SUPREME COURT OF QUEENSLAND

CITATION:	*R v O'Hara* [2015] QCA 283
PARTIES:	**R** **v** **O'HARA, Michael John** (applicant)
FILE NO/S:	CA No 63 of 2015 DC No 898 of 2011 DC No 602 of 2012 DC No 618 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence & Conviction)
ORIGINATING COURT:	District Court at Brisbane – Unreported, 20 April 2012
DELIVERED ON:	18 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2015
JUDGES:	Fraser and Gotterson and Philip McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application be refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL GENERAL PRINCIPLES – RIGHT OF APPEAL – NATURE OF RIGHT – SCOPE AND EFFECT OF APPEAL – where the applicant sought an extension of time within which to appeal against his conviction and sentence on the basis that he was affected by a neurological disorder – where the applicant was convicted on his own pleas of guilty of two counts of fraud and two summary offences – where the Court of Appeal had refused an earlier application by the applicant for an extension of time to appeal against conviction after a full consideration of the merits of the proposed appeal – where the suggested basis of the present application was the same as that which was previously refused, namely that the applicant was suffering from episodes of "focal dyscognitive seizures" at the time he pleaded guilty and was therefore unfit to plead – where the character of the application was an impermissible attempt to relitigate a case which the court had conclusively determined – where the application was refused CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant sought an extension of time within which to appeal against his conviction

and sentence on the basis that he was affected by a neurological disorder described as focal dyscognitive seizures which made him unfit to plead at the time he was sentenced and caused his failure to appeal within time – where the applicant's case was the same as that which the Court of Appeal had previously rejected in an earlier application for an extension of time to appeal against conviction upon the same basis – application refused

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – POWER TO BRING APPEAL – GENERALLY – where the Court of Appeal had refused an earlier application by the applicant for an extension of time to appeal against conviction after a full consideration of the merits of the proposed appeal – where it was ultimately unnecessary to determine the jurisdictional question as to whether the court had jurisdiction to hear a second application for an extension of time in which to appeal

Criminal Code (Qld), s 668D

Grierson v The King (1938) 60 CLR 431; [1938] HCA 45, considered
Lowe v R [2015] NSWCCA 46, considered
Napier v Western Australia (2008) 36 WAR 543; [2008] WASCA 106, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, considered
R v A [2003] QCA 445, considered
R v Lumley [2008] QCA 155, cited
R v Lumley [2009] QCA 172, cited
R v MAM [2005] QCA 323, considered
R v Nudd [2007] QCA 40, cited
R v O'Hara [2014] QCA 257, considered
R v Upson (No 2) (2013) 229 A Crim R 275; [2013] QCA 149, considered
Walton v Gardiner (1993) 177 CLR 378; [1993] HCA 77, cited

COUNSEL: The applicant appeared on his own behalf
G P Cash for the respondent

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

[1] **FRASER JA:** I agree with the reasons for judgment of McMurdo JA and the order proposed by his Honour.

[2] **GOTTERSON JA:** I agree with the order proposed by Philip McMurdo JA and with the reasons given by his Honour.

[3] **PHILIP McMURDO JA:** On 20 April 2012 the applicant was convicted on his own pleas of guilty of two counts of fraud and two summary offences. He was sentenced to cumulative terms totalling 10 years for the fraud offences and short concurrent terms for

the summary offences. He had been in custody for 778 days, the whole of which was declared as time served and a parole eligibility date was fixed at 3 March 2013.

[4] Within two weeks of his release on parole in April 2013, the applicant filed an application for an extension of time within which to appeal against his conviction. That application was heard by this court on 21 August 2014 and dismissed on 10 October 2014.[1]

[5] This is a further application for an extension of time within which to appeal. In this application he seeks to appeal against both conviction and sentence. The suggested basis for this application is the same as that which was refused in 2014, namely that when he pleaded guilty, he was suffering from frequent episodes of focal dyscognitive seizures. He also maintains, as he did in 2014, that he has suffered these episodes for many years which would include the periods of his offending. It is not clear whether he maintains that this condition provided him with a defence of insanity or whether he relies upon it only to explain his pleas of guilty.

[6] In this application, as in 2014, the applicant is not legally represented. But when he pleaded guilty and was sentenced, he was represented by experienced counsel. An agreed schedule of facts was tendered for his sentencing hearing. Those facts are discussed in the principal judgment of this court in the 2014 application, which was given by Ann Lyons J.[2] It is unnecessary to repeat that discussion here except to note that the two offences of fraud each involved elaborate schemes which were implemented over substantial periods (15 months in one case and over three years in the other) and yielded in total more than $2 million. One of the schemes was only uncovered when the applicant was arrested for the other and when his house was searched, a bag was found containing $230,000.

