SUPREME COURT OF QUEENSLAND

CITATION:	*R v Verrall* [2012] QCA 310
PARTIES:	**R** **v** **VERRALL, Steven Peter** (appellant)
FILE NO/S:	CA No 169 of 2011 SC No 1500 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	10 August 2012
JUDGES:	Holmes JA and Philippides and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – PLEAS – GENERAL PLEAS – PLEA OF GUILTY – EFFECT – where the appellant pleaded guilty to one count of trafficking in dangerous drugs, 14 counts of importing border-controlled drugs and one count of dealing with the proceeds of crime – where the appellant sought at first instance to have his pleas of guilty set aside – where the application was refused – where the appellant seeks to appeal – where the relevant provisions of the *Criminal Code* (Qld) provide a strong indication that conviction occurs when the allocutus is administered – whether the appeal is properly brought against the conviction or against the refusal to set aside the pleas of guilty – whether there exists any source of jurisdiction for the appeal outside Ch. 67 of the Code – whether there has been a miscarriage of justice *Civil Proceedings Act* 2011 (Qld), s 211 *Constitution of Queensland Act* 2001 (Qld), s 58 *Criminal Code* 1995 (Cth), s 307, s 400 *Criminal Code* 1899 (Qld), s 590AA, s 648, s 649, s 650, s 668A, s 668D, s 668E *Criminal Practice Rules* 1999 (Qld), r 51 *Drugs Misuse Act* 1986 (Qld), s 5

Judicature Act 1876 (Qld), s 10, s 19
Supreme Court Act 1995 (Qld), s 254
Supreme Court of Queensland Act 1991 (Qld), s 9, s 11, s 62, s 69

Carr v Finance Corporation of Australia Ltd [No 1] (1981) 147 CLR 246, [1981] HCA 20, considered
Chen v R [2012] NSWCCA 53, cited
Director of Public Prosecutions v Wentworth [1996] QCA 333, cited
Ex parte Maher [1986] 1 Qd R 303, 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
Nudd v The Queen (2006) 80 ALJR 614; (2006) 225 ALR 161, [2006] HCA 9, considered
R v Collins; ex parte A-G (Qld) [1996] 1 Qd R 631, [1994] QCA 467, considered
R v Corrigan [2001] QCA 401, cited
R v Drozd (1993) 67 A Crim R 112; [1993] QCA 224, cited
R v Foster; Ex parte Gillies [1937] St R Qd 67, considered
R v Long (No 1) [2002] 1 Qd R 662, [2001] QCA 318, considered
R v Lowrie [1998] 2 Qd R 579; [1997] QCA 434, considered
R v Lowrie and Ross [2000] 2 Qd R 529, [1999] QCA 305, considered
R v Mundraby [2004] QCA 493, considered
Re: N (a solicitor) [2010] QSC 267, considered
R v Nerbas [2012] 1 Qd R 362, [2011] QCA 199, considered
R v Phillips and Lawrence [1967] Qd R 237, cited
R v Popovic [1964] Qd R 561, cited
R v Queensland Television Limited, ex parte Attorney-General [1983] 2 Qd R 648, considered
R v SBJ [2009] QCA 100, considered
R v Shillingsworth [1985] 1 Qd R 537, considered
R v Skase [1995] 2 Qd R 297, cited
R v Wade [2012] 2 Qd R 31, [2011] QCA 289, considered
R v Woodman [2010] QCA 162, cited
R v Verrall [2011] QCA 206, related

COUNSEL: The appellant appeared on his own behalf
G R Rice SC for the respondent

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

[1] **HOLMES JA:** On 11 November 2009, the appellant pleaded guilty to one count of trafficking in dangerous drugs contrary to s 5 of the *Drugs Misuse Act*, 14 counts of importing border-controlled drugs contrary to s 307.2(i) of the *Criminal Code* (Cth) and one count of dealing with the proceeds of crime, contrary to s 400.4(1) of the *Criminal Code* (Cth). Subsequently, he sought to have those pleas set aside in an

application heard and refused on 30 May 2011. He has lodged an appeal, with the grounds in the notice of appeal being that: his pleas of guilty were equivocal; they were entered in circumstances amounting to a miscarriage of justice; and the primary judge erred in not granting leave to set them aside.

[2] The appellant's notice of appeal was filed on 21 June 2011. If it were against the order of the primary judge refusing to set aside the pleas of guilty, it was within time; but if it were against conviction, it was more than six months late. This court, hearing the appellant's application for an extension of time,[1] noted that the question of whether the order or the conviction was the subject of appeal was a difficult one, on which the appellant was not in a position to advance submissions. It granted the extension of time to enable full argument on the question as to whether the appeal was one as of right from the primary judge's decision, as well, of course, as the merits of the appellant's argument that the pleas should be set aside.

