SUPREME COURT OF QUEENSLAND

CITATION:	*R v Filho* [2003] QCA 223
PARTIES:	**R** **v** **FILHO, Agenor Rodrigues** (applicant)
FILE NO/S:	CA No 9 of 2003 DC No 86 of 1996
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Mackay
DELIVERED EX TEMPORE ON:	2 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	2 June 2003
JUDGES:	McMurdo P, Davies JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for Extension (Sentence) refused** **2. Declare that in giving effect to the sentence imposed on the applicant in the Supreme Court of Mackay on 24 July 1996, the applicant is entitled to have the period of 47 days from 7 June 1996 – 24 July 1996 declared as time served as part of that sentence**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT - SENTENCE - PLEA OF GUILTY, CONTRITION AND CO-OPERATION - where applicant convicted of importing prohibitive substance and sentenced to 15 years imprisonment with recommendation for parole after 7 ½ years - where maximum penalty life imprisonment – where applicant co-operated with authorities including giving evidence against co-offenders - whether declaration under s 161 *Penalties and Sentences Act* 1992 (Qld) should have been made at sentence to recognise time already served - whether sentence manifestly excessive in all the circumstances

Crimes Act 1914 (Cth), s 19AB
Penalties and Sentences Act 1992 (Qld), s 161

R v Ferriera [2002] QCA 12; CA No 318 of 2001, 4 February 2002; considered
R v Salles [2003 QCA 127; CA No 10 of 2003, 20 March 2003, considered
R v Tai Ka Kin; R v Chan Chee Hong; CA Nos 287 and 288 of 1989, 15 December 1989, applied

COUNSEL: The applicant appeared on his own behalf
G C Davey for the respondent

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

THE PRESIDENT: The applicant applies for an extension of time within which to apply for leave to appeal against his sentence imposed in the Supreme Court sitting at Mackay on 24 July 1996. He was sentenced to 15 years' imprisonment with a recommendation for parole after seven-and-a-half years.

The applicant represents himself today. He is a Brazilian national and his first language is Portuguese, not English. He has, however, been incarcerated within the Queensland prison system since 1996 and he has been able to articulate his contentions clearly and effectively in his written and oral submissions to us today.

He contends that a declaration under section 161 Penalties and Sentences Act 1992 (Qld) ("the Queensland Act") should have been made at his sentence to recognise the time he has served in pre-sentence custody. He also contends that his cooperation with the authorities including giving evidence against his co-

offenders and his plea of guilty were not sufficiently recognised, making his sentence manifestly excessive.

The applicant has a substantial difficulty in this application because, like his co-offender Ferreira, he originally filed an application for leave to appeal against sentence within time but, again like Ferreira, signed and filed a notice of abandonment shortly before it was listed for hearing. The effect of the notice of abandonment lodged on 18 October 1996 was that his application for leave to appeal was deemed to have been dismissed by the Court under Criminal Practice Rules 1900 Order 9 Rule 22.

There has been very substantial delay of about six-and-a-half years in the making of this application which he has attempted to explain as being because he was not aware of his rights.

The applicant was originally, however, aware of his right of appeal and appears to have made an informed decision to give up that right in abandoning that application. I am prepared, however, to consider broadly the merits of his application for leave to appeal against sentence in determining his application to extend time.

The applicant pleaded guilty by ex officio indictment to one count of importing prohibiting imports, narcotic goods, cocaine, being not less than a commercial quantity. The maximum penalty was life imprisonment.

He and his co-offenders, Ferreira and Salles, were crewmen on the ship "Doce River" which commenced its voyage in Brazil in April 1996. It travelled via Taiwan to Mackay where it intended

to load coal. On 7 June 1996, an alert watchman at the wharves at Hay Point noticed three seamen coming ashore more than an hour after the other crew had left for town by bus. The crewmen requested the watchman to call a taxi. He complied but also called the Australian Customs Service because he was concerned that these three men were carrying two bags, one of which was very large. The watchman delayed the offenders at the wharf until the authorities arrived. Customs Officers located 20 packages weighing approximately one kilogram each inside the bags containing a white substance found to be cocaine.

The applicant and his co-offenders were interviewed in the presence of an interpreter by Federal Police on 8 June 1996.

The applicant told police that when the vessel was close to Taiwan, Ferreira asked him if he wanted to earn some extra money by carrying a product. He was not in a good financial position because his ex-wife had caused him to be sacked from his employment and this had created financial difficulties for him and he thus agreed to become involved. He knew that he was being asked to carry prohibited goods into Australia. The three men were to be paid $US20,000 which was to be split evenly between them. They were to be met by someone in town wearing a distinctive hat.

The 20 packages contained 14.872 kilograms of pure cocaine, the largest amount of cocaine ever seized at that time in Queensland by the Australian Federal Police. It was estimated that, in kilo packages, it was worth about $1.8 million and could be worth up to five or six times that amount of money on the streets.

The applicant was immediately cooperative with police. His co-offender Ferreira was not initially cooperative but subsequently also made full admissions; Ferreira, it was plain, co-opted this applicant into committing the offence.

