SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hussein & Hussein* [2009] QCA 246
PARTIES:	**R** **v** **HUSSEIN, Azhar Zuhayr** (applicant) **R** **v** **HUSSEIN, Afsheen Kashef** (applicant)
FILE NO/S:	CA No 146 of 2009 CA No 147 of 2009 DC No 631 of 2006 DC No 748 of 2006 DC No 2089 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 August 2009
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2009
JUDGES:	Keane, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Applications for extension of time within which to appeal against sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where applicants were convicted, after trial, of six counts of rape against complainant [C] and sentenced to fifteen and a half and fifteen years imprisonment – where applicants pleaded guilty to ten counts of rape and one count of deprivation of liberty against complainant [D] and sentenced to eleven and a half and ten years imprisonment to be served concurrently with the sentences in respect of the offences against [C] – where applicants' previous appeals against conviction and applications for leave to appeal against sentence were dismissed – where applicants sought leave to adduce fresh evidence and submitted that the primary judge sentenced the

applicants on the basis of four factual errors – whether extension of time should be granted

Corrective Services Act 2006 (Qld)
Penalties and Sentences Act 1992 (Qld), s 188(1)(c)

Grierson v The King (1938) 60 CLR 431; [1938] HCA 45, considered
R v AP [2003] QCA 445, cited
R v McQuire [2004] 1 Qd R 685; [2003] QCA 523, cited
R v Nudd [2007] QCA 40, cited
R v Senior [2005] QCA 21, cited
R v Smith [1968] QWN 50, considered
R v Smith (No 2) [1969] QWN 10, cited

COUNSEL: The applicants appeared on their own behalf
P F Rutledge for the respondent

SOLICITORS: The applicants appeared on their own behalf
Director of Public Prosecutions (Qld) for the respondent

[1] **KEANE JA:** I have had the advantage of reading the reasons for judgment prepared by Muir JA. I agree with the order proposed by his Honour and with his Honour's reasons.

[2] **MUIR JA:** The applicants were convicted on 18 January 2006 after a trial in the District Court of six counts of rape committed on the complainant [C] on 17 September 2004. Each was convicted as principal offender on three of the counts and as aiding the other on the remaining counts. On 9 March 2006, the applicants pleaded guilty to ten counts of rape and one count of deprivation of liberty on 13 February 2005 of another complainant [D]. After the trial of the offences concerning [C], the judge who had presided at the trial sentenced the applicants for the rapes of [C] and [D] and for other less serious offences. Afsheen Hussein was sentenced to fifteen and a half years imprisonment for each of the six counts of rape against [C] and to eleven and a half years imprisonment for each of the ten counts of rape against [D]. Azhar Hussein was sentenced to 15 years imprisonment for the six counts of rape against [C] and to ten years imprisonment for each of the ten counts of rape against [D]. All sentences were ordered to be served concurrently.

[3] The offences against [D] were committed by the applicants in company with co-offenders, AAG and AAH. Some of the convictions were as principal offender and others as aider of the other three offenders. AAG and AAH, who pleaded guilty and who cooperated with the police, were sentenced to eight and a half years imprisonment with a serious violent offence declaration. The learned sentencing judge stated that had it not been for their cooperation with authorities, he would have imposed 11 year terms of imprisonment.

[4] The applicants appealed against their convictions for the rapes of [C] and applied for leave to appeal against their sentences in respect of the offences against [C] and [D]. The appeals against conviction and the applications for leave to appeal against sentence were respectively dismissed and refused by this Court on 20 October 2006.

[5] On 9 June 2009, the applicants filed applications for extensions of time within which to apply for leave to appeal against their sentences. Should extensions of time be granted the applicants propose to rely on the grounds that the sentences imposed were based on four factual errors, namely:

> "1. The applicants were sentenced as the protagonists in the [D] matter,
> 2. A psychologist (sic) report was not presented in court during the sentence hearing because of financial incapacity,
> 3. The applicants were punished to a greater extent than was authorised by the former *Corrective Services Act*, and
> 4. The applicants were punished on the assumption on what might have happened if the victims began to resist instead of what actually happened."

[6] The delay in making the applications is said to have arisen as a result of evidence which was not available "during the original sentence hearing or the previous appeal".

[7] Ground 1 relies on the evidence of a person who swears that he met AAG and AAH when in prison in 2006. The substance of his evidence is that AAG and AAH informed him to the effect that: they were the planners of the incident involving [D]; they held screwdrivers to her throat "at sometime of the incident"; and that "they misled everyone into believing that the Hussein brothers were the main culprits." There is no evidence of when the applicants became aware of the evidence this witness was able to give and the delay in making the applications is unexplained.

[8] In any event, the "fresh evidence" was not such that it could have had material bearing on the sentences imposed had it been before the sentencing judge. All four offenders admitted raping the complainant. The witness does not swear that the applicants were not armed with a screwdriver at any stage of the subject attack. Even if the applicants did not hold the or a screwdriver, they participated in the subjugation of the victim by their presence and took advantage of her helplessness. Defence counsel at first instance submitted that "[AAG and AAH] were equally involved" and that each AAG and AAH "had been armed with one of the two screwdrivers at some stage of the incident" and the sentencing judge made no finding to the effect that this was inaccurate. Of particular significance is the sentencing judge's intimation that AAG and AAH would have been sentenced to 11 years imprisonment had it not been for their cooperation with the authorities. Whatever the sentencing judge meant by referring to the applicants as "the protagonists", he plainly did not see their conduct as meriting any greater punishment than that of AAG and AAH.