The effect of the plea of guilty

[3] The argument as to which decision was properly the subject of appeal concerned, first, whether the appellant had indeed been convicted. In *R v Nerbas*,[2] Philip McMurdo J canvassed different views expressed on the effect of a plea of guilty, as, for example, in *Maxwell v The Queen*.[3] There, the members of the High Court were united in the view that a conviction could not occur without the court's determination of guilt; their opinions varied, however, as to what was sufficient to manifest such a determination. Dawson and McHugh JJ considered that determination of guilt would not normally occur until sentence was passed; remanding the appellant for sentencing would not suffice.[4] Gaudron and Gummow JJ, on the other hand, considered that remanding an accused for sentence would, absent circumstances showing that the remand was provisional, amount to an indication that guilt was determined.[5] Toohey J described a number of different ways in which the court could manifest its acceptance of a guilty plea, one of which was by administration of the allocutus.[6]

[4] In *Nerbas*, a case in which the applicant had pleaded guilty and the allocutus had been administered, with the sentence hearing adjourned, Philip McMurdo J concluded that according to "the prevalent view" the applicant had been convicted, although the conviction was susceptible to being set aside if a change of plea were permitted. The prevalence of that view is unarguable: this Court has consistently held that the administering of the allocutus is the court's acceptance that guilt has been established, whether by verdict or plea: see *R v Shillingsworth*,[7] *R v Lowrie & Ross*[8] and *R v SBJ*.[9] And it is, with respect, correct, given the provisions of Chapter 64 of the *Criminal Code* (Qld) which deal with the allocutus and the sequence of events following its administration. They begin with s 648:

> "**648 Convicted person to be called on to show cause**
>
> When an accused person pleads that the person is guilty of any offence, and when, upon trial, an accused person is convicted of any

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1 *R v Verrall* [2011] QCA 206.
2 [2012] 1 Qd R 362, [2011] QCA 199.
3 (1996) 184 CLR 501, [1996] HCA 46.
4 At 509.
5 At 531-2.
6 At 520.
7 [1985] 1 Qd R 537 at 543.
8 [2000] 2 Qd R 529 at 539.
9 [2009] QCA 100 at [25].

> offence, the proper officer is required to ask the person whether the person has anything to say why sentence should not be passed upon the person, but an omission to do so does not invalidate the judgment."

Section 649(1) goes on to say that a "person convicted of an indictable offence, whether on the person's plea of guilty or otherwise" may move for arrest of judgment on the ground that the indictment does not disclose an offence, but if such a motion is not made or is dismissed, s 650 permits the passing of sentence forthwith.

[5] Those sections, particularly the wording of s 649(1) taken in context with s 648, provide a strong indication that conviction occurs, at the latest, once the defendant has been called upon as s 648 prescribes. That view is reinforced by the terms which the *Criminal Practice Rules* 1999 require the "proper officer" (usually the judge's associate) to use for the purposes of s 648 in addressing a defendant who has pleaded guilty:

> "You have been convicted...on your own plea of guilty...of [the offence]."[10]

As Hart J pointed out in *R v Phillips & Lawrence*,[11] the associate in thus addressing the defendant speaks for the court, and what is said is an acceptance of a plea of guilt.

Sources of appellate jurisdiction outside the Criminal Code

[6] Section 668D gives a person convicted on indictment rights of appeal. The question raised here was whether there existed also jurisdiction to review the decision of the judge at first instance refusing to set aside the plea. In *Nerbas*, Philip McMurdo J remarked that it was unnecessary for the applicant to appeal against conviction as well as appealing against the judgment refusing him leave to withdraw his pleas of guilty. In considering what was required for an appeal of the latter kind, his Honour referred to *R v Mundraby*,[12] in which the court's attention also focussed on the correctness of the decision refusing leave to withdraw a plea of guilty. But in neither *Mundraby* nor in *Nerbas* was the court invited to consider the source of jurisdiction for the appeal. And in the result, the conclusion as to whether there was error in each case turned (impliedly in *Nerbas*,[13] expressly in *Mundraby*[14]) on whether there had been a miscarriage of justice.

[7] The point is not generally without significance, however, because the question of whether an extension of time is required will often depend on which is the operative decision to be appealed; and, if the appeal is against conviction, the focus will immediately be on whether there has been a miscarriage of justice to warrant setting the conviction aside under s 668E(1), without the need to consider error in the decision refusing the application to set the plea aside. The question, then, is what jurisdiction exists to hear an appeal from an order made in the course of criminal proceedings, and more particularly, to review a decision refusing to set aside pleas of guilty.

[8] Section 10 of the *Judicature Act* 1876 provided for appeal to the Full Court, and, later, the Court of Appeal,

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10 *Criminal Practice Rules* 1999 r 51.
11 [1967] Qd R 237 at 288.
12 [2004] QCA 493.
13 [2011] QCA 199 at [55]-[57].
14 [2004] QCA 493 at [16], [28].

> "from every order made by a Judge in court or chambers except [costs] orders".

That provision was held by the majority in *R v Foster*; *ex parte Gillies*[15] to give a right of appeal to the Full Court against a conviction for contempt, which, not being a conviction on indictment, did not come within the appeal provisions of the *Criminal Code*. Their reasoning, briefly put, was that s 19 of the *Judicature Act* had previously operated to exclude from the appellate jurisdiction of the Supreme Court appeals from orders in criminal causes and matters (as the majority in *Foster* considered the appeal in that case to be); in repealing s 19, the legislature must have intended to give s 10 its full operation, free of that limitation. (Blair CJ, dissenting considered the jurisdiction conferred by s 10 to be restricted to civil appeals.)

[9] *Foster* was followed in another contempt matter, *R v Queensland Television Ltd; ex parte Attorney-General*,[16] and, in a different context, in *Ex parte Maher*.[17] In the latter case the question was whether s 10 gave a right of appeal against an order granting bail. The provision on its natural reading was held, following *Foster*, to be sufficiently wide to confer a right of appeal in criminal causes and matters; consequently the Crown's appeal was competent.

