SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hawks* [2019] QCA 181
PARTIES:	**R** **v** **HAWKS, Mark** (applicant)
FILE NO/S:	CA No 307 of 2018 DC No 29 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Dalby – Date of Sentence: 22 August 2018 (Horneman-Wren SC DCJ)
DELIVERED ON:	10 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2019
JUDGES:	Gotterson and Philippides JJA and Bradley J
ORDERS:	**1. The application for an extension of time in which the appeal against the sentence be granted.** **2. The appeal be allowed.** **3. The sentence imposed on 22 August 2018 be set aside and a term of seven years imprisonment be imposed cumulative on the sentence imposed on 8 April 2016.** **4. A parole eligibility date of 22 May 2021 be imposed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN GRANTED – where the applicant sought an extension of time to appeal against his sentence of seven years on the basis that the imposition of a cumulative sentence rendered the sentence manifestly excessive – where the applicant's explanation for the delay and seeking an extension was that he only became aware of the applicability of the principle of totality after his imprisonment and required time to research and consider his position – where the applicant submitted that the trial judge did not take into account that he had already been sentenced for related offences on 4 October 2017 – whether it is in the interests of justice to grant the extension CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG

PRINCIPLE – OFFENCES AGAINST THE PERSON – GRIEVOUS BODILY HARM – where the sentencing judge erroneously calculated the commencement date of the index sentence to be the date after the 4 October 2017 sentence expired – where the sentence ought to be served cumulative on the sentence imposed on 9 April 2016, which expires on 29 August 2018 – where the respondent accepts that leave should be granted but that the appeal should be dismissed because the sentencing judge also had a discretion, pursuant to s 156 of the *Penalties and Sentences Act* 1992 (Qld) to order that the sentence be imposed cumulatively on the expiration of the "period of imprisonment", being 3 October 2020 – whether the Court should re-exercise the sentencing discretion to correct the error of the sentencing judge

Corrective Services Act 2006 (Qld), s 205, s 209
Penalties and Sentences Act 1992 (Qld), s 156, s 156A

R v Dancey [2013] QCA 135, discussed
R v Lacey [2013] QCA 318, cited
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, cited
R v Wiggins [2003] QCA 367, discussed

COUNSEL: The applicant appeared on his own behalf
C W Wallis for the respondent

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

[1] **GOTTERSON JA:** I agree with the orders proposed by Philippides JA and with the reasons given by her Honour.

PHILIPPIDES JA:

Background

[2] The applicant was convicted on his plea of guilty to one count of grievous bodily harm committed on 17 November 2016. He was sentenced on 22 August 2018 to seven years imprisonment cumulative on an earlier sentence of approximately five years imprisonment. Parole eligibility was set at 22 May 2021 being two years and nine months from the date of sentence.[1]

[3] The applicant seeks an extension of time in which to appeal the sentence imposed on 22 August 2018 on the basis that the imposition of a cumulative sentence rendered the sentence manifestly excessive. The applicant also complains that the principle of totality was not taken into account.

[4] As was said in *R v Tait*,[2] in deciding whether to grant an extension of time in which to appeal a sentence or conviction, it is necessary to examine whether there is any

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1 The effective sentence was therefore was one of 12 years and four months imprisonment commencing on 18 June 2015 with parole eligibility after serving five years and two months in custody.

2 [1999] 2 Qd R 667 at [5].

good reason to account for the delay and consider, on balance, whether it is in the interests of justice to grant the extension. This may involve an assessment of whether the appeal seems to be a viable one. Where feasible, it is appropriate to make some provisional assessment of the strength of the applicant's case and consider the outcome of that assessment when deciding if the case is a fit one for granting an extension. The length of the delay is a relevant factor.

Application for extension

[5] The application was filed on 21 November 2018, some two months out of time. The complaint is that the totality principle was not considered. The applicant stated that the reasons for delay were that he only became aware of the applicability of the principle of totality after his imprisonment and required time to research and consider his position before seeking legal advice. The applicant submits that the trial judge did not take into account that the applicant was sentenced on 4 October 2017 for related offences also committed on 17 November 2016. Those offences concerned the discharge of a firearm in a public place, unlawful possession of firearms and evading police for which the applicant was sentenced to concurrent terms with a three year head sentence and a parole eligibility date of 18 August 2018.

