SUPREME COURT OF QUEENSLAND

CITATION:	*R v Murphy* [2017] QCA 267
PARTIES:	**R** **v** **MURPHY, Scott Stuart** (appellant)
FILE NO/S:	CA No 39 of 2017 DC No 490 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport – Date of Conviction: 30 August 2016 (Clare SC DCJ)
DELIVERED ON:	8 November 2017
DELIVERED AT:	Brisbane
HEARING DATES:	21 April 2017; 12 May 2017
JUDGES:	Fraser and Philippides JJA and Flanagan J
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – PLEAS – GENERAL PLEAS – PLEA OF GUILTY – WITHDRAWAL AND RESTORATION OF PLEA – GENERALLY – where the appellant pleaded guilty to one count of extortion, one count of robbery in company, two counts of deprivation of liberty, one count of assault occasioning bodily harm in company and one count of assault occasioning bodily harm – where the appellant contended that he was pressured to plead guilty for the benefit of his co-accused – where the appellant contended that he only pleaded guilty after receiving advice that he would not serve any more time in actual custody – where the appellant was sentenced to concurrent sentences of one term of six years' imprisonment, one term of five years' imprisonment, three terms of three years' imprisonment and one term of two years' imprisonment, with a parole eligibility date of 12 February 2019 – whether the pleas of guilty were involuntary on the basis that they were induced by imprudent and inappropriate advice *GAS v The Queen; SJK v The Queen* (2004) 217 CLR 198; [2004] HCA 22, cited *Meissner v The Queen* (1995) 184 CLR 132; [1995] HCA 41, applied *R v Boag* (1994) 73 A Crim R 35, cited *R v Liberti* (1991) 55 A Crim R 120, cited

R v MCK [2017] QCA 56, cited
R v Wilkes (2001) 122 A Crim R 310; [2001] NSWCCA 97, distinguished

COUNSEL: C F C Wilson for the appellant
P J McCarthy for the respondent

SOLICITORS: Archbold Legal for the appellant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **PHILIPPIDES JA:** On 30 August 2016, the appellant was convicted on his own pleas of guilty to six counts, in respect of which he was sentenced on 16 September 2016 as follows:

- six years' imprisonment on count 4 (a count of extortion);
- five years' imprisonment on count 2 (a count of robbery in company);
- three years' imprisonment on each of counts 1 and 3 (counts of deprivation of liberty) and count 6 (a count of assault occasioning bodily harm in company); and
- two years' imprisonment on count 5 (a count of assault occasioning bodily harm).

[3] The sentences were imposed concurrently, with a parole eligibility date of 12 February 2019 and a declaration being made as to pre-sentence custody.

The notice of appeal

[4] A notice of appeal against conviction was filed on 8 March 2017, which was approximately five months out of time. The appellant, therefore, required an extension of time for filing the notice of appeal. The appellant's explanation for the delay was not challenged by the respondent. In those circumstances, on 21 April 2017, this Court granted the application for an extension of time within which to appeal against conviction.

[5] The appellant was also granted leave to amend the notice of appeal to advance a single ground of appeal, that the appellant's pleas of guilty "were not truly voluntary in that they were induced by wrong advice as to the likely penalty".

[6] The appellant's ultimate submission was counsel provided an assurance and promise of no jail time that went beyond strong advice of a possible outcome and amounted to a representation of a specific outcome of no jail time (or at most, six to nine months) with a head sentence of 18 months to two years. Based on the appellant's version of the advice provided to him and the allegations and charges that he was facing, any advice promising no jail time was "… imprudent and inappropriate".

The evidence

The appellant's first affidavit

[7] The appellant deposed that "ever since being charged" in April 2014, he had wanted to plead not guilty and contest the charges that he was facing. In preparation of a bail application while he was in custody after his arrest, he provided a full version of events addressing the allegations against him and his innocence.

