Pleas and Traversals

Will Tuckey
Barrister
Samuel Griffith Chambers
BA/LLB (Hons I), LLM

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Notes:

Updated versions of this paper, cases and resources may be available here: Resources.

This paper aims to set out how instructions should be taken from a client about a criminal plea and the circumstances that may invalidate such a plea. These are two sides of the same coin; learning how to take a plea teaches us to detect when a plea has been taken poorly, and studying cases where pleas have been withdrawn teaches us what not to do in taking a plea.

Whilst this paper may be overly long, it is designed to reference cases and principles that may assist when confronted with a plea traversal. For ease of reference, a number of the relevant authorities have been hyperlinked to caselaw.nsw.gov.au or JADE.

Special thanks are given to **Jane Sanders** and **Alexandra White** of **The Shopfront Youth Legal Centre**, who provided me with an unpublished research paper on plea traversals and allowed me to plagiarise.

Please do not hesitate to contact the author by email or text about any errors or case suggestions to incorporate in future editions of the papers or if you need any assistance with a matter: wtuckey@sgchambers.com.au or 0410658480.

The law stated herein is probably correct up to 3/10/2024.

2 PLEAS

The term plea has a broad meaning when used in a legal setting. It can be an allegation made by or on behalf of a party to a legal suit supporting his or her claim or defence. In criminal law, it is the accused's answer to the charge against them.

The plea usually takes the form of *'guilty'* or '*not guilty'*, and according to *Butterworths Australian Legal Dictionary,* this is known as '*a plea to the general issue*.'

2.1 PRACTITIONERS' OBLIGATIONS

The Legal Profession Uniform Law and associate rules contain several specific provisions and rules that directly apply to taking instructions from a client regarding a criminal plea.

2.1.1 Communication of Advice and Duty to the Client

The *Legal Profession Uniform Law Australian Solicitor's Conduct Code Rules* at Reg 7 states (emphasis mine):

> ***7 Communication of advice***
>
> *7.1 A solicitor must provide clear and timely advice to **assist a client to understand relevant legal issues** and to make **informed choices** about action to be taken during the course of a matter, consistent with the terms of the engagement.*
>
> *7.2 A solicitor must inform the client or the instructing solicitor about the **alternatives to fully contested adjudication** of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the matter.*

The *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Advocacy Rules)[1] sets out the following duties to the client (emphasis mine):

> *37. A barrister must promote and **protect fearlessly and by all proper and lawful means the client's best interests** to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person.*
>
> *36. A barrister must inform the client or the instructing solicitor about the **alternatives to fully contested adjudication** of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.*
>
> *37 A barrister must seek to assist the client to **understand the issues in the case** and the **client's possible rights and obligations**, sufficiently to permit the*

[1] Solicitors acting as advocates are bound by the Advocacy Rules.

client to give proper instructions, including instructions in connection with any compromise of the case.

*38. A barrister must (unless circumstances warrant otherwise in the barrister's considered opinion) advise a client who is charged with a criminal offence about **any law**, **procedure** or **practice** which in substance holds out the **prospect of some advantage** (including diminution of penalty), **if the client pleads guilty** or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings.*

2.1.2 Criminal Pleas

Rules 39 and 40 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* [NSW] - Advocacy Rules – sets out a practitioner's obligations in relation to criminal pleas:

Criminal pleas

39 It is the duty of a barrister representing a person charged with a criminal offence:

(a) to advise the client generally about any plea to the charge, and

(b) to make clear that the client has the responsibility for and complete freedom of choosing the pleas to be entered.

40 For the purpose of fulfilling the duty in rule 39, a barrister may, in an appropriate case, advise the client in strong terms that the client is unlikely to escape conviction and that a plea of guilty is generally regarded by the court as a mitigating factor to the extent that the client is viewed by the court as co-operating in the criminal justice process.

These provisions require the practitioner to explain to the client the nature and elements of the charges against them and their available pleas. This requires advice regarding the evidence supporting the charges, any possible defences and the consequences of their plea.

Rule 39(b) clearly states that while practitioners must advise clients about a plea, they must ensure that the client understands that it is the client's responsibility to choose their plea following that advice. This prohibition prohibits the practitioner from placing any inappropriate pressure on the accused to plead in a particular fashion.

Rule 40 clarifies that it is not inappropriate for a practitioner to advise the client in strong terms about the strength of the crown case and the benefits of a guilty plea.

2.1.3 Improper Pressure

Rules 39 and 40 reveal the fine line between a practitioner's duty to ensure a plea is an exercise of the client's free will and their obligation to press upon clients' matters in their best interests fearlessly. The distinction between proper and improper pressure may be a fine line and will be determined by the nature of the pressure and whether it left the client with the freedom to choose their plea.

Fundamentally, a plea to a charge is not valid unless it is entered in the exercise of free choice: *Meissner v The Queen* (1995) 184 CLR 132 at 141 per Brennan, Toohey and McHugh JJ.

This is not to say, however, that any pressure placed upon an accused to plead in a particular fashion will be improper (*Meissner* at 143):

Argument or advice that merely seeks to persuade the accused to plead guilty is not improper conduct for this purpose, no matter how strongly the argument or advice is put. Reasoned argument or advice does not involve the use of improper means and does not have the tendency to prevent the accused from making a free and voluntary choice concerning his or her plea to the charge. As long as the argument or advice does not constitute harassment or other improper pressure and leaves the accused free to make the choice, no interference with the administration of justice occurs.

Conduct is likely to have the tendency to interfere with a person's free choice to plead not guilty, however, when the conduct consists of a promise or benefit that is offered in consideration of the accused pleading guilty. The difficulty in such cases is to draw the line between offers of assistance that improperly impact on the accused's freedom of choice and offers of assistance that are legitimate inducements. In most cases, that difficulty can be resolved by determining whether, in all the circumstances of the case, the offer could reasonably be regarded as intended to protect or advance the legitimate interests of the accused having regard to the threat to those interests that arises from the institution of the criminal proceedings."

In *Regina v Murphy* [1965] VR 187 even though it found that Counsel's advice was strong, unduly pessimistic as to the consequences of proceeding to trial and unduly optimistic regarding the sentence she would receive on a plea of guilty, the Court stated:

The strength of the advice given would appear to be a matter between the applicant and her chosen legal representative, and in the absence perhaps of fraud, duress or the like, which is not suggested, cannot, we think, on any recognized principle afford ground for relief in this Court. After all, ***it is the duty of counsel to advise his clients of the course which he honestly believes in the exercise of his judgment to be in their own interests in all the circumstances****, and it is for his clients to accept or reject that advice and, if thought fit, change their counsel.*

Consistent with rule 40, Hulme J in *R v KCH* [2001] NSWCCA 273 at [168] has stated, 'there can be no doubt that persuasion or advice may be expressed in strong terms – see e.g. R v Cincotta (unreported, CCA, 1 November 1995).'[2]

In *KCH,* the appellant was incorrectly told by his legal advisers during a Jury trial that the Judge hearing the matter had expressed a view that he would be convicted. The appellant pleaded guilty, influenced by this advice. In considering this on an application to withdraw the plea of guilty, the majority stated:

101. It follows that legal practitioners who represent accused persons owe a duty to the court not to bring improper pressure to bear on their clients to plead guilty. In particular, that duty would be breached by a practitioner deliberately or negligently giving the client false information that the trial judge had expressed a particular opinion as to the prospects of the client being found guilty. Such a duty is part of the general duty not to corrupt the administration of justice which in turn is derived from the public interest in ensuring that the administration of justice is not subverted or distorted by dishonest or negligent practices.

…

103. In these circumstances, it is appropriate to regard a decision to enter a plea of guilty as having been procured by improper pressure when such advice materially

[2] *R v KCH* [2001] NSWCCA 273 at [168].

> *contributes to the maintenance (until the plea is entered) of an earlier decision to plead guilty. In my view, the advice will be regarded as having materially contributed to the maintenance of the decision if it was likely to influence the client in acting in the way that he or she in fact did act (cf **Chappel v Hart** per Gaudron J at 238 to 239, per McHugh J at 244 to 245, per Kirby J at 268 et seq).*

In R v Wilkes [2001] NSWCCA 95, counsel conveyed to the appellant that a witness's evidence meant that the case would be lost and that by pleading guilty, the appellant could save some years off the sentence that would be imposed. Counsel's advice, accordingly, was that he should plead guilty since there was no effective way of defending the case. The appellant said in response to this advice, "Well, if I've got no chance, I might as well plead guilty".

Trial counsel in the matter conceded in the CCA that he had 'not given the appellant any real choice as to whether he should plead guilty or not,' and that the appellant had not given him any instructions acknowledging that he had committed the offence. Counsel also conceded that matters could have been reasonably argued at trial. Wood CJ at CL at [40] found that the advice given was incorrect and imprudent, and the plea was not attributable to a genuine consciousness of guilt.[3]

2.1.4 Advice on a Plea

The rules set out above and various authorities dealing with the issue make it apparent that a number of steps are required to ensure that a client is given proper advice regarding a plea.

Nature and elements of the charges. A client must be provided with advice regarding the nature of the charges they face and the elements of those offences.[4]

Evidence and facts. The client must be advised regarding the evidence and facts related to the alleged charges and how they bear upon proof of the offences alleged. The client should also be given advice in relation to their ability to challenge the evidence and facts against them.[5]

In *Liberti* (1991) 55 A Crim R 125, Kirby P stated:

> *An accused person will not always know the legal consequences of the facts to which he pleads guilty. He or she is normally entitled, where represented, to look to the lawyers to explain those facts for their legal significance.*

Instructions. The client's instructions as to whether they are, in fact guilty or innocent of the charge(s) alleged need to be taken to inform the advice that is given.[6] Where a client has provided a version of events or indicated liability in the brief of evidence (such as in an interview with the police) or in earlier instructions and then gives contrary instructions (such as to plead guilty or accept facts on a different basis) the legal practitioner will need to discuss the difference in the change of instructions and understand the reasons for the change.[7]

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[3] It is unclear from the judgment in this matter whether counsel's advice was imprudent merely because it involved telling the client that conviction was a foregone conclusion or because this advice was incorrect. Rule 40 suggests that counsel should only go so far as telling a client that they are 'unlikely' to escape conviction.

[4] *R v Iral* [1999] NSWCCA 368; R v Ganderton (NSWCCA, 17 September 1998, unreported); *Liberti* (1991) 55 A Crim R 120.

[5] *R v McLean* [2001] NSWCCA 58.

[6] *R v Ganderton* (NSWCCA, 17 September 1998, unreported); In *R v Iral* [1999] NSWCCA 368 at Meagher JA criticised a solicitor acting for the appellant in concluding: '*1. That it is doubtful that Mr Hovan at any stage elicited from the appellant what the facts of the case were or what the appellant's instructions were… and 4. Despite Mr Hovan's evidence to the contrary, that neither Mr Hovan nor any of his minions explained to the appellant exactly what were the ingredients of the offence with which he was charged*.'

[7] Lourey v R [2010] NSWCCA 158.

Defences. A client must be informed of any defence they have or might have to the charges they face. These include any statutory or common law defence that arises on the evidence and instructions of the client. This requirement includes advising the client on any defence that is arguable or open, even if the legal practitioner believes that it is unlikely to succeed.[8]

Alternatives. A client must be advised regarding 'alternatives to fully contested adjudication.' In a criminal matter, this includes pleading guilty and the advantages of pleading guilty (including but not limited to the utilitarian discount on sentence). It also includes advising the client regarding the advantages of limiting issues in dispute (such as 22A of the *Crimes (Sentencing Procedure) Act* 1999).[9]

2.1.5 Requirement for Written Instructions

There is no statutory requirement that a client's plea be taken in writing; however, a number of authorities indicate that instructions to plead guilty should be taken in writing and/or strongly criticise lawyers who fail to 'obtain written confirmation of a client's instructions before putting the instructions into effect.'[10]

2.2 ARRAIGNMENT

An arraignment is a formal proceeding conducted "to establish the accused's identity, acquaint him with the charge, and obtain his plea."[11]

An arraignment on indictment was discussed in *R v Nicolaidis* (1994) 33 NSWLR 364; 72 A Crim R 394 at 367 (NSWLR), 396–397 (A Crim R):

> *[t]he arraignment of defendants, against whom bills of indictment have been preferred and signed, consists of three parts, (1) calling the defendant to the bar by name; (2) reading the indictment to him; (3) asking him whether he is guilty or not … Except in a few special cases (eg where the defendant is a deaf mute, or refuses to plead) the initial arraignment must be conducted between the clerk of the court and the defendant. The defendant must plead personally – the plea cannot be made through counsel or any other person on his behalf … The arraignment is not complete until the defendant has pleaded.*

The need for an accused person to be personally arraigned, and not rely on Counsel was discussed in *R v Heyes* (1950) 34 Cr App R 161 at 162 (CCA); *R v Ellis* (1973) 57 Cr App R 571 at 574–575 (CA).

In *R v Duffield* (1992) 28 NSWLR 638; 64 A Crim R 18 (CCA) (at 655–656 (NSWLR); 35 (A Crim R)), Kirby P observed that "[a] public acknowledgment of a plea of guilty from the lips of the accused person may help ensure against later assertions of a lack of understanding, confusion or actual misrepresentation of instructions given to legal representatives."

If an accused person refuses to indicate their plea at arraignment, they are taken to have entered a plea of not guilty.

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[8] *R v Favero* [1999] NSWCCA 320.
[9] S72 of the *Criminal Procedure Act* 1986 imposes specific obligations on practitioners in EAGP matters.
[10] *R v Favero* [1999] NSWCCA 320 at [12] and [15].
[11] *R v Williams* [1978] QB 373 at 381 (CA).

In the Local Court, committal matters and matters that proceed in the superior courts otherwise than on indictment (such as a case conference certificate or court attendance notices), there is no requirement that the accused personally enter their plea.

