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

IN THE DISTRICT COURT
AT NAPIER

CRI-2015-041-001516
[2018] NZDC 3188

THE QUEEN

v

TRIESTE MARTIN ROPIHA
Defendant

Hearing: 13 February 2018

Appearances: Mr Walker for the Crown
Mr Tennet for the Defendant

Judgment: 28 February 2018

DECISION OF JUDGE D G SMITH
[on application to change plea]

---

[1] The defendant Mr Ropiha was charged with 12 charges of possession of a class A controlled drug, namely methamphetamine for a purpose specified in s 61(c) of the Misuse of Drugs Act 1975, two of those charges being joined with a named co-offender; and 6 charges of supplying a class A controlled drug, namely methamphetamine and one charge under the Arms Act of being unlawfully in possession of a pistol, namely a sawn-off shotgun in contravention of s 50(1)(a) Arms Act 1983. The last charge referred to carries a maximum sentence of three years imprisonment. All the other charges carry a maximum sentence of life imprisonment.

[2] On all matters Mr Ropiha originally entered not guilty pleas.

[3] On 29 November 2016, the Crown presented an amended Crown charge notice with one charge of possession of methamphetamine for supply (as a representative charge) and a second charge of supplying methamphetamine (as a representative charge); and the unlawful possession of a firearm charge remained.

[4] Mr Ropiha appeared in the Napier District Court on 29 November 2016 by way of an AVL link from the prison at which he is being held.

[5] Counsel appearing for Mr Ropiha entered guilty pleas to charges 1 and 2 and the Court was advised that a disputed facts hearing was required. As to the third charge, Mr Ropiha changed his election to Judge-alone and that charge was to be dealt with on the same day as the disputed facts hearing.

[6] Mr Ropiha's counsel was Mr Russell Fairbrother QC. On the day that the pleas were entered Mr Fairbrother was detained in a matter in the Court of Appeal. His instructing solicitor appeared. It was through him that the pleas were entered.

[7] On 3 August 2017 (i.e. eight months later) Mr Ropiha filed an application for leave to withdraw his guilty pleas.

[8] The grounds relied upon in the application are:

(a) The Court has power to so order under s 115 of the Criminal Procedure Act 2011.

(b) The plea was made under pressure and Mr Ropiha was effectively forced into it.

(c) He has a defence to the charges which ought to be heard.

(d) Further and additionally, he did not enter the guilty pleas and they were entered beyond his instructions so he has not entered a guilty plea and they should be withdrawn.

(e) It is in the interests of justice to order the change of plea.

(f) To be advanced by submissions of counsel at the hearing.

(g) As appearing by the affidavit of Mr Ropiha sworn and filed in support.

(h) Reliance is placed on s 115 and *Webber v Police;*[1] *R v H;*[2] *R v Merrilees*;[3] *Williamson v R*;[4] *R v Hall*;[5] *R v Le Page*;[6] and *R v Mitchell*.[7]

The law

[9] The application relies on s 115(1) of the Criminal Procedure Act 2011 which states:

> **115 Plea of guilty may be withdrawn by leave of court**
>
> (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.

[10] Gault P in delivering the decision of the Court of Appeal in *R v Clark*,[8] stated:

> Prior to sentencing leave to vacate a plea of guilty is a matter for the discretion of the Judge in the exercise of the court's inherent jurisdiction (*Adams on Criminal Law*, CA356.04). It is a broad discretion. While the most common circumstances which warrant leave are that the accused has not really pleaded guilty, that there has been some critical mistake, or there is a clear defence to the charge, these are no more than examples (see *R v Le Comte* [1952] NZLR 564, 574; *R v Turrall* [1968] NZLR 312, 313; *R v Ripia*; *Falkner v Crown Solicitor at Auckland* (Auckland High Court, T116/94, 27 July 1995). The underlying object is to avoid a miscarriage of justice, or, perhaps in the prospective context is better viewed from the opposite end, to consider the interests of justice. Such a test incorporates not only the interest of the accused but also the interests of victims or witnesses as well (*R v Ripia*[9] at p4).

[11] The onus of making out the relevant grounds rests on the defendant as applicant.[10]

[12] The circumstances in which the Court may allow a guilty plea to be withdrawn may be summarised as follows:

---

[1] *Webber v Police* (1991) 7 CRNZ 319.
[2] *R v H* [1991] 7 CRNZ 110.
[3] *R v Merrilees* [2009] NZCA 59.
[4] *Williamson v R* [2015] NZCA 621.
[5] *R v Hall* [2015] NZCA 403.
[6] *R v Le Page* [2005] 2 NZLR 845 (CA) para [16]-[19].
[7] *R v Mitchell* [2017] NZCA 184.
[8] *R v Clark*, 28 May 2002, CA 59/02 at para [14].
[9] *R v Ripia* [1985] 1 NZLR 122.
[10] *Blakemore v Waitakere District Court* HC Auckland M879/02, 14 November 2002 at para [12].

