SUPREME COURT OF QUEENSLAND

CITATION:	*R v GV* [2006] QCA 394
PARTIES:	**R** **v** **GV** (applicant)
FILE NO/S:	CA No 190 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	Orders delivered extempore 27 September 2006 Reasons delivered 13 October 2006
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2006
JUDGES:	Jerrard JA and Jones and Atkinson JJ Judgment of the Court
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – on numerous occasions prior to trial the applicant received legal advice to plead not guilty on the basis that defences under ss 24 and 25 of the *Criminal Code 1899* (Qld) were available to him – where applicant was unexpectedly advised to plead guilty on the morning of the trial – where applicant pleaded guilty – where the applicant did not know he could appeal a conviction after pleading guilty – whether the applicant had any real prospects of success on an appeal to set aside his conviction CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON PLEA OF GUILTY – GENERAL PRINCIPLES – where the applicant pleaded guilty to dangerous driving on the morning of the trial – where the facts presented to the sentencing judge raised a complete defence to the charges – whether the trial judge should have exercised discretion in directing that a plea of not guilty be entered – whether in all of the circumstances a miscarriage of justice had occurred

Criminal Code 1899 (Qld), s 24, s 25

Maxwell v The Queen (1996) 184 CLR 501, applied
Meissner v The Queen (1995) 184 CLR 132, cited
R v Jerome and McMahon [1964] Qd R 595, discussed
R v Lewis [2006] QCA 121; CA No 325 of 2005, 21 April 2006, cited
R v Mundraby [2004] QCA 493; CA No 312 of 2004, 23 December 2004, cited
R v Ogborne [2006] QCA 161; CA No 233 of 2005, 17 May 2006, applied
R v Popovic [1964] Qd R 561, discussed
R v Tatnell [1962] Qd R 11, discussed
R v Warner [1980] Qd R 207, cited
R v Webb [1986] 2 Qd R 446, cited
Webster & Co v The AUSN Co Ltd [1902] St R Qd 207, discussed

COUNSEL: D S Courtney for the applicant
C W Heaton for the respondent

SOLICITORS: Locantro Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT**: The applicant applied for leave to appeal his conviction out of time. At the end of the hearing the Court made the following orders: that the application for leave to extend the time within which to appeal against conviction and sentence was granted; the plea of guilty and conviction were set aside and a plea of not guilty was directed to be entered. These are the reasons for making those orders.

[2] The application concerns what must be regarded as a very unusual set of circumstances to which we will refer in more detail. The application was accompanied by a letter from the applicant's solicitor which attached sentencing remarks, an outline of submissions and affidavits from the applicant, his mother and his father. The court then received a second outline of submissions and another affidavit from the applicant further explaining his reasons for not applying within time. A transcript of the hearing before the learned sentencing judge was subsequently obtained by the court.

Leave to extend time

[3] An application to extend time for leave to appeal against conviction may be allowed if there is a satisfactory explanation for the delay. Even if no satisfactory explanation for delay is given, an application to extend time may be granted if the applicant can demonstrate that to refuse it would result in a miscarriage of justice.[1] In order to decide whether or not there is an adequate explanation and whether or not to refuse leave to extend time would result in a miscarriage of justice, it is necessary to look at the circumstances of the case.

[1] See *R v Lewis* [2006] QCA 121 at [3] per McMurdo P.

[4] The applicant was convicted on his own plea of guilty in the District Court on 10 October 2005 on one count of dangerous operation of a motor vehicle causing grievous bodily harm. He was sentenced to two years imprisonment suspended for a period of three years and was disqualified from holding or obtaining a driver's licence for three years. The applicant's complaint, however, is not about the sentence imposed but about the efficacy of his plea of guilty.

[5] His notice of application for an extension of time within which to appeal was received on 7 July 2006, some eight months out of time. He says that he did not appeal within time as he lost confidence in his legal representatives, felt he was treated unfairly and had lost faith in the legal system. He said he lost faith in the legal system because his legal representatives advised him over the course of a number of conferences prior to the day of trial that he had a strong defence; and then on the morning of trial unexpectedly and strongly advised him to plead guilty to avoid the possibility of imprisonment. The applicant was unaware until he saw another solicitor that he had any right to appeal his conviction based on his plea of guilty. The explanation for delay in appealing is adequate. However the application would not be granted unless the applicant has sufficient prospects of success on appeal to warrant it. Whether or not there would be a miscarriage of justice depends on whether or not the applicant has any real prospects of success on an appeal to set aside his conviction.

