SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wade* [2011] QCA 289
PARTIES:	**R** **v** **WADE, Bowan Taylor** (appellant)
FILE NOS:	CA No 49 of 2011 SC No 29 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Toowoomba
DELIVERED ON:	18 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	7 October 2011
JUDGES:	Muir and Chesterman JJA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The appellant's guilty plea be set aside.** **3. The appellant's conviction be set aside.** **4. There be a re-trial.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – PLEAS – GENERAL PLEAS – PLEA OF GUILTY – WITHDRAWAL AND RESTORATION OF PLEA – GENERALLY – where the appellant was convicted of murder on his own plea of guilty and sentenced to life imprisonment – where the appellant told his legal representatives prior to trial that he intended to plead not guilty – where there was psychological evidence that the appellant experienced a heightened state of arousal when confronted with a situation for which he was not prepared and did not deal well with large crowds of people – where the appellant had requested to not be present at his trial – where the appellant requested that his legal representatives provide him with witness statements to read during the trial so as to distract him from his environment – where the appellant consistently maintained to his legal representatives that he was not guilty of murder – where the appellant made admissions of guilt to a number of people, including police – where the admissions were inconsistent and did not accord with medical evidence – whether the appellant should be allowed to withdraw his plea of guilty – whether the conviction for murder gave rise to a miscarriage of justice

Criminal Code 1899 (Qld), s 23, s 302, s 668E(1)

Borsa v The Queen [2003] WASCA 254, considered
Collins v R (1980) 31 ALR 257; [1980] FCA 72, considered
Hogue v The State of Western Australia [2005] WASCA 102, cited
Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, considered
R v Carkeet [2009] 1 Qd R 190; [2008] QCA 143, considered
R v Chiron [1980] 1 NSWLR 218, considered
R v Gadaloff [1999] QCA 286, cited
R v Mundraby [2004] QCA 493, considered
R v Murphy [1965] VR 187; [1965] VicRp 26, considered
R v Nerbas [2011] QSC 41, cited
Rotner v R [2011] NSWCCA 207, considered

COUNSEL: P E Smith, with K M Hillard, for the appellant
T A Fuller SC for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA**: **Introduction** On 21 March 2011 the appellant was convicted of murder on his plea of guilty and the sentence of life imprisonment mandated by s 302 of the *Criminal Code* 1899 (Qld) was imposed. The appellant appeals against his conviction on grounds that:

(1) His guilty plea was not a true acknowledgement of guilt;
(2) The primary judge erred in failing to:
  (a) accept defence counsel's submission that the appellant was pleading guilty only to avoid sitting through a trial, which was "not an acceptance of the plea of guilt";
  (b) hear evidence from the appellant as to why he was pleading guilty;
  (c) hear submissions about whether the trial ought to proceed in the appellant's absence;
  (d) enquire beyond the administration of the *allocutus* into whether the appellant wished to say or add anything to the legal discussion;
  (e) exercise an arrest of judgment in light of the appellant's comments throughout the sentencing process indicating non-acceptance of the facts contributing to the basis of the plea.
(3) It would be a miscarriage of justice if his guilty plea was not set aside and a retrial ordered.
(4) The plea of guilty was not truly voluntary in light of the appellant being deprived of appropriate medications at the time of the trial and his plea.

The proceedings at first instance

[2] On 21 March 2011 the appellant was arraigned in the presence of the jury. To the surprise of his legal representatives, he pleaded guilty. His counsel requested and

was given an opportunity to confer with the appellant before the *allocutus* was administered. When the hearing resumed, counsel for the appellant informed the court that, having spoken to the appellant, it appeared clear to him that the plea of guilty was "not one that can truly be described as a voluntary admission of the elements of the offence of murder but indeed seems rather to be motivated by a desire that he not sit through the course of a trial". He submitted that the plea of guilty to murder should not be accepted. Argument then ensued. Counsel submitted that an appropriate course would be not to accept the plea and to order that the trial proceed in the absence of the appellant.

[3] The prosecutor submitted, in effect, that what defence counsel had said did not indicate that "the plea was entered with anything other than a conscious decision on the part of the accused". The primary judge noted that there was no application to withdraw the plea. Having regard to the way in which argument progressed, the appellant was invited, implicitly, to withdraw his guilty plea if he wished to do so. Defence counsel applied, unsuccessfully, to call the appellant to give "evidence as to the reasons for his plea of guilty". He then requested that the primary judge clarify with the accused whether he was seeking to withdraw his plea. The appellant was called upon and, in response to being asked whether he had anything to say as to why sentence should not be passed on him, replied, "No". Defence counsel withdrew and the sentence proceeded.

[4] In the course of the brief sentencing hearing, the appellant interjected a number of times. After the prosecutor stated that, "[t]he prisoner attended that martial arts class for no apparent reason", the appellant interjected, "I was invited, dickhead…". After the prosecutor said, "He says, your Honour, from the dock, that he was invited. That evidence is not apparent on the brief, but-----", the appellant interjected, "What a shock". When the prosecutor submitted that there was no evidence that the victim was pregnant, the defendant said:

> "The question I have: one, it's a mandatory sentence. Why the fuck do I have to sit here? Two, if you're going to mouth off with that one, where the fuck did I get it from, idiot? Huh? Ever think about that?
>
> …
>
> Check your fucking phone records [indistinct]."

