NOTE: Name suppression order in force as to complainant in this case

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

C.R. Nos: 803, 815-819, 823-824/08

CROWN

V

NOOTAI HENRY
Accused

Hearing: 3, 8 April 2009

Appearances: Mr T Vakalalabure for the Accused
Mrs K Saunders for Crown

Date of Judgment: 3 July 2009

JUDGMENT OF WILLIAMS CJ

The Nature of the Case

[1] On 18 November 2008, the Applicant pleaded guilty to 8 charges relating to alleged offending on the night of 25 September 2008. The charges included rape (x3), indecent assault (oral violation), threatening to kill, burglary, aggravated wounding, and abduction (detaining) with intent to have sexual intercourse. The Applicant was due to be sentenced on 28 November 2008.

[2] By letter of 27 November 2008, the Applicant wrote to the Registrar from Aorangi Prison attaching a memorandum to the Sentencing Judge "advising him that I am vacating my guilty plea". On 28 November 2008, the Applicant appeared before Paterson J who directed that his application, which had been drafted by a lawyer in prison on remand (Mr T Vakalalabure) be treated as a formal application to vacate his guilty plea. The Crown indicated that the application would be opposed and Paterson J therefore made directions concerning the filing of affidavits and other matters. He gave the Applicant's then counsel, Mr Anthony Brown, leave to withdraw. He advised Mr Henry to take legal advice from a lawyer, other than the lawyer who drafted his application. On 22 January 2009, the Applicant wrote to the

Registrar confirming that he had instructed Mr Tevita Tangaroa Vakalalabure to act for him. He said that he was "also aware of the advice of Paterson J on 28 November 2008, but I have resolved to let Mr Vakalalabure represent me".

[3] In his memorandum of 27 November 2008 ("the application") he said:

> "2. On 25 September 2008 I was formally charged with the above offences and appeared without counsel at the High Court, where I pleaded not guilty to all those charges. I was advised to seek counsel.
>
> 3. I then instructed Mr Anthony Brown who took carriage of my case.
>
> 4. I appeared before Nicholson J on 2 November 2008 and on advice of my counsel (which I was not happy with) I vacated my not guilty plea and entered guilty pleas to all the charges.
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> 5. I have difficulty in understanding why my counsel wanting me to plead guilty to crimes that I did not commit. My counsel, without addressing my concerns in detail so that I can understand his advice, maintains that the evidence against was overwhelming and that I did not have any defence which I totally disagree with him.
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> 6. I went along with my counsel's advice because I never any better about the law (sic).
>
> 7. I have since 21st November received an independent legal advice which thoroughly goes through a step by step explanation that I could understand about the evidence against me and defences that are available to me. The conclusion of that legal advice is consistent with my plea of not guilty initially.
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> 8. I have since the 22nd November tried to get in touch with my counsel to get him to advise the Court that I intend to vacate my guilty plea and enter not guilty pleas, but I was not able to get a hold of him.
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> 9. I managed to get in touch with him on 26 November 2008 at 2pm. I advised him of my position and instructed to accordingly advice the Court. He maintaining that I do not have any defence and that he will not be able to represent me any longer if I vacate my guilty plea.
>
> 10. Under that circumstance I now write this memorandum from prison and seek the leave of the Court to vacate my guilty pleas and enter not guilty pleas pursuant to section 68 of the Criminal Procedure Act which provides –
>
> > '68. Withdrawal of plea of guilty – the plea of guilty may, by leave of the Court, be withdrawn at any time before the defendant has been sentenced or otherwise dealt with.'

11. I believe that I am entitled by law to vacate my guilty plea and that the prosecution to prove their case and to ask Your Honour to order accordingly.

12. Further I elect to be tried by a Judge and jury at the earliest possible sitting of the High Court in 2009. And that I remain in prison pending the hearing of my case.

13. Lastly, I ask the Court to order that disclosures be served on me in prison to have in my custody until I am able to instruct a new counsel to have carriage of the case."

(Underlining added)

Chronology of Events

(i) As noted above, the *alleged offence took place on 25 September 2008.* At 0807 hours on 25 September 2008 the Applicant was interviewed at his residence by Sergeant I Matapo. The job sheet recorded the Applicant as saying that:

> "Last night, I went out to the Rehab. ... I was pretty wasted last night and can't remember how much I had to drink. ... after the Rehab closed I came home and went to sleep. I cannot recall being with anyone last night."

After an interval of 5 minutes the Applicant acknowledged that he had gone to the complainant's house at 12.45 am and that "she opened the door for me and we started to get it on. We started kissing and undressing at the same time and then started to have sex, wild sex". He then referred to the complainant falling and hitting her head on the floor tiles and said he later took her to the hospital. He said that after she had received treatment they went back to the complainant's house and later he left. He said that he had known the complainant for a while and had been having sex with her once or twice a week.

At 12.05 pm on 25 September 2008 the Applicant was interviewed at greater length at the Police Department by Detective Sergeant S T Matapo. The Applicant said he had seen the complainant at the Rehab Night Club and that "she and I were making eye signals to each other", that she had later opened the door to her house and that they had consensual sex in the course of which the complainant had suffered a heavy fall which caused extensive bleeding which resulted in her asking to be taken to the hospital. The

Applicant said he took the complainant to the hospital and after she had been treated, took her home where consensual sex occurred again before he left.

(ii) The Applicant first appeared before the Court on one charge of rape on 26 September 2008 (R803/08). He was unrepresented and *entered a plea of not guilty* to that charge.

(iii) The second appearance was on 9 October 2008 in relation to a further seven charges. He was again unrepresented, and was remanded to custody *without plea* until 3 November 2008 to allow him to seek legal advice.

(iv) On 14 October 2008, Mr Brown met the officer in charge Detective Sergeant S Tuaati at Police Headquarters. Mr Brown was given copies of seven Informations, the Job Sheet, the Transcript of Interview and a Summary of Facts . The Summary of Facts, reflecting the complainant's radically different version of events stated that the Accused broke into the complainant's home and repeatedly punched her and raped her on several occasions. She said she was badly injured and feared for her life. The Summary of Facts stated that the complainant had never met the Applicant before the night in question.

(v) On 14 October 2008, the Applicant first met with a solicitor, Mr Anthony Brown. On 15 October 2008, Mr Brown wrote to the Court advising that *the Applicant wished to enter guilty pleas* to each of the eight charges.

(vi) On 20 October 2008, the hearing was bought on. Contrary to the earlier indication given by Mr Brown, the Applicant entered *not-guilty* pleas to each of the eight charges. He was then remanded to 28 October 2008 for a trial date to be set.

(vii) On 28 October a trial date was set for 30 March 2009, and the Applicant's application for bail was adjourned part-heard.

(viii) The hearing of the bail application continued on 30 October 2008, and was adjourned part-heard to 18 November 2008.

(ix) On 18 November 2008, the Applicant *pleaded guilty* to all eight charges and was remanded to sentencing on 28 November 2008.

(x) On 27 November 2008, the Applicant made the present application *for leave to vacate his guilty pleas.*

(xi) On 22 January 2008 the Applicant informed the Court he had instructed Mr Tevita Tangaroa Vakalalabure to act for him.

(xii) The hearing of the present application took place on 3 and 8 April 2009.

Affidavit Evidence

[4] Affidavits were filed on 13 February 2009 by the Applicant, and on 20 March 2009 by Mr Brown.