In the Local Court, pleas are often accepted through the accused's representative. There is, however, no bar on the accused entering their own plea, and, in many cases, it may be preferable, for example, after a process of negotiation:

> *Especially in circumstances where the committing magistrate is aware that the plea is proffered following "negotiations" between the prosecutor and those representing the accused, there is much to be said for affording the accused the opportunity, for himself or herself, to acknowledge the plea orally in public before the magistrate acts upon it. The reasons for such a course are obvious. Such an act acknowledges guilt in a public way. It thereby attracts to the accused the advantages, upon sentence, which normally attend the admission of guilt and the formal acceptance of what must then follow. But it also involves a procedure which may help to remove some of the problems which are inherent in plea bargaining…*[12]

2.3 PLEAS OF NOT GUILTY

A plea of not guilty is a declaration by the accused that they rely upon their presumption of innocence, and it is then for the state to prove their case against them. In *Griffiths v The Queen,* Brennan, Dawson and Gaudron JJ said (at 79; 547-548; 167):

> *A plea of not guilty puts all elements of the offence charged in issue.*[13]

In *Thompson v The* King [1918] AC 221; [1918-19] All ER Rep 521; (1917) 13 Cr App R 61 (HL) Lord Sumner said (at 232; 526; 78):

> *The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the defence with fancy defences in order to rebut them at the outset with some damning piece of prejudice.*[14]

An accused person is not required to set up any defence or raise any particular issue with the crown case on a plea of guilty. 'The plea of guilty may be equivalent to saying "let the prosecution prove its case, if it can", and having said so much the accused may take refuge in silence.'[15]

2.4 PLEAS OF GUILTY

A plea of guilty is a *'formal confession of the existence of every ingredient necessary to constitute the offence*.'[16] The plea of guilty admits all the elements of the offence charged but no more: *R v Maitland* [1963] SASR 332.[17]

In *Weston v The Queen* [2015] VSCA 354 (17 December 2015) Redlich JA at [109] said:

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[12] *R v Duffield* (1992) 28 NSWLR 638; 64 A Crim R 18 at 655–656 (NSWLR), 35 (A Crim R) (CCA).
[13] (1994) 69 ALKR 77; 76 A Crim R 164; 125 ALR 545 (HC) *Ross on Crime* [16.2105].
[14] [1918] AC 221; [1918-19] All ER Rep 521; (1917) 13 CR App R 61 (HL) Lord Summer said (at 232; 526; 78) *Ross on Crime* [16.2105].
[15] *R v Noor Mohamed* [1949] AC 182 at 191 (PC).
[16] *R v D'Orta-Ekenaike* [1998] 2 VR 140; (1997) 99 A Crim R 454 (CA) at 146-147; 462; citing *De Kruiff v Smith* [1971] VR 761 at 765; *R v Henry* [1917] VLR 525 at 526. *Ross on Crime* [16.2130].
[17] *Butterworths Australian Legal Dictionary, '*Guilty Plea', p 536.

1 The basis of a plea on arraignment is that in open court an accused freely says what he is going to do; and the law attaches so much importance to a plea of guilty in open court that no further proof is required of the accused's guilt.

2 The plea of guilty constitutes an admission of all of the legal ingredients of the offence and is the most cogent admission of guilt that can be made. It's significance rests in part upon the high public interest in the finality of legal proceedings.

2.4.1 A Plea of Guilty must be Unequivocal

A plea of guilty must be unequivocal to be accepted by the court. In *Maxwell v The Queen* (1996) 184 CLR 501, Dawson and McHugh JJ said (at 511; 7; 186):

> *The plea of guilty must however be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake or even the desire to gain a technical advantage. The plea may be accompanied by the qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered. But otherwise an accused may insist upon pleading guilty.*[18]

Where it becomes apparent to a court, for whatever reason, that the accused person's version of the facts is inconsistent with the plea, the court should give the opportunity to withdraw the plea. If that does not occur and the accused person insists upon pleading guilty, the court should ignore the accused person's version.[19]

2.4.2 Plea to a Less Serious Offence

An accused person may plead guilty to a less serious offence than the primary count on the indictment. This may take the form of pleading guilty to an alternative charge that the prosecution relies upon as an alternative or an offence that has not been charged (s154 *Criminal Procedure Act* (NSW) 1986). The prosecution may accept the plea to the less serious offence or reject it.

If the plea is rejected, the procedure to be followed was outlined in *R v Broadbent* [1964] VR 733 (CCA) O'Bryan J, with whom the others agreed, said (at 736):

> *The most convenient way to deal with the matter is to allow the whole trial to go forward, that is, the trial on both counts. The jury can be told, whether the prisoner does or does not withdraw his plea of guilty to the lesser offence, that having heard him say in effect in open court that he is guilty of the lesser offence, they can use that admission against him considering what the proper verdict should be. That is, if they find him guilty of the more grave charge, there is no necessity for them to consider the lesser charge, but if they find him not guilty of the more grave charge, they may, in considering his guilt of the lesser charge, take into account his plea of guilty. If the court does otherwise and withdraws the lesser charge from the jury and proceeds only with the major offence, it might be supposed that the court had in some way accepted the plea of guilty, and afforded the accused an answer by way of autrefois convict to the major charge.*

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[18] (1996) 184 CLR 501; 87 A Crim R 180; 135 ALR 1 in *Ross on Crime* [16.2135].

[19] Howie and Johnson, *Annotated Criminal Legislation New South Wales,* 2016-2017 Edition at [2-3 193.1] – citing various authorities.

2.4.3 Conviction on Plea of Guilty

A plea of guilty upon entry does not constitute a conviction. The plea is an admission that may allow the court to proceed to conviction. The distinction was set out in *R v Tonks* [1963] VR 121 ([1963] VR 121 at 127–128):

> *The review of the authorities which we have made satisfies us that a plea of guilty does not if its own force constitute a conviction. In our opinion it amounts to no more than a solemn confession of the ingredients of the crime alleged. A conviction is a determination of guilt, and a determination of guilt must be the act of the court or the arm of the court charged with deciding the guilt of the accused … There can accordingly be no conviction on a count to which an accused pleads guilty until by some act on the part of the court it has indicated a determination of the question of guilty. And if there can be no conviction till then, neither can there be a successful plea of autrefois convict.*

2.4.4 Consequences of a Plea

In taking instructions relating to a plea, a practitioner must advise a client as to the consequences of that plea. A practitioner may need to advise a client about the following consequences:

1. Sentencing procedure and law - including maximum penalties, standard non-parole periods, and sentencing options;
2. Consequences of a finding of guilt and/or conviction - including in relation to future employment, employment-related disciplinary proceedings, firearms, travel, spent convictions, family law proceedings, and working with children's checks;
3. Consequences in relation to future proceedings – the plea *may* be used as an admission of guilt in future proceedings against co-accused and/or form the basis of future tendency arguments;
4. Statutory consequences – driving disqualification, sexual offender registers, high risk sexual and violent offender orders, firearms prohibition orders;
5. Publicity - advice should be given regarding any potential order for suppression, even if there is no hope of such an order; and,
6. Financial consequences – court costs and victim's compensation.

2.5 Agreeing Facts

While a guilty plea admits the elements of a charge, it does not admit the non-essential ingredients of an offence.[20] In *GAS v The Queen* (2004) 217 CLR 198 at [30], the full bench of the High Court said:

> *In the case of a plea of guilty, any facts beyond what is necessarily involved as an element of the offence must be proved by evidence, or admitted formally (as in an agreed statement of facts), or informally (as occurred in the present case by a statement of facts from the bar table which was not contradicted). There may be significant limitations as to a judge's capacity to find potentially relevant facts in a given case.*

In *R v Crowley* [2004] NSWCCA 256 at [46], Smart AJ said:

[20] *Sentencing Bench Book,* [1-450] accessed 5/5/2017.

> *Agreed facts should always be carefully checked by all parties and their legal representatives, and especially by counsel for an offender. This should not be perfunctory.*[21]

In *R v Balchin* (1974) 9 SASR 64 (CCA) the court said in a joint judgment (at 67):

> *[I]t could well constitute a* ***breach of professional duty*** *to an accused person if his counsel without specific authority to do so, should make any admission which could be detrimental to the interests of the accused, or which otherwise might have the effect of depriving him of a fair trial.*

In *R v Birks* (1990) 19 NSWLR 677; 48 A Crim R 385 Lusher J said (at 702; 409):

> *[I]n a criminal trial an admission, and a waiver is in the nature of an admission, can only be made by an accused on the advice of counsel, sensibly and usually in writing, which is difficult to obtain or give in the run of a vigorous cross-examination. Lastly, an accused cannot be required to make an admission or even to consider one.*

Dowling v R [2017] NSWCCA 98

In usual circumstances, a client is bound by the conduct of their representative if the representative allows a set of facts be tendered without objection. In *Dowling* the Court dealt with a situation in which counsel for the accused allowed facts to be admitted without objection. The Dowling gave evidence on sentence which didn't reveal any inconsistency with the facts and even expressed contrition regarding the offending – which the court was entitled to infer related to the offending detailed in the facts. Adamson J, with whom Leeming JA and Wilson J set out the principles:

> *[31] The facts on the basis of which an offender is sentenced must generally be either* ***proved to the requisite standard, admitted or agreed****: The Queen v Olbrich (1999) 199 CLR 270; [1999] HCA 54; Weininger v The Queen (2003) 212 CLR 629; [2003] HCA 14; GAS v The Queen; SJK v The Queen (2004) 217 CLR 198; [2004] HCA 22 at [30]. It is* ***preferable that the facts be signed by the offender before sentence*** *in order to indicate his or her agreement to the facts. However, where this course is not taken, the agreement can be indicated to the Court by the conduct of counsel for the person who stands to be sentenced.*
>
> *[32] In the present case, I regard the applicant as being* ***bound by the conduct of his counsel****: see also CL v R [2014] NSWCCA 196 at [43]-[44] per Adamson J (Hoeben CJ at CL and Fullerton J agreeing). An agreement as to the facts commonly forms the basis for sentencing following a plea of guilty. I do not discern any basis on which the statement of facts ought not to have been accepted by the sentencing judge, or on which their correctness ought to be revisited on this application. The applicant did not give evidence at the sentence hearing which cast any doubt on the correctness of the agreed facts. Nor is there any basis for supposing that he was not fully consulted about their content by his legal representatives: cf. R v Crowley [2004] NSWCCA 256. In the circumstances of the present case, there having been no query raised by the sentencing judge as to the facts of the offences, the sentencing judge was both entitled and obliged to sentence on the basis of the facts tendered by the Crown without objection.*

[21] *Sentencing Bench Book,* [1-460] accessed 5/5/2017.

3 CONVENIENCE PLEAS

An accused person has the freedom to plead guilty to an offence even if they are not guilty or maintain that they are not, in fact, guilty. A plea of guilty for reasons other than guilt is often referred to as a 'convenience plea.'

In *Meissner v R* (1995) 184 CLR 132; (1995) 130 ALR 547, addressing whether a '*person*' can plead guilty to a charge whether or not they believed themselves to be guilty, the majority (at 141) said:

> *A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty.*

In *Meissner*, Dawson J at (157) recognised this fact:

> *It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred.*

In *Loury v Regina* [2010] NSWCCA 158 per Whealy J (Kirby J and Hodgson JA agreeing), the Court said:

> *99 What also emerges from the authorities is that a plea of guilty may be entered for reasons other than a belief in one's own guilt. As noted by Dawson J in Meissner v The Queen (1995) 184 CLR 132, the accused person's exercise of free choice may "extend beyond that person's belief in his guilt" and includes situations such as the avoidance of worry or inconvenience, the protection of one's family and even "the hope of obtaining a more lenient sentence than [the accused] would if convicted after a plea of not guilty" (at 157).*

3.1 CONVENIENCE PLEAS ARE BINDING

A correctly entered convenience plea will not be set aside by a court at a later stage merely because the accused person changes their mind or regrets the consequences of their plea.

In *Meissner v R* (1995) 184 CLR 132, the majority (at 141) stated:

> *A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. An inducement to plead guilty does not necessarily have a tendency to pervert the course of justice, for the inducement may be offered simply to assist the person charged to make a free choice in that person's own interests.* ***A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of free choice in the interests of the person entering the plea.*** *There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence.*[22]

[22] Emphasis mine.

Howie J in Wong v Director of Public Prosecutions [2005] NSWSC 129; 155 A Crim R 37 stated:

> *33 A court is entitled to accept a plea of guilty that is given in the exercise of a free choice in a defendant's own interests and there will be no miscarriage resulting from reliance on the plea* ***even though the person entering the plea "is not in truth guilty of the offence"****: Meissner [Meissner v The Queen 1994) 184 CLR 132] at 141.*

Loury v Regina [2010] NSWCCA 158 per Whealy J (Kirby J and Hodgson JA agreeing):

> *Howie J made clear in* Wong v Director of Public Prosecutions *(NSW) (2005) 155 A Crim R 37 at [33], there will be no miscarriage of justice in situations where a plea of guilty has been entered for the purpose of gaining some perceived advantage, despite maintaining one's innocence, so long as the plea was entered in the exercise of a person's free choice or in his or her own interests.*

In *R v Sagiv* (1986) 22 A Crim R 73, Lee J (McInerney and Campbell JJ agreeing), made the following observations at 80-81:

> *It is clear that in the case of mistake or other circumstances affecting the integrity of the plea as an admission of guilt the court should readily grant leave. But if the plea has been entered in full knowledge of all the facts and intentionally as a plea to the charge which is made, the court is plainly entitled to exercise its discretion against a withdrawal of the plea. The law regards a plea of guilty made by a person in possession of all the facts and intending to plead guilty as an admission of all the legal ingredients of the offence… and as the most cogent admission of guilt that can be made, for the court is prepared to act upon it and proceed to conviction or final disposition of the proceedings.*

In R v Khan [2002] NSWCCA 521, Giles JA (Sully and Dowd JJ agreeing) at [28] stated:

> *Putting aside cases where on the admitted facts the accused could not in law have been convicted of the offence charged,* R v Davies *also shows that the fact the accused can point to some doubt about his guilt, absent the plea of guilty, does not mean that leave to withdraw the plea will be granted.*

3.2 Acting in Relation to a Convenience Plea

There is some ethical tension between a practitioner's duty of frankness to the court and entering a plea of guilty where the client denies guilt. Caselaw and the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, however, make it clear that a practitioner may enter a plea of guilty despite the client's continued denial of the offences.