[10] Section 10 of the *Judicature Act* was replaced, in identical terms, by s 254 of the *Supreme Court Act* 1995.[18] Section 62(1), (s 69(1) before renumbering), of the *Supreme Court of Queensland Act* 1991 is another possible source of jurisdiction: it provides for an appeal from

> "any judgment or order of the court in the Trial Division".[19]

It might be thought, in light of *Foster* and *Maher*, that either the jurisdiction created by s 254 or that under s 62 permitted an appeal against the order in the present case. However, in *R v Lowrie*,[20] in which the appellant sought leave to appeal against decisions which had led to her indictment for murder (rather than an accessorial charge) and a refusal to stay or quash the indictment, Davies JA concluded that the appeal was incompetent. Neither s 254 nor s 69(1) (now s 62(1)) was intended to enlarge the rights of appeal conferred by chapter 67 of the *Criminal Code* in respect of judgments or orders made in proceedings on indictment. The reasoning of the majority in *Foster* was wrong.

[11] Pincus JA in *Lowrie* also considered that the application should be dismissed as incompetent, although he expressed his conclusions more narrowly. Observing that none of the decisions in *Foster*, *Queensland Television* and *Maher* involved appeals from interlocutory orders, he concluded that s 254 of the *Supreme Court Act* ought to be read as excluding such appeals, and he did not consider that any other provision

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15 [1937] St R Qd 67.

16 [1983] 2 Qd R 648.

17 [1986] 1 Qd R 303.

18 Section 254 was later repealed by s 211 of the *Civil Proceedings Act* 2011. However, s 11 of the *Supreme Court of Queensland Act* 1991 provides that the repeal of the 1995 Act does not affect any jurisdiction of the Supreme Court derived from it.

19 Attempts have also been made to rely on s 9 of the *Supreme Court of Queensland Act* 1991 (now s 58(1) of the *Constitution of Queensland Act* 2001) as a source of jurisdiction. It provides that the Supreme Court has all the jurisdiction necessary for the administration of justice in Queensland. Those attempts have been comprehensively rejected: *R v Skase* [1995] 2 Qd R 297; *R v Corrigan* [2001] QCA 401; and *R v Woodman* [2010] QCA 162.

20 [1998] 2 Qd R 579.

gave the court jurisdiction to hear them. Shepherdson J, on the other hand, considered that there was a right of appeal under s 69(1) of the *Supreme Court of Queensland Act*, noting that in other cases[21] the Court of Appeal had assumed the existence of such a jurisdiction.

[12] The issue arose again in *R v Long (No 1).*[22] The accused sought to appeal a Supreme Court judge's refusal of his application for a change of venue, arguing that s 69(1) of the *Supreme Court of Queensland Act* provided jurisdiction. Section 592A of the *Criminal Code* (now s 590AA) had by then been enacted and applied to directions and rulings "as to the conduct of the trial"; s 592A(4) specifically precluded interlocutory appeal against such directions or rulings. Williams JA adopted the reasoning of Pincus JA in *Lowrie* in concluding that s 254 did not provide for an appeal from an order made in an interlocutory way in a criminal matter. And, he observed, neither Pincus JA (tacitly) nor Davies JA (expressly) had considered s 69(1) to provide any right of appeal against such an order.

[13] As well as endorsing Davies JA's reasoning on the point in *Lowrie*, Williams JA noted that the introductory words of s 69(1) made it subject to the provisions of any other Act, which included the *Criminal Code*. The *Code*, by its terms, limited appeals from criminal matters commenced by indictment; a general provision such as s 69 could not enlarge the right of appeal thus conferred. Byrne J regarded *R v Lowrie* as establishing that appeals against interlocutory orders in proceedings on indictment were incompetent, neither s 254 nor s 69(1) enlarging the rights of appeal conferred by the *Criminal Code*. McMurdo P dissented, taking the view that *Lowrie* had not definitively determined whether s 69(1) gave a right of appeal from orders made in proceedings on indictment. Nor, in her view, was an application for a change of venue an application for a direction or ruling under s 592A so as to be precluded by that section.

[14] The refusal of leave to withdraw the plea of guilty in the present case was not a direction or ruling as to the conduct of the trial, so s 592A(4) (now s 590AA(4)) has no application here. But *Lowrie* and *Long (No 1)* must be regarded as establishing that there is no right of appeal against interlocutory orders in proceedings upon indictment beyond what may be found in the *Criminal Code*; and the *Code* itself provides no such recourse to an accused person.[23] Indeed, in my view, the conclusion reached by Davies JA in *Lowrie*, that neither s 254 nor s 69(1) should be regarded as enlarging the rights of appeal conferred by chapter 67 of the *Criminal Code* from judgments or orders (interlocutory or final) made in proceedings on indictment, should be accepted.

[15] If, on the other hand, one takes the more parsimonious approach of Pincus JA in *Lowrie*, the question is whether an order made on an application for leave to withdraw a plea of guilty is interlocutory or final in nature. In Queensland the view has been taken that a convicted person may at any time before sentence be allowed to withdraw a plea of guilty.[24] The position is not dissimilar to that where an application is made to set aside a default judgment, the circumstance considered by the High Court in *Carr v*

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21 *R v Drozd* (1993) 67 A Crim R 112 and *Director of Public Prosecutions v Wentworth* [1996] QCA 333.

