SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mamea* [2010] QCA 127
PARTIES:	**R** **v** **MAMEA, Savelio** (applicant)
FILE NO/S:	CA No 52 of 2010 DC No 3244 of 2009 DC No 2065 of 2009 DC No 3421 of 2008 DC No 1866 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	25 May 2010
JUDGES:	Fraser and White JJA and Mullins 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 refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant was convicted on his pleas of guilty to one count of rape and one count of sexual assault – where the applicant applied to vacate his pleas of guilty and the judge concluded that there was no ground established to justify setting the pleas aside – where the applicant sought leave to appeal against conviction and argued that the respective District Court judges erred in allowing the convictions to be entered and in not allowing his pleas to be vacated – whether there was a miscarriage of justice such as to justify setting aside the conviction on the applicant's pleas of guilty – whether it is in the interests of justice to grant the extension *Meissner v The Queen* (1995) 184 CLR 132, [1995] HCA 41, cited *R v Carkeet* [2009] 1 Qd R 190; [2008] QCA 143, cited *R v GV* [2006] QCA 394, cited *R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, cited

COUNSEL:	The applicant appeared on his own behalf M J Copley SC for the respondent
SOLICITORS:	The applicant appeared on his own behalf with T Seupule assisting Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** On 28 August 2009 the applicant was convicted on his pleas of guilty to a number of offences, including one count of rape and one count of sexual assault involving the same complainant. On 26 February 2010 he was sentenced to seven and a half years imprisonment for the rape offence and to a concurrent term of three years imprisonment for the sexual assault. On a second indictment he was sentenced to concurrent terms of three months imprisonment for receiving stolen property with a circumstance of aggravation and stealing. On a third indictment he was sentenced to concurrent terms of two years imprisonment for burglary with circumstances of aggravation and assault occasioning bodily harm whilst armed and in company, and to concurrent terms of three months imprisonment for attempted stealing and stealing. The concurrent sentences imposed on the third indictment were ordered to be served cumulatively upon the concurrent sentences imposed on the first and second indictments. The effective term of imprisonment is therefore nine and a half years.

[2] On 18 March 2010 the applicant filed an application for extension of time within which to appeal against his conviction. He also filed a notice of appeal against conviction and application for leave to appeal against sentence. The proposed appeal against conviction concerns the count of rape and associated count of sexual assault on the first indictment.

[3] Because neither party was ready to make submissions in relation to the application for leave to appeal against sentence the Court ordered that that application be adjourned to a date to be fixed. In the application for an extension of time to appeal against conviction the Court gave leave to the applicant's sister in law, Ms Toaiva Seupule, to make submissions on the applicant's behalf. She relied upon written submissions which had been filed on the applicant's behalf and also made some concise remarks.

Extension of time to appeal against conviction

[4] In deciding whether to grant an extension of time to appeal against conviction the court will consider the length of the delay, whether the delay is explained, and whether it is in the interests of justice to grant the extension: see *R v Tait* [1999] 2 Qd R 667 at 668. The proposed appeal against conviction is nearly six months late. Some of that delay is explained by the appellant's application for leave to withdraw his plea of guilty to the charge of rape and sexual assault, an application which was heard and refused by Trafford-Walker DCJ on 27 November 2009. Mr Copley SC, who represented the respondent, submitted that a possible explanation for the remainder of the delay might be found in the fact that the applicant was not sentenced until February 2010. The applicant's explanation for the delay is that he had several problems of comprehension and understanding of legal proceedings, he had not been provided with appropriate legal advice, he had thought that an appeal would be futile, but that when he received the transcript of the proceedings he decided to apply for an extension of time. That explanation is not persuasive but the Court retains the discretion to grant the necessary extension

even in the absence of a satisfactory explanation for the delay where refusal of the extension would result in a miscarriage of justice: see *R v GV* [2006] QCA 394 at [3]. In this case if an appeal is potentially viable I would not regard the unexplained delay as a bar. Accordingly it is necessary to consider whether the applicant has a potentially viable appeal.

[5] Although the stated ground of the proposed appeal is "fresh evidence" no fresh evidence was adduced. The arguments advanced for the applicant focussed upon the question whether the applicant should have been permitted to withdraw his plea of guilty to the charges of rape and sexual assault. It is useful then to commence by outlining what occurred when the applicant pleaded guilty and in his subsequent application for leave to withdraw those pleas.

The proceedings on 28 August 2009

[6] The transcript of the proceeding before Rafter DCJ on 28 August 2009 records that the applicant was arraigned on the three indictments, he pleaded guilty to all counts, and the judge's associate administered the allocutus. After some discussion between counsel and the judge the sentence proceeding was adjourned. The court then adjourned but it reconvened shortly afterwards. The applicant's counsel informed the judge that shortly after the court adjourned corrections staff had told him that when the applicant was being taken to the cells the applicant had said that he was not guilty of the rape, he didn't want to plead guilty, he had been forced into it by his lawyers, and he misunderstood what was happening. He wished to vacate those pleas. In the course of further submissions the applicant's counsel said that he thought that when the applicant was arraigned on "the rape charges" the applicant said "not guilty" and then said "guilty". The judge observed that his associate had asked for a plea a second time because the associate could not hear what the applicant said the first time and that the applicant then clearly pleaded guilty. The proceeding was adjourned to enable the applicant to apply to vacate his plea.