Affidavit of Defendant

[5] The circumstances as to the preparation of the affidavit were as follows. The Defendant wrote out a statement at the Aorangi Prison on 29 January and signed it at 1.50pm. The statement has a footnote which reads:

> "I Tevita Tangaroa Vakalalabure personally receiving Nootai Henry's statement from prison to be converted into his affidavit to be signed in Court pursuant to Paterson J's orders."

It is to be noted that the handwritten statement signed by the Applicant is in English.

[6] The resulting affidavit refers to the earlier stages of the matter and records (para 2) that he entered a plea of not-guilty when arraigned on the single charge of rape on 26 September 2008. When he appeared on 9 October 2008 he was advised to obtain legal representation. He did this, phoning Mr Anthony Brown's office and on Tuesday 14 October 2008 meeting him at the in prison (para 5). At that meeting the Applicant told Mr Brown about the events of 25 September and answered several questions in relation to those events. Mr Brown is then said to have told the Applicant he had no chance of getting the charges dropped and pressured him to change his mind. The Applicant replied that he would admit to what he had told Mr Brown but not to raping or doing anything to hurt the complainant. The meeting ended and the Applicant claims to have been very confused as a result of it (paras 6 – 8).

[7] The Applicant's affidavit states that on 20 October 2008 he arrived in Court and Mr Brown told him that because of the number of charges against him he would not be able to get away with it and asked him to plead guilty (para 20). The Applicant refused. When asked to plead the Applicant pleaded not guilty and told the court that Mr Brown was forcing him to plead guilty to the charges when he was not sure of what was going on (para 13). When they left the courtroom Mr Brown is said to have told the Applicant how disappointed he was in him and that taking Mr Brown's advice

was his only chance, that if he had pleaded guilty he would have his sentence cut down, and that he should think about changing his plea or Mr Brown would not represent him (para 15).

[8] The Applicant's affidavit also states that at his next appearance on 18 November 2008 Mr Brown advised him that if he pleaded guilty he would be sentenced to only six months and that Mr Brown could get this cut down to three. The Applicant is said to have hesitantly agreed to plead guilty on this basis despite being uncomfortable about it. The Applicant returned to prison and phoned Mr Brown the following day. Mr Brown returned his call a week later and informed him the Police wanted to impose a ten year sentence but that Mr Brown could have this reduced to six years. The Applicant was angry at hearing this, felt deceived and misrepresented by Mr Brown. The Applicant said he felt that Mr Brown had failed and neglected to look after his interests.

[9] Shortly afterwards the Applicant met his cousin a lawyer, Mr Tevita Tangaroa Vakalalabure, who was in prison on remand at the time. Mr Vakalalabure advised him that he could change his plea if he wished and that Mr Vakalalabure advised him "that his preliminary opinion is that there are defences available to me in law but he will only be certain after his reviewed the police evidence"

[10] The concluding paragraphs of the affidavit were in the following terms:

> "27. **THAT** by opportunity I met my cousin-Tangaroa a lawyer who was on remand for a week, after a few days I approached him and told him about my circumstances and if there was anything I could do about. Tangaroa advised me that I have to instruct Anthony to file an application to change my plea to not guilty, and that there is a law that I can change my plea at anytime before I get sentenced. He also advised me that his preliminary opinion is that there are defenses available to me in law but he will only be certain after his reviewed the police evidence.
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> 28. **THAT** I did call Anthony twice but he was in meetings. Two days before I was to be sentenced, Anthony called me in prison and I told him that I wanted him to apply to the Court to withdraw my guilty plea and that I want to stand trial. I also told him that I do have a defence in law which he failed ignored or neglected to tell about. Anthony flatly refused to carry out my instructions, and said that I have to do it myself as he will not assist me.
>
> 29. **THAT** on after lunch on 27th November 2008, I asked my cousin to help me as Anthony is refusing to carry out my instructions. Tangaroa then took notes while we discussed my circumstances, and story about how the changes came about. He then wrote a letter to the Registrar, and a memorandum tot the sentencing judge which I both signed. This was delivered by the Superintendent of Prison to the Court.
>
> 30. **THAT** I have found another lawyer who has reviewed the police evidence (which evidence was also reviewed by Anthony) and has advised

> me that I have a defence in law which I never was told about by Anthony when he was my lawyer.
>
> 31. **THAT** I want to change my plea from guilty to not guilty, and to go to trial as the circumstance in how I entered a guilty was such that I was misrepresented, deceived and never told of the availability of legal defences in law that I now know about by Anthony."

Affidavit of Mr Brown

[11] By his affidavit Mr Brown stated that he first received a call from the Applicant on 10 October, obtained the Applicant's police file on 13 October, and met the Applicant on 14 October 2008. At the meeting Mr Brown told the Applicant he should ask Mr Brown to clarify anything he did not understand. The Applicant is said to have understood this. Mr Brown only went through the informations with the Applicant, as the Applicant is said to have read them and then declared "this is bullshit", refusing to read any of the other documents in the file.

[12] Mr Brown's affidavit stated that he then asked the Applicant for his version of events. The Applicant is said to have admitted he had sexual intercourse with the complainant but to have claimed it was consensual and that the complaint had led him on. Mr Brown replied that on the information disclosed by the police there were certain facts that appeared inconsistent with the Applicant's account of events. In particular, Mr Brown referred to the allegation that the Applicant had forced his way into the Complainant's home; why his bike was parked away from the house yet the Applicant had told Mr Brown that the Applicant had driven to the house, and the essential allegation that he stalked and watched and waited outside until the complainant went to bed.

[13] The Applicant is said to have taken some time to think about what he wanted to do, and then to have said "yes I admit to the charges". Mr Brown is said to have wanted to make sure the Applicant wished to plead guilty to each of the eight charges and to have asked the Applicant if this was the case, to which the Applicant replied "yes all the charges but not rape". The Applicant is stated to have repeatedly said that the complainant had consented to the sexual intercourse. Mr Brown replied that a plea of not guilty on the three charges of rape on the basis of consent was inconsistent with an admission of guilt on the charge of detaining with intent to have sexual intercourse. Mr Brown deposed that it was clear to him that the Applicant did not at first understand what rape and consent meant, so he spent some time explaining the law to the Applicant. He said to the Applicant "did (name of the complainant) give herself to you to have sex with her". He said "no we just got into it from the moment

she opened the door and I came in". Mr Brown referred to the evidence that the complainant had fallen and hit her head so hard that Henry had to take her to the hospital for medical treatment. Mr Brown deposed that Henry said that the complainant was punching him, fighting back, and that things "got a bit rough". Mr Brown advised the Applicant that that conduct might be seen as a clear sign that the complainant was not consenting to sexual intercourse. Mr Brown also deposed that Henry told him that the complainant was not physically ready for intercourse.

[14] The Applicant is said to have gone quiet for some time, and then said words to the effect that "yes this would be rape". The Applicant is said to have kept saying that the complainant was his girlfriend and that they had been having an affair.

[15] Mr Brown deposed that he proceeded to tell the Applicant he would inform the Court the Applicant wished to plead guilty to the charges, and that Mr Brown would prepare submissions in mitigation. The Applicant is said to have nodded his head in agreement to this, and then asked what sentence he would receive. Mr Brown replied that he did not know but would do some research. The meeting is said to have ended with the Applicant giving Mr Brown very clear instructions that he wanted to plead guilty, and to see whether the sentence could be brought down to two years.

