ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 60/2021
[2021] NZSC 82

BETWEEN	CHRISTOPHER HATLEY Applicant
AND	THE QUEEN Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: D A Ewen for Applicant
M J Lillico and J A Eng for Respondent

Judgment: 8 July 2021

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B We make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest is permitted.

REASONS

Introduction

[1] The applicant faces trial in the District Court on charges of offering to sell methamphetamine, kidnapping and aggravated robbery. The Crown wishes to adduce, on a propensity basis, evidence of his conviction on a charge of demanding with intent

to steal and the summary of facts relating to that offending on which the applicant pleaded guilty. The District Court ruled that the evidence was admissible on a propensity basis and could be adduced in the form of the summary of facts.[1] The applicant seeks leave to appeal against the decision of the Court of Appeal upholding that ruling.[2]

Background

[2] The propensity evidence relates to an incident which took place two days after the alleged index offending (the propensity incident). On the basis of an agreed summary of facts, the applicant sought a sentence indication on an amended charge of demanding with intent to steal which arose out of the propensity incident. The applicant accepted the sentence indication,[3] pleaded guilty and was convicted and sentenced.

[3] The applicant challenged the admissibility of the propensity evidence. In upholding the decision of the District Court that the evidence was admissible and could be adduced in the form of the summary of facts, the Court of Appeal concluded that although a defendant is not bound by the summary of facts, "equally they cannot say it is not an admission".[4] In reaching that view, the Court considered the summary was a "statement" in terms of ss 4 and 27 of the Evidence Act 2006 as it had been adopted by the applicant in pleading guilty on the basis of that summary.[5] The Court accepted the applicant could dispute some or all of the summary at trial which may mean him giving evidence.

The proposed appeal

[4] There is now no challenge to the propensity ruling itself, rather, the focus is on the form in which the evidence is to be adduced. In terms of the form, the Court of

---

1 *R v Hatley* [2021] NZDC 1932 (Judge Mill).
2 *Hatley v R* [2021] NZCA 183 (French, Clifford and Collins JJ) [CA judgment].
3 *R v Hatley* DC Wellington CRI-2019-085-364, 30 September 2020.
4 CA judgment, above n 2, at [40].
5 Under s 4(1) of the Evidence Act 2006, a statement is "(a) a spoken or written assertion by a person of any matter; or (b) non-verbal conduct of a person that is intended by that person as an assertion of any matter". Section 27(1) provides that evidence "offered by the prosecution … of a statement made by a defendant is admissible against that defendant".

Appeal was told that where propensity evidence concerns a previous conviction entered after a guilty plea, the usual practice is to adduce the propensity evidence by way of the relevant police summary of facts with the consent of the defendant. In those cases, an agreed statement under s 9 of the Evidence Act will be before the jury. Here, the applicant does not consent to that course.

[5] In challenging the decision of the Court of Appeal, the main points that the applicant wishes to raise can be summarised as follows. First, it is said that the summary is not a "statement" for the purposes of the Evidence Act because there is not necessarily a voluntary and informed acceptance of its contents for the purposes of other proceedings. Further, the requirement in r 5A.1(1)(b) of the Criminal Procedure Rules 2012, that a defendant advise the court whether the summary is accepted when a guilty plea is entered, compels speech. The New Zealand Bill of Rights Act 1990 is accordingly engaged, but the Court of Appeal did not address the justification for the use of such compelled speech in other, collateral, proceedings. Finally, the applicant says the approach of the Court is of broader importance to the profession, to the way in which defendants are advised more generally, and to the operation of subpt 7 of Part 2 of the Evidence Act dealing with convictions. Thus, he says it is necessary for the issue to be determined pre-trial.

[6] We accept the submission for the respondent that it is not necessary in the interests of justice for this Court to hear and determine the proposed appeal pre-trial.[6] If the applicant is convicted, he may reprise these arguments in any appeal against conviction. As the matter may come before the Court again, we do not express any view on the merits of the arguments that the applicant wishes to advance.

Result

[7] The application for leave to appeal is dismissed.

---

6 Senior Courts Act 2016, s 74(4).

[8] For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest is permitted.

Solicitors:
Crown Law Office, Wellington for Respondent