by considering the merits of the proposed appeal as if it were an application filed within time (***Gregory*** at [38]). His Honour twice stated, adopting the words of Street CJ in ***Unger***, that "the general principle" was that, where the matter was concluded and the time for appeal had expired, the matter was to be regarded as at an end (***Gregory*** at [39], [45]). Despite the material error, his Honour refused the application to extend time.

6. 32 The test of "substantial injustice" to which the appellant objects is merely one way of encapsulating the importance of the principle of finality and certainty when determining whether to re-open closed cases. In its practical application the test involves no higher threshold than the test of what justices requires.

6. 33 The reason that formulation imposes no higher threshold in practice is that the importance accorded to the principle of finality does not mean that finality is applied "in isolation from the justice of the case"[24]. Statements to the effect that the primacy of finality requires "*the most exceptional circumstances before an defendant may be permitted to argue that new law should apply to his old case and that, otherwise, a substantial injustice will be caused*"[25] do not impose the vaunted threshold the appellant contends, on the contrary, in applying that principle, the Court of Appeal

[24] ***R v Bestel*** [2014] 1 WLR 457 at [24].
[25] ***R v Bestel*** [2014] 1 WLR 457 at [23].

explained that the general practice was to consider the "underlying justice" of the case[26].

6. 34 This is no different from the "interests of justice" formulation in ***Gregory*** for which the appellant contends. The difference between the approach in ***Gregory*** and the UK cases and that proposed by the appellant is that the appellant's application of the "underlying justice" test (AWS ***O'Grady*** at [44]) focusses almost entirely on the interest of the applicant in having his or her sentence reopened. That is the basis on which the appellant submits that serving a sentence based on erroneous principle constitutes an injustice which it is the purpose of the appeal provisions to correct. On that view, the determinative consideration is that there is an ongoing sentence affected by extant error, or as the appellant puts it, that "an applicant is still serving a sentence imposed under erroneous principles" and "will continue to serve a sentence vitiated by error." (AWS ***O'Grady*** at [44]).

6. 35 The appellant contends that once material error is established leave to appeal should be granted and the matter must be considered afresh. The appeal may ultimately be dismissed, but if material error is established, or even arguable grounds are established, the case should be reopened. The supervening factor is that error, or even "arguable grounds", have been established. No additional threshold should be applied. This renders an application for an extension of time indistinguishable from an application for leave to appeal.

6. 36 This conception of what "the interests of justice" require equates the interests of justice with the interests of the applicant, or the injustice suffered by an individual applicant serving a sentence "vitiated by error". The appellant's contention is that it is unjust that he is serving a term of imprisonment "infected by multiple errors" and this could not be said to be anything but a "substantial" injustice. That fact is said to be sufficient, "more than sufficient" (AWS ***O'Grady*** at [40]) to warrant, at the very least, the grant of leave to appeal.

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[26] ***R v Bestel*** [2014] 1 WLR 457 at [24].

6. 37 If the existence of error were sufficient to warrant the grant of leave then the interests of the administration of justice generally, and the principle of finality in particular, would have no role to play. As the appellant puts it, "to the extent that 'finality' may be a relevant consideration, its significance is 'heavily counter balanced'" by the need to correct errors impacting on the liberty of offenders (AWS ***O'Grady*** at [38]). Although this purports to be based on ***Gregory***, it is very different from ***Gregory*** where finality was regarded as a "powerful" consideration and the existence of error was only one of a number of factors to be considered.

6. 38 In the present case, the approach adopted by the CCA was that all relevant factors should be considered, including the length of the delay, the reasons for the delay, the interests of the victim and the interests of the community (CCA at [67] AB287.30). This was consistent with the approach in ***Unger***, ***Gregory*** and the UK cases.

6. 39 The delay on ground 1, the ***Muldrock*** ground, was explained by the fact that the decision in ***Muldrock*** was handed down almost 3 years after the sentence in the present case and it took some time for the Legal Aid Commission to assess the cases affected by the decision in ***Muldrock***. The CCA acknowledged that that delay was beyond the appellant's control.

6. 40 However, the delay of over 4 years on the other 3 grounds was "largely unexplained" (CCA at [68] AB287.48). The affidavits set out the chronology of events from which it might be supposed that the combination of the change in representation and the delay in assessing the application for legal aid contributed to a large part of the delay but it did not explain all of it.

6. 41 The appellant had filed a notice of intention to appeal in relation to the conviction and sentence within time on 23 February 2009. There were no grounds pleaded in that document but it would have allowed the appellant to aver the 3 errors that were later raised. That original Notice was effective for a 6 month period *(Criminal Appeal Rules* r 3A). No Notice of Abandonment was filed and the Notice lapsed.

6. 42 The 3 grounds now raised could have been raised at any time. The issue of whether time should be extended for those 3 grounds involved different considerations from the issue of whether time should be extended for the ***Muldrock*** ground based on a change of law.

6. 43 The CCA correctly noted that the inadequately explained delay, the interests of the victim and the principle of finality "tend[ed]" against the grant of an extension of time. However, as a number of errors had been established, it was necessary to consider whether a lesser sentence was warranted in law (CCA at [69] AB288.20).

