IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA241/2017
[2019] NZCA 259

BETWEEN	BROWNIE JOSEPH HARDING Appellant
AND	THE QUEEN Respondent

Hearing:	6 May 2019
Court:	Courtney, Venning and Lang JJ
Counsel:	P T Eastwood for Appellant K S Grau for Respondent
Judgment:	26 June 2019 at 3 pm

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] Brownie Harding pleaded guilty to 11 charges relating to the manufacture and distribution of methamphetamine in Northland. He applied unsuccessfully to vacate his guilty pleas to four of those charges.[1] After a disputed facts hearing, Moore J

[1] *Harding v Police* [2017] NZHC 1188 at [92] (Decision declining application to vacate pleas of guilty).

imposed a sentence of 28 and a half years' imprisonment with a 10 year minimum period of imprisonment.[2]

[2] Mr Harding appeals his conviction on the ground that leave should have been granted to vacate his guilty pleas and that a miscarriage of justice will occur if he is held to them.[3] The specific grounds of appeal overlap somewhat and are best summarised as follows (which is not in the order counsel argued them):

(a) There was pressure from the Judge to plead.

(b) There was pressure to plead from counsel, who was in a position of conflict because she was also acting for members of Mr Harding's family.

(c) Counsel gave misleading advice about the evidence required to prove the charges of manufacturing methamphetamine.

(d) The evidence that methamphetamine (as opposed to ephedrine) was being manufactured was weak.[4]

(e) Mr Harding did not receive the audio transcript books before entering the guilty pleas.

[3] In addition, Mr Eastwood, for Mr Harding, suggested that a breach of s 25(b) and (f) of the New Zealand Bill of Rights Act 1990 (BORA) occurred as a result of Mr Harding not having the charges determined at trial. However, this ground adds nothing. If there are circumstances that justify quashing Mr Harding's conviction, then he will be able to exercise his BORA right; if not, there will not have been any breach of a BORA right. We therefore do not deal with this ground further.

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2 *R v Harding* [2017] NZHC 675 at [97] and [102] (Sentencing Notes).

3 Mr Harding also appeals his sentence, but the sentence appeal has been severed and will be heard at a later date. *Harding v R* CA241/2017, 15 April 2019 at [3].

4 The terms pseudoephedrine and ephedrine were both used in evidence. Pseudoephedrine is a subset of ephedrine. For consistency, we refer only to ephedrine in this judgment.

Background

[4] Mr Harding was arrested in December 2014 along with several others. These included his partner, Casey Rewha, his sons, Evanda Harding and Tyson Harding, and his father, Joseph Harding. The arrests were the culmination of an investigation by the Organised and Financial Crime Agency of New Zealand (OFCANZ) into the manufacture of distribution of methamphetamine in Northland, which focused on members and associates of the Headhunters motorcycle gang.

[5] The Crown alleged that methamphetamine manufacturing had occurred in six separate phases between September and November 2014 in a house at a rural property southwest of Whangarei. The property was owned by Mr Harding's sister and brother-in-law. The Crown case rested mainly on photographic surveillance evidence obtained between July and October 2014 and intercepted communications obtained after 17 October 2014 from an audio listening device installed in the kitchen area of the house. The Crown alleged that it was Mr Harding who "spear-headed" the operation.

[6] At the relevant times Mr Harding, Ms Rewha, Evanda Harding and Mr Harding senior were all represented by Ms Pecotic. From an early stage there were discussions between Ms Pecotic and Crown counsel regarding the possible resolution of the charges brought against these four defendants. At that stage it appeared to her that there was no conflict between them, but it was a matter which she and the Court were clearly alive to.[5]

[7] Mr Harding initially faced 35 charges. Ultimately however, he pleaded guilty to 11 and the Crown withdrew the remainder. The charges to which he pleaded guilty were:

(a) manufacturing methamphetamine between 23 and 26 September 2014 (transaction 1);

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5 See for example *R v Harding* HC Whangarei CRI-2014-088-003309, 23 March 2016 (Minute No 2 of Moore J) at [33]–[37]; and *R v Harding* HC Whangarei CRI-2014-088-003309, 22 April 2016 (Minute No 3 of Moore J) at [28]–[29].

