

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 63/2020
[2020] NZSC 127

BETWEEN BROWNIE JOSEPH HARDING
 Applicant

AND THE QUEEN
 Respondent

SC 64/2020

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 Applicant

AND THE QUEEN
 Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: R N Park for Applicant
 E J Hoskin for Respondent

Judgment: 17 November 2020

JUDGMENT OF THE COURT

- A The application for an extension of time to apply for leave to appeal is granted.**
- B The application for leave to appeal against conviction is dismissed (*Harding v R* [2019] NZCA 259).**
- C The application for leave to appeal against sentence is granted (*Harding v R* [2020] NZCA 217). The approved question is whether the Court of Appeal was correct to dismiss the appeal against sentence.**
- D The Registrar is to set down the appeal against sentence to be heard together with the appeal against sentence in *Berkland v R* [2020] NZSC 125.**
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REASONS

Introduction

[1] Mr Harding was sentenced to 28 and a half years' imprisonment with a minimum term of 10 years' imprisonment after pleading guilty to 11 charges relating to the manufacture and distribution of methamphetamine.¹

[2] Mr Harding appealed to the Court of Appeal against conviction and sentence. His conviction appeal was brought on the ground that leave should have been granted by the sentencing Judge, Moore J, to vacate four of his guilty pleas (all of which related to manufacturing charges).² That appeal was dismissed.³ The hearing of his appeal against sentence was postponed pending the outcome in *Zhang v R*, which dealt with the sentencing levels for methamphetamine-related offending.⁴ It was then argued on appeal that *Zhang* altered sentencing levels for Mr Harding's offending. The appeal against sentence was dismissed by a differently-constituted panel.⁵

[3] Mr Harding now seeks leave to appeal to this Court against conviction and sentence. The applications for leave to appeal are out of time but there is no objection to our granting an extension of time and we do so. Leave to appeal against sentence is granted on the question set out below at [17]. We now give brief reasons for declining leave to appeal against conviction.

Background

[4] The background is set out in detail in the judgment of the Court of Appeal on the conviction appeal.⁶ For present purposes, we need only note the following. Mr Harding was arrested in December 2014 along with several others, including family members. The arrests followed an investigation by what was then known as

¹ *R v Harding* [2017] NZHC 675 (Moore J) [Sentencing remarks].

² *Harding v New Zealand Police* [2017] NZHC 1188.

³ *Harding v R* [2019] NZCA 259 (Courtney, Venning and Lang JJ) [CA judgment (conviction appeal)].

⁴ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

⁵ *Harding v R* [2020] NZCA 217 (Goddard, Ellis and Brewer JJ) [CA judgment (sentence appeal)].

⁶ CA judgment (conviction appeal), above n 3, at [4]–[13].

the Organised & Financial Crime Agency New Zealand into the manufacture and distribution of methamphetamine in Northland. This investigation focused on members and associates of the Headhunters motorcycle gang.

[5] The Crown case was that methamphetamine manufacturing had occurred in six separate phases in a property owned by relatives of Mr Harding. The case rested primarily on photographic surveillance evidence and intercepted communications. The allegation was that Mr Harding was in charge of the operation.

[6] The number of charges against Mr Harding was reduced after Mr Harding pleaded guilty to 11 charges. The Crown offered no evidence on the other charges. Sentencing was adjourned to allow the trial of Mr Harding's co-defendants to take place.⁷

[7] On the morning of 1 September 2016 when Mr Harding was due to be sentenced, his counsel Ms Pecotic sought more time to take instructions on the summary of facts. As Mr Harding disputed his role in the manufacturing and the amount of methamphetamine produced, the sentencing was adjourned to allow for a disputed facts hearing.

[8] Ultimately, in the course of the disputed facts hearing, Mr Harding applied for leave to vacate his pleas. That application was heard by Moore J on 4 April 2017. The application to vacate the pleas was brought on two bases: first, that Mr Harding did not understand the legal elements of the manufacturing charges and on the admitted facts he could not have been guilty, and second, that there was a possible defence of which he had been unaware. The High Court Judge heard evidence at this hearing from both Mr Harding and Ms Pecotic.

