

SUPREME COURT OF QUEENSLAND

CITATION: *R v Cain* [2009] QCA 365

PARTIES: **R**
v
CAIN, Ryan Thomas
(applicant)

FILE NO/S: CA No 156 of 2008
DC No 35 of 2008

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Conviction)
Sentence Application

ORIGINATING COURT: District Court at Mackay

DELIVERED EX TEMPORE ON: 27 November 2009

DELIVERED AT: Brisbane

HEARING DATE: 27 November 2009

JUDGES: Holmes and Muir JJA and Daubney J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. The application for an extension of time within which to appeal against conviction is granted. Time is extended for the filing of the notice of appeal against conviction to Friday, 4 December 2009.**
2. The hearing of the application for leave to appeal against sentence is adjourned to the date fixed for the hearing of the appeal against conviction.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where applicant convicted by jury of two counts of rape and pleaded guilty to one count of burglary – where concerns arose after trial about applicant’s mental fitness for trial – where psychiatrist thought it more likely than not that applicant unfit for trial – whether extension should be granted
Kesavarajah v The Queen (1994) 181 CLR 230; [1994] HCA 41, cited
R v Presser [1958] VR 45, cited
R v Tait [1999] 2 Qd R 667; [\[1998\] QCA 304](#), cited

COUNSEL: S J Hamlyn-Harris for the applicant
M B Lehane for the respondent

SOLICITORS: Fisher Dore Lawyers for applicant
Director of Public Prosecutions (Qld) for the respondent

HOLMES JA: The applicant seeks an extension of time within which to appeal against his conviction on 18 March 2008, of three counts of rape and one count of burglary. He was convicted of the rape counts after a trial, but pleaded guilty to the count of burglary. The basis for his application is to be found in the reports of Dr Beech, psychiatrist, who interviewed the applicant in custody on 30 December 2008. It seems concerns emerged in relation to the applicant's mental state during conferences with his counsel in relation to a sentence appeal, and that was the impetus for Dr Beech's involvement.

At the time of his first report, Dr Beech had available to him the applicant's instructions to his trial lawyers, a facsimile the applicant had sent in October 2008 concerning his appeal instructions, and notes of conferences with him in October and November 2008. In his report, Dr Beech gave the opinion that the applicant suffered from paranoid schizophrenia with grandiose and persecutory delusions. He raised the possibility that the applicant might not have been fit for trial if he were at the time suffering from psychosis as a result of his schizophrenia.

Dr Beech was provided with further material, consisting of a letter from the applicant, received on 27 May 2009, an affidavit of the applicant's barrister at trial, Mr Cullinane, and a file note of a conference with the applicant on 30 April 2009. He also spoke by telephone with the applicant's mother and sister. From what Mr Cullinane had said in his affidavit, Dr Beech noted that there had been concern whether the applicant could give a consistent version of events in evidence, and that he was given to grandiose statements about his career as a rap artist, but was otherwise lucid and able to instruct in relation to the charges. The applicant's mother and sister both reported that not long after his arrest in relation to the offences he had begun making bizarre and grandiose claims about his supposed musical career.

Dr Beech thought it more likely than not that the applicant was psychotic by the time he went to trial, and would have been unfit for trial in that "his delusional thinking would

have had a significantly adverse effect on his capacity to know what defence he should rely upon and to give his account to the court and to instruct his counsel”.

Dr Beech may need to expand on what he means by “significantly adverse effect”, since the relevant question is whether an accused possesses certain abilities which, as paraphrased in *Kesavarajah v The Queen* (1994) 181 CLR 230 from the tests in *R v Presser* [1958] VR 45, are the abilities:

- (1) to understand the nature of the charge;
- (2) to plead to the charge and to exercise the right of challenge;
- (3) to understand the nature of the proceedings, namely that it is an inquiry as to whether the accused committed the offence charged;
- (4) to follow the course of the proceeding;
- (5) to understand the substantial effect of any evidence that may be given in support of the prosecution and
- (6) to make a defence or answer the charge.

It is not presently possible to explore the question of those capacities further, because at present the Legal Aid office (the applicant’s former solicitors) has no instructions to waive privilege in relation to the material which was provided to Dr Beech for both the first and second reports, and there is a question as to whether he is in a fit mental state to give the necessary instructions.

An application for an extension of time, generally speaking, requires the Court to consider the length of delay, whether there is any good reason shown to account for it, and whether it is in the interests of justice to grant the extension, which “may involve some assessment of whether the appeal seems to be a viable one”: *R v Tait* [1999] 2 Qd R 667.

The delay in filing the application for an extension of time is explained by the emergence of the applicant’s psychiatric symptoms only at a point where instructions were being taken from him in relation to a sentence application, and when I say emergence in that context, I mean emergence to the knowledge of the solicitors who acted for him at that

time. Dr Beech's reports make it clear that an examination of the merits of a possible appeal on the basis of the fitness question is warranted. There are, as counsel for the Crown pointed out in written submissions, some countervailing aspects. It seems that the applicant's counsel described him as "lucid" and certainly the transcript of the trial suggests that counsel was in possession of detailed and not obviously bizarre instructions for the purpose of cross-examination. Nonetheless, it seems to me in the interests of justice that the question should be resolved by an appeal hearing in which, it seems inevitable, evidence will have to be called.

I would grant the application for an extension of time within which to appeal against conviction and adjourn the hearing of the application for leave to appeal against sentence to the date fixed for the hearing of the appeal against conviction.

MUIR JA: I agree.

DAUBNEY J: I concur.

HOLMES JA: Now, that extension of time as to when Mr Hamlyn-Harris, will the notice of appeal be filed?

MR HAMLYN-HARRIS: Your Honour, could we have one week from today?

HOLMES JA: Time is extended for the filing of the notice of appeal against conviction to Friday, the 4th December.

There is the remaining question of what you're doing about the privilege issue.

MR HAMLYN-HARRIS: Yes. And I should inform the Court that the instructions have now been obtained after a medical opinion was received that those instructions could be given. I understand that a request has now been made by my instructing solicitors for the material but it has not yet been received from Legal Aid. I understand the Legal Aid office is in the process of putting it together to provide it.

HOLMES JA: I should make the other formal order which is that the application for leave to appeal against sentence is adjourned to the date fixed for the hearing of the appeal against conviction.