SUPREME COURT OF QUEENSLAND

CITATION:	*R v Summers* [2004] QCA 432
PARTIES:	**R** **v** **SUMMERS, Gavin George** (applicant)
FILE NO/S:	CA No 290 of 2004 DC No 739 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for extension (conviction)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	12 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2004
JUDGES:	McPherson JA, Jerrard JA, Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Application for an extension of time within which to appeal against conviction dismissed**
CATCHWORDS:	COURT OF APPEAL – EXTENSION OF TIME APPLICATIONS
COUNSEL:	The applicant appeared on his own behalf R G Martin SC for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Qld) for the respondent

McPHERSON JA: I will give reasons now why I think this application should not be granted.

The applicant was tried before the District Court on an indictment charging a single count of torture of a woman, who

was, he says now, not his de facto wife, but at any rate, was someone with whom he spent time.

On 2nd April 2004, the jury found him guilty of a lesser alternative count of assault occasioning bodily harm while armed and on 6th April 2004, he was sentenced to imprisonment for 12 months.

On some date late in the ensuing four weeks, the Attorney-General lodged an appeal against sentence. It was heard by the Court of Appeal, which delivered judgment on the 3rd of August 2004. The Court allowed the appeal and increased the sentence from one to three years.

This is now an application by the applicant for an extension of time within which to appeal against his conviction. It is, I think, fair to say that the idea of appealing against conviction was something that may have been precipitated by the Attorney's successful appeal, which trebled the duration of his sentence. The applicant himself says, in effect, that he might have been prepared to submit to the lesser term, until the appellant's appeal succeeded and it was increased to three years.

Whether or not that is so, this application to appeal against conviction, was not lodged until 26th August 2004, which means that it was some two and a half months late.

In a statement in support of his application, the applicant refers to several matters which he says he intends to argue on appeal, if the extension of time is granted.

The first is that his barrister and solicitor did not represent or advise him properly or competently at the trial. They advised him not to give evidence and, despite his instructions, they failed to call his mother as a witness at the trial, and possibly some other witnesses as well.

Affidavits have been provided by the barrister and solicitor who acted for the applicant at the trial. They each depose that no pressure was put on him not to give evidence, but they stressed to him the disadvantages of his doing so.

The evidence at the trial was that the applicant had used a hammer in assaulting the complainant. It turned out to be the same hammer as he had used on an earlier occasion, to assault another woman in very similar circumstances. There was, therefore, a well justified expectation on the part of the legal advisers that, if the applicant gave evidence, leave would or might have been given to cross-examine him about this and his other convictions. That would probably have been fatal to any chance he might have had of being acquitted of the more serious offence and certainly of the alternative of which he was in the end found guilty.

The applicant does not distinctly deny that he assaulted the complainant, but says, essentially, that she attacked him

first while he was asleep. He claims that at the time she struck his foot which at the time was causing him great pain, and the excruciating pain of this assault on him provoked the assault that he then committed on her, or led him to defend himself by assaulting her.

The evidence which he supposed his mother could give seems to have related to the general character or conduct of the complainant, and her behaviour in getting the hammer from his mother's place and taking it to the place where she lived.

His mother was, however, not present when the assault took place and so she could not have given admissible evidence in support of what appears to be the applicant's claim of having acted in self defence or under provocation, which he appears to be relying on to sustain the proposed appeal.

His use of a weapon in assaulting the complainant, shows a disproportionate response in the matter of any defence or provocation which would have been involved in the case.

His legal advisers were therefore correct, in my opinion, in declining to call his mother as a witness at the trial, because there is no rule that you can simply call witnesses whether they have anything relevant or not to say.

The applicant also appears to challenge the evidence of the medical practitioner, who examined the complainant after the event. The complainant had a number of signs of having been

assaulted, and seriously assaulted, but the applicant is concerned about the fact that she was said to have had scratches on her back. The medical practitioner said they were consistent with her having been dragged on the floor or on the ground on her back.

The applicant before us has said that she was only dealt with on the bed and could not have derived the scratches from that location. In effect, he says nothing that would have caused the scratches happened in the course of the assault, and that those injuries must have been sustained when the complainant hid beneath a barbecue in the neighbouring garden, or scaled a fence, or a couple of fences, to escape from him.

Even so, it would not necessarily follow that he was not legally and criminally responsible for causing those injuries.

He also complains that the bruises which the complainant afterwards was seen to have, were not inflicted by him. Some photographs of her condition after the incident were admitted in the evidence. They, it seems, were taken by the police. Some others that were taken privately of her, seem to have been excluded at the trial. The applicant complains that they or that evidence was or were fabricated by the police. However, the probability that the complainant sustained bruising when being attacked by someone wielding a weapon like a hammer, plainly tended to support the complainant's account of events and it is not at all surprising that the jury accepted her evidence.

The applicant does not, as I understand his statement, assert that he did not assault the complainant, but rather that he was compelled to defend himself or provoked into doing so.

There was no evidence at the trial to contradict her testimony, just as there is none now to contradict his legal advisers' explanation of why he and his other proposed witnesses were not called to give evidence at the trial.

There is really no tangible prospect that at any future trial, he would be acquitted of this offence and none at all that, if this application were granted, the Court of Appeal would allow the appeal, set aside the conviction and order a new trial to be held. In my opinion, the application to extend the time for appealing, should be dismissed.

JERRARD JA: I agree. The complaint that Mr Summers makes on his appeal or his application, is that he acted on advice given to him that he should not give evidence.

In his arguments to this Court, he has described briefly the nature of the evidence he would have given and the defence that he would have put forward.

That defence would itself have established that he had used the same weapon when on release from custody, to hit the complainant with, as he had used when committing an earlier

offence of assault, for which he was serving that sentence of imprisonment.

I did find the fact of using the same hammer, would have, in my judgment and that of the legal representatives who were advising him, significantly prejudiced him before the jury.

In any event, on the count that he has described to us of the evidence that he would have given, it appears to me that the jury would inevitably have come to the conclusion that the applicant had used excessive force when assaulting the complainant, assuming in his favour, that the jury were prepared to accept that he may have done that either as a result of provocation or in self defence.

I add that not only does the material and the information he has given to this Court not really disclosed any arguable defence of any kind, but that if Mr Summers is to get parole on his present sentence, he has to stop blaming the victim and start accepting and taking the blame for what he did to her.

FRYBERG J: For the reasons which my colleagues have given, I agree that the applicant has not demonstrated any significant chance of success on appeal.

In my judgment, he has also failed to demonstrate any adequate explanation for why he did not bring his appeal within time. I agree with the proposed order.

McPHERSON JA: The order is that the application for an extension of time within which to appeal, is dismissed.
