SUPREME COURT OF QUEENSLAND

CITATION:	*R v Shipley* [2014] QSC 299
PARTIES:	**THE QUEEN** (applicant) **And** **SHIPLEY, Kathleen May** (respondent)
FILE NO/S:	SUP37/14
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	10 December 2014
DELIVERED AT:	Rockhampton
HEARING DATE:	3 December 2014
JUDGE:	McMeekin J
ORDERS:	**1. Order that pleas of guilty be entered to the charges on indictment SUP37/14 notwithstanding the respondent's pleas of not guilty.**
CATCHWORDS	CRIMINAL LAW – PROCEDURE – PLEAS – OTHER MATTERS – where the respondent pleaded guilty to possession of drug offences by way of registry committal – where the defendant was a passenger in a vehicle where drugs were found – where the respondent denied knowledge of the drugs – where the respondent subsequently pleaded not guilty to the charges on arraignment in the Supreme Court – where the Crown seeks a direction that a guilty plea should be entered – whether the respondent can withdraw a plea of guilty entered by way of a registry committal *Criminal Code* 1899 (Qld) s 600 *Drugs Misuse Act* 1986 (Qld) s 9, s 116, s 129 *Justices Act* 1886 (Qld) s 114

Attorney-General (Qld) v Lawrence [2013] QCA 364 cited
Clare v R (1994) 2 Qd R 619; [1993] QCA 558 cited
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51; [1996] HCA 24 cited
Grassby v The Queen (1989) 168 CLR 1; [1989] HCA 45 cited
Meissner v R (1996) 184 CLR 501; [1995] HCA 41 cited
R v Amanatidis [2001] NSWCCA 400 cited
R v Bridges [1986] 2 Qd R 391 cited
R v GV [2006] QCA 394 cited
R v McGregor [2009] QCA 308 cited
R v Mundraby [2004] QCA 493 cited
R v Nerbas [2012] 1 Qd R 362; [2011] QCA 199 cited
R v Phillips and Lawrence [1967] Qd R 237 cited
R v Smythe [1997] 2 Qd R 223 cited
R v Solway [1984] 2 Qd R 75 cited
R v Von Snarski. [2001] QCA 71 cited
R v Warneminde [1978] Qd R 371 cited
Thow v Campbell [1997] 2 Qd R 324 cited

COUNSEL: A Baker for the applicant

D Winning (Sol) for the respondent

SOLICITORS: Office of the Director of Public Prosecutions (Qld) for the applicant

Winning Lawyers for the respondent

McMeekin J:

[1] Ms Shipley is charged with two counts of possession of a dangerous drug, one with a circumstance of aggravation. She pleaded guilty to these charges by way of a registry committal. When arraigned in the Supreme Court on 24 November 2014 Ms Shipley entered pleas of not guilty.

[2] There are two issues. The first is whether Ms Shipley can withdraw a plea of guilty entered by way of a registry committal. The second is whether, if that is allowed, the fact of the plea of guilty can be proved at her trial. The result of both issues is governed by s 600 of the *Criminal Code* 1899 (Qld).

The Crown Case

[3] The applications proceeded on the basis that the evidence available to the prosecution, both at the time of the entry of the pleas and now, established the following facts.

[4] On 30 July 2013 police observed a white truck perform a manoeuvre and come to a stop near a service station. Police checks showed that the registered owner of the

truck, one Pallas, was wanted for questioning by police. When police approached the vehicle, Pallas was in the driver's seat. The defendant and another person, Hewitt, were seated in the passenger seats. I understand all to be located on the front bench seat of the truck.

[5] After conducting a search of the truck, police located a silver canister wedged on top of a red tool box affixed to the undercarriage of the tray. Inside the canister was a number of clip seal bags and several vials, each containing crystal substances. Subsequent analysis showed that the canister contained:

a) A glass pip in which methylamphetamine was detected;
b) A second glass pipe in which methylamphetamine and methylsuflonylmethane was indicated;
c) Two clip seal bags in which 2,4-methylenedixoypyrovalerone was detected;
d) Four clip seal bags in which methylamphetamine was detected;
e) One clip seal bag in which methylamphetamine and methylsuflonylmethane was indicated;
f) One clip seal bag in which methylamphetamine, methylsuflonylmethane and chlorpheniramine was indicated; and
g) A clip seal bag containing less than 1 gram of cannabis seeds and cannabis leaf.

