

COURT OF APPEAL

**HOLMES CJ
GOTTERSON JA
McMURDO JA**

**CA No 240 of 2017
DC No 74 of 2016**

THE QUEEN

v

CLELAND, Robert Jamie

Applicant

BRISBANE

WEDNESDAY, 21 FEBRUARY 2018

JUDGMENT

McMURDO JA: The applicant was charged with one count of doing grievous bodily harm and one count of unlawful wounding. After a trial he was convicted and sentenced. He was ordered to serve a term of six years imprisonment for the grievous bodily harm offence and a concurrent two years for the other offence. His parole eligibility date was set at the halfway mark.

Those sentences were imposed on 10 March 2017. It was not until 13 October 2017 that he sought to challenge them. He applies for an extension of time in which to seek leave to appeal against his sentence. He is not legally represented and his proposed arguments for that appeal are not entirely clear. However, there is a ground of appeal which appears from the judge's sentencing reasons although it has not been raised by him.

In the altercation in which these offences were committed the applicant stabbed the complainant and on the jury's verdicts wounded him and caused grievous bodily harm. In his sentencing reasons the judge said that:

“When you took that knife and opened that knife you did intend the effect of you producing the knife, that is, the wound and the GBH.”

A little later the judge said that what he described earlier as the knife and which he also described as the multi-tool was not “an easy thing to manipulate” because the judge himself had “had a go at it”. The judge said that to his mind, this difficulty in the use of the weapon had “clearly expressed your intent to do the harm that you did in respect of both matters”.

On those findings, the applicant had committed the more serious offence of causing grievous bodily harm with intent to do so. That offence under s 317 of the *Code* carries a maximum penalty of life imprisonment. The offence with which the applicant was charged and of which he was convicted by the jury was an offence under s 320 and carried a maximum penalty of 14 years. It must be said that the prosecutor told the judge that the maximum penalty was 14 years in this case. Nevertheless, the judge has sentenced the applicant on the basis that he was guilty of a more serious offence which had not been considered by the jury. It is sufficient to say that in this respect there was an arguable error in the exercise of the judge's discretion.

The applicant's explanation for not challenging these sentences within time is that, he says, his then lawyer told him that he could not appeal “the judge's decision” and that he first became aware of the possibility of an appeal by talking to another prisoner some months later. His explanation for not applying to this Court before October 2017 is not especially compelling, but there is an apparent basis for his proposed appeal of which he need not have been aware which warrants an extension of time and in my view the grant of leave to appeal.

The arguments on the merits of the appeal and for any resentencing by this Court should take place on another day by which time the applicant may have legal representation and the respondent will be on notice of the ground which I have discussed. I would order that the

time for making an application for leave to appeal against sentence be extended to 13 October 2017, that leave to appeal be granted and that the appeal be heard on a date to be fixed.

HOLMES CJ: I agree.

GOTTERSON JA: I agree.

HOLMES CJ: The orders are that the time for making an application for leave to appeal against sentence is extended to 13 October 2017. Leave to appeal is granted. The appeal is adjourned to a date to be fixed. Now, Mr Cleland, what it comes down to is this: the sentencing judge seems to have sentenced you on the basis that you were guilty of grievous bodily harm with intent to do grievous bodily harm. That is a more serious offence than the one the jury found you guilty of which was just doing grievous bodily harm. Do you understand that?

APPLICANT: I have been sentenced on a higher rate?

HOLMES CJ: It seems – well, there is certainly a good argument that that is so. Now, it would be very desirable if you could get Legal Aid to assist you in your appeal and you may find that they are interested in assisting you given that you have got your extension of time and you have got leave to appeal. But you will have to convey to them the basis of that so you will need to be able to explain it.

APPLICANT: Yep, yes, your Honour.

HOLMES CJ: All right. Well, the appeal itself will happen on a date in the future that you will be notified of, but what you should really do is – in your own interests is to make an application for Legal Aid.

APPLICANT: Yes, your Honour.

HOLMES CJ: All right. Thank you. We can - - -

APPLICANT: Excuse me, your Honour.

HOLMES CJ: Yes.

APPLICANT: Will I be getting all this in paperwork? What was just said?

HOLMES CJ: Well, I will order a transcript of today's proceeding and it may be that Legal Aid can obtain that for you. All right. Thank you.

APPLICANT: Thank you, your Honour.