SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hennessy; Hennessy v Vojvodic* [2010] QCA 345
PARTIES:	**R** **v** **HENNESSY, David John** (appellant) **HENNESSY, David John** (appellant) **v** **VOJVODIC, Danilo Denny** (respondent)
FILE NO/S:	CA No 90 of 2010 CA No 153 of 2010 DC No 1686 of 2008 DC No 2421 of 2008 DC No 2566 of 2008 DC No 2802 of 2008 DC No 1101 of 2010 DC No 1102 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	10 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2010
JUDGES:	Fraser and White JJA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In respect of CA No 90 of 2010:** **1. Allow the appeal.** **2. Set aside the pleas of guilty.** **3. Quash the convictions in respect of Count 1 on Indictment 1686 of 2008 and Bench Charge Sheet 2808 of 2008 in respect of breaches of the domestic violence order of 14 November 2006.** **4. Set aside the sentences imposed for those offences.**

In respect of CA No 153 of 2010:

1. **Grant leave to appeal.**
2. **Allow the appeal.**
3. **Set aside the pleas of guilty entered in the Magistrates Court at Beenleigh on 15 February and 24 April 2007.**
4. **Quash the convictions.**
5. **Set aside the sentences imposed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – GENERAL PRINCIPLES – where appellant convicted on his own pleas of guilty of unlawful stalking and other offences – where appellant has served the sentences imposed – whether a defence of unsoundness of mind was open to the appellant – whether the appellant's pleas should be set aside and the convictions quashed in the interests of justice

Criminal Code 1899 (Qld), s 27
Justices Act 1886 (Qld), s 222(2)

Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, followed
Price v Davies (2001) 120 A Crim R 183; [2001] WASCA 81, followed
R v Davies (1993) 19 MVR 481, followed
R v Hennessy [2010] QCA 142, related
R v Hura (2001) 121 A Crim R 472; [2001] NSWCCA 61, followed
R v Liberti (1991) 55 A Crim R 120, followed
Soteriou v Police (SA) (2000) 32 MVR 256; [2000] SASC 256, cited
Wong v Director of Public Prosecutions (NSW) (2005) 155 A Crim R 37; [2005] NSWSC 129, followed

COUNSEL: The appellant appeared on his own behalf
M B Lehane for the respondent

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

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of White JA. I agree with those reasons and the orders proposed by her Honour.

[2] **WHITE JA:** On 2 June 2010 this Court extended time for the appellant to appeal against his convictions in the District Court on 27 October 2008 for the offence of unlawful stalking and for breaches of a domestic violence order.[1] The appellant also seeks leave to appeal against the order made in the District Court on 25 May 2010 dismissing his application for an extension of time within which to

1 *R v Hennessy* [2010] QCA 142.

appeal convictions entered in the Magistrates Court on 15 February 2007 and 24 April 2007. In each appeal the appellant seeks to have his pleas of guilty set aside on the ground that at the time he committed the offences he was not of sound mind. It is convenient to refer to him as "the appellant" throughout.

[3] The appellant had filed a notice of appeal[2] in time on 24 November 2008 in respect of the 27 October 2008 District Court proceedings but it was struck out for want of prosecution on 25 August 2009.[3]

[4] Legal Aid for this appeal was declined and the appellant conducted his own appeal; he gave sworn evidence and was cross-examined by counsel for the respondent.

Proceedings the subject of the appeal and application for leave to appeal

[5] On 27 October 2008 the appellant pleaded guilty in the District Court at Brisbane to offences contained in three indictments and to a number of summary charges. They were, in chronological order:

Indictment No. 1686 of 2008

- Between 27 December 2006 and 3 July 2007 the appellant unlawfully stalked the complainant in contravention of a Magistrates Court order made on 14 November 2006.

Summary charge 1

- Between 26 March 2007 and 2 July 2007 the appellant breached a domestic and family violence protection order made on 14 November 2006.

Summary charge 2

- On 29 August 2007 the appellant was unlawfully in possession of amphetamine.

Summary charge 3

- On 29 August 2007 the appellant was in a park in contravention of a park curfew.

Indictment No. 2566 of 2008

- On 14 February 2008 the appellant broke and entered premises (a pharmacy) and stole medication.