[7] At the sentencing hearing, there was evidence to the effect that the applicant suffered from a delusional disorder which impaired his judgment and moral reasoning. But there was then no suggestion that he had any condition which may have affected his criminal responsibility or his fitness to plead. The sentencing judge noted that he had been assessed by numerous psychiatrists. There was no indication in the evidence in the sentencing hearing that the applicant may have been suffering from focal dyscognitive seizures. That condition was raised for the first time in his 2014 application.

[8] The outcome of the 2014 application was that it was refused by this court, rather than an extension of time being granted and the appeal being dismissed. But the application was refused after a full consideration of the merits of the proposed appeal. This raises a question of whether this court has jurisdiction to hear this second application for an extension of time in which to appeal.

Jurisdiction

[9] A right to appeal against conviction or sentence is conferred by s 668D of the *Criminal Code*. A person may appeal against his conviction on any ground which involves a question of law alone[3] and, with the leave of the court against his conviction on another ground.[4] The practice of this court is to regard the grant of leave, where that is necessary for an appeal against conviction, as a formality and to dispose of the proceeding as an appeal, by an order dismissing or allowing the appeal. Where an appeal against conviction

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1 *R v O'Hara* [2014] QCA 257.
2 Ibid 9-10 [37]-[40].
3 s 668D(1)(a).
4 s 668D(b).

is dismissed, it is well established that the court has no jurisdiction to hear a further appeal: see, e.g. *R v MAM*;[5] *R v Nudd*;[6] *R v Lumley*.[7] These and other judgments to the same effect have applied *Grierson v The King*,[8] which held that where a right of appeal is provided by a statute in terms such as in s 668D, the statute is to be interpreted as allowing for but one appeal.

[10] In *Grierson* the High Court refused special leave to appeal against a decision of the New South Wales Court of Criminal Appeal, in which Jordan CJ had said:[9]

> "When an appeal has once been fully heard and disposed of, that is, in my opinion, an end of the matter so far as appeal is concerned, and the prisoner cannot continue to appeal from time to time thereafter, whenever a new point occurs to him or to his legal advisers or whenever a new fact is alleged to have come to light."

The passage from the judgments in *Grierson* which is usually cited is from the judgment of Dixon J as follows:[10]

> "The Supreme Court held … 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.
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> In my opinion this conclusion is correct."

[11] In this court the same reasoning has been applied where an application for leave to appeal against sentence has been determined on the merits and there is a second attempt to appeal the sentence. In *R v Upson (No 2)*,[11] Fraser JA (with whom Holmes JA and Daubney J agreed) noted that the reasoning in *Grierson* had been applied in that context in a number of decisions in this court, and said:[12]

> "In the case of an application for leave to appeal against sentence where a previous application was refused on the merits of the proposed appeal, the mere repetition or refinement of the original grounds of appeal, the formulation of different grounds, or reliance upon new evidence, does not take the case outside the general rule that the Court lacks jurisdiction to hear the second application."

In essence the reasoning in *Upson (No 2)* was that in an application for leave to appeal against sentence, the leave requirement has ordinarily been regarded as a mere formality, just as it has been for an application seeking leave to appeal a conviction,[13] so that there was no material difference between the two. As was there noted, the practice in sentence applications is for the court to order in terms of a refusal or grant of leave.[14] But such applications are argued and determined according to the merits of the proposed appeal against sentence.

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5 [2005] QCA 323.
6 [2007] QCA 40.
7 [2008] QCA 155 and [2009] QCA 172.
8 (1938) 60 CLR 431.
9 As set out in *Grierson v The King* (1938) 60 CLR 431, 432.
10 Ibid 435.
11 [2013] QCA 149.
12 Ibid 11 [25].
13 Ibid 5 [11].
14 Ibid.