[5] Subsequently, the appellant said:

> "The question I have is: I've already pleaded guilty, so what are you trying to prove? That I'm guilty?
>
> …
>
> Can I leave? I'm serious. I don't want to put up with this clown."

[6] Very shortly after this interruption the appellant's request was granted: a sentence of life imprisonment was imposed.

The appellant's dealings with his legal representatives

[7] Ms Horne, a solicitor employed by Legal Aid Queensland, gave evidence to the following effect. She had management of the appellant's file from some time in September 2010. Until his guilty plea, the appellant's instructions were always that he wished to contest the charge of murder. Consistently with the appellant's instructions, defence counsel made a submission on 23 April 2010 at the conclusion of the appellant's committal hearing that there was no case to answer on murder.

[8] On 21 March 2011 as the jury were being brought into court, Ms Horne approached the dock and spoke to the appellant. She told him that he would be called upon, and

the charge would be read to him, he would be asked how he pleads and that is when he should say "not guilty". The appellant nodded and said, "yep".

[9] After the appellant pleaded guilty and was still in the dock, Ms Horne asked him whether he had meant to plead guilty. He replied, "yes" and said something like, "if I can't be involved then what's the point". Asked what he meant, he said something like, "I'm not going to be able to keep quiet when the witnesses are speaking crap, and they will find me guilty anyway so I might as well not sit through it all, and enter the plea now." The appellant subsequently explained why he thought he would be found guilty of murder even though, according to him, he did not intend to kill the deceased.

[10] During the adjournment which followed, she and defence counsel spoke to the appellant. The appellant was "pacing back and forth in his cell throughout this time". He said he did not wish to sit through a trial and that he believed he would lose his temper while witnesses were giving their evidence so that the jury would find him guilty in any event. He expressed concern that if he became frustrated with witnesses, he would get more charges. He also said that all along he had never wanted to be at the trial.

[11] Asked by defence counsel during the conference if he wanted to maintain the plea of guilty to murder, the appellant said, "yes." Asked if he wanted to seek to have the plea of guilty overturned, he said, "no." Nevertheless, the appellant continued to instruct defence counsel and Ms Horne that he was not guilty of murder.

[12] During sentencing, the appellant became increasingly impatient about the process and what was being said by the prosecutor. He appeared agitated and stood up more than once, asking to be returned to the cells. He made outbursts about the facts, indicating his disagreement.

[13] The appellant telephoned Ms Horne on 22 March 2011 shortly after he had arrived back at the jail. The substance of the conversation was as follows. He realised that he had "done the stupidest thing [he] could ever have done". He pleaded guilty because he did not deal well with crowds, he never had and so he was "freaking out" with all those people in the court. He thought that they still had to bring the jury in as well and said that he just wanted to get out of there. He felt stupid and said that the thought of a two week trial had been too much. Even "in the elevator on the way up [to the courtroom] he had intended to defend the charge and … just freaked out when he saw all those people in the court". He did not want to be there.

[14] Asked by Ms Horne about his comments on 21 March 2011 about him losing his temper, the appellant said he thought that if he became abusive that would not be a "good look" and that he had been in trouble at his committal for bad behaviour. He was concerned that he would get into trouble again. He did not enter his plea of guilty to accept guilt and just wanted to leave and get out of there. He did not agree with what the judge said to the jury panel about a realisation of being guilty. That was not a factor in his entering the plea. The appellant asked Ms Horne as to whether he could change or vacate his plea and was advised about appealing his conviction.

[15] During a conference with the appellant on 23 March 2011, Ms Horne asked the appellant if something had happened over the weekend to cause him to change his plea. He said no, that it was a spur of the moment thing because he wanted to get

out of court and was very anxious. Previously, the appellant had asked Ms Horne if it was possible for him to have a solitary cell in the watch house during his trial. He told her, at a later time before the trial, that he did not want to be present at his trial. On 8 March 2011, during a conference, the appellant asked his counsel if he had to sit through his trial. He said he "didn't like that he [had] to sit there" and asked if he could sit in his cell and let it happen without him. Counsel advised that he had to be there and be conscious of the jury observing him during the trial. At a conference on 16 March 2011, the appellant asked counsel if there would be people in court for his matter.

[16] During a conference with the appellant on 25 February 2011, the appellant advised Ms Horne that he had stopped taking his medication in November 2010. The note she made at the time included:

> "was anti-psychotics
> voluntary pt of m.h
> from 6–13/14 was taking pills (ADHD, mood stabilisers, anti-psychotics)
> since here – max dose Avanza, 500m seroquel valium, zypraxa, risperidone – since a ch."

[17] Ms Horne challenged the appellant about whether it was a good idea and he replied that he was okay without it and was only a voluntary patient. On 22 March 2011, the appellant told Ms Horne that he was looking after himself, he was being seen by a nurse and was being medicated again.

