SUPREME COURT OF QUEENSLAND

CITATION:	*R v Binney* [2025] QCA 46
PARTIES:	**R** **v** **BINNEY, Jason William** (applicant)
FILE NO/S:	CA No 290 of 2022 SC No 44 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	Supreme Court at Toowoomba – Date of Conviction: 5 October 2018 (Burns J)
DELIVERED ON:	11 April 2025
DELIVERED AT:	Brisbane
HEARING DATE:	1 April 2025
JUDGES:	Mullins P and Flanagan JA and Cooper J
ORDER:	**The application for an extension of time within which to appeal against conviction is refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN REFUSED – where the applicant pleaded guilty to one count of murder, one count of burglary and stealing and one count of wilful damage – where the applicant was convicted and sentenced to life imprisonment for the count of murder – where no order as to parole eligibility was made – where the applicant appeals his conviction on the count of murder and seeks an extension of time within which to appeal – where the applicant's appeal was filed out of time – where the applicant contends that he was not aware of nor advised of his right to appeal against conviction until February 2022 – where the applicant seeks to have his plea of guilty for the count of murder set aside – whether there is an adequate explanation for the delay in filing the notice of appeal – whether, regardless of any unexplained delay, refusing the application would result in a miscarriage of justice – whether an extension of time should be granted APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – FURTHER EVIDENCE – where the applicant seeks leave to adduce evidence addressing delay for the purpose of the application for an extension of time – where the evidence sought to be adduced contains an asserted true version of events – whether

	the asserted true version of events gives rise to a possible defence under ss 271 or 272 of the *Criminal Code*
	Corrective Services Act 2006 (Qld), s 181(2)(c) *Criminal Code* (Qld), s 7(1)(a), s 8, s 271, s 272, s 671(1) *Criminal Practice Rules 1999* (Qld), r 92(a)
	Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, cited *R v Carkeet* [2009] 1 Qd R 190; [2008] QCA 143, cited *R v GV* [2006] QCA 394, cited *R v Horne* [2011] QCA 282, cited
COUNSEL:	R B Carroll for the applicant (pro bono) M B Lehane for the respondent
SOLICITORS:	Fisher Dore Lawyers for the applicant (pro bono) Director of Public Prosecutions (Queensland) for the respondent

[1] **MULLINS P:** I agree with Flanagan JA.

[2] **FLANAGAN JA:** On 5 October 2018, before Burns J, in the Supreme Court of Queensland at Toowoomba, the applicant pleaded guilty to one count of murder, one count of burglary and stealing and one count of wilful damage.

[3] For the count of murder he was convicted and sentenced to life imprisonment. No order was made as to parole eligibility. The applicant was therefore eligible for parole, in accordance with s 181(2)(c) of the *Corrective Services Act 2006* (Qld), after serving 20 years.

[4] For the count of burglary and stealing, he was sentenced to two years imprisonment and for the count of wilful damage, six months imprisonment. All sentences were ordered to be served concurrently. A period of 973 days spent in pre-sentence custody between 5 February 2016 and 5 October 2018 was declared to be time already served under the sentence.

[5] On 22 December 2022, the applicant filed a notice of appeal against his conviction on the count of murder. On the same day he also filed a notice of application for an extension of time within which to appeal. Pursuant to s 671(1) of the *Criminal Code* (Qld) and r 92(a) of the *Criminal Practice Rules 1999* (Qld), the time for appealing against the conviction was within one calendar month from the date the applicant pleaded guilty. The applicant's notice of appeal was therefore filed over four years out of time.

[6] On 4 March 2025, the applicant filed an amended notice of application for an extension of time within which to appeal, an application for leave to adduce evidence and an amended notice of appeal. The further evidence sought to be adduced is an affidavit of the applicant which addresses delay for the purpose of the application for an extension of time, the reasons for the applicant's plea of guilty, as well as providing the applicant's "true version of events" relevant to Ground 1 of the amended notice of appeal filed 4 March 2025. This ground states:

> "A miscarriage of justice arose in the circumstances, as described in the applicant's affidavit affirmed on 26 February 2025, in which he failed to raise an arguable defence of self-defence that was open to him, and instead pleaded guilty to the offence of murder upon a version of events that was incorrect."

