# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Nerbas* [2011] QSC 41 |
| PARTIES: | **THE QUEEN**<br>**(respondent)**<br>**v**<br>**KELSEY JAMES NERBAS**<br>**(applicant)** |
| FILE NO: | Indictment No 1320 of 2008 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application for withdrawal of guilty pleas |
| DELIVERED ON: | 18 March 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 4 February 2011 |
| JUDGE: | Mullins J |
| ORDER: | **The application for leave to withdraw guilty pleas is refused** |
| CATCHWORDS: | CRIMINAL LAW – PROCEDURE – PLEAS – GENERAL PLEA – PLEA OF GUILTY – WITHDRAWAL AND RESTORATION OF PLEA – GENERALLY – application to withdraw guilty plea – where prosecution case against applicant and two co-accused was almost complete – where applicant's instructions on one aspect of the evidence against him were wrong – where defence conducted on the basis of those instructions – where applicant's lawyers advised the applicant that the prosecution case was strong and of the possible options – where applicant gave written instructions that he would plead guilty – where applicant was re-arraigned and pleaded guilty – whether applicant understood the nature of the charges - whether pleas were entered freely and voluntarily – whether applicant incapable of making a decision to change the pleas - where application refused<br><br>*Meissner v The Queen* (1995) 184 CLR 132, considered<br>*R v Chiron* [1980] 1 NSWLR 218, considered<br>*R v Gadaloff* [1999] QCA 286, followed<br>*R v Handlen & Paddison* [2010] QCA 371, considered<br>*R v Mundraby* [2004] QCA 493, considered<br>*R v Wilkes* [2001] NSWCCA 97, considered |
| COUNSEL: | The applicant in person<br>G R Rice SC for the respondent |
| SOLICITORS: | Commonwealth Director of Public Prosecutions for the respondent |

[1] The applicant's trial in this court before a jury of the four charges on indictment number 1320 of 2008 commenced on 24 November 2008. The applicant was represented by Mr Hunter SC instructed by solicitors' firm Ryan & Bosscher. The co-defendants on the same indictment, Handlen and Paddison, also pleaded not guilty to the charges that applied to them and were parties to the same trial. The last witness for the prosecution, Mr Thomson, had almost completed his evidence-in-chief, when at the commencement of the ninth day of the trial (4 December 2008) the applicant's counsel applied for discharge of the jury with respect to the applicant on the basis of prejudice caused to the applicant by late disclosure of part of that witness' evidence.

[2] After the trial judge indicated that he has disinclined to accede to the application, there was an adjournment at 10:54am. During that adjournment the applicant took advice from Mr Hunter and solicitor Mr Shields. Another solicitor from Ryan & Bosscher, Mr Jacob, was present at the conference and took notes. The applicant signed instructions at 1:35pm that he wished to enter a plea of guilty to the indictment.

[3] When court resumed at 2:30pm on that day, the applicant was re-arraigned and pleaded guilty to each of the four counts against him and the *allocutus* was administered. The transcript of the re-arraignment shows that it proceeded in the usual way. In the course of that afternoon the applicant regretted his decision. Ultimately he obtained new legal advisers and filed an application on 26 June 2009 for leave to withdraw his plea of guilty on the grounds that the plea of guilty was not a free and voluntary confession, was not attributable to a genuine consciousness of guilt and was induced by threats and other impropriety. He has not been sentenced.

[4] The trial proceeded to verdict against Handlen and Paddison and both were found guilty of the respective charges against them. Their appeals against conviction were dismissed: *R v Handlen & Paddison* [2010] QCA 371 (the Court of Appeal reasons).

**Grounds of the applicant's application**

[5] The applicant now appears on his own behalf to pursue his application for leave to withdraw his guilty pleas and has expanded the grounds for his application. The applicant impugns the quality of the legal advice that he received prior to making the decision to change his pleas to guilty, asserts that he did not understand the nature of the charges, and continues to assert that he was intimidated into changing his pleas. Coupled with that attack, the applicant also asserts that he was in a highly traumatised emotional state and incapable of making a rational decision on whether to change his pleas.