The appellant's affidavit evidence

[18] In an affidavit filed on 19 September 2011, the appellant swore to the following effect. When in prison for the subject offence he was a voluntary patient with the prison mental health service for about 18 months during which time he was prescribed the drugs Avanza, Seroquel, Valium, Zyprexa and Risperidone. He said he didn't know what diagnosis he had been given or what the drugs were meant for. He stopped taking his medication "in about November or December 2010". Some psychiatrists were telling him he did not have anything wrong with him but others were telling him to keep taking the drugs. At the time of his guilty plea, he was not taking any medication. He considered that, after ceasing his medication, he was "less able to deal with stress and…would sometimes blurt out things that [he] shouldn't say".

[19] The appellant swore:

> "I believed that when the witnesses gave their evidence and started saying things that weren't true or that I didn't agree with, that I would have trouble not blurting things out. My belief of this caused my plea of guilty.
>
> This happened at my committal hearing and I was told by my lawyers at that time…that I'd end up with more charges or a charge of contempt of court if I kept doing that."

[20] The appellant swore that ever since he was young he had had "problems dealing with large groups of people". He had asked his lawyer before the trial to give him a copy of witnesses' statements to read during the trial so that he could be distracted from "the people in court, from what people were saying". He had no witness statements with him in court and thought that he would end up with more charges from making comments and blurting things out in the courtroom without the distraction provided by the statements.

[21] He also swore:

> "26. I couldn't deal with all the people in the Courtroom. I didn't really appreciate in my panicked state that this was the jury panel and that most of them would be taken back outside later.
>
> 27. I just panicked. I just didn't want to be there in the Courtroom in that situation, and I knew I couldn't do a trial like that. I was going to plead not guilty all the way through until I got there and all this happened.
>
> 28. When my barrister (John) asked me whether I wanted to withdraw my plea and change it to not guilty, I said no. I said this because I didn't think it would make any difference. I'd still have the same problems about the people in court and being present in court risking me losing my temper, and I still didn't have any statements to read to distract me.
>
> …
>
> 31. If I had medications or some vallum (sic) at the time of my trial, I feel that I would have been more able to deal with the situation of being in Court. I believe that I could have controlled my temper, my comments and actions, and not freak about the group of people being there. I have no doubt that I would have felt much calmer.
>
> 32. I understand that I will have to give evidence in the Court of Appeal about this, but have received medications since my sentence, so will find it much better and easier for me to deal with, although I would much rather prefer to give evidence by video link."

[22] The appellant gave the following account of the death of the deceased. What happened to the deceased was an accident. On the way to the storage shed, the deceased was giving him a "hard time about not being able to find her things." When she was standing on boxes to get her things, she made "smirky comments" and said that he would never see his child grow up. She gave him "a really bitchy smile" and said, "thanks for everything". He became angry, pushed her on her legs with both his arms and she overbalanced. He "swung out with a backhand and struck her in the face just below her right eye as a reflex so that she wouldn't land on [him] and she hit the floor and sort of curled up and laid there". He shook her, trying to get her attention, but failed. So he got down on his knees, opened one of her eyes and waved his hands. The eye didn't move. He couldn't find a pulse and couldn't detect any breath. He thought she was dead, freaked out, shut the shed door and locked it out of habit.

[23] He denied telling his friend, Mr Sapienza, that he checked the deceased for about 30 minutes or that he said he put his hand around her throat and choked her. He also denied telling him that the deceased was covered in blood and faeces. When he spoke to Mr Sapienza and others after the death of the deceased he was "distressed and hysterical".

[24] He told his half-brother, Mr Skornseck, that he had broken the defendant's neck "because he was pushing me about what happened". He said that he did not actually know what the cause of death was.

[25] He did not think that he told his brother, Mr Mason Wade, that he broke the deceased's neck and speculated that his brother may have heard this from Mr Skornesk.

[26] He did not sign Sergeant Grace's notebook because he disagreed with its content and, in particular, he disagreed that he said that he choked the deceased until she was blue.

The prosecution's evidence

[27] The appellant and the deceased had recently separated. On 8 August 2009 the appellant told his brother that the deceased was pregnant. He mentioned that she had been on a drinking and drug binge and that he had organised to have her "banned from all the pubs in town so she could not abuse herself". The appellant said that if the deceased was "not going to do the right thing by the baby [he] might as well kill her". He mentioned killing the deceased another three or four times in the course of the conversation. On 9 August 2009 the appellant and the deceased travelled to a storage facility in Stanthorpe to enable the deceased to retrieve some of her property. Her body was discovered the following day in a padlocked storage shed at the facility hired by the appellant's flatmate. The key to the storage facility was found in a motel room the appellant had been occupying with others.

[28] Mr Mason Wade received a telephone call from the appellant at around 4.19 pm on 9 August 2009. The appellant said, "I've killed her". Mr Mason Wade asked how it happened and was told:

> "Stacey came over to see me to pick up some things she had left there and said thanks for everything (or thanks for nothing) and I just snapped, I picked her up and threw her and she has gone flying."

