SUPREME COURT OF QUEENSLAND

CITATION:	*McNamara v Queensland Police Service* [2013] QCA 100
PARTIES:	**McNAMARA, David Myles** (applicant) **v** **QUEENSLAND POLICE SERVICE** (respondent)
FILE NO/S:	CA No 212 of 2012 DC No 50 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	10 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	27 March 2013
JUDGES:	Fraser JA and Margaret Wilson and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The applicant is granted leave to appeal.** **2. The appeal is allowed.** **3. The plea of guilty entered by the applicant on 6 February 2012 in the Gladstone Magistrates Court is set aside.** **4. The matter is remitted to the Gladstone Magistrates Court to be determined according to law.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – PLEAS – OTHER MATTERS – where applicant pleaded guilty in a magistrates court – where applicant also provided material to the court which outlined a possible defence – whether plea should be treated as equivocal and set aside – whether acceptance of the plea amounts to a miscarriage of justice CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – NECESSITY OR EMERGENCY – SUDDEN OR EXTRAORDINARY EMERGENCY – where applicant pleaded guilty – where applicant stated "I believe that what's I have to do because I was speeding" – where applicant provided details of the defence of extraordinary emergency – whether a miscarriage of justice occurred

CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – OTHER MATTERS – where applicant pleaded guilty – where a defence was available and communicated to the court – whether a miscarriage of justice occurred in accepting the guilty plea

Criminal Code 1899 (Qld), s 25
Justices Act 1886 (Qld), s 145
Transport Operations (Road Use Management - Driver Licensing) Regulation 2010 (Qld), s 85, s 86
Transport Operations (Road Use Management) Act 1995 (Qld)

Ajax v Bird [2010] QCA 2, distinguished
Maxwell v The Queen (1996) 184 CLR 501; [1996] HCA 46, followed
McKinlay v Commissioner of Police [2011] QCA 356, cited
Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, considered

COUNSEL: T A Ryan for the applicant
D L Meredith for the respondent

SOLICITORS: Howden Saggers Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Douglas J. I agree with those reasons and with the orders proposed by his Honour.

[2] **MARGARET WILSON J:** I agree with the orders proposed by Douglas J and with his Honour's reasons for judgment.

[3] **DOUGLAS J:** Mr McNamara was charged in the Magistrates Court with exceeding the speed limit by more than 40 kilometres per hour by travelling at 142 kilometres per hour in a 100 kilometres per hour zone along the Bruce Highway at Tannum Sands. He entered a plea by telephone that was treated as one of guilty by the magistrate at Gladstone who decided the case.

[4] He had, however, provided the Magistrates Court with an eight page document explaining why he came to be speeding on the night in question. It tells a story worthy of a scene from a cheap crime novel but one which raises the possibility that he had a defence under s 25 of the *Criminal Code*, that he was dealing with an extraordinary emergency. In my view his plea should, in the circumstances, have been treated as equivocal and should now be set aside.

Background

[5] The appellant was employed as a security officer. His explanation for speeding began with his leaving Townsville to drive to the Gold Coast on the evening of 16 May 2011. He had 90 oz of gold bullion worth $126,000 in his possession to finalise a property purchase at the Gold Coast, something that was known, so far as

he knew, only to a real estate agent involved in the transaction. Early the next morning, when it was still dark, an unknown vehicle came up behind his car and activated its high beam headlights or spotlights but did not pass him, even though he slowed down to allow that. It continued to tailgate him, sometimes at a distance as close as three to four metres.

[6] He perceived this as an attempt to hijack him or his car and as a seriously life-threatening situation. He believed it would be dangerous to pull over and decided to speed up to outrun his pursuers. It was then he believes he was caught by the speed camera. Further on he resumed travel within the speed limit but was again approached by what he assumed was the same vehicle which resumed tailgating him with its lights on high beam until, eventually, it turned off to the left shortly before he reached Miriam Vale. He estimated the episode extended over a distance of about 80 kilometres.

[7] He prefaced his description of the events with a letter which, by reference to a fuel receipt and his infringement notice and the distances of relevant places between Rockhampton and Miriam Vale, set out an attempted reconstruction of the speeds at which he travelled along the Bruce Highway. He described his speeding as resulting "from a controlled manouvre (sic) performed under duress to significantly reduce the likelihood of an accident occurring and prevent harm being caused to myself and/or others or becoming a victim of a criminal act (Robbery)."

