

SUPREME COURT OF QUEENSLAND

CITATION: *R v CAP* [2014] QCA 247

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

FILE NO/S: CA No 182 of 2014
DC No 241 of 2008

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Sentence & Conviction)

ORIGINATING COURT: District Court at Cairns

DELIVERED EX TEMPORE ON: 2 October 2014

DELIVERED AT: Brisbane

HEARING DATE: 2 October 2014

JUDGES: Holmes and Gotterson JJA and Mullins J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Refuse application to extend time for leave to appeal against sentence.**
2. Adjourn application to extend time to appeal against conviction to a date to be fixed.
3. Direct that Mr CAP file and serve any affidavit in support of that application by 23 October 2014.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – PROCEDURE – POWER OF COURT ON APPEAL – GENERALLY – where the applicant pleaded guilty to nine counts of rape, four counts of carnal knowledge against the order of nature and one count of assault occasioning bodily harm whilst armed – where the applicant was sentenced to an effective sentence of 19 years imprisonment – where there had previously been a hearing on the merits of an application for leave to appeal against sentence in which the court concluded the applicant could not succeed – where the formal order of the court in the previous hearing did not reflect the substance of the judgment – whether an extension of time for leave to appeal against sentence should be granted

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON

GUILTY PLEA – GENERAL PRINCIPLES – where the applicant sought an extension of time to appeal against conviction – where the applicant’s material was insufficient to support the application – where the application was adjourned to allow the applicant to obtain advice and assistance in obtaining the affidavits to support the application

R v CAP [2009] QCA 174, related

R v Upson (No 2) (2013) 229 A Crim R 275; [2013] QCA 149, considered

COUNSEL: The applicant appeared on his own behalf
D R Kinsella for the respondent

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

MULLINS J: On 12 May 2008, Mr CAP pleaded guilty to 14 charges on an indictment in the District Court and was sentenced on 15 May 2008. For four counts of rape of his daughter (counts 1, 4, 6 and 7), he was sentenced to 19 years imprisonment. For two counts of rape of one niece, two counts of rape of a second niece and one count of rape of a third niece (counts 8, 10 to 12 and 14), he was sentenced to 17 years imprisonment. He was sentenced to 14 years imprisonment for four counts of carnal knowledge against the order of nature (counts 2, 5, 9 and 13) and seven years imprisonment for one count of assault occasioning bodily harm whilst armed (count 3). All sentences were concurrent.

He applied for an extension to appeal against his conviction and his sentences. He was represented by Legal Aid Queensland and the appeal against conviction was abandoned, except in respect of count 5. There was a technical problem with the offence that comprised count 5 and that conviction was quashed. The Court of Appeal dismissed the application to extend the time to appeal against sentence: *R v CAP* [2009] QCA 174.

The applicant applied on 8 July 2014 for an extension of time to appeal against the conviction for the 13 offences to which he pleaded guilty and the sentences.

The applicant has already had a hearing on the merits of an application for leave to appeal against sentence. Although the application that was before this Court in 2009 was strictly an application for an extension of time to seek leave to appeal against sentence, Jones J

(with whom the other members of the Court agreed) at [5] was disposed to grant an extension of time to seek leave to appeal the sentences generally, as at that stage, the delay in bringing the application was relatively short, an explanation had been given for the delay and the length of the sentences justified granting the extension.

After considering the merits, Jones J held (at [34] - [35]) that the application to appeal the sentences was unsuccessful. The formal order made by the Court merely dismissing the application to extend the time to appeal against sentence did not reflect the substance of the judgments.

This Court held in *R v Upson (No 2)* [2013] QCA 149 that there is no jurisdiction for the Court to entertain a further application for leave to appeal against sentence when the Court has previously refused an application for leave to appeal against sentence in the same matter on the merits.

It is arguable that, as the record of this Court shows, there has not been a determination of the earlier application for extension of time for leave to appeal against sentence on the merits, the decision in *Upson* should not be applied. As a matter of discretion, however, the applicant should not be given a further opportunity to argue the merits of the sentences, when this Court has given him a full hearing on the merits of his sentences and concluded that he cannot succeed in an appeal against the sentences. On this basis, I would refuse the application for an extension for leave to appeal against sentence.

The applicant's 2008 application for an extension of time to appeal against the conviction for the 13 offences was not pursued on the merits. Although the applicant's material in the form it presently takes fall far short of material that would justify an extension of time to appeal against the conviction, the material foreshadows a claim of duress in relation to the guilty pleas and that the appeal would be pursued on the basis that the pleas of guilty involved a miscarriage of justice.

If the applicant wishes to pursue such an application seriously, the application needs to be adjourned for the applicant to obtain appropriate advice and assistance in obtaining the

affidavits to enable the Court to embark on a proper hearing of the application for extension of time to appeal against conviction.

The orders which should be made are:

1. Refuse application to extend time for leave to appeal against sentence.
2. Adjourn application to extend time to appeal against conviction to a date to be fixed.
3. Direct that Mr CAP file and serve any affidavit in support of that application by 23 October 2014.

HOLMES JA: I agree.

GOTTERSON JA: I also agree.

HOLMES JA: Mr CAP, what all that means is you've still got the application for an extension of time to appeal against conviction for the argument you want to make about your guilty pleas. If you want us to consider it, you've got three weeks to put in an affidavit. You'll have to get some help and get that organised. You know what you want to say. It's a matter of putting it in the right form. Do you understand that?

APPELLANT: Yeah.

HOLMES JA: All right. Thank you. We'll adjourn.