SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ackerman* [2017] QCA 214
PARTIES:	**R** **v** **ACKERMAN, Marius Anton** (applicant)
FILE NO/S:	CA No 50 of 2017 DC No 447 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 18 March 2015 (Devereaux SC DCJ)
DELIVERED ON:	26 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2017
JUDGES:	Sofronoff P and Gotterson and McMurdo JJA
ORDER:	**The application is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant lodged fraudulent claims for GST refunds – where the amount paid over by the Commonwealth was over $1,100,000 – where the applicant pleaded guilty to 56 counts of obtaining a financial advantage by deception and to nine counts of attempting to obtain a financial advantage by deception – where the applicant was sentenced to seven years' imprisonment with a non-parole period of four years – whether the sentence was manifestly excessive having regard to sentences imposed in comparable cases CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the sentencing judge made an observation that the GST claim forms filed by the applicant were completely false – where the applicant submits that the claim forms were only partly false – whether the sentencing judge proceeded upon an incorrect observation regarding the falsity of the claim forms CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR

INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the sentencing judge sentenced the applicant on the basis that the applicant obtained $1,104,565.40 by way of deception – where the applicant submits that the true amount obtained by deception was $945,475.31 – whether this discrepancy resulted in an error in sentencing

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where s 16A(1) of the *Crimes Act* 1914 (Cth) requires a court to impose a sentence that is of a severity appropriate in all the circumstances – where s 16A(2) of the *Crimes Act* requires a court to take into account all relevant matters – whether the sentencing judge erred by failing to take into account all relevant matters

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant's former solicitors initially filed a notice of appeal within time – where the applicant's former solicitors withdrew and the applicant was later refused Legal Aid – where the applicant abandoned his original appeal – where the applicant now seeks an extension of time within which to apply for leave to appeal against his sentence – whether there are justifiable grounds for the delay in bringing the appeal

Crimes Act 1914 (Cth), s 16A(1), s 16A(2)
Criminal Code 1995 (Cth), s 11.1(2), s 134.2

R v Cole, unreported, Sleight DCJ, District Court of Western Australia, DC No 651 of 2013, 11 December 2013, distinguished
R v DAQ [2008] QCA 75, applied
R v Hood, unreported, Rafter SC DCJ, District Court of Queensland, DC No 2182 of 2011, 4 May 2012, considered

COUNSEL: The applicant appeared on his own behalf
W S Ferguson (*sol*) for the respondent

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

[1] **SOFRONOFF P:** This is an application for an extension of time within which to file an application for leave to appeal against sentence.

[2] The applicant pleaded guilty on the sixth day of his trial to 56 offences contrary to s 134.2 of the *Criminal Code* 1995 (Cth) of obtaining a financial advantage by deception and to nine counts of attempting to obtain a financial advantage by deception. The offences were constituted by the applicant's submission of fraudulent claims for GST refunds by three companies controlled by him and his

wife. The total claimed in that way was $1,174,325.60. Of this, only $69,838 was not paid over by the Commonwealth and, in this respect, the particular counts involving this sum were offences of attempting to obtain a financial advantage contrary to the section that I have referred to. In this way the Commonwealth lost over $1,100,000 which has not been recovered. The offence carries a maximum penalty of 10 years.

[3] On 18 March 2015, over two years ago, Devereaux DCJ sentenced the applicant to seven years' imprisonment in respect of counts 1 to 23 and 30 to 62. He sentenced the applicant to four years' imprisonment in respect of the remaining counts. His Honour fixed a non-parole period of four years.

[4] On 7 April 2015 the applicant's then solicitors filed an application for leave to appeal against those sentences. The appeal was listed for hearing on 29 July 2015. The applicant's solicitors ceased acting and the applicant applied for Legal Aid, which was refused. The applicant was notified of this refusal on 8 July 2015. He did not at that time have the record books. In his submissions he says that as a result he "was left with no other option but to abandon the appeal". This is not correct. The applicant could have asked for the hearing to be adjourned if he needed time to prepare.

[5] The applicant says that he had been transferred to Palen Creek Correctional Centre, a low security facility. He says that he was not allowed to prosecute an application for leave to appeal while at that facility. After some time, he asked to be returned to a maximum security facility so that he could consider an appeal. He says that it was only after this that he realised that he had five grounds to raise by way of appeal.

[6] The first of these points is that the applicant says that he pleaded guilty to offences against s 134.2 and s 11.1(2) of the *Criminal Code* but that he was sentenced only under s 134.2.

[7] Section 134.2 provides, in summary, that a person commits an offence if the person, by deception, dishonestly obtains a financial advantage from another person, including a Commonwealth entity.

[8] Section 11.1 provides, relevantly, that a person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

[9] In this way the applicant had been charged with having committed an offence against s 134.2 and, in respect of deceptions by him which did not result in the payment by the Commonwealth of money, of attempting to commit that offence.

[10] As one would expect, his Honour was well aware of the different offences with which the applicant had been charged. He had sat through five days of trial. Indeed, in the course of sentencing the applicant his Honour referred to the sum of $69,838 as the "amount that is referrable to the attempt charges".

