SUPREME COURT OF QUEENSLAND

CITATION:	*R v UD* [2011] QCA 307
PARTIES:	**R** **v** **UD** (applicant)
FILE NOS:	CA No 217 of 2011 DC No 1394 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence & Conviction)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	1 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2011
JUDGES:	Margaret McMurdo P, Muir and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for an extension of time within which to appeal against conviction refused.** **2. Application for an extension of time within which to obtain leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – PLEAS – GENERAL PLEAS – PLEA OF GUILTY – WITHDRAWAL AND RESTORATION OF PLEA – GENERALLY – where the applicant pleaded guilty to 22 sexual offences against five complainant children – where the applicant argued that he plead guilty on his counsel's advice that he would receive a lesser sentence if he did so – whether the applicant should be permitted to withdraw his pleas of guilty – whether the applicant is bound by the conduct of his case by counsel at first instance – whether the convictions gave rise to a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to eight years imprisonment for one count of maintaining a relationship with a child under 12 in care, four years imprisonment for each of five counts of indecent treatment of a child under 12 in care, two years imprisonment for each of eight counts of making child exploitation material

and one count of indecent treatment of a child under 12 in care, one year's imprisonment for each of five counts of wilfully exposing a child to an indecent act, picture or object and one count of attempting to procure a child under 16 to perform an indecent act and six months imprisonment for one count of indecent treatment of a child under 12 in care – where the sentences were ordered to be served concurrently – where the head sentence of eight years was imposed at the request of the applicant's counsel at first instance – whether the sentences imposed were manifestly excessive – whether leave to appeal against sentence should be granted

Lacey v Attorney-General of Queensland (2011) 85 ALJR 508; [2011] HCA 10, cited
Liberti v R (1991) 55 A Crim R 120, cited
Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, considered
R v Auer; ex parte A-G (Qld) [2011] QCA 222, considered
R v Birks (1990) 19 NSWLR 677, cited
R v Flew [2008] QCA 290, cited
R v G [1997] 1 Qd R 584; [1995] QCA 517, cited
R v H [1999] QCA 396, considered
R v Levack; ex parte A-G (Qld) [1999] QCA 448, considered
R v NE [2004] 2 Qd R 328; [2003] QCA 574, cited

COUNSEL: The applicant appeared on his own behalf
V A Loury for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for refusing the application for an extension of time to appeal against conviction and for leave to appeal against sentence.

[2] **MUIR JA: Introduction** The applicant was convicted after pleas of guilty of six counts of indecent treatment of a child under 12 under care, one count of indecent treatment of a child under 16, five counts of wilfully exposing a child under 16 to an indecent act, picture or object, eight counts of making child exploitation material, one count of maintaining a sexual relationship with a child under 16 with a circumstance of aggravation and one count of attempting to procure a child under 16 to perform an indecent act. He was sentenced on 7 July 2010 to: eight years imprisonment for the maintaining offence; four years imprisonment for each of five of the indecent treatment offences; two years imprisonment for the child exploitation material offence and for one of the indecent treatment offences and to one year's imprisonment for each of the other offences except for one of the indecent treatment offences for which he was sentenced to six months imprisonment. All sentences were ordered to be served concurrently. One thousand one hundred and fifty-four (1,154) days of pre-sentence custody were declared time spent serving his sentences and a recommendation of parole eligibility on 7 July 2010 was made.

[3] There were five complainants. The complainant in respect of the maintaining offence, B, was the granddaughter of the applicant's wife. The offending conduct commenced when the complainant was five years of age and occurred over a period of at least eight years. The applicant regularly touched her on the vagina, performed oral sex on her, and would have her sit on his lap whilst his penis was erect and would rock her from side to side. On one occasion when B was 12, the applicant supplied her with alcohol until she was intoxicated and then performed oral sex on her. A similar incident occurred when B was about 14 or 15 years of age. At around the same time, the applicant attempted unsuccessfully to have B perform sexual favours for another man in return for payment. During a pretext telephone call from B, the applicant admitted having performed oral sex on her, seemingly as part of a pattern of conduct. One of the documents seized at the applicant's home by police contained comments about performing oral sex on B when she was 13.

