

Wade v R

**1 December 2004
(BR) Martin CJ, Angel & Thomas JJ
Extempore**

This was an application for an extension of time in which to apply for leave to appeal against the severity of a non-parole period of 3 years and 6 months following the applicant's pleas of guilty to (i) robbery aggravated by being armed with a dangerous weapon (blood filled syringe), and (ii) two counts of assaulting a police officer in the execution of his/her duty. There was no application for leave to appeal against the head sentence of 7 years imprisonment.

The application for leave to appeal was filed 9 months and 12 days out of time.

An extension of time within which to seek leave to appeal was refused on the papers on 7 July 2004. After the application for an extension of time had been refused, the applicant filed a Notice of Application for Rehearing by the Court of Criminal Appeal pursuant to s.429(2) of the *Criminal Code*.

The applicant, who was addicted to morphine based drugs and who had a long history of drug abuse, stole drugs from a pharmacy after threatening two female staff members with a blood filled syringe. Police attended while the robbery was in progress. The applicant threatened both attending police members with the syringe. He was sprayed with capsicum spray and dropped the syringe after being struck on the arm with a baton. The incident was recorded on security video.

The applicant had an extensive criminal history in all states of Australia except Tasmania. His prior offending included a conviction for armed robbery in the Northern Territory for which he was sentenced to 7 years imprisonment with a non-parole period of 3 years and 6 months. Following the applicant's release to parole in 1995, he committed further offences in the Northern Territory and, in breach of bail, travelled to NSW in 1996, committed further offences and was sentenced to imprisonment. His parole was revoked and he was returned to the Northern Territory and required to serve additional time for breach of parole. He then returned to NSW where he committed further offences and sentenced to imprisonment. The present offences occurred on 4 October 2002.

In 2001 he received a letter from the NSW authorities warning that he may be declared a habitual offender.

The applicant sought leave to appeal on the grounds that the non-parole period was manifestly excessive and that the sentencing judge had misunderstood a number of salient facts and had sentenced on an erroneous basis. At the hearing of the application, the applicant also applied to put before the court material additional to the material provided to the sentencing judge concerning efforts made by the applicant to rehabilitate himself.

The court unanimously dismissed the application for an extension of time holding that:

- (i) the minor errors of fact identified by the applicant were of no significance,
- (ii) the additional material was of no significance, would not have impacted on the sentencing judge, and should not have any impact on the Court of Criminal Appeal,
- (iii) the offence, although poorly planned, was a serious example of an armed robbery,
- (iv) although the applicant's addiction was a matter that gave rise to considerable sympathy, it could not be used as a mitigating factor in a serious case of robbery,
- (v) the non-parole period was well within the range of the sentencing discretion, and
- (vi) it would have been open to the sentencing judge to refuse to fix a non-parole period.

At the hearing of the application, the respondent was not called upon to make any submissions.