SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hughes* [2003] QCA 460
PARTIES:	**R** v **HUGHES, Roland Lance** (applicant)
FILE NO/S:	CA No 308 of 2003 DC No 1153 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2003
JUDGES:	McPherson JA, Holmes and McMurdo JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal against sentence granted** **2. Appeal allowed** **3. Sentence imposed in the District Court on 29 August 2003 be varied by suspending what remains of it from the date of delivery of this judgment for an operational period of two years from 29 August 2003**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE – GROUNDS FOR INTEREFERENCE - where application for leave to appeal against sentence – where medical evidence before sentencing judge indicated applicant suffered from a medical condition with a median survival time of 5 – 7 years – where medical report subsequent to sentence indicates applicant's life expectancy is now between months and 2 years – where applicant does not submit sentencing judge erred and seeks to rely solely on subsequent medical report – where power to interfere with sentence conferred by s 668E where Court is of the opinion some other sentence should have been passed – where Court is concerned with the circumstances as they existed at the date of sentence – whether circumstances existing at the date of sentence can include facts then existing

but not the subject of adduced evidence – whether Court should admit evidence of subsequent report and allow appeal

C*orrective Services Act* 2000 (Qld), s 133
Criminal Code 1899 (Qld) , s 668E

R v Goodwin (1990) 51 A Crim R 328, considered
R v Cornale [1993] 2 Qd R 294, considered
R v Leith [2000] 1 Qd R 660, distinguished
R v Maniadis [1997] 1 Qd R 593, considered

COUNSEL: A Moynihan for the applicant
S Bain for the respondent

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

[1] **McPHERSON JA**: The facts are set out in the reasons for judgment of McMurdo J, which I have had the advantage of reading and with which I agree.

[2] The jurisdiction on appeal to set aside or vary a sentence imposed for a crime was first conferred by s 668E(3) of the Code, which was introduced by the *Criminal Code Amendment Act 1913*. Like other such provisions in Australia, it was based on the Criminal Appeal Act 1907 in England. On an appeal against sentence, s 668E(3) adopts as the criterion for interference that "some other sentence … is warranted in law and should have been passed." If that requirement is satisfied, the sentence is to be quashed, and that other sentence passed in substitution therefor. Otherwise the appeal is to be dismissed.

[3] Assuming the grant of leave to appeal against sentence, s 671B(1) invests the Court with powers exercisable on the hearing of the appeal against sentence. The Court may "if it thinks it necessary or expedient in the interests of justice" also make one or more of the several different orders specified in paragraphs (a) to (e) of s 671B(1). They include, so far as relevant here, the power to:

> "(c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable, witness;"

Section 671B(1) goes on to add that, in relation to the proceedings of the Court of Appeal (as it now is), the Court may exercise:

> "any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters …"

The powers of the Supreme Court on appeal in civil matters have since been transferred to the Court of Appeal by the *Supreme Court of Queensland Act* 1991, s 29. In relation to proceedings on appeal against a sentence in criminal proceedings, the Court of Appeal may under s 671B(1) therefore receive evidence of any competent witness, and exercise any of the other powers which are, or formerly were, exercisable by the Full Court of the Supreme Court, including the power to admit further evidence on appeal.

[4] Because in that respect the powers of the Court of Appeal derive from those exercised on appeal in civil matters, one would expect the principles applied in admitting further evidence on appeals in sentencing cases to be the same or similar to those applied in appeals in civil matters. One obvious difference, which was not specifically adverted to in *R v Maniadis* [1997] 1 Qd R 593, 596-597, is that s 671B(2) precludes an increase in the sentence by reason of any evidence that was not given at the trial, which clearly enough includes the hearing of sentence or the trial of an issue in the course of that hearing. Another is that there is authority for saying that in criminal, and therefore sentencing, appeals the attitude of the Court is in some respects rather less strict: *Goodwin* (1990) 51 ACrimR 328, 330. However, the impression that, on sentencing appeals, evidence is freely admitted is not justified by anything said judicially on the comparatively rare occasions on which the question has been closely considered. See *Goodwin*, above, at 329. In *R v Lanham* [1970] 2 NSWR 217, 218, the Court of Appeal in New South Wales (Mason, Manning and Isaacs JJ) said (at 218):

> "It would seem from the argument presented to this Court in support of the submission that the fresh evidence should be received that a belief is entertained in some quarters that it is the customary practice of the Court to receive fresh evidence on matters relevant to penalty. It is necessary that we should state clearly and unequivocally that it is not the customary practice of the Court to receive fresh evidence and that in every case proper grounds must be established as a foundation for the exercise of the Court's discretion to admit fresh evidence. Indeed, if the Court were to take any other view, it would be lending its encouragement to a situation in which evidence relevant to the issue of penalty might be withheld from a lower court to be used on appeal in the event that the penalty was thought to be too severe."