(a) If the defendant did not appreciate the nature of the charge, or did not intend to admit his or her guilty, or if on the admitted facts the defendant could not have been guilty of the offence charged.[11]

(b) If the defendant's ability to determine whether or not to plead guilty was affected by a permanent impairment or lack of capacity or by ill-health or other circumstances.

(c) If there is a possible defence to the charge of which the defendant was unaware when he or she pleaded guilty, whether because of incompetent legal advice or otherwise.[12]

(d) There is some impropriety in conduct of the proceedings or of the prosecution.[13]

[13] The Court of Appeal has made it clear that leave will seldom be given where the defendant has had competent and correct legal advice before the plea[14] or, except in very rare circumstances, if the Court is satisfied the plea was made freely and on an uninformed basis.[15] This includes if the defendant has an arguable defence which he or she chose not to advance after proper advice about the charges and the quality of the defence.[16] Leave will not be given if the guilty plea was entered by a competent defendant who had no viable defence.[17]

[14] The above principles were summarised by Asher J in *Joshi v R*.[18]

[15] At paragraph [7] His Honour stated:

> Regret over the decision to enter a guilty plea is not the test. As was stated in *R v Merrilees*:

---

[11] See *Udy v Police* [1964] NZLR 235 (SC); *R v Taylor* [1967] NZLR 577 (SC).
[12] *R v Le Comte* [1952 NZLR 564 (SC); R v Merrilees [2009] NZCA 59; *Watts v R* [2011] NZCA 41; *Sharp v District Court at Whangarei* [1999] NZAR 221 (HC).
[13] *R v Nevin* [2006] NZCA 72, (2006) 245 NSR (2d) 52; *R v Djekic* (2000) 147 CCC (3d) 572 (ONCA).
[14] *R v Stretch* [1982] 1 NZLR 225 (CA).
[15] *R v Merrilees*.
[16] *Hussein v R* [2011] NZCA 58 at [22].
[17] *R v Ericson* [2007] NZCA 18.
[18] *Joshi v R* [2015] NZHC 2022 at paras [5]-[7].

> "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."

The evidence

[16] In his affidavit in support, Mr Ropiha states:

> 4. I have been defending this matter and have been to one pre-trial. I made it very clear with my communications with Russell Fairbrother QC that I had a defence and wanted to defend this.
>
> 5. However, at my appearance when the guilty pleas were entered I was appearing by AVL. Russell Fairbrother was not there. I am not sure who the lawyer was, I think it might have been Leah Lafferty.
>
> 6. The lawyer there did not speak to me at any time before, during or after the hearing. Instead, he spoke to the Judge. He entered guilty pleas on my behalf. I was quite surprised about that because it was not my intention and was done against my instructions. I made a complaint and the Court transcript will show this.
>
> 7. Friends privately paid for this. The money ran out very quickly. Mr Fairbrother did not do the application to exclude the search about the van well. He did not come and see me often and talked about rolling everything up to a Judge-alone hearing where the facts could be established, so it comes as no surprise that he entered a guilty plea for me.
>
> 8. I made it clear to him a few times he visited me in prison. Up until then he had only visited me four or five times. I made it clear to him that I was not pleading guilty and I was very unhappy with what happened and that I was apply for legal aid, which I did so.
>
> 9. The case was immediately put off and I applied for fresh counsel and obtained it. I signalled this application immediately and I have made it as soon as possible.
>
> 10. The first part of my application is that I did not enter the pleas.

[17] The balance of the affidavit deals with factual matters concerning the charges.

[18] A transcript of what took place when the pleas were entered was presented to Court. It was accepted that the transcript is a fair representation of what was said. It makes it clear that there was no complaint from Mr Ropiha at the time that the pleas were entered and he now accepts that.

[19] Under cross-examination, Mr Ropiha accepted that what had occurred had been discussed with Mr Fairbrother, and yes, that he had recommended that is the way to go. He claimed that was not the same as him taking it up. He disputed that he had accepted Mr Fairbrother's advice. He put it that he was brainstorming in his head, and he did not understand. Mr Ropiha maintained that he had not made a decision and that he would go back and think about it, and that he would sit on it. He claimed that he had been unable to get a hold of Mr Fairbrother before Christmas.

[20] It was put to Mr Ropiha that he had been in Court many times and that he would have complained if the entering of pleas had not been as he intended. He responded that he did not want to call out and thought he could do it after.

[21] Mr Fairbrother swore an affidavit following his release from his obligation of confidentiality.