[8] The charges against the appellant were listed for hearing on 29 August 2016. Shortly before that date, the appellant was advised who his barrister would be. The barrister nominated was a different barrister from the barrister who had acted for him on the bail application (and to whom he had given his version of events) and who he had thought would be acting for him. He assumed that his version had been given to the new barrister.

[9] During the first conference with his barrister and solicitor on the first day of the listed trial, the appellant was advised that the trial was straightforward and, given the other co-accused were more involved, they would follow their case and let them speak first. The commencement of the trial was delayed and, at another conference later that day, the appellant was shown a new indictment that no longer included the charge of torture. The appellant said he was advised that if he pleaded guilty, he would get around 18 months' imprisonment to serve six months' actual imprisonment. The appellant said he responded that he was not guilty.

[10] The following day (30 August 2016) at the commencement of trial, he entered pleas of not guilty. At a further conference on that day, the appellant was again approached by his counsel and solicitor with a further new indictment, from which both the kidnapping and torture charges had been removed.

[11] The appellant deposed to being advised that, if he pleaded guilty, he "would receive a period of 18 months' imprisonment but it would be wholly suspended", meaning "no more jail time", that "the extortion charges were at the lowest level" and "there was a strong risk of conviction at trial". When the appellant asked what his co-accused were doing, he was told that they were waiting for him to decide and also that pleading guilty was the "best deal for everyone". The appellant deposed that he then pleaded guilty on the following bases:

- Over two days he was approached twice and advised to plead guilty, where for the past two and a half years he had been instructing that he wished to go to trial and "[had] never changed those instructions".
- His involvement, "on the Crown case, was at the very lowest of extortion and other charges".
- There was "a strong chance of conviction at trial".
- On a guilty plea, he "would not serve any additional jail time" and would receive a suspended sentence.
- He felt "undue pressure" to take "the deal for the benefit of [his] co-accused" as he was advised that this deal would be the "best for everyone" and the others were waiting on him to decide.

[12] The appellant stated that he "never wanted to plead guilty" but he did so because of the pressures on him to plead guilty "for the benefit of his co-accused" and the advice he received that he was likely to be convicted at trial and would not go to jail

if he pleaded. He stated that he would not have pleaded guilty "if there was any chance of [his] incarceration".

[13] On the appellant pleading guilty, he was remanded in custody. When his solicitor conferenced with the appellant, the appellant stated, "*What the fuck, if there was any chance of going to jail I would never have pleaded guilty*". The appellant stated that the solicitor said that he knew that and then discussed the possibility of appeals.

[14] In the final paragraph of his first affidavit, the appellant stated that he felt "ambushed". He said that he had always maintained his innocence but he was approached by counsel, who advised him to plead guilty for the benefit of the other co-accused, that conviction after trial was likely and that he "would not go to jail" if he did plead.

[15] In cross-examination, the appellant accepted that he had read through the statement of facts and that if he pleaded he would be sentenced on the basis of those facts. Of importance in the decision to plead was that he was told that there was a strong case against him and that he would not serve any jail time. His main interest was in not going to jail.

The evidence of the appellant's former counsel

[16] The appellant's former counsel gave affidavit evidence and was cross-examined. He deposed to meeting the appellant for the first time on 29 August 2016, the day on which the trial proceeding was supposed to commence. At that stage, the Crown case against the appellant was that he was the "ringleader" in relation to all charges and had arranged for the offending to occur, even though he was not physically present for most of it. Counsel recalled that a co-accused pleaded guilty on the first day of trial and counsel recalled that she provided a statement against the other co-accused as part of that process and undertook to give evidence at the appellant's trial.

[17] Counsel deposed to extensive negotiations conducted between the Office of the Director of Public Prosecutions and counsel for the co-accused in the trial, as a result of which he conveyed to the appellant that the Crown was willing to reduce the charges which he faced to the ones to which he eventually pleaded guilty. Counsel indicated that, on sentence, he would ask the sentencing judge to sentence the appellant to 18 months' to two years' imprisonment and ask that that period be suspended forthwith to take into account the time (two years) he had spent in pre-sentence custody and the particularly onerous bail conditions to which he had been subjected. He also indicated that the Crown would concede that they could not prove that the appellant had specific knowledge of the plan to commit the offences and that his criminal liability arose as a party to most of the offending, given the allegations of his conduct prior and subsequent to the actions of his co-accused.