Effect of plea of guilty

[6] The difficulty for the applicant in this case is that his conviction was based on his plea of guilty. A person of full age and capacity has a choice whether or not to plead guilty or not guilty to a charge whether they are in fact guilty or not guilty.[2] A court is entitled to act on such a plea when it is entered in open court. The entry of a plea of guilty is an admission of all the elements of the offence.[3] It is of course an admission not just to all the elements of the offence but also that any available defences have been negatived. It follows that in order to set aside a plea of guilty it is not sufficient for a person to say for the first time on appeal that he or she is not in fact guilty of the offence. A conviction entered on the basis of a plea of guilty will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred.[4] If the applicant can show that a miscarriage of justice has occurred, he or she should be allowed to withdraw the plea of guilty and have the conviction set aside.

[7] This is not a case of improper conduct on the part of the applicant's lawyers. As McMurdo P said in *R v Ogborne*:

> "Argument or advice that seeks to persuade an accused to plead guilty is not improper conduct, no matter how strongly the argument or advice is put."[5]

[8] However, whether or not there was a miscarriage of justice does not depend on the motives of those who persuaded the accused to plead guilty nor of the subjective

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[2] See *Meissner v The Queen* (1995) 184 CLR 132 at 141; *R v Mundraby* [2004] QCA 493.
[3] *Meissner v The Queen* (supra) at 157.
[4] *Meissner v The Queen* (supra) at 157.
[5] [2006] QCA 161 at [4].

regrets of the accused who has pleaded guilty and suffered punishment, but rather whether objectively a miscarriage of justice has occurred.

[9] In this case, the miscarriage of justice which is said to have occurred is the denial of a fair chance of acquittal for the applicant because, by pleading guilty, he could not argue the defence available under s 25 of the *Criminal Code* which is a complete defence to that charge. The circumstances of the applicant's behaviour which raised the potential for a defence under s 25 of the *Criminal Code* are set out in the sentencing remarks and, perhaps even more importantly for the purposes of this application, in the submissions by the prosecutor and the defence.

Sentencing remarks

[10] The matter was set down for trial on 10 October 2005. The transcript reveals that the learned trial judge immediately launched into a discussion of the availability of a defence under s 25 of the *Criminal Code*. The applicant was arraigned and, to the surprise of the judge, he pleaded guilty. The judge was therefore aware that this was a late, and unexpected, plea of guilty. The prosecutor then set out the facts on which the Crown relied. Those facts showed that the applicant had a good defence to the charge which, on the version recited by the prosecutor, the Crown would have had great difficulty in negativing beyond reasonable doubt.

[11] The circumstances of the offence referred to by the judge in the sentencing remarks were as follows. The applicant was driving on a major arterial road in Brisbane, Gympie Road, outbound. The maximum permissible speed was 70 kilometres per hour. He approached the intersection with Beams Road, which is an intersection governed by traffic lights, shortly after 10.30 at night. The applicant's motor vehicle was in the left-hand lane of two right-hand turn lanes. The traffic light facing him was red. He was travelling at 100 kilometres per hour and went through the red light. He failed to see a motor vehicle coming in the opposite direction which was executing a right-hand turn in accordance with a green arrow into Beams Road. A collision occurred between the two. The applicant braked but nevertheless the impact was of some force and the passenger in the applicant's vehicle suffered grievous bodily harm. That passenger received prompt, efficient, good quality medical attention and had made a complete recovery by the time the applicant was sentenced.

[12] The learned sentencing Judge referred to the youth of the applicant, he was still only aged 23 with no criminal history, a good work record and good references. He did however have a traffic history involving speeding on a few occasions and on one occasion failing to stop at a red traffic light.

