

SUPREME COURT OF QUEENSLAND

CITATION: *R v Murphy* [2016] QCA 45

PARTIES: **R**
v
MURPHY, John Steven
(applicant)

FILE NO/S: CA No 317 of 2014
DC No 861 of 2013

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Conviction)

ORIGINATING COURT: District Court at Brisbane – Date of Conviction: 12 February 2014

DELIVERED ON: 1 March 2016

DELIVERED AT: Brisbane

HEARING DATE: 22 February 2016

JUDGES: Gotterson and Morrison and Philip McMurdo JJA
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **The application for an extension of time is refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – GENERAL PRINCIPLES – where the applicant was convicted of rape and unlawful and indecent dealing with a child under 16 – where the applicant did not appeal his conviction within the requisite period – where the applicant seeks leave for an extension of time to appeal – where the applicant claims that a miscarriage of justice has occurred because the complainant’s evidence was misunderstood by the jury at trial, and because there were discrepancies and inconsistencies in the evidence could not support a guilty verdict – whether there was a miscarriage of justice

R v CAP (No 2) [\[2014\] QCA 323](#), cited

COUNSEL: The applicant appeared on his own behalf
S J Farnden for the respondent

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

- [1] **GOTTERSON JA:** I agree with the order proposed by Morrison JA and with the reasons given by his Honour.
- [2] **MORRISON JA:** On 12 February 2014 Mr Murphy was convicted, after a trial, on two counts. Count 1 was that on an unknown date between 15 March 2012 and 31 March 2012 Mr Murphy raped the female complainant. She was then 12 years old. Count 2 was that on 27 May 2012 Mr Murphy unlawfully and indecently dealt with the same complainant, then a child under 16.
- [3] Mr Murphy did not appeal against his convictions within the requisite period to do so, which expired on 12 March 2014. I will shortly examine his explanation for that.
- [4] He now seeks to extend the time to appeal his convictions. His application was filed on 2 December 2014. It was thus nearly nine months after when an appeal should have been lodged.
- [5] The issues raised by this application are whether:
- (1) there is any good reason to account for the delay; and
 - (2) overall, is it in the interests of justice to grant the extension of time?¹
- [6] The applicable principles are well known. In *R v CAP (No 2)* the Court recently restated them:²
- “[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*.³ 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*⁴ 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.”
- [7] In *R v Abell*⁵ it was observed that:
- “If an applicant is unable to demonstrate that a proposed appeal has any prospect of success, the application for an extension of time may be refused on that ground alone: *Jeffers v The Queen* (1993) 67 ALJR 288 at 289.”

Explanation for the delay

- [8] Mr Murphy’s explanation for the delay is this:

¹ *R v Tait* [1999] 2 Qd R 667 at [5].

² [2014] QCA 323 at [4]-[5].

³ [1999] 2 Qd R 667 at 668 [5].

⁴ [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].

⁵ [2015] QCA 144 at [5].

- (a) after conviction and sentencing he did not receive a letter about his appeal rights;
 - (b) he was not given legal advice about the prospects of an appeal, the applicable limitation period, or that Legal Aid would assist with lodgement of the notice of appeal;
 - (c) his “friends asked [his] lawyer about appealing” the conviction, and related that they had been told that “it would cost about \$50,000”;
 - (d) as a consequence, he thought an appeal was not possible and he took the view that he “just had to cop what happened”;
 - (e) eventually, in October 2014 he was told that he could apply for an extension.
- [9] None of that explanation is given on oath in affidavit form, but appears in the grounds of the application.
- [10] The explanation is contradicted by an affidavit from Mr Shields, Mr Murphy’s solicitor at the trial. He deposes that:⁶
- (a) he and Senior Counsel appeared for Mr Murphy at the trial;
 - (b) after the sentence, advice was given to Mr Murphy that Mr Shields and Senior Counsel were jointly of the view that there was no appealable error;
 - (c) Mr Murphy instructed them not to file a notice of appeal;
 - (d) he could not recall whether he advised as to the 28 day appeal period;
 - (e) Mr Murphy also instructed that he did not want any correspondence sent to him in prison.
- [11] After that affidavit was provided and referred to in the respondent’s outline, Mr Murphy filed an outline in response.⁷ That response does not take issue with what Mr Shields deposed, but urges his grounds for the proposed appeal. Orally Mr Murphy asserted that there was no contact with Mr Shields, but that assertion was not on oath and cannot be given any weight. The application was part heard on 23 September 2015 and adjourned, with a direction that further outlines be provided before the resumed hearing. Mr Murphy has filed a further outline⁸ but still does not challenge what Mr Shields deposed.
- [12] Thus the case is one where Mr Murphy was advised that there was no basis for an appeal, and instructed his lawyers not to file one. Nearly nine months later he has applied to be permitted to appeal because of the ground he has identified, and to which I will come.
- [13] Good reason to account for the delay between 12 March 2014 and the filing of the application has not been shown.