[6] There was a large quantity of methylamphetamine found in the various substances located - 16.956 grams, and at a high level of purity ranging from 48.6% to 67.6%.

[7] The canister also contained drink straws, five empty vials, a small gas lighter, digital scales, a further clip seal bag containing two black rubber pieces, a metal strainer and a blue grinder.

[8] Located inside the cab of the vehicle, and behind the driver's seat, was a plastic shopping bag containing eight packets with a large quantity of clip seal bags inside each of the packets, each containing a distinctive green seal. The bags found in the canister were similarly sealed.

[9] Ms Shipley, along with Pallas and Hewitt, was arrested and transported to Tully Police station. She participated in a record of interview, in which she stated that she did not know about the drugs or utensils found on the truck. The other two declined to be interviewed.

The Entry of the Pleas

[10] It is common ground that Ms Shipley entered her pleas of guilty when in receipt of legal advice and in accordance with the registry committal procedure.

[11] That procedure is governed by s 114 of the *Justices Act* 1886 (Qld).

[12] In conformity with that procedure Ms Shipley's then legal advisor gave notice to the clerk of the court stating, *inter alia*, that Ms Shipley wished to be committed for sentence, and filed a statement, required by ss114(2), signed by Ms Shipley and the solicitor, that she pleaded guilty to the offences acknowledging that she was not obliged to do so and that she had " nothing to hope from any promise and nothing to

fear from any threat that may have been held out to induce [her] to make any admission or confession of guilt."

[13] The first notice that I have mentioned was filed on 13 December 2013, the statement was signed on 12 February 2014 and the committal for sentence occurred on 28 February 2014.

The Relevant Legislation

[14] The parties are agreed that s 600 of the *Criminal Code* 1899 (Qld) governs the issue. That section provides:

> **600 Persons committed for sentence**
>
> (1) When a person has been committed by a justice for sentence for an offence, the person is to be called upon to plead to the indictment in the same manner as other persons, and may plead either that the person is guilty of the offence charged in the indictment or, with the consent of the Crown, of any other offence of which the person might be convicted upon the indictment.
>
> (2) If the person pleads not guilty, the court, upon being satisfied that the person duly admitted before the justice that the person was guilty of the offence charged in the indictment, is to direct a plea of guilty to be entered, notwithstanding the person's plea of not guilty.
>
> (3) A plea so entered has the same effect as if it had been actually pleaded.
>
> (4) If the court is not so satisfied, or if, notwithstanding that the accused person pleads guilty, it appears to the court upon examination of the depositions of the witnesses that the person has not in fact committed the offence charged in the indictment or any other offence of which the person might be convicted upon the indictment, the plea of not guilty is to be entered, and the trial is to proceed as in other cases when that plea is pleaded.
>
> (5) A person who has been committed for sentence may plead any of the other pleas mentioned in section 598.

Ms Shipley's Primary Submission

[15] No evidence was led on this application to impugn the effect of the statement signed by Ms Shipley and filed before the clerk of the court that the plea was entered voluntarily by her.

[16] Hence I am "satisfied that [Ms Shipley] duly admitted before the justice that [she] was guilty of the offence charged in the indictment". I am therefore required "to direct a plea of guilty to be entered, notwithstanding the person's plea of not guilty" (s 600(2)) unless "it appears to the court upon examination of the depositions of the witnesses that the person has not in fact committed the offence charged in the indictment or any other offence of which the person might be convicted upon the indictment" (s 600(4)).

[17] Ms Shipley's principal submission was to the effect that no jury, properly instructed, could find her guilty of the offences charged on the evidence that the prosecution has, and had at the time of her pleas.

The Evidence was Insufficient

[18] In my view Ms Shipley should be accepted in her submission that the evidence available at the time of her committal and the entry of her plea was not sufficient to sustain a conviction.

[19] She was charged with unlawful possession of the drugs found under the truck pursuant to s 9 of the *Drugs Misuse Act* 1986 (Qld).