Special care is needed, and several additional rules apply to practitioners when they act put a plea of convenience into effect. Such pleas are particularly susceptible to reversal because they involve no true admission of guilt and may depend heavily upon the legal advice that has been given.

In *R v Allison* (2003) 138 A Crim R 378 (Qld CA), Jerrard JA giving the leading judgment said (at 385 [26]):

> *[E]xperience shows that some people charged with serious offences (and particularly offences of incest or indecently dealing with children) wish both to maintain to their lawyers that they are actually innocent, and also to plead guilty. In those circumstances it is imperative that these lawyers ensure that no plea be taken until*

(written) instructions have been obtained in which the person charged describes a wish or willingness to plead guilty, and an understanding that by so doing, he or she will be admitting guilt. If those instructions are obtained and adhered to a lawyer may properly appear on the plea.[23]

3.2.1 Conduct Rules

Rule 41 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* [NSW] imposes additional requirements on a practitioner acting for a person in relation to a convenience plea. The CCA has described this rule as setting out 'important and protective' explanations to be given to a client before they enter a convenience plea:[24]

> *41 Where a barrister is informed that the client denies committing the offence charged but insists on pleading guilty to the charge, the barrister:*
>
> *(a) must advise the client to the effect that by pleading guilty, the client will be admitting guilt to all the world in respect of all the elements of the charge,*
>
> *(b) must advise the client that matters submitted in mitigation after a plea of guilty must be consistent with admitting guilt in respect of all of the elements of the offence,*
>
> *(c) must be satisfied that after receiving proper advice the client is making a free and informed choice to plead guilty, and*
>
> *(d) may otherwise continue to represent the client.*

3.2.2 Admission to All the World

Rule 41(a) is important because a client may desire to enter a convenience plea and later assert their innocence. Whilst this does not prevent them from asserting their innocence to friends and family, their admission of guilt will be considered a true admission in all proceedings relating to the charge.

Whilst a client may understand that their admission will apply to the balance of proceedings in relation to the offence to which they plead, they may not understand that it may be evidence of their guilt in a multitude of other contexts. These contexts include later trials against the client where it is adduced as tendency or coincidence evidence, trials against co-offenders, civil proceedings, and high-risk offender proceedings, to name a few.

3.2.3 Sentence Proceedings

Rule 41(b) requires a practitioner to advise the client that a plea entered for reasons of convenience may disadvantage them at sentence.

At sentence, the practitioner will be bound by their duty not to knowingly or recklessly mislead the court and their duties towards the integrity of evidence.

Consequently, the practitioner will not be able to advance any argument or lead any evidence of contrition and remorse in relation to the offence. The consequence of this is that on a convenience plea, the client will not be entitled to this fundamental mitigating factor.

Further, the client must understand that they cannot mitigate their penalty by offering evidence that contradicts the plea or any agreed facts. For instance, a client must be disabused of any thought that

[23] (2003) 138 A Crim R 378 (Qld CA) – *Ross on Crime* [3.8640].
[24] *White v R* [2022] NSWCCA

they can plead guilty and then persuade the court through the evidence on the sentence that they are not, in fact, guilty. The client will also not be able to give evidence on sentence that establishes a defence to the charges, such as a claim that they were acting in self-defence or their acts were unintentional.

Although it may depend on the case, a client who has entered a plea as a matter of convenience may be unable to give evidence in sentence proceedings at all for fear of giving evidence that contradicts their plea of guilty or agreed facts. As a result, the client may be able to establish mitigating facts on sentence that go beyond contrition and remorse.

The client must also be advised that they will be limited in what they can say during sentence assessments and psychological/psychiatric reports, as denying the offence or aspects of it may produce an adverse impression.

If a sentencing judge becomes aware of statements by the client, either in filed material or oral evidence, that traverses the plea of guilty or agreed facts, proceedings will often come to a halt until the judge is satisfied that they should continue.

If a client traverses a plea of guilty in material that is filed before sentence, usually a Sentence Assessment Report, clear instructions must be taken that the client wishes to maintain the plea of guilty and proceed to sentence. If the matter arises during the sentence proceedings, such as when a client gives evidence, time should be requested to take further instructions from the client and proceed with the sentence.

A judge can only reject a plea of guilt under certain circumstances. If the client makes a statement that suggests he is innocent of the offence charged, it is appropriate for a Judge to ask if the plea is maintained; however, where the client insists on maintaining the plea of guilty, then the court should not interfere. In *R v Martin* (1904) 4 SR (NSW) 720, the accused pleaded guilty to an offence but then made a statement indicating that he had a defence to the charge. The Supreme Court was called upon to consider whether the Judge should have rejected the guilty plea. Owen J with GB Simpson J and Pring J agreeing… indicated:

> *…it appears to me that we cannot go into the matter since the accused pleaded guilty. It is true that he added a qualifying statement, but when the situation was explained to him, he refused to allow the matter to go before a jury, and persisted in the plea of guilty. It has been said that a plea of not guilty should have been entered, but it appears to me that where a man who evidently knows what he is about insists upon recording a plea of guilty, the Judge cannot interfere. If there is any doubt as to the nature of the plea, or any reason to suppose that the accused is not thoroughly aware of what he is doing, a plea of not guilty should be entered…*

In *Maxwell v The Queen* at 510–511 (CLR), 186 (A Crim R) per Dawson and McHugh JJ the court stated (footnotes omitted):

> *…if the trial judge forms the view that the evidence does not support the charge or that for any other reason the charge is not supportable, he should advise the accused to withdraw his plea and plead not guilty. But he cannot compel an accused to do so and if the accused refuses, the plea must be considered final, subject only to the discretion of the judge to grant leave to change the plea to one of not guilty at any time before the matter is disposed of by sentence or otherwise.*
>
> *The plea of guilty must however be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt. Those circumstances include*

ignorance, fear, duress, mistake or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered. But otherwise an accused may insist upon pleading guilty.

3.2.4 Free and Informed Decision

Rule 41(c) imposes a duty on a practitioner to ensure the client makes a free and informed choice. Based on the authorities cited above, these may include considerations of whether the accused is under any improper pressure to plead guilty, whether they are of sound mind, whether they are of full age and whether they are deciding in their own interests.

3.3 Use of a Convenience Plea in Other Proceedings

As noted above, a client who enters a convenience plea may be confronted by it later in proceedings against themselves – usually as tendency or coincidence evidence. Pleas of guilty to an offence may also used by the prosecution as prior statements made by a person when they are called as an unwilling witness against another person (such as where one accused pleads guilty and a co-accused takes their matter to trial).

R v Moussa [2017] NSWCCA 267 was an urgent interlocutory appeal against a trial judge's decision to reject a statement of agreed facts and remarks on sentence from a prior matter (the 2011 offences) being admitted as evidence of a tendency of the accused. The trial judge had permitted the Crown to rely on a conviction certificate from the 2011 offences as evidence that the accused had previously committed the elements of the offence but declined to permit the Crown to rely on the agreed facts from the matter.

During the appeal, the CCA accepted that a conviction certificate indicating a plea of guilty could be used as evidence of a tendency as far as the elements of the offence were concerned. The court also accepted that agreed-upon facts from a prior offence could be used as evidence of a tendency in later proceedings. The only contentious issue on appeal was whether the Crown could rely upon the 2011 judge's remarks on the sentence to establish that the facts had been agreed upon without a signature. The CCA concluded that the remarks could be relied upon for this purpose in a voir dire (but not themselves tendered in the trial). The matter was sent back to the trial judge for determination.

In returning the matter to the District Court, the CCA commented:

> *[27] … there is no suggestion that the Agreed Facts in the earlier proceedings were agreed facts pursuant to the provisions of s 191 of the Evidence Act and, further, there is no suggestion that the Agreed Facts were not admissions made generally and beyond the proceedings to which they related. If they were intended to be a statement of agreed facts limited to the then sentencing proceeding and without admission of the facts generally, one would expect a statement in the document to that effect.*

The decision makes it apparent that it is open to a trial Court to admit evidence of a guilty plea as evidence of the elements of a prior offence and agreed facts, whether signed or unsigned, as evidence of a person's prior acts. Unless limited by s191 of the *Evidence Act* 1995, agreed facts in sentence proceedings may be regarded as 'admissions made generally and beyond the proceedings to which they related.'

In *R v D'Orta-Ekenaike* [1998] 2 VR 140; (1997) 99 A Crim R 454 (CA), an accused had entered a plea of guilty at committal but then withdrew it in the District Court and proceeded to a jury trial on a plea of not guilty. The Crown led evidence of the fact that the accused had entered a guilty plea at the earlier stage in proceedings as evidence of a confession in the jury trial. The accused contended that he had entered the plea hoping to get a suspended sentence and not as a true admission of guilt.

The Victorian Court of Appeal held that the court had discretion over whether the earlier plea of guilty was admissible as an admission (in NSW, this would be pursuant to an objection under s137 of the *Evidence Act NSW* 1995). Where a plea has been entered and later withdrawn by leave of the court (such as in a traversal application), it is unlikely to meet the standards for admission because the court has acknowledged that there was an issue affecting the integrity of the plea. Where, however, the plea was withdrawn without the need for a hearing or where it was left undisturbed, it may be necessary to put evidence before the court challenging its probative value as an admission. Even if the plea was entered as a matter of convenience, it may well be admitted as evidence of an admission if it was found to have been made from free choice.

Even though the accused gave evidence at trial that he had entered the plea for reasons of convenience, the Court of Appeal stated:

> *Evidence of an earlier plea of guilty amounts to a formal confession of the existence of every ingredient necessary to constitute the offence: see De Kruiff v. Smith [1971] VR 761 at 765; R. v Henry [1917] VLR 525 at 526. It needs hardly be said that such evidence was highly damning of the applicant's case…*

The court noted, however, that the situation required the judge to give strong directions to the jury. Winneke P, with whom Brooking JA and Vincent AJA agreed, stated:

> *…. In a case where the Crown was contending that the applicant's plea of guilty at the lower court was conclusive evidence of his guilt, including the challenged issue of his state of mind, it was the judge's obligation to give the jury directions, carrying with them the full authority of his office, as to how they should approach such a significant issue. Like in every other case where an alleged confession of guilt has been challenged, his Honour, in my view, was bound to instruct the jury in the circumstances that, before they could use the evidence of the guilty plea as conclusive evidence of the applicant's guilt, they had to be satisfied beyond reasonable doubt that such plea was, and was intended to be, a true acknowledgment of the applicant's guilt of the crime charged; and that if, having regard to the evidence, they concluded that it was possible that he had entered the plea not because of a belief in his guilt but because he believed he would receive a suspended or more lenient sentence, then they should discard the plea of guilty from their consideration.*

4 WITHDRAWING A PLEA OF GUILTY

An application to withdraw, or traverse, a plea of guilty may be made to a court before the finalisation of the matter (conviction and sentence) or to an appeal court on an appeal against conviction where a plea of guilty was entered in the originating court: *R v Chiron* [2018] 1 NSWLR 218.

4.1 WITHDRAWING A PLEA BEFORE SENTENCE

Before *White v R* [2022] NSWCCA 241, Courts applied a 'miscarriage of justice' test to applications to withdraw a plea of guilty. For the application to succeed, the applicant needed to establish, on the balance of probabilities, that maintaining a guilty plea had or would constitute a miscarriage of justice.

Despite being on the balance of probabilities, several judicial dicta have been applied to increase the burden on an applicant. Kirby P in *R v Liberti* had said that such applications should be approached 'with caution bordering on circumspection.'[25] Lord Upjohn in *Recorder of Manchester* said that applications should only be granted in 'clear cases and very sparingly.'[26]

White, however, determined that the correct test to apply to an application to withdraw a plea of guilty before sentence (first scenario cases) was the *interests of justice.* The miscarriage of justice test was limited to conviction appeals to the CCA governed by s6 of the *Criminal Appeal Act* 1912 (CAA) and possibly other forms of appeal after sentence (second scenario cases).

4.1.1 The Test, Onus and Burden of Proof

White determined that the test that should be applied to an application to withdraw a plea of guilty before a sentence should be the test of whether it is in the 'interests of justice.' At [60] the court stated:

> *… the proper test to be applied where an accused seeks leave to withdraw his or her plea of guilty prior to conviction (a first scenario case) is whether the **interests of justice** require that course to be taken.*

This test was said to be broader than the miscarriage of justice test :

> [58] *We would respectfully reject the Director's fallback submission that there is no real or material difference between the interests of justice test and the "miscarriage of justice" test. A positive conclusion on the balance of probabilities that there **would be** a miscarriage of justice if a plea was not permitted to be withdrawn is, no doubt, the paradigm case where it will be in the interests of justice to permit withdrawal of a plea. But equally, it may also be in the interests of justice to permit a plea to be withdrawn if there is **a risk** of a miscarriage of justice, provided that the risk is a **real and not fanciful** one.*[27]

[25] *R v Liberti* (1991) 55 A Crim R 120 at 122 per Kirby P.
[26] [26] From Lord Upjohn in *S (an infant) v Recorder of Manchester* [1971] AC 481.
[27] See, for example, Kitchen at 65.

