SUPREME COURT OF QUEENSLAND

CITATION:	*R v GBE* [2018] QCA 345
PARTIES:	**R** **v** **GBE** (applicant)
FILE NO/S:	CA No 71 of 2018 DC No 20 of 2017
DIVISION:	Court of Appeal
PROCEEDINGS:	Application for Extension (Conviction) Sentence Application
ORIGINATING COURTS:	Children's Court at Townsville – Date of Conviction: 10 July 2017; Date of Sentence: 7 September 2017 (Lynham DCJ)
DELIVERED ON:	11 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	30 July 2018
JUDGES:	Fraser and Philippides JJA and Henry J
ORDERS:	**1. Application for an extension of time in which to appeal refused.** **2. Application for leave to appeal sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – PARTICULAR CASES – where the applicant was convicted on his plea to one count of riot pursuant to s 61 of the *Criminal Code* (Qld) with two circumstances of aggravation, causing grievous bodily harm and property damage – where the applicant was part of a group of more than 12 defendants involved in a riot at a Youth Detention Centre – where during the course of the riot the group damaged air-conditioning units, used metal poles as weapons and retrieved other objects which were used to attack staff members – where various staff members suffered injuries – where one staff member was struck in the head with a rock which resulted in the loss of sight in an eye and which constituted the grievous bodily harm – where the applicant seeks an extension of time to lodge an appeal against conviction for the circumstance of aggravation of causing grievous bodily harm – whether refusing the extension of time to lodge an appeal against conviction would result in a miscarriage of justice CRIMINAL LAW – GENERAL MATTERS – ANCILLARY

LIABILITY – COMPLICITY – COMMON PURPOSE OR JOINT CRIMINAL ENTERPRISE – PARTICULAR CASES – where the applicant submitted that he could not be lawfully convicted of riot with circumstance of aggravation of causing grievous bodily harm because the Crown did not purport to identify who threw the rock to cause the grievous bodily harm – whether the applicant could be convicted of the circumstance of aggravation as a secondary party by virtue of either s 7 or s 8 of the *Criminal Code* (Qld) – whether a person can only be convicted of a circumstance of aggravation where the person did the act constituting the relevant circumstance of aggravation – whether the concept "the offence" contemplates only a non-aggravated form of the offence or whether "the offence" involves a circumstance of aggravation where that circumstance of aggravation had been proven to arise – whether the term "offence" means to a particular level or type of punishment depending on the proven circumstances or simply liability to punishment per se

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant pleaded guilty to riot with two circumstances of aggravation and was sentenced to two and a half years' detention, to be released after serving 50 per cent, and convictions were recorded – where the applicant was also given concurrent sentences for other offences – where the applicant seeks leave to appeal against sentence – whether the sentence imposed on each of the applicant was manifestly excessive in all the circumstances

Criminal Code (Qld), s 7, s 8, s 61

R v Barlow (1997) 188 CLR 1; [1997] HCA 19, applied
R v Graham [2017] 1 Qd R 236; [2016] QCA 73, distinguished
R v KAR & Ors [2018] QCA 211, applied
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, cited

COUNSEL: A W Collins for the applicant
M R Byrne QC for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecution (Queensland) for the respondent

[1] **THE COURT:** The applicant seeks an extension of time in which to appeal against his conviction, in the Children's Court at Townsville, on his plea of guilty to one count of riot with two circumstances of aggravation; namely, causing grievous bodily harm and causing property damage pursuant to s 61 of the *Criminal Code* (the Code). The applicant also seeks leave to appeal against sentence.

Conviction appeal

[2] The grounds on which the applicant seeks to appeal against his conviction, if leave were granted, are that the primary judge should not have accepted his plea of guilty to the indictment charging riot with a circumstance of aggravation of causing grievous bodily harm. The applicant also complains that a miscarriage of justice has occurred due to entering an equivocal plea of guilty to the count of riot with the circumstance of aggravation of causing grievous bodily harm. Alternatively, it is contended that the plea was not an informed plea.

[3] The applicant sought and was granted leave to adduce evidence in relation to the contention that the plea of guilty to the circumstances of aggravation were not properly informed plea. The respondent was also permitted to adduce further evidence.

Error in law in accepting the plea of guilty?

