SUPREME COURT OF QUEENSLAND

CITATION:	*R v McQuire* [2003] QCA 523
PARTIES:	**R** **v** **McQUIRE, Kevin Andrew** (applicant)
FILE NO/S:	CA No 256 of 2003 DC No 9 of 1997
DIVISION:	Court of Appeal
PROCEEDING:	Application for Reopening (criminal)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	28 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	4 November 2003
JUDGES:	McPherson and Williams JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application to extend the time within which to re-open the sentence imposed on 10 August 1999 as varied by this court on 25 February 2000 is refused**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – ORDERS FOR COMPENSATION, REPARATION, RESTITUTION, FORFEITURE AND OTHER MATTERS RELATING TO DISPOSAL OF PROPERTY – COMPENSATION – QUEENSLAND – where applicant convicted on seven counts of misappropriation of property – where ordered to pay compensation of half the total amount misappropriated – where prosecution presented information about applicant's financial position at sentencing – where this information was not directly disputed by applicant's counsel – where accountants' report put forward on appeal by applicant – whether it could be established that applicant was sentenced under a clear factual error of substance CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION – MISCELLANEOUS MATTERS – QUEENSLAND – PROCEDURE – EXTENSION OF TIME, NOTICE OF APPEAL AND ABANDONMENT – where

application for reopening filed out of time – whether any satisfactory explanation for delay – whether extension of time should be granted

Penalties and Sentences Act 1992 (Qld), s 188

Crampton v The Queen (2000) 206 CLR 161, referred to
Hancock v Prison Commissioners [1960] 1 QB 117, referred to
R v Burton [2002] QCA 114; CA Nos 304, 306 and 348 of 2001, 22 March 2002, cited
R v Davis (1999) 109 A Crim R 314; [1999] QCA 486; CA No 267 of 1999, 24 November 1999, cited
R v Mackenzie [2002] 1 Qd R 410; [2000] QCA 324; CA No 353 of 1999, 20 October 2000, cited
R v McQuire & Porter; ex parte A-G (Qld) [1999] QCA 205; CA No 70 of 1999, 8 June 1999, cited
R v McQuire & Porter (2000) 110 A Crim R 348; [2000] QCA 40; CA Nos 280 and 308 of 1999, 25 February 2000, considered
R v Morrison [1999] 1 Qd R 397; [1998] QCA 162; CA No 391 of 1997, 26 June 1998, cited
R v Rasmussen; ex parte A-G (Qld) [2002] 1 Qd R 299; [2000] QCA 91; CA No 288 of 1999, 24 March 2000, followed
R v Sheehy [2003] QCA 420; CA No 381 of 2002, 26 September 2003, followed

COUNSEL: A J Kimmins for the applicant
M J Copley for the respondent

SOLICITORS: Jacobson Mahony for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** The facts relevant to this application are set out in the reasons for judgment, with which I agree, of Williams JA. I intend to deal here with another matter raised by the Crown in opposition to the application to re-open the sentence imposed on the applicant.

[2] The sentence in question was originally imposed by Hanger DCJ in the District Court at Southport on 10 August 1999. The application to re-open it is made under s 188(1)(c) of the *Penalties and Sentences Act 1992*. It provides so far as material that:

> "(1) If a court has in, or in connection with, a criminal proceeding, including a proceeding on appeal –
>
> (a) …
>
> (b) …
>
> (c) imposed a sentence decided on a clear factual error of substance;
>
> the court, whether or not differently constituted, may reopen the proceeding."

By virtue of s 188(5)(b) of the Act an application for re-opening of the present kind must be made (i) within 28 days after the day on which the sentence was imposed; or (ii) within any further time allowed by the court on application at any time. Because of the length of time that has elapsed since being sentenced, the applicant is in this instance obliged to rely on the second of these two alternatives.

[3] One response of the Crown is to submit that the applicant has made his application to the wrong court. Instead of applying to the District Court to re-open the sentence he has applied to the Court of Appeal, which, it is argued, is not the court that, in terms of s 188(1)(c), imposed the sentence. This in turn has raised the question of whether it was the District Court or the Court of Appeal that imposed the sentence now sought to be re-opened.

