IN THE COURT OF APPEAL OF NEW ZEALAND

CA18/2009
CA24/2009
[2010] NZCA 71

	BETWEEN	DICK HALTON HEADLEY AND KAY HALTON SKELTON Appellants
	AND	THE QUEEN Respondent

Hearing: 13 October 2009

Court: William Young P, O'Regan and Arnold JJ

Counsel: H D M Lawry for Ms Skelton
Mr Headley in person
M F Laracy and M J Inwood for Respondent

Judgment: 16 March 2010 at 2.30 pm

JUDGMENT OF THE COURT

A Mr Headley's appeal is dismissed.

B Ms Skelton's appeal is dismissed.

REASONS OF THE COURT

(Given by William Young P)

Introduction

[1] On 29 October 2008 Ms Kay Skelton and her father, Mr Dick Headley pleaded guilty to a count which alleged that they had abducted Ms Skelton's child. They were each subsequently sentenced to home detention.[1]

[2] Despite their pleas of guilty they both now challenge their convictions by way of appeal.

[3] Shortly before the proposed hearing Mr Headley (who represented himself) requested that his appeal be dealt with on the papers. He pointed to the difficulties he would face if he had to attend the hearing. The Crown did not object and the Court made an order under s 392A(4) of the Crimes Act 1961 changing the mode of hearing for Mr Headley's appeal. The hearing of Ms Skelton's appeal proceeded, and the same panel has dealt with both appeals. At Mr Headley's request, we delayed consideration of the appeals until the pre-sentencing report and sentencing notes for a co-offender, Ms Rowe, could be obtained. This took some time. We derived no assistance from them.

Background

[4] The case has a well known background which can be shortly explained.

[5] The victim of the abduction was J, the son of Ms Skelton and Mr Christopher Jones. There was lengthy litigation in the Family Court over J and in the course of which a number of Family Court Judges expressed considerable dissatisfaction about the conduct of Ms Skelton. The upshot of the litigation was that in June 2006 an interim parenting order was made in the Family Court in favour of Mr Jones along with limited supervised access to Ms Skelton and no access to Mr Headley.

[6] On 18 August 2006 J was kidnapped by Ms Nikala Taylor, a friend of Ms Skelton. On the Crown case, this was pursuant to a plan of which Ms Skelton

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1 *R v Skelton* HC Hamilton CRI 2006-019-6530, 18 December 2008.

was the author. Ms Skelton was, on the Crown case, present at the time of the kidnapping albeit that she was disguised with a wig. The child was then delivered to Mr Headley and was retained by Mr Headley for some six months.

[7] The case understandably attracted some publicity. Habeas corpus proceedings were taken and both Ms Taylor and Ms Skelton were imprisoned for non-compliance with the orders made. Eventually Ms Taylor was released as a result of a successful appeal to the Supreme Court but Ms Skelton spent 79 days in prison for contempt of Court. Her stay in prison came to an end on 23 January 2007 when Mr Headley returned J to the Hamilton Police Station.

[8] Mr Headley, Ms Skelton and Ms Taylor were charged with kidnapping and abduction. They were all committed for trial and this was scheduled to start on 28 October 2008.

[9] There was some interlocutory skirmishing. Mr Headley and Ms Skelton sought a stay of the proceedings on the basis of the extensive publicity which the case had received. They also, along with Ms Taylor, sought a change of venue from Hamilton. These applications were declined in July and August 2008.[2]

[10] Subsequent challenges to these judgments were dismissed by this Court in a judgment delivered on 22 September 2008.[3] The Court declined – for want of jurisdiction – leave to appeal against the refusal of a stay. It granted leave to appeal on the change of venue issue, but dismissed the appeal.

[11] On 20 October 2008 Ms Skelton applied to the Supreme Court for leave to appeal against the decision as to the change of venue. This was some eight days before the trial was to commence. Also of contextual significance is that Ms Taylor, on 24 October 2008, pleaded guilty to the count of abduction which she faced.

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2 In the case of Ms Taylor and Ms Skelton, see *R v Skelton* HC Hamilton CRI 2006-019-6530, 9 July 2008; and in the case of Mr Headley see *R v Headley* HC Hamilton CRI 2006-019-6530, 29 August 2008.

3 *R v S* [2008] NZCA 382.

