IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA220/2018
[2018] NZCA 349

BETWEEN	HEATHER GLEASON-BEARD Appellant
AND	THE QUEEN Respondent

Hearing: 24 July 2018

Court: Williams, Brewer and Thomas JJ

Counsel: N P Bourke and K Paima for Appellant
J E Mildenhall for Respondent

Judgment: 6 September 2018 at 4.00 pm

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The appeal against conviction is allowed and the conviction is quashed.

C A judgment of acquittal is to be entered.

REASONS OF THE COURT

(Given by Thomas J)

[1] The appellant, Heather Gleason-Beard, is a young Canadian who was visiting New Zealand in 2017. One night at a bar in Queenstown she took offence at something another bar patron said to her. She threw her drink at him, cutting his top lip as the glass connected with his face. On the morning of her trial on charges including a charge of wounding with intent to injure, the trial Judge initiated an in-chambers

hearing where he expressed his doubt there was any defence to that charge and said a sentence of imprisonment was likely in the absence of a guilty plea. Eventually, the Judge gave a formal sentence indication on the alternative charge of injuring with reckless disregard. Ms Gleason-Beard accepted the indication, pleaded guilty and was sentenced.[1]

[2] Ms Gleason-Beard now appeals her conviction on the basis that comments made by the Judge in chambers improperly influenced her decision to plead guilty and the sentence indication which followed was unnecessarily rushed and unfair.

[3] The notice of appeal was filed out of time for reasons adequately explained by trial counsel. The Crown does not oppose an extension of time and it is granted.

Factual background

[4] On the night of 9 July 2017, Ms Gleason-Beard and the complainant were drinking at a bar in Queenstown. They began talking. Ms Gleason-Beard became upset with the complainant and the bar manager described her punching and kicking the complainant, and spitting in his face. The bar manager intervened. Ms Gleason-Beard walked away but turned back and struck the complainant in the face, either with her glass or with that of the complainant. Bar staff removed Ms Gleason-Beard from the bar and called the police. When apprehended, Ms Gleason-Beard admitted to the police that she struck the complainant with a glass but denied spitting on him.

[5] The complainant received a laceration to his top lip as a result of being struck by the glass but declined medical treatment. In his victim impact statement, the complainant said his tooth was chipped and he could not afford to go to the dentist.

[6] In her interview with the police, Ms Gleason-Beard described the complainant being rude to her and insulting her. She recalled him saying, "[o]h you have small tits, you have bee sized tits". While she did not know exactly what had happened, she said

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1 *R v Gleason-Beard* DC Invercargill CRI-2017-059-481, 21 March 2018.

she acted impulsively and intended to throw the drink at the complainant rather than strike him with the glass.

[7] Ms Gleason-Beard was charged with assault,[2] wounding with intent to injure,[3] and (alternatively) injuring with reckless disregard.[4]

The day of the trial

[8] Ms Gleason-Beard's jury trial was set down for 21 March 2018. Prior to the commencement of the trial, at approximately 9.40 am, Judge M J Callaghan requested to see counsel in chambers, with Ms Gleason-Beard present. The Crown prosecutor, Ms Thomas, was not present at this stage although her junior was. There was an exchange between the Judge and Ms Gleason-Beard's then counsel, Mr Collins. Because of its importance to this decision, we set out the exchange in full.

> Court: The reason I've asked to see you in particular, Mr Collins, is I'm struggling to see what defence can be argued in front of the jury on these charges.
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> Mr Collins: Thank you for the indication, Sir, quite frankly Miss — the sole issue is intention. Miss Gleason-Beard [was] not intending to apply direct and force with the glass into [the complainant's] face. Interestingly, Sir, for the first time, two nights ago, a further notebook entry was disclosed to counsel, through the officer in charge and for the first time suggesting that the fact the glass that connected with [the complainant's] face was his own glass. The entire intention of Ms Gleason-Beard was to throw on the liquid on the complainant, not to assault with the glass or causing an injury.
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> Court: But it is still the intentional application of force, isn't it?
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> Mr Collins: Sir, there will be evidence given, and I accept that perhaps it's not expressly made out in Ms Gleason-Beard's DVD interview but she intends to give further evidence about her intentions and what she perceived happening to her at the time with [the complainant's] actions and words that he's used. Obviously I'm going to prejudice her defence by disclosing that to my learned friend now, Sir, but certainly, Sir, in my view, and I've discussed it at length with other counsel, other, there's certainly a defence to run, Sir. She's fully aware of the guilty plea credit. She's fully aware there will be none of that if she's convicted. Respectfully, Sir, there's a defence there to run.
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> Court: Well I don't want to prejudice her defence but I just want her to make sure she understands that if she's convicted of charge 2 then the starting point

