SUPREME COURT OF QUEENSLAND

CITATION:	*R v Harold* [2010] QCA 267
PARTIES:	**R** **v** **HAROLD, Cyril Dennis** (applicant)
FILE NO/S:	CA No 128 of 2010 SC No 31 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence & Conviction)
ORIGINATING COURT:	Supreme Court at Mt Isa
DELIVERED ON:	8 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	22 September 2010
JUDGES:	McMurdo P, Fraser JA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for an extension of time to appeal against conviction is refused.** **2. The application for an extension of time to apply for leave to appeal against sentence is granted with time extended to 31 May 2010.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – applicant convicted of manslaughter – appeal and application for leave to appeal over three years out of time – DNA evidence linked applicant to the killing – no fingerprints or DNA on knife or cricket bat at crime scene – applicant admitted to others he had killed the deceased – whether sound reason for lengthy delay and reasonable prospects of success in appeal against conviction – whether in the interests of justice to grant application for extension of time CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – applicant had some relevant criminal history and several prior periods of imprisonment – aged 34 at time of sentence – demonstrated no remorse or insight into offending – whether some prospects of success in application for leave to appeal against sentence – whether in the interests of justice to grant application for extension of time

R v Sebo; ex parte A-G (Qld) [2007] QCA 426, considered
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, cited
R v Whiting; ex parte Attorney-General [1995] 2 Qd R 199; [1994] QCA 425, considered

COUNSEL: The applicant appeared on his own behalf
V A Loury for the respondent

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

[1] **McMURDO P:** The applicant, Cyril Dennis Harold, has applied for an extension of time to appeal against his conviction of manslaughter in the Mount Isa Supreme Court on 21 December 2005. He has also applied for an extension of time to apply for leave to appeal against his sentence of 14 years imprisonment. His application is over three years out of time.

[2] Mr Harold has provided no written explanation for the lengthy delay in bringing this application. He was self-represented at the hearing of this application which was by way of video link from Lotus Glen Prison, Cairns. He is an Aboriginal man and from his manner of speech it seemed that English is not his first language. He said he was not able to read much. By way of explanation for the delay, he stated that he "would not know how to start an appeal"; another inmate, Michael Davison, encouraged and assisted him in bringing this application. He wanted Mr Davison to assist him at the hearing but the prison authorities did not permit it.

[3] To succeed in his application, Mr Harold would ordinarily need to provide both a sound reason for the lengthy delay in bringing the application and to also demonstrate that he has a viable prospect of success: *R v Tait*.[1] This Court would grant such an application where the interests of justice warranted it. The question for this Court, then, is whether Mr Harold has demonstrated the interests of justice warrant the granting of his application for an extension of time to appeal either against his conviction or his sentence.

The application for an extension of time to appeal against conviction

[4] The grounds of his application are:

> "There was no DNA evidence Tested or presented at my Case. No DNA Linking me to the Crime Scene or Witnesses. They has Just convicted me on a Poor Aboriginal man and his past Conviction of a lesser Nature Minding his own Business (ground 1).
>
> No evidence on the knife or cricket Bat at Crime Scene Linking me to this Crime (ground 2).
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> All Blood Pattern and Testing was inconsistent with Mr Harold's Testimony. This was never Argued or Questioned (ground 3)." (errors as in original)

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1 [1999] 2 Qd R 667 at 668; [1998] QCA 304.

[5] He expanded slightly on these grounds in his proposed notice of appeal:

> "Ground (1). The Judge Should of Ruled Mr Smids Examinations of the Pathologist Evidence as inadmissible as he was not an expert or Qualified in his examination. It was all Opinion Evidence.
>
> There was no DNA evidence to put me at the Crime Scene. Blood found on Bathroom or Laundry Floor did not Match me or the Deceased. This was never tested or Argued. It belonged to an Unknown Male of a Different Origin. (Ground 2)
>
> No fingerprints of me on the Murder Weapon or evidence anywhere or incoclusive. No evidence of anything and Intoxication of me or the Deceased was not put to the Crown or Jury and State of Mine of the Deceased at the time of the Offence. (Ground 3)" (errors as in original)

[6] He added nothing of substance to these contentions in his oral submissions.

[7] Mr Harold pleaded not guilty to murdering his partner. The jury acquitted him of murder but convicted him of manslaughter.