(b) manufacturing methamphetamine between 30 September and 1 October 2014 (transaction 2);

(c) manufacturing methamphetamine between 8 and 9 October 2014 (transaction 3);

(d) manufacturing methamphetamine between 20 and 23 October 2014 (transaction 4);

(e) manufacturing methamphetamine between 28 and 31 October 2014 (transaction 5);

(f) supplying Evanda Harding with pseudoephedrine on 30 October 2014 (transaction 16);

(g) conspiring to supply the class A controlled drug methamphetamine on 5 November 2014 (transaction 25);

(h) manufacturing methamphetamine between 6 and 14 November 2014 (transaction 27);

(i) possessing the class A controlled drug methamphetamine for supply on 14 November 2014 (transaction 31);

(j) conspiring to supply methamphetamine on 15 November 2014 (transaction 36); and

(k) participating in an organised criminal group between 23 September and 16 December 2014 (transaction 49).

[8] Mr Harding entered his guilty pleas on 2 June 2016.[6] Sentencing was adjourned to allow the trial of Mr Harding's co-defendants, which started on 27 June 2016, to be completed.[7] The trial saw one defendant discharged at the end of

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6 *R v Harding* HC Whangarei CRI-2014-088-003309, 2 June 2016 (Minute of Moore J) at [1].
7 *R v Harding* [2017] NZHC 1181 (Reasons on disputed facts) at [19]–[20].

the Crown case and the remaining three convicted on a variety of charges including being party to the manufacture of methamphetamine and participating in an organised criminal group.[8] Mr Harding's sentencing was eventually set down for 1 September 2016. However, agreement could not be reached on the summary of facts, particularly as regards the amount of methamphetamine manufactured and Mr Harding's role in the overall operation.

[9] On the morning of 1 September 2016 Ms Pecotic appeared for Mr Harding and sought further time to take instructions on the summary of facts, which had still not been agreed. Ms Pecotic spent the rest of that day and the following day with Mr Harding working through the summary of facts and obtaining instructions. On the afternoon of 2 September 2016 she produced a handwritten statement signed by Mr Harding and an annotated summary of facts signed by Mr Harding (erroneously dated 2 August 2016). Although Mr Harding accepted that methamphetamine had been manufactured, including on the six occasions relating to the charges to which he had pleaded guilty, he disputed his role in those manufactures and the amount of methamphetamine produced. The sentencing was accordingly adjourned to allow for a disputed facts hearing.

[10] The disputed facts hearing was set down for 23 November 2016. On 1 November 2016 Ms Pecotic applied unsuccessfully to adjourn the disputed facts hearing because of other commitments.[9] Mr Niven accepted instructions to appear for Mr Harding. During the course of the disputed facts hearing Mr Harding indicated that, notwithstanding the previously agreed summary of facts, he did not accept that any methamphetamine had been manufactured during the first two phases (charges 1 and 2). Shortly afterwards, he also denied that any manufacturing occurred during the fifth phase (charge 5).

[11] After discussion with the Judge, Mr Harding confirmed that he wanted to apply to vacate his guilty pleas in respect of those charges. Moore J required a formal application. Mr Harding duly filed a handwritten application and affidavit. The affidavit included a waiver of legal professional privilege. Mr Harding claimed

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8 At [18].
9 At [25].

that he had not understood the legal elements of the manufacturing charges and that, based on his instructions to Ms Pecotic, he could not have been guilty of those charges. Specifically, he maintained that he had told Ms Pecotic that he had only extracted pseudoephedrine in the first two manufactures and that on the fifth occasion there had been a problem with the process and no methamphetamine had been produced. He said that he had pleaded guilty only because he believed, on the basis of counsel's advice, that these facts would have been sufficient to prove the charges of manufacturing methamphetamine. In the circumstances Ms Pecotic was granted leave to withdraw.[10] Mr Edgar assumed conduct of the matter. Mr Harding subsequently extended his application to vacate his guilty pleas to include charge 3, which was also a charge of manufacturing methamphetamine.

[12] Moore J heard the application to vacate the guilty pleas on 4 April 2017. Mr Harding gave evidence. Ms Pecotic provided an affidavit and also gave evidence. She said that there had been lengthy discussions between her and Mr Harding over the each of the charges. These covered the evidence, the law and what the proposal Mr Harding might make to the Crown to resolve matters. She also said that Mr Harding's instructions were not consistent: the instructions he gave her before pleading guilty were "completely different" to his instructions after the guilty pleas were entered.[11] Further, Ms Pecotic considered that it was evident from admissions that Mr Harding made to her (including providing her with a recipe) that he knew how to manufacture methamphetamine and that he understood the distinction between extracting pseudoephedrine and manufacturing methamphetamine.

[13] Moore J accepted Ms Pecotic's evidence. He dismissed the application, with reasons to be given later.[12] The disputed facts hearing then proceeded on 5 and 6 April 2017. In a results only decision delivered at the end of that hearing the Judge determined that at least 6.5 kilograms of methamphetamine had been manufactured over the course of the operation and that Mr Harding had spearheaded the manufacturing and distribution operation.[13]

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10 Decision declining application to vacate pleas of guilty, above n 1, at [31].