[4] The legal representatives of the applicant accepted that liability was either absolute or strict on both the base charge of riot and the circumstance of aggravation of causing property damage. However, it was argued on behalf of the applicant, that as a matter of law, the plea to the offence of riot causing grievous bodily harm could not be accepted and thus that, irrespective of whether there was good reason for the delay, the conviction was required to be set aside as a miscarriage of justice. The argument was premised on the contention that the applicant's liability was as a principal, pursuant to s 7(1) of the Code (as to the offence of riot simplicter) and that s 8 could not apply, as a matter of law, to the aggravated offence of riot (with the circumstance that grievous bodily harm was caused by another unnamed rioter). Nor was s 7 available for the reasons raised in *R v Graham.*[1] As was explained in *R v KAR & Ors*,[2] this contention that the party provisions are not available to a circumstance of aggravation is flawed in that it misconceives what was determined by the plurality in *R v Barlow*[3] as to the meaning of the term "offence". In addition, counsel for the applicant made submissions arising from what was said to be textual considerations in s 61 of the Code, which mirrored those made in *KAR*, and which fail for the reasons stated in that case.[4] The ground that the plea was unable to accepted as a matter of law cannot succeed.

Was the plea unequivocal?

[5] The applicant's contention was that the plea was equivocal and that, if that submission was accepted, given that the applicant was at the time a juvenile, was not present in Court (where he might have sought the advice of his solicitor), the complexity of the indictment and the manner in which the charge was particularised and that exceptional circumstances were demonstrated, sufficient to justify the Court vacating the plea of guilty. In raising the importance of the plea, reliance was placed on the following extract from *Archbold Criminal Pleading*:[5]

> "It is important that there should be no ambiguity in the plea, and where the prisoner makes some other answer than 'not guilty or guilty,' as the case may be, care should be taken to make sure that he understands the charge and to ascertain to what the plea amounts.

---

1 [2017] 1 Qd R 236.
2 [2018] QCA 211.
3 (1997) 188 CLR 1.
4 [2018] QCA 211 at [70]-[80].
5 Butler and Garsia, *Archbold Criminal Pleading: Evidence, & Practice*, 37th ed, Sweet and Maxwell, 1969 at [425].

> Where the plea is imperfect or unfinished, and the court of trial has wrongly held to amount to plea of guilty, on appeal ie Court of Appeal may order a plea of not guilty be entered and that the appellant be tried on the indictment."

[6] The counsel for the applicant referred to the transcript of the arraignment, on 10 July 2017 which recorded that, when asked by the judge's associate how he pleaded; guilty or not guilty to the offence of riot with the two circumstances of aggravation, the applicant responded, "I don't know, no, no, guilty?" His Honour then asked his associate to administer the allocutus in respect of that charge. The Court was able to hear a recording of the arraignment. In answer to the question how he pleaded, the applicant could be heard mumbling some words, before pausing and saying in a clear and loud voice the word "guilty".

[7] In his affidavit, the applicant stated that he hesitated because he "was confused, and did not know why [he] was being said [to have] caused grievous bodily harm" and he was not present when Mr Oakland was injured. In giving evidence, the applicant explained that his hesitation arose because he thought that he was the only one amongst the group of co-accused who was charged with and pleading to the circumstance of doing grievous bodily harm.[6] He said he probably would not have hesitated had he then known that he was not the only member of the group being charged. He felt reassured after he heard a co-accused plead guilty. At no stage, when giving evidence, did the applicant state that he did not intend to indicate that he was pleading guilty to the offence he was arraigned on. Indeed, the applicant accepted that the guilty plea instructions document, a copy of which was exhibited to the affidavit of Ms Taylor, was read out to him before he signed it and that he wanted to plead guilty to the charge.

[8] Ms Taylor, who acted on behalf of the applicant at the relevant time deposed in her affidavit that she spoke with the applicant in December 2016 by video link and informed him of the QP 9 facts and showed him some photos. She spoke again with the applicant on 6 April 2017 and went through the brief of evidence with him via video link. Her notes were exhibited to her affidavit and not disputed. A full hand up committal was held on 19 April 2017 and followed by a phone conference with the applicant's barrister on 7 July 2017. The applicant's verbal instructions to plead guilty were recorded in notes made by Ms Taylor, a copy of which was exhibited to her affidavit. A copy of the instructions were also emailed to the applicant's case worker. The applicant entered a plea of guilty on 10 July 2017. On 5 September 2017, Ms Taylor spoke to the applicant, as did his barrister. Given the applicant's explanation provided for his hesitation, the firm manner in which he entered the plea of guilty, that he signed instructions that he accepted that he was guilty and gave instructions to plead guilty, there is no basis in the contention that the plea was anything other than a clear and unequivocal plea. This ground lacks any substance.

