SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gardiner* [2004] QCA 117
PARTIES:	**R** **v** **GARDINER, Wayne Robert** (applicant)
FILE NO/S:	CA No 1 of 2004 DC No 802 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	21 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	21 April 2004
JUDGES:	McMurdo P, McPherson and Williams JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – CONCURRENT, CUMULATIVE AND ADDITIONAL SENTENCES, SENTENCES ON ESCAPE AND COMMENCEMENT OF SENTENCE – DATE OF COMMENCEMENT – where applicant seeking leave to appeal against decision of learned sentencing judge not to reopen his sentence proceedings under s 188 of the *Penalties and Sentences Act* – where applicant on parole when committed further offence for which this sentence was imposed – where learned sentencing judge given incorrect date for completion of balance of sentence for first offence – whether sentence imposed based on a clear factual error of substance – whether any wrongful exercise of discretion in the refusal to reopen *Penalties and Sentences Act* 1992 (Qld), s 188
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 (Qld) for the respondent

THE PRESIDENT: The applicant was convicted on 29 July 1998 of raping a 13 year old girl on 15 October 1997. He was sentenced to six years imprisonment cumulative upon any other sentences that he was liable to serve. He had been sentenced in 1995 to three years imprisonment for dangerous driving causing death and was on parole when he committed the offence of rape. Upon his conviction of rape his parole was revoked and he was required to serve the balance of that sentence. He appealed to this Court against his conviction but that appeal was dismissed. See *R v Gardiner* [1998] QCA 353; CA No 266 of 1998, 6 November 1998.

It is common ground that at his sentence for rape the Judge was wrongly informed that the applicant would complete serving his original sentence on 20 October 1998. The learned sentencing Judge stated at page 5 of her sentencing reasons:

> "I sentence you on the basis, as both counsels have advised me, that that will mean the sentence imposed in 1995 will not be fulfilled until 19 or 20 October 1998."

Later in her sentencing reasons at page 6, she added:

> "You must be imprisoned for this crime, but I am concerned your mother is obviously not young and the children will need you, and that is why I have decided, in view of the cumulative sentence that I must impose, that a sentence of six years at the very lowest end of the range, which is appropriate, is what is called for and I impose that on the understanding that the first sentence will expire in October 1998, three years after it was imposed and secondly, that you will be eligible to apply for parole after serving half your sentence.

> If I am wrong in either of those two assumptions, at any time while you are serving your sentence, your legal advisers may apply to me and I will consider it again to see if it needs correction, but it seems to me that is the correct position."

As I have stated, in fact, the original sentence imposed in 1995 did not finish until 29 July 1999. The applicant applied in late 2003 under s 188 *Penalties and Sentences Act* 1992 (Qld) ("the Act") to reopen his sentence proceedings claiming the sentence was decided on a clear factual error of substance. He asked the Court to then resentence him to take into account that factual error. See s 188(3(b)(iii) of the Act.

The applicant became aware of this error on 1 September 1998 but made no application until late 2003. It seems that this was when he realised that the effect of amendments to the *Corrective Services Act* 1988 (Qld) affected his eligibility for remission because he committed a subsequent offence whilst on parole. It is well established that such changes to the Corrective Services regime do not invoke s 188 of the Act and are matters for the community correctional authorities, not the courts.

The learned primary Judge refused to reopen the sentence under s 188 of the Act and the applicant now applies for leave to appeal from that decision. The relevant parts of s 188 provide:

> "(1) If a Court has in, or in connection with, a criminal proceeding, including a proceeding on appeal –
> . . .

(c) imposed a sentence decided on a clear factual error of substance;
the Court, whether or not differently constituted, may reopen the proceeding –
...

(3) If a Court reopens a proceeding, it –
...

(b) may resentence the offender –
...

(iii) for a reopening under subsection (1)(c) - to a sentence that takes into account the factual error;
. . ."

Her Honour noted that in imposing the original sentence she did so on the understanding that the first sentence would expire in October 1998, three years after it was imposed, and that the applicant would be eligible to apply for parole after serving half his sentence. Her Honour imposed the sentence of six years cumulative imprisonment, which she saw at the very lowest end of the appropriate sentencing range. Her Honour noted that in determining the appropriate sentence she was particularly affected by the eligibility for parole date. Two factual errors were now known to her: first, the original sentence expired nine months later than she understood at the time she imposed sentence; second, the applicant was eligible to apply for parole three months earlier than her Honour had been told when she imposed the original sentence. Her Honour concluded that the cumulative sentence she imposed was not decided on a clear factual error of substance operating against the applicant's interests. She was concerned with the date of overall eligibility for parole rather than when the six year cumulative sentence she was imposing formally

commenced and she imposed in any case the lowest possible sentence she was able to impose.

A clear factual error was plainly placed before the sentencing Court when the learned sentencing Judge was told the original sentence would expire nine months earlier than it did. Her Honour's reasons for refusing to reopen the sentence make it clear that she did not determine the six year cumulative sentence on the basis of when the applicant would commence serving that sentence. She determined it by reference to when he would become eligible for parole, a date three months earlier than she was originally informed and, in any case, imposed the most lenient sentence she lawfully could.

The learned primary Judge did not impose a sentence based on a clear factual error of substance. The errors were simply not decisive in the imposition of the sentence and s 188 of the Act was not invoked. Even if the sentence was decided on a clear factual error, the appellant has not established that there has been any wrongful exercise of the refusal of the discretion to reopen given by s 188(1) of the Act.

I would refuse the application for leave to appeal.

McPHERSON JA: I agree.

WILLIAMS JA: I agree.

THE PRESIDENT: That is the order of the Court.

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