NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA110/2015
[2016] NZCA 41

BETWEEN	HARLEY TRIDENT RICHMOND Appellant
AND	THE QUEEN Respondent

Hearing: 16 February 2016

Court: Stevens, Simon France and Ellis JJ

Counsel: R A Barnsdale for Appellant
H W Ebersohn for Respondent

Judgment: 3 March 2016 at 3.00 pm

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Stevens J)

Introduction

[1] Mr Richmond pleaded guilty in the District Court at Hamilton to one charge of sexual violation by rape and was sentenced by Judge Thomas to seven years and six months' imprisonment.[1]

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1 *R v Richmond* DC Hamilton CRI-2013-019-1815, 17 November 2014.

[2] Mr Richmond appeals against both conviction and sentence. On the conviction appeal, Mr Richmond says, in summary, that the circumstances in which he pleaded guilty were such that the plea was not entered freely. The relevant circumstances claimed are that Mr Richmond's son was suffering from ill health and he says the Judge stated that if he continued to plead not guilty he would be remanded in custody until the trial date. On the sentence appeal the ground is that the sentence was manifestly excessive.

Background

[3] Mr Richmond faced two charges of rape in relation to the same complainant. He initially pleaded not guilty to both charges. On the morning of his trial, in circumstances to be described below, he pleaded guilty to the first of the charges and the Crown offered no evidence in relation to the second.

[4] On 19 October 2012 Mr Richmond was at a friend's residence. He drank alcohol with his friend and the complainant, who was the flatmate of Mr Richmond's friend. At some stage, the complainant went to her bedroom. Mr Richmond followed her into the room and raped her. This is the charge in respect of which Mr Richmond pleaded guilty. Early in the morning of 20 October 2012 Mr Richmond returned to the complainant's address and entered through an unlocked door. Mr Richmond went to the complainant's bedroom where she was getting out of bed. That is when the second rape (on which the Crown offered no evidence) is alleged to have occurred.

[5] On 24 January 2013 Mr Richmond was spoken to by the police and claimed that he had never had sexual intercourse with the complainant. Mr Richmond noted the significant age difference between the complainant and himself. At the time, she was 63 years old and he was 24 years old.

[6] After DNA evidence collected from inside the complainant's vagina and underwear matched Mr Richmond's DNA, the police re-interviewed Mr Richmond. At first Mr Richmond said he could not remember, possibly because he was "paralytically drunk". Then he said that "it wasn't rape, she wanted it". In summary, he said that when he went to the toilet, she pulled him into her room and that was

when it happened. He also said the next day he went around to tell the complainant what he had done was wrong as he had "kids and everything"; she wanted to do it again, but he refused and left.

[7] As to the circumstances surrounding the guilty plea, Mr Richmond and his trial counsel, Mr Curran, have both filed affidavits. We have also been provided with a transcript of the proceedings in Court when Mr Richmond pleaded guilty.

[8] The trial was due to start (after earlier attempts to begin failed) on the morning of 5 August 2014, but Mr Richmond failed to appear in Court. When brought to Court later by the police, Mr Richmond's explanation for his non-appearance was that he went to Waikato Hospital to visit his sick son.

[9] Mr Curran says he contacted Mr Richmond the night before trial (4 August 2014) and understood Mr Richmond would be attending at the trial the next day. When Mr Richmond failed to appear as required, a voice message left on Mr Curran's telephone advised that Mr Richmond was in Hamilton and was walking to the courthouse. He never arrived. The voice message Mr Richmond left made no mention of being at the hospital with a sick child, and Mr Curran's returned calls went unanswered.

[10] Mr Richmond was arrested in the afternoon of 5 August. He was brought to Court the next morning when the trial was due to start, albeit a day late. Discussions then took place between Mr Richmond and Mr Curran concerning the charges, including the proposal that if Mr Richmond pleaded guilty to one charge the Crown would offer no evidence on the other.

[11] As part of the discussions, two aspects of bail were raised. First, the Crown indicated it would oppose bail continuing for the duration of the trial in order to ensure the trial was completed. Mr Curran says his client was unsettled by this. Second, the defence asked what the Crown attitude would be to bail pending sentence if Mr Richmond were to plead guilty. The Crown said it would adopt a neutral stance. It is the situation concerning bail that underlies Mr Richmond's claim of pressure.