[4] As appears from the reasons of Williams JA, the sentence currently being served by the applicant was first imposed by an order of Hanger DCJ on 10 August 1999. It was a sentence that the applicant serve a term of imprisonment of seven years. His Honour also made an order under s 35(1)(b) of the Act that the applicant pay compensation of $322,500 or half of the total amount misappropriated, to be paid to the Registrar of the District Court at Southport for payment out to the persons entitled thereto. He further ordered that half of that sum, namely $161,250 be paid within six months; in default, that the applicant be imprisoned for a further period of three months; and the balance on or before the date when the applicant was eligible for parole; that is to say, three and a half years from 10 August 1999, or 10 February 2003. Again, it was ordered that, in default of payment, the applicant be imprisoned for a further period, in this instance of nine months, to be served cumulatively. At the request of Mr Byrne, counsel for the Crown at the sentence hearing, Hanger DCJ also made an order to the effect that each of the complainants should receive 50 per cent of his or her claim.

[5] Following that sentence, the applicant on 16 August 1999 appealed to the Court of Appeal against his conviction, and also sought leave to appeal (CA 280 of 1999) against the sentence imposed on him. Judgment of the Court of Appeal was delivered on 25 February 2000 dismissing that appeal or application (as it was) for extension of time within which to appeal. As regards sentence, the Court allowed the application and appeal against sentence by extending the time within which the first order for compensation was to be complied with, and adding a recommendation for parole after three years. As to that, the formal order of the Court of Appeal dated 25 February 2000, as passed and entered, is in the following terms:

> "3. Application for leave to appeal against sentence granted. Appeal against sentence allowed to the extent of:
>
> (a) Substituting for 10 February 2000, the date by which the sum of $161,250 was to be paid by way of compensation, 10 April 2000; and
>
> (b) Adding a recommendation that the applicant/appellant McQuire be released on parole after serving three years of the sentence of imprisonment."

[6] From this it can be seen that the Court of Appeal did not set aside the sentence imposed in the District Court, but simply varied it in the two respects stated in paras (a) and (b) of cl. 3 of the order dated 25 February 2000. Mr Kimmins nevertheless submitted on the hearing of this application that the effect of the order made in the

Court of Appeal was that the sentence imposed in the District Court on 10 August 1999 was discharged and replaced by a new sentence imposed by and in the Court of Appeal. It therefore was or became, so he urged, the court which "has imposed a sentence" within the meaning of s 188(1)(c) of the Act, and was invested with power under that provision to re-open the proceeding.

[7] The contention to that effect is opposed to what was said by Mackenzie J in *R v Rasmussen, ex p Attorney-General* [2002] 1 Qd R 299, 306, and by McMurdo P in *R v Burton* [2002] QCA 114, at p 4. It is, however, submitted for the applicant that in *R v Rasmussen*, the Court was concerned with the case of a sentence imposed in this Court on an appeal by the Attorney-General under s 669A(1) of the Code, and that it specifically authorises the Court of Appeal to "vary" the sentence below. In contrast, s 668E(3) of the Code, 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."

In speaking of the corresponding provision in s 4(3) of the English *Criminal Appeals Act* 1907, on which s 668E(3) was modelled, Winn J in *Hancock v Prison Commissioners* [1960] 1 QB 117, 125, said that "quash" meant "to make that earlier sentence null and void and of no effect for the future from that point of time onwards, but not so as to render it null and void ab initio, namely, as from the date when it was passed." That, says Mr Kimmins for the applicant, represents authority for the proposition that when on appeal this Court under s 668E(3) substitutes one sentence for another, the sentence imposed in the court below is rendered void as to the future and replaced by that other sentence substituted by the Court of Appeal.

