# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Hansen* [2008] QCA 351 |
| PARTIES: | **R**<br>**v**<br>**HANSEN, Edward Charles**<br>(applicant) |
| FILE NO: | CA No 211 of 2008<br>DC No 2104 of 2004 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Extension (Conviction) |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 5 November 2008 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 20 October 2008 |
| JUDGES: | McMurdo P, Fraser JA and McMeekin J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDERS: | **Application dismissed.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where applicant seeks extension of time in which to appeal against conviction – where application is made following a significant delay – where no reasonable excuse is offered for the delay – whether there is a compelling demonstration of a serious injustice which can be corrected only on appeal – whether the application for extension of time in which to appeal against conviction should be granted<br><br>*Criminal Practice Rules* 1999 (Qld), r 70(3)<br><br>*R v Basacar* [2008] QCA 285, followed<br>*R v DAQ* [2008] QCA 75, followed<br>*R v Marriner* [2007] 1 Qd R 179; [2006] QCA 32, followed<br>*Wu v The Queen* (1999) 199 CLR 99; [1999] HCA 52, followed |
| COUNSEL: | The applicant appeared on his own behalf<br>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:** The application for an extension of time to appeal against conviction should be refused for the reasons given by McMeekin J.

[2] **FRASER JA:** I have had the advantage of reading the reasons for judgment of McMeekin J. I agree with the order proposed by his Honour, and with his reasons for the order.

[3] **McMEEKIN J:** The applicant was tried before his Honour Judge White and a jury in the District Court and on 12 August 2005 convicted on an indictment charging one count of maintaining a sexual relationship with a child with a circumstance of aggravation, one count of rape and 15 counts of unlawful carnal knowledge of a child under the age of 16 years. For these offences he was sentenced by Judge White to imprisonment for 12 years, in respect of the count of maintaining a sexual relationship and convicted but not further punished on the remaining counts.

[4] The applicant appealed against his conviction on all counts and sought leave to appeal against his sentence. The notice of appeal was filed on 7 September 2005. The applicant filed a notice of abandonment of appeal which notice purports to have been signed by the applicant on 7 June 2006 but which is shown as having been filed in the Registry on 7 February 2006.

[5] The Court of Appeal dismissed the application for leave to appeal against sentence on 6 March 2006.

[6] On 12 August 2008 the applicant filed an application for an extension of the time within which to appeal against the convictions of 12 August 2005 along with the notice of appeal. The notice of appeal asserts that there was a "miscarriage of justice" and "substantial miscarriage of justice" without further particularity.

[7] The applicant is self represented.

**Relevant Principles**

[8] In *R v Basacar* [2008] QCA 285 this court recently considered the proper approach to an application to extend time in which to appeal, but in the circumstances that pertain here where there has been an earlier abandonment of an appeal. It was held that the application necessarily had to be considered by reference to the considerations relevant to an application to set aside the abandonment and reinstate the appeal.

[9] An application to revive an abandoned appeal is governed by r 70 of the *Criminal Practice Rules* 1999. Rule 70 provides:

> "Abandoning appeal

(1) An appellant, at any time after starting an appeal, may abandon it by giving to the registrar a notice of abandonment of appeal.

(2) The appeal is taken to be dismissed by the court when the notice is given to the registrar.

(3) However, if the court considers it necessary in the interests of justice, the court may set aside the abandonment and reinstate the appeal."

[10] The question therefore is whether, in terms of r 70(3) the court "considers it necessary in the interest of justice" to set aside the abandonment and reinstate the appeal.

[11] In determining that question the decisions of this court in *R v Basacar* and *R v Marriner* [2006] QCA 32 require three things to be considered. They are:

(a) The reason for the abandonment of the appeal in the first place;

(b) The explanation for any delay that has occurred in the meantime; and

(c) The prospects of success of the appeal.

**Explanation of Abandonment**

[12] Here there was no explanation in the evidence for the abandonment of the original appeal. On the hearing of the appeal it emerged that the Legal Aid Office had refused to fund the appeal and recommended it be abandoned and that the applicant concentrate on an appeal against sentence in which case, legal aid for the latter appeal would be forthcoming. As I have mentioned that appeal was argued and determined by this court.

[13] The applicant contended that he had received advice at the time of the abandonment that he could reinstate the appeal at some future time. To support that submission he tendered a letter from the Jubilee Consulting Service. The letter does not on its face purport to be written by a lawyer but rather two social workers. The letter refers generally to matters not in the province of a lawyer but rather a social worker. The letter in terms does not state that an appeal may be abandoned and later reinstated without difficulty. It provides scant reason to any reasonable person to justify so important a step as the abandonment of an appeal against a verdict which, as the applicant would now have it, was unjustly obtained.

