ORDER PROHIBITING PUBLICATION OF THE REASONS FOR JUDGMENT IN NEWS MEDIA OR ON INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF RETRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA603/07
[2008] NZCA 477

THE QUEEN

v

PETER LLOYD MACHIRUS

Hearing: 15 October 2008

Court: O'Regan, Potter and Fogarty JJ

Counsel: P H B Hall and K H Cook for Appellant
B M Stanaway for Crown

Judgment: 11 November 2008 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B Convictions set aside and retrial ordered.

C Order prohibiting publication of the reasons for judgment in news media or on Internet or other publicly available database until final disposition of retrial. Publication in Law Report or Law Digest permitted.

REASONS OF THE COURT

(Given by Fogarty J)

Introduction

[1] The appellant was convicted by a jury in the District Court at Christchurch on 13 September 2007 of 20 counts of receiving. He appeals against conviction and sentence.

[2] His principal ground of appeal against conviction is that the trial miscarried, essentially because information about an inducement to a critical Crown witness, L, namely a discount in sentence, which was advised in a sentencing indication given by Judge Radford prior to the trial in which L gave evidence, was not conveyed to defence counsel nor to the trial Judge.

[3] The Crown case was that L was a burglar who stole valuable property from partly built houses in and around Christchurch. L then onsold this stolen property to Mr Clayton and to the appellant, Mr Machirus. L was the thief/burglar and the appellant and Mr Clayton were in partnership as receivers. The Crown case was that it was a large-scale commercial burglary/receiving ring.

[4] L had originally been charged jointly with the other accused. In April 2005 he had entered pleas of guilty to 18 counts of burglary, four of theft, five of receiving and one of converting a motor vehicle. When he was sentenced on these charges he was given credit for his guilty pleas but also for:

> … the assistance to the police which led to many additional charges being laid.

[5] The trial the subject matter of this appeal was the second trial. L gave evidence at the first trial on behalf of the Crown. There he was cross-examined closely on the assistance he gave to the police and in particular his motivation to lie.

[6] Between the first and second trial L committed a number of further offences. Mr Machirus and Mr Clayton applied to the Court to exclude his evidence at the retrial but this application was dismissed by the Judge. At the time of the application, L was awaiting sentence on 15 charges to which he pleaded guilty. One of those charges pre-dated the first trial and was a charge of assault on a female, emanating from Christchurch. The remaining charges were laid after the first trial and emanated from Wellington and Lower Hutt. They included dangerous driving, driving with excess blood alcohol, driving while disqualified, two charges of burglary, receiving property and theft, and four other dishonesty charges. L was due to be sentenced in Wellington on 28 August 2007, that is immediately after giving evidence in this, the second trial.

[7] The original basis for the application to exclude L's evidence at the second trial was the contents of some documents from Wellington relating to the history of L's plea of guilty in respect of the Christchurch assault. The Wellington documents showed the original charges were more serious and that there had been negotiations between L's counsel and the police resulting in the current plea to a lesser charge. There was suspicion by some of the accused in the second trial and their counsel, that the guilty plea to a lesser charge may have been the result of an agreement to reduce the charge in exchange for L's testimony at the retrial.

Disclosure by Crown

[8] On the morning of the hearing of the application to exclude L's evidence at the retrial, the prosecutor provided a letter by way of disclosure to defence counsel and Mr Machirus, who was conducting his own defence. A copy was provided to the trial Judge, Judge Crosbie. The text of the letter is as follows:

RE: OPERATION RHINO

1. As requested, I have carried out inquiries in relation to [L's] pending sentencing hearing in Wellington.

2. L pleaded guilty to the excess breath alcohol and dangerous driving charge on 9 January 2007. He pleaded guilty to the charge of male assaults female on 22 February 2007. The assault was originally a more serious charge. It would seem from the file that the officer in Christchurch holding that file did not action it for a considerable period of time, due to work pressure. When it was finally called in Wellington Court, [L's] solicitor sought a stay on the basis of the delay. The Wellington Crown recommended that the charge not be pursued. Negotiations then between the Wellington Crown/Police and Defence Counsel resulted in a plea to the current charge.

