IN THE COURT OF APPEAL OF NEW ZEALAND

CA20/2016
[2016] NZCA 204

BETWEEN	LEIDEN CHEYNE O'SULLIVAN Applicant
AND	THE QUEEN Respondent

Hearing: 3 May 2016

Court: Randerson, Stevens and French JJ

Counsel: F C Deliu for Applicant
B J Horsley for Respondent

Judgment: 16 May 2016 at 10.30 am

JUDGMENT OF THE COURT

The application for an extension of time to appeal is declined.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] In May 2008 Mr O'Sullivan pleaded guilty in the Whangarei District Court to two charges of arson. The case was transferred to the High Court and on 19 August 2008 he was sentenced by Harrison J to six months' home detention and ordered to pay $1,000 in reparation.[1]

[1] *R v O'Sullivan* HC Whangarei CRI-2007-088-5182, 19 August 2008.

[2] Over seven years later, on 22 January 2016, Mr O'Sullivan filed a notice of appeal against conviction. Justice Wild directed the notice of appeal should be treated as an application for an extension of time to appeal pursuant to s 388(2) of the Crimes Act 1961.[2] He further directed that the application should be heard separately from the proposed appeal.

[3] The Crown opposes an extension of time being granted.

Factual background

[4] On the evening of 13 November 2007 two fires were deliberately lit at separate locations in Whangarei.

[5] There is a dispute as to the order in which the two fires were lit. According to Mr O'Sullivan, the first and more serious fire occurred at a block of public toilets in the Barge Park Show Grounds (the Barge Park fire). The fire was lit while a person was still in one of the cubicles. The fire caused extensive property damage. The second and less serious fire was at a portable toilet.

[6] Mr O'Sullivan, then aged 19, was charged with two counts of arson under s 267(1) of the Crimes Act. The Crown alleged he was driving a group of his friends around the city. The group stopped at a portable toilet where Mr O'Sullivan and one of the group (a Ms O'Hagan) used piled up newspapers to set the toilet alight. Mr O'Sullivan then allegedly drove the group to the Barge Park toilets where he and Ms O'Hagan used toilet rolls to set the block of toilets on fire. Another of the group (a Michaella Frandi) was using the toilets at the time.

[7] Mr O'Sullivan pleaded not guilty to both charges and on 2 May 2008 there was a depositions hearing. At the depositions hearing Michaella Frandi and her sister, Hope Frandi (who was also part of the group), gave evidence. Mr O'Sullivan was represented by counsel Mr Watson.

[8] At the conclusion of the depositions hearing the Crown agreed to amend the portable toilet charge to one of arson under s 267(2)(a). The charge relating to the

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2 *O'Sullivan v R* CA20/2016, 15 March 2016.

Barge Park toilets remained as a charge under s 267(1)(a). Section 267(2)(a) carries a lesser maximum penalty than s 267(1)(a) because, unlike the latter, it does not involve endangering life.

[9] Mr O'Sullivan then pleaded guilty to both counts. This was against the advice of Mr Watson, who had advised him to maintain his not guilty plea to the Barge Park fire. Mr Watson applied for bail pending sentence but the application was unsuccessful and Mr O'Sullivan was remanded in custody.

[10] Subsequently, Mr O'Sullivan instructed new counsel Mr Fairley. On 8 July 2008 Mr Fairley filed an application to vacate the guilty plea in relation to the Barge Park fire. The grounds of the application were that Mr O'Sullivan had made the decision to plead guilty contrary to legal advice and in circumstances where he had a clear defence if his testimony were to be accepted at trial. In an affidavit sworn in support of the application, Mr O'Sullivan stated he did not personally light either of the fires. That was done by Ms O'Hagan. He said he accepted he was guilty of the portable toilet fire as a secondary party because when Ms O'Hagan went with newspapers in her hand and he opened the door, he realised she was going to light a fire. However, in relation to the Barge Park fire, which he said occurred first in time, he did not know what she was going to do.

