SUPREME COURT OF QUEENSLAND

CITATION:	*R v BCJ* [2012] QCA 316
PARTIES:	**R** **v** **BCJ** (appellant)
FILE NO/S:	CA No 171 of 2012 DC No 18 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Childrens Court at Townsville
DELIVERED ON:	20 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2012
JUDGES:	Holmes and White JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The appellant's guilty pleas are set aside.** **3. The appellant's convictions are set aside.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – GENERAL PRINCIPLES – where appellant was convicted on pleas of guilty to two counts of indecent treatment of a child under 12 and one count of rape – where appellant appeals against the convictions – where appellant was 14 years old at the time of the offences, and 17 years old at the time of arraignment – where appellant applied to have the pleas of guilty vacated – where primary judge refused the application, finding that there was no miscarriage of justice and that the guilty pleas should not be set aside – where the pleas were entered on strong legal advice – where the advice was given at a conference at the court shortly before the appellant's trial was to commence – where the appellant suffered from intellectual and learning deficits – where the appellant maintained his innocence throughout – where there was an arguable defence – whether the pleas of guilty were made freely and voluntarily – whether there has been a miscarriage of justice *Borsa v The Queen* [2003] WASCA 254, cited

Meissner v The Queen (1995) 184 CLR 132, [1995] HCA 41, cited
R v Carkeet [2009] 1 Qd R 190, [2008] QCA 143, cited
R v Verrall [2012] QCA 310, cited
R v Wade [2012] 2 Qd R 31; [2011] QCA 289, considered

COUNSEL: G McGuire for the appellant
S J Farnden for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The appellant appeals against his conviction on two counts of indecent treatment of a child under 12 and one count of digital rape, notwithstanding his plea of guilty to all three counts. His outline of submissions referred to the appeal as brought against the primary judge's refusal of his application to have the pleas of guilty set aside, but the notice of appeal is in the form of an appeal against conviction. *R v Verrall*[1] makes it clear that the appeal is properly brought against the conviction, not the primary judge's order.

[2] The appellant was 14 years old in July 2009, when the offences were said to have been committed. The indictment was presented on 25 July 2011. On 3 October 2011, the appellant, by then 17 years old, was arraigned and pleaded guilty to all three counts. The allocutus was administered; the appellant said nothing in reply. A pre-sentence report was ordered and the sentence adjourned to a date to be fixed. On 30 April 2012, it was indicated that there would be an application to have the pleas of guilty vacated. The application itself was heard on 18 June 2012.

The Crown case

[3] At the time of the events giving rise to the charges, the complainant was eight years old and was living with her parents in the same house as the appellant, his mother and his three siblings. The child was interviewed by police on 19 September 2009. She gave an account of sexual assaults by the appellant on two separate occasions two weeks previously, on a Friday night and a Saturday night. On the Friday night, the adults were watching football on a television outside the house. She was inside, sitting on the appellant's lap to watch a movie, when he put his fingers on her "rude part", "close to [her] hole". On that first occasion, the child also said, the appellant had held and moved her hand on his penis and made her move it. When he asked her whether what he was doing to her "rude part" was nice, she answered "No" and "just walked away". Later in the interview she answered in the affirmative when asked whether the appellant had ever put his fingers "inside your hole", and said that it happened "the first time".

[4] In the Saturday incident, the child said, two of the appellant's siblings were in the room. She and the appellant were under a blanket, again watching a movie, when he put her left hand on his penis and made her squeeze it. The transcript is not entirely clear, but it seems the child said he was also touching her genital area again. Her mother came into the room and pulled the blanket off. The appellant's penis was exposed. She told her mother what he had done.

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1 *R v Verrall* [2012] QCA 310.

[5] The child's mother's made two statements. In her first statement, she said that on a Friday night in early July 2009, she had been outside watching football on television while the appellant, his siblings and her daughter were in the lounge room. She went inside to see the appellant and the child on the couch under the blanket, and pulled it away from them. She saw the appellant push the child's hand away from his groin area. His penis was exposed and protruding from his pyjamas. She asked her daughter whether the appellant had touched her "down there" but was unable to get any information from her. A couple of days later, however, the child told her that the appellant had touched her, putting his fingers in her "rude part".

