SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hickman* [2004] QCA 85
PARTIES:	**R** **v** **HICKMAN, Arthur Cyril** (appellant)
FILE NO/S:	CA No 430 of 2002 DC No 704 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	23 March 2004
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2004
JUDGES:	Davies and Williams JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON PLEA OF GUILTY – GENERAL PRINCIPLES – where appellant convicted on plea of guilty of stalking with a circumstance of aggravation – where evidence that appellant was unwell at the time he pleaded guilty – whether evidence establishes that the appellant did not have the capacity to understand implications of what he was doing – whether guilty plea should be set aside *R v Boag* (1994) 73 A Crim R 35, cited *R v McQuire & Porter* (2000) 110 A Crim R 348, cited *R v Meissner* (1995) 184 CLR 132, followed
COUNSEL:	R S M G King for the appellant D L Meredith for the respondent
SOLICITORS:	Cranston McEachern for the appellant Director of Public Prosecutions (Queensland) for the respondent

DAVIES JA: I shall ask Justice Williams to deliver his reasons first.

WILLIAMS JA: In the District Court, Brisbane, on 25 November 2002, the appellant pleaded guilty to one count of stalking with a circumstance of aggravation and was sentenced to a 12 month intensive correction order. That sentence has been served. Notice of appeal was filed on 20 December 2002 seeking to have the conviction quashed. It was asserted in the notice of appeal that the plea on which the conviction was based was not attributable to a genuine consciousness of guilt, and that it was not bona fide.

No material supporting those grounds was filed with the notice of appeal. The matter was listed for hearing on 19 May 2003, but de-listed because of the appellant's ill health. It was again listed for hearing on 15 October 2003. There was, at that date, still no material filed in support of the grounds and the matter was adjourned on terms that within 28 days the appellant filed affidavits in support of his contentions. The appellant has filed three affidavits; one by himself, one by his friend Robin Clapham, and one by Dr Sarah Cunningham. Today, a further affidavit by Robin Clapham was filed by leave.

Before considering that material it is desirable to say something briefly about the offence. The charge relied on a number of concerning acts committed between 29 February and 14 September 1999. As a result of an assault on a fellow worker

on 24 February 1998, the appellant was dismissed from his employment. He was convicted of that offence on 26 February 1999 and placed on probation for two years. The prosecution case was that thereafter the appellant carried on a vendetta against the director of the company which had formerly employed him.

He was arrested on the current charge on 9 September 1999. The prosecution case with respect to the concerning acts was in many respects a strong one, including the making of threats to use violence. The only issue which would have been reasonably open if the matter went to trial was whether or not the jury considered the combination of concerning acts constituted the offence of stalking.

In March 2000, the original indictment was presented in the District Court. The matter was mentioned from time to time, but apparently not set down for trial because the prosecution was considering further evidence. The matter was listed for trial on 18 August 2000, but that trial was adjourned because new evidence was being considered. There were further mentions in the District Court throughout 2001. A trial then commenced on 18 March 2002, but was apparently adjourned because the prosecution was not ready to proceed. A further trial then commenced on 20 May 2002 but was aborted after some days, apparently because of an issue with fresh evidence. There was a further attempt to have a trial in July 2002, but again that trial was aborted when defence counsel was granted leave to withdraw.

The trial in question began on 25 November 2002. Up to that point of time the appellant had been pleading not guilty. He was further arraigned on 25 November 2002 and initially pleaded not guilty. He was then represented by experienced counsel. Later in the morning, but before the prosecution had opened its case, counsel asked that the appellant be re-arraigned. He then pleaded guilty. It is accepted that during the course of the morning counsel for the prosecution had intimated to counsel for the appellant that the prosecution was not seeking an actual custodial sentence. The intimation was made that the prosecution would seek a 12 month intensive correction order coupled with a restraining order. It was on that basis that the plea of guilty was entered.

The appellant was born on 21 January 1951, making him nearly 52 when that plea of guilty was entered. He had held a number of jobs since leaving school and was obviously an intelligent, worldly-wise person.