[20] Although 'possession' is not defined in the *Drugs Misuse Act* 1986 (Qld), s 116 of that Act states that '[t]he Criminal Code shall, with all necessary adaptations, be read and construed with this Act'.

[21] Schedule 1 of the *Criminal Code 1899* (Qld) states that the term 'possession' includes 'having under control in any place whatever, whether for the use or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing in question'.

[22] As the definition says it is inclusive and not exhaustive (and see *R v Warneminde*[1]). The concept of possession at common law was explained by Giles JA (with the agreement of Adams J) in *R v Amanatidis*[2]:

> "**[9]** Possession of a thing in the criminal law involves physical control or custody of the thing plus knowledge that you have it in your control or custody (*He Kaw The v The Queen* (1985) 157 CLR 523 at 537-9, 546, 585-7, 599-600). The physical control or custody may be shared, but must be control or custody to the exclusion of other persons or persons other than those with whom it is shared (*R v Dib* (1991) 52 A Crim R 64 at 66-7). It is not enough, however that you are one of a number of persons with access to the thing to the exclusion of other persons - that does not constitute your physical control or custody of the thing or physical control or custody shared with the others of the number of persons. So in *R v Filipetti* (1984) 13 A Crim R 335 finding drugs in the lounge room of a house occupied by six persons, to which all six had access, did not establish physical control or custody of the drugs by one of the occupants, because any physical control or custody of the one occupant was not to the exclusion of the other occupants and shared physical control or custody could not be inferred; see also *R v Bazeley* (CCA, 23 March 1989, unreported) and *R v Sobolewski* (CCA, 21 April 1998, unreported)."

[23] Thus both the common law concepts and the inclusory definition in the Code require the essential common element of "control". In *R v Solway*[3] the Court expressed the view that:

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1 [1978] Qd R 371
2 [2001] NSWCCA 400
3 [1984] 2 Qd R 75

> "... before a person can be said to be in possession of any object he must not only know of its existence, but he must have laid a claim to it (*Warneminde*), or exercised some control over it (*Thomas and Todd*)."

[24] Ms Shipley denied any knowledge of the presence of the drugs. There was no direct evidence that she was aware of their presence. She made no claim to the substances or exercised any overt control over them. In those circumstances, absent any special evidentiary provisions, the prosecution's case is necessarily a circumstantial one.

[25] There is of course nothing wrong with circumstantial proof[4] but for a conviction to be sustained, possession must be proved beyond reasonable doubt. To reach that standard the inference of guilt must be the only rational inference that can be drawn from the evidence.[5]

[26] That test is not met here.

[27] In my view this is a *Filipetti* situation. Ms Shipley was one of three persons who had access to the vehicle. Whatever control or custody she may have had was not to the exclusion of the other two. And there is nothing to indicate that there was shared control or custody. All that is known is that the three people were travelling in a truck together. The drugs were not in locations that permitted the inference to be drawn that all must have known of the presence of the drugs, or at least the substances[6], that were secreted on or in the truck. There was no evidence to tie Ms Shipley to the bag found in the cabin. There was no evidence that Ms Shipley had any knowledge of the presence of the drugs. The evidence is as consistent with Ms Shipley entering the truck unaware the drugs were present as any other hypothesis.

[28] The prosecution argue that s 129 of the *Drugs Misuse Act* 1986 (Qld) applied to reverse the onus of proof. That section relevantly provides:

> **129 Evidentiary provisions**
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> (1) In respect of a charge against a person of having committed an offence defined in part 2 [which is here relevant]—
>
> … (c) proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in the person's possession unless the person shows that he or she then neither knew nor had reason to suspect that the drug was in or on that place; …

[29] Before the onus is reversed under s 129 the prosecution must first show that Ms Shipley was "the occupier or concerned in the management or control" of the truck. That must be shown to the criminal standard of proof: *R v Smythe*.[7]

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4 See *R v Armstrong* (Unreported, Queensland Court of Criminal Appeal, CA 191 of 1985, McPherson, Thomas and de Jersey JJ, 17 October 1985); *Duncan v Martyn* (Unreported, Queensland Court of Criminal Appeal, CA 14 of 1989, Kelly SPJ, Kneipp and Demack JJ, 18 April 1989)