11 At [73].

12 The reasons were delivered on 1 June 2017: Decision declining application to vacate pleas of guilty, above n 1.

13 *R v Harding* HC Whangarei CRI-2014-088-003309, 6 April 2017 (Minute of Moore J – Disputed

Relevant principles

[14] An appellant seeking to quash a conviction entered as a result of a guilty plea must show that a miscarriage of justice will occur if the conviction is not quashed. The general principle is that stated in *R v Le Page*:[14]

> …it is only in exceptional circumstances that onappeal 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*[15] and *R v Ripia*[16] are examples.

[15] Four broad categories are recognised as producing circumstances where there may be a miscarriage of justice as a result of a guilty plea:[17]

(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.

(c) Where the plea was induced by a ruling based on a wrong legal authority.

(d) Where trial counsel errs in his or her advice as to the non-availability of certain defences or outcomes.

[16] It is well recognised that an offender may plead guilty for a variety of reasons, including advantages to be obtained through a guilty plea such as the withdrawal of other counts or discounts on sentencing. In *R v Merrilees* this Court observed that:[18]

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facts hearing results) at [3]–[5]. The Judge delivered reasons later on 1 June 2017: Reasons on disputed facts, above n 7.

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

15 *R v Stretch* [1982] 1 NZLR 225 (CA).

16 *R v Ripia* [1985] 1 NZLR 122 (CA).

17 *R v Le Page,* above n 14, at [17]–[19]. The last category was recognised in *R v Merrilees* [2009] NZCA 59 at [34].

18 At [35].

> 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.

Appeal

Pressure from the Judge

[17] Mr Eastwood argued that Mr Harding came under pressure from the Judge to plead guilty. During the course of argument, however, he accepted that there was no factual basis on which to assert that the Judge had done or said anything that could reasonably be perceived as pressure on Mr Harding to plead. The submission relied on Moore J's 23 March 2016 minute, in which the Judge noted Ms Pecotic's undertaking to advise the parties should a conflict arise but accepted that the potential for conflict was less acute in the context of resolution discussions.[19] It is evident, however, that the Judge was simply concerned that if such discussions did conclude matters counsel's position should be confirmed well before trial. He commented:

> [36] For that reason it is of particular importance that Ms Pecotic makes contact with the Crown and actively engages in discussions designed to explore and advance the possibility of resolution.
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> [37] When this matter is next called I expect Ms Pecotic and the Crown to report on the fact that active discussions have taken place. I would also expect Ms Pecotic to be in a position to advise what her intentions are in the event that resolution discussions fail.

[18] We are satisfied that the Judge's only concern was to ensure that Ms Pecotic's position did not cause difficulties if the matter ran to trial. It cannot reasonably be concluded that the Judge's comments gave an indication either way as to what Mr Harding ought to do.

Pressure from counsel and counsel's conflict of interest

[19] Mr Harding claimed that Ms Pecotic conveyed to him that he ought to plead guilty for the sake of his family. This allegation is interwoven with the assertion that

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[19] Minute No 2 of Moore J, above n 5.

Ms Pecotic acted in a position of conflict because she represented three members of Mr Harding's family and we therefore deal with these grounds together.

[20] In the affidavit sworn to support the application to vacate the guilty pleas he Mr Harding said that he pleaded guilty because he believed (wrongly) that the extraction of pseudoephedrine would, alone, be sufficient to prove a charge of manufacturing methamphetamine. He made no mention of any other ground. In his oral evidence before Moore J, however, Mr Harding added that he had been influenced to plead to the charges by Ms Rewha and Ms Pecotic because they had said that the Crown would treat his other family members more leniently if he did so.[20] This assertion was not put to Ms Pecotic in cross-examination.

[21] The Judge did not accept Mr Harding's claim:

> [83] I also regard it as significant that Mr Harding's most recent explanation, and the basis on which he now seeks to vacate his pleas, is inconsistent with his statement of 2 September 2016 and the summary of facts he amended and adopted on the same date. One of the explanations he proffered in evidence was that although he wanted to go to trial he was told that if he pleaded guilty the Crown would be lenient towards his family. However, both statements of 2 September 2016 were made after the trial involving his former partner and sons had finished. Thus the position of his family had been settled well before he made the statements on 2 September 2016 which he now contradicts.