Asked how the deceased died, the appellant said that "[s]he had a broken neck".

[29] At 3:00 pm on 9 August 2009 the appellant met with Mr Sapienza. He told him:

> "I was at the storage shed with Sal and she was picking up her stuff. She was standing on a box or something. She got the rest of her stuff and as she was standing on the box she said, 'Thanks for everything.' That's when I lost it and threw her off the box…I walked over when she was still on the floor of the storage shed and put my hands around her throat and started to choke her. She didn't fight back but just cried. I did this for about thirty minutes and she was blue. I just left. The last time I saw her she was covered in her own faeces and blood."

[30] The appellant called Mr Douglas Egan at 3.30 pm on 9 August 2009. He said: "I need some advice I've just killed my girlfriend."

[31] At 4.30 pm on 9 August 2009 the appellant called his half brother, Mr Skornseck. He told him that he had "killed someone" and identified the victim as his ex-girlfriend. Asked how, the appellant said, "I broke her neck…I just lost it".

[32] The appellant contacted police at 4:00 pm on 10 August 2009 as a result of a message he received. He told the police officer to whom he spoke that the deceased was in a storage shed in Stanthorpe. Informed that the police had been to the shed and had not found a body, he indicated that she was in another shed at the complex. He said that he "lost it" and had "knocked her off and then choked her til she was blue" in the face. The appellant refused to adopt the content of this conversation when it was put to him later in the day.

[33] Between 3.30 pm and 4.30 pm on 10 August 2009 the appellant rang Mr Green, "a counsellor", and told him that he thought that he had killed his ex-girlfriend. He said, "I think I've killed her. She took her things and I threw her. I think I killed her…We were there together. I gave her her things and…[s]he put on a smirky look on her face and she grinned at me…[i]t made me feel really pissed. I was angry. Really angry…I only pushed her and she went flying…[s]he went blue. I think I've killed her."

[34] Mr Green asked the appellant again what had happened and received the response, "I threw her. I can't remember what happened. She went blue and I'm pretty sure she is dead."

[35] The appellant told the first police officer he spoke to that the deceased was dead. In an interview with a police officer on 10 August 2009 commencing at about 4.43 pm, the appellant said, in effect, he could not remember some of the things he had told Sergeant Grace in an earlier conversation, but admitted that he had said that he had lost his temper and that the deceased had no pulse when he left her.

The specialist medical evidence

[36] The deceased was found lying just inside the door of the storage room. She was partly on her back and partly on her left side. Both feet were touching one side of the narrow room she was lying across. Both knees were bent with the right leg crossed over the left. Her head was on its left side on the concrete floor flexed towards the chest. There was blood exuding from the nose.

[37] The deceased's scalp had "areas of boggy consistency, consistent with underlying injury". There was a blue bruise superior to the left ear and a blue and red bruise in the right posterior parietal region. There was irregular purple and red bruising on both sides of the face. No neck injuries were seen but bruising was seen on the lower chest. There were abrasions to the right upper arm and to the left leg and a bruise and an abrasion to the right leg. No injuries to the deceased's skull or brain or to any part of her neck were observed. The pathologist, Dr Milne, was unable to determine the cause of death from his initial examination. He said that although the external examination did not "show any injuries to suggest strangulation, either manually or with a ligature…strangulation with a soft broad ligature may leave no sign of injury, and…cannot be excluded".

[38] A post-mortem examination showed areas of bruising to the head from blunt force trauma which could have been caused by the impact of an object against the head or the impact of the head against an object or surface. It was possible that the deceased suffered a reduced level of consciousness and if she had so suffered, this could have predisposed her to positional asphyxia. The deceased had a history of cystic fibrosis which condition "may make someone more susceptible to other factors such as asphyxia". Her acute bronchitis and bronchopneumonia "appears to have developed as a complication of cystic fibrosis. It cannot be excluded that it was a complication of aspiration, which could have resulted from a state of impaired consciousness. Although the degree of the deceased's infection [was] not significant enough to cause death in its own right, in a situation where death resulted from an asphyxial process, it may have had some contribution to death." The swine flu detected in the examination "may have [made] some contribution to death in the context of asphyxia, however any contribution is likely to [have been] minor".

[39] In cross-examination, Dr Milne gave the opinion that the widespread bruising across the deceased's face was consistent with manual smothering. He considered that if

there had been significant pressure on the deceased's mouth then bruising or other injuries to the lips would probably have been visible. He saw no such evidence.

[40] Also in cross-examination, Dr Milne accepted that "death by manual strangulation" could be excluded and, in particular, "manual strangling … for a period of 30 minutes". He concluded also that the evidence indicated that the deceased had survived for a period of at least four hours.[1] That was deduced from the fact that injuries from the head and face showed associated inflammation which generally did not occur until approximately four hours after infliction of injury.