[5] The present case is not of that kind. For the reasons given by McMurdo J, it is one in which the additional evidence demonstrating the applicant's seriously and rapidly deteriorating condition was not known to the applicant or his advisers until after the sentencing process had taken place. It is, therefore, at least "new" evidence. Having regard to the source of the information, there is no reason for doubting its reliability, or for suspecting that the applicant is seeking to come to this Court by way of application for leave to appeal against sentence instead of applying under s 133 of the *Corrective Services Act* 2000.

[6] Leave to appeal against sentence should be granted and the appeal allowed. The sentence imposed in the District Court on 29 August 2003 should be varied by suspending what remains of it from the date of delivery of this judgment for an operational period of two years from 29 August 2003.

[7] **HOLMES J:** I agree with the reasons for judgment of McPherson JA and McMurdo J and the orders they propose.

[8] **McMURDO J:** The applicant was convicted at trial on 27 May 2003 of indecent treatment of a child under 16 with a circumstance of aggravation. The applicant was sentenced on that charge on 29 August 2003 to 12 months imprisonment, partially suspended after serving six months, with an operational period of two years. The applicant has been in custody since the date of his conviction, so that he is due to be released on 26 November 2003.

[9] The circumstances of the offence are obscure, because the evidence at trial is not in the appeal record. Nothing, for example, is explained as to how the applicant and complainant came into contact. It appears that the learned sentencing judge proceeded on this basis: that the applicant took the hand of the complainant, a seven year old girl, and used it to part her labia so as to touch her vaginal opening.

[10] The applicant was born on 13 January 1941, and was 62 years at the time of the offence. The applicant had some minor criminal history, with no previous sexual offences, and with no previous terms of imprisonment. He was found to have no prospect of re-offending.

[11] Before the sentencing judge, there was tendered a medical report of a haematology registrar at the Royal Brisbane Hospital, at which the applicant had been treated since January 2003 under the specialist care of another doctor. As that report showed, the applicant suffers from a condition called myelofibrosis which was treated with regular red cell transfusions. According to that report, the applicant's "overall prognosis is relatively guarded. However his median survival time from the present is likely to be in the order of 5-7 years, dependent upon progressive marrow fibrosis, and leukaemic transformation." The learned sentencing judge expressly referred to this evidence and clearly and properly considered it.

[12] For the applicant, Mr Moynihan does not challenge the head sentence, and nor does he submit that the sentencing judge was in error in suspending the sentence only after six months, upon the basis of the evidence before him. The basis for this application is a subsequent report of 23 September, i.e. dated some three weeks after the date of his sentence. Its author is Dr J S McDonald, the Medical director of the Security Unit of Princess Alexandra Hospital. Dr McDonald says that the applicant's myelofibrosis is a condition which is "slowly transforming to acute myeloid leukaemia" although "the time frame for this transformation is uncertain". Dr McDonald then says:

> "His prognosis is uncertain as well. If the condition does not transform to acute myeloid leukaemia his life expectancy is probably measured in months up to 2 years. However if transformation to acute myeloid leukaemia does occur his outlook is for a shorter life expectancy probably measured in weeks or months. There is some evidence that a slow transformation is occurring."

[13] The applicant's case is if this evidence had been before the sentencing judge, a different sentence would have been warranted by the circumstance that there is demonstrated a real prospect that the applicant has only some weeks left to live.

[14] The Court's power to interfere with this sentence is conferred by s 668E of the *Criminal Code* which provides:

> "(3) On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

That power is limited to cases where another sentence is not only warranted in law but is the sentence which "should have been passed". It is not a power which is exercisable simply because the Court feels that in the circumstances which have arisen subsequent to the sentence, another sentence is now warranted. Instead, the Court is concerned with the circumstances as they existed at the date of the sentence.