[6] According to the mother's second statement, made nine months later, when she pulled the blanket back she could see that the child's hand was holding the appellant's penis, with his left hand over hers, while his right hand was resting on the child's crotch. At the committal proceedings, the mother was asked about the discrepancy between her accounts as to how much she had seen. She responded that when she made her first statement she was still shocked by what she had seen and her memory had improved since.

[7] The only particulars of the three counts were given in a schedule of facts produced by the prosecution after the appellant's pleas were entered. The first offence of indecent treatment was said to have occurred on a Friday night while the complainant child and the appellant were watching television, with the child sitting on the appellant's lap and a blanket over them both. The actus reus was that the appellant took the complainant's hand and made her touch his penis in a masturbating motion.

[8] The particulars of the second incident as set out in the schedule of facts were very similar to that of the first, and there was nothing to identify when it occurred. It was said that the complainant and the appellant were sitting on the lounge watching a particular movie when the child was made to touch the appellant's erect penis, which she saw "pointing up". The third count was the rape. Again there was no indication in the schedule of when it occurred, nor do the particulars given seem to amount to actual penetration. According to the schedule, the child said that the appellant had put his finger on her "rude part" and asked her if it felt nice, to which she responded "No".

[9] At some unidentified time the child told her father that the appellant had "touched [her] down there" pointing to her groin. The child also said more generally in her s 93A statement that the appellant regularly picked her up and did something (what is not clear) to her "rude part"; she used to tell her mother on each such occasion. There was nothing in her mother's evidence to support the assertion that such complaints were made to her.

[10] The appellant took part in a record of interview with police which was not before this court. It seems (from the primary judge's reasons) that in it the appellant admitted that his penis was exposed when the child's mother removed the blanket; there is nothing to indicate that any other concession was made.

The appellant's dealings with his legal representatives

[11] The witnesses on the application to set aside the pleas were the appellant and his mother, Ms FMA, the barrister and members of the firm of solicitors who had previously represented him and a forensic psychologist who had examined him in December 2010.

[12] The sequence of events which emerged was as follows: The firm of solicitors represented the appellant from the first mention of the charges in the Magistrates Court. An employed solicitor, Mr Goodhew, was responsible for the file. He took the appellant through the brief of evidence and obtained a preliminary statement from him, drafted by reference to the statement of the child's mother. The appellant's account of the incident she described was that he was sitting upright on the sofa with the child lying on her side with her back to him and her legs across his thighs. Both were under a blanket. The child's mother pulled the blanket away and told the child to go into her room. The appellant denied that the child had touched his groin or he the child's. His penis was not exposed nor did he have an erection. The statement gave instructions to enter a plea of not guilty.

[13] According to Mr Goodhew, it was his intention to have the statement signed once the forensic psychologist, Mr Walkley, had assessed the appellant and confirmed that he had the capacity to give instructions. The copy of the statement in the record is unsigned, so it is not clear whether he did so. Mr Walkley did in fact advise that he considered the appellant to be capable of giving instructions, including in relation to his plea. On 19 July 2011, the appellant signed a document containing his instructions that he intended to plead not guilty to the offences as indicted: the two counts of indecent treatment and the one of rape.

[14] A barrister, Mr Pennell, appeared for the appellant at the committal proceedings in March 2011, speaking briefly to the appellant and his mother before the proceedings began. The appellant was committed for trial, and a pre-recording of the child's evidence was set down for Monday 3 October 2011. On 8 September 2011, the solicitors sent a letter to the appellant advising him accordingly and suggesting that he arrive at the court at least 15 minutes before proceedings commenced. There was no mention in that letter of conferring with him in advance.

[15] In the week of 26 September, Mr Goodhew was on leave, but he had left instructions with another solicitor to arrange a conference between Mr Pennell and the appellant. The solicitor made a number of unsuccessful attempts between 27 and 30 September to telephone Ms FMA, but her mobile phone was not operating because she had exhausted her credit. The appellant received a letter on Friday 30 September proposing a conference to be held with the solicitor and the barrister on that same day. He and his mother then went to the solicitors' office to find that Mr Goodhew was away. They spoke to the principal of the firm, as he confirmed in evidence. Because he could not find the file and knew nothing of the matter, he told them that he was unable to take part in any conference.

