SUPREME COURT OF QUEENSLAND

CITATION:	*R v Tabe* [2004] QCA 17
PARTIES:	**R** **v** **TABE, Graham Victor** (applicant)
FILE NO/S:	CA No 376 of 2003 SC No 35 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	10 February 2004
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2004
JUDGES:	McMurdo P and McPherson and Williams JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for extension of time refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION – MISCELLANEOUS MATTERS – QUEENSLAND – PROCEDURE – EXTENSION OF TIME, NOTICE OF APPEAL AND ABANDONMENT – where applicant convicted of possession of a dangerous drug, methylamphetamine, with circumstance of aggravation – where sentenced to two years imprisonment – where applicant alleged new evidence established tape recorded interview had been tampered with – whether extension of time to appeal against sentence should be granted CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERAL PRINCIPLES – where applicant alleged new evidence tainted evidence relied on by learned sentencing judge – whether original allegedly tainted evidence had been relied on by learned sentencing judge – whether sentence should be interfered with on that basis CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT –

FACTORS TO BE TAKEN INTO ACCOUNT – PARITY – CO-OFFENDERS – DISCRIMINATION BETWEEN CO-OFFENDERS – where applicant sentenced to 2 years imprisonment and co-offender to 12 month Intensive Correction Order – where co-offender pleaded guilty and applicant did not – where applicant was older than co-offender and had more serious criminal history – whether sentence should be varied for disparity with co-offender

COUNSEL: The applicant appeared on his own behalf
M J Copley for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the Respondent

THE PRESIDENT: On 19 November 2001 the applicant was convicted after a trial of possession of a dangerous drug, methylamphetamine, with a circumstance of aggravation, namely a quantity more than the prescribed amount of a schedule one drug, 13.845 grams, and was sentenced to two years imprisonment.

He appealed against his conviction but not his sentence. That appeal was dismissed on 22 August 2003: see *R v Tabe* [2003] QCA 356, CA No 132 of 2003, 18 July 2003. He now applies for an extension of time to apply for leave to appeal against sentence. He claims he thought he was initially also applying for leave to appeal against sentence when he appealed against his conviction.

The applicant explains the lateness of this application because he has only comparatively recently been able to fund the forensic testing of the disputed tape and he received, on 26 November 2003, a statement about the tape from Associate Professor Brian Lovell, Research Director of the Intelligent

Real Time Imaging and Sensing Group and the Director of the Electrical Engineering Program with the School of Information Technology and Electrical Engineering, University of Queensland.

The application for an extension of time was received by the Registry on 28 January 2004, some two months after he received Dr Lovell's statement and well out of time.

He contends that new evidence establishes that a tape-recorded interview tendered during the sentence proceeding was likely to have been tampered with; that there was a lack of parity between the sentence imposed on him and that of his co-accused and that, in any case, his sentence was manifestly excessive.

As to his first point, the applicant contends that long after the taped interview tendered at sentence was recorded he was invited by police to speculate as to what had been contained in the package which was collected and in response he said, "One of two things...eccy tablets". He says he did not use that phrase during the police interview and yet it appears on the tape.

Dr Lovell notes there are anomalies in the tape which could be interpreted as evidence of tampering. The interview is recorded as starting at 11.31 a.m. and as concluding at 11.55 am but runs for 18 minutes, not 24 minutes, so that six minutes of the recording is missing. There are some clicks before and after that phrase in the tape. These clicks are consistent with the

editing of the tape and the addition of the phrase after the interview. Dr Lovell concludes that the evidence strongly suggests some form of interference.

Although the police officers involved in taping the questioning of the applicant may have plausible answers to the matters raised by Dr Lovell, Dr Lovell's statement is, on its face, concerning. It does not, however, mean the applicant's application for an extension of time will be successful if the taped interview had no effect on the sentence.

The tape was tendered at sentence and, I stress, not at the trial, without objection from the applicant's counsel. The transcript of the tape-recording the subject of this application is difficult to comprehend because many of the portions were recorded in the transcript as indistinct.

The Prosecutor at sentence said the tape was not played during the trial partly because it is very hard to understand. He said:

> "From what I can read of it, I can't see any reference to the version that was really advanced at the trial which is the existence of Mr Tabler. He seems to have been talking solely about his dealing with Ms Briggs in the interview with police so that your Honour is left - it's up to your Honour to form your own view of the facts - but your Honour is left somewhat in the dark as to what really happened here. Your Honour might think that on the evidence of the defence case that Tabler does exist, which means it might be arguable by my learned friend, for example, that Tabe himself really was an intermediary but one who didn't have an innocent association."