22 [2002] 1 Qd R 662, [2001] QCA 318.

23 The Attorney-General, on the other hand, may refer to this court points of law arising in relation to directions or rulings under s 590AA: s 668A (1).

24 *R v Popovic* [1964] Qd R 561 at 567; *R v Phillips & Lawrence* [1967] Qd R 237 per Hart J at 288-289.

Finance Corporation of Australia Ltd [No 1].[25] Refusal of the application to withdraw the plea of guilty does not finally dispose of the matter: at least in principle, it is not a bar to a subsequent decision to set aside the plea, either on application or because the court, having heard what is put on sentencing, concludes that a plea of not guilty ought to be entered. Nor is it a decision which directly deals with the applicant's rights; it merely preserves the status quo. On the principles in *Carr*,[26] I would regard the order refusing leave to withdraw the plea as interlocutory, and, accordingly, as one from which no appeal lies.

[16] Consequently, whether or not one adopts the more broadly expressed view of Davies JA in *Lowrie*, the appeal in this case is properly brought against the conviction pursuant to s 668D of the *Criminal Code*, not the order of the primary judge, so that the third of the grounds in the notice of appeal is irrelevant.

The Crown case

[17] The appellant was charged in February 2008 and was held thereafter in custody. The Crown case against him was that he was engaged in importing cocaine from Thailand and trafficking in the drug. He received the cocaine, first, through Australia Post post office boxes as well as a private mail box service, and, later, through courier service deliveries to residential addresses. The post office boxes were opened using false names and fake driver's licences containing the appellant's photograph, a number of which were found in the search of his home. Also found on the search were keys for a number of the boxes, the SIM card for the mobile telephone service identified on the application forms, articles of mail sent through some of the mail boxes and notes referring to them. Handwriting analysis found the writing on the application forms to be consistent with the appellant's. The appellant had also signed for a number of packages delivered by courier service.

[18] Part of the evidence consisted of internet communications between the appellant and the Thailand-based supplier which were intercepted from the end of November 2007. It was alleged that they communicated by means of saved messages in the "Drafts" folder of a Hotmail account to which both had the password. The intercepted material included references to the quality of the product (variously described as "powder" and "rock") and the percentages at which it was testing; the amount which the recipient had on hand (at one point, he complained that he was "down to the last 3 oz"); the sending of packages and addresses which could be used to receive couriered deliveries; turnover ("between 1-300,000k" a week); and the problems of using Western Union transactions, which were traceable.

[19] A second source of information about the dealings between the appellant and the man in Thailand was the appellant's laptop computer, the hard drive of which was examined after his arrest. Fragments of email messages sent and received before the intercept was put into place were able to be located. They included references to sending amounts of money; prospective customers who wanted to buy in bulk at a lower price; the difficulties with quality; and the fact that everything would be all right "unless they X-ray".

[20] Twelve packages containing cocaine addressed to post office boxes were intercepted by authorities and were the subject of importing counts against the appellant.

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25 (1981) 147 CLR 246, [1981] HCA 20.

26 Per Gibbs CJ at 248, per Mason J at 256.

The evidence for a thirteenth importing count involving a couriered package came, in part, from email fragments found on the appellant's computer. They contained the name and address to which the package had been sent and a discussion of how the appellant would induce the occupier of the premises to sign for it. Later passages in the email fragments suggested that the appellant had concerns about whether the package had been intercepted; he intended to tell the occupier to refuse the package, and, consistently, he sent a text message to that effect to the occupier. The remaining importation charge concerned another couriered package, the name and address for which was contained in a draft message in the intercepted Hotmail account. A fake driver's licence in the name of the package's supposed recipient was found in the appellant's home; it contained his photograph.

[21] The trafficking count was based on statements made in the internet communications about the appellant's dealings with his customers. The money laundering count concerned 171 Western Union money transfers from Australia Post outlets to Thailand, each for about $900, amounting to a total of some $141,000. Handwriting analysis established that all of the Western Union forms were filled in by the appellant and his fingerprints were found on a number of the forms. They were also referred to in internet communications, and CCTV footage of some of the post offices where the transfers were made appeared to show the appellant.

The appellant's dealings with his legal representatives prior to giving instructions for a guilty plea

[22] The appellant was committed for trial in late 2008 after a hearing held over three days. In early 2009, he retained the firm of AW Bale & Son to act on his behalf. An indictment was presented against him in May 2009. In June 2009, the matter was listed for trial in the November sittings of the Supreme Court. On 10 July 2009, the appellant met his solicitor, Mr Andrew Bale, whose recollection of their conference was that the appellant maintained that the case was a circumstantial one, that he expected to be found not guilty, and that he had a complete defence to the charges which he would disclose to his legal representatives closer to trial. The appellant said he "had a plan"; of which, Mr Bale said in his affidavit, he was never made aware.

