SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nerbas* [2011] QCA 199
PARTIES:	**R** **v** **NERBAS, Kelsey James** (applicant)
FILE NO/S:	CA No 85 of 2011 SC No 1320 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	14 July 2011
JUDGES:	Chief Justice, McMurdo and Dalton JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Extend the time for the applicant to appeal against the judgment of Mullins J to 19 April 2011.** **2. Allow that appeal.** **3. Grant leave to the applicant to withdraw his pleas of guilty made on 4 December 2008.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – PLEAS – GENERAL PLEAS – PLEA OF GUILTY – WITHDRAWAL AND RESTORATION OF PLEA – GENERALLY – where the applicant was convicted on his own pleas of guilty of two counts of importing a commercial quantity of border controlled drugs, one count of possession of such drugs and one count of attempting to possess such drugs on 4 December 2008 – where the applicant applied to withdraw his guilty pleas but was refused – where the applicant seeks an extension of time to appeal against conviction – whether the application for an extension of time should be granted – whether the applicant should be granted leave to withdraw his pleas of guilty *Criminal Code* 1995 (Cth), s 11.2A, Div 307 *Criminal Procedure Act* 1986 (NSW), s 157 *Boag v R* (1994) 73 A Crim R 35, cited *Griffiths v The Queen* (1977) 137 CLR 293; [1977] HCA 44, considered

Maxwell v The Queen (1996) 184 CLR 501; [1996] HCA 46, considered
Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, considered
R v Campbell (2008) 73 NSWLR 272; [2008] NSWCCA 214, applied
R v GV [2006] QCA 394, considered
R v Handlen and Paddison (2010) 247 FLR 261, [2010] QCA 371, cited
R v Hura (2001) 121 A Crim R 472; [2001] NSWCCA 61, considered
R v Jerome and McMahon [1964] Qd R 595, considered
Liberti v R (1991) 55 A Crim R 120, considered
R v Mundraby [2004] QCA 493, considered
R v Murphy [1965] VR 187; [1965] Vic Rp 26, cited
R v Nerbas [2011] QSC 41, cited
R v Phillips and Lawrence [1967] Qd R 237, considered
R v Tonks [1963] VR 121; [1963] Vic Rp 19, considered
Wilson v Chambers & Co Pty Ltd (1926) 38 CLR 131; [1926] HCA 15, cited

COUNSEL: The applicant appeared on his own behalf
S M Ryan on behalf of the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

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

[2] **McMURDO J:** In 2008 the applicant, together with two men called Handlen and Paddison, was charged with four offences involving the importation and possession of drugs, under Division 307 of the *Criminal Code* 1995 (Cth).

[3] Their trial commenced in November 2008. On its ninth day, the applicant changed his plea to guilty to all charges. The allocutus was administered and his sentence hearing was adjourned whilst the trial against Handlen and Paddison continued. They were found guilty by the jury on all counts. Their appeals against conviction were dismissed in this Court[1] but they have obtained special leave to appeal to the High Court.

[4] The applicant is yet to be sentenced. He made an application to a judge in the Trial Division (Mullins J) to withdraw his pleas of guilty. His application was refused by a written judgment delivered on 18 March 2011.[2] On 19 April 2011, the applicant filed a notice of appeal against that judgment, together with an application for an extension of time within which to appeal what was said to have been his conviction of those offences in 2008. The applicant also needs an extension for his appeal

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1 *R v Handlen and Paddison* [2010] QCA 371.
2 *R v Nerbas* [2011] QSC 41.

against the judgment of Mullins J, although only to the extent of four days. He has explained that short delay, from his circumstances as a prisoner without legal representation. The period of delay since the end of 2008 is not satisfactorily explained. However, if the appellant were allowed to appeal against the judgment of Mullins J, success upon that appeal would be sufficient for his purposes. To explain that, it is necessary to say something of what has happened since the applicant pleaded guilty to these charges on 4 December 2008.

[5] On 20 January 2009, the applicant's then counsel told the sentencing judge that there may be an application to set aside the pleas of guilty. His sentencing was adjourned. After some further "sentence reviews", the date for his sentencing was fixed for 9 June 2009 unless an application for a change of plea was made before then. On 3 June 2009, the applicant's then counsel made such an application and the sentencing hearing was adjourned. Directions were made for the filing of material for the application to withdraw the pleas and subsequently, it was listed for hearing on 22 October 2009. However on that date the hearing was adjourned when the applicant's previous solicitors were given leave to withdraw and new solicitors appeared.