[16] In fact, the employed solicitor who had been left with the file had been in contact with Mr Pennell. Because of the unsuccessful attempts to contact the appellant through his mother's mobile phone, they had reached the view that he was unlikely to attend the hearing on 3 October and had gone so far as to join with the Crown in seeking to have a notice to appear served on him. The application was made in the afternoon of 30 September, about the time the appellant and Ms FMA were at the solicitors' office. The court declined to make the order.

[17] On the morning of 3 October 2011, Mr Goodhew went at 8.30 am to Mr Pennell's chambers where they discussed the case against the appellant before going to the courthouse. At the court they found the appellant and Ms FMA waiting in the foyer. All four went into a conference room where Mr Pennell gave his views on

the appellant's prospects on any trial and the course he should take. The pre-recording of evidence was set for 9.30 am; Mr Pennell said that he and Mr Goodhew would have reached the court five or 10 minutes earlier. Records of the State Reporting Bureau showed that at 9.42 am, the appellant's matter was mentioned and the Crown prosecutor advised that Mr Pennell was conferring with his client. At 10.37 am, both counsel appeared and said that the pre-recording would not be required, but some more time was needed. The arraignment took place at 10.58 am.

[18] There was some divergence between the appellant and Ms FMA, on the one hand, and the lawyers, on the other, as to what was said in the course of the conference and how long the discussions took. On the appellant's account, he went into a conference room with his mother and his legal representatives. The latter began to talk to him about his options. Mr Pennell told him that no-one would believe his version of events; that the complainant would be more believable; and that his advice was to plead guilty. He drew him a diagram indicating that a plea of guilty would lead to freedom, a plea of not guilty to gaol. This discussion took five to 10 minutes. The appellant said he was frightened and crying. He felt that he "was given no time to process what had been said … and ... did not fully understand what was happening." He was then asked to leave the room while his mother and the legal representatives spoke for another 10 minutes or so.

[19] According to the appellant, his mother emerged from the room crying and said that she had been told that his only option was to plead guilty. They spoke alone for about five minutes. His mother said that she would support him "no matter what". He did not understand when he was supposed to have committed the rape, but, he agreed, he understood that how he pleaded was his decision and not his mother's. He pleaded guilty, however, because he thought it was his only choice. Asked about an assertion in his affidavit that he felt he was being forced into a decision that he did not want to make, the appellant said that was because he knew he did not do what he was accused of. He did not want to plead guilty to something he had not done.

[20] The appellant recalled signing instructions to enter a plea of guilty. Those instructions read as follows:

> "I BCJ instruct that I will enter a plea of guilty to:
>
> 1. Indecent treatment of a child under 16 years.
>
> 2. Indecent treatment of a child under 16 years.
>
> 3. Rape.
>
> I have been made aware of the evidence against me and I have decided to entre [sic] a plea of guilty of my own free will and without any inducement or promis [sic] to do so."

The appellant agreed he had said in his affidavit that he told his lawyers a number of times that he wanted to plead not guilty but felt that each time his instructions were dismissed. He had asked his mother to get him new lawyers after his plea of guilty was entered. It was in early 2012 that he told his mother he wanted to change his plea. Asked further questions in re-examination about the written instructions, he said that he did not know what the word "inducement" meant.

[21] Ms FMA's account of the conference on the morning of 3 October was that there was some urgency because there was only a short amount of time before the hearing was to proceed. Mr Pennell told her son that the case against him did not look good and he would be better off pleading guilty. Mr Pennell did not tell the appellant he had to plead guilty; instead, he said if he did not plead guilty he would go to gaol, but that if he did plead guilty he would not go to gaol. The appellant was upset and crying. The legal representatives left her alone with her son, who wept and said he had not committed the offences. Ms FMA then spoke to Mr Pennell and Mr Goodhew alone. They told her that her son's only chance to stay out of detention was by pleading guilty. She was concerned that her son would be placed in detention and feared that, because of his disabilities, he would not be able to look after himself. She said that because she was frightened for her son, she had made him plead guilty.

[22] Mr Pennell gave evidence. He said that in the conference on 3 October, he gave the appellant and his mother advice that the Crown had a very strong case. He did not tell the appellant that the complainant would be more believable or that his version of events would not be accepted. Under cross-examination, Mr Pennell was asked whether he had informed the appellant and his mother that it was his opinion there was not enough evidence to support the appellant's plea of not guilty and responded that it was "something that [he] would say". He conceded the effect of his advice at the conference was that if the appellant went to trial and was convicted he might well go to gaol, but that if he pleaded guilty there was a "pretty strong chance" he would not go to gaol.