5 See *R v Bridges* [1986] 2 Qd R 391

6 See *Clare v R* (1994) 2 Qd R 619; [1993] QCA 558 where it was held that the prosecution was not required to prove that the accused knew the powder in his custody was heroin when he claimed he thought it was perfume base

7 [1997] 2 Qd R 223 per Thomas J at 225

[30] A person sitting in the passenger seat of a vehicle, without more, is not normally seen to be the one "concerned in the management or control" of the vehicle, particularly where there is someone else driving the vehicle. Pallas would seem to be the one in control of the vehicle. In the absence of any other evidence I am satisfied that the prosecution cannot establish that Ms Shipley was "concerned in the management or control" of the vehicle.

[31] The question then is whether a person sitting in the passenger seat of a vehicle is the "occupier" of the vehicle for the purposes of the Act.

[32] "Occupier" is not defined in the Act nor the *Criminal Code*, save for the purposes of Chapter 23 which are not relevant here. Occupation is more commonly associated with premises rather than a vehicle but I cannot see that a vehicle is not capable of being a relevant "place" for the purposes of the *Drugs Misuse Act* 1986 (Qld).

[33] Speaking broadly there have been two approaches in the decided cases to the issue of what it is necessary to show to trigger the reversal of onus provisions in the *Drugs Misuse Act*. One is to look to the usual indicia of occupation exemplified in the judgment of Keane JA (as his Honour then was) in *R v McGregor*.[8] The other is to look for some measure of control or management over the place in question: *Thow v Campbell*[9]*; R v Von Snarski*.[10]

[34] Thus in *McGregor* Keane JA pointed to evidence of the defendant's presence in the unit, his use of laundry facilities there, the presence of a prescription for medicine for the defendant found on top of the cupboard in which drugs were located, the unexplained booking of the unit in the defendant's name, and the unexplained presence of the defendant's clothes in the unit.

[35] In *Thow* the defendant had quit the residence the day before the relevant drugs were located leaving some of his clothes behind to be collected later. He was held not to be an "occupier", he no longer exercising any measure of control over the premises and not intending to do so in the future.

[36] The cases show that, at the very least, the concept of "occupier" demonstrates that something more than the defendant's mere presence at the place in question is needed before the onus is reversed.

[37] Whether "control or management" needs to be shown or not it cannot be said that occupation is shown here. For the reasons set out above there is no evidence of control or management of the truck even to the limited extent that the approach of Ambrose J in *Thow* would suggest was needed – de facto control of the cabin of the truck for the purposes of facilitating travelling as a passenger. Nor is there any evidence of a more permanent connection with the truck than the mere entering of it.

[38] In the circumstances the prosecution could not avail themselves of s 129 of the *Drugs Misuse Act* 1986 (Qld).

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8 [2009] QCA 308

9 [1997] 2 Qd R 324

10 [2001] QCA 71 at [21]

[39] The issue remains as to whether demonstration that the prosecution proofs fall short in this way is sufficient to warrant the setting aside of the effect of the earlier pleas. Before turning to that question I will address an argument that the registry pleas were nullities and hence void *ab initio*.

A Nullity?

[40] Mr Winning who appeared for Ms Shipley argued that a plea entered by way of a registry committal was a nullity as the plea lacked an essential characteristic of any plea namely that it be entered in "open court". He pointed out that until the introduction of the present procedure following the so-called "Moynihan reforms" in 2010 a plea at committal was taken in open court and hence the taking of the plea was an exercise of judicial power. With a plea entered by filing a form in the registry the taking of the plea was an administrative act and so one not permitted by the law.

[41] No direct authority is cited for that proposition although Mr Winning pointed out that the High Court in *Meissner v R*[11] said that "a Court will act on a plea of guilty when it is entered in open court by a person of full age…".[12]

[42] The High Court in *Meissner* was concerned with the circumstances in which the Court would set aside a plea of guilty entered into in open court. The Court was not purporting to address the necessary pre-conditions to a valid plea of guilty. The point in the passage quoted no doubt was to draw a distinction between a plea in open court and an admission of guilt made elsewhere. A confession of guilt other than in open court normally operates only as an admission against interest and forms part of the factual matrix upon which a court will act in determining guilt where guilt is in issue.