Was the plea properly informed?

[9] It was submitted that the plea of guilty to the circumstances of aggravation was not properly informed. In support of that contention, the applicant stated in his affidavit, "I pleaded guilty to the charge on the basis that I was involved in the riot, but I was not responsible for harming Mr Oaklands and was not near the other boys when the rock was thrown"[7] and the applicant's letter of apology set out the applicant's

---

6 T1-8, 1-11.

7 Affidavit of the applicant sworn 25 May 2018 at [7].

version.[8] On sentence, the prosecution did not dispute the assertion that the applicant was not present when the rock was thrown which struck Mr Oaklands. In his submissions on sentence, counsel for the applicant submitted:[9]

> "Your Honour, the very nature of riot itself is that it's the coming together of a number of people, and it then takes on that life of its own because of the a the group situation, and, your Honour, to demonstrate this situation, [the applicant] was actually not present in the group when the object was thrown that caused the injury to the staff, and, of course, we accept he is liable because he has been part of the riot, but physically, he was not present at that particular time, and he arrived shortly after. He composed a letter of apology to the court; I seek to hand that up."

[10] As was accepted on behalf of the applicant, the issue of whether the plea was an informed one is influenced by whether accessorial liability was available and the proper construction of s 61 of the Code. No particulars were sought of the basis of liability for the offence, but it was evident from the agreed statement of facts that it was charged in relation to the circumstance of aggravation that bodily injury was caused on the basis of the application of the party provisions. As the respondent submitted, neither the applicant's solicitor nor his experienced counsel raised any issue as to the basis of liability for the circumstance of aggravation of causing grievous bodily harm. The statement of facts was agreed and was not the subject of criticism in the course of submissions. Furthermore, Ms Taylor's evidence made it clear that the applicant was advised that his accessorial liability for that circumstance of aggravation. There is no substance to the contention that the plea to the offence was not an informed plea.

[11] Given that the lack of explanation for the delay and that the grounds of appeal lack merit, the application for an extension of time in which to appeal should be refused.

Sentence application

[12] The ground sought to be pursued through the application for leave to appeal sentence, in its most recent articulation, was that the sentence imposed was manifestly excessive. The applicant's counsel acknowledged this ground's prospects turned significantly upon the outcome of the conviction appeal.

[13] The applicant pleaded guilty to the following three offences, receiving the following sentences:

- Sexual assault on 13 June 2016 - Six months detention
- Unlawful assembly on 2 July 2016 - Three months detention
- Riot with circumstances of aggravation on 10/11 November 2016 - Three years detention

[14] The sentences were ordered to be served concurrently. He was ordered to be released after serving 50 per cent of the detention and convictions were recorded.

---

8 AB at 186.
9 AB at 49.21-49.28.

[15] Considerations common to the sentencing of the offending rioters have already been canvassed in *KAR*[10] and need not be repeated here. This Court there considered the sentences of seven of the applicant's co-offenders for their involvement in the riot, which was prolonged and caused very significant property damage as well as injuries. The injuries included the doing of grievous bodily harm to one officer, whose eye was hit by a stone thrown by an unknown rioter.

[16] Six of the offenders in *KAR* received two and a half years detention. This Court concluded such a period was not so significant as to exceed an appropriate range of penalty for such serious offending by a juvenile in custody. The present applicant's period of detention is six months longer. It is towards the upper range of an appropriate sentence for a juvenile for an offence of this kind. However, the inherent seriousness of the offending, discussed in *KAR*, and the following matters personal to the applicant do not suggest an excess of that range.

[17] The applicant was an instigator of the riot and encouraged its continuation. At the time of the throwing of the stone which caused the grievous bodily harm, the applicant happened to be at large rioting elsewhere in the centre. However, it was the applicant and another offender who at the outset, when a football game was cancelled, responded "Fuck you cunts, you're cancelling the game, we're going to get you, you cunts" and told the other players to come with them. It was also the applicant who, after the rioters went to near a playing field and fetched rocks to throw, called out "Don't isolate yourselves", "Stick in groups" and "Let's go back and get the others". Moreover, at a later stage, after staff retreated under siege to the visitors' centre, he returned with a table knife and motioned towards staff. He did at one point assist in the moving of a coke machine to allow injured staff assistance but he did not then surrender. He was one of the latter rioters to surrender, eventually doing so at 6 am, the morning after the riot started.