[7] The present hearing only concerns the application for an extension of time to appeal against conviction. For the reasons which follow the application should be refused.

The proceedings before Burns J

[8] When the applicant entered his plea of guilty before Burns J on 5 October 2018, he was represented by experienced counsel instructed by Legal Aid Queensland. The facts in relation to the murder count had been reduced to an agreed schedule of facts.

[9] In brief, the deceased, Mark Wilkes, resided in Dalby. He was formerly married to a person who will be referred to as Ms MB. They had three biological children. Their relationship ended on 27 February 2015. Following the separation, Ms MB and the three children lived with her parents. During this time Ms MB commenced a relationship with the applicant.

[10] There was a dispute between Ms MB and the deceased in relation to parenting issues. On 17 August 2015, Ms MB and the applicant attended the house of the deceased. They were both intoxicated. The deceased was asleep. Ms MB assaulted the deceased and threatened to make him "disappear". The applicant who was waiting outside the house with another male, yelled out to the deceased to "come down and fight him".

[11] On 23 August 2015, the deceased made an assault complaint in relation to this incident. The deceased also lodged a Domestic Violence Order Application which was granted by the Dalby Magistrates Court.

[12] The parenting situation remained unresolved and in September 2015, the applicant was heard to make threats against the deceased. The applicant was observed as being possessive and jealous in relation to Ms MB.

[13] In November 2015, the applicant and Ms MB separated following a fight conducted in front of a number of people at which the applicant was overheard to say to Ms MB "I'll take the kids off you and get rid of (the deceased) if that's what you want".

[14] In around November 2015, the applicant informed a Mr Rose that the deceased was causing trouble between himself and Ms MB. He wanted someone to give the deceased a "tickle up" when he and Ms MB were away in Hervey Bay. Mr Rose refused to be involved. When Ms MB arrived, the applicant told her that Mr Rose would get someone to harm the deceased while they were away in Hervey Bay to which Mr Rose replied "No, it's not going to happen".

[15] On the day of the murder, which was 20 January 2016, the deceased was off work sick. Ms MB recalls that on the evening of 20 January 2016, the applicant, after cooking dinner, went for a walk. She did not accompany him. When the applicant returned from his walk, Ms MB noted that the applicant put on a load of washing. At around 10.00 pm that evening, Ms MB's neighbour informed her that the deceased had been killed in a fire.

[16] A son of Ms MB told police that the applicant went for a walk on the night of the fire and was absent for approximately half an hour to an hour. When he returned home, the applicant quickly walked into the laundry and took off his shorts and put them in the washing machine and may have had a shower. The son also observed that when the applicant returned home from his walk he was holding something under his shirt.

[17] The day following the murder the applicant placed a post on Facebook stating that he had done eight loads of washing that night. On 29 January 2016, he showed a friend a piece of paper with the words "you're next" written on it in black writing. The applicant stated that he found this note under the windshield wiper of his car. Further, on 2 February 2016, the applicant attended the Dalby Hospital and reported that an intruder knocked on his door and when he went outside he was hit over the head two to three times with a steel bar and attacked with a knife causing minor cuts. The medical opinion with respect to these injuries was that they were not consistent with the applicant's account, but could be consistent with self-inflicted injuries.

[18] There were also statements from neighbours of the deceased that at or about 9.30 pm on the night of the fire, they heard a male voice yell either "Binney" or "Vinnie, go back to your drugs" or words to that effect. Another neighbour stated that at about 9.20 pm on the night of the fire, she heard a loud noise which sounded like a howl and a scream together. Another neighbour also heard what sounded like a "disjointed howling noise". When the deceased was located after the fire had been reported, he was observed to have a number of open wounds and broken bones on the crown of his head. Next to the deceased's body on the floor was an ashtray and cigarettes, a lighter and a mobile phone which had been damaged by the fire. The back door of the residence was locked. The extensive injuries to the head region of the deceased were confirmed upon a post-mortem examination.