[8] The Court has not been supplied with an appeal record book but the evidence at trial, summarised by the judge in his jury directions, included the following. The deceased was found dead in the house shared by Ms Rita Harold (Mr Harold's mother) and her partner, Mr Alexander Sailor. There were no eyewitnesses to the killing. The deceased's blood was found throughout bedroom 2 and on a cricket bat and a knife found in a cupboard in bedroom 2. Bloodstained finger marks were found near the doorway to the bathroom and on a wall in bedroom 2. DNA analysis of the two fingerprint marks were inconclusive but they were consistent with Mr Harold's DNA. There were drag marks on the floor consistent with the deceased having been moved to the laundry after she had been assaulted in bedroom 2. An unknown male's blood was found near the drag marks on the floor near the laundry. Some DNA in bedroom 2 and near the laundry was from an unknown male person.

[9] When Mr Harold was medically examined, he had only one injury: a sore knee. He had no lacerations to his hands. His fingerprints were not on the cricket bat or the knife.

[10] A swab taken from Mr Harold's right hand tested positive for blood and indicated DNA from two people: the deceased and Mr Harold. A swab from Mr Harold's left hand also showed the presence of DNA from two people, one of whom was the deceased. A swab taken from Mr Harold's left foot tested positive for blood but was inconclusive as to whose blood; insofar as it was possible to match it, it was consistent with the deceased's DNA. The DNA profile of both Mr Harold's right and left hand finger and nail scrapings showed the presence of DNA from two people: a major contribution from the deceased and a minor contribution from Mr Harold. Mr Harold's shirt was bloodstained on the outside. On the inside, it contained DNA from both the deceased and Mr Harold. The pathologist, who gave unchallenged evidence of his expertise, gave the following testimony. The deceased suffered 13 separate stab wounds to her front, one of which penetrated the upper lobe of the lung and caused her death. She also had seven or eight stab wounds to

her back, one to her right upper arm, one to her right thigh, and defensive injuries to her hands. She had a fracture of the left greater horn of the thyroid carpal, sometimes associated with strangulation. There were, however, no other signs of strangulation.

[11] A police officer gave evidence that the impressions of the soles of shoes or thongs at the crime scene appeared similar to Mr Harold's thongs, although it was not possible to get a complete match.

[12] Sherylee Rose Sambo gave evidence that she saw Mr Harold go to the house where the deceased was killed, shortly after the deceased entered the house. The deceased had been drinking alcohol during the day. On the night of the killing, Mr Harold told her that the deceased had passed away. He was shaking. Ms Sambo agreed she had been drinking a lot on the day of the killing.

[13] Garrick Robinson Yam gave the following evidence. He spoke to Mr Harold the day after the deceased died. Mr Yam had been drinking heavily. Mr Harold was drunk and had probably had a fight with someone. Mr Harold said that he thought he had killed the deceased. Mr Harold was crying and upset. Mr Yam agreed that his memory was not good. He said, however, that he was sure Mr Harold told him "I think I've killed [the deceased]."

[14] Mr Harold's mother, Rita Harold, gave the following evidence. She lived with her partner, Mr Sailor, at the house where the deceased was killed. She and Mr Sailor do not drink alcohol and do not allow it in their home. At about 5 pm, Mr Harold came to their house. The deceased followed Mr Harold into the house a little later. Ms Harold told Mr Harold not to argue with the deceased or she would call the police. Ms Harold and Mr Sailor left with some children Ms Rita Harold was caring for. At that time, the appellant and deceased were both drunk but Rita Harold agreed "they were getting along fine". There was no sign of any blood in the bedroom, hallway or laundry. When she came home she asked Mr Harold if the deceased was in the house. She told him that the deceased had to leave and could not stay in the house. She went into the bedroom, saw the deceased, and called the ambulance.

[15] Shirley Toby gave the following evidence. On the day the deceased died, she was drinking at the Albion Hotel with the deceased. They were both drunk. Ms Toby left the deceased at the hotel. Ms Toby did not see Mr Harold until that evening when he came to the front gate of the place where she was drinking with others, including Garrick Yam. Mr Harold said, "I think I killed her. Mum, I think I killed her." Mr Harold always called her "Mum". He looked a bit shocked. Ms Toby was drunk. Mr Harold hugged her. She agreed her memory was not good because it was a long time ago and because of her "problem with the drinking". She agreed that at the committal proceedings she gave the following version of this conversation with Mr Harold:

> "He said something like 'Mum, my missus is dead.' This would have been about 9 o'clock. He always calls me Mum. I said ['the deceased'] he said, 'Yes.' … I said 'what happened?' and … he said 'I went into the bedroom and found her. I closed her eyes with my hands.' When he said this he moved his hand down over his face, over his eyes.' 'Yes,…Boy I know you wouldn't do that. [Mr Harold] was crying hugging me all the time.' "

[16] She agreed that Mr Harold told her that he had gone to the bedroom and found the deceased, and closed her eyes. He hugged Ms Toby. She agreed she could not now recall her conversation with Mr Harold because she had been drinking and she was "not pretty good on remembering". She had never seen Mr Harold hit the deceased and she had known them both a very long time.