[18] While the comparative significance of the applicant's role is relevant, care must be taken not to make too much of. As was explained in *KAR*:[11]

> "[T]he relevance to sentence of the difference in roles between participants in criminal activity is tempered by the offence of riot's elementary focus upon combination of purpose and conduct. It also tends to dissipate the longer it is that the activity is persisted in and the clearer it is that all are willing participants in serious components of the activity."

[19] Bearing that consideration in mind we would hesitate to regard the nature of the applicant's role as sufficient justification alone for an uplift to three years detention relative to the two and half years detention imposed upon many of the applicants in *KAR*. However, there are other considerations adverse to the applicant.

[20] The applicant was 16 years old at the time of sentence and thus one of the older of the rioters.

[21] He had an extremely concerning criminal history. On 6 May 2014 he was placed on nine months probation for multiple break and enter offences and other offences against property. On 25 July 2014 that order was extended because he breached it

---

10 [2018] QCA 211.
11 [2018] QCA 211 at [204].

and he was also sentenced to community service for committing further similar offences. On 18 September 2015 he was placed on 18 months probation for multiple offences including further burglary and other break and enter offences as well as dangerous driving causing grievous bodily harm whilst adversely affected. He had spent seven months on remand prior to being sentenced. On 7 November 2016, shortly before the riot, he was sentenced for further multiple offending, again including burglary and breaking and entering but also including rape, sexual assault and deprivation of liberty. He had committed the sex offences within six weeks of the imposition of his most recent sentence of probation. He was sentenced to four years detention. That did not deter him from rioting in detention only three days later.

[22] He had been on remand for some time prior to his sentence of 7 November and had continued to offend even in custody. Whilst on remand he had, on 13 June 2016, sexually assaulted a female youth detention worker by grabbing and squeezing her buttock when she was escorting a group of detainees. Some weeks later, on 2 July 2016 he committed the offence of unlawful assembly, during a painting session, by engaging with other detainees in threatening and damaging conduct from which staff had to retreat. The applicant was sentenced for these two offences when sentenced for the riot.

[23] In electing to impose concurrent sentences the sentencing judge below was entitled to have regard to the applicant's overall criminality in determining the sentence for the most serious of those matters, the riot, subject to that sentence not being so high as exceed a just range of punishment for the riot.[12]

[24] In contrast to these adverse considerations the pre-sentence report identified no weighty considerations in mitigation. It did explain the applicant's disadvantaged background, including his early exposure to domestic violence, a permissive approach to his freedoms whilst a boy on a Torres Strait island and a lack of age appropriate supervision when he moved to Cairns to attend high school and his behaviour deteriorated. The pre-sentence report noted the applicant had expressed remorse but was self-motivated in doing so, being more concerned by the consequences of his offending to himself than others. The author reported the applicant "maintained numerous cognitive distortions that have served to displace responsibility for his behaviour".

[25] As to the applicant's behaviour in custody, it was noted that whilst in Cleveland Youth Detention Centre he had been involved "in numerous behavioural incidents that include inappropriate sexual behaviour, property damage and possession of restricted items along with disruptive, threatening, aggressive, intimidating and violent behaviour". He was moved to Brisbane Youth Detention Centre after the riot and whist there had been involved in "13 incidents including assaults, aggressive and disruptive behaviour" and had "repeatedly demonstrated poor interpersonal boundaries with female staff".

[26] The applicant's engagement in offence specific interventions with the Griffith Youth Forensic Service had been poor. The clinical psychologist from that service opined his emerging psychopathology was that of an antisocial personality disorder. She assessed the applicant "presents as a high risk of sexual and non-sexual recidivism".

---

12 *R v Nagy* [2004] 1 Qd R 63 at [72].

[27] It is readily apparent the applicant's only material claims to leniency, his youth and plea of guilty, were largely neutralised by his troubling resistance to rehabilitation. Having regard to the gravity of the applicant's offending, his concerning criminal history and the fact he was sentenced concurrently for other offending, the sentence imposed was not manifestly excessive.

Orders

1. Application for an extension of time in which to appeal refused.

2. Application for leave to appeal sentence refused.