[8] One infers from the appeal record that he initially proposed to enter a plea of guilty before the Magistrates Court in Townsville but that the learned magistrate there, when handed his submission, told him that he would have to plead not guilty. He subsequently appeared by telephone before the Magistrates Court in Gladstone where the transcript shows the following exchanges occurred:[1]

> "CLERK: Do you still want him on the phone, your Honour?
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> BENCH: Yes, get him on the phone.
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> CLERK: Before I phone him, he's just emailed me eight pages of stuff in relation to this. I can't clearly see if he's pleading guilty or not guilty. Do you want that printed out?
>
> BENCH: Yes, print it out before we ring him.
>
> Basically what Mr McNamara is saying is that he was being tailgated.
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> MS SULZER: Right. He's contesting the charges then, is he?
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> BENCH: Well, originally he was going to Townsville to plead on it.
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> …
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> BENCH: … I note this matter's come back from Townsville. It was originally sent up there for a plea of guilty and it appears that you've changed that plea. Is that correct?

[1] See AR5 ll 25-42 and AR6 ll 9-60.

DEFENDANT: Well I pled guilty because I believe that's what I thought I had to do. I was speeding, but-----

BENCH: Yes.

DEFENDANT: -----because I handed a submission to the Magistrate he's explained to me that no, I can't do that. So more or less I have to plead not guilty if I'm going to hand up a submission.

BENCH: I don't necessarily agree with that. I think - I've just been given a copy of your submission. I think you've faxed that through this morning, or emailed it, sorry.

DEFENDANT: Yeah, I just emailed it through to Sharyn Joynson.

BENCH: Yes, that's my clerk. All right, look, I've just read it and basically what you seem to be saying is you do acknowledge that you were speeding but you were saying it's a situation where you were being tailgated, I believe.

DEFENDANT: I would say it's a little bit more than tailgating and I've - I've had it go through my mind so many times as to what they were actually trying to do. I will never understand it because the persons that did that weren't caught and I can't provide any information to apprehend them.

BENCH: Okay. Well, look, is it the case that you want the matter dealt with today or-----

DEFENDANT: I would appreciate that, your Honour, because I'm not too sure whether you're aware but there is another cyclone in the - the Coral Sea.

BENCH: Great.

DEFENDANT: So these - these things can just absolutely wreak havoc on North Queensland, as you know.

BENCH: All right. Well, are you formally entering a plea of guilty?

DEFENDANT: Well, yeah, I believe that's what I have to do because I was speeding."

[9] The learned magistrate then proceeded to treat the plea as one of guilty and dealt with him on the basis that he accepted what he had said in explanation of the events. He recorded a conviction but imposed no further monetary penalty. He did not make an order disqualifying the appellant from holding a driver's licence but pointed out to him that Queensland Transport would disqualify him from driving as a result. The learned magistrate said that the appellant may be able to apply for an

order that he be permitted to drive for his work, something that the appellant said would not assist him because his work as a security officer required him to have a licence for all hours. It later transpired that he did not qualify for such a licence because of his traffic record.

[10] He was subsequently disqualified from driving by Queensland Transport because of the speed at which he had been travelling. He then appealed to the District Court on the ground that "having a conviction recorded is a harsh sentence."

[11] Both in the Magistrates Court and the District Court he represented himself and appears not to have had the benefit of legal advice. Before the learned District Court judge the matter was dealt with on the basis that a plea of guilty had been entered and that the suspension of his licence was a statutory consequence of that plea whether or not a conviction was recorded.[2] His Honour adverted to the possibility that there may have been a defence of extraordinary emergency in argument but no submission was made to him by the appellant that the plea was equivocal while the prosecutor submitted that it would have been a "tenuous defence at best" and submitted that the learned magistrate had exercised his discretion to accept the plea.[3]

[12] The learned District Court judge concluded:[4]

> "The difficulty he faces in this appeal is that his conviction upon his plea of guilty is sufficient to cause the legislative consequence of the suspension of his driver's licence. It does not matter whether the conviction is recorded or not recorded. The Court has no jurisdiction in this appeal to consider or to interfere with the suspension order."

[13] It seems that a copy of Mr McNamara's explanation of what occurred was before the Magistrates Court and was on the file that went to the District Court. It was proved by his solicitor's affidavit in this Court. Mr McNamara was legally represented for the first time in the Court of Appeal. The focus of Mr Ryan's submissions for him was that his plea before the Magistrates Court was equivocal and should not have been accepted.

