SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pilot* [2014] QCA 275
PARTIES:	**THE QUEEN** **v** **PILOT, Lomax Douglas** (appellant)
FILE NOS:	CA No 46 of 2014 DC No 183 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED EX TEMPORE ON:	6 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2014
JUDGES:	Gotterson and Morrison JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. The pleas of guilty entered before Judge McLauchlan QC on the 30th of April 2007 are set aside.** **3. A re-trial on the counts to which the appellant then pleaded guilty is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant pleaded guilty to seven sexual offences in 2007 – where the appellant was detained under the *Dangerous Prisoners (Sexual Offences) Act* 2003 (Qld) at the end of his sentence – where the appellant suffers from significant cognitive impairment – where in 2012 the Mental Health Court found the appellant permanently unfit for trial for an earlier offence committed in 2002 – where the Director of Public Prosecutions does not oppose the appeal – whether there was a question as to the appellant's fitness to plead *Criminal Code* 1899 (Qld), s 668E *R v Dunn* [2014] QCA 254, applied
COUNSEL:	S M Ryan QC for the appellant V A Loury for the respondent

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

GOTTERSON JA: I now invite Justice McMeekin to give reasons in respect of this matter.

McMEEKIN J: The appellant is Lomax Douglas Pilot. On 30 April 2007 in the District Court of Townsville, Mr Pilot was convicted on his own pleas of guilty of seven sexual offences by Judge McLauchlan QC. He was sentenced to five years imprisonment, suspended after three years, with an operational period of five years. As matters have transpired, at the end of his sentence, Mr Pilot was detained under the *Dangerous Prisoners (Sexual Offences) Act* 2003. Mr Pilot appeals now on the basis that he was not fit to stand trial in April 2007. This Court granted him an extension of time in which to appeal on 13 May 2014.

The Director of Public Prosecutions has investigated the matter and does not oppose the appeal. That attitude is, with respect, entirely appropriate, given the evidence now placed before the Court. In the circumstances, it is not necessary to go into the facts in any great detail.

The relevant test that must be applied on this question was explained by McMurdo P in *R v Dunn* [2014] QCA 254 at [63], and I quote:

> "Under s 668E(1), *Criminal Code*, this Court is bound to allow the appeal and set aside the convictions if there has been a miscarriage of justice. As Justice Hayne explained in *Eastman*, there will be a miscarriage of justice if an accused has gone to trial and been convicted when he may not have been fit to plead and stand trial. If there is a real and substantial question to be considered about an accused's fitness to plead, there is a miscarriage of justice. The question is not whether the Appellate Court is persuaded the accused was not fit to plead, but whether there was a question as to the

> accused's fitness. Only if the appellate court is affirmatively persuaded that no tribunal, acting reasonably, could conclude that the accused was not fit may that court determine that no miscarriage of justice has occurred so that the question of fitness can be put aside."

As it is not necessary that this Court be persuaded that Mr Pilot was unfit to plead in 2007, only that he may not have been fit to plead, it suffices to say that the evidence gathered amply satisfies that test. I'll briefly describe that evidence.

The relevant offences were alleged to have occurred in 2006 when Mr Pilot was aged 18 years. In 1996, Mr Pilot fell from a tree and suffered traumatic brain injury. He was then a child aged 10 years. It's now recognised that, as a result of the injury he sustained, he has significant cognitive impairment. Those who acted for the appellant in 2007 now have no particular recollection of him or of the consideration that they gave to this issue. Some records have been lost. However, it is evident from contemporaneous letters that there was, then, a concern about Mr Pilot's fitness to plead. A solicitor with Independent Advocacy Townsville expressly raised the issue when referring Mr Pilot to the solicitors who acted on the sentence. The barrister retained wrote in an application for funding for a psychological report two months before the sentence that it appeared to the barrister that the appellant had, and I quote:

> "…little understanding as to the nature or seriousness of the offences."