[11] The application to vacate the guilty plea came on for hearing before Harrison J on 10 July 2008. Mr O'Sullivan was not present in Court. Justice Harrison indicated that a sentence of home detention would be available if Mr O'Sullivan maintained both guilty pleas, as opposed to the three to four year prison sentence he might receive were the guilty plea vacated and the charge relating to the Barge Park fire to go to trial and he be convicted.

[12] The case was then stood down to allow Mr Fairley to phone Mr O'Sullivan at the prison for instructions. Mr O'Sullivan instructed Mr Fairley to withdraw the application to vacate the guilty plea. This was duly done and Mr O'Sullivan was released on bail pending sentence.

[13] Sentencing took place on 19 August 2008 when, as mentioned, Mr O'Sullivan was sentenced to six months' home detention and ordered to pay $1000 in reparation. In deciding to impose what was a very lenient sentence, Harrison J stated the guilty pleas were "a major factor".[3] The Judge regarded them as a "sign of genuine contrition and remorse".

[14] Ms O'Hagan, who had admitted the two arson charges, was dealt with in the Youth Court.

[15] Subsequently, Mr O'Sullivan's mother, Ms Stone made a complaint to the New Zealand Law Society against Mr Fairley alleging he had placed undue pressure on her son to abandon his application to vacate the guilty plea. The complaint was dismissed.[4] We were told Ms Stone also made a complaint against Harrison J to the Judicial Conduct Commissioner, but that too was dismissed.

[16] Ms Stone approached several lawyers to see if anything could be done to overturn the convictions. In 2009 Mr Warren Pyke was instructed and obtained a grant of interim legal aid for the purposes of investigating a possible appeal. The O'Sullivan family gave Mr Pyke a tape of a discussion they had secretly recorded with the Frandi sisters. In the course of the discussion, the Frandi sisters had made comments suggesting aspects of their statements to the police were unreliable. The Frandi sisters were not, however, willing to provide evidence in support of an appeal and legal aid was withdrawn.

[17] Mr O'Sullivan and his mother say without legal aid they could not afford a lawyer and so were unable to do anything further about bringing an appeal until 2015 when Ms Stone came into an inheritance. They then instructed Mr Deliu in March 2015 and a notice of appeal was filed.

[18] The application for an extension of time is supported by affidavit evidence from Mr O'Sullivan, his mother, and sister. The Crown has provided affidavits from Mr Watson and Mr Fairley.

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3 *R v O'Sullivan*, above n 1, at [14].
4 *Kessell v Fairley* LCRO 05/08, 13 February 2009.

[19] In his affidavit, Mr O'Sullivan says he did not light either of the two fires and did not do anything to assist the person (Ms O'Hagan) who did light them. He pleaded guilty to something he did not do.

Analysis

[20] The principles governing applications for an extension of time are well established. Relevant considerations include the interests of society in the finality of decisions, the period of the delay, the reasons for it, the merits of the proposed appeal, whether the liberty of the subject is involved, the impact on the administration of justice and any prejudice to the Crown.[5] The ultimate question is what is in the interests of justice.[6]

The delay

[21] The delay in this case is extraordinarily long. That is a major factor weighing against granting an extension of time. It has been held the Court should only entertain an appeal that is many years out of time in exceptional circumstances.[7]

[22] Further, the explanation for the delay — especially the period after 2009 — is inadequate. We acknowledge the family's financial circumstances, but it would still have been possible for a notice of appeal to have been filed. As Mr Deliu acknowledged, a long delay can be a major factor weighing against leave and, when unexplained, can be decisive.[8]

[23] We also accept the Crown is prejudiced by the lengthy delay. The events at issue occurred in 2007 and the ability of witnesses to recall what happened has been inevitably affected.

