DISTRICT COURT OF QUEENSLAND

CITATION:	*R v MW* [2019] QDCPR 12
PARTIES:	**THE QUEEN** **(Respondent)** **v** **MW** **(Applicant)**
FILE NO/S:	322/18
DIVISION:	Criminal
PROCEEDING:	Pre-Trial Hearing
ORIGINATING COURT:	District Court at Thursday Island
DELIVERED ON:	29 March 2019
DELIVERED AT:	Cairns
HEARING DATE:	26 March 2019
JUDGE:	Fantin DCJ
ORDER:	**1. Defendant's pleas of guilty to three counts of carnal knowledge with or of a child under 16 entered on 14 June 2018 with respect to Indictment 322/18 are vacated.** **2. Direct that pleas of not guilty be entered on behalf of the defendant with respect to counts 1 – 3 on Indictment 322/18 presented on 14 June 2018.** **3. The matter is listed for review on 1 April 2019.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – Pleas - whether defendant should be granted leave to withdraw pleas of guilty to three counts of unlawful carnal knowledge – whether pleas were entered in circumstances where they did not constitute a confession of guilt – whether the defendant's instructions disclose a viable defence **Legislation** *Criminal Code 1899* (Cth) s 590AA(1) **Cases** *Maxwell v R* (1996) 184 CLR 501 *R v Popovic* [1964] Qd R 561 *R v Phillips & Lawrence* [1967] Qd R 237

R v Verrall [2013] 1 Qd R 587
R v GV [2006] QCA 394
R v Nerbas [2012] 1 Qd R 362
R v Tatnell [1962] Qd R 11
R v Wade [2012] 2 Qd R 31
Meissner v The Queen (1995) 185 CLR 132

COUNSEL:	J Trevino for the Applicant
	C Georgouras for the Respondent
SOLICITORS:	Legal Aid Queensland for the Applicant
	Cairns Office of the Director of Public Prosecutions for the Respondent

Nature of the application

[1] On 26 March 2019 at Thursday Island, I made orders in this matter. These are my reasons for that decision.

[2] The defendant applies, after arraignment but before being sentenced, to vacate her pleas of guilty to three counts of unlawful carnal knowledge.

[3] The grounds of the application are that:

1. the pleas of guilty did not, in the circumstances of this case, constitute a confession of guilt by the defendant; and

2. the defendant's instructions disclose a viable defence to all three counts. That is, there are grounds for concluding that the defendant is not criminally responsible for the offences to which she has pleaded guilty.

[4] The Crown opposes the application.

[5] At the time of the alleged offending, the defendant was 25 years old with no relevant criminal history.

[6] Count 1 alleges that on a date unknown between 24 March and 11 April 2016 at Bamaga (a community located at the tip of Cape York) the defendant had sexual intercourse with complainant A, a boy then aged 15 years. It is alleged, and accepted by the defendant, that this was consensual sexual intercourse initiated by the complainant A.

[7] Count 2 alleges that on a date unknown between 24 June and 11 July 2016 at Badu Island (in the Torres Strait) the defendant had sexual intercourse with complainant B, a boy then aged 15 years.

[8] Count 3 alleges that on a date unknown between 24 June and 11 July 2016 at Badu Island the defendant had sexual intercourse with complainant C, a boy aged 14 years. The offending in count 3 is alleged to have occurred the day after count 2, and at the same house.

Procedural history

[9] It is necessary to summarise the matter's lengthy procedural history to understand the context in which the application is made.

[10] Police did not receive receive formal complaints until January 2017, about six to nine months after the alleged offending. The defendant declined to participate in a record of interview. She was charged with three offences of unlawful carnal knowledge, three offences of indecent treatment and one of rape, and released on bail.

[11] On 8 September 2017 there was a full hand up committal in the Bamaga Magistrates Court. The indictment was not presented in this Court until 30 January 2018.

[12] On 7 June 2018, a nolle prosequi was entered with respect to that indictment due to errors in it. The Crown presented a new seven count indictment. It preferred three offences of unlawful carnal knowledge, three offences of indecent treatment and one of rape.

[13] At that time the defendant was represented by counsel instructed by the Aboriginal and Torres Strait Islander Legal Service, not the counsel and solicitor who appeared on this application.

[14] The defendant applied to sever the counts relating to each complainant. On 8 June 2018 O'Brien CJDC allowed the application and ordered separate trials with respect to each complainant. The matter was listed for the pre-recording of evidence under s 21AK of the *Evidence Act* (Qld) on 14 June 2018.

[15] On 12 June 2018 the defendant's counsel indicated to the Crown that the defendant would enter a plea of guilty to one count of unlawful carnal knowledge in respect of each complainant, in satisfaction of the indictment. The Crown accepted that indication and provided a replacement indictment and schedule of facts. The s 21AK hearing was vacated.