[8] There are, however, some practical difficulties with such a conclusion, with which the applicant's submission does not seek to grapple. One is that the order made by this Court on 25 February 2000 does not purport to substitute but merely to ingraft two subparagraphs on to the existing sentencing order made in the District Court. If, as the applicant's submission appeared to suggest, the Court of Appeal had no power to vary the sentence in that way, it would logically follow that the original sentence imposed by the District Court on 10 August 1999 remains extant in its original form unaffected by anything sought to be achieved by the variation order made by this Court in disposing of the appeal on 25 February 2000. Such an outcome might not be relished by the applicant, who would then still be confronted by the unqualified full seven year sentence imposed at first instance in the District Court. The only alternative would be to try to interpret the Court of Appeal order as having quashed the original sentence, but then "substituted" it as a new sentence with the alterations in paras (a) and (b) of cl 3 of the order of 25 February 2000. That is, however, not what that order itself purports to do.

[9] The practice of simply varying sentences without quashing them and substituting new sentences is one that is frequently adopted in the Court. It has been followed in England ever since the Court of Appeal was first established there in 1908. More often than not a sentence of imprisonment has been varied by reducing it in duration without going through the process of formally setting it aside and substituting another and shorter sentence. For early examples, see *R v Brenner* (1915) 11 Cr App R 203; *R v Dickson* (1921) 16 Cr App R 47; and the host of other reported decisions

referred to in vol 14(2) *Eng & Empire Digest* (1977) Reissue §§ 7246-7250. On some other occasions the Court has "substituted" a lesser sentence but without first "quashing" the sentence imposed below. A similar pattern, or lack of it, is discernible in decisions of the Court of Criminal Appeal and of the Court of Appeal in Queensland.

[10] From this it is evident that, in disposing of sentencing appeals, one form rather than another has been adopted apparently with little discrimination. In practice, the choice of form has probably depended largely on the extent to which the original sentence called for replacement or simply a degree of adjustment. There is some advantage in not disturbing the sentence below more than is needed to give effect to the intention of the Court of Appeal in allowing the appeal. That is especially so when the assent of the accused is required for a particular course (such as the conditions of probation) and it is not proposed to alter that aspect of the sentence but only other parts of it. At one time, it was thought desirable to avoid so far as possible setting aside the whole sentence of imprisonment, as distinct from simply varying it on appeal, because a sentence imposed in the Court of Appeal was regarded as having a different starting time. In the case of sentences of imprisonment that are altered on appeal, the point has ceased to matter much, if at all, since the inclusion in the Act of ss 154(a) and 158.

[11] Irrespective of the literal meaning of the word "quash", it is evident that s 668E(3) has consistently been regarded as authorising variation by reduction of a sentence on appeal without first setting it aside and substituting another. Mackenzie J, speaking of the Attorney's appeal against sentence in *R v Rasmussen* [2002] 1 QdR 299, 306 said:

> "The record remains that of the court of trial even though in one respect it may have been varied by the Court of Appeal. In my view, for the purposes of the *Penalties and Sentences Act* the court of trial remains the court which made the order …"

This is consistent with the history of the matter, as stated in Stephen's *Constitution, Rules and Practice of the Supreme Court of New South Wales* (Sydney; 1843-5), at 48, where the learned author said:

> "Sentences are more generally passed by the Presiding Judge; and immediately after the Verdict. But, in cases where any difficulty is felt, or a doubt exists of any kind, the sentence is reserved; and, not infrequently, until the last day of the session."

Then, after discussing the practice of reserving difficult matters for the opinion of all the Judges in conference, the author goes on:

> "Where the sentence is that of the Court, in Term, it is pronounced, as in the Queen's Bench, by the Senior Puisne Judge."

In other words, it was only when the sentence was referred to the Court sitting in Banc that the sentence was imposed by the Court in what we would now consider the equivalent of an appeal. The sentence was only in those particular circumstances that of the Full Court and not of the Judge at trial.

[12] In my view, this basic structure survived the introduction of the system of criminal appeals based on the English legislation first introduced in Queensland into the *Criminal Code* in 1913. It is only when the sentence is first imposed by the Court of Appeal that it can be said to be the court that in terms of s 188(1)(c) imposes the

sentence. When, as in this case, the Court of Appeal merely varies the sentence imposed below, it is the court below which imposed the sentence that is authorised to reopen the proceeding under that provision.

