SUPREME COURT OF QUEENSLAND

CITATION:	*R v FAA* [2011] QCA 83
PARTIES:	**R** **v** **FAA** (applicant)
FILE NO/S:	CA No 303 of 2010 DC No 96 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	29 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2011
JUDGES:	Muir and White JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**The application for an extension of time is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where applicant found guilty by a jury of three counts of indecent treatment of a child under the age of 16 on 19 August 2010 – where applicant did not file notice of appeal until 13 December 2010, almost three months after the time limit had expired – where applicant seeks extension of time to appeal against conviction – where it is feasible and appropriate to make some provisional assessment of the strength of the applicant's appeal – where applicant complains about the conduct of counsel at trial – where applicant alleges that defence counsel failed to adduce particular evidence – where applicant complains about forensic decisions of counsel in pursuing a certain line in cross-examination or when addressing the jury – where applicant does not complain about any matter involving an error of law upon which legal advice might have been required – whether application for extension of time should be granted *Criminal Code Act* 1899 (Qld), s 671 *R v BBQ* (2009) 196 A Crim R 173; [2009] QCA 166, considered

R v Birks (1990) 19 NSWLR 677, cited
R v G [1997] 1 Qd R 584; [1995] QCA 517, cited
R v NE [2004] 2 Qd R 328; [2003] QCA 574, cited
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, applied
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, considered

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] **MUIR JA:** I agree that the application should be dismissed for the reasons given by Martin J.

[2] **WHITE JA**: I have read the reasons for judgment of Martin J and agree with his Honour that the application should be dismissed for those reasons.

[3] **MARTIN J:** The applicant seeks an extension of time in which to appeal against his conviction. He was convicted by a jury on 19 August 2010 of three counts of indecent treatment of a child under 16. On 20 August 2010 his Honour Judge Newton sentenced the applicant to 12 months imprisonment on each of two counts and 18 months imprisonment on the third count. The sentences were to be served concurrently and were suspended after six months with an operational period of two years.

[4] Section 671 of the *Criminal Code* provides that a person desiring to appeal from any conviction shall give notice of appeal within one calendar month of the date of such conviction. It follows then that the time for giving notice of appeal in this case expired on 18 September 2010. The applicant did not file a notice of appeal until 13 December 2010, almost three months after the time limit expired.

[5] Section 671(3) of the *Criminal Code* allows this Court to extend the time within which such a notice of appeal may be given. Where there is an application for an extension of time in a criminal appeal the Court of Appeal will:

(a) examine whether there is any good reason shown to account for the delay, and
(b) consider overall whether it is in the interests of justice to grant the extension.

When it is feasible to do so, the Court will often find it appropriate to make some provisional assessment of the strength of the applicant's appeal and to take that into account in deciding whether there is a fit case for granting the extension.[1]

[6] The applicant relied on two affidavits. In the first, he says that:

(a) he was not told by his lawyers of his "rights or grounds to appeal [his] conviction";
(b) he was not seen by his solicitor or contacted by him within the appeal period; and
(c) he wrote to his solicitor in late September but did not receive a reply until after 4 October.

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1 *R v Tait* [1999] 2 Qd R 667.

[7] He does not say that he told his lawyers that he wished to appeal. In his submissions he said that he was told by his solicitor that he had no prospects of success but this appears to have been conveyed in the letter referred to above.

[8] In the applicant's second affidavit he sets out his complaints about the conduct of his counsel at the trial and about the issues which he says should have been raised at trial. The concerns expressed in that affidavit would have been known to him immediately upon the completion of the trial. He does not complain about any matter which involves an error of law or upon which he might have required legal advice. If he was dissatisfied with the result of the trial it was incumbent upon him to take the matter further. I do not regard his explanation as constituting a good reason which accounts for the delay.

[9] I turn now to the matters raised by way of complaint about the conduct of the trial. The accusations made by the applicant relate, in the main, to alleged failures by defence counsel to adduce particular evidence or to pursue a certain line in cross-examination or when addressing the jury. Although it is not possible to make any final assessment of the case advanced by the applicant it is possible to make a provisional judgment on the strength of the case sought to be advanced. In doing so, the principles which have been enunciated in this court concerning assertions of incompetence of counsel need to be borne in mind.