[13] His Honour then referred to the quite unusual circumstances of this case. A serious road rage incident had been initiated, caused by and continued by the occupants of another vehicle whom the Judge referred to as "skinheads". Eleven kilometres back from the intersection where the collision occurred, an occupant of the skinheads' vehicle threw bottles which struck the applicant's vehicle. When he wanted to know what that was for he was met by a very aggressive response from the occupants yelling "Let's fuck these guys" and with many other obscenities and threats. The skinheads' vehicle then pursued the applicant's vehicle for a substantial distance and often in a threatening way. At one stage, the applicant left

Gympie Road in an attempt to elude his pursuers but that detour unbeknown to him very shortly brought him back onto Gympie Road.

[14] After the collision the skinheads got out of the vehicle and made very aggressive threats to the applicant saying things such as, "Get out of the fucking car, you cunt, unless you want to die." The applicant attempted to run away and was attacked by one of the skinheads. A good Samaritan who attempted to assist was threatened with violence by a bottle wielding skinhead. The applicant was then rescued by an off duty police officer.

Submissions on sentencing

[15] There were additional facts put forward by the prosecution in its sentencing submissions which tended to exculpate the applicant from guilt. The submissions were that the applicant had been chased by a group of skinheads for some 11 kilometres. The applicant's car was travelling at 90 to 100 kilometres per hour when the collision happened. The skinheads continued their attack on the applicant and the passengers in his motor vehicle even after the collision occurred. The menacing threat of one of the skinheads, "Get out of the fucking car, you cunt. Get out of the fucking car unless you want to die" was captured on the tape of the 000 call made by the applicant's injured passenger.

[16] Other witnesses also described the skinheads as attempting to open the car doors to get at the people injured inside. After the collision the skinheads chased the applicant on foot. He ran to a Caltex Service Station some hundreds of metres away and his pursuers were only stopped because of the presence of an off duty police officer. They did however damage the Caltex Service Station.

[17] The prosecutor submitted that an independent witness had seen the applicant going through a red light after first checking that it was safe to do so because there were no cars in either direction. The applicant passed his phone to a passenger and asked him to ring 000 to alert the police. The applicant was not affected by liquor or a drug. The dangerous driving was, in the Crown's submission, of relatively short duration.

[18] In addition to these submissions, counsel for the applicant, without contradiction from the prosecution, told the learned sentencing Judge that the applicant had stopped his car at a red light previously and a taxi driver who witnessed the event saw the skinheads stop behind the applicant's car, alight from their vehicle and run towards the applicant's car. The applicant had driven away when the lights went green fearful for his own safety and that of his passengers.

[19] After the collision several people went to the aid of the person injured in the applicant's car and were threatened by the skinheads. That submission was as follows:

> "Mr Boni in fact in his evidence gives evidence that one of the skinheads actually when he went to help the people in the vehicle actually came at him with a broken stubby bottle and threatened him not to interfere. Another witness gave evidence that this vehicle was bombarded with broken bottles and kicking at the doors and so forth, and from the statement of Miss Nicole Lea, the young lady who was

> unfortunately injured, one of the skinheads actually was forcing or trying to force her out of the vehicle while she was seriously injured. In fact he succeeded in doing that, forcing her out of the vehicle and putting her on the roadside and abusing and threatening her."

[20] The skinheads chased the applicant to the Caltex Service Station and the female console operator, who had been working there for 30 years, saw the three skinheads physically assault the applicant, kick him to the ground and punch him. They only decamped when an off duty police officer identified himself. That off duty police officer then placed the applicant in his vehicle and went back to the scene where he was taken to hospital.

Section 25 of the Criminal Code

[21] The Judge referred to the fact that it was easy to sit back with hindsight and think of alternatives that the applicant might have undertaken to escape from the violence and threats but that attempting to escape was to a degree understandable. His Honour said that:

> "The accused may have had very real difficulty in raising a reasonable doubt pursuant to s 25 of the Criminal Code which deals with extraordinary emergency and sudden emergency, but it is clearly a most relevant matter in the sentencing process today."

[22] His Honour then imposed the sentence referred to above of two years imprisonment wholly suspended for a period of three years.

[23] In his reference to s 25, however, his Honour unfortunately misstated the onus of proof. There is no onus on the accused to raise a reasonable doubt. Once an accused person has satisfied the evidentiary onus, as would no doubt have been done in this case, then the onus of excluding the operation of the excuse beyond reasonable doubt is on the prosecution.