The psychologist's report

[41] In a report dated 4 October 2011, Dr Frey, a psychologist, after having interviewed the appellant by video link and subsequently in person over a two hour period, gave the following opinions. It was not unusual for a young man with the appellant's background to "experience heightened arousal when suddenly confronted with a situation for which he was not prepared". The background referred to was the appellant's "lifetime of trauma, abuse, neglect and the failure to attach to a stable caregiver…". In such circumstances, the appellant, being already over-sensitive to stress, had a reaction when confronted with people gathered in the courtroom of either fighting or fleeing. The latter manifested itself in the desire to end the trial. Dr Frey was informed by the appellant that he pleaded guilty "because he could see no other way to quickly extricate himself from a situation he found unbearably anxiety-producing". Earlier in his report, he described the appellant's response as "a strong anxiety reaction… [which] caused him to impulsively prioritise escaping from the situation over his longer term objective of challenging the charge against him".

Relevant principles

[42] For the appellant to succeed on his appeal against conviction he must first persuade the Court to go behind his plea of guilty: he bears the onus of proof.[2] The principles relevant to the circumstances in which a Court may go behind a plea of guilty are discussed in the following passage from the reasons of Brennan, Toohey and McHugh JJ in *Meissner v The Queen*:[3]

> "A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. An inducement to plead guilty does not necessarily have a tendency to pervert the course of justice, for the inducement may be offered simply to assist the person charged to make a free choice in that person's own interests. A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence. The principle is stated by Lawton LJ in *R v Inns*:
>
> > 'The whole basis of a plea on arraignment is that in open court an accused freely says what he is going to do; and the law attaches so much importance to a plea of guilty in open court that no further proof is required of the accused's guilt.

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1 2-33.

2 *R v Gadaloff* [1999] QCA 286 at [4] and *R v Nerbas* [2011] QSC 41 at para [37].

3 (1995) 184 CLR 132 at 141, 142.

> When the accused is making a plea of guilty under pressure and threats, he does not make a free plea and the trial starts without there being a proper plea at all. All that follows thereafter is, in our judgment, a nullity.'
>
> It may not be strictly accurate to describe what follows as a nullity, but it is certainly liable to be set aside and a new trial ordered. If a plea of guilty is entered by the person charged in purported exercise of a free choice to serve that person's own interests, but the plea is in fact procured by pressure and threats, there is a miscarriage of justice. In such a case, the court is falsely led to dispense with a trial on the faith of a defective plea. The course of justice is thus perverted." (citations omitted.)

[43] Dawson J's statement of principle in *Meissner*[4] is of particular relevance to the circumstances under consideration:

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

[44] For good reason, courts exercise great caution in determining applications to set aside or withdraw guilty pleas. In *R v Mundraby*, Jerrard JA observed:[5]

> "This court was referred to the observations of Kirby P (as His Honour then was) in *Liberti* (1991) 55 A Crim R 120 at 121–122, cited by McPherson JA herein. Kirby P also added that:
>
> > 'For good reasons, courts approach attempts at trial or on appeal in effect to change a plea of guilty or to assert a want of understanding of what was involved in such a plea with caution bordering on circumspection. This attitude rests on the high public interest in the finality of legal proceedings and upon the principle that a plea of guilty by a person in possession of all relevant facts is normally taken to be an admission by that person of the necessary legal ingredients of the offence'."

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4 At (1995) 184 CLR 132, 157.

5 [2004] QCA 493 at para [21].

[45] In *R v Carkeet*,[6] Fraser JA, Keane and Holmes JA agreeing, also emphasised the difficulty of having a guilty plea set aside. He referred with apparent approval to the observation of Steytler J in *Borsa v The Queen*[7] that:

> "It is no easy matter for an appellant to persuade a court to set aside a conviction based on a plea of guilty. There must be a strong case and exceptional circumstances…[b]efore an appellate court will set aside a conviction of that kind, the appellant must show that there has been a miscarriage of justice."

[46] It was said by Nagle CJ at CL in *R v Chiron*[8] that the tension experienced by a defendant in the course of the trial and disappointment arising from the failure of the defendant's legal advisers to have available in the defendant's case a particular witness "are not unusual feelings experienced by an accused person at his trial and they, of themselves, would not call for the intervention of this Court".

[47] Nagle CJ nevertheless concluded that, as the plea of guilty had been induced by an erroneous ruling on the admissibility of evidence by the trial judge, it should be set aside and the appeal allowed. The Chief Justice's observations in this regard are relevant to the present role of this Court:

> "However, this is not an end of the matter, for by s 6 of the *Criminal Appeal Act*, 1912, this Court is enjoined to allow an appeal 'if it is of opinion … that on any other ground whatsoever there was a miscarriage of justice …'. The discretion given to the Court is wide, as Sholl J observed in *R v Murphy*:
>
> > 'It was established very early in the history of the Court of Criminal Appeal in England that a person who had pleaded guilty could nevertheless be an appellant under the legislation, and that view has been adopted here and elsewhere. But there has been a series of decisions tending to limit somewhat strictly, and for obvious reasons, the cases in which such appeals should be permitted to succeed, and I have had occasion to refer to a number of them. They all depend, however, on there being in the Court's opinion a miscarriage of justice. That is, for present purposes, the measure of the Court's jurisdiction, and decisions as to what cases have and what have not been considered to fall within the limits of that jurisdiction ought not to be read as if they were statutory definitions of those limits. The question for the Court always is whether there has been a miscarriage of justice, and if there has, the Court is subject to a mandatory obligation to set aside the conviction.'" (citations omitted)