[6] There followed a series of mentions, with the Court being advised of a difficulty in obtaining the file from the former solicitors. On 21 April 2010, the solicitors who had sought the file were themselves permitted to withdraw. In the meantime, the application to change the pleas had been set down for hearing on 25 June 2010. On that date, when the applicant was not legally represented, he sought to file a lengthy and late affidavit and upon the request of the prosecution the application was again adjourned. There followed some further mentions, in which there was delay because the applicant was seeking legal representation, before ultimately the case was heard on 4 February 2011.

[7] In these circumstances, and according to the authorities, it is not entirely clear that the applicant has been convicted. The plea of guilty itself does not constitute a conviction. As the Victorian Full Court said in *R v Tonks*,[3] there must at least be some act constituting a determination of guilt. Agreeing with that view, Gibbs J, sitting in this Court in *R v Jerome and McMahon*, said:

> "In the present case the court has done nothing upon the plea of guilty to indicate a determination of the question of guilt. The court might do that by imposing a punishment; by discharging a prisoner on his own recognisances; by releasing him upon parole; or even perhaps by adjourning the proceedings to enable information relevant only to the question of sentence to be obtained. Nothing of that kind occurred in the present case. The pleas of guilty, it is true, were said to be accepted, but they were never acted upon in such a way that the court finally determined the guilt of the accused persons."[4]

[8] In *R v Phillips and Lawrence*, Hart J thought that "… probably the best way to regard a conviction on a plea of guilty is as provisional, in the sense that it is subject to be vacated *ab initio* until sentence, but is valid unless and until vacated".[5] That view has been accepted in some judgments in the High Court. In *Griffiths v The*

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3 [1963] VR 121 at 127-128.
4 [1964] Qd R 595 at 604.
5 [1967] Qd R 237 at 288-299.

Queen, that was the conclusion of Aickin J,[6] and Barwick CJ said that where a plea of guilty is accepted there is then a conviction.[7] In the same case, Jacobs J expressed a different view, which was that a conviction occurred only upon its being recorded, so that the Court's power to allow a guilty plea to be withdrawn was an aspect of its power to amend the record.[8] That view was rejected by Gaudron and Gummow JJ in their joint judgment in *Maxwell v The Queen*, where their Honours agreed with Aickin J in *Griffiths* that there will have been a conviction where a defendant has pleaded guilty and has been remanded for sentence.[9] To the same effect was the judgment of Toohey J in that case who said:

> "The Crown argued that because the court may allow a plea of guilty to be withdrawn at any point until sentence, there can be no conviction until that point. But there is no necessary inconsistency in finding that a conviction occurs before sentence is passed and holding that there is power to allow a change of plea before sentence is passed. In that situation the change of plea sets aside the conviction. The view has been taken that a conviction on a plea of guilty is to be regarded as provisional in the sense that, until sentence, it is subject to be vacated."[10]

But in *Maxwell*, Dawson and McHugh JJ said that there was no conviction until the Court had finally disposed of the matter, which ordinarily occurred upon the imposition of the sentence.[11]

[9] In *R v Hura*,[12] the New South Wales Court of Criminal Appeal held that once the Court has accepted a plea of guilty, there is no power in the sentencing judge to permit the plea to be withdrawn. But that was because of the terms of the relevant statute there, by which the acceptance of a plea of guilty is to have effect as if it were the verdict of the jury.[13]

[10] Citing *Maxwell*, McPherson JA (with whom Jerrard JA and Mackenzie J agreed) said in *R v Mundraby* that "a plea may with leave be withdrawn at any time before sentencing has taken place".[14] And in *R v GV*, the Court (Jerrard JA, Jones and Atkinson JJ) said that the sentencing judge has power to reject a guilty plea at any time prior to the passing of the sentence.[15]

[11] Clearly then, Mullins J had power to permit the withdrawal of the guilty pleas and, according to what appears to be the prevalent view, the applicant had been convicted but the convictions were susceptible to being set aside by a permitted change of plea. The alternative view is that the applicant has not yet been convicted because the Court has not finally disposed of the matter by imposing the sentence. Either way, it is unnecessary for the applicant to distinctly appeal against conviction as well as appealing against the judgment of Mullins J. It is for the appeal against the judgment that he needs an extension of time.

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6 (1977) 137 CLR 293 at 334-335.
7 Ibid at 302.
8 Ibid at 318.
9 (1996) 184 CLR 501 at 531-532.
10 Ibid at 523.
11 Ibid at 509-510.
12 (2001) 121 A Crim R 472.
13 Then s 91 of the *Criminal Procedure Act* 1986 (NSW), now s 157.
14 [2004] QCA 493 at [11].
15 [2006] QCA 394 at [38].

