Singh v The Queen [2014] NTCCA 16

PARTIES:	SINGH, Upkar v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 15 of 2013 (21208024)
DELIVERED:	9 October 2014
HEARING DATES:	29 and 30 September and 1 October 2014
JUDGMENT OF:	KELLY AND BLOKLAND JJ, MILDREN AJ
APPEALED FROM:	RILEY CJ

CATCHWORDS:

CRIMINAL LAW – Procedure – Pleas – Plea of guilty – Free and voluntary admission of guilt – Whether accused's will was overborn – Accused's deteriorating health on remand – Accused's understanding of the consequences of a guilty plea – Appeal dismissed

Child Protection (Offender Reporting and Registration) Act 2004 (NT), s 37

Dietrich v The Queen (1992) 177 CLR 292; *Hogue v The State of Western Australia* [2005] WASCA 102; *Liberti v The Queen* (1991) 55 A Crim R 120; *Lo Castro v The Queen* [2013] NTCCA 15; *Meissner v The Queen* (1995) 184 CLR 132, applied

Maxwell v The Queen (1996) 184 CLR 501; *R v Toro-Martinez* (2000) 114 A Crim R 533, referred to

REPRESENTATION:

Counsel:

Appellant:	M Johnson
Respondent:	R Griffith

Solicitors:

Appellant:	Robert Welfare & Associates
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	37

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Singh v The Queen [2014] NTCCA 16
No. CA 15 of 2013 (21208024)

BETWEEN:

UPKAR SINGH
Applicant

AND:

THE QUEEN
Respondent

CORAM: KELLY AND BLOKLAND JJ AND MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 9 October 2014)

THE COURT:

Introduction

[1] On 21 March 2013, the applicant pleaded guilty to one count of aggravated assault upon a female under the age of 16 years, and to two counts of intentionally exposing a child under the age of 16 to an indecent film (the indecent exposure charges). A number of other serious charges were not proceeded with. By the time of his plea hearing, the applicant had been held in remand for in excess of twelve months. The learned sentencing judge recorded convictions in relation to each count and imposed separate sentences on each count, some of which were partially made concurrent, totalling six months' imprisonment. Having regard to the time already spent

on remand, the sentencing judge ordered that the applicant be immediately released. As a consequence of the findings of guilt and convictions recorded on the two counts of indecent exposure, the applicant was subjected to the reporting conditions required by s 37 of the *Child Protection (Offender Reporting and Registration) Act* for eight years.[1]

[2] The applicant now seeks leave to have his pleas of guilty quashed, and a new trial ordered on the basis that the pleas were entered in circumstances where they were not free and voluntary and not entered in circumstances indicating a consciousness of guilt.

Background Facts

[3] According to the facts which were accepted by the trial judge at the hearing of the plea, the applicant is now aged 48 having been born on 22 November 1965 in Naya Nangi, in Kunja, India. His first language is Punjabi, his second language is Hindi and his third language is English. He also speaks some Indonesian. After attending school in India, in 1991 he obtained a Master of Physics degree at the Lalit Narayan Mithralla University in Bihar State, India. Unable to obtain employment in that field, he established a factory for the production of lubricating oil pumps in Kunja, employing, when in full production, 11 people. In 2001, after four years of operations, he closed the factory because of production difficulties caused by electricity supply problems and regulatory obstacles which he was unable to overcome.

[1] That consequence is imposed directly by the legislation, not the sentencing judge. The sentencing judge commented that the applicant would be subject to that condition for 15 years and, apparently, the relevant register reflects this. It is now common ground that this was in error, and that the register should be corrected to record a requirement to report for eight years. However, this error is not relevant to this appeal.

He then moved to Bangkok, Thailand, where he obtained some employment, before migrating to Australia in 2003.

[4] Between 2003 and 2005, he worked in various places as a farm hand. In 2005, he obtained employment as a supervisor for a grape farm in Ti Tree, Northern Territory. Whilst living there and visiting Alice Springs, he met Tamika McKee, who had four children by a previous relationship, and they married in 2008. Prior to 29 February 2012, the applicant and his wife were living in Alice Springs, where he had obtained employment as a fork lift driver, and she was employed as a security officer at the Yeperenye Centre in Alice Springs. By this time only one of the children was still living at home.

[5] Tamika McKee comes from a local family. Through her extended family, the applicant met a number of young teenage girls, including JW, HD and CW who started to visit the household. On 29 February 2012, the applicant was arrested in respect of 32 counts, some of which were charged on information, and the others on complaint. The charges on information, (case number 21208024) included two counts of aggravated assault against JW aged 13 years, one count of indecent assault against JW, two counts of attempting to procure JW to have sexual intercourse, five counts of intentionally exposing a child to indecent video images and photographs, and two counts of committing acts of gross indecency, against JW and CW respectively. The complaint charges were 20 counts of supplying liquor to a child, and one count of intentionally exposing HD, a child under 16, to

indecent videos and photographs, the latter of which appears to have been a mistake and not proceeded with. These offences were alleged to have occurred between 1 January and 27 February 2012. Some charges had specific dates, and others did not.

[6] On 1 March 2012, the applicant appeared in the Court of Summary Jurisdiction and applied for bail. On the same day he applied for legal aid with the Northern Territory Legal Aid Commission (the Commission). The application was part heard until March 2012 when he was granted bail subject to conditions.[2] After his release the applicant was re-arrested on 14 March 2012 in relation to case numbers 21209907 and 21209908. These were two charges of indecent assault, the first against SP, and the second against SCH, both allegedly females under the age of 16. These offences apparently allegedly occurred in 2011.

[7] No immediate application for bail was made, because the Commission lawyers representing the applicant advised that any application should await obtaining the Child Forensic Interviews (CFIs) from the police. Although not all of the material needed had been obtained, the applicant's lawyers applied for bail on 19 April 2012. The matter was part heard and then adjourned to 27 April 2012 when the hearing continued. In the result, bail was refused.

