SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smith* [2016] QCA 201
PARTIES:	**R** **v** **SMITH, Alan Peter** (applicant)
FILE NO/S:	CA No 84 of 2016 SC of 1989
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence & Conviction)
ORIGINATING COURT:	Supreme Court at Townsville – Date of Conviction & Sentence: 2 August 1989
DELIVERED ON:	16 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2016
JUDGES:	Fraser JA and Dalton and North JJ 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 – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant pleaded guilty to manslaughter – where there has been a period of twenty six years since conviction and sentence – where the applicant seeks an extension of time to appeal his conviction – whether there would be a serious miscarriage of justice if extension of time was refused *Meissner v The Queen* (1995) 184 CLR 132; [1995] HCA 41, cited *R v DAQ* [2008] QCA 75, cited *R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, cited
COUNSEL:	The applicant appeared on his own behalf D C Boyle for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** On 4 April 2016 the applicant (also now known as Alan Peter Truelove) filed an application for an extension of time within which to appeal against his conviction of the offence of manslaughter and his sentence for that offence of 12 years imprisonment. The applicant was convicted and sentenced for that offence on 2 August 1989.

[2] In *R v Tait* [1999] 2 Qd R 667 at 668 the Court held that, in considering an application for an extension of time within which to bring a criminal appeal, the Court will "examine whether there is any good reason shown to account for the delay and consider overall whether it is in the interests of justice to grant the extension." After referring to the possibility that this may involve an assessment of whether the appeal appears to be viable, the Court went on to refer to other factors, including the length of the delay, "it being much easier to excuse a short than a long delay". In *R v DAQ* [2008] QCA 75 at [11], Keane JA (with whose reasons McKenzie AJA and I agreed) referred to an example in which an applicant had made a deliberate decision not to appeal and had changed his mind in that regard only after serving the bulk of the sentence. Keane JA observed that, "it is understandable that the discretion to allow an appeal to proceed should be exercised in favour of an applicant only where the applicant presents a compelling demonstration of a serious injustice which can be corrected only on appeal".

[3] The applicant apparently decided in 1989 not to appeal against his conviction or seek leave to appeal against his sentence. Furthermore, in the course of explaining why he had not sought to appeal earlier than 4 April 2016, the applicant observed that when he was released on parole in 2000 he had "hoped to let bygones be bygones as an unfortunate period in my life". In the light of the extraordinary delay of more than 26 years and the applicant's deliberate decision 16 years ago not to appeal, it would be wholly inappropriate to extend time in the absence of a persuasive argument that the applicant's conviction or sentence had occasioned a serious miscarriage of justice.

[4] The applicant's stated reason for wishing to appeal against his conviction is that, as a result of his conviction, he was "harassed and pursued" by various organisations throughout Australia. He submitted that this had precluded him from pursuing his employment as a truck driver. He saw the solution to his difficulties as being to "clear my name of this original wrongful conviction in 1989". However, the applicant adduced no evidence that his conviction was wrongful. His arguments that defence counsel "did not even put up any defence" and that he was denied "my legal right to testify [or] give my version of events/evidence", "the right to call any witness in my defence", and "the right to cross examine the Prosecution witness", all lack substance, given that he was convicted upon his own plea of guilty.

[5] The applicant's argument that his solicitor "just entered a Plea without my consent" is also without substance. The transcript reveals that on the third day of the applicant's trial for murder the applicant was arraigned upon a charge of manslaughter. When called upon, the applicant personally pleaded guilty to that charge. The jury was discharged without giving a verdict on the offence of murder charged in the indictment. The trial judge went on to hear submissions before imposing a sentence of 12 years imprisonment.