[13] The result cannot be regarded as entirely satisfactory, and so it remains whichever view of the matter is taken. It has the consequence that, for the purpose of s 188(1)(c), it is necessary to scrutinise the form of order made in the Court of Appeal to ascertain whether the sentence imposed below has simply been varied, or has been set aside and replaced by another sentence imposed in the Court of Appeal. Because on occasions when a sentence is simply varied on appeal, it will usually be the court that originally imposed it which "decided [it] on a clear factual error of substance", it will in most cases also be the appropriate court to which an application to reopen the sentence should be directed.

[14] In the present case, I am satisfied that the order of the Court of Appeal dated 25 February 2000 did no more than vary the sentence imposed in the District Court on 10 August 1999, doing so in the two respects referred to in para 3 of that order without quashing or setting aside the sentence as a whole. It follows that this application to reopen that sentence should have been made to the District Court and not to this Court. Even if I had arrived at a different view of the interpretation of s 188(1)(c), I would not have thought it practicable or desirable for the Court of Appeal to determine whether the sentence imposed on the applicant in this instance had been "decided on a clear factual error of substance". The error, if any, took place in the District Court and the application should more appropriately have been directed to and determined by that court.

[15] In those circumstances, the proper course would, in my opinion, have been for this Court to exercise the powers conferred by s 671B of the *Criminal Code* on the Supreme Court of remitting this application to the District Court under s 68(2)(b) of the *Supreme Court of Queensland Act* 1991. By s 668(1) of the Code, the "Court" in s 671B means the Court of Appeal. Because, however, I am persuaded by what Williams JA has written that the applicant has no prospect of succeeding in the application in any event, I would refuse the application to extend the time within which to apply to reopen the sentence imposed on 10 August 1999 as varied by this Court on 25 February 2000.

[16] **WILLIAMS JA:** The applicant applies for the reopening of the sentence imposed on him on the ground of a clear factual error of substance; s 188(1)(c) of the *Penalties and Sentences Act* 1992. The application is out of time and in consequence an extension of time for making the application is sought; s 188(5).

[17] In the circumstances it is necessary to set out at some length the history of this matter which has become rather complicated.

[18] On 16 February 1999 the applicant pleaded guilty to seven counts of misappropriation of property; the offences occurred in 1990 and 1991, and the total value of the property in question was $685,000. He was indicted jointly with one Porter, but that is largely irrelevant for present purposes.

[19] Apparently the applicant had initially been indicted on at least one other similar offence which had gone to trial and resulted in a not guilty verdict. After that the seven counts in question were listed for trial. At that stage Mr Hardcastle was briefed on behalf of the Director of Public Prosecutions and Mr A J Kimmins,

instructed by McLaughlins, on behalf of the applicant. There were negotiations of a plea bargaining nature between counsel, and ultimately it was agreed that if the applicant pleaded guilty, and provided evidence against his co-accused, the prosecution would ask that the sentence be wholly suspended and not appeal it. That arrangement was, so it was contended, approved by the office of the Director. Thus when the matter came before Hall DCJ in the District Court at Southport on 16 February 1999 the applicant pleaded guilty, provided information against Porter on a hearing pursuant to s 13A of the *Penalties and Sentences Act* 1992, and counsel for the prosecution submitted that the sentence of imprisonment to be imposed should be wholly suspended. In the light of all that was put to him (including that Porter and not the applicant was the "moving spirit") Hall DCJ ordered that the applicant be imprisoned for five years, but wholly suspended that sentence. The Attorney-General considered that the sentence was manifestly inadequate and lodged an appeal which was heard on 14 May 1999. The judgment of the court (Pincus JA, Davies JA, and Chesterman J) was delivered on 8 June 1999; [1999] QCA 205. In its reasons the court concluded there was nothing to prevent the Attorney appealing, observed that there was "substance" in the submission on behalf of the Attorney that the sentences should have been in the range of seven to eight years, and ultimately decided to set aside the sentences and remit the matter to another District Court judge for re-sentencing.