[12] In order to obtain leave to withdraw his pleas of guilty, the applicant had to show that a miscarriage of justice had occurred or would occur if leave was refused.[16] In *Meissner v The Queen*, 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 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".[17]

In the same case Dawson J said:

> "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."[18]

[13] In *Mundraby*, McPherson JA said that although the circumstances capable of amounting to a miscarriage of justice in this context are not to be restricted or circumscribed, they must be such as to indicate that the plea of guilty was not "really attributable to a genuine consciousness of guilt",[19] for which he cited *R v Murphy*[20] and *R v Boag*.[21]

[14] The applicant has sought to prove that he was induced to plead guilty by several factors which did not involve a consciousness of guilt. He says that he was poorly advised by his counsel and solicitor at the trial, that he did not understand the charges and that his lawyers threatened and intimidated him with the effect of exacerbating his alleged mental instability. As to that last matter, before Mullins J there was evidence called by the applicant from Mr Stoker, a psychologist, who said that the applicant was highly traumatised emotionally when changing his pleas, resulting in a dissociative type episode which made him incapable of rational thought.

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16 *R v Mundraby* [2004] QCA 493 at [11]; *Boag v R* (1994) 73 A Crim R 35 at 36-37.
17 (1995) 184 CLR 132 at 141.
18 Ibid at 157.
19 [2004] QCA 493 at [11].
20 [1965] VR 187.
21 (1994) 73 A Crim R 35 at 37.

The prosecution case

[15] Before going to these arguments, it is necessary to discuss the prosecution case at the trial. The applicant was charged with two counts of importing a commercial quantity of border controlled drugs, one count of possessing a commercial quantity of border controlled drugs and one count of attempting to possess a commercial quantity of such drugs. The two importations occurred in May and September 2006, involving large quantities of cocaine and tablets containing MDMA and methamphetamine being shipped from Canada. The drugs were hidden within computer monitors prior to their shipment, which was said to have been done by the applicant's co-accused, Handlen and Paddison, together with an accomplice named Reed.

[16] In April 2006, a company called Reliable Computer Conversions Pty Ltd was incorporated in Queensland with Reed and the applicant as its directors. The applicant, a Canadian, lived in Brisbane and conducted a business called "Ecom" from an office at Spring Hill. He and Reed were friends. On 8 May 2006, they signed a lease for the company to take an office and storage space at Geebung for 21 months commencing on 15 May 2006. The applicant paid a deposit on the lease on 23 May 2006, at least partly from funds which the applicant deposited to the company's bank account on 18 May 2006.

[17] The prosecution case, based upon Reed's evidence (Reed having earlier pleaded guilty) was that the applicant was told about the first importation in a discussion on or about 14 May and that the applicant then agreed to be "part of it" for which he would be "compensated".

[18] The first container was delivered to the Geebung premises on 29 May 2006 where the monitors (some of which contained drugs) were unloaded from the container by Reed, Handlen and the applicant. A few days later Reed, Handlen and the applicant went back to Geebung and identified the particular monitors which contained the drugs (they had been marked with stickers). They removed the packages of drugs and initially stored them in boxes at Geebung before taking them to the hotel where Reed was staying in Brisbane.

[19] After the packages were distributed, Reed, Handlen and the applicant went to Canada in mid June 2006. At this time, two more shipments were planned. The first was to consist only of monitors without drugs. The next shipment, which was to contain drugs again hidden in some of the monitors, became the second importation on the indictment.

[20] By early September 2006, Reed, Handlen and the applicant had each returned to Australia and Paddison had arrived here. Reed and the applicant then rented storage premises at Virginia, to which they moved the monitors which had been used to hide the drugs in the first importation.

[21] The second container with drugs arrived in Australia on 7 or 8 September 2006. It was inspected by Customs when the drugs were discovered. They were removed and the container was repacked to disguise the discovery. It was delivered to the Geebung premises where Reed and Paddison unloaded the monitors. The applicant then arrived and the three men left Geebung in the applicant's car. At this time there was extensive electronic and other surveillance of all four men. There was a recorded discussion between Reed, Paddison and the applicant, as they travelled

from Geebung, about the apparent rearrangement of monitors by Customs within the container.