The proceedings on 27 November 2009

[7] At the hearing of that application on 27 November 2009 the applicant was represented by counsel. He relied upon affidavits he had sworn and he was cross-examined. The Crown relied upon an affidavit by Ms Robinson, a law clerk employed by the applicant's former solicitors. She too was cross-examined.

[8] The applicant deposed as follows. He recalled signing his "plea of guilty instructions" with a law clerk on 25 August 2009 at the prison. Someone told him that he would receive a visit in the cells before his court appearance on 28 August 2009 and he said that he did want to see his solicitors before court. When he entered the court-room he saw the law clerk and a barrister he recalled from an earlier conference. The barrister spoke briefly to him and then returned to the bar table. He recalled hearing the charges read out to him and he recalled entering his pleas of guilty. He was then taken back to the cells. He felt angry and frustrated that he had not been given an opportunity to tell his legal team that he had changed his mind about entering his pleas of guilty to the rape and sexual assault charges after the 25 August 2009 conference and before the court hearing. He accepted that he had signed his plea of guilty instructions at that conference but understood that he would be able to speak to his lawyers before court commenced. He swore that if he had been given that opportunity he would have told his lawyers that he had made a mistake in signing his "plea of guilty instructions" and did not want to plead guilty.

[9] Ms Robinson deposed as follows. She attended at a conference at the prison where the applicant's solicitor and defence counsel, Mr Lynch, were also present. Mr Lynch discussed the evidence against the applicant in relation to his charges, likely penalties if he was found guilty after a trial, and penalty ranges if he pleaded guilty. During that conference the applicant signed instructions that he wished to plead not guilty to the count of rape and one sexual offence charged on the first indictment. At the end of the conference the applicant suggested that he might plead guilty to those offences. Mr Lynch advised the applicant that he should give that matter considerable thought and telephone his solicitors after he had considered his position thoroughly. Ms Robinson subsequently attended at the prison on 25 August 2009 in order to confirm instructions which she had been told the applicant had given to the solicitor. She deposed that on this occasion: the applicant signed instructions that he wished to plead guilty; during the conference the applicant asked her if she thought that he had made the right decision; she responded that she could not give an opinion, that it was the applicant's decision, and it was a decision he needed to live with and be comfortable with in himself; the applicant expressed his worry that if he was found guilty after a trial he would face substantial incarceration; Ms Robinson indicated that people who plead guilty receive a less severe punishment; and she confirmed the penalty range suggested by Mr Lynch in the earlier conference.

[10] The instructions signed by the applicant included the following statements: the applicant was aware of the charges (which he summarised); he understood their nature and the allegations being made by the Crown; he had an opportunity to read all the paperwork in relation to the charges; it had been explained to him on many occasions that it was his decision what to do and no-one else's; although he had received advice from his lawyer nobody had told him to plead guilty; in relation to the offences charged in the first indictment he was pleading guilty "for convenience only"; the sex with the complainant in those charges was "consensual sex"; he was aware that because he was pleading guilty for convenience his lawyer would be unable to make submissions in relation to the offence; he would be limited to making submissions in relation to his personal particulars; he understood that by pleading guilty he would be taken to have accepted the evidence against him; he gave those instructions of his own free will; his decision to plead guilty was his own; and no threat, promise or inducement had been made or held out to him to make him plead guilty.

[11] Ms Robinson deposed that she had obtained antecedents from the applicant for the purpose of submitting them to the court on the day of the sentence; at the conclusion of the conference the applicant asked her if he would be receiving another prison visit; she replied that he had been adequately advised in relation to likely penalties, the evidence the Crown was relying on had been thoroughly conveyed, she had obtained the relevant information about him to submit to the court on the day of his sentence, and he would not receive another prison visit; she suggested that if the applicant needed she would come down and see him on the morning of the sentence to obtain further antecedent information; and she told the applicant that if he had any questions or concerns in the interim he should contact his solicitors.

[12] Ms Robinson deposed that the applicant did not indicate that he wanted to see his legal representative before the court hearing. After she arrived at the court-room on 28 August 2009 the applicant was present; she told the applicant that he would be arraigned on all his charges and that is when he would enter his pleas; she referred

to the possibility of an adjournment of the sentence; and the applicant did not indicate that he wished to change his plea. She and the applicant's barrister were in court for about five minutes with the applicant before the judge entered the court. At no stage did the applicant attempt to obtain their attention to convey that he wished to plead not guilty to the offences. She recalled that when the judge's associate arraigned the applicant in relation to his rape offence the applicant said "not guilty", the judge's associate said words to the effect of "pardon", and the applicant subsequently said "guilty". Ms Robinson then gave an account of subsequent events which substantially agreed with that given by the applicant.

