SUPREME COURT OF QUEENSLAND

CITATION:	*R v Richardson* [2014] QCA 171
PARTIES:	**R** **v** **RICHARDSON, Ronald James** (applicant)
FILE NO/S:	CA No 94 of 2014 DC No 32 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	25 July 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17 July 2014
JUDGES:	Margaret McMurdo P and Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICE OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant was sentenced after trial for the offence of fraud to four years imprisonment on 22 February 2013 – where the applicant filed a notice of appeal against conviction and an application for leave to appeal against sentence on 6 March 2013 – where at the hearing of the appeal the applicant's counsel informed the Court the sentence application was not pursued – where the Court on 30 July 2013 refused the sentence application and dismissed the appeal against conviction on 30 August 2013 – where the applicant twice lodged an application to reopen his sentence pursuant to s 188(1)(c) of the *Penalties and Sentences Act* 1992 and both applications were refused for being out of time – where the applicant has not explained the delay – where the applicant says the decision not to pursue his sentence application at the earlier appeal was taken by counsel without his express written approval – where the applicant says the jury and learned sentencing judge were deceived about the extent of the fraud and its consequences – where the applicant's proposed grounds of appeal are that his sentence is manifestly

excessive and that he was sentenced on the wrong facts – whether the applicant has shown good reason to account for the delay – whether it is in the interests of justice for the applicant to be granted an extension of time to apply for leave to appeal against sentence

Criminal Code 1899 (Qld), s 668D
Penalties and Sentences Act 1992 (Qld), s 188(1)(c)

Grierson v The King (1938) 60 CLR 431; [1938] HCA 45, considered
R v Eveleigh [2009] QCA 257, cited
R v Gasenzer [2013] QCA 9, cited
R v Griffin [1969] 2 NSWR 497, cited
R v Medway [1976] 2 WLR 528; [1976] QB 779, cited
R v Richardson [2013] QCA 241, related
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, applied
R v Upson (No 2) [2013] QCA 149, considered
R v Ward [2008] QCA 222, cited

COUNSEL: The applicant appeared on his own behalf
T Fuller QC for the respondent

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

[1] **MARGARET McMURDO P:** The applicant, Ronald James Richardson, was convicted on 22 February 2013 after a jury trial of the offence of fraud to the value of $30,000 or more and was sentenced to four years imprisonment. He appealed against his conviction and applied for leave to appeal against his sentence, but at the hearing of his appeal on 30 July 2013 his barrister stated he was not pursuing the application for leave to appeal against sentence and the Court ordered that it be refused.[1] His appeal against conviction was dismissed on 30 August 2013.[2]

[2] On 24 April 2014 the applicant, who is now self-represented, applied for an extension of time to apply for leave to appeal against his sentence. He asserted that his lawyers at the hearing of the appeal decided not to pursue his application for leave to appeal without obtaining his instructions. He has provided no evidence to support that assertion and nor has the respondent filed or called evidence to refute it.

[3] In not pursuing his application for leave to appeal against sentence, his counsel did not formally abandon the application under the *Criminal Practice Rules* 1999 (Qld) r 69. Had he done so, under r 69(4) the Court has power to set aside the abandonment and reinstate the application if this is necessary in the interests of justice.[3] And unlike in *R v Upson (No 2)*,[4] this Court's order refusing the application for leave to appeal was not an order made after the Court had dealt with the application on its merits. It follows that I consider the applicant would be entitled to an extension of time if he

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1 *R v Richardson* [2013] QCA 241, [1].
2 *R v Richardson* [2013] QCA 241.
3 Compare *R v Griffin* [1969] 2 NSWR 497 and *R v Medway* [1976] QB 779.
4 [2013] QCA 149.

provided sound reasons to account for his delay in seeking to pursue his appeal rights and established that the interests of justice warranted the extension. For the reasons given by Morrison JA the applicant has neither adequately explained the delay nor that he has any promising prospects of success in his proposed appeal. I agree with Morrison JA that the application for an extension of time should be refused.

[4] **FRASER JA:** I agree that the application should be refused for the reasons given by Morrison JA, which I have had the benefit of reading. My agreement with those reasons is subject only to the qualification that I prefer not to express any view about the possible application in this matter of *R v Upson (No 2)* [2013] QCA 149.

[5] **MORRISON JA:** This is an application for an extension of time to lodge an appeal against a sentence imposed on 22 February 2013. On that day the applicant was convicted on one count of fraud, after a trial lasting five days. He was sentenced to four years imprisonment.

Sequence of steps since the trial

[6] The sentence was imposed on 22 February 2013. The present application was filed on 28 April 2014, some 13 months after the time when it should have been filed.

[7] The applicant's material reveals that an appeal against his conviction and sentence was filed on 6 March 2013. In that appeal the applicant was represented by senior counsel, instructed by an experienced criminal law firm. The appeal was heard on 30 July 2013, at which time senior counsel for the applicant told the court that the application for leave to appeal against sentence was not pursued. As a consequence that application was refused.[5]

[8] The decision of this Court on the appeal was delivered on 30 August 2013, and an order filed that day formally records the refusal of the application for leave to appeal against sentence.

[9] It is reasonable to conclude that the applicant would have been advised of the outcome of his appeal on or soon after 30 August 2013.

[10] The applicant says that upon "finding that my appeal against Conviction had been refused, due to the manner in which the Appeal was conducted", he lodged an application to reopen his sentence proceeding under s 188(1)(c) of the *Penalties and Sentences Act* 1992. That application was heard on 18 October 2013. The application was determined on the basis that even if the applicant could have persuaded the learned primary judge that there were reasons why he had not filed his application within time, nonetheless no ground had been raised to show a prospect of success on the application. The application was therefore dismissed on the basis that it was brought out of time, and therefore incompetent.[6]

[11] The applicant then lodged an appeal against that decision, but it was abandoned on 17 March 2014.

[12] The applicant then lodged a further application to reopen the sentence. That application was heard on 11 April 2014, and refused because it was out of time.

[13] The present application was filed on 28 April 2014. The applicant has not sworn an affidavit dealing with anything other than to attach several statements from witnesses at the trial.

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5 *R v Richardson* [2013] QCA 241, at [1] ("***Richardson***").

6 *R v Richardson*, 18 October 2013, Botting DCJ.

Applicable legal principles

[14] The long accepted test to be applied in considering whether to grant an extension of time to appeal appears in *R v Tait*[7] where the court said:

> "The recent approach of this Court to the question of extending time in criminal appeals is sufficiently illustrated by *R v M* and a number of unreported cases in this Court. These suggest that the Court will examine whether there is any good reason shown to account for the delay and consider overall whether it is in the interests of justice to grant the extension. That may involve some assessment of whether the appeal seems to be a viable one. It is not to be expected that in all such cases the Court will be able to assess whether the prospective appeal is viable or not, but when it is feasible to do so, the Court will often find it appropriate to make some provisional assessment of the strength of the applicant's appeal, and take that into account in deciding whether it is a fit case for granting the extension. Other factors include prejudice to the respondent, but in the case of criminal appeals this is not often a live issue. Another factor is the length of the delay it being much easier to excuse a short than a long delay."

Is there good reason to account for the delay?

[15] The applicant has not sworn an affidavit in explaining the delay. Instead he has put forward submissions articulating the proposed grounds of his appeal and various other matters concerning the progress of matters since he was sentenced.

[16] Apart from contending that the sentence was manifestly excessive, two central points are raised in relation to the sentence, namely:

(a) when his appeal against sentence was not pursued before this Court on 30 July 2013, and it was consequently refused, that was the consequence of a decision taken by the applicant's senior counsel and solicitors "without my express written approval" and in circumstances where the applicant "never signed or authorised any document confirming that I did not wish to pursue the Appeal against my sentence";[8]

(b) at the trial the jury, and consequently the learned sentencing judge, were deceived into believing that one complainant (Jeavons) had transferred $36,000 from his superannuation fund as a consequence of the alleged fraud, and that a second person (Campbell) was a complainant in respect of his $36,000 investment.

[17] As to the first point, that must have been known to the applicant at the time of the trial, or at the latest when the decision on the appeal was handed down on 30 August 2013. The reasons of this Court on the appeal state, in the first paragraph, that the application for leave to appeal against sentence "was not pursued and it was ordered that the application be refused". If it be the case, as the applicant contends, that he never authorised that course of events, it must have been plain to him by shortly

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7 *R v Tait* [1999] 2 Qd R 667, at 668; [1998] QCA 304.

8 Paragraphs 5 and 6 of the application.

after 30 August 2013 that the application in respect of sentence had been abandoned. Notwithstanding that, there is no hint of that being mentioned to the learned sentencing judge on 18 October 2013. The applicant's material asserts that he told the learned sentencing judge on 11 April 2014 of that fact.[9]

[18] No explanation has been forthcoming as to why that asserted fact was not raised earlier. It now forms part of the explanation for the delay in bringing this application. However, in my view it is difficult to accept. The applicant has been careful in the application itself to say that the abandonment of the application for leave to appeal against sentence was without his "express written approval" and that he had not signed or authorised "any document" in that respect.[10] Further, he asserts that the abandonment of the sentence application was not discussed with his senior counsel or his solicitors. However, he has not gone on oath about that. Further, no attempt has been made to adduce evidence from the senior counsel or the solicitors in support of the assertion. It is difficult to conceive that experienced senior counsel and solicitors would have taken that course unilaterally.

[19] As to the second point, those matters also must have been known in the course of the trial. The applicant has sworn an affidavit exhibiting statements provided by the prosecution in respect of the witnesses, Newbold, Jeavons and Campbell. Paragraph 10 of the statement of Jeavons says that he deposited $36,000 from the Jeavons Superannuation Fund into an account named RMC (Cooloola) Pty Ltd at the Bank of Queensland, on 19 January 2009. Attached to that statement is an application for shares, for the Jeavons Superannuation Fund in RMC (Cooloola) Pty Ltd, requiring that Jeavons "tender payment by cheque made payable to: RMC (Cooloola) Pty Ltd or by transfer to the following bank account", and then nominating a bank account with the Bank of Queensland in the name of RMC (North West) Pty Ltd. The applicant also refers to various exhibits tendered at the trial in respect of the transfers concerning the Jeavons' shares.

[20] The applicant's affidavit exhibits an affidavit of Campbell dated 7 April 2014, concerning whether he was truly a complainant in respect of the alleged fraud. Part of that affidavit includes that Campbell spoke to the applicant's lawyers when the trial commenced, advising them that he was not a complainant, making that point very strongly, and requesting that this be brought up in his evidence. He complains that even though the applicant's barrister was a party to that conversation, he did not bring that aspect of evidence forward at the trial. However, the applicant's material contains an excerpt from the evidence given at the trial by Campbell, under questioning from the applicant's barrister. That excerpt reveals that the barrister did illicit from Campbell the evidence that he was not deceived into investing $36,000, but rather considered that the whole process was a capital raising venture being conducted by the applicant.

[21] Leaving aside the merits of those two points, to which I shall return, they were clearly known to the applicant in the course of the trial in February 2013. There is no explanation for the failure to raise those matters earlier than in this application. Indeed, the appeal was conducted on the ground that the verdict was unsafe and unsatisfactory, which required an examination of all of the evidence, but in particular the dealings with Newbold, Jeavons and Campbell, and the transactions by which their investments were made. The matters now referred to by the applicant must have been known by him at the time the appeal was heard.

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9 Paragraphs 18 and 19 of the application.

10 Paragraphs 5 and 6 of the application.

[22] In so far as the application has engaged in the steps seeking to reopen the sentence, and then abandoning an appeal from one of those decisions, they do not provide an adequate explanation for the delay in seeking to appeal against the sentence, and in the bringing of this application. The plain fact is that the applicant, with the assistance of his legal advisers, filed an application for leave to appeal against sentence at the same time as the appeal was lodged against his conviction. Knowledge of the necessity to bring such an application, and within the requisite time, should be attributed to the applicant, through his legal advisers. That application must have been filed by the end of March 2013. It was abandoned on 30 July 2013. That course of conduct makes it difficult to explain the delay since, and in truth there is no adequate explanation of it.

Proposed grounds of appeal

[23] There are two main grounds advanced in respect of the sentence. They are: first, that the sentence was manifestly excessive; and secondly, that the sentence process miscarried because the learned sentencing judge proceeded on the basis that $108,000 had been dishonestly obtained, whereas a proper consideration of the facts surrounding the Jeavons' investment and Campbell's insistence that he not be a complainant, would have meant that the applicant was sentenced on the basis that he was only guilty of dishonestly obtaining $36,000.

[24] It is convenient to consider the second point first. There are considerable difficulties confronting the contention advanced. The first is that the offence with which the applicant was charged was that he had "dishonestly gained sums of money for RMC (Cooloola) Pty Ltd or another" on various dates, with the aggravating circumstance that the value of the property was more than $30,000. Evidence was led that Newbold, Jeavons and Campbell had each advanced $36,000 in circumstances which amounted to fraud. The circumstances of the investment of each of those witnesses was examined at length before the jury, and on appeal. The essence of the fraudulent representations appears in the reasons on appeal[11] as follows:

1. That 20 per cent interest would be paid on monies put in.
2. That the money they put in would be used to purchase the Fraser Shores Medical Centre.
3. That RMC (Cooloola) Pty Ltd was in a position to purchase the Fraser Shores Medical Centre at a price which would allow a return of 20 per cent.
4. That a certain number of shares in the company would be issued.