3. Judge Radford gave a sentencing indication on 22 May, suggesting 2½ to 3 years imprisonment was appropriate on all matters.

4. [L] pleaded guilty to the remaining counts on 31 May 2007.

5. [L's] counsel suggested sentencing should be after the Operation Rhino trial, the reason being that if (sic) was a sentenced prisoner, there were concerns regarding his safety. As a remand prisoner however, he has enhanced safety and a further remand was therefore sought by his counsel until after Operation Rhino.

6. Judge Radford was prepared to agree with that and he has recorded:

   "I record that I have indicated the fashion in which I intend to sentence, and my reason for doing so is that it must not be thought that the sentence that I am going to impose would be influenced in any way by the course of conduct which may occur in Christchurch. In other words, [L] will not influence the sentence that is to be imposed by his conduct in Christchurch. I am making this point clear, as much for [L's] protection, and so that the prosecution are not left in a position where it might be suggested that he may have to gain some advantage in these proceedings by the evidence that he may give.

[9] That letter was interpreted by Judge Crosbie, in his ruling on 22 August 2007 dismissing the application to exclude L's evidence, in the following fashion:

> [15] What is now known is that His Honour Judge Radford provided a sentencing indication in Wellington to [L]. In a letter to all counsel and self-represented accused the Crown reported that it had made inquiries of the Wellington District Court which advised that Judge Radford gave a sentencing indicated of 2½ to 3 years. The Judge was prepared to delay sentencing until after this trial on the basis that there were safety issues for [L]. The Crown reports that the Judge recorded:
>
> > I record that I have indicated the fashion in which I intend to sentence, and my reason for doing so is that it must not be thought

> that the sentence that I am going to impose would be influenced in any way by the course of conduct which may occur in Christchurch. In other words, [L] will not influence the sentence that is to be imposed by his conduct in Christchurch. I am making this point clear, as much as for [L's] protection, and so that the prosecution are not left in a position where it might be suggested that he may have to gain some advantage in these proceedings by the evidence that he may give.
>
> [16] It is problematic that [L] has not been sentenced when he could have been and particularly in view of the observation by appellate authorities that it is desirable to do so. That position was beyond the control of the Court and it is not for this Court to interfere with a sentencing process originated in another registry.

[10] The prosecutor did not provide the whole of Judge Radford's sentencing indication. On 31 May 2007 when L entered the remaining guilty pleas, Judge Radford stated:

> [1] [L] has come back before the Court for plea and sentence on a large number of charges. He has appeared on a number of occasions on these charges but because there were so many of them and they extended over such a length of time, considerable effort was required for Mr Bradley to discuss matters with [L] and the prosecution and try to resolve all outstanding issues.
>
> [2] On an earlier occasion [L] wished to have matters dealt with in such a way that his status within the prison was altered, for the reason that he is involved in a trial in Christchurch, the details of which are known both to the prosecution and to the defence and which I do not propose to detail within this memorandum, save to say that what is to transpire is very much to his credit.
>
> [3] The matter has come back this morning following a sentencing indication which I gave on 22 May but Mr Bradley reminds me that on that day I gave a sentencing indication then said that that indication was only available so long as pleas were entered and matters tied up, but if that happened then the actual sentencing could be adjourned.
>
> [4] The sentencing indication I gave was for a final outcome of between two and a half and three years and that is still on the table. I have indicated to both Mr Bradley and Mr Brickell for the prosecution, my reasoning process for reaching that conclusion. My reasoning process is that [L] has a very extensive history of criminal offending and that the offences that he has now pleaded guilty to are serious and have taken place over quite a long period of time and the offences were committed, I think on almost every occasion, while subject to another sentence. Accordingly it seemed to me that, while I am not determining the final sentence at this point, a starting point of something in the region of four to four and a half years was appropriate but then significant discounts had to be given to take account of the guilty pleas which did amount to a significant assistance to everybody because of the complex nature of all of the offending and of course significant discount for the matter which involves the Christchurch trial.

