SUPREME COURT OF QUEENSLAND

CITATION:	*R v NX* [2018] QCA 325
PARTIES:	**R** **v** **NX** (applicant)
FILE NO/S:	CA No 295 of 2017 DC No 40 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction & Sentence)
ORIGINATING COURT:	District Court at Rockhampton – Date of Sentence: 21 July 2016 (Smith DCJA)
DELIVERED ON:	23 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2018
JUDGES:	Fraser and Morrison JJA and Mullins J
ORDER:	**Application for extension of time to appeal against conviction and apply for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant was convicted after trial of four counts of torture, one count of rape and four counts of common assault committed against her daughters – where the applicant was sentenced to nine years' imprisonment on one count of torture and five years' imprisonment for each of the other counts of torture – where serious violent offence declarations made in respect of those counts – where the applicant was convicted and not further punished in respect of the other counts – where the applicant applies for an extension of time in which to appeal against the convictions and apply for leave to appeal against the sentences – where the applicant represented herself – whether it is in the interests of justice to grant the extension of time *R v BH; ex parte Attorney-General* (2000) 110 A Crim R 499; [2000] QCA 110, considered *R v HAC* [2006] QCA 460, cited *R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, followed
COUNSEL:	The applicant appeared on her own behalf

S J Farnden for the respondent

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

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

[2] **MORRISON JA:** I agree with the reasons of Mullins J and the order her Honour proposes.

[3] **MULLINS J:** The applicant who is an indigenous woman was convicted on 21 July 2016 after a seven day trial in the District Court of four counts of torture, one count of rape and four counts of common assault. The complainants are daughters of the applicant. The applicant was sentenced on 21 July 2016 to nine years' imprisonment for the count of torture that was count 11 and five years' imprisonment for each of the other counts of torture (counts 3, 5 and 9). A serious violent offence declaration was made in relation to each of those offences. In respect of the other offences (counts 1, 4, 6 and 10), the applicant was convicted and not further punished. The applicant was acquitted of counts 2, 7 and 13 and a *nolle prosequi* was entered during the course of the trial in respect of count 8.

[4] The applicant filed an application for an extension of time in which to appeal against the conviction and for leave to appeal against the sentences on 13 December 2017 which was almost 17 months out of time. (The application was dated 5 October 2017, but the applicant states it was not posted to the court when given by the applicant to a prison officer for that purpose.) The applicant prepared her submissions in support of the application without legal assistance and appears on her own behalf to pursue the application. The applicant traversed some factual matters in both her written and oral submissions, but did not rely on any affidavit in support of the application.

[5] The respondent obtained, and relied on, an affidavit of the applicant's former solicitor, Mr A R Telford. The court and the parties also had access to the learned trial judge's summing up and sentencing remarks.

Nature of the offences

[6] The offences concerned historic incidents. Count 1 involved the applicant punching the first-named daughter in the chest. Count 3 was the offence of torture against the first-named daughter that was specified as occurring over an eight year period that ended when the first-named daughter was about 17 years old. In summing up each of the torture counts, the trial judge made it clear the prosecution case was that the acts of torture occurred during the period specified in the charge, but that the jury did not need to be satisfied that the torture occurred continuously over the charged period. The nature of the torture relied on in respect of the first-named daughter was the repeated biting of the complainant's fingers, including by targeting the injured fingers repeatedly in order to cause severe pain to her which would cause the nail to fall off often, and beating the complainant with her hands, fists, electrical cords, broomsticks, mops, bed slats, putting a knife to her throat and, on one occasion, biting her on the neck.

[7] Count 4 involved the applicant punching the second-named daughter in the head with a closed fist. Count 5 was the offence of torture committed over a seven year period against the second-named daughter (who was about 16 years old by the end of that period) by biting her fingers two to three times per week hard enough that the fingernail would come off and repeatedly targeting her fingers, in order to cause severe pain to her, and beating her with hands, electrical cords, broomsticks, mops, spoons and a bed slat. Count 6 involved the applicant hitting the second-named daughter with a wooden bat.