[23] On 23 October 2009, there was a trial review at which it was confirmed the trial was listed to commence on 10 November 2009. On 9 November 2009, the appellant was visited at the gaol by Mr Bale and Mr Damien Walsh, his barrister. According to the appellant, Mr Walsh showed him the statement of facts produced by the Crown and informed him that the Crown had a strong circumstantial case. The emails relied on by the Crown raised a strong inference that their subject was cocaine or other drugs, and Mr Walsh questioned how the appellant would explain "all the money going overseas". The appellant, according to his affidavit, said that he had been through the committal transcripts and thought there were weak points; that he had not seen the emails; and that the money going overseas could be for a number of things as to which he had not yet given his explanation. He asserted that the Crown could not possibly prove everything it was saying. Mr Walsh expressed his expectation that the appellant would be found guilty on what appeared, to him, an overwhelming case. He left the appellant with a list of the charges against him. In his affidavit, the appellant said that he felt he had no option but to plead guilty. In cross-examination he went further and maintained that he was told that he had no other option. He agreed, however, that Mr Walsh having told him he wanted to help him but did not think he could win the case, he and Mr Bale had left it to him, the appellant, to make his decision.

[24] Mr Bale's account of the conference coincided with the appellant's in some respects: he agreed that Mr Walsh had pointed out the difficulties in defending the case. Mr Bale added, however, that the appellant conceded that he had obtained the drugs from overseas on behalf of others, and sold some. He accepted advice that that would make him guilty of trafficking but wished to contest the extent of the commercial undertaking alleged. At no stage was the appellant told that he must plead guilty; instead he was told that if he wished to go to trial, a trial would be run but his lawyers did not believe he could succeed.

[25] On the following day, 10 November 2009, counsel for the Director of Public Prosecutions (Cth) entered a nolle prosequi in respect of the existing indictment and presented a fresh indictment. The new indictment contained the same number of counts of trafficking, importing and dealing in proceeds of crime against the appellant. What was altered were the dates: where formerly the importing offences had been charged as having occurred "on or about" a particular date, they were now alleged as occurring between two dates, usually between a month and seven weeks apart. The period for the trafficking count was expanded by two months, while that for the money-laundering count remained unchanged. The appellant was in court for the mention but was not required to enter a plea.

[26] According to the appellant, before he was taken into court on 10 November, he had a short meeting with counsel and his solicitor, at which Mr Walsh showed him some of the emails relied on by the Crown. At either this meeting or that the previous day, the possibility of a plea of guilty with a contested sentence was raised. The appellant said in evidence that Mr Bale had described the contested sentence to him as one where "you can plead guilty to the facts but negotiate the mitigating circumstances". He had, himself, a belief that "if he contested something and the evidence didn't substantiate the charge, then that charge could be dropped". That was, he said, "how [he] interpreted it at that point". In his affidavit, he deposed that on looking at the emails more closely that evening, he reached a view that there was "possible evidence of fabrication". In a conference with his legal representatives on the following morning he informed them of his belief and was told that it could be dealt with at the contested sentence.

[27] On Mr Bale's account, in the conference before court on 10 November, the appellant said that he wanted time to consider his position and that he thought he was running a trial on the "technicalities" of the case. Mr Bale took that as a reference to gaps in the Crown's proof of the continuity of exhibits. That afternoon the appellant raised the issue of fabrication of the emails, but when asked whether he had any means of proving that they were fabricated, did not answer. By then, though, the appellant had made disclosures which meant that it was apparent that he could not be called as a witness. Mr Bale advised the appellant that the Crown had provided further statements that established the continuity of the exhibits, so there was no prospect of defending the case on that score.

[28] The appellant provided his representatives with signed instructions as to his intention to plead guilty. They were in these terms:

> "I, Stephen Peter VERRALL hereby instruct my Solicitors that I propose, when called upon, to plead Guilty to the indictment against me presented in the Supreme Court at Brisbane on 10/11/09.
>
> I instruct my legal representatives to negotiate in my best interests in relation to the factual scenario and reserve my right to conduct a contested sentence.

> In negotiating the matter I wish my legal representatives to have particular regard to Count 17 and resolve that matter if possible.
>
> I have understood that I have a right to put the Crown to proof on a trial however elect to plead guilty in an attempt to mitigate the penalty likely to follow my conviction.
>
> I give these instructions fully informed of my rights and without threat promise or inducement.
>
> Dated at Brisbane this 11th day [of] November 2009."

The appellant's signature appears on the document, which was witnessed by Mr Bale.

[29] The appellant maintained that the instructions to plead guilty were given on 10 November in the conference before the court mention of that date and before the new indictment was presented. That seems improbable, given the date on the document and the fact that at the mention on 10 November no intimation was made of any guilty plea. The appellant said that he thought the instructions

> "meant that I could contest the facts that I didn't agree with what the DPP was stating and if enough of the facts or faults with the evidence could be shown then that particular charge pertaining to that evidence could be dealt with or dismissed by the presiding judge".

He did not, however, identify any statement made to him as the source of that belief.

[30] According to Mr Bale, the instructions were signed at the conference on the morning of 11 November. The appellant seemed to understand the advice given to him, discussed comparable sentences, and instructed him (Mr Bale) to try to convince the Crown not to proceed with the money-laundering count. The appellant said he wanted his counsel to dispute the money laundering charge because he had not "run money through a company". He agreed that he and Mr Walsh had talked about the counts before going into court and he understood that he was pleading to the charges. He was told that the negotiations with the Crown in relation to the money laundering charge were unsuccessful and pleaded guilty to it, although he was "unwilling".

