

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

NOTE: DISTRICT COURT ORDER IN [2022] NZDC 10698 PROHIBITING PUBLICATION OF THE DETAILS IN PARAGRAPH [28] OF THAT JUDGMENT REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA350/2022
[2023] NZCA 643**

BETWEEN REX MALCOLM POOLE
Appellant

AND THE KING
Respondent

Hearing: 1 November 2023
Court: French, Thomas and Fitzgerald JJ
Counsel: T J Jackson for Appellant
M G McClenaghan for Respondent
Judgment: 14 December 2023 at 11 am

JUDGMENT OF THE COURT

A The appellant's application for leave to adduce the further evidence of Robert Walters is declined.

B The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] On 1 March 2019, Mr Poole pleaded guilty in the District Court to a charge of attempted sexual violation. Before sentencing was due to take place, he applied for leave to withdraw the guilty plea.

[2] The application was heard by Judge Lynch who refused to grant leave.¹ Subsequently Mr Poole was sentenced to 12 months' home detention with judicial monitoring.²

[3] He now appeals his conviction on the grounds that the Judge should have allowed him to withdraw his guilty plea.

Background

The Crown case

[4] Mr Poole and the complainant had been friends. On 29 November 2017, Mr Poole arrived at the complainant's address to return some property.

[5] Without asking the complainant, Mr Poole got into the complainant's bed prompting the complainant to go to another room and try to sleep there on the floor. The complainant then texted and attempted to phone a female friend, whom he regarded as his mentor, asking her for help to get rid of Mr Poole.

[6] Mr Poole eventually got out of the bed but, unbeknown to the complainant, remained in the house. The complainant returned to his bed thinking Mr Poole had left. Mr Poole then re-entered the bedroom. He was naked. He ripped the complainant's underpants off and forced him to move from his side to his stomach. Mr Poole then knelt over the complainant and began trying to put his penis in the complainant's anus.

¹ *R v Poole* [2021] NZDC 25469 [Withdrawal judgment] at [138].

² *R v Poole* [2022] NZDC 10698 [Sentencing notes] at [55] and [57].

[7] The complainant could feel Mr Poole's penis on his bottom. He clenched his buttocks together and tried to shuffle away from him. He asked Mr Poole to stop and said that he was not interested. However, Mr Poole continued.

[8] Mr Poole was then interrupted by the arrival of the complainant's mentor but despite that Mr Poole continued to masturbate and ejaculated over the complainant and the bedding. He then reluctantly left the address. Police were called at around 10.30 pm.

[9] The complainant was examined by a MEDSAC (Medical Sexual Assault Clinicians Aotearoa) doctor. The examination revealed bruising and redness to his anus as well as bruising on his right arm caused by blunt force.

[10] There was also forensic evidence that Mr Poole's DNA had been identified from testing of the semen stains on the complainant's duvet.

[11] While detectives were conducting a scene examination of the complainant's home in the early hours of the following day, 30 November, they were advised that Mr Poole was in the police custody suite having been arrested on an unrelated matter. At 4.25 am, one of the detectives returned to the police station and spoke to Mr Poole about the complainant's allegation. Mr Poole claimed it was the complainant who had raped him. He stated that the complainant had held a knife to his throat and bailed him up against the bedroom door. When asked about the woman who had come to the house, he said he tried to ask her for help, that she trapped him in the bathroom and would not let him go.

[12] During conversations with other police officers between 7.50 am and 8.40 am on 30 November, Mr Poole declined several times to be medically examined. He said the complainant had drugged him offering him cannabis which wasn't cannabis and that he wanted his blood tested but not until his lawyer, Mr Allan, got there. He also declined to provide a DNA buccal sample. It was suggested a full medical examination could likely corroborate his claims of being drugged but he remained adamant about not doing anything until he had spoken to Mr Allan. Several attempts were made to contact Mr Allan but without success.

[13] The officers said Mr Poole presented as coherent. He engaged freely and comprehended what was being asked of him.

[14] In her statements to the police, the complainant's mentor said she arrived at the complainant's house at about 10.20 pm having attempted to phone the complainant at 10.05 pm following his text. On entering the house, the first thing she noticed was a sound that she described as like a kid crying. The door to the complainant's room was ajar and she could see a naked male kneeling on the complainant's bed thrusting backwards and forwards appearing to have sex with the complainant. She could hear the complainant saying "No, no stop it, ow". She told the male to stop which he did.

