SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hutchinson* [2010] QCA 22
PARTIES:	**R** **v** **HUTCHINSON, Renold Winston** (appellant/applicant)
FILE NO/S:	CA No 63 of 2009 DC No 144 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2010
JUDGES:	Chief Justice and Keane JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant convicted on guilty plea of one count of rape – where complainant was 18 years old and residing in the applicant's house at the time of the rape – where applicant sentenced to seven years imprisonment with parole eligibility after one third of the sentence had been served in custody – whether sentence manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – GENERAL PRINCIPLES – where applicant filed for an extension of time to appeal against his conviction on the ground that fresh evidence has become available since trial – where applicant was of sound mind – where applicant entered a guilty plea in the exercise of a free choice by him – whether a miscarriage of justice occurred in acting on the applicant's plea of guilty *Meissner v The Queen* (1995) 184 CLR 132; [1995] HCA 41, followed *R v Carkeet* [2009] 1 Qd R 190; [2008] QCA 143, distinguished

COUNSEL: N P Hiscox for the applicant
M J Copley SC for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree with the orders proposed by His Honour and with his reasons.

[2] **KEANE JA:** On 18 August 2008 the applicant was convicted on his own plea of one count of rape. He was sentenced on 20 February 2009. On that occasion he was sentenced to seven years imprisonment with parole eligibility on 19 June 2011, ie after one-third of the sentence had been served in custody.

[3] On 20 March 2009 the applicant filed an application for leave to appeal against his sentence on the ground that it was manifestly excessive. The form which was filed by the applicant at that time indicated an intention to appeal against his conviction but no grounds were advanced in support of that appeal.

[4] On 26 October 2009 the applicant filed an application for an extension of time to appeal against his conviction on the ground that fresh evidence has become available since his trial and which, it is said, shows that the complainant has admitted to witnesses that she was not raped by the applicant. It may be that an extension of time to appeal was not necessary to enable his appeal against conviction to proceed. However that may be, in order to pursue an appeal against his conviction based on that evidence, the applicant must first show that his plea of guilty should be set aside.

[5] I propose to set out some factual background of the case before considering the arguments in support of the applications made by the applicant.

Factual background

[6] The charge to which the applicant pleaded guilty was of rape committed between 1 June 2000 and 27 June 2000. At that time the applicant was 36 years old. The complainant was 18 years old at the time. She had come to reside in the applicant's house about eight or nine weeks earlier at the invitation of the applicant's then wife. The complainant was seeking refuge from an abusive partner.

[7] The applicant was sentenced on the basis of facts outlined to the court in the applicant's presence. It was said that the applicant came into the complainant's bedroom while she was asleep. He woke her by rubbing her breasts. He lowered her shorts and underwear and entered her from behind. She told him to stop but he persisted, ejaculating inside her. The intercourse was unprotected. The following morning the complainant left the house and reported the rape. DNA tests of swabs taken by the police showed the presence of the applicant's DNA. The applicant, when questioned by police, denied any sexual contact with the complainant.

[8] For reasons not involving any fault on the part of the applicant or the complainant, the complaint against the applicant lay dormant until 2006. When the complaint was re-enlivened by the authorities, the applicant maintained his position that no sexual contact had occurred between himself and the complainant.

[9] The applicant was charged with the offence in question and also with three counts of sexual assault and another count of rape. These other charges were discontinued before trial. The plea of guilty to the offence in question was entered on the morning of the trial.

The new evidence

[10] The new evidence on which the applicant seeks to rely consists of evidence of a number of persons who say that the complainant engaged in a consensual sexual relationship with the applicant and that she had lied about being raped by the applicant, in one case "because she wanted his money from a car accident payout", and in another as a "way of paying [the applicant] back for leaving [his former wife]." This new evidence is denied by evidence from the complainant and her evidence is corroborated by other witnesses.

[11] It may be noted here that there is no evidence before this Court that the complainant has ever made any claim for money upon the applicant. And the complainant made her first complaint against the applicant while he was still living with his former wife. There is thus reason for some scepticism about the new evidence on which the applicant seeks to rely, but one may put that scepticism to one side because no basis has been shown for setting aside the applicant's plea of guilty.

The plea of guilty

[12] In *Meissner v The Queen*, Brennan, Toohey and McHugh JJ said:[1]

> "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, even if the person entering it is not in truth guilty of the offence." (Footnote omitted).