Was the guilty plea equivocal?

[14] Mr Ryan submitted accurately for the appellant that the record does not indicate that the learned magistrate considered a possible defence under s 25 of the *Criminal Code*. Mr Meredith submitted for the respondent that the facts could be construed to lead to the view that Mr McNamara was making an unequivocal plea of guilty for the sake of convenience and because he wished to make submissions in mitigation of penalty. He argued that the plea could be accepted on the authority of *Meissner v The Queen*.[5]

[15] That decision discussed circumstances where a plea of guilty is made properly after reasoned argument or advice is given that merely seeks to persuade an accused person to plead guilty. As Brennan, Toohey and McHugh JJ said:[6] "Reasoned

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2 See ss 85 and 86 of the *Transport Operations (Road Use Management - Driver Licensing) Regulation* 2010 (Qld) as well as the definition of "convicting" under Schedule 4 of the *Transport Operations (Road Use Management) Act* 1995 (Qld).

3 See AR27 ll 42-46.

4 See AR39 ll 25-35.

5 (1995) 184 CLR 132; [1995] HCA 41.

6 (1995) 184 CLR 132, 143.

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." The learned magistrate here did not offer either argument or advice but the appellant showed no signs of appreciating that he may have had a good legal defence to the charge while offering evidence that, objectively speaking, suggested the existence of such a defence.

[16] Mr Meredith also submitted that the appellant was probably not in danger when the speed camera caught him but that is something that should not be determined on an appeal in the absence of further evidence or cross-examination directed to that issue.

Discussion

[17] I am not comfortable with the acceptance of the submission that the plea was entered voluntarily in circumstances such as occurred here, where a lay person has offered an explanation consistent with the existence of a potential defence under s 25 and where the learned magistrate has not adverted to that issue. He accepted a plea couched in the appellant's language: "I believe that's what I have to do because I was speeding" but where the explanation he had offered clearly raised the possibility of the defence of extraordinary emergency.

[18] The consequences of allowing the guilty plea to stand are that the appellant's earning capacity has been significantly impaired and he has been convicted where he has a reasonable argument that he should not have been.

[19] The test to be applied is not in doubt. In *Maxwell v The Queen*,[7] Gaudron and Gummow JJ said:

> "… In general terms and leaving aside a plea to a lesser charge, the power to reject a plea is a power which is exercised where the plea is equivocal or does not constitute a confession of guilt (for example, if it is accompanied by a statement which indicates that the accused denies or does not admit some element of the offence charged) or, for some other reason, there are grounds for thinking that the accused is not criminally responsible for the offence to which he or she has pleaded guilty.
>
> The nature of the exercise involved in the rejection of a plea and in the grant of leave to withdraw a plea is such, in our view, that it must be concluded that conviction only occurs when the court does some act which indicates that it has determined guilt or, which is the same thing, that it has accepted that the accused is criminally responsible for the offence in question."

[20] Here, in my view, there has been a miscarriage of justice caused by the acceptance of the plea as a guilty plea which we have the power to correct by exercising the power the District Court would have had to set aside the plea.[8]

[21] The circumstances of this case raise again the issue of whether the substance of the complaint has been stated to the appellant when he was asked to plead. It is

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7 (1996) 184 CLR 501, 531 (citations omitted); [1996] HCA 46, applied in circumstances similar to these in *R v GV* [2006] QCA 394 at [38].

8 Cf *Ajax v Bird* [2010] QCA 2 at [7] in the case of an appeal where there has been an unequivocal guilty plea.

desirable to point out that s 145 of the *Justices Act* 1886 (Qld) requires the substance of the complaint to be stated to the defendant, when present at the hearing, when the defendant shall be asked how he or she pleads. That did not occur here. It may not have affected the result in this case but the desirability of following the statutory procedure has already been pointed out in this Court, something which needs to be reinforced.[9]

Order

[22] Accordingly, I would order that:

(a) the appellant be granted leave to appeal;
(b) the appeal be allowed;
(c) the plea of guilty entered by the applicant on 6 February 2012 in the Gladstone Magistrates Court be set aside; and
(d) the matter be remitted to the Gladstone Magistrates Court to be determined according to law.

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[9] See *McKinlay v Commissioner of Police* [2011] QCA 356 at [22]-[33].