SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gopurenko* [2017] QCA 242
PARTIES:	**R** **v** **GOPURENKO, Stephen John** (applicant)
FILE NO/S:	CA No 111 of 2017 DC No 72 of 2014 DC No 129 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Maroochydore – Date of Sentence: 29 April 2014 (Long SC DCJ)
DELIVERED ON:	17 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	4 September 2017
JUDGES:	Sofronoff P and Fraser JA and Boddice J
ORDER:	**The application for an extension of time to appeal the sentence be refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – where the applicant was sentenced in the County Court in Victoria to a period of imprisonment of five years and four months, with a minimum non-parole period of four years – where the applicant was released on parole on 21 March 2013 with a period of 700 days of imprisonment remaining outstanding – where the applicant was immediately extradited to Queensland – where the applicant was subsequently sentenced in Queensland on 29 April 2014 to an effective head sentence of six years imprisonment with a parole eligibility date set at 21 March 2015 – where on 10 October 2014 the Court of Appeal refused an application for leave to appeal against that sentence finding the sentence imposed was not manifestly excessive – where on 5 May 2017 an application for an extension of time within which to reopen the sentence of 29 April 2014 was refused by the District Court on the basis there was no demonstrated errors of substance in the sentencing procedure, and there was nothing calling for the alteration of that sentence – where the applicant now seeks an extension of time within which to appeal against the sentence imposed on 29 April 2014 – where the applicant relies on the ground that the sentencing

judge acted upon the incorrect assumption that time served under the Queensland sentence would constitute time served under the earlier sentence of imprisonment imposed in Victoria – where the applicant submits the extension should be granted as the previous application for leave to appeal was not decided on its merits as it was decided, under a similar misapprehension as to the effect on the sentence imposed in Victoria – where the applicant's delay in bringing the application is explained by the applicant only becoming aware of the correct position of the Victorian correctional authorities in July 2016 – whether an extension of time within which to appeal against sentence should be granted – whether a previous Court of Appeal ruling in relation to the sentence stands as a jurisdictional bar to granting leave to appeal – whether the application is an abuse of process

Lowe v The Queen (2015) 249 A Crim R 362; [2015] NSWCCA 46, considered
R v Ankers [2003] QCA 211, considered
R v Brown [2003] QCA 372, considered
R v Edwards [2002] QCA 192, cited
R v Herbert [2014] QCA 83, considered
R v Kapitano [2002] QCA 496, considered
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, cited
R v Senior [2002] QCA 104, considered
R v Upson (No 2) (2013) 229 A Crim R 275; [2013] QCA 149, cited
R v Williams [2016] QCA 204, considered

COUNSEL: The applicant appeared on his own behalf
J A Wooldridge for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Boddice J and with the order his Honour proposes.

[2] **FRASER JA:** I agree with the reasons for judgment of Boddice J and the order proposed by his Honour.

[3] **BODDICE J:** On 23 April 2014, the applicant was convicted of three counts of armed robbery, one count of common assault and two counts of fraud. He was sentenced to an effective head sentence of six years imprisonment. Four hundred and three days of pre-sentence custody was declared as time already served under the sentence. His parole eligibility date was set at 21 March 2015.

[4] On 10 October 2014, an application for leave to appeal against that sentence of imprisonment was refused. The Court of Appeal found there was no basis to conclude the sentence imposed on the applicant was manifestly excessive.

[5] On 5 May 2017, an application for an extension of time within which to reopen the sentence imposed on the applicant on 29 April 2014 was refused by the District Court of Queensland at Maroochydore. It was held there was no demonstrated errors of substance in the original sentencing proceeding and there was nothing calling for alteration of that sentence.

[6] On 31 May 2017, the applicant filed a notice of application for an extension of time within which to appeal against the sentence of imprisonment imposed upon him on 29 April 2014. The ground for that extension is that the original sentencing Court proceeded on the incorrect assumption that time served under that sentence of imprisonment would constitute time served under a sentence of imprisonment earlier imposed on the applicant in Victoria.