The plea of guilty

[31] The transcript of proceedings on November 11 shows that Mr Walsh asked that the appellant be arraigned on all of the counts in the indictment except for trafficking, as to which there was a question of "quantum". Once that was resolved, he said, the appellant could also be arraigned on that count. Mr Walsh asked for time to explain to the appellant what a "bulk" arraignment was, although he said he had already gone through the counts with his client. Counsel subsequently indicated that a bulk arraignment was satisfactory. The associate proceeded to ask the appellant whether he had read each of the counts against him contained in the indictment, understood their contents, sought and received legal advice from his counsel in respect of each of them and was prepared to plead to them without their being read separately. To each of those questions in turn, the appellant answered in the affirmative. He was then asked how he pleaded to the 15 counts (other than dealing in proceeds of crime) and answered "guilty".

[32] When the allocutus was administered and the appellant was asked whether he had anything to say, he responded "No, nothing". There was discussion about the position

of the appellant's co-accused (who was charged with only one count and was intending to make a submission to have it dropped) and about when the sentence of the appellant could take place. It was indicated that the matter would be set down for sentence the following week. Later that morning, the appellant was arraigned on the remaining count of dealing with money with a value of more than $100,000 intending that it would become an instrument of crime. He pleaded guilty, and when the allocutus was administered and he was asked if he had anything to say, he answered "No". The sentence was listed for 20 November 2009.

The decision to seek to change the plea

[33] According to the appellant's affidavit, when he was arraigned he had not seen a copy of any indictment although, he deposed, he had seen a "list of the charges" the previous day and was given another copy on the day of the arraignment. He heard the discussion in court about the case against his co-accused. The prosecutor said that she would have to consider how to prove that emails were sent from the appellant to the co-accused. The appellant said that, hearing this, he realised the weakness of the case against him. Subsequently, he began to examine the emails and found there was some repetition in them and some variation in different versions of them. He raised various issues about the emails with his legal representatives as a result of which, it seems, they adjourned the contested sentence. In February 2010, he decided that he should change his plea to one of not guilty.

[34] On 25 February 2010, the appellant wrote to his solicitors as to his intention to seek to reverse his plea of guilty. He asserted that he had gone through the email fragments and considered that they had been "tampered with and fabricated". In his view, they would have been excluded had an application been made under s 590AA of the *Criminal Code*. He did not agree with half of the facts asserted in the agreed statement of facts and considered the evidence should have been tested at a pre-trial hearing.

The hearing of the application for leave to withdraw the pleas

[35] Although the appeal is from the conviction, not from the refusal of leave to withdraw the pleas of guilty, the proceedings before the primary judge are important, because they are the source of the record for this appeal and because his Honour made credit findings in relation to the appellant and his former solicitor, Mr Bale, favouring the latter's account. The appellant did not seek to supplement the record on appeal; nor did he advance any argument as to why his Honour's credit findings should be disregarded.

[36] The appellant's application for leave to withdraw his pleas of guilty proceeded on his and Mr Bale's affidavits, with cross-examination of each. In addition, the respondent Crown relied on an affidavit from an officer of the Director of Public Prosecutions' office annexing the sentencing material which had been provided to Mr Bale. It consisted of a number of documents including the statement of facts, a summary of internet communications between the appellant, a selection of emails intercepted and found on his laptop, a list of postal boxes controlled by him and a list of Western Union transactions.

[37] The appellant's complaints before the primary judge were that he had been told by Mr Walsh on both 9 and 10 November that he had no option but to plead guilty; that Mr Walsh when advising him had not had a crucial part of the committal depositions; that he thought his legal representatives would defend him on the basis that the Crown

had not established the continuity of the evidence; that he had not seen the evidence before the arraignment hearing so as to enable him to explore its strengths and weaknesses with his counsel; and that he had never been given an opportunity to give a version of the events.

[38] Cross-examined, the appellant agreed that he had known since February 2008 that he was charged with the business of carrying on trafficking in cocaine over an approximate 12 month period. He had previously been convicted of trafficking and sentenced to seven years imprisonment, but maintained, nonetheless, that he did not know much about the elements of the offence. He knew that he was charged with importing, that it was alleged that he had arranged to import cocaine by post from Thailand to a range of post office boxes and that he had been sending money to Thailand to buy drugs. He knew that he was charged with money laundering, but believed he had a defence to that charge, because he had "never run money through a company". He was aware that police had seized from his premises keys to post office boxes to which drugs had allegedly been sent and other items related to the applications for the post office boxes. It was put to him that he knew there was a range of things taken from his premises which linked him to the postal importation; to which he responded, "only circumstantially".

[39] The appellant agreed that he was present during the committal proceeding, which took place over a period of days, and heard cross-examination of the computer examiner who had retrieved emails from his internet account. The charges were read to him by the Magistrate at the end of the committal. He accepted too, that the counts were discussed with him before he pleaded guilty. Questioned about his signed instructions that he wished to plead guilty, he said that he was "not disputing that paperwork… [but] the facts leading up to that paperwork".

[40] On a number of occasions throughout the hearing, the learned primary judge pointed out to the appellant that he had said and produced nothing to indicate that he might not be guilty of the charges. Asked at the end of his evidence whether he wished to suggest a defence, the appellant said that he was innocent of trafficking and of a lot of the allegations and believed he had a defence to do with the continuity of the evidence. He did not think it necessary to say any more.

