SUPREME COURT OF QUEENSLAND

CITATION:	*R v CAP (No 2)* [2014] QCA 323
PARTIES:	**R** **v** **CAP** (applicant)
FILE NO/S:	CA No 182 of 2014 DC No 241 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	5 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	5 November 2014
JUDGES:	Muir, Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Refuse the application for an extension of time to appeal against conviction.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – where the applicant sought an extension of time to appeal against conviction and sentence – where the application to extend time for leave to appeal against the sentence was refused on 2 October 2014 – where the applicant was ordered to file and serve any affidavit in support of the application for extension of time to appeal against conviction by the 23 October 2014 – where the applicant was charged with 14 counts in 2006 – where the counts included; nine counts of rape, four counts of carnal knowledge against the order of nature; and one count of assault occasioning bodily harm whilst armed – where the applicant pleaded guilty to all 14 charges – where in 2008 the applicant applied for an extension of time to appeal against conviction and sentence – where in 2009 when that application was heard the appeal against conviction was abandoned, except in respect of count 5 which related to carnal knowledge of an animal – where the respondent conceded that count 5 was not made out and the conviction was set aside for that count – where the current application for an extension of time to appeal against conviction is in relation to

the remaining 13 charges – where the delay in seeking an appeal is nearly six years – where the applicant had assistance in filing the first application in 2008 – whether there is an adequate explanation for the delay – where the merits of the proposed appeal are considered – whether the material filed is sufficient enough to justify an extension of time to be granted

R v CAP [2009] QCA 174, related
R v CAP [2014] QCA 247, related
R v Lewis (2006) 163 A Crim R 169; [2006] QCA 121, applied
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, applied

COUNSEL: The applicant appeared on his own behalf
D R Kinsella for the respondent

SOLICITORS: The applicant appeared on his 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 Morrison JA.

[2] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the order proposed by his Honour.

[3] **MORRISON JA:** This is an application for an extension of time to appeal against convictions on 13 offences. The application originally included an application for an extension of time leave to appeal against the sentences imposed, but that application was refused on 2 October 2014.[1] At that time orders were made that the present application be adjourned, and that the applicant file and serve any affidavit in support of the application by 23 October 2014. The result is that the applicant relies on two affidavits, filed on 8 July and 14 October 2014.

Applicable legal principles

[4] On an application for an extension of time to appeal in a criminal matter the principles have been well established in *R v Tait*[2]. The court examines whether there is any good reason shown to account for the delay, and considers whether it is in the interests of justice to grant the extension. That may involve some assessment, of the viability of the proposed appeal, or as it has been called, a provisional assessment of the strength of the appeal. Further it is accepted that a short delay is easier to excuse than a long one.

[5] Further, as *R v Lewis*[3] shows, even where there is no satisfactory explanation for not bringing an appeal within time, the court should not refuse the application to extend time if the applicant is able to demonstrate that to refuse it would result in a miscarriage of justice.

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1 *R v CAP* [2014] QCA 247.
2 [1999] 2 Qd R 667, at 668 [5].
3 [2006] QCA 121 at [3]; see also *R v Nuttall* [2013] QCA 219 at [19] and *Craber v WorkCover Queensland* [2013] QCA 304 at [13].

History of the proceedings

[6] The applicant was arrested on 9 September 2006, on 14 charges which can be summarised as follows:

(a) four counts of rape of his daughter;

(b) two counts of rape against one niece, and two counts of rape against a second niece, and one count of rape against a third niece;

(c) four counts of carnal knowledge against the order of nature (including count 5, relating to carnal knowledge of an animal); and

(d) one count of assault occasioning bodily harm whilst armed.

[7] There was a committal proceeding which included cross-examination of each complainant. The applicant's plea of guilty was only indicated one week before the trial, which was set for 12 May 2008. On that day the applicant pleaded guilty to all 14 charges on the indictment, and was sentenced on 15 May 2008.