[13] Dawson J said:[2]

> "It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence (*R v Forde* [1923] 2 KB 400 at 403; *R v Murphy* [1965] VR 187 at 188; *R v Chiron* [1980] 1 NSWLR 218 at 235; *R v Liberti* (1991) 55 A Crim R 120 at 121-122; *R v Ferrer-Esis* (1991) 55 A Crim R 231 at 232-233). But the accused may show that a miscarriage of justice occurred in other

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1 (1995) 184 CLR 132 at 141.

2 (1995) 184 CLR 132 at 157 (citations footnoted in original).

> ways and so be allowed to withdraw his plea of guilty and have his conviction set aside. For example, he may show that his plea was induced by intimidation of one kind or another, or by an improper inducement or by fraud (*Pilkington v The Queen* [1955] Tas SR 144; *R v Murphy* [1965] VR 187 at 190; *R v Barnes* (1970) 55 Cr App R 100 at 106; *R v Inns* (1974) 60 Cr App R 231 at 233; *R v Chiron* [1980] 1 NSWLR 218 at 235)."

[14] On the applicant's behalf it is submitted that he:

> "was only educated to year 10, had a low level of legal knowledge and a low understanding of social responsibilities and would not have been able to make the necessary decision as to the consequences of a plea of guilty with full understanding of the consequences of his decision or any informed decision without Kerri (his wife) beside him."

[15] The applicant was 44 years old when he entered his plea of guilty and 45 years old at the date of sentence. There is no evidence to support the proposition that the applicant was not of sound mind much less that he did not appear to be so to the court and his own lawyers. There is also no evidence to support the proposition that his decision to plead guilty was not made in the exercise of a free choice by him. Remarkably, bearing in mind the other evidence which has been tendered on his behalf, the applicant himself has not troubled to swear an affidavit in support of the submission made on his behalf.

[16] It may be that there is good reason for what would otherwise seem to be a remarkable absence of evidence necessary to support this application. The applicant has an extensive criminal history which commenced in 1985. It is unlikely that an adult with such a history did not have a clear appreciation of the consequences of a plea of guilty. Moreover, the applicant was present when the circumstance of the offence to which he pleaded guilty was explained to the sentencing judge. It is evident from the transcript of the hearing that the applicant made no attempt to dispute the accuracy of that account despite having the opportunity to do so. It is possible that these considerations explain the absence of an affidavit from the applicant. Whether or not that is so, it is sufficient to note that the absence of necessary evidence means that the applicant has failed to discharge the burden of bringing into doubt the integrity of the applicant's plea of guilty.

[17] Accordingly, there is no reason to think that a miscarriage of justice occurred in the court below acting on the applicant's plea of guilty. This case can readily be distinguished from the decision of this Court in *R v Carkeet*.[3] In that case, the new evidence before this Court demonstrated beyond reasonable doubt, as the Crown accepted, that the applicant was not in truth guilty of the offence in question, and that another person was guilty, and had been convicted, of the offence. In this case the new evidence on which the applicant relies is denied by the complainant and, as I have noted, the applicant has not given evidence to establish that his plea of guilty was not a reliable admission of the offence with which he was charged.

The sentence

[18] At sentence the applicant's counsel argued for a sentence of seven years imprisonment with parole eligibility being fixed after two years had been served.

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3 [2009] 1 Qd R 190.

That circumstance makes it very difficult to accept the contention that the sentence which was imposed is "manifestly excessive".

[19] The applicant's criminal history includes offences of personal violence. At the time of the offence he was drinking heavily and abusing drugs, but these circumstances do not mitigate his offence.

[20] The learned sentencing judge noted the lapse of time between the offence and the sentence. His Honour accepted that in the meantime the applicant had largely rehabilitated himself having stopped his excessive drinking and begun business as a motor mechanic. Moreover, his Honour accepted that the plea of guilty was indicative of a degree of remorse on the applicant's part.

[21] The complainant's life has been very difficult since the rape. She has had four children who have been taken into care by the Department of Child Safety. She has suffered an opiate dependency. The learned sentencing judge accepted that the rape contributed in some way to her difficult life but his Honour did not accept that all the complainant's problems could be sheeted home to the offence in question.

[22] The offence in question was committed upon an obviously vulnerable young woman who had taken refuge under the applicant's roof at the invitation of his then wife. His offence was a serious violation of the complainant even though violence was not used.

[23] Having regard to all of these circumstances, I am satisfied that the sentence imposed on the applicant was not manifestly excessive.

Orders

[24] I would dismiss the applicant's appeal against his conviction.

[25] I would also refuse the application for leave to appeal against sentence.

[26] **DOUGLAS J:** I agree with the reasons of Keane JA and the orders proposed by his Honour.