[18] Counsel could not recall the exact conversations with the appellant in relation to the advice given to the appellant on penalty. However, counsel stated that his usual practice in advising his clients as to penalty was to exercise great caution against promising specific outcomes. He deposed that:

> "Without exception, I remind my clients that the final decision is made by the sentencing judge and that while my submissions may be persuasive, a judge is not bound by either those submissions or those

> made on behalf of the Crown. I routinely follow this course when I advise every client in relation to any charge no matter how serious.
>
> Despite not being able to recall the exact conversations with Mr Murphy, I can categorically say that I would not have deviated from my usual course in this regard."

[19] Counsel was aware that the appellant was friends with one of the co-accused and conveyed to the appellant what he had been told by the barrister acting for that co-accused. Counsel did not tell the appellant that he had no choice but to plead guilty to assist that co-accused but instead said that this was an additional factor that might influence his decision. Counsel accepted that he may have said something to the appellant to suggest that it was his view that the proposed outcome was the best deal for everyone, but he stated that he would have reminded the appellant that the decision to plead was one for him alone and not one that counsel could make for him.

[20] Counsel stated that the appellant was undoubtedly under considerable pressure and stress, given the nature of the proceedings and the time pressures associated with them, but counsel was not concerned that the appellant had had insufficient time to make the necessary decisions. In counsel's view, the appellant presented as an intelligent man with a good understanding of the proceedings and the time pressures he faced in relation to this particular trial were not exceptional.

[21] Counsel specifically recalled a final conference with the appellant and his solicitor before he was arraigned and pleaded guilty to the amended indictment. Counsel said that he watched the solicitor take the appellant line by line through the proposed schedule of facts. Counsel recalled that the appellant said that his version of events differed in part from what was alleged against him. Despite that, though, the appellant ultimately provided instructions that he was willing to plead guilty to those allegations, which he subsequently did.

The evidence of the appellant's former solicitor

[22] The appellant's former solicitor provided affidavit evidence that, following negotiations with the Crown which involved counsel only, counsel advised that the Crown accepted that the appellant's involvement was at the lower end and significantly less than that of his co-accused. Counsel also indicated that the offer required that everyone pleaded. He did not recall any further conversation pertaining to the other co-accused.

[23] When asked about penalty, given the significantly less involvement that was said to be alleged against the appellant, he believed that a term of imprisonment ranging from a wholly suspended jail term up to approximately six to nine months "would be the likely outcome". He recalled that the appellant asked his opinion. Both he and counsel agreed that, "if it were going to be such a short term of imprisonment, it may be worth entering a plea", given the potential outcome of losing a trial where a statement was provided by a co-accused. The solicitor stated that he recalled the appellant saying that he would enter a plea of guilty on the basis that he would be sentenced to a wholly suspended term of imprisonment "or a short actual custodial term". The solicitor's evidence was that there was a discussion about actual

imprisonment, that the appellant did accept there could be some actual imprisonment and that the indication was of up to six to nine months.

The appellant's second affidavit

[24] In response to the affidavits of his former legal representatives, the appellant provided an additional affidavit. The appellant stated that the penalty advice of a range of six to nine months actual custody was given to him when he was *first* approached on the first day (29 August 2016) concerning an earlier version of the indictment than the one to which he pleaded. At this time, he remembered asking for a penalty range "to make an informed decision" and was advised that the penalty would range from a wholly suspended sentence to six to nine months in actual custody. The appellant stated that when he was advised of "the chance of actual jail time", he maintained the position that he wanted to proceed to trial.