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5 *R v Knight* [1998] 1 NZLR 583 (CA) at 587 and 589; *R v Lee* [2006] 3 NZLR 42 (CA) at [100]; *Mikus v R* [2011] NZCA 298 at [26].
6 *R v Lee*, above n 5, at [107].
7 *Butcher v R* [2015] NZCA 102 at [7].
8 *R v Lee*, above n 5, at [115].

The strength of the proposed appeal

[24] The phrase "exceptional circumstances" has also been used by this Court in connection with cases where an appellant seeks to appeal a conviction following the entry of guilty pleas. That is so even when the appeal is in time. An appellant must show a miscarriage of justice will result if their conviction is not overturned. Where the appellant fully appreciated the merits of their position and made an informed decision to plead guilty, the conviction cannot be impugned.[9]

[25] The essence of Mr Deliu's argument is that Mr O'Sullivan did not make an informed decision because in the case of the Barge Park fire he was subjected to undue pressure by Mr Fairley and Harrison J. As regards the guilty plea in relation to the portable toilet fire, the submission is that the plea was based on a misunderstanding of the law relating to liability as a secondary party. Mr Deliu says further that Mr O'Sullivan is innocent of both charges and has a defence that ought to be heard. In support of that latter submission, Mr Deliu relied on Mr O'Sullivan's affidavit evidence protesting his innocence as well as various inconsistencies in the evidence of the Crown witnesses and the taped admissions of the Frandi sisters.

[26] We acknowledge that in assessing the merits of an appeal for the purposes of an application for an extension of time, it is not our task to make a final determination of the merits. To put it another way, the applicant is not required to show that he or she has a watertight case or must inevitably succeed. This was stressed by Mr Deliu. However, there must be more than an arguable defence. In circumstances of lengthy and unexplained delay, what is required has been variously described as "a strong prima facie" case or "an overwhelming" case.[10]

[27] For the reasons that follow we are not persuaded this case meets either of those descriptions. We consider it to be weak.

[28] The first point we would make is that the guilty pleas were not entered simply on the basis of a summary of facts as is often the case but rather entered after

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9 *R v Le Page* [2005] 2 NZLR 845 (CA) at [16]; *R v Stretch* [1982] 1 NZLR 225 (CA); *R v Ripia* [1985] 1 NZLR 122 (CA).

10 *S (CA88/2014) v R* [2014] NZCA 583 at [12]–[13]; *R v Latifi* [2007] NZCA 372 at [4]; *Price v R* [2013] NZCA 539 at [4].

a depositions hearing where the Crown evidence had been tested. Mr Watson cross-examined the witnesses.

[29] Secondly, Mr O'Sullivan signed written instructions regarding his pleas, which, as the Crown submits, indicates the decision was informed and deliberate. Further, there is no complaint about the legal advice Mr Watson gave regarding the charges. That is hardly surprising having regard to the fact Mr O'Sullivan entered the guilty plea in relation to the Barge Park fire *against* Mr Watson's advice. That would suggest Mr O'Sullivan was a person who makes his own decisions. Mr O'Sullivan's only complaint against Mr Watson appears to be that he was unsympathetic and made a lacklustre application for bail. Mr O'Sullivan had breached his bail conditions on four occasions.

[30] We note too that at no stage did Mr O'Sullivan ever attempt to vacate the guilty plea in relation to the portable toilet fire, notwithstanding the opportunity to revisit the plea in July 2008.

[31] As for the 2008 hearing of the application to vacate the guilty plea, Mr O'Sullivan and his mother say he had insufficient time to consider his options, was bullied by Mr Fairley and under pressure because he was terrified of remaining in prison. These assertions are disputed by Mr Fairley. Mr Fairley says although he told Mr O'Sullivan to seriously consider the Judge's proposal, he was very careful not to persuade Mr O'Sullivan one way or the other but to let him make his own decision. He claims Mr O'Sullivan understood all the issues and had weighed up the options.