[2] There is a conflict in the evidence as to when he was released on bail. According to the affidavit of the Director of Public Prosecutions he was released on 2 March 2012. According to the statutory declaration of the Principal Legal Officer of the Northern Territory Legal Aid Commission, Mr Goldflam, he was not released until 12 March 2012. The applicant also asserted that although bail was granted on 2 March, he was not released until 12 March 2012 because up until then he was unable to comply with his bail conditions. Nothing turns on this.

[8] On 3 May 2012, the applicant terminated his instructions with the Commission and on or about 22 May 2012 he engaged a private practitioner, Mr Preston. According to Mr Preston, the applicant at all times denied all of the charges. The three matters proceeded through a number of mentions in the Court of Summary Jurisdiction until 4 July 2012 when dates were set for oral committal hearings for all three matters from 12 to14 September 2012. The matters proceeded on those dates. Two were adjourned part heard until 4 October 2012 and the third adjourned part heard until 5 October 2012. The applicant was committed for trial in respect of all three matters. It is likely that, at least by the time of the committal hearing, if not some time before, copies of the CFIs had been made available to Mr Preston.

[9] On 12 August 2012, Mr Preston attended on the applicant at the prison and raised with him for the first time the possibility of negotiating a plea bargain and discussed with him the possibilities of lengthy imprisonment terms.

[10] In the meantime, the applicant remained on remand in protective custody, having been assaulted by another prisoner. According to the applicant, he was in solitary confinement for eight months in all, and his health began to deteriorate. The applicant's claim is supported by the evidence of Mr Goldflam. During this period he was locked up alone in a cell for up to 22 hours a day.

[11] By October 2012, the applicant had begun to have financial and personal difficulties, including the following.

(a) His wife no longer visited him in prison and had apparently left the rented family home, and he did not know where she was.

(b) His car had been damaged.

(c) He did not have the ability to raise a cash surety for bail.

(d) He believed that his wife had taken his money without his authority.

(e) The money from his tax return had “gone”.

(f) His relatives in Melbourne were not returning calls made by Mr Preston.

(g) He was advised by Mr Preston that he was unlikely to overcome the presumption against bail.

(h) He was experiencing difficulties in arranging Mr Preston’s fees.

[12] On 2 October 2012, Mr Preston again raised the possibility of a plea bargain, and indicated that if he could arrange for the prosecution to accept guilty pleas to charges not involving “the sexy things” he believed that he could “get him out of jail in fairly short time as he had already served a fair period in jail”. This was further pursued on 4 October, and according to Mr Preston the applicant agreed to him commencing negotiations, “but on

the understanding that he would have to approve of the charges he would plead guilty to and the facts or matters which constituted the charges".

[13] On 25 October 2012, three indictments were filed in the Supreme Court in respect of the three matters.

[14] On 12 December 2012 hearing dates were allocated by the Registrar as follows:

(a) A special sitting for the pre-recording of evidence in relation to all three matters was listed for 25 to 27 March 2013.

(b) Case number 20208024 was scheduled as a six day trial listed for 12 April 2013.

(c) Case number 21209907 was scheduled as a three day trial listed for 8 May 2013.

(d) Case number 21209908 was scheduled as a three day trial listed for 4 June 2013.

[15] Mr Preston began negotiations with the prosecutor on the applicant's behalf. On 27 November 2012 he wrote to the prosecutor indicating that the charges would be defended, but that "if all matters could be resolved on the basis of one incident … without any indecent assault I believe the matter could be resolved". This was not accepted by the Crown.

[16] Subsequently, on 11 December 2012, Mr Preston wrote again to the prosecutor in which he stated that he had instructions "to put a further proposal on the basis that it is in full resolution of the charges and that facts can be agreed upon. The proposal is also on the basis that the Crown does not seek that my client serve further actual time in prison." The offer to plead related to three counts on matter 21208024, *viz* one count of aggravated (but not indecent) assault on JW, and two counts of exposure to an indecent video (but not a photograph) involving HD and JW. This offer was not accepted. It does not appear that the applicant was aware of this letter until some time later.

[17] On 23 December 2012, Mr Preston wrote to the applicant advising the present state of the negotiations with the Director of Public Prosecutions (DPP), which indicated that the DPP might accept the plea offer only if there were also a plea to "some offences (but not all) on the other two matters ie: case numbers 21209907 and 21209908". Mr Preston also raised the question of funding for the trials, the amount outstanding to date, and that he was "not prepared to continue to act unless promises regarding payment are abided by". He indicated what his future costs were likely to be if there were a plea and if the matters all went to trial, and that he had offered on two previous occasions to transfer his file to the Commission which the applicant had rejected. He also indicated that he should delay any bail application whilst negotiations were taking place, and he indicated the costs of a further bail application.

[18] The applicant replied by letter written in his own hand dated 14 January 2013 in which he said:

> "I already meat you on 23-12-12 and you give me a 2 pages of letter from your side about Negotiating and I told you if you do it up to 20-01-2013 Negotiating with D.P.P. then alright. But after that I no need any negotiation with D.P.P.
>
> I am thinking because I am poor man because I am in prison not outside and is very hard for me to arrange that Big amount for you and you said Maybe not possible I got bailed or NOT. So, I decided if up to 20-01-2013 possible with D.P.P. Negotiating and I have to see if I agree or not. After that date maybe be I represent by myself or and can hire another Indian lawyer from Melbourne. So, its request please let me know before 20-01-2013 what you done because I am listening 2 months about Negotiation with D.P.P. …
>
> Please, See me up to 20-01-13 about negotiation with D.P.P." (*sic*)

[19] Despite the 20 January 2013 deadline, and the lack of any funds coming from the applicant or his family to meet his present and future costs, Mr Preston continued to assist the applicant and saw him on several occasions in January and February 2013. Eventually, the negotiations having come to a stand-still, the applicant terminated Mr Preston's instructions by letter dated 18 February 2013. On 19 February 2013, Mr Preston obtained the applicant's authority to forward his file to Mr Goldflam, the Principal Legal Officer of the Commission, which he did.