[48] Lee J in *R v Chiron*, in addressing the circumstances in which an accused may have pleaded guilty as a result of stress, said:[9]

> "…the fact that the appellant was under tension cannot, alone or in combination with the other matters referred to, in my view, be held to introduce an element of unfairness to the appellant in regard to the decision which he made. Tension, extreme tension, is, no doubt,

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6 [2009] 1 Qd R 190; [2008] QCA 143.
7 [2003] WASCA 254 at para [20].
8 [1980] 1 NSWLR 218 at 220. See also per Lee J at 238, 239.
9 At p 241.

> experienced by many who are involved in litigation, but it is not a factor which can be regarded, except in very exceptional circumstances, which are not present here, as unfairly affecting him in the choice he makes. There are, no doubt, many factors which may operate to induce a man to admit his guilt after he has pleaded not guilty; and the decision not to fight on is not always to be expected to be based entirely on logic or reason. Being under tension may of itself induce a desire to confess to one's misdeeds which might otherwise be held in check. But, having said that, it does not by any means follow that the plea of guilty is not to be taken for what it is—an admission of guilt—'A plea of guilty duly recorded provides the strongest evidence of guilt': *R v Murphy*, or that it should, on that account, be regarded as having been unfairly obtained." (citation omitted)

[49] In *R v Murphy*,[10] Sholl J observed in a passage referred to as "widely quoted" in the reasons of Simpson J in *Rotner v R*[11]:

> "I should be disposed to agree that if [the applicant] pleaded guilty through a misapprehension of the law, e.g. 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."[12]

[50] Under s 668E(1) of the *Criminal Code*[13]:

> "The Court on any such appeal against conviction shall allow the appeal if it is of opinion that…the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice…"

[51] As the above authorities demonstrate, before a court will go behind a guilty plea and entertain an appeal against conviction it must be satisfied that a miscarriage of justice has occurred.[14] 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; on the admitted facts, the accused would not, in law, have been liable to conviction of the subject offences; the plea was not made freely and voluntarily, such as where it was obtained by an improper inducement or threat or it is shown that the plea was "not really attributable to a genuine consciousness of guilt". And, of course, it will normally be impossible to show a miscarriage of justice unless an arguable case or triable issue is also established.

[52] Plainly, although it is useful and, at the least, desirable, to have regard to principles expressed in earlier decisions and to the circumstances identified in them as those

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10 [1965] VR 187 at p 191.

11 [2011] NSWCCA 207 at 48.

12 Approved by Simpson J, McClellan CJ at CL and Fullerton J agreeing in *Rotner v R* [2011] NSWCCA 207.

13 1899 (Qld).

14 *Hogue v The State of Western Australia* [2005] WASCA 102; *R v Chiron* [1980] 1 NSWLR 218 at 231; *Meissner v The Queen* (1995) 184 CLR 132 at 157.

justifying the setting aside of a conviction based on a guilty plea, the exercise of the statutorily conferred power cannot be fettered by any preconceptions of limitations on the power arising from the approach taken in previous decisions. Whether the requirements of s 668E(1) have been fulfilled in a particular case must depend on an examination of all relevant circumstances.[15]

[53] It is implicit in the reasons of Brennan, Toohey and McHugh JJ in *Meissner v The Queen*[16] that a guilty plea may be set aside as a miscarriage of justice where it is not "entered in the exercise of a free choice in the interests of the person entering the plea." Brennan J's following explanation in *Collins v The Queen*[17] of the process by which the voluntariness of a confession should be determined is relevant to the issue under consideration:

> "The conduct of police before and during an interrogation fashions the circumstances in which confessions are made and it is necessary to refer to those circumstances in determining whether a confession is voluntary. The principle, focussing upon the will of the person confessing, must be applied according to the age, background and psychological condition of each confessionalist and the circumstances in which the confession is made. Voluntariness is not an issue to be determined by reference to some hypothetical standard: it requires a careful assessment of the effect of the actual circumstances of a case upon the will of the particular accused."

The respondent's contentions

[54] Counsel for the respondent submitted that the appellant's admissions made it plain that he was aware that he had killed the deceased. He submitted that the prosecution had a strong case of murder based on the admissions made to Mr Sapienza and that whilst in isolation, the medical evidence was inconclusive, when combined with the appellant's admissions it could not be said that the conviction for murder gave rise to a miscarriage of justice. It was submitted that petechial haemorrhaging supported the conclusion that the deceased had asphyxiated by pressure being applied to her blood vessels either by smothering or choking.

[55] Whilst positional asphyxia was possible, that would have required the deceased to have been rendered unconscious and to have fallen in such a position that her breathing was compromised. Her pre-existing conditions may have rendered her more vulnerable to that. However, the pathologist was of the view that the deceased would have required some obstruction in addition to that caused by the position of her body to cause the petchial haemorrhaging.

