SUPREME COURT OF QUEENSLAND

CITATION:	*R v Harms* [2003] QCA 14
PARTIES:	**R** **v** **HARMS, Colin Gordon** (applicant)
FILE NO/S:	CA No 299 of 2002 SC No 690 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Application for Re-opening (criminal)
ORIGINATING COURT:	Supreme Court
DELIVERED EX TEMPORE ON:	31 January 2003
DELIVERED AT:	Brisbane
HEARING DATE:	31 January 2003
JUDGES:	Davies and McPherson JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Dismiss the application**
CATCHWORDS:	APPEAL – ADMISSION OF FRESH EVIDENCE – IN GENERAL – claim by application that evidence would become available in different trial – whether qualifies as fresh evidence for this hearing
COUNSEL:	The applicant appeared on his own behalf C W Heaton for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

McPHERSON JA: On 18th December 1999, the applicant now before us was convicted of attempted murder after a trial in the Supreme Court at Brisbane. He appealed against his conviction to this Court which dismissed his appeal on 10th October 2000 following a hearing that had taken place on 3rd October. The reference there is Queen against Harms [2000] QCA 49; the reasons I reported. The order of dismissal was formally entered on the 12th of October 2000.

The applicant again appealed, or purported to appeal, against his convictions on 5th February 2002. His appeal, or the application to extend the time for appealing, was heard and dismissed on 19th March 2002. From that decision, he seems to have sought special leave to appeal to the High Court. The fate of that application is not entirely clear to me, although the applicant says that he has been told by an officer of the registry of the High Court that the determination of a fresh evidence question must first be considered in this Court before the High Court will examine it in their jurisdiction.

On 24th of September 2002, the applicant filed a further notice of appeal against his conviction, or an application to extend the time for so appealing.

Except perhaps to the extent that fresh evidence issues are now sought to be raised in this Court, the appeal against conviction or application to extend time for appealing is, in my view, incompetent and should be dismissed. I shall briefly now say why.

On turning to the applicant's amended written summary or outline of argument, it is apparent that as regards his conviction his complaints are almost without exception directed to matters that occurred at his trial in December 1999. In what are described as parts 1 and 2 of that outline, the outline complains of matters going only to the sentence

imposed by him, and that question may be deferred until I have referred to part 3.

The matter of conviction is taken up in part 3 of the outline. It refers to a gun used in the attempted murder and to the dismissal of a charge of being illegally in possession of it and of some bullets. No evidence, fresh or otherwise, or material in a form that we would consider reliable enough to act on, is given to identify the charge that is said to have arisen out of the possession of that gun, or even to identify the person against whom it was laid, or to show its connection, if any, with the attempted murder. It is in any event difficult to see how the dismissal of that charge could be used to impugn the verdict at the trial on the attempted murder charge. With exceptions to be mentioned, the remainder of what appears in part 3 of the outline is concerned with matters of fact and of credibility of witnesses that were fully in issue at the trial, as well of course as the evidence that was given by them with which the appellant disagrees in various respects. There are also sundry references to rulings or directions by the trial Judge, all of which are comprehended by the dismissal of the previous two appeals to which I have referred.

In part 3(i) of the outline, the applicant asks that the statement of a Miss Oerton-Stafford, which she made to the police, be read to this Court; but there is nothing to show that it was evidence at the trial. It is only in paragraphs (j), (k) and (n) of part 3 that there is any reference to

fresh evidence at all. Paragraph (j) refers to the evidence of Oerton-Stafford at a drug trial and to evidence that at that trial she was suffering from bi-polar affective disorder. The point being made apparently is that this might have affected her credibility at the trial of the appellant where she was also a witness. So perhaps it might, but we know nothing at all about the drug trial or about her condition or evidence at it. All we have is the applicant's statement to the effect I have indicated. His statement does not qualify as fresh evidence or material on which this Court could safely act according to any of the tests that are applied to the admission of such evidence on appeals in this Court.

So far as paragraph 3(n) is concerned, it refers to what is said to be fresh evidence concerning the car that was used in the course of the murder attempt. The allegation is that the Director of Public Prosecutions is in some way perverting the course of justice, by adjourning a case against the applicant concerning that car, which was last listed for hearing on 24th of October 2002. The applicant informed us that he hopes that this case, when heard, will throw up facts that will show that some of the evidence given by those at the trial in December '99 was false and that the witnesses concerned were committing perjury. That fails on any view of it, to qualify as fresh evidence; indeed, it has not, even at the present stage, attained the state of being in existence.

Finally, there is a complaint in paragraph (o) of para three about the failure of the applicant's solicitor at the trial to

call a witness, resulting it is said, in a denial to the applicant, of an opportunity of being acquitted. This appears to be quite clearly a complaint about the competence of his legal representatives at the trial. In fact on that occasion, the applicant was represented by an experienced member of the Bar. I would not hesitate to assume that that barrister was consulted about the question of whether that witness should be called and gave his advice according to the view he took of the matter. Before any allegations of professional incompetence are made against him, we would require proper affidavits, as well as an opportunity to the Crown and to counsel himself, to meet the assertions that are made against him. There is clear authority for that in this Court and, unless it were done, we would not be in a position to determine where the truth lay. We have no evidence about the significance, if any, of the uncalled witness, on which we could act to justify granting this application and we would not do so in the absence of material of the kind I have referred to.

There is nothing else in Part 3 of the written outline, except the revealing remark in paragraph (m), that if there was any involvement by the applicant in the crime of attempted murder, it was by comparison with the participation of others, only borderline. There is therefore nothing in Part 3 of the applicant's outline, which would or could justify the application to extend time for initiating yet another and third appeal against conviction in this matter. I would

accordingly dismiss the application to extend time for appealing against conviction.

Parts 1 and 2 of the outline embody an attempt to re-argue the matter of the sentence imposed on the applicant, on grounds essentially of disproportionality with the sentences imposed on the other offenders and in particular, the co-offender, Lang and also on the ground that the sentence imposed on the applicant was excessive. A similar application was heard and dismissed on the 19th of March 2002 and there is no basis for extending the time to enable that or a similar application to be heard again now, even if we have jurisdiction to do so. No new evidence or material is offered in support of it, but only arguments about the unfairness of the sentence that was imposed on the applicant. Those arguments have already been considered and disposed of on the last occasion in this Court.

Overall, I have referred in a little detail to the contents of the applicant's written outline, in order to demonstrate my opinion of the material that the applicant has placed before us. I should not in doing so be taken to have acknowledged that this Court has jurisdiction to hear an appeal of this kind after a previous appeal or appeals have been dismissed simply because an attempt is made to adduce further evidence on the appeal or in support of the application made for extending the time for that appeal to be heard.

Having regard to the decision in Grierson v. The King (1938) 60 CLR 431, I consider that we have no jurisdiction to

entertain a further appeal, or an application to extend the time for appealing, in a case of this kind, in which the matter has been before the Court and appeals have been determined on two previous occasions.

I would therefore dismiss the application or application to extend the time.

DAVIES JA: I agree.

MULLINS J: I agree.

DAVIES JA: The orders are as indicated by Mr Justice McPherson.