[20] The matters came before Southwood J on 22 February 2013 for a mention. At this time the applicant was unrepresented. It is not clear what transpired

on this occasion.[3] The evidence is that Mr Preston appeared and advised the court that his instructions had been terminated and that he had been authorized to forward the brief to the Commission and that he had done so.

[21] The matters next came before Riley CJ on 6 March 2013, which was an arraignment day. It appears that the applicant, who appeared by video link from the gaol, informed the court that although Mr Goldflam from the Commission was prepared to represent him, the applicant did not want to be represented by him because the Commission had lied to him and did not tell him the truth. Mr Goldflam was present in court when that was said, and made a note of it. The court was apparently told that efforts were being made on the applicant's behalf to engage another private practitioner, Mr McBride, who had been contacted by the applicant's wife. There is no evidence as to what financial arrangements, if any, had been discussed with Mr McBride about this possible brief. The transcript of 8 March 2013 reveals that Mr McBride, who was in Darwin, appeared by telephone, and advised the Chief Justice that he was unable to accept the brief because he was about to take leave and was going overseas. The Chief Justice pointed out to the applicant that the matter was to go ahead on 25, 26 and 27 March, and he asked him what he wanted to do. The applicant asked for clarification about whether the matter concerned some matters "from welfare or the three cases from the kids, from childs". When it was clarified that this related to the charges brought against him and had nothing to do with

[3] This may have been a call-over of the list. The applicant may not have been present.

welfare, the applicant said that in that case, he would represent himself. The Chief Justice then pointed out the disadvantages he would face if he were self-represented, and in particular, that he would not be permitted to cross examine the complainants except by putting questions through the presiding judge. Without going through the whole transcript in detail, it quickly became apparent to the Chief Justice that the applicant would have had difficulty in formulating proper questions if he became self-represented, and strongly suggested that he accept Mr Goldflam's offer. At the applicant's request, the matter was adjourned until 14 March to enable the applicant to reconsider his position.

[22] Mr Goldflam deposed that on 6 March he was contacted by the prosecutor who requested him to act as a "go-between" with the applicant to settle the case.

[23] Mr Goldflam wrote on 14 March that he would pass on a Crown offer to the applicant, and he believed that it was likely that he had obtained the applicant's instructions to act in this capacity. It is likely that there was a meeting at the prison between Mr Goldflam and the applicant on 13 March, and that the offer was approved by the applicant.

[24] On 14 March 2013, the matter was called on again before the Chief Justice. Mr Goldflam advised the court that he had visited the applicant at the prison on 13 March and advised him that if he engaged him by 14 March, he had time to prepare for the hearings, but that he was unable to extend his offer

beyond 14 March, and that unless he engaged him by then, the offer of legal aid would be withdrawn. The Chief Justice asked the applicant what his position was. The applicant gave a jumbled explanation about how he had lost everything, he was in prison "under protection", he had been assaulted in prison, he had complained to the authorities about the assault, the prisoner who assaulted him "got six months", that the case was closed without his knowledge, that he had complained to the Ombudsman about this, that apparently he was not satisfied with the sentence imposed, he was told there was a lack of evidence because there were no witnesses, when he believed the assault had been witnessed by 10 people and was caught on CCTV footage, and that because of all of this he was dissatisfied with the justice system and did not trust anyone. The Chief Justice explained to him that there was nothing which could be done about the assault matter, that he had to make up his mind about whether to accept Mr Goldflam's offer today, and if not he would have to appear unrepresented, that Mr Goldflam was an honourable and experienced lawyer whom the court had complete faith in, and he explained the difficulties facing him if he were to go ahead representing himself. He was asked whether he wanted to be represented by Mr Goldflam or not. The following exchange occurred:

> THE ACCUSED: Your Honour, can you give me one day more please so I can talk to Mr Goldflam?
>
> HIS HONOUR: No. No, I'm not going to give you one day more. You've had plenty of time. You've heard what Mr Goldflam has had to say. You're really just putting off making a decision, Mr Singh.

THE ACCUSED: Your Honour, my bad luck, your Honour, I will do myself, your Honour. My bad luck. My bad luck.

HIS HONOUR: Well, it's a matter for you. I would suggest to you that is a very, very unwise decision but it is your decision. Is that your final decision then?

THE ACCUSED: Yes, your Honour. My bad luck, your Honour.

HIS HONOUR: Well, when you say it's your bad luck, you're bringing it upon yourself.

THE ACCUSED: What I need, your Honour, I need interpreter because my English is not very well. I need a Punjabi interpreter or maybe Hindi, Indian and national language interpreter please, your Honour.

HIS HONOUR: I don't accept that, Mr Singh, your English is sufficient for these purposes.

THE ACCUSED: But I can't understand the difficult words, you know, some hard words.

HIS HONOUR: Well then we will avoid hard words. We'll be dealing with children so we won't be using hard words in any event.

[25] His Honour reiterated that the matter would be proceeding on 25 to 27 March and dealt with other matters. He did however ask Mr Goldflam if he was "missing anything here" and more specifically, whether there was any suggestion of mental impairment, and was assured by Mr Goldflam that he had had three lengthy conferences with Mr Singh over the last three weeks and he was unable to provide any indication of anything which suggested to him that there was some fundamental difficulty with Mr Singh's trial proceeding.