**Delay**

[14] As to the delay the applicant filed this application three years to the day after his conviction and about two and a half years after his notice of abandoning the appeal was filed. Those are very lengthy delays. This court recently considered the significance of a lengthy delay in *R v DAQ* [2008] QCA 75 where Keane JA pointed out at [10]-[12] (footnotes omitted):

> "Delay in making an application is relevant to the exercise of the discretionary power to grant an extension of time because delay detracts from the public interest in the finality of litigation. Indeed, it is the public interest in this regard that affords the *raison d'etre* of statutory time limits on appeals. One can readily understand that statutory time limitations on appeals should yield to the concern that the judicial process may have operated imperfectly in a particular case where there is no real prejudice to the public interest in the finality of litigation. For that reason, an applicant for an extension of time who has failed to observe statutory time limits by reason of ignorance or inadvertence or even incompetence, and who is obliged, because of a short period of unintentional delay, to seek an extension of time in order to institute an appeal, can expect to be given the benefit of an extension where there is an arguable case that an appeal may succeed.
>
> On the other hand, where an applicant has made a deliberate decision not to appeal, and has changed his mind in that regard only after serving the bulk of his sentence, it is understandable that the discretion to allow an appeal to proceed should be exercised in favour of an applicant only where the applicant presents a compelling demonstration of a serious injustice which can be corrected only on appeal.
>
> In the present case, the applicant deliberately adhered to his decision to accept the verdict of the jury until the bulk of his sentence had been served and he had become eligible for parole. The public interest in the finality of the processes of criminal justice warrants the rejection of so belated an attempt to call that process into question unless there is a compelling argument that a miscarriage of justice involving the conviction of an innocent person had occurred."

[15] Despite filing an affidavit in the proceedings the applicant has not offered any explanation for these lengthy delays. His application for extension of time within which to appeal records, as his grounds, three matters:

> "(a) Continuing delays in receiving court transcripts;
>
> (b) I was forced to become self taught due to Legal Aid refusal to appeal my conviction;
>
> (c) The Centre [a reference to the Wolston Correctional Centre] has inadequate facilities for anything but slow processing."

[16] No evidence is proffered to support any of the grounds. In any case it is inconceivable that the first and third grounds mentioned could justify any significant delay at all. Indeed the court transcripts to which the applicant intended to refer were apparently the transcripts of the committal which would have been available at the time of trial. They were almost certainly irrelevant to

a consideration of the conduct of the trial, and would have been available, if requested, long before the abandonment of the original appeal.

[17] As to the second ground mentioned it provides no explanation as to why the original appeal was abandoned or why so much time elapsed before this application was brought. The grounds of the appeal are a basic assertion of a miscarriage of justice without elaboration. They hardly require any deep insight into the law.

**Prospects of Success**

[18] Finally, it is necessary to consider the prospects of success of an appeal. Where the delay is so long as it is here the issue is whether the applicant has shown a "compelling argument that a miscarriage of justice involving the conviction of an innocent person had occurred" (per Keane JA in *DAQ* at [12]).

[19] The grounds of the appeal as I have said cite "miscarriage of justice" and "substantial miscarriage of justice". They refer to s 668E – the general provision giving this court the power to set aside the verdict of a jury on the ground that it is "unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice".

[20] Perusal of the affidavit filed by the applicant does not assist the applicant on any relevant matter. The affidavit essentially recites the applicant's denial of his guilt of the relevant offences and alleges that the complainant lied in her evidence. It needs hardly be said that the applicant faces a very difficult task in persuading this court to take a different view of the credit of the complainant than that adopted by the jury. Any such submission ignores the juries' role as the "constitutional tribunal for the determination of facts": *Wu v The Queen* [1999] HCA 52, paragraph [74] per Kirby J citing earlier authority.

[21] Nor is it helpful for the applicant to assert that some aspects of the evidence led at the trial tended to support his denials (and I note that the applicant did not give evidence at trial) – all matters plainly for the jury whose task it was to weigh up the evidence. Those assertions included:

(a) Having a legitimate reason to look at rental houses (the prosecution alleging that the sexual acts the subject of the charge had taken place in such places);

(b) That it was unlikely that he would have sexual intercourse with the complainant when inspecting rental houses given the presence of third parties or the potential for third parties to appear;

(c) The absence of child pornography on his computer;

(d) The claimed equivocal results of a medical examination of the complainant, it being alleged by the applicant that the examining

medical practitioner may have caused damage to the hymen of the 12 year old complainant (contrary to the evidence summarised by the learned trial judge, without complaint, in his summing up);

(e) The inability of police to locate a green sleeping bag on which the complainant had alleged sexual intercourse had occurred;

(f) The absence of any DNA evidence on a blanket taken from the boot of the applicant's car, the alleging that the blanket was one identified by the complainant onto which the applicant had ejaculated;

(g) His caring for the complainant's grandmother whilst on bail which the applicant alleges was inconsistent with the complainant's claim that the applicant had threatened to leave her grandmother if the complainant did not comply with his "desires".

[22] None of these matters either singularly or together demonstrate that any miscarriage of justice has occurred.

[23] The applicant has provided a submission running to some 14 pages. It is not always clear what precise point the applicant seeks to make. I will deal with the grounds that I can identify.