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2 Crimes Act 1961, s 196, maximum penalty one year's imprisonment.
3 Section 188(2), maximum penalty seven years' imprisonment.
4 Section 189(2), maximum penalty five years' imprisonment.

for the offending has to be somewhere between two and a-half and three years on the basis of *Nuku* with the aggravating features.

Mr Collins: Thank you, Sir, but she's not seeking a sentence indication.

Court: No, I'm not giving her a sentence indication I'm just indicating that, on the basis of the facts that I've read on this file, and I'm the Trial Judge, if those facts come out at a hearing then that's where she's looking at. The problem that she faces then is that she doesn't get any discount for a guilty plea and, I don't know whether she's got previous convictions or not, I doubt it —

Mr Collins: She's not, Sir.

Court: — I doubt that she has but she might struggle, and this is the problem, down to get below two years so I'm just, I'm just saying that on the basis — I mean that you've got your instructions and —

Mr Collins: Your Honour, this is concerning in front of my client to be throwing out prison and the only attempt to that is to get her to plead guilty. I just I really struggle with that Sir.

Court: No — okay. Well all I'm doing is I feel that it's important that she hears what things/where things are at because if she's going to give evidence contrary to what she says in her DVD then that's —

Mr Collins: It's not contrary, Sir, its supplementary and she's —

Court: – all right, well that's a matter for her but I just want, I just want you to understand, I want her to understand the situation that she's facing. The second charge is also a qualifying offence.

Mr Collins: And certainly, Sir, but I think the Crown — on the basis of the complainant's statement, Sir, there's no evidence about the mechanics of how that's occurred. For the first time, as I've mentioned, he says it's his — her glass. For the first time, two nights ago, I learned that the other witness to be called thinks it was his own glass. Sir, the mechanics —

Court: Well she seems to think it was her glass.

Mr Collins: — what he did — what she did, sorry. And what was her intention, are the sole issues in trial and that's what I'm opening to the jury, Sir, and that's what I'll be closing on to the jury too.

Court: All right, well that's fine, I'm just, I'm just letting you know or letting her know —

Mr Collins: — I've discussed fully the guilty plea credit with her Sir, her potential options from day one about another route that she could have gone and, Sir, the day before trial it's — the only option is to be asking her to plead guilty Sir.

Court: Look — I'm not asking her to do that, I'm merely pointing out the reality of the situation. She said, "I was there, I was drunk, I was with some friends."

Mr Collins: Sir, she knows what she said in her DVD.

Court: "And I was throwing a drink."

Mr Collins: She attempted to throw the liquid, like — and I don't want to give my closing, Sir, but I can give my closing now if you like.

Court: No, I understand that. I understand that. I'm just —

Mr Collins: I appreciate Your Honour's warning. I appreciate Your Honour's judicial advice.

Court: I'm just trying to be, I'm just trying to be even-handed because it seems to me it's a serious matter for her —

Mr Collins: It is a very serious matter, Sir.

Court: Yeah, I know.

Mr Collins: She had to have intended to injure him, Sir.

Court: All right, okay, well that's fine, I just —

Mr Collins: And that there's a bit of "water under the bridge" for the jury will find that beyond reasonable doubt in my submission, Sir.

Court: All right, okay. All right. Well that's fine I just thought I better raise it because —

Mr Collins: Thank you, Sir, I appreciate it but the difficulty I feel someone on Monday morning (inaudible 09:46:57) —

Court: All right. All right well we'll see — will be, sorry?

Mr Collins: I just feel the only reason —

Court: Well it's the first time, first time I've had you and your client together to discuss these matters, so that's why.