> [5] Mr Bradley has advanced this proposition: That plainly [L] is in custody and will remain so. He has to give evidence in Christchurch. If he is a sentenced prisoner, his safety may be in issue. I am told that he has enhanced safety if he is a remand prisoner. Accordingly what is sought is a further remand before sentenced is imposed until after the Christchurch case.
>
> [6] I am prepared to agree with that and grant such a remand to 28 August 2007 at 9.15 am but I make the following observations:
>
> a) Mr Brickell has only unfortunately just been handed the file and while this morning he could see no reason why that course of action should not be followed, leave is granted to the prosecution to have the matter brought back before me should: on mature consideration, he feel that is appropriate.
>
> b) I record that I have indicated the fashion in which I intend to sentence and my reason for doing that is that it must not be thought that the sentence that I am going to impose would be influenced in any way by the course of conduct which may occur in Christchurch. In other words [L] will not influence the sentence that is to be imposed by his conduct in Christchurch. I am making that point clear as much for [L's] protection and so that the prosecution are not left in a position where it might be suggested that he may have to gain some advantage in these proceedings by the evidence that he may give.
>
> [7] Accordingly on all matters [L] is remanded for sentence to 28 August 2007 at 9.15 am. I see no point in calling for a further probation report give that [L] has been in custody.

Analysis of consequences of non-disclosure of Judge Radford's notes of 31 May

[11] L should have been sentenced prior to giving evidence. Judge Radford's sentencing indication had first been given on 22 May 2007. L had come back to Court on 31 May for sentence. The Judge was faced with an application for a further remand on the basis that L would be safer if he was a remand prisoner. The Judge agreed to do that but, probably conscious that it was contrary to established principle not to sentence him before he gave evidence, he decided to make additional observations. It is more likely than not that the purpose behind [6](b), from the Judge's point of view, was to make it clear to L that the discount which Judge Radford had just foreshadowed would not be further improved by the way in which he gave evidence at the retrial.

[12] Mr Stanaway conceded that "in hindsight" it would have been preferable for the prosecutor to have provided a copy of these notes to the trial Judge or to counsel.

[13] Mr Stanaway went further, however, and sought to defend the decision to disclose only [6](b) on the grounds that Judge Radford was not providing a discount against sentence in anticipation of L co-operating with the police and giving evidence in the Christchurch retrial. He argued that the phrase in [4] of the 31 May notes "*and of course significant discount for the matter which involves the Christchurch trial*" was a significant discount in respect of the guilty plea to the Christchurch assault. That simply does not make sense. L obtained a discount from between four and four and a half years down to between two and a half and three years. That is of the order of 45 per cent. It is a discount outside the range available to sentencing Judges for guilty pleas.

[14] It is hardly necessary also to analyse contextually the rest of the sentencing notes, but there is other material in [2] and [5] which reinforces the literal meaning of the last sentence in [4] that the subject matter is a trial in Christchurch which is forthcoming. That could only be this retrial. That interpretation is reinforced by the sentencing itself which took place on 29 August. Mr Stanaway agreed that the Judge plainly thought that he was providing a discount because of L's co-operation in giving evidence in Christchurch. Judge Radford said (at [11]):

> [11] I decided, when giving you my indication, that a starting point in the region of four to four and a half years was appropriate but that considerable discount needed to be given. What I said was that the pleas involved considerable discount on their own as did the activity that you have undertaken in Christchurch. I cannot emphasis (sic) enough, really, that that has been the major factor which has persuaded me to reduce the level which would otherwise be entirely appropriate. You are a man who, with all of your previous convictions, is likely to have a sentencing level increased because of those convictions being aggravating features.

Mr Stanaway had to argue that the Judge on 29 August had made a mistake, had misread his earlier notes of 31 May and was now, for the first time, providing for a discount for the co-operation of L. We reject that argument.