[7] The applicant submits an extension of time should be given as the previous application for leave to appeal was not decided on its merits, being decided under a similar misapprehension as to the effect of the applicant's sentence in Victoria and the delay in the bringing of the application is explained by the applicant only being advised of the correct position in July 2016, after which he made an unsuccessful attempt to reopen his sentence in the District Court.

Background

[8] The applicant was born on 6 November 1977. He has a lengthy criminal history, in Queensland and Victoria.

[9] In 2008 he committed a number of offences of dishonesty in Victoria. Shortly after the commission of those offences he relocated to Queensland. Whilst in Queensland he committed the fraud offence, as well as the armed robberies and common assaults.

Offences

[10] The conviction of three offences of armed robbery related to three separate occasions, 19 February 2009, 23 February 2009 and 4 March 2009. On each occasion, the applicant used a replica handgun to threaten bank staff. The offence of common assault arose out of the robbery on 23 February 2009. A customer was pushed out of the way.

[11] The offences of armed robbery were described as being frightening as the applicant used the replica as if it was a pistol in order to menace patrons and staff. The incidents were said to be likely to have long-term impacts. There was reference to a victim impact statement. In all over $40,000 was obtained from these robberies.

[12] The two offences of fraud related to events between 27 December 2008 and 23 February 2009. The applicant used a purchase order book from a previous employer to dishonestly obtain hardware items on 15 occasions which he then subsequently pawned. The total value of the goods was $14,230.66. The applicant received a total of $3,190 from pawning those items.

Sentencing hearing

[13] A factor taken into account at the time of the applicant's sentence on 29 April 2014 was that the applicant had, on 12 October 2009, been sentenced in the County Court

in Victoria to a period of five years and four months imprisonment, with a minimum non-parole period of four years in respect of an offence of armed robbery committed on 19 March 2009. Again a replica pistol was used to threaten staff.

[14] The applicant was also convicted at that time of offences of theft and obtaining property by deception. That related to the use of the same purchase order book, between 19 November 2008 and 24 November 2008, on five occasions to make purchases to obtain hardware items to a value of $2,559.73. The applicant had also obtained money from the sale of tools which did not exist in April 2008 and dishonestly obtained equipment on 1 May 2008.

[15] In sentencing the applicant, the sentencing judge noted that the offences committed by the applicant in Queensland were similar to the offences committed by the applicant in Victoria. It was also noted that the applicant had spent a substantial period of time in custody in Victoria in relation to the Victorian offences. During that custody, the applicant completed various rehabilitation programs. Upon his release, he had been extradited to Queensland such that the balance of his Victorian sentence remained outstanding.

[16] The sentencing judge observed:

> "Whilst these circumstances of your release on parole in Victoria generally stand very much to your credit, they relate directly to the assessment of your circumstances in respect of your sentence for only the Victorian offending. And there can be no doubt that the related Queensland offending adds very substantially to your criminality and therefore the appropriate punishment of you. In this regard, it is clear that any response by this court, must include a substantial period of imprisonment and such as to require the fixing of a parole eligibility date in order to appropriately deal with the seriousness of your Queensland offending and to achieve the necessary deterrent effect. Whilst your achievement of a parole order in Victoria will no doubt stand you in good stead in this regard, necessarily you will be required to now also satisfy an appropriate Queensland parole authority of your suitability for release into the community here and in reference to all of your offending and any issues of rationalisation of any co-existing Victorian parole order, would be a matter for that authority."

[17] The sentencing judge found that the appropriate approach in sentencing the applicant required an assessment of the totality of his situation and of the sentences that had been and were to be imposed for his offending. Allowing for that approach, the sentencing judge found that had all of the offending occurred in Queensland, an appropriate approach would have been a head sentence of not less than 10 years imprisonment for the armed robbery offences alone. Such a sentence would have required the applicant to serve 80 per cent, or at least eight years, of that sentence.