[26] On 19 March 2013, Mr Goldflam received a letter from the prosecutor tentatively offering to settle on terms identical to that set out in Mr Preston's letter of 11 December 2012. Mr Goldflam then confirmed the offer in a telephone conversation with another more senior prosecutor who had previously been handling the matter. He then went to the prison with another Commission lawyer, Amelia Beech, to obtain instructions from the applicant. The applicant was strongly advised to accept the offer. According to Mr Goldflam, the applicant said that he wanted to discuss the matter with his wife and accordingly he and Ms Beech attended on the applicant later that same day when he was advised by the applicant that he would plead guilty to counts 3, 19 and 28 on case number 21208024, but only on condition that the DPP confirm in writing that it would accept a plea in those terms. The applicant then signed a handwritten document, witnessed by Ms Beech in the following terms:

> I, UPKHAR SINGH, OFFER TO PLEAD GUILTY TO THE THREE CHARGES AS CONTAINED IN THE LETTER DATED 11 DECEMBER 2012 BY MY FORMER LAWYER MURRAY PRESTON. (COUNTS 3, 28 AND 19)
>
> I WANT THE DPP TO GIVE ME A LETTER CONFIRMING IN WRITING THAT THEY ACCEPT THIS OFFER.
>
> I UNDERSTAND THAT IF I PLEAD GUILTY TO THE TWO CHARGES (28, 19) OF INDECENT DEALING, I WILL BE ON THE CHILD OFFENDERS REGISTER FOR EIGHT YEARS.

[27] On 21 March 2013 the matters were mentioned before the Chief Justice and stood down to enable draft agreed facts to be considered by the applicant.

At that stage, Mr Goldflam appeared as the applicant's duty solicitor, because the applicant had not yet signed an application for legal aid. During the brief adjournment, Mr Goldflam visited the applicant in the court's cells and showed him the fresh indictment with only three counts on it (which replaced the existing indictment in matter number 21208024) and the draft agreed facts. According to Mr Goldflam, he read these documents to him. The applicant signed the agreed facts document at Mr Goldflam's request. The applicant was shown the two *nolle prosequi* documents which the Crown had prepared in relation to matters numbered 21209907 and 21209908. The applicant also signed the application for legal aid. It will be necessary to consider all of the circumstances of what took place in the cells later.

[28] Later that same morning, the prosecutor filed both of the *nolle prosequi* instruments in court, Mr Goldflam announced his appearance for the applicant and the applicant was arraigned before the Chief Justice and pleaded guilty to the three counts. No interpreter was provided. There is a dispute between the applicant and Mr Goldflam as to what exactly occurred when he was asked to plead. It will be necessary to resolve this dispute later on.

[29] The Chief Justice, after hearing submissions, convicted the applicant on each count and immediately proceeded to impose the sentences referred to earlier. The applicant was then released.

[30] At some time shortly after his release, the applicant consulted Mr Goldflam about whether he would act for him in appealing against his conviction. He was advised that there were no grounds for an appeal, but Mr Goldflam assisted him, providing technical assistance on what he needed to do in order to lodge his appeal. The applicant lodged his application for leave to appeal without legal assistance within the prescribed time.

Principles governing applications for leave to appeal where the applicant had pleaded guilty

[31] In *Meissner v The Queen* Dawson J said:[4]

> 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.

[32] In *Hogue v The State of Western Australia*, Wheeler JA said:[5]

[4] (1995) 184 CLR 132 at 157
[5] [2005] WASCA 102 at [22]

> It is no easy matter for an appellant to persuade a Court to set aside a conviction based on a plea of guilty. The appellant, in such a case, must show that there has been a miscarriage of justice: *Borsa v The Queen* [2003] WASCA 254 at [20] per Steytler J. The three well recognised circumstances (albeit not exhaustive) that will amount to a miscarriage of justice and result in the plea of guilty being set aside are: where the appellant did not understand the nature of the charge, or did not intend to admit guilt; where upon the admitted facts, the appellant could not in law have been guilty of the offence; and where the guilty plea has been obtained by improper inducement, fraud or intimidation, and the like: …

[33] In *Liberti v The Queen*, Kirby P (as he then was) said:[6]

> 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 upon 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'Neill* [1979] 2 NSWLR 582; (1979) 1 A Crim R 59; *Sagiv* (1986) 22 A Crim R 73 at 81.

[34] These principles are not in doubt and have been applied in this Court: *Lo Castro v The* Queen.[7]

[35] It is not necessarily the case that the applicant must show that his plea was affected by external duress, ie that improper pressure was brought to bear upon him by some third person. In *Maxwell v The Queen*[8] Dawson and McHugh JJ said:

> The plea of guilty must however be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt. Those circumstances include ignorance, fear, duress mistake or even

[6] (1991) 55 A Crim R 120 at 122
[7] [2013] NTCCA 15 at [89]
[8] (1996) 184 CLR 501 at 511

> the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty 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. But otherwise an accused may insist upon pleading guilty.[9]

[36] In *R v Toro-Martinez*[10] Spigelman CJ (Newman and Adams JJ concurring) reviewed the authorities and said:

> It is undesirable to lay down a test which would attempt to define the circumstances in which a miscarriage of justice may be found to arise…
>
> A formulation which has frequently been referred to with approval is that of Sholl J in *Murphy* [1965] VR 187 at 191: "…for some other reason which enabled one to say that her plea was not really attributable to a genuine consciousness of guilt…."…
>
> The significance of this factor is also affirmed in *Cincotta* (unreported, Court of Criminal Appeal, NSW, No 60472 of 1995, 1 November 1995) in which Hunt CJ at CL with whom Grove and Allen JJ agreed, said (at p 1):
>
> A person who has pleaded guilty will be permitted to withdraw that plea where it has been shown that a miscarriage of justice has occurred. The applicant for such permission bears the onus of showing the existence of that miscarriage. It will be shown to exist where, for example, the plea was induced by threats or other impropriety when the applicant would not otherwise have pleaded guilty. There must be shown to be some circumstance which indicates that *the plea of guilty was not really attributable to a genuine consciousness of guilt.* (Emphasis added.)