[16] Mr Brown's affidavit also stated that in the holding cell before the Applicant appeared at the hearing on 20 October 2008, Mr Brown asked whether the Applicant was ready to plead guilty. The Applicant is said to have said that he was. Following his entering of pleas of not guilty at that hearing Mr Brown asked the Applicant why he had changed his plea. The Applicant replied "I was not steady and did not have a good sleep last night" and was unable to explain why he had not told Mr Brown this before the hearing. When Mr Brown visited the prison on 31 October the Applicant is said to have approached him and said he wanted to change his pleas for each of the eight charges to guilty. On this basis Mr Brown had the case bought forward, and on 18 November 2008 the Applicant was arraigned and pleaded guilty to each of the eight charges. Mr Brown's affidavit attaches as an exhibit a copy of the transcript of the Applicant's pleas and a short statement the Applicant made to the Court as an apology at that time.

[17] Mr Brown's affidavit concluded by stating that the Applicant informed Mr Brown that he wished to change his plea on 26 November when Mr Brown met him to discuss his plea in mitigation. Mr Brown told the Applicant that Mr Brown would no longer represent him at this point. Mr Brown asserted that at no time did he pressure the

Applicant into pleading guilty or tell him that if he did plead guilty he would be sentenced to a term of imprisonment for a period of months. Mr Brown maintained that he is sure the Applicant fully understood the decision to plead guilty and the consequences of such a plea.

Oral Evidence

Applicant

[18] At the first day of the hearing on 3 April 2008, Mr Vakalalabure made opening submissions followed by the examination of the Applicant. The Applicant's evidence was given, at his request, in Cook Islands Maori because his counsel said the Applicant was not fluent in English. I requested that he be asked to explain how his affidavit (which was written entirely in English) came to be produced. The Applicant was asked and confirmed in Maori while on oath that the contents of his affidavit had been explained to him, he understood them, and they were correct. Mr Vakalalabure said from the Bar that it had taken him "three days to add up his affidavit sitting with him" to convert the Applicant's handwritten affidavit (in English) into the signed affidavit.

[19] On questioning from Mr Vakalalabure the Applicant expanded upon points contained in his affidavit. He stated that on 14 October he was shown only the seven informations by Mr Brown and not the rest of the documents which formed part of his Police file. He denied admitting the charges, stating that he had agreed only to the events as he had described them to Mr Brown, and said that did not agree with Mr Brown on pleading guilty at that time. He denied being informed by Mr Brown of any possible defences to the charges saying instead he was told only that it would be very difficult to defend them. He denied having approached Mr Brown during Mr Brown's visit to the prison on 31 October, and particularly of having told Mr Brown that he wished to change his plea to guilty at that time.

[20] Regarding the hearing on 18 November, the Applicant's oral evidence was that Mr Brown encouraged him to plead guilty on the basis that the Court would sentence him to 6 months imprisonment which Mr Brown would try to cut down to three. He stated he was also told by Mr Brown that the Judge did not like the charges against him and that it was best for him to plead guilty. The Applicant maintained he did not wish to plead guilty but believed there was no other way around it (including by seeking further legal advice) describing Mr Brown as the only lawyer he could afford.

When questioned on his statement to the Court following his guilty pleas on 18 November, the Applicant stated the idea of apologising to the Court for his earlier not-guilty plea was an idea of Mr Brown's, and that he was told by Mr Brown to apologise before coming into Court that day. The Applicant also stated that Mr Brown did not visit him at any point between 20 November and 28 November, and that his only contact with Mr Brown in that period was a phone call the Applicant made to Mr Brown on 26 November (contrary to the statement in Mr Brown's affidavit that they met on 26 November).

[21] On cross-examination by Ms Saunders for the Crown the Applicant was questioned as to his understanding of English and the nature of a guilty plea. He was further questioned on his guilty pleas on 18 November and his belief that he might receive a six month sentence for pleading guilty to rape when he had received a two year sentence for burglary in 2006. In response to these questions the Applicant maintained that he understood Maori better than English and confirmed that he understood that after pleading guilty in Court to a criminal charge, an Applicant person then proceeded to sentencing. The Applicant also admitted lying to the Court about his reasons for pleading not guilty on 20 October as provided in the apology he offered when changed his pleas to guilty on 18 November. He claimed however, that each of the guilty pleas, the apology, and the (false) reason offered for his having entered the earlier not-guilty pleas were made on the advice of Mr Brown.

[22] The Applicant was then questioned on his statements to Police on the morning of 25 September. He confirmed that when first asked where he had been the night before he replied that he had been home alone, but upon being asked if he was sure about this had then taken nearly five minutes to answer (truthfully) that he had not. He was further questioned on the documents shown to him by Mr Brown on 14 October and maintained that he had been shown only the seven informations, while admitting also that he had declared them to be "bullshit" and had not wished to read the rest of the documents in the file at the time. In response to questioning, the Applicant was unable to offer an explanation for Mr Brown's having requested that he be arraigned again on 18 November, but denied that it was on the basis that he had indicated to Mr Brown that he wished to plead guilty when Mr Brown visited his prison on 31 October.

Mr Brown

[23] Mr Brown was called as a witness at the resumed hearing on 8 April 2009. He reaffirmed the contents of his affidavit.

[24] On cross-examination by Mr Vakalalabure Mr Brown stated that 14 October 2008 was the first time he had met with the Applicant, and that at the meeting he placed the Applicant's file before him with the informations on top. Mr Brown's evidence was that the Applicant read only the informations, and not the job sheets, the transcript of his police interview or the summary of facts. The Applicant was said to have responded that the informations were "bullshit", but Mr Brown acknowledged that it was Mr Brown's opinion from this that the Applicant did not wish to read the rest of the file rather than that the Applicant had made a statement to that effect. Mr Brown also stated that in that meeting he asked the Applicant for his version of events but did not provide him with specific advice in relation to possible defences against the charges. Mr Brown stated that his approach at that time was to consult with the Applicant only to get a clear version of the Applicant's account of the charges that had been laid.

[25] Regarding the Applicant's purported decision to enter pleas of guilty at that meeting, Mr Brown stated that the Applicant was agitated and took some time before admitting to the charges. He also stated that the Applicant found it quite difficult to reconcile rape and consensual sex and this required an explanation before the Applicant understood how the law operated. Mr Brown took the Applicant's statement that "yes this would be rape" following this explanation as indicating his understanding of the distinction and an admission of his guilt.

[26] Mr Vakalalabure posed several questions regarding whether Mr Brown did or should have discussed possible defences with the Applicant before allowing him to plead guilty. Mr Brown's response was that following the statement of the Applicant that "yes this would be rape" Mr Brown felt the appropriate next step was to prepare submissions in mitigation. When questioned on the conflict between the Applicant's evidence to the effect that he did not tell Mr Brown he wished to plead guilty at the 14 October meeting, and Mr Brown's affidavit evidence stating that that meeting had ended with clear instructions from the Applicant to plead guilty, Mr Brown stood by his affidavit.

[27] On further questioning Mr Brown confirmed that he did not go through the summary of facts with the Applicant before the Applicant is said to have agreed to enter a guilty plea. Mr Brown's evidence was that he did refer to the facts in the summary of facts on other occasions where he met with the Applicant, but without making specific reference to the summary of facts as the source of the material he was referring to. Notes taken by Mr Brown of his meeting with the Applicant on 14 October and on 31 October were also produced to the Court. The note of 31 October relevantly recorded that Mr Brown was approached by the Applicant at the prison and that the Applicant stated that he wanted to plead guilty so he could start his sentence.

[28] Regarding their meeting in the holding cell before the hearing on 20 October Mr Brown's evidence was that the Applicant confirmed at that time that he would enter pleas of guilty. Regarding the hearing on 18 November Mr Brown's evidence was that he did not advise the Applicant that it would be better for him to plead guilty, but that he did advise the Applicant to offer an apology to the Court.