[17] Mr Alexander Sailor, the step-father of the deceased and the partner of Mr Harold's mother, Rita, gave the following evidence. The deceased and Mr Harold would argue a bit after they had been drinking, but they would settle down. On the day the deceased was killed, Mr Harold came to Mr Sailor's home and the deceased followed at about 5 pm. He told them both they could cook a meal but he did not want any fighting whilst he was out. They were both drunk. He went out to attend to some business and came back later. Mr Harold was sitting out the front of the house and he walked off. Mr Harold's mother, Rita, told Mr Harold to get the deceased up and take her back to Lenny Burns' place. At first, he and Ms Rita Harold thought the deceased was sleeping, but later Mr Harold turned up asking for a smoke and told them she was dead.

[18] Loretta Khan gave the following evidence. She was Mr Harold's aunt and had been drinking with the deceased at the Albion Hotel on the day she died. She saw Mr Harold at about 8 pm inside a flat at Thompson Street. Mr Harold said, "Mum, I think I killed her." Ms Khan had been drinking that day but she was not drunk. Mr Harold asked for a beer but she refused and he left. She denied telling a police officer that Mr Harold "had come and told [Ms Khan] he's choked the fuck out of her". But when a taped conversation was played to Mr Khan, she acknowledged that she did say that to the police; she was affected by alcohol at the time. She maintained that Mr Harold put his arms on her shoulder and said, "I think I've killed her"; he did not say, "I choked the fuck out of her."

[19] Hedrick Joseph Bee gave the following evidence. He had been drinking with the deceased and Mr Harold at the Central Hotel on the day of the killing. Later that night, Mr Harold came to his place and told him he had found the deceased dead on the bed. He had tears in his eyes and had been crying.

[20] Mr Harold did not give or call evidence. The case put by Mr Harold's barrister to the jury was that there was DNA evidence that blood from an unknown person was present at the crime scene. As Mr Harold had no injuries resulting in blood loss, somebody else must have been there. This person may have been the killer. The DNA evidence linking Mr Harold to the crime scene was consistent with him making an attempt to clean the deceased's body after she was killed by another. The prosecution evidence would not satisfy the jury beyond reasonable doubt that Mr Harold killed the deceased and they should find him not guilty.

[21] The judge told the jury that evidence of Mr Harold's intoxication was a matter that they should consider in relation to the offence of murder, namely, whether he had the capacity to form an intention to kill or do grievous bodily harm to the deceased or whether he did in fact intend to cause death or grievous bodily harm to the deceased.

[22] The judge warned the jury that the case against Mr Harold was circumstantial and they could only convict if they were satisfied that the only rational inference was one of guilt beyond reasonable doubt. This was a prudent but generous direction for Mr Harold, as there was evidence that he had admitted killing the deceased.

[23] The following matters are relevant to the contentions Mr Harold has made in his application.[2] It is clear from my summation of the prosecution evidence that, contrary to Mr Harold's assertions, there was DNA linking Mr Harold to the crime scene. Also contrary to Mr Harold's claims, his past convictions were not placed before the jury. It is true, as Mr Harold contends, that no fingerprints or DNA material belonging to Mr Harold were found on either the knife or the cricket bat. Mr Harold's contentions suggest that he gave evidence at trial, but he did not. His case at trial, that someone else killed the deceased, was nevertheless clearly put to the jury by his barrister and by the judge. Contrary to Mr Harold's contentions, the pathologist's evidence was clearly relevant and admissible and there was no evidence challenging the pathologist's qualifications. It is true, as Mr Harold states, that blood belonging to another male was found at the crime scene; both Mr Harold's barrister and the trial judge pointed this out to the jury. Mr Harold did not seem to apprehend that the judge correctly directed the jury as to the relevance of intoxication on the charge of murder. The jury understood and acted on that direction in acquitting him of murder. Mr Harold has not made out any of his contentions relating to an appeal against conviction.

[24] Despite the evidence of the presence of blood from an unknown male at the scene, in the absence of any competing evidence, the prosecution evidence against Mr Harold at trial was compelling. There was a body of DNA evidence linking Mr Harold to the killing. He had the deceased's blood on his hands and blood-stained finger marks on the walls were consistent with his blood. He had the opportunity to kill the deceased: there was no evidence that anyone other than the deceased and Mr Harold were in the house when she was killed. He told others afterwards that he had killed her. Mr Harold does not suggest the judge's directions to the jury were in any way flawed. On the evidence at trial, the jury were well entitled to convict Mr Harold of manslaughter.