[8] There were no convictions in respect of counts 7 and 8 which related to the third-named daughter.

[9] Count 9 was the offence of torture against the fourth-named daughter over a six year period that ended when she was about 10 years old and involved the applicant biting her fingers repeatedly and, on occasion, this led to the nail being infected and nails coming off, with the applicant targeting the same finger repeatedly in order to cause severe pain to the complainant, and beating her with hands, fists, electrical cords and bamboo sticks. Count 10 involved striking the fourth-named daughter with an electrical frying pan cord.

[10] Count 11 involved the offence of torture against the fifth-named daughter over a nine year period ending on 31 December 2013 with the applicant biting fingers, so the nails would come off, then biting her on the fingers after the nails had come off, and frequently beating her with electrical cords, metal spoons, sticks, belts and toys. Count 12 involved the applicant raping the fifth-named daughter by inserting a pair of pliers into her anus without her consent which was relied on also as a particular of count 11. The fifth-named daughter was 17 years old at the trial.

[11] In relation to each of the offences of which the applicant was convicted, her case at trial was that there was a reasonable doubt about the relevant complainant's evidence, the prosecution could not exclude domestic discipline as a defence in respect of counts 1, 4, 6 and 10, and the jury could not be satisfied that the conduct the subject of the torture charges (counts 3, 5, 9 and 11) could be proved to be torture.

The applicant's submissions

[12] The applicant concedes that she had received the letter from her former solicitors Anderson Telford Lawyers dated 26 July 2016 sent to her at the prison, summarising the events of the trial and advising of her appeal rights and the time restrictions for lodging an appeal. The applicant recalls receiving the letter close to the expiry for lodgment of an appeal as of right and was cognisant of the advice in the letter that her former lawyers considered she did not have grounds to appeal the conviction and sentence. (The letter enclosed a Legal Aid application, the form for the notice of appeal and a stamped envelope addressed to the Grants Department of Legal Aid Queensland.)

[13] The applicant alleges that at the time she was convicted she was suffering from severe debilitating emotional stress and anxiety and was subsequently unable to engage in "purposeful thought". Her mother had passed away in October 2015 and at the time of the trial the applicant was still mourning her passing and affected by regret at not being able to see her in hospital before she passed away or be involved

in the dressing ceremony before the funeral. The applicant alleges she was assaulted in prison in February 2017.

[14] The applicant complains about the solicitor who acted for her before Anderson Telford Lawyers who did not test the complainants' evidence at the committal hearing. The applicant alleges negligence, mainly in general terms, against the solicitor and counsel who acted for her during the trial. The applicant does not endeavour to show how her specific complaints against the lawyers who acted for her at the committal and at trial resulted in a miscarriage of justice. In addition, the complaints of this nature that are the subject of submissions are not reflected in the proposed ground of appeal in relation to the conviction that the verdicts are unsafe and unsatisfactory.

[15] The applicant concedes that she signed a 44 page statement and provided detailed written instructions to Anderson Telford Lawyers to proceed to trial. The applicant asserts that she was "forced" to sign the instructions and "pressured" to sign the statement, before she had finished correcting it. The applicant accepts that she gave instructions that she would not give evidence at the trial.

[16] The applicant submits that her rights to a proper trial were denied to her because she is "just another indigenous person that does not matter".

[17] The applicant does not specify the grounds for applying for leave to appeal against the sentences. The applicant submits, however, that the making of a serious violent offence declaration was unfair, due to a proper defence not being conducted on her behalf by her lawyers.

[18] The applicant sets out in her written submission filed on 31 October 2018 details of the attempts that she and her partner have made since her conviction to obtain legal representation that have been unsuccessful.