[29] Mr Brown was also questioned on the state of his records, and when and how he came to inform the Court that the Applicant should be arraigned again on 18 November on the basis that the Applicant had told Mr Brown on 31 October that he wished to change his plea to guilty. He was also questioned as to whether Mr Brown had actually met the Applicant on 26 November as stated in his affidavit.

[30] Regarding the further arraignment, Mr Brown maintained, despite it being put to him that he was lying, that he informed the court by email that the Applicant should be arraigned at the hearing on 18 November (which had originally been scheduled for supervision of bail purposes). Regarding the meeting on 26 November, there was some confusion on Mr Brown's part as to whether he met the Applicant in person. However Mr Brown maintained that he was instructed that the Applicant wished to change his plea to not guilty on that date, while accepting this might have occurred by telephone rather than in person.

[31] Since matters of credibility have been raised by both counsel, who each contended that the deponent for the other side was lying on certain matters, it is appropriate to record my overall impression of the two witnesses. The Applicant did not make a good impression although not necessarily dishonest in all areas. His recollection was often vague or imprecise as to some of the key events. It is clear that he lied to the Police at the outset of his initial interview. Some of his answers were repetitive and gave the impression of being well rehearsed. As noted below, in the disputed areas I

prefer the evidence of Mr Brown. He gave his evidence fairly and was willing to make concessions including the acceptance of his relative inexperience. He also acknowledged that his case management was inadequate in some respects. I consider that he gave a balanced account of his dealings with the Applicant.

Summary of Submissions

Initial Written and Oral Submissions on April 3 2009

[32] Mr Brown was unavailable on 3 April. After discussion it was agreed that the Applicant's case would be presented first with submissions for the Crown and cross-examination of Mr Brown at a later date. This was on the footing that if anything arose in the examination of Mr Brown that counsel for the Applicant had not had the opportunity to put to the Applicant, then the Applicant could be recalled. In the event it did not prove necessary for the Applicant to be recalled.

[33] The Crown lodged written submissions dated 27 March. Mr Vakalalabure handed in written submissions on 3 April.

[34] By its written submissions of 27 March the Crown stated that to succeed in his application the Applicant must satisfy this Court that at the time he pleaded guilty the Applicant did not within the terms of s 61(4) of Criminal Procedure Act 1980 understand the nature and consequences of his plea. The submissions cited the principles discussed in *Marino v Police* CRI 2007-441-27 High Court, Napier, 14 May 2008 and *R v Ripia* [1985] 1 NZLR 122. In *Marino* Asher J said at paragraph 9:

> "When an application is made to withdraw a guilty plea before sentence, the touchstone is whether the interests of justice require leave to be granted: *R v Ripia* [1985] 1 NZLR 122 at 127; *R v Turrall* [1968] NZLR 312 at 315; *R v Kihi* CA 395/03, 25 March 2004. While the discretion is not lightly exercised, a number of non-exhaustive grounds have been recognised as justifying leave ... These include:
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> (a) where the accused did not intend to plead guilty;
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> (b) where in entering a plea the accused has acted upon a material mistake;
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> (c) where there was a serious defect or irregularity in the proceedings leading up to the plea;
>
> (d) where there is a clear defence to the charge.
>
> The onus rests upon the accused to demonstrate that leave to withdraw the guilty plea should be granted."

[35] The Crown acknowledged that the Applicant claimed he had a defence, but further submitted that the merits of any such defence were not in issue on an application such as the present, and instead what must be looked at is the Applicant's understanding of the law and options available to him at the time he pleaded. The submissions reiterated that the Applicant understood the nature of a guilty plea, was not mistaken as to the law, and knew what he was doing at the relevant time.

[36] The written submissions of Mr Vakalalabure as to the law referred to several English and Northern Irish authorities on the circumstances in which leave will be granted following an application for a change of plea. Counsel said that these authorities had been listed for the purposes of drawing the Court's attention to the jurisprudence of other common law countries in relation to applications of this nature so that the Court's deliberations were not limited to New Zealand authorities alone. Paragraphs 16 – 20 of the submissions were as follows:

> "16. In R v McNally (1954) 1 WLR 933, a case on indictment Lord Goddard CJ stated the matter with customary conciseness –
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> *'The question whether a plea may be withdrawn or not is entirely a matter for the trial judge. If the court came to the conclusion that there was a question of mistake or misunderstanding or that it would be desirable on any ground that the prisoner should be allowed to join issue, no doubt the court would allow him to do it. For example, it has been known for a prisoner charged with receiving stolen goods to acknowledge that he had received them, and to plead guilty adding "but I did not know that they were stolen". In such a case, the trial judge might well allow the prisoner to change his plea but it is entirely within the discretion of the judge.'*
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> 17. The Court of Appeal decision of England, R v Drew (1985) 1 WLR 914, Lord Lane follows Lord Goddard in holding -
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> *'An equivocal (unclear vague) plea is one qualified by words which, if true, indicate that the accused is in fact not guilty of the offence charged.'*
>
> 18. Lord Lane in R v Drew (supra) said:
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> *'In our judgement only rarely would it be appropriate for the trial judge to exercise his undoubted discretion in favour of an accused person wishing to change an unequivocal plea of guilty to one of not guilty. Particularly this is so in cases where, as here, the accused has throughout been advised by experienced counsel and where, after full consultation with his counsel he has already changed his plea to one of guilty at an early stage in the proceedings. The courts consideration of this matter also makes it clear that a judge is not bound to accept the uncorroborated assertions of an accused but must consider any evidence that the plea of guilty was not freely made and decide whether or not it is convincing."*

19. In R v South Tameside Magistrates Court ex-parte Rowland [1983] 3 All ER 689, the Court of Appeal endorsed that -

> *'that to allow a change of plea was a matter for our absolute discretion, and that once an unequivocal plea had been entered the discretionary power should be exercised judicially, very sparingly and only in clear cases.'*

20. In The Queen v Leslie James White (CAR3242), the Court of Appeal in Northern Ireland, citing R v Quinn [1996] Crim LR 516 said -

> *'Where a judge has failed to exercise discretion vested in him, the Court of Appeal may itself consider, in the light of the facts then known, how he should have exercised it.'*

[37] Following reference to those authorities it was submitted orally that this was "a clear case where the discretion of the Court should be exercised in favour of the defendant as he was represented by counsel when he entered pleas of not guilty to all charges before Nicholson J on 20 October 2008 and he was represented by counsel on 18 November when he vacated his not guilty pleas and entered pleas of guilty to all charges". The submissions concluded by contending that it was apparent from the chronology of these proceedings that the defendant was mistaken when he entered pleas of guilty to all charges because of the quality of the advice he was given by counsel.

[38] The Court requested counsel to elaborate as to the assertion that the defendant was mistaken when he entered pleas of guilty because of the quality of the advice he had been given. Counsel said that:

> "The material mistake is that he was advised to plead guilty without his counsel having had ... the opportunity to properly assess the documents that were provided to him on the available defences that he had in relation to the charges .... His lawyer maintained throughout ... that he does not have any defence in law. From a preliminary perusal of the documents that were available to Mr Brown at that point it is obvious that there are defences available to the defendant which should have been known to him."

The Court notes in passing that the first assertion is incorrect. Mr Brown's affidavit at paragraph 6 recorded that he had received the police file and in cross-examination (T4) he said he had reviewed the file before his first meeting with the Applicant.

