SUPREME COURT OF QUEENSLAND

CITATION:	*R v Korin* [2020] QCA 40
PARTIES:	**R** **v** **KORIN, Eugene** (appellant)
FILE NO/S:	CA No 109 of 2019 DC No 17 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport – Date of Conviction: 3 April 2019 (Rackemann DCJ)
DELIVERED ON:	Date of Order: 9 March 2020 Date of Publication of Reasons: 13 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	9 March 2020
JUDGES:	Morrison JA and Bond and Callaghan JJ
ORDER:	**Date of Order: 9 March 2020** **Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – PARTICULAR CASES – where the appellant, having been diagnosed with terminal cancer and having undergone treatment which caused side effects including anxiety and depression, pleaded guilty to one count of possessing child exploitation material – whether appellant's guilty plea was freely entered
COUNSEL:	P D Kelly for the appellant (pro bono) D Balic for the respondent
SOLICITORS:	No appearance for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT:** At the conclusion of the hearing of this appeal, the Court made an order dismissing the appeal, with reasons to be expressed later. We set out below our reasons for dismissing the appeal.

[2] On 3 April 2019 the appellant was convicted on his own plea of guilty of one count of possessing child exploitation material.

[3] The sentence proceeded on the basis of an agreed schedule of facts. In brief summary, the appellant and the prosecution agreed:

(a) In 2011 the appellant and his then partner resided in a townhouse. There were two filing cabinets in one of the rooms of the townhouse: one for the appellant and one for his partner.

(b) Between December 2012 and May 2013 the appellant's partner found some CDs in the appellant's filing cabinet. She found the images on the discs to be disturbing.

(c) When she later confronted the appellant concerning the discs and their content, he initially told her that the discs belonged to a friend of his but he did not know what was on them and queried why she did not take them to the police. However, when she threatened to do so, the appellant told her "I won't get in trouble as there is adult porn on there [as] well."

(d) In 2017, the appellant's partner reported the matter to the police.

(e) An examination of the discs revealed child exploitation material on each disc. The discs contained a range of 135 photographs and 33 videos of children, male and female, aged between approximately 6 and 14 years old. The majority of the images and videos were "date modified" between the years of 2002 and 2009.

(f) The appellant knew there was child exploitation material on the discs but he never looked at the discs and was holding them for somebody else. He did not create or download the material on to the discs.

[4] The appellant was sentenced to nine months imprisonment wholly suspended for an operational period of two years.

[5] The appellant appealed against his conviction. His notice of appeal identified the ground of appeal in the following way:

> "On Thursday 2.00 o'clock before my trial on Monday I had a meeting with my legal aid solicitor …, we spoke about the outcomes of pleading not guilty and the offer made by the prosecutor. I was very tired and emotionally worn out after the last year, weekly fighting my ex partners toxic attitude towards me. I was explained the outcome of pleading not guilty, they mentioned evidence against me and I would go to jail if found guilty and not see my daughter at all, the comparison by [the barrister] was 'it was like holding a joint for someone else ", very little to fear and I would see my daughter. Just plead guilty and get a suspended sentence as offered, If I was found guilty at trial I would appeal and that would be much more time not having my daughter with me.
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> I didn't really think about it then and didn't take into consideration the work I had put into defending myself, and a previous magistrate saying "it was a dog's breath of evidence with the discs and all he could see was he said she said".
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> I was just so worn out with bad health and emotion I said ok get it over and done with so I can move on and all I could think of was to get my daughter back.

> I believe I was pressured into pleading guilty with no discussions as to pleading not guilty."