[6] The applicant also has prepared documents to show that he had a viable defence to the charges and, in fact, no case to answer. Although the applicant's submissions on this aspect were in the nature of submissions to support an appeal against conviction, his material on this aspect is relevant to the issue of whether there would be a miscarriage of justice, if he were not allowed to change his pleas of guilty.

**The charges**

[7] Count 1 on the indictment related to importing a commercial quantity of border controlled drugs, namely cocaine, 3,4 methylenedioxymethamphetamine and methamphetamine. The dates specified in the charge for the importing were between 1 August 2005 and 29 May 2006. This was referred to at the trial as the first importation. (Although the applicant places great weight on the use by the prosecutor during the trial of the expression "importation" when the offence is "importing", the charges used the correct term.) Count 3 on the indictment charged the applicant with possession of the drugs that had been unlawfully imported in the first importation. Count 4 related to the second importation. It was alleged that the applicant imported a commercial quantity of the same types of border controlled drugs between 1 July 2006 and 18 September 2006. Count 5 was an attempted possession charge against the applicant in relation to the drugs that had been the subject of the second importation. It was alleged to have been committed between 18 and 20 September 2006.

**The prosecution's case against the applicant**

[8] The respondent's submissions for this application were accompanied by the document that had been prepared for the purpose of the trial that particularised the applicant's participation for the purpose of each of the four counts. The respondent's case against all defendants at the trial relied significantly on the evidence of an accomplice Reed which must have been accepted by the jury in the cases against Handlen and Paddison. The respondent submits that there was overlap between the evidence given by Reed against Handlen and the evidence given by Reed against the applicant and it was not logical to suggest that what Reed said about the applicant's involvement in the offences was any less cogent than what he said about Handlen's involvement, particularly as much of the evidence that applied to the applicant also applied to Handlen and/or Paddison. (In fact, the applicant acknowledged (at Transcript 1-77) at the hearing of the application that the jury was attentive to Reed's evidence, although he attributed it to the fact that Reed "is a good looking guy, so the juries are obviously inclined to listen to what he has to say" and referred to his nickname of "Hollywood" because he was able to concoct stories.) As a result of Reed's evidence at the trial about when the applicant was informed by Handlen about the first importation, the respondent conceded on this application that the applicant did not become involved in the first importation until 15 May 2006.

[9] In summary, based on evidence given at the trial, Handlen and Reed collaborated in Canada over importing the drugs into Australia by inserting the drugs in the picture tubes of computer monitors. The applicant was a friend of Reed. For the purpose of the importation a business of recycling computer monitors was established in Brisbane. The company Reliable Computer Conversions Pty Ltd (Reliable) was incorporated in Queensland on 24 April 2006 with Reed and the applicant as directors. Reed and the applicant signed a lease for commercial office and storage premises situated at Geebung (unit 18) on 8 May 2006 for 18 months commencing on 15 May 2006. Handlen arranged for funds to be sent to the applicant's bank account that enabled the applicant to pay a security deposit on the lease on 23 May 2006. The applicant was told about the importation by Handlen on or about 15 May 2006 and the applicant agreed with Handlen to continue to help them and "to be a part of it" for which he would be "compensated". Reed had heard the end of this conversation and then talked with the applicant about this conversation with Handlen and the first importation.

[10] The first container shipment of computer monitors was delivered to unit 18 on 29 May 2006 and was unloaded by Reed, Handlen and the applicant. A few days later Reed, Handlen and the applicant returned to unit 18 and identified the 16 monitors that housed the drugs and removed the packages of drugs. The packages were stored in cardboard boxes at unit 18 and then taken by Reed, Handlen and the applicant to the hotel where Reed was staying. Most of the packages were transferred to associates of a person nominated by Handlen Reed, Handlen and the applicant went to Canada in mid-June. The applicant returned to Brisbane after a holiday. Reed returned to Australia on 10 August 2006, Handlen on 6 September 2006 and Paddison on 4 September 2006. On Handlen's instructions, Reed and the applicant rented storage premises from Kennards at Virginia to which on 31 August 2006 they removed the 16 monitors that had been used to hide drugs in the first importation.

