SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lemmo* [2014] QCA 25
PARTIES:	**R** **v** **LEMMO, Jason Vincent** (applicant)
FILE NO/S:	CA No 201 of 2013 CA No 284 of 2013 DC No 541 of 2011 DC No 312 of 2012 DC No 313 of 2012 DC No 147 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction) Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	25 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	14 February 2014
JUDGES:	Muir and Gotterson JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for extension of time to appeal against conviction refused.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant pleaded guilty to 14 counts of armed robbery, three counts of armed robbery with personal violence, one count of armed robbery with wounding and one count of attempted armed robbery – where the applicant sentenced to 12 years imprisonment for each armed robbery offence – where the applicant claims pleas were coerced – where the applicant claims not to be of sound mind when pleas entered – where no sworn or documentary evidence to support claims – whether it is in the interests of justice to extend the time for appeal CRIMINAL LAW – APPEAL AND NEW TRIAL –

APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant committed numerous armed robbery offences in mid 2009 – where the applicant was charged and held in custody for 513 days – where the applicant when released on bail committed a further seven armed robberies in mid 2011 – where the applicant pleaded guilty – where the sentencing judge treated the commission of the 2011 offences whilst the applicant was on bail for the 2009 offences as an aggravating factor – where the applicant sentenced to 12 years imprisonment for each armed robbery offence and a serious violent offence declaration made – whether sentences were manifestly excessive

Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, followed
R v Lotoaniui [2013] QCA 71, considered
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, followed

COUNSEL: The applicant appeared on his own behalf
P J McCarthy for the respondent

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

[1] **MUIR JA:** I agree with the reasons of Mullins J and with the orders she proposes.

[2] **GOTTERSON JA:** I agree with the orders proposed by Mullins J and with the reasons given by her Honour.

[3] **MULLINS J:** On 21 November 2012 the applicant pleaded guilty in the District Court at Beenleigh to counts 1, 2, 4, 5, 7, 9 to 12, 15, 16 and 19 on indictment number 541 of 2011 (the first indictment). The allocutus was administered. The Crown entered a nolle prosequi in respect of the other seven counts on the first indictment. The offences on the first indictment were committed between 20 May and 16 July 2009. They comprised seven counts of armed robbery, three counts of armed robbery with personal violence (counts 2, 4 and 19), one count of armed robbery with wounding (count 10) and one count of attempted armed robbery (count 15).

[4] An *ex officio* indictment (number 312 of 2012) (the second indictment) had been presented in the District Court at Townsville against the applicant in respect of a further seven counts of armed robbery committed between 10 June and 2 August 2011 in Townsville. The applicant pleaded guilty to all counts on the second indictment in Townsville on 28 September 2012. The applicant also pleaded guilty to three summary offences that were committed during the period covered by the second indictment (two charges of enter premises with intent and one charge of deprivation of liberty). The allocutus was administered and the applicant remanded in custody. The second indictment and related summary offences were transferred to the District Court at Beenleigh, so that the sentencing could proceed with the first indictment.

[5] The sentencing on both indictments was adjourned which enabled a forensic psychological assessment report in respect of the applicant to be prepared. The assessment commenced on 11 March 2013 and was completed on 5 May 2013.

[6] The applicant was sentenced in respect of both indictments on 27 May 2013. The applicant also pleaded guilty to a drink driving offence that was committed on 13 July 2009. In respect of each of the counts to which the applicant pleaded guilty on the first indictment (other than count 15) the applicant was sentenced to 12 years' imprisonment. In respect of count 15, he was sentenced to 10 years' imprisonment. For each of the counts on the second indictment, he was also sentenced to imprisonment for a period of 12 years. In respect of each of the counts on both indictments, a declaration was made that he was convicted of a serious violent offence. Pursuant to s 159A of the *Penalties and Sentences Act* 1992 (Qld) it was declared that 657 days spent in pre-sentence custody between 9 August 2011 and 26 May 2013 was deemed time already served under the sentences.

[7] On 19 August 2013 the applicant filed an application for leave to appeal against the sentences imposed on the first and second indictments. On the same date he also filed an application for extension of time. An order was made in the Court of Appeal on 3 September 2013, with the consent of the respondent, extending the time to lodge the application for leave to appeal against sentence to 20 August 2013.

[8] On 11 November 2013 the applicant filed an application for extension of time to appeal against his convictions on the first and second indictments. That application is supported by a letter written by the applicant on 30 October 2013 and written submissions prepared by the applicant addressing his conviction.

[9] The application to extend the time to appeal against conviction was heard in conjunction with his application for leave to appeal against sentence. The applicant was self-represented.