Mr Collins: Thank you, Sir, but I'm well aware of my obligations. I'm well aware of the guilty plea credit. I'm well aware of the decision of the Supreme Court of *Hessell*. I would have fully appraised Ms Gleason-Beard —

Court: Yeah I know that. I can understand that.

Mr Collins: And in terms of discussing with the client today, when she's facing jury trial when no doubt she's nervous enough as it, to effectively start throwing prison around as a — really the only —

Court: Well she must — she must know that that's the — it's a *Nuku*, it's a band — it's Band 2 of *Nuku* —

Mr Collins: She had to have intended to cause that injury, Sir.

> Court: If she's convicted, I'm saying if she's convicted its Band 2 of *Nuku*. There's extreme violence. There's weapon. There's attacking of the head and there's a vulnerable victim, so there are four —
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> Mr Collins: How was this victim vulnerable, Sir?
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> Court: Well it was an unexpected assault on him.
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> Mr Collins: Well there's a bit of evidence to go, Sir.
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> Court: I know, I understand that but I'm just saying there are four aggravating factors.
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> Mr Collins: There's plenty of mitigating factors, Sir, but obviously she's got to be found beyond reasonable doubt to be guilty first, to have an intent to injure him.
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> Court: All right, that's fine, I just needed to raise it, okay, thank you.

[9] Ms Gleason-Beard was then stood down in custody.

[10] As soon as Ms Thomas arrived at Court, Mr Collins discussed his difficulties with her. It is not contested that Ms Thomas expressed her concern and said she would not accept a guilty plea unless Ms Gleason-Beard had a lengthy opportunity to discuss that with Mr Collins. She suggested asking for a formal sentence indication on the charge of injuring with reckless disregard only, saying the Crown would not seek a sentence of imprisonment. Mr Collins then obtained instructions from Ms Gleason-Beard to seek a sentence indication on one charge of injuring with reckless disregard.

[11] According to the Court's record, the Judge gave his indication at approximately 10.50 am.[5] He indicated a sentence of 220 hours' community work and emotional harm reparation of $3,000. Ms Gleason-Beard and Mr Collins discussed the indication in the cells. Ms Gleason-Beard wavered between rejecting and accepting the indication, before accepting it at 2.00 pm.

[12] Ms Gleason-Beard's final sentence was adjusted to 100 hours' community work and $5,000 emotional harm reparation following her offer to increase the latter.

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5 We note that Mr Collins has suggested that the sentencing indication had concluded by 10.30 am. Nothing turns on this time difference.

Grounds of appeal

[13] Ms Gleason-Beard said her guilty plea was entered under duress as a result of the Judge erring by:

(a) effectively giving an unrequested sentence indication;

(b) adopting a manifestly excessive starting point;

(c) clearly intimating she should plead guilty otherwise she would be imprisoned; and

(d) undermining counsel's advice to Ms Gleason-Beard as to the availability of a defence and the likely sentencing outcome if she were found guilty.

[14] Ms Mildenhall, for the Crown, submitted there was no possibility of a miscarriage of justice and the appeal must therefore fail. The Crown's position is that, while Ms Gleason-Beard was clearly upset and under pressure, there was no suggestion she was not competently and fully advised. Moreover, Ms Mildenhall submitted there was no defence to the charge.

Affidavits in support of the appeal

[15] Ms Gleason-Beard filed an affidavit outlining her experience of the day of the trial and why she pleaded guilty.

[16] Ms Gleason-Beard said she did not follow everything that was said in the initial exchange between the Judge and Mr Collins but had the impression the Judge was saying he would sentence her to imprisonment. She felt the Judge was not interested in hearing her perspective on what had happened and described feeling "bullied and belittled". She said she began to panic and had the impression the Judge simply wanted her to plead guilty and that was the point of requesting the in-chambers meeting.

[17] Ms Gleason-Beard said she had confidence in her defence but was concerned that the Judge, with his experience, was clearly trying to persuade her there was a good chance the jury would find her guilty and she would be sent to prison. She believed the Judge would influence the jury and their opinions and she was aware he would be the sentencing Judge.

[18] Ms Gleason-Beard described being in the court cells as a "foreign and intimidating experience". She said that, following the sentence indication, she was unable to think rationally and all she could think about was a lengthy prison sentence. She emphasised this was the first criminal charge she had ever faced and she had no prior experience with the court process. She felt "dehumanised", alone and pressured to plead guilty. She felt things "were spiralling out of control" and that her only way to take back control was to plead guilty, knowing the sentence she would receive.