[24] The defence available under s 25 is:

> "subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise."

[25] This section is the subject of a learned chapter in a book by RS O'Reagan *New Essays on the Australian Criminal Codes*.[6] Mr O'Reagan refers to a note in his draft of the *Criminal Code* explaining the effect of the provision by its author, Sir Samuel Griffith:

> "This section gives effect to the principle that no man is expected (for the purposes of the criminal law, at all events) to be wiser or better than all mankind. It is conceived that it is a rule of the

[6] RS O'Reagan *New Essays on the Australian Criminal Codes*, Chapter 4 "Sudden or Extraordinary Emergency", The Law Book Co, Sydney, 1988.

> Common Law, as it undoubtedly is a rule upon which any jury would desire to act. It may, perhaps, be said that it sums up nearly all the Common Law rules as to excuses for an act which is prima facie criminal. (Queensland Parliamentary Papers CA 89-1897, 13.)"[7]

[26] Mr O'Reagan refers to s 25 as being a residual defence to protect the "morally innocent" where other defences did not apply.[8]

[27] Sir Samuel Griffith revealed his understanding of s 25 in a case decided by him as Chief Justice of Queensland with regard to a collision at sea. In *Webster & Co v The AUSN Co Ltd*,[9] his Honour said at 216:

> "It is sufficient in such a case of extreme danger if the person in charge of [the ship] exercises such judgment as a man of ordinary skill and fortitude might reasonably be expected to exercise under the circumstances."

He compared this position to sections 24 and 25 of the *Criminal Code* which he referred to as "rules of common sense as much as rules of law".

[28] The defences available under s 24 and s 25 of the *Criminal Code* may work in combination so that the existence of an emergency can either be actual or the product of an honest and reasonable, but mistaken, belief.[10]

[29] Section 25 is certainly available as a defence to a dangerous driving charge. In *R v Warner*[11] Andrews J, giving the judgment of the court, relevantly wrote at 210:

> "There is quite a significant body of evidence to the effect that a rather terrifying situation may have been created by the driver of the other vehicle and that the accused may have been acting in response to it from fear and to avoid the risk of harm at the hands of the other driver.
>
> With proper directions there remains a case under s 328A of the Code for consideration by the jury."

Andrews J held that for that driver, a defence based on either s 24 or s 25 of the Code was available in that case. That approach establishes that a defence under s 25 was available in this case.

[30] It is a defence which should have been left to a jury. Whether or not they would have acquitted on the basis of it would have been a matter for the jury. It was a question of fact[12] but a defence which was lawfully available. It could not be said with certainty whether the applicant would have been convicted or acquitted but it can be said that it is a question which should on the material before us have been left to the jury.

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[7] RS O'Reagan (supra) at 50.
[8] RS O'Reagan (supra) at 51.
[9] *Webster & Co. v The AUSN Co. Ltd* [1902] St R Qd 207.
[10] See *R v Webb* [1986] 2 Qd R 446 at 449.
[11] *R v Warner* [1980] Qd R 207.
[12] See *Larner v Dorrington* (1993) 19 MVR 75 at 79.

Withdrawal of plea of guilty

[31] A judge has a duty to ensure that the facts on which the judge sentences are in fact and in law sufficient to prove guilt of the offence to which an offender pleads guilty. If they are not, then the judge has a power to reject the plea of guilty.

[32] In *R v Tatnell*,[13] Hanger J, with whom Mansfield CJ agreed, held that:

> "These cases seem to me ample authority for a proposition that, though the prisoner in fact announced a plea of guilty to a charge, yet where he makes statements, at the time or before sentence, which show that…he alleges facts which would amount to a defence to the charge, then in these circumstances, he should be treated as pleading 'not guilty'."

[33] In *R v Popovic*,[14] Lucas J, with whom Wanstall CJ agreed, wrote that:

> "This was simply a case in which an unrepresented accused person pleaded guilty and made, in mitigation, an explanation which really amounted to a denial of his guilt. The Criminal Code is silent upon the subject, as it is upon the subject of the withdrawal of a plea of guilty upon application in that behalf and the substitution of a plea of not guilty in its stead…I see no reason why in circumstances such as these the Court should not in a proper case, and as a matter of discretion, direct the entry of a plea of not guilty notwithstanding that an accused person has pleaded guilty before a Magistrate, has been committed for sentence, and has again pleaded guilty before the court to which he has been committed."

[34] In *R v Jerome and McMahon*,[15] Gibbs J observed:

> "It seems to me that it is in the interests of justice that where a prisoner in the one breath pleads guilty and makes it clear that he in fact denies the existence of a vital element of the offence charged against him the judge should have power to direct a plea of not guilty to be entered notwithstanding that the accused, whether it be through lack of appreciation of the significance of what was going on, through sheer contumaciousness, or through a desire to achieve some technical advantage, adheres to his wish to enter a plea of guilty."

[35] In the curious circumstances of the case *R v The Justices at Cloncurry, ex parte Ryan*,[16] Andrews J, giving the judgment of the court, relevantly wrote that:

> "Once…he was seen to have defence, a plea of not guilty should have been recorded and the matter should have then gone to evidence." (After a plea of guilty).

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[13] *R v Tatnell* [1962] Qd R 11 at 14.
[14] *R v Popovic* [1964] Qd R 561 at 567.
[15] [1964] Qd R 595 at 603-603
[16] [1978] Qd R 213 at 220.

[36] A plea of guilty may be withdrawn at any time before the sentence is imposed. As the High Court held in *Maxwell v The Queen*[17] after referring to authority in the House of Lords:

> "… a plea of guilty is not, in the ordinary course of events, accepted until sentence is passed on the accused. As Lord Reid observed in *S v Recorder of Manchester*:
>
> > 'It has long been the law that when a man pleads guilty to an indictment the trial judge can permit him to change his plea to not guilty at any time before the case is finally disposed of by sentence or otherwise.'
>
> It is the disposal of the case which results in the judgment of the court embodying a determination of guilt."[18]

[37] Those cases and others establish the proposition, repeated in the annotations to s 598 of the *Criminal Code*, at [598.15], that a plea of guilty which is not in plain, unambiguous and unmistakeable terms must be treated as a plea of not guilty, and further that where, on a plea of guilty, a defendant so qualifies the plea by giving an explanation in relation to the matter with which he has been charged, he should be taken to be pleading not guilty.

[38] The court may reject the plea of guilty at any time prior to the passing of sentence. Those circumstances may arise, for example, when notwithstanding the plea, the sentencing submissions are inconsistent with the plea. Such circumstances are referred to by Gaudron and Gummow JJ in *Maxwell v The Queen*:

> "In general terms and leaving aside a plea to a lesser charge, the power to reject a plea is a power which is exercised where the plea is equivocal or does not constitute a confession of guilt (for example, if it is accompanied by a statement which indicates that the accused denies or does not admit some element of the offence charged) or, for some other reason, there are grounds for thinking that the accused is not criminally responsible for the offence to which he or she has pleaded guilty.
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> The nature of the exercise involved in the rejection of a plea and in the grant of leave to withdraw a plea is such, in our view, that it must be concluded that conviction only occurs when the court does some act which indicates that it has determined guilt or, which is the same thing, that it has accepted that the accused is criminally responsible for the offence in question." [19]

[39] The applicant can hardly be worse off because the prosecution put such an exculpatory account before the learned sentencing judge in this matter, rather than its being the applicant who did so. But suppose it was only the applicant who put forward the explanation of his having been pursued by people threatening to assault him and the other occupants of the vehicle, and that the Crown knew nothing of

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[17] *Maxwell v The Queen* (1996) 184 CLR 501.
[18] *Maxwell v The Queen* (supra) at 509.
[19] *Maxwell v The Queen* (supra) at 531.

those matters. If the applicant put that account forward, for the first time, on his sentence, the cases cited show a clear line of authority requiring a plea of not guilty to be entered. Accordingly where the Crown put that forward, the judge should have taken the same step.

[40] When it became apparent to the Judge that the facts on which he was being asked to sentence the applicant showed that he had, at least arguably, a complete defence to the charge, the Judge should have directed that a plea of not guilty be entered in place of the plea of guilty. In those circumstances the applicant was unfairly denied a fair opportunity of acquittal and he should be given leave to withdraw his plea of guilty and a plea of not guilty entered in its place.