[9] In *Maxwell* the Court was considering a different question, namely the power of the trial judge to reject a guilty plea after it had been accepted by the Crown in full satisfaction of the indictment.
[10] (2000) 114 A Crim R 533 at 537-538

The ground of appeal

[37] The ground of appeal relied upon is that the pleas were entered in circumstances where they were not free and voluntary and not entered in circumstances indicating consciousness of guilt. This appears to be a combination of an assertion that the pleas were obtained by improper means and that the applicant did not intend to plead guilty. There is support for the proposition that a plea is tainted if the free choice of the accused has been overborne by intimidation, inducement or other means: see *Meissner v The Queen* at 148 per Deane J.[11] In the same case, Brennan, Toohey and McHugh JJ said:[12]

> Conduct is likely to have the tendency to interfere with a person's free choice to plead not guilty, however, when the conduct consists of a promise or benefit that is offered in consideration of the accused pleading guilty. The difficulty in such cases is to draw the line between offers of assistance that improperly impact on the accused's freedom of choice and offers of assistance that are legitimate inducements. In most cases, that difficulty can be resolved by determining whether, in all the circumstances of the case, the offer could reasonably be regarded as intended to protect or advance the legitimate interests of the accused having regard to the threat to those interests that arises from the institution of the criminal prosecution.

[38] In *Maxwell v The Queen,*[13] the High Court considered the circumstances under which a plea of guilty might be rejected by a trial judge. In the course of deciding this question Gaudron and Gummow JJ said:[14]

---

[11] (1995) 184 CLR 132 at 143
[12] Ibid
[13] (1996) 184 CLR 501
[14]Ibid at 531

> There is more to the grant of leave to withdraw a plea than alteration of the record. Ordinarily, it involves a consideration of the circumstances in which the plea was made, with leave being 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 require.

The circumstances upon which the plea of guilty was obtained

[39] The overall circumstances in which the plea of guilty was obtained may be summarized as follows:

(a) the applicant had been remanded in custody since 14 March 2012. For eight months of that time, he was in protective custody, which meant that he was confined separately from all other prisoners in his cell for 22 hours a day [AB 22. 6];

(b) the applicant had been refused bail and had been advised that a further bail application was unlikely to succeed;

(c) by at least some time in mid to late 2012, the applicant had apparently exhausted his funds and by January or February 2013 his then solicitor Mr Preston had indicated that he would not make an application for bail without further funds, which he did not have;

(d) By March 2013, the applicant's health had deteriorated. Prior to going into remand, the applicant weighed 84 kg. Upon his release he weighed 63.4kg. Dr Chaudry, in his report dated 27 May 2013, noted that he had had a left sided incarcerated hernia repair in 2012, and he had been

booked in for an elective right side inguinal hernia repair. Dr Chaudry stated in his report that as at 27 May 2013 the applicant "seemed like in significant physical and mental disrepair. He seemed quite weak and mentally distraught." Ms Beech, in her affidavit said that when she visited the applicant on remand on 19 March 2013 with Mr Goldflam, he "seemed mentally unwell and physically frail. He was highly anxious throughout of [*sic*] meeting." She noted that her overall sense was that he was "a man struggling in custody. He seems [*sic*] physically pale and wan. He also seemed highly anxious and distressed about his predicament." Mr Goldflam was also "concerned about the adverse effect of almost a year's imprisonment on Mr Singh's health and well-being." On this same occasion, Mr Goldflam said that he was "seriously concerned for his health, and I was anxious to assist him to get out of prison as soon as possible … He presented as a man who was distraught, desperate, suspicious and perhaps even paranoid." He said that he wanted to win the applicant's confidence, and to develop enough confidence that he would accept his advice. "I was confident that if that occurred, I could quickly secure his liberty. I was anxious that if I was unable to win his confidence, he would remain incarcerated, with the prospect of having to conduct up to three jury trials as a litigant in person. Thirdly, my expressed concern about his health and ongoing incarceration was in my view an important

consideration to be taken into account by him in deciding whether or not to enter into a plea agreement";

(e) if the matters went to trial and bail was not granted, it would seem most likely that the applicant would have remained on remand until at least the completion of the pre-trial recordings in late March 2013, if not until the end of the last trial due to commence in June 2013;

(f) certainly by this time his wife had been in touch with him at the prison and was supportive of him, even though, because of the charges the applicant was facing, she had indirectly lost her employment and had become alienated from her extended family in Alice Springs. There is some evidence that she was consulted about whether the applicant should plead guilty to the three charges, and that she was urging him to do so; and

(g) English was the applicant's third language.

Basis of applicant's claim to set aside guilty pleas

[40] In written submission and in oral argument on the hearing of the application for leave to appeal, counsel for the applicant contended that this Court should conclude that, because of his language difficulties, when he entered the guilty pleas to the three charges on 21 March 2013, the applicant did not understand that he was pleading guilty.

[41] There is evidence that the applicant's understanding of English was considerably less than that of a person whose command of English was that of a native speaker. He did not ask Mr Goldflam to provide an interpreter either during their conferences, nor when he was asked to plead. Nor did Mr Goldflam raise it with him, although he had been present in court when the applicant had appeared unrepresented and submitted to the Chief Justice that he be provided with an interpreter, which was refused. Mr Goldflam has experience and training in assessing whether clients require an interpreter but he considered that he did not require an interpreter.

[42] If the report of Dr Elder is accepted, despite the applicant's superficial fluency and overall competence in everyday communication Mr Singh's English language proficiency is well below the B2 level needed to guarantee full understanding of oral interactions with members of the legal profession and for full understanding of the importance of written material presented to him in relation to his case. Dr Elder's opinion is supported by the transcripts of what occurred in court when the applicant was not legally represented. The tests which were conducted show the following.