According to the appellant's affidavit he was on medication at the time he pleaded guilty. The following extracts from his affidavit state the appellant's case for setting aside the plea of guilty:

> "On the 24th of November 2002, the day before the trial, I was suffering from stress and anxiety, and was physically ill from the stomach problems...
>
> On the night of the 24th of November 2002, I was still physically ill and suffering from extreme stress...

> On the morning of the 25th of November 2002,I felt a little better, but still suffered from nausea and stress...
>
> I entered a plea of not guilty, but was physically ill. I had to go to the toilet on a number of occasions and could not stop the vomiting. In addition to the stomach difficulties, I was feeling very stressed and anxious and had taken a larger than normal dose of my medication.
>
> I informed [counsel] that I was so ill that I wanted the matter over and done with. I showed him the Medical Certificate and I said that I was sick and depressed and that I had been fighting these charges since I was arrested ... and that I did not feel well enough to attend a 5-8 day trial."

It is clear from the appellant's affidavit that he admits he was informed that the prosecution was not seeking an actual custodial sentence and that he agreed to plead guilty on that basis.

The first affidavit from Robin Clapham adds little to that position. She says that on 24 November 2002 the appellant "was extremely stressed and anxious and suffered from vomiting spells". In the second affidavit, she makes observation about incidents of depression, particularly an incident some six months earlier after one of the aborted trials.

The affidavit from Dr Sarah Cunningham is carefully worded. She first treated the appellant in 1990, but he did not attend her surgery between 1991 and 1997. She then refers to a specific visit on 1 April 1998. On that occasion, she noted that he was "extremely anxious, restless and was having difficulty with coping". She then says that the appellant attended her surgery on a number of occasions after 1 April 1998, but no dates are given. There is no specific reference

to any consultation around 25 November 2002. The doctor does refer, in the affidavit, to the appellant becoming "more depressed and agitated as court dates approached". And then goes on to say:

> "It is my opinion that the prolonged nature of the criminal proceedings has brought Mr Hickman to a point where he was under severe psychological pressure. This, combined with his stomach problems, I believe, may have made him unable to consider carefully all options available to him, especially in respect of the criminal charge. A long trial would have, in my opinion, caused him great mental and physical stress and would have made it difficult for him to make clear and conscious decisions."

That affidavit does not establish any particular medical condition affecting the appellant's capacity to make the decision on 25 November 2002 whether or not to plead guilty. That was on the first day of trial and, in consequence, the stress of a long trial to which the doctor referred would not then have been operative.

The material also establishes that the appellant acknowledged in writing his instructions on pleading guilty. Though he had a stomach problem on 25 November 2002 necessitating his visiting the toilet regularly, and he was also then in a stressful situation, there was no indication on that date that his mental capacity to make a decision about his plea was impaired. Certainly, his then legal advisers were not of the view that his capacity was impaired.

The approach of an appellate Court to an application such as this must be in accord with the decision in *Meissner* (1995)

184 CLR 132. At 157 Justice Dawson said that a plea of guilty "will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred". Such a miscarriage of justice may be established by proving that the accused did not understand the nature of the charge or did not intend to admit he was guilty of it; but a miscarriage of justice may be established in other ways. In the same case, at 141, Justices Brennan, Toohey and McHugh said:

> "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. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence."

These passages have been followed and applied in Queensland: *McQuire and Porter* (2000) 110 A Crim R 348 especially at 354 and 360. It is for the appellant to establish on the balance of probabilities that a miscarriage of justice has occurred: *Boag* (1994) 73 A Crim R 35. It is clear from perusing those authorities that a plea should only be set aside in exceptional circumstances.

As already noted, the appellant here was of mature age and with some worldly experience. He was aware that there was a strong case against him but the prosecution was not asking for a custodial sentence; he was influenced in changing his plea by that circumstance. There is nothing in the medical evidence to suggest that he did not at the material time have

the capacity to understand the implications of what he was doing.

I am not satisfied that on the material before the Court a case has been made out for setting aside the plea. It follows that the appeal against conviction should be dismissed.

DAVIES JA: I agree.

PHILIPPIDES J: I also agree.

DAVIES JA: The appeal is dismissed.