Indictment No. 2421 of 2008

- On 27 February 2008 the appellant broke and entered premises (a pharmacy) and stole medication.

The appellant was sentenced to 18 months imprisonment on the stalking charge, 30 months imprisonment on each of the break, enter and steal offences, six months

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2 CA No 314 of 2008.

3 Discussed in the extension of time application: *R v Hennessy* [2010] QCA 142 at [13].

on the drug possession, and convicted and not punished further on the other summary charges. A parole release date of 26 January 2009 was given. A restraining order was made until 27 October 2013.

[6] On 15 February 2007 the appellant appeared in the Magistrates Court at Beenleigh where pleas of guilty were entered in respect of 16 charges of breaching a domestic violence order made on 14 November 2006, two charges of stalking and one charge of breaching bail conditions. All offences occurred in December 2006. In respect of each breach of the domestic violence order, the appellant was convicted and sentenced to four months imprisonment; in respect of the two charges of stalking he was convicted and sentenced to six months imprisonment; he was convicted and sentenced to four months imprisonment for the breach of the bail conditions. Those sentences of imprisonment were wholly suspended with an operational period of two years.

[7] On 24 April 2007 the appellant again appeared in the Magistrates Court at Beenleigh where pleas were entered in respect of 15 breaches of the domestic violence order made on 14 November 2006 and three summary offences, being public nuisance, contravention of a direction and obstructing police. He was convicted on all charges and sentenced to imprisonment for nine months with a court ordered parole release date of 23 July 2007.

[8] On 25 May 2010 the appellant appeared in the District Court seeking an extension of time within which to appeal the convictions in the Magistrates Court in order to set aside the pleas of guilty on the ground that he had a psychiatric defence to the offending conduct. Her Honour refused the application because she held that she had no jurisdiction to consider an appeal against conviction in respect of an indictable offence dealt with summarily under s 222(2)(c) of the *Justices Act* 1886 (Qld). No extension of time issue arises and the appellant seeks leave to appeal her Honour's dismissal of his application.

Issues

[9] The issues on the appeal and the application for leave to appeal are whether the appellant had available to him a defence of unsoundness of mind when he had pleas of guilty entered in the Magistrates Court in 2007 or pleaded guilty in the District Court in 2008. If he did, whether those pleas should be set aside and the convictions quashed in the interests of justice.

[10] The appellant has served the sentences imposed.

[11] If the defence of unsoundness of mind is raised, it is raised for all offences[4] but the appellant wishes only to have the convictions quashed in respect of the stalking and breaches of the domestic violence order offences – these, as will become apparent, he regards as conduct for which he has no moral or legal culpability. He accepts that he committed the break and enter offences and the other summary offences and does not seek to have them expunged from his criminal record.

Circumstances of the offences

[12] The appellant was born on 26 November 1970 and was thus aged between 36 and 38 when these offences were committed. He has an extensive criminal history

[4] Subject to the respondent's submission about part of the stalking period which is considered below.

dating from 1988 including stealing, breaking and entering, wilful damage to property and numerous breaches of Magistrates Court orders. He had been addicted, principally to methylamphetamine, for many years and offended to finance his drug habit. Tests have returned negative for unlawful substances for several years and the appellant continues his rehabilitation efforts.

[13] The schedule of agreed facts placed before the District Court relates that the complainant to the stalking charges first met the defendant when she was 19, some 15 years earlier than the commencement of the offending conduct. They were of a similar age and dated for about a year before they started living together. The relationship was turbulent. The appellant was imprisoned for about a year after they had been together for two years but the complainant continued to be his partner while he was in prison. About three days before his release she ended the relationship and she made this clear when she saw him a few days later. Five years after the relationship ended, the appellant arrived, unannounced, at the complainant's place of work and they spoke for a short period. Over the next 10 years until about 2006 they had no direct contact, although the appellant telephoned the complainant's mother a few times. From June 2006 he commenced ringing the complainant's parents regularly and arriving at their house uninvited. He sent a card to her at her parent's house and several months later telephoned the complainant at home. He began leaving messages on her phone and sending letters. The letters and messages contained poems, drawings, newspaper clippings and other documents. They became more frequent and in some weeks she received up to five letters.