Circumstances of the offending

[10] The schedule of facts tendered on the sentencing summarised the facts of the offences as follows. The applicant entered a fish and chip shop at Hendra on 20 May 2009 at about 4.00 pm. He was wearing a dark grey and black jacket with the hood over his head, dark sunglasses and dark grey track pants with a white strip down the sides, old white sport shoes and black gloves. He came behind the counter, pointed a Stanley knife at an employee's throat and asked for all the money. (A Stanley type knife was used in counts 1, 2, 5, 7, 15, 16 and 19.) The sum of $995 was stolen.

[11] Count 2 was committed three days later when a BWS bottleshop was robbed at Marsden at about 7.00 pm by the robber holding a Stanley knife to the employee's face. The robbery was captured on CCTV and the grey hooded jumper that the robber wore was similar to the jumper found in the applicant's possession when arrested in Victoria. The sum of $500 was taken.

[12] The applicant was identified in a photoboard identification by the employee who was robbed at the convenience store in Caboolture on 12 June 2009 at about 6.55 pm (count 4). The applicant had a broken bottle with a jagged edge that he used to threaten the employee. The sum of $1,060 was taken.

[13] Count 5 was committed on 25 June 2009 at a bottleshop at Ascot. The applicant entered the store at about 6.30 pm wearing a grey hooded jumper with a black/grey pattern, large black sunglasses and boardshorts. He walked around the counter to the employee's side and held a box cutter or Stanley knife with green duct tape on the handle near the employee's stomach and asked for all the cash. The sum of $920 was taken. When the applicant was subsequently questioned by police and shown the CCTV stills in respect of this robbery, he admitted that the person in the photographs looked like him, it was his jumper, but said "I was off my head, I don't remember exactly."

[14] Count 7 related to the robbery on 27 June 2009 of a grocery store at Runcorn. The applicant pointed a box cutter knife at the employee's face at or before taking the sum of $850. The applicant was captured on CCTV footage and the dark grey jumper that he wore was similar to the one found in his possession when arrested.

[15] On 29 June 2009 a convenience store at Tingalpa was robbed at about 6.40 pm (count 9) by the applicant pointing a knife at the employee and the sum of $1,500 was taken. The jumper that the applicant was wearing for this robbery matched the jumper that was found in his possession when arrested in Victoria.

[16] Another robbery was committed later at 10.00 pm on 29 June 2009 at Marsden (count 10). The applicant wore the same hooded jumper as for the earlier robbery that night. There was a scuffle with an employee whose chin was cut. The applicant had a pocket knife with a brown handle and then threatened to stab the employee. The applicant took $250 and the till. A till was found in the applicant's vehicle when it was intercepted in Victoria.

[17] Count 11 concerned the robbery of a bottleshop on 30 June 2009 at 6.10 pm at Wynnum. The applicant threatened the employee with a homemade weapon with green tape around the handle and a metal part that looked like it was made out of bolts. The sum of $600 was taken. He wore the same jumper that was found in his possession when arrested in Victoria.

[18] The applicant committed another robbery on 30 June 2009 at 7.30 pm at a Foodstore at Crestmead (count 12). He had what looked like a homemade weapon in his hand and pointed it close to the employee's throat. He took $3,000.

[19] The attempted armed robbery (count 15) was committed on 13 July 2009 at a supermarket at Mansfield. The applicant entered the store at about 2.25 pm holding a yellow box cutter. The employee had been chopping vegetables and swung the kitchen knife at the applicant. The employee backed away and then ran from the shop with another employee. The applicant then walked from the shop.

[20] At about 3.00 pm on the same day the applicant then robbed a bottleshop at Rochedale (count 16), threatening the employee with a yellow handled Stanley knife.

[21] Count 19 concerned the robbery of a bottleshop at Marsden at 6.45 pm on 16 July 2009. The employee was threatened with an orange Stanley knife against his neck. The sum of $805 was taken.

[22] A partial registration number of the vehicle involved in the robbery of the supermarket at Mansfield was obtained from a witness and, in conjunction with the description of the vehicle, the police matched the vehicle to the applicant. He had

been stopped for drink driving in Logan Central on the night of 13 July 2009 and the footage of the applicant at the tavern matched the CCTV footage of the applicant from the robberies earlier that day. There was a similarity in the appearance of the robber on the CCTV footage for each robbery. For some of the robberies the police were able to show from the applicant's mobile telephone records that his mobile telephone was used in or near the suburb where the offences were committed.

[23] The applicant was located in Victoria on 21 July 2009 from where he was extradited to Queensland. He was held in custody until 17 December 2010 (a period of 513 days) before he was released on bail.

[24] Count 1 on the second indictment was committed on 10 June 2011. It was a robbery of a bottleshop at Rasmussen at 6.40 pm where the employee was threatened by the applicant producing a knife. The sum of $400 was taken.