[22] In an affidavit sworn for the purposes of the appeal Mr Harding deposed that:

> On many occasions my former partner Casey Rewha pleaded with me to plead guilty, to save our family. As Maria Pecotic told her Brownie has to plead guilty or the crown were going to punish your family.
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> Around April 2016 I asked Casey Rewha to email Maria Pecotic as part of my instructions, that I wanted to take all charges to trial.
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> I received a hand delivered letter dated 2nd May 2016 from Maria Pecotic.
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> In this letter it stated: At a special callover and through my discussions with the crown, the resolution of your case also has an effect on how the crown would treat your family Evanda, Tyson, Casey and your father.

[23] Mr Harding said that he took that as a threat by the Crown against his family and, although he did not want to plead guilty, he felt that he had no choice in light of this threat. Mr Eastwood described the letter of 2 May 2016 as the catalyst for

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[20] Decision declining application to vacate pleas of guilty, above n 1, at [83].

Mr Harding pleading guilty. This assertion has to be viewed against the fact that Mr Harding emailed the letter back to Ms Pecotic on 5 May 2016 with detailed handwritten notes on it about the Crown's proposal for resolution and a few notes about the defence response. There was, however, not a single comment about the sentence that Mr Harding now says he viewed as a threat to punish his family.

[24] It is clear that there were discussions between Ms Pecotic and Mr Harding about the effect his position could have on his family members. Ms Pecotic gave evidence that, initially, the Crown was not willing to enter into discussions regarding Mr Harding's family members until Mr Harding resolved the charges against his part. On her insistence that this was unfair, it changed its position and considered an offer of resolution from Mr Harding's partner and sons. Ultimately, that proposal was rejected, and they proceeded to trial.

[25] In her 23 May 2016 file note Ms Pecotic recorded that:

> - [Mr Harding] is aware that at the moment – his resolving the case impacts on his family – so would really like him to make up his mind sooner rather than later. I have already organised to get other lawyers involved in the case to assist as he knows.
>
> …
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> At the end of the day it is his decision what he wants to do – if he takes the case to trial we talk about the risks – in all likelihood his entire family excluding his dad will be in the dock with him.
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> …
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> We have a lot of discussion over what would happen at trial and how a trial would run – and how he could handle giving evidence about all of this – talk about it being a Whangarei jury and how I am not sure what they are like – but juries do not like methamphetamine – you have to have a cast iron defence. Based on what he has told me – I do not like his chances. He says he wants to give evidence for his dad – I say that can happen if that situation arises. But it would not be a good idea to give evidence at his own trial thinking he can get everyone off – he could do a really bad job and make it 10 times worse for everyone else. At the moment the others could blame him – it is a little hard for them to do that with him sitting right there – saying he didn't do anything and is not involved.

[26] In our view, Ms Pecotic's file note can be accepted as an accurate record of the discussions that she had with Mr Harding about the effect of his position on his family members. But the discussions record no more than the obvious issues that

needed to be considered, given Mr Harding's position. It is very likely that Mr Harding was influenced by family considerations in making the decision to plead. But we do not accept that there was any improper influence by Ms Pecotic. Nor do we consider that, at the pre-trial stage, there was any conflict between Mr Harding and the other members of his family for whom Ms Pecotic was acting. This ground of appeal fails.

Misleading advice from counsel

[27] Mr Harding claimed that he had entered his guilty pleas under misapprehensions as to (1) the essential elements of the offences to which he was pleading and (2) the extent to which he could challenge the essential elements of the offence at the disputed facts hearing.

[28] The first of these related to Mr Harding's claim that, in relation to charges 1 and 2, he had told Ms Pecotic that no methamphetamine had been manufactured but that only ephedrine had been extracted. In relation to count 5 he says that he told her that because of a technical production problem no methamphetamine manufacturing had taken place. He claimed that Ms Pecotic had led him to believe that extracting ephedrine was sufficient to prove a charge of manufacturing methamphetamine and accordingly pleaded on the basis that he thought there was no defence to charges 1 and 2. He said that he only became aware that extracting ephedrine was insufficient to prove a charge of manufacturing methamphetamine when he was told this by Ms Rewha, after he had pleaded guilty.

[29] These assertions were central to the application to vacate the guilty pleas. But the Judge did not accept them. Ms Pecotic gave evidence of the steps she took to ensure that Mr Harding fully understood the elements of the offence of manufacturing methamphetamine. She provided him with a copy of *R v Fatu*,[21] and an extract from *Adams on Criminal Law*. She told him that manufacture was only complete once methamphetamine had actually been made and that if only ephedrine was extracted that was a different offence. She explained that he did not need to have been present on every occasion. This advice was imparted over the course of several months and,

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[21] *R v Fatu* [2006] 2 NZLR 72 (CA).

during Ms Pecotic's visits to Mr Harding, she discussed the evidence with him and the likely effect of it. Ms Pecotic's file note of 23 May 2016 is consistent with her evidence, including, for example, the record that "I ask him if he can deny that no manufacturing at all occurred between the time periods 23 September 2014 to the period when intercepts were installed. He says no he cant say that".