The solicitors retained also recorded in a letter of instruction to the psychologist that the appellant seemed, and I quote:

> "…not fully understanding what has just been said to him."

A psychologist's report was obtained in February 2007. The psychologist seems to have interpreted her instructions as limited to providing an opinion to go in mitigation of sentence; hence, she did not consider this issue. Mr Pilot's responses to her questioning, as described in her report, raises concerns as to his mental state. It is noteworthy that in

her report the psychologist expressly advised that the appellant's behaviour, observed by her, was indicative of a psychological diagnosis that was, and I quote:

> "…beyond the scope of her report to specify."

It would seem from the material that there was some confusion on the part of those then acting for the appellant as to whether the matter ought to be referred to the Mental Health Court. It was not.

On 4 October 2011, the appellant was charged with one count of rape, allegedly committed in 2002. The question of the appellant's fitness to plead was referred to the Mental Health Court. On 12 September 2012, that Court found that the appellant was permanently unfit for trial in respect of the 2002 offence.

The appellant has now obtained a report from a psychiatrist, Dr Jane Phillips. Dr Phillips has made an extensive review of the collateral evidence concerning Mr Pilot's mental state in 2007. That evidence includes reports that in the days and weeks either side of the sentence, notations were made by psychologists and prison officers of the appellant's observed behaviour that raised significant concerns about the appellant's mental state. A month after the sentence was imposed, Mr Pilot was admitted to the secure Mental Health Unit. Dr Phillips is of the view that the appellant was not fit to plead in April 2007 and that his unfitness is permanent. Her opinion is consistent with the finding of the Mental Health Court. It is unopposed by any countervailing opinion and seems, with respect, to be a considered appraisal of all the available evidence.

There is, thus, a demonstrated brain injury long before the sentence, concerning contemporaneous evidence as to Mr Pilot's behaviour and thinking, a recognition by a psychologist two months prior to sentence that Mr Pilot had an undiagnosed psychological condition, and persuasive and unchallenged expert opinion as to his mental state in April 2007 to the effect that Mr Pilot was not fit to plead. In the premises, I am satisfied that when Mr Pilot was called on to plead in April 2007, there was a real and substantial question to be considered about his fitness to plead. That being so, in being

called on to plead in April 2007, there occurred a miscarriage of justice under s 668E(1), of the *Criminal Code*. This Court is bound to allow the appeal.

While accepting that there is a real and substantial question to be considered, the Director does not concede that Mr Pilot was, in fact, unfit to plead to the relevant charges. That issue will need to be determined, at least initially, by the Mental Health Court.

I would order that the appeal be allowed, that the pleas of guilty entered before Judge McLauchlan QC be set aside and a re-trial of the charges ordered.

GOTTERSON JA: I agree.

MORRISON JA: I also agree.

GOTTERSON JA: The orders of the Court are:

1. Appeal allowed;
2. The pleas of guilty entered before Judge McLauchlan QC on the 30th of April 2007 are set aside; and
3. A re-trial on the counts to which the appellant then pleaded guilty is ordered.

McMEEKIN J: The issue of Mr Pilot's continued detention finds a solution in the application for bail made today by the appellant. I observe that Mr Pilot has now served the sentence that Judge McLauchlan imposed. It would be entirely inappropriate that he be further detained in custody. Because of the rather tortured nature of what has occurred to Mr Pilot over the years because of his acquired brain injury and his mental state and the fact that he is presently detained under various orders at The Park Centre for Mental Health at Wacol, it is obviously desirable that he continue in residence there for his own safety and the safety of the public. In all the circumstances, it seems to me there is no question that he deserves to be admitted to bail, but that needs to be conditioned. Counsel have liaised on the matter and agreed on an order that they submit is appropriate. I agree that the order proposed with the conditions set out therein is an appropriate one to make in all the circumstances.

GOTTERSON JA: I also agree.

MORRISON JA: I agree also.