SUPREME COURT OF QUEENSLAND

CITATION:	*R v Manzoni* [2010] QCA 85
PARTIES:	**R** **v** **MANZONI, David** (applicant)
FILE NO/S:	CA No 17 of 2010 DC No 565 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction and Sentence)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	16 April 2010
DELIVERED AT:	Brisbane
HEARING DATE:	9 April 2010
JUDGES:	McMurdo P, Holmes and Muir JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for extension of time dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where applicant convicted of one count of assault occasioning bodily harm while armed – where applicant sought extension of time within which to lodge an appeal against conviction and application for leave to appeal sentence – where applicant out of time by 15 months – where applicant argued that inadequacies in his legal representation at trial caused a miscarriage of justice – where no prospects of success on appeal or application for leave to appeal against sentence demonstrated – whether application for extension of time should be granted *R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, cited
COUNSEL:	The applicant appeared on his own behalf B J Power for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The application for an extension of time should be refused for the reasons given by Holmes JA.

[2] **HOLMES JA:** On 4 November 2008, the applicant was convicted after a trial of one count of assault occasioning bodily harm while armed. A conviction was recorded and he was sentenced to imprisonment for nine months, wholly suspended for two years. On 3 February 2010, he filed a notice of application for an extension of time to appeal his conviction and sentence. Such an application requires the court to consider the length of the delay, whether there is any good reason to account for it and whether it is in the interests of justice to grant the extension. The last "may involve some assessment of whether the appeal seems to be a viable one": *R v Tait* [1999] 2 Qd R 667.

[3] By way of explanation for the delay, the applicant says that just after he was sentenced the trial judge told him he could appeal the sentence. That seems improbable, but it is of no consequence. He says he asked his barrister whether, if he appealed, there was any possibility of a new trial and was told there was not; similarly his solicitor in a letter told him that he could appeal, but advised against doing so. In August 2009, the applicant says, he spoke to a family friend who was a "QC". Although he does not disclose the content of any advice given, by inference it was to the effect that he had some prospect of success; he asserts that his lawyers hid the fact that he "could have a new trial".

[4] What emerges from the summing-up and the sentencing remarks is that the applicant had struck the complainant more than once with a baseball bat causing bodily harm; that much was undisputed at trial. The issue was whether he did so in self-defence. The applicant did not give evidence, but he had said in a police interview that it was the complainant who first punched him. The complainant's account was that the applicant set on him, unprovoked, with two baseball bats, and his DNA was in fact obtained from blood stains on two bats. The applicant had no indicia of injury; the complainant had a wound to his forehead.

[5] The Crown case was that the complainant and the applicant had been in business and shared a house, and had fallen out. In response to the applicant's threat to report him to Centrelink for working and drawing social security benefits, the complainant went to the applicant's bedroom and said words to the effect, "Let's go to Centrelink"; the assault followed. The applicant was asked about the Centrelink exchange in his police interview and initially denied it, but later conceded that what he had said about those matters and about a claim that the complainant had threatened to kill him was untrue. (Here he asserted that he had simply not told "the whole truth".) The Crown relied on those lies as evidence of consciousness of guilt. It also relied on admissions the applicant made in the interview: that he struck the complainant although the latter had said, "I give up", and he could see that the man could not get up; that he was not afraid of the complainant; and that he was angry. In addition, the Crown relied on inconsistencies, including that at one stage the applicant told the police that the complainant had tried to assault him, but at another said that he had definitely been punched, but he could not say where.

[6] The defence, on the other hand, relied on evidence from the applicant's daughter, called in the Crown case, that the complainant had made threats to her father; on the fact that it was the applicant who had called the police, not the complainant; and on the fact that the applicant was a man of 54 and not particularly strong.

[7] Here the applicant identified as the basis for his proposed appeal that his barrister had not called evidence relevant to his defence, because he had a conflict of interest. He had a "time limit"; he planned to leave following the trial for Bali. That contention is puzzling, because the verdict was returned on 4 November 2008, and the judge's report indicates that the same counsel appeared at the sentence three days later, on 7 November 2008. At any rate, what is more important is whether there is any evidence of incompetence on the part of the applicant's counsel causing a miscarriage of justice.

[8] The applicant asserted that his counsel had refused to adduce evidence that he could give or call. He, the applicant, wanted to show that the complainant had "terrified him and his family", and that he had called the police repeatedly on the day of the assault, and before it. He wished to subpoena a former employer of the complainant whom the latter had threatened; but his counsel had said he did not regard the proposed witness as reliable. He wanted one of his friends called to say that the complainant had admitted stealing from another former employer. And he wanted to prove that the complainant was "high" on dexamphetamine at the time of the assault, by giving evidence that he had some weeks later found at the house an empty bottle of the medication labelled as prescribed to the complainant; but his counsel had said that the discovery was not probative. In addition, the applicant said, during the trial he had obtained a copy of a search result showing that the complainant's denial in evidence of being the director of a company or companies was untrue, but his counsel had declined to put it into evidence.

[9] None of the responses attributed to counsel seem to me to fall outside the bounds of ordinary decision-making in the running of a trial. The applicant had raised self-defence in his police interview, saying that he had been punched first, and his daughter had given evidence that he had been threatened by the complainant. Plainly enough, counsel had to make a forensic decision as to whether it was advisable to go into evidence in the defence case. The effect on the jury, had he called witnesses but not the applicant, would have been a matter of some concern. On the other hand, given the fact that the applicant appears to have admitted to lying in his interview and, to paraphrase the learned judge's comments on sentence, contradicted himself more the longer the interview went on, it is not hard to imagine that counsel may have thought discretion was the better part of valour and made a rational choice not to call evidence.

[10] The complaint in relation to sentence is that the applicant's counsel failed to present character references. The learned judge explicitly proceeded on the basis that the offence was out of character, that the applicant had no relevant criminal history, and that he was a family man, educated, with a business background. The sentence imposed, as the applicant indeed accepted, seems relatively lenient.

[11] The applicant seems to have acted on advice in the first place in choosing not to appeal. Even if one were to regard his acceptance of that advice as somehow justifying the delay in seeking an extension of time, the delay after 15 August 2009, when, by inference, he obtained advice to the contrary, is simply unexplained. I do not think that he has shown any compelling reason to suppose either an appeal or an application for leave to appeal against sentence would be successful. I would dismiss the application for an extension of time to appeal against conviction and to seek leave to appeal against sentence.

[12] **MUIR JA:** I agree with the reasons of Holmes JA and with the order she proposes.