

**IN THE DISTRICT COURT
AT HAMILTON**

**CRI-2017-019-005151
[2017] NZDC 28022**

NEW ZEALAND POLICE
Prosecutor

v

[YASMIN BRAY]
Defendant

Hearing: 8 December 2017

Appearances: Sergeant M Hepworth for the Prosecutor
G Prentice for the Defendant

Judgment: 8 December 2017

ORAL JUDGMENT OF JUDGE A S MENZIES

[1] Ms [Bray] is before the Court today facing three charges of burglary and one charge of theft. The burglary charges carry a maximum penalty of 10 years' imprisonment and the theft charge carries a maximum penalty of seven years' imprisonment. Ms [Bray] has no previous convictions and is 18 years of age.

[2] Pleas of guilty were entered to the charges on 23 August 2017. Following the entry of those pleas a pre-sentence report was directed, restorative justice was directed and sentencing was arranged for 16 October 2017.

[3] On that date Mr Prentice appeared and there is an indication on the charging document that there may be a basis to vacate the guilty pleas and an application has subsequently been filed. That is what is before the Court for consideration today.

[4] The application is based on the submission that Ms [Bray] was not legally represented when her pleas were entered and that she has an arguable defence to the charges.

[5] Ms Prentice has provided written submissions in support of the application and referred to the main authorities in the context of such an application. They include *R v Clark*¹, *R v Stretch*² and *Hussain v R*³.

[6] Those authorities reflect the well-established principles which relate to such applications. In that context, there are really two main criteria. The first is that the applicant to vacate the pleas was either not legally represented or did not receive adequate legal representation when the pleas were entered and secondly that there is an arguable defence to the charges.

[7] So far as these issues are concerned, Ms [Bray] has filed a brief affidavit dated 30 November and she records an appearance on 10 August on the four charges but her case was put off for legal aid to be completed.

[8] When the matter was next called, a lawyer had not been assigned, although she was not aware of why that was the case. At the second appearance, she spoke with a duty lawyer and told the duty lawyer that she wanted to get the matter over and done with. She assumed having been present when the offences had taken place that she was therefore guilty. She was anxious for the matter to proceed and entered the guilty pleas accordingly.

[9] Her affidavit then goes on to say that she was not aware of how serious the charges were, the evidence against her or the potential consequences of having convictions for these charges. After the pleas were entered she was eventually granted legal aid and this application has then been pursued by Mr Prentice.

[10] So far as the representation issue is concerned, the charging documents show that a duty solicitor did appear on the day but it is clear from the affidavit that

¹ *R v Clark* CA59/02, 28 May 2002.

² *R v Stretch* [2016] NZHC 2783.

³ *Hussain v R* [2011] NZCA 58 at [22].

Ms [Bray] did not have counsel assigned for her or instructed by her in the normal sense and it can be inferred from both the charging documents and what Ms [Bray] has said that the scope of advice that she sought and was provided with would have been very limited. As she said in her affidavit, her main concern at the time was to get matters over and done with.

[11] I am therefore satisfied that the first limb has been met. It is clear that Ms [Bray] did not have the benefit of full legal advice at the time. To a large degree that was of her making in indicating to the duty lawyer that she wanted to get matters over and done with but I appreciate that a person appearing in Court for the first time at a comparatively young age may well not have understood the implications of what she was facing and that has proved to be the case.

[12] So far as the second issue is concerned Ms [Bray] herself has not set out anything in her affidavit about a potential defence. Mr Prentice in his memorandum has outlined that he has taken full instructions and based on his assessment there is an argument as to whether she was either a principal or a party to any of the offending.

[13] The submissions note that the police case against Ms [Bray] relies on the statements from the co-accused and there is likely to be a challenge to the admissibility of those statements. Mr Prentice further argues that there is an argument at law as to whether the alleged facts in relation to one of the charges ending 7998 amounts to burglary at law.

[14] Mr Prentice's submissions then address Ms [Bray]'s age, the fact she has no previous convictions and the potential for significant consequences for her basically for the rest of her life if she has these four convictions against her name.

[15] The police position is one of neutrality. I am satisfied on the information that I have reviewed both in terms of the affidavit and the submissions from Mr Prentice that Ms [Bray] did not have the benefit of appropriate and complete advice when she entered her pleas.

[16] I am further satisfied on the basis of what Mr Prentice has outlined in his submissions that there is the potential for a defence to be argued.

[17] I am therefore satisfied that the necessary grounds are established under s 115 Criminal Procedure Act 2011 and I therefore grant Ms [Bray] leave to withdraw the guilty pleas that have been entered.

A S Menzies
District Court Judge