[11] Another shipment of computer monitors to Reliable arrived in Australia on 8 September 2006 when it was inspected by Customs. The drugs were discovered and a substitution made by police, the container was repacked for delivery and electronic and other surveillance was put in place. One intercepted call on 12 September 2006 revealed that the applicant called Reed about the progress of the clearance of the container and, when Reed said that he thought that the paperwork problems had been sorted out, the applicant referred to the stress "killing" him. The container was delivered to unit 18 on 18 September 2006 and was unloaded by Reed and Paddison under police surveillance. The monitors were put into unit 18. The applicant collected Reed and Paddison from unit 18 in his car after the unloading was completed and there was discussion amongst them about the apparent rearrangement of the pallets of monitors by the authorities. Later that afternoon the applicant went to his office at Spring Hill and used his computer to make a number of internet searches entering search terms such as "customs drug bust monitors" and "drug bust in screens." In preparation for transporting the drugs from unit 18, Reed and the applicant went to several car hire businesses on the afternoon of 19 September 2006. On 20 September 2006 Handlen authorised Reed and Paddison to inspect the monitors' contents and they were filmed doing so at unit 18 shortly prior to arrests taking place that evening of Handlen, Paddison, Reed and the applicant.

[12] The respondent points to evidence that supported Reed's evidence against the applicant, including telephone intercepts, surveillance and that Reliable had been incorporated for the business of recycling computer monitors and, although a shipment had been received by 29 May 2006, the applicant was aware that no monitors had been used to generate income for Reliable, but the business was incurring expenses such as the lease of unit 18. Although the applicant's role in the first importation commenced much later and was a lesser role than the roles of Reed, Handlen and Paddison and his role in the second importation was primarily administrative acts, the case against him that was put before the jury was appropriately described on this application as strong.

**Summary of the applicant's evidence on the application**

[13] The applicant's affidavit filed on 26 June 2009 (the first affidavit) dealt with the events that resulted in his giving the instructions to Mr Shields that he wished to change his plea to guilty of the charges. (The applicant did not formally rely on the first affidavit on this application, but the respondent relied on what matters it dealt with and those which were not raised by it. The content of the first affidavit was

largely repeated in the applicant's later affidavit.) For the purpose of his defence at the trial, the applicant had given written instructions to Ryan & Bosscher that he did not do the internet searches that were done at his office on 18 September 2006. Although the applicant in the first affidavit explained why he had given written instructions to the effect that he had not done the internet searches on 18 September 2006, for the purpose of this application what is relevant is that the state of the applicant's written instructions to his lawyers, as at 4 December 2008, and that his defence conducted at the trial was that he had not done those internet searches.

[14] The applicant stated in the first affidavit that, after Mr Hunter was unsuccessful in obtaining a mistrial based on the lack of disclosure of parts of Mr Thomson's evidence, he had a meeting with Mr Hunter, Mr Shields and Mr Jacob and that he was given three options which were:

(a) Continuing on with the trial, but that because of an ethical reason Ryan & Bosscher could no longer represent him and he would be found guilty;

(b) Ask the judge for some time to get new lawyers, but it was likely he would still be found guilty;

(c) Plead guilty and try to get the prosecutor to lower the sentence that he asked for.

[15] The applicant was also advised that, if found guilty, he would have "zero chance of an appeal". The applicant then had an hour in which to consider his decision and decided to plead guilty. The applicant stated in paragraph 30 of the first affidavit that he felt he "was being coerced to option 3 and was under a lot of duress at this time." He stated in paragraph 32 that he signed what Mr Shields drafted "not really knowing what I signed as my mind was elsewhere." When the applicant returned to court to be re-arraigned, he stated in paragraph 33 that he "had to really contain myself to not burst out loud laughing."