[9] Essentially, in relation to three of the four manufacturing charges subject to the plea vacation application, Mr Harding said only ephedrine was extracted. He said that following discussions with Ms Pecotic, he was led to believe that extracting ephedrine was sufficient in law to amount to manufacturing methamphetamine. On the fourth charge, Mr Harding accepted methamphetamine was manufactured but

⁷ One of the co-defendants was discharged and the other three were convicted.

said he was not involved in the process. Ms Pecotic's evidence was that she had explained the elements of the offences to Mr Harding and that he understood the meaning of manufacture. And she said she had spent two days with Mr Harding reviewing the summary of facts.

[10] The High Court accepted Ms Pecotic's account and rejected that of Mr Harding. The Court also determined there was no clear defence to the charges and that the pleas were freely entered.

[11] The disputed facts hearing then proceeded on 5 and 6 April 2017. The Judge made findings that at least 6.5 kg of methamphetamine had been manufactured over the relevant period and that Mr Harding was in charge of the manufacturing and distribution operation.

The proposed appeal against conviction

[12] On the proposed conviction appeal, Mr Harding wishes to argue that he entered guilty pleas without having received information about elements of the offences and about the sufficiency of evidence. In addition, he says he had been erroneously advised that he could dispute the summary of facts after his plea and he was pressured into pleading guilty by his ex-partner and lawyer in order to secure reduced penalties for members of his family involved in the offending. Accordingly, Mr Harding submits that a substantial miscarriage of justice has occurred or will occur unless the appeal is heard.

Our assessment

[13] The proposed conviction appeal would largely have this Court re-visit matters dealt with by the Court of Appeal. There is no challenge to the principles applicable to vacating a plea applied by the Court of Appeal. Rather, the challenge would be to the Court of Appeal's assessment of the facts.

[14] In relation to the facts, the Court essentially upheld Moore J's factual findings. Relevantly, the Court noted that there was evidence from Ms Pecotic as to the steps she had taken to ensure Mr Harding understood the elements of the offence.

She also explained that manufacture was only complete at the point methamphetamine was actually made and that if the only product produced was ephedrine, that was a different offence. The Court of Appeal observed that the advice on these matters “was imparted over the course of several months” and Ms Pecotic’s evidence was supported by her contemporaneous file notes.⁸ Further, the Court stated that on Ms Pecotic’s evidence, Mr Harding had accepted that manufacturing occurred on the occasions in issue and he did not say only ephedrine had been extracted.⁹ Finally, on this aspect the Court said that in his “written instructions dated 31 May 2016 Mr Harding confirmed his intention to plead guilty”, including to the charges now in issue, and made “assertions as to how much methamphetamine he accepted had been manufactured on each occasion”.¹⁰

[15] As to the argument the pleas were entered in response to pressure, the Court accepted it was “very likely” Mr Harding had been “influenced by family considerations”.¹¹ But the Court rejected the suggestion there was any improper influence by Ms Pecotic.

[16] Nothing raised by Mr Harding gives rise to an appearance of a miscarriage of justice in relation to the Court of Appeal’s assessment of the facts. The criteria for leave to appeal are accordingly not met in relation to the conviction appeal.¹²

Result

[17] An extension of time to apply for leave to appeal is granted. The application for leave to appeal against conviction is dismissed. The application for leave to appeal against sentence is granted on the question of whether the Court of Appeal was correct to dismiss the appeal against sentence. The Registrar is to set the appeal

⁸ CA judgment (conviction appeal), above n 3, at [29].

⁹ The Court accepted Ms Pecotic’s evidence that after the pleas were entered, Mr Harding disclosed new information to her which contradicted his earlier instructions, including a claim that at least some of the manufacturing phases involved the extraction of ephedrine only. When Ms Pecotic asked him if he wanted to vacate his pleas, he said he did not.

¹⁰ At [30].

¹¹ At [26].

¹² Senior Courts Act 2016, s 74(2).

against sentence down to be heard together with the appeal against sentence in *Berkland v R*.¹³

Solicitors:
Watkins Law, Kaikohe for Applicant
Crown Law Office, Wellington for Respondent

¹³ *Berkland v R* [2020] NZSC 125.