[12] Mr Richmond now claims the Judge before whom he appeared told him that if he continued to plead not guilty, the Judge would remand him in custody until the trial date. Mr Richmond further claims his son's health was mentioned and he was told that if he pleaded guilty he would be allowed bail until the date of sentencing. Mr Richmond says that he was given 30 minutes to think about it.

[13] Mr Curran says he advised his client and took instructions on the Crown's proposal that Mr Richmond would plead guilty to count one. In summary, Mr Richmond:

(a) was advised that, irrespective of the reduction in charges to one, he still faced a lengthy period of imprisonment;

(b) indicated his willingness to enter a plea to the single count; and

(c) discussed with Mr Curran a number of matters including:

(i) the benefit from the reduction in the number of charges;

(ii) the risk that if convicted after trial on one or both counts the end sentence would be longer; and

(iii) that the entry of a guilty plea was an acceptance of responsibility, and that the acceptance of responsibility could allow for a more benevolent attitude from the Parole Board when Mr Richmond reached his parole date.

[14] Mr Curran deposed that, after Mr Richmond expressed a desire to plead guilty, Mr Curran initiated a further discussion with his client. This was because of Mr Curran's concern that he thought Mr Richmond had an arguable defence. They discussed the prospects of success of the defence and noted this would largely turn on what the jury made of him and the complainant as witnesses.

[15] Mr Richmond gave Mr Curran a signed written instruction just before he pleaded guilty. In that instruction Mr Richmond records he:

(a) understood that if he pleads guilty he will be receiving a term of imprisonment;

(b) considered the risk of continuing to trial;

(c) was aware that if convicted of one or both charges he will face a longer sentence and in all likelihood jeopardise any prospect of an early parole; and

(d) accepted the Crown had advised that it will remain neutral on bail and was aware of problems with his child that mitigate towards a grant of bail through to sentencing.

Analysis

[16] There is no dispute as to the applicable law. It is only in exceptional circumstances that an appeal against conviction will be entertained after a guilty plea. The approach to conviction appeals was set out in *R v Le Page* where this Court said:[2]

> [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.

[17] There are at least three broad categories where, notwithstanding a guilty plea, there can be a miscarriage of justice.[3] These are:

(a) where the defendant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge;

(b) where on the admitted facts the defendant could not in law have been convicted of the offence charged; or

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2 *R v Le Page* [2005] 2 NZLR 845 (CA) at [16].
3 At [17].

(c) where the plea was induced by a ruling which embodied a wrong decision on a question of law.[4]

[18] To these three categories should be added a fourth, as discussed by this Court in *R v Merrilees*.[5] That involves the situation where trial counsel errs in his or her advice as to the non-availability of certain defences or potential outcomes. Counsel for example may act wrongly or negligently to induce a decision on the part of a defendant to plead guilty under the mistaken belief or assumption that no tenable defence existed or could be advanced.

[19] Relevant to the present case are the following observations of this Court in *Merrilees*:[6]

> It is often the case that an offender pleads guilty reluctantly, but nevertheless does so, for various reasons. They may include the securing of advantages through withdrawal of other counts in an indictment, discounts on sentencing, or because a defence is seen to be futile. Later regret over the entering of a guilty plea is not the test as to whether that plea can be impugned. If a plea of guilty is made freely, after careful and proper advice from experienced counsel, where an offender knows what he or she is doing and of the likely consequences, and of the legal significance of the facts alleged by the Crown, later retraction will only be permitted in very rare circumstances.

[20] Mr Barnsdale, counsel for Mr Richmond, accepts that when the question of accepting a plea of guilty to count one arose, Mr Richmond received legal advice on all the relevant issues from Mr Curran. It is accepted that Mr Curran's advice was correct in all respects. He was told he would still receive a lengthy period of imprisonment, that his counsel thought he had an arguable defence, and of both the benefits of pleading guilty and the risks of continuing to trial. We are thus satisfied that Mr Richmond fully appreciated the situation he was in and made an informed decision to plead guilty.

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4 J B Robertson and F B Adams (eds) *Adams on Criminal Law* (looseleaf ed, Thomson Reuters) at [CPA232.14] notes three further possible circumstances where an appeal against conviction following a guilty plea may provide a ground for an appeal. None of these has any application in the present case.

5 *R v Merrilees* [2009] NZCA 59 at [34].