[16] The applicant's affidavit filed on 8 November 2010 was a response to affidavits of Mr Hunter and Mr Shields and is more in the nature of argument rather than additional evidence.

[17] Substantial additional evidence was relied on by the applicant in the form of a 45 page affidavit that was sworn in June 2010 and included 26 exhibits (the June 2010 affidavit). A replacement exhibit 17 and an additional exhibit 28 were forwarded to the court in January 2011.

[18] The applicant asserted that the nature of the charges was never explained and he was confused by the two charges of importing, as he knew that he had never done anything that fell within the description of "importing", as explained by the prosecutor in his opening at the trial. The applicant analysed evidence which appeared to be relevant to the applicant's participation in the first importation prior to 15 May 2006, but which has become irrelevant, in light of the concession now made by the respondent that the applicant did not become involved in the first importation until 15 May 2006. On a number of peripheral details, the applicant analysed the evidence given by Reed at the trial minutely and pointed to discrepancies, either with earlier versions given by Reed or with other evidence. An example of that is the visit on 14 September 2006 to the OzSpy Store.

[19] The applicant complained about the accuracy of information put before the court at an early hearing by a Federal Agent to oppose the applicant's bail application. The

applicant set out the reasons for his involvement in assisting in the hire of a rental car on 20 September 2006 and asserted that he had no "direct knowledge" that the car may have been used for the transporting of drugs. The applicant complained about the late disclosure by the prosecution of aspects of Mr Thomson's evidence. The applicant also incorporated much of what had been disclosed in the first affidavit about why he gave written instructions to Ryan & Bosscher that he said he did not do the internet searches that were done at his office on 18 September 2006 (when he, in fact, did do them).

[20] Paragraph 178 of the June 2010 affidavit set out allegations of improper conduct against Mr Hunter:

> "Mr Hunter further threatened me by saying that he (*sic*) DPP had over two years to investigate me and that they were going to tell the jury that I had serious tax matters with the ATO (which is untrue). And that this was a motive for me to be involved. Plus he threatened me by saying the DPP had pictures they were going to show the jury, who are '*simple folk*', of me in helicopters and driving luxury cars plus living in a lavish waterfront apartment et cetera. Mr Hunter said the jury would most definitely only view me as a participant. I couldn't believe he was intimidating me with this."

[21] Paragraphs 193 to 201 of the June 2010 affidavit detailed the applicant's evidence about his state of mind leading up to the re-arraignment. The applicant referred to the "intense stress and pressure" his legal team was "dumping" on him and that his head "really started to spin and I become completely disorientated and utterly confused." He stated that it felt "like my brain was burning." He described how "everything became detached and separated" and that he "felt completely delirious to the fact of how it was possible for an innocent man to be going guilty and was not able to rationalize my thoughts clearly." The applicant stated that when he returned to court for the re-arraignment he "felt completely delirious and couldn't stop laughing."

[22] The applicant set out in the June 2010 affidavit a similar argument to that approved in the Court of Appeal reasons at [72] that the respondent's case advanced on the basis of joint criminal enterprise was not a form of criminal responsibility under the *Criminal Code* (Cth). The applicant asserted in paragraph 258 that he was "railroaded by my legal team" to plead guilty for being part of a joint enterprise in the importation that had a common purpose which were "invalid concepts." The applicant made allegations against the prosecutor that were misconceived.

[23] The applicant also gave oral evidence on the application in which he reiterated that he was innocent of the matters against him and that his guilty pleas "were not genuine or to be accepted by the courts as a true admission of guilt on my part" (Transcript 1-12-1-13). He admitted (at Transcript 1-16) to becoming aware on 17 September 2006 that there were drugs in the container, but claimed that thereafter he was trying not to associate with the group. The applicant explained that until he spoke to Mr Stoker he did not realise what kind of state he was in when he changed his plea to guilty and stated (at Transcript 1-18):

> "I just knew I was being pressured into something I didn't want to do. I was being backed into a corner of a situation I just didn't want to be in, and I felt very pressured and intimidated by the fact they just weren't giving me any option but to plead guilty."