[19] In his first interview with police, the applicant denied any involvement in the murder. While in a cell at the Dalby Watchhouse, he made certain admissions to a police agent. He stated that he asked an unnamed Vietnam veteran to kill the deceased. This unnamed person had entered the house of the deceased and killed him. The applicant then entered the house and saw the deceased lying on the couch with blood everywhere. The unnamed male used fuel which had been stored in a baby's bottle from the deceased's house to torch the house. The applicant stated that the blood of the deceased which was subsequently found on the applicant's thong probably came from when he walked by the unknown male holding the hammer. The applicant stated that Ms MB wanted the deceased dead and had tried to get a male called "Stuart" to kill him.

[20] In a second police interview, the applicant asserted that Ms MB had been pestering him to get rid of the deceased. The applicant repeated that he had engaged an unnamed killer to carry out the murder on the proviso that the applicant was present and brought the weapon and a substance to light the fire as well as gloves. He stated that the hammer used in the murder was obtained from the boot of his car.

[21] The applicant asserted that he believed the unnamed killer was only going to hurt the deceased or give him a "tickle up" but it went further than the applicant had anticipated.

[22] The killer, who he refused to name, was a Vietnam veteran who served in the war with the applicant's father and owed his father a few favours. The killer was

terminally ill with cancer and had about eight weeks to live. On the night of the murder the applicant rode his pushbike to meet the killer and they both walked to the deceased's house with gloves on. The killer first entered the house and after about 10 minutes whistled for the applicant to enter. When the applicant entered he saw the deceased lying naked on the lounge with blood coming from his nose. The killer was still holding the hammer and swinging it. This is how he believes the blood of the deceased got on his thong.

[23] The applicant gave the killer the bottle containing fuel and the killer told him to go downstairs and he would sort the rest out.

[24] In the agreed schedule of facts the prosecution identified a number of bases for the applicant's criminal responsibility. These included as a principal offender pursuant to s 7(1)(a) of the *Criminal Code*, by directly causing the death of the deceased by striking him in the head with the intention of causing death and setting the premises on fire. Another basis of liability was pursuant to s 8 of the *Criminal Code* "by having a common intention with another to prosecute an unlawful purpose, namely a plan to seriously assault the deceased, intending serious injury and to set fire to the deceased's property, and an intention to cause death or grievous bodily harm on the part of the principal offender was a probable consequence of the prosecution of that purpose". The first basis of criminal liability involved the applicant actually killing the deceased with the hammer whereas the s 8 basis involved the deceased being killed by the unknown person.

[25] As to the agreed schedule of facts, his Honour noted that the deceased appeared to have died from the injuries caused by the hammer prior to the fire taking hold.[1] His Honour further noted that it was most likely that the deceased was asleep in the loungeroom when he was struck by the hammer.[2]

[26] It was accepted by his Honour and conceded by the prosecution, that the applicant should be sentenced on the basis that his criminal liability arose pursuant to s 8 of the *Criminal Code*. This was the basis submitted by the applicant's counsel before his Honour.[3]

[27] The prosecution asserted that but for the applicant's plea of guilty, the prosecution would have submitted that his Honour had a discretion to extend the statutory non-parole period having regard to the fact that the offending involved a course of conduct over a lengthy period of time in the context of disputed Family Court proceedings and in circumstances where the murder was committed while the applicant was on bail.