[14] On 14 November 2006 the complainant was granted a domestic violence order against the appellant in the Brisbane Magistrates Court for two years. Nonetheless, she continued to receive telephone calls, letters and postcards from the appellant. He would visit her house unexpectedly asking to see her and leaving gifts. Sometimes he sat in his car outside her house for extended periods. The complainant reported all contact to the police.

[15] The appellant was dealt with in the Beenleigh Magistrates Court on 15 February 2007 for breaching the domestic violence order on 16 occasions between 3 and 23 December 2006 and dealt with for unlawful stalking between 17 and 22 December 2006.

[16] The appellant again came before the Beenleigh Magistrates Court on 24 April 2007 and was dealt with for 15 further charges of breaching the domestic violence order between 28 December 2006 and 23 March 2007. Three of those breaches were committed after the imposition of the suspended sentence on 15 February 2007. The facts of the 15 charges of breach of the domestic violence order for which the appellant was dealt with on 24 April 2007 constituted part of the schedule of facts of unlawful stalking before the District Court in October 2008. During the period 26 March 2007 to 2 July 2007, the complainant received many handwritten letters by registered mail and exercise books containing personal messages, poems, pictures and newspaper clippings. Attached to the schedule of facts was a detailed schedule of contact from 28 December 2006 to 2 July 2007. The appellant sent this correspondence while an inmate at the Woodford Correctional Centre.

[17] On 11 July 2007 the appellant participated in a record of interview with police at the Woodford Correctional Centre during which he admitted sending the

correspondence to the complainant, that he was aware of the domestic violence order and the conditions of no contact. He told police that he was in love with the complainant and, that despite the domestic violence order, he did not really believe she did not want contact with him.

[18] It is unnecessary to set out the particulars of the breaking and entering offences as the appellant does not seek to have those pleas of guilty set aside.

[19] The appellant in his evidence on the appeal gave some background to these matters, confirming much that was in the medical reports. He said that he had been placed in solitary confinement at the Arthur Gorrie Correctional Centre in the maximum security unit and started hearing voices in approximately mid-2006. He said:

> "At first I thought it was Corrective Services were pumping in voices to try and rehabilitate me or something, along these lines. I honestly believed that what I was hearing was actually happening. The voices were telling me things like a book was being written about me, I was finally going to get paid for the unjust [sic] that had been done to me when I was young.[5] I'd fallen through the net most of my life and – and now that we finally realised what your problems are you're going to receive the help that you need, all these kind of voices kept telling me all these different things, but most importantly they told me that my ex-girlfriend wanted me back."

This was after a gap of nearly 10 years from when their relationship had ended. He continued:

> "I still had these strong feelings for her somewhere deep in my heart, and when these voices started telling me all these things I started believing them and one of the big things they told me was that she wanted me back and for some crazy reason I got out of gaol a short time later and I tried to contact her through her parents, started sending flowers around to her house and – and making phone calls to the house, stopping in at all hours of the day and night, and then before I know it I had a DVO put on me for unwanted sort of attention, and – but the voices kept telling me that I had to – I had to prove my love to her, that I shouldn't listen to the police, I should prove my love to her by keeping up the attention and prove to her that I still loved her and all this kind of stuff, and as crazy as it might sound – sound right now, at the time it just – I believed that these voices were coming from somewhere, Corrective Services or somewhere, and that they were telling me – they were helping me, they were rehabilitating me and they were getting me on the track because it wasn't just – they weren't just telling me to contact her, they were telling me to do other things, like employment-wise, education-wise, and – and it was – like, four years on now, it all seems so crazy but at the time it was just – it was really intense, it was like I was alive for the first time in my life and I was finally getting rewarded for – for the past wrongs that had been done to me and it was just – it was really strange."

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[5] The appellant told his treating doctors that he was sexually abused as a child by family members. This was related by his counsel to the District Court in 2008.

Dr P Fama's report

[20] About a year after the appellant had been convicted in the District Court in October 2008 he approached Legal Aid to appeal the convictions on the ground that he had a psychiatric condition at the time of the offences. As a consequence, Dr Peter Fama, a well-known forensic psychiatrist, examined him at the Woodford Correctional Centre on 1 December 2009. Dr Fama had been supplied with a considerable quantity of material including the appellant's prisoner case notes from the maximum security unit at the Arthur Gorrie Correctional Centre, psychiatric assessment and program and progress notes from an unidentified correctional centre, a report by general practitioner/counsellor Dr Wendell Rosevear of 4 April 2008, a report by psychologist Mr David Whittingham of 26 October 2008, a referral letter to Dr Rosevear from Dr Mark Schramm, psychiatrist of the Prison Mental Health Service dated 20 January 2009, various QP9s and the exhibits and transcript in the District Court proceedings.