[4] Another of the complainants, W, was B's childhood friend. When she was eight or nine years of age, the applicant, who was babysitting her and B, had them remove their clothes and dance naked for him. He lay on top of W, kissed her neck and chest and rubbed his erect penis against her labia. He showed another of the complainants a pornographic magazine and vibrator and made comments about its use. That complainant was then 15 years of age.

[5] The remaining two complainants were sisters. One was aged four and the other five when the applicant, who was babysitting, exposed his penis to them.

[6] The applicant pleaded guilty and there was a full hand-up committal hearing. The sentencing judge took into account that the applicant had demonstrated deep remorse and shame and that he had experienced "a hard time in custody".

[7] The notice of appeal and application for leave to appeal against conviction and sentence were filed on 28 July 2011, approximately 12 months out of time. No explanation was provided for the delay.

[8] The grounds of appeal stated in the proposed notice of appeal are "I was not allowed to defend myself in any courts." The applicant did not confine himself to this ground in several pages of written submissions relied on by him. However, it is not easy to identify clearly the grounds which the applicant wishes to advance. The applicant claimed to be innocent of the offences despite his guilty pleas. In his unstructured and partially incoherent handwritten submissions, the applicant appeared to be making the following points. He did not touch any of the complainants. He contracted "a Cholera related red virus" in 1990. If he had had sexual contact with the complainants he would have transmitted his virus to them with fatal results. He had been advised that sexual contact "to people would be fatal for the victim – the victim surely dies and [he] would become a killer". Moreover, he had a homosexual relationship with a person called "Andy" who died in 1993 from AIDS and "never had girls…for sexual relationships".

[9] The claim that the applicant had no contact with B is inconsistent with the statement that he gave her and her brother "a roof over there (sic) heads" and that he allowed B to use a hose in his premises to wash sperm from her vagina after parties attended by her but not by him. There is inconsistency also with the assertion that he had seen two of the complainants aged four and five "with red rashes and small blisters (like chickenpox) around bum and genitals". It was also said that the girls were "stark naked" all day at his place and that they had been dumped in his care in 2004.

[10] In the course of his oral submissions the applicant said, in effect, that he may well have had sex with B on an occasion when she brought rum into his house were it not for her off putting odour.

[11] A typed schedule placed before the sentencing judge detailed the applicant's offending conduct. The facts were uncontested and the basis on which the applicant was to be sentenced must have been plain to him.

[12] In an unsworn statement the applicant explained:

> "I could not say not guilty or my sentences would had been pushed up to double as the barrister told me so. I did not know what to do, why could I not got the cross-examining from the accusers why only the sentences…"

[13] It is appropriate to be sceptical about the applicant's assertions as to his counsel's advice but, even if the advice was given, no miscarriage of justice would have occurred. The general rule is that an accused person is bound by the way a trial is conducted by his or her counsel except in "wholly exceptional circumstances".[1]

[14] In a letter of 8 July 2010, the day after the sentencing hearing, the applicant's solicitors advised him that the eight year term of imprisonment was imposed at the request of his counsel "rather than the requested 9 years by the Crown". The letter noted that the applicant's guilty plea to all 22 charges was accepted by the Court and that his early guilty plea and "the substantial submissions by Counsel were all noted in [the applicant's] favour". The letter advised that the applicant needed to make urgent application for parole and that the solicitors had "fulfilled" their instructions from Legal Aid to act on the applicant's behalf in relation to the 22 charges to which he had pleaded guilty. They advised that there were 28 days within which to appeal but that they did not recommend that he appeal "as the time period ordered may well be more than [his] current sentence". The letter concluded by acknowledging the applicant's clear instructions to "enter pleas of guilty to all charges." At no stage did the applicant contend that the letter contained inaccuracies.

[15] The principles relevant to the circumstances in which a Court may go behind a plea of guilty are discussed in the following passage from the reasons of Brennan, Toohey and McHugh JJ in *Meissner v The Queen*:[2]

> "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. An inducement to plead guilty does not necessarily have a tendency to pervert the course of justice, for the inducement may be offered simply to assist the person charged to make a free choice in that person's own interests. 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. The principle is stated by Lawton LJ in *R v Inns*:

---

1 *R v Birks* (1990) 19 NSWLR 677 at 685; *R v G* [1997] 1 Qd R 584 at 586 and *R v NE* [2004] 2 Qd R 328 at 336, 337.

2 (1995) 184 CLR 132 at 141, 142.