[28] In the sentencing remarks, Burns J made specific reference to s 181(2)(c) of the *Corrective Services Act 2006* (Qld) which provides that for a life sentence a person will become eligible for parole after having served 20 years imprisonment. His Honour further referred to the power under the *Penalties and Sentences Act 1992* (Qld) to fix a longer non-parole period. His Honour stated that he had given consideration to extending the non-parole period but in the end accepted the

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1 RB, page 64, lines 35–42.
2 RB, page 65, lines 1-2.
3 RB, page 112–115.

prosecution's submission that the applicant was entitled to some credit for his plea of guilty.[4]

The applicant's affidavit affirmed 26 February 2025

[29] The respondent made no objection to the Court considering the applicant's affidavit for the purpose of determining the application for an extension of time.

[30] The applicant's explanation for the delay of over four years in filing the notice of appeal is that he was not aware of, nor advised, as to his right to appeal against conviction subsequent to being sentenced on 5 October 2018.

[31] According to the applicant, he first became aware of his right to appeal around February 2022 when he was informed of that right by a friend who had conducted online research. The applicant further states that he was preoccupied with a matter concerning his son and that "[a]ll of [his] energy and fight went into his [son's] matter".[5]

[32] On 22 June 2022, the applicant took the unusual step of writing a 26 page letter directly to Burns J. According to the applicant's affidavit, this letter contained the true version of events.[6]

[33] In this letter the applicant asserts that after returning from his walk, Ms MB asked him whether the deceased was "gone and had been dealt with". She demanded that the deceased be dealt with immediately. According to the applicant, he went for another walk, this time armed with a fuel bottle and gloves. He knocked on the front door of the deceased's premises. When the deceased opened the door, the applicant told him that Ms MB did not wish to lose her children and wanted the deceased gone but he was only there to talk to him. Thereafter the deceased pushed and punched him. He retaliated by punching the deceased and pushed him back through the door. The deceased tripped, but as he was falling grabbed a hammer off the television cabinet and came at the applicant. The applicant asserts that he then blocked the hammer with his left forearm twice and the deceased dropped the hammer. A scuffle ensued and in self-defence he hit the deceased four times with the hammer as he came towards him. The applicant panicked as there was no signs of life. He used the fuel bottle to light a fire and left the residence of the deceased with the hammer and the fuel bottle.

[34] In paragraph 21 of his affidavit, the applicant states that the true version of events in his 26 page letter to Burns J was also contained in a 27 page "letter of remorse" which he gave to his legal representatives on the morning he was sentenced. He was advised by his legal representatives that this letter could not be used at sentence. The applicant does not exhibit this 27 page letter to his affidavit. Nor is there any affidavit from his previous legal representatives as to either the existence of this letter or the giving of advice that the letter could not be used at sentence.

[35] In paragraph 15 to 24 of his affidavit, the applicant gives his explanation as to why he entered a plea of guilty to murder. He describes his previous version of events given to the police agent as "untrue". He gave this untrue version because he had not

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4 RB, page 86.
5 Applicant's affidavit, paragraph 4.
6 Applicant's affidavit, paragraph 8.

been receiving his prescribed medication and was under severe duress caused by family traumas and police pressure.

[36] Exhibit "JWB-02" to the applicant's affidavit is a statutory declaration dated 9 August 2016 in which he sought to formally withdraw all his statements made to police between 21 January 2016 and 5 February 2016. The withdrawal was sought on the basis that he was of unsound mind at the time he made these statements to police which was caused by a lack of prescribed medication and severe duress.

[37] His explanation for maintaining the untrue version of events before Burns J is that he "did not have enough faith in [his] legal representatives to talk about the truth".[7] He further asserts that he was simply too tired to continue to challenge the offences and accepted the advice of his legal representatives that it was best to plead guilty and "get it over and done with".

[38] In paragraph 23 of his affidavit, he summarises his explanation for his plea as follows:

> "Throughout the course of my criminal proceedings, I did not have confidence in my legal representatives. I had approximately four or five lawyers with Legal Aid Queensland during the course of my matter. Each time there was a change of lawyer, I had to repeat previous instructions and discuss things yet again. It made it harder to keep going over the same stuff. I also did not feel that I could say much to my barrister."