[20] The applicant then changed solicitors; on 10 June 1999 he engaged Witheriff Nyst to act for him on the re-sentence. The matter was listed for hearing on 9 August 1999. On the morning of that day the applicant had a conference with his new counsel, Mr Cuthbert. It was apparently decided that applications should be made to the court (Hanger DCJ) for a stay of the proceedings, or alternatively for leave to withdraw the plea of guilty on the basis that the applicant had been induced to plead guilty by the representation of the Director of Public Prosecutions that it would not appeal against a wholly suspended sentence. Mr Byrne QC appeared for the Director and successfully argued that the stay should be refused and that the applicant should not be permitted to withdraw his pleas of guilty. Thereafter the re-sentence proceeded. The prosecution provided material, including financial documents to Mr Cuthbert, and a short adjournment was granted to enable that material to be considered by Mr Cuthbert and the applicant. In an affidavit filed in support of this application the applicant states that he advised Mr Cuthbert that details in those documents in regard to his financial position were incorrect.

[21] Following that adjournment an exchange took place between Mr Cuthbert and Hanger DCJ which included the following statements by counsel:

> "Your Honour, I have been supplied by my learned friend Mr Byrne with the resume about which he spoke and have had time to briefly consider it, without doing so in great detail.
>
> However, Your Honour, since my client maintains his innocence of the charges and has sought before Your Honour, unsuccessfully to have those matters determined by a jury in a trial of the charges, my client feels, and I submit, that I can really play no useful part in the sentencing process in the light of the proposed future conduct of the litigation that I have outlined to Your Honour.

> I am therefore not in a position to admit any of the factual bases on which the Crown is proceeding and do not concede any of those or that factual basis.
>
> …
>
> So, Your Honour, I shall remain for the sentencing procedure but I can be of no further assistance to the Court.
>
> …
>
> Your Honour, … I do not admit or concede any of the factual matters put forward by the Crown and I dispute the same. … So, I am not admitting or conceding and am in fact disputing the basis on which the Crown and Mr Porter are proceeding and my client maintains his innocence and his desire for a trial."

[22] The prosecutor had in his possession (and I assume this was one of the documents shown to Mr Cuthbert) a report on the applicant's financial position prepared by Maree Zanatta, a Certified Practising Accountant employed by the Queensland Police Service as an Investigative Accountant.

[23] After referring to the detail of the offences Mr Byrne QC submitted that a head sentence in the order of eight years imprisonment was appropriate and asked for an order that full compensation be paid. He did indicate that the order to pay compensation could provide for payment by instalments with a default provision.

[24] At that stage Hanger DCJ asked Mr Cuthbert whether he wished to make submissions and he replied: "No, I've made my position clear". Submissions were then made on behalf of Porter. The following extracts from the reply of Mr Byrne QC are of relevance for present purposes:

> "In respect to the assertion that Porter has no funds, the Crown is unable to advance any material in respect to that. The same, however, could not be said for the prisoner, McQuire. Indeed, he is currently, on the instructions I have, living at a house which is rented in his name for which the rent is $1,560 per month. The company which was mentioned in my submissions … did have him as a director until the convictions were recorded. The shareholder is now his father with his wife being the director and the net asset position of that company, as at June '98, is positive $867,000.
>
> The income received by the McQuire Family Trust in 1999 from that company was $245,000. …
>
> The company … is also a 50 per cent … shareholder of a company called Sovereign Mortgage Corporation Pty Ltd. That company's income for the '98/99 financial year, gross, was 1.56 million and on materials for the current financial year, the prisoner and his wife received a total income of $165,336."

[25] Counsel for the applicant made no attempt to respond to those assertions by the Crown, which were in accordance with the report of Zanatta.

[26] Hanger DCJ then proceeded to sentence the applicant on 10 August 1999. He noted that money had been obtained from various members of the community with promises to invest that money securely and at a high interest rate. That money had, however, been put to "your own personal use, living what appears to have been a somewhat lavish lifestyle. None of the moneys have been repaid." His Honour went on:

> "Now, you, McQuire, through your counsel, indicated that you disputed all the facts placed before me. However, your plea of guilty to the charges, although you subsequently applied, unsuccessfully, to have your pleas withdrawn, involves an admission of all elements of the offences, and that includes the amount of money alleged in the indictment to have been misappropriated. You have not sought to adduce any evidence yourself and have obviously instructed your counsel not to address me in mitigation."