[24] The applicant also asserted that when he was sitting in the dock, when he returned for the re-arraignment, that he was "laughing hysterically" (at Transcript 1-19) and that Mr Shields approached him and asked if everything was all right.

**Mr Stoker's evidence**

[25] Mr Stoker is a psychologist who saw the applicant for an hour on 21 October 2009. Mr Stoker prepared a written report of that date. He relied on the first affidavit and the interview he had with the applicant. The applicant told him that "his brain burnt and simply shut down" at the time he pleaded guilty which was a similar feeling to that which he suffered when his wife announced that she would be leaving him a few years previously. The applicant stressed to Mr Stoker that he maintained his innocence and had not imported anything.

[26] Mr Stoker's opinion was that when the applicant changed his plea to guilty, he was "highly traumatized emotionally" and that his highly traumatized state would have resulted in a dissociative type episode which is an unconscious defence mechanism by which an idea is separated from the accompanying affect. Mr Stoker was further of the opinion that the dissociative state rendered the applicant "incapable of a rational thought process required to make a reasoned decision on how to plead."

[27] Mr Stoker acknowledged in cross-examination (at Transcript 1-31) that there was nothing in the first affidavit that had alerted him to the applicant being in a dissociative state at the time he changed his plea to guilty or from which he could diagnose any interference with rational thought functions. Mr Stoker also conceded (at Transcript 1-32) that he accepted those things that he set out on pages 7 and 8 of his report as true for the purpose of reaching his opinion. Those matters included the statements made by the applicant to him that during the process of making his decision to change his plea, he felt his "brain was burning" and that he went into "zombie mode." Mr Stoker accepted (at Transcript 1-34) that his diagnosis of the dissociative state was premised upon the degree of trauma which the applicant described to him.

**Summary of the evidence of Mr Shields and Mr Hunter**

[28] Although observations were made by Mr Shields and Mr Hunter in the course of their affidavits that were disputed by the applicant in his evidence, the applicant did not require Mr Shields and Mr Hunter for cross-examination.

[29] In his affidavit filed on 17 July 2009, Mr Shields explained how the situation arose where Ryan & Bosscher and Mr Hunter might need to withdraw as the lawyers for the applicant. At paragraph 18, Mr Shields stated that he explained to the applicant that if his instructions changed from what was contained within the signed statement that they may be "conflicted and would ethically have no choice but to withdraw from further representing him." Mr Shields recalled the applicant asking about the appropriate sentence, if he were to enter a plea of guilty, and that the applicant queried the effect of his plea of guilty on the co-accused. Mr Shields' outlining of the options open to the applicant was similar to that recorded by the applicant in the first affidavit. Mr Shields stated in paragraph 28 that he specifically asked the applicant whether or not he fully understood the advice which had been provided to him in the options which were open to him and (in paragraph 29) that the applicant advised that he did so. The conference concluded on the basis that the lawyers would return in one hour to further discuss the matters raised within the conference.

[30] Mr Shields stated that when he, Mr Jacob and Mr Hunter returned, before they could say anything, the applicant raised his hands in the air and said words which indicated that the applicant had decided to enter a plea of guilty. Mr Shields hand wrote the written instructions which the applicant signed in the presence of Mr Hunter and Mr Jacob, after those instructions were read out by Mr Shields to the applicant. Mr Shields denies that the applicant was threatened to follow any course or coerced to enter a plea of guilty.

[31] The terms of the instructions signed by the applicant were:

> "I Kelsey James Nerbas instruct my solicitor and counsel that I wish to enter a plea of guilty to the indictment which is currently before the court.
>
> I have made this plea of guilty to the indictment at such a late stage after conference with Jeff Hunter, Peter Shields and John Jacob. During that conference all aspects of the Crown case were discussed including the 'new' evidence of the AFP computer analyst. Thomson.
>
> I am also aware that my counsel will endeavour to have the Crown withdraw the first count on the indictment. However I accept the decision to withdraw that charge is a matter for him and him alone.
>
> My instructions to enter a plea of guilty have been made after I have I have had 1 hour to consider my advice.
>
> My instructions to enter a plea of guilty have been made of my own free will. No threat, promise or inducement has been held out to me to enter this plea of guilty."