[22] Mr Fairbrother had had appointments with Mr Ropiha on eight occasions and stated:

> 4. Mr Ropiha faced many charges coalescing around two separate incidents. The first was a night-time search without warrant by police at a vacant Flaxmere address; the police allege Mr Ropiha fled the scene on their arrival. The second was the occasion of his arrest in the carpark of [the retail store] in Napier.
>
> 5. In relation to the Flaxmere incident, Mr Ropiha denied he was present and the search was challenged at a pre-trial before Judge Rea. His Honour ruled the fruits of the search admissible.
>
> 6. In relation to [the retail store] carpark arrest, Mr Ropiha was fixated on his belief the officer, who was described stumbling across a drug deal was not truthful. Mr Ropiha believed the route the officer said he was taking was improbable, given his purported destination. There was no dispute Mr Ropiha was in a vehicle in which a quantity of methamphetamine was found, along with cash and a gun. In dispute was his role, if any, and the extent of his knowledge.
>
> 7. I form the opinion that there was no evidential basis for a challenge to [the retail store] carpark search and that on both matters Mr Ropiha was best tried by a Judge alone. To succeed required an objective, time consuming and careful forensic analysis by the trier of fact. I believe the concentration on the issues, in the face of so much amphetamine and indicators of dealing, was beyond what could be expected of a jury.

> 8. As a result of a discussion with Mr Walker, the Crown prosecutor, it was proposed a number of charges be reduced into represented charges of possession for supply and supply. Pleas of guilty could then be entered, without compromising Mr Ropiha's position, and the extent of any involvement resolved by a disputed fact hearing.
>
> 9. I discussed this course of action with Mr Ropiha at Rimutaka Prison and he, with considerable hesitation, accepted my advice.
>
> 10. Before the scheduled disputed fact hearing, Mr Ropiha changed that instruction. I was disappointed, but not completely surprised. I found Mr Ropiha to be articulate but untrusting of the policing and judicial system. The impression that I gave Mr Ropiha was that his natural instinct is to distrust and fight every inch of the way. At the time, I believed he trusted me and he accepted my advice on that basis.
>
> 11. I have no desire to obstruct Mr Ropiha's application for change of plea. That he agreed to the proposal of pleading to representative charges and disputing the factual background, was more a product of my persuasion than his inclination.

[23] Under cross-examination, Mr Fairbrother was taxed on his evidence by Mr Tennet, counsel for Mr Ropiha. Mr Fairbrother denied that Mr Ropiha was still undecided. Mr Fairbrother was clear, "Mr Ropiha accepted my advice. We shook hands on it". Mr Fairbrother was clear that he was forcible in terms of his advice, but he was clear that Mr Ropiha saw the benefits and that he was not intimidated by Mr Fairbrother.

[24] Having heard Mr Fairbrother, Mr Tennet's position on behalf of Mr Ropiha, altered slightly. He had begun by claiming that Mr Ropiha had never agreed to the pleas being entered. The position then moved to one that he changed his mind after he had seen Mr Fairbrother, but before the matter appeared in Court. The suggestion made there should have been a check with Mr Ropiha before the plea was actually entered at that time.

[25] He secondly submitted that because pleas had been entered by a lawyer rather than through Mr Ropiha's own words that was not entering the plea. As Mr Walker pointed out in response, s 11 of the Criminal Procedure Act provides for the defendant's case to be conducted by a lawyer.

[26] Having considered the affidavit evidence and heard the cross-examination of both Mr Ropiha and Mr Fairbrother, I am left in no doubt that Mr Fairbrother did

receive instructions from Mr Ropiha to enter guilty pleas and that Mr Ropiha has had second thoughts after the pleas were entered. I accept that the pleas were entered on Mr Ropiha's instructions.

[27] That determination does not dispose of the application alone. I am also required, in the interest of justice, to consider whether Mr Ropiha does have a valid defence.

[28] The matters put forward by Mr Tennet in terms of what the possible defence would be, are speculative. The matters referred to in Mr Ropiha's affidavit reinforced the position as it was seen by Mr Fairbrother; namely the circumstantial evidence which Mr Ropiha faces is overwhelming.

[29] Mr Ropiha's real concern was an obsession about the police officer's route and concern that the buyer was a plant. He acknowledges being in a shed in relation to one of the incidents where there was drug dealing taking place. He says he left his waist bag with his I.D in it in the shed, on top of a car. He claims it must have been placed under the car near drugs by somebody else to hide their involvement.

[30] In respect of the arrest at [the retail store], he claims he was a passenger in the car and then states that he does not normally drive it. He claimed he did not know or see any drugs found in the van.

[31] Given the quantities that were found, Mr Ropiha's credibility is extremely low, in respect of both matters.

[32] The advice given to Mr Ropiha by Mr Fairbrother was sensible and appropriate. There is nothing that has been put before me which convinces me that Mr Ropiha has a viable defence to the two charges that he has pleaded guilty to, and the pleas are maintained. The application to vacate the guilty pleas is dismissed.

[33] The matter was previously scheduled for a disputed facts hearing.

[34] This matter is adjourned to 16 March 2018. That is a nominal date at this time. A scheduling of the disputed facts hearing and the defence of the firearms charge needs to be made so all matters may be disposed of.

D G Smith
District Court Judge