[19] Mr Collins also filed an affidavit. He said that at no time had Ms Gleason-Beard admitted guilt to him in respect of any of the charges. Instead she consistently said that she had intended only to throw the liquid contents of her beer glass at the complainant as he motioned towards her chest. Mr Collins exhibited Ms Gleason-Beard's handwritten brief of evidence giving an outline of the defence she was likely to run at trial. He did not advise Ms Gleason-Beard to plead guilty or support that step. In his words, "her unwavering narrative to me was a complete answer to the Crown case".

[20] Mr Collins described the difficult environment of the court cells where Ms Gleason-Beard was held between 10.30 am and 1.30 pm to consider the sentence indication. Mr Collins met with her in the cell meeting room but they were subject to interruptions by others also wanting to use the room. This involved Ms Gleason-Beard being returned to a holding cell. Mr Collins himself was under pressure, receiving several telephone calls from the Crown prosecutor and court registry staff wanting to know whether Ms Gleason-Beard had made a decision, because the jury panel was waiting and arrangements had to be made for a witness to give evidence via AVL if the trial were to proceed. Mr Collins said Ms Gleason-Beard was distraught and solely focused on whether she would be sent to prison. She asked whether the Judge was biased against her and whether he could be asked to recuse himself. Although

Ms Gleason-Beard was allowed to make a phone call to her mother in Canada, this was observed by two Corrections officers, a court registrar and a court attendant.

The law

[21] As this is an appeal against conviction, it falls to be considered under s 232 of the Criminal Procedure Act 2011. The relevant provision in this case is s 232(2)(c) which requires an appellate court to allow an appeal where there has been a miscarriage of justice for any reason. A miscarriage of justice means:[6]

> (4) … any error, irregularity, or occurrence in or in relation to or affecting the trial that—
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> (a) has created a real risk that the outcome of the trial was affected; or
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> (b) has resulted in an unfair trial, or a trial that was a nullity.
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> …

[22] Where the conviction follows a guilty plea, the appeal threshold has been described in the following terms:[7]

> [16] … it is only in exceptional circumstances that an appeal against conviction will be entertained following entry of a plea of guilty. An appellant must show that a miscarriage of justice will result if his conviction is not overturned. Where the appellant fully appreciated the merits of his position, and made an informed decision to plead guilty, the conviction cannot be impugned. …

[23] Those exceptional circumstances include three broad categories discussed by this Court in *R v Le Page*:[8]

> (a) where the appellant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge;
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> (b) where on the admitted facts the appellant could not in law have been convicted of the offence charged; or

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6 Criminal Procedure Act 2011, s 232(4).

7 *R v Le Page* [2005] 2 NZLR 845 (CA), cited with approval in *Richmond v R* [2016] NZCA 41 at [16]; and *Nixon v R* [2016] NZCA 589 at [8].

8 *R v Le Page*, above n 7, at [17]–[19].

(c) where the plea was induced by a ruling which embodied a wrong decision on a question of law.

[24] The third category includes circumstances where a judge rules there is insufficient evidence for a particular defence to be left to the jury.[9] However, a guilty plea will be set aside in the circumstances of an adverse ruling only if there is no other option for a defendant other than to plead guilty.[10]

[25] A fourth category, where trial counsel errs in the advice given as to the non-availability of certain defences or potential outcomes, was more recently adopted in *R v Merrilees*.[11] This Court noted:

> [35] 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.

[26] In these circumstances, the appellant must raise a defence of "some substance".[12] There is conflicting authority as to the threshold the defence must meet. In *Cooper v R*, this Court declined to set a particular threshold and refused to adopt the Crown's submission that the appellant must show the defence has good prospects of success.[13] More recently in *Nixon v R*, this Court stated mere assertions were not enough and a "real case for the defence must be established".[14] Having said that, the Court then cited the following passage from *Penniket v R*, indicating that the "real case" comment does not elevate the threshold but rather requires there be more than the mere existence of a possible defence:[15]

> [8] … The existence of a defence at the time of the guilty plea, even a possibly viable defence, is not alone enough to allow a change of plea. There may be