[24] Firstly, it is asserted that there was a reasonable apprehension that the entire jury panel was affected by bias. According to the applicant one of the empanelled members of the jury knew one of the Crown witnesses, a Detective Chambers. The juror was discharged and replaced by another member of the panel. The panel was still in the rear of the court room at this stage. From this event the applicant seeks to argue that there is a strong inference that the discharged juror discussed with fellow members of the jury panel knowledge that he had obtained from the witness that he knew concerning the case that was to be tried. It is plain from the terms of the submission that this is entirely speculative. The trial judge gave the usual direction that the jury should not bring into account any matters extraneous to the evidence led before them.

[25] Secondly, there is a complaint that two unidentified female police officers talked to an unidentified young female witness and it is asserted that they "were no doubt preparing her or spruiking her regarding beneficial cooperation of magnified evidence". Again there is not the slightest evidence to support the claim. The wording of the submission makes that plain.

[26] Thirdly, there is a complaint about the use of a tape of the complainant’s evidence, a claim that the tape was damaged and replaced and a complaint as to the timing at which the tape was introduced into the evidence. It is asserted that the procedure adopted was done "to confuse or dupe the jury". There was no rational explanation in this submission as to why the course adopted at trial, assuming it be as alleged by the applicant, somehow resulted in any miscarriage of justice. The inference that the applicant seeks to draw appears at paragraph

17 of his submission and is that whatever was contained on the tape that was damaged and replaced was adverse to the credibility of the Crown's chief witness, and that the tape was "conveniently damaged". Again there is not a shred of evidence to support any of the assertions.

[27] It is asserted that the jurors could not hear the tape and that the jurors paid little attention to the tape recorded evidence. That assertion is based on a comment allegedly made by the trial judge that the mechanism by which the tape was heard by the jurors be moved closer to them. Again there was no evidence at all to support the assertions. Indeed his Honour observed in his summing up that it appeared to him that the jury had been diligent in paying attention through the trial to the evidence. Nor is there an explanation as to what material was contained on the tape that was to the benefit of the accused and which was potentially overlooked not only by the jurors but by his counsel at trial and by the trial judge in his summing up.

[28] There is a complaint at paragraph 23 of the applicant's submissions about the conduct of the defence counsel. The applicant asserts that there was an agreement that the complainant not be present whilst tapes were played. The tapes contained the complainant's allegations. The applicant's complaint is that this arrangement is evidence of bias against him, presumably by his own counsel. The inference of course does not follow.

[29] There are several allegations made by the applicant that the complainant was led by her father and a Detective Bond into giving answers that she did not believe in and that ideas were planted in her mind. It is said this is evident from the tape recording made of her allegations which was played to the jury. If that is so then that was properly a matter for the jury to weigh up.

[30] At paragraphs 30 to 38 the applicant makes various observations on the evidence led from a medical practitioner of his examination of the hymen of the complainant. Certainly his Honour’s summing up of the evidence is unequivocal. As best can be worked out from the applicant's description of the evidence it would seem that the medical practitioner provided careful evidence of what he found and what conclusions could be drawn from what he found. His examination was consistent with the possibility of penetration having occurred. The evidence of the examination and the opinions of the doctor were plainly admissible and it was for the jury to weigh up their significance. There is nothing in this to suggest any miscarriage of justice.

[31] At paragraphs 29, 37, 40, 49 and 51 of the submission the applicant asserts that the trial judge interrupted the proceedings. There is nothing in the submission to demonstrate that the trial judge in any way misused his position or in some way impeded the defence in being properly presented to the jury. At the hearing of the appeal the applicant was invited to expand on his written submissions if he wished and could not cite a single example to support the allegation.

[32] At paragraphs 58 to 60 of the submission it is asserted that the trial judge erred many times, was biased and in a way prejudicial to the applicant. The complaint apparently is to a reference by his Honour to the taped evidence

tendered by the Crown accompanied by an assertion by the applicant that it is common knowledge that in these types of allegations the police usually "cut corners, prompt witnesses to enhance their evidence" a practice which the applicant asserts the trial judge engaged in throughout the trial including in his summing up when he planted seeds in the minds of the jury. What seeds are not explained. I note that no redirections were sought at trial.

[33] As an example of an error by his Honour it is asserted that he told the jury to use their commonsense to reach a verdict. The applicant's interpretation of that everyday direction is that it is equivalent to the trial judge telling the jury to forget about the evidence. Needless to say his Honour's direction could hardly carry the implication that the applicant seeks to place on it. The interpretation suggested serves to emphasise the lack of confidence one can have that there is any merit in any of the applicant's arguments.

[34] In circumstances where, as here, there is no explanation for a very long delay, and with the added factor of an appeal brought within time but long abandoned and no reasonable explanation offered for that abandonment, "the discretion to allow an appeal to proceed should be exercised in favour of an applicant only where the applicant presents a compelling demonstration of a serious injustice which can be corrected only on appeal" (per Keane JA in *R v DAQ* supra).

[35] In my view no injustice has been demonstrated. It follows that it is not necessary in the interests of justice to set aside the applicant's abandoned notice of appeal or to reinstate his appeal, nor would I would extend time within which to appeal.

**Order**

[36] The application is dismissed.