In an application to withdraw a guilty plea, the accused bears the onus of proof based on the balance of probabilities.

White rejected that the burden for applications to withdraw pleas of guilty should be elevated by reference to previous authority. The Court decided that the Courts had 'undoubted discretion' to deal with applications to withdraw pleas, which should not be fettered by requiring they be approached with 'caution bordering on circumspection' (at [68]). The Court did qualify, however, that 'this is not to say the discretion should be exercised liberally.'[28]

White also rejected the application of Lord Upjohn's 'clear' and 'sparing' dictum as 'neither necessary nor desirable' in determining applications. [29]

The Court, at [69] rejected a prosecution submission that the applicant bore a 'substantial' or 'heavy onus,' stating: 'there is no principled basis for this Court to treat that onus as any "heavier" than in other circumstances where a party seeks to persuade a court to exercise a discretion in the interests of justice.'

4.1.2 The Interests of Justice Factors

In *White* at [65], the court set out a non-exhaustive list of factors to be considered by the court when dealing with an application to withdraw a plea before sentence:

> *[65] … A non-exhaustive list of factors affecting the interests of justice will include:*
>
> - *the circumstances in which the plea was given;*
> - *the nature and formality of the plea, involving as it does the admission of all the formal elements of the offence;*
> - *the importance of the role of trial by jury in the criminal justice system;*
> - *the time between the entry of the plea and the application for its withdrawal;*
> - *any prejudice to the Crown that might arise from the withdrawal of the plea;*
> - *the complexity of the elements of the charged offence;*
> - *whether all of the relevant facts upon which the Crown intended to rely were fully known to the accused;*
> - *the nature and extent of legal advice received by the accused before entering the plea;*
> - *the seriousness of the alleged offending and thus the likely consequences in terms of penalty;*
> - *the subjective circumstances of the accused;*
> - *any intellectual or cognitive impairment suffered by the accused, notwithstanding their fitness to plead;*

[28] At [68] quoting Debelle J from *Webb v Hay* (1992) 64 A Crim R 38 at 52, citing Kitchen at 63 per Bollen J; R v Roach (1990) 54 SASR 491 at 495.

- *any reason to suppose that "the accused [was] not thoroughly aware of what he [or she was] doing";*[30]
- *any extraneous factors that bore upon the making of the plea at the time it was made, including inducement by threats, fraud or other impropriety;*[31]
- *whether the accused has been persuaded to enter a plea by reason of imprudent and inappropriate advice tendered by his or her legal representatives;*[32]
- *any explanation that has been proffered by the accused for the application to withdraw their guilty plea;*
- *any consequences to victims, witnesses or third parties that might arise from the withdrawal of the plea; and*
- *whether, on the material before the Court, there is a real question about the accused's guilt to the charge in respect of which the plea has been entered.*[33]

4.1.3 Summary Proceedings

There is no statutory test for withdrawing a guilty plea before sentence in the Local Court. Following *White,* the test to be applied is 'the interests of justice' and the onus on the accused to establish that it is in the interests of justice.

There is no specific statutory provision for withdrawing a plea once it is entered and before sentence. The court, however, may maintain such applications on a common law basis.

If the accused has entered a guilty plea and the court has proceeded to convict the accused, or make an order against the accused, the power of the court to entertain an application is found in s207 of the *Criminal Procedure Act 1986* (NSW).[34]

> ***207 Power to set aside conviction or order before sentence***
>
> *(1) An accused person may, at any time after conviction or an order has been made against the accused person and before the summary proceedings are finally disposed of, apply to the court to change the accused person's plea from guilty to not guilty and to have the conviction or order set aside.*
>
> *(2) The court may set aside the conviction or order made against the accused person and proceed to determine the matter on the basis of the plea of not guilty.*

4.1.4 Interlocutory Appeals Against a Magistrate's Decision

An accused person may appeal to the Supreme Court against a Magistrate's refusal to allow a plea to be withdrawn. Section 52 of the *Crimes (Appeal and Review) Act* 2001 provides for an appeal as of right after the accused is convicted or sentenced by the Local Court on a question of law:

> ***52 Appeals as of right***

[30] *R v Martin* (1904) 21 WN (NSW) 233 at 235, quoted with approval by Dawson and McHugh JJ in Maxwell at 511.
[31] See *R v Cincotta* (Court of Criminal Appeal (NSW), 1 November 1995, unrep).
[32] *R v Wilkes* at [18].
[33] *Hura* at [69].
[34] It is unclear what might constitute 'an order against the accused' – it might be sufficient if the court has merely accepted the plea of guilty and adjourned the matter for sentence.

(1) Any person who has been convicted or sentenced by the Local Court, otherwise than with respect to an environmental offence, may appeal to the Supreme Court against the conviction or sentence, but only on a ground that involves a question of law alone.

(2) An appeal must be made within such period after the date or the conviction or sentence as may be prescribed by rules of court.

Section 53 provides that the accused may appeal to the Supreme Court by leave on a question of fact or a mixed question of law and fact after conviction or sentence or against an interlocutory order made by the Local Court:

53 Appeals requiring leave

(1) Any person who has been convicted or sentenced by the Local Court, otherwise than with respect to an environmental offence, may appeal to the Supreme Court against the conviction or sentence on a ground that involves--

(a) a question of fact, or

(b) a question of mixed law and fact,

but only by leave of the Supreme Court.

…

(3) Any person against whom--

(a) …

(b) an interlocutory order has been made by the Local Court in relation to the person in summary proceedings,

may appeal to the Supreme Court against the order, but only on a ground that involves a question of law alone, and only by leave of the Supreme Court.

(4) An application for leave to appeal must be made within such period after the date of the conviction, sentence or order as may be prescribed by rules of court.

A Magistrate's refusal to allow a plea to be withdrawn is an interlocutory order which can be appealed under s53(3)(b) before sentence and/or conviction.

4.1.5 Matters Committed for Sentence

Where a guilty plea is entered in the Local Court, and a matter is committed to the District or Supreme Court for sentence, section 106 of the *Criminal Procedure Act* 1986 provides that the accused person can change their plea, and the Court must direct that the person be put on trial. The person is then taken to have been committed for trial.[35] Section 106 ceases to apply once a client is arraigned in a higher court and formally enters a plea of guilty.

The accused's plea of guilty in the Local Court might, in appropriate circumstances, be used as evidence of an admission in any trial of the accused.

[35] Note s104 may apply to offences carrying life imprisonment.

4.1.6 After Arraignment in the Supreme and District Courts

Once an accused person has pleaded guilty to an offence in the District or Supreme Court on arraignment, the plea may only be withdrawn by leave of the Court. An application to withdraw a plea of guilty may occur at any time up until sentence is passed: *Frodsham v O'Gorman* [1979] 1 NSWLR 683.

No statutory provisions exist for an application for leave to withdraw a guilty plea. The test for leave was established as 'the interests of justice' by *White.*

The District and Supreme Court rules may govern the form of an application to withdraw a plea it is usually commenced by a notice of motion with affidavit(s)or other evidence in support. If leave is granted, the Court would ordinarily order a trial.

There is authority for the proposition that an application cannot be made to withdraw a plea of guilty if the plea was entered in the presence of a jury:

> *Hura confirmed, for example, that, once the District Court of New South Wales has accepted a plea of guilty (entered mid-trial) and discharged the jury, the plea may not be withdrawn thereafter.*[36] *In R v Chiron,*[37] *it was also held that there was no jurisdiction to permit withdrawal of a guilty plea once a jury had returned a verdict and been discharged.*[38] *In these cases, an accused seeking to go behind his or her plea of guilty could only do so on appeal against conviction, in which to succeed a miscarriage of justice would need to be established.*[39]

4.2 Withdrawing a Plea After Sentence

White distinguished attempts to withdraw a guilty plea before the sentence is passed and on appeal after the matter has been finalised.

The critical distinction between the two scenarios is the concept of finality. The principle of finality has been described as: 'A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances.[40]

White explained the distinction at [62]:

> *Where a conviction has been entered and sentence passed, any attempt on appeal to disturb that outcome will necessarily impact on the finality of the verdict and sentence. On the other hand, where a conviction has not yet been entered even though the accused has pleaded guilty, nothing is final because it remains open for the Crown or the Court not to accept the guilty plea and, in the case of the Crown, to withdraw its acceptance at any time until the formal recording of a conviction and sentence. That was what Maxwell was all about.*[41]

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[36] See Criminal Procedure Act, s 157.
[37] [1980] 1 NSWLR 218 at 226–227.
[38] See also *R v Wilkes* at [11]–[13].
[39] *White* at [62].
[40] *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1, 17 [34].
[41] See also *R v Jerome & McMahon* [1964] Qd R 595 at 604 per Gibbs J, cited with approval by Gaudron and Gummow J in Maxwell at 529; cf, *Liberti v R* (1991) 55 A Crim R 120 at 122, where Kirby P did not appear to distinguish between the relevance of finality at trial and on appeal.

4.2.1 The Miscarriage of Justice Test[42]

White preserved the miscarriage of justice test specifically for appeals to the CCA governed by section 6 *of the Criminal Appeal Act*. It also suggests that the test for other appeals after sentence should require a finding of a miscarriage of justice, or at least that the principle of finality should weigh upon the Court's discretion.[43]

The miscarriage of justice test is well set out in several authorities. In *R v Boag* (1994) 73 A Crim R 35 per Hunt CJ at CL (with McInerney and James JJ agreeing) (at 36):

> *In stating the test to be applied in determining whether the applicant should be permitted to withdraw his plea of guilty, the judge correctly said that such a course should be allowed where it has been shown that a miscarriage of justice has occurred. The judge also correctly said that the applicant bore the onus of showing the existence of that miscarriage.*

In *R v Liberti* (1991) 55 A Crim R 120 at 121 – 122, Kirby P said:

> *… Courts approach attempts at trial or an appeal in effect to change a plea of guilty or to assert a want of understanding of what was involved in such a plea with caution bordering on circumspection. This attitude rests on the* ***high public interest in the finality of legal proceedings*** *and upon the principle that a plea of guilty by a person in possession of all relevant facts is* ***normally taken to be an admission by that person of the necessary legal ingredients of the offence****…*

4.2.2 Conviction Appeal from a District or Supreme Court Sentence

A person who pleads guilty to an offence in the District or Supreme Court and is sentenced may appeal against their conviction to the Court of Criminal Appeal[44] These appeals are determined according to s6 of the Criminal Appeal Act 1912.

Section 6 of the *Criminal Appeal Act* provides:

> ***6 Determination of appeals in ordinary cases***
>
> *(1) The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever* ***there was a miscarriage of justice****, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*

[42] These principles are set out in *Mao v DPP* (NSW) [2016] NSWSC 946.

[43] It may be a matter for future argument whether the miscarriage applies to all appeals after sentence or those governed by s6 of the *Criminal Appeal Act*. White divides matter into two scenarios (before sentence and after sentence) but only made a specific finding regarding section 6 appeals based on the 'statutory root' contained in s6. This statutory test does not appear in legislation that creates appeals from the Local to the District Court.

[44] s5 *Criminal Appeal Act* provides for appeals as of right or requiring leave.

Accordingly, where the appeal is based on withdrawing a plea of guilty, which led to the conviction, the appellant must establish that the plea was such that the consequent conviction and sentence constituted 'a miscarriage of justice in acting

In *White,* at [58], the court discussed the miscarriage of justice test that applies to appeals against conviction (referred to as second scenario cases) under s6:

> *The proposition that the Court of Criminal Appeal may quash a conviction entered upon a plea of guilty only if it is demonstrated that a miscarriage of justice will occur if the plea is not permitted to be withdrawn is unimpeachable in the context of what we have described as a second scenario case. That is because, in such a scenario, the Court at first instance has simply accepted the plea and proceeded to convict and sentence the appellant; it has not been called upon to make any decision on a question of law that may be "wrong", so as to attract what has been described as the "second limb" of s 6(1) of the Criminal Appeal Act.* ***Only the third limb of that section ("miscarriage of justice") is available to an appellant in such circumstances*** *and so it is entirely apposite to speak of the need to establish a miscarriage of justice in the second scenario, as that is the criterion that must be satisfied if an appeal is to succeed following conviction upon a plea.*

4.2.3 Appeals from the Local Court to the District Court

Where a person has been convicted in the Local Court following a plea of guilty, they can appeal against the conviction to the District Court, but only with leave.

Section 12 of the *Crimes (Appeal and Review) Act 2001* provides:

> ***12 Appeals requiring leave***
>
> *(1) Any person who has been convicted by the Local Court in the person's absence or following the person's plea of guilty may appeal to the District Court against the conviction, but only by leave of the District Court.*
>
> *…*
>
> *(3) An application for leave to appeal must be made--*
>
> > *(a) within 28 days after (but not before) the sentence imposed after the relevant conviction is made, or*
> >
> > *(b) if an application for annulment of the conviction has been made under Part 2 within that 28-day period, within 28 days after the Part 2 application is disposed of under that Part.*

Section 13 of the Act provides that an appeal under section 12 can be made late, within 3 months, by leave of the District Court.

Section 14 states that the application for leave to appeal must state the general grounds of the appeal and, if it is late, the reasons for that lateness.

> ***14 Lodgement of appeals and applications for leave to appeal***
>
> *…*

(3) An application for leave to appeal under section 12 or 13 is to be made by lodging a written application for leave to appeal, together with a written notice of appeal, with--

(a) a registrar of the Local Court, or

(b) the person in charge of the place where the appellant is in custody.

(4) An application for leave to appeal ***must state the general grounds of the application*** *and, in the case of an application under section 13, must state the* ***reasons why an appeal or application for leave to appeal was not made within the time allowed*** *by section 11, 11A or 12, as the case may be.*

(5) On the granting of leave to appeal, an appeal is taken to have been made in accordance with the written notice of appeal referred to in subsection (3).