[25] Count 2 was committed on 16 June 2011 at 7.10 pm when the applicant robbed a video store in Vincent. He used a large kitchen knife. An unknown amount of cash was taken.

[26] Count 3 concerned the robbery of the Pizza Hut at Thuringowa Central on 16 June 2011 at about 10.45 pm. The applicant held a 32 cm long knife and took $425.

[27] The applicant robbed the same video store at Vincent again on 23 June 2011 at 9.00 pm (count 4). He used a kitchen knife and took $300.

[28] Count 5 concerned the robbery of a general store at Rupertswood at 6.55 pm on 14 July 2011. He used a knife to threaten the employee and stole at least $500 in cash and a cheque.

[29] Count 6 concerned the robbery of a video store at Idalia at 8.45 pm on 1 August 2011. The applicant used a knife and took between $300 and $400.

[30] Count 7 concerned the robbery of a convenience store at Thuringowa at 12.30 am on 2 August 2011. The applicant used a knife and took between $200 and $400.

[31] The applicant was taken into custody on 9 August 2011 and remained in custody until sentenced.

Should the time to appeal convictions be extended?

[32] No extension should be granted unless it would be in the interests of justice: *R v Tait* [1999] 2 Qd R 667, 668. The problem for the applicant is that his convictions were entered after he pleaded guilty. If he could pursue the appeal, it would be tantamount to an application to set aside his guilty pleas. The test to be applied is whether there has been a miscarriage of justice: *Meissner v The Queen* (1995) 184 CLR 132, 157. The onus lies on the applicant to establish that a miscarriage of justice took place when the court accepted and acted on his pleas.

[33] The applicant identifies in his written outline of submissions that he intended to contest counts 2, 5, 7, 9 to 12, and 16 on the first indictment and counts 2, 3 and 6 on the second indictment.

[34] What the applicant relies on are assertions in his submissions about his capacity when he pleaded guilty and the coercion of his lawyers. There is no sworn evidence or other documentary support for his assertions.

[35] The applicant's application to extend the time to appeal against his convictions must fail in the absence of any sworn or other probative evidence to support his assertions. In any case, an analysis of the material that has been provided suggests the futility of the applicant's attempt to set aside his guilty pleas.

[36] The applicant asserts in his submissions that he was of unsound mind at the time of sentencing, as he overdosed on 3 December 2012.

[37] The critical dates for any issue about his capacity are those on which he pleaded guilty to the counts on the second indictment and the relevant counts on the first indictment. His overdose was after he had pleaded guilty in respect of the first and second indictments. The only offence to which he pleaded guilty on the day of sentencing was the drink driving offence which is irrelevant for the purposes of his claims. There has been no attempt by the applicant to explain why he gave the instructions to his lawyers that would have been necessary to enable the second indictment to proceed as an *ex officio* indictment.

[38] The psychological assessment which was done after pleading guilty records that the applicant's accounts of the offences are similar to the information contained in the QP9s. Paragraphs 7.2 and 7.3 of that report record:

> "7.2 Mr Lemmo was forthcoming in providing information about his offending behaviour. He accepted that the information contained in the QP9 was accurate, stating 'I did do the things that are reported in there'. He reported that the offences in 2009 stemmed from [his partner] telling him that if he did not bring home an income from his business then the relationship was over. He reported that this is when he knew he was in 'big trouble' as he had spent all of his money on drugs and gambling and had no way of coming up with the money for his family. He then had the idea of committing the Armed Robbery to get the cash to give to [his partner]. He reported that over a 3 week period he committed a range of Armed Robberies to come up with the cash. He reported that some of the money went back into his drug and gambling cycle and not to [his partner]. When he was caught for the Armed Robbery offences in the Brisbane area, he was given Bail and moved to Townsville to live with his mother and father. He reported that during bail he continued to run his business in Townsville and again got involved in the drugs and gambling. During this time he still maintained contact with his daughter and would fly down to Hervey Bay to spend time with her once a month.
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> 7.3 He reported that in May 2011 he had a court hearing in Brisbane for his 2009 offences. At this hearing he was told that he could get a lengthy imprisonment sentence. He returned to Townsville very upset and despondent about this possibility; and started to get more heavily involved in the drugs and gambling. Once again this cycle of abuse left him

> short of money and his business started to suffer so he began to commit Armed Robberies to keep his business afloat."

[39] The applicant does not attempt to explain on this application the admissions he made about his offending to the psychologist, why he co-operated with the psychologist in being interviewed and assessed for over four hours for the purpose of the sentencing or why he wrote a letter of apology to the Court and his victims for his offending.