[43] But here Parliament has determined that a plea of guilty made in a certain way will have a certain effect. The answer to the argument of invalidity is that subject to some narrow exceptions Parliament can do as it pleases.[13] Those exceptions are not engaged here.

[44] The argument seemed to be that the taking of a plea in the manner provided for in s 114 of the *Justices Act* 1886 (Qld) involved an administrative function not a judicial one and that the process set out in the legislation therefore involved an impermissible usurpation of the judicial power. If the argument is right then it must *a fortiori* apply to a wide range of offences commonly dealt with by written admissions of guilt forwarded to the registry. However I cannot see that it has any proper basis.

[45] It may be accepted that the determination of guilt or innocence of persons charged with a criminal offence involves "the most important of all judicial functions"[14] and one not to be exercised by the executive.[15] But the taking of the plea in the manner

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11 (1996) 184 CLR 501; [1995] HCA 41

12 *Ibid* at [22] – Mr Winning's emphasis

13 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24 per Dawson J at p 72 – 76.

14 *Ibid* at 26 per Gaudron J

15 *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96; [1986] HCA 47; *Liyanage v The Queen* [1967] 1 AC 259

provided does not involve the conviction of the defendant or the necessary acceptance of the plea.

[46] The taking of a plea by justices following a committal, whether "hand up" or otherwise, does not involve, and never has involved, the exercise of a judicial function. It has long been recognised that the holding of a committal by justices involved the exercise of an executive or ministerial function: see *Grassby v The Queen*[16] and the authorities discussed.

[47] The direction by the justices whether to commit for trial or to discharge the defendant at the conclusion of the committal is part of that executive or ministerial process. A committal for sentence is no different. The significant point is that the answer that the defendant makes to the justices, or presiding magistrate, when called on, and if a plea of guilty, merely determines the administrative order made.

[48] That the plea before the justices was once in open court and can now be entered by the filing of a written document does not alter the essential nature of the plea. It determines the administrative order to be made. The acceptance of the plea and the conviction of the defendant, both essentially judicial functions, remain to be performed by a Court. That is why, despite the registry plea, it is necessary for the defendant to be arraigned in open court and a plea taken as s 600 of the *Criminal Code* provides. The very question in issue now is the acceptance of Ms Shipley's plea and her possible conviction.

[49] That the Court's discretion is limited by s 600(4) of the *Criminal Code* involves no impermissible crossing of the line by the legislature. Just where that line is drawn must be decided on a case by case basis and cannot be stated in the abstract with any confidence. In *Kable v Director of Public Prosecutions (NSW)* McHugh J suggested that "the boundary of State legislative power is crossed when the vesting of those functions or duties might lead ordinary reasonable members of the public to conclude that the State Court as an institution was not free of government influence in administering the judicial functions invested in the Court."[17] Gaudron J too was concerned with the impact of legislation on the integrity of the Courts and the maintenance of public confidence.[18] In my view these concerns are not present here.

[50] The provisions of the *Justices Act* 1886 (Qld) under consideration may be contrasted with the effects of the legislation struck down in *Attorney-General (Qld) v Lawrence*[19] which were summarised as:

> "…the executive is empowered to make decisions on the basis of its view of the public interest, the merits of which are not reviewable in any court, whether or not to nullify the Supreme Court's order by imprisoning that person and whether or not subsequently to give effect to the order. The power to nullify orders of the Supreme Court, being exercisable upon the merits of each case on a case by case basis, is analogous with the power of an appellate court to set aside orders found to be made in error. The power is otherwise foreign to judicial power, most obviously because of the

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16 (1989) 168 CLR 1 at 11; [1989] HCA 45 per Dawson J (Mason CJ, Brennan, Deane, Toohey JJ agreeing)

17 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24 at [25]

18 *Ibid* at [26] per Gaudron J

19 [2013] QCA 364

> political character of the sole criterion for a decision which may result in imprisonment and the fact that the power is exercisable by a party to the proceedings in which the affected order was made."[20]

[51] The concern in *Lawrence* that the legislation would undermine the authority of the Court is not a concern here and the conclusion that the "amendments are within that exceptional category of legislation which is invalid on the ground that it is repugnant to that institutional integrity of the Supreme Court which is entrenched under the Commonwealth as the highest court for the time being in the judicial hierarchy of the State" does not apply.