[15] She then partially closed the door to give the male some privacy and then heard the complainant say "Stop it, no". On opening the door again, she saw the male was still on the bed and his hips still thrusting backwards and forwards. He then stopped, covered himself with the duvet and got off the bed. It was then, the Crown say, that Mr Poole ejaculated. The male asked for some space. After a minute, the male left the room naked but covering his genitals with his hands and went to the bathroom.

[16] While he was in the bathroom, she heard the male yell out that he had been raped, to which she replied "That is not what I saw". She tried to usher him out. At one point as he was walking down the stairs, her impression was that he intentionally headbutted the wall twice.

[17] Mr Poole was initially charged with actual sexual violation but that was later changed to a charge of attempted sexual violation.

Events leading up to the guilty plea

[18] Mr Poole pleaded not guilty to the charge and elected trial by jury. He was initially represented by Mr Allan. However, he became dissatisfied with Mr Allan and dismissed him in October 2018, 16 days prior to the original trial date. Mr Bamford was then assigned to act for Mr Poole and a trial date was set for 11 March 2019. Mr Bamford was a Nelson based lawyer and the proceedings were in the Christchurch District Court, resulting in Mr Bamford engaging other lawyers to act as his agents for some appearances.

[19] At a callover held on 18 January 2019 (that is, approximately two months before the trial date) Mr Poole was represented by another lawyer Ms Sewell, who appeared as Mr Bamford's agent. She advised the Court that a sentence indication was going to be sought, and told the Judge that a suggested alternative charge had been suggested but not accepted. A date of 15 February 2019 was duly allocated for the indication hearing. The presiding Judge observed that there was obviously no pressure on Mr Poole because they still had the trial date. Ms Sewell confirmed that Mr Poole was aware of that and that she had discussed the sentencing indication with him beforehand.

[20] Mr Poole was present in the courtroom during this callover and was told by the presiding Judge that she understood he was still ready to go to trial on 11 March so that if the sentence indication was not to his liking he would still have his trial date.

[21] On the day allocated for the sentencing indication, Mr Bamford told Judge Neave that the sentence indication was not ready to proceed. It was duly adjourned to 1 March 2019.

[22] When the case was called again on 1 March 2019, counsel appearing for Mr Poole on behalf of Mr Bamford was a Mr Nolan. He advised the Court his understanding was that Mr Poole was in a position to plead guilty. The charge of attempted sexual violation of the complainant was then put to Mr Poole who was asked whether he pleaded guilty or not guilty to which he replied "guilty". Various sentencing reports were then ordered for sentencing scheduled for May 2019.

[23] We interpolate here that two days earlier on 27 February 2019 Mr Poole had instructed Mr Bamford to tell the Court he wanted to plead guilty. And that on the day the guilty plea was entered, Mr Poole signed a written instruction stating he instructed his lawyer to enter a guilty plea to one charge of attempted sexual violation.

The application to vacate the guilty plea

[24] The sentencing never took place in May 2019. It was initially adjourned to ascertain if a disputed facts hearing was required because Mr Poole had taken issue with the summary of facts, and then subsequently adjourned again until 6 September

2019 for Mr Poole to make an application to vacate the guilty plea. Mr Poole advised the Court on that day that he had instructed new counsel, Mr Chambers. Mr Bamford was granted leave to withdraw.

[25] The grounds of the application for leave to vacate the guilty plea were that Mr Poole contended he had been pressured into pleading guilty and that his representation by Mr Bamford was inadequate.

[26] For various reasons, the hearing of the application took place in two stages and was not finally completed until 9 June 2021. In the first stage Mr Poole was represented by Mr Chambers and in the second stage by a Mr Lucas.

[27] Evidence was given by Mr Poole, Mr Bamford and Mr Nolan.³

[28] In evidence, Mr Poole said he felt “blindsided” and “powerless” the day the guilty plea was entered. He was “under extreme duress and trauma”, the duress coming partly from Mr Bamford but also from the conduct of all the lawyers involved as well as Mr Poole’s past experience of having the justice system “weaponised” against him. Mr Poole said he hadn’t intended that morning to enter a guilty plea but had no option because Mr Bamford had gone ahead and entered the plea and was not even there. It was claimed that because Mr Bamford was not ready for the impending trial he had manipulated Mr Poole and put undue pressure upon him to have a sentencing indication and ultimately plead guilty.