(a) He had an 80% correct response to the meaning of the 2000 most common words in the English language, and between 10% and 30% of words in the range from 3,000 to 8,000 words. The conclusion reached was that he could read everyday material but his knowledge of less frequent words would have impeded his understanding of more abstract

or complex texts such as letters written to him by his former solicitor Mr Preston, or face-to-face discussion on the same topic.

(b) A test of his understanding of legal vocabulary pitched at a level between basic and low resulted in a poor performance, and he was oblivious to grammatical clues which might have assisted him in choosing the correct response.

(c) There was a similar result when asked to read statements in plain language about simple legal cases pitched at the same level.

(d) He performed extremely poorly on a test of understanding implied meaning based on context or common knowledge, and generally selected only literal rather than implied meaning. This test content covered meanings implicit in general conversation of everyday topics.

(e) The results of his speaking ability were noted as follows: “Mr Singh understood the questions asked of him and talked fluently about his life experiences including his family and his education in India. His speech, while clearly accented, was generally easy to comprehend. However, his command of grammar was limited. He used predominantly the present tense, whether talking about past, future or hypothetical situations and his speech was almost entirely devoid of model verbs (could, should, might, etc). He used mainly simple sentences without subordination and made frequent errors, including with usage of question forms and passive voice as noted in the court

transcripts. Whilst these errors did not generally interfere with intelligibility on familiar topics, his limited grammar and vocabulary made it difficult for him to express his views clearly on more abstract matters. Here there was also a loss of coherency and fluency and he became difficult to follow. Mr Singh's superficial fluency and apparent ease with general everyday English is somewhat deceptive therefore, and masks significant limitations that place him below the B2 level which I deem necessary to engage meaningfully with the niceties of interaction in a legal context, including expressing his views clearly and unambiguously to his lawyers".

(f) There were also listening tests which showed an inadequate understanding of the gist of and detail of opinions on a general topic by five different speakers. His result was somewhere between the lowest and second lowest level test results.

[43] In cross-examination, Dr Elder properly conceded the obvious: that she was not present at the meetings between the applicant and his lawyers, that she did not know what was said at those meetings and could not express an opinion one way or the other about whether the applicant had understood what was discussed at those meetings.

[44] The applicant's alleged misunderstanding of the effect of his plea is supported by the affidavit of Sister Mary Bennett, who assisted him to prepare his affidavits filed in these proceedings. Sister Mary is a former

primary school teacher. She explained the difficulties she had in drafting these documents:

> "Over a period of several months as I assisted Mr Singh with the various stages of going through the application process, I would often get frustrated, as I could see that I had not always grasped what he meant. I would write something down, and then find that it was not what he was trying to say. As time went on, I realised that his mind was not working in a linear fashion, and that I would be given many side issues which were sometimes his opinions about what was happening, and sometimes facts of what had happened. … I spent a long time trying to work out what he was trying to say.
>
> One day as I was listening to Mr Singh talking, it suddenly dawned on me that he may not have been using some words the way I thought he was. I stopped him and said: 'I am going to ask you a question. What do you think 'negotiation' means?' He said: 'It means they are not going to do anything, they give up.'
>
> I then asked Mr Singh about signing the Agreed Facts. … Mr Singh said that he thought Russell [Goldflam] was asking him to agree that these were the charges being laid; that this was what 'the kids were saying'. He said there was nothing on the document to say that he was signing it to say that he agreed that he was guilty of these charges. I asked him what he thought the document was for. He said that he thought it would just go with the other papers and that it would go into the file and then the judge would say 'You are a free man.' This was what he thought on the morning he went in to the court."

[45] He also told her later what he thought 'negotiation' meant.

> "He said that in his country, people get arrested and are given bail in order to be able to get deals made. If people don't have bail and are imprisoned, they are beaten, starved and treated badly in order to make them pay money to get out of jail. He then said, 'I was treated badly, put in the punishment cells and starved, so that is what I thought they were doing to me.'"
>
> "He thought, as in his country, he would agree to pay money and the judge would let him go. In his country, this is common (he said) -

> the accused would pay money (to the police I think) and then the police would tell the judge that this was taken care of and the accused would go free. … If they were to continue with the more serious charges, then it would not involve a fine, but that he would stay in prison, then go to court and fight them. He was adamant that he would not say he did something he did not do. … Paying a bribe as he understood it did not involve an admission of guilt."

[46] To a large extent, Sister Bennett's evidence depends upon her acceptance of the various things she was told by the applicant.

[47] Originally, (in his affidavit in support of his application for leave to appeal dated 17 April 2013) the applicant's complaint was that his guilty plea was entered under pressure to be released from prison, and that:

> "the written proposal given to the defendant, and signed by him on 19/03/2013 did not tally regarding the penalty expected for the guilty plea with the proposal given to the defendant on 11/12/2012. The defendant signed the document on the understanding that it was relevant to the counts of 3, 28, and 19 and in accordance with the offer made on 11/12/2012."

This is a reference to the letter written by Mr Preston which became the basis of negotiations in March 2013. This affidavit shows that the concern the applicant had with the "penalty expected" was that he was placed on the Register for 15 years instead of eight years. The significance of this document is that it does <u>not</u> say that the applicant did not understand that he was pleading guilty to the charges, and the reference to "the expected penalty" indicates that he was clearly expecting to suffer some penalty as a result.

[48] The applicant filed a later affidavit (affirmed on 27 May 2013) in which he emphasised that he never willingly agreed to plead guilty to the charges. He deposed that his lawyers knew that "I signed the guilty plea to get out of prison as I was extremely ill and that this was not because I was actually guilty." He also complained that the "negotiated guilty plea was made" but that "the outcome in court did not reflect this" and that at the time of the entry of the plea, he was under stress and duress "due to extreme ill health and desperation". He continued, "I was also in a state of depression as a result of being in solitary confinement for eight months. I despaired of getting fair help to clear my name. It seemed that lawyers were willing to help me to be released from jail, but not to help me clear my name. … I was in a no win situation."