[52] In my opinion the entry of the plea in the manner provided for in the *Justices Act* has the effect parliament has laid down. It is not void *ab initio* as submitted.

[53] This brings me to the last and more difficult question - whether the test laid down in s 600(4) of the *Criminal Code* is met by demonstrating that the prosecution proofs are not sufficient to show a prima facie case and put the person on their charge.

What is the Test?

[54] Neither side could find any authority directly on point as to the construction and application of the statute in these circumstances.

[55] I have concluded, not without some hesitation, that Ms Shipley's argument does not meet the test laid down in the statute.

[56] There is a distinction between it appearing that "the person has not in fact committed the offence charged" and it appearing that the evidence is not sufficient to meet the criminal standard of proof. In that latter case it would be more accurate to say that the defendant may not have committed the offence.

[57] It is not as if it would be impossible for there to be cases where the depositions might show that the defendant could not have committed the offence in question.

[58] That can be illustrated by simple examples.

[59] If, say, the depositions show that at the time of the alleged offence the defendant could not have been at the time and place necessary to commit the offence, say the person was in prison at the time – as it happens a fact situation that I encountered when in practise, then the court would presumably readily accept that "the person has not in fact committed the offence charged."

[60] Take another example. Say that the offence charged is one of assault occasioning grievous bodily harm. The depositions show that an inconsequential scratch had been suffered. That too would satisfy the test mandated by the legislation. Examples could be multiplied.

[61] That is not to say that the test urged by Ms Shipley here may not apply. But it is odd that the legislature, if it intended to postulate the test that Ms Shipley argues for, did not use language more appropriate to that end.

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20 *Ibid* at [35]

[62] An example of such language appears in s 108 of the *Justices Act* 1886 (Qld) which deals with the duty of the justices on a committal hearing to either discharge or commit the defendant. There the test is in this form (when discharging): if "the justices are of the opinion that the evidence is not sufficient to put the defendant upon the defendant's trial for any indictable offence…".

[63] That formula is effectively the test that Ms Shipley argues I should use in applying s 600(4). That formula is a time honoured one dating back to at least 1848 and the commencement of the modern form of committal in the United Kingdom with the passing of *The Indictable Offences Act* 1848 (UK) and adopted in New South wales in 1850.[21] It can hardly be supposed that parliament was ignorant of the approach it had commanded, and has for so long commanded, justices to make on the hearing of a committal. That a different form of words was adopted for the test that a court should apply when considering the setting aside of a plea of guilty entered at committal strongly suggests that a different test was intended.

[64] As well it is not surprising that the legislature would consider that a different and sterner test should be met before permitting a plea of guilty to be set aside. A plea entered when the prosecution evidence may be equivocal and commonly, as here, the defendant being the only one knowing the true facts, does not have that stain of injustice that would accompany a plea to a charge that plainly cannot be right.

[65] I am reinforced in that view by the accepted principle that there is no miscarriage of justice where a court acts on a plea of guilty "even if the person entering it is not in truth guilty of the offence": *Meissner v R.*[22] The policy reasons which underlie that approach are no less compelling on a registry committal than to a plea entered in open court. In the same case Dawson J said:

> 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**.[23]

[66] None of the circumstances that Dawson J listed apply here. While those circumstances are not taken to be exclusively stated they provide a guide to the

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21 See *Grassby v The Queen* (1989) 168 CLR 1; [1989] HCA 45 at 11 per Dawson J

22 (1995) 184 CLR 132 at 141 per Brennan, Toohey and McHugh JJ

23 *Ibid* at 157 – emphasis added and footnotes omitted

relevant matters. Not that the common law tests are necessarily relevant. But the focus I take to be the same – is the court persuaded that there has been a "miscarriage of justice"?

[67] In *R v Nerbas*[24] McMurdo J (with the concurrence of de Jersey CJ and Dalton J) after referring to these passages from *Meissner* pointed out that in *R v Mundraby*[25] McPherson JA said that although the circumstances capable of amounting to a miscarriage of justice in this context are not to be restricted or circumscribed, they must be such as to indicate that the plea of guilty was not "really attributable to a genuine consciousness of guilt."