The learned primary Judge was required to fix a minimum non-parole period under section 19AB Crimes Act 1914 (Cth) ("the Commonwealth Act").

The applicant was 34 years old at sentence. He came from an impoverished background. He finished school at 17 and commenced a trade as an electronic technician and developed some computer skills. He also worked in the construction industry. He was conscripted into the National Service and served 18 months in the Brazilian Navy. He then worked in the shipping industry. He has been married with three children aged 11, 8 and 2 at sentence. His house was paid off and valued at about $US12,000 and 40 per cent of wages ($918 per month), were being sent to his former wife and children. He had also formed a de facto relationship and his pregnant partner miscarried when hearing of his detention in Queensland.

His financial difficulties were exacerbated by him spending $US3,000 attempting to gain access to his children through the Courts.

He had never been in trouble with the law before and he expressed remorse for his action and for the shame that he brought his family and his children whom he would no longer be able to

maintain. He was also concerned that he could not give emotional or financial support to his de facto wife.

The third offender, Salles, had indicated at the time of this applicant's sentence that he would go to trial and both the applicant and Mr Ferreira agreed to give evidence against him.

His Honour was wrongly informed by the Prosecutor at sentence that he was not required to make the declaration for time already served under s 161 of the Queensland Act. The learned sentencing Judge determined that the circumstances justified a sentence of 18 years imprisonment but reduced this to 15 years because the applicant was prepared to cooperate with the authorities in the trial of Salles. His Honour fixed a non-parole period as required under the Commonwealth Act at the half-way point of seven and a-half years without further reducing the sentence. His Honour imposed a heavier penalty on Ferreira, whom he regarded as more involved in the offence, reducing a notional sentence of 22 years to 19 years for his cooperation and imposing a non-parole period at the half-way point of nine and a-half years.

Salles eventually pleaded guilty and was sentenced to 20 years imprisonment. He was unsuccessful in his application for leave to appeal against that sentence which was found by this Court to be within the limits of a sound sentencing discretion: see R v Salles; CA No 92 of 1997, 20 May 1997 where this Court determined that Salles's sentence was not manifestly excessive relying on the authorities or R v Tai Ka Kin and R v Chan Chee Hong; CA Nos 287 and 288 of 1989, unreported 15 December 1989.

Salles has more recently unsuccessfully applied to extend time within which to apply for leave to appeal against that sentence: see R v Salles [2003] QCA 127; CA No 10 of 2003, 20 March 2003. As Salles had already had his appeal against sentence dismissed on its merits, this Court refused the application to extend time. The Court, however, made the declaration that Salles was entitled to have his period of presentence custody treated as time already served under that sentence under s 161 Queensland Act.

Ferreira too has recently applied to this Court for an extension of time within which to apply for leave to appeal against sentence, despite abandoning his application for leave to appeal filed within time: see R v Ferriera [2002] QCA 12; CA No 318 of 2001, 4 February 2002, where this Court held that the sentence of 19 years imprisonment was not manifestly excessive and Ferriera had no real prospect of success in any appeal against sentence and that the mitigating factors of cooperation and a plea of guilty had been sufficiently taken into account and the discount given. For that reason his application to extend time in which to apply for leave to appeal against sentence and to withdraw a notice of abandonment of his earlier application for leave to appeal against sentence dated 18 October 1996 was refused. The Court, however, again made the declaration now sought by the applicant as to time served under the sentence.

Here the learned sentencing Judge was rightly concerned about the importance of deterrence in a case such as this. It was a

very serious example of an importation of a commercial quantity of cocaine. Although the applicant had no prior criminal history, had cooperated with the authorities, had indicated his willingness to give evidence against his co-offender Salles and had pleaded guilty by way of ex-officio indictment at an early stage, a very substantial deterrent penalty was warranted. The sentence was not manifestly excessive.

This Court has long held that there is no jurisdiction to entertain a further application for leave to appeal against sentence after an earlier application has been dismissed on its merits. Although the effect of the Criminal Practice Rules Order 9 rule 22, (abandoning an appeal) is not to dismiss an appeal on its merits, the applicant must show some good reason why he should not be bound by the abandonment. He has not done so: compare R v Ferreira [2002] QCA 12; CA No 318 of 2001, unreported 4 February 2002.

The application for an extension of time within which to appeal against sentence should in my view be refused. This applicant is, however, entitled to the declaration which he seeks, and which was made in both R v Ferreira and R v Salles. I would therefore dismiss the application to extend time within which to apply for leave to appeal but declare that in giving effect to the sentence imposed on the applicant in the Supreme Court of Mackay on 24 July 1996, the applicant is entitled to have the period of 47 days from 7 June 1996 to 24 July 1996 declared as time served as part of that sentence.

DAVIES JA: I agree with the reasons of the presiding Judge. I would only add that nothing in my agreement should be taken as

acceptance of the view that apart from the declaration this Court has jurisdiction to hear and determine an application for leave to appeal against sentence in the circumstances of this case.

ATKINSON J: I agree with the reasons of the President and with the order she proposes.

THE PRESIDENT: That's the order of the Court. Do you understand that? You have the declaration but your application is otherwise dismissed.