[25] It follows that as Mr Harold has not demonstrated that he has any prospects of success in an appeal against conviction, the interests of justice do not warrant the granting of his application for an extension of time to appeal against conviction.

The application for an extension of time to apply for leave to appeal

[26] I turn to Mr Harold's application for an extension of time to appeal against sentence. This Court has not had the benefit of an appeal record book containing counsel's sentencing submissions. In sentencing Mr Harold, the judge found that the jury entertained a reasonable doubt as to Mr Harold's capacity to form an intention to kill or do grievous bodily harm because of his intoxication. After being convicted of manslaughter, Mr Harold pleaded guilty to two counts of assault occasioning bodily harm of his partner whilst armed, and some summary offences: three of breaching a domestic violence order in respect of his partner, one of driving under the influence of liquor or a drug, one of unlicensed driving and numerous breaches of bail. The judge took these matters into account in imposing the 14 year sentence for manslaughter, convicted Mr Harold of them but did not further punish him for them.

[27] Although Mr Harold's criminal history has not been placed before this Court, counsel for the respondent has informed us that he had a number of convictions for assault occasioning bodily harm and breaching domestic violence orders in 1995,

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2 Set out at [4] and [5] of these reasons.

1998 and 1999 and had served periods of imprisonment for those offences. He was 34 at the time he killed the deceased and 36 at sentence. In imposing the sentence of 14 years imprisonment, the judge noted:

> "The circumstances reveal what can only be described as a terrible situation of constant violence inflicted, in the course of drinking bouts, upon a woman who you were in a relationship with and with whom there must have been some significant bond. It cannot be known what led, on this occasion, to your attacking her with a knife but presumably the catalyst was a drunken quarrel about something or other.
>
> The repetitive and prolonged nature of the attack upon the deceased with the knife makes this a very serious case of manslaughter. The community is entitled to look to the Courts to ensure that sentences, which are commensurate with the criminality involved in brutal attacks on women, are imposed. Here it is common ground that I should take into account the previous history of violence, including the offences to which you have pleaded guilty today and those offences for which you have already been dealt with involving the deceased, and impose a sentence in respect of the manslaughter count which reflects the whole history of the matter."

[28] Mr Harold was a mature man when he unlawfully but intentionally killed the deceased. He demonstrated no remorse or insight into his long history of abusive behaviour when intoxicated towards the deceased. He did not cooperate in any way with the administration of justice. A heavy penalty was warranted as a personal deterrent to Mr Harold and to deter others who perpetrate deadly domestic violence. Nevertheless, comparable decisions of this Court which my modest research located suggest that a 14 year sentence may be bordering on the outside of the range in all the circumstances: see, for example, *R v Sebo; ex parte A-G (Qld)*[3] and *R v Whiting; ex parte Attorney-General*.[4] I emphasise that this is only a preliminary view without the benefit of an appeal record book and considered submissions from counsel.

[29] In support of the sentence of 14 years imprisonment, counsel for the respondent referred the Court to *R v Bates; R v Baker*,[5] and *R v Corry*.[6] In my opinion, those cases bear no genuine comparability to the circumstances of the present case and are not helpful in determining the range.

[30] Although Mr Harold has not provided any evidence to explain his lengthy delay in bringing this application, it seems that it may well be attributable to social and educational disadvantage resulting in him being less able than most to protect his own interests. He may have some prospects of success in an application for leave to appeal against sentence. In all the circumstances, the interests of justice warrant the granting of an extension of time so that this issue can be fully explored and determined in a considered way. Hopefully, Mr Harold will apply for legal aid and

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3 [2007] QCA 426.
4 [1995] 2 Qd R 199; [1994] QCA 425.
5 [2002] QCA 174.
6 [2006] QCA 203.

the Court will have the benefit of his legal representative's submissions at the subsequent hearing of the application for leave to appeal against sentence.

ORDER:

Mr Harold's application for an extension of time to appeal against conviction is refused, but his application for an extension of time to apply for leave to appeal against sentence is granted with time extended to 31 May 2010.

[31] **FRASER JA:** I have had the advantage of reading the President's reasons. It is in the interests of justice that the Court grant an extension of time to apply for leave to appeal against sentence. I agree with the President's reasons for refusing an extension of time for appealing against conviction. I agree with the orders proposed by her Honour.

[32] **JONES J:** I agree with the orders proposed by the President.