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9 *R v Clarke* [1972] 1 All ER 219 (CA); and *R v Le Page*, above n 7, at [19].
10 *R v Le Page*, above n 7, at [23]; and *Banbrook v R* [2013] NZCA 525 at [20].
11 *R v Merrilees* [2009] NZCA 59 at [34], cited with approval in *Richmond v R*, above n 7, at [18]; and *Nixon v R*, above n 7, at [10].
12 *Cooper v R* [2013] NZCA 551 at [19]–[21].
13 At [19]–[21].
14 *Nixon v R*, above n 7, at [11].
15 *Penniket v R* [2016] NZCA 154, cited in *Nixon v R*, above n 7, at [11].

> defences that could be run, but which are put to one side because they are unlikely to succeed, or carry other disadvantages. In the absence of material counsel error, such decisions cannot be revisited on appeal save in rare circumstances. The sole fact that a possible defence was known to exist at the time the appellant pleaded guilty does not on its own show a miscarriage of justice.

[27] Other categories of exceptional circumstances for allowing an appeal against conviction following a guilty plea have been accepted in principle. To give one example, the Supreme Court in *Wilson v R* stated:[16]

> [104] We accept Mr Cook's submission that the summary in *Le Page* is incomplete because it does not recognise the possibility that a conviction following a guilty plea may be quashed on appeal (and no retrial ordered) where there is an abuse of process of a type that would justify the granting of a stay in order to preserve the integrity of the justice system. In principle, where an abuse of process by the police or prosecuting authorities is sufficiently significant to justify the granting of a stay, the fact that a defendant has entered a guilty plea should not prevent him or her from appealing against conviction in reliance on the abuse of process. The entry of the stay in this type of case indicates that the prosecution should not have gone to trial for reasons based on the public interest. The fact that a conviction results from a guilty plea rather than a trial should not change the position, at least in principle.

Issues

[28] There are two issues in this case. The first is whether the Judge's intervention constituted exceptional circumstances which could result in a miscarriage of justice. The second is whether Ms Gleason-Beard's proposed defence was of sufficient substance such that the Judge's approach created a real risk that the outcome of the trial was affected.

[29] If the answer to both these questions is yes, a miscarriage of justice has occurred.

Did the Judge's intervention constitute exceptional circumstances?

[30] Mr Bourke, for Ms Gleason-Beard, submitted the Judge, of his own initiative, convened a hearing in chambers before the start of the trial and proceeded to give what amounted to an unrequested sentence indication. Although the Judge disavowed such,

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16 *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705.

Mr Bourke submitted the Judge's comments fell within the definition of a sentence indication.[17] The Judge assessed the offending as having four aggravating features and falling within band two of *Nuku v R*, this Court's guideline judgment on sentencing for violent offences involving intent to injure.[18] The Judge emphasised Ms Gleason-Beard might struggle to reduce the starting point to below two years' imprisonment. In Mr Bourke's submission, irrespective of whether the Judge gave a sentence indication or not, the effect of his comments was unfairly to impinge upon Ms Gleason-Beard's confidence and Mr Collins' ability properly to advise her.

[31] In addition, Mr Bourke submitted the Judge's informal sentence indication was manifestly excessive. He said the Judge erred in identifying the aggravating factors, particularly extreme violence and vulnerability of the complainant. Mr Bourke cited both *Hetherington v Police* and *Hepi v Police* to illustrate that the alleged offending would fall within band one of *Nuku*.[19] In Mr Bourke's submission, because the Judge adopted a manifestly excessive starting point and did not allow for mitigating factors, he erred in informing Ms Gleason-Beard that imprisonment was likely.

[32] Mr Bourke then submitted the Judge's comments were to the effect that Ms Gleason-Beard did not have an available defence. Those comments directly impacted Mr Collins' ability to advise Ms Gleason-Beard and effectively coerced her into entering a guilty plea, he said. Furthermore, in Mr Bourke's submission, the procedure to which Ms Gleason-Beard was subject following the formal sentence indication was rushed and unfair. He said the informal indication had a profound impact on her, pointing to her affidavit where she deposed she understood the Judge to be saying he would sentence her to imprisonment if found guilty, and she felt panicked and intimidated. He submitted the Judge's approach was inappropriate and was compounded by Ms Gleason-Beard being held in the court cells. While in the cells, her ability to seek advice from Mr Collins was hindered by interruptions and pressure from those concerned to know whether or not the trial would proceed. Mr Bourke submitted these factors acted cumulatively to deny Ms Gleason-Beard her

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17 Criminal Procedure Act, s 60.