The appeal notice, accordingly, should set out the 'grounds' or reasons that the applicant says their plea should be withdrawn consistent with the authorities above. Section 62 provides that a notice of appeal or an application for leave to appeal may be amended.

Section 16 states:

16 Determination of applications for leave to appeal

(1) The District Court may determine an application for leave to appeal by dismissing the application or by granting leave to appeal.

…

If leave is granted for the conviction appeal, s20 provides the orders the court can make. As there was no hearing of the substantial charges in the Local Court, and conviction appeals are determined on the transcripts, the court will make an order that the conviction is set aside and the matter is remitted to the Local Court:

20 Determination of appeals

(1) The District Court may determine an appeal against conviction--

(a) by setting aside the conviction, or

(b) by dismissing the appeal, or

(c) in the case of an appeal made with leave under section 12 (1)--by setting aside the conviction and remitting the matter to the original Local Court for redetermination in accordance with any directions of the District Court.

It is noted that the *Crimes (Appeal and Review) Act* does not specify the test to be applied either for applications for leave to appeal or appeals against conviction where a plea of guilty was entered.

On one hand, appeals from the Local Court to the District Court fit the description of *White* of 'second scenario' cases and it might be thought that the 'miscarriage of justice' test applies. However, *White* was dealing specifically with appeals against conviction brought under section 6 of the *Criminal Appeal Act.* The rational for the application of the 'miscarriage of justice' test was that the words were contained in section 6 and provided a 'statutory root' for the test.

Appeals to the District Court contain no such root. Accordingly, it may be argued that a miscarriage of justice need not be established. The interests of justice test may be the applicable test, although, in

addition to the other factors in the case, the court will have regard to the principle of finality creating a higher burden for the appeal to be successful.

4.2.4 Supreme Court Conviction Inquiry

Under section 78 of the *Crimes (Appeal and Review) Act 2001*, a convicted person (whether after trial or a guilty plea) may apply to the Supreme Court for an inquiry into their conviction. An inquiry may be granted if it '*appears that there is doubt or a question as to the convicted person's guilt.'* After such an application, the Court may direct that the inquiry into the conviction be conducted by a judicial officer or refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal under the *Criminal Appeal Act 1912* (s79).

5 TRAVERSAL CIRCUMSTANCES

The circumstances that may lead to a successful traversal application are not the subject of an exhaustive list. The following section attempts to draw examples from caselaw that may illustrate the type of factional scenario that may provide a basis for withdrawing a plea. Whilst the 'interests of justice' test and the 'miscarriage of justice' test differ, the factual circumstances overlap. Whilst *White* represents a significant adjustment to the common law concerning plea traversals, the cases that preceded it are still instructive and can be relied upon to satisfy either test.

In R v Sewell [2001] NSWCCA 299 at [64], Smart AJ recognised that applications to withdraw a plea of guilty arise from a variety of circumstances and that it is difficult to 'fit all cases within one verbal formula… The categories are not closed.'

The following section attempts to distil a comprehensive list of circumstances that may justify leaving to withdraw a guilty plea. While it attempts to be comprehensive, it will be by no means exhaustive. No single authority will provide a template for an application to withdraw a plea, and often, an application will turn on a combination of factors and circumstances. Practitioners may also encounter new and novel situations allowing a plea to be withdrawn, which may not be the subject of previous authority.

5.1 MISCARRIAGE OF JUSTICE VS INTERESTS OF JUSTICE

The authorities preceding *White* limited the circumstances in which a plea could be withdrawn to considerations of the circumstances in which the plea was entered and the integrity of the plea itself. The accused's asserted or demonstrated innocence was a relevant factor but would not allow a plea to be withdrawn if the plea was otherwise correctly entered.

In *Ishac v R* [2011] NSWCCA 117, McColl JA (RS Hulme and Hislop JJ agreeing) stated at [30]:

> *Any miscarriage of justice is to be found **in the circumstances** in which the applicant came to enter his plea. The question in a case where the applicant seeks to challenge a conviction following a plea of guilty is not guilt or innocence as such, but **the integrity of the plea**.*

In *R v Kouroumalos* [2000] NSWCCA 453 where Wood CJ at CL (Studdert and Whealy JJ agreeing) at [19] said:

> *What is required for an exercise of the relevant discretion is the identification of some circumstance which indicates that the plea of guilty was not really attributable to a **genuine consciousness of guilt** or that otherwise **the integrity of the plea** is bona fide in question.*

In *R v Stephen J Rae (No 2)* [2005] NSWCCA 380; 157 A Crim R 182, the Court stated:

> *20 The intent to murder was admitted by the plea of guilty. While the ultimate question is in the terms of s 6 of the Criminal Appeal Act, whether there was a miscarriage of justice (see R v Murphy (1965) VR 187; R v Chiron (1980) 1 NSWLR 218; R v Davies (1993) 19 MVR 481; R v Khan [2002] NSWCCA 521; R v SL [2004] NSWCCA 397), **any miscarriage of justice is to be found in the circumstances in which the applicant came to enter his plea**.*

In *White,* the Court recognised that the 'interests of justice' test was broader than the miscarriage of justice test. Firstly, the interests of justice test might be satisfied by showing that there was a '**non-negligible risk**' of a miscarriage of justice rather than that the plea of guilty '***would result in*** or ***produce***' a miscarriage of justice.[45] Secondly, the interests of justice test 'may focus on matters going beyond the integrity of the plea, although that **will generally be the focal point of the inquiry**.'[46]

5.2 The Relevance of Innocence

Many authorities have confirmed that an application to withdraw a plea of guilty is not a question of the applicant's guilt or innocence, but one as to the integrity of the plea. In R v Khamis 2014] NSWCCA 152 Hoben CJ at CL at [59] stated:

> *Ordinarily, this task is not an investigation of the applicant's guilt or innocence, rather it is an examination of the integrity of the plea of guilty itself (R v Stephen J Ray (No 2) [2005] NSWCCA 380 at [20]; Sabapathy v R [2008] NSWCCA 82).*

Further, it should be kept in mind Court is '*entitled to accept a plea of guilty that is given in the exercise of a free choice in a defendant's own interests and there will be no miscarriage resulting from reliance on the plea* ***even though the person entering the plea "is not in truth guilty of the offence.***'[47]

The question of a person's guilt or innocence, however, remains a crucial factor in any application to withdraw aa plea for the following reasons:

a. The Courts will generally not entertain an application unless the applicant at least asserts that they are innocent, and
b. An otherwise cogent application to withdraw a plea may be frustrated if the Court finds that there would be no triable issue if the application were to succeed, and the matter returned for trial.

Accordingly, in addition to establishing that the integrity of the plea is in question, an applicant will need to show that there is a real question about their guilt: *R v Davies* (1993) 19 MVR 481; applied in *R v Toro-Martinez* (2000) 114 A Crim R 533; [2000] NSWCCA 216; (2000) 7 Crim LN 47 [1162].

The applicant's claim of innocence will often be tested against the strength of the Crown case: *R v Roach* (1990) 54 SASR 491 at 495-496 per Legoe J.

In *R v Ross* (unreported, NSWCCA, 20/04/94) Mahoney JA sated:

> *I do not think that, in principle, the strength of the Crown case or of the accused's defence is irrelevant. For example, if it were conceded that the Crown case was overwhelming and that the defence could not hope to succeed, there would hardly be a miscarriage of justice if the convictions stood. In considering whether there has been a miscarriage of justice, the court looks not only at principle but at reality. It would be conscious of the danger of putting aside principle upon the plea that the accused was plainly guilty: the possibility of abuse from such an approach is plain…*
>
> *It is, in my opinion, sufficient in this regard that the accused had a* ***reasonably arguable case at the trial*** *and that there was* ***a real possibility that he would succeed****.*

[45] *White* at [30].
[46] *White* at [65].
[47] *Wong v DPP* [2005] NSWSC 129 at [33].

If he had this, he need prove no more in this regard. If by being led to plead guilty in an unacceptable way he lost this, that is, in my opinion, sufficient to establish a miscarriage.

…

*It follows from this that, in an appeal such as this, it is not necessary to pursue to the end the strength of the case of the prosecution or the defence: it is sufficient if the defence had the prospect of success to which I have referred**. In many if not most cases, such a prospect will exist** and, no doubt, in such cases, the Crown will concede this issue. What will remain for consideration will be whether the circumstances affecting the plea of guilty establish that a miscarriage of justice has taken place.*

Regina v Murphy [1965] VR 187

Murphy pleaded guilty to embezzlement charges and was consequently convicted and sentenced to imprisonment. She later sought leave to appeal against the conviction in the Supreme Court of Victoria on the following two grounds, the first of which was:

> *"I am not guilty of any of the offences of which I was convicted and my said pleas of guilty to each such offence were false"*

Concerning the first ground, the Court stated:

> *This ground appears to be an invitation to this Court to disregard the plea of guilty and to determine for itself, without the aid of a jury, the guilt or innocence of the applicant upon the depositions in the committal proceedings supplemented by such additional facts as she has deposed to before us.*

Herring CJ and Adam J commented:

> *In the present instance, the applicant's case is that she pleaded guilty because of questions irrelevant to the actual question of her guilt or innocence, and that she is in fact not guilty. [the accused's counsel], in his admirable address on her behalf, put it that **it would be sufficient if the question of her guilt or innocence was an issuable matter**. I should be disposed to agree that if she pleaded guilty through a misapprehension of the law, eg. a misunderstanding of what she was pleading to, or what constituted the crime charged, or for some other reason which enabled one to say that her plea was not really attributable to a genuine consciousness of guilt, an issuable question of guilt would be sufficient to warrant the ordering of a new trial.*

The second ground will be dealt with below.

R v Toro-Martinez [2000] NSWCCA 216; 114 A Crim R 533

Toro-Martinez was charged with being knowingly concerned with the importation of cocaine and took the matter to trial. At the commencement of the trial, Toro-Martinez made an application for a permanent stay based on police impropriety which was rejected. Consequent to this ruling, he entered a plea of guilty. He appealed his conviction arguing that the judge had erred in the pre-trial ruling.

Spiegelman CJ, with whom Newman J and Adams J agreed, dismissed the appeal stating:

> *15 In the present case, the appellant has given no evidence. No material concerning the circumstances relating to the change of his plea from not guilty to guilty is before the Court. What, if any, advice he was given is not the subject of any material before the Court. Rather, the Court is asked to infer that he would not have changed his plea*

but for the admission into evidence of evidence which was not specified with any degree of precision either at first instance or in this Court.

The Court was particularly critical of allowing a plea to be withdrawn merely for forensic advantage:

> *28 … In the present case no attempt has been made to suggest that the Appellant might not be guilty. The case for the Appellant rises no higher than, if certain evidence had been rejected, he would not have been found to be guilty.*
>
> *29 Nothing is more calculated to bring the criminal justice system into disrepute than to treat it as some form of forensic game. The criminal justice system is designed to discover the truth. The protection of personal liberty embedded in our criminal procedure - including the presumption of innocence and the standard of proof beyond reasonable doubt - do not constitute an invitation to manipulate or distort the truth.*

The Court reinforced the need for, at the very least, asserted innocence:

> *32 The occurrence of circumstances in which considerations of this character could be permitted to overturn a conviction after a plea of guilty, when there is not even a **pretence of innocence** is, to my mind, virtually inconceivable. In the application of a test as broad as "miscarriage of justice" I am not prepared to say that there can be no such circumstances. However, they would have to be extreme, not just extraordinary. Nothing of that character appears on the facts of this case.*

5.3 Legal Advice

An application to withdraw a plea of guilty will often stand or fall based on the quality of the legal advice which has been given prior to a plea being entered.

Issues with legal advice have led to pleas being withdrawn range from honest mistakes by practitioners on matters of law, failure to take relevant instructions, such as in relation to a defence up to practitioners exerting improper pressure on a client to plead guilty.

In a number of cases, there is a conflict between the evidence of the applicant and their legal representatives. In some of the cases the evidence of the applicant is preferred to that of their legal advisors. These cases provide valuable instruction in the care and diligence needed when advising on a plea and the importance of file notes and signed instructions in order to meet any allegation of professional incompetence.

An application to withdraw a plea of guilty based on issues relating to legal advice needs to not only identify the deficiency in advice but also show that the deficiency acted to produce a plea that was not a true confession.

5.3.1 Erroneous Legal Advice

Jimenez v R [2017] NSWCCA 1

In *Jimenez*, the accused pleaded guilty to possessing child pornography under s91H(2) of the *Crimes Act* 1900 (NSW) in the Local Court and was convicted and fined $6,600. From a transcript of the sentence proceedings, it was apparent that the magistrate, Jimenez's solicitor, and the DPP solicitor appeared laboured under the mistaken belief that the relevant offence related to children under 18, as it is with Federal offences, rather than 16 which is the relevant age for the NSW offence.

Jimenez appealed to the District Court, where he sought leave to plead not guilty, the mistake regarding age was not yet apparent. However, Jimenez argued that he had entered the plea on erroneous legal advice because he was innocent and that there was no conclusive evidence that the people depicted in the material were minors. Berman DCJ and the legal representatives again laboured under the misapprehension that the relevant age for the offence was 18. Jimenez's solicitor argued that the only issue in dispute was the age of the people depicted in the images (i.e. whether it could be inferred that they were under 18) and that the matter should be returned to the Local Court for determination. The Judge viewed the material on the application and determined that they were satisfied that all people depicted in the images were under 18. As that was the only matter in dispute, the Judge dismissed the application because this determination meant that there would be no triable issue for the Local Court to determine.