[39] When asked what were the defences that were available counsel said as to rape the defence was consent. He then suggested that as to the aggravated wounding and forcible entry that the most relevant explanation was that the Applicant had taken the complainant to hospital. He also elaborated on defences which were said to have been available on the other charges including the fact that the Applicant had had the decency to take the complainant to the hospital to attend to her injuries. This was

relevant to the question of whether there was any intention to commit a violent and serious offence on the complainant. The fact that the applicant had taken the complainant to the hospital "should have been a caution to Mr Brown to properly investigate". It was also submitted that it was important to note that Mr Brown took just one meeting with the Applicant to advise him that in his considered opinion the Applicant should plead guilty.

[40] Counsel for the Applicant submitted that a plea could be vacated where counsel errs in his or her advice to an accused as to the non-availability of certain defences or outcomes or if counsel acted so wrongly and negligently as to advise the accused to plead guilty under the mistaken belief or assumption that no tenable defences exist or could be advanced.

Post-hearing Submissions

[41] On 13 May 2009 I issued a minute as to timetabling. In accordance with that minute the Court received further submissions from the Crown in opposition on 27 May, and final submissions from the Applicant in reply on 3 June 2009.

Crown Submissions

[42] By its further submissions of 27 May the Crown referred to the transcript of the hearing on 3 and 8 April and addressed the facts. It was noted that the application to vacate the guilty pleas was advanced on the grounds that there was material mistake in the legal advice given to the Applicant i.e. trial counsel error. Specifically it was alleged that when Mr Brown advised the Applicant to plead guilty he, Mr Brown, had not properly assessed the evidence against the Applicant nor had he considered the defence said to be consent and lack of intent.

[43] In response, the Crown submitted that while the advice could arguably have been of a higher standard, Mr Brown nonetheless did obtain from the police sufficient information from which he could assess the strengths and weaknesses of the Crown case and from which he could (and did) properly obtain instructions. The Crown submitted that the decision to plead guilty was an informed decision; the realistic assessment by a 30 year old who was no stranger to the Court system and one that was not affected by trial counsel error.

[44] As to the meeting on 14 October there was no dispute that the parties had met on 14 October and that Mr Brown had a number of documents from the police file with

him. Nor was there any dispute that after reading the first of the informations, the Applicant refused to read any of the other material. The issue for the Court to determine was whether there was in fact a decision made by the Applicant to plead guilty to the charges. The evidence of Mr Brown was that after discussing the allegations the Applicant did make an informed decision to plead guilty. The Applicant on the other hand denied that he had so instructed Mr Brown. The Crown placed reliance on the fact that the meeting resulted in the letter of 15 October 2008 to Crown Law advising that guilty pleas would be entered. The Crown submitted that the reason for bringing the case on was so as to expedite the sentencing process and this seems perfectly reasonable.

[45] As to the meeting of 31 October 2008, the Crown noted that there was a conflict in the evidence. Mr Brown deposed that this was a chance meeting when he was visiting the prison and that the Applicant initiated contact and told him he wanted to plead guilty. The Applicant on the other hand contends he never saw anything. The Crown urged the Court to reject the Applicant's contention out of hand. In the totality of the evidence it could rightly be dismissed as nonsense. As to the Court Appearance on 18 November where the Applicant had claimed he was forced to plead guilty, the Crown noted that the Applicant alleged that the apology given to the Court was scripted by Mr Brown. This had been denied by Mr Brown.

[46] Turning to the extent of contact between Mr Brown and the Applicant, the Crown submitted that Mr Brown was sufficiently familiar with the Crown's case and used the summary of facts to advise and take instructions from the Applicant. In addition to the meeting of 14 October, there were other meetings held in Court on each of the subsequent Court appearances together with numerous telephone conversations.

[47] The Crown submitted that on the major issues where there was conflict, it was highly relevant to the assessment of the evidence that the Applicant had admitted lies in Court (the apology on 18 November 2008) and he had a history of dishonesty offending.

[48] The Crown did not dispute that the Applicant claimed he had a defence but it did not follow that the application must succeed. Focus on the authorities must be on the Applicant's understanding of the law and the options available to him.

[49] The Crown placed significant weight on the letter to the Court of 15 October 2008. If the Applicant was to be believed, Mr Brown had no instructions to advise the Court

that guilty pleas would be entered. The Crown submitted that the seriousness of this allegation should not be over-estimated. It did not however bear scrutiny. The Crown asked why Mr Brown would write to the Court if this was not pursuant to instructions. As to the hearing on 18 November, the transcript spoke for itself. The Applicant's claim that the apology was scripted by Mr Brown should be dismissed as patently untrue. Indeed it made complete sense for the Applicant to have voluntary said what he did given what occurred on 20 October. He had wasted the Court's time. With reference to the Applicant's refusal to read the documents on 14 October, Mr Brown was not obliged to ensure that the Applicant did so nor was the Applicant compromised as a result. It was more than sufficient and proper for Mr Brown to have used the documents in the manner described and to have tested what he had been told by the Applicant was consensual activity in light of the Crown case. It was incumbent upon him as counsel to express an opinion which he did.

[50] The Crown noted that the Applicant was well versed in Court procedure and fully understood the difference between guilty and not guilty. That he would deliberately enter a plea of guilty to eight serious charges after each was specifically put to him and in the light of what had occurred in the past while maintaining his innocence defied belief.

[51] The Crown further submitted that as the Court of Appeal had said in the *R v Procter* [2007] NZCA 289, guilty pleas were a recognition that the complainant was telling the truth, whatever the instructions to the contrary might have been.

[52] The Crown concluded its submissions by submitting that the case had all the hallmarks of an offender playing the system; putting off the inevitable and changing his mind at will. It was not a case of mistake in law. Counsel did advise him and no pressure was exerted. The Applicant knew what he was doing. That he now regrets it, is no basis for the application to succeed. The Applicant has not satisfied that the onus upon him and the interests of justice did not require the application for leave to be granted.

Applicant's Submissions

[53] In his post-hearing submissions of 3 June, counsel for the Applicant focused strongly on the analysis of the New Zealand Court of Appeal in *R v Merilees* [2009] NZCA 59. He referred to paragraph [33] of that decision which sets out the circumstances in which a plea of guilty may be retracted after correction and sentence.

> "(i) The first is where the appellant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge. These are situations where the plea is shown to be vitiated by genuine misunderstanding or mistake. Where the accused is represented by counsel at the time of the plea it may be more difficult to vitiate such a guilty plea.
>
> (ii) The second is where on the admitted facts the appellant could not in law have been convicted of the offence charged.
>
> (iii) The third category is where it can be shown that the plea was inducted by a ruling which embodied a wrong decision on a question of law.
>
> (iv) There will be a further situation where trial counsel errs in his or her advice to an accused as to the non-availability of certain defences, or outcomes, or if counsel acts so as to wrongly, and perhaps negligently, induce a decision on the part of a client to plead guilty under the mistaken belief or assumption that no tenable defence existed or could be advanced."

[54] Counsel for the Applicant said reliance was placed on the first and fourth principles in the *Merilees* case.

[55] As to the first principle it was argued that there had been a mistake as to the nature of the charges or alternatively, that the Applicant did not intend to plead guilty. As to the latter, reliance was placed on the fact that on 20 October before Nicholson J the plea was not guilty. It was submitted that there was evidence that the Applicant was being forced to plead guilty by his counsel. Counsel should have recognised that the issue of consent to the sexual intercourse was disputed by the Applicant in a police statement and in a police interview. The applicant had tenable defences in law to all the charges which were already recorded by the police. Reliance was placed on aspects of the police interview of 25 September. It was submitted that there had been no proper discussion on the consequences of a guilty plea. Counsel was bound to acquaint himself with the maximum penalty from previous cases on similar charges and mitigating aggravating factors. There was no evidence that any such comprehensive advice was tendered to the Applicant. Indeed it was argued that there was no evidence at all as to any advice that has been given to the Applicant.

