SUPREME COURT OF QUEENSLAND

CITATION:	*R v BCK* [2013] QCA 11
PARTIES:	**R** **v** **BCK** (applicant)
FILE NO/S:	CA No 214 of 2012 DC No 1174 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	8 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	31 January 2013
JUDGES:	Muir and Fraser JJA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – PARTICULAR CASES – where applicant convicted of one count of torture – where applicant applying for extension of time to appeal against conviction – where applicant argued her plea of guilty should be set aside because she did not appreciate the nature and seriousness of the offence with which she was charged – where applicant contended she did not understand the case against her as English was her second language – whether there was a miscarriage of justice *Criminal Code* 1899 (Qld), s 320A(2), s 668E(1) *Jeffers v The Queen* (1993) 67 ALJR 288; [1993] HCA 11, cited *Meissner v The Queen* (1995) 184 CLR 132; [1995] HCA 41, considered *R v Carkeet* [2009] 1 Qd R 190; [2008] QCA 143, cited *R v Lewis* (2006) 163 A Crim R 169; [2006] QCA 121, cited *R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, cited
COUNSEL:	The applicant appeared on her own behalf A W Moynihan SC for the respondent

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

[1] **MUIR JA**: I agree that the application should be refused for the reasons given by Fraser JA.

[2] **FRASER JA:** On 9 November 2010 the applicant, who was represented by a solicitor and counsel, pleaded guilty and was convicted of one count of torture. The resolution of a disputed factual question delayed the sentence hearing. The applicant filed an application for leave to withdraw her plea of guilty but that application was withdrawn on 27 May 2011. The applicant was represented by different solicitors and counsel when she was sentenced on 16 September 2011. She was sentenced to four years imprisonment, with an order suspending the imprisonment for an operational period of five years after the applicant had served 14 months. The period of 231 days during which the applicant was held in pre-sentence custody was declared to be imprisonment already served under the sentence.

[3] On 23 September 2011 the applicant applied for leave to appeal against sentence on the ground that it was manifestly excessive. On 29 June 2012 the applicant filed a notice of abandonment of that application. On 23 August 2012 she filed an application for an extension of time within which to appeal. The application does not identify whether it is the conviction or sentence which is sought to be challenged, but on the same day the applicant filed a notice of appeal against conviction only.

[4] In an application for an extension of time within which to appeal against conviction it is relevant to consider whether there is any good reason to explain the delay and the applicant must demonstrate that it is in the interests of justice to extend time: *R v Tait* [1999] 2 Qd R 667 at 668. Although a satisfactory explanation for the delay is usually required, the Court retains a discretion to grant the extension if its refusal would result in a miscarriage of justice: *R v Lewis* (2006) 163 A Crim R 169 at [23]; *R v Carkeet* [2009] 1 Qd R 190. Unless an applicant is able to demonstrate a prospect of success in the proposed appeal, the extension of time should in any event be refused: *Jeffers v The Queen* (1993) 67 ALJR 288 at 289.

The circumstances of the offence and the applicant's personal circumstances

[5] Before discussing the grounds of the proposed appeal against conviction, I will summarise the circumstances of the offence and the applicant's personal circumstances with reference to which she was sentenced and the sentencing remarks.

[6] The applicant was 40 and 41 years old during the period of the offence alleged in the indictment as dates unknown between February 2008 and early in May 2009. She was the step-mother of the complainant child. The child was then between four and six years old. At some unidentified point during the charge period the child told his father that the applicant had beaten him. The father told the applicant that even if the child had done something wrong she could not beat him because it was considered to be child abuse in Australia. Subsequently, on 6 May 2009, the child's

father found the child crying and complaining of a sore bottom. There were marks and bruises on the child's back. The child's father took him to a medical centre, where a doctor observed several broad scabs, approximately 40 mm x 20 mm, across his back and a large abrasion on his lower back. The wounds were subsequently described in more detail after examination at a hospital. There were seven full thickness wounds with a slightly curved appearance across the child's back and buttocks. These were consistent in appearance with having been inflicted a number of days earlier by whipping with an electrical cord. The most extensive lesions were over the child's left buttock. There were also other areas of scarring and extensive criss-crossing alterations to the pigmentation and skin, suggestive of earlier scarring. These old linear scars were consistent in appearance with having been inflicted by an electrical cord. An old scar to the child's upper chest was consistent in appearance with having been inflicted by pinching weeks or months earlier.

[7] At the sentence hearing, the prosecutor submitted and the applicant's counsel accepted on her behalf, that she was responsible for all of the recent injuries and she was also responsible for a substantial number, but not all, of the older injuries; that she had inflicted the injuries evidenced by the linear criss-crossing scars by beating the child with an electrical cord; that she had pinched the child on his chest or stomach area and his legs; and that she had severely beaten the child with the intention of causing severe pain and suffering. She did so in order to discipline the child for a variety of matters, including bed wetting, insulting the applicant, and lying.