[41] The primary judge concluded that there was no reason to doubt the appellant's guilt of the charges, that there was no undue pressure exerted on him to plead guilty and that there was no justification granting leave to withdraw the pleas. His Honour made some credit findings, expressing a general preference for the evidence of Mr Bale to that of the appellant. He did not accept as true the appellant's contention that he was told he had no option but to plead guilty or that it was not his intention to plead guilty. Nor did he accept that the appellant was denied the opportunity to provide his version of events to his lawyers, finding, instead, that he had given some account of the level of his involvement in obtaining the cocaine and distributing it. He found any contention that the appellant was induced by his lawyers to believe that he might challenge his convictions in a contested sentence incredible, and did not accept they had ever said anything to him to that effect. To the contrary, his Honour considered that the appellant saw the contested sentence as an opportunity to put his offending conduct in respect of the trafficking charge in the best light. He did not accept the appellant's assertion that he did not understand or have foreknowledge of what he was pleading guilty to.

The appellant's contentions on appeal

[42] The appellant's submissions on appeal were concerned not so much with his understanding of the guilty pleas when he entered them as with what he perceived as his legal representatives' failure to explore possible defences with sufficient vigour. He said, somewhat tellingly, that it was his lawyers' job to provide a defence to him. There were, he asserted, failures to ensure that the brief to counsel was complete, to take his instructions on all the evidence and to advance pre-trial arguments, which meant that defences relating to the admissibility of evidence and continuity of the exhibits were missed.

[43] The issue concerning counsel's brief turned on parts of the transcript of the committal hearing which, the appellant said, had not been provided to counsel. In one of the passages in question, counsel for a co-accused questioned the expert who had examined the appellant's hard drive. The net effect of his answers was that he could not say whether the person alleged to be the Thailand-based supplier had read the draft emails in the Hotmail account; it could simply be seen that someone had read the drafts. Moreover, at the committal the presiding magistrate had observed there was no evidence that one of the people whose address was used to receive courier deliveries knew of the importations because there was no evidence that "the relevant [draft] emails were ever sent, accessed or read by [that defendant] or anyone else for that matter". The magistrate had also referred to the case against another co-accused as a circumstantial one. The appellant relied on those references as somehow weakening the case against him.

[44] The appellant said he did not accept that his legal representatives could properly have checked the continuity of the exhibits, because statements dealing with that issue were only delivered a couple of days before trial. He suggested also that late disclosure of the statement of a financial analyst in confiscation proceedings had prejudiced his defence: the analyst had said he found no withdrawals from bank or credit card accounts which could have provided a source of funds for transfers of money overseas by the appellant. The alteration in the dates on the indictment might have affected continuity and admissibility issues. His plea of guilty was entered without a full appreciation of what he was pleading to because the charges did not state the seizure number and weight of the narcotic involved.

[45] The appellant relied on passages from three cases, *Chen v R*[27], *Nudd v R*[28] and *Re: N (a solicitor)*[29] to advance an argument that he had suffered a miscarriage of justice because his representatives had not done enough to challenge the Crown case. Unfortunately, none of the references was apposite here. The passage cited from *Nudd*[30] concerned what was required of lawyers appearing at trial; that cited from *Chen*[31] related to a barrister's obligation to ensure the prosecution was put to proof of its case where his client confessed guilt but maintained a plea of not guilty; and *Re: N* involved consideration of whether a solicitor's failure to take her client's statement for a contested sentence hearing, resulting in a last minute adjournment, was unsatisfactory professional conduct warranting referral to the Legal Services Commissioner. None of the passages cited had any bearing on the position of a defendant pleading guilty.

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27 [2012] NSWCCA 53.
28 (2006) 225 ALR 161, [2006] HCA 9.
29 [2010] QSC 267.
30 225 ALR 161, 176, [53].
31 At [39].

[46] In any event, the committal evidence which the appellant says his lawyers did not have appears to have been of no consequence. Any prospect that the emails could not be proved against other accused (as opposed to the appellant, whose internet account had been intercepted and his laptop seized) was unlikely to assist the appellant. The fact that the case was, in some respects, circumstantial rather than relying on direct evidence was immaterial to whether the appellant's plea of guilty was a proper one; and even had there been any prospect of some chink in the prosecution case in the form of a failure to prove continuity, again, it could hardly go to whether the appellant's plea of guilty was freely entered. The appellant did not identify how the change in the dates on the indictment made any difference to any possible defence; indeed, he did not identify any possible defence. There was no late disclosure of material by the Crown; the statement of the analyst to which the appellant referred had been made, it seems, in later confiscation proceedings.

[47] The appellant did, it should be said, rely on parts of *Chen v R* beyond the passage setting out the obligations of a barrister whose client was pleading not guilty despite an admission. He argued that the circumstances of that case resembled his own. But *Chen* concerned a challenge to the decision of the primary judge refusing leave in circumstances where the judge had taken into account affidavits from the applicant's former legal representatives upon which the Crown indicated that it was not relying. The applicant had consequently been denied the opportunity to cross-examine his former representatives. There was evidence that the applicant's counsel told him that if he did not plead guilty he would not act for him. The terms of the applicant's instructions were that he intended to enter pleas of guilty "subject to agreement as to the facts to be pleaded to". Subsequent to the entry of the pleas of guilty, the Crown had indicated that it proposed to present a fresh indictment with fewer charges and a reduction in the amount the subject of the alleged fraud. Those factors, none of which is present here, seemed to have been the reasons for the court's decision to uphold the appeal and give leave to the appellant to withdraw his pleas of guilty.