[49] On 5 July 2013, the applicant received notice that a single judge had rejected his application for leave to appeal, and in accordance with the court's rules, the applicant filed a notice dated 12 July 2013 requesting that his application be considered by a full bench of this Court. In that application the applicant again stressed that his decision to plead guilty was for health reasons:

> "It was extremely unfortunate that my health was in great jeopardy … and the only way open for me to be released from prison (even after serious charges were dropped) was me to use the strategy of a guilty plea bargain, even though the prosecution knew I was maintaining my claim to innocence in fact. … The guilty plea bargain probably saved my life physically, and now I am asking the court to reconsider the fairness of my having had to use this strategy for health rather than judicial reasons, and give me an opportunity to clear my name in justice."

[50] The first time that there is a claim that the applicant did not understand the effect of his decision to plead guilty appears in his affidavit affirmed on 4 November 2013 when he asserted that he thought that "'negotiation' meant that the DPP would not proceed with the charges"; that when he signed the agreed facts, he thought "Russell Goldflam was showing me what the accusations were and what the kids were saying about me". He also deposed: "I did not know that signing this paper meant I agreed that I did these things. … Russell said I had to sign this paper to get out of prison. I thought it was just going in with the other documents about the case. Because of the negotiation (which I had misunderstood) I thought that the Judge would read this and say 'You are a free man.'... I did not know that I was going to have to say guilty in court. Russell did not tell me this. I was very sick, and gave up. I did not give any attention to what was happening, except that my wife said to do what Russell said, so when he stood beside me and said 'Say guilty' and I saw my wife nodding I did. I trusted Russell because he said there had been a negotiation. (Which I thought meant nothing would happen.) I knew I was not guilty of anything, but I was very sick and did not realise that Russell was telling me to plead guilty to such serious charges…"

[51] The applicant was cross-examined about his alleged misunderstanding about the purpose of the Agreed Facts and said that Mr Goldflam had not said to him that the Agreed Facts were admissions; he said that "it was just a formality to get me released." He was asked about what he thought was

going to happen when he was brought into Court and said, "I thought they were going to negotiate and that's what they were doing. That's what I thought they were doing", and that when the Judge walked in he thought he would be released. When asked about a telephone call he had with his wife the previous day, he said that she had told him, "Plead guilty and we'll fight later." In a later answer, he said that his wife had not told him that he should plead guilty. Rather she had said, "Sign on the negotiation papers, we will see what it says later and then we will fight." He asserted that no-one had told him that he would have to plead guilty, and that when he was arraigned before the Chief Justice, he was surprised that he was asked to plead, and that Mr Goldflam had whispered in his ear to say, "Plead guilty", and he did so. Still later in cross-examination he said that Mr Goldflam "told me if you plead guilty, you will be released and you can leave Alice Springs with your wife." In his answer to the very next question he said that Mr Goldflam did not say anything about pleading guilty.

[52] The applicant was a poor witness. He gave his evidence with the assistance of an interpreter in the Punjabi language. His evidence was full of internal contradictions which are not explicable by a lack of understanding of what was being asked of him. At times, he avoided answering questions by giving non-responsive answers. We do not accept his evidence as to his understanding of "negotiation", his understanding of the significance of the Agreed Facts, that he did not understand that he was expected to plead

guilty in open court, nor that there would be no consequences for him if he did.

[53] Mr Preston's evidence was that the applicant appeared to have understood the impact of negotiating. In a letter that the applicant wrote to Mr Preston dated 14 January 2013, he asked Mr Preston to continue negotiating with the DPP up until the 20 January 2013, observing, "It's my luck if I got 5 yrs sentenced or 10 yrs." Mr Preston's evidence was that he found it difficult to believe that the applicant did not understand that he was trying to negotiate pleas of guilty to minimal charges if the other charges were dropped. He said that he had gone over this with him over quite a number of meetings. He did not believe, notwithstanding that he had read Sister Bennett's affidavit and the report from Dr Elder, that there was any misunderstanding between him and the applicant.

[54] Mr Goldflam's evidence was that the applicant was cognitively and linguistically competent to participate in negotiation, re-engage the Commission to act for him, take advice and provide instructions. He did not say anything to him which caused him to believe that he did not understand the nature of the pleas of guilty which were being proposed. He inferred from the applicant's agonised protestations of innocence and patent reluctance to agree to the pleas that he was well aware of the significance of what was being proposed. Mr Goldflam conceded that he stood next to the applicant when he was arraigned, and he conceded that he might have whispered in his ear to plead guilty if he had been asked by the applicant

what he should do. We have listened to the tape recording of the taking of the pleas. There is nothing audible on the tape which indicates that there was anything unusual, although that is not necessarily decisive one way or the other. We are not satisfied that the applicant has proved, the burden of proof being on him on the balance of probabilities, that he did not understand the effect and purpose of his pleas of guilty, and that he entered those pleas under any misunderstanding.

[55] In arriving at this conclusion we have not overlooked the evidence of Sister Mary Bennett, and the role she played in assisting the applicant to prepare his affidavits. We do not consider that her conclusion that there were misunderstandings about his understanding of what negotiation meant has any merit. The explanation which the applicant gave to her about his understanding being coloured by what was common place in his native country was not given in evidence by the applicant. We consider that it is more likely that the applicant was reconstructing the events in his mind. He plainly knew that he needed to find some plausible explanation as to why he had pleaded guilty.

[56] Whilst we accept the evidence of Dr Elder as to the applicant's linguistic skills in English, her evidence did not go so far as to persuade us that he did not understand fully what he was doing when he instructed Mr Goldflam that he was prepared to plead guilty to the charges. He had been in Australia for nearly 10 years. It is difficult to believe that he did not understand the effect of a guilty plea. Although the transcripts and Dr Elder's evidence

reveal that his English skills had shortcomings, there is nothing in them to indicate that he did not understand what was being said to him by the Chief Justice. Further, on occasions when he did not understand something or if he wanted more information, he was not hesitant to ask for an explanation. (On one occasion, for example, he asked what a subpoena was).