Prospects of the proposed appeal

- [14] Mr Murphy’s proposed points for appeal are that a miscarriage of justice has occurred because:

⁶ Affidavit of Mr Shields filed 4 September 2015, [4]-[8].

⁷ Outline filed 14 September 2015.

⁸ Dated 3 December 2015.

1. if the complainant's evidence had been properly understood it would have been clear that he was not at the complainant's house at the time of the rape offence; put shortly he says that the complainant's evidence was that the rape occurred on the weekend of 24 to 25 March 2012, and he was only at the house on 31 March 2012; and
2. there were such discrepancies and inconsistencies in the evidence that the verdict could not be supported.⁹

First point - date of the offence

[15] To advance the first point Mr Murphy draws upon a number of passages in the learned trial judge's summing up to the jury, where the complainant's evidence was referred to. The complainant identified her birthday as being 15 March, and as to the time of the offence, said:

- (a) "I think it was March, my birthday. March. And it was before my last one, so near March";
- (b) it was after her birthday, on a weekend; she thought it was on a Saturday;
- (c) in her third interview with the police she said it was after her birthday; on her birthday weekend her family had visited and it was the weekend after that; it was a Sunday morning.

[16] There was a formal admission at the trial that Mr Murphy had been at the complainant's house on 31 March 2012.

[17] For a number of reasons Mr Murphy's contention cannot be accepted:

- first, the complainant's evidence was the best of her memory; a perusal of the account in the summing up suggests that she was not being definite that it was the weekend of 24 and 25 March; whenever it was, she was only definite it was after her birthday;
- secondly, the inconsistencies in the complainant's evidence, as to the dates, were explored in cross-examination, in the addresses to the jury,¹⁰ and in the summing up; the jury did not have to accept that it was the weekend of 24 and 25 March, as opposed to 31 March when Mr Murphy admitted he was there; it is evident on a perusal of the transcript that other inconsistencies (referred to by Mr Murphy in his oral address) were also explored, particularly in cross-examination, but also in addresses to the jury;¹¹ they were matters for the jury to consider;
- thirdly, Mr Murphy's case at trial was not that he was somewhere else at the time, but that the offending conduct had simply not happened;¹²
- fourthly, Senior Counsel for Mr Murphy addressed the jury on the basis that "there was no doubt that [Mr Murphy] was there on the weekends concerned", but that others were there and that would make it improbable that the offending conduct would have occurred;¹³

⁹ This point was raised orally on 23 September 2015 and an adjournment was granted to permit Mr Murphy access to the trial transcripts so the point could be developed. His further outline filed on 3 December 2015 addresses this point.

¹⁰ Summing up transcript: T 61 line 24.

¹¹ T 60-63.

¹² T 2 lines 38-42; T 11 line 42; T 16 line 39; T 62 line 42.

¹³ T 60 lines 38-46.

- fifthly, the reference by the learned trial judge to the significance that there was no complaint “between the 26th and 27th of March and the time in June where [the complainant] disclosed it to a friend”,¹⁴ does not assist; the trial judge was summarising the address by Mr Murphy’s Senior Counsel, and offering no comment of his own; further, that comment has to be seen in light of the fact that the jury members were told by Mr Murphy’s own Counsel that there was no doubt that Mr Murphy was there “on the weekends concerned”; Senior Counsel was simply picking the first possible time on the evidence;
- sixthly, when the learned trial judge finished the summing up in those terms, Senior Counsel for Mr Murphy did not seek a redirection to correct what is now said to be an error.

[18] I pause to note that Mr Murphy does not advance any specific ground to support a challenge to the conviction on count 2. All that is advanced is that: (i) Mr Murphy was only a visitor, and he was not romantically involved with the complainant’s mother; (ii) the complainant could have complained earlier; and (iii) if the complainant was scared, as she said she was, why would she remain in Mr Murphy’s presence.¹⁵

[19] Those matters are ones for the jury, and were the subject of address.¹⁶ They do not establish that a miscarriage of justice has occurred, in respect of either conviction. I do not consider that the first ground of the proposed appeal has merit.

Second point – inconsistencies in the evidence.

[20] As developed in the further outline this point focused on four main areas of contended inconsistencies in the evidence:¹⁷

- (a) the first area concerned that part of the Crown case that concerned the discovery of condoms in Mr Murphy’s car, and the conversation the complainant said she had with him about condoms and their use; Mr Murphy pointed to variations in the evidence as to who asked for a phone to be retrieved from the car, which led to the condoms being discovered; he also pointed to variations in the evidence as to where he was when the request for the phone was made;
- (b) the second area concerned the evidence from the complainant and her mother as to an inappropriate conversation between the complainant and Mr Murphy on the verandah of the house one night; Mr Murphy pointed to the fact that the mother had not referred to the event in her police statement;
- (c) the third area concerned differences in the evidence as to what the complainant said (that she was actually touched), and her mother’s statement to police as to what she was told by the complainant (that Mr Murphy did not physically touch her, but pointed towards her “vaginal area”); and
- (d) the fourth area concerned inconsistencies in the complainant’s account as to the second charged event, appearing from a police statement and evidence of L (a friend of the complainant); L said the complainant’s account to her, as to one charged event, was that the event occurred on a day when L had been at the property, whereas neither the complainant, her mother or M (the complainant’s

¹⁴ T 61 line 30.

¹⁵ Outline in response, page 4.

¹⁶ T 16 lines 40-46; T 57 lines 14-20 and 35-45; T 58 lines 1-6; T 61 line 36 to T 62 line 3; T 63 lines 8-14.

¹⁷ Some additional minor aspects were raised but they do not add weight to those dealt with.

sister) said that L was there on that day; further, though the complainant's evidence was that Mr Murphy had made comments to her about body piercings which he said were on another girl, L said that the complainant did not relate that aspect to her.¹⁸

- [21] The variations in the accounts as to the discovery of the condoms included: the complainant said that Mr Murphy asked for his phone, whereas M said that another person asked for it; the complainant and M said Mr Murphy was at the fire when the request for the phone was made, whereas the mother said he was on the verandah; and different accounts came from the complainant in her police interviews, as to when Mr Murphy spoke to her about condoms (at the fire, soon after or some hours later).
- [22] The contended inconsistencies do not, in my view, lead to the conclusion that a jury could not accept the complainant's account. The jury could well take the view that the differences were simply an example of different people having a different memory of the same event. The complainant, M, and the mother all said that the condoms were discovered when someone asked for the phone, that M asked a question about the condoms when they were discovered, and that both the complainant and M were at the car when they were discovered. Ultimately, a jury could well take the view that those differences did not impact greatly on the complainant's reliability.
- [23] The mother's evidence as to the inappropriate conversation on the verandah was something that touched on the mother's reliability, not necessarily that of the complainant. The point being made here (as it was at the trial) was that if it had truly happened the mother would have said something about it to the police, and therefore the jury should conclude that the mother made it up, or lied about hearing it to support her daughter. However, even if the jury doubted the mother's version they were still left with the evidence of the complainant herself as to that event. If the jury accepted the complainant's evidence it would not matter that there was an inconsistency in the mother's accounts. In fact that was the way counsel for Mr Murphy put it to the jury, namely the conclusion that the mother had made it up was "no reflection on the complainant child" and it was "no criticism of the complainant child".¹⁹
- [24] As to the third area, the differing accounts as to what was done (touching, as the complainant said, and not actually touching, as the mother said she was told) was something that could impact on the jury's assessment of the complainant's credibility and reliability. However, the jury might take the view that a young girl may well tell her mother a less embarrassing version of what occurred, than the one she related to the police. Alternatively, she was confused, as the recounting to her mother was when she was put on the spot, in a public place (a bus).²⁰ Ultimately, it was open to the jury to accept the complainant's evidence over that of what the mother said she was told.
- [25] As to the fourth area, the fact that the complainant gave a different account to a friend does not lead necessarily to the conclusion that the jury had to reject her evidence. The complainant may have been confused as to the date at the time she spoke to the friend, but not later, or it may simply be a matter of memory fading on peripheral matters but remaining consistent on important matters.²¹ The fact that she didn't

¹⁸ The complainant said Mr Murphy had referred to the fact that another (named) girl had body piercings in the area of the complainant's body, which he was touching or to which he was pointing. It was conceded at trial that the named girl did not have any such body piercings, had not claimed to, nor had discussed such a thing with Mr Murphy.

¹⁹ Transcript of addresses, T 22.

²⁰ The two alternatives were raised by the prosecutor in address: T 4-5.

²¹ As the prosecutor suggested in address: T 4.

mention the body piercing comment to L hardly destroys her evidence generally. Further, the fact that the other girl did not, in truth, have body piercings or discuss such a thing with Mr Murphy, is not of great moment, in my view. The jury could have concluded that Mr Murphy made the comments even though they were untrue, as a way of manipulating the complainant to accede to his conduct, and the complainant did not realise it.²²

- [26] The overarching difficulty with the points raised by Mr Murphy is that they were all agitated at the trial, in considerable detail. Not only were they explored in cross-examination, the transcripts of the addresses to the jury, and the summing up, reveal that each of the prosecutor, counsel for Mr Murphy and the trial judge addressed the conflicts now raised.²³
- [27] Further, the jury were directed as to how they should deal with inconsistencies in evidence, and the impact of inconsistencies on acceptance or rejection of a witness's testimony. There is no suggestion of any deficiency in the directions.
- [28] Ultimately the suggested inconsistencies were all matters for the jury to assess. No compelling reason has been shown to conclude that the jury could not have accepted the evidence of the complainant, and reached the verdict they did.
- [29] I do not consider that the second ground of the proposed appeal has merit.

Conclusion on the prospects of success

- [30] In my view there are no prospects that the proposed appeal will succeed.

Do the interests of justice require an extension?

- [31] This aspect is answered by the conclusions reached as to the inadequacy of the explanation for the delay, and the lack of prospects of success on the appeal. It is not in the interests of justice to grant the extension of time.

Conclusion on the application

- [32] For the reasons expressed above I would refuse the application.
- [33] **PHILIP McMURDO JA:** I agree with Morrison JA.

²² As the prosecutor suggested in address: T 11-12.

²³ First area: trial transcript T 10-11, 16-17, 19, 22-23; transcript of addresses T 18-21; transcript of summing up T 32-42. Second area: trial transcript T 19-21; transcript of addresses T 21-22; transcript of summing up T 42-55. Third area: trial transcript T 2, 16-17; transcript of addresses T 4, 15-17. Fourth area: transcript of police interview page 25; trial transcript T 26-27; transcript of addresses T 3-4, 15, 17-18; transcript of summing up T 17-27, 56-63.