[6] The transcript of the trial reveals that there was a substantial body of evidence adduced in the Crown case before the applicant entered a plea of guilty to manslaughter. I will give a very brief summary of that evidence. In January 1989 the applicant lived in a de facto relationship with the mother of a six year old child. Until the child was returned to her mother in mid-January 1989, the child had been staying with her mother's parents. At that time she had no injuries. The child's mother gave evidence that she witnessed the applicant assault the child on a number of occasions. Neighbours gave evidence that at various times they heard thumping noises and a man yelling angrily. Towards the end of January 1989 an ambulance was called to the applicant's home. The child was found unconscious and transported to hospital. There was medical evidence that bruises were found upon the child's entire lower abdomen and

back. The bruises were of a depth which suggested the use of a substantial amount of force. There were burns to the child's head and body which were likely to have been from friction when the child was pulled across carpet. The child had extensive bruising to her head, trunk and all limbs, as well as a fracture to the right side of her skull with brain swelling. The child died two days after being admitted to hospital. A forensic pathologist gave evidence that the child had a skull fracture, diffuse axonal injury to the brain, a fractured nose, 11 broken ribs, bruises to parts of internal organs with internal bleeding, and bruising to the chest wall. Other medical evidence was to the effect that those injuries together caused the child's death. Considerable force must have been inflicted to cause the head injury and the broken ribs. There was evidence that the applicant gave different versions of events. He told ambulance officers that he had gone a bit far when he had disciplined the child. He told a social worker that he had to discipline the child because she was ill-disciplined after returning from staying with her grandparents and she injured her head when she ran into a door. At one point during a police interview the applicant gave exculpatory explanations to police. At another point in the interview he told police that:

> "[The child] was like a daughter to me and I had to discipline her for her own good. I hit her but it was only with my open hand. I must have gone too far…open hand, that's all…[in relation to burns on the child's bottom] I smacked her – the skin came off in my hand. I was angry. It must have been too hard."

[7] There is no substance in the applicant's argument that his entry of the plea of guilty itself involved a miscarriage of justice because defence counsel advised him to plead guilty although the applicant insisted that he was not guilty. Given the evidence adduced in the Crown case before the applicant pleaded guilty, and the absence of any exculpatory evidence in this application, advice to that effect is not shown to have been inappropriate. Furthermore, it was open to the applicant to plead guilty whilst at the same time privately maintaining his innocence, if that is what occurred. In *Meissner v The Queen* (1995) 184 CLR 132 at 141-142, Brennan, Toohey and McHugh JJ stated that:

> "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. … 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 a free choice in the interests of the person entering the plea. 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. … If a plea of guilty is entered by the person charged in purported exercise of a free choice to serve that person's own interests, but the plea is in fact procured by pressure and threats, there is a miscarriage of justice. …"

[8] If the applicant was advised by defence counsel to plead guilty, that does not suggest that the applicant's plea of guilty was not entered in the exercise of a free choice to serve the applicant's own interests. One aspect of the applicant's own interests served by his plea of guilty was that the plea could be relied upon in mitigation of sentence. In the course of defence counsel's plea in mitigation, defence counsel submitted to the trial judge that the applicant had "shown a deep repentance" and had "indicated to the Crown at the earliest opportunity that he was prepared to plead to manslaughter on the basis that it was a serious manslaughter and that there was little justification that could be said in objective terms for the way that the violence towards the child escalated."[1]

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[1] Transcript 2 August 1989, 118.

[9] The applicant made various submissions to the effect that there had been unfairness at his trial before he pleaded guilty, including a suggestion that he was denied access to medical documentation at the time of the hearing. The applicant did not identify any particular document or information which was not available to him and should have been available to him before he entered his plea of guilty. His other submissions were similarly expressed in vague and general terms. There is no evidence of any miscarriage of justice such as would justify this Court in setting aside the applicant's plea of guilty and his conviction upon that plea.

[10] In summary, the applicant pleaded guilty to the offence, he made a deliberate decision not to appeal against his conviction, he has no explanation for his delay of more than 26 years in appealing, there is no evidence that the applicant's plea of guilty or his conviction involved any miscarriage of justice, and the only evidence before the Court suggests that there was in fact no such miscarriage of justice.

[11] The applicant did not seek to support his application for an extension of time for leave to appeal against sentence. That is unsurprising in circumstances in which he served the whole of his sentence many years ago. It is sufficient in this respect to record my conclusion that the sentence was not manifestly excessive.

Proposed order

[12] I would refuse the application for an extension of time.

[13] **DALTON J:** I agree with the reasons of Fraser JA and with the proposed order.

[14] **NORTH J:** I agree with the order proposed by Fraser JA for the reasons given by his Honour.