[12] In a recent judgment in the New South Wales Court of Criminal Appeal, *Lowe v R*,[15] a different view was reached as to a second application for leave to appeal against sentence, namely that the refusal of leave to appeal was no jurisdictional bar to a second application. In the principal judgment which was given by Davies J, *R v Upson (No 2)* was said to be inconsistent with some of the judgments of the High Court in *Postiglione v The Queen*.[16] However, a second application could be refused as frivolous or vexatious if "based on matters agitated on a previous application", as was said in a judgment of the court in 2004, in a passage set out by Davies J.[17]

[13] In the present case, the previous application was for an order extending the time to appeal against conviction. Although that application was refused because the court saw no merit in the proposed appeal, the judgment was not the disposition of an appeal. The reasoning in *Upson* is not so clearly applicable where the court's previous judgment, as here, has been to refuse an application for extension of time. Although the demerit of a proposed appeal may often be a reason for refusing such an application, an application may also be refused because the failure to appeal (or apply for leave to appeal) is not satisfactorily explained. In *R v A*,[18] each of McMurdo P and Davies JA discussed the question of the applicability of *Grierson* to the present circumstances. The President found it unnecessary to express a concluded view.[19] Davies JA said that the refusal of an earlier application for an extension of time to appeal against conviction "does not preclude this Court from hearing a further such application, though if it were based on the same grounds it would be bound to fail".[20] However, as was noted in *R v Upson (No 2)*,[21] the Western Australian Court of Appeal has applied *Grierson* in a case such as the present, where the previous application for an extension of time to appeal was refused because the proposed appeal lacked merit.[22]

[14] The respondent did not submit that the court lacks jurisdiction to hear the present application and it is preferable to leave this jurisdictional question for another case where the question is fully argued. If the court has jurisdiction, this application should fail because, as I am about to discuss, it is based on the same ground as was considered and rejected in the previous application.

The 2014 judgment

[15] The thorough judgment of Ann Lyons J, with whom Muir and Gotterson JJA agreed, in the 2014 application makes it unnecessary for me to detail the case which the applicant then advanced and the court's reasons for rejecting it, but some discussion of the argument and the evidence in that case is necessary.

[16] The applicant's case was that he had recently been diagnosed with a neurological disorder described as focal dyscognitive seizures, which had affected him at the date of his sentence for many years previously, and for almost all of his subsequent incarceration. He argued that this condition had made him unfit to plead. The evidence which he adduced included letters from Professor McConnell addressed to his general practitioner, Dr Sturman, a medical certificate from Dr Sturman and a letter from a psychologist,

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15 [2015] NSWCCA 46.
16 (1997) 189 CLR 295; [1997] HCA 26.
17 *R v Alameddine* [2004] NSWCCA 286 [98], set out in *Lowe* [2015] NSWCCA 46 [107].
18 [2003] QCA 445.
19 Ibid 9 [25].
20 Ibid 12 [41].
21 [2013] QCA 149, 7 [18], n 22.
22 *Napier v Western Australia* [2008] WASCA 106 [24].

Mr Huntley. The applicant had told Professor McConnell that he suffered episodes of "going blank" which occurred on a frequent basis of variable duration, from seconds to minutes and occasionally much longer periods of time. Professor McConnell originally wrote that it was "well possible that these 'blank out episodes' could represent focal dyscognitive seizures". In the second of his letters to Dr Sturman, Professor McConnell expressed the more definite opinion that these episodes of "blankness" were "indeed likely focal dyscognitive seizures".

[17] Dr Sturman's medical certificate expressed her opinion that "this new diagnosis of long-standing symptoms supports [the applicant's] assertion that he was not functioning adequately cognitively at the time of his trial …". Mr Huntley wrote that there appeared "to be sufficient evidence to suggest that [the applicant] may suffer from a neurological condition that has caused significant disruption to his life", although that was apparently a description of Professor McConnell's diagnosis rather than Mr Huntley's own assessment.

[18] Ann Lyons J also considered evidence from psychiatrists as to the applicant's condition both when he was sentenced and subsequently. Her Honour said that there was nothing in that material which supported a factual basis for a diagnosis of dyscognitive seizure attacks during his period in custody,[23] and concluded that the applicant had not adequately explained his failure to appeal within time.[24]

[19] Her Honour also extensively referred to the transcript of the sentence hearing, which was significant in at least two ways. The first was that it revealed that the applicant had foreshadowed his intention to plead guilty "a long period of time" before the sentence hearing. Secondly, it recorded the applicant, as well as his counsel, addressing the sentencing judge and expressing deep remorse for his offending.[25] Ann Lyons J observed that the transcript did not indicate that the applicant had been experiencing a "blank out" or was in a state of cognitive disassociation on the day of sentence.[26]

[20] Her Honour then considered the evidence as to the applicant's soundness of mind at the time of the offences and extensively discussed the psychiatrists' opinions before concluding that it was "patently clear that [the applicant] was not considered to be of unsound mind at the time he committed any of the offences".[27]

[21] The applicant therefore had no reasonable prospects of success in arguing that he was either unfit to plead or of unsound mind at the time of any of the offences.[28]

The present evidence

[22] In the present application, further medical evidence was tendered by the applicant. There is a document addressed "to whom it may concern", signed by Professor McConnell, in these terms:

> "This is to confirm that Michael O'Hara suffers from focal dyscognitive seizures. This results in episodes where he may continue to interact with others but is not cognisant of his actions. I believe that this is very likely relevant to his current legal proceedings as these episodes were untreated at the time of his legal hearing."