[16] On 14 June 2018 the Crown presented the current indictment. The defendant entered pleas of guilty to the three counts. The allocutus was administered. The sentence hearing was adjourned to 28 June 2018.

[17] On 28 June 2018 the sentence commenced before Morzone DCJ in Cairns. The defendant had travelled from Bamaga (a distance of about 1,000 kilometres) for the sentence. She had a seven month old child who she was breast feeding. No written material was placed before the court on the defendant's behalf. During oral submissions by defence counsel, His Honour (properly, in my respectful submission) expressed concerns about the lack of any information to assist him in understanding the causes of the offending, the defendant's risk of reoffending, prospects of rehabilitation, and need for supervision. His Honour ordered a pre-sentence report, including a psychological report, and adjourned the sentence to 27 August 2018.

[18] In August 2018 a pre-sentence report and psychological report were provided.

[19] On 27 August 2018, as a result of matters raised in those reports, the defendant's legal representatives sought, and were granted, leave to withdraw. The matter was adjourned to enable the defendant to obtain new legal representation.

[20] In September 2018 the file was transferred from the Aboriginal and Torres Strait Islander Legal Service to Legal Aid Queensland. After further mentions, the defendant's new legal representatives filed an application under s 590AA of the *Criminal Code* (Qld) to vacate the pleas of guilty.

Grounds

[21] The relevant portions of the pre-sentence report and psychologist's report are extracted and summarised in the Defendant's Outline of Submissions.

[22] The pre-sentence report dated 17 August 2018 states at page 2:

"Attitudes towards offences:

[The defendant] does not fully agree with all of the police facts. She stated that the Badu Island offending [counts 2 and 3] occurred on one night and stated that she woke up at 3:00am to a group of boys including the two victims [B and C] in her room. [The defendant] stated that they jumped on top of her, began pushing her around on the bed and forced her to have sex with them despite telling them that she just wanted to go back to sleep.

[The defendant] agrees with the police facts surrounding the offending which occurred in Bamaga [count 1] with the victim [A]. [The defendant] stated that she had reasonable belief that victim [A] was a lot older given his physical appearance and behaviour within the community which gave her the impression that he was older than 15 at the time. [The defendant] accepts responsibility for her actions in this offending and stated that she shouldn't have done it and wasn't thinking clearly at the time.

Given her explanation of the offending which took place on Badu Island, [the defendant] was questioned as to why she had entered a guilty plea. Her response was that she had not fully understood what she was pleading guilty to and formed the impression that if she pleaded guilty than the charges would be dropped. This suggest that [the defendant] did not fully understand the court process and further, she stated that she felt pleading guilty was an "easy way" out of the legal trouble she had found herself in."

[23] The psychological assessment report of Dr Nelson dated 24 August 2018 provides:

"Responses to Charges of Sexual Misconduct

[The defendant] was offered opportunity to comment on the alleged offending and her decision to enter pleas of guilty to all charges. The content of her reply could potentially cause concern for the Court. ... [The defendant] agrees that she did plead guilty to all charges but argues that she did so after being pressured by her ATSILS Barrister [name deleted] (surname not provided) to make a quick decision after being advised that pleading 'Not Guilty' would lead to a longer period of incarceration (away from her son). [The defendant] takes responsibility for the alleged sexual mistreatment of [A] but provides a substantially different account of the events involving [B and C]. She believes that she is not guilty of offending against [B and C] and to the contrary that she was the person offended against."

[24] Dr Nelson's report thereafter sets out the defendant's account of her alleged offending. Her account in respect of count 1 and complainant A clearly raises a

defence under s 215(5) of the Code: ie. that she believed on reasonable grounds that the complainant child was above the age of 16. Her account to Dr Nelson was as follows:

> *"Alleged offending against [A] [count 1]*
>
> *[The defendant] reports that she had met [A] at an informal party in Bamaga in 2016 where people were socializing, drinking, listening to music, and generally just enjoying each other's company. [A] was an acquaintance of hers and through the night they had talked about a range of things and became comfortable with each other. She describes [A] as a young man who looks to be about 21 years of age, of a big build, and with facial hair. She also knew him as one who drank alcohol regularly, smoked cannabis with other men close to her age, and that he had slept (had penetrative sex) with many girls she knew that were her age or older. She reports that they went to her cousin's house and had sex. They did not sneak away in private attempting not be seen and only had sex on this occasion. She admits not asking [A] his age since she did not believe that he was even close to 15 years of age. She said that she was shocked when the Police told her that he was under 16 and felt very bad about it. She added that [A] had approached her at Bamaga, apologized for the trouble he had caused, and said that he wanted the charges dropped. He also said that the families would not let the matters drop and that they were telling the boys what to say."*