The accused then brought an application under s78 of the *Crimes (Appeal and Review) Act 2001* (NSW) for an inquiry into his conviction. Garling J concluded that there was a doubt or question as to Jimenez' guilt because of the erroneous approach of the Local and District Courts and the 'the erroneous approach of the applicant's solicitor in providing advice to the applicant as to whether or not it was in his interest to plead guilty to the offence.'[48] He then referred the matter to the CCA.

Giving the majority verdict and allowing the appeal against conviction, Adams J concluded:

> *It seems certain that the appellant was advised, for the purposes of the proceedings and, in particular, the plea, that the offence was committed if the images were of a child aged less than 18 years. The admission of fact, therefore, actually implicit in his plea was that the child was under the age of 18 years. In my view, the plea* ***could not be regarded as an admission*** *that the child was under the age of 16 years. It must follow "that the plea of guilty was not really attributable to a genuine consciousness of guilt":* R v Boag *(1994) 73 A Crim R 35 at [2];* R v Thalari *[2009] NSWCCA 170. The submissions of the Crown, therefore, to the effect that the appellant had in substance otherwise admitted that the images were those of a girl under the age of 16 years, is not to the point.*

5.3.2 Insufficient Legal Advice

R v Williamson [2012] QCA 139

Willamson was convicted after pleading guilty to a charge of torture. He appealed his conviction to the Queensland Court of Appeal, complaining that the guilty plea was not informed or voluntary and that his solicitors did not explain the substance and effect of a guilty plea.

Williamson gave evidence on appeal, and Fraser JA commented:

> *44. … After seeing and hearing the appellant give evidence and undergo a searching cross-examination, I thought that she was a person who, without the benefit of clear legal advice in straightforward language about the nature of the offence and the processes of the court, might well have failed to understand the nature of the offence with which she was charged, the apparently straightforward language in which she was arraigned, and the effect of her plea of guilty. I considered that the appellant entered her plea of guilty under a fundamental misapprehension as to its effect.*

The appeal was allowed with the Court finding that:

[48] A*pplication by Alex Jimenez under s 78 Crimes (Appeal and Review) Act 2001* [2016] NSWSC 635 at [43]

a. Williamson's solicitors took no notes or usual precautions of obtaining signed instructions in relation to any advice that was given

b. The solicitor did not explain that pleading guilty is an admission of inflicting severe emotional and psychological pain on the child.

The solicitors failed to explain in plain English, the nature of the charge, effect of plea and court processes.

Regina v Iral [1999] NSWCCA 368

At committal proceedings, Iral pleaded not guilty to charges. When the matter came for trial, he pleaded guilty and the matter was adjourned for sentence. Before the sentence date, he made an application to change his plea. This application was refused, and he appealed to the CCA

In deciding the matter, Meagher JA drew the following conclusions about the sufficiency of Iral's legal advice:

> *1. That it is doubtful that Mr Hovan at any stage elicited from the appellant what the facts of the case were or what the appellant's instructions were;*
>
> *2. That Mr Hovan was more interested in extracting funds from the appellant and using his services as a translator than he was in supplying the normal services of a solicitor;*
>
> *3. Apparently neither Mr Hovan nor any of his employees had an* ***authority to enter the plea*** *of guilty on 1 September 1998; and*
>
> *4. Despite Mr Hovan's evidence to the contrary, that neither Mr Hovan* ***nor any of his minions*** *explained to the appellant* ***exactly what were the ingredients of the offence*** *with which he was charged.*

5.3.3 Failure to Advise of Defences

R v Ganderton (NSWCCA, 17 September 1998, unreported)

Ganderton pleaded guilty to charges of dangerous driving causing grievous bodily harm and was sentenced in the District Court. He appealed to the CCA against the conviction on several grounds, including that he entered the plea in ignorance of a defence that had been available to him.

Section 52A(8) of the *Crimes Act* (NSW) 1900 provides a statutory defence to a charge of dangerous driving if alcohol was a factor but the accused can establish that the grievous bodily harm occasioned by the impact was not in any way attributable to the influence of intoxicating liquor.

Ganderton's case was that he: first, that at the time he pleaded guilty, the facts of his case were such as to make this defence arguably available to him; *secondly,* that his legal representatives did not advise him of the availability of the defence; *thirdly,* that he was not himself aware, otherwise, of the existence and of the availability in fact to him of the *defence; fourthly,* that the integrity of his pleas of guilty is tainted by this lack of awareness on his part; and *fifthly and finally,* that it would constitute a miscarriage of justice to hold him to the consequences of those tainted pleas.

The solicitor who appeared for Ganderton in the Local and District Court provided an affidavit to the court indicating that they had considered the statutory defence, rejected it, and advised the appellant that they could see no other way out than continuing to plead guilty. A solicitor who had represented Ganderton earlier in proceedings conceded that he had not advised the appellant of the statutory

defence because, based on Ganderton's instructions and the police fact sheet, he did not believe that the statutory defence was available.

Sperling J and Greg James J gave a joint judgment allowing the appeal. They found that Ganderton was not advised of the relevant defence, did not know of it and that it may have been arguable at trial. The judgment stated the following principles:

> *Belief by the accused that he is guilty of the offence charged may arise from a* ***mistaken or possibly mistaken understanding of the facts****, as in* Davies*. It may also arise from a* ***failure on the part of the accused's legal representative to inform the accused accurately of the elements of the offence****, so that the accused incorrectly believes that the facts as alleged and admitted constitute the offence charged.*
>
> *It makes no difference in principle that the omission of the legal representative was - as in the present case – to inform the accused of* ***the existence of a possible defence*** *in the strict sense of a defence which the accused has to establish.*
>
> *If it had been appreciated that the appellant had or might have a defence under s52A(8), (this being the relevant source of what was alleged in Ganderton to be an arguable defence available to the applicant in that case), a report from an expert would have been obtained and the charge would have been defended. The appellant would have had an arguable case for acquittal.*
>
> *There was, in these circumstances, no 'genuine consciousness of guilt' when the appellant pleaded guilty to the charges, and there was an 'issuable question of guilt' to be tried. There was, accordingly, a miscarriage of justice, and there must be a new trial.*

Sully J provided a dissenting judgment in which he accepted that Ganderton had not been advised of the available defence but that no miscarriage of justice had occurred because he did not consider the defence an 'issuable question of guilt' (i.e., it was arguable).

Accordingly, an application to withdraw a plea based on a failure to advise requires proof not only of a failure to advise but also that that failure deprived the applicant of an arguable case. An application to withdraw a guilty plea on this basis may require tendering the relevant aspects of the brief of evidence if it is available.

R v Favero [1999] NSWCCA 320

Favero was found in possession of 6 kilograms of amphetamines. On arrest, he told police that the drugs were not his and he was holding them for a person called 'Sam.' His matter was eventually committed for trial to the District Court.

After a brief conference with Mr Thomas of Counsel, uninstructed by a solicitor, Favero pleaded guilty to the supply charge. After a change in legal representatives, he was informed that he may have a *Carey*-style defence available to him. He then applied to the District Court to withdraw his plea of guilty. This was refused.

Favero appealed his conviction to the CCA. In allowing the appeal, Sully J commented on the advice given by Mr Thomas who had failed to take written instructions or have a witness present in conference:

> *15 One result of that course of professional representation of the present applicant is that a state of affairs has resulted of which, as it seems to me, it cannot be gainsaid that, whatever took place in detail in the exchanges held between the applicant and*

> *his then counsel, the applicant had not had any, or any competent, advice that laid out before him, in a way that permitted the taking of proper relevant instructions, the nature and scope of the defences that might be lawfully available to him in connection with charges of the kind that had been preferred against him.*

Boag (1994) 73 A Crim R 35

Boag provides a counterpoint to these authorities in circumstances where an applicant was given pessimistic advice about the prospects of a defence and accepted that advice.

Boag appealed against his convictions on several matters. Sometime after entering a guilty plea, he spoke to lawyers who were more positive about his chances of running a defence at trial. He appealed against his conviction arguing that he had lost the chance of a defence.

The Court explained at 37, a number of circumstances which may permit a plea to be withdrawn:

> *A miscarriage of justice may occur in many different situations if a prisoner is not permitted to withdraw his plea of guilty. Such a miscarriage will be established not only where the applicant did not appreciate the nature of the plea which he had entered but also, for example, if there was no evidence upon which he could have been convicted, or if he had not intended to admit that he was guilty or if his plea had been induced by fraud or threats or other impropriety, when he would not otherwise have pleaded guilty… there must be shown to be some circumstance which indicates that the plea of guilty was not really attributable to a genuine consciousness of guilt.*

However, the appeal was dismissed, with the Court finding that Boag made a deliberate and fully informed choice to plead guilty based on legal advice. His later realisation that he may have had a defence, or a better chance at pursuing one, did not alter his earlier recognition of guilt.

5.3.4 Imprudent and Inappropriate Advice

Regina v Wilkes [2001] NSWCCA 97; 122 A Crim R 310

Wilks entered a plea of not guilty to a charge of murder and proceeded to trial in the Supreme Court. During cross-examination, his brother, John Wilkes, said that he saw Wilkes striking the deceased. This evidence was unexpected and detrimental to Wilks' defence. Wilks discussed the matter with his Counsel, who made several comments, including:

> *'John Wilkes' evidence and the way it has come out means you are going to lose this case.'*
>
> *'The idea that you were drunk/knocked out/can't remember doing anything like this won't help us because this piece of evidence is so strong.'*
>
> *'You can be virtually certain that you are going to be found guilty.'*
>
> *'Although the decision is yours and although I will fight on if you want to, we are going to lose this case.'*
>
> *'If you are considering pleading guilty I think it is the right decision and it will definitely save you a couple of years in gaol.'*

Wilkes told his counsel that John Wilkes was lying, and he maintained his innocence. According to his counsel, he said:

'What about what I said to the police in the first place, I was really drunk, then knocked out and I don't remember doing anything like this.'

'If I knew/remembered doing this, I would have pleaded guilty from the start but as far as I know or remember I didn't do it.'

'Well if I've got no chance I might as well plead guilty.'

Wilkes was given some time to think about his plea and another conference was held. In a second conference, counsel told Wilkes that there was no evidence to support a partial defence of provocation, and in relation to Wilkes' reliance on his state of intoxication, Counsel said:

> *"White juries will never let an Aboriginal accused off because they were drunk in my experience."*

As the trial had commenced based on identification, Counsel also told Wilkes that it would be difficult, if not impossible, to switch the defence to another more limited defence. Counsel didn't advise Wilkes that a jury would need to be given an unreliability warning about John Wilkes' evidence as to the identification and having been criminally concerned in the events. He also failed to advise Wilkes about the possibility of an alternative verdict of manslaughter. After several conversations with counsel, Wilkes entered a guilty plea before the jury.

At sentencing, Wilkes sought leave to withdraw the plea based on further advice from his counsel that his earlier advice was incorrect. The trial judge refused leave. Wilkes appealed to the CCA against his conviction.

In an affidavit on the appeal, Wilkes said:

> *I felt that I didn't have a chance if I kept on running my trial and I felt that I was backed into a corner trying to defend myself against the witnesses. I considered my position and decided that I would be better to plead guilty to murder and take a lesser sentence.*

In an affidavit on the appeal, trial Counsel said that upon reflection, he had become concerned that he had not given the appellant any real choice as to whether he should plead or not and that the appellant had not given him any instructions acknowledging that he had committed the offence. Further, Counsel conceded that the assessment of Wilkes prospects at trial was incorrect and that challenges could have been made to certain aspects of the Crown case.

The CCA relevantly concluded that Wilkes had never admitted his guilt to his legal representatives and:

> *40 Although no evidence was given by the appellant to us expressly asserting his innocence, the inference to be drawn from the entirety of the evidence before us is that the plea of guilty was entered solely because of the advice which he had received as to the likely outcome of the trial. That advice, as I have observed, Counsel now regards as having been incorrect and imprudent. Moreover, if the facts are as have been stated, then it must be accepted that the plea was not one attributable to a genuine consciousness of guilt.*

The Court then went on to consider whether there could be any question about Wilkes guilt in relation to the matter, and concluded:

> [46] *While the Crown case may, on one view, appear on the limited material provided to us, relatively strong, it cannot be said at this stage that questions of the kind mentioned could not genuinely arise which should be determined by a jury.*

After reviewing several decisions Wood CJ at CL stated that the appeal hinged on the following considerations (at 20):

a. whether the advice given to the appellant was or was not imprudent and inappropriate;
b. whether his plea was or was not attributable to a consciousness of guilt; and
c. whether the material before this court shows that there is or is not a real question about his guilt.

He concluded, with the agreement of Giles J and Simpson J:

> *48 In all those circumstances, not withstanding the respect which needs to be given to the finality of verdicts in criminal trials, a circumstance requiring very great diligence on the part of trial counsel, when advising as to the wisdom of entering a plea, I have reached the conclusion that this appeal should be allowed and the conviction set aside. I would order a new trial.*

The Court also commented that trial counsel should have asked for more time to allow Wilkes to consider his change of plea:

> *50 It should also be said that it was regrettable for advice to have been given, and a decision taken of such importance, in haste and without proper reflection since little was to be lost, in pragmatic terms, concerning the timing of the plea.* ***The proper course, with hindsight, would have been to reserve any decision about a change of plea overnight****, by which time a better appreciation may have been possible concerning the likely credibility of John Wilkes and Mr Payne, and during which time the appellant could have had the opportunity of considering his position without being distracted by the immediate pressures of a hearing that was about to resume.*
>
> *51 I mention these matters not by way of criticism of trial Counsel, but to underline for the future the care needed when occasion arises for a possible change of plea mid trial. Not only should Counsel take the time needed for proper reflection, but so should they be allowed the opportunity if time is sought.*

Loury v R [2010] NSWCCA 158

Loury pleaded not guilty to several offences and was committed to stand trial in the District Court.

