

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 117/2020  
[2021] NZSC 29

BETWEEN                      FEI HE  
   Applicant  
  
AND                              THE QUEEN  
   Respondent

Court:                      Glazebrook, O'Regan and Ellen France JJ  
  
Counsel:                      A J Bailey for Applicant  
   A J Ewing for Respondent  
  
Judgment:                      25 March 2021

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed.**

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**REASONS**

[1]     The applicant went to trial in the District Court on six charges of possession for sale or supply of non-approved psychoactive substances, one representative charge of sale of a non-approved psychoactive substance,<sup>1</sup> and two charges of money laundering. The Crown case was that the applicant was the ringleader in a sophisticated operation involving psychoactive substances having a value of approximately \$4 million. She had been advised in writing before the trial by her trial lawyers that, in view of the evidence against her and the difficulties with her proposed defence, it was in her interests to plead guilty.

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<sup>1</sup> Psychoactive Substances Act 2013, s 70.

[2] During the trial, the Crown prosecutor proposed a deal which involved the applicant pleading guilty to one representative charge of possession for sale and supply of non-approved psychoactive substances and one representative charge of sale of a non-approved psychoactive substance. The remaining charges would be dismissed under s 147 of the Criminal Procedure Act 2011. This reduced the number of charges she faced from nine to two. It also reduced the maximum cumulative penalty she faced to four years' imprisonment. The apparent reason for this offer was that there had been delays in the progress of the trial and a mistrial was becoming a real possibility.<sup>2</sup>

[3] This offer was put to the applicant and she decided to accept it. She signed written instructions to her counsel confirming that she would plead guilty to the two psychoactive substance charges and that the other charges would be withdrawn. The evidence before the Court of Appeal was that this document was signed in the presence of a Mandarin-speaking translator (the applicant is a Mandarin speaker).

[4] The applicant appealed to the Court of Appeal against her conviction. She argued that her plea of guilty was entered under pressure from her trial lawyers, and that a miscarriage of justice was thereby occasioned. Her appeal was dismissed.

[5] The Court of Appeal heard evidence from both the applicant and her trial counsel. Both were cross-examined.

[6] In her evidence, the applicant's trial counsel denied putting the applicant under any undue pressure to plead guilty. The Court of Appeal accepted that evidence as truthful, in contradistinction to the evidence given by the applicant.<sup>3</sup> It said it did not find the applicant's evidence that she was placed under undue pressure credible.<sup>4</sup> It noted that the applicant faced an overwhelming Crown case,<sup>5</sup> and although she had been determined to defend the charges after an earlier offer by the Crown,<sup>6</sup> her change of heart was largely attributable to the fact that the Crown's offer which she accepted

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<sup>2</sup> *He v R* [2020] NZCA 591 (Kós P, Thomas and Gendall JJ) at [1] and [10] [CA judgment].

<sup>3</sup> At [25] and [26].

<sup>4</sup> At [19] and [26].

<sup>5</sup> At [5], [6] and [27].

<sup>6</sup> She had maintained this determination to defend the charges since first charged, some three years earlier. The Crown prosecutor had previously offered the applicant a deal which involved dropping both of the money laundering charges if the applicant pleaded guilty to the possession for sale and supply charges. She declined.

was a substantial improvement on the earlier offer.<sup>7</sup> It noted that she received a significant guilty plea discount when being sentenced.<sup>8</sup>

[7] The applicant seeks leave to appeal to this Court against her conviction, challenging the Court of Appeal's credibility findings against her.<sup>9</sup> The application is advanced on the basis that a miscarriage of justice may have occurred,<sup>10</sup> and also on the basis that the proposed appeal involves a matter of general or public importance.<sup>11</sup>

[8] On the miscarriage ground, the applicant wishes to argue on appeal that the Court of Appeal's factual findings were incorrect, which led it to conclude, wrongly, that she was not improperly pressured to accept the Crown offer. She wishes to argue that it is not clear that she was aware that the offer she ultimately accepted was more favourable to her than the offer she had earlier rejected. And she argues that the circumstances in which the Court was reconvened after the trial had been suspended to allow the plea discussions to occur indicated that the applicant's trial counsel was not confident that she would maintain her stance of accepting the Crown offer if the Court had not been reconvened until the following day. In the face of the Court of Appeal's very clear evaluation of the credibility of the witnesses before it, we do not see these arguments as having sufficient prospects of success to justify the cost and expense of a further appeal.

[9] The matter of general or public importance that the applicant wishes to pursue would arise only if her challenge to the factual findings of the Court of Appeal succeeded. As we have found there is insufficient prospect of that occurring to justify the grant of leave, the argument falls away.<sup>12</sup>

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<sup>7</sup> At [27].

<sup>8</sup> At [27]. The discount was 8 months or about 20 per cent, reducing the end sentence to two years and four months' imprisonment: *R v He* [2019] NZDC 24130 (Judge O'Driscoll) at [47].

<sup>9</sup> The arguments addressed in this judgment are those advanced on the applicant's behalf by her counsel. Just prior to the delivery of this judgment, the applicant herself filed 15 pages of handwritten material and two pages of notated documents, which covered a broad range of matters, including her version of the events leading to her guilty plea. We considered this material but it did not assist us in the evaluation of the applicant's case for leave.

<sup>10</sup> Senior Courts Act 2016, s 74(2)(b).

<sup>11</sup> Section 74(2)(a).

<sup>12</sup> The Court of Appeal referred to this argument but did not need to address it: CA judgment, above n 2, at [29].

[10] The application for leave to appeal is dismissed.

Solicitors:  
Crown Law Office, Wellington for Respondent