[2016] QCA 6

COURT OF APPEAL

FRASER JA
DAUBNEY J
JACKSON J

CA No 206 of 2015
DC No 2350 of 2010

THE QUEEN

v

DBK **Applicant**

BRISBANE

TUESDAY, 2 FEBRUARY 2016

JUDGMENT

FRASER JA: I'll ask Justice Daubney to give the first judgment.

DAUBNEY J: On the 1st of February 2011, the applicant pleaded guilty to one count of indecent treatment of a child under 16 who was a lineal descendant. The complainant was the applicant's granddaughter, and was 15 years old at the time of the incident. On 13 April 2011, the applicant was sentenced to six months' imprisonment, wholly suspended for an operational period of three years.

The applicant now seeks to appeal against both conviction and sentence, and has sought an extension of time within which to appeal. His application for an extension of time and notice of appeal were filed on 7 September 2015.

The circumstances of the offending were set out in a schedule of facts which was in evidence before the learned sentencing judge. The complainant was visiting the applicant and his wife, her grandmother. The offence occurred on the first evening of what was to be a two week visit. The grandmother had left the house after having a disagreement with the applicant, and the complainant was left alone with the applicant. The schedule of facts discloses that at about 7.30 pm on 10 January 2010, the applicant initiated an inappropriate sexual conversation with the complainant. The complainant did not respond, left the house, and then spoke with her mother. Her mother said that she would drive up from Murwillumbah to collect the complainant. Later that evening, the applicant asked the complainant to turn off a light. The complainant turned off the light and stood in the doorway near the front of the house. The applicant approached the complainant from behind, placed his arms around her and began to rub his hands over her stomach and breast area repeatedly. The complainant pushed herself away and said "No, Pop" before existing the house through the front door.

The complainant went back into the house briefly to collect her bag and shoes, and then went outside to wait for her mother. At about 9.50 pm she phoned her mother and said "Pop just tried to feel me up". The complainant and her mother agreed that she should wait at a nearby bus stop for the mother to arrive. She went to the bus stop and then phoned her boyfriend and told him what had happened.

The complainant's mother arrived and spoke briefly to her daughter, before they drove to a police station and spoke with an officer at about 10.25 pm. After a short conversation with the police, the complainant and her mother drove home.

On 14 January 2010 the complainant was contacted by police and provided an interview in which she gave details of the offending. On 19 January 2010, the applicant was contacted by police and participated in a recorded interview. He denied the inappropriate touching, but agreed that he did have an inappropriate conversation with his granddaughter.

As already noted, on 1 February 2011, the applicant pleaded guilty. The plea was entered about a week before the date on which the complainant was to give pre-recorded evidence for the purposes of the trial.

Whilst couched as an appeal against conviction and sentence, it is clear that what the applicant really seeks is to have his guilty plea set aside. In *Meissner v R* (1995) 184 CLR 132 Brennan, Toohey and McHugh JJ said at 141:

> "A court will act on a plea of guilty when it is 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 free choice in the interests of the person entering the plea."

The onus is on an applicant seeking to set aside a guilty plea to establish that a miscarriage of justice took place when the Court accepted and acted on his plea (see *EJ v R* [2009] QCA 378 at [19]).

The applicant has summarised the issues he would seek to ventilate on this appeal in the following passage in his written outline of argument filed on 4 January 2016:

> "What is this hearing about?
>
> I believe my lawyers (particularly [the first lawyer]) did not act in a professional, honest or ethical manner while representing me, which largely formed my decision to plead guilty.
>
> Even after I was sentenced, I found further evidence to suggest this was the case, including official court records (transcripts) that I believe have been altered. In addition, I found that I had not been kept informed and had been denied access to telephone records that would have been critical to my defence."

The applicant then identified three reasons for his appeal:

1. He believes the lawyers representing him made alterations to official court records.

2. He believes his lawyer denied him access to telephone records and did not inform him of the existence of those records, despite them being "critical" to his defence.