[57] The applicant is plainly a well-educated man, having achieved a Master of Science degree. Neither Mr Preston nor Mr Goldflam thought it necessary to engage an interpreter when consulting with him, and the Chief Justice thought that his English proficiency was such that no interpreter would be required for his trial, and (as noted above) Dr Elder conceded that she could not comment on the possibility of misunderstandings between the applicant and his lawyers in the prison cells.

[58] There are a number of other difficulties with acceptance of the applicant's evidence. He claimed that the Commission did not apply for bail for him after his arrest on 14 March 2012, and this was the reason why he terminated the Commission's instructions and engaged Mr Preston. The evidence, which we accept, from both the affidavit of the Director of Public Prosecutions and from Mr Goldflam is that there was a prolonged application for bail in April 2012 before Mr Neill SM which was heard over two days, but was unsuccessful. It is standard practice for an accused to be present at a bail hearing. His allegation that there was no bail application is plainly wrong.

[59] The applicant's evidence was that his dissatisfaction with Mr Preston was at least in part because he had promised to make a bail application for him but did not do so. Mr Preston's evidence, which we accept, was that he had discussed another bail application with the applicant, and his advice was that another application would be unlikely to succeed at the time for various reasons.

[60] Another reason given by the applicant for his dissatisfaction with Mr Preston's representation of him was that Mr Preston had made unauthorised efforts to negotiate with the DPP. (This was part of the applicant's argument that he did not understand the effect of the offer made to the DPP on his behalf by Mr Goldflam, which was based on a letter of offer originally sent to the DPP by Mr Preston.)

[61] We find that the real reason for terminating his instructions was either because he could no longer afford Mr Preston's services, or because he was unwilling to release money he had arranged to borrow from his niece. Mr Preston had obtained a written authority from the applicant to obtain a medical report. On 10 December 2012, the applicant wrote a letter to Mr Preston accusing him of lying to him and demanding the return of the letter of authorisation, "… then I know you lie to me or honest with me". He further threatened Mr Preston with going on a hunger strike if he did not return this letter, but said that if Mr Preston complied he would call his niece and $5,000 would be made available immediately with another $5,000 to follow soon. The letter of authorisation was returned, but there was no

further money paid into Mr Preston's trust account. The overall impression is that the applicant was behaving in a manner which was manipulative and possibly deceitful. He appeared by his conduct, particularly during the pre-trial meetings with the Chief Justice, to have made excuses for not re-engaging the Commission because he was in denial and did not want to face trial, and was deliberately placing obstacles in the way of getting his matters resolved.

[62] The second limb of Mr Johnson's argument for the applicant was that the applicant's decision to plead guilty was not free and voluntary because of the pressure under which he was placed to accept the plea bargain. We do not doubt that he was under a lot of pressure to accept the plea bargain, but we find that he did so voluntarily with a full appreciation of the consequences. He knew by 14 March that Mr Goldflam would not be able to represent him at his trial if he did not engage him on that date. He also knew that he would be self-represented, and without an interpreter; that he could only cross-examine witnesses through the Judge, and that the Judge had indicated to him that he was not capable of asking proper questions. He knew that the hearing dates were not going to be vacated, and that Mr McBride was not available to represent him. After going through all this patiently with him, the Chief Justice gave him one more chance to change his mind, but he was determined not to engage Mr Goldflam and to represent himself. The plea bargain that he was asked to consider on the morning of 21 March reflected the terms of Mr Preston's letter to the DPP of

11 December 2012 in which Mr Preston said that the applicant would be prepared to plead guilty to the very charges to which he ultimately pleaded guilty. Mr Preston's evidence, which we accept, is that he had discussed this proposal with the applicant sometime after the end of the committal proceedings and was instructed to go ahead on the basis that the final decision would be up to the applicant. We do not accept that the implications of a guilty plea would have come as a complete surprise to the applicant on 21 March 2013, particularly as he had already indicated that he was prepared to negotiate a plea by his written instructions dated 19 March which specifically referred to him offering to plead guilty to the three charges "as contained in the letter dated 11 December 2012 by my former lawyer Murray Preston (counts 3, 28 and 19)."

[63] The applicant stated in his affidavit that at his conference with Mr Goldflam and Ms Beech on 19 March he had asked about the "Child Offender register". He said that Mr Goldflam said that "the Child Offenders list was not important, it did not matter much … it was something the police had and everyone would forget after about a month". We reject this evidence. It is difficult to believe that Mr Goldflam would have so advised the applicant. Mr Goldflam's response was to deny saying it. He said, "I told Mr Singh (erroneously) he would be on the Register for eight years. I explained in some detail what the reporting requirements were." Mr Goldflam was not cross-examined on this part of his evidence.

[64] Further, Mr Goldflam's evidence was that after the applicant was released from prison, he consulted him on five occasions in late March and early April about the prospect of an appeal and did not raise with him any complaint about not understanding the effect of being asked to plead guilty. The only specific matter he raised was a complaint that he had been placed on the *Child Protection (Offender Reporting and Registration) Act* register for 15 years instead of eight years. We think it likely that this was the major cause of the applicant's disappointment with the result. Regrettably, Mr Goldflam decided that his advice had been wrong and apologized to the applicant, saying that it would not have affected the advice he had given him. It appears that Mr Goldflam too readily accepted personal blame for an administrative error over which he had no control.

[65] In conclusion, we are not satisfied that the applicant's will was overborn and that he did not freely and voluntarily admit his guilt; nor are we able to conclude that there was any miscarriage of justice.

[66] The orders of the Court are that leave to appeal is granted but the appeal is dismissed.

* * * * * * * * * *