SUPREME COURT OF QUEENSLAND

CITATION:	*R v Vidler* [2005] QCA 384
PARTIES:	**R** **v** **VIDLER, Bradley Milton Craig** (applicant)
FILE NO/S:	CA No 183 of 2005 SC No 464 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	14 October 2005
DELIVERED AT:	Brisbane
HEARING DATE:	3 October 2005
JUDGES:	McMurdo P, Jerrard JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION – MISCELLANEOUS MATTERS – QUEENSLAND – PROCEDURE – EXTENSION OF TIME, NOTICE OF APPEAL AND ABANDONMENT – where applicant had already appealed against conviction – where applicant contends he was not informed of his counsel's decision not to proceed with some grounds of appeal in original appeal – where applicant sought leave to bring new appeal on those grounds and new grounds – whether extension of time should be granted CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – FRESH EVIDENCE – AVAILABILITY AT TRIAL; MATERIALITY AND COGENCY – PARTICULAR CASES – AVAILABILITY AT TRIAL – EVIDENCE IN POSSESSION OF CROWN NOT DISCLOSED TO DEFENCE – where applicant sought leave to tender fresh evidence – where applicant submitted that the fresh evidence gave rise to a reasonable doubt – whether

leave should be given to tender fresh evidence

Criminal Code 1899 (Qld), s 688D
Police Powers and Responsibilities Act 2000 (Qld)

Grierson v The King (1938) 60 CLR 431, followed
R v AP [2003] QCA 445; CA No 133 of 2003, cited
R v Chapman [2004] QCA 177; CA No 71 of 2004, cited
R v MAM [2005] QCA 323; CA No 118 of 2005, 30 August 2005, cited
R v Pettigrew [1996] QCA 235; [1997] 1 Qd R 601, cited
R v Tabe [1983] 2 Qd R 60, cited
R v Vidler [2000] QCA 63; (2000) 110 A Crim R 77, referred to
TKWJ v The Queen (2002) 212 CLR 124, cited

COUNSEL: The applicant appeared on his own behalf
M J Copley for the respondent

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

[1] **McMURDO P:** I agree with Douglas J's reasons and with the orders he proposes.

[2] **JERRARD JA**: In this matter I have read the reasons for judgment and orders proposed by Douglas J, and I agree with those. Mr Vidler argued his own application in a courteous and frank way, and he understood that the problem he faced was that he had already had an unsuccessful appeal against conviction. One of the central planks of his argument before this Court was that the original grounds of appeal which had been filed, and which were dated 22 October 1999, had been abandoned without his express authority. Assuming in his favour that that happened, those grounds of appeal, in grounds 1 and 2, asserted that the verdict of the jury was unsafe and unsatisfactory in that the jury should not have been satisfied beyond reasonable doubt that self-defence and provocation, respectively, had been excluded; the other four grounds of appeal complained about the adequacy of the directions given with respect to self-defence and provocation, and the relevance of intoxication to a defence of provocation.

[3] The grounds of appeal which were in fact argued complained of misdirections by the learned trial judge with respect to both self-defence and provocation. With due respect to Mr Vidler's complaint that the original grounds were abandoned without his express authority, the essential complaints made in those grounds, namely misdirections about the only two matters in issue – whether Mr Vidler acted in self-defence or under provocation – actually were argued. There was no other basis for arguing that the verdict of guilty was unsafe and unsatisfactory, because the evidence led certainly entitled the jury to find that Mr Vidler had shot the deceased man with a .22 rifle in the presence and sight of the witnesses Cooke and Veress, and when the witness Parker was present, although Parker did not see the actual shooting.

[4] Part of Mr Vidler's argument to this Court was that there was a significant matter involving the witness Cooke, who had now sworn an affidavit in which he described

not having given at the trial truthful evidence which he could have given, and swearing that the reason that truthful evidence was not given was because of (in effect) intimidatory conduct by a police officer. Mr Cooke's affidavit, put before this Court by Mr Vidler, swore that the evidence he should have given at the trial included that he was uncertain whether or not the deceased man was holding a rifle at the time he was shot; the true facts being that Mr Cooke was unsure of, and unable to observe clearly, whether that man had a weapon or not, because the deceased was standing behind the open door of a Land Cruiser utility and Mr Cooke's view of the deceased was obstructed by Mr Vidler.

[5] The evidence Mr Cooke did give at the trial was summarised by the learned trial judge during the judge's instructions to the jury, and included reference to six separate occasions when Mr Cooke was asked whether or not the deceased was holding a weapon when shot by Mr Vidler. Those questions are reproduced at pages 234 and 235 of the trial transcript,[1] and the questions and answers read:

- "Did Dave Edwards have anything with him at that time? No, I didn't see nothing, no."
- "Did you see him with a 30-30 rifle at that time? No."
- "Did the deceased Edwards have a gun in his hands? I don't, I don't think – I couldn't be sure. I saw them, I saw Noel and then I chased Noel. I couldn't be sure. I don't think so but I couldn't be sure."
- "You didn't see David Edwards with a gun at that point? I don't think so, no".
- "You then went out the front and you saw Dave and Brad and you saw – did you see the 30-30 at that stage? No, I didn't, I was just looking at Dave and Brad. Wouldn't have a clue where the 30-30 was."