[29] For his part, Mr Bamford denied coercing or pressuring Mr Poole into pleading guilty. Mr Bamford stated that prior to the guilty plea being entered, he had discussed the strength of the Crown case with Mr Poole and advised him that he was at serious risk of being convicted. Mr Bamford considered that a major problem for Mr Poole in defending the charge was that despite having a limited recollection of events, he maintained a firm belief that the complainant had caused his intoxication by drugging him. Another concern was that he did not think Mr Poole would present well as a

³ Two evidential hearings took place, one on 26 June 2020 when Mr Chambers was counsel and the other on 3 June 2021 when Mr Lucas was counsel. Ms Sewell, the barrister who had represented Mr Poole at the callover on 18 January 2019, was not present at either hearing, but the Crown relied on the transcript of the callover hearing.

witness. In short in Mr Bamford's assessment, the chances of successfully defending the charge were low.

[30] Mr Bamford acknowledged it was him who had driven the idea of a sentencing indication but said it had been discussed beforehand with Mr Poole.

[31] Mr Bamford also explained that once he received the Crown submissions for the sentence indication hearing, he considered that rather than being locked into a sentencing indication which would give less flexibility it would be better for Mr Poole to plead guilty and to obtain reports detailing his very significant mitigating factors. In Mr Bamford's assessment, those factors would be likely to lead to substantial discounts on sentence.

[32] He then had at least two further discussions to that effect with Mr Poole before arranging for Mr Nolan to appear for the guilty plea to be entered.

[33] Mr Nolan testified that when he met with Mr Poole and received his written instructions, Mr Poole did not raise any concerns about entering the plea of guilty

The Judge's decision

[34] In dismissing the application to withdraw the guilty plea, Judge Lynch structured his judgment by reference to the principles articulated in the High Court decision of *Police v Milne*,⁴ and made the following key findings:

- (a) Mr Poole was a forthright person with strong views which he expressed clearly and forcefully.⁵ He had demonstrated when giving evidence and being cross-examined that he was his own man and not to be trifled with.⁶ It was "inconceivable" that he simply rolled over and entered a guilty plea he did not want or intend to enter.⁷

⁴ *Police v Milne* [2020] NZHC 267.

⁵ Withdrawal judgment, above n 1, at [135].

⁶ At [134].

⁷ At [96].

- (b) Mr Poole fabricated some of his evidence to suit his duress narrative.⁸
- (c) Mr Nolan was an impressive witness.⁹
- (d) While aspects of Mr Bamford's representation and trial preparation were not up to best practice standard (for example inadequate record keeping and failing to obtain Mr Poole's signature to the summary of facts), the trial was not complex and an experienced barrister like Mr Bamford would have got up to speed in terms of preparation.¹⁰
- (e) The complaints against Mr Bamford were either not made out or did not have a material bearing on Mr Poole's decision to plead guilty.¹¹
- (f) The Crown case against Mr Poole was a strong one and it was not a case where on the facts he could not have been guilty of the charge.¹²
- (g) Mr Poole appreciated the nature of the charge, knew the case against him and knew he could defend it if he wished.¹³
- (h) His decision to plead guilty was not affected by ill-health, any impairment or lack of capacity and he was not operating under a material mistake.¹⁴

The relevant legal principles

[35] It is well established that it is only in exceptional circumstances that an appeal against conviction will be entertained following entry of a plea of guilty.¹⁵ The appellant must show that a miscarriage of justice will result if their conviction is not

⁸ At [109].

⁹ At [101].

¹⁰ At [90].

¹¹ At [137].

¹² At [117].

¹³ At [85] and [119].

¹⁴ At [132]–[133].

¹⁵ *R v Le Page* [2005] 2 NZLR 845 (CA) at [16].

overturned.¹⁶ Where an appellant has fully appreciated the merits of their position and made an informed decision to plead guilty, the conviction will usually be upheld.¹⁷

[36] A series of decisions in this Court has recognised four broad categories where there may be a miscarriage of justice resulting from a guilty plea if the conviction is not quashed and the matter allowed to go to trial:¹⁸

- (a) the defendant did not appreciate the nature of or did not intend to plead guilty to a particular charge;
- (b) on the admitted facts the offender could not in law have been convicted of the offence charged;
- (c) the plea was induced by a ruling based on a wrong legal authority; and
- (d) the defendant received incorrect advice from trial counsel as to the non-availability of certain defences or outcomes.