[11] There is nothing in this ground.

[12] The second point the applicant would wish to argue is that the Judge's observation that forms containing the claims for GST "must have been completely false documents" was incorrect. He says that they were only partly false. It may be that

parts of the fraudulent documents that the applicant submitted were accurate. That does not change them into documents that cannot be characterised truthfully as false documents. It hardly matters that, when he deceived the Commonwealth into paying him over $1,000,000, the applicant happened to say some things that were true.

[13] There is nothing in this ground.

[14] As to his third ground, the applicant says that some of the moneys obtained by him were actually owed by the Commonwealth to the respective companies who claimed them. Upon this basis, the applicant contends that the true amount he obtained by way of deception was not $1,104,565.40 but merely $945,475.31. If this were true, it would not be capable of altering the sentences imposed for the commission of what were, even on this view, serious offences of deception involving the loss to the Commonwealth of money in the order of $1,000,000.

[15] There is nothing in this ground.

[16] Fourthly, the applicant points to s 16A(1) of the *Crimes Act* 1914 (Cth). That section requires a court when imposing a sentence to impose a sentence that is "of a severity appropriate in all the circumstances of the offence". Section 16A(2) obliges a court, when imposing a sentence, to take into account such matters as are "relevant and known to the court". The applicant says that Devereaux DCJ did not refer to either of these sections and, as a consequence, one must infer that his Honour erred.

[17] It is only necessary to state that ground to see that there is nothing in it. His Honour actually took into account all relevant matters and, indeed, the applicant does not point to any material failure in that respect apart from the matters with which I have already dealt.

[18] Finally, the applicant complains that the sentences imposed upon him were manifestly excessive. He seeks to demonstrate this conclusion by pointing to two previous cases, *Hood*,[1] a decision of the Queensland District Court and *Cole*,[2] a decision of the Western Australian District Court.

[19] *Hood* had defrauded the Commonwealth of $1,374,533.28. He also attempted to defraud the Commonwealth of $29,474.59. He was sentenced to six years with a non-parole period of two years. *Cole* defrauded the Commonwealth of $1,725,775.60 and attempted to defraud the Commonwealth of a further $36,963.81. He was sentenced to seven years' imprisonment with a non-parole period of three years and nine months.

[20] The applicant in this matter was sentenced to a term of seven years' imprisonment on the substantive offences and four years' imprisonment on the counts relating to his attempts to commit offences. It is apparent that there is no marked disparity in sentencing. It is true that *Cole* obtained over $1,750,000 from the Commonwealth and the applicant was charged with having obtained $1,100,000. While it is true that there are some differences between the cases, *Cole* was a case in which the Court of Appeal of Western Australia accepted a concession by the respondent

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1 *R v Hood*, unreported, Rafter SC DCJ, District Court of Queensland, DC No 2182 of 2011, 4 May 2012.

2 *R v Cole*, unreported, Sleight DCJ, District Court of Western Australia, DC No 651 of 2013, 11 December 2013.

prosecutor on appeal that the sentence had been based upon a material factual error. As a consequence, the sentence was set aside and the matter remitted to the District Court for resentencing. The case is not authority for anything.

[21] *Hood* was a case in which the amount that the appellant gained by deception was similar to the amount that the applicant had obtained. *Hood* had pleaded guilty. The applicant had also pleaded guilty but as late as possible. Nevertheless, the learned sentencing judge gave him some discount for that reason.

[22] Even if this were an appeal, it would not be sufficient to demonstrate inferred error in the exercise of discretion by pointing to the result in *Hood*. The terms of imprisonment imposed were not markedly different, the amounts obtained were not markedly different and the evident differences in some of the circumstances that the applicant has described in his outline of submissions negate any possibility of an inference of error based upon that single case.

[23] Delay in making an application is relevant to the exercise of the discretion to grant an extension of time. Keane JA, as his Honour then was, said in *R v DAQ*[3] that this is because delay detracts from the public interest in the finality of litigation. Nevertheless, time limits must give way to the demands of justice. As Keane JA also pointed out in the same case, when an applicant has made a deliberate decision not to appeal, an applicant would have to present "a compelling demonstration of a serious injustice which can be corrected only on appeal".[4]

[24] In this case the applicant has failed to make such a demonstration. Indeed, he has also failed at the first hurdle; the reason for his abandonment of his original application for leave to appeal against the sentence together with the reasons put forward for delay, so far as any such reasons have been put forward, are themselves inadequate to explain the delay. Even if that were not so, the proposed grounds upon which the applicant would seek to apply for leave to appeal against the sentence imposed upon him have no merit and, consequently, he has demonstrated no injustice as would justify an extension of time.

[25] For these reasons I would refuse to grant an extension of time.

[26] **GOTTERSON JA:** I agree with the order proposed by Sofronoff P and with the reasons given by his Honour.

[27] **McMURDO JA:** I agree with Sofronoff P.

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3 *R v DAQ* [2008] QCA 75 per Keane JA at [10].

4 *ibid* at [11].