[22] Later that day, which was 18 September, the applicant was at his office at Spring Hill when a number of internet searches were made using his computer. These involved the use of search terms such as "Customs drug bust monitors" and "drug bust in screens". As I will discuss, the evidence of these internet searches became critical to the advice which the applicant received on the day on which he changed his pleas.

[23] On 20 September, Reed and the applicant went to several places, seeking to hire a car. On the same day, Reed and Paddison were filmed making an inspection at Geebung of the contents of the monitors. By the end of that day, all four had been arrested.

[24] The prosecution provided particulars of the applicant's alleged involvement in a document entitled "Aspects of Participation". They included particulars of acts of the applicant prior to 14 May 2006 when, according to Reed's evidence, the applicant was first told about the importation and agreed to be part of it. Therefore, the prosecution case became limited to what the applicant had done after then and up to the point at which the goods were imported. In *R v Campbell*, Spigelman CJ (with whom Weinberg AJA and Simpson J agreed) held that the concept of "import" in s 307(11) of the *Criminal Code* (Cth) involves the goods "arriv[ing] in Australia from abroad" and being delivered to a point which would "result in the goods remaining in Australia".[22] As Holmes JA said in the appeal by Handlen and Paddison, although s 307(11) concerns precursor substances rather than drugs, the reasoning of Spigelman CJ is equally applicable to s 307(1) and "[t]he practical result in *Campbell* was that goods were imported once they were cleared through customs and collected; or, at the latest, when the container in which they had been shipped arrived at the appellant's premises".[23] As already noted, the container arrived at the Geebung premises on 29 May 2006. The evidence of a Customs broker who had been engaged by Reed was that the container was not cleared for collection by Quarantine until it was fumigated on 27 May.[24]

[25] For the first count of importing drugs, the particulars of the applicant's participation, which post-dated 14 May 2006, were:

- On 18 May 2006, depositing $1,200 in cash to the company's bank account.
- On 23 May 2006, paying $7,337 as a security deposit on the lease of the Geebung premises.
- Permitting the Geebung premises to be used as a place of delivery of the shipping container and storage of its contents.
- Pending the arrival of the container, "acting as a secondary point of contact with Customs brokers".

The applicant now argues that the third of those particulars, permitting the Geebung premises to be used in that way, could not have been a particular of importing the

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22 *R v Campbell* (2008) 73 NSWLR 272 at 294 citing *Wilson v Chambers & Co Pty Ltd* (1926) 38 CLR 131 at 139 per Isaacs J.

23 [2010] QCA 371 at [46].

24 Trial transcript 1-57.

drugs because it must have happened (if at all) after the drugs were imported. But in context, this should have been understood as the conduct of the applicant in agreeing to the use of those premises.

[26] For the second importation, it was alleged that the applicant participated by, amongst other things, paying the rent on the Geebung premises, discussing with Reed the progress of clearance of the container (between 9 and 18 September) and making the Geebung premises available as a place of delivery for the container and the storage of its contents.

[27] The charge of possession related to the first importation. The applicant's participation was alleged to have included his assisting the unloading of the monitors from the container at Geebung and subsequently assisting Handlen and Reed to extract drugs from the monitors and transport the drugs from Geebung.

[28] The charge of attempting to possess drugs related to the second importation. The applicant was alleged to have assisted by collecting Reed and Paddison from Geebung after they had unloaded the container, by discussing with them the apparent inspection of the container, by the internet searches on the applicant's computer and by the attempts to hire a car in which to transport the drugs.

[29] The prosecution case was opened at the trial consistently with those particulars and with some further details as follows:

> "Turning to Mr Nerbas, he and Reed ... had been close friends from years past in Canada. One of the reasons why Brisbane was chosen as a destination for these importations as opposed to somewhere else in Australia was that Mr Nerbas was resident here at the time, he had some business experience himself and he knew the city well. However, as I mentioned, he was not involved in this venture from the very outset. He agreed to come into it after being informed of the pending importation by Mr Handlen at a Sunday night barbecue at Spring Hill Manor. This was around the time that he and Reed both signed the lease on the warehouse.
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> He continued to act in his capacity as a director of RCC and lessee of the warehouse after he became aware that the so-called business was effectively a front for smuggling drugs. He and Matt Reed presented themselves as the public face of RCC, for example in dealings with the Customs brokers. Given their youth and appearance they gave the business a public face of respectability.
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> Mr Nerbas paid the rental deposit on the lease of unit 18, and a couple of weeks later paid another 7,300 odd dollars security deposit on the lease, knowing full well by then that the warehouse - what the warehouse was to be used for. He made other payments of cash to RCC's bank account with which to meet the lease commitments. He was a secondary point of contact with the Customs brokers and was generally available to assist as required. He was called on to assist with the unloading of the container when it arrived in May. Later he also participated in the process of unpacking the monitors and extracting the packages of drugs.