[27] His Honour then noted the plea of guilty and indicated that he had regard to that in determining the appropriate sentence, namely seven years imprisonment. He regarded the applicant and Porter as equally culpable. Relevantly he then said:

> "So far as compensation is concerned, in your case, McQuire, I propose to make an order for compensation, and that amount will be half the total amount misappropriated, … ".

[28] The order then went on to provide that half of the amount then outstanding of the amount misappropriated, namely $322,500, should be paid within six months (on 10 February 2000) and the other half on 10 February 2003. Default terms of imprisonment were imposed to be served cumulatively.

[29] Witheriff Nyst lodged an appeal on 16 August 1999. It sought to appeal the convictions, the order refusing leave to withdraw the plea, and sought leave to appeal against the sentence.

[30] Thereafter the applicant again changed his legal representation; on or about 17 November 1999 he retained the services of Mr O'Gorman of Robertson O'Gorman. The applicant's affidavit exhibits a file note from that firm of that date which records the applicant giving instructions that it was "simply wrong for the asset position to be described as $867,000." Clearly the applicant then made assertions that incorrect factual material had been placed before the sentencing judge, and the file note contains the observation: "It would appear that the issue of the compensation order with default further term of imprisonment is going to have to be addressed on the appeal against sentence. He was critical of his lawyers for not challenging the figure put up by the prosecution. …" The applicant was asked to provide his solicitors with further information; he did so by a handwritten letter dated 22 November 1999. It refers in some detail to alleged factual errors in his financial position as put to the sentencing judge. Mr Hampson QC, and Mr Hamlyn-Harris, were retained on the applicant's behalf with respect to the pending appeal. It appears from the applicant's affidavit that both counsel were involved in considering whether the alleged errors could be utilised in the course of the appeal. It appears that at some stage Mr Hampson QC advised that the material could not be used as it was not advanced by his legal team at first instance. Presumably it was recognised that the material was known to the applicant and his legal advisers at the

time of sentence and therefore could not be said to constitute "fresh evidence" which might have been admissible in proceedings in the Court of Appeal.

[31] On 7 February 2000 the appeal (together with appeals by Porter) came before the court constituted by the Chief Justice, the President, and Byrne J. There was lengthy argument with respect to the appeal against conviction and whether or not there had been a miscarriage of justice because the applicant was not allowed to withdraw his pleas of guilty. It is not necessary to consider that aspect of the appeal further. The transcript indicates that towards the end of his submissions Mr Hampson QC turned to the question of sentence and said "we have set out in our written submissions all we want to rely on". A perusal of the "written submissions" indicates that the stance taken by counsel on behalf of the applicant was that in the circumstances the prosecution was obliged to prove all the matters relied on for sentencing purposes beyond reasonable doubt. At that time the applicable law was as stated in *R v Morrison* [1999] 1 Qd R 397. The contention was that, by Mr Cuthbert stating that the applicant disputed the factual basis for sentencing being advanced by the Crown, all matters, including facts relevant to the payment of compensation, had to be proved beyond reasonable doubt.

[32] In the course of submissions by Mr Byrne QC on behalf of the Crown, Justice Byrne asked what did the Crown say "about this question of the absence of evidence to show that [McQuire] had [the capacity] to pay the restitution ordered?" The response by counsel was:

> "The material and those figures which were put up were not disputed and as was pointed out in discussion this morning whether or not he believed himself guilty of the offences there was nothing to prevent him litigating or disputing the financial circumstances of himself, his companies and his family. That was not done and if there had of been challenge then evidence may have been led."

[33] In reply Mr Hampson reiterated that if the Crown wanted an order for compensation they had to prove capacity to pay. The Chief Justice then observed that counsel only took a "blanket position" and that was to be contrasted with "a real dispute" which might put the Crown to proof. Mr Hampson concluded his submission on that point by saying: "In that order it is quite wrong, the order that was made for compensation."

