SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smith* [2003] QCA 281
PARTIES:	**R** **v** **SMITH, Donna Marie** (applicant)
FILE NO/S:	CA No 141 of 2003 DC No 150 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence & Conviction)
ORIGINATING COURT:	District Court at Townsville
DELIVERED EX TEMPORE ON:	8 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	8 July 2003
JUDGES:	Davies, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for extension of time within which to appeal against conviction and sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – FRESH EVIDENCE – AVAILABILITY AT TRIAL; MATERIALITY AND COGENCY – PARTICULAR CASES – MATERIALITY AND COGENCY – EVIDENCE DIRECTED TO CREDIT – where witness at trial admitted afterwards that he had committed perjury by giving the evidence which he did – where the evidence given by that witness was favourable to applicant – whether this meant that the applicant did not receive a fair trial – whether jury was properly directed on the use they could make of prior inconsistent statements made by that witness CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – PURPOSE OF SENTENCE – DETERRENCE – where applicant convicted on two counts of defrauding the Commonwealth – where sentenced to two and a half years imprisonment with an order that she be released on a recognisance after serving 12 months imprisonment – where reparation order in the sum of $35,975.33 – where no remorse – where prior convictions for dishonesty – whether any merit in issues that would be raised if extension of time was

granted

COUNSEL: The applicant appeared on her own behalf
G C Davey for the respondent

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

WILLIAMS JA: The applicant was convicted on the 21st of September 2002 after an eight day trial of two counts of defrauding the Commonwealth. Count 2 on the indictment alleged an offence between the 28th of July 1995 and the 7th of November 1996 and Count 3 on the indictment alleged an offence between the 19th of May 1997 and the 11th of February 2000. They were counts on which a conviction was recorded.

The jury acquitted the applicant of Count 1 on the indictment which alleged a similar offence committed between the 16th of November 1994 and the 11th of January 1995. On each count on which conviction was recorded the applicant was sentenced to two and a half years' imprisonment with an order that she be released on a recognisance after serving 12 months imprisonment. Those sentences were to be served concurrently.

There was also a reparation order in the sum of $35,975.33.

The applicant lodged an appeal against conviction on the 25th of October 2002 but that was abandoned by notice filed 22nd January 2003. The principles upon which an abandonment may be withdrawn were considered by the Court of Criminal Appeal in R v. Tabe [1983] 2 QdR 60, but it is not necessary to refer to that decision further.

The applicant now seeks an extension of time to appeal both against conviction and sentence. The relevant notice was filed on the 8th of May 2003. Of most significance in the matters raised in that notice is the allegation that the applicant is now possessed of fresh evidence which only became available to her in about May of 2003. The nature of that fresh evidence will be referred to shortly.

The prosecution allegation was that the applicant during the material periods obtained a sole parent pension to which she was not entitled because at the material times she was living in a de facto relationship with one Wayne Wilson. The applicant has two children of which Wayne Wilson is the father and there was no disputing at trial that for some period at least they had lived in a de facto relationship.

Wayne Wilson was interviewed by police on the 17th of July 2001 and in the statement then given he said that the parties were living in a de facto relationship at times material to the charges. He then gave evidence at the committal proceedings against the applicant on the 31st of January 2002 and his evidence was in accordance with his statement to the police. But at trial he gave evidence to the contrary. He gave evidence that at times material to the charges the parties were separated and he said that his statements to the police and at committal were lies.

The applicant did not give evidence at the trial. In the summing-up the learned trial Judge did refer extensively to the evidence of Wilson. That was understandable because, as he said, apart from the accused, Wilson was the person best able to give evidence as to the living arrangements between them.

When Wilson gave evidence contrary to his earlier statements to the police and evidence at committal the learned trial Judge acceded to the prosecution request that he be declared hostile and he was cross-examined. His earlier statements were then placed in evidence. In the course of the summing-up the learned trial Judge referred to those earlier statements and referred to the significance of the evidence actually given by Wilson at the trial.

As I say, the jury convicted the applicant of two counts but acquitted her on the third. Subsequent to the trial police interviewed Wilson on the 24th of November 2002 and in the course of that interview he admitted committing perjury by giving the evidence which he did at the trial of the applicant before the jury.

Subsequently on the 19th of May 2003 he faced committal proceedings on three charges of perjury and now stands committed for trial with respect to those charges. It is in those circumstances that the applicant says that there is fresh evidence available, namely the fact that Wilson committed perjury at her trial. She submits that it follows

that she did not receive a fair trial. To use her own words the trial was undermined.

In my view it is significant that Wilson being charged with perjury is consistent with the Crown case at trial, namely that Wilson and the applicant did reside in a de facto relationship during the relevant periods. This is not a case where the perjured evidence was unfavourable to the applicant at trial. Clearly it was favourable to her and the jury would appear to have properly evaluated the evidence given by Wilson in returning verdicts of guilty on Counts 2 and 3.

In my view the directions given to the jury in relation to the prior inconsistent statements admitted after Wilson was declared hostile were adequate. The jury was instructed that in the circumstances great care was required before they could convict on the basis of those statements.

The applicant has raised a number of other relatively minor points in seeking to challenge the summing-up. It is true that initially the learned trial Judge made a factual error, but that was corrected in redirections. Apart from that it appears to me that the summing-up was more than adequate. In oral submissions today, the applicant referred to the definition given by the learned trial Judge of a de facto relationship but it does appear to me that the definition that he gave was extremely broad and in essence he left it to the jury to determine what constituted a de facto relationship and that was, in my view, entirely appropriate.

So far as sentence is concerned, in matters of this kind the importance of deterrence as an element has been repeatedly emphasised by the Court of Appeal. It is not necessary to refer to cases in support of that proposition. Here there was a substantial amount of money involved in the fraud. The fraud was committed over an extensive period of time. The applicant has shown no remorse. The conviction was after an eight day trial, as I have said, and the applicant also has prior convictions for dishonesty.

In the circumstances there is no substantive merit in any of the issues that would be raised if an extension of time to appeal against conviction and sentence was allowed and in my view the application for extension of time should be refused.

DAVIES JA: I agree.

JERRARD JA: I agree.

DAVIES JA: The application for extension of time within which to appeal against conviction and sentence is dismissed.
