CHILDRENS COURT OF QUEENSLAND

CITATION:	*R v NOL* [2019] QChC 13
PARTIES:	**R** (respondent) **v** **NOL** (applicant)
FILE NO/S:	418/2018
DIVISION:	Criminal
PROCEEDING:	Section 590AA Application
ORIGINATING COURT:	Brisbane Childrens Court
DELIVERED ON:	11 June 2019 (*ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	11 June 2019
JUDGE:	Allen QC DCJ
ORDER:	**1. The applicant is granted leave to withdraw his pleas of guilty.** **2. The pleas of guilty entered on indictment 418/18 on 4 March 2019 are set aside.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – PLEAS – GENERAL PLEAS – PLEA OF GUILTY – WITHDRAWAL AND RESTORATION OF PLEA – AFTER COMMITTAL FOR SENTENCE ON PLEA OF GUILTY – where the applicant entered pleas of guilty to all offences for which he was charged on indictment – where the applicant applies to set aside the pleas of guilty – where the applicant gave evidence that at the time of entering the pleas he did not understand the extent of his criminal liability – where the applicant has subsequently received advice that he has arguable defences to the charges - whether the pleas of guilty should be set aside
COUNSEL:	D Wells for the applicant J Malouf for the respondent
SOLICITORS:	DL Legal for the applicant Office of the Director of Public Prosecutions (Qld) for the respondent

[1] The applicant child is charged on an indictment charging one count of armed robbery in company with personal violence, one count of attempted armed robbery in company with personal violence, one count of attempted armed robbery in company, one count of assault occasioning bodily harm in company, and one count of common assault. All those offences are alleged to have occurred on 24 April 2018. The applicant was born on 6 September 2004 and is now aged 14, and he was aged 14 when he was arraigned on the indictment on 4 March 2019 and pleaded guilty to all counts. The allocutus was administered and the matter was listed for sentence on 29 May 2019 and a pre-sentence report ordered.

[2] The applicant first met with counsel on 23 May 2019 and, at that time, gave instructions as to his involvement in matters on 24 April 2018 inconsistent with the pleas of guilty that he had entered. As a result, the sentence was delisted and the applicant now applies for leave to withdraw his pleas of guilty. In support of that application, he has affirmed two affidavits. In his affidavit affirmed on 11 June 2019, the applicant deposes that, when he pleaded guilty, he did so believing that his presence with his friends at the robbery made him guilty, and it was on that basis that he gave instructions that he wished to plead guilty, and that, in fact, he did not do anything at the robbery or wish for any of the offences constituting a robbery and attempted robbery to happen. In his more recent affidavit, he provides more detail as to his account of events which is inconsistent with him being a party to the offence of robbery and attempted armed robbery and, as submitted by his counsel, raises some issues with respect to his criminal liability for the offences of assault. It is submitted on behalf of the applicant that his instructions with respect to the assault offences are such as to raise issues of provocation or self-defence. So, essentially, the applicant deposes that, when he pleaded guilty to the offences, he did so on a misunderstanding as to the law and that, upon giving fuller instructions as to his version of events, he has received advice that he has arguable defences to the charges and for that reason wishes to withdraw his pleas of guilty.

[3] The prosecution has opposed such application. The outline from counsel for the prosecution was drawn without the benefit of having been able to consider the affidavit material from the applicant, which was only filed today, and so some of the force of the submissions made by the prosecution in opposing the application has been lessened. The prosecution refers to the fact that a schedule of facts was sent to the applicant's present solicitor on the 6 November 2018, well before the applicant entered his pleas of guilty.

[4] I did at one stage have some concern as to the absence of any affidavit evidence from the applicant's solicitor as to the circumstances in which the applicant gave instructions to plead guilty, given that one would usually expect that a client, in those circumstances, would be taken through the schedule of facts and it would be confirmed that they understood the facts alleged and also understood the basis upon which they were liable to offences to which they were pleading guilty. However, I have the affidavit evidence of the applicant himself. The prosecution has not sought to cross-examine the applicant, so his evidence as to his lack of understanding of his criminal liability prior to entering the pleas of guilty is unchallenged. I also note that the affidavits of the applicant have been witnessed by his solicitor, and, given the ethical constraints upon his solicitor, I can safely assume that nothing his solicitor would be able to say about those matters would be inconsistent with what the applicant himself has affirmed, given that it would be a gross ethical breach for

a solicitor to facilitate an affidavit going before the court if the solicitor had any belief that the affidavit was false, let alone the sort of gross ethical breach that would be involved in witnessing such an affidavit. So, in those circumstances, I can safely act upon the evidence of the applicant contained in those affidavits.

[5] The applicant has referred to the statement of Brennan, Toohey and McHugh JJ in *Meissner v R* [1995] 184 CLR 132, at 141 to 142, where the Justices stated:

> 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.

[6] Counsel for the applicant has pointed out that those are not the circumstances which apply here - the applicant not being of full age and being a young indigenous boy who has affirmed to his lack of understanding. Also in *Meissner*, Dawson J at page 157 stated that:

> The entry of a plea of guilty… 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 that 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.

[7] Both those passages from *Meissner were* quoted by the Court of Appeal in *R v Wade* [2012] 2 Qd R 31. At paragraph [49] in *Wade*, Muir JA referred to the decision of *R v Murphy* [1965] VR 187 at 191, where Sholl J observed:

> I should be disposed to agree that if [the applicant] pleaded guilty through a misapprehension of the law, eg a misunderstanding of what she was pleading to, or what constituted the crime charged, or for some other reason which enabled one to say that her plea was not really attributable to a genuine consciousness of guilt, an issuable question of guilt would be sufficient to warrant the ordering of a new trial.

[8] Muir J went on to state (at [51]) that the authorities demonstrated that, before a court would go behind a guilty plea and entertain an appeal against a conviction, it must be satisfied that a miscarriage of justice has occurred. I interpolate that, whilst that might be the test on appeal, it would certainly be arguable that the test for me today would be less stringent, given that the matter has not yet proceeded to sentence. In any event, Muir J went on to state:

> A miscarriage of justice may be established in circumstances in which for example: in pleading guilty, the accused did not appreciate the nature of the charges or did not intend to admit guilt…

[9] Muir J also stated:

> And, of course, it will normally be impossible to show a miscarriage of justice unless an arguable case or triable issue is also established.

[10] With respect to that matter of a triable issue, I have had regard to the schedule of facts, which is exhibit 1 on the application, but also the witness statements which

form part of the depositions. And I accept that when one has regard to the witness statements, considered in light of the affidavits of the applicant, that there are triable issues with respect to his guilt. That should not be taken as any assessment by me as to the strength of the prosecution case, or the prospects of acquittal on a trial, but merely, as I stated, a conclusion that there is, to use the terms of Muir J in *Wade*, "an arguable case or triable issue".

[11] So, in those circumstances, where there is uncontradicted evidence of a lack of understanding on the part of the applicant as to the applicable law when he entered the pleas of guilty, unchallenged evidence from the applicant of a version of events which provides an arguable defence, and where the prosecution case does not put beyond any doubt such an arguable defence, it is my conclusion that the interests of justice mean that the applicant should be given leave to withdraw his pleas of guilty. And, in those circumstances, the pleas of guilty which were entered on 4 March 2019 are set aside.