[34] The judgment of the court was delivered on 25 February 2000, and is reported at (2000) 110 A Crim R 348. In his reasons the Chief Justice noted at 352 that "McQuire asserts that the level of the sentences imposed is manifestly excessive" and records that it was submitted that in the process of sentencing the learned judge failed to apply *Morrison*. After referring to the statements by Mr Cuthbert to the sentencing judge quoted above the Chief Justice said at 354 that "McQuire took a transparently tactical approach which could not succeed and was properly rejected." In his view in the circumstances *Morrison* "simply had no impact on the matter".

[35] The judgment of the Chief Justice dealt extensively with the appeal against convictions and the submission that the judge at first instance erred in not permitting a withdrawal of the pleas. Then he went on to say at 357 that the "remaining issue is whether the applicants have established their contention that the level of the sentences is manifestly excessive." At 358 his Honour said: "The issue of remorse was potentially significant in a case like this, where innocent members

of the public had been defrauded of very substantial sums of money, to their personal great detriment, and where none had been repaid." That led the Chief Justice to deal at 359 with the challenge by the applicant to "the orders for compensation on the ground that the judge could not have concluded on proper materials that he had the capacity to pay it." He went on to say:

> "Information about McQuire's financial position was presented by the prosecutor. It suggested a person with access to very substantial financial resources. It was presented in the usual way, through assertion by the prosecutor from the Bar table. Counsel for McQuire did not directly dispute it. Neither did he suggest it should be verified on oath, or by the production of documents. He did not request that witnesses be sworn, whom he could cross-examine. Counsel could have taken any of those courses without compromising the position McQuire wished to present with relation to his claimed innocence of the charges. This issue was quite subsidiary. McQuire's silence, lack of response is consistent with his acceptance of the accuracy of the information put forward, and it provided a sufficient basis for the order for the payment of compensation."

[36] In consequence the Chief Justice did not interfere with the order for compensation, other than by extending the date for the first payment to 10 April 2000 because the date specified by the sentencing judge had passed before the decision of the Court of Appeal was handed down. The others members of the court, the President and Byrne J, agreed with what the Chief Justice said in relation to compensation. They did however constitute the majority, the Chief Justice dissenting, in ordering that there be added to the head sentence of seven years imprisonment a recommendation for eligibility for parole after serving three years. The sentence was varied by the majority because, in their view, such a recommendation was required in order to give full effect to the pleas of guilty.

[37] The appellant has not made any payment by way of compensation and his applications for parole have been refused. He believes, probably justifiably, that a reason for refusal of parole has been his failure to pay compensation as ordered. That undoubtedly has enlivened the default provisions, namely three months imprisonment for failure to pay the first instalment, and nine months imprisonment to be served cumulatively for non-payment of the second.

[38] By June 2002 the applicant had been refused parole on some three occasions and said that by then he was aware of the effect of non-payment of the compensation on his imprisonment. The application pursuant to s 188 of the *Penalties and Sentences Act* was not filed until 7 August 2003. The explanation given for the failure to make application prior to that date is that the applicant was not fully aware of the impact of the failure to pay on his applications for parole.

[39] The applicant's present solicitors commissioned a report from BDO Kendalls, chartered accountants, in relation to the applicant's capacity to pay compensation as ordered. Those accountants furnished a report dated 17 September 2003. It is of some significance that basic figures therein correspond with figures found in the Zanatta report and relied on by the prosecution before the sentencing judge. The real issue, though this is in many ways an over-simplification, is the extent to which one could have regard to the fact that the applicant was, at the material time, in a

position of controlling the affairs of the companies in question. The applicant was in a position to direct payments from the trustee company to family members including himself, and other entities. Payments of wages were also made to the applicant and his wife. In addition there were significant management fees paid by one company to another within the group. Payment of such monies was again, it would appear, at the discretion of the applicant.

[40] It would appear that, depending on how distributions were made and inter-company payments directed, the applicant may, or may not, have had significant assets at his disposal to pay compensation. It is sufficient to say that before it could be established that there was "a clear factual error of substance" underlying the order for compensation made, there would need to be a careful analysis of competing accounting evidence.