6 At [35].

[21] These circumstances may be compared with those in *R v Stretch* where this Court emphasised that an appeal will rarely succeed where the defendant has had competent and correct legal advice before the plea.[7] This includes if the defendant has an arguable defence which he or she chose not to advance after proper advice about the charges and the quality of the defence.[8]

[22] Mr Richmond does not suffer from an impairment that affected his ability to plead guilty. The best Mr Richmond can put his case on appeal is that he was in part motivated to plead guilty by bail considerations; if bail was granted (which it was), he would be able to spend time with his allegedly sick child until sentencing. He claims this affected his ability to plead.

[23] In his affidavit, Mr Richmond states:

> 5. The Judge who heard my case of breach of bail was a different Judge from the Judge who sentenced me, and *he told me that if I continued to plead Not guilty, he would remand me in custody until the trial date*.
>
> 6. However my son's health was mentioned and *I was told that I pleaded guilty I would be allowed bail until the date of sentencing, as I was already on electronic bail*.
>
> …
>
> 8. My main concern at this time was welfare of my son and *my lawyer told me that I would not get a very long sentence*.
>
> …

[24] We are satisfied there are material errors in these parts of Mr Richmond's affidavit. None of the italicised statements in the three quoted paragraphs above are true. In particular we consider that the affidavit is unreliable and provides no evidential basis for the claim that the Judge communicated any position on the prospects of bail to Mr Richmond or that the Judge's stance in that respect induced him to plead guilty. On the contrary, the evidence establishes that Mr Richmond received appropriate advice from Mr Curran on the effect that maintaining his not guilty plea was likely to have on bail and also of the Crown's offer of neutrality in the event that his plea was changed. In our view the reality was simply that Mr Richmond had to make a choice.

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7 *R v Stretch* [1982] 1 NZLR 225 (CA).
8 *Hussein v R* [2011] NZCA 58 at [22].

[25] We also note that, while there is evidence from Mr Richmond that his son was ill, there is no evidence of the seriousness or extent of such illness. Moreover, the separation of a father from his young child is simply the unavoidable consequence of being found guilty of such offending and cannot by itself form the basis for setting aside a guilty plea. It is clear from the note of instructions to trial counsel that Mr Richmond considered the risks of continuing to trial, the benefits of a shorter sentence and the better prospects for parole if he pleaded guilty.

[26] In short, Mr Richmond pleaded guilty after receiving legal advice, the correctness of which is not challenged. Applying the approach in *Le Page*, Mr Richmond fully appreciated the nature of the charge and the merits of his position, and made an informed decision to plead guilty. No ruling embodying a wrong decision on a question of law is relied upon.

[27] Finally, there are no admitted facts that could assist Mr Richmond in this case. Rather, the fact that Mr Richmond initially denied sexual contact and only altered his version to a consent defence after DNA results undermined his credibility in a "he said / she said" case.

[28] The appeal against conviction cannot succeed.

Sentence appeal

[29] Mr Richmond appeals on the basis that the sentence is manifestly unreasonable. The Crown submits that the sentence imposed was within the Judge's sentencing discretion as the Judge correctly applied the sentencing guideline case of *R v AM* and the principles that apply to guilty pleas.[9]

[30] There is no real dispute that the offending involves two significant aggravating features:

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9 *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

(a) The complainant was very vulnerable. She was 63 years old while Mr Richmond was 24 years old. She was intoxicated at the time and suffered from various health ailments.[10]

(b) The effect that the offending had on the complainant as set out in the victim impact statement.[11]

[31] The Judge found that the offending fell on the cusp between the lower two bands in *R v AM*. Rape band one (6–8 years) deals with offending where aggravating features are not present or present to a limited extent.[12] Rape band two (7–13 years) covers cases involving two or three of the factors increasing culpability to a moderate degree. This includes offending involving a vulnerable victim.[13]

[32] The Judge chose a starting point of eight years' imprisonment. From that starting point, the Judge reduced the sentence by six months to take account of the guilty plea. The Judge noted Mr Richmond was not entitled to a larger discount given the lateness of the plea.[14]

[33] We are satisfied the starting point adopted by the Judge was well within the available range. The discount for the late guilty plea was, if anything, generous. No other mitigating factors have been identified by Mr Richmond. Accordingly, the end sentence of seven years and six months' imprisonment cannot be said to be manifestly excessive.

Result

[34] The appeals against conviction and sentence are dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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10 This issue is covered in *R v AM* at [43]–[44]. This Court noted vulnerability is increased the greater the age gap between the victim and the offender and the greater the physical frailty of the victim.

11 Discussed in *R v AM* at [44].

12 At [93].

13 At [98].

14 *Hessell v R* [2011] 1 NZLR 607 (SC).