[56] It was emphasised that the appellant's plea was confirmed after he had spoken to his legal advisors and after he had time to consider his position. It was pointed out that the transcript and oral evidence of the appellant on appeal showed that he followed what was happening in the proceedings and was aware that he was pleading guilty to murder with the consequence that a sentence of life imprisonment would be imposed.

Conclusion

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15 See eg *R v Carkeet* (supra) at para [26].

16 (1995) 184 CLR 132 at 141. See also at 143.

17 (1980) 31 ALR 257 at 307.

[57] The appellant, when in prison prior to his trial, had been taking what Dr Frey described as a bewildering array of psychotropic medications "including a major tranquiliser", "an anti-psychotic…sometimes also given in extreme cases of anxiety". There was evidence that the appellant was subject to panic attacks and became anxious "when confronted with new situations and large groups". He was "housed in a small unit at the gaol because he doesn't cope well with crowds of people". He had said that he didn't want to be present in court during his trial and had queried the necessity for his presence.

[58] The appellant's conduct described by Ms Horne, and revealed by the transcript of proceedings at first instance, was consistent with the behaviour of a person suffering from a panic attack and/or pronounced anxiety. Part of this conduct was the appellant's request to be furnished with witness statements to read during the proceedings so that he could divert his attention from his surroundings, assisting him to control his outbursts. The evidence establishes to my satisfaction that the appellant's intention to plead not guilty to murder, to which he had consistently adhered, was overwhelmed by his desire to escape from the courtroom as he felt he would be unable to cope.

[59] The appellant's evidence, supported by the evidence of the psychologist and that of Ms Horne, shows that the appellant's response to the environment he found himself in on 21 March 2011 went beyond the feelings of stress, pressure and agitation that would normally be felt by an accused in the appellant's situation. The appellant's mental and emotional state was such that his ability to make a rational decision on how to plead was substantially impaired. As a result, his plea of guilty could not be said to have been made in the exercise of his free choice.

[60] On the present state of the evidence, the appellant has an arguable case in respect of the murder charge. The medical evidence does not point unequivocally to an intention to cause grievous bodily harm or kill. Although the appellant made admissions which were damming on their face, he told different people different things, weakening the evidentiary value of the admissions. Also the admissions most harmful to his defence are inconsistent with the medical evidence. For the above reasons, the appellant has established that there was a miscarriage of justice and that the guilty plea should not stand.

[61] I would order that:

(a) The appeal be allowed;

(b) The appellant's guilty plea be set aside;

(c) The appellant's conviction be set aside; and

(d) There be a retrial.

[62] **CHESTERMAN JA**: It is no light thing, as the cases collected and discussed by Muir JA show, to set aside a conviction which follows a plea of guilty. An appellant must demonstrate that the conviction, if allowed to stand, would constitute a miscarriage of justice. That very general expression means, more particularly, that the appellant must show (i) that he is not, or that there is a distinct possibility that he is not, guilty as a matter of fact; and (ii) that his confession of guilt manifested in the plea is somehow vitiated so that it was not a true confession.

[63] The appellant has surmounted the first obstacle. The facts are fully set out in Muir JA's reasons, and need not be repeated. There are plausible grounds, arising

from the facts, for thinking that he may not be guilty of murder. There is no doubt that he caused Klarissa Callow's death. There is room for doubt that he did so intentionally.

[64] A forensic pathological investigation could not determine the cause of death. There were no observable injuries indicating the application of force which might support an inference of an intention to cause death or grievous bodily harm. The evidence of such acts giving rise to the inference come only from admissions made by the appellant to friends and family shortly after Ms Callow's death.

[65] The undoubted incriminating effect of these admissions is diminished because some are disputed and some are demonstrably wrong when regard is had to the lack of signs on the body which would have been present had the appellant acted as he described. Some of the admissions are consistent with an unintentional homicide.

[66] The appellant's account of the cause of the death given on the hearing of the appeal was that Ms Callow was standing on a box in the storage shed intending to retrieve her belongings when the appellant angered by her expression, or some remark she had made, pushed her so that she fell onto the concrete floor.

[67] That account gives rise to a possibility, which a jury might regard as amounting to a reasonable doubt, that the appellant did not foresee the death as a possible consequence of his actions and that an ordinary person would not have reasonably foreseen the death as a possible consequence. If the possibility is made good to the satisfaction of a jury the appellant would not be criminally responsible for the death by reason of the operation of s 23 of the *Criminal Code*.

[68] The second requirement which the appellant must satisfy is that his confession was vitiated in some manner.

[69] This is not a case in which the appellant did not understand what he was doing, or the charge, or the consequences of a plea of guilty, or in which there was a lack of deliberateness in his decision to plead guilty. His case is put on the basis that he did not freely choose to plead guilty but did so because of a psychological compulsion which deprived him of the capacity to make a free choice of plea in his own interests.