18 *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39 at [38(b)].

19 *Hetherington v Police* [2015] NZHC 1829; and *Hepi v Police* [2014] NZHC 3180. See *Nuku v R*, above n 18, at [38(a)].

fundamental right adequately and appropriately to consult and instruct a lawyer on matters of grave importance.

[33] Ms Mildenhall, on the other hand, took issue with Ms Gleason-Beard's description of being isolated and alone, given she had the benefit of Mr Collins' advice at the relevant times. Ms Mildenhall suggested Ms Gleason-Beard's primary motivation was to stay out of prison and prison was a real possibility if she did not plead guilty. She therefore made an informed and rational decision when pleading guilty.

[34] We have no doubt the Judge acted with good intentions. Having read the file, he was clearly concerned that Ms Gleason-Beard, someone who had no criminal history, might receive a sentence of imprisonment. However, we are troubled by the Judge's persistence, particularly given Mr Collins' response to the Judge's comments. Mr Collins made it clear Ms Gleason-Beard was not seeking a sentence indication, she had been fully advised of the benefits of a guilty plea and her defence had been fully canvassed with her. It is, perhaps, unsurprising that, given the file contained the Crown evidence only, the Crown case would have seemed to the Judge to be a strong one. The Judge should, however, have been prepared to accept the possibility of a defence to the charges, particularly given what defence counsel had to say about that.

[35] We are also concerned about the impact on Ms Gleason-Beard and Mr Collins of the Judge's approach. While a robust exchange with counsel might be appropriate at an earlier case management conference, we have real doubts as to whether it is appropriate, or indeed fair, on the morning of the trial. The affidavits from Ms Gleason-Beard and Mr Collins demonstrate the impact on them of the Judge's approach.

[36] It is difficult to escape the conclusion that the Judge did indeed give a sentence indication in circumstances where, not only was one not requested as required by statute, but he persisted in the face of defence counsel's unequivocal statement that a sentence indication was not being sought.[20]

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[20] Criminal Procedure Act, s 61(1).

[37] The difficulties were exacerbated given what the Judge said about the likelihood of a sentence of imprisonment. We do not consider the Judge was correct in his comments that the allegations, if made out, would place the offending in band two of *Nuku* with a starting point of up to three years' imprisonment. An obvious example is the Judge's identification of the vulnerability of the complainant as an aggravating factor. The complainant was a man of much larger stature than Ms Gleason-Beard. While the complainant might have been taken by surprise by the assault, that hardly places him as a vulnerable complainant in the way in which this is understood as an aggravating factor. In addition, the violence could not be considered extreme. The case could well be considered as one where the offender's culpability might have better been reflected in a less serious charge. Indeed, the Crown laid, and was prepared to accept a plea to, an alternative charge. Furthermore, the Crown had not intended to seek imprisonment. Band one of *Nuku*, which can involve a sentence less than imprisonment, was therefore the appropriate starting point.[21]

[38] Following intervention from the clearly concerned Crown prosecutor, the Judge then gave a formal sentence indication on the alternative charge of injuring with reckless disregard.

[39] For reasons which were not explained, Ms Gleason-Beard was then taken into custody and kept in a holding cell, apart from when she met with Mr Collins in the cell meeting room. We accept Mr Bourke's submission that the environment in which Ms Gleason-Beard was required to consider the sentence indication compounded the other concerns. She had been told by the Judge who was to preside over her trial that he doubted she had a defence to the charge and that he considered she would struggle to receive a sentence below two years' imprisonment. Ms Gleason-Beard was then put in a custodial environment and asked to consider the sentence indication of community work.[22] In our view, Ms Gleason-Beard's decision to plead guilty in these

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21 *Nuku v R*, above n 18, at [38(a)]: "where there are few aggravating features, the level of violence is relatively low and the sentencing judge considers the offender's culpability to be at a level that might have been better reflected in a less serious charge, a sentence of less than imprisonment can be appropriate".