[6] The respondent submitted that there was no good reason for the delay, given the applicant was represented at his sentence and the principle of totality was specifically mentioned during his sentence. The respondent submitted that it was apparent from the sentencing remarks that the sentencing judge had regard to the issue of totality, referring to the sentencing process being "made more difficult" by virtue the earlier sentences. His Honour considered the time that the applicant had already spent in custody for those offences in formulating the sentence to be imposed and the total effect of the sentence to be imposed and declined to declare the offence a serious violent offence. It cannot be said that the sentencing judge did not have regard to the totality principle in imposing sentence.

The sentence imposed

[7] The offence as mentioned occurred on 17 November 2016. In his sentencing remarks, the sentencing judge erroneously stated that the offence was committed on 17 November "last year" but it is apparent that his Honour was clearly intending to refer to 2016.[3]

[8] The circumstances of the offending are that the applicant and the complainant attended the house of a mutual acquaintance to whom the applicant occasionally dealt drugs. The applicant had with him a firearm which he knew was operational. An altercation occurred between the applicant and the acquaintance, during which the applicant was alerted to the presence of the complainant. The applicant discharged the weapon in the direction of the kitchen of the house and, as a result, shot the complainant, who sustained life threatening injuries. The applicant fled the scene, knowing he had injured the complainant. In addition, the applicant fled town and purposefully evaded police, changing vehicles while he fled.

[9] His Honour sentenced the applicant on the basis that he deliberately took the rifle to the house "for the purpose of intimidating another person and that as events transpired, [the applicant] shot [the complainant]; it not being [the applicant's] intention to

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[3] Sentencing Transcript at 2.10.

have actually shot anybody". The sentencing judge referred to the applicant having fled and evaded police until his arrest some two months later.

[10] His Honour referred to the severe nature of the injuries suffered by the complainant. The bullet passed through the complainant's arm and into his chest, entered the chest cavity, penetrated the lung, and lodged near the spine. The complainant sustained a partially collapsed lung and sustained ongoing physical and emotional effects from the injury.

[11] The sentencing judge referred to the need for specific and general deterrence. His Honour observed that general deterrence was an important feature in offences of grievous bodily harm caused by the use of a firearm. Further, the applicant had a poor criminal history which included numerous drug offences, property offences and offences of unlawful uses of motor vehicles.

[12] His Honour observed that the applicant's history included a sentence of three years imprisonment imposed on 8 April 2016 and that the present offending occurred while on parole for that sentence. The applicant had been released on parole on 11 April 2016 (on presentence custody being declared as time served).

[13] His Honour also considered the applicant's difficult background, his rehabilitation, including his abstinence from drugs, and that a timely plea was entered.

[14] His Honour observed that the sentencing process was made "more difficult" by virtue of the fact of the applicant's "earlier sentences". His Honour noted that the applicant "was currently serving a total sentence of five years, three months and 16 days which commenced on 18 June 2015" and that his fulltime release date was 3 October 2020.

Further submissions of the respondent

[15] Although the respondent, contested the granting of an extension of time on the basis put forward by the applicant, the respondent raised separately what was said to be an error in the exercise of the sentencing discretion which, it was accepted, justified the grant of the application for an extension of time to appeal the sentence.

[16] The error concerned the sentencing judge's approach in imposing a cumulative sentence pursuant to s 156A of the *Penalties and Sentences Act* 1992 (Qld) (the PSA). It was submitted that, while the sentencing judge stated that the sentence imposed was required by s 156A of the PSA to be served cumulatively, because the index offence was committed while the applicant was on parole for the sentence imposed in 2016, his Honour erroneously ordered that the seven year sentence imposed be served cumulatively "upon [the] sentence that you're currently serving", in other words the sentence imposed in 2017. His Honour stated:

> "*A sentence of seven years from today* will see your fulltime discharge date be the 3rd of October 2027 because this must be a sentence [which] you serve cumulatively on that other sentence. I formed the view that appropriate parole eligibility date is one which lies *two years and nine months from today*. That is the 22nd of May 2021…"

[17] His Honour appears to have erroneously calculated the commencement date of the index sentence to be the day after the end of the 2017 sentence, which is an

approach permitted by s l56 of the PSA, but inconsistent with the approach his Honour was taking under s 156A.

[18] The respondent submits that, although leave to appeal ought to be granted, the appeal should be dismissed as the sentencing judge also had a discretion pursuant to another provision, s 156 of the PSA, to order the sentence imposed to be served cumulatively on the expiration of the "period of imprisonment"[4] already imposed, which was the period ending on 3 October 2020. On that basis, the penalty actually imposed was appropriate and the Court should not interfere with the sentence imposed, despite the error. The respondent submitted that a sentence of seven years imprisonment was supported by authority particularly given the circumstances of the offence, being the premeditation, the nature of the weapon used, the applicant's criminal history and that, at the time of offending, the applicant was under a parole order.

[19] The basis on which the submissions proceeded below centred on s 156A and not on s 156. The argument before the sentencing judge proceeded on the basis of the application of s 156A and the imposition of a sentence cumulative on the term of the 2016 sentence.

[20] Section l56A relevantly provides that those who offend in the prescribed way while subject to a parole order serve the "new" sentence cumulatively on the sentence that they were subject to at the time of their offending, including the consequences brought about by breach of the Court ordered parole. The respondent accepts that the sentence imposed for the offence was required by s 156A to be served cumulatively "with any other term of imprisonment imposed the offender is liable to serve" (by reason of the commission of the offence while released on parole). Section 156A therefore required that the sentence be imposed cumulatively on the 2016 sentence (including any period the applicant was liable to serve pursuant to s 205 and s 209 of the *Corrective Services Act* 2006 (Qld) as a result of his failing to comply with a single order of the Court) as it was that sentence in respect of which he was subject to a parole at the time of the commission of the index offence.

[21] Given the error, this Court ought to grant the extension of time sought and grant leave to appeal. This Court is required to re-exercise the sentencing discretion.

[22] A consideration of the authorities indicates that seven years imprisonment was an appropriate sentence for the sentencing judge to impose. In *R v Wiggins*,[5] a 30 year old appellant with a significant criminal history which included drug offences was convicted of grievous bodily harm and sentenced to six years and nine months imprisonment. The appellant in that case had also offered to plead guilty at a relatively early stage. In *R v Dancey*,[6] a 34 year old applicant with a significant criminal history which included violent offences which were "somewhat dated" was refused leave to appeal a head sentence of five years imprisonment for grievous bodily harm. That sentence was imposed on 19 November 2012 and was to be served cumulatively on a pre-existing sentence which had a full time release date on 25 April 2013. Parole eligibility was set for 25 August 2014, after serving 16 months of the cumulative sentence.

[23] Exercising the sentencing discretion afresh, I would impose the same sentence imposed by the sentencing judge of seven years imprisonment as appropriate bearing in mind

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4 See *R v Bartorillo* [2006] QCA 283 at [36].
5 [2003] QCA 367.
6 [2013] QCA 135.

the nature of the offence, the need for an appropriately deterrent sentence and that the applicant has already been sentenced for related offending on 17 November 2016.

[24] The sentence ought to be served cumulatively on the 2016 term of imprisonment the applicant is liable to serve. The cumulative sentence is to be imposed to commence after the 2016 term of imprisonment, that is, on 29 August 2018 (being the fulltime discharge date of the 2016 sentence including the period of contingent liability) and not 3 October 2020. A parole eligibility date of 22 May 2021 is imposed, being two years and nine months from the date of sentence on 22 August 2018.[7]

[25] Such a sentence takes into account the totality principle set out succinctly in *R v Lacey*:[8]

> "An important sentencing consideration when imposing a cumulative sentence is the totality principle. It requires the Court when sentencing to review the aggregative sentence and consider whether the aggregate is just and appropriate. In particular, the Court must not lose sight of the overall effect of the sentence and must guard against a sentence that is so unduly onerous as to be overwhelming and crushing."

[26] The orders I propose are:

1. The application for an extension of time in which the appeal against the sentence be granted.
2. The appeal be allowed.
3. The sentence imposed on 22 August 2018 be set aside and a term of seven years imprisonment be imposed cumulative on the sentence imposed on 8 April 2016.
4. A parole eligibility date of 22 May 2021 be imposed.

[27] **BRADLEY J:** I agree with the reasons for judgment of Philippides JA and the orders proposed by her Honour.

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7 The respondent erroneously submitted that the parole eligibility date ought to be 28 May 2021, being two years and nine months after the end of the 2016 sentence: Appeal Transcript 1-20.12-41.

8 [2013] QCA 318 at [14].