[32] Mr Fairley also says — and this is not disputed — that when he phoned Mr O'Sullivan for instructions, the latter's immediate reaction was to instruct Mr Fairley to withdraw the application to vacate the guilty plea. However, Mr Fairley did not accept those instructions immediately and suggested Mr O'Sullivan think it over and Mr Fairley phone back in 20 minutes. It appears Mr O'Sullivan's mother was also involved in the phone conversation.

[33] Significantly, the allegations of bullying against Mr Fairley are very much at odds with contemporaneous emails from Mr O'Sullivan's mother. In communications prior to the hearing, she described Mr Fairley in glowing terms as "an absolute star lighting the way", doing "sterling work" for the family and that they felt "very privileged" he had agreed to act for them.

[34] Then the day after the hearing she wrote to Mr Fairley as follows:

> Hi Arthur,
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> Just letting you know I have received your email and will make sure that Leiden sees it as you have asked- I also agree it is a good thing to do and I appreciate the personal support you have given Leiden as this has been a huge encouragement at a very critical time- thank you.
>
> I have told Leiden that should he even begin to get an itch to attempt to breach bail you would be around to speak to him pronto and he has assured me that he does not want to go back to prison and he does understand this will happen if he breaches.
>
> I will make sure full payment is made to you for your help through this very soon.
>
> The ache I have in my heart is concern for Leiden's future now as he is a very bright, intelligent person and I am worried these charges will make things hard from him but am trying not to envision hurdles before they come. I do understand why Leiden made his choice and I will not undermine that decision at all- I agree with you why it is important not to.
>
> It is really an honour to have you act on our behalf and personally I thank you for supporting Leiden not only professionally but from a paternal approach as well which has been sorely lacking in Leiden's life but very much appreciated at the time it is now given. My belief is that it will help Leiden to make good choices from now on because a person he admires has shown faith in him and encouraged him at this time.

[35] We acknowledge Ms Stone shortly thereafter had a change of heart and came to rue the decision that had been made. However, we consider her immediate response to be very telling.

[36] In submissions, Mr Deliu claimed there was no contemporaneous record of the events of 10 July 2008. That is not correct. There was in fact a minute issued by

Harrison J at the conclusion of the hearing.[11] Mr Fairley's account is consistent with that minute, the relevant parts of which read:

> [1] Mr Leiden O'Sullivan pleaded guilty in the District Court at Whangarei following completion of a preliminary hearing on 2 May 2008 to two charges of arson. He admitted that he committed this offence, first, on a public toilet facility at Barge Park, Northland Show Grounds, and, second, on a portaloo at Pompallier Estate Drive.
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> [2] The police case is essentially that Mr O'Sullivan acted in concert with a young woman on both occasions. This morning Mr Smith for the Crown advises that the young woman fell within the jurisdiction of the Youth Court. She has admitted the charges in that forum and has been dealt with accordingly.
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> [3] Mr O'Sullivan was remanded in custody for sentence following entry of his pleas of guilty. He has since applied for leave to withdraw his guilty plea to the first and more serious offence of arson at Barge Park. He admits his participation in the second offence of arson of the portaloo.
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> [4] Mr O'Sullivan has sworn an extensive affidavit in support of his application and I have had the real benefit of a written synopsis of submissions from Mr Fairley on his behalf and from Mr Smith for the police.
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> [5] In the course of argument this morning I granted an adjournment so that Mr Fairley could obtain further instructions from Mr O'Sullivan, who is an inmate at Ngawha Prison. Mr Fairley spoke twice with Mr O'Sullivan in conversations some 20 or 30 minutes apart. He gave him full advice about the options available to him today. Mr O'Sullivan's mother, Ms Tracey Kessell, who was in Court throughout argument before the adjournment, also spoke twice with her son. I accept that Mr Fairley gave Mr O'Sullivan comprehensive advice on his options, as did Ms Kessell, and that with the benefit of that advice Mr O'Sullivan has instructed Mr Fairley to withdraw this application. Accordingly both convictions stand.
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> …
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> [7] I remand Mr O'Sullivan for preparation of a pre-sentence report with a home detention appendix for sentence in the High Court at Whangarei before me at 9 am on 19 August 2008.
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> [8] In the interim I admit Mr O'Sullivan to electronic monitoring bail …
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> …
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> [10] It will be apparent from the terms of this minute that I will consider favourably an application by Mr O'Sullivan for a sentence of home detention. I will be influenced by the existence of his pleas of guilty, by his age, by his previous good record and most particularly by the support available from his mother and sister. It will be for Mr O'Sullivan to ensure that he complies rigorously with the terms of bail prior to sentence in the High Court on 19 August 2008.

