IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA NO. 7/18

BETWEEN **WEN YANG DONG**

Appellant

AND **THE CROWN**

Respondent

Coram: Williams P
Barker JA
White JA

Hearing date: 30 October 2018

Judgment (No.1): 1 November 2018

Reasons for Judgment: 23 November 2018

Counsel: Mr M Mitchell and Mr A Manarangi for Appellant
Ms K Bell for the Crown

REASONS FOR JUDGMENT OF THE COURT OF APPEAL
DELIVERED BY BARKER JA

A. The appellant appealed against his conviction on one charge of forgery and his sentence in the High Court of 6 months imprisonment imposed on 18 September 2018 after a plea of guilty.

B. On 30 October 2018 the Court heard argument in support of the appeal and argument from the Crown and reserved its decision.

C. On 1 November 2018 the appellant appeared and the Court announced that it had reached a decision namely that the appeal be allowed and the conviction and sentence quashed. Reasons for judgment were promised and these reasons now follow.

Reasons for Judgment

[1] The appellant is a Chinese national. He is a foreign fishery agent who admitted to forging Cook Islands Ministry of Marine Resources access agreements for long-term fishing vessels.

[2] The Ministry of Marine Resources (**the Ministry**) had entered into an agreement with the appellant's company in China to license two longline fishing vessels to access the Cook Islands Economic Zone and in May 2018, the Ministry duly sent the agreement that had been executed by the Minister of Fisheries to the appellant. Six weeks later, the Ministry received back from the appellant that document which had been altered in two aspects. The signature of the Minister of Fisheries had been removed and replaced by the seal of the Ministry of Marine Resources and four additional longline vessels had been added to the schedule. When this forgery was discovered, the appellant was confronted by Ministry officials: he advised that the reason for creating the forgery was to secure funds in China so he could pay back the relevant license fee for the two vessels.

[3] The Crown accepted the defendant's explanation. He pleaded guilty to one charge of forgery on 19 September 2018 when he appeared before Keane J in the High Court and was sentenced to 6 months' imprisonment.

[4] The learned Judge considered that despite the fact that the appellant had pleaded guilty at the earliest opportunity and that he had returned to the Cook Islands to "face the music" he should be sentenced to imprisonment.

[5] The Judge noted that the appellant did not benefit, that his offending was out of character, that he would lose his job ending a promising a career, that he had personal crises, that his engagement to his fiancée had been terminated and that he was at a distance from his parents which he found distressing.

[6] The Judge noted that the maximum sentence for the imprisonment was 10 years and he imposed a sentence which denounced the offending and deterred others. It was of itself very serious in that it embarrassed the integrity of the statutory fishing regime in the Cook Islands and of the resource itself. He noted that there was no real tariff and that previous sentences for

forgery have ranged from community service to imprisonment, the highest of which also involved theft as a servant.

[7] At the hearing, the Judge enquired where the offence had taken place. It appeared that the answer was in China because that was where he had forged the document which he then uttered when he sent it to the officials in the Cook Islands.

[8] An appeal was then filed invoking Section 5 of the Crimes Act 1969 which reads as follows:

> **5. Persons not to be tried in respect of things done outside the Cook Islands** – Subject to the provisions of section 6 of this Act, no act done or omitted outside the Cook Islands is an offence, unless it is an offence by virtue of any provision of this Act or of any other enactment.

[9] After the appeal had been filed the appellant made an application to call further evidence which was not opposed by the Crown. Counsel for the Crown cross-examined the appellant on an affirmation which disclosed that in fact that there had been two applications, one of which was for a second access agreement which gave permission for the four extra vessels: there was no suggestion that the appellant altered this access agreement which achieved what he was trying to do in the forged document.

[10] The appellant gave evidence in support of his lengthy affirmation which exhibited all the relevant documents but in having heard his evidence the Court and having read the affirmation and his cross-examination ,the Court considers that nothing much turns on this further evidence except that it shows that the appellant had little criminal intent and that the four extra vessels for which an access agreement was granted were really what he attempted to achieve by his forged document.

[11] The first legal matter for consideration is the unusual situation of an appeal being filed when there has been a guilty plea and there has been no application to the High Court to vacate the guilty plea and replace it with a plea of not guilty.

{12} Jurisdiction to consider an appeal against conviction where there has been a guilty plea was considered by the New Zealand Court of Appeal in an unreported decision of *R v Le*

Page (28 April 2005) where the Court spoke of the jurisdiction of the New Zealand Courts appeal to entertain such an appeal in the following terms:

> [16] Despite the understanding which Mr Le Page and his counsel (not Mr Neutze) had at the time the pleas were entered and at the time of sentencing, 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. These principles find expression in numerous decision of this Court, of which *R v Stretch* [1982] 1 NZLR 225 and *R v Ripia* [1985] 1 NZLR 122 are examples.
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> [17] A miscarriage of justice will be indicated in at least three broad situations which are identified and discussed in Adams on Criminal Law at para CA385.21. 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 counsel at the time a plea is entered, it may be difficult indeed to establish a vitiating element. It is not suggested the present case is in this category.
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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. Examples are where a charge required special leave and such was not obtained, a charge was out of time or where as a matter of law the facts are insufficient to establish an essential ingredient of the offence. R v Mohammed CA415/96, 13 November 1996, is a relevant example. Following an unsuccessful s347 application, in which Mr Mohammed challenged whether the facts were capable of supporting charges of forgery, he entered pleas of guilty to the charges. On appeal against conviction this Court was satisfied that as a matter of law forgery could not lie on the basis of the facts alleged. Accordingly, the Judge below was wrong to have refused the s347 application. This Court intervened and quashed the convictions. Again, the present case is not suggested to be in that category, although it is based upon a challenge to a pre-trial ruling which the appellant contends was wrongly decided. That circumstance indicates that there may be scope for overlap between the categories to which we are referring.
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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. That description is of course apt to describe the situation in Mohammed, which type of case may also be seen as a subset of the third category. Examples are where a trial Judge wrongly concludes that there is no evidence sufficient to justify a defence being left to the jury (say provocation or self defence) leaving the accused with no option but to plead guilty. In such cases, which will admittedly be rare, this Court would intervene to cure a miscarriage of justice which plainly flowed from the erroneous ruling. The present appellant contends that his pleas were entered in the face of an erroneous legal ruling.

[12] The Court also stated that there was no jurisdiction remaining in the High Court once an appeal against conviction had been filed to entertain a change of plea. However the Court

considered that it had jurisdiction to consider an appeal despite the plea of guilty and this proposition is borne out by Section 67(1) of the Cook Islands Judicature Act which says plainly that a person convicted before a Judge of the High Court sitting with or without a jury may appeal as of right to the Court of Appeal against conviction and sentence. Those words do not need an aberration to make them mean what they say and therefore we consider. Based on the second category of the Le Pen analysis, that there is justification for hearing this appeal in the unusual circumstances of there having been a plea of guilty.

[13] The only argument against the conviction was raised by counsel for the Crown, namely Section 6 of the Crimes Act 1969 which reads as follows:

> **6. Place of commission of offence** – For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in the Cook Islands, the offence shall be deemed to be committed in the Cook Islands, whether the person charged with the offence was in the Cook Islands or not at the time of the act, omission, or event.

[14] It was said by counsel in submission that although the forgery itself occurred outside the Cook Islands. an act or omission necessary for the completion of the offence occurred in the Cook Islands -namely the acquisition by the appellant of the seal which was forged and the access agreements. The question is whether the appellant's acquisition of these documents which he needed for the purpose of forgery brought the offending within the purview of Section 6. We do not think that it does find authority for this view from the leading New Zealand text, Adams on Criminal Law" where the commentary on the identical section in the New Zealand Crimes Act 1961 reads as follows:

> The second test in s 7 focuses not on the conduct of the defendant, but on the occurrence of any "event" necessary for the completion of the offence. This requires the offence to be a "result crime", that is, an offence which requires a particular consequence to flow from the defendant's conduct before the offence is complete. The paradigm "result crime" is homicide, where the necessary event is the death of the victim. If A assaults B in Australia, and B later returns to New Zealand and dies from the assault, the New Zealand courts will have jurisdiction because the necessary event, the death, occurred in this country: compare *Re Oulette and R* (1998) 126 CCC (3d) 219 (QCA). Determination of jurisdiction under this limb requires the court to determine whether or not the offence requires an event to occur in New Zeeland as part of the offence. Thus, in *Tipple v Pain* [1983] NZLR 257 (HC), the arrival of goods in New Zealand was an event necessary for the completion of the offence charged and its occurrence was sufficient to give the New Zealand courts jurisdiction, whereas in *Collector of Customs v Kozanic* (1983) 1 CRNZ 135 (HC), where the respondent had been charged with attempting to smuggle goods into New Zealand, it was held that the making of a false

> Customs declaration was not a "necessary event" for the offence to be complete; therefore the alleged offence did not fall within the jurisdiction of the New Zealand courts.

[15] It seems that from the commentary that the offence to which the second test under Section 6 applies – and that is the same as Section 7 of the New Zealand Act – requires the effect to be a "result crime", that is an offence which requires a particular consequence to flow from the defendant's conduct before the offence is complete. And that was not the situation here, which is more akin to that in one of the cases mentioned in the commentary, *Collector of Customs v Kozanic* [1983] 1 CRNZ 135, where a customs declaration was not a necessary offence for the offence to be complete and therefore the offence did not fall within the jurisdiction of the New Zealand Courts. We consider the same applies to the present situation. The offence was completed when the forgery was completed and all this happened in China. Therefore, the conviction cannot stand because the criminal offending occurred outside the jurisdiction.

[16] We then have to consider whether, following the decision of the New Zealand Supreme Court in *Walsh v R* [2006] NZSC111, Judgment 19 December 2006, the Court should use its powers contained in Section 69(3) of the Judicature Amendment Act 2011 to substitute for the offence of forgery, the offence of uttering. In the *Walsh* case, the Supreme Court decided that this could be done fairly without any further evidence as to the accused's intent and that the evidence to prove all elements of the crime of uttering was necessarily comprehended by the Crown case. However, counsel for the Crown in the present appeal indicated that the Crown did not wish to have the Court substitute the offence of uttering. To do so could be unfair to the appellant in that he may have had a defence to the charge of uttering because of his lack of intent to do anything criminal or to achieve anything personal for himself.

[17] So therefore we decline to substitute the defence of uttering and the conviction for forgery is dismissed which also means that the appeal against conviction is allowed as is the appeal against sentence| the appellant is entitled to the return of his passport.

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Barker JA