[10] A number of the leading authorities are conveniently collected in *R v BBQ*[2] where Fraser JA said:

> **"[90]** In *R v G*[3], Fitzgerald P and Thomas J said that the statement by Gleeson CJ in *R v Birks*[4] that "As a general rule … it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence" should be read as indicating "no more than that such conduct by counsel will not automatically entitle an accused person to a retrial in every case; it does not mean that such conduct will never have that result; whether or not a new trial should be ordered will depend on the circumstances of each case; a new trial will generally not be appropriate unless incompetent or improper conduct by counsel deprived the person convicted of a significant possibility of acquittal, such as for example when the accused is deprived of the opportunity to present his defence …"
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> **[91]** In *R v NE*[5], this Court examined the authorities touching on the question of what an appellant must prove in order to establish that there has been a miscarriage of justice by reason of the conduct of the defence. The ground of appeal relied upon by the appellant in that case was that a miscarriage of justice had occurred because the appellant was not properly advised as to whether he should give evidence on oath at the trial. Davies JA, with whose reasons McMurdo P and Chesterman J agreed, said:
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> > "What an appellant must prove, in a case such as this, is that the advice of counsel not to give evidence, which

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2 (2009) 196 A Crim R 173, [2009] QCA 166.
3 [1997] 1 Qd R 584.
4 (1990) 19 NSWLR 677 at 685.
5 [2004] 2 Qd R 328; [2003] QCA 574.

> resulted in the appellant's failure to give evidence, deprived the appellant of a chance of an acquittal that was fairly open. When there has been flagrant incompetence on the part of counsel the burden of proving that may be easily discharged; where for example, the advice was given because of a blatant error and, but for that error, the advice would have been otherwise. It is more difficult to discharge where the alleged error of counsel said to result in the miscarriage involves a decision based on a forensic choice; for example, whether in the circumstances, the appellant's giving evidence will be more likely to help or harm his case. As Gleeson CJ put it in *TKWJ v The Queen*[6]:
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> > "But, in the context of the adversarial system of justice, unfairness does not exist simply because an apparently rational decision by trial counsel, as to what evidence to call or not to call, is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness."
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> The question, in the end, is an objective one; whether the decision or choice complained of is capable of reasonable explanation. If it is, it cannot be said that an appellant was thereby deprived of a chance of acquittal that was fairly open."

[11] In the "Notice of Appeal" filed in December 2010 the sole ground of appeal was: "My barrister did not follow my instructions during trial also failed to use defence material of multiple natures from simple questions to diagrams (exhibits) and character witnesses." The second affidavit of the applicant goes into greater detail. The applicant identifies fifteen separate points and, in his oral submissions, he observed that a lawyer might be able to find more.

[12] The grounds advanced fall into a number of broad categories:

(a) Counsel's conduct

It was said that counsel at the trial (another barrister having appeared at the pre-recording of evidence) failed to act in a professional manner including refusing to engage in conferences with the

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6 (2002) 212 CLR 124 at [16].

applicant. In the absence of any material from that barrister it is difficult to assess the validity of those complaints. The applicant does not say how this affected his prospects. Even if the truth of the allegations is assumed, it is difficult to see how the conduct alleged would have made a material difference to the conduct of the defendant's case.

(b) Failure to use certain evidence

This broad ground includes allegations:

(i) that particular records of counsellors who had interviewed the complainant were not tendered;

(ii) that evidence concerning the applicant's access to his daughter was not adduced;

(iii) that the conduct of the complainant at various times was not raised;

(iv) that the manner of dress of the applicant at his house (that is, sometimes only wearing a singlet) was the same no matter who was present was not placed before the jury; and

(v) that evidence was not adduced to the effect that the applicant believed it normal to shower with pre-pubertal girls.

There are other instances advanced but they are of a similar nature. In each case the applicant does not demonstrate how it is relevant or how its production might have affected the conduct or outcome of the trial.

(c) Other assertions

This is a group of matters which relate to issues which might be categorised as going to the credit of the complainant. In each instance it is possible to see why a barrister might, in the exercise of a proper forensic decision, decide that they were either irrelevant or that their pursuit might actively work to damage the applicant's interests.

[13] The capacity to assess the strength of any of the points is necessarily limited by the circumstances of this type of application. But it is obvious from the summing up that the learned trial judge described the issue to be decided by the jury as whether or not, in a very general sense, they believed the complainant or the defendant. The defendant gave evidence.

[14] The learned trial judge did advise the jury as to the manner in which they should assess the evidence and the tests which should be applied. His Honour summarised the arguments presented by the applicant's counsel and, from that, it appears that the address by counsel did raise a number of substantial issues with respect to the credibility of the complainant.

[15] Each of the issues set out in the second affidavit of the applicant (apart from those which can immediately be dismissed as irrelevant) could be explained as being a deliberate step taken by counsel for forensic reasons and which would not be upset on appeal. The applicant does not have an easy task in these circumstances. As Gleeson CJ said in *TKWJ v The Queen* (2002) 212 CLR 124 at [16]:

> "But, in the context of the adversarial system of justice, unfairness does not exist simply because an apparently rational decision by trial counsel, as to what evidence to call or not to call, is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness."

[16] The applicant has not demonstrated a good reason for his delay, nor has he demonstrated that it would be in the interests of justice to grant the extension. I would dismiss the application.