[37] We acknowledge that the categories of miscarriage for this purpose are not closed and that a plea of guilty obtained by duress and coercion for example would obviously be capable of causing a miscarriage of justice.¹⁹

Arguments on appeal

[38] The central contention of Mr Poole’s counsel, Mr Jackson, was that the test adopted by the Judge for determining whether the plea was considered was “set too high, as was the assessment of any available defence, so that the apparent strength of the untested prosecution case and the degree of coercion ... were given undue weight”.

¹⁶ Criminal Procedure Act 2011, s 232(2)(c).

¹⁷ *R v Le Page*, above n 15, at [16].

¹⁸ *R v Le Page*, above n 15, at [17]–[19]; *R v Stretch* [1982] 1 NZLR 225 (CA) at 229 citing *R v Forde* [1923] 2 KB 400, [1923] All ER 477 at 403; *R v Merrilees* [2009] NZCA 59 at [33]–[34]; *Richmond v R* [2016] NZCA 41 at [17]–[18]; and *Nixon v R* [2016] NZCA 589 at [8].

¹⁹ Matthew Downs (ed) *Adams on Criminal Law – Criminal Procedure* (online ed, Thomson Reuters) at [CPA232.14] identifies an additional three categories under which an appeal may succeed: where the appellant was impacted by a permanent impairment or lack of capacity, where there was some impropriety in the proceedings or of the prosecution, and where the court has failed to provide the defendant with an opportunity to vacate their guilty plea when imposing a sentence different to that which was indicated prior to the plea being entered.

[39] In Mr Jackson's submission, the Judge wrongly elevated the notion of coercion to an almost literal level at the expense of a fair assessment of the circumstances at the time and what led to the plea. No, or insufficient, weight was given to: Mr Poole's subjective understanding or lack thereof, his subjective predicament, his intellectual and emotional ability, and the true position he was placed in.

[40] As regards the defence, Mr Jackson argued that all Mr Poole was required to demonstrate was that there was a possible and realistic defence. It did not need to be a clear defence, beyond reasonable doubt or even probable.

[41] Trial counsel being unprepared was, Mr Jackson submitted, at the heart of the case. That realisation by Mr Poole, along with his belief that the guilty plea had or may have been intimated by counsel behind the scenes, generated his sense of hopelessness and defeat. He was worn down.

[42] Since the District Court hearing, Mr Jackson has obtained an affidavit from a prison officer, Mr Walters, which he sought to adduce as further evidence on appeal.

[43] Mr Walters says he remembers Mr Poole arriving at the prison on 30 November 2017 at around 2.30 pm in the afternoon. According to Mr Walters, Mr Poole appeared "wasted" by which Mr Walters says he means unsteady on his feet, slow moving, uncoordinated, eyes shut and a blank expressionless look. A photo of Mr Poole taken at the prison showing him with an expressionless look is attached as an exhibit to the affidavit.

[44] Mr Jackson relies on the affidavit as bolstering the claim that Mr Bamford was inadequately prepared for trial. Giving evidence from the Bar, he says it took him six weeks to obtain the affidavit which demonstrates the Judge was wrong to assume Mr Bamford could have obtained it within 18 days. Mr Jackson goes so far as to say that had this evidence been available on 1 March 2019 Mr Poole would not have entered the plea in the way he did. Instead, he would have gone to trial as he wanted.

[45] The Crown opposes the application to admit the further evidence. It has also filed a response affidavit from Mr Lucas, the lawyer who represented Mr Poole at the

District Court hearing of the application to vacate the guilty plea. Mr Lucas says he and Mr Poole discussed the prison officer evidence and that he advised Mr Poole it was unlikely to be helpful and was of marginal benefit. Mr Poole did not instruct him to obtain the evidence. Mr Bamford's failure to call the prison officer evidence was however a feature of the application to withdraw the guilty plea.

[46] The "new" evidence of Mr Walters is plainly not fresh. And for reasons we go on to explain, we consider it is also not cogent and therefore should not be admitted.

Analysis

[47] This appeal essentially turns on the facts. Having reviewed all the evidence ourselves, we have come to the clear conclusion the appeal is devoid of merit and should be dismissed.

[48] In our view, the overwhelming weight of the evidence supported the Judge's finding that the decision to enter a guilty plea was a considered and fully informed one made by Mr Poole of his own free will.²⁰ The fact he may have regretted it shortly afterwards does not alter that fact. He entered the plea freely after careful and proper advice from an experienced counsel. He undoubtedly knew what he was doing. He knew the likely consequences and he knew the legal significance of the facts alleged by the Crown.