[21] After summarising the relevant facts of the charges and some family history, which included diagnosed schizophrenia in his brother and possible schizophrenia in his mother, Dr Fama related that at interview the appellant gave a history of persistent distressing hallucinations through 2006-2007 with recurrence in 2008 at the time of the break-ins to the pharmacies. Dr Fama noted that his account was supported by the prisoner case notes at Arthur Gorrie Correctional Centre which stated, inter alia,

> "1/3/06 – During the course of the session Prisoner Hennessy advised that he has recently been suffering from quite significant paranoid thinking and auditory hallucinations."

Dr Fama also noted the progress notes of the Arthur Gorrie Correctional Centre reporting:

> "14/5/07 – Phone call from Hennessy's GP (on the outside). Hennessy has rung his GP from prison to tell him he is hearing voices and that is the reason why he has smashed the television sets.
>
> 14/6/07 – He advised me he was 'hearing voices'."

Dr Fama referred to the psychiatric notes prepared by Dr Mark Schramm:

> "16/6/07 – Voices – external – talked about them in fashion leading me to suspect pseudohallucinations rather than true AH – seems always to have insight @ time but some contradiction in later saying he's thought in past they were being piped through speakers by officers who'd spoken with his g/f …
>
> - it's as if they (officers, govt) are broadcasting the voices – as if they're trying to write a book on me."

[22] Dr Fama wrote that Dr Schramm had noted that the appellant first developed hallucinations and a persecutory system when using amphetamines and other drugs but that they had become even worse when he was held in isolation in the maximum secure unit. The symptoms had continued despite abstinence from all illicit substances. The appellant told Dr Schramm that the voices were encouraging him to contact his girlfriend.

[23] The appellant described to Dr Fama that he had heard a voice sounding as if it was coming from a loud speaker saying "You cut the baby's face" when he was in the detention unit. When in the secure unit he experienced continual harassing and threatening voices. Often the voices would cajole him, urging him to try harder to contact the complainant, saying "You're getting paid – you'll get rewarded!" He told Dr Fama, in relation to the stalking count, that the police kept telling him to stop but the voices kept telling him to keep going to prove his love for the complainant. He told Dr Fama that his actions were reinforced by glimpsing the last name of the complainant on the TV screen. The hallucinatory experiences continued for about two years apart from a brief respite while responding in prison to prescribed medication, which he later abandoned when in the community. He was told by voices to carry out the pharmacy break-ins to satisfy an old debt and to avoid punishment by his creditors and he believed, at the time, that he was compelled to carry out those offences. As the appellant made clear, he does not wish to have those pleas of guilty set aside.

[24] Dr Fama concluded that on the available evidence the appellant would have been afflicted by a mental disease "within the usual meaning of s 27 of the Criminal Code" which would have deprived him of the capacity to control his actions and to know that he ought not to do those acts, particularly in relation to the stalking, possessing amphetamine and contravention of curfew offences. Dr Fama was more reserved about the break-in offences. He diagnosed the appellant as suffering from paranoid schizophrenia which was in complete remission at the time of interview. Dr Fama wrote:

> "The long persistence of [the appellant's] psychotic symptoms while in custody without access to illicit drugs indicates that the correct diagnosis has been schizophrenia, not a drug-induced psychosis."

Dr Fama was of the opinion that the appellant would have been fit for trial when he was sentenced on 27 October 2008.

[25] The appellant tendered a handwritten letter dated 16 April 2010 from Dr Schramm. Dr Schramm explained that as the appellant's treating doctor within the Prison Mental Health Service he was unable to provide an independent report but wished to place certain matters before the court:

> "I have been this man's treating psychiatrist during various periods in custody since 2007 for management of what I consider to be schizophrenia. He is currently well (with only residual symptoms and excellent insight). I am writing to ask that you may reconsider granting him funding in an appeal against conviction for offences in 2007 (breach DVO and unlawful stalking) in that I believe it is likely he would be afforded a defence of unsound mind as he was experiencing command auditory hallucinations to visit his girlfriend at the time (the complainant)."