[8] On 1 September 2008 the applicant applied for an extension of time to appeal against conviction and sentence. He was represented by Legal Aid Queensland at that time. The applications were heard on 2 June 2009.[4]

[9] The reasons of this Court on the hearing of that application record some pertinent facts. The applicant first contacted Legal Aid Queensland on about 21 July 2008, and that office prepared the Notice of Appeal which was subsequently filed. The delay in filing the Application for Leave to Appeal against Sentence, and the Appeal against Conviction, was explained by the applicant's loss of contact with his then solicitors, and more particularly by his being hospitalised in July and August 2008.[5]

[10] The appeal against conviction was abandoned, except in respect of count 5. The respondent conceded that count 5 was not made out and that conviction was set aside.[6]

[11] The applicant was represented by senior counsel, instructed by Legal Aid Queensland, on the hearing of his application and appeal on 2 June 2009.

The current application

[12] The current application was filed on 8 July 2014. When the application was heard on 2 October 2014 the application for an extension of time to appeal against the conviction was not pursued on the merits.[7] Mullins J[8] referred to the applicant's material in these terms:

> "Although the applicant's material in the form it presently takes fall far short of material that would justify and extension of time to appeal against the conviction, the material foreshadows a claim of duress in

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4 *R v CAP* [2009] QCA 174.
5 [2009] QCA 174, at [4].
6 [2009] QCA 174, at [6]-[9].
7 [2014] QCA 247, at p 3.
8 With whom Holmes and Gotterson JJA agreed.

> relation to the guilty pleas and that the appeal would be pursued on the basis that the pleas of guilty involved a miscarriage of justice."[9]

[13] For that reason directions were given for further material to be filed by 23 October 2014.

The applicant's affidavit

[14] The affidavit filed on 14 October 2014 reveals these matters:

(a) that when the applicant was sentenced he:

> "had no idea that [he] could even appeal, let alone have 28 days in which to lodge an appeal ... [he] had nobody to help [him] … [he] was not in any state to read anything or to make progress to lodge an appeal or even to find out that there was such an avenue that [he] could have taken";[10]

(b) that he applicant denies that a legal person attended on him while he was in hospital in Townsville, to prepare an appeal for him;[11] that denial is based upon the fact that he has no recollection of it occurring;

(c) that the applicant has

> "closely scrutinised all the material regarding my sentencing and conviction made available to me, and can see faults with what acts of sexual depravity the complainants alleged I did them to (sic)";

(d) "Due to medial [sic] serious medical conditions and my psychological and emotional states at the time of sentencing" an appeal could not be lodged within time; and

(e) the applicant "would like a retrial where all of the complainants and witnesses would be cross-examined so that the truth may be forthcoming."[12]

Discussion

Explanation for the delay

[15] By way of explaining the delay of nearly six years, the applicant has referred to his medical conditions and mental state when he was in hospital, which appears to have been in July and August 2008.[13] The applicant also refers to the fact that he "had nobody to help [him]", and had "no idea that [he] could even appeal".

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9 [2014] QCA 247, at p 3.
10 Paragraph 1E of the affidavit.
11 This responds to an affidavit from a Legal Aid lawyer, swearing that a Legal Aid welfare officer had seen him in hospital and helped prepare the appeal forms. See paragraph [14].
12 Paragraph 1E of the affidavit.
13 [2009] QCA 174, at [4].

[16] Those explanations are not sufficient. It is clear that the applicant had the assistance of Legal Aid Queensland when his first application to appeal against his conviction was filed on 1 September 2008. Explanations were given at that time for the delay in filing the application. Clearly the applicant had the assistance of Legal Aid Queensland in preparing those explanations, and filing the material to support them. Further, at the time that the application was heard, on 2 June 2009, the applicant also had the assistance of senior counsel instructed by Legal Aid Queensland. Given that the appeal against conviction was abandoned, except in respect of count 5, it is not difficult to infer that the applicant had the benefit of advice from both Legal Aid Queensland and senior counsel in respect of taking that course.