[18] To allow for the significance of the efforts the applicant had taken towards gaining parole in Victoria and to recognise his pleas of guilty, the sentencing judge observed that adopting a more flexible approach was appropriate. In doing so the sentencing judge expressly said it was necessary to have regard to the sentence that was actually imposed upon the applicant in Victoria.

[19] Allowing for these factors, the sentencing judge imposed a sentence of six years imprisonment for each of the offences of armed robbery, a sentence of six months imprisonment for the offence of common assault and sentences of two years imprisonment in respect of each offence of fraud. After declaring 403 days of presentence custody as time served under those sentences of imprisonment, the sentencing judge fixed a parole eligibility date of 21 March 2015; that is, after the applicant had served two years of the overall head sentence of six years.

[20] The sentencing judge expressly observed that the total effect of that sentence was that in conjunction with the Victorian sentence the applicant was receiving a total head sentence of "about 10 years which you commenced to serve on 21 March 2009 and a total non-parole period of about six years."

Earlier leave to appeal application

[21] In refusing leave to appeal, Fraser JA (with whom Holmes JA (as the Chief Justice then was) and Morrison JA agreed) found the sentencing methodology adopted by the sentencing judge reflected the methodology approved in *R v Edwards*.[1] A consideration of *Edwards* made it "difficult to contend that the applicant's effective total sentence of 10 years imprisonment with a minimum custodial period of six years imprisonment is manifestly excessive for his four armed robbery offences and all of his offences of dishonesty".

[22] Fraser JA also found that the sentencing judge had had regard to all relevant matters, including the applicant's upbringing, drug addiction, steps towards rehabilitation and relevant references. The applicant's belief that he would probably be required to serve the whole of the term of the Queensland sentence was said to have no evidence to support that belief, particularly as the applicant had the benefit of the material demonstrating the extent of his rehabilitation during the Victorian sentence. In any event, "whether or not the applicant will be granted parole is a matter which this Court cannot reliably predict. That is a matter for the parole authorities."

[23] Fraser JA concluded:

> "The applicant informed the Court that he had been unable to obtain confirmation from the Victorian parole authorities that the time he had served under the Queensland sentence would count towards service of the outstanding balance of his Victorian sentence which he was serving on parole. It therefore should be made clear that the Queensland sentence was imposed upon the basis that time served under the Queensland sentence would amount to time served under the Victorian sentence. There was no challenge to that proposition at the sentence hearing. This Court has no evidence which suggest that it is not correct. Accordingly, the Court necessarily proceeds on the same basis."

Applicant's submissions

[24] The applicant submits that the basis upon which the sentence was imposed at first instance and by which the Court of Appeal proceeded in refusing leave to appeal

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1 [2002] QCA 192.

against that sentence was inaccurate. The Victorian authorities have not accepted that the time served in Queensland counts towards service of the outstanding balance of his Victorian sentence. Instead, the Victorian parole authorities will await his release from custody in Queensland to determine whether he will be required to serve the balance of the Victorian sentence.

[25] The applicant relies on communications from the Parole Board Victoria and, in particular, the contents of an email dated 23 December 2016:

> "To make a determination on the length of time Mr Gopurenko will be required to complete on his Victorian sentence the Board will need to hold a Time to Count meeting. This cannot occur until he is back in Victoria [sic] custody and a complete report can be generated of his [sic] the full circumstances of his extradition and imprisonment. Given this, Stuart Ward's (Chief Administration Officer) statement that as it currently stands your client's sentence in Victoria remains at 700 days. How much of this is served as parole would need to be determined again after your client has returned to Victoria, community corrections staff have completed the required reports are considered by the Board."