> 'The whole basis of a plea on arraignment is that in open court an accused freely says what he is going to do; and the law attaches so much importance to a plea of guilty in open court that no further proof is required of the accused's guilt. When the accused is making a plea of guilty under pressure and threats, he does not make a free plea and the trial starts without there being a proper plea at all. All that follows thereafter is, in our judgment, a nullity.'
>
> It may not be strictly accurate to describe what follows as a nullity, but it is certainly liable to be set aside and a new trial ordered. 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. In such a case, the court is falsely led to dispense with a trial on the faith of a defective plea. The course of justice is thus perverted." (citations omitted.)

[16] Dawson J's statement of principle in *Meissner*[3] is of particular relevance to the circumstances under consideration:

> "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. For example, he may show that his plea was induced by intimidation of one kind or another, or by an improper inducement or by fraud." (citations omitted)

[17] Courts exercise great caution in determining applications to set aside or withdraw guilty pleas.[4]

[18] It seems plain enough that the applicant not only did not contest his guilt but that by pleading guilty sought to obtain the reduction in his sentences which his legal advisors had advised, correctly, would be likely. The applicant has not demonstrated that he will have suffered a miscarriage of justice should he be unable to withdraw his guilty pleas. There is no reason to suspect that, having regard to his conduct at first instance and the evidence before the sentencing judge, the applicant did not knowingly plead guilty or even that he was innocent of the offences to which he pleaded guilty.

---

3 At p 157.

4 *Liberti v R* (1991) 55 A Crim R 120 at 121-122 per Kirby J.

[19] Turning now to the application for leave to appeal against sentence, counsel for the respondent relied on *R v Levack; ex parte A-G of Qld*,[5] *R v H*[6] and *R v Auer; ex parte A-G of Qld*[7] to support the submission that the eight year term of imprisonment was within the appropriate range. There is little to be served by detailed analysis of these cases. In the course of reasons in *R v Auer*,[8] Margaret Wilson AJA noted that the appropriate range in the case of the respondent *Auer* was eight to ten years imprisonment. His sentence for the offence of maintaining a sexual relationship was increased from four to nine years. He was 31 years of age and had relevant prior criminal history. There were five young complainants ranging from five to nine years of age. The offending against three of the complainants involved either touching outside the clothing or touching the genitalia inside the clothing. The respondent digitally penetrated the anus of one of the children with his finger. The most serious conduct involved the persistent rubbing of a complainant's genitalia when bathing her over a period of about four months, helping her to masturbate on two occasions and inserting a finger outside her vaginal passage in the area of the labia. The respondent cooperated with authorities and his conviction on 12 of the 16 counts depended solely or substantially on his admissions.

[20] *Levack* was an Attorney's appeal decided prior to the decision of the High Court in *Lacey v Attorney-General of Queensland*.[9] The Court, while commenting that the appropriate sentencing range was eight to ten years, declined to disturb the respondent's eight year sentence imposed after a plea of guilty. The offending conduct, all of which was against boys, did not involve sodomy.

[21] In *R v H*, an application for leave to appeal against an eight year sentence imposed after a plea of guilty for maintaining a sexual relationship with each of two boys under the age of 12 was dismissed. The offending conduct consisted of masturbation and fellatio of and by the complainants as well as the licking of their anuses. It was remarked that the conduct "could have supported a higher sentence".

[22] Any appeal against sentence has no realistic prospect of success. As counsel for the respondent submitted, the offending occurred over a lengthy period and commenced when B was very young. Having regard to the other offending against other young victims, a head sentence of eight years could hardly be considered manifestly excessive. Moreover, the applicant's burden in showing the head sentences to be manifestly excessive is increased by the fact that the head sentence accorded with defence counsel's submissions.[10]

[23] For the above reasons I would refuse both the application to extend time within which to appeal against conviction and the application for an extension of time within which to obtain leave to appeal against sentence.

[24] **WHITE JA:** I have read the reasons for judgment of Muir JA and agree with his Honour's reasons and the orders which he proposes.

---

5 [1999] QCA 448.
6 [1999] QCA 396.
7 [2011] QCA 222.
8 [2011] QCA 222.
9 (2011) 85 ALJR 508; [2011] HCA 10.
10 See *R v Flew* [2008] QCA 290 at paras [27] and [28].