SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cherry* [2014] QCA 262
PARTIES:	**R** **v** **CHERRY, Rodney Michael** (applicant)
FILE NO/S:	CA No 100 of 2014 SC No 49 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	17 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17 July 2014
JUDGES:	Margaret McMurdo P and Fraser and Morrison JJA Judgment of the Court
ORDERS:	**1. The application to amend the ground of appeal in the proposed application for leave to appeal is granted.** **2. The application for an extension of time to apply for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant was convicted after trial on two counts of murder – where the victims were the applicant's wife and his step-daughter – where the applicant procured his wife's daughter to kill her mother by providing the daughter with the murder weapon – where the applicant then murdered another step-daughter as he believed that she knew of his role in her mother's killing – where the applicant was sentenced in 2002 to life imprisonment on both counts – where a mandatory minimum parole period of 20 years was set – where the applicant was also charged with drug and weapons offences at the time he was charged with the two murders – where the applicant was remanded in custody on all offences until his sentence on the murder offences, a period of 537 days – where the drugs and weapons offences were discontinued as the magistrate considered that in light of the murder offences it was "fruitless to proceed" – where the applicant appealed unsuccessfully against his murder convictions but not his sentence in 2004 – where, 10 years later, the applicant

applied to a Trial Division judge for an extension of time to re-open his sentence under s 188 *Penalties and Sentences Act* 1992 (Qld) – where the applicant contends that the learned sentencing judge would have declared the 537 days pre-sentence custody as time served under the sentence, had the judge known at the time of his sentences for murder that the drug and weapons offences were to be dismissed – where the application to extend time to file the sentence application was granted, but the application was dismissed – where the applicant then filed an extension of time to apply for leave to appeal to the Court of Appeal against the sentences imposed for the murder offences in 2002 – where the applicant is over 11 years late in pursuing his appeal against sentence – where counsel for the applicant sought to amend the grounds of appeal at the hearing – where the applicant contends that the 537 days of presentence custody should have been included as part of his 20 year non-parole period – whether the application for extension of time should be granted

Criminal Code 1899 (Qld), s 688E
Penalties and Sentences Act 1992 (Qld), s 158, s 161, s 188

House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
R v Barron [2013] QCA 349, distinguished
R v Cherry [2004] QCA 328, related
R v Cherry [2014] QSC 58, related
R v Leith [2000] 1 Qd R 660; [1998] QCA 320, distinguished
R v M [1996] 1 Qd R 650; [1995] QCA 531, cited
R v Marriner [2007] 1 Qd R 179; [2006] QCA 32, cited
R v Massey (2002) 132 A Crim R 433; [2002] QCA 312, cited

COUNSEL: K M Hillard for the applicant
B Power for the respondent

SOLICITORS: Fisher Dore Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT:** The applicant was convicted after a trial on 8 November 2002 of two counts of murder. In the first count, the victim was his wife. In the second count, which occurred about two years later, the victim was his 17 year old step-daughter. The applicant procured his wife's daughter to kill her mother, providing the daughter with the murder weapon, a loaded pistol. He then murdered another step-daughter as he believed she knew of his role in her mother's killing and he had a sexual relationship with the girl prior to her 16th birthday. He was sentenced to life imprisonment on both counts. A mandatory minimum parole period of 20 years was set so that he is presently eligible for parole on 8 November 2022.

[2] He was charged with both murders on 20 May 2001 when he was also charged with a number of drug and weapons offences. He was remanded in custody on all the offences until his sentence on the murder offences, a period of 537 days. His sentence did not include any declaration about this presentence custody.

[3] On 12 May 2003 the drug and weapons offences were discontinued in the Magistrates Court as the magistrate considered that in light of the sentence for the murder offences, it was "fruitless to proceed". As the prosecution was unable to locate the required information about the unfinalised charges, the magistrate considered the interests of justice required that they be dismissed.

[4] The applicant unsuccessfully appealed against his murder convictions but not his sentence in 2004.[1] About 10 years later in March 2014 he applied to a Trial Division judge for an extension of time to re-open his sentence under s 188 *Penalties and Sentences Act* 1992 (Qld). He contended that, had the sentencing judge known at the time of his sentences for the murder offences that the drug and weapons offences were to be dismissed, the judge would have declared the 537 days presentence custody as time served under the sentence. The application to extend time to file the 2014 application was granted but the application was dismissed.[2] The applicant did not seek to appeal from that decision, consistent with this Court's approach in *R v Marriner*[3] which held that a refusal to re-open a sentence under s 188 did not give rise to any appeal rights under the *Criminal Code* 1899 (Qld).

[5] The applicant then filed the present application for an extension of time to apply for leave to appeal to this Court against the sentences imposed for the murder offences on 8 November 2002. He was over 11 years late in pursuing his appeal against sentence. In attempting to explain this long delay, he deposed that until recently he was unaware that it was arguable that the time he spent on remand prior to his two convictions for murder should have been declared as time served as part of his sentence. If given an extension of time, his proposed application for leave to appeal would contain the sole ground: "The sentence imposed on 8 November 2002 was not in accordance with the law". At the hearing of the application, his counsel sought to amend that ground by adding the words "and is otherwise unfair in the circumstances". This Court reserved its decision as to whether it would allow that amendment.

[6] In determining whether to grant an extension of time, this Court will give consideration to the reasons for the delay in seeking to appeal and, if the extension were granted, whether the proposed appeal has prospects of success. This Court will grant an extension of time to avoid a miscarriage of justice.

[7] To succeed in the proposed application for leave to appeal against sentence, the applicant must demonstrate error on behalf of the sentencing judge as discussed in *House v The King*.[4] It is therefore necessary in considering this application to consider the facts and the law as they were at the time of the 2002 sentence.