[23] Mr Pennell agreed that there were some inconsistencies and areas of confusion in and between the evidence of the complainant child and her mother, and he had not obtained particulars from the Crown before speaking to the appellant and his mother. He had assumed in speaking to the appellant that the digital penetration was alleged to have occurred on the occasion when the child's mother had pulled the blanket away, and that the mother's evidence would thus support the child's allegation of rape. He had not been made aware that the appellant and Ms FMA had gone to the solicitor's office the previous Friday, and he had not expected the appellant to attend court for the pre-recorded evidence hearing. He agreed that he and Mr Goodhew had reassured the appellant's mother that the boy would not be placed on a sex offenders' register, because he was a juvenile, although they now appreciated that that advice was wrong. The appellant had never admitted that he had done anything wrong and had maintained his innocence. The boy was upset and crying when he gave instructions that he would plead guilty.

[24] The solicitor, Mr Goodhew, had made a file note of the conference on 3 October 2011. It recorded the following events. Mr Pennell went through those matters which the child's mother confirmed: that the appellant and child were sitting on a lounge chair; that a blanket concealed their bodies from their waists down; and that the appellant's penis was exposed. Mr Pennell said the only allegation not corroborated by the mother was the digital rape. According to the file note, Mr Pennell said that in his opinion there was no risk of the appellant going to gaol if he pleaded guilty. In conference with Ms FMA alone, Mr Pennell said his advice was to plead guilty because of the overwhelming evidence against the appellant. The two lawyers then left the appellant with Ms FMA. After about 10 or 15 minutes, the appellant, who was upset, indicated that he wanted to plead guilty to the charges. Mr Goodhew drew the written instructions which the appellant signed,

and they went into court where the appellant was arraigned and entered the plea of guilty.

[25] In evidence, Mr Goodhew said that Mr Pennell had not told the appellant that the complainant would be more believable or that no-one would believe his version of events. He confirmed that in a letter he sent to Legal Aid in March 2012, which set out some detail of the conference on 3 October 2011, he described Mr Pennell telling the appellant's mother that "in his opinion there was not enough evidence to support [the appellant's] plea of not guilty". Mr Goodhew agreed that a later description by Ms FMA of the appellant's state of mind accorded with his own impression during his dealings with the boy:

> "[He] is confused about what it is all about. He just simply does not understand what is going on and believes that he did not do anything wrong."

The psychologist's evidence

[26] Mr Walkley, the psychologist retained to assess the appellant, had furnished a written report in January 2011. In it, he reviewed other medical assessments made of the appellant, which suggested that he suffered from autistic spectrum disorder, attention deficit hyperactivity disorder, and signs of something called sensory integration dysfunction. A psychometric assessment indicated that the appellant's full scale IQ was 83, placing him in the lower half of the Low Average intelligence classification. There were deficits evident in his processing capacity, his verbal comprehension and working memory. Mr Walkley concurred that the boy suffered from learning deficits and would struggle with education. Nonetheless, he considered him to have a reasonable grasp of the concepts involved in his legal difficulties, some confidence in asserting his rights, an understanding of what was discussed and no apparent impediments to his speech and language functions. His conclusion was that the appellant had the capacity to give informed instructions, including in relation to a plea of guilty.

[27] Mr Walkley gave evidence at the hearing of the application for leave to withdraw the pleas. He was asked about the appellant's earlier diagnosis of autistic spectrum disorder. It was likely, he said, that a person presenting with that condition would have difficulty interacting with others and with reading verbal cues, presenting in consequence as an "out of touch, disassociated person with eccentricities". The appellant's intellectual capacity to process the information necessary in deciding whether to plead guilty would reflect his IQ score, in the lower average range; and although in Mr Walkley's interview with him, the appellant indicated he was willing to stand up for himself, his defences would be down if it were his own representatives he was dealing with. Having to decide on a plea was a difficult situation in which a good deal of information and different alternatives and consequences had to be processed quickly. Mr Walkley said of the appellant in that situation:

> "I think he was always going to do a reasonably poor job of that, given his intellect and if time is another factor, I guess that's not going to help. It would certainly be in detriment, I think."

