SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lacey* [2016] QCA 25
PARTIES:	**R** **v** **LACEY, Jade Michael** (applicant)
FILE NO/S:	CA No 267 of 2015 SC No 308 of 2011 SC No 123 of 2013 SC No 124 of 2013 SC No 127 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 19 March 2013
DELIVERED ON:	12 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	2 February 2016
JUDGES:	Holmes CJ and Morrison and Philip McMurdo JJA Separate reasons of judgment for each member of the Court, each concurring as to the order made
ORDER:	**Applications for extension of time and leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – POWERS OF APPELLATE COURT – GENERALLY – where the applicant was sentenced on seven indictable offences – where the sentences were to be served concurrently but cumulative upon earlier sentences being served – where a previous application for leave to appeal against the subject sentences was refused – where the applicant now argued the learned sentencing judge acted upon a factual error – where the court has no jurisdiction to grant leave to appeal on a subsequent application, even if a new ground of appeal is adduced – whether the court has jurisdiction to hear the fresh application CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant was sentenced for offences committed in April and May 2007 – where the applicant was declared to be a serious violent offender for one offence of torture – where the applicant was subsequently sentenced on seven indictable offences – where the sentences

were to be served concurrently but cumulative upon the earlier sentences being served – where the applicant argued the learned sentencing judge proceeded upon a factual error, namely that all of the earlier sentences were declared serious violent offences – whether the learned sentencing judge proceeded upon a factual error

Penalties and Sentences Act 1992 (Qld), s 188

Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, applied
R v Lacey [2013] QCA 318, considered
R v Upson (No 2) (2013) 229 A Crim R 275; [2013] QCA 149, applied

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

[1] **HOLMES CJ:** I agree with the reasons of Philip McMurdo JA and the order he proposes.

[2] **MORRISON JA:** I have read the reasons of Philip McMurdo JA and agree with those reasons and the order his Honour proposes.

[3] **PHILIP McMURDO JA:** This is a second attempt to appeal against sentences imposed in 2013 for offences of armed robbery in company with actual violence. For each of these three offences, the applicant was sentenced to a term of two years' imprisonment, those terms to be concurrent with each other but cumulative upon other sentences which the applicant was then serving. Each offence was declared to be a serious violent offence. The applicant says that the sentences should not have been cumulative upon other terms and that the declarations should not have been made.

[4] In October 2013, the applicant's first application for leave to appeal against these sentences was refused. According to this court's judgment in *R v Upson (No 2),*[1] where an application for leave to appeal against sentence has been refused after consideration of the merits of the proposed appeal (as in this case), the court has no jurisdiction to grant leave to appeal on a subsequent application. It does not matter whether the second application is made upon grounds which differ from those of the original application. Fraser JA (with whom Holmes JA and Daubney J agreed) said:[2]

> "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."

[5] The applicant argues that *Upson* does not preclude the present application because this time he makes a complaint which, through no fault of his own, was not made on

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1 (2013) 229 A CrimR 275; [2013] QCA 149.
2 [2013] QCA 149 [25].

the previous application, namely that the sentencing judge acted upon a factual error as to the applicant's criminal history. It is unnecessary to consider here whether an argument of that kind takes an application outside the jurisdictional bar according to *Upson*. It is also unnecessary to consider whether a criticism of *Upson* in a recent judgment in the New South Wales Court of Criminal Appeal warrants a reconsideration by this court of the question of jurisdiction.[3] This is because the complaint that there was a significant factual error by the sentencing judge has no substance as a proposed ground of appeal and the applicant's other arguments, being only a repetition or refinement of those advanced on the previous application, warrant the refusal of the application as frivolous or vexatious. In *Postiglione v The Queen*,[4] Dawson and Gaudron JJ said:

> "Ordinarily it is of no consequence whether an order is made dismissing an application for leave to appeal or whether leave is granted and the appeal dismissed. However, putting aside applications which are frivolous or vexatious, there is no reason in principle to prevent a person bringing a second application for leave to appeal if an earlier application has been dismissed. An application based on matters agitated on a previous application is properly to be regarded as frivolous or vexatious".[5]

[6] To discuss the applicant's new argument, it is necessary to summarise his relevant criminal history. When he received the sentences which he now challenges, he was serving a period of imprisonment of 11 years to expire on 11 May 2020, with an eligibility for parole on 30 August 2016. That period comprised various terms for offences committed in April and May 2007. He was sentenced first for the May 2007 offences, which were committed when the applicant and his brother, Dionne Lacey, went with loaded firearms to an apartment to negotiate the purchase of drugs. They argued with the occupants, one of whom was shot by the applicant in the legs before being fatally shot by Dionne Lacey. For this the applicant received a five year sentence which was not declared to be a serious violent offence.

[7] The April 2007 offences were committed by the applicant and his brother against a man named Matthews. Each was sentenced to identical terms of imprisonment to be served concurrently, but cumulative upon their sentences for the May 2007 incident. The longest of these terms was one of six years which each received for the offence of torture, which for each of the brothers was declared to be a serious violent offence. In Dionne Lacey's case some of the other offences against Matthews were also declared to be serious violent offences. But relevantly for the applicant's present argument, only the offence of torture was declared in his case.

[8] When the applicant's period of imprisonment commenced in May 2009, he had been in custody for approximately two years but not in circumstances which permitted that to be declared as pre-sentence custody. Nevertheless, in refusing the previous application for leave to appeal against the subject sentences, the court treated the period of imprisonment as being effectively 13 years.[6]

[9] The subject offences were also committed in April 2007 and by both the applicant and his brother Dionne. The applicant, his brother and another man went to an apartment to buy drugs. The apartment was occupied by a man called Pritchard, who was there with two others. The applicant's group threatened and assaulted Pritchard

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3 In that case, *Lowe v R* [2015] NSWCCA 46, *Upson* was said to be inconsistent with some of the judgments in *Postiglione v The Queen* (1997) 189 CLR 295; [1997] HCA 26.