[12] On the morning of 28 October 2008 both Ms Skelton and Mr Headley sought an adjournment of the trial. This application was based on:

(a) The fact that the Supreme Court had not yet given a decision in respect of the refusal to change the venue;

(b) Issues associated with the potential status of Ms Taylor as a witness, in light of the fact that she had not yet been sentenced; and

(c) Mr Headley's lack of representation.

[13] These applications were declined by Priestley J and he subsequently delivered his reasons for this decision on 10 November 2008.[4] In the meantime, on 29 October Ms Skelton and Mr Headley both pleaded guilty to the count of abduction which they faced.

The basis upon which the appeals were advanced

[14] Both appellants advance their current appeals on the basis that they were forced into pleading guilty by a combination of what they claim were the wrongful refusals:

(a) To grant stays of proceedings;

(b) To direct a change of venue; and

(c) To adjourn the proceedings on the first day of trial.

[15] In the case of Ms Skelton, her counsel puts the matter in this way:

> The appellant was therefore left in the position that she could not get a fair trial and she was denied her right to appeal. She was left with little option but to change her plea and appeal the resulting conviction on the basis that she could not pursue her appeal nor could she obtain a fair trial.

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4 *R v Skelton* HC Hamilton CRI 2006-019-6530, 10 November 2008.

[16] In addition, Mr Headley complains that he was unrepresented at the time he pleaded guilty and no summary of facts was available at the time of the plea. He suggests that he would not have pleaded guilty if he had realised that he could have called character evidence at trial. Priestley J appointed an amicus to provide assistance during the anticipated trial but Mr Headley was unhappy with the barrister chosen to fill this role. He also claims the police officers involved in the investigation were biased and failed to disclose material to him.

Evaluation

[17] It is trite that an appeal against conviction following a plea of guilty will be entertained only in exceptional circumstances. The relevant principles are discussed in *R v Le Page*[5] where the appellant had pleaded guilty following an adverse admissibility ruling:

> [16] … it is only in exceptional circumstances that an appeal against conviction will be entertained following entry of a plea of guilty. An appellant must show that a miscarriage of justice will result if his conviction is not overturned. Where the appellant fully appreciated the merits of his position, and made an informed decision to plead guilty, the conviction cannot be impugned. These principles find expression in numerous decisions of this Court, of which *R v Stretch* [1982] 1 NZLR 225 and *R v Ripia* [1985] 1 NZLR 122 are examples.
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> [17] A miscarriage of justice will be indicated in at least three broad situations which are identified and discussed in Adams on Criminal Law, para CA385.21 [Now CA385.17]. 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 an accused is represented by counsel at the time a plea is entered, it may be difficult indeed to establish a vitiating element. … [18] A further category is where on the admitted facts the appellant could not in law have been convicted of the offence charged. …
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> [19] The third category is where it can be shown that the plea was induced by a ruling which embodied a wrong decision on a question of law. … Examples are where a trial Judge wrongly concludes that there is no evidence sufficient to justify a defence being left to the jury (say provocation or self-defence) leaving the accused with no option but to plead guilty. In such cases, which will admittedly be rare, this Court would intervene to cure a miscarriage of justice which plainly flowed from the erroneous ruling. The

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5 *R v Le Page* [2005] 2 NZLR 845 (CA).

> present appellant contends that his pleas were entered in the face of an erroneous legal ruling.
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> [20] Is that so? It is notorious that legal rulings vary greatly as to their impact. Where, for example, an accused is reliant upon a single defence, and the Judge considers that such defence does not lie, then the ruling may necessarily be decisive. But where, as in the present case, a ruling concerns the admissibility of evidence, it does not ordinarily follow that an accused thereby had no option but to alter his plea.
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> [21] This distinction is discussed in *R v Chalkley* [1998] QB 848. At p 864 Auld LJ in delivering the judgment of the Court of Appeal said this:
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> ". . . a conviction would be unsafe where the effect of an incorrect ruling of law on admitted facts was to leave an accused with no legal escape from a verdict of guilty on those facts. But a conviction would not normally be unsafe where an accused is influenced to change his plea to guilty because he recognises that, as a result of a ruling to admit strong evidence against him, his case on the facts is hopeless. A change of plea to guilty in such circumstances would normally be regarded as an acknowledgement of the truth of the facts constituting the offence charged."
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> Earlier in the judgment the Judge made observations in a similar vein, namely that where a ruling renders a case "factually overwhelming" or "makes it harder" for an accused to mount a defence, such difficulty is insufficient to establish the necessary nexus between the ruling and the change of plea.