[56] It was further submitted that in the evidence the first leg of the *Merilees* principles had been established. It was also submitted that counsel had erred in his advice and induced the Applicant to plead guilty under the mistaken belief or assumption that no tenable defence existed. In this respect, the submission was based on the fact that it was counsel that had the mistaken belief or assumption that no defence existed or could be advanced and that it was negligent for counsel to have acted in this way.

[57] Emphasis was also placed on the contradictory pleas while the Applicant was represented by the same counsel.

[58] To the extent that in the *Merilees* case the Court held that no miscarriage of justice occurred because the guilty plea was made after advice by experienced counsel, it was asserted that wrong advice had been given here as to the likely sentence. Reliance was placed on the Applicant's contention that he was advised of the sentence would be about six months and counsel could reduce it to three months.

[59] As to the meeting of 14 October at the prison, this was the only meeting at which advice was given by counsel. The meeting lasted no more than 25 minutes and at this meeting counsel had made the assumption that the Applicant was guilty. There was evidence of negligence because it would require more than just a short meeting to be able to advise on the charges and the consequences of any pleas.

[60] As to the meeting of 20 October in the holding cell, it was submitted that on this occasion the Applicant was in effect forced to plead guilty. This is what the Applicant said to the Judge in open Court. It was contended that when Mr Brown advised that he would not represent the Applicant if he was going to plead not guilty, that made the Applicant worried and led the Applicant to believe that he had no other option but to plead guilty. The Applicant was under pressure in that he felt he would be abandoned by counsel if he did not accept counsel's advice.

[61] As to the meeting of 18 November, it was acknowledged that there was conflicting evidence as to whether Mr Brown had said that the Applicant faced a sentence of six months which could be reduced to three months. However, it was contended that Mr Brown had no authority to request the Court to have the matter called on 18 November for guilty pleas to be entered. It was noted that the Applicant disputed Mr Brown's contention that when Mr Brown was at the prison on 31 October, the Applicant gave him instructions to have the case brought on so that he could plead guilty.

[62] In conclusion it was submitted that the evidence highlighted inconsistencies in Mr Brown's evidence as to how the Applicant came to plead guilty. Counsel may not have been truthful as to the circumstances in which the Applicant came to plead guilty. The absence of any copy of an email sent by counsel to the Court should be noted. The submission concluded by saying that it was a reasonable doubt as to whether the Applicant gave free and voluntary instructions of a change of a plea to

guilty as asserted by the Crown. The Court must consider that there was a reasonable likelihood that the plea was not voluntary and the only option was for justice to be done was to put the Applicant to trial and the prosecution be made to prove its case. "The fact that a not guilty plea followed by a guilty plea was tendered by the Applicant while being represented by the same counsel should ring alarm bells with the Court. Counsel did not advise the Applicant properly at any stage and he did not have the experience to discharge his responsibility as counsel toward the Applicant".

[63] The Crown referred to the transcript of the hearing on 3 and 8 April and addressed the facts. The submissions reiterated that Mr Brown had assessed the strengths and weaknesses of the Crown case and did properly obtain instructions, and that the Applicant's decision was informed and not affected by error. The submissions urged this Court to accept Mr Brown's version of events in the several areas where the Applicant's evidence differed, and place significant weight on Mr Brown's having written to the Court on 15 October advising that the Applicant wished to enter guilty pleas and the fact of the Applicant having been arraigned again on 18 November. The Crown submitted both were events indicating that Mr Brown was instructed that the Applicant wished to plead guilty.

Legal Principles

[64] Sections 61 to 68 of the Cook Islands Criminal Procedure Act 1980 set out the procedure to be followed by this Court upon arraignment. Section 61 relevantly provides:

> **61. Pleas on defendant being charged-** (1) Before any charge is gone into, the defendant shall be called by name and the charge shall be read to him and when the Court is satisfied he understands it he shall be asked how he pleads.
>
> (2) He may plead either guilty or not guilty or such special pleas as are hereinafter provided for.
>
> (3) If the defendant wilfully refuses to plead or will not answer directly, the Court may enter a plea of not guilty.
>
> (4) If he pleads guilty, and the Court is satisfied he understands the nature and consequences of his plea, the Court may convict him or deal with him in any other manner authorised by law.
>
> (5) If a plea of guilty is not entered, the trial shall be conducted as hereinafter provided.

Section 61(1) thus protects against an Applicant pleading guilty in instances where he or she does not understand the charge upon which they are arraigned.

[65] Regarding an application for leave to withdraw a plea, the relevant provision is section 68 of the Criminal Procedure Act:

> **68. Withdrawal of plea of guilty** - A plea of guilty may, by leave of the Court, be withdrawn at any time before the defendant has been sentenced or otherwise dealt with.

[66] Counsel have not been able to refer to Cook Islands authority on the exercise of the s 68 discretion. However, the relevant provisions in New Zealand statute are similar: (s 42 of the Summary Proceeding Act 1957, and section 169 of that Act prior to 28 June 2009 and s 184K thereafter, and s 25(c) of the New Zealand Bill of Rights Act 1990). The exercise of the discretion to allow a withdrawal and change of plea has also been extensively considered in case law in New Zealand.

[67] Some care must be exercised when considering the New Zealand authorities. A distinction can be frequently noted in the cases as to the treatment of applications to withdraw or change a plea before, as opposed to after, an Applicant is sentenced: see *R v Ripia* (1984) 1 CRNZ 145, and *R v H* (1991) 7 CRNZ 110. However this distinction is not always carefully articulated. On occasion it is somewhat confusingly treated as one between applications made before and after an Applicant is "convicted": see *R v Le Page* [2005] 2 NZLR 846, and the discussion of the Court in *Ripia* at 150.

[68] The "conviction" appellation may confuse where a plea is entered in respect of an indictable offence because in New Zealand, pursuant to s 3 of the Crimes Act 1961, a person is "convicted on indictment" at the point a guilty plea is entered, notwithstanding that sentence has not been passed. By contrast a "conviction" for a non-indictable offence is commonly or perhaps even "primarily" treated as not having occurred until the point at which sentence is passed: *R v McLeod* [1988] 2 NZLR 65, at 68-69.

[69] The phrase "sentenced *or otherwise dealt with*" in s 68 of the Criminal Procedure Act 1980 does not undermine or alter this distinction. The phrase also exists in the equivalent New Zealand section (s 42 of the Summary Proceedings Act) and whatever "otherwise dealt with" is intended to encompass the authorities are now clear that a distinction is appropriately drawn on the basis of the stage of the proceedings at which an application for leave is made: see *R v Ripia* (1984) 1 CRNZ

145, at 150, and *Marino v Police* (CRI 2007-441-27, High Court Napier, 14 May 2008, Asher J).