[26] The appellant also tendered a letter of 4 April 2008 from Dr Rosevear. It was before the District Court on his sentence on 27 October 2008.[6] Dr Rosevear has cared for the appellant since 28 February 2007 in relation to his sexual abuse as a child and recovery from alcohol and drug abuse, past imprisonment and prolonged solitary confinement. Relevantly, he wrote:

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6 AR 66.

> "While in solitary confinement in prison for periods that he says extended to 3 months, he started to have auditory hallucinations. He has been on Zyprexa to help with the auditory hallucinations and until very stable, I think he needs to stay on medication."

[27] In cross-examination the appellant was challenged about the availability of an insanity defence during the whole period of the stalking. It is unnecessary to embark on the rather convoluted nature of those exchanges except to record that counsel for the respondent was of the view that Dr Fama's report covered only the period from 25 March 2007 to 2 July 2007 - the period charged on the District Court indictment. Dr Fama had the schedule of facts which covered the whole period from the imposition of the domestic violence order on 14 November 2006 and referred to the two Magistrate Court proceedings. Counsel for the respondent also referred to a phone message from the appellant to the complainant of 28 December 2006: "I'm back on drugs and alcohol. No direction, just totally, totally love struck",[7] to submit that he was then suffering a drug induced psychosis not schizophrenia. Dr Fama quoted this message in his report. His diagnosis specifically excluded drug-induced psychosis. On a reading of his entire report the reasonable conclusion is that the defence of unsoundness of mind would apply to all the stalking offences and breaches of the domestic violence order.

Circumstances of the pleas in the District Court on 27 October 2008

[28] The appellant had been on remand for almost a year prior to his appearance in the District Court. He had no visit from his lawyers, although was in contact with them. He had, by then, been treated for schizophrenia in the prison. The appellant said that he had instructed his legal representatives that he had a psychiatric defence and that he wanted "to go by way of mental health" or by advising the court "of my psychiatric demeanour at the time of the offences or whether a psychiatric report just be done on me". No report was prepared, although some other material was, principally about rehabilitation.[8] Eventually his file was given to another lawyer whom the appellant had never seen. On 27 October 2008 he was brought up to the courtroom from the cells, placed in the dock, and met with his barrister and solicitor for the first time. The appellant said he conversed with them for 10 to 15 minutes, waiting for the judge to come into the courtroom.

[29] The appellant said that he was happy to plead guilty provided his lawyers actually told the court of his mental difficulty and it was used as a "mitigating factor". It became apparent in the course of his cross-examination that the appellant had a mistaken view about what a plea of guilty meant and the role of the Mental Health Court (Tribunal, as he expressed it). The appellant had been telling his lawyers about his hallucinations for a year before sentence. The advice given to him in the courtroom was not to go down the Mental Health "Tribunal" path because if he did, he would have to return to Arthur Gorrie Correctional Centre (on remand) for another 12 to 18 months before a hearing date became available in the Mental Health "Tribunal". On the other hand, he was advised that if he pleaded guilty he would be sentenced and out of prison within a couple of months. An affidavit from the appellant's counsel in the District Court proceedings

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7 AR 54.

8 Report of Dr W J Rosevear, 4 April 2008, AR 66; Community Bridges Inc letter of 29 September 2008, AR 67; The Bridge Network, July 2008, AR 68.

tendered by the respondent's counsel was consistent with the appellant's evidence. The appellant was released from prison about three months after his sentence.

[30] The appellant's lawyers were well aware of his hallucinations and mental health issues. His counsel in making his sentencing submissions said:[9]

> "His instructions are that in terms of the stalking matter he was subject to some auditory hallucinations and delusional thinking at the time. It is clear he was aware of the wrongness of his actions. That is evident in the content of, for instance, some of the letters themselves and references to the police and him being incarcerated."

His counsel told the court that in the prison environment the appellant had been appropriately managed with medication and took the anti-psychotic drug Zyprexa, that he was not presently medicated and there was now no evidence of delusional thinking or auditory hallucination. A letter written by the appellant was tendered in which he wrote, relevantly:[10]

> "The last couple of years have been horrible for me. I have suffered from hallucination and delusions that led me to contact my ex girlfriend because she still meant a lot [sic] to me.
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> This has now been brought under control with medication and I have had no contact with her for over a year."