According to Loury, he had appeared in the District Court on a date when the matter was listed for arraignment. His solicitor told him that he had arranged for him to plead guilty, he said, according to Loury: 'I've made it so you'd take some charges, little ones, for your brother so he doesn't get the maximum penalty. Don't worry. All you will get is a slap on the wrist, a suspended sentence. Let's go inside and wait.' Loury said this was a complete surprise to him, but he relied upon his solicitor's assurance that 'it will be alright' and that it was 'a nothing thing' and entered guilty pleas. The matter was adjourned for sentence.

In a Pre-Sentence Report, Mr Loury made several statements contradicting the agreed facts. His lawyers did not discuss these contradictions with him before sentencing. He was then sentenced to a significant term of full-time custody.

Loury appealed his conviction to the CCA, arguing that his pleas were not attributable to a genuine consciousness of guilt; instead, they were entered on his legal representatives' imprudent and inappropriate advice.

The solicitor gave evidence on the appeal. He broadly accepted Loury's account of how the plea came to be entered but said that it hadn't occurred to him that Loury didn't understand the situation, and if it had, he would have asked for an adjournment to conference him further.

The Court found that the appeal was made good concerning the plea for the following three reasons:

1. Loury had demonstrated that there was a 'strong triable issue' in relation to the matter if it was allowed to go to a hearing.
2. Loury did not meaningfully understand the nature of the charges he pleaded guilty to; he had simply relied upon the assurances of his solicitor that it would be okay.
3. His plea was not a true acknowledgement of his guilt.
4. Loury was 'overwhelmed' by the Court's circumstances and atmosphere when he entered his plea.
5. He had no idea about the factual basis for the plea that would be put to the Court and that the agreed statement of facts had never been shown to or explained to him, and it was entirely inconsistent with the instructions he had given to his solicitor and his statements to police.

5.3.5 Improper Pressure to Plead

R v KCH [2001] NSWCCA 273; 124 A Crim R 233

KCH initially pleaded not guilty to charges relating to the rape of a child and an alternative count of indecent assault. After the first day of trial and near the conclusion of the Crown case, KCH had a conference with counsel in which counsel told him that the trial judge had expressed the view that if he persisted in the trial, it was possible he would be convicted of the rape charge and should plead to the alternative. After this conference, KCH pleaded guilty to the alternate charge and was convicted and sentenced.

KCH appealed, alleging that he had received inappropriate advice from his counsel and that his decision had been influenced by improper pressure. The CCA was satisfied that counsel had commented about the judge's opinion but not that the judge had expressed that opinion. Further, it was satisfied that the expressed opinion induced KCH to enter his plea of guilty.

The Court commenting: (at 5)

> *Legal practitioners owe a duty to the court not to bring improper pressure on clients to plead guilty, this will be breached where a practitioner deliberately or negligently gives a client false information as to the trial judges' view or opinion. This duty is part of the general duty not to corrupt the administration of justice which is derived from the public interest in ensuring the administration of justice is not subverted.*

R v Nerbas [2012] 1 Qd R 362

Nerbas was charged with two other men with drug importation offences. During his trial for the matter, he changed his plea to guilty, and the matter was adjourned for sentence. Before sentence he applied to withdraw his plea of guilty. This application was refused, and he appealed to the Queensland Court of Appeal.

Nerbas sought to prove that he was induced to plead guilty by several factors which did not involve a consciousness of guilt. He said that he was poorly advised by his counsel and solicitor at the trial, that

he did not understand the charges and that his lawyers threatened and intimidated him with the effect of exacerbating his alleged mental instability. As to that last matter, on the application before the trial judge there was evidence called by the applicant from a psychologist who said that Nerbas was highly traumatised emotionally when changing his pleas, resulting in a dissociative type episode which made him incapable of rational thought.

During the trial, Nerbas sought to change his instructions to his legal representatives. The trial was initially run on the basis that Nerbas had never undertaken several relevant internet searches alleged by the Crown. When this position became untenable, Nerbas instructed that he had conducted the searches in innocent circumstances.

Nerbas' lawyers informed him that if he maintained his change in instructions, they would have to withdraw 'for ethical reasons', and he would have to continue the trial unrepresented unless new counsel could be retained.

McMurdo J, with whom the Chief Justie and Dalton JJ agreed, found that Nerbas' purported late recollection of the internet searches would be difficult to explain to a jury. But went on to say:

> *50. However in my view, this change in his instructions would not have required or permitted his counsel and solicitor to withdraw from the case. They were precluded from conducting his case upon any factual basis which they* **knew** ***to be false****. But they would not have been placed in that position by this change of instructions. They would have been understandably sceptical about the applicant's new instructions. But it was not for them to adjudicate upon their truth.*

McMurdo J concluded:

> *54. As to the strong advice given to him about his prospects (or lack of prospects) of an acquittal, Mullins J cited this passage from the judgment of Brennan, Toohey and McHugh JJ in Meissner:*
>
> > *Argument or advice that merely seeks to persuade the accused to plead guilty is not improper conduct for this purpose, no matter how strongly the argument or advice is put. Reasoned argument or advice does not involve the use of improper means and does not have the tendency to prevent the accused from making a free and voluntary choice concerning his or her plea to the charge. As long as the argument or advice does not constitute harassment or other improper pressure and leaves the accused free to make the choice, no interference with the administration of justice occurs.*[49]
>
> *I agree that the strong advice as to prospects, of itself, did not make these pleas of guilty involuntary ones. However, there was also the* ***unjustified threat by the lawyers to withdraw*** *if he changed his instructions. That had the consequence of depriving the applicant of the option of defending the charges, with the benefit of legal representation, upon the factual position which he claimed to be true.* ***It is inherently likely that this threat, at least in part, induced him to plead guilty****…*

He also noted that the decision to allow the appeal was despite a strong crown case:

> *55. …There is nothing which he has now raised which detracts from the apparent strength of the prosecution case, let alone which proves his innocence. However,* ***the***

[49] Meissner (1995) 184 CLR at 143.

***apparent strength of the prosecution case should not result in the applicant being deprived of a trial**, once he has demonstrated that he was relevantly induced to plead guilty by his lawyers' unjustified threat to withdraw.*

R v Bayliss (2002) NSWCCA 11

Bayliss had pleaded not guilty to several charges and had his matter listed for trial in the District Court. Before the trial, the District Court judge was asked to give a sentence indication concerning a possible agreed-upon resolution proposed by the parties.[50] The judge indicated that a sentence of 9 months of periodic detention would be appropriate. Bayliss then pleaded guilty, was sentenced and served his 9 months of periodic detention. Years later, seven and a half years after his conviction he appealed.

On appeal, Bayliss argued, among other things, that:

(a) the sentencing indication hearing was improperly sought unilaterally by the Crown;

(b) he was given corrupt legal advice, and improperly pressured into pleading guilty;

(c) the evidence placed before the Court for the sentence indication was inadmissible;

(d) what occurred that day amounted to a criminal conspiracy to pervert the course of justice and to obtain (on the part of MK) a financial benefit by deception;

(e) he has been intimidated out of pursuing his case until now;

(f) the plea was unlawfully obtained by fraud and duress.

Bayliss' account on appeal was that either his counsel or solicitor said to him in the course of a discussion, in the presence of his parents: -

" Hey mate, you are getting a fantastic deal. It is only weekend detention. Cop it sweet, plead guilty "

He said that he also specifically remembered the solicitor saying:-

"If you do not plead guilty you will never get Legal Aid again."

It was his account that pressure was continuously placed upon him, that he could not control his lawyers, and that, ultimately, he submitted and agreed to enter a guilty plea. At this point, he said he had remarked:

"Stuff it, I will follow your legal advice and plead guilty";

He said this was because although he had repeatedly claimed that he wanted his trial and wanted it on, they would not give it to him.

Counsel and the Legal Aid solicitor who appeared for Bayliss gave evidence on the appeal and each said there were no threats made or voices raised, and that they discussed the matter properly and civilly, and without any pressure being placed upon the appellant to enter a plea of guilty. They denied many of the accusations made by Bayliss and produced written instructions that contradicted his version of events.

The Court concluded:

[50] This occurred in 1994. The practice of sentence indications in NSW is no longer common.

20 By reason of the written instructions, and the clear and cogent evidence of trial counsel and solicitor, which we prefer to that of the appellant and his parents, none of whom made a favourable impression on us, we do not believe that there is any factual basis for the various assertions made to the effect that the appellant's plea was entered as a result of fraud or duress or improper pressure from his legal advisers. Nor is there any credible basis to assume or to find that he was given corrupt or inappropriate legal advice, or that he has been in any way intimidated from pursuing his rights since the time of the conviction. In fact, his unsupported allegations of conduct which would amount to serious criminality on the part of others, including an assertion that his legal advisers were working hand in hand with the Crown to make sure that a conviction was obtained, do him no credit whatsoever.

21 To the contrary of his unfounded claims, we are of the view that he received careful and competent advice from his legal advisers, who acted prudently, at every step, in obtaining his written and signed instructions. The evidence before us supports the proposition, and no other proposition, that the plea was one which he entered, in the exercise of free choice, after having been properly advised as to his rights.

With regard to the delay between the conviction and appeal, the Court quoted Greg James J, who observed in *Regina v Brehoi* [1999] NSWCCA 113 that the burden which rests upon an applicant in relation to an application of this kind will be "*harder to discharge the longer any suggested matter impugning the integrity of the plea and known to the applicant is allowed to lie.".*

5.3.6 Deficient Advice Regarding Facts

Loury v R [2010] NSWCCA 158

In *Loury*, summarised above, the CCA found that a miscarriage of justice occurred when an accused was not adequately advised about his guilty plea and the agreed statement of facts. Hodgeson JA expressed concern regarding the statement of agreed facts that appeared to be at odds with Loury's instructions:

2 The agreed statement of facts on the basis of which the appellant was sentenced differed in very substantial respects from the account given by the appellant in his interview with police. An important issue in the appeal was whether the appellant understood this, and nevertheless ***gave his consent to the use of that statement****.*

3 Mr Croke gave evidence to the effect that the appellant was aware of the content of the agreed statement of facts and gave instructions that his case go forward on the basis of that agreed statement of facts. However, nowhere in Mr Croke's evidence does he identify any occasion when he ***went through the agreed statement of facts*** *with the appellant or* ***drew his attention to the significant differences from the police interview****, or even* ***gave the appellant a copy*** *of the agreed statement and asked him to read and consider it. If any of these things had happened, I would have expected Mr Croke to advert to this in his evidence. The fact that he did not do so, in my opinion, strongly supports the appellant's evidence that he was not aware of the content of the agreed statement of facts, and that he did not appreciate that he was to be sentenced on the basis of that agreed statement.*

Whealy J at [107] referred to the same situation:

I came to the clear view that, at no time, had the appellant been shown the Agreed Statement of Facts. At no time were they ***ever explained to him****.* Mr Croke *of course,*

> *insisted that they were. It is significant, however, that* Mr Croke *was* ***unable to produce notes of any conference*** *that he had ever had with the appellant or his brother. He was unable to produce any* ***written statement made by the appellant****. Indeed, the appellant claimed that he had never provided any written statement either to his solicitor or his barrister. There were* ***no written instructions to plead*** *and there was no suggestion that the Agreed Statement of Facts had ever been read over or signed by either of the brothers.*

Furthermore, the Court went on to explain the duties of counsel towards the client on sentence in relation to the facts. Counsel in the matter had maintained in evidence on the appeal that he was essentially not responsible for the Agreed Statement of Facts which had been settled by the solicitor. He maintained that and discrepancy between the facts and the client's instructions were a matter for the solicitor to remedy. The court found that this attitude by Counsel was 'completely mistaken.' At [109], Whealy J stated:

> *As counsel retained on behalf of the appellant, it was his duty to take the time to listen carefully to the appellant's instructions and to satisfy himself, upon careful reflection, as to the true situation so far as the appellant was concerned. It was also counsel's professional duty to determine whether the appellant should be advised to seek different representation in an endeavour to resile from the plea he had entered.*

Regina v McLean [2001] NSWCCA 58; 121 A Crim R 484

McLean pleaded guilty to conspiring to import cannabis, money laundering, and arranging a marriage to assist in visa acquisition. He was sentenced and then appealed his conviction to the CCA, arguing that he had made it clear to his legal representatives that he wished to challenge a number of factual aspects of his sentence, but no challenge ever occurred. He was advised that if he wanted to challenge any of the facts, he would have to go into the witness box and expose himself to cross-examination concerning the identity and roles of his co-conspirators.

Wood CJ at CL set out several matters McLean had indicated he wanted to challenge and concluded:

> *52 …. none of this seems to have been explored with him. Moreover, it seems that he was not advised that he could invite the sentencing Judge to examine for himself the material tendered, so far as it threw light upon either of these matters, or that he could have required the relevant witnesses, whose statements had been tendered, including the case officer, to attend for cross examination on those aspects of the facts that he disputed.*
>
> *53 Exercising* ***due care*** *for the proper protection of the interests of a person facing sentence for a charge that attracted a possible sentence of life imprisonment, these matters should, in my view, have been* ***explicitly and carefully raised*** *by the applicant's legal advisers.* ***Whatever their private views*** *may have been as to whether the material available supported the statement of facts, they should, in the face of the note, have* ***carefully explored*** *with him the issue or issues that he wished to ventilate, and then have* ***obtained his formal instructions****, preferably by reducing them to writing, and having them signed.* ***It is important that Counsel exercise proper care in advising clients in relation to issues such as this, and in taking proper instructions upon the basis for the entry of a plea.*** *That is expected of them by the Court, and a* ***failure to exercise the requisite care may have adverse consequences for them professionally****.*

The Court accepted that counsel had provided Mclean with inappropriate advice regarding his ability to challenge relevant aspects of the facts. This resulted in a potentially serious risk that he had been sentenced based on an incorrect set of facts to which he disagreed. This error was held to have occasioned a miscarriage of justice, and an appeal was allowed.