3. He felt his lawyers were not representing him properly, because they did not consider his matter in full and did not take proper instructions. This caused the applicant to believe he had no hope of a fair trial and no choice but to plead guilty.

Similar complaints are made in a handwritten outline of submissions appended to the applicant's notice of appeal against conviction and sentence.

The applicant was initially represented by a particular solicitor, who represented the applicant up to and including the time of his committal hearing. It is clear on the face of the applicant's various written submissions that he was highly dissatisfied with the way in which the solicitor conducted his case. After the committal, another solicitor took over conduct of the applicant's case. Counsel was briefed and appeared for the applicant when he pleaded guilty and subsequently at the sentencing hearing. Nothing in the applicant's submissions casts any aspersions on the conduct or representation of the second solicitor and counsel.

The applicant has not adduced any evidence in support of his contention that inadequate legal representation induced his plea of guilty or caused a consequential miscarriage of justice.

Dealing with the applicant's complaints in turn:

(a) The applicant has not adduced any evidence as to the alleged inaccuracies in transcripts. Appended to his written outline of submissions filed on 4 January 2016 were two pages of what appears to be a transcript of the interview between the complainant and the police. The applicant has highlighted a number of passages in that transcript which he says he believes are not correct and were altered possibly by his lawyers. There is simply no factual basis for these assertions. In any event, the applicant does not demonstrate how these matters could have impacted on his decision to plead guilty.

(b) The applicant makes a general assertion that he was denied access to telephone records between the complainant and her mother and that these records "contain information that could have been cross-referenced with other information pertaining to the case". Again, there is simply no factual basis for this assertion.

The applicant has not provided any basis for concluding that these telephone records might have provided exculpatory evidence.

(c) The applicant says that he feels that he was not represented properly by his lawyers because they did not consider his matter in full and were not acting under instructions. His complaints in his regard, as particularised in his written outline of submissions filed on 4 January 2016, relate to the first solicitor who represented the applicant up to and including the time of his committal. Even if the applicant was dissatisfied with the services rendered by his first solicitor, there is no complaint by the applicant about the second solicitor or counsel who represented him before the District Court. The applicant has adduced no evidence in support of his generalised complaints about legal representation.

There is nothing in the material before this Court to suggest that the applicant did not plead guilty by his own free choice. In *Meissner's* case at 141 Brennan, Toohey and McHugh JJ relevantly said:

> "A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty."

They continued:

> "There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence."

None of the matters to which the applicant points supports a setting aside of the plea of guilty. Nor has the applicant adduced, or sought to adduce, evidence from which it could be concluded that there was an interference with his free choice to plead guilty or not guilty. His appeal would be bound to fail.

Returning then to his application for an extension of time, it will be recalled that sentence was passed on 13 April 2011. The present applications were not filed until 7 September 2015. The evidence in support of the application for an extension of time is sparse. I would accept that the applicant has been under extended psychological treatment for anxiety and depression-related issues. In an unsworn statement filed with the application for an extension of time, the

applicant also said, in effect, that he was unaware of the time limit for appealing. Be all that as it may, there is scant explanation for the very significant delay which is attached to this matter.

But in any event, for the reasons referred to previously, the applicant would have no prospects of success on his appeal and, accordingly there is no utility in granting an extension of time.

Accordingly, I would order that the application for an extension of time within which to appeal be dismissed.

FRASER JA: I agree and would add just a couple of very brief remarks. The applicant submitted that he was not allowed to represent himself, but he was unable to explain how that could have occurred. As Justice Daubney has pointed out, the applicant did not seek to adduce any evidence in this application, thus there is no evidence to support that submission and nor is there any evidence to contradict the admission of guilt in his plea of guilty. I agree with the order proposed by Justice Daubney.

JACKSON J: I agree with Justice Daubney's reasons and the additional remarks by Justice Fraser.

FRASER JA: Accordingly, the order of the Court is that the application for an extension of time within which to appeal be dismissed.