SUPREME COURT OF QUEENSLAND

CITATION:	*R v Beer* [2004] QCA 396
PARTIES:	**R** **v** **BEER, Barry Joseph** (applicant)
FILE NO/S:	CA No 251of 2004 SC No 623 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	25 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2004
JUDGES:	Davies JA, Fryberg and Mullins JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for extension of time to appeal against conviction dismissed** **2. Application to adduce further evidence dismissed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – applicant seeks extension of time after previously abandoning appeal against conviction – whether in the interests of justice that abandonment of appeal be set aside – whether applicant can adduce further evidence *R v Tabe* [1983] 2 Qd R 60
COUNSEL:	The applicant appeared on his own behalf M R Byrne for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

DAVIES JA: I shall ask Justice Mullins to deliver her reasons first.

MULLINS J: The applicant was convicted after trial of one count of grievous bodily harm with intent. He was sentenced to eight years' imprisonment and a declaration was made that he was convicted of a serious violent offence.

On 6 December 1999 a notice of appeal against conviction and an application for leave to appeal against sentence was filed. A notice of abandonment of the appeal against conviction was filed on 6 April 2000.

The application for leave to appeal against sentence was heard on 12 April 2000 and was successful. The sentence was reduced to seven years' imprisonment and the serious violent offence declaration was set aside.

This current proceeding commenced with the filing on 30 July 2004 of a notice of application for extension of time to appeal against the conviction. An amended notice was filed on 24 August 2004.

The facts relating to the offence are set out in the Court of Appeal's judgment on the application for leave to appeal against sentence: R v. Beer [2000] QCA 193.

The complainant's version of the assault by the applicant which was substantially supported by the complainant's

stepdaughter's evidence must have been accepted by the jury for them to have found the applicant guilty of grievous bodily harm with intent.

The applicant was provided in May 2002 with the material relied on by the complainant in support of his application for criminal injuries compensation. This material has prompted this application.

The applicant now points to material that was not made available to him at trial and, in effect, seeks a new trial on the basis of this fresh evidence.

The first category of such evidence is that which could be given by clinical psychologist, Mr Peter Egan, who saw the complainant on five occasions between 28 April and 28 May 1998 for the purpose of counselling the complainant after the assault that had been committed against him by the applicant on 21 April 1998.

Mr Egan was engaged for that purpose by the complainant's employer. Mr Egan provided a report dated 9 May 2001 for the criminal injuries compensation application, in which Mr Egan set out the history that the complainant gave him of the assault, the complainant's description of the effects of the trauma on him and Mr Egan's opinion.

The applicant relies on the observation which Mr Egan made on the second occasion he counselled the complainant on 30 April 1998. Mr Egan stated at page 2 of his report:

> "On that occasion I noticed some mild dissociative features in his history, mainly in the form of patchy and incomplete memory of the assault, which is not uncommon in history of such trauma."

The statement of the events that was given by the complainant to the police was made on 7 May 1998. The trial took place between 8 and 10 November 1999.

The complainant was cross-examined on his version of the events. Mr Egan's report was not in existence at the time of the trial. Generally there is no obligation on the prosecution to obtain a report for the purpose of the trial from a psychologist who has provided counselling to a complainant.

Mr Egan's notes may have been sought by the defence on subpoena for the purpose of the trial if inquiries of that nature had been pursued by the defence. What Mr Egan meant by the sentence in his report to which the applicant draws the Court's attention is a matter of debate.

In any case, Mr Egan was making a comment about the presentation of the complainant on that one occasion which preceded the making by the complainant of his statement to the police. What the applicant wishes to do now is to pursue a fishing expedition in respect of that one sentence.

The second category of so called fresh evidence is a reference in the Ipswich Hospital report dated 29 June 2001 to the fact that it was noted on 25 April 1998 that there were a few scratch marks on the complainant's right back and arm.

The stab wounds inflicted by the applicant were to the left side of the complainant's neck and the left abdomen. The applicant wishes to pursue how those scratch marks came to be on the complainant, as the complainant did not make any reference in his statement or evidence to those scratch marks.

It appears that the scratch marks were not noted in the hospital notes until four days after the complainant's admission. There is nothing to suggest that they are relevant to the matters which were in issue at the trial. They have no significance to the applicant's version of events given in evidence at the trial.

The two matters that the applicant wishes to pursue by way of fresh evidence are not of such a nature that pursuing those lines of inquiry would be likely to have raised a reasonable doubt about the applicant's guilt when viewed in combination with the evidence given at the trial.

The other evidentiary matters which the applicant now wishes to pursue on appeal arise from the evidence of witnesses given at the trial. The applicant also wishes to challenge the learned trial Judge's direction to the jury on self defence.

These matters could easily have been pursued by the applicant on the appeal against conviction that was originally filed.

To pursue them now requires the applicant, in effect, to obtain an order from this Court setting aside the abandonment of that appeal. It is rarely that an abandonment of appeal against conviction is set aside: R v. Tabe [1983] 2 QdR 60. It must be in the interests of justice for the abandonment to be set aside.

The applicant asserts that he lodged the notice of abandonment under protest after considerable pressure from his then legal representatives. The applicant has not sworn to the circumstances in which he gave instructions for the notice of abandonment to be lodged. It can be noted, however, it was done a few days before the appeal was due to be heard by the Court of Appeal.

The mere assertion by the applicant of succumbing to pressure from his legal representative is not sufficient to discharge the onus which the applicant bears of showing why he should have the abandonment set aside at this late stage.

I would therefore dismiss the application for extension of time within which to appeal against a conviction and the application for leave to adduce further evidence.

DAVIES JA: I agree.

FRYBERG J: I agree.

DAVIES JA: The applications are dismissed.
