EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2017-070-001275
[2018] NZDC 23029

[JOSEPH RATCLIFF]

v

THE QUEEN

Date of Ruling: 2 November 2018

Appearances: K Hadaway for the Applicant
S Davison for the Crown

Judgment: 2 November 2018

RULING OF JUDGE C J HARDING

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[1] Mr [Ratcliff] today applies to vacate a plea of guilty to a charge of possession of an airgun except for some lawful, proper and sufficient purpose.

[2] The background to the matter is that on [date deleted] 2017 he had been at a restaurant in Tauranga, other people were also in the same general location, when an argument developed in the cul-de-sac end of [address deleted].

[3] Mr [Ratcliff] went towards his vehicle where on the Crown case he reached into and removed an air powered BB pistol and where on Mr [Ratcliff]'s evidence he was handed that pistol. Nothing in particular turns on that at present. He then turned and presented the gun towards the complainant who had it seems been, at least in part,

pursuing him and fired several pellets. Mr [Ratcliff] does not accept that they hit the complainant. The complainant's position is that they did.

[4] As a result of those events briefly summarised he was charged with assault with a weapon and unlawful possession of the airgun.

[5] Mr Balme was his counsel originally. He had a number of discussions with Mr Balme. His recollection of the detail of those is less than clear. His evidence about what Mr Balme said to him was inconsistent, but he accepted that Mr Balme said to him, having looked at CCTV footage which was available, that he, Mr [Ratcliff], could go to trial and fight for self-defence. He, Mr [Ratcliff], said Mr Balme then went and got a deal to the effect that if he pleaded guilty to charge 2 the airgun possession charge the Crown would offer no evidence on the assault with a weapon charge resulting in that being dismissed.

[6] Although in his affidavit in support of his application to change plea he indicated Mr Balme almost guaranteed s 106 discharge in relation to charge 2. He resiled from that level of guarantee in evidence, but remained of the view that Mr Balme said there was in effect a very good chance in his view of a discharge for reasons that Mr Balme explained.

[7] Mr Balme in his evidence explained that the defendant had seen the disclosure, including by the time of the plea arrangement the Crown summary of facts, the matter having been progressed from the police to the Crown. There had been a number of meetings and Mr Balme was clear that Mr [Ratcliff] knew exactly what the summary of facts from the Crown said, including the parts which he does not accept about pellets hitting the complainant.

[8] Mr Balme's evidence, which I accept, was that it was his view that CCTV footage would have significantly assisted a Judge at any application for discharge providing a graphic vision of what occurred and in effect supporting a submission that this was a minor situation with elements of self-defence to it. But Mr Balme's advice was that it was better to plead guilty to charge 2, avoid a trial on charge 1 and apply for a discharge, which had a strong prospect of success.

[9] Mr Balme's evidence was that the defendant, Mr [Ratcliff], he, Mr Balme, and the defendant's uncle, who was apparently heavily involved, all agreed that that was the appropriate course. That is what occurred.

[10] Mr [Ratcliff] now applies to vacate his guilty plea on the basis firstly, that he has a tenable defence of self-defence and secondly, that vacating of the plea is required in the interests of justice.

[11] The governing provision of s 115 Criminal Procedure Act 2011.

> **115 Plea of guilty may be withdrawn by leave of court**
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> (1) A plea of guilty may, by leave of the court, be withdrawn at any time before the defendant has been sentenced or otherwise dealt with.
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> (2) The court must grant leave to a defendant to withdraw a plea of guilty referred to in section 116(1) if—
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> (a) the court, presided over by the judicial officer that gave the relevant sentence indication, indicates that the circumstances described in section 116(2) apply and it proposes to impose a sentence of a different type or types, or of the same type or types but a greater quantum, than that specified in the sentence indication; or
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> (b) the court, presided over by a judicial officer other than the one that gave the relevant sentence indication, indicates that it proposes to impose a sentence of a different type or types, or of the same type or types but a greater quantum, than that specified in the sentence indication.

[12] The circumstances in which that discretion should be exercised, have been discussed at length by the Court of Appeal in *R v Merrilees*.[1]

> The exceptional circumstances in which an appeal against conviction may be pursued after entry of guilty are described by this Court in *R v Le Page* … It has to be shown a miscarriage of justice will result if a conviction is not overturned, and where an appellant fully appreciates the merits of his position and makes an informed decision to plead guilty, a conviction cannot be impugned. It was said that a miscarriage will be indicated in three broad situations, namely:
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> > [17] …The first is where the appellant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge. These are situations where the plea is shown to be vitiated by genuine misunderstanding or mistake. Where an accused is represented by

[1] *R v Merrilees* [2009] NZCA 59.

> counsel at the time a plea is entered, it may be difficult indeed to establish a vitiating element …
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> [18] A further category is where on the admitted facts the appellant could not in law have been convicted of the offence charged …
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> [19] The third category is where it can be shown that the plea was induced by a ruling which embodied a wrong decision on a question of law …
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> There will be a further situation where trial counsel errs in his or her advice to an accused as to the non availability of certain defences, or outcomes, or if counsel acts so as to wrongly, and perhaps negligently, induce a decision on the part of a client to plead guilty under the mistaken belief or assumption that no tenable defence existed or could be advanced.
>
> It is often the case that an offender pleads guilty reluctantly, but nevertheless does so, for various reasons. They may include the securing of advantages through withdrawal of other counts in an indictment, discounts on sentencing, or because a defence is seen to be futile. 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.

[13] This is not a situation where there was any genuine misunderstanding or mistake. Mr [Ratcliff] was represented by experienced counsel and clearly understood the potential availability of a self-defence argument when the guilty plea was entered. He elected to plead guilty to one charge and in effect take what he regarded as a good chance of a discharge rather than going to trial on two charges.

[14] This is not a situation where he could not in law have been convicted of the offence charged nor is it a situation in the third category described by the Court of Appeal where there was a plea induced by a ruling involving a wrong decision on a question of law. There was no improper pressure on Mr [Ratcliff] to plead guilty.

[15] In terms of the more recent decision of Nation J in *R v Enoka* [2] adopted in *Foley v R*, he did really plead guilty.[3] There is no defence now proffered of which he was unaware when he pleaded guilty. There was no defective or irregular aspect to

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2 *R v Enoka* [2017] NZHC 2032.
3 *Foley v R* [2016] NZCA 607.

the proceedings and there is no suggestion of any impairment or lack of capacity to make a proper decision. He did not act on any material mistake.

[16] The argument left to the defendant is that it is in the interests of justice that he be allowed to vacate his plea. The authorities have some time indicated that where a defendant is represented by experienced counsel and has made a considered decision to plead guilty he will rarely be permitted to change his plea. That does not preclude me granting the application, but I am unable to conclude against the background to which I have referred that leave to vacate his plea should be granted to Mr [Ratcliff]. That is not required in the interests of justice. His plea was entered after detailed consideration and careful advice by experienced counsel.

[17] There is no injustice in requiring the plea to remain and the application is declined.

C J Harding
District Court Judge