SUPREME COURT OF QUEENSLAND

CITATION:	*Sysel v Dinon & Ors* [2002] QCA 149
PARTIES:	**HANA SYSEL** (appellant/applicant) **v** **OFFICERS S DINON, BM WILKIE, DJ EDMONDS AND SERGEANT GT FLEMING** (respondents/respondents)
FILE NO/S:	CA No 75 of 2002 DC No 159 of 1999 DC No 848 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Application for reopening (Criminal)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	26 April 2002
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2002
JUDGES:	McPherson and Williams JJA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal against sentence dismissed.** **2. Application for leave to extend time to apply under Section 188 of the *Penalties and Sentences Act* 1992 granted.** **3. Application under Section 188 of the *Penalties and Sentences Act* 1992 to re-open proceedings refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – application to reopen appeal – where court made a probation order operate concurrently with a term of imprisonment – whether a probation order can be made to be served concurrently with a term of imprisonment – whether probation order was consistent with s 92(1)(b) *Penalties and Sentences Act* 1992 – whether court of appeal could impose a sentence to be served concurrently with a probation order of a different court – application for leave to appeal dismissed

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the circumstances of an applicant have changed and further evidence to assist the applicant is available – whether the court has a basis to interfere with an earlier appeal – application to reopen proceedings refused

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where appeal is determined in default of appearance by the applicant – whether applicant has a right to apply to set aside the order – whether the appropriate application is an application to extend time to appeal or an application for leave to appeal

Penalties and Sentences Act 1992 (Qld), s 188, s 91, s 92

R v Hughes (1999) 1 Qd R 389, considered
R v Stephenson [2001] QCA 407; CA 179 2001, 2 October 2001, considered

COUNSEL: B G Devereaux for the applicant
C Heaton for the respondents

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondents

[1] **McPHERSON JA:** For the reasons given by Muir J, I agree that neither of the grounds relied on for re-opening the sentence in this case are available to the applicant, and also that the application for leave to appeal against the orders of the District Court must be dismissed.

[2] During the hearing of the application, the thought occurred to me that, because of the applicant's failure to appear at the hearing before the Court of Appeal which delivered judgment on 16 June 2000 dismissing the appeal, the applicant might perhaps claim to have that order set aside as a matter of right or justice as having been given in default of appearance by her on the hearing of that appeal. That would accord generally with the way in which judgments in default are approached on the civil side of the court's practice provided good grounds of defence are shown. In criminal matters, however, my impression is that if an application to that effect is possible at all, it has generally been advanced in the form of an application to extend time for appealing or for obtaining leave to appeal.

[3] In any event and even if some such alternative procedure were available here, setting aside the order of 16 June 2000 would make no difference to the

outcome. The matters on which the applicant relies or now wishes to advance are issues, like the state of her mental health, which could have been pursued at the time of the original sentence hearing; or matters which have arisen since sentencing, such as the birth of the triplets and the difficulties they have created for the applicant. As to the latter, it was not suggested that there is any general power in this Court to revise a sentence in the light of latter events. Indeed, there are sound reasons of policy why, except where expressly authorised by statute, this Court should not have or exercise any such power.

[4] The powers conferred by s 188(1) of the *Penalties and Sentences Act* 1992, and in particular s 188(1)(c), of re-opening a sentence have been considered in several recent cases which are referred to in the judgments in *R v Stephenson* [2001] QCA 407. As appears from the reasons of Wilson J and the authorities cited in that case at para [21], those powers are available only in respect of clear errors as to matters of present fact at the time of sentencing. The applicant's remarkable feat of parturition on 22 June 2000 does not satisfy that requirement. It was not a present fact at the time of the original sentencing, nor was it a present or unpredictable event at the date of sentencing in the Court of Appeal.

[5] **WILLIAMS JA:** I agree with all that has been said by Muir J in his reasons and with the orders he proposes.

[6] **MUIR J**: The applicant seeks an order under s 188 of the *Penalties and Sentences Act* 1992 reopening her appeal, by leave, from the judgment of a judge of the District Court on appeal from determinations in the Magistrates Court. On 15 December 1999 the District Court upheld a number of sentences imposed in the Magistrates Court on 19 February 1999 and set aside a sentence imposed in that court on 27 January 1999. The applicant also seeks leave to appeal against the orders of the District Court in relation to sentence and an extension of time within which to make application under s 188.

[7] It is convenient to describe the relevant sentences by reference to the following table extracted from the reasons for judgment of the Court of Appeal delivered on 16 June 2000 when the Court granted the applicant leave to appeal and allowed her appeal in part.

Hearing	Offence	Result
Magistrates Court 27 January 1999	Breaches of domestic violence orders	(1) 3 months suspended
Magistrates Court 19 February 1999		(2) Ordered to serve whole of suspended sentence (1)
	Breach of domestic violence order	(3) 240 hours community service and 3 years probation
	Breach of domestic	(4) 2 months suspended

	violence orders and wilful damage	
	Serious assault	(5) 1 month; $500 compensation
	Breach of domestic violence order	(6) 6 months, suspended after 3 months
	Obstructing police	(7) 7 days
	Serious assault	(8) 2 months; $400 compensation
	Wilful damage	(9) 14 days; $46.60 compensation
District Court 15 December 1999		Sentence (1) set aside; 2 years probation substituted

[8] The Court of Appeal made orders on 16 June 2000 –

(a) setting aside the order of 19 February 1999 requiring that the 3 months suspended sentence imposed on 27 January 1999 be served;

(b) setting aside the 2 months suspended sentence imposed on 19 February 1999;

(c) setting aside the sentence of 6 months imprisonment suspended after 3 months imposed on 19 February 1999 and substituting a sentence of 3 months imprisonment.

[9] It also set aside an order for costs made in the District Court and, subject to the above variations, upheld the order made in the District Court on 15 December 1999. It was pointed out in the Court's reasons that the probation order made by the District Court had no practical effect as a probation order with a three year term had been made on 19 February 1999 and was still extant.

[10] The applicant's sentence was reduced, not because of any perception that it was excessive, but because the Court concluded that the suspended sentences it set aside were contrary to the requirements of s 92(5) of the *Penalties and Sentences Act* 1992 ("the Act").

[11] There was no appearance on behalf of the applicant at the hearing on 31 May. The applicant swears that at this time she was about to give birth to triplets and was experiencing health problems. She further explains her non-appearance and delay in making this application as follows. She had lost contact with her former solicitors and was not told of the hearing date or of the subsequent result of the appeal. In late 2000 when she contacted the solicitors to make inquiries she was told that the solicitor handling the case had gone to another firm. She was unsuccessful in obtaining her file and then contacted a body that provided free legal advice. She then sought legal aid and further delays were experienced before advice could be given. As a result of her difficult

pregnancy, the care of her children and her general state of mental and physical health she has had great difficulty in managing her affairs.

[12] On 8 March 2000 the applicant's former solicitors wrote to the registry advising that they were no longer acting for the applicant and were seeking leave to withdraw. The registry attempted to contact the applicant but two letters sent with that end in mind were returned to the registry unopened.

The Applicant's antecedents and the circumstances surrounding the subject offences

[13] At the time of the offences the applicant was 25 years of age and had no prior criminal history. She showed considerable promise in her schooling where she performed well academically and was highly regarded by her teachers. She completed two and half years of a commerce degree course at Griffith University before applying for admission to the Queensland Police Force. Her application succeeded, she completed her training and was a police officer for approximately two years before resigning.

[14] The applicant then formed a relationship with a police officer and a wedding date of 14 February 1999 was set. Close to that date the relationship failed and the applicant, in consequence, suffered a great degree of anguish and distress. It seems that the termination of the relationship was fraught with tension and that both parties engaged in violent behaviour. Each party sought and obtained domestic violence orders against the other. On 24 January 1999 the applicant, in breach of the domestic violence order against her, called at the complainant's home where she took up a bowling ball and threw it through a window. She took papers of the complainant and burnt them in the yard. She also slapped him on the face. When approached by police she declined to be interviewed.

[15] The next day she returned to the complainant's home, slapped him again and threw some ornaments inside the house causing damage. She threw a stone through a closed window, threatened to get the complainant "sacked", to kill his children and to burn his house down. She was arrested and appeared in court on 27 January when she pleaded guilty to charges of breaching domestic violence orders.

[16] After the Magistrates Court proceedings she made a telephone call to the complainant's mother in the course of which she threatened to kill him. Later that day she returned to the complainant's house where she again spoke to the complainant's mother and threatened to smash the house up. She was then arrested for breaching the domestic violence order. She resisted arrest and was handcuffed and placed in a police vehicle. Whilst being transported to a police station she bit a policewoman who was accompanying her in the back seat of the police vehicle on the left hand. The bite left marks but did not break the constable's skin.

The applicant's mental and physical health

[17] The applicant was seen by a psychiatrist, who on 10 February 1999 gave a report in which he expressed the opinion that the applicant may be suffering from a "borderline personality disorder" but concluded that she was not

suffering from a formal psychotic illness. Another psychiatrist, who also saw her in February 1999, diagnosed "a significant bi-polar effective disorder" (sic). He thought she was on inappropriate medication and described her as a "singularly tormented young lady." He appears to have attributed her aggressive conduct at about the time of the offences to a combination of her psychiatric condition and inappropriate medication.

[18] Dr Chittenden, a specialist in psychological medicine, in a report of 12 August 1999 diagnosed the applicant as suffering from posttraumatic stress disorder and from a major depressive disorder as a result of assaults made on her by the complainant. She strongly recommended that the applicant have psychiatric care and be placed on anti depressant medication.

[19] The applicant became pregnant in about October 1999 and suffered a difficult pregnancy in the course of which she was admitted to hospital from time to time. She gave birth to triplets on 22 June 2000 and was discharged from hospital on 4 July 2000. She was readmitted to hospital on 15 July 2000 as a result of problems she experienced in coping with the babies and was discharged on 20 July 2000.

Grounds for re-opening the appeal to the Court of Appeal

[20] The grounds relied on by the applicant for seeking to reopen the proceedings are that –

(a) the Court of Appeal acted on the erroneous understanding that the applicant had served the terms of imprisonment imposed pursuant to the orders in the Magistrates Court and in the District Court;

(b) the Court of Appeal imposed an impermissible sentence in that a probation order was made which operated concurrently with a sentence of imprisonment.

[21] Mr Devereaux for the applicant submits that if the proceedings must be re-opened then it would be appropriate to set aside the sentences of imprisonment having regard to matters including the applicant's pleas of guilty, lack of previous convictions, the totality principle, the time spent in custody, her present position as a sole carer for triplets and her psychiatric condition.

[22] There is no substance in the first ground. At the hearing of the application for leave to appeal on 31 May 2000 the court was erroneously told that the applicant had served the terms of imprisonment ordered but the error was corrected in later written submissions delivered before the court made its determination.

[23] The effect of the order made on 16 June 2000 was the applicant was required to serve concurrent terms of imprisonment of 1 month, 3 months, 7 days, 2 months and 14 days whilst remaining subject to the community service order and three year probation order imposed in the Magistrates' Court on 19 February 1999 and the two year probation order made in the District Court on 15 December 1999.

[24] Mr Devereaux submitted that the probation order made by the District Court infringed the requirements of s 92 of the Act because its term was concurrent with the terms of sentences of imprisonment imposed on 19 February 1999. The sentence of three months imposed by the Court of Appeal, in his submission, suffered from the same vice. These complaints are rather curious in nature, at least when regard is had to the practical consequences of the sentences.

[25] As previously mentioned, the applicant succeeded in the District Court in having a three month suspended sentence set aside. The two years probation order made by the sentencing judge had no practical effect. The Court of Appeal set aside two sentences and reduced one sentence of six months imprisonment suspended after three months to a term of imprisonment of three months. Nevertheless, Mr Devereaux seeks to show an irregularity in the sentencing process so that the applicant's sentences can be considered afresh and consideration given to matters not before the Court of Appeal in the earlier hearing.

Construction of s 92 of the Penalties and Sentences Act 1992

[26] In order to consider the merits of the applicant's argument it is useful to set out sections 91 and 92 of the Act.

> **"91 Making of an order**
>
> If a court convicts an offender of an offence punishable by imprisonment or a regulatory offence, the court may—
>
> (a) whether or not it records a conviction—make for the offender a probation order mentioned in section 92(1)(a); or
>
> (b) if it records a conviction—make for the offender a probation order mentioned in section 92(1)(b).
>
> **92 Effect of order**
>
> **(1)** The effect of a probation order is—
>
> (a) that the offender is released under the supervision of an authorised corrective services officer for the period stated in the order; or
>
> (b) that the offender—
>
> (i) is sentenced to a term of imprisonment for not longer than 6 months; and
>
> (ii) at the end of the term of imprisonment the offender is released under the supervision of an authorised corrective services officer for the remainder of the period stated in the order.
>
> **(2)** The period of the probation order starts on the day the order is made and must be—
>
> (a) if the order is made under subsection (1)(a)—not less than 6 months or more than 3 years; or

(b) if the order is made under subsection (1)(b)—not less than 9 months or more than 3 years.

(3) The requirements of a probation order made under subsection (1)(a) start on the day the order is made.

(4) The requirements of a probation order made under subsection (1)(b) start—

(a) immediately the offender is released from prison; or
(b) if the offender is released to a re-integration program—at the end of the program.

(5) A term of imprisonment imposed under subsection (1)(b)(i) must not be suspended under part 8."

[27] Putting aside s 92(1)(b) for the moment, it may be seen that the making of a probation order has the consequence that –

(a) the offender is released under the supervision of an authorised corrective services officer for the period stated in the order[1];
(b) the period of the order starts on the day on which it is made[2];
(c) the requirements of the order start on the day on which the order is made [3].

[28] Plainly, such an order is incompatible with a concurrent term of imprisonment. As Pincus and McPherson JJA said in *R v Hughes*[4] -

> "Except to the extent specifically permitted under s 92(1)(b), it is neither permissible nor proper to make a probation order to operate concurrently with a sentence of imprisonment"

[29] Section 92(1)(b) expressly permits the making of a probation order which is concurrent with a term of imprisonment where –

(a) the sentence is a term of imprisonment no longer than six months[5]; and
(b) where the term of the probation order is not less than nine months or more than three years[6].

[30] The period of such a probation order starts on the day on which the order is made[7] but its requirements start upon the offender's release from prison[8], unless the offender is released to a re-integration program, in which case the requirements start at the end of the program[9].

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[1] s 92(1)(a)
[2] s 92(2)
[3] s 92(3)
[4] (1999) 1 QDR 389 at 392
[5] s 92(1)(b)(i)
[6] s 92(2)(b)
[7] s 92(2)
[8] s 92(4)(a)
[9] s92(4)(b)

[31] Mr Devereaux submitted that a term of imprisonment and a probation order had to be imposed in respect of the same offence in order to come within s 92(1)(b). On 19 February 1999 no term of imprisonment was imposed for the offence the subject of the probation order and, if the argument is correct, the probation order thus failed to comply with s 92(1)(b).

[32] Whilst conceding that the construction advanced on behalf of the applicant is a possible construction of s 92 I do not consider that it should be accepted. In s 92 the word "offence" is required to be read as including the plural[10]. There is nothing in s 92(1)(b) which requires the conclusion that an offender can not be sentenced to a six month term of imprisonment for each of two or more separate offences and be subjected to probation orders in respect of one or more of the same offences. Once this is accepted, there would seem to be no compelling reason why, for example, an offender sentenced to a term of imprisonment of six months for each of two offences being dealt with at the same time as a third offence, could not be subjected to a term of probation in respect of the third offence without a further term of imprisonment being imposed.

[33] In such a case there would be no incompatibility between the sentences for terms of imprisonment and the concurrent term of the probation order. Section 92(1)(b)(3) acknowledges, implicitly, that a probation order may be made, the requirements of which do not commence until the offender is released from imprisonment.

[34] The type of probation order just discussed is within the scope of s 92, literally construed. Also, there does not appear to be any cogent reason why the legislation should be given the restrictive construction for which Mr Devereaux contends. The Act is intended to apply in circumstances in which offenders may be sentenced in the one sentencing process for multiple offences and, in which the sentencing judge or magistrate must have regard not only to the seriousness and criminality of each offence but to the totality of the proven criminal behaviour, and to the overall effect of the sentences imposed[11].

[35] The conclusion I have reached on the construction of s 92 accords with the view expressed in the reasons in *R v Sysel*[12].

[36] The next point to consider is whether the Court of Appeal's order of 16 June 2000 infringed s 92 by imposing a sentence which was concurrent with a probation order made by a different court on a different occasion. Disregarding the sentences set aside, the effect of the order of 16 June was that a six month sentence suspended after three months was replaced by a three month sentence. If the first mentioned sentence did not infringe the requirements of s 92 it is difficult to see why the substitution of a lesser sentence on appeal would achieve that result. There could have been no possible non-compliance with s 92(1)(b) if the Court of Appeal had set aside all prior sentences and reimposed the ones it did not wish to set aside. Consequently, if a difficulty exists it is of a technical nature only but I do not consider that there is even a technical difficulty.

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[10] *Acts Interpretation Act* s32C
[11] see eg., *Mill v R* (1988) 166 C.L.R. 59
[12] [2000] QCA 233

[37] The Court of Appeal had before it all the sentences imposed in the Magistrates Court of 19 February 1999 and in the District Court on 15 December 1999, not merely those sentences it set aside. Its powers on appeal were at least as extensive as those of the court below[13]. In exercising its powers to alter sentences imposed at first instance (or in the District Court) the Court of Appeal could make any order which was within the power of the Magistrates Court (or the District Court on appeal from the Magistrate's Court). Moreover, it had the discretion to dismiss the appeal if it concluded that no substantial miscarriage of justice had occurred.[14]

[38] The foregoing discussion shows that there is no basis for this Court to interfere with its earlier determination, which, on the facts then before the court, may be thought to have been generous to the applicant. Her circumstances have changed since that determination but that, of itself, would not permit her sentence to be re-opened. Nor would the fact that further evidence of assistance to her is now before this Court. The evidence of her mental and emotional state could have been advanced at the earlier hearing. Also, if this Court had power to re-open the earlier proceedings the applicant's lengthy delay in seeking resolution of this matter would be a factor which would detract significantly from the merits of her argument. Any amelioration of the applicant's circumstances must rest with the Queensland Corrective Services Commission.

[39] I would dismiss the application for leave to appeal, grant the application for an extension of time within which to make application under s 188 of the Act but refuse the application.

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[13] *Criminal Code* 2668E(2)
[14] *Criminal Code* S668E(1A)