[25] The defendant's account in respect of counts 2 and 3 is recorded in detail over three pages of the psychologist's report. That account is essentially consistent with that given to the authors of the pre-sentence report: that she was raped by the complainants to counts 2 and 3. The psychologist records that the defendant was staying at the house of one of the complainants to babysit his younger siblings while their parents were away. After putting the younger siblings to sleep, the defendant went to bed. Complainants B and C and other teenage boys were in the lounge room. She heard them laughing, making comments and the sounds of pornography coming from a laptop. In the early hours of the morning the complainants entered her locked bedroom. She told them to go away. They left and later returned. They jumped on her and were pushing her around. Ultimately complainant B got on top of her and raped her. She heard the other boys laughing. Shortly after, complainant C did the same. She said she was having trouble breathing as he was not a small boy. The next day the defendant told a friend what had happened. She was concerned that the complainants' parents would turn on her if she told them and they did not believe her. At the minimum, her account raises a defence under s 23(1)(a) of the Code: that the sexual contact with the complainants occurred independently of the exercise of her will.

The defendant's evidence

[26] In addition to the pre-sentence report and psychologist's report, the defendant relies upon two affidavits sworn by her on 22 January 2019.

[27] The first affidavit deposes as to the circumstances of the alleged offending. Her account is consistent with the information she provided to the psychologist Dr Nelson and to the authors of the pre-sentence report.

[28] The second affidavit details the defendant's contact and communication with her former legal representatives. She deposes that:

1. she was never taken through the brief of evidence against her, either before the committal or thereafter;

2. despite asking her solicitor when she would be able to give her statement, she was not provided with an opportunity to give her version of events to her lawyers by way of a written statement or proof of evidence;

3. she does not recall receiving any advice about the committal process;

4. she first met her counsel two days before her court date in June 2018, this meeting occurred at the court house;

5. she was required to travel from Bamaga to Cairns for that purpose;

6. she had two conferences with her lawyers in June 2018;

7. in the first conference in June 2018 she told her lawyers that:

   (a) she believed the complainants were all much older than 16;

   (b) she did not want, and did not agree to, sexual intercourse with the complainants to counts 2 and 3;

8. she was not advised in conference with her legal representatives that it was a defence to the charges if the carnal knowledge occurred without her consent;

9. in the second conference she was advised that she had a good chance of being found not guilty of rape but should plead guilty to the three counts of carnal knowledge;

10. she did not decide to plead guilty because she thought she had done anything wrong. Rather, she was advised that if she pleaded not guilty she would likely be found guilty and would, after trial, be sentenced to 8 years imprisonment or more. In those circumstances, she decided to plead guilty to "minimise the time I would be in prison and separated from my child"; and

11. everything she told the psychologist, Dr Nelson, was the truth.

[29] The Crown filed an affidavit exhibiting the relevant transcripts of earlier proceedings and the statement of facts upon which the defendant pleaded guilty.

[30] The Crown invited the defendant's previous legal representatives and counsel to provide affidavits in response. Tellingly, they declined to do so.

[31] The defendant was not required for cross examination.

[32] The defendant's evidence is unchallenged and, for the purposes of this application, is accepted.

Relevant principles

[33] A plea of guilty may be withdrawn at any time before the sentence is imposed. The judge retains a discretion to grant leave to change the plea to one of not guilty at any time before the matter is disposed of by sentence or otherwise.[1]

[34] In Queensland the view has been taken that a convicted person may at any time before sentence be allowed to withdraw a plea of guilty.[2]

[35] Where the defendant has pleaded guilty, the allocutus has been administered and the sentencing hearing adjourned, according to the prevalent view the defendant has been convicted, although the conviction is liable to being set aside if a change of plea were permitted.[3]

[36] 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.[4]

[37] If an accused has in fact announced a plea of guilty to a charge but makes statements, at the time or before sentence, which show that he or she alleges facts which would amount to a defence to the charge, in these circumstances, he or she should be treated as pleading "not guilty".[5]

[38] The plea of guilty must be unequivocal and not made in circumstances suggesting it is not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered.[6]

[39] Leave to withdraw a plea may be granted if it resulted from a mistake of fact or a misunderstanding of the law, inability to obtain legal representation or if the interests of justice otherwise so require.[7]

[40] "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 offences to which he or she has pleaded guilty".[8]

[41] A plea of guilty which is not in plain, unambiguous and unmistakeable terms must be treated as a plea of not guilty, and further, where on a plea of guilty a defendant so

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[1] *Maxwell v R* (1996) 184 CLR 501 at 508 – 509 (per Dawson and McHugh JJ).
[2] *R v Popovic* [1964] Qd R 561 at 567; *R v Phillips & Lawrence* [1967] Qd R 237 per Hart J at 288-289; *R v Verrall* [2013] 1 Qd R 587 per Holmes JA at [15]; *R v GV* [2006] QCA 394 (a judgment of the Court) at [38].
[3] *R v Nerbas* [2012] 1 Qd R 362 per Philip McMurdo J; *R v Verrall* at [4] per Holmes JA.
[4] *R v GV* at [31].
[5] *R v Tatnell* [1962] Qd R 11.
[6] *Maxwell v R* at 511 (per Dawson and McHugh JJ).
[7] *Maxwell v R* at 531 (per Gaudron and Gummow JJ).
[8] *Maxwell v R* at 531 (per Gaudron and Gummow JJ).

