[2018] QCA 278

COURT OF APPEAL

FRASER JA
PHILIPPIDES JA
DAVIS J

CA No 33 of 2018
DC No 434 of 1999

THE QUEEN

v

POTTER, Craig Geoffrey **Applicant**

BRISBANE

THURSDAY, 18 OCTOBER 2018

JUDGMENT

FRASER JA: The applicant applies for an extension of time to appeal against his conviction in the District Court on 15 November 1999. On that date, he was convicted on his own plea of guilty of one count of indecent assault. That assault consisted, at least in part, of the applicant penetrating the vagina of the complainant with his finger.

The applicant deposes in an affidavit that he entered a plea of not guilty but changed his plea after his barrister, who was an experienced counsel, advised him that there was a "possibility of imprisonment should I be found guilty at trial". Consistently with what was said in *Meissner v The Queen* (1995) 184 CLR 132, a decision such as that does not evidence a miscarriage of justice. The applicant made a free choice to enter his plea after considering his options and the various risks. The applicant goes on to depose:

> "I was advised by my barrister that because I was altering my plea due to being under duress of imprisonment, I had the right to return to court at any time to have my case re-heard, and that my guilty plea must be ignored by the court."

It is inherently improbable that experienced counsel would have given such obviously wrong advice. When an allegation that counsel gave that advice is made in an affidavit, sworn about two decades after the conviction, in an endeavour to have the conviction set aside, the allegation is properly to be characterised as incredible. In an affidavit upon which the Crown seeks to rely, Mr Adam Campbell Guest, a legal practitioner who instructed counsel for the applicant upon his plea, deposes that he did not hear any advice to that effect being given by counsel and did not himself give that advice. The applicant also deposes:

> "After changing my plea, I became aware that my lawyers were withholding a vital piece of evidence from me, being the complainant's claim on non-consent."

The affidavit does not identify the vital piece of evidence said to have been withheld from the applicant, apart from the uninformative description: "the complainant's claim on non-consent."

This part of the applicant's evidence is too vague to supply material support for his application. Mr Guest deposes that he did not withhold any evidence from the applicant.

To succeed on an appeal against conviction based on a plea of guilty, an appellant must demonstrate that there has been a miscarriage of justice. Mere stress or pressure upon the accused at the time of the plea is not sufficient.

In a case of this character, it is necessary for the appellant to establish that the plea was not a free and unequivocal plea. It is the case, however, that a plea of guilty based on misapprehension of a point of law may, in some circumstances, warrant the setting aside of a conviction. In *R v Wade* [2012] 2 Qd R 31, Justice Muir examined the relevant authorities in some depth, and approved the following observations by Justice Steytler, as his Honour then was, in *Borsa v The Queen* [2003] WASCA 254:

> "It is no easy matter for an appellant to persuade a court to set aside a conviction based on a plea of guilty. There must be a strong case and exceptional circumstances. Before an appellate court will set aside a conviction of that kind, the appellant must show that there has been a miscarriage of justice.

Those observations were also adopted in *R v Carkeet* [2009] 1 Qd R 190.

In considering the application for an extension of time, the Court should examine whether there is any good reason shown to account for the delay and consider overall whether it is in the interests of justice to grant the extension: see *R v Tait* [1999] 2 Qd R 667. The applicant's affidavit does not explain the delay in bringing the appeal. His counsel, in an outline of submissions, submitted by reference to the applicant's affidavit that the applicant had outlined his reasons for not wanting to change his plea earlier, and these are concerned with the shortage of funds, and now he has the funds available to fund this appeal. No affidavit to that effect has been forthcoming. There is no explanation for the 19 years delay in bringing this application. There is no evidence that the applicant has a defence to the charge. There is no material upon which the Court could conclude that a miscarriage of justice has occurred.

I would refuse the application.

PHILIPPIDES JA: I agree.

DAVIS J: I agree with Justice Fraser.

FRASER JA: The application is refused. Adjourn the Court.