

# SUPREME COURT OF QUEENSLAND

CITATION: *R v BBK (No 2)* [2014] QCA 71

PARTIES: **R**  
v  
**BBK**  
(applicant)

FILE NO/S: CA No 203 of 2013  
SC No 922 of 2007  
DC No 1202 of 2007  
DC No 2465 of 2007

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Criminal)

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 11 April 2014

DELIVERED AT: Brisbane

HEARING DATE: 7 April 2014

JUDGES: Gotterson JA and Boddice and Thomas JJ  
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 – APPEAL AND NEW TRIAL –  
PROCEDURE – OTHER MATTERS – where the applicant  
was convicted and sentenced to a term of imprisonment of six  
years on a count of maintaining a sexual relationship with  
a child under sixteen years of age – where the applicant was  
convicted and sentenced for a number of other counts  
charged by separate indictment to be served upon completion  
of the sentence on the maintaining count – where the  
applicant applied for leave to appeal his sentence and was  
refused leave by this Court in 2008 – where the applicant  
filed an application in the District Court for a re-opening of  
the sentence proceeding – where the application was refused  
– where the applicant sought leave to appeal against the  
refusal of his District Court application under s 118 of the  
*District Court of Queensland Act 1967* (Qld) – whether  
a refusal to re-open a sentence is beyond the scope of s 118 –  
whether the application for leave to appeal against the refusal  
of his District Court application should be allowed

*District Court of Queensland Act 1967* (Qld), s 118  
*Penalties and Sentences Act 1992* (Qld), s 188(1)(c)

*R v BBK* [2008] QCA 2, cited  
*R v Christensen* [2007] QCA 56, considered  
*R v Johnston* [2008] QCA 291, considered  
*R v Marriner* [2007] 1 Qd R 179; [2006] QCA 32, followed  
*R v Upson (No 2)* [2013] QCA 149, distinguished

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] **GOTTERSON JA:** In August and September 2007 at the District Court at Brisbane, the applicant, BBK, pleaded guilty to an array of offences of which he had been charged by indictment and summarily. He was convicted and sentenced on 2 October 2007 to a term of imprisonment of six years on a count of maintaining a sexual relationship with a child under sixteen years of age and also in respect of a number of counts charged by separate indictment, to concurrent terms of imprisonment of 18 months to be served upon completion of the sentence on the maintaining count.
- [2] The applicant applied to this Court for leave to appeal against sentence. The application was heard on 31 January 2008. It was refused that day.<sup>1</sup>
- [3] On 2 July 2013, the applicant filed an application in the District Court pursuant to s 188(1)(c) of the *Penalties and Sentences Act 1992* (Qld) for a re-opening of the sentence proceeding on the footing that the sentence imposed in October 2007 had been decided on a clear factual error of substance. His application was heard by a judge in Brisbane on 18 July 2013. It was refused, no such error having been established.
- [4] By a notice of application filed in this Court on 19 August 2013, the applicant has sought leave to appeal against the refusal of his District Court application. The application is sought to be made under s 118 of the *District Court of Queensland Act 1967* (Qld) (“the Act”). The application is opposed on jurisdictional grounds. The opposition to it is well-founded in law. In *R v Marriner*,<sup>2</sup> this Court held that a refusal to re-open a sentence was an exercise of the criminal jurisdiction of the District Court under Part 4 of the Act and, that by virtue of s 118(1)(a),<sup>3</sup> was beyond the scope of s 118.<sup>4</sup> This decision was followed in *R v Christensen*<sup>5</sup> and noted as authoritative in *R v Johnston*,<sup>6</sup> both decisions of this Court.
- [5] The applicant was unable to offer any argument why this line of authority ought not be followed in his case. His application must therefore be dismissed for want of jurisdiction.

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<sup>1</sup> *R v BBK* [2008] QCA 2.

<sup>2</sup> [2007] 1 Qd R 179.

<sup>3</sup> Which excludes the application of s 118 to the exercise of the criminal jurisdiction under Part 4.

<sup>4</sup> *R v Marriner* [2007] 1 Qd R 179 per McPherson JA at [12], de Jersey CJ and Williams JA concurring.

<sup>5</sup> [2007] QCA 56 per de Jersey CJ and Holmes JA.

<sup>6</sup> [2008] QCA 291.

- [6] I would add that in the course of oral submissions, the applicant referred to the recent decision of this Court in *R v Upson (No 2)*.<sup>7</sup> That case concerned a circumstance in which an offender who had been refused leave to appeal against sentence applied anew to this Court for such leave. His application was refused. The applicant's application presently before this Court is not made in a comparable circumstance.

**Order**

- [7] I would propose the following order:
1. Application for leave to appeal refused.
- [8] **BODDICE J:** I have read the reasons for judgment of Gotterson JA. I agree with those reasons, and the proposed order.
- [9] **THOMAS J:** I agree with the reasons and order proposed by Gotterson JA.

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<sup>7</sup> [2013] QCA 149.