[49] Mr Poole was experienced in his dealings with the criminal justice system and the process of pleading to charges. Most importantly, he was very familiar with the Crown case against him and in December 2017 had written a lengthy assessment of the Crown case and his defence which ran to some 27 pages. He wrote a second detailed account in August 2018. The evidence was that he knew his case inside out.

[50] He had also demonstrated a preparedness to dismiss lawyers, including on the eve of trial. Mr Allan had been dismissed 16 days before the trial date. This sits uneasily with the suggestion that Mr Poole had felt trapped and had no choice but to plead guilty because of Mr Bamford's alleged shortcomings and the pending trial.

²⁰ Withdrawal judgment, above n 1, at [85], [108], [132] and [138]

[51] Another of Mr Poole's claims in the District Court was that it was Mr Bamford who had already entered his guilty plea for him. He also claimed that until he walked into the Court that morning, he "had no idea" that he was there for a guilty plea hearing.

[52] That was demonstrably false and cannot be glossed over as a subjective understanding or subjective predicament. Apart from the evidence of Mr Bamford and Mr Nolan, and the signed instructions, the transcript of the hearing when the guilty plea was entered records Mr Nolan asking the Judge to defer entry of Mr Poole's conviction. Mr Nolan told the Judge he was making that request because a change of unit at the prison would prevent Mr Poole from completing a course he had been doing. Mr Nolan could not possibly have known that unless the guilty plea had been discussed with Mr Poole beforehand.

[53] Then there is the further point that there had been a two-day interval between Mr Poole's discussions with Mr Bamford about pleading guilty and the entry of the plea, during which Mr Poole could have changed his mind.

[54] As regards the strength of the Crown case, we agree with the Judge that it was a strong case.²¹ There was the text sent by the complainant to his mentor wanting her to come round and help him, hardly something the complainant would have done had he been intending to stupefy Mr Poole and rape him. And there is the unequivocal eyewitness account of the mentor that Mr Poole was the sexual aggressor, the injuries to the complainant and the DNA evidence of Mr Poole's semen on the duvet.

[55] We also agree with the Judge that an application to withdraw a guilty plea "is not a licence to explore a defence or defences which were always available".²² In any event, in our view, the defence that Mr Poole had been drugged and raped by the complainant would almost certainly have been rejected by the jury as implausible.

[56] As regards the "new" evidence of the prison officer Mr Walters, we agree with the assessment made by Mr Lucas that it is of marginal benefit given other more

²¹ At [117].

²² At [119].

compelling evidence — not only evidence about it being Mr Poole who was the sexual aggressor as detailed above — but also evidence of his state of sobriety and general condition at the time.

[57] There is no suggestion for example in the mentor’s account that he presented to her as being under the influence of drugs or alcohol. On the contrary, her evidence of him deliberately inflicting injuries on himself as he left the house suggests that he may have been setting up a strategy to portray himself as the victim.

[58] Then there is the evidence of a change of story. Only a few hours after the incident when he first claimed to police he had been raped by the complainant, he never mentioned being stupefied or drugged. What he said was that he had been attacked and a knife had been held to his throat. He was even able to describe the knife. It was, he said, a serrated knife that came from a knife set.

[59] Later at the police station — some six hours before he was interviewed by Mr Walters — Mr Poole refused to undergo a medical examination despite claiming at that point to have been drugged. Further, the police officers’ observations of him, which were recorded at the time, are at odds with Mr Walter’s recall some seven years later.

[60] It is also noteworthy that Mr Walter’s affidavit exhibits a document described as an “Immediate Needs Checklist” completed by Mr Walters at the time. The form contains no record of Mr Poole being under the influence of some substance even though one of the questions on the form directs the interviewer to ask the incoming prisoner whether there are any medical problems or conditions of which the prison should be aware. Another question is whether there are any other issues that need to be dealt with immediately.

[61] The form also records that in accordance with standard practice Mr Poole was referred for a risk assessment by a nurse. Mr Poole has not provided evidence of the risk assessment form or evidence of why he was unable to obtain it.

[62] For all these reasons we are not persuaded that a miscarriage of justice will occur unless Mr Poole is able to impugn his guilty plea.

[63] The appeal against conviction is accordingly dismissed.

Outcome

[64] The appellant's application for leave to adduce the further evidence of Robert Walters is declined.

[65] The appeal against conviction is dismissed.

Solicitors:
JMJ Lawyers Limited, Timaru for Appellant
Crown Solicitor, Christchurch for Respondent