

SUPREME COURT OF QUEENSLAND

CITATION: *Sirriss v Bowman* [2012] QCA 108

PARTIES: **SHERILEE VIOLA SIRRISS**
(applicant)
v
BERYL ANNE JOSEPHINE BOWMAN
(respondent)

FILE NO/S: Appeal No 9385 of 2011
DC No 318 of 2009

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: District Court at Townsville

DELIVERED ON: 20 April 2012

DELIVERED AT: Brisbane

HEARING DATE: 28 March 2012

JUDGE: Chesterman JA, Boddice and Dalton JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Grant the applicant leave to appeal.**
2. Allow the appeal and set aside the order dismissing the applicant's application.
3. Order the applicant be paid the sum of \$22,500 by way of criminal compensation.

CATCHWORDS: CRIMINAL LAW – PROCEDURE – CRIMINAL INJURIES COMPENSATION – QUEENSLAND – EVIDENCE AND PROCEDURE – where the applicant applied for criminal compensation pursuant to s 663B of the *Criminal Code* – where pursuant to s 10 of the *Limitation of Actions Act 1974* (Qld) the limitation period applicable to that application was six years from the time the cause of action arose – where previous authority held the cause of action arose upon conviction – where the criminal compensation application was dismissed due to delay notwithstanding the limitation period had not expired – whether the delay was sufficient to deprive the applicant of a claim

LIMITATION OF ACTIONS – GENERAL MATTERS – STATUTES OF LIMITATION GENERALLY – OTHER MATTERS – whether the delay was sufficient to deprive the applicant of a claim

LIMITATION OF ACTIONS – LIMITATION OF PARTICULAR ACTIONS – ACTIONS TO RECOVER MONEY RECOVERABLE BY VIRTUE OF AN ENACTMENT – where an applicant for criminal compensation had an entitlement pursuant to s 663B of the *Criminal Code* to make application upon the respondent’s conviction – where ‘convicted’ is not defined in the *Criminal Code* – whether the fact the sentencing judge ordered no conviction recorded deprived the respondent of that entitlement

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – GENERALLY – where an applicant for criminal compensation had an entitlement pursuant to s 663B of the *Criminal Code* to make application upon the respondent’s conviction – where ‘convicted’ is not defined in the *Criminal Code* – whether the fact the sentencing judge ordered no conviction recorded deprived the respondent of that entitlement

Criminal Code 1899 (Qld), s 663B

District Court of Queensland Act 1967 (Qld), s 118

Limitation of Actions Act 1974 (Qld), s 5, s 10

Penalties and Sentences Act 1992 (Qld), s 4, s 12

Uniform Civil Procedure Rules 1999 (Qld), r 371(2)(d)

Birkett v James [1978] AC 297, cited

Fredericks v Wheeler [1997] QCA 245, applied

Hogg v Dudman [2001] QDC 360, cited

R v Chong; ex parte Chong [2001] 2 Qd R 301; [1999] QCA 314, applied

R v Muckan [1975] Qd R 393, cited

R v SBJ [2009] QCA 100, cited

Steinback v Steinback [2000] QDC 312, cited

COUNSEL: S J Hamlyn Harris for the appellant
No appearance for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
No appearance for the respondent

- [1] **CHESTERMAN JA:** I agree that the Court should make the orders proposed by Boddice J, for the reasons given by his Honour.
- [2] **BODDICE J:** The applicant seeks leave to appeal a decision of the District Court of Queensland dismissing her application for criminal compensation. The issue for determination on the appeal, if leave be granted, is whether the primary judge erred in holding that delay was sufficient to deprive the applicant of a claim, notwithstanding the claim having been brought within the statutory limitation period.

Background

- [3] On 12 April 1993, the applicant sustained a broken jaw when she was punched in the face with a closed fist by the respondent. On 24 November 2006, the respondent

pleaded guilty in the District Court of Townsville to the offence of grievous bodily harm. She was convicted and sentenced to 200 hours community service. No conviction was recorded.