[18] Mr Lawry (for Ms Skelton) sought to bring the case into the third of the categories discussed in *Le Page*.

[19] We are firmly of the view that this ground is not available in relation to the change of venue and adjournment decisions. It was perfectly open to Ms Skelton and Mr Headley to have gone to trial. If they were found guilty they would have had appeal rights in which they could have pursued their complaints about the refusal of an adjournment and change of venue (albeit that in practical terms they would probably have had to go to the Supreme Court on the latter issue). We see their complaints in these respects as falling within the principles discussed in *Chalkley*.

[20] We incline to the view, although not quite so firmly, that the same is true of their complaint that the proceedings were not stayed. In favour of the appellants on this point is the consideration that a refusal of a stay is, in a sense, akin to a refusal to leave a defence. On the other hand, had the appellants gone to trial and been found guilty, the focus on a later appeal would not have been on the stay decision itself, but rather on the free-standing question whether the trial itself had been fair. Relevant to

this consideration would have been not only the pre-trial publicity but also the steps which were taken at trial to ensure an impartial jury. And the truth remains that the appellants could have gone to trial if they had chosen.

[21] We recognise that the miscarriage of justice test under s 385 of the Crimes Act is necessarily open-textured and we have sought to look at the matter in the round. Viewed at in this way, the salient features of the case seemed to us to be:

(a) There is not the slightest indication in papers or indeed what counsel said to us of either appellant having a defence. The overwhelming impression we have (in common with that of the Judge) is that they were simply putting the Crown to proof. In that context, the most plausible interpretation of what happened is that having endeavoured to avoid or defer, as long as possible, a trial, they were finally faced with the unpalatable choices of either pleading guilty (and receiving some credit for their guilty pleas) or being found guilty following trial.

(b) Their application for a stay was always a long shot. People who commit crimes of a kind which attract high levels of publicly are not thereby immunised from later criminal liability. In saying this we are conscious of the complaint by Ms Skelton that much of the publicity was directly associated with the actions of Mr Jones and, to some extent, the Family Court in releasing copies of earlier Family Court judgments. But these particular actions occurred in a context in which they were hardly unpredictable and, whatever criticisms may be made of the release of the Family Court material, it was at least an understandable response to the actions of the appellants. We see no credible basis upon which the appellants could fairly claim to have been aggrieved by the refusal of the stay application.

(c) On the change of venue application, we are content to stand by the judgment of this Court delivered in September 2008.

(d) It is not the law that a trial must be adjourned merely because an application for leave to appeal in relation to an interlocutory decision is outstanding. As already noted, in the decision of Priestley J not to adjourn the trial did not foreclose the options of Ms Skelton. She could perfectly well have gone to trial had she wished to do so, secure in the knowledge that if the Supreme Court were later to conclude that a change of venue ought to have been granted, any resulting conviction would almost certainly be set aside.

(e) In the case of Mr Headley, the mere possibility that his trial, as an unrepresented defendant, might not have been fair cannot warrant a setting aside the plea of guilty. In reality such a possibility will be present in almost all cases where the defendant is self-represented. But it can hardly be the position that such a defendant can plead guilty, obtain the advantage of an accordingly reduced sentence, and then, at the end, claim to be entitled to have the conviction set aside on the basis of an anticipation of unfairness at trial.

Mr Headley's additional points

[22] We address Mr Headley's additional points as follows:

(a) The absence of a summary of facts at the time of Mr Headley's plea is not a matter of concern. There was a summary of facts available at sentencing, which was read at the sentencing hearing as contemplated by the Practice Note on Sentencing.[6]

(b) The appointment of an amicus was a cautious step given Mr Headley's position on appointing counsel (he was not entitled to legal aid). Priestley J treated him as unwillingly representing himself in terms of *R v Condon*,[7] which was a generous view in the circumstances. We reject Mr Headley's criticisms of the amicus who was appointed. In

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6 *Practice Note - Sentencing 2003* - [2003] 2 NZLR 575.
7 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 (SC).

any event there is nothing to indicate any cause for concern that the steps taken to provide for assistance at the anticipated trial were inadequate or unfair.

(c) The complaints about the police officers are unsubstantiated and there is nothing before us to indicate that their conduct had any influence on Mr Headley's guilty plea.

Result

[23] The appeals are dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent