SUPREME COURT OF QUEENSLAND

CITATION:	*R v Namai* [2014] QCA 213
PARTIES:	**R** **v** **NAMAI, Ruth Irene** (applicant)
FILE NO/S:	CA No 178 of 2014 DC No 256 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	29 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2014
JUDGES:	Holmes JA and Ann Lyons and Flanagan JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for an extension of time refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant pleaded guilty to one count of unlawful wounding – where the applicant was sentenced to 30 months imprisonment with a parole release date set at 9 October 2014 – where the application for leave was filed almost seven months out of date – where no good reason explains the delay – where the applicant submits that the sentence is manifestly excessive because the parole release date should have been set at 9 August 2014 – whether the sentence imposed is manifestly excessive – whether an extension of time should be granted *R v Andrews* [2012] QCA 266, considered *R v Baker* [2012] QCA 237, distinguished *R v Friday* [2005] QCA 440, considered
COUNSEL:	J Sheridan for the applicant B J Power for the respondent
SOLICITORS:	Trent Kimpton Solicitors for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of A Lyons J and the order she proposes.

[2] **ANN LYONS J:**

The current application

[3] On 9 December 2013 the applicant pleaded guilty to one count of unlawfully wounding her sister on 21 April 2012. The Crown subsequently entered a *nolle prosequi* in relation to the alternative charge of grievous bodily harm. The learned sentencing judge then sentenced the applicant to two and a half years imprisonment and fixed a parole release date of 9 October 2014 which was ten months after the date of sentence. The applicant had not served any time in pre-sentence custody.

[4] Pursuant to an application filed on 4 July 2014, almost seven months after the date of sentence and almost three months from her parole release date, the applicant now applies for an extension of time within which to file her application for leave to appeal her sentence on the basis that it is manifestly excessive and that the parole release date should have been fixed after eight months in custody, that is at 9 August 2014.

[5] In an affidavit filed in support of her application the applicant states that following her sentence she received written legal advice from her previous solicitors advising her of the sentence which had been imposed and indicating to her that if she wished to appeal that she had 28 days within which to do so. The applicant states that when she received the letter at the Townsville Women's Correctional Centre there were only a few days remaining on that 28 day period and she thought that she could not prepare the necessary documents and lodge her appeal within that time. She also states that she was "quite emotional also following my sentence having been separated from my children. Recently I was told that I could seek the leave of this court to appeal outside of time and I then instructed my new solicitor to immediately lodge this application."[1]

[6] The applicant bears the onus in the application for an extension of time within which to file the application for leave to appeal. This Court has previously recognised that in an application for an extension of time within which to apply for leave to appeal, there are two central issues which are relevant to the consideration of the exercise of the discretion. The first issue is whether there is a good reason for the delay and the second issue is whether it would be in the interests of justice to grant the extension.

[7] In relation to this first issue I can see no good reason to explain the delay. It would seem clear that the applicant was advised by her solicitors in relation to her appeal rights and was well aware of the time limitations. It then took some seven months to file the relevant notice. I do not consider that the applicant has adequately explained the delay. She was well aware of the relevant time limits before the time period expired but made a decision not to apply. Whilst her decision was understandable in the circumstances it would seem to me that she was not mislead in any way and she chose not to appeal within time in full knowledge of the relevant time periods which operated.

[8] It is clear however that a failure to satisfy the Court in relation to the first question does not mean that the discretion cannot be exercised in favour of the applicant in

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1 Affidavit of Ruth Namai sworn 23 June 2014 at [6].

relation to the second issue which relates to the question as to whether it is in the interests of justice to grant the extension. In order to consider that aspect of the application it is necessary to consider the circumstances of the offence.

Circumstances of the offence

[9] A brief schedule of facts had been tendered at the sentencing hearing and those facts were expanded upon in the course of the hearing particularly in relation to the actions of the complainant immediately prior to the wounding when she apparently bit the applicant twice.

[10] The complainant was the younger sister of the applicant. On 20 April 2012 she and the applicant attended a party together. They were both drinking and they were both heavily intoxicated. In the early hours of 21 April 2012 the two sisters became involved in a verbal altercation which then escalated into a physical fight. The complainant and the applicant were each throwing punches and they both ended up on the ground. It would appear that at that point the complainant bit the applicant hard on the arm and on the right breast. At that point the fight was broken up by others and the complainant moved away from the area where the fight had occurred. The applicant yelled at the complainant, "I'm going to kill you. I'm going to kill you" and then walked into the kitchen, grabbed a knife which was lying on the kitchen bench and walked out of the kitchen with the knife in her hand.[2] With the blade of the knife concealed behind her forearm the applicant then ran up to the complainant swearing at her and calling her names. The complainant was then stabbed once in the chest by the applicant.

[11] The complainant immediately had difficulty breathing and collapsed. An ambulance was called and she was subsequently taken to the Cairns Base Hospital where she was assessed as having sustained a penetrating wound to the upper left chest which caused a partial collapse of the left lung which required a chest drain. When police attended at the scene the applicant put her hands up and indicated to them that she had stabbed the complainant and indicated that she "had to".[3]

Matters relied on by the applicant

[12] The applicant contends that whilst the head sentence of two and half years (30 months) imprisonment was within range, it should have been ameliorated with a parole release date being set at eight months instead of 10 months. It is argued that in failing to set an earlier release date the sentence imposed was either manifestly excessive or that insufficient weight was placed on the circumstances of the case and the applicant's personal situation.

[13] The applicant argues that in terms of the factual background, there had been a significant physical altercation between the applicant and the complainant where the applicant had been bitten twice. It was also argued that whilst the applicant went in search of a knife, it happened quickly in the context of the fight and at a time when the applicant was drunk, angry, hurt and humiliated. It was also argued that there was only one blow and that not enough recognition was given to the applicant's cooperation with police and that the learned sentencing judge mischaracterised her admissions to police.

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2 AB 34.

3 AB 27.

The sentencing hearing

[14] A consideration of the sentencing remarks indicates that in imposing the sentence that he did of 30 months with a requirement to serve ten months the learned sentencing judge specifically stated that he took into account the assistance the applicant had given to police in relation to the investigation of the offence, but did not consider it to be a "true" confession. It would seem to me that the initial admission must indeed have been a limited admission of culpability given the applicant had indicated to police that she had done the act because she "had to" and given that the matter had been set down for trial with the applicant only pleading guilty on the eve of trial. It would seem correct to me that the applicant did not, at the outset, accept her full culpability for her true role in the stabbing. I can see no error in the way in which the admissions to police were characterised by the sentencing judge.

[15] Neither do I consider that insufficient weight was placed on the circumstances of the case and the applicant's personal situation. His Honour specifically noted all of the relevant factors and took them into account. In particular he noted that the applicant was 28 years of age at the time she committed the offence and 30 at the time of sentence. She was separated from her partner and had three young children, one of whom was aged seven and two who were born in the same year both of whom were aged five. His Honour indicated that the applicant had received a good education to year 12 at a boarding school in Charters Towers and then subsequently did a traineeship with Comalco in Weipa. He also noted that she had a good work history with the Cape York Land Council in an administrative capacity and had subsequently also worked for an aboriginal corporation on Horn Island.

[16] His Honour also took into account the fact that she had been in a long term stable relationship until she had discovered a short time prior to the offence that her partner had sexually abused two of her younger sisters (not the complainant) while they were in their early teens. This resulted in the breakup of her relationship and had caused her some stress. Reference was also made to the fact that she had the care of her children which she shared with her extended family and her ex partner.

[17] In terms of the circumstance of the offence his Honour specifically stated that the applicant was "drunk, angry, hurt and humiliated at the time you committed this offence, in circumstances where your sister had bitten you twice."[4] Consideration was also given to the fact that when she was employed on Horn Island she had provided assistance to police in relation to the prosecution of a child sex offence which she discovered during her time there.

[18] In coming to an appropriate sentence the learned sentencing judge in my view appropriately considered a number of decisions to which he was referred namely: *R v Meehan*,[5] *R v Friday*,[6] *R v Chong; ex parte Attorney-General (Qld)*,[7] *R v Baker*,[8] and *R v Andrews*.[9] His Honour, however, noted the different factual circumstances in both *Andrews* and *Baker*.[10] I also agree with his view that the decision in *R v Baker*

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4 AB 29, ll 42 – 44.
5 [1996] QCA 215.
6 [2005] QCA 440.
7 [2008] QCA 22.
8 [2012] QCA 237.
9 [2012] QCA 266.
10 AB 30.

was not particularly apt, given that it involved a sentence for grievous bodily harm, which carried a maximum penalty of 14 years and not seven, which was the applicable maximum penalty for unlawful wounding. Those sentences did however provide some assistance in relation to the types of sentences which could be imposed.

[19] His Honour also indicated that the sentence imposed in *R v Andrews* involved a sentence after trial of an offender who suffered from untreated schizophrenia where it was considered that this warranted a reduction in sentence which was achieved by a reduction in the time he needed to spend in actual custody. In coming to the sentence that he did the learned sentencing judge placed specific reliance on the remarks of McMeekin J in *Andrews* who had considered the decision of *R v Friday*, where Mackenzie J referred to the fact that an unlawful wounding charge, which did not cause any damage to internal organs but which required deep and superficial sutures, in a context of an argument which arose from jealousy where both parties were drunk, could result in a head sentence of three years imprisonment, although three years "was at the top of the permissible range".[11] McMeekin J held:[12]

> "[32] There are remarks in some of the cases that suggest that a sentence of three years imprisonment is towards the top of any permissible range: see *R v Friday* ([2005] QCA 440 citing *R v Shillingsworth* [2002] 1 Qd R 527). I would not accept that such comments necessarily apply here – so much depends on the seriousness of the injury, the criminal history of the offender, the degree of pre-meditation, the proportionality of the offender's conduct to the situation, any ongoing relationship between the attacker and the victim, and the genesis of any dispute. Such remarks can only be of very general assistance as evidenced by the fact that sentences of four years imprisonment have been imposed for offences of unlawful wounding: *R v Curley* ([2002] QCA 140); *R v Devon* ([2004] QCA 216 at [13]-[15]). Conversely the cases in which sentences of two years imprisonment have been imposed for unlawful wounding involving a weapon, the sentence for which the applicant contends, involve very different circumstances to those here – *R v Sokol* ([2011] QCA 20) is an example where the offender had no significant criminal history, had struck out with a glass in his hand, the presence of which he was unaware, and there were good reasons to think he was very unlikely to offend again."

[20] Having specifically mentioned those cases and the remarks of McMeekin J it is clear to me that the sentencing judge was well aware of the need to consider the specific factors in each case with great care. Accordingly, I consider that the sentencing judge did recognise the true nature of the factual background within which the stabbing occurred. Having considered the learned sentencing judge's sentencing remarks, it seems clear to me that his Honour was well aware of the nature of the fight between the two women and in particular that the complainant had bitten the applicant twice just prior to the stabbing. However it was also very clear to his Honour that a knife had been used and he made it clear that both personal and general deterrence were significant factors in this case, given that

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11 [2005] QCA 440 at 4.

12 [2012] QCA 266 at [32].

a serious chest wound was inflicted. Whilst his Honour acknowledged the applicant's cooperation with police, it was clear to him that she had only pleaded guilty on the eve of trial and had in fact intended to go to trial presumably on the basis of self defence. It would also seem clear to me that the learned sentencing judge did take into account the applicant's personal background, particularly her child care responsibilities, noting that the care was shared between her partner and her family.[13] His Honour did not consider that the applicant had a significant criminal history.

[21] In my view, having considered all of the authorities it would seem clear that a sentence of two and a half years was appropriate in all of the circumstances. It would seem to me that the learned sentencing judge has not committed any error in the sentencing process and has indeed imposed a sentence well within the range of applicable sentences.

[22] Indeed I note that the applicant does not in fact argue that the head sentence was incorrect. The argument would seem to be that a parole release date should have been fixed at eight months rather than 10 months. In my view it was significant that this was a late plea of guilty, occurring as it did on the eve of trial and it was also clearly a case where general deterrence and personal deterrence were particularly relevant considerations given it was indeed an offence "where people used knives and where life threatening injuries could result."[14]

[23] In those circumstances I cannot see that any wrong principle was involved or that in setting a parole release date at the one-third mark, the sentence imposed was manifestly excessive.

[24] Accordingly I am not satisfied that it is in the interests of justice to interfere with the sentence imposed as it was clearly a sentence open in the circumstances.

Should the application be allowed?

[25] As I have indicated the applicant bears the onus in the application for an extension of time within which to file the application for leave to appeal. The two central issues relevant to the consideration of the exercise of the discretion are whether there is a good reason for the delay and whether it would be in the interests of justice to grant the extension.

[26] The applicant has not satisfied the onus and I would refuse the application for an extension of time within which to file the appeal.

[27] **FLANAGAN J:** I agree with the reasons of A Lyons J and the order she proposes.

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13 AB 29.

14 AB 30, ll 10 -11.