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[11] *O'Sullivan v R* HC Whangarei CRI-2008-488-38, 10 July 2008.

[37] In relying on that minute, we have not overlooked Mr Deliu's further contention that Harrison J allegedly pre-determined the application, improperly held a private meeting in chambers with counsel and bullied Mr Fairley. We do not know whether there was a meeting in chambers but what is certain is that the Judge gave his sentencing indication in open court. Further, and in any event, what matters for present purposes is what was later conveyed by Mr Fairley to Mr O'Sullivan and operative on the latter's mind.

[38] According to a letter written by Mr Fairley on 28 January 2009 to the New Zealand Law Society, the Judge "did no more than the standard thing done by a judge and that was to make it clear he had not made up his mind about the application but put forward the proposition and invited [Mr Fairley] to discuss it with [his] client". Mr Fairley is a senior litigator with over 35 years' experience. There is no evidence the Judge bullied him and we consider it very unlikely Mr Fairley would allow himself to be bullied at the expense of his client. Mr Fairley's perception was that Harrison J was concerned for Mr O'Sullivan's welfare.

[39] We acknowledge Mr O'Sullivan would have felt under pressure. However, that was inherent in the situation. Anyone facing serious charges will inevitably be under pressure when making a decision of that kind and, as noted in *R v Merrilees,* will often make the decision for various reasons, including, as happened here, the opportunity to gain a discounted sentence and certainty of outcome.[12]

[40] In our assessment, there is overwhelming evidence that Mr O'Sullivan fully appreciated the merits of his position. He made an informed decision to plead guilty and two months later reaffirmed that decision. He was represented at the critical times by senior counsel whose advice was appropriate. Mr O'Sullivan was facing significant litigation risk and secured a sentence that was, on anyone's view of it, very lenient. The fact Mr O'Sullivan has later come to regret his decision is not the test.

[41] That is sufficient to dispose of the application. However, for completeness, we also record our impression that aspects of Mr O'Sullivan's claims about the night

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[12] *R v Merrilees* [2009] NZCA 59 at [35].

of the fires are problematic. He says, for example, through counsel that he never knew what the others were intending to do and was taken by surprise at the first fire, which on his account was the Barge Park fire. However, he also admits that only three days earlier he had been with Ms O'Hagan and others at that very same location when she had set fire to the toilets.

[42] We also have concerns about the covertly taped discussions with the Frandi sisters, including the real possibility that the sisters were put under pressure and said what they thought the O'Sullivans wanted to hear. In any event, the Frandi sisters have never resiled from their testimony at the depositions hearing and neither is willing to give evidence in support of the appeal. Also of concern is the attempted introduction into evidence of a report from a behavioural science consultant purporting to assess the truthfulness of Ms O'Hagan in her police interview. The report is undated and was apparently commissioned by Mr O'Sullivan's mother. It is plainly inadmissible and of no weight.

Conclusion

[43] The threshold for granting an extension of time after such a long period of delay is a high one. This case falls well short of it.

[44] We are satisfied that in all the circumstances of this case an extension of time is not in the interests of justice. The delay is extraordinary and the merits of the proposed appeal are weak. Mr O'Sullivan has not persuaded us a miscarriage of justice will result if his convictions are not overturned.

Outcome

[45] The application for an extension of time is declined.

Solicitors:
Crown Law Office, Wellington for Respondent