[25] It was on the second day of the trial (30 August 2016) that the appellant was advised that "the penalty was a head sentence of 18 months' to two years' imprisonment, which would be wholly suspended", when he eventually pleaded guilty. The appellant recalled the following conversation taking place at a conference prior to his entering his guilty pleas and at some time around when counsel was giving final penalty advice:

(a) Counsel indicated the head sentence "was 18 months to two years and that was what he would be submitting".

(b) Counsel began to say "that the Judge decides the ultimate penalty" but his solicitor said that the appellant was a good friend and a good mate and said something to the effect, "… no ifs or buts, what is he getting? No Jail?"

(c) Counsel said, "… likely suspended sentence".

(d) His solicitor said, "No Jail?"

(e) Counsel said, "Suspended sentence".

[26] The appellant maintained that he decided to plead guilty only after receiving advice of a "head sentence of 18 months to two years" and "a suspended sentence".

Documentary evidence

[27] One of the documents exhibited to the affidavit was a document entitled "Client Instructions – Plea of Guilty – District Court" signed by the appellant and witnessed by his then solicitor dated 30 August 2016. The first page contained statements that the appellant understood that he had been charged with the offences to which he pleaded guilty (the offences then being set out); that the allegations against him were outlined in the Schedule of Facts; and the contents of that document, being the Schedule of Facts.

[28] Under the heading "Client Instructions" on the second page of that document, the following relevant statements, *inter alia*, are contained:

> "I have received advice from my legal representative about the nature of the charge/s, the evidence the prosecution intends to place before the court, and the possible penalties for conviction of this offence...
>
> I fully understand that although I may have been given advice of an expected penalty range by the Legal Representatives, the sentencing

> Court is not bound by, nor obliged to follow or accept any penalty submitted by my Legal Representatives or the Crown...
>
> I am aware that my sentence may involve a term of actual imprisonment."

The relevant principles

[29] A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. However, a court may permit a plea of guilty to be withdrawn in circumstances where letting it stand produces a miscarriage of justice.[1] There is a strong public interest nevertheless in the finality of legal proceedings and "upon the principle that a plea of guilty by a person in possession of all relevant facts is normally taken to be an admission by that person of the necessary legal ingredients of the offence".[2] Accordingly, the Court approaches any attempt to withdraw or change a plea with caution. The onus is on an accused to show that a miscarriage of justice would occur if he or she was not allowed to withdraw a plea.[3]

Consideration

[30] It should be observed that the appellant's evidence was that he pleaded guilty because of a number of factors, including the advice that there was a strong chance of conviction. It was not contended that that evidence was "imprudent and inappropriate". This was not a case, such as *R v Pugh*,[4] where wrong legal advice was said to be given as to the merits of the case.

[31] As the respondent submitted, the record revealed that the appellant entered his pleas without demur[5] and had nothing to say when called upon, nor did the appellant suggest that he did not understand the charges to which he entered guilty pleas. The evidence indicates that prior to entering his pleas, the appellant was taken in detail through the schedule of facts, which was then later tendered at his sentence. It was argued by the respondent that the appellant seized upon an outcome in his best interest of which there was no guarantee. In such circumstances the plea was not rendered as other than voluntary by reason of any wrong advice that he was given on likely outcome.[6]

[32] In the written submissions for the appellant, it was asserted that the pleas of guilty were due to the external pressure placed on him by his legal representatives (the persistent efforts to take the deal for the benefit of *everyone*) coupled with the promise of no further jail time that induced the appellant to plead guilty. It was further submitted that the "assurance and promise of no jail time" went beyond strong advice and a possible outcome and amounted to a specific outcome with no contemplation of serving actual jail time. This assertion was said to be supported by the appellant's discussion with his solicitor during a conference post-conviction where the appellant plead guilty on the basis that there was no chance of his immediate incarceration and if there was "*any chance*" he would not have pleaded

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1 *Meissner v The Queen* (1995) 184 CLR 132 at 157.
2 *R v Liberti* (1991) 55 A Crim R 120. See also *R v Mundraby* [2004] QCA 493 at [11].
3 *Boag v The Queen* (1994) 73 A Crim R 35 at 36-37.
4 (2005) 158 A Crim R 302.
5 AB at 14.1-45.
6 *R v MCK* [2017] QCA 56 at [61].

guilty. Based on the appellant's version of the advice provided to him and the allegations and charges he was facing, it was contended that any advice promising no jail time was "... *imprudent and inappropriate*".[7]

[33] It was argued that the appellant's guilty pleas were not a true acknowledgement of guilt because of undue pressure and two "representations" concerning penalty said to be "imprudent and inappropriate", but which, it was conceded, did not amount to "guarantees". That was an appropriate concession as it is clear that the advice provided by the appellant's counsel was not in the form of a guaranteed outcome and indeed so much was accepted by the appellant.

[34] It was contended that a representation was made by counsel that the head sentence would be 18 months' to two years' imprisonment, which was imprudent and inappropriate on any case. However, the difficulty with that contention is that it was not the appellant's evidence that the head sentence was of concern to him in deciding to enter his guilty pleas, rather his focus was on the issue of actual incarceration. No doubt, for this reason, the appellant additionally relied on what was said to be a further representation as to the custodial component of the penalty that would be imposed. Initially, it was submitted that the representation made to the appellant was that "there would be no actual time spent in custody". This accorded with one aspect of the appellant's evidence; that he decided to plead guilty when he was told by counsel on the second day, after the removal of the kidnapping charge, that he would receive a suspended sentence, that is, "no jail time". Importantly, his evidence was that he would not have pleaded guilty "if there was any chance of incarceration". However, the appellant's version that he was told there would be no custodial component did not accord with the evidence of his then solicitor or counsel. Counsel's evidence was that he gave advice that he would ask for a wholly suspended sentence but that he advised it was a matter for the judge and that some period of actual incarceration was likely, in the order of six to nine months. The appellant's evidence cannot be considered reliable on that issue.

[35] The further submission was made that the advice given concerning the likelihood of a short period of incarceration was imprudent and inappropriate, such that not setting aside the guilty pleas produced a miscarriage of justice. It is not necessary to consider whether any advice as to a likely period of incarceration of six to nine months was imprudent advice, given that the appellant did not give evidence that he pleaded on that advice. To the contrary, his evidence was that, when advised of the prospect of an actual period of incarceration of that length (after the new indictment without the torture charge being discussed), he maintained his decision to continue to plead not guilty. On his evidence, the critical factor that altered his decision was that he was advised he would have "no jail time" on a plea of guilty to the final version of the indictment.

[36] Moreover, no matter what advice he received from his legal representatives, the appellant appreciated that, ultimately, it was a matter independent of that advice as to what sentence the judge did in fact impose. A prisoner's disappointment in the outcome is an insufficient basis to permit the withdrawal of a plea. That decisions to plead are made without any foreknowledge of the sentence that will be imposed

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7 *R v Wilkes* [2001] NSWCCA 97.

is one of the described "fundamental principles" observed by the plurality in *GAS v The Queen; SJK v The Queen*.[8]

[37] The appellant relied on the case of *R v Wilkes*,[9] submitting that the three principles set out therein had been satisfied in the appellant's case, being: that the advice given to the appellant was imprudent or inappropriate; that his plea was not attributable to a consciousness of guilty; and that there was a real issue to be tried. For the reasons already given, that case does not assist the appellant.

[38] The appellant has not demonstrated that the advice given to him vitiated his free choice such that the guilty pleas amount to a miscarriage of justice.

Proposed Order

[39] The appeal is dismissed.

[40] **FLANAGAN J:** I agree with the order proposed by Philippides JA and with her Honour's reasons.

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8 (2004) 217 CLR 198 at 210-211 [29].

9 (2001) 122 A Crim R 310; [2001] NSWCCA 97.