10 6. 44 That was the correct approach because if it was established that the appellant was serving an unwarranted sentence then that was a matter which may well counterbalance the factors tending against the extension of time.

6. 45 As the later decision of ***WA v R*** explained, the merits remain the Court's primary consideration in an application to extend time [27].

No lesser sentence warranted

6. 46 The appellant submits that the errors had "directly impacted" on his liberty (AWS ***O'Grady*** at [28]) and his claim "to earlier liberty was denied" (AWS ***O'Grady*** at [40]). The "substantial injustice" test is said to impose an
20 unnecessary hurdle on the true purpose of the appeal provisions which is "the correction of ***excessive*** punishment imposed on individuals ***in consequence*** of judicial error" *(emphasis added)*(AWS ***O'Grady*** at [28]), the implication being that the errors had led to the imposition of an unwarranted sentence.

6. 47 The appellant's contention is essentially that if the CCA granted leave and assessed the sentence properly it would inevitably have imposed a lower sentence.

6. 48 Whether such lower sentence was warranted was the very issue the CCA addressed. Under the heading **"Is some lesser sentence warranted in**

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[27] ***WA v R*** [2014] NSWCCA 92 at [14].

law?" (CCA [70] AB288) the CCA considered whether, taking into account the established errors, the sentence was otherwise appropriate.

6. 49 Two of the errors, the ground 2 error in relation to the structure of the sentence for count 7, and the ground 3 error of imposing a fixed term instead of a non-parole period, were immaterial because they would have made no difference to the total sentence as those individual sentences were subsumed by the total sentence (CCA at [45] AB281.10, [50] – [51] AB282.30). The ***Muldrock*** error of applying a two stage approach (***Muldrock*** at [28]) did not necessarily produce a longer sentence. The SNPP remained an important guidepost in the assessment of the appropriate sentence and the weight given to that consideration was a matter of discretion for the sentencing judge in all the circumstances of the case.

6. 50 The error in Ground 4 in relation to the psychiatric evidence was arguably more significant. The sentencing judge's erroneous finding that the appellant's mental illness had not contributed to the sexual offending (CCA at [64] AB286.50) and that general deterrence remained an appropriate consideration (CCA at [65] AB287.20) had the potential to affect the assessment of the moral culpability for the offence and the weight given to general deterrence, which, in the ordinary course, would have resulted in a longer sentence.

6. 51 The CCA accepted that these errors had been made but considered that no lesser sentence was warranted because of the seriousness of the offences and the violence perpetrated on the victim.

6. 52 In the first assault the appellant smashed a beer bottle over the victim's head, kicked her repeatedly and broke 4 of her ribs. He refused to call an ambulance and forced her to have sexual intercourse (CCA at [13] – [20] AB274.30 – 275).

6. 53 He came back 4 days later and assaulted her again. On this occasion he put a cigarette lighter to her flesh and insisted on having sexual intercourse even though she pleaded that she was in too much pain from her broken ribs from the last assault (CCA at [29] – [30] AB277.40).

6. 54 The appellant submits that the CCA made no reference to his background of having been adopted out to a non-indigenous family and to his mental health problems (AWS at [41]) yet the CCA in fact made express reference to those matters (CCA at [72] AB288.50). The Court had referred to the appellant's mental health problems in the course of discussing the psychiatric evidence and the error of giving limited weight to that evidence (CCA [52] – [65] AB282.40 - 287). In the penultimate paragraph the CCA again briefly referred to the appellant's mental illness and the other matters advanced on his behalf (CCA at [90] AB293.28).

6. 55 The CCA also took into account that the appellant had pleaded not guilty and shown no remorse or contrition (ROS at [21] AB119.35). Even in his most recent affidavit dated 17 September 2013 the appellant discussed his difficulties in gaol and his attempts to address some of his problems but he made no mention of remorse for the offence or for what he had done to the victim.

6. 56 Contrary to the appellant's submission, the CCA did not "merely" consider the objective seriousness of the offence and his criminal history (AWS at [39]). The CCA found the errors established, particularly in relation to the psychiatric issues, and clearly took those errors into account in determining whether a lesser sentence was warranted.

6. 57 The appellant is correct that the sentence was not re-determined afresh as if leave had been granted and the matter had proceeded as an appeal. This was because the matter had not been reopened. This was not an appeal, nor an application for leave to appeal. The issue was whether the sentence represented an injustice which required reopening despite the considerable delay.

6. 58 The appellant contends that less weight should have been given to the seriousness of the offences and more to the subjective considerations, particularly the psychiatric issues. However, it was open to the CCA, in balancing the various and competing considerations bearing upon the determination of the sentence, to afford considerable weight to the objective seriousness of the offences and to conclude that, even giving proper weight to the SNPP and to the appellant's mental health problems,

no lesser sentence should be imposed. That conclusion was well open given the undeniable seriousness of these repeated assaults and the other circumstances of the case.

PART VIII: Time Estimate

It is estimated that oral argument will take 1 hour.

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Dated: 11 July 2014

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