

SUPREME COURT OF QUEENSLAND

CITATION: *R v Kennedy* [2017] QCA 272

PARTIES: **R**
v
KENNEDY, Danielle Elizabeth
(applicant)

FILE NO/S: CA No 170 of 2017
DC No 244 of 2017

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Sentence)

ORIGINATING COURT: District Court at Southport – Date of Sentence: 11 May 2017
(Kent QC DCJ)

DELIVERED ON: 10 November 2017

DELIVERED AT: Brisbane

HEARING DATE: 8 November 2017

JUDGES: Sofronoff P and Gotterson and Philippides JJA

ORDER: **The application for an extension of time to seek leave to appeal against sentence is refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced following her pleas of guilty to five years’ imprisonment for arson, two years’ imprisonment for assault occasioning bodily harm whilst armed, two years’ imprisonment for assault occasioning bodily harm and 18 months’ imprisonment for burglary whilst armed, with parole eligibility after 18 months on the arson count and a parole release date of 8 November 2018 on the other counts – where the applicant’s conduct was described by the sentencing judge as vindictive – where the applicant suffered from an adjustment disorder and symptoms of depression and had significant health problems – where the applicant contended that the sentences were manifestly excessive – where the applicant contended that she suffered a severe blow to the head and did not believe that she had committed the offences – where the applicant alleged that she had not received advice as to the 28 day time limit for bringing the application – whether there was adequate explanation for the delay – whether refusing the application would result in a miscarriage of justice – whether an extension of time should be granted

R v Francis [\[2014\] QCA 258](#), cited

R v Leslie [\[2016\] QCA 15](#), cited

R v Silasack [\[2009\] QCA 88](#), cited

COUNSEL: The applicant appeared on her own behalf
D Balic for the respondent

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

- [1] **SOFRONOFF P:** I agree with the reasons of Philippides JA and with the order her Honour proposes.
- [2] **GOTTERSON JA:** I agree with the order proposed by Philippides JA and with the reasons given by her Honour.
- [3] **PHILIPPIDES JA:** The applicant seeks an extension of time in which to seek leave to appeal against sentences imposed on 11 May 2017 on the ground that they were manifestly excessive.
- [4] The applicant was sentenced on her pleas of guilty to concurrent sentences as follows:
- five years' imprisonment on one count of arson (count 3);
 - two years' imprisonment on each of one count of assault occasioning bodily harm whilst armed (count 2) and one count of assault occasioning bodily harm (count 4); and
 - 18 months' imprisonment on one count of burglary whilst armed (count 1).
- [5] On count 3, parole eligibility was set after 18 months' imprisonment and for the other counts, a parole release date of 8 November 2018 was set. A declaration was made as to three days presentence custody.
- [6] The circumstances of the offending are as follows. The applicant had become upset with a resident of a building in Southport, being a Mr Harrison. She confronted the complainant, Mr Harrison, and his companion, the complainant, Ms Wilson, brandishing a hurling stick. In the confrontation, the applicant struck Ms Wilson on the forearm, causing her a severe bruise (counts 1 and 2). The applicant was then ejected from the unit and went downstairs where she approached a woman, asking, "What can I use to start a fire?"
- [7] The applicant then proceeded to a petrol station where she bought petrol (some six litres in a jerry can). On returning to the building, the applicant said, "Darren, you'll go down for this" and ignited the fuel outside Mr Harrison's unit.
- [8] The ensuing fire was eventually able to be contained by the fire brigade but caused significant damage to the building, totalling \$356,736 (count 3).
- [9] Mr Harrison sustained burns in attempting to extinguish the flames and injured his back in fleeing the building for which he was treated in hospital. The applicant also suffered minor burns. When authorities arrived at the scene, the applicant was questioned but did not fully accept responsibility for the offences.

- [10] Ms Wilson provided a Victim Impact Statement outlining the emotional and financial impact of the offending.
- [11] In imposing sentence, the sentencing judge observed that the offences were very serious and involved some pre-planning by the applicant in taking the hurling stick with her to confront Mr Harrison and then travelling some distance to return with the fuel. The conduct was described as vindictive, with both victims, who were virtual strangers to the applicant, suffering severely. The sentencing judge referred to general deterrence as an important consideration in the sentence imposed.
- [12] His Honour had regard to the fact that she had entered a timely plea of guilty as an important factor in the applicant's favour. The sentencing judge also referred to the applicant's suffering from an adjustment disorder and symptoms of depression and that she had been on the methadone programme and had significant health problems. His Honour noted that the applicant had some work history but was not employed at the time of sentence. She had positive referee reports and had done well on restrictive bail conditions over a lengthy period. She had remained abstinent from alcohol and drugs and had complied with a curfew.
- [13] The application to appeal against sentence was not lodged until 1 August 2017, some two and a half months late. The applicant alleged that she did not recall receiving advice regarding the 28 day appeal timeframe and that she did not receive any written communication about that matter. The applicant also maintained she had commenced her application on 22 June 2017 with Legal Aid by phone. However, Thomas Schafer, a lawyer with Legal Aid Queensland who acted at the sentencing hearing on behalf of the applicant, deposed to having sent a letter to the applicant regarding her right of appeal and that no appeal was recommended in her circumstances. That letter was exhibited to his affidavit. No mention is made of a telephone call. In the circumstances, the explanation for the delay provided by the applicant is not persuasive.
- [14] Nevertheless, an extension of time may still be granted if a demonstrable miscarriage of justice might be perpetuated by the refusal of the extension. In making her application, the applicant maintained she had no memory of committing the offences, attributing her conduct to automatism and involuntary intoxication, which were a defence and "mitigating factors" not considered by the sentencing judge. The applicant entered pleas of guilty so that the issue of defences was not a question for determination. The sentencing judge took into account matters of mitigation, as mentioned. An absence of memory of committing the offences and intoxication were not a basis for additional consideration by way of mitigation.
- [15] Additionally, on the hearing before this Court, the applicant raised that that she had suffered a severe blow to the head after being pushed down a flight of stairs. She contended that she did not believe that she had committed the offences other than that of arson and that she should not have pleaded guilty to them. There was no application to withdraw the pleas, but any such application would be doomed on the material before the Court. The applicant was seen by witnesses to be armed and to have struck Ms Wilson in the unit. Moreover, she did not raise any dispute as to the circumstances of the offending when they were outlined in submissions.
- [16] As regards the severity of the sentences, an application for leave to appeal on the ground that the sentences were manifestly excessive would not be likely to enjoy

success having regard to the sentences imposed by this Court in *R v Francis*,¹ *R v Silasack*² and *R v Leslie*.³

- [17] In those circumstances, I would refuse the application for an extension of time to seek leave to appeal against sentence.

¹ [2014] QCA 258.
² [2009] QCA 88.
³ [2016] QCA 15.