[6] Those quotations of what Mr Cooke actually said on oath show that he did swear at the trial both that the deceased did not have a weapon, and that he was unsure whether the deceased did or not. That means there is really no substantial difference between his evidence at the trial and his affidavit evidence now.

[7] It is clear that the proposed grounds of appeal that Mr Vidler now wants to argue are almost all new matters, which were not part of the original grounds of appeal, about the withdrawal of which Mr Vidler now complains. It seems that he really wants to have a second appeal on new grounds, and that the complaint about abandonment of grounds without his specific authority, and the argument that Mr Cooke can now give relevant fresh evidence, are a means of getting to put forward his new grounds. It is simply too late for him to have an appeal on those new grounds. He also swore an affidavit in this Court about the events which led to his shooting the deceased, which affidavit raised a defence of self-defence. But he did not give evidence at his trial, and it is too late now to give his account. Finally, I note that the first of his new grounds complains about conduct in breach of the provisions of the *Police Powers and Responsibilities Act* 2000 (Qld), which only came into force after his trial in October 1999.

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1 A copy of the summing up was supplied to the court for the hearing of this appeal

[8] **DOUGLAS J:** On 19 July 2005 the applicant sought an extension of time within which to appeal his conviction for murder. That conviction occurred on 6 October 1999. He also now wishes to apply for leave to withdraw his counsel's abandonment of appeal grounds when an appeal from that conviction was heard on 25 February 2000 and to seek leave to reinstate the grounds of appeal filed in a notice of appeal on 26 October 1999 as well as to appeal on a number of fresh grounds.

[9] The immediate problem he faces is that he has already pursued one appeal against his conviction. It was treated as a final appeal and dismissed on its merits on 10 March 2000: see *R v Vidler* [2000] QCA 63; (2000) 110 A Crim R 77. It was argued on the basis that the learned trial judge had misdirected the jury with respect to self defence and provocation, several other grounds having been abandoned including those related to a claim that the conviction was unsafe and unsatisfactory. The applicant has made out a persuasive case that he did not receive advice in prison from his solicitor that his counsel proposed to limit the grounds argued although there is evidence that the advice was sent to him by facsimile. He now wishes to argue a fresh appeal including a ground that the verdict was unsafe and unsatisfactory as well as several other grounds related to the reception of certain evidence said to have been obtained illegally and other evidence said to have been withheld by the prosecution that were not raised in his earlier appeal.

[10] As has been said many times, this Court has no jurisdiction to hear a further appeal once an appeal has been dismissed on its merits: see *Grierson v The King* (1938) 60 CLR 431, 435-437. Davies JA collected the recent authorities reaffirming this principle in *R v AP* [2003] QCA 445 at [36]-[38]. See also the recent decision of this Court in *R v MAM* [2005] QCA 323 where Keane JA, with whom the other members of the Court agreed, reaffirmed that:

> "It is clear that the right of appeal conferred by section 668D of the *Criminal Code* 1899 (Qld) ('the *Criminal Code*') is exhausted once an appellant has been afforded one opportunity to have his or her appeal considered on its merits."

[11] Although the Court may set aside a notice of abandonment and permit a new notice of appeal to be filed – see *R v Tabe* [1983] 2 Qd R 60 – that principle does not entitle the applicant to a further appeal when the "first" appeal has been heard and dismissed on the merits. As Dixon J pointed in *Grierson* at 437, in such a case of withdrawal of a notice of abandonment there has been no determination by the Court "and there is no English case in which, after such a determination, an appeal has been reopened or a fresh appeal has been entertained". Nor does the leave to set aside the abandonment of an application for leave to appeal in *R v Chapman* [2004] QCA 177 provide any comfort to the applicant here. Again, in that case, there had been no hearing of an earlier appeal on the merits.

[12] The decision in *R v Pettigrew* [1997] 1 Qd R 601 did not question the application of the general principle in *Grierson* in circumstances such as the present: see at 604-607 per Fitzgerald P. It dealt with the power of the Court to set aside orders where there has been an error or mistake as to the content of an order previously made by the Court: see at 619 and 621 per Pincus JA and Mackenzie J. Fitzgerald P approached the issue on the narrower basis that the Court's powers included power to set aside an interlocutory order refusing leave to appeal after the order had been perfected when the interlocutory order was based upon a factual misapprehension,

shared by the parties and the Court, derived from ambiguity in the order of a lower court: see at 615.

[13] Here it is asserted by the applicant that he did not consent to the abandonment of grounds of appeal by his counsel at the previous hearing. Ordinarily a party is held to the way in which his or her counsel has presented that party's case because counsel is in effect the party's agent: *TKWJ v The Queen* (2002) 212 CLR 124, 147 at [74]. The amendment of the original notice of appeal was part of the discretion in respect of the conduct of the case which the applicant's then counsel was entitled to exercise. The applicant has not established that his counsel was acting contrary to his instructions at the hearing of the appeal.

[14] There is no reason why the Court should depart from the established rule in *Grierson.* Nor did the factual issues the applicant wishes to raise in the further appeal he seeks or the further evidence he wished to tender on this application provide any good reason why the jury's verdict should be challenged. The application to adduce further evidence and the application for an extension of time to appeal should be refused.