- [4] On 16 December 2009, the applicant filed an application for criminal compensation pursuant to s 663B of the *Criminal Code* (“the Code”). That application was dismissed by the primary judge on 16 September 2011 on the basis that the applicant’s delay in bringing the application left the respondent in the position where a fair hearing of the allegations was rendered highly improbable.¹

Legislative scheme

- [5] Section 663B of the Code provides:

“663B.(1) Where a person is convicted on indictment of any indictable offence relating to the person of any person or of more than 1 indictable offence relating to the person of any person (whether in respect of 1 indictment or more than 1 indictment) arising out of the one course of conduct or closely related courses of conduct of that person so convicted, the court, on the application by or on behalf of the person aggrieved by the offence or offences, may, in addition to any other sentence or order it may make, order the person to pay to the person aggrieved a sum not exceeding the prescribed amount by way of compensation for injury suffered by the person by reason of the offence or offences of which the offender is convicted.

(1A) For the purpose of determining whether courses of conduct are closely related, regard shall be had, in addition to any other relevant matter, to the acts or omissions constituting the courses of conduct and the times of the doing of the acts or the making of the omissions, one in relation to another.

(1B) Injury suffered by a person aggrieved by reason of the commission the person convicted of more than 1 indictable offence described in subsection (1) may, in respect of the person convicted, be the subject of 1 application only and 1 court order for the payment of a compensatory sum only.

(1C) An order made under subsection (1) shall not, for any purpose, be taken to be part of a sentence.

(2) In determining whether or not to make an order under subsection (1) and in determining the amount of any order, the court shall have regard to any behaviour of the person aggrieved which directly or indirectly contributed to the injury suffered by the person, and to such other circumstances as it considers relevant (including whether the person aggrieved is or was a relative of the convicted person or was at the time of the commission of the offence, living with the convicted person as his wife or her husband or as a member of the convicted person’s household) and to the other provisions of this Chapter.

¹ AB 65/10.

(3) If any money was found on the person of the offender on the offender's arrest, the court may, if it is satisfied that the money is the property of the offender, order it to be applied towards the payment of any sum ordered to be paid by the offender under subsection (1).

(4) The person aggrieved may enforce any order under subsection (1) against the offender as if the order were a judgment of the court given in an action for the amount of the order less any moneys received by that person under an order made under subsection (3)."

Section 663B creates a statutory right, in the nature of a cause of action.² An application for criminal compensation is an action.³ The limitation period for bringing such an action is six years, from the date of conviction.⁴

The appeal

- [6] The appeal is brought pursuant to s 118 of the *District Court of Queensland Act 1967*. By s 118(3), the applicant requires leave to appeal to this Court. Leave was sought, but in the notice of appeal, not in an application. That irregularity does not affect the substantive issues raised by the appeal. No prejudice could flow from declaring it an effective notice of appeal.⁵
- [7] Whether leave to appeal should be granted requires a consideration of all of the circumstances, including the prospects of success on appeal.
- [8] In dismissing the applicant's application due to delay, the primary judge relied on a number of decisions of the Supreme and District Courts.⁶ Those decisions proceeded on the basis there was no statutory limitation period for the making of applications under s 663B of the Code.
- [9] In *R v Chong; ex parte Chong*⁷ this Court held there was a statutory limitation period for applications for compensation under s 663B of the Code. An applicant for criminal compensation had six years from the time when the cause of action arose to bring any application. Such a cause of action arose upon conviction.
- [10] In dismissing the application, the primary judge did not refer to *R v Chong; ex parte Chong*. It appears it was not brought to his attention. However, the primary judge correctly recognised that any limitation period applicable to the application would be that prescribed by s 10 of the *Limitation of Actions Act 1974 (Qld)*, namely, six years.
- [11] As the applicant had commenced her application within the allowed statutory time period, there was no basis to dismiss her application for delay. Whilst a court has an inherent power to dismiss a claim for want of prosecution, there was no such application in the present case. In any event, the power to dismiss for want of prosecution is to be exercised sparingly where, as here, the limitation period has not expired and the applicant could simply file a further application.⁸

² *R v Chong; ex parte Chong* [2001] 2 Qd R 301 at 303 per de Jersey CJ; 305 per McMurdo P and 308 per Demack J.

³ *Limitation of Actions Act 1974*, s 5.

⁴ *Limitation of Actions Act 1974*, s 10(1)(d); *Chong* at 309.

⁵ UCPR, r 371(2)(d).