[8] In addition to the pain and scarring, the child suffered severe psychological effects. A victim impact statement prepared by the child's current foster parents refers to the child being scared everyday whilst he was living with the applicant. The applicant did not stop beating him when he cried and asked her to stop. After the last beating, which led to the child being placed with the foster parents, he could not sit down because of the pain and was unable to attend school for several weeks. His wounds required daily dressings which were painful. They took just under two months to heal, leaving scars. A portion of the child's buttock had to be removed because of scarring. The child was sensitive about the permanent scars which he carries. He suffered from regular nightmares associated with the applicant and was required to receive fortnightly counselling for over a year and a half.

[9] The applicant was born and brought up in the south of Sudan. She was educated in Khartoum, obtaining a diploma in childcare and physical education in teaching. She taught for 11 years before moving to Egypt. She moved because she feared for her life as a result of ethnic and religious conflict targeting southern Sudanese people. After working as a childcare worker for three years in Egypt, during which period she was married to her first husband, she was granted refugee status with him in Australia. They arrived in Australia some years before the present offending. After the applicant's marriage ended unhappily, she met her second husband, the child's father, who convinced her to apply to the authorities to gain custody of the child. The child was then in foster care. When the applicant was given custody the child was about one month short of five years old. The applicant gave up her job to care for the child full time. According to reports by two psychiatrists and a psychologist, the applicant found the child's behaviour very challenging, the applicant's marriage became very unhappy, and she found herself in a difficult and depressing situation.

[10] The applicant told the psychiatrists and the psychologist that she disciplined the child in accordance with traditional Sudanese values. The applicant made that assertion on the basis of versions which she gave to Dr Milad (that she did not use severe punishment towards the child) and to Dr Grant and Mr Perros (that she did not strike or hit the child on more than one day). According to the accepted facts at the sentence hearing, those versions significantly understated the severity and frequency of the beatings the applicant administered to the child. As to the cultural norms in Sudan, the applicant told the psychiatrists that Sudanese culture allowed the use of mild physical punishment to correct challenging behaviour in young children. The pre-sentence report by the psychologist, Mr Perros, discussed an academic study of child rearing practices amongst selected Sudanese families in South Australia which referred to young Sudanese children being disciplined by being given five lashes on the back with a small stick after two or three warnings. Whilst the evidence suggests that corporal punishment of small children by their parents and other adults was commonplace where the applicant was brought up in south Sudan, there was no evidence that repeatedly beating a small child with an offensive instrument with the intention of causing severe pain and suffering and with such force as to cause extensive or permanent scarring was an acceptable form of domestic discipline. The evidence supported the opinion expressed by Dr Grant that the applicant's physical disciplining of the child exceeded cultural norms in Sudan.

Sentencing remarks

[11] The sentencing judge described the applicant's offending as "a case of severe and extravagant overdiscipline" in which the applicant was "intent on deliberately inflicting injury, suffering and pain to the child". His Honour inferred from the evidence of the observable injuries that the offending occurred over a significant period of some months, that the pinching of the child was relatively minor but that the use of the offensive instrument, the electrical cord, involved whipping the child with shocking consequences.

[12] The sentencing judge took into account the applicant's background and traditional upbringing, but also noted that she had been warned by her husband not to discipline the child in the way she did. His Honour concluded that the applicant's culturally different background was not a substantial factor in favour of mitigating the sentence. In the applicant's favour, the sentencing judge accepted that whilst the applicant lacked insight into her offending in the past, there was growing insight, evidenced by a reference from a counsellor who attested to the applicant's attendance and participation in a program for survivors of refugee related torture and trauma. His Honour also took into account in the applicant's favour her plea of guilty, that she had been waiting for the ultimate resolution of the matter for eight months without knowing the result, that incarceration would be more difficult for the applicant than others because of her cultural background and lack of facility with the English language, the absence of any criminal history and that the applicant suffered from an anxiety disorder and depression. The sentencing judge noted that punishment of the applicant must take into account the impact upon the child, who was desperately hurt.

Proposed appeal against conviction

[13] In seeking to appeal against conviction the applicant faces the obstacle that she pleaded guilty. Section 668E(1) of the *Criminal Code* provides that the Court on an

appeal against conviction "shall allow the appeal if it is of opinion ... that on any ground whatsoever there was a miscarriage of justice …". It was held in *Meissner v The Queen* (1995) 184 CLR 132 at 141 that there is no miscarriage of justice if a court acts on a plea of guilty entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea: and that is so even if the person entering the plea is not in truth guilty of the offence. The applicant entered her plea of guilty in open court and there is no suggestion that she was not of full age and of sound mind and understanding. Her arguments concern the factual basis of the conviction, her understanding of the nature of the charge of torture, and suggested difficulties in understanding the proceedings.