[70] With that distinction in mind, the relevant authorities may be considered. In *Sharp v District Court at Whangarei* [1999] NZAR 221, Randerson J, on an application for review, considered a District Court refusal of an application to set aside an earlier guilty plea in respect of a number of charges. The grounds in support of the application for review were that the plaintiff was labouring under a mistake about the nature of those charges and the defences thereto when he entered his guilty plea, and he had a proper defence to the charges which ought to be heard. His Honour noted that: (224-225)

(i) The discretion to permit a change of plea is unfettered and may be exercised wherever the interests of justice so require: *R v Ripia* (1984) 1 CRNZ 145, 150 and [1985] 1 NZLR 122, 126-127. As stated by Hardie Boys J in *R v Turrall* [1968] NZLR 312, 313:

> "This Court should be the fountain of justice and ensure that no man is wrongfully convicted even if it is his own foolish act that has bought the situation about"

(ii) Although the discretion is unfettered, it will not lightly be exercised, particularly when the Applicant is legally represented at the time the plea is made.

(iii) Several particular grounds have been recognised at least since *R v Le Comte* [1952] NZLR 564 (CA) as justifying the setting aside of a plea, including that:

(a) In entering the plea the Applicant acted upon a material mistake; and

(b) There was a clear defence to the charge. This does not mean that it must be established beyond reasonable doubt but the defence must at least be reasonably arguable such that a jury could be left in a state of reasonable doubt: *R v Pira* (High Court, Rotorua, S.3/90, 11 April 1990, Anderson J).

(iv) The onus of making out the relevant grounds rests upon the Applicant as applicant and where the Applicant has merely repented of the plea, without more, the application will not be granted.

[71] It will be noted that elements (i) and (ii) of proposition (iii) must both be established. In *Sharp* his Honour found that the District Court Judge had erred in law on the basis that he had failed to address the central issue raised by the plaintiff, namely the

plaintiff's misunderstanding of the correct legal position in relation to the charges he faced, and in particular the fact that the plaintiff had laboured under a material mistake of law in believing that he was obliged to plead guilty when he was not (undisputed on the evidence). In that regard, his Honour held: (230)

> Where there is a clearly established mistake on the part of an accused person, the materiality of that mistake will depend on whether it was an effective cause of the accused's decision to plead guilty. It clearly was in the present case. Depending on the nature of the mistake, the Court will ordinarily inquire whether there is a proper defence which ought to be heard.

[72] Regarding the likelihood of success of the defence required for a mistake to be material, his Honour stated that "*The applicant need not establish that the proposed defence would inevitably or likely succeed. It is sufficient if a reasonably arguable defence is raised which could leave a jury in a state of reasonable doubt: R v Pira (supra)*" (230). On the bases that the interests of justice required the application to be granted given the seriousness of the charge, the mistake made in relation to the plea was material, and the Applicant had not received adequate advice on the key issues in relation to his defence, the decision of the District Court Judge was set aside.

[73] For present purposes *R v Ripia* (1984) 1 CRNZ 145 the Court of Appeal (Cooke, Macmullin and Somers JJ) is of central importance. In that case the Court considered the distinction between applications for change of plea made before and after sentencing. It noted that applications of the latter kind were properly bought as appeals against conviction and subject to a much higher threshold, being permitted only in "exceptional cases".

[74] Regarding applications for leave brought prior to sentencing, however, the Court held that in such cases no question of appeal against conviction arose and "*the grounds upon which the Court may allow a change of plea are not so restricted*" (150). Citing *Adams' Criminal Law and Practice in New Zealand* (2nd ed, para 2838), the Court observed that such applications might be permitted on the basis of mistake or misunderstanding by the Applicant, and citing Hardie Boys J in *R v Turrall* [1968] NZLR 312, held that they were to be considered on the "*broad principle that the interest of justice demanded that the accused be allowed to change his plea to one of not guilty*" (150).

[75] The Court said at page 150:

"The grounds upon which an applicant may advance an appeal against conviction are very limited as the cited authority shows: a change of plea on an appeal will be allowed only in very exceptional cases ... but we are here concerned with an earlier stage in the proceedings – the power of the High Court to allow a change of plea before sentence has been imposed in that Court itself. In such a case no question of appeal against conviction arises and the grounds upon which the Court may allow a change of plea are not so restricted. The position is set out in "Adams Criminal Law and Practice in New Zealand" 2nd Edition, paragraph 2838 ...

> 'A plea of guilty given on arraignment may be withdrawn, with permission at any time before sentence, the granting of such permission being in the discretion of the judge. Adams gives mistake or misunderstanding or other reasons rendering it desirable that the prisoner should be allowed to join issue with a plea as justification for its withdrawal. In *Turall* [1968] NZLR 312 a change of plea was allowed in the High Court on the broad footing that the ?? required it. Although in its citation of cases the judgment in that case does not differentiate between the various stages at which a change of plea may be sought and cases such as *Forde* dealing with appeals against convictions are included, Hardie Boys J correctly decided the application on the broad principle that the interests of justice demanded that the accused should be allowed to change his plea to one of not guilty. His comment is worth mentioning:
>
> > "This Court should be the fountain of justice and ensure that no man is wrongfully convicted even if it is his own foolish act that has brought the situation about.'"

... The real issue in the present case is whether *Ripia* understood the nature of the charge against him and in the face of that understanding made his own decision, albeit with Mr Ryan's advice, to plead guilty.

On the state of the evidence and the complainant's demeanour, Mr Ryan a counsel of many years experience in the criminal courts, took a pessimistic view of what would be his chances of acquittal and so advised him. Some counsel may have advised to plead no guilty and take the verdict of the jury. But such advice would need to have been accompanied by advice on the likely consequences for Ripia if the jury should return a verdict of guilty against him. What is important is if Mr Ryan left the choice to Ripia. Provided he did that, he was quite entitled, indeed obliged to put forward to Ripia the pros and cons of the case and impress upon him the consequences and terms of sentence if he were found guilty after entering a plea of guilty – *R v Hall* [1968] 52 Crim App R 528 – 534. A plea of guilty had certain advantages for Ripia. The Courts often take a plea of guilty into account as a mitigating factor and give a discount for such pleas .... In the end we are constrained to the view that Ripia, having received proper advice from Mr Ryan, was left to make up his own mind on his plea and that his application to be allowed to change it was made merely because he repented of it and because of further advice he thought he ought to have taken his chance with a jury. That is not enough to support an application for change of plea – *R v Le Comte* [1952] NZLR 564. Barker J was right in reaching the decision he did. The application for leave to appeal is dismissed."

(Underlining added)

[76] On the facts in *Ripia*, the Court found that when the Applicant entered his guilty plea he had understood the nature of the charge against him and, in the face of that understanding, made his own decision to plead guilty, albeit with advice from

counsel. The Court held that provided the choice had been left to the Applicant counsel was entitled and even obliged to put to the Applicant the pros and cons of the case, and to impress upon the Applicant the consequences in terms of sentence if he were found guilty after pleading not guilty. The Court declined to allow the Applicant to change his plea merely because he repented of it and on further advice from different counsel thought he ought to have taken his chance with a jury.

Discussion

[77] Following *R v Ripia*, I am obliged to consider whether the broad principle of justice requires that the Applicant should be allowed to change his pleas to not guilty. More specifically the issue is whether the Applicant understood the nature of the charges against him and, on the face of that understanding, made his own decision, albeit with Mr Brown's advice to plead guilty. A further question is whether Mr Brown left the choice to the Applicant having put forward the pros and cons of the case and the likely consequences in terms of sentence.

[78] Except for the meeting which Mr Brown said took place at the prison on 31 October 2008, the chronological narrative is largely undisputed although in certain respects there is a sharp disagreement as to precisely what happened and what was said. In relation to those evidentiary conflicts the Court bears in mind that the Applicant is more comfortable in Cook Islands Maori. (Unlike Mr Vakalalabure Mr Brown speaks fluent Cook Islands Maori.) The Applicant is also reasonably fluent in English as the hearing itself demonstrated. I find that the evidence does not disclose any communication difficulties in the various discussions between the Applicant and his counsel.