[13] Ms Robinson adhered to her evidence in cross-examination. In answer to questions asked by the judge she said that after the applicant had signed his instructions he did not say that he thought that he had made a mistake and she did not say that he had made the right decision.

[14] In cross-examination of the applicant he agreed that after a conference with Ms Robinson, a solicitor, and Mr Lynch, he rang the solicitor and told them he was going to plead guilty. He said that when he signed the instruction document on 25 August he said, "I think I've made the wrong mistakes in myself, I think" and that Ms Robinson replied "No, I think you've made the - you've made the right decision". He agreed that he had signed the instructions for convenience to minimise his sentence. He said that Ms Robinson told him that, "we'll come around and see you before the Court", he asked for the matter to be adjourned, and she told him that it could not be adjourned. He maintained that he expected to see his lawyers when he arrived at the court but no one came to see him. He agreed that after he was taken to the court-room there was a short period of time before the judge arrived and that Ms Robinson spoke to him while he was in the dock, although he was not sure whether that was before or after the judge arrived. He said that he did not ask to speak to the barrister because he felt "a little bit upset". He recalled the barrister turning around to him and speaking briefly to him but the applicant did not say anything because he thought he was "getting sentenced that day and dealt with and over it." The applicant's evidence was that the only reason he pleaded guilty was that he was angry about not talking to the barrister and was "absolutely blank" at the time.

[15] Trafford-Walker DCJ referred to the statement by the applicant's former counsel and the evidence of Ms Robinson that when the applicant was arraigned on 28 August 2009 he said "not guilty" to one of the relevant charges but his Honour found that when the applicant was arraigned on that and other charges he entered pleas of guilty to each and every one. His Honour found that the applicant was not an honest witness; his evidence under cross-examination was not convincing; the applicant had decided to plead guilty freely and voluntarily; the applicant's suggestion in cross-examination that he pleaded guilty because he was angry was not true; and the applicant had second thoughts about having pleaded guilty after he left the court-room. His Honour concluded that there was no basis upon which the applicant should be allowed to change his plea.

The applicant's proposed appeal

[16] As I mentioned earlier, the stated ground of the applicant's proposed appeal against conviction is "fresh evidence" but he did not adduce any evidence in this Court. The applicant referred to the offences of rape and sexual assault as having dated

from 1999 and he argued that there was no evidence to support those charges "besides a statement". He complained that he had not been given proper legal advice and representation about those matters. He argued that on 28 August 2009 Rafter DCJ erred in allowing the convictions to be entered when there was "clear confusion and poor legal presentation" and that on 27 November 2009 Trafford-Walker DCJ erred in not allowing the pleas to be vacated. He contended that he had not been thinking rationally at the time and, because of a long term amphetamine habit, had a short-term memory. He argued that the terms of a complaint he made to corrections officers immediately after he left the court-room after pleading guilty demonstrated that he had no such intention and proved that his counsel had not taken instructions from him. He argued that his legal representatives had not checked to ensure that he had a full understanding of the paperwork he had signed which recorded his instructions that he would plead guilty. These arguments were elaborated upon in the applicant's written submissions.

Discussion

[17] Although the evidence of Ms Robinson that she heard the applicant initially say "not guilty" was consistent with the statement to the same effect by the applicant's former counsel, neither Rafter DCJ or his Honour's associate apparently heard the applicant say "not guilty", the transcript of the proceeding before Rafter DCJ contains no hint of such a plea (although nor does it record that the associate sought clarification of what the applicant said), the applicant did not give evidence in his affidavit or orally that he did say "not guilty", and such a plea would not have reflected the applicant's intention so far as it appeared from the evidence accepted by Trafford-Walker DCJ. The finding by Trafford-Walker DCJ that the applicant pleaded guilty was open on the evidence and his Honour had the advantage of seeing and hearing the applicant and Ms Robinson give their evidence. I am persuaded that this Court should accept and act upon that finding.

[18] The question in the application for leave to withdraw the guilty pleas was whether there had been a miscarriage of justice such as would justify setting aside the conviction on those pleas: see *R v Carkeet* [2009] 1 Qd R 190 at [25]-[26]. In *Meissner v The Queen* (1995) 184 CLR 132 at 141 Brennan, Toohey and McHugh JJ 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 an 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."

[19] Trafford-Walker DCJ addressed the correct question and found that the applicant's pleas of guilty were free and voluntary and that no ground had been established which would justify setting the pleas aside. The applicant has not adduced any evidence which raises a doubt whether he is guilty of the offences to which he pleaded guilty and the evidence accepted by Trafford-Walker DCJ amply supported his Honour's conclusions. His Honour did not err in rejecting the applicant's improbable explanation for having pleaded guilty when, on his case, he had not intended to do so. The applicant does not have a fairly arguable ground of appeal that there was any miscarriage of justice such as would justify setting aside his pleas of guilty. Because the proposed appeal is bound to fail the application for an extension of time is futile.

Proposed order

[20] I would refuse the application for an extension of time within which to appeal against conviction.

[21] **WHITE JA:** I agree with the reasons of Fraser JA and the order proposed by his Honour.

[22] **MULLINS J:** I agree with Fraser JA.