[25] As this Court found, there was evidence that the applicant had made plainly false statements to Newbold in respect of whether the Fraser Shores Medical Centre had actually been purchased or not,[12] and admissions by the applicant that he had made untrue statements to Newbold and Campbell in that respect.[13] The essence of the fraud was that the applicant represented that an agreement had been entered into between RMC (Cooloola) Pty Ltd for the purchase of the Fraser Shores Medical Centre, when that had never happened, and no money had been paid by RMC (Cooloola) Pty Ltd in that respect.

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11 *Richardson* at [28].
12 *Richardson* at [30].
13 *Richardson* at [31].

[26] Further, this Court summarised the essential nature of the case brought at trial in this way:[14]

> "[41] The evidence relevant to the representations that the investors' money would be used to purchase the Fraser Shores Medical Centre and that the appellant was in a position to purchase it at a price which would allow a 20 per cent return may be summarised as follows. The appellant gave evidence to the effect that he intended to purchase the centre but had not got around to making an offer to purchase, let alone determining a purchase price acceptable to him or obtaining any clear intimation that a reasonable offer was likely to be accepted. The appellant gave no evidence of how he would have set about determining the purchase price or of how he could be satisfied that the purchase price payable would provide for a 20 per cent return on investors' money.
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> [42] The jury were aware that investors were being paid a 20 per cent return on funds invested in respect of medical centres which had never been established. They were aware also that the investors' monies had been speedily paid out of the RMC (Cooloola) account and that the monies had then been promptly dissipated. It was obvious to the jury that a false explanation had been given by the appellant for reasons for the transfer of the monies from the RMC (Cooloola) account.
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> [43] In the light of the circumstances described above, it was well open for the jury to accept beyond reasonable doubt that when the relevant representations and statements were made, the appellant knew that RMC (Cooloola) was not in a position to purchase the Fraser Shores Medical Centre at all or "at a price which would allow a return of 20 per cent". They were entitled also to conclude that the appellant did not intend that the money provided by investors would be used to purchase that centre. The obvious inference was that the appellant's intention throughout was that monies obtained from the investors would be deployed at his discretion within the RMC Group."

[27] The applicant's material contends that the learned sentencing judge was deceived by Jeavons, in that Jeavons did not transfer any funds to RMC (Cooloola) Pty Ltd. He points to the fact that Jeavons identified a sum of $36,000 on the bank statement of the Jeavons Superannuation Fund as being an internet transfer direct to the account of RMC (Cooloola) Pty Ltd, whereas the corresponding credit reference suggests that it was a direct credit from Newbold identified as "Direct Credit David Mark Newbold – L Jeavons Shares". The RMC (Cooloola) Pty Ltd bank account reference, according to the applicant, states: "Dr David Mark NE – L Jeavons Shares". That entry was on 19 January 2009. Even if the money went into the RMC (Cooloola) Pty Ltd account from Newbold, the entries suggest that it was on behalf of Jeavons. That is entirely consistent with Jeavons having made the investment, even if the deposit was made via Newbold. Newbold's own contribution was made on 12 January

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14 *Richardson* at [41]-[43].

2009, the relevant reference being entitled "Direct Credit Newbold Superann – Newbold Super".

[28] On the appeal those transactions were examined. The court also examined the evidence of the applicant which included his requesting Newbold to act as an intermediary to send the Jeavons' documentation to Jeavons.[15] The court recorded the following in respect of Jeavons:

> "[21] The evidence does not disclose in detail what happened with the Jeavons' documentation, but $36,000 was paid in respect of the proposed Jeavons' investment into the bank account of RMC (Cooloola) on 19 January 2009. A form of application for "THIRTY SIX THOUSAND (**$36,000**) Ordinary "**B**" Class (Dividend) Shares" in RMC (Cooloola) Pty Ltd signed on behalf of "THE TRUSTEES JEAVONS SUPER FUND" was in evidence."

[29] In light of those matters there is no substance in the applicant's complaint about the Jeavons' payment. The investment might have been made via Newbold, but Jeavons clearly contributed $36,000.

[30] There is no substance in the point raised about Campbell. His contribution was made on the same basis as the others, namely on the basis of the representations set out at paragraph [24] above. The jury accepted that what was said was false, a conclusion also reached on the appeal. Campbell's evidence at trial was that at the time he received the offer to invest he did not understand that the Fraser Shores Medical Centre **had been** purchased, nor was he told by the applicant that the practice **had been** purchased. He said that he understood it was "a capital raising venture to raise some capital for purchase". However, that evidence does not answer the representation and the fraud. The representation was that RMC (Cooloola) Pty Ltd was in a position to purchase the practice at a price which would allow a return of 20 per cent, whereas in fact there had never been any agreement to purchase the practice, and no money had ever been paid by RMC (Cooloola) Pty Ltd in respect of such a sale. The fact that Campbell might now, or even at the time of trial, wish to characterise himself as not being a complainant, is not to the point. Plainly his evidence was that he was putting forward the funds towards the purchase of that practice, but in the form of a fundraising exercise. However, the representations were false, as the jury found, and as was confirmed on appeal.

[31] There was, therefore, ample support for the learned sentencing judge's proceeding to sentence on the basis that the fraud involved the loss of $108,000. That is true, even if Campbell does not wish to complain about it.

Was the sentence excessive?

[32] No material has been advanced by the applicant which would suggest that the sentence was outside the bounds of that which might be imposed for that offence. The respondent has referred to several decisions which demonstrate that the applicant's chances of success in persuading a court that the sentence was manifestly excessive are poor. Those cases include *R v Ward*,[16] *R v Gasenzer*[17] and *R v Eveleigh*.[18]

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15 *Richardson* at [16].

16 *R v Ward* [2008] QCA 222. This authority was referred to the sentencing judge.

17 *R v Gasenzer* [2013] QCA 9.

18 *R v Eveleigh* [2009] QCA 257.

Can a second application for extension of time be brought?

[33] In *R v Upson (No 2)*[19] this Court held that applications for leave to appeal against sentence come within the general rule[20] laid down in *Grierson v The King*.[21] That rule is that once a right of appeal against conviction conferred by s 668D of the *Criminal Code* had been exercised and the appeal had been determined on the merits, the court has no jurisdiction to entertain a further appeal. That rule applies even where the applicant wishes to raise grounds of appeal which differ from the original grounds, or to rely upon new evidence.[22]

[34] The Court expressed its view as follows:[23]

> "[25] It is to be emphasised that, consistently with the importance of the principle of finality in litigation, any exception to the general rule in *Grierson* must fall within very narrow bounds. In the case of an application for leave to appeal against sentence where a previous application was refused on the merits of the proposed appeal, the mere repetition or refinement of the original grounds of appeal, the formulation of different grounds, or reliance upon new evidence, does not take the case outside the general rule that the Court lacks jurisdiction to hear the second application. That is what the applicant sought to do in this case. Accordingly, the Court lacked jurisdiction to hear the applicant's proposed application for leave to appeal against sentence. That being so, the application for an extension of time to bring the application for leave to appeal against sentence should be refused on the ground that it is futile."

[35] Whilst it can be said that the previous application for leave to appeal against sentence was not determined on its merits, because it was abandoned, and therefore *Upson (No 2)* may not strictly apply, nonetheless this Court should be slow to entertain a second application where the reason for the first one being refused was that it was abandoned. The decision to not pursue the application implicitly reflects a decision that there is no merit in it. I would be inclined to view that such a circumstance should be equated with the position where the application was pressed and determined on the merits of the proposed appeal.

[36] However, the point has not been fully argued, nor addressed by the applicant, who is self represented. There is no necessity to determine whether that course should be applied to the particular circumstances of this case. It suffices to note that *Upson (No 2)* may pose a further difficulty in relation to the applicant's ultimate success.

Conclusion

[37] For the reasons expressed above no good reason has been shown to account for the delay in bringing this application, nor do the interests of justice require the grant of an extension of time. In that respect the proposed appeal faces considerable difficult, and its prospects must be said to be poor.

[38] I would refuse the application.

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19 *R v Upson (No 2)* [2013] QCA 149 ("***Upson (No 2)***").
20 *Upson (No 2)* at [14]-[16] and [20].
21 *Grierson v The King* (1938) 60 CLR 431; [1938] HCA 45.
22 *Upson (No 2)* at [3].
23 *Upson (No 2)* at [25].