

SUPREME COURT OF QUEENSLAND

CITATION: *Popa v Austin* [2004] QCA 227

PARTIES: **POPA, Costica**
(appellant/applicant)
v
AUSTIN, Paul
(respondent/respondent)

FILE NO/S: CA No 9 of 2004
DC No 189 of 2003

DIVISION: Court of Appeal

PROCEEDING: Application for Extension of Time s 118 DCA (Criminal)

ORIGINATING COURT: District Court at Cairns

DELIVERED EX TEMPORE ON: 1 July 2004

DELIVERED AT: Brisbane

HEARING DATE: 1 July 2004

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 seek leave to appeal dismissed**

CATCHWORDS: CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - OTHER CASES - where the applicant was convicted in the Magistrates Court of possessing property that may reasonably be suspected of being tainted property - where appeal to the District Court was dismissed - where applicant seeks leave to appeal to this Court on the grounds that the police could not have formed a reasonable suspicion that the money was tainted at the time of arrest - where the applicant also submits that he has already been charged with an offence which relies on the same subject matter as that in the current offence - whether application for extension of time and leave to appeal should be granted

Criminal Code (Qld), s 16

McGee v McKeever; ex parte McGee [1995] 1 QdR 623

R v Hull (No 2) [1902] St R Qd 53, cited

COUNSEL: Applicant appeared on his own behalf
S G Bail for respondent

SOLICITORS: Applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: On 19 February 2002, the applicant was convicted after a trial in the Supreme Court at Cairns of trafficking in heroin between 1 April 1999 and 20 January 2000. He was sentenced to 12 years imprisonment. On 28 March 2003, he was convicted after a trial in the Magistrates Court at Cairns of possessing property, namely \$8,520 in Australian currency, that may reasonably be suspected of being tainted property. He was sentenced to six months imprisonment to be served concurrently with the sentence he was then serving. The learned magistrate also ordered that the money the subject of the charge be forfeited to the Crown.

On 26 or possibly 27 November 2003 the appellant's appeal against his conviction and sentence for possession of suspected tainted property was dismissed by the District Court.

In order to appeal against that decision of the District Court the applicant requires leave of this Court. He seeks leave to appeal against that decision both as to conviction and sentence. His application to do so is out of time but he contends that he filed an application, though not in the correct form, within time. His application in the correct form was approximately two and a half weeks out of time so he

therefore also needs an extension of time within which to seek leave to appeal.

It is convenient to turn at the outset, to the applicant's prospects of success in an appeal, should leave be granted, because if he has no reasonable prospects of success leave should be refused.

The applicant who prepared his own outline of argument and argued his own appeal stated what were, in effect, his proposed grounds of appeal as follows:

1. "The principal evidence that supports the charge was the subject matter in successfully obtaining a conviction on a related charge of trafficking in a dangerous drug in the Cairns Supreme Court;
2. The failure of the Department of Prosecutions to deal with this matter in the Supreme Court;
3. At the time of my arrest police could not have formed a reasonable suspicion that the money was tainted in any form."

The principal point argued by the applicant was that at the time he was charged with this offence he had already been convicted of a charge "which relies on the same subject matter as the current charge". This appears to be an attempt to rely on section 16 of the *Criminal Code* which is relevantly in the following terms:

"A person cannot be twice punished either under the provisions of this Code or under the provisions of any other law for the same act or omission..."

However, possessing property reasonably suspected of being tainted property is not the same punishable act or omission as trafficking in heroin.

It is true that possession of the sum of \$8,520 was relied on by the Crown as evidence to support the Crown case that the applicant was trafficking in heroin. But to rely simply on that, as the applicant appears to, is to fail to distinguish "between the acts which were the elements of the offence and the particular evidence which was adduced to prove the acts", R v Hull (No 2) [1902] StRQd 53 at 58.

There is therefore no substance in this ground of appeal which had been considered and dismissed by the learned District Court judge.

The second apparent ground, that the Director of Prosecutions failed to deal with this matter in the Supreme Court, is without substance and nothing further need be said about it.

As to the third ground, that at the time of the applicant's arrest the police could not have formed a reasonable suspicion that the money was tainted property, evidence was given by Detective Sergeant Carroll who was the primary investigator in a drug detection operation. About \$6,000 was found in the glove box of Mr Popa's vehicle and the remainder on his person. It was in cash denominations of mostly \$100, \$50 and \$20.

The applicant gave an unsatisfactory explanation for the possession of money. He said that the money in the glove box was left there by a friend who had had the vehicle and who had said he would pick up the money another time. He said that the money on his person was for plastering work which he had done. He named the persons whom he said had left the money in his glove box and for whom he had done plastering work.

Checks were made to ascertain the whereabouts of such persons. As to the first of them - Mark Denescu - there was no record of his existence either in immigration records or on the police databases. As to the second - Nikolai Stoyka - his last known address was at Bowen at some railway gang sheds and he was unable to be located.

The applicant was receiving Centrelink benefits and appeared to have no other source of income. He did not appear to have worked as a plasterer since 1995 or 1996. He had only one bank account which showed payments from Centrelink into the account and payments out of it. There was no other substantial money going into or out of that account.

It is for the court at the time of the trial to determine objectively on the basis of facts proved at that time, whether it is satisfied beyond reasonable doubt that the property may reasonably be suspected of being tainted property, that is, property derived as a result of the commission of a crime for the purpose of section 65 of the *Crimes (Confiscation) Act* 1989, (see now section 252 of the *Criminal Proceeds*

Confiscation Act 2002): *McGee v. McKiever; ex parte McGee*
[1995] 1 QdR 623.

It seems to me plain on the facts that I have related that the court was entitled to be so satisfied. There is therefore no substance in this ground.

For the reasons which I have given the application for special leave against the decision of the District Court must be dismissed.

WILLIAMS JA: I agree.

JERRARD JA: I agree.

DAVIES JA: The order is as I have indicated.