[32] Mr Shields swore a further affidavit on 30 July 2010 to respond to the applicant's affidavit of 45 pages. In paragraph 3 of this further affidavit, Mr Shields set out the reasons for why he refuted the suggestion that the applicant was "disorientated and utterly confused" and/or "delirious". In paragraph 4, Mr Shields stated that he would not have taken any instructions from the applicant if he had thought that the applicant were not in a position to provide cogent instructions. In paragraph 6, Mr Shields refuted that Mr Hunter threatened the applicant in Mr Shields' presence.

[33] Mr Shields did not respond to the applicant's allegations made against Mr Shields which were part of the applicant's explanation for giving written instructions in the first place that he did not do the internet searches at his office on 18 September 2006. The applicant asserts at paragraph 37 of his written submissions that as those allegations have not been contested by Mr Shields, they must be accepted as true. That overlooks the irrelevance of those allegations against Mr Shields to the issues on this application. It cannot be said that those allegations must be accepted, when no evidence is given by Mr Shields about the events giving rise to those allegations.

[34] Mr Hunter's affidavit was sworn on 24 September 2010. He did not have any contemporaneous notes of his dealings with the applicant. Mr Hunter explained why he considered at the time that the evidence from Mr Thomson was devastating for the applicant. Mr Hunter stated in paragraph 17 that when he attended on the applicant, after the application to discharge the jury was unsuccessful, that he did not "recall anything about his demeanour, behaviour or speech that caused me to have the slightest doubt about his ability to comprehend what was being discussed and to make what was obviously a very serious decision." In paragraph 18, Mr Hunter stated that he made his view of the applicant's lack of prospects in the trial

"very clear" and he recalled that the applicant understood what had happened with respect to his defence, as he "knew about the significance of the internet searches, that the evidence all pointed to him as being the one who had undertaken them, and that his attempt to blame Reed had completely failed." Mr Hunter had, consistent with the applicant's written instructions, put to Reed in cross-examination that Reed was the one who did the searches on the applicant's computer to see whether there had been anything in the news about Customs finding drugs. Mr Hunter referred in paragraphs 19 and 20 to the options advised to the applicant by Mr Shields.

[35] At paragraph 26, Mr Hunter denied threatening the applicant in any way and that he had no recollection of ever having or seeing anything about the ATO in connection with the applicant. Mr Hunter did not recall using the expression "simple folk". Mr Hunter stated at paragraph 36:

> "I am well aware of the difference between coercion and a frank explanation to a client about where his best interests lie. I made Nerbas well aware of my view of his prospects and about what he should do, however it was also made plain to him that it was his decision."

[36] Mr Hunter referred to his experience in acting for many people who were suffering a variety of mental illnesses or disabilities and stated at paragraph 42:

> "There was absolutely no suggestion whatsoever that Nerbas was in a state of dissociation, delirium or hysteria. His affect was entirely normal. He appeared to understand the problems facing him – in light of the course the trial had taken – and was able to ask appropriate questions, such as those that related to his prospects on appeal and the likely sentence. I have no recollection of Nerbas being asked to read his 'instructions' out loud and being unable to."

**The law**

[37] Because the applicant pleaded guilty to the charges, he requires the leave of the court to withdraw those guilty pleas which places the onus on him to establish that a miscarriage of justice took place, when the court accepted and acted on his pleas of guilty by convicting him on 4 December 2008: *R v Gadaloff* [1999] QCA 286 at [4] per McPherson JA (*Gadaloff*).