[79] As to the meeting on 14 October, there is no dispute that Mr Brown visited the Applicant and that Mr Brown had with him the informations, the police department job sheet recording the initial interview on 25 September, at approximately 8am in the morning, the more lengthy interview with the police officers commencing at 12.05pm on 25 September and the police summary of facts. As noted earlier, in the first interview the Applicant began by saying that he went home the previous evening and went to sleep and could not recall being with anyone the night before. Five minutes later he told a detailed story of the night's events and his version of what had happened with the complainant.

[80] As to the meeting of 14 October, I find that Mr Brown had with him the relevant documents received from the Police and that Mr Brown was broadly familiar with their contents. I find it is quite clear that Mr Brown had read the two police interviews. I also find that when Mr Brown invited the Applicant to consider the various documents the Applicant refused to read any of the material, describing the allegations as "bullshit". I accept the evidence of Mr Brown as set out in paragraphs 12 – 20 of his affidavit.

> "12. I asked Henry for his version of events. I told him that until I knew what he had to say I was unable to properly discuss any possible defences or mitigation with him.
>
> 13. Henry admitted he had sexual intercourse with the complainant but he claimed that it was consensual and that the complainant had (while at the Rehab Bar earlier that evening) led him on.
>
> 14. After listening to his instructions I advised Henry that on the information disclosed by the police there were certain facts that appeared inconsistent with his account. In particular the allegation that he had forced his way into the complainant's home; why his bike was parked away from the house yet he told me he drove to the house and the essential allegation that he stalked and watched and waited outside until the complainant went to bed.
>
> 15. Henry then took some time to think about what he wanted to do. After a short period of silence he said to me "yes I admit to the charges".
>
> 16. I wanted to maker sure that he wished to plead guilty to each of the eight charges and when I asked him if that was the case he replied "yes all the charges but not rape". He kept saying that the complainant had consented to the sexual intercourse.
>
> 17. I advised Henry that a plea of not guilty on the three charges of rape on the basis of consent was inconsistent with an admission of guilt on the charge of detaining with intent to have sexual intercourse.
>
> 18. It was clear to me that Henry did not at first understand what rape and consent meant so I spent some time explaining the law to him. I said to Henry "Did (name of the complainant) give herself to you to have sex with her". He said "no we just got into it from the moment she opened the door and I came in".
>
> 19. I referred to the evidence that the complainant had fallen and hit her head so hard that Henry had to take her to the hospital for medical treatment. He told me that the complainant was punching him, fighting back and that things 'got a bi rough'. I advised Henry that that conduct might be seen as clear sign that the complainant was not consenting to the sexual intercourse. I also recall Henry told me that the complainant was not physically ready for intercourse and I recall asking Henry if this was another sign indicating to him that she was not consenting to sexual intercourse.

> 20. Henry went quiet for some time and the said words to the effect 'yes this would be rape'. I recall he also kept saying that the complainant was his girlfriend and that they had been having an affair."

[81] The fact that Mr Brown wrote the letter of 15 October corroborates Mr Brown's account. I find Mr Brown to be an entirely truthful witness. It hardly seems credible that a legal practitioner would write such a letter if there was any doubt about the instructions that he had received. The letter said:

> "I can confirm that we are ready to enter a plea and as such, a plea of guilty will be entered for all charges provided there are no further charges or amendments to the charges laid as of the above date. I therefore await your instructions and equally indicate the proceedings to be as swift as possible."

[82] To the extent that the Applicant claimed when pleading not guilty on 20 October that he had been forced to plead guilty, I find on the evidence that the allegation of inappropriate pressure or compulsion has not been established.

[83] As to a meeting with Mr Brown on 31 October, this was flatly denied by the Applicant. I accept Mr Brown's evidence as truthful. It is firmly corroborated by his handwritten file note saying that he had met the Applicant at the prison when there at a prayer service.

[84] While Mr Brown's experience in conducting criminal cases is rather limited, I find that he put to the Applicant his assessment of the chances that a defence of consent would succeed and correctly pointed out to the difficulties in having the Court accept the Applicant's evidence. I reject the contention that the Applicant later pleaded guilty by reason of mistake, misunderstanding, or inappropriate pressure from counsel.

[85] As to the question of advice on the consequences of pleading guilty I find that the Applicant was sufficiently informed of the fact that pleas of guilty would result in a reduction in sentence. I entirely reject the Applicant's suggestion that he was told that his sentence might be 6 months imprisonment which could be cut down to three months (see paragraph 20 above). I accept that Mr Brown had not developed the precise submissions that he would make by way of mitigation but in my view that is of no consequence. It is clear on the evidence that the Applicant, perhaps disappointed by the fact that his sisters would not support his bail application, expressed to Mr Brown his wish to get the sentence started and the process of serving his time underway.

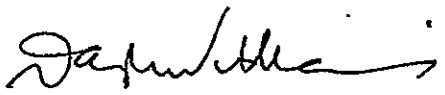
[86] In my view, this, like *Ripia,* is a case where the defendant repented of his informed and deliberate decision to plead guilty because another lawyer, his cousin, Mr Vakalalabure conveyed to him that he was "entitled by law to vacate [his] guilty plea and [have] the prosecution ... prove their case" (paragraph 11, Applicant's memorandum of January 22, 2009 quoted in paragraph [3] above) and that his chances with a jury might be better than Mr Brown had suggested. The fact that the advice came from a blood relation while the two were in prison may perhaps have understandably inclined the Applicant to place more reliance on that advice than he should have. Moreover, the advice given to him, as stated in paragraph 27 of his affidavit which, one may recall, was prepared by Mr Vakalalabure, wrongly conveyed that "there is a law that I can change my plea at any time before I get sentenced". In addition, to the extent that it is suggested that new defences have been identified (see paragraphs 30 and 31 of the Applicant's affidavit) it is notable that neither the Applicant nor his counsel have ever articulated what were the alternative legal defences, other than consent, to the central charges of rape. It is apparent that on the rape charges the only likely available defence was consent and that if that charge was established there would be little or no prospect of resisting conviction on the other charges. I find that all of these matters were sufficiently explored in the discussions between the Applicant and Mr Brown on 14 October.

[87] The Applicant was obviously a difficult client. He has a history of dishonesty offending beginning in 1999 amounting to 14 convictions for dishonesty related offending resulting in 2006 of a sentence of 2 years' imprisonment. His refusal to consider the police file documentation made it difficult for Mr Brown. Nevertheless I find that Mr Brown quite properly tested the Applicant's assertions that sex had been consensual and explained to him in general terms the concept of consent. I further find that after receiving that explanation the Applicant instructed his lawyer that he wished to plead guilty.

Concluding Comments and Decision

[88] In terms of the applicable principles that are set out in *R v Ripia*, the Court finds that the interests of justice do not require the application for leave to be granted notwithstanding the relative inexperience of Mr Brown and the absence of any written instructions from the Defendant to plead guilty. The Court finds that Mr Brown did carry out his obligations to the Applicant as set out in the *Ripia* case.

[89] The application is dismissed and the Applicant will be sentenced as soon as reasonably practicable. There are already Crown submissions on file as to sentence as well as a victim impact statement and reports from the Probation Service. Counsel for the Defendant is requested to file written submissions as to sentence no later than Tuesday, 7 July 2009.



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David Williams CJ

July 3, 2009