[17] It may be, though the evidence is not in a state where a finding could be made, that the applicant suffered some sort of incapacity whilst in hospital in July and August 2008. However, nothing of that kind is suggested for the period thereafter, either between then and 2 June 2009 when the first application was heard by this Court, or the almost five and a half years between then and now. Were any such contention to be advanced, it would need to be supported by proper material, and particularly material which could attest to the medical basis for suggesting ongoing disablement.

[18] Part of the material relied upon by the respondent includes an affidavit sworn on 28 May 2009 by a lawyer employed by Legal Aid Queensland. That affidavit was evidently filed in 2009 to explain the delay for the first application heard by this Court. The affidavit reveals that on 29 April 2009 the applicant gave instructions for the reasons for delay. They included that: the applicant could not recall whether he received a letter from his solicitor advising of his appeal rights; he was hospitalised for about five weeks in July or August 2008 for a heart condition and kidney problems; and while he was in hospital in August 2008 "a welfare officer came to see him and helped him to prepare the appeal forms that [Legal Aid Queensland] had sent to him". The applicant's current denial of the last point is based upon his present lack of recollection. Given that he gave those instructions five and a half years ago, and thus much closer to the time, his current denials are not compelling.

[19] There is, therefore, no adequate explanation for the delay in making the application.

Merits of the proposed appeal

[20] The only points put forward by the applicant touching the merits of his proposed appeal, consistent of three things:

(a) that he has read the material regarding his sentencing and conviction and "can see faults with what acts of sexual depravity the complainants allege I did";[14]

(b) that he would like a re-trial, where all of the complainants and witnesses would be cross-examined "so that the truth may be forthcoming"; [15] this is evidently because the complainants did not understand questions because of language problems;[16] and

(c) that he was the subject of some form of duress at the time of entering the pleas of guilty.[17]

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14 Affidavit 14 October 2014, paragraph 1(E).
15 Affidavit 14 October 2014, paragraph 1(E).
16 Affidavit filed 8 July 2014, paragraph 8.
17 Affidavit filed 8 July 2014, paragraph 7.

[21] The first point does not assist the applicant. It is an unspecified allegation that there are "faults" in relation to the allegations of the conduct constituting the offences. The faults are not identified, nor the basis for contending that any of them might constitute a miscarriage of justice.

[22] The applicant's desire for a re-trial so that the complainants and witnesses could be cross-examined, does not advance the application. Once again there is no identification of any fact that might constitute a miscarriage of justice. As it was, there was a full committal, with cross-examination of each complainant.[18] The unsworn material refers to the assertion that the young girls involved in the offences had language difficulties and did not understand the questions. It sets out that they did not have English as their first or even second language, and therefore "would not have known what sodomy and bestiality was", as in their own languages "they would have their own words for those acts". Assertions are also made about misinterpretation during the legal proceedings. No material has been filed to support these assertions.

[23] There is nothing to substantiate the alleged difficulties with language; and certainly nothing that would suggest that a miscarriage of justice has occurred. The applicant's pleas of guilty were entered following the committal. No ground to challenge the convictions is raised by this point.

[24] The third point relates to the unsubstantiated allegations of duress. The applicant's material in this respect is in the same condition that it was when this Court heard the application on 2 October 2014. Mullins J described the material as falling "far short of material that would justify an extension of time to appeal against a conviction".[19] A review of the material supports that conclusion.

[25] In his affidavit filed 8 July 2014 the applicant asserted that he had pleaded guilty to charges for which he was not guilty and said:

> "[7] That for those particular charges for which I pleaded guilty, the reason was that [I] was instructed to plead guilty and did so under great duress and having placed full trust in my legal representative.
>
> [8] That more than one alleged victim of mine lied in their statements and/or did not understand what was being asked them/did not understand the language."