[38] What does not amount to a miscarriage of justice was the subject of observations made in *Meissner v The Queen* (1995) 184 CLR 132 (*Meissner*). Brennan, Toohey and McHugh JJ stated at 141:

> "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*)

[39] Dawson J in *Meissner* stated at 157:

> "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. But the accused may show that a miscarriage of justice occurred in other 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.
> (*footnotes omitted*)

[40] The tension or pressure that a defendant is usually under during a criminal trial is not a factor that of itself calls for the intervention of the court, where the defendant wishes to resile from the plea of guilty entered during the trial due to that pressure: *R v Chiron* [1980] 1 NSWLR 218 at [8] and [91].

[41] A miscarriage of justice may occur when a defendant acts on inappropriate or mistaken advice by the defendant's lawyer which results in the defendant changing the plea to guilty: *R v Wilkes* [2001] NSWCCA 97 (*Wilkes*). The public defender in *Wilkes* realised after the defendant changed his plea to guilty of murder that he had made a mistake in his assessment of the case and the advice given. The observation was made at paragraph [50] by Woods CJ at CL that in that case, with hindsight, the proper course would have been to reserve the decision about a change of plea overnight by which time the public defender would have had a better appreciation of the evidence that had been the motivation for the advice and the defendant could have considered his position without being distracted by the immediate resumption of the trial. That is a helpful observation, but does not set a standard for the amount of time in any particular trial that must elapse between the giving of advice to a defendant that raises the possibility of a change of plea before a defendant makes the decision. There are many variables that could affect the appropriate timing of such decision.

[42] There is no principle that a plea of guilty must be set aside if the person entering it did not have a full and informed understanding of the applicable law, as distinct from knowledge of the facts constituting the offence: *R v Mundraby* [2004] QCA 493 at [14] and [24].

**Resolution of the conflicting evidence**

[43] The applicant's evidence of his state at the time Mr Shields and Mr Hunter conferred with him on 4 December 2008 and that of Mr Shields and Mr Hunter are unable to be reconciled. Mr Hunter and Mr Shields are experienced lawyers in the field of criminal law. Mr Jacob took comprehensive notes of the conferences and Mr Shields prepared written instructions for the change of pleas which the applicant signed. The conference notes record the pertinent questions asked by the applicant about his options. If the applicant at the time of giving these instructions was

disoriented, confused or delirious or if he was laughing hysterically when he returned to court, I consider that would not have escaped the attention of either Mr Shields or Mr Hunter in the circumstances. The fact that neither observed the applicant in such a state weighs heavily against acceptance of the applicant's claim that he was confused or delirious at the time of deciding to change his pleas to guilty.

[44] Where there are discrepancies between the evidence of Mr Shields and Mr Hunter, on the one hand, and the evidence of the applicant, on the other, about what occurred on 4 December 2008 leading up to the applicant's instructions that he was changing his pleas to guilty and his pleading guilty, the evidence of Mr Shields and Mr Hunter must be preferred. As Mr Stoker's evidence is based on the applicant's description of his state, which I do not accept truly reflects how he behaved or appeared at the relevant time, Mr Stoker's opinion cannot be acted upon.

**Did the applicant understand the charges?**

[45] By the time the applicant pleaded guilty, he had heard almost all the prosecution evidence against him. He had also sat through the committal hearing and the opening of the respondent's case at the trial during the course of which the prosecutor summarised the separate acts of the applicant that the prosecution relied on to show his involvement in the offences. One of those acts in relation to the second importation which was attributed by the respondent only to the applicant was the making of the internet searches on 18 September 2006.

[46] The applicant now relies on the Court of Appeal reasons to support his assertion that he did not understand the charges, on the basis that he knew that he never did any act that was within the meaning given by the prosecutor during his opening of the evidence at the trial to the act of importing and that was confirmed by the observations in the Court of Appeal reasons at [52] that it was Reed who had actually imported the drugs on each occasion. Although the Court of Appeal found that the prosecution had left the case to the jury on the basis of joint criminal enterprise which was not the basis for criminal responsibility under the *Criminal Code* (Cth), it was held (at paragraphs [70] and [71] of the Court of Appeal reasons) that the verdicts against Handlen and Paddison could be maintained on the basis that the evidence that was adduced against them supported the verdicts, in reliance on s 11.2(1) of the *Criminal Code* (Cth). The acts of the applicant that were relied upon by the prosecution to show his involvement in the importing supported, as a matter of law, his liability for these offences as an aider and abetter based on s 11.2(1). What the applicant had to understand was the nature of the facts relied on by the prosecution against him in respect of each of the charges that could as a matter of law prove the charges against him. The evidence of Mr Shields and Mr Hunter makes it clear that the applicant understood the nature of those facts.