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.[9]

[42] If a defendant were to put forward, for the first time, on her sentence, an exculpatory account of the circumstances of the alleged offending, and the Crown knew nothing of those matters, there is a clear line of authority requiring a plea of not guilty to be entered.[10]

[43] 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; or the plea was not made freely and voluntarily, such as where it is shown that the plea was "not really attributable to a genuine consciousness of guilt". And it will normally be impossible to show a miscarriage of justice unless an arguable case or triable issue is also established.[11]

Discussion

[44] Here, sentence has not yet been imposed on the defendant. It follows from the authorities above that the Court has power to reject the earlier pleas of guilty and grant leave to change the pleas to not guilty.

[45] I pause to observe that the defendant purports to make the application pursuant to s 590AA(1) of the *Criminal Code* (Qld). However in *R v Verrall* Holmes JA said that a decision to grant or refuse leave to withdraw a plea of guilty is not a direction or ruling "as to the conduct of the trial" (so in that case s 590AA(4) had no application).[12] For purposes of this application, I do not determine the procedural point whether the defendant was entitled to bring the application under s 590AA(1). It is clear from the authorities that the defendant may at any time before sentence is imposed apply to vacate her plea.

[46] The Crown opposes the application on the basis, it submits, that the defendant entered pleas of guilty in open court, in the exercise of her free will, based on sound legal advice, in consideration of a forensic decision to reduce time spent in actual custody, despite a potential defence to the charges.

[47] It relies upon the statement in *Meissner v The Queen* that *"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."*[13]

[48] The Crown also emphasised authorities to the effect that a person may plead guilty for all manner of reasons, that a conviction entered upon that basis will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred, and that courts approach attempts at trial or on appeal to change a plea of guilty with caution bordering on circumspection.

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[9] *R v GV* at [37].
[10] *R v GV* at [39].
[11] *R v Wade* [2012] 2 Qd R 31 at [51] per Muir J; *R v Verrall* at [28] per Holmes JA.
[12] [2013] 1 Qd R 587 at [14].
[13] (1995) 185 CLR 132 at 141.

[49] A number of observations may be made about those submissions.

[50] First, this is an application to vacate a plea before sentence has been imposed, not an appeal against conviction.

[51] Second, the submission that the defendant received "sound legal advice" cannot be accepted in the face of the defendant's unchallenged evidence.

[52] Third, the defendant was (unsurprisingly) anxious to minimise the amount of time spent in custody separated from her infant. However it cannot be said, on the evidence, that her decision to plead guilty was a considered forensic decision entered in the exercise of a free choice by a person after receiving adequate legal advice, including as to defences she may have.

[53] This is not a case where the schedule of facts on which the judge was to sentence were in fact and in law insufficient to prove guilt of the offences. Rather, it is a case which, on the defendant's account, falls within the second and third limbs referred to in *Maxwell v R*[14]. That is, the pleas did not constitute a genuine confession of guilt and there are grounds for thinking that the accused is not criminally responsible for the offences to which she has pleaded guilty.

[54] The evidence of the defendant suggests that she may have entered pleas of guilty out of ignorance, in circumstances where she did not appreciate the consequences of her instructions and where she had received inadequate legal advice.

[55] Her account of the circumstances of the offending provides a complete defence to count 1 (that she believed on reasonable grounds that the complainant child was above the age of 16), and a complete defence to counts 2 and 3 (that the sexual contact with the complainants occurred independently of the exercise of her will). Her evidence is that she was not given legal advice about those defences. Worse, that in counts 2 and 3 she was herself the victim of rape.

[56] It follows that her earlier pleas do not constitute a true confession of guilt and there are grounds to consider that the defendant is not criminally responsible for the offences to which she has pleaded guilty.

[57] It is difficult to imagine a more patent miscarriage of justice if she were not permitted to withdraw her pleas.

Conclusion

[58] In those circumstances, the defendant would be unfairly denied a fair opportunity of acquittal if leave were not granted to withdraw her pleas.

[59] It is clearly in the interests of justice that the defendant be granted leave to vacate her earlier pleas of guilty and for the court to direct that a plea of not guilty be entered with respect to each of the three counts. The application is allowed.

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[14] (1996) 184 CLR 501.