[15] We accept that, if Judge Radford's sentencing notes were not read fully and the reader simply focussed on the conclusion, then [6](b), read on its own, could be interpreted as the Judge saying that there was no basis for any suggestion that L had something to gain by giving evidence at the retrial of Mr Machirus and his co-accused. It may be that the prosecutor formed that impression and thought that the

letter reproduced at [8] above correctly summarised the position. Whether that is so or not, the disclosure that was made in the letter was inaccurate and did not properly apprise the Judge, counsel and Mr Machirus of the true position.

[16] It is a well established principle of common law that the Crown must disclose any factor which might operate as an inducement to a witness to give evidence: be it the fact that the witness is a paid police informer; or has obtained a discount in anticipation of co-operation; or has had a charge reduced to a lesser charge; or has received an immunity; or any other inducement factor. These factors are obviously material to the credibility and reliability of the evidence of the witness. They will inevitably be put to the witness in cross-examination. They are material which the Judge and jury are entitled to know about. They can be the basis for a ruling excluding the witness from the trial. Indeed, that was the application which Judge Crosbie heard on 21 August.

[17] Mr Hall submitted that the trial miscarried on 21 August when the Judge received the letter but not the sentencing notes. We agree. It is not necessary to extend the analysis to the trial evidence and argument. It was common ground between counsel that L's evidence was a very important part of the Crown case. Judge Crosbie described him as the principal witness of fact for the Crown. He is elsewhere described as the "glue" holding together the Crown case. It was L who gave detailed evidence that he and the co-accused, Mr Clayton, were in partnership and in the business of receiving stolen property. Mr Hall submitted correctly that where a convicted person is given a discount for co-operating with a police prosecution and is giving evidence, whether or not he is sentenced before the trial, as he should be, that discount is a continuing inducement to co-operate. If he subsequently refuses to give evidence the Crown have a remedy. The Solicitor-General can seek leave to appeal out of time against the sentence on the grounds that the sentencing Judge gave excessive credit based on the false premise that assistance would be provided. See *R v Gray* [2008] NZCA 311 [38] citing *R v Hadfield* CA337/06 14 December 2006 at [11].

[18] Accordingly Mr Hall submitted that the fact that the sentencing notes on 31 May were not known to counsel or the trial Judge:

1. Was a breach of the appellant's fair trial rights, s 25 of the New Zealand Bill of Rights Act 1990.

2. Removed from the jury evidence about the presence of an operating inducement, impeding unfairly the opportunity of counsel for the accused or the accused themselves (Mr Machirus represented himself) from challenging the evidence of L on this basis and affected the content and extent of any direction the trial Judge might give to the jury in terms of s 122 of the Evidence Act 2006.

[19] Mr Hall submitted that the disclosure could have altered the jury's verdict. He pointed out the jury convicted the appellant in respect of four counts which were founded upon direct evidence given by L implicating the appellant in receiving property stolen by him (counts 30, 34, 46 and 50) but he was acquitted of others on which L attempted to implicate him. Mr Stanaway offered no argument against these submissions.

[20] This Court must allow an appeal if it is of the opinion that a trial has miscarried. Section 385(1)(c) provides relevantly:

> **385 Determination of appeals in ordinary cases**
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> …
>
> (1) On any appeal to which subsection (1AA) applies, the Court of Appeal or the Supreme Court must allow the appeal if it is of opinion -
>
> …
>
> (c) That on any ground there was a miscarriage of justice; or
>
> …

[21] We are satisfied that the accused were placed in an unfair disadvantage by the non-disclosure of the sentencing notes of 31 May, as were the Judge and jury and that a miscarriage of justice resulted. There is no doubt that had the Judge and jury been informed of the presence of the discount they would have been much better informed of the context within which L was to give and gave evidence.

[22] We therefore allow the appeal and set aside the convictions. We order a retrial. Mr Machirus can apply for bail to the District or High Court. A copy of this judgment is to be served on Mr Clayton and his counsel, Ms E Bulger.

Solicitors:
Crown Law Office, Wellington