[9] The fact that a psychologist's report was not tendered at the sentencing hearing because of financial incapacity, if that was the case, was something known to the applicants at the time of the original appeal. It is too late to agitate that matter now. The applicants were not dealt with harshly by the sentencing judge. The sentences for the offences against [D] were made concurrent with the sentences for the offences against [C], even though committed in respect of a different victim at a different time. The fifteen and a half year and the 15 year sentences for the offences against [C] were head sentences designed to reflect the criminality of the overall

conduct of the applicants. It was held in the original appeal[1] that these head sentences were not manifestly excessive. Apart from that, the applicants have not attempted to put before the Court any evidence to demonstrate that a psychologist's report, if obtained, would have been to their advantage.

[10] In relation to the third ground of appeal, the applicants rely on an amendment to the *Corrective Services Act* 2006 (Qld), which came into force after they were sentenced and, it is submitted, has the effect that they must serve an additional four years in a high security facility. Because of this, it is submitted that this Court should reopen the sentence under section 188(1)(c) of the *Penalties and Sentences Act* 1992 (Qld) as, in sentencing, "the court" acted on an erroneous factual basis. Section 188(1)(c) only applies where the Court to which application is made has imposed the sentence or, perhaps, varied it.[2] This Court, on appeal, refused leave to appeal against sentence: it did not impose the sentence and this ground was not agitated on the earlier appeal. That may well have been because the ground lacks substance. A legislative change of the nature of that under consideration after the imposition of a sentence provides no basis for reopening a sentence under s 188.

[11] There is no substance either in the ground that the applicants were punished on an erroneous assumption. The point raised by the learned sentencing judge in relation to the offences against [C] was that [C] was induced to comply with the applicants' demands, in part, by the way in which the applicants handled and displayed a knife throughout the incident. By this conduct, the applicants implicitly threatened [C] with the use of the knife if she failed to comply with their demands. A similar point was made by the sentencing judge when dealing with the offences against [D]. In his reasons on the first appeal, Jerrard JA observed, "… the circumstances of both sets of offences involved a considerable risk of actual violence if the victim began to resist." That conclusion, with respect, does not suggest that the applicants were punished for something which might have happened but did not. Rather, the observation was made in order to identify and explain the criminality of the applicants' conduct at the time they engaged in it.

[12] As the proposed grounds of appeal are lacking in merit it is unnecessary to finally determine the merits of the respondent's contention that the applicants' right to bring these applications was extinguished when their previous applications for leave to appeal were refused.

[13] The principle relied on was explained by Keane JA, with whose reasons the other members of the Court agreed in *R v Nudd*:[3]

> "The right of appeal to this Court is created by s 668D of the *Criminal Code* 1899 (Qld). Once this Court has decided an appeal to it on its merits, the right of appeal conferred by s 668D of the Code is exhausted, and this Court has no jurisdiction to entertain a further appeal. That this is so is well established in a long line of authorities: see *Grierson v The King* (1938) 60 CLR 431, *R v Smith* [1968] QWN 50, *Mickelberg v The Queen* (1989) 167 CLR 259; especially at 287, and *R v MAM* [2005] QCA 323."

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1 *R v Hussein & Hussein* [2006] QCA 411 at [52].
2 *R v McQuire* [2004] 1 Qd R 685.
3 [2007] QCA 40.

[14] The rationale for the decision of the High Court in *Grierson v The King* was that the right of appeal to the New South Wales Court of Criminal Appeal was statutory and that "… the court has no further authority to set aside a conviction upon indictment than the statute confers."[4] In his reasons Dixon J observed that:

> "The Supreme Court held, in accordance with a decision of the Supreme Court of South Australia (*R. v. Edwards* [*No. 2*] (1931) SASR 376), that a second appeal from a conviction could not be entertained after the dismissal, upon the merits, of an appeal or **application for leave to appeal** and that the first appeal could not be reopened after a final determination." (emphasis added)

[15] *Grierson*, like *Nudd*, was a case concerning an appeal against conviction and sentence after an appeal against conviction and sentence had been heard and determined on the merits. So, too, was *R v Senior*,[5] another fairly recent decision of this Court in which *Grierson* was applied.

[16] In *R v Smith*,[6] a case like the present where there was a previous application for leave to appeal which was refused, two of the members of the Court, Hart and Douglas JJ doubted that the Court had jurisdiction to extend the time for appeal. The other member of the Court, Lucas J, was of the opinion, on the authority of *Grierson*, that the Court had no jurisdiction to entertain the application. The question was left undecided in *R v AP*,[7] but Davies JA in his reasons observed that the principle in *Grierson* had been applied in circumstances such as those under consideration in two decisions of the Court of Criminal Appeal. The decisions referred to were *R v Smith*[8] and *R v Smith (No 2)*[9]. In the latter case, Sheehy SPJ, with whose reasons Hanger and Hart JJ agreed, adopted the reasoning and conclusions of Lucas J in *R v Smith*. However, as the question has not been argued fully on this appeal, it is undesirable that it be decided.

[17] I would dismiss the applications for extension of time within which to appeal against sentence. There is no credible explanation for the great delay in making the applications and the proposed grounds of appeal are all unmeritorious.

[18] **FRASER JA:** I agree with the reasons of Muir JA and with the order his Honour proposes.

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4 *Grierson v The King* (1938) 60 CLR 431 at 435, 6 per Dixon J, with whose reasons McTiernan J agreed.
5 [2005] QCA 21.
6 [1968] QWN 50.
7 [2003] QCA 445.
8 [1968] QWN 50.
9 [1969] QWN 10.