[14] In the applicant's oral submissions in this Court, she accepted that she hit the child with an electrical cord, but she denied that she ever twisted or pinched the child or touched his penis and that she would not let the child go on outings or have friends. She said that she did not hurt the child with the electrical cord and that many of the injuries and bruises found on the child were inflicted by his father rather than by her.

[15] It is apparent from the sentencing judge's remarks, and from an exchange during the sentence hearing when the prosecutor abandoned the tender of material in support of an allegation that the applicant pinched the child's penis, that the sentencing judge did not accept that allegation. The applicant was sentenced in her presence on the basis that, in the course of "severe and extravagant over-discipline" in which she was "intent on deliberately inflicting injury, suffering and pain to the child", she used an electrical cord to whip the child in addition to "pinching the child on the legs and the chest and stomach area which are relatively minor in the scheme of things". As to the nature of the conduct, the applicant's substantial complaint then is that she did not pinch the child or hurt the child when she whipped him with the electrical cord. However, the applicant accepted at the sentence hearing that she did engage in that conduct. After the sentence hearing had been adjourned to facilitate the resolution of factual disputes, and after the applicant had abandoned an application to withdraw her plea of guilty, her counsel expressly disclaimed any dispute about the prosecution contention that the applicant had intentionally inflicted severe pain upon the child and caused the child's severe scarring by more than one beating with an electrical cord and by pinching the complainant on his chest and on his legs. There is no evidence to contradict those accepted facts.

[16] The applicant complained that a witness falsely stated that she had been hitting the child from when the child was four years old, but she only started to discipline the child when she started to take him to school. However the prosecutor made it plain that the time when the conduct commenced was uncertain, and the applicant was sentenced on the basis that, as the sentencing judge observed, the offending occurred only "over a significant period of some months".

[17] The applicant also stated in her notice of appeal against conviction that she understood that hitting the child with the cord was not acceptable and she regretted doing that, but she did not accept that she had ever tortured the child in any way. She stated that she did not realise or understand what the charge of torture was or had meant, and was encouraged by her lawyer to accept it because her lawyer told her that she would get a smaller sentence; she thought that she would be given a sentence like community service and was shocked when told in January 2011 that

she would have to prepare herself for jail. In oral submissions the applicant said that her lawyers had not explained the charge of torture to her.

[18] It should be noted however, that, on the applicant's own argument, after being advised by her lawyers that she should prepare herself for jail in May 2011 she abandoned her application for leave to withdraw the plea of guilty and it was not until September 2011 that she was sentenced. Furthermore, it is clear from her counsel's remarks at the sentence hearing in her presence that the nature of the charge of torture had been explained to her. Her counsel told the sentencing judge that he had spoken to the applicant on a number of occasions about the charge and that "her version of what torture is is entirely different to what the Australian version of torture is, and that had a large part to do with the attempt to change the plea and the disputed facts. [The applicant's] version of torture is someone who's strung up by the feet and dismembered or burnt to death at the stake…that comes from her having been raised in the Sudan…[t]hat's a cause of great consternation to her because she doesn't understand torture the way that we accept the definition – the legal definition of torture."

[19] In light of this exchange and the course of the sentence hearing summarised earlier, and in the absence of any evidence to the contrary, no basis appears for a conclusion that the applicant did not fully appreciate the nature and seriousness of the offence to which she pleaded guilty. The admitted facts amounted to "torture", which is defined to mean "the intentional infliction of severe pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion": *Criminal Code*, s 320A(2). By the applicant's plea, she admitted her guilt of the offence of torturing another person: s 320A(1).

[20] The applicant contended that she found the case extremely difficult to understand because English was her second language and the language spoken by the interpreter was Egyptian Arabic, rather than Sudanese Arabic. The record reveals that the sentence proceedings were interpreted for the applicant by an interpreter who told the sentencing judge that he conversed with the applicant in Sudanese Arabic. The sentencing judge was at pains to ensure that the proceedings were interpreted in a way which ensured that the applicant understood everything that was said in court. The applicant's assertion that the language spoken by the interpreter was Egyptian Arabic is not reconcilable with what the interpreter told the sentencing judge. The applicant's submissions in support of her proposed appeal are also irreconcilable with statements made at the sentence hearing in her presence by the prosecutor, her own counsel, and the sentencing judge. She did not adduce any evidence in support of her submissions.

[21] There is no evidence that the applicant might have been the victim of a miscarriage of justice. I am not persuaded that she has any reasonable prospect of establishing a ground for withdrawing her plea of guilty and setting aside the conviction.

Proposed order

[22] I would refuse the application.

[23] **DALTON J:** I agree with the reasons of Fraser JA and the order proposed.