His Honour received the report from Dr Rosevear, the relevant passage of which has been set out above dealing with the appellant's auditory hallucinations.

[31] In his sentencing remarks the learned sentencing Judge, when describing the stalking offence, made virtually no reference to the appellant's psychiatric difficulties, stating only:[11]

> "… and at least on your behalf it is conceded that you did have some knowledge of the fact that what you were doing was wrong, that it was unlawful and that you had been forbidden from doing it. That makes your unlawful stalking on this occasion much worse than the cases that ordinarily come before the Court."

At the least his Honour ought to have been referred to authorities such as *Channon v The Queen*,[12] *R v Tsiaris*[13] and *R v Verdins*[14] on the question of a mental disorder (short of insanity) as a mitigating feature. The appellant said that after the judge's summing up remarks when he was called a "predator", it hit him hard about how he was regarded over the stalking charges and appealed immediately.

[32] In the course of cross-examination Justice Fraser, in an attempt to simplify a question, asked the appellant:[15]

> "Had you had the report that said you have a complete defence to all but the earlier period, and then you're being asked would you have

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9 AR 34.
10 AR 71.
11 AR 39-40.
12 (1978) 33 FLR 433; [1978] FCA 16.
13 [1996] 1 VR 398.
14 [2007] 16 VR 269; [2007] VSCA 102.
15 Appeal Transcript 1-21.

> pleaded guilty knowing that the likelihood is that you'll be sentenced on the footing that you were guilty for all of the period of the offences?"

The appellant answered:

> "I would have still asked for it to go – I believe by going the way of Mental Health Tribunal is a plea of guilty. I still would have admitted to the offences but I would have asked them if I had a defence."

He revealed a very mistaken understanding of what a plea of guilty entailed.

Circumstances of the pleas in the Magistrates Court on 15 February and 24 April 2007

[33] The appellant was asked in cross-examination why he pleaded guilty in February 2007 in the Magistrates Court. He said he was very delusional at the time and believed:[16]

> "…the courts, all society, were in on some kind of big grand plan to rehabilitate me and the main reason I pleaded guilty was to go along with the advice that I was given."

The advice was that he would get out of gaol. He added that it was only now, being well, on medication and having medical supervision that he understood what he went through and "just want the courts to recognise that". He said that on 15 February 2007 he was hearing voices:[17]

> "I was under the delusion that all of society, the whole planet, was looking at me and trying to rehabilitate me, for reasons I won't go into because they're all a bit weirder now, but it was my belief that I was being rehabilitated, that the voices were being piped in by Corrective Services, that my mobile phone was speaking to me, the TV was speaking to me, radios were speaking to me, the newspaper was printed specially for me, songs, new songs written on the – were written about me, old songs were dedicated to me. This is how sick I was."

When asked whether he had conveyed those things to his solicitor, the appellant responded that he told his solicitor that he was hearing voices but "didn't go into too much detail because speaking about it seemed a bit strange."

Setting aside a plea of guilty

[34] In *Meissner v The Queen*,[18] Brennan, Toohey and McHugh JJ said:[19]

> "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

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16 Appeal Transcript 1-22.
17 Appeal Transcript 1-22, 1-23.
18 (1995) 184 CLR 132; [1995] HCA 41.
19 Ibid at 141.

> 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."

Dawson J said:[20]

> "It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence. But the accused may show that a miscarriage of justice occurred in other ways and so be allowed to withdraw his plea of guilty and have his conviction set aside."[21]

[35] In *R v Liberti*,[22] Kirby P (as his Honour then was) said:[23]

> "For good reasons, courts approach attempts at trial or on appeal in effect to change a plea of guilty or to assert a want of understanding of what was involved in such a plea with caution bordering on circumspection. This attitude rests on the high public interest in the finality of legal proceedings and upon the principle that a plea of guilty by a person in possession of all relevant facts is normally taken to be an admission by that person of the necessary legal ingredients of the offence: see *O'Neil* [1979] 2 NSWLR 582; (1979) 1 A Crim R 59; *Sagiv* (1986) 22 A Crim R 73 at 81."