[8] The sections of the *Penalties and Sentences Act* relevant to presentence custody declarations at the time of sentence provided:

> "**158(1)** If –
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> (a) an offender –
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> (i) is convicted of an offence; and
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> (ii) *has been in custody in relation to proceedings for the offence and for no other reason*; and

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1 *R v Cherry* [2004] QCA 328.

2 *R v Cherry* [2014] QSC 58.

3 [2006] QCA 32.

4 (1936) 55 CLR 499.

(b) the court sentences the offender to imprisonment for the offence;

the court may order that the term of imprisonment is to have effect on and from the day the offender was arrested.

…

161(1) If an offender is sentenced to a term of imprisonment for an offence, any *time that the offender was held in custody in relation to proceedings for the offence and for no other reason* must be taken to be imprisonment already served under the sentence, unless the sentencing court otherwise orders.

…

(4) If –

(a) an offender is charged with a series of offences committed on different occasions; and

(b) the offender *has been in custody continuously since arrest on charges of the offences and for no other reason*;

the time held in presentence custody must be taken, for the purposes of subsection (1), to start when the offender was arrested even if the offender is not convicted of the offence for which the offender was first arrested or any other offences in the series." (emphasis added)

[9] At the time of sentence, the applicant had not been in custody in relation to proceedings for the murder offences and for no other reason. He was additionally in custody for the drug and weapons offences. For that reason, the judge could not have ordered that the sentence of life imprisonment take effect from the time of his arrest under s 158(1)(a)(ii) as it then was. For the same reason the sentencing judge could not have ordered the period of presentence custody to be imprisonment already served under the sentence pursuant to s 161(1) as it then was. And for the same reason the applicant was not assisted by s 161(4) as it then was. It follows that the sentence imposed on 8 November 2002 was in accordance with the law so that his proposed ground of appeal against sentence could not succeed.

[10] The applicant's counsel submitted that, nonetheless, this Court should extend time, as it would be unjust if the applicant did not have his 537 days of presentence custody taken as part of his 20 year non-parole period. His counsel contends that this Court should extend time, grant the application for leave to appeal, allow the appeal and declare the 537 days of presentence custody as time served under the sentence. In support of that contention, counsel cited *R v Leith*[5] as an example of a case where this Court extended time and allowed an appeal against sentence to prevent an injustice.

[11] Cases like *Leith* and, more recently, *R v Barron*[6] are easily distinguishable from the present case. Neither was serving a life sentence for the heinous crime of murder. More importantly, they were both granted leave to adduce further compelling evidence on appeal that they were suffering from terminal cancer. Ordinarily in such cases an exceptional circumstances parole order is the appropriate remedy but

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5 [2000] 1 Qd R 660.

6 [2013] QCA 349.

as time was of the essence this Court allowed their appeals so that they would not die in prison. Although the sentence passed by the sentencing judge in *Leith* and *Barron* was not manifestly excessive or otherwise affected by error with reference to the circumstances actually known to the sentencing judge, it would have been within the lawful authority of the sentencing judge to have made the order for the release of the prisoner which was later made on appeal. In light of the fresh evidence it could be held that the sentencing judge "should have" made the order for early release: see *R v M*.[7]

[12] The community has an interest in the finality of litigation so that a significant miscarriage of justice must be shown before extending time to appeal against sentence after more than 11 years. This is especially so where, as here, the applicant has already had an appeal in which he chose not to seek to appeal against sentence. It may be that if the applicant's drug and weapons offences had been discontinued prior to his sentence, a presentence custody declaration could have been made, although it is not necessary for this Court to decide that hypothetical question. It may be that had he pleaded guilty to the drug and weapons offences at the time of his sentence on the murder offences, the presentence declaration could have been made. But it may be that the sentencing judge would have delayed the applicant's non-parole period beyond 20 years if he were being sentenced for the drug and weapons offences as well as the murder offences. And it may be that the fact that the applicant had spent 537 days in presentence custody which could not be declared, was a factor in the sentencing judge exercising his discretion not to extend the non-parole period beyond the minimum of 20 years despite the gravely anti-social nature of the murders. And it is relevant that the applicant's appalling murder offences render it unlikely he would be considered as a serious candidate for release on parole other than exceptional circumstances parole, after 20 years: see *R v Massey*.[8] In any case, the parole authorities, when considering any application from the applicant, can be expected to take into account the fact that he has spent 537 days in presentence custody which was not declared under his sentence.

[13] But in any case, this Court's power to quash a sentence is conferred by s 668E(3) of the *Criminal Code*: "…the Court, if it is of opinion that some other sentence, whether more or less severe, **is warranted in law and should have been passed**, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal" (emphasis added). It was not open to the sentencing judge to declare that the 537 days served by the applicant in pre-sentence custody was time served under the sentence. Nor was it open to the sentencing judge to take that pre-sentence custody into account in any other way. The law permitted only the sentence of life imprisonment imposed by the sentencing judge, a sentence which carried with it a minimum non-parole period of 20 years. Accordingly, the Court cannot hold that a less severe sentence was "warranted in law" or "should have been passed".

[14] For all these reasons we are unpersuaded that the interests of justice warrant granting the more than 11 year extension of time to apply for leave to appeal. The proposed ground of appeal, even if amended, would not be successful. The respondent did not oppose the amendments, had prepared responsive submissions and would not be prejudiced by it. We would grant the application to amend the

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7 [1996] 1 Qd R 650 at 654 (Davies JA).

8 [2002] QCA 312, [10].

ground of the proposed application for leave to appeal but refuse the application to extend time.

ORDERS:

1. The application to amend the ground of appeal in the proposed application for leave to appeal is granted.

2. The application for an extension of time to apply for leave to appeal against sentence is refused.