> He paid for some of the tools they used to make the drug extraction. He was involved in placing the drugs in the duffle bags and provided the transport for them back to the Oaks Hotel with Reed and Dale Handlen, and he was present for at least part of the process of transferring the drugs at the Oaks Hotel to the various Asian visitors.
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> Mr Nerbas participated with Reed in the exercise of moving the 16 monitors from the first importation to the Kennards storage area which he paid for. He also went with Reed to Sydney to collect cash from Shen, half of which went into his bank account. These matters, the Crown says, tend to support the truth of Reed's version of Mr Nerbas's involvement in the first importation, and in the timing of things, they also indicate he must by then have known the purpose of the second importation.
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> So far as the second shipment of drugs is concerned, Mr Nerbas continued with his administrative role of attending to payment of rent on the warehouse. In discussions with Matt Reed, he took an interest in the progress of clearance and delivery of the container which was disproportionate to its declared contents.
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> To give you an instance, on 12 September ... Reed gave Mr Nerbas what appeared to be an encouraging update on the progress of clearance of the container. You will hear Mr Nerbas's response in the following terms: 'The stress thing is killing me, but now that's all good. I feel a little better.' The Crown will be submitting to you in due course that no-one talks like that about scrap monitors. He was, of course, aware that load after load, three in all, of monitors was being brought to the warehouse ostensibly as part of RCC's business, but in fact no business was being done.
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> He collected Mr Reed and Mr Paddison from unit 18 on the afternoon of the 18th of September after they had completed the unloading of the container, and he was party to discussions about the significance of the evident Customs inspection, and later in the day, as I mentioned earlier, made his own Internet searches seeking information on that subject.
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> As a manifestation of the fact his role included being available to assist as required, he and Reed visited a number of car yards on the afternoon of 20 September with a view to hiring a vehicle which could be used as transport.
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> Finally, as I mentioned, he negotiated a value for his contribution with Dale Handlen in the sum of $100,000, and you will hear that that negotiation was in terms that he would be paid more in the event of future importations."[25]

[30] The prosecution case was then presented and the evidence against the applicant was given consistently with the opening. To a large extent the case against the applicant depended upon the testimony of Reed. The applicant's case, not surprisingly, strongly challenged that evidence. But there was also the evidence, from the police

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25 Trial transcript 1-34 to 1-36.

examination of the applicant's computer used at his office at Spring Hill, of the internet searches conducted on 18 September 2006. According to the evidence from police surveillance of those premises, the applicant was there between 17.03 and 17.14 hours when, as the computer recorded, the searches were undertaken.

[31] In his cross-examination of Reed, the applicant's counsel suggested that it was Reed who undertook those searches. He obtained a concession from Reed that he sometimes used the applicant's computer. But Reed denied that he had undertaken these searches. According to the surveillance evidence, Reed was not at the Spring Hill premises for all of the time when the searches were undertaken. The applicant's counsel did not question the accuracy of the surveillance evidence. If the clock in the computer was then accurate, it could not have been Reed who undertook the searches. The strategy of the applicant's counsel was to argue that the clock in the computer could have been inaccurate.

[32] On the eighth day of the trial, the prosecution called a computer examiner employed by the Australian Federal Police, who gave evidence that the time and date settings on the computer were accurate. The applicant's counsel complained to the trial judge that this evidence had taken him by surprise and that he would take instructions about it overnight. On the following day, the applicant's counsel renewed his complaint, saying that his conduct of the case would have been different had he known that in fact the time and date had been correctly set. Upon that basis, he applied for a mistrial. He also said that he wished to take advice from more senior counsel about a "really fundamental issue". The trial judge indicated that he was disinclined to discharge the jury but did not at that point rule on the application. The Court adjourned at 10.54 am and resumed at about 2.30 pm, when the applicant's counsel asked for the applicant to be re-arraigned and the applicant entered pleas of guilty to the four offences.