[48] The appellant referred to a decision of this court which was helpful: *R v Wade*.[32] In it, after a review of the authorities, Muir J observed:

> "A miscarriage of justice may be established in circumstances in which for example: in pleading guilty, the accused did not appreciate the nature of the charges or did not intend to admit guilt; on the admitted facts, the accused would not, in law, have been liable to conviction of the subject offences; the plea was not made freely and voluntarily, such as where it was obtained by an improper inducement or threat or it is shown that the plea was 'not really attributable to a genuine consciousness of guilt'. And, of course, it will normally be impossible to show a miscarriage of justice unless an arguable case or triable issue is also established."[33]

His Honour went on to note, however, that whether the requirements of s 668E(1) of the Code had been fulfilled must depend on an examination of the circumstances in any given case.

[49] In *Meissner v The Queen*,[34] the High Court majority (Brennan, Toohey and McHugh JJ) said this as to when conduct designed to induce a defendant to plead guilty became improper:

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32 [2011] QCA 289.

33 At [51].

34 (1995) 184 CLR 132 at 141.

> "It will often be difficult to determine whether conduct that falls short of intimidation but which has the tendency to induce an accused to plead guilty is improper conduct that interferes with the accused's free choice to plead guilty or not guilty. 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."[35]

[50] The appellant suffers from the difficulty that the learned primary judge made credit findings against him and in favour of Mr Bale. This court, not having heard any evidence, is in no position to substitute different findings. Mr Bale's evidence identifies strong advice as to the appellant's poor prospects of acquittal, given in proper terms, and it would seem, well-founded. In any event, it would be extremely difficult to accept, given the appellant's capacity for argument, that he would be cowed into submission had he any belief that he had a basis for defending the charges. Equally, it is very improbable, had there been some such basis, that he would not have revealed it to his lawyers, the primary judge or this court.

[51] The written instructions provided by the appellant to his representatives were clear. They referred specifically to his understanding that he could put the Crown to proof at a trial but chose, instead, to plead guilty to mitigate the penalty, and said expressly that the instructions were given without threat, promise or inducement. There is no reason to suppose the appellant did not understand what he was pleading guilty to. He had had the charges read to him at the committal proceedings and had sat through cross-examination at those proceedings. He deposed that he had seen copies of the charges at the time of the arraignment. The counts were discussed with him before his plea, and on his arraignment, he said that he had read the counts, understood them and received advice in respect of them. His pleas of guilty were unequivocal.

[52] One gains a strong impression that the appellant's complaint is really that, on reflection, he considers his lawyers should have found some technical defence for him. The conclusion I reach is that there was no pressure placed on the appellant to plead guilty; that he was aware what each of the charges to which he pleaded guilty concerned; that he understood what he was doing when he entered the pleas; and that there is no basis for supposing that the pleas of guilty were not properly and appropriately entered in the context of an overwhelming Crown case. No miscarriage of justice occurred in the appellant's conviction.

[53] I would dismiss the appeal.

[54] **PHILIPPIDES J:** I have had the advantage of reading the reasons for judgment of Holmes JA and agree with those reasons and the order proposed. As Holmes JA has explained, the appeal in this case is not from the refusal of leave to withdraw the pleas of guilty but from the conviction, in respect of which no miscarriage of justice has been shown.

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[35] At 143.

[55] As to whether the appellant had been convicted, to the decisions referred to by Holmes JA may be added *R v Collins ex parte Attorney-General* [1996] 1 Qd R 631. McPherson JA and Lee J stated at 638:

> "Conviction is the act of the court, not of the accused. For this reason, it has been accepted in this State that a conviction occurs only upon some intimation by the court that it accepts the plea as its determination of guilt and, in effect, adopts it as its verdict. This is surely right. In the normal course, that intimation would be evidenced by the administration of the *allocutus:* see s 648 of the Code, and *R v Shillingsworth* [1985] 1 Qd R 537, 543. But as s 648 itself recognises, a failure to administer the *allocutus* does not invalidate the judgment. A fortiori its administration is not necessary to perfect the conviction. All that is required for that to occur is some unequivocal and overt expression of acceptance by the court of the plea as its determination of guilt; how that acceptance is manifested is immaterial: *Griffiths v The Queen*, 302, 335-336; *R v Jerome and McMahon,* 604. Other methods may include an express statement by the court or proceedings to hear submissions on sentence."

[56] Likewise, Fitzgerald P at 634 in considering the effect of a plea of guilty stated:

> "… the court is entitled to accept the plea, either expressly or by recording a conviction, administering the allocutus (Code, s 648) or some other overt and unequivocal manifestation of acceptance."

[57] **DOUGLAS J:** I agree with the reasons of Holmes JA and the order proposed by her Honour. I merely wish to add that the order in *R v Nerbas*[36] referred to the matter as an appeal against the decision to refuse leave to withdraw the pleas of guilty but was a case where the notice of appeal correctly said it was an appeal against conviction. Subject to the issues relevant to any application for leave to extend time to bring an appeal, there is little practical concern about the erroneous procedural approach as the proper focus will be on whether there has been a miscarriage of justice in any event.

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[36] [2011] QCA 199.