22 We also note the default statutory five working days to consider a sentence indication. See Criminal Procedure Act, s 64(b).

circumstances, notwithstanding her defence and counsel's advice, was understandable and, indeed, rational.

[40] Finally, we consider the Judge's interference effectively undermined Mr Collins's position as counsel for Ms Gleason-Beard. Mr Collins stood up to the Judge in an appropriate way but the Judge effectively overrode him and diminished his standing in front of his client. This was inappropriate.

[41] In our view, the Judge overstepped his role, which is that of an independent and impartial arbiter to ensure the parties receive a fair trial.[23] It is not for a judge to give advice to a defendant,[24] which is what happened in effect in this case, or to undermine the advice already given to Ms Gleason-Beard by her lawyer. The transgression was particularly serious, given the continued efforts of Mr Collins to resist the Judge's approach. As already noted, Mr Collins emphasised to the Judge that a sentence indication was not sought and Ms Gleason-Beard had been fully advised as to her defence and guilty plea credit. Even when Mr Collins told the Judge that he had real concerns about references to prison, given Ms Gleason-Beard was already "nervous enough", the Judge persisted.

[42] We do not criticise the Judge for seeking to ensure that Ms Gleason-Beard had received adequate legal advice. However, once being informed of that, a judge must pull back from further interference. It is simply not the role of the judge to argue with counsel about prospects of success of a defence, particularly when she or he has scant knowledge of the evidence which would support it.

[43] We consider that Ms Gleason-Beard's guilty plea was as a result of the Judge's intervention. The Judge's comments put in Ms Gleason-Beard's mind that, if she went to trial, she would be found guilty and sentenced to prison. She wanted to avoid that

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23 For example: *M (CA508/2014) v R* [2015] NZCA 183 at [26]; *Hinton v R* [2016] NZCA 269 at [23]; and *R v H (CA421/01)* (2002) 19 CRNZ 518 (CA) at [33]. See also New Zealand Bill of Rights Act 1990, s 25(a); and Judicial Integrity Group *The Bangalore Principles of Judicial Conduct* (2002), Value 1: Independence and Value 2: Impartiality.

24 This is the role of defence counsel. See Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.13.1. See also *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [48] where this Court considered problematic the submission that a judge query defence counsel as to whether advice had been given to the defendant about the election to give evidence, because such an approach "confuses the role of Judge and counsel".

by any means. However, she had consistently maintained she had no intention to injure the complainant. We conclude that the Judge's behaviour effectively undermined Ms Gleason-Beard's right to plead not guilty and to have the charges against her determined by a jury, as she had elected to do. The Judge's intervention inappropriately overbore her decision and the role of counsel.

[44] The circumstances of the present case do not easily fit within the recognised categories of exceptional circumstances which warrant vacating a guilty plea. The case has some analogies with *Hancock v R*, where this Court allowed an appeal against conviction, finding the defendant's pleas were unnecessarily rushed and based on erroneous advice from counsel that the defendant would otherwise go to prison.[25] In this case the incorrect "advice" came from the Judge and had an obvious effect on Ms Gleason-Beard. It also has similarities with *Witehira v R*, where this Court allowed an appeal against conviction when an informal sentence indication was given on one of three charges at the suggestion of Crown counsel.[26] The defendant pleaded guilty to that one charge having been led to believe — erroneously — that imprisonment would result if he were instead found guilty by a jury on all three.

[45] As the Supreme Court has recognised, the list of categories of exceptional circumstances in *Le Page* is not necessarily complete.[27] Case law demonstrates a willingness to adopt new categories where necessary. Mr Bourke proposed either recognising a new and separate category of unfair interference by the presiding judge or expanding existing categories, such as judicial rulings containing errors of law or counsel errors in advice, to include circumstances such as arose in this case.

[46] The circumstances of this case are very similar to the third category in *Le Page*, where the plea is induced by a ruling which embodies a wrong decision on a question of law.[28] It is also analogous to the fourth category adopted in *Merrilees*, which involves erroneous advice from defence counsel.[29] However it is categorised, this case ought to be determined from first principles. The question is whether the Judge's

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25 *Hancock v R* [2012] NZCA 292.
26 *Witehira v R* [2013] NZCA 58.
27 *Wilson v R*, above n 16, at [104].
28 At [19].
29 *R v Merrilees*, above n 11, at [34].

intervention was capable of constituting exceptional circumstances which could result in a miscarriage of justice. For the reasons given, we consider it was.