[68] There is nothing in the evidence before me to show that Ms Shipley in any way misunderstood the effect of what she was doing. She was then in receipt of legal advice. She makes no complaint about the conduct of her then solicitor. Her pleas of guilty and, as far as I am made aware of them, the circumstances surrounding the entry of her pleas, appear to be attributable to, and consistent with, a "genuine consciousness of guilt."

[69] Mr Winning who appeared for Ms Shipley argued that the conviction on a guilty plea was "provisional" citing the judgment of Hart J in *R v Phillips and Lawrence,*[26] where his Honour thought that "… probably the best way to regard a conviction on a plea of guilty is as provisional, in the sense that it is subject to be vacated ab initio until sentence, but is valid unless and until vacated". The accuracy of that remark was examined by McMurdo J in *R v Nerbas*[27] but the issue need not detain me here - that I have the power to set aside the pleas is not in doubt. The statute makes that plain.

[70] Mr Winning then argued that that the test he advanced has the backing of authority citing principally *R v GV*[28] where the Court made the comment that:

> "When it became apparent to the Judge that the facts on which he was being asked to sentence the applicant showed that he had, at least arguably, a complete defence to the charge, the Judge should have directed that a plea of not guilty be entered in place of a plea of guilty. In those circumstances the applicant was unfairly denied a fair opportunity of acquittal and he should be given leave to withdraw his plea of guilty and a plea of not guilty entered in its place."

[71] *GV* does not support Ms Shipley's argument. In *GV* the appellant pleaded guilty to a count of dangerous operation of a motor vehicle causing grievous bodily harm. He drove through a red light at speed colliding with another vehicle and harming the occupant. It was common ground, and the sentencing judge was well aware at sentence, that he had done so because he was at the time being pursued by a number of people who wished to do him harm. On the prosecution facts he had a defence under s 25 of the *Criminal Code*. It was in those circumstances that the Court made the remark relied on.

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24 [2012] 1 Qd R 362; [2011] QCA 199
25 [2004] QCA 493 at [11]
26 [1967] Qd R 237 at 288–299
27 [2012] 1 Qd R 362; [2011] QCA 199 at [7]-[11]
28 [2006] QCA 394 at [40]

[72] There is no like consideration here.

[73] In *GV* the Court (Jerrard JA, Jones and Atkinson JJ) pointed out the applicable principles that apply to the setting aside of a plea in this passage:

> "The difficulty for the applicant in this case is that his conviction was based on his plea of guilty. A person of full age and capacity has a choice whether or not to plead guilty or not guilty to a charge whether they are in fact guilty or not guilty. A court is entitled to act on such a plea when it is entered in open court. The entry of a plea of guilty is an admission of all the elements of the offence. It is of course an admission not just to all the elements of the offence but also that any available defences have been negatived. It follows that in order to set aside a plea of guilty it is not sufficient for a person to say for the first time on appeal that he or she is not in fact guilty of the offence. A conviction entered on the basis of a plea of guilty will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. If the applicant can show that a miscarriage of justice has occurred, he or she should be allowed to withdraw the plea of guilty and have the conviction set aside."[29]

[74] In my view the test laid down in s 600(4) for the setting aside of a plea is not greatly different from the test discussed in *R v GV* above and applied in later cases such as *Nerbas*. The concern is not to permit a plea to stand if there has been a miscarriage of justice. I conclude that the statute requires that I must come to the positive view that Ms Shipley has not in fact committed the offence charged.

[75] Where, as here, Ms Shipley is the one person who does know whether she is guilty of the charge of possessing the drugs in the truck her entry of pleas of guilty, unexplained as they are, cannot be seen to involve a miscarriage of justice in the sense discussed in the cases. I am certainly not persuaded that Ms Shipley did not commit the offences charged.

[76] Given that conclusion, as required by s 600(2) of the *Criminal Code*, I direct that pleas of guilty be entered to the charges notwithstanding Ms Shipley's pleas of not guilty.

[77] In the circumstances it is not necessary to rule at a later trial on the admissibility of the registry plea.

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[29] *R v GV* [2006] QCA 394 at [6] – footnotes omitted