[40] The applicant makes complaints about his legal representatives, suggesting that they lied and misled him into entering guilty pleas when he intended to take the matters to trial. The applicant recorded in his letter dated 30 October 2013 that accompanied his extension application that he was advised by his barrister if he was to plead not guilty, but was found guilty, then the prosecution would ask for around 18 years, but that if he were to plead guilty, the prosecution would drop quite a few charges and he would be looking at around 10 years. The applicant has failed to provide a copy of any written instructions he gave to his lawyers in relation to the guilty pleas. As it turned out, the prosecution did enter a nolle prosequi in respect of seven counts on the first indictment and the applicant's counsel did submit that the effective head sentence should be between nine and 10 years with a serious violent offence declaration.

[41] There has been no serious attempt by the applicant to show that there was a miscarriage of justice on the two occasions when the Court accepted his guilty pleas to the first and second indictments. It is therefore not in the interests of justice to grant an extension of time for the applicant to appeal against his convictions entered after the guilty pleas. The application for the extension should be refused.

The applicant's antecedents

[42] The applicant was born in 1976 and was 33 years old when the offences on the first indictment were committed and 35 years old when the offences on the second indictment were committed. He had a prior criminal history that relevantly included a conviction in the District Court in 1998 for robbery with actual violence for which he was sentenced to imprisonment for a period of two years with a recommendation for parole after serving six months.

Sentencing remarks

[43] The learned sentencing judge noted that the total cost in terms of money stolen from the offences on the first indictment was around $10,500 and the violence included statements of threatening to stab complainants. It was an aggravating feature of the offences on the second indictment that they were committed within six months after the applicant was released from custody. There were similar threats made to stab in relation to these offences and a total of about $2,125 was taken. Reference was made to the three victim impact statements that had been tendered that "very starkly indicate the unpredictable and personally catastrophic consequences for at least some of the people involved as victims of [the applicant's] offending".

[44] The sentencing judge noted that the first period of 513 days spent in custody was equivalent to 22 months in custody where 80 per cent of the head sentence was being served. The sentencing judge rejected the submission made on behalf of the applicant that he should treat the offending as a single period of offending, as that

would not reflect the aggravation associated with the second series of offences committed whilst on bail for the first series of offences.

[45] The sentencing judge noted the authorities to which he had been referred by both counsel including *R v Lotoaniui* [2013] QCA 71 in which a number of the other authorities were analysed. The unusual aspect of the offending in the commission of numerous offences over two separate periods of offending was emphasised.

[46] The sentencing judge gave the applicant credit for his timely pleas of guilty on the first indictment and particularly the pleas of guilty to the second indictment, and that he was affected by drugs and had a gambling addiction, but managed lengthy periods of positive contributions to the community as a business owner and a worker, by treating the starting point of the effective head sentence as 14 years' imprisonment, rather than 15 years' imprisonment. The sentencing judge then reduced that effective head sentence by a further two years to reflect the first period of custody which was non-declarable. The sentencing judge noted that apart from the imprisonment that the applicant served around 1998, his criminal history was much less serious than some of the offenders in the comparable authorities, but that had been factored into the other factors that had been taken into account in balancing both aggravation and mitigation.

Are the sentences manifestly excessive?

[47] The applicant's primary contention on his sentence leave application is that he has been sentenced for offences which he now asserts he did not commit and that had the effect of increasing the head sentence. That ground cannot be pursued where the applicant has been unsuccessful in obtaining an extension of time to appeal against his conviction for those offences.

[48] The applicant also asserts his sentence should have been shorter, in view of the fact that he was to be subject to a serious violent offence declaration, and the offending in the comparative sentences was worse than his offending and those offenders had worse criminal histories than him.

[49] The finding made by the sentencing judge that weighed against the applicant (and is not challenged or challengeable by the applicant) was the aggravation of his offending by the commission of the offences on the second indictment whilst on bail for like offences on the first indictment and after having been held in custody for 513 days before being granted bail.

[50] The valid point the applicant makes about his prior criminal history in comparison to the offenders in the comparable authorities was not overlooked by the sentencing judge, but was displaced by the aggravating aspect of the applicant's offending. The prosecutor did not seek cumulative sentences, but an effective head sentence that took into account this aggravating aspect. On the basis of *Lotoaniui* and the authorities analysed in that decision, the sentence of imprisonment of 12 years for each of the armed robberies on the first indictment (if the offences on the second indictment had not been committed) would not have been justified. That sentence does, however, reflect a sound exercise of the sentencing discretion when the circumstances of the offending on the second indictment are also taken into account, as the sentencing judge was required to do. The applicant cannot succeed in showing that the sentence of 12 years' imprisonment with the accompanying serious

violent offence declaration for each of the armed robberies was manifestly excessive.

Orders

[51] The orders which should be made are:

1. Application for extension of time to appeal against conviction refused.

2. Application for leave to appeal against sentence refused.