4 (1997) 189 CLR 295, 305.

5 See also *Lowe v R* [2015] NSWCCA 46 [107]; *R v Alameddine* [2004] NSWCCA 286.

6 *R v Lacey* [2013] QCA 318 [2].

and another and stole money, drugs and other property. When someone in the applicant's group suggested that Pritchard and his group should be shot, the applicant said "just shoot him in the legs" and a shot was fired, the bullet grazing the outside of the leg of one of Pritchard's group. These events resulted in the three counts of armed robbery in company with actual violence for which the applicant received the subject sentences. He pleaded guilty to those offences and at the same time to offences of trafficking in dangerous drugs (from June 2006 until May 2007), the possession of things for use in connection with trafficking in dangerous drugs, unlawful possession of cocaine and an assault occasioning bodily harm which was committed in March 2006. The applicant was sentenced to concurrent terms of imprisonment of five years on the trafficking count and 15 months on the assault count. On an earlier date, the applicant's brother was sentenced for his participation in these offences and received effectively the same sentences. Dionne Lacey was then serving a longer period of imprisonment, having been convicted of manslaughter for the May 2007 shooting.

[10] When imposing the subject sentences, de Jersey CJ discussed the applicant's criminal history. Referring to the offences committed upon Mr Matthews, his Honour said:[7]

> "Then, on the 10th of September 2010, you were sentenced in the District Court for a series of offences committed in April 2007 upon Mr Matthews; assault occasioning bodily harm in company while armed, extortion, threatening violence at night, torture, unlawful wounding with intent and deprivation of liberty.
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> You and your brother were sentenced to six years' imprisonment to be served cumulatively upon the sentences being served in respect of the offences concerning Mr Palmer. The Judge declared that you were convicted of serious violent offences."

In the course of discussing the subject offences, de Jersey CJ said:[8]

> "Your counsel emphasised that unlike Dionne, you did not, on this occasion, carry or use a firearm. That is a legitimate point of distinction, but these events, nevertheless, carried the appearance of a team effort by the three of you. I note again that you committed these offences during the commission of the other offences in relation to Mr Matthews, offences which the sentencing District Court Judge declared to be serious violent offences."

[11] The applicant's argument is that these passages demonstrate a factual error by the sentencing judge, namely a belief that each of the offences which he had committed against Mr Matthews had been declared to be a serious violent offence, whereas only that of torture had been so declared. The first difficulty with this argument is that it is not at all clear that his Honour did make that mistake. On one view, his Honour was instead saying that the offences of torture committed by the applicant and his brother were declared as serious violent offences, which was correct. The second difficulty is that even assuming that these passages should be understood as the applicant contends, it does not appear that the error could have been of any significance. Importantly, his Honour went on to refer to the period of imprisonment which the applicant was then serving, accurately stating the duration of that period and his parole eligibility date. It cannot be said that the sentencing judge imposed these cumulative terms under any misunderstanding about their commencement date.

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7 *R v Lacey*, unreported, de Jersey CJ, Supreme Court of Queensland, SC Nos 308 of 2011, 123 of 2013, 124 of 2013 and 127 of 2013, 19 March 2013.

8 Ibid.

[12] Moreover, in dismissing the applicant's previous application for leave to appeal against these sentences, it is clear the Court of Appeal was under no error as to the applicant's criminal history and, in particular, the details of his earlier sentences. They were accurately set out in the judgment of Fraser JA with whom the other members of the court agreed.[9] For present purposes it may be accepted, as the applicant asserts, that his counsel on the previous application misinformed the court that each of the offences against Mr Matthews had been declared a serious violent offence. But that was inconsequential because the court acted upon the true position.

[13] The applicant argues that the suggested mistake by the sentencing judge resulted in heavier sentences for the subject offences. However, from the Chief Justice's reasons it appears that the only relevance of the previous declaration was its effect upon the applicant's then parole eligibility date. There was no statement by his Honour, for example, that a previous declaration was relevant to whether the subject offences should be so declared.

[14] The applicant refers to s 188(1) of the *Penalties and Sentences Act* 1992 (Qld) which relevantly provides as follows:

> "**188 Court may reopen sentencing proceedings**
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> (1) If a court has in, or in connection with, a criminal proceeding, including a proceeding on appeal–
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> …
>
> (c) imposed a sentence decided on a clear factual error of substance;
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> …
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> the court, whether or not differently constituted, may reopen the proceeding."

By s 188(3)(b)(iii), if the court reopens a proceeding, it may resentence the offender "to a sentence that takes into account the factual error".

[15] The power under s 188 to reopen a sentence is of no present relevance. The applicant is seeking to appeal against these sentences, not applying to have them reopened by the sentencing court. Of course a factual error of substance which has affected the exercise of the sentencing discretion could also provide a ground of appeal. But the applicant's difficulties, whether in an appeal or in seeking to have the sentencing court reopen the proceeding under s 188, (again) would be in demonstrating a factual error and one of substance. The suggested error is not of that kind.

[16] The applicant's other arguments are presented upon the basis that their rejection in the previous application should now be disregarded by this court, because it should start again on account of the suggested factual error. Because the applicant's case of a factual error cannot be accepted, it follows that the applicant cannot be allowed to reagitate the case which was rejected on his previous application.

Order

[17] For these reasons I would refuse the application for an extension of time and for leave to appeal against sentence.

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9 *R v Lacey* [2013] QCA 318 [2], [9].