[15] The question then arising is whether those circumstances can include only those put before the sentencing judge, or whether they can ever include facts and circumstances then existing but not the subject of evidence then adduced. That question has been answered in this Court in *R v Maniadis*.[1] In the joint judgment of Davies JA and Helman J, with whom Fitzgerald P agreed, their Honours said at 596-597:

> "Subject to what we say later about the decision of this Court in *R v Cornale*[2] the power to admit evidence not adduced below appears to be at least as wide in an appeal against sentence as in an appeal against conviction. In an appeal against conviction the grounds of unreasonableness, that the evidence did not support the verdict and error of law all appear to relate to a verdict upon the evidence adduced at trial and the law existing at the time of trial. Only the ground of miscarriage of justice appears to allow the admission of evidence not adduced at trial. The sole ground in subs (3) that some other sentence is warranted appears to allow at least the same latitude to an appellate court to admit such evidence.
>
> That is not to say that the discretion to admit new evidence in an appeal pursuant to subs (3) will be commonly exercised by an appellate court.[3] But a court of appeal will admit new evidence on such an appeal, notwithstanding that it is not fresh in the above sense, if its admission shows that some other sentence, whether more or less severe, is warranted in law; in this case, that the sentence in fact imposed was unwarranted in the sense that it was manifestly excessive.[4] Evidence of events occurring after the date of sentence is generally unlikely to show this unless it shows what the state of affairs was at the time the sentence was imposed.[5]"

Their Honours then discussed whether such further evidence would ever be admitted absent a satisfaction of the conditions indicated by the judgment of the majority of the New South Wales Court of Criminal Appeal in *R v Goodwin*,[6] being that, if the existence of the evidence was known to the appellant, its significance was not realised by him and that its existence was not known to the appellant's legal advisers at the time of the sentence hearing. They held that

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1 [1997] 1 Qd R 593.

2 [1993] 2 Qd R 294.

3 See, for example, *R v Lanham* [1970] 2 NSWR 217, *R v Brett* [1983] 1 Qd R 38.

4 Cf *Knights* (1993) 70 ACrimR 105.

5 As in *R v M* [1996] 1 Qd R 650; *R v Smith* (1987) 44 SASR 587; *Jones* (1993) 70 ACrimR 449. Evidence of subsequent sentences imposed on co-offenders appears to be an exception to the general proposition; and query *Greer v The Queen* referred to in *Gavin v The Queen* (1991) 6 WAR 195 at 208.

6 (1990) 51 ACrimR 328.

> although further evidence will usually be excluded absent a satisfaction of those conditions, there remained a discretion in an exceptional case to admit further evidence to avoid a miscarriage of justice.[7] Accepting that there may be such exceptional cases, they will be very rare, for a number of reasons. The reasons include the clear need for finality in litigation, the desirability of having the evidence adduced before the primary tribunal of fact and the existence of other remedies in otherwise deserving cases, such as the grant of an exceptional circumstances parole order under s 133 of the C*orrective Services Act* 2000. A sentencing hearing is not a rehearsal for another sentence hearing in this Court.

[16] The evidence admitted on appeal in *Maniadis* went to the facts and circumstances existing at the date of the sentence. In my view, it should not treated as authority for the admission of evidence of matters arising after the sentence hearing unless that evidence is adduced to prove a fact existing when the sentence was imposed. Otherwise, the facts would not be relevant to the question of what sentence "should have been passed". The same limitation was recognised by the majority (McPherson and Pincus JJA) in *R v Cornale*,[8] where it was held that this Court's power under s 668E(3) was limited to the powers of a sentencing court according to the law at the time of the sentence. It is also the limitation which is established and applied in New South Wales,[9] Victoria,[10] South Australia[11] and Western Australia[12].

[17] The circumstances of the present matter are highly unusual, representing that very rare case where the further evidence would be admitted. Even then, other discretionary considerations are involved. In particular, even in such an unusual case, the proper course should be for the prisoner to seek the desired outcome through the administrative process that governs the release of prisoners, and in particular pursuant to s 133, and a corrections board should not decline to consider an application under that section merely because there is a potential for a successful sentence appeal. In the present case, however, it appears that that has not been done and in these circumstances of urgency, the Court should on this occasion admit the evidence and allow the appeal with the effect of suspending the term effectively from the date of this order.

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7 At 597.

8 [1993] 2 Qd R 294.

9 *R v Vachalec* [1981] 1 NSWLR 351 at 353 (Street CJ); *R v Bailey* (1988) 35 ACrimR 458; *R v D B* [2001] NSWCCA 320.

10 *R v Eliasen* (1991) 53 ACrimR 391; *R v Pilarinos* [2001] VSCA 9; *R v Wilshaw* [2001] VSCA 35

11 *R v Smith* (1987) 44 SASR 587.

12 *R v Campbell (No 2)* (1981) 6A Crim R 208; *Anderson v The Queen* (1996) 18 WAR 244 per Steytler J at 259, cf Malcolm CJ at 246; *Li Chun Sheung v R* [2000] WASCA 340.