[6] The appellant supported his appeal with affidavit material, which was broadly consistent with the ground of appeal. He deposed that he had been diagnosed with terminal cancer in 2017 and this greatly affected his judgment. He was very tired and emotionally worn out from fighting with his former partner's attitude towards him and going through the chemotherapy process. He complained that when he agreed to plead guilty he was intimidated and that he was not told of the consequence of pleading guilty. (For reasons which will appear, we do not accept his evidence about intimidation and not being properly advised.) He exhibited letters from medical practitioners confirming that he had been diagnosed with terminal cancer in 2017 and that in March and April 2019 he was being treated with chemotherapy drugs which caused him "to suffer several side effects including loss of appetite, diarrhoea, ulceration of the skin and mouth, shortness of breath, severe tiredness, swollen and blistered feet, anxiety and depression with mood swings."

[7] The respondent relied on affidavit evidence from the appellant's former solicitor, legal professional privilege having been waived by the institution and conduct of the appeal. One of the appellant's affidavits was sworn in response to the solicitor's affidavit and did not challenge any relevant part of the solicitor's affidavit evidence. At the hearing on appeal, the solicitor was cross-examined by counsel, commendably appearing *pro bono* for the appellant, but neither the truth nor the reliability of the solicitor's evidence was challenged.

[8] We accept the solicitor's evidence and prefer it to the evidence of the appellant, to the extent there is any conflict. The solicitor's affidavit contained a more precise examination of the relevant chronology of events and was supported by exhibited contemporaneous handwritten diary notes of relevant conferences and signed documentation from the appellant confirming his instructions. The solicitor's affidavit and oral evidence justified the following conclusions.

[9] The solicitor's firm was retained in January 2019 in the face of a trial scheduled to commence on 11 March 2019. The appellant provided written instructions to the firm which confirmed his intention to plead not guilty and to proceed to trial. Amongst other things those instructions communicated to the solicitor that one of the side effects of the appellant's medical treatment was "emotional mood swings" and that the appellant felt he had "experienced a depression effect but not violent or aggressive".

[10] On 21 February 2019 the solicitor received an offer from the Crown in a context which suggested that there had been a previous attempt to negotiate the matter through the appellant's previous legal representatives. The offer was that the Crown would accept a plea of guilty on the factual basis that although the appellant had knowingly possessed the discs containing the child exploitation material he was holding them on behalf of another person and had never viewed the contents of them nor did he create them himself.

[11] That day or the next day the solicitor sought instructions from the appellant who told him that he still wished to proceed to trial.

[12] On Thursday 7 March 2019 (this was evidently the Thursday referred to in the notice of appeal), a pre-trial conference occurred between the appellant, his counsel and the solicitor. The solicitor deposed that the substance of what occurred during that conference was as follows:

> "16. In providing this advice, we broke down the Appellant's trial defence into what we saw as his three main areas of weakness: the admissions he had made to Police and other witnesses about his knowledge of the contents of the discs, that the handwriting on the discs looked very similar to his own, and the inherent difficulty in accepting his explanation for how the discs must have come to the attention of Police.
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> 17. We also discussed the Crown's offer to resolve the matter as a sentence on the amended factual basis, and that, in our view, it was attractive as it not only substantially reduced the seriousness of the offending, but significantly reduced the risk of actual imprisonment being imposed on sentence. We told him that, if he wanted to accept this offer, he would need to make his decision now or the benefit he would otherwise receive for pleading guilty prior to trial would be lost.
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> 18. During this conference, the Appellant provided his instructions that he wished to enter a plea of guilty, rather than proceed to trial, on the negotiated factual basis that he was holding the discs for someone else and had not viewed their contents but was aware of what was on them.
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> 19. In providing these instructions, the Appellant told us that his biggest concern was the effect that being convicted for these offences would have on his Blue Card and his access to his daughter. He specifically queried whether he could avoid having a conviction recorded; we advised him that the only way to avoid a conviction being recorded was if the Court was to impose a sentence that did not involve imprisonment, and that there was no real prospects of arguing for such a sentence if he was convicted after trial.
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> 20. Conversely, we advised him that if he plead guilty on the reduced factual basis, then he stood a better chance of receiving a sentence that would allow the Court to exercise its discretion and not record a conviction. This was not overstated; the Appellant was told that there were no guarantees about this, and if we considered it possible to argue for a sentence that did not involve a conviction being recorded, we would do so."