[26] The respondent has provided the transcripts of the applicant's plea and sentencing in 2008. Several facts are apparent from those transcripts, namely:

(a) the applicant was represented by counsel instructed by the Aboriginal and Torres Strait Islander Legal Service, on each occasion; the first was on 12 May when pleas of guilty were entered to each count, and the second was on 15 May when the sentence hearing took place;

(b) on 12 May 2008, the applicant responded to questions concerning whether he had read each count in the indictment, fully understood them, and had sought and received advice from his counsel in respect of them; the answer was affirmative to each question;

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18 [2009] QCA 164, at [19].

19 [2014] QCA 247, at p 3.

(c) the sentence hearing is recorded in nearly 30 pages of transcript; counsel for the applicant participated fully in that hearing, including providing a deal of information about the applicant that could only have been the product of instructions given to him by the applicant himself; that included instructions about the nature of the committal, and the nature of the cross-examination of the complainants at that committal; and

(d) the schedule of facts, which was tendered by consent, recorded the detail of the rapes against the applicant's daughter and nieces; it also records that there was DNA evidence which confirmed that the applicant was the father of the child born to his daughter.

[27] Attached to the affidavit by the applicant filed on 8 July 2014 is a document described as "submission/information to dispute the complainants versions of events". In that unsworn document the applicant contends that he was never questioned about the sodomy or bestiality offences, or at least "not that I can remember anyway". He suggests that the first time he heard about the sodomy and bestiality charges was when they "were read out". That assertion cannot be sustained in light of the transcripts. The applicant was arraigned so that he could, as his counsel requested, "plead in bulk". That is what occurred, and therefore there was no occasion on that day when the charges were read out. After the guilty plea had been entered the charges were referred to in these terms:

> "… you have been convicted on your plea of guilty of nine counts of rape, four counts of unnatural offences and one count of assault occasioning bodily harm with a circumstance of aggravation."

[28] Further, counsel for the applicant told the sentencing judge, on 12 May 2008, that the schedule of facts was tendered by consent, and counsel had "been through it with [the applicant]". That schedule of facts lists all the occasions of sodomy and the occasion of bestiality, in detail.

[29] The applicant also asserts that his counsel "instructed me to be quiet, shut my mouth, and say nothing" on the occasion when he pleaded guilty and that shortly before that appearance counsel "informed me that – practically exact words – 'if you plead not guilty, I cannot defend you anymore (sic)'". Neither of those assertions, in the absence of greater particularity and sworn evidence, can possibly amount to a credible case of duress in terms of entering the pleas of guilty. No doubt the applicant's counsel told him that if he changed his plea to not guilty, then that counsel could not act for him. That was evidently because the applicant had acknowledged the offences in conference with his counsel, when his counsel took him through the agreed schedule of facts. The applicant's plea of guilty to at least the count of rape against his daughter which resulted in her becoming pregnant and giving birth, was completely understandable, given that there was DNA evidence which confirmed that the applicant was the father of his daughter's child. Further, the proceedings on 12 May, which was the day when the pleas of guilty were entered, was a short hearing during which the applicant was not required to say very much. No doubt the applicant was instructed by his counsel to answer the relevant questions, but otherwise to keep quiet and say nothing.

[30] The applicant asserts in unsworn material that he did not realise until 2010, when he first read the statements and transcripts, that he had never met or known some of the

people who gave evidence. Once again these assertions are not supported by proper evidence, and must be doubted in light of the applicant's agreement to the schedule of facts tendered at the sentencing hearing, and his counsel's statement that he had taken the applicant through those facts. That schedule identifies each of the complainants, their relationship to the applicant, and those present at the time when the offences occurred.

[31] The applicant's complaints, at least insofar as they concern the assertions of duress in respect of the pleas of guilty, suffer not only from the fact that they are made in unsworn material, but also from the fact that they were not raised until the applicant's affidavit was filed on 8 July 2014. They do not seem to have featured in any of the material on the first application to this Court in 2009.

Conclusion

[32] For the reasons expressed above no adequate explanation has been given for the delay in filing the application, there are no demonstrated prospects of success in the proposed appeal, and no miscarriage of justice would occur if leave was refused.

[33] I would refuse the application.