There is also another letter from Professor McConnell to Dr Sturman as follows:

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23 *R v O'Hara* [2014] QCA 257, 9 [34].
24 Ibid 9 [35].
25 Ibid 11 [43].
26 Ibid 12 [44].
27 Ibid 15 [49].
28 Ibid 15 [50].

> "I had the pleasure of seeing Michael O'Hara in Neuropsychiatry Second Opinion Outpatient Clinic. He states that he has done extremely well with the introduction of sodium valproate and has had no further episodes of loss of consciousness or any other seizure like events. These have reduced markedly in frequency and now occur only occasionally."

There are two further letters from Professor McConnell which are of no relevance and need not be discussed.

[23] There is a further medical certificate from Dr Sturman which repeats the opinion she expressed in the certificate which was considered by the court in the 2014 application.

[24] There is a report by Dr Helen Brown, a neurologist, dated 11 August 2015. She described a recent consultation in which the applicant had "one of his typical stereotyped events" which she then described. Her report does not express an opinion as to whether the applicant had this condition on the date of his sentence hearing. From Dr Brown's description of the episode during the consultation, it seems inconceivable that the applicant could have been suffering such an episode at the sentence hearing without that being noticed by his lawyers and the sentencing judge. Moreover, Dr Brown recorded that the applicant said that his intent on the day of his sentence had been to plead not guilty, which is plainly inconsistent with what was said both by him and his counsel to the sentencing judge.

[25] There is a document described as "Consultation Liaison Psychiatry - Summary of Care" dated 2 September 2015 and completed by Dr Moss, a psychiatrist with Queensland Government Mental Health Services. This document provides no support for the applicant's argument. More particularly it expresses no opinion as to whether the applicant was suffering seizures as he claimed and was doing so when he was sentenced.

[26] There is also a report from a Dr Walton, a psychiatrist, which was tendered at this hearing. This report is dated 30 May 2001. It makes no reference to the condition of which the applicant now complains.

[27] In an affidavit filed on 21 April 2015, the applicant exhibited a report by Dr Scott dated 21 January 2011. This was extensively discussed by Ann Lyons J.[29] (The same report is exhibited to a further affidavit of the applicant filed 7 September 2015.)

[28] In his affidavit filed 17 September 2015, the applicant exhibited reports by Dr Barnes, psychiatrist, dated 22 June 2011, 10 February 2012 and 31 May 2012. This evidence was considered by the court on the previous application.[30]

[29] He also exhibited a report from Dr Mann, psychiatrist, from which much has been redacted but was clearly written after Dr Mann saw the applicant in prison where he was on remand. Dr Mann's opinions were extensively discussed in the previous judgment.[31]

Conclusion

[30] The applicant's case is the same as that which the court has previously rejected, namely that he was unfit to plead because at his sentence hearing he was experiencing a prolonged episode of "blankness" which was not discernible by anyone present, most particularly his counsel or the sentencing judge. It is clear from the reasons for judgment in 2014 that the outcome would have been no different with the addition such of this evidence as is new. In apparent recognition of that difficulty, the applicant

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29 *R v O'Hara* [2014] QCA 257, 14-15 [48].
30 Ibid 7, 8 [30], [31].
31 Ibid 6-7 [25]-[29].

sought to challenge the correctness of the reasoning in the 2014 judgment, which well illustrated the true character of the present application as an impermissible attempt to relitigate a case which the court has conclusively determined. Such a proceeding is a category of case which constitutes an abuse of the court's process, as Mason CJ, Deane and Dawson JJ said in *Walton v Gardiner*.[32]

[31] The present application was for an extension of time to appeal both against conviction and against sentence. The previous application did not seek to challenge the sentence or sentences. But if the present application is new in that respect, it remains vexatious because it seeks to relitigate the same case which the court has rejected. There was no further argument, for example, that the sentences were manifestly excessive.

[32] I would order that the application be refused.

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32 (1993) 177 CLR 378, 393.