[39] He accepts however, that he signed instructions on 20 September 2018 confirming his intention to plead guilty to the offences. He was also aware of his right to a trial.[8]

[40] At paragraph 25 of his affidavit, the applicant gives what he describes as the "true version of events" which are generally consistent with those contained in the letter he wrote to Burns J.

The application for an extension of time should be refused

[41] On an application to extend time, relevant considerations include the length of the delay, the explanation for the delay and whether it is in the interests of justice to grant the extension. Even where there has been a considerable unexplained delay, an extension of time should not be refused if such refusal would otherwise result in a miscarriage of justice.[9]

[42] The applicant's explanation for the extensive delay of over four years in filing a notice of appeal is wholly inadequate. It is not at all surprising that in circumstances where the applicant had been convicted upon his own plea of guilty to murder that he did not actively consider his appeal rights. No explanation is given as to why the applicant did not seek legal advice. As is evident from his affidavit he was at all relevant times aware of both his "true" and "untrue" version of events. As early as 9 August 2016 he had sworn a statutory declaration seeking to withdraw all his previous statements to police due to him not being of sound mind. He had also written a "letter of remorse" on or about 5 October 2018 which contained the asserted true

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7 Applicant's affidavit, paragraph 17.
8 Applicant's affidavit, paragraph 18.
9 *R v Horne* [2011] QCA 282 at [5]; *R v GV* [2006] QCA 394 at [3].

version of events. It follows that for the period of four years, in which he failed to obtain legal advice, he was fully aware of the asserted basis for seeking to have his plea set aside.

[43] As well as there being no adequate explanation for the extensive delay in filing a notice of appeal, the applicant has not established any proper basis for setting aside his plea of guilty.

[44] As correctly acknowledged by Mr Carroll of counsel, who appeared pro bono for the applicant:[10]

> "The effect of the leading authorities is that a person who has voluntarily pleaded guilty, but who now asserts that he or she is in fact innocent, will have to point to extraordinary circumstances in order to demonstrate a miscarriage of justice."

[45] In *Meissner v The Queen*,[11] Brennan, Toohey and McHugh JJ observed:

> "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."

[46] In *R v Carkeet*,[12] Fraser JA with whom Keane and Holmes JJA agreed, stated:

> "When a person of full age and apparently sound mind and understanding enters a plea of guilty in open court in the exercise of a free choice, the circumstances in which that person might establish a miscarriage of justice resulting from the plea must be very rare indeed. As the above quote from *Meissner* indicates, it is not sufficient to point to evidence that establishes that the person is in truth not guilty of the offence."

[47] In the present application there is no suggestion that the applicant did not understand the nature of the count of murder or did not intend to admit guilt. Nor is there any suggestion that his plea of guilty was obtained by improper inducement, fraud or intimidation. Mr Carroll accepted that the applicant's plea was voluntary. Mr Carroll submitted however, that the applicant's "free choice" had been compromised. This compromise arose from those matters summarised in paragraph 23 of the applicant's affidavit set out at [38] above. The primary factor was the applicant's lack of confidence in his legal representatives. The difficulty with this submission is that such a factor is not unique or peculiar to the applicant and would apply to most applicants seeking to have a plea of guilty set aside.

[48] Further, a consideration of the proceedings before Burns J does not support the assertion that the applicant was not of sound mind and understanding when he entered his plea of guilty. There is no medical evidence to support this assertion. The applicant also acknowledges that he signed instructions on 20 September 2018 and

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10 Applicant's outline of submissions, paragraph 29.
11 (1995) 184 CLR 132 at [141].
12 [2008] QCA 143 at [24].

5 October 2018 confirming his intention to plead guilty to the offences. He was also aware of his right to a trial. His other reasons for pleading guilty, namely that he "could not fight two battles at once" and that he "felt bad for what happened to [the deceased]" do not constitute cogent reasons sufficient to set aside his plea of guilty.