Did Ms Gleason-Beard have a defence of sufficient substance?

[47] Ms Mildenhall submitted Ms Gleason-Beard's proposed defence had no prospect of success. She said Ms Gleason-Beard's evidence did not tally with her police interview, nor with the bar manager's statement that Ms Gleason-Beard had punched and kicked the complainant prior to the glass incident. She maintained Ms Gleason-Beard may have had a possible defence to wounding with intent to injure but not to the alternative charge of injuring with reckless disregard, to which she pleaded guilty. She referred to the fact Ms Gleason-Beard admitted being drunk and impulsively and deliberately throwing her drink at the complainant with sufficient force to injure his face. In those circumstances, Ms Mildenhall submitted there was no arguable defence to the charge of injuring with reckless disregard.

[48] We consider there was a sufficiently substantial defence to the more serious charge of wounding with intent to injure. In her handwritten notes provided to Mr Collins well in advance of the trial, Ms Gleason-Beard said the complainant made derogatory remarks on finding out that she had been a stripper, commented that her breasts were "mosquito bite tits", and made a motion towards her chest with his hand. She said she intended to throw the contents of her drink at him in an effort to get away but had no intention to throw the glass at him. She said she was impulsive, was not a violent person (we note she has no criminal convictions), and did not defend herself to the police because she did not want further complications.

[49] Contrary to the Crown's submissions, we do not consider this statement was necessarily inconsistent with the statement Ms Gleason-Beard gave to the police on the night of the incident. In her statement to the police, she accepted she had been drunk but remembered a man being really rude to her and her throwing a drink on him before leaving. She told the police he had made a derogatory comment about the size of her breasts and she had made an impulsive gesture, throwing up her hands. She conceded she had reacted but said she did not intend to be violent. She did not tell the police the complainant had made a motion towards her chest with his hand.

[50] The complainant was much larger than Ms Gleason-Beard. The complainant's statement records that Ms Gleason-Beard told him she was a stripper. He said he asked her why, because he thought she was better than that, and acknowledged she then got upset. This, therefore, gives some support to Ms Gleason-Beard's version of events and is suggestive of the complainant's attitude towards her.

[51] There was no medical evidence as to the complainant's injury, given he declined medical attention on the night and continued drinking in the bar. Although there was reference to the complainant receiving a chipped tooth, the first time that was referred to was in the victim impact statement. There was a real issue as to whether Ms Gleason-Beard had caused the complainant serious injury.

[52] Ms Gleason-Beard's defence was also relevant to the alternative charge of injuring with reckless disregard. Such a charge requires the Crown to prove a defendant appreciated the risk of causing an injury and decided to take it anyway. Given Ms Gleason-Beard's version of events, we accept she had a sufficiently substantial defence to this charge as well.

[53] We have not overlooked the fact that Ms Gleason-Beard was also charged with assault on the basis of the bar tender's evidence of having seen her kick and punch the complainant. The complainant made no reference to this in his formal written statement. This charge was also withdrawn as a result of the sentence indication.

[54] The point is that Ms Gleason-Beard received a conviction for injuring with reckless disregard where she had a defence of substance and entered a guilty plea in circumstances where the Judge's intervention made her position and that of her counsel untenable. This constitutes a miscarriage of justice.

Result

[55] The application for an extension of time is granted.

[56] For the reasons given, the appeal is allowed and Ms Gleason-Beard's conviction for injuring with reckless disregard is quashed.

[57] We note Ms Gleason-Beard completed her sentence of 100 hours' of community work and paid $5,000 reparation to the complainant. She has now returned to Canada. We accept Mr Bourke's submission that it is not in the interests of justice to order a retrial. We therefore direct a judgment of acquittal be entered.[30]

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[30] Criminal Procedure Act, s 233(3)(a); *R v Kino and Mete* [1997] 3 NZLR 24 at 29; and *R v Accused (CA54/96)* (1996) 13 CRNZ 561 at 565.