His Honour added:[24]

> "An accused person will not always know the legal consequences of the facts to which he pleads guilty. He or she is normally entitled, where represented, to look to the lawyers to explain those facts for their legal significance. Ultimately, the accused is entitled to look to the court before which he or she comes to offer protection from a conviction which is not, in law, sustained by the facts."

[36] In *R v Hura*,[25] Spigelman CJ discussed the "exceptional cases" in which the court would set aside a conviction following a plea of guilty. He noted that the

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20 Ibid at 157.

21 His Honour referred to *R v Forde* [1923] 2 KB 400 at 403; *R v Murphy* [1965] VR 187 at 188; *R v Chiron* [1980] 1 NSWLR 218 at 235; *R v Liberti* (1991) 55 A Crim R 120 at 121-122; *R v Ferrer-Esis* (1991) 55 A Crim R 231 at 232-233.

22 (1991) 55 A Crim R 120.

23 Ibid at 122.

24 Ibid at 125.

25 (2001) 121 A Crim R 472; [2001] NSWCCA 61.

authorities had been considered in *R v Toro-Martinez*[26] and identified a number of circumstances when the court would act notwithstanding a plea of guilty to avoid a miscarriage of justice:[27]

> "● where the appellant "did not appreciate the nature of the charge to which the plea was entered": *Ferrer-Esis* (1991) 55 A Crim R 231 at 233.
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> ● where the plea was not "a free and voluntary confession": *Chiron* (at 220 D-E).
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> ● the "plea was not really attributable to a genuine consciousness of guilt": *Murphy* [1965] VR 187 at 191.
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> ● where there was "mistake or other circumstances affecting the integrity of the plea as an admission of guilt": *Sagiv* (1986) 22 A Crim R 73 at 80.
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> ● where the "plea was induced by threats or other impropriety when the applicant would not otherwise have pleaded guilty … some circumstance which indicates that the plea of guilty was not really attributable to a genuine consciousness of guilt": *Cincotta* (Court of Criminal Appeal, NSW, No 60472 of 1995, 1 November 1995).
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> ● the "plea of guilty must either be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt": *Maxwell* at 511; 186-187.
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> ● if "the person who entered the plea was not in possession of all of the facts and did not entertain a genuine consciousness of guilt": *Davies* (1993) 19 MVR 481. See also *Ganderton* (unreported, Court of Criminal Appeal, NSW, No 60364 of 1998, 17 September 1998) and *Favero* [1999] NSWCCA 320."

His Honour quoted[28] a passage from the judgment of Badgery-Parker J in *Davies*:[29]

> "If the plea was not entered into with full knowledge of the facts and as a genuine recognition of guilt, and if the material before the court of Criminal Appeal shows that there is a real question about the guilt of the accused, then the proper course must be to set aside the plea of guilty, to quash the conviction and to order a new trial."

[37] These propositions were endorsed by Howie J in *Wong v Director of Public Prosecutions (NSW)*:[30]

> "The authorities referred to in the above passage show that the issue is one of the integrity of the plea of guilty and the question to be

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26 (2000) 114 A Crim R 533; [2000] NSWCCA 216.
27 *R v Hura* (2001) 121 A Crim R 472 at 478; [2001] NSWCCA 61 at [32].
28 Ibid at 478 [33].
29 (1993) 19 MVR 481.
30 (2005) 155 A Crim R 37 at 41-42; [2005] NSWSC 129 at [16].

> determined is whether a miscarriage of justice would arise if the court acted upon the plea of guilty to convict and sentence the defendant."

[38] In *Price v Davies*,[31] Roberts-Smith J, hearing an appeal from a magistrate, concluded:[32]

> "Although the appellant's plea of guilty was unequivocal, it was not a properly informed plea and indeed was founded on a mistaken view that the facts as he wished to put them before the court, would afford him no defence as a matter of law. That went to the root of his plea and as a result the appellant was denied (albeit not by any error on the part of the magistrate) the right and opportunity to present his defence and have it considered by the court."

In *Soteriou v Police (SA)*,[33] Duggan J, hearing an appeal from a magistrate, concluded that a plea of guilty to drink driving to protect a friend who would have lost her licence was entered without sufficient knowledge to make an informed decision.[34]

Discussion

[39] The appellant gave his evidence in a forthright and convincing manner and no basis for not accepting him as truthful and reliable was advanced. He had been attempting to have the issue of his psychiatric condition considered by his lawyers for many months before "sentence". Having been told that he suffered from a serious psychiatric illness at the time of the stalking offences which explained the command hallucinations, he was concerned, not surprisingly, that his moral and criminal responsibility for his conduct should be set in its true context. A short and, essentially, shallow conversation about the practical advantage of pleading guilty over having the matter dealt with in the Mental Health Court did not allow the appellant to explore what he wanted to achieve (apart from getting out of prison) and have explained to him just what a plea of guilty entailed and for him to weigh up truly the advantages and disadvantages of so doing.[35] Dr Fama described the appellant as being above average intelligence so that his lawyers may have mistakenly thought he understood more than he did. It became apparent during the course of the appellant's cross-examination that he had an imperfect understanding of what a plea of guilty actually entailed. He seemed to think that it was an admission to doing the acts, which he acknowledged he did, and that the mental illness in some way operated to reduce or absolve him from responsibility but was not part of the process of entering a plea. From this I think it may safely be inferred that the appellant did not intend by his pleas to admit that he was guilty of the offences of stalking and breaching the domestic violence order.[36] The information available to the District Court of hallucinations and delusions was itself strong and it was far from apparent, as his counsel had asserted, that the appellant was aware of the "wrongness", in the sense of legally culpability, of his actions.

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31 (2001) 120 A Crim R 183; [2001] WASCA 81.
32 Ibid at 208 [114].
33 (2000) 32 MVR 256; [2000] SASC 256.
34 At [33].
35 *R v Liberti* (1991) 55 A Crim R 120 at 125 per Kirby P; *R v Davies* (1993) 19 MVR 481.
36 *Meissner v The Queen* (1995) 184 CLR 132 at 157 per Dawson J.

[40] It was conceded by counsel for the respondent that although s 222(2)(b) of the *Justices Act* 1886 precludes an appeal to the District Court where there has been a plea of guilty to an indictable offence dealt with summarily,[37] a District Court judge would have jurisdiction in an appropriate case to consider whether the plea was an unequivocal plea of guilty.

[41] I am persuaded that this is one of the exceptional cases where an accused person has entered pleas of guilty without a proper understanding of what was entailed in that plea, so far as acknowledgment of criminal responsibility was concerned, and where he had available to him a well-founded defence of unsoundness of mind. It is quite possible that the appellant was not even fit to plead at the time he appeared before the Magistrates Court in February and April 2007 in light of the medical evidence now available. Accordingly, a miscarriage of justice has occurred and the appellant should be permitted to withdraw his pleas of guilty limited, as he has sought, to the stalking and breaches of domestic violence order in the Magistrates Court and the District Court. As a consequence his convictions for those offences should be quashed and the sentences set aside. The appellant made no application[38] for leave to appeal the restraining order made in the District Court on 27 October 2008 for five years until 27 October 2013, pursuant to s 359F of the *Criminal Code*. He is, therefore, still bound by its terms.

[42] The orders which I would make in respect of CA No 90 of 2010 are:

1. Allow the appeal.

2. Set aside the pleas of guilty.

3. Quash the convictions in respect of Count 1 on Indictment 1686 of 2008 and Bench Charge Sheet 2808 of 2008 in respect of breaches of the domestic violence order of 14 November 2006.

4. Set aside the sentences imposed for those offences.

In respect of CA No 153 of 2010:

1. Grant leave to appeal.

2. Allow the appeal.

3. Set aside the pleas of guilty entered in the Magistrates Court at Beenleigh on 15 February and 24 April 2007.

4. Quash the convictions.

5. Set aside the sentences imposed.

Since the appellant has served the entirety of his sentences, including for offences in respect of which he brings no appeal, it is not an appropriate case for ordering a retrial to test the unsoundness of mind defence.

[43] **JONES J:** I agree with the reasons expressed by White JA and with the orders proposed.

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37 *Smith v Ash* [2010] QCA 112 at [50] per Fraser JA; *Ajax v Bird* [2010] QCA 2.

38 Pursuant to s 118 of the *District Court of Queensland Act* 1967 (Qld); see *R v Johnston* [2008] QCA 291 at [8] per Fraser JA.