[49] Further, there were sound reasons why the applicant entered a plea of guilty. As observed by Dawson J in *Meissner v The Queen*:[13]

> "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 element of the offence and a conviction entered upon the basis of a such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred."

[50] First, through the negotiation of his legal representatives, the applicant was able to plead guilty to murder on the basis of s 8 of the *Criminal Code*. This had the consequence that, by his plea, the applicant did not have to accept responsibility for being the person who actually killed the deceased with the hammer.

[51] Secondly, as submitted by the respondent,[14] the applicant faced a strong prosecution case. The applicant had made repeated threats to kill or injure the deceased. He was motivated in this respect because of his feelings for Ms MB. The applicant had gone for a walk at or about the time of the murder. The blood of the deceased was found on the applicant's thong. The applicant had also engaged in conduct after the murder to deflect attention from himself.

[52] Thirdly, as is evident from the proceedings before Burns J, but for the applicant's plea of guilty, the prosecution would have submitted for, and his Honour would have considered, setting a non-parole period beyond 20 years. Before Burns J, the history of the matter was outlined in defence counsel's written submissions. This history evidenced that the applicant, prior to sentencing, was willing to plead guilty on the basis of s 8 of the *Criminal Code*. While this offer was initially rejected by the prosecution, the sentencing proceeded on the basis of the applicant being criminally liable pursuant to s 8. The history reveals that this process was conducted at least a year prior to the applicant being sentenced and was no doubt based on advice given to him by his legal advisors and also reflected the strength of the prosecution case. By his plea of guilty on a s 8 basis, the applicant had a better chance of obtaining a more lenient sentence.

[53] To these considerations may be added the inherent difficulties which the applicant would have faced had he sought to rely on the asserted true version of events. These considerations may readily explain why the applicant's legal representatives may have advised him that the "letter of remorse" could not be tendered at sentence. The applicant submitted that if an extension of time to appeal against the conviction for murder is not granted, a miscarriage of justice would result because he would be

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13 (1995) 184 CLR 132 at [157].

14 Respondent's Outline of Submissions, paragraph 27-29.

denied the chance of an acquittal. He submitted that consideration of the true version of events gives rise to a possible defence under either s 271 or s 272 of the *Criminal Code*. Section 271 deals with self-defence against unprovoked assault and s 272 deals with self-defence against provoked assault. The difficulty with such a defence is that the true version of events is inconsistent with the agreed factual basis upon which the applicant was sentenced, and is also inconsistent with the contemporaneous versions he gave to the police agent and in his second record of interview.

[54] The applicant's explanation for the inconsistencies in these competing versions is wholly inadequate. Even if it was accepted that the true version of events was contained in the appellant's letter of remorse which was given to his legal representatives on the morning he was sentenced, this does not assist the applicant. If accepted, it shows that the applicant, in spite of being aware of the competing versions of events, provided written instructions to his legal representatives that he intended to plead guilty and appreciated that he had a right to trial. As already observed, his legal representatives had, over a period of approximately 12 months been communicating with the prosecution as to the basis of criminal liability for a plea of guilty. If the true version of events was accepted, this would have left the applicant in a position where he was the person who in fact killed the deceased with a hammer by striking him four times. There are also obvious difficulties with the applicant pursuing a defence under ss 271 or 272. On the asserted true version of events, it was the applicant who went to the house of the deceased. If it was his intention merely to talk to the deceased, the question arises why he took fuel and gloves.

[55] As there were sound reasons for the applicant's plea of guilty and as there is no basis for viewing his plea as other than voluntary, the applicant has no realistic prospect of having his plea of guilty set aside. It is therefore not in the interests of justice for the applicant to be granted an extension of time to appeal against conviction.

Disposition

[56] The application for an extension of time within which to appeal against conviction should be refused.

[57] **COOPER J:** I agree with Flanagan JA.