[26] The applicant submits in those circumstances an extension of time to appeal ought to be given. Further, leave to appeal ought to be given as the sentence imposed is manifestly excessive in the circumstances. The applicant will be required to serve a total of 11 years four months under the Victorian and Queensland sentences. That time is substantially in excess of the 10 years said to be appropriate if all the offending had occurred in Queensland.

Respondent's submissions

[27] The respondent submits that an extension of time ought to be refused. The Court has previously considered an application for leave to appeal on its merits. Further, there is no merit in the new application for leave to appeal. The sentences imposed were not manifestly excessive.

[28] The Victorian sentences were taken into account at the time of the original hearing. Whilst at that sentence hearing there was an understanding the sentences imposed in Queensland would run concurrently with the Victorian sentence, it does not follow the sentences imposed would have been different if that premise proves incorrect. On the comparable authorities the sentence imposed was lenient. Further, the Victorian parole authorities have yet to determine what, if any, further portion of the remaining sentence in Victoria the applicant will be required to serve in Victoria.

Consideration

[29] In *R v Upson (No 2)*[2] this Court held:

> "In the case of an application for leave to appeal against sentence where a previous application was refused on the merits of the proposed appeal, the mere repetition or refinement of the original grounds of appeal, the formulation of different grounds, or reliance upon new evidence, does not take the case outside the general rule that the Court lacks jurisdiction to hear the second application."

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2 (2013) 229 A Crim R 275 at [25].

[30] In *R v Williams*[3] this Court observed that in *Lowe v Queen*[4] the New South Wales Court of Appeal held that a refusal of an application for leave to appeal did not constitute a jurisdictional bar to the making of a second application. However, it was found unnecessary to consider whether *R v Upson (No 2)* remained applicable, as even if there was no jurisdictional bar the second application for leave to appeal against sentence sought to be argued in *Williams* was an abuse of process as an impermissible attempt to re-litigate a case which the Court had conclusively determined on the merits.

[31] For similar reasons, it is unnecessary to reconsider the correctness of *R v Upson (No 2)* in the present case. Absent that jurisdictional bar, the applicant's second application for leave to appeal is without merit. There is no identifiable change of circumstance that presently exists which is contrary to those considered by that Court of Appeal. The Victorian parole Board has not determined whether time served under the Queensland sentences will be taken into account in relation to the balance of the Victorian sentence.

[32] In any event, as was observed at the sentencing hearing, if the applicant had been sentenced in Queensland on the basis the Victorian offences had also occurred in Queensland, he would have been sentenced to imprisonment of at least 10 years with a consequent automatic declaration of the conviction of a serious violent offence necessitating he serve 80 per cent of that sentence.

[33] Even if the time he was required to serve in Queensland is not counted for in respect of the Victorian sentence, the sentence the applicant received, allowing for that Victorian sentence was substantially less than he would have been required to serve in any event. The applicant has been sentenced to a total of 11 years four months imprisonment, with parole eligibility after six years, substantially less than the at least eight years he would otherwise have been required to serve before any parole eligibility, if the head sentence had been 10 years imprisonment. Any necessity to serve the whole of that sentence is due to the applicant having offended in a similar way whilst on parole.

[34] A review of the comparable authorities[5] reveals a sentence of 11 years four months for four armed robberies involving use of a replica pistol to threaten bank staff, as well as persistent offences of dishonesty committed separately over a lengthy period is well within an appropriate exercise of the sentencing discretion. The offences of dishonesty would appropriately have attracted periods of imprisonment to be served cumulatively on the sentence of 10 years imposed for the four armed robberies.[6]

Orders

[35] I would order that the application for an extension of time to appeal the sentence be refused.

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3 [2016] QCA 204 at [25].
4 (2015) 249 A Crim R 362.
5 *R v Brown* [2003] QCA 372; *R v Senior* [2002] QCA 104; *R v Kapitano* [2002] QCA 496; *R v Ankers* [2003] QCA 211; *R v Herbert* [2014] QCA 83.
6 *R v Nagy* [2004] 1 Qd R 63.