[41] Section 188(1)(c) provides that if "a court has in, or in connection with, a criminal proceeding, … imposed a sentence decided on a clear factual error of substance" it may "reopen the proceeding". Subsection (5) thereof provides that for a reopening under subsection (1) the application must be made within "28 days after the day the sentence was imposed" or within "any further time the court may allow on application at any time."

[42] Generally s 188 has been considered by this court in cases such as *R v Burton* [2002] QCA 114, *R v MacKenzie* [2002] 1 Qd R 410 and *R v Davis* (1999) 109 A Crim R 314. However none of those cases deals with the sort of issues raised by this application.

[43] Following the approach normally adopted by courts when dealing with an application for an extension of time within which to bring an application, there should be a satisfactory explanation for the delay and some material indicating the prospects of success if an extension of time for making the application in question was granted.

[44] Here, as is demonstrated by the foregoing history of this matter, the applicant was aware on 10 August 1999 when the material in question was placed before the sentencing judge that he believed it to be incorrect. He advised his legal representatives of that belief, and the issue was raised, albeit in a broad sense, on the hearing of the appeal on 7 February 2000. The point was clearly taken before the court on that occasion that material before the sentencing judge did not establish that the applicant had a capacity to pay compensation. The contentions now advanced, and based on the report of BDO Kendalls, are no different from those raised by the applicant with his solicitors, Robertson O'Gorman, prior to the hearing of the appeal on 7 February 2000. Throughout the whole of the proceedings the applicant has been represented by counsel experienced in the criminal law. As Hayne J said in *Crampton v The Queen* (2000) 206 CLR 161 at 217; "Ordinarily, an accused must also bear the consequences of a decision not to take a point at trial." To similar effect is a passage in my judgment in *R v Sheehy* [2003] QCA 420 with which Muir and Holmes JJ agreed; there I said at para [34]:

> "Here the appellant had full opportunity of raising issues relevant to the voluntariness of the confessional statements on the s 592A hearing before Philippides J. He had the right to give evidence; there was an obligation on him to raise at that stage all relevant material enabling the court to make a proper determination on the issue of

> voluntariness. This is not a case where that question was not properly tested. He cannot complain if, for tactical reasons, he then withheld relevant material from the court."

[45] In this case, after conference between counsel and the applicant, it was agreed that a certain stance should be taken with respect to the sentencing procedure. The applicant raised on appeal from the sentence imposed issues in relation to the sufficiency of the evidence on which the sentencing judge based the order the compensation be paid. All relevant information was in the hands of the applicant's legal representatives both at the sentencing stage and at the time of the hearing of that appeal. More than three years has elapsed since the hearing of that appeal, and no new material has emerged; the report from BDO Kendalls at most lends support to the information given by the applicant to his legal representatives in 1999 and 2000. No sufficient basis for extending time has been established.

[46] The only factual error asserted is that the applicant did not have the capacity to pay compensation when the order was based on the fact that he did. The applicant was aware at all times of the matters now advanced in support of the contention that the sentence was based on a clear factual error of substance.

[47] In the circumstances it has not been established that this is an appropriate case in which to grant an extension of time to reopen the sentence, in particular the orders for payment of compensation, made on 10 August 1999.

[48] I have had the advantage of reading what McPherson JA has written on the submission made by the Crown that the appropriate court to deal with an application for re-opening of the sentence pursuant to s 188(1)(c) is the District Court. I agree generally with all that he has said with respect to that matter, and his conclusion that in the circumstances of this case the District Court, and not the Court of Appeal, was the appropriate court. I would, however, observe that where the alleged "clear factual error of substance" related only to a variation made to the original sentence by the Court of Appeal, then the Court of Appeal may be the appropriate court. This is not such a case.

[49] The application to extend the time within which to re-open the sentence imposed on 10 August 1999 as varied by this court on 25 February 2000 should be refused.

[50] **MULLINS J:** I agree with the reasons for judgment of Williams JA. I also agree with the reasons of McPherson JA that the appropriate court to which the application to re-open should have been made in this matter was the District Court. I therefore agree that the application to extend the time within which to apply to re-open the sentence should be refused.