As far as I can see, that is the only reference in the sentencing submissions or in the sentencing remarks to the transcript of the tape-recording which was tendered at sentence. That transcript records Constable Ward as asking the applicant, "What do you believe is in the parcel?" with the answer handwritten, "Don't know". This is also consistent with an earlier recorded question and answer.

Shortly afterwards Constable Ward is recorded as asking, "What do you believe is inside it? - - Indistinct" and the answer, "One of two things. Either some eccy tablets"; the transcript then records that a portion of the tape-recording is missing.

As the respondent points out this answer is, in any case, equivocal and equally consistent with the applicant's knowledge at the time of the question with the benefit of hindsight. The appellant's counsel at sentence made no reference to the tape but asked the Judge to sentence on the basis that the drug was not a product destined for the applicant; it was not his but he was used by the person Tabler.

The learned sentencing Judge set out the factual basis on which she was sentencing the applicant in her sentencing remarks. He drove his co-offender Briggs to the Bundall Mail Centre on 19 November 2001 to collect a package which had previously, but by then no longer, contained the illegal drugs. Briggs collected

the package and was apprehended by police when she returned to the car in which the applicant was waiting.

In sentencing this applicant her Honour noted that the jury rejected his defence of honest and reasonable but mistaken belief. His involvement in the matter was not just on the day on which he was deemed to be in possession of the drug but began on 16 November 2001 when he attended the Bundall Post Office and attempted to pick up a parcel addressed to Mr Tabler at 1 Markeri Street, Mermaid Waters. The applicant did not reside at that address.

Her Honour accepted there was a person named Mr Tabler or, at least, another person who involved the applicant in collecting the package with drugs in it. Her Honour found that someone of the applicant's age and history could not have been so naïve as to collect such a parcel in these circumstances without knowing that there was something unlawful in it.

Her Honour noted that it did not matter whether or not the applicant knew the parcel contained methylamphetamine but the jury verdict means that they rejected his claim to an honest and reasonable but mistaken belief that the package did not contain methylamphetamine. Because he was involved both on 16 and 19 November and used Ms Briggs as an intermediary, his level of involvement was greater than hers.

Her Honour noted that the applicant allowed himself to become involved in collecting a package in circumstances where he had some idea of what was in the package and showed some persistence and determination in collecting that package.

Her Honour's sentencing remarks make it plain that the tendered tape-recording had no influence on the learned primary Judge in determining the appropriate sentence. So his point that he raises as to the tape is of no assistance to him.

As to the remaining grounds, his co-offender Briggs pleaded guilty. She was 34 years of age. She had some minor convictions for property offences for which she was fined in the Southport Magistrate's Court. Her role, as has been noted, was to pick up the parcel from the post office on behalf of someone she met in the pub and she had the applicant give her a lift there in his car. She was to meet the principal at the pub at about lunchtime that day. She thought she was picking up a package of cannabis. The prosecution submitted a fully suspended sentence was within range.

The applicant, on the other hand, was 60 years old at sentence and had a much more extensive criminal history than Ms Briggs, commencing in 1971 with receiving for which he was placed on two years' probation. He had a number of convictions for property offences during 1970s and in 1979 was convicted of cultivating a prohibited plant for which he was sentenced to seven years

imprisonment. In 1980 he was sentenced to an effective term of two years imprisonment cumulative on that sentence for offering to bribe a police officer. In 1994 he was convicted of manufacturing a therapeutic drug, namely, Tabe Poulticare, without a licence and was fined. Finally, he was found in possession of property suspected of being stolen or unlawfully obtained in 1999 and was fined $40. His counsel, at sentence, submitted that a sentence of two years imprisonment was appropriate in the circumstances. The maximum penalty for this offence was 25 years imprisonment.

The sentence imposed on Briggs reflected her comparative youth and family responsibilities, her lesser involvement in the offence, her lesser criminal history and, importantly, her plea of guilty. The sentence imposed on this applicant was not disproportional to that imposed on Ms Briggs in all the circumstances, namely his age, his prior criminal history, the absence of any cooperation with the administration of justice and his greater involvement in the commission of the offence.

As his application for leave to appeal against sentence would almost certainly be unsuccessful, even were he to establish that the taped interview had been tampered with, there is no good purpose in granting the application for the substantial extension of time which the applicant now seeks. I would refuse the application for the extension of time.

McPHERSON JA: I agree.

WILLIAMS JA: I agree.

THE PRESIDENT: That is the order of the Court.