The findings at first instance

[28] The learned primary judge described Mr Goodhew as the most impressive of the witnesses called and expressed a preference for his evidence "based on the

contemporaneous notes". He accepted his version of what was said to the appellant over the evidence of the appellant and his mother. His Honour concluded that the appellant understood both the nature of the charges and that he was entitled to plead guilty or not guilty. The prospect of avoiding detention was a significant factor affecting both him and his mother. The judge accepted that the appellant had at all times maintained his innocence, but he noted that a plea of guilty would not necessarily cause injustice, notwithstanding that the person entering it was not, in fact, guilty. The advice given was sensible and there was no inappropriate urging. His Honour declined to set the pleas aside.

Discussion

[29] There are many statements in the authorities as to the courts' reticence in setting aside convictions based on pleas of guilty.[2] Such a step will be warranted only where the conviction entails a miscarriage of justice. In *R v Wade*,[3] Muir JA, after reviewing a number of cases, described some of the circumstances which may give rise to a miscarriage of justice:

> "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."[4]

[30] In the present case, the learned primary judge had the advantage of seeing the witnesses; his findings as to their credit would not lightly be disregarded. In fact, there was not, in my view, any critical difference in their accounts, but I proceed on the basis that Mr Pennell's advice to the appellant and his mother was in terms of Mr Goodhew's file note: that there was no risk of the appellant going to gaol if he pleaded guilty. Mr Pennell accepted that he had told the appellant there was a likelihood of imprisonment if he did not plead guilty. As the learned judge at first instance found, that was reasonable advice, properly given. It was not improper conduct amounting to inducement in the way explained in *Meissner v The Queen*.[5] Accepting that to be the case, there was, nonetheless, a combination of circumstances here which gives cause for concern about the way in which the appellant's pleas of guilty eventuated.

[31] Given his youth, low intellectual capacity and difficulties in processing information, it was important that the appellant have both a clear explanation of the case against him and the opportunity to reflect on what decision he should make. He did understand the form of the charges – that they were of indecent treatment and digital rape – but he did not understand what the case was against him in respect of those charges. The conference with his legal representatives did not improve matters in

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2 See, for example, *Borsa v The Queen* [2003] WASCA 254 at [20], cited with approval in *R v Carkeet* [2009] 1 Qd R 190, [2008] QCA 143.

3 [2011] QCA 289.

4 At [51].

5 (1995) 184 CLR 132 at 141.

that regard, given the absence of any particulars and the conflict in the evidence (apparently not perceived by counsel at the time of the conference) as to the occasion on which the rape was alleged to have occurred.

[32] The appellant was called on to make his decision in undesirable circumstances of pressure, where he was aware that there was a judge waiting on the outcome. Mr Pennell and Mr Goodhew would have reached the court at around 9.20 or 9.25 am; at 10.37 am it was indicated to the court that the pre-recording was not required. Assuming counsel was able to appear before the judge immediately the appellant gave instructions as to his plea, there was at best something in the order of an hour and a quarter between the start of their conference and the appellant's instructions to plead guilty. (If there were any delay in the judge's being available for the matter to be mentioned, that time might have been significantly less.)

[33] As Mr Walkley observed, by reason of his intellectual and learning difficulties, the appellant was particularly susceptible to the strong arguments advanced by his own counsel. That is likely to have been compounded by the emotional pressure placed on him by his mother's distress and her anxiety for him to plead guilty in order to avoid detention. All witnesses were consistent in saying that the appellant maintained his innocence in all his dealings with his legal representatives and was in a state of upset when he agreed to plead guilty. There is strong reason to think, accordingly, that his plea was not attributable to a genuine consciousness of guilt.

[34] There was no improper inducement, but the pressures under which the appellant was placed, combined with his youth and vulnerability, were such as to lead to the conclusion that his pleas were not made freely and voluntarily. There plainly was an arguable case for the defence; there were inconsistencies and uncertainties in the Crown case, as against the appellant's assertions of innocence. All of those factors taken together lead me to conclude that the convictions entail a miscarriage of justice and should be set aside. I would make the following orders:

1. The appeal is allowed.
2. The appellant's guilty pleas are set aside.
3. The appellant's convictions are set aside.

[35] **WHITE JA:** I have read the reasons for judgment of Holmes JA and agree with her Honour's reasons and the orders she proposes.

[36] **DAUBNEY J:** I respectfully agree with Holmes JA.