The respondent's submissions

[19] Ms Farnden of counsel who appeared on behalf of the respondent submits the applicant's explanation for the delay is not sufficient. Even when the applicant decided that she would appeal in mid-July 2017, there is no adequate explanation for the further delay of five months in filing the application (or the delay of three months, if the applicant's explanation of giving the application to a prison officer to post in October 2017 is accepted). Ms Farnden submits that an analysis of the summing up and sentencing remarks reveals there was significant evidence to support the convictions and there are no apparent errors in the careful summing up of the trial judge. It is also submitted the effective sentence imposed of imprisonment of nine years with a serious violent offence declaration was supported by the comparable cases to which the trial judge was referred. On the basis the proposed appeal does not have prospects of success and the explanation for the delay is not satisfactory, the respondent submits the application should be refused.

Is it in the interests of justice to grant the extension?

[20] As set out in *R v Tait* [1999] 2 Qd R 667 at [5], the approach of the court to the question of extending time in a criminal appeal is to 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.

[21] The applicant is at a disadvantage in pursuing the application for an extension, because of the amount of time that she allowed to pass, before she prepared her application on 5 October 2017. That would not preclude the extension, however, if it were otherwise in the interests of justice to grant the extension.

[22] The problem for the applicant is that the specific complaints that she now makes about the conduct of her lawyers in relation to the trial do not necessarily have the consequence that the verdicts were unsafe and unsatisfactory. It is apparent from the summing up that the applicant's case was clearly articulated by the trial judge and that as the incidents occurred up to 19 years prior to the trial, all relevant warnings about the consequences of long delay and the prejudice as a result to the applicant were pointed out to the jury. The arguments put by the applicant's counsel as to the unreliability of the complainants and the inconsistencies in their evidence were also emphasised by the trial judge. The question of what evidence the jury should accept and whether they could be satisfied beyond reasonable doubt that the prosecution had proved the elements of each of the charges were matters for the jury. The trial judge observed in the course of his sentencing remarks that the acquittals on counts 2, 7 and 13 were explicable, as a result of the directions given to the jury.

[23] The applicant's approach to her application was, in substance, to ask the court to undertake an investigation for her benefit to ascertain whether she did, in fact, have any grounds to appeal. That is not the role of the court of an application for an extension.

[24] On the basis of all the materials that have been provided for the purpose of considering the application for an extension of time to appeal against the convictions, the interests of justice do not require the extension to be granted.

[25] The applicant was 27 years old at the start of the period of offending. At the time of sentence, she was 46 years old. Although the applicant had a minor criminal history, the trial judge considered it was not relevant and treated the applicant as a person without previous convictions.

[26] The comparable decisions relied on for the purpose of the sentencing were *R v G; ex parte A-G (Qld)* [1999] QSC 84, *R v BH; ex parte Attorney-General* [2000] QCA 110, *R v MAH* [2004] QCA 198 and *R v HAC* [2006] QCA 460. The observation was made in the joint judgment of Moynihan SJA and Atkinson J in *BH* at [32] that:

> "It is likely that a person who is convicted of the crime of torture particularly where it involves the intentional infliction of pain or suffering on more than one occasion will be declared a serious violent offender. To do so reflects the nature of the offence."

See also *HAC* at [11].

[27] The trial judge observed there were no long term physical injuries suffered by the four complainants, but there was a prolonged period of abuse which caused significant psychological damage to them. Because of the prolonged nature of the torture and the extreme pain that would have been caused at the time the children were struck with sticks and weapons and by the biting of already injured fingers, the trial judge declared each of the torture offences be serious violent offences.

[28] The effective sentence of nine years' imprisonment imposed after a trial with the consequence that follows from the serious violent offence declaration is consistent with the comparable authorities that were relevant for the sentencing. The applicant has little prospect of showing the sentences were manifestly excessive.

Order

[29] The order which should be made is:

> Application for extension of time to appeal against conviction and apply for leave to appeal against sentence refused.