[47] The applicant made the decision to change his pleas after the prosecution case had almost concluded upon receiving appropriate legal advice about the strength of the prosecution case (even though it was technically incorrectly based on the applicant being part of a joint criminal enterprise when the proper basis for criminal liability was aiding and abetting). The applicant's assertion that he did not have a relevant understanding of the charges to which he pleaded guilty must be rejected.

**Was there intimidation or coercion?**

[48] The applicant was in a difficult position in the trial after Mr Thomson gave his evidence and the trial judge had indicated that his application for a mistrial would be rejected. The applicant now acknowledges that his instructions to his lawyers for the purpose of the trial that he did not do the internet searches at his office on 18 September 2006 were wrong and that he, in fact, did do them (for which he now gives an explanation). The problem for the applicant was that his lawyers on his behalf had made forensic decisions about the conduct of his defence during the trial based on those specific instructions which raised the potential ethical problem that the lawyers might be required to withdraw, if the applicant then changed those instructions.

[49] It is clear from Mr Hunter's affidavit that the advice that he and Mr Shields gave to the applicant was robust and frank advice about the applicant's position and the likely courses the trial could take from that point. Because of the stage that the trial had reached, the reality was there were limited options for the applicant and the options pointed to the one outcome – conviction of the charges. Unlike *Wilkes*, the substance of the advice given to the applicant was not mistaken, but accurately reflected the state of the evidence against the applicant. What may be perceived by the recipient of legal advice as pressure is legitimate, and not intimidation, where it is the recipient's own lawyers conveying the advice in the recipient's interests: *Meissner* at 149 per Deane J. That proposition was also expressed in the joint judgment of Brennan, Toohey and McHugh JJ in *Meissner* at 143 as follows:

> "Argument or advice that merely seeks to persuade the accused to plead guilty is not improper conduct for this purpose, no matter how strongly the argument or advice is put. Reasoned argument or advice does not involve the use of improper means and does not have the tendency to prevent the accused from making a free and voluntary choice concerning his or her plea to the charge. As long as the argument or advice does not constitute harassment or other improper pressure and leaves the accused free to make the choice, no interference with the administration of justice occurs."

[50] As was observed in *Gadaloff* at [7], the strength of the case against a defendant is relevant in deciding whether it, rather than any alleged intimidation, duress or other improper influence, was the real motive for entering that plea. The extensive no case submission which the applicant has now prepared with the luxury of time does not change the strength of the case against the applicant at the trial based substantially, but not entirely, on Reed's evidence. On the basis that I accept the evidence of Mr Shields and Mr Hunter, I find that the advice that was given to the applicant who was under pressure at the time was neither intimidating nor threatening. The advice given by Mr Hunter and Mr Shields reflected the unenviable situation of the applicant at that time. In the circumstances, the applicant's guilty pleas were entered freely and voluntarily.

**Was the applicant incapable of making a decision to plead guilty?**

[51] The applicant's evidence that his "brain was burning" and that he was in a dissociative state cannot stand with the observations made of the applicant by Mr Shields and Mr Hunter. I accept the statements made by each of Mr Shields and Mr Hunter to the effect that they would not have accepted the instructions that the applicant wanted to change his pleas to guilty, unless satisfied that he was capable

of giving those instructions. There is no factual basis to support the ground that the applicant was incapable of making a decision to plead guilty.

**Order**

[52] The applicant is unable to discharge the onus he bears to show his guilty pleas involved a miscarriage of justice on the various grounds relied on. The application for leave to withdraw the guilty pleas is refused.