[70] Dr Frey in his very thorough report said:

> "… (the appellant) presents as a survivor of childhood trauma and failed attachment during childhood. He told me that, consistent with living in a hyper-aroused state, he has always been very anxious, particularly when confronted with new situations and large groups of people. He said he avoids places where he might encounter a crowd … and has never been to large public events popular with young people … . He said in the prison environment whilst on remand he requested placement in smaller units … and whilst serving his current sentence, he tries to spend as much time as possible in his cell. He said that he is subject to panic attacks, in which his breathing becomes stifled, he starts to sweat and tremble, and his only thoughts (very common in panic attacks) are to escape the situation. He also has difficulty controlling his impulses at times, and said that he was concerned as a result that he would make inappropriate statements during his trial to witnesses, and perhaps

face additional penalties from the court. All of these reported symptoms are entirely consistent with a childhood history of trauma and disrupted attachment.

In addition, in the period following being placed in custody … (the appellant) had experienced extreme difficulties sleeping at night, often getting as little as three or four hours of sleep each night. As a result, the prison mental health service had placed (the appellant) on an almost bewildering array of psychotropic medications – avanza (60 mls), an anti-depressant; seroquel (500-600 mls), a major tranquilizer, also used for psychosis; valium (10-15 mls), a tranquilizer used for anxiety; zyprexa (13 mls), also a major tranquilizer sometimes used for psychosis; and respiradone (one ml), an anti-psychotic medication sometimes also given in extreme cases of anxiety, as well as antihistamines for insomnia. (The appellant) said by December, 2010, he had come to doubt the effectiveness of this range of medication and stopped taking them. In retrospect, (the appellant) believes that the drugs did assist him to deal with stress … and to feel calmer and less agitated. Without at least several of these drugs (I find it difficult to believe he needed all of them, but I am not a medical specialist) (the appellant) said he found he was more susceptible to stress and feared he would be more likely to act impulsively whilst under stress.

(The appellant) maintained … that he intended to plead 'not guilty' … . He said that he was already sufficiently concerned about his ability to control his anxiety and impulsivity during the trial to request that he be allowed to read the … statements … as a way of diverting his attention from the proceedings when he was upset. This very insightful solution, which probably would have been sufficient to reassure (the appellant) that he could retain emotional control during the court case was discouraged by his … lawyers who were concerned with how (his) reading in court might be (interpreted). In addition, (the appellant) requested that he be absent from court during the trial; again, this was deemed impractical. When (the appellant) was sent to the Toowoomba court the night before his trial, both his attempts to signal to others how stressful he expected the trial to be, as well as his proactive attempts to find ways of helping him manage this stress had been misinterpreted and he said he had begun to realise that he would have to manage his high level of stress and arousal without assistance. (The appellant) said he hardly slept at all that night, and he had been told he would not be permitted a book or any other diversion … during the evenings after his trial adjourned for the day, so he said he had little else to do but become more anxious during the night.

(The appellant) said he was unprepared … when the summons came to begin the trial. He said he had been told he had plenty of time and had not dressed correctly and was still buttoning his shirt as he entered the … courtroom in handcuffs. He said he was subsequently removed from the courtroom and that the handcuffs were removed and he was allowed to finish dressing, but he … realised that all of the potential jurors … had seen him in handcuffs and partially

> dressed and he began to panic as he said he assumed that any juror who had seen him would automatically conclude he must be guilty or he would not be … handcuffed. Further … he was unprepared for the number of people … in the courtroom … . … (the appellant) said he began to question whether he could face a large number of people every day for the two weeks (of) … his trial … and then face evenings alone in solitary … . … he began to worry that he would react to witnesses with agitation, which would irritate the court and be taken as further evidence of his guilt. As (the appellant) mulled these concerns over, he … suddenly felt overwhelmed and did not believe he would be able to endure a trial. He … felt very strongly that he just wanted it all to end, and he said the only way this could occur was if he changed his plea."

[71] It is to be expected that every accused in a criminal trial will experience one or more of a variety of emotions; anxiety, fear and tension which, in turn, are likely to produce agitation and/or depression. The degree of the emotion experienced will often be extreme. The fact that an accused experiences such emotions and pleads guilty either because of them or while affected by them will not, at least ordinarily, be a reason for not accepting a plea of guilty as a true confession of guilt. For that to happen, as the cases show, "there must be a strong case and exceptional circumstances".

[72] The evidence of Dr Frey is just sufficient to make the case exceptional. The level of emotional distress and panic with a consequential inability to cope with the trial can be seen to have deprived the appellant of the capacity, at the time when called upon to plead, to make a free choice in his own interests. The appellant's mental state at the commencement of the trial was abnormal. Although conscious of what he was doing, and of the consequences, the plea was compelled by psychological processes which took from him a sufficient degree of self control and awareness of his own interests that to allow the conviction to stand would amount to an injustice.

[73] A relevant factor in concluding that the conviction should be set aside is that it is for the most serious offence known to the criminal law, and the only one which carries a mandatory term of life imprisonment. The consequences for the appellant are so serious it is easier than in other cases to discern a miscarriage of justice if the conviction were allowed to stand.

[74] I agree with the orders proposed by Muir JA.

[75] **MARGARET WILSON AJA**: I agree with the orders proposed by Muir JA and with his Honour's reasons for judgment.