[30] By Ms Pecotic's account, Mr Harding accepted that manufacturing occurred on the occasions alleged. He did not deny that it was methamphetamine that had been manufactured. He did not say that only ephedrine had been extracted. In written instructions dated 31 May 2016 Mr Harding confirmed his intention to plead guilty, including to charges 1, 2, 3, 4 and 5 and assertions as to how much methamphetamine he accepted had been manufactured on each occasion.

[31] Moore J explicitly accepted Ms Pecotic's account and rejected Mr Harding's account.[22] Specifically, he accepted Ms Pecotic's evidence that she had repeatedly explained the legal elements of manufacturing methamphetamine, a claim that was supported by her contemporaneous notes.[23] There is no basis on which to conclude that Moore J's assessment of Mr Harding's claim was wrong.

[32] Mr Harding's alternative claim is that he pleaded guilty under the misapprehension that he could dispute both his role in the manufacturing process and that it was actually ephedrine that was being produced rather than methamphetamine. Thus, he was unaware of the true consequences of pleading guilty. This position is not tenable. Ms Pecotic's evidence was that after the guilty pleas were entered Mr Harding began emailing her with information that he had not previously disclosed and which contradicted his earlier instructions to her. It was not until 17 July 2016, more than a month after Mr Harding had entered his guilty pleas, that she was first told that Mr Harding claimed that at least some of the manufacturing phases involved the extraction of ephedrine only. She visited him on 26 August 2016 and spent some three hours discussing these issues. She asked him whether he wanted to vacate his pleas and he said he did not and that he simply wanted to challenge the amount of methamphetamine it is alleged was manufactured.

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22 Decision declining application to vacate pleas of guilty, above n 1, at [77].
23 At [78].

[33] Moore J found, rightly in our view, that Mr Harding fully understood the nature of the charges that he was pleading to and did so with the benefit of comprehensive advice as to the consequences.[24] His assertion that he believed that charges could be undermined at a disputes hearing is contrary to that finding and to Ms Pecotic's evidence about the events that followed that pleas. This ground of appeal fails.

Strength of the evidence

[34] Mr Eastwood submitted that there was, in fact, doubt over whether the Crown could prove that it was methamphetamine that was being manufactured rather than ephedrine being extracted. This submission rested solely on an extract from the cross-examination of Sergeant Dunhill, who gave evidence at the disputed facts hearing regarding the probable amount of methamphetamine produced. In relation to transaction 4, it was put to him that that it was possible that on 20 October there was about two ounces of methamphetamine that had been manufactured and he said that he doubted that. In explanation, he said

> A. Because you're picking out one or two isolated reference to numbers. I've gone through quite an extensive analysis as to how I've arrived at my figures and a lot of that has not been referenced by yourself here.
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> …
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> A. Certainly the figures you've put to me could relate to methamphetamine. There's nothing in there that tells me it's definitely methamphetamine for a start, then you have to take into account is this simply one step in the process of a continuing process –
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> …..
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> Q. So we may not be even talking about meth at all. We may —
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> ….
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> Q. — be talking about ephedrine extraction?
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> A. That's a possibility, yes.

[24] At [78].

[35] Mr Eastwood argued that if an expert witness could have doubt over whether ephedrine or methamphetamine was being produced then so could a jury. We do not accept that this one isolated extract from the cross-examination could fairly be regarded as indicative of the strength of the Crown case. We need go no further than Moore J's observation that:

> [84] It also cannot be overlooked that the evidence against Mr Harding was extremely strong. In my view, on the basis of the transcripts alone, conviction on each of the manufacturing charges was all but inevitable. This is not a case involving a possible defence of which Mr Harding was not aware.

[36] This ground of appeal fails.

The audio transcript booklet

[37] Mr Eastwood submitted that Mr Harding received the audio transcript booklets after he had entered his pleas and was therefore deprived of the opportunity to consider that evidence before making the decision to plead guilty. Ms Pecotic rejected this assertion. She said that she provided Mr Harding with full copies of the disclosure, including the printed transcripts. She also prepared a summary of the intercepted communications and discussed that with him.

[38] Mr Harding did not actually mention this aspect in his affidavit as a matter of concern to him. Nor did Mr Eastwood identify anything specific in the transcripts that would have affected the decision to plead guilty. In these circumstances this ground of appeal also fails.

Result

[39] The appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent