SUPREME COURT OF QUEENSLAND

CITATION:	*R v Morcus* [2011] QCA 285
PARTIES:	**R** **v** **MORCUS, Matthew David** (applicant)
FILE NO/S:	CA No 195 of 2011 DC No 80 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	Orders delivered ex tempore 5 October 2011 Reasons delivered 14 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	5 October 2011
JUDGES:	Chesterman and White JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Delivered ex tempore on 5 October 2011:** **Application for extension of time within which to appeal against conviction granted to 8 July 2011**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where applicant convicted of one count of wounding with intent to do grievous bodily harm and one count of wilful damage to property – where applicant's appeal lodged approximately one month out of time – where applicant pursued right to appeal with as much diligence as possible in the circumstances – where applicant contends prior inconsistent statement ought to have been put to complainant – whether application for extension of time should be granted *Criminal Code* 1899 (Qld), s 668E(1) *R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, cited
COUNSEL:	Applicant appeared on his own behalf M B Lehane for the respondent
SOLICITORS:	Applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **CHESTERMAN JA**: I agree with the reasons given by White JA for the extension of time the court granted on 5 October last. The applicant always wanted to appeal his conviction and the delay in filing the notice of appeal was short and not the applicant's fault. The respondent did not in the end oppose the extension of time.

[2] It is not, as White JA points out, appropriate to comment upon the merits of any appeal, slight though they appear to be. Though no use appears to have been made of Dr Zaidi's statement at the trial he and his lawyers had it, and could have used it if they thought it helpful.

[3] **WHITE JA**: On 5 October this Court granted the applicant an extension of time to 8 July 2011 in which to appeal his convictions with reasons to be given subsequently. These are my reasons for joining in that order.

[4] The applicant was found guilty after a trial in the District Court at Ipswich on 10 May 2011 of one count of wounding with intent to do grievous bodily harm and one count of wilful damage to property. The applicant filed his application for an extension of time on 8 July 2011 together with his notice of appeal. The approach of this Court to an application for an extension of time is to examine whether there is any good reason shown to account for the delay and whether it is in the interests of justice to grant the extension.[1]

Explanation for delay

[5] The applicant was just under one month out of time. As conceded by Mr Lehane for the respondent, such a delay is not great. There is no suggestion of any prejudice to the respondent. In his application the applicant had stated that he was waiting for sufficient funds to obtain a full copy of the transcript before applying. In his outline of argument dated 26 August 2011 but received in the registry on 2 September 2011, the applicant has expanded upon that brief statement. He advised his solicitor immediately following the return of the jury verdicts that he wanted to appeal his convictions. The solicitor agreed to send him the appropriate "paperwork" but he did not receive it in time as that letter, dated 13 May 2011, was sent to his mother at her address. She did not immediately open it but instead, eventually, posted it to his partner who then sent it to him at the prison. The solicitor had advised in the letter that there were no grounds to appeal the convictions and that the applicant would be unsuccessful in seeking legal aid.

[6] The applicant contacted Legal Aid on 19 June 2011; an appointment was made for a video link conference on 30 July at the Borallon Correctional Centre; he then came into receipt of the correct forms which he filled out and dispatched immediately.

[7] The applicant has pursued his right to appeal with as much diligence as he was able in his circumstances.

Interests of justice

[8] In *R v Tait*[2] this Court said whether it is in the interests of justice to grant the extension:

> "… may involve some assessment of whether the appeal seems to be a viable one. It is not to be expected that in all such cases the Court

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1 *R v Tait* [1998] QCA 304.

2 [1998] QCA 304.

> will be able to assess whether the prospective appeal is viable or not, but 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 take that into account in deciding whether it is a fit case for granting the extension."[3]

[9] It seems, from the applicant's grounds of appeal, set out in his notice of appeal, that he contends that the jury verdicts were "unreasonable, or can not be supported having regard to the evidence… or that on any ground whatsoever there was a miscarriage of justice".[4]

[10] The applicant contends that the jury failed properly to consider the "overwhelming" evidence presented by the applicant, his partner Jennifer Thomas, and the "police forensic officer" in relation to:

- the inconsistent evidence of the complainant with the evidence of the applicant and Ms Thomas in relation to the incident and the cause of the injury to the complainant's head;
- that no weapon was seen by Ms Thomas or produced in evidence;
- the medical evidence of a seven centimetre gash to the top of the complainant's head was consistent with being accidentally caused in the course of a struggle between the complainant and the applicant;
- the evidence of the complainant was inconsistent with that of the applicant, Ms Thomas and the "police forensic officer";
- the "police forensic officer" could not eliminate the gash to the head being caused by the undercarriage of the trailer; and
- the applicant was defending himself from the complainant after an argument and did not intend to injure him.

By the "police forensic officer", the applicant was referring to Dr Robert Hoskins, Director of the Queensland Clinical Forensic Medicine Unit. The applicant had prepared his own application, grounds of appeal and written outlines and appeared for himself by video link.

[11] The applicant also contends in his grounds of appeal that he did not intend to damage the complainant's motor vehicle and any damage was sustained during the struggle while he was defending himself; and the jury failed to consider the evidence, particularly that no weapon was found consistently with the prosecution case.

[12] In his written outline of submissions and his written reply to the respondent's written outline, the applicant complained about the failure of the prosecution to call evidence from the "nurse" who first treated the complainant. After hearing the applicant's oral submissions, it became apparent that he was referring to Dr Syed Zaidi who first treated the complainant at the Esk Hospital Emergency Department. Mr Lehane was able to produce Dr Zaidi's statement. Dr Zaidi said

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3 At [5].

4 *Criminal Code*, s 668E(1).

that the complainant gave a history of being struck by a steel bar while riding a motor bike travelling at a speed of 60 kilometres per hour as an explanation for his injury. This was inconsistent with the complainant's account at trial.

[13] The Court does not have the benefit of a record of the trial but it does have the extensive summing up of the trial judge extending to some 38 pages. From that it can be gleaned that the applicant and the complainant are brothers. An altercation occurred between them on 1 June 2010 on a property where they lived with their father. The altercation took place at night. The complainant's account was completely contradicted by the applicant's account of what occurred. The applicant's partner, Ms Thomas, was also present but not, contrary to what the applicant asserts, a witness at the crucial time when the wound was received by the complainant.

[14] The prosecution case was that an altercation occurred inside the house between the brothers during which Ms Thomas grabbed the complainant and dragged him off the applicant. The complainant said that he was threatened by the applicant with a hammer and he picked up a bar for protection. The complainant walked outside, put the bar in the back of his utility. He then saw the applicant approaching with a machete in his right hand. He described the applicant as swinging it over his head. The complainant walked backwards keeping his distance. The applicant smashed the windscreen of the complainant's utility with the machete. The pair walked back and forth for a period. The applicant smashed the side window and the complainant tried to run in and get his brother off the swing, hoping to knock him over. As he ran in he felt a hit. The men landed on the ground; the complainant gave his brother a couple of punches and Ms Thomas pulled him off. The complainant then felt what, no doubt, was blood running down his face and shoulder. He got into the car and at that point the applicant came over and swung the machete at the side mirror and damaged it. The complainant then drove off.

[15] The prosecution tendered graphic photographs which showed the wound to the complainant's head, a cut to the side mirror and which depicted the box trailer.

[16] Detailed evidence was given by Dr Hoskins about the nature of the wound and whether it could have occurred if the complainant had lifted his head and cut it on the back of a box trailer located in the yard in the course of the struggle. That was the applicant's account. He denied ever having a machete. It is a ground of appeal that the jury ought not to have found him guilty because no such weapon has ever been found. Apparently there was evidence that there were machetes on the property at some time. The applicant, who gave evidence, said that the only time he hit the complainant over the head was in the house with a crutch. The evidence was quite inconsistent with the wound being inflicted by such a weapon. The applicant said that the complainant tackled him outside, they fell under the trailer or very close to the back of it, the complainant ended up on top of him and, although he does not know how the injury was caused, suggested that it must have occurred when the complainant lifted his head forcefully onto the sharp edge of the trailer. This evidence raised the question of accident which was put to the jury.

[17] The applicant as well as the complainant sustained injuries in the altercation as photographs of both were before the jury.

[18] Although the applicant contends that the corroborating evidence of Ms Thomas was disregarded by the jury, her evidence, as recounted by the trial judge, was that as

both men were headed towards the door, going outside into the pitch dark, she was in a panic and went to the telephone to call their father. The phone was towards the back of the house. When she finished telephoning, which did not take long, she got her torch and went outside because she could hear scuffling and fighting and a voice saying "get off". She could see the complainant on top of the applicant and pulled him off. She did not see the complainant get into his car and said that she was just panicking. It is unlikely that the evidence of Ms Thomas would assist the jury in resolving either account. The fact that the men were on the ground struggling outside when she came out with the torch was not inconsistent with either account.

[19] It appears from her Honour's summing up that Dr Hoskins gave evidence which was extensively tested in cross-examination. In summary he said that the complainant's wound had "all the features of being an incised wound rather than a laceration". He was asked how sharp the object would have to be to cause that kind of wound and answered that it would depend partially on the amount of force. It seems that the complainant suffered a fractured skull. Dr Hoskins, as quoted by her Honour, said:

> "…I can be reasonably confident that I can't say for certain that this was caused by a sharp knife edge but it's unlikely to have been caused by anything much wider than about one millimetre."[5]

The doctor thought that the appearance was one of having been caused by an impact rather than a "drawing along" because that would not cause an underlying skull fracture, thus the object which caused the wound would need to be the length of the wound (admitted to be at least seven centimetres long). Dr Hoskins concluded that injury with a non-sharp object would require "a fair amount of force" and, with a sharp object, at least a moderate amount of force to cause the underlying skull fracture. Dr Hoskins thought the object which caused the cut had gone straight in as opposed to at an angle and explained why he reached that conclusion. The injury was consistent with a sharp object coming down onto the complainant's head.

[20] Dr Hoskins was shown a photograph of the trailer and whether the injury would be consistent with a head hitting the edge of the trailer. He explained that there would have to have been a "fairly forcible impact because these are not truly sharp edges" to the trailer. Dr Hoskins eliminated parts of the trailer because there would have been a L shape in the wound. From all those features he concluded that the head would have to be moving sideways towards the box-shaped structure to strike the head exactly in the mid point of the upward portion. At the same time it would have to do so in a way that did not cause the second arm of the box-shaped structure to strike the head because there were no parallel marks suggesting a box-shaped impact. If those conditions were met, then the wound which he observed on the complainant could have been made by forceful contact with the trailer.

[21] The trial judge directed the jury how they might ascertain the applicant's intention if they concluded that the applicant was responsible for the wounding and accident was eliminated. The Crown relied on circumstantial evidence. The fact of striking over the head with a machete was relied upon as well as the fight where the applicant had been bettered by his brother; that he had armed himself with a hammer and then with the machete; then pursued him; and by starting to damage the car, leaving the complainant with no alternative but to act and, as soon as he did,

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5 3-23.

striking him over the head. Finally, instead of rushing to his brother's aid the applicant hit the side mirror with the machete as the complainant was trying to get away.

[22] The applicant also complains that the police did not take swabs from the back end of the trailer, no doubt for evidence of blood or other deposits. That would be a matter which could be the subject of comment at the trial but nothing more.

[23] The fact that the machete was not found was a matter that was squarely raised for the jury's consideration.

[24] The applicant complains that the prosecution "concealed" Dr Zaidi's evidence; that he ought to have been called; and when the jury were assessing the two competing accounts his evidence about the complainant's different account of how he came to be injured just a few hours later may have caused the jury to have a reasonable doubt. It may be inferred, from the summing up, that this inconsistent version was not put in cross-examination to the complainant. Mr Lehane did not oppose the extension of time being granted after Dr Zaidi's statement was canvassed at the hearing. In the absence of that concern, even without the benefit of a transcript of the trial, the prospects on appeal did not look promising. However, because there is to be an appeal, it is not appropriate to comment further.

[25] **McMEEKIN J**: I agree with the reasons of White JA for the extension of time granted on 5 October 2011.