[13] On 8 March 2019, having previously arranged with the Crown Prosecutor to have the matter listed, the solicitor appeared at a mention and advised the District Court that the appellant intended to plead guilty. The trial was delisted and the matter was listed to proceed as a sentence on 3 April 2019. The appellant was not arraigned at the mention.

[14] Between 8 March 2019 and 3 April 2019 the solicitor prepared the matter for sentence and that included having email exchanges with the appellant seeking supporting material for his hearing and conducting discussions with the Crown about the agreed factual basis for the sentence. The agreed schedule of facts was not actually settled until the afternoon of 2 April 2019.

[15] On the morning of the sentence hearing on 3 April 2019 the appellant, his barrister and the solicitor had a further short conference at the courthouse. The appellant confirmed his intention to plead guilty; the solicitor took him through the agreed

schedule of facts; the appellant communicated agreement with the schedule of facts; the appellant signed written instructions to make a plea of guilty and discussed his medical issues and the legal advisers told him what sentence they intended to submit for. Soon after the conference concluded the appellant's matter was called. He was arraigned and entered his plea of guilty and the matter proceeded to sentence.

[16] The appellant never expressed to the solicitor that he felt overwhelmed, intimidated or otherwise incapable of giving proper consideration to his instructions to plead guilty. Nothing about the interactions between the appellant and the solicitor caused the solicitor any concern. There was no sign to the solicitor that the appellant lacked appropriate capacity.

[17] In an appeal from conviction upon a plea of guilty in open court, the fundamental question is whether the appellant can demonstrate that there has been a miscarriage of justice: *R v WBA (No 2)* [2018] QCA 360 at [8] to [9]. This was not a case where the appellant contended that upon the facts admitted he could not in law have been convicted of the offence charged. Rather, the appellant contended that a miscarriage of justice occurred because his plea of guilty made in open court should not be regarded as a free and voluntary plea.

[18] As we have recorded, the appellant based that contention upon his affidavit evidence that when he gave his solicitor instructions that he intended to plead guilty, he had been "diagnosed with terminal cancer with 2 year left". He was "very tired and emotionally worn out" and "going through the chemotherapy process." This "greatly affected" his judgment. There was "total intimidation" from his lawyers and he "wasn't told of the consequences of pleading guilty."

[19] It is true that the evidence supports the conclusion that both at the time he gave his solicitor instructions that he intended to plead guilty and at the time of the guilty plea some weeks later, the appellant was suffering from a terminal cancer diagnosis and was undergoing chemotherapy treatment which, amongst other side effects, caused him to experience anxiety and depression with mood swings. However, critically, the appellant's own evidence did not go so far as to demonstrate that the appellant's mental state at either time was such that he did not appreciate the nature of the charge or intend to admit that he was guilty of it. And the unchallenged evidence of the solicitor was inconsistent with any such conclusion.

[20] The appellant did depose to his having felt intimidated. But the unchallenged evidence of the solicitor negated any notion that the will of the appellant was overborne by pressure imposed on him by his legal advisers. To the contrary, the appellant initially gave instructions that he intended to plead guilty after a conference where issues were explained to him. His proceeding was then listed for a plea. His guilty plea upon arraignment did not occur for some time later. During the intervening period, negotiations occurred. And there was a further conference explaining the position just before the guilty plea. Instructions were taken as to the accuracy of the agreed schedule of facts.

[21] In *Meissner v The Queen* (1995) 184 CLR 132, Brennan, Toohey and McHugh JJ observed (at 141, footnote omitted):

> "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 of sound mind and understanding, provided the plea is entered in exercise of a free

> choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, … ."

[22] We are not persuaded that the appellant did not make a free choice to plead guilty in the sense explained by the High Court. We are not persuaded that there has been any miscarriage of justice. The appeal should be dismissed.