⁶ *R v Muckan* [1975] Qd R 393; *Steinback v Steinback* [2000] QDC 312 (Robertson DCJ) and *Hogg v Dudman* [2001] QDC 360 (O'Brien DCJ).

⁷ [2001] 2 Qd R 301.

⁸ See, generally, *Birkett v James* [1978] AC 297.

- [12] The primary judge considered authorities relevant to an extension of the limitation period in respect of actions for personal injuries analogous. That is a very different proposition. There, a claimant seeks an indulgence from the Court, the claimant not having commenced the action within the requisite statutory limitation period. In exercising a discretion to grant that indulgence, it is relevant for a court to consider delay, and any prejudice to a respondent. Such considerations do not arise in respect of an action properly brought within the statutory limitation period.
- [13] The applicant has established that the primary judge erred in dismissing her application for criminal compensation. She was entitled to succeed on that application, unless the sentencing judge's order that no conviction be recorded deprived her of an entitlement to criminal compensation.
- [14] The entitlement to criminal compensation under s 663B of the Code arose where a person has been "convicted on indictment". Whilst the word "conviction" is defined in s 4 of the *Penalties and Sentences Act 1992* ("the 1992 Act"), the word "convicted" is not defined in the Code, or in the *Acts Interpretation Act*. Generally, a person is "convicted" when the Court accepts the verdict or plea of guilty by administering the *allocutus*.⁹
- [15] By s 12(3) of the 1992 Act, a conviction without recording the conviction "is taken not to be a conviction for any purpose". Taken literally, s 12(3) of the 1992 Act would mean the order that no conviction be recorded in respect of the respondent meant that the respondent was not a person who had been "convicted on indictment".
- [16] Section 12(3) applies "except as otherwise expressly provided by the Act or another Act". Section 12(4) of the 1992 Act provides:
- “(4) A conviction without the recording of a conviction—
- (a) does not stop a court from making any other order that it may make under this or another Act because of the conviction; and
- (b) has the same result as if a conviction had been recorded for the purposes of—
- (i) appeals against sentence; and
- (ii) proceedings for variation or contravention of sentence; and
- (iii) proceedings against the offender for a subsequent offence; and
- (iv) subsequent proceedings against the offender for the same offence.”
- [17] The applicant had an entitlement, pursuant to s 663B of the Code, to make application for criminal compensation upon the respondent being convicted on 24 November 2006. The fact that the sentencing judge, in the exercise of his discretion, ordered no conviction be recorded did not deprive the respondent of that entitlement. The provisions of s 12(3) of the 1992 Act were subject to s 12(4) of that Act, which expressly preserved the Court's ability to make orders under any other Act. Those orders included an order for criminal compensation under s 663B of the Code.

⁹ *R v SBJ* [2009] QCA 100 at [25].

- [18] This interpretation of s 12(3) of the 1992 Act is consistent with observations made in *Fredericks v Wheeler* [1997] QCA 245. In *Fredericks*, the Court had to consider whether a right of appeal remained when no conviction had been recorded for an indictable offence. In finding such a right of appeal continued to exist, the Court observed:

“Under s. 673 of the Code a person summarily convicted of an indictable offence (as the applicant was) is entitled to appeal as if convicted on indictment ... Under s. 12(3) of the *Penalties and Sentences Act 1992* (‘the 1992 Act’) except as otherwise expressly provided, a conviction without recording a conviction is taken not to be a conviction for any purpose. But under s. 12(4) of the 1992 Act a Court may make ‘any other order that it may make under this or another Act because of the conviction’. On the face of it, the subsection appears to preserve this Court’s statutory jurisdiction to allow appeals against conviction where, no conviction having been recorded, what is complained of is a conviction on indictment or a conviction which must for the purposes of appeal be treated as if it were on indictment, under s. 673.”

Conclusion

- [19] The applicant is entitled to an award of criminal compensation. The primary judge assessed the applicant’s criminal compensation in the sum of \$22,500, including \$10,000 for mental or nervous shock. The applicant does not seek leave to appeal that assessment.
- [20] I would grant the applicant leave to appeal, allow the appeal, set aside the order dismissing the applicant’s application, and order that the applicant be paid the sum of \$22,500 by way of criminal compensation.
- [21] **DALTON J:** I agree that the Court should make the orders proposed by Boddice J, for the reasons given by his Honour.