The applicant's legal advice

[33] What passed between the applicant and his trial counsel and solicitor, during that adjournment before the applicant changed his pleas, was the subject of evidence by each of them in the hearing before Mullins J. The applicant tendered affidavits sworn by him and was cross-examined. The prosecution tendered affidavits by the trial counsel, Mr Hunter SC, and by one of his instructing solicitors, Mr Shields. Neither was cross-examined by the applicant, who conducted his own case. Mullins J preferred the evidence of Mr Hunter and Mr Shields where it conflicted with that of the applicant.[26]

[34] But on the question of what advice was given, the applicant's evidence was substantially consistent with that of the lawyers. Upon all accounts, he was given advice in strong terms that the evidence of the computer examiner meant that there was no prospect of an acquittal. Counsel also advised that it would be "very difficult to succeed on appeal" upon the argument that the jury should have been discharged on the basis of that late evidence. According to Mr Shields, Mr Hunter told the applicant that the prospects of a successful appeal were non-existent, that there were no "technical" grounds of appeal and no prospect of any conviction being set aside as unsafe. Similarly, the applicant's version of this advice was that he was told that he would have "zero chance of an appeal".

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[26] *R v Nerbas* [2011] QSC 41 at [43].

[35] The applicant's case had been conducted on the basis of instructions that he had not undertaken the internet searches. The applicant was told that if he changed those instructions, Mr Hunter and Mr Shields would be unable to continue to act for him and, in that event, he would be unrepresented for the balance of the trial.

[36] The applicant's evidence was that the nature of the charges was never explained to him. He makes a related complaint that his lawyers, and in particular his counsel, misunderstood the law affecting his case. The particulars of this complaint is that the prosecution and all defence counsel at the trial had treated the alleged criminal responsibility of the defendants to be by their involvement in a joint criminal enterprise, which could not have been a basis for their criminal responsibility at the relevant time. The events occurred prior to the amendment of the *Criminal Code* (Cth) in 2010 by the insertion of s 11.2A. The conduct of the case upon that erroneous basis is detailed in the judgment of Holmes JA (with whom Fraser and White JJA agreed) in the appeal by the applicant's co-accused.[27]

[37] As to the complaint that there was no advice as to the nature of the charges, Mr Hunter's evidence was that:

> "The concept of a joint enterprise was explained to him early in the piece. In the context of the facts of this case, it was pretty obvious what the prosecution were alleging his involvement in the importation was. No-one suggested he was involved from the beginning, but the prosecution case was that he was involved before the first shipment landed. He never expressed any problem comprehending the case to me or to anyone else in my presence – rather, his instructions were directed towards him having a burgeoning business in Qld already and an innocent explanation for his involvement."[28]

In preferring Mr Hunter's version of events, Mullins J thereby accepted that evidence. The trial record would also indicate that the applicant was advised in terms of a "joint enterprise". To that extent, the applicant can rightly claim that he received advice in terms which did not accord with the relevant law.

[38] However, as McPherson JA said in *Mundraby*, 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 a knowledge of the facts constituting the offence".[29] A misunderstanding of the applicable law could be critical but it need not be so in every case. As an example of where a legal error did warrant the setting aside of a conviction notwithstanding a guilty plea, McPherson JA cited *Liberti v R*,[30] where a statement of facts placed before the sentencing judge should have alerted him to the fact that the appellant had not committed the offence which he had admitted. Kirby P there said that an appeal would be allowed on this ground if it appeared that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it or if, upon the admitted facts, he could not in law have been convicted of the offence charged.[31]

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27 *R v Handlen & Paddison* [2010] QCA 371 at [52] to [72].

28 Affidavit of JR Hunter sworn 24 September 2010, paragraph 35.

29 [2004] QCA 493 at [14].

30 (1991) 55 A Crim R 120.

31 Ibid at 121-122.

[39] I would accept that the applicant did not have, to use the words of McPherson JA in *Mundraby*, "a full and informed understanding of the applicable law" as distinct from a knowledge of the facts constituting the offence. But as his Honour there said, if a plea of guilty had to be set aside for that circumstance, "… there would be few pleas of guilty that, after inquiry, would not be set aside. The myriad of minor offences to which guilty pleas are entered without first receiving competent legal advice would all be liable to be vacated".[32]

[40] Although the applicant's legal advice here was imperfect, it could not have obscured the nature of the prosecution case and the true basis for the applicant's criminal responsibility. The applicant must have understood that he was said to be guilty of these offences for having engaged in the conduct described in the prosecution's particulars and again described in the course of the prosecutor's opening. Through his counsel he had sought to defend these charges upon the grounds that the conduct attributed to him either did not occur or had an innocent explanation, such as his securing the lease for the Geebung premises but only for legitimate commercial purposes. He must have understood that by pleading guilty to these charges, he was admitting, in substance, that he had assisted in the importing of the drugs, and that he (along with others) had been in possession or had been trying to obtain possession of them.

[41] In the hearing of this appeal, the applicant sought to make much of the fact that his co-accused have been granted special leave to appeal to the High Court. However, the outcome of their appeals will not reveal whether the applicant committed the offences which he admitted. The questions in those appeals surround whether the Court of Appeal was correct in dismissing the appeals of Handlen and Paddison by the application of the proviso, in the context of the case against them having been considered by the jury upon the "joint criminal enterprise" basis. The applicant's position is quite different, because his convictions do not depend upon a jury verdict, but result (or when sentenced will result) from his own admissions made in open court.

Were the guilty pleas made voluntarily?

[42] The applicant claims that he was threatened and intimidated by his lawyers and unduly pressured to plead guilty. Related to this is his claim that he was mentally unstable at the time.

[43] On these questions, there was a more substantial difference between his evidence and that of the lawyers. The effect of their evidence was that he was allowed to make up his own mind, although they agree that he was strongly and bluntly advised that he had no real alternative but to plead guilty. As to his mental state, the applicant told the psychologist, Mr Stoker, that "his brain burnt and simply shut down" at the time and that he "went into 'zombie mode', his thoughts were jumbled and his feelings and emotions confused". He said that when he returned to the Court that afternoon, he had difficulty walking and wanted to "laugh hysterically" and that when the trial judge came into Court and he was re-arraigned, so the applicant recalled to Mr Stoker, he was "looking down on himself". He said he was so traumatised that he could not read the written instructions which he had just given to his lawyers, to change his pleas, so that he had his lawyers read them to him.

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32 [2004] QCA 493 at [14].

[44] The description of the applicant's mental state, as given to Mr Stoker, was supported by the applicant's own evidence before Mullins J. But her Honour did not accept that evidence and nor was she bound to do so. Mullins J preferred the evidence of Mr Shields, who said that the applicant did not appear to be disorientated, confused or delirious and that he would not have taken instructions from the applicant had he thought that this was the case. She accepted the evidence of Mr Hunter that he did not "…recall anything about [the applicant's] 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".[33] She accepted also Mr Hunter's evidence that the applicant had understood what had happened in the course of the trial and that the applicant "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".[34] In particular, Mr Hunter said that "[t]here 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 the 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 [do so]".[35]

[45] There is no demonstrated error in her Honour's factual findings; indeed no suggestion of an error in making those findings was identified in the applicant's argument. A consequence of those findings was that the factual basis for Mr Stoker's opinion was not established; instead, that basis was proved to have been false. Therefore, there is no demonstrated error in her Honour's rejection of Mr Stoker's evidence. The applicant's argument that he was threatened and intimated by his lawyers must be assessed upon the premise that he was not mentally unstable at the time and that, in particular, he was capable of making a rational decision.

[46] But the applicant complains that he was denied the opportunity to defend the case upon the premise that he *did* undertake the internet searches, but for an innocent purpose. There was evidence by the applicant that just prior to the trial "I meditated my mind back to see if I could be absolutely sure it was or wasn't me who conducted those searches, and I recalled something. Eventually the memory came back where it was me who did those searches".[36] He said that he had this recollection of overhearing Reed and Handlen having a conversation a couple of days prior to the day the internet searches were made, which indicated to him that they were involved in importing drugs within the container which arrived in September 2006. The applicant's evidence was that he then became suspicious and was concerned that their conduct could affect him (he not being otherwise involved in this shipment or the earlier one). Consequently, he said, after picking up Reed and Paddison from Geebung on 18 September, he went back to his Spring Hill office "and conducted a covert style investigation", using the words or phrases which were the same or similar to those he had heard spoken by Reed and Handlen to undertake his searches. Of course, all of this was contrary to the instructions

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33 Affidavit of JR Hunter sworn 24 September 2010, paragraph 17.

34 Ibid, paragraph 18.

35 Ibid, paragraph 42.

36 Affidavit of KJ Nerbas sworn 25 June 2009, paragraph 13.

which he had given to his lawyers, which was that he had not conducted the searches.

[47] According to the applicant's evidence, on about the fourth or fifth day of the trial he endeavoured to communicate these new instructions to Mr Hunter and then to Mr Shields. His evidence was that each responded by cutting him short before he could do so, saying that if he changed his instructions they would have to withdraw from the case for ethical reasons. The applicant said that he did not press the matter but instead then signed another affidavit prepared by his solicitors, which apparently contained confirmation of his instructions that he had not undertaken the searches.

[48] All of that evidence was within an affidavit sworn by the applicant on 25 June 2009. It does not appear to have been specifically addressed within the affidavits of Mr Shields (which were sworn on 17 July 2009 and 30 July 2010) or that of Mr Hunter (which was sworn on 24 September 2010). This is apparently explained by the fact that neither Mr Hunter nor Mr Shields was informed of that part of the applicant's affidavit or otherwise given an opportunity to respond to it. But each of them said that at the critical conference with the applicant on the day of his change of pleas, they told him that if his instructions changed as to the internet searches, they would have to withdraw. It is not unlikely then that they had said effectively the same thing to the applicant earlier in the trial.

[49] His purported recollection of the circumstances of the internet searches would certainly have been difficult for the applicant to explain to the jury. Quite apart from the lateness of this recollection and its inconsistency with the way in which the applicant's case had been conducted in the cross-examination of Reed, it was not obviously probable, especially when put against all of the other evidence properly admitted against him.

[50] However in my view, this change in his instructions would not have required or permitted his counsel and solicitor to withdraw from the case. They were precluded from conducting his case upon any factual basis which they *knew* to be false. But they would not have been placed in that position by this change of instructions. They would have been understandably sceptical about the applicant's new instructions. But it was not for them to adjudicate upon their truth.

[51] The applicant's evidence was that in the critical conference, whilst the matter was stood down on the morning of 4 December, Mr Shields, in the presence of Mr Hunter and another solicitor, said that the applicant had three options which were:

(a) continue the trial but without representation from the solicitors because they could not represent him "for ethical reasons";
(b) ask the trial judge for some time to retain new counsel;
(c) plead guilty.

He said he was told that under (a), the outcome would be that "without representation I will get found guilty". He says he was told in relation to (b) that if he was given any time to retain new counsel, he would only be given "one day to do so" which would be unrealistic and he "would get found guilty". In Mr Hunter's affidavit, he appeared to agree with that evidence of the applicant.[37] There was some difference in the affidavit of Mr Shields, which suggested that it was only if the instructions changed then he would have to withdraw.

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[37] Paragraph 25 of the affidavit where Mr Hunter said that the applicant "was told something to that effect".

[52] But upon all accounts, the applicant was told that he was precluded from defending the case with the benefit of legal representation, upon the factual basis which he then said was true.

[53] Mullins J described the position of the lawyers, in the context of that change in instructions, as raising a "potential ethical problem" because the lawyers "on his behalf had made forensic decisions about the conduct of his defence during the trial based on those specific [earlier] instructions". In my respectful view, the lawyers' problem with the change of instructions would not have been an ethical one; rather it would have been the practical difficulty for an advocate in explaining to a jury how his client might now be truthfully recalling an event after having been mistaken for much of the trial.

[54] As to the strong advice given to him about his prospects (or lack of prospects) of an acquittal, Mullins J cited this passage from the judgment of Brennan, Toohey and McHugh JJ in *Meissner*:

> "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."[38]

I agree that the strong advice as to prospects, of itself, did not make these pleas of guilty involuntary ones. However, there was also the unjustified threat by the lawyers to withdraw if he changed his instructions. That had the consequence of depriving the applicant of the option of defending the charges, with the benefit of legal representation, upon the factual position which he claimed to be true. It is inherently likely that this threat, at least in part, induced him to plead guilty. Mullins J did not find otherwise.

[55] The applicant claims that he has now provided what he describes as a "… comprehensive explanation to the matters and evidence against him … which in turn is a veritable viable defence". It is sufficient to say that his explanation of the facts and circumstances relied upon by the prosecution is not immediately compelling. There is nothing which he has now raised which detracts from the apparent strength of the prosecution case, let alone which proves his innocence. However, the apparent strength of the prosecution case should not result in the applicant being deprived of a trial, once he has demonstrated that he was relevantly induced to plead guilty by his lawyers' unjustified threat to withdraw.

[56] The applicant signed written instructions recording that his pleas of guilty were not the result of any inducement. But the fact of the inducement cannot be ignored. And it can be noted that the terms of those instructions contained no specific admission of guilt (save for that which might be inferred from the instructions to plead guilty).

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38 (1995) 184 CLR 132 at 143.

Orders

[57] I would extend the time for the applicant to appeal against the judgment of Mullins J to 19 April 2011 and I would allow that appeal and grant leave to the applicant to withdraw his pleas of guilty made on 4 December 2008.

[58] **DALTON J:** I agree with the orders proposed by Philip McMurdo J and with his reasons.