

SUPREME COURT OF QUEENSLAND

CITATION: *R v Wirth* [2006] QCA 388

PARTIES: **R**
v
WIRTH, Hans Jurgen
(applicant)

FILE NO/S: CA No 188 of 2006
DC No 54 of 2003
DC No 586 of 2004
DC No 587 of 2004

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Sentence & Conviction)

ORIGINATING COURT: District Court at Beenleigh

DELIVERED ON: 6 October 2006

DELIVERED AT: Brisbane

HEARING DATE: 26 September 2006

JUDGES: Keane and Holmes JJA and Jones J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **Application refused**

CATCHWORDS: CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION - QUEENSLAND - PROCEDURE - EXTENSION OF TIME, NOTICE OF APPEAL AND ABANDONMENT - applicant pleaded guilty to and was convicted of three counts of armed robbery, one count of armed robbery with personal violence, two counts of deprivation of liberty, two counts of serious assault and summary offences - sentenced to various concurrent terms of imprisonment, maximum being eight and a half years for armed robbery with personal violence - serious violent offence declarations made in respect of the four armed robbery offences - applicant applied to this Court for extension of time to appeal conviction and sentence in March 2005 - this Court rejected application in May 2005 - applicant filed new application for extension of time to appeal conviction and sentence in July 2006 - applicant relied on need to attend to family circumstances - whether applicant has shown a good reason, in the interests of justice, to grant application for extension of time

R v Tait [1998] QCA 304; [1999] 2 Qd R 667, applied

COUNSEL: The applicant appeared on his own behalf
S G Bain for the respondent

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

- [1] **KEANE JA:** On 9 December 2004, the applicant entered pleas of guilty to a number of offences for which he was sentenced to concurrent terms of imprisonment, the most severe of which was eight and a half years for armed robbery with personal violence committed on 1 November 2003. A serious violent offence ("SVO") declaration was made in respect of this offence. For another offence of armed robbery, also committed on 1 November 2003, the applicant was sentenced to six years imprisonment with an SVO declaration. The applicant was also sentenced to seven and a half years imprisonment with an SVO declaration in respect of an armed robbery committed on 11 June 2003. He was also sentenced to seven years imprisonment with an SVO declaration for an armed robbery committed on 20 December 2001. He was sentenced to shorter terms of imprisonment for a range of other offences.
- [2] On 10 March 2005, the applicant applied for an extension of time within which to appeal against his conviction and sentence. This application was considered by this Court on 18 May 2005.¹ On that occasion, the applicant was represented by counsel. The application relating to the convictions was abandoned. The application in relation to sentence was considered on the merits, and was rejected on the footing that it had not been demonstrated that the sentence was manifestly excessive.
- [3] On 4 July 2006, the applicant filed the current application for an extension of time within which to appeal against both conviction and sentence. In particular, he asserts that he was not guilty of the armed robbery of 20 December 2001 and the armed robbery with personal violence of 1 November 2003.
- [4] The applicant complains that he was originally given poor advice to plead guilty to offences of which he was not guilty. There is, however, no reason to think that his plea was not voluntary.
- [5] The applicant also complains of poor advice in relation to, and poor representation at, the hearing of his application to this Court in May 2005. In particular, he claims that he did not have the opportunity to be present and to make submissions on his own behalf with a view to demonstrating his innocence of some, but not all, of the offences with which he was charged. In this regard, it must be said immediately that, on 16 May 2005, the applicant swore an affidavit in which he confirmed that he did not wish to appeal against his convictions. That he may have been poorly advised in this regard cannot detract from the force of his own voluntary abandonment of his claim to challenge his convictions.
- [6] In *R v Tait*,² it was said that, in determining an application for an extension of time, this Court will "examine whether there is any good reason shown to account for the delay and whether it is in the interests of justice to grant the extension".

¹ *R v Wirth* [2005] QCA 166; CA No 53 of 2005, 18 May 2005.

² [1998] QCA 304; [1999] 2 Qd R 667 at 668 [5].

- [7] The applicant's only explanation for the delay between May 2005 and the current application is that he was not able financially to mount an application earlier, so that he was ultimately constrained to make this application on his own behalf. That is hardly a satisfactory explanation of a delay of 14 months; but there are more substantial reasons why the interests of justice do not warrant the grant of an extension of time in this case.
- [8] The applicant admits that, in relation to the armed robbery with personal violence of 1 November 2003, he was involved in the robbery although he asserts that he "remained in the car" while the robbery was carried out by his accomplice. The applicant has shown no basis on which he might hope to escape responsibility for this crime. The applicant's admission on this application that he was the driver for his accomplice only confirms this conclusion. It was this crime which attracted the highest of the concurrent sentences. Little purpose, in terms of the interests of justice, would be achieved by allowing the applicant now to challenge his convictions for the other armed robberies for which he was sentenced to lesser terms of imprisonment.
- [9] The applicant disavowed any challenge to his convictions for all his offences more than a year ago. It is not readily apparent that the interests of justice would not be served by allowing the convictions, which were regularly entered upon the best evidence of guilt, ie his voluntary plea of guilty, to be challenged now. At best for the applicant, if these convictions were to be set aside, there would have to be a retrial, and the passage of time has been such that relevant evidence may well have been lost over the years.
- [10] In summary in relation to the convictions, there is no reason to doubt that the original pleas of guilty were voluntarily entered, in December 2004, and that the 2005 challenge to the conviction was voluntarily abandoned. No good reason has been shown to allow the applicant to challenge the convictions now, almost two years after his voluntary pleas of guilty and more than a year after his voluntary abandonment of a belated attempt to challenge them. Especially is this so when he has shown no reason to doubt his responsibility for the offence which attracted the longest of his concurrent sentences.
- [11] In relation to the question of sentence, the considerations relevant to that question were fully addressed in this Court's decision of 18 May 2005. That decision fully canvassed the merits of the applicant's challenge to his sentence.
- [12] One new matter before the Court on this application is that the applicant now seeks to rely upon the need for him to assist with the care of his elderly mother who has become ill.
- [13] On behalf of the respondent, it was urged that there is no power in this Court to review its earlier decision. It is not necessary to rule upon the respondent's submission. Even if it be assumed that it is open to this Court to reconsider the matter in the light of the further matters which the applicant now seeks to urge in mitigation of his sentence, the correctness of the decision of 18 May 2005 has not been shown to be attended with sufficient doubt to show that the interests of justice require a reconsideration of the matter so as to support the grant of an extension of time. That the applicant's mother has become ill since this Court's decision of May

2005 is not a matter which is apt to cast any doubt on the correctness of that decision, or, for that matter, on the correctness of the original sentence.

Conclusion and order

- [14] No good reason, in terms of the interests of justice, has been shown to grant the application for an extension of time.
- [15] I would order that the application be dismissed.
- [16] **HOLMES JA:** I have read the reasons for judgment of Keane JA and agree that the application should be dismissed.
- [17] **JONES J:** I agree with the reasons expressed by Keane JA that the application should be refused.