5.3.7 Voluntary Confession

Regina v Murphy [1965] VR 187

Murphy pleaded guilty to embezzlement charges and was consequently convicted and sentenced to imprisonment. The first ground of appeal is dealt with above, the second stated:

> *"Despite the fact that I am not guilty of any of the offences of which I have been convicted and have at all times and to all persons maintained my innocence my counsel [not counsel on the appeal] unduly influenced me to plead guilty in as much as he led me to believe that:*
>
> > *(a) if I pleaded not guilty I would inevitably be convicted;*
> >
> > *(b) that if I pleaded not guilty I would upon conviction probably lose possession of a baby boy entrusted to the care of myself and my husband which baby we hope to adopt;*
> >
> > *(c) that if I pleaded guilty I would not be sent to prison;*
> >
> > *(d) that if I pleaded guilty and thereby avoided being sentenced to prison my said husband and I would probably be allowed to retain possession of the said baby boy."*

Concerning this second ground, the Court stated:

> *We are satisfied by the evidence provided by the applicant's affidavits, and by the evidence given by her on her oral examination before us that before pleading guilty she* ***appreciated the nature of the charges against her****, that she* ***knew by such plea that she was admitting that she was guilty****, and it is not disputed that upon the facts she was admitting by her plea, in law a conviction was proper.*

Further:

> *It is not suggested by this ground that the applicant was not perfectly well aware that by pleading guilty she was admitting and intending to admit her guilt of the offences charged.* ***All that can be said is that the advice given to her by her counsel was unduly pessimistic as to the consequences of her standing her trial and unduly optimistic regarding the sentence upon her pleading guilty.*** *These may provide the motives for the course she took, but that is all. Although in this ground she alleges that she was unduly influenced by her counsel, it is made clear enough from the evidence which we heard from her counsel and indeed from herself, that* ***the decision to plead guilty was her own decision****, taken after consultation, it seems, with her husband. The strength of the advice given would appear to be a matter between the applicant and her chosen legal representative, and in the absence perhaps of fraud, duress or the like, which is not suggested, cannot, we think, on any recognized principle afford ground for relief in this Court. After all, it is the duty of counsel to advise his clients of the course which he honestly believes in the exercise of his judgment to be in their own interests in all the circumstances, and it is for his clients to accept or reject that advice and, if thought fit, change their counsel.*

5.3.8 Full Knowledge and Intentional

Lawson v R [2011] NSWCCA 44

Lawson's matter was listed for trial before a jury. Before empanelment, the trial judge was asked to make evidentiary rulings. After the judge indicated his intention to allow the Crown to rely on inculpatory material, Lawson entered pleas of guilty to charges of kidnapping and conspiring to inflict grievous bodily harm.

In a pre-sentence report, Lawson made statements traversing his plea of guilty. The District Court heard an application to withdraw the plea. Lawson gave evidence that he lacked knowledge when entering the plea and that there was no evidence for the conspiracy charge he pleaded guilty to. Against this, the Court heard evidence from Lawson's previous legal representatives and evidence from the Crown case to assess the conspiracy charge. The application was refused. Lawson was then sentenced to a significant term of imprisonment and appealed against his conviction.

The CCA reviewed the application proceedings in the District Court. The Court commented: (at 37)

> *It is also necessary to consider whether or not, for example, **a mistake occurred in the events or process leading to the entry of the guilty pleas** or other circumstances existed that could be said to have **affected the integrity of the pleas** as admissions of guilt. On the other hand, if the evidence indicates that the pleas were entered in **full knowledge of all the facts and intentionally** to the charges is made, then [the trial judge] was obviously entitled to exercise his discretion against the withdrawal of the pleas.*

The Court that Bennett DCJ was correct in finding that Lawson had been appropriately advised as to the nature of the charges and that his lawyer's advice that the Crown case was a lot stronger after the Judge's evidentiary ruling was correct – it 'was not advice which can at all be considered to have been imprudent or inaccurate.'[51]

5.3.9 Fully Informed & Familiarity with Legal System

R v Bercheru [2001] NSWCCA 10

Bercheru illustrates a situation in which practitioners were found to have acted competently contrary to the client's assertion. It also illustrates the importance of written instructions.

Bercheru pleaded guilty to one count of having a traffickable quantity of heroin. Before entering his plea, his solicitor took written instructions. After the plea was entered and during proceedings, he indicated that there was a possibility that he wished to withdraw his plea of guilty; he conferred with counsel, who obtained written instructions in which Bercheru confirmed his understanding of the relevant considerations and his decision to enter a guilty plea.

After he was sentenced to 8 years imprisonment, he appealed against the conviction on the basis that his plea was not free and voluntary. He alleged that his plea was not a true admission of guilt or that it was made in circumstances where his legal representatives effectively pushed him into a plea.

The Court found no support for Bercheru's allegations; to the contrary, it found that he was fully informed and clearly understood what he was doing when he pleaded and that had the case gone to trial, he would inevitably have been convicted. The Court commented: (at [25] – [26])

[51] At [70].

*Upon the appellant's own evidence, and by the signing of the written instructions on 26 June, the only inference open is that he was **fully informed** and **clearly understood** what he was doing. Apart from the advice given to him by his solicitor and counsel, and the opportunity which he had to reconsider his position, he was **not unfamiliar with criminal proceedings** by reason of his earlier trial and appeal.*

*There is not the slightest support, in my view, for any reasonable suspicion that he was wrongly pressured into entering into and adhering to the plea, or that he did so as a result of inappropriate or imprudent advice. Rather the material before us shows that the plea was a result of a **free** and **informed choice.***

5.3.10 Sufficient Advice

Kim v R [2015] NSWCCA 115

Kim entered a guilty plea and was sentenced to 3 years imprisonment. He attempted to withdraw his guilty plea on appeal. He claimed that his solicitor did not provide him with sufficient advice, including on what "in company" meant or what "recklessly causing GBH" meant. The Crown called the solicitors who had acted for him who effectively rebutted his assertions.

At [61] R A Hulme J concluded:

The applicant has failed to establish that when he pleaded guilty, and adhered to his plea of guilty, he did not appreciate the nature of the charge; that he was not in possession of all of the relevant facts; that his plea was not attributable to a recognition of guilt; that there was something that adversely affected the integrity of the plea; or that the advice of his solicitor was in any relevant way at fault.

Smith (2003) NSWCCA 53)

Smith applied to withdraw his plea of guilty in the District Court. Knight DCJ refused his application. Smith appealed against his subsequent conviction to the CCA.

Smith argued that when he entered his guilty plea, he was depressed and anxious, frustrated by his lawyer's failure to act on his instructions regarding witness, calling and evidence gathering, induced by his barrister to enter a guilty plea to get less time in prison and had been told that going to trial would distress his family.

The appeal failed because Smith's barrister gave evidence contradicting many of his assertions as to how the plea came to be entered, and his assertion relating to depression and anxiety was all based on his evidence and not a medical opinion.

R v Kouroumalos [2000] NSWCCA 453

Kouroumalos asserted that he was improperly advised by his solicitor, including that the solicitor didn't go through the brief of evidence with him. Whilst accepting that improper legal advice could establish a basis for withdrawing a plea, the Court rejected the Kouroumalos' evidence that the advice was improper and preferred the evidence of the relevant solicitor that he had been competently advised. In dismissing the appeal, Wood CJ at CL stated:

I am similarly satisfied that he realised that the Crown case against him was strong, that it was well made out on the transcripts, and that he knowingly offered the pleas of guilty with an appreciation of all matters relevant to that decision.

5.4 CONDUCT OF JUDGE

5.4.1 Inappropriate Pressure by Jude

R v Nightingale [2013] EWCA Crim 405

Nightingale pleaded guilty to possession of a prohibited firearm and possession of ammunition before a military Court Martial. He was subsequently convicted.

The issue on appeal stemmed from an uninvited sentence indication by the Judge Advocate General, which amounted to more than an enquiry into the sentencing framework. The charges engaged a mandatory custodial term, however, in exceptional circumstances the Court Martial could impose a lesser sentence. It was noted that where the defendant has not sought an indication on sentence, the judge should not give an advanced indication (per the principle in *R v Goodyear* [2005] 1 WLR 2532).

The appeal was allowed and the plea of guilty was set aside. The conviction based on the plea was quashed.

The court held at [16] that:

> *"…the uninvited indication given by the judge, and its consequent impact on the defendant after considering the advice given to him by his legal advisers on the basis of their professional understanding of the effect of what the judge has said, had created inappropriate additional pressures on the defendant and narrowed the proper ambit of his freedom of choice".*

Guardiglia v R [2010] VSCA 343

Guardiglia was facing trial for a number of robbery offences. At a point in the trial the jury was discharged. Uninvited by any of the parties, the trial Judge expressed their view that there was a 'very strong' prosecution case. She emphasised the cost of a new trial and offered a 'substantial discount' on sentence if Guardiglia was to plead guilty. She urged Guardiglia to discuss her views with his counsel a number of times. Defence counsel then conferred with Guardiglia and indicated that the judge was offering a 'good deal' and that he should take it.

At [39] Nettle JA of the Victorian Court of Appeal stated:

> *In my view, it is apparent from the passages of the transcript earlier set out that the judge set out to influence the applicant to change his plea from not guilty to guilty by advising him as to his prospects of being found guilty, and of the advantages to him of changing his plea to guilty. In the ordinary course of events, judicial persuasion of that kind would be likely to carry weight with an accused and be difficult for him or her to resist.*

The Court weighed the pressure brought by the Judge against the fact that Guardiola had the benefit of the defence counsel's considered and detailed advice and time to think about the matter. The Court also weighed the fact that the DPP had offered to reduce the charges he faced if he pleaded guilty. Ultimately, the Court determined, at [41], 'it is not necessary for the applicant to establish that the judge's promise of a substantial discount was the only cause of his decision to change his plea. It is sufficient if it made a material contribution to his decision. And in my view, it is plain that it did.'[52]

[52] Note that Ross AJA gave a dissenting judgment based largely on a finding that the Judge's inducement was not improper.

5.4.2 Wrongful admission of evidence

Regina v Chiron (1980) 1 NSWLR 218

In *Chiron,* the accused pleaded not guilty to a charge of rape in the District Court and the matter was listed for trial. In pre-trial argument, his lawyers unsuccessfully opposed the admission of 'similar fact' evidence. After a short judgement from the trial judge indicating that he proposed to allow the similar fact evidence. In his judgment, the judge commented that the evidence would 'sound the death knell of [Chiron's] case.' Chiron then conferred with his legal representatives, and he did. Chiron's counsel advised him 'something to the effect that I could try, but not successfully, to defend [the charge]' and indicated that it was in his interest to plead guilty. Chiron then instructed his lawyers that he would enter a plea of guilty, which occurred. Chiron appealed to the CCA against his conviction.

The CCA unanimously determined that the judge's decision to admit similar fact evidence was erroneous. Street CJ commented that if the matter had proceeded to trial and conviction, the conviction would have been overturned on appeal. In deciding to allow the appeal, he stated:

> *(5) In the foregoing context, the admission of guilt involved in the change of plea to "guilty" must be regarded as* ***tainted. It was not a free and voluntary confession****. It was not properly available to the jury as a basis for returning the verdict of guilty.*

Nagle CJ at CL determined that Chiron entered his guilty plea on legal advice and that the plea was not made under any mistake or misunderstanding of the circumstances. At (14) Nagle CJ at CL said:

> *(14) In my view, the present appeal resolves itself into the question of whether a plea of guilty* ***made by an accused person freely and voluntarily*** *but, nevertheless,* ***induced by an incorrect ruling*** *of the trial judge as to the admissibility of material evidence proposed to be led by the Crown, can be said to result in a "miscarriage of justice."*

Nagle CJ at CL resolved this question in favour of Chiron and determined to allow the appeal.

It is noted that Lee J provided a dissenting judgment. Whilst he agreed that the similar fact evidence was wrongly admitted, he stated:

> *(94) I, too, think that* [an accused person be allowed a trial by jury] *is of fundamental importance; but I consider that such a viewpoint has little relevance when an accused, having availed himself of a trial by jury, has, in the presence of the jury, altered his plea from not guilty to guilty* ***after proper consultation*** *with his counsel, and in the sure knowledge that conviction and gaol would follow.*
>
> *(95) I am unable to see any element of unfairness to the accused in the totality of the circumstances under which the plea of guilty was made and, accordingly, am not satisfied that there has been a miscarriage of justice.*
>
> *(96) Nor, I would add, do I consider that the* ***voluntariness*** *or* ***credibility*** *of the appellant's admission is rendered suspect by any of the evidence which the appellant claims he would bring forward if he were granted a new trial. I would dismiss the appeal against the conviction.*

5.5 LEGAL ISSUES

5.5.1 Evidence given at sentence contrary to a plea

Regina v Sagiv (1986) 22 A. Crim. R. 73

Sagiv was charged with the importation and possession of cocaine. He pleaded guilty to all counts without suggesting that the pleas were qualified. He gave evidence during sentence proceedings and claimed that he had believed the substance concerned was gold rather than cocaine.

Counsel and the trial judge discussed whether Sagiv should be allowed to persist in his plea of guilty based on the evidence he had given. Queens Counsel for Sagiv indicated that Sagiv wanted to resolve the matter that day.

The trial judge indicated that he did not believe 'one word' of Sagiv's evidence in relation to the gold and was reluctant to allow Sagiv to withdraw his plea of guilty, however, he agreed to refer the matter CCA posing two questions of law:

i. Should the prisoner as a matter of law be permitted to withdraw his plea of guilty to the charge, and
ii. Should the prisoner in the proper exercise of judicial discretion be permitted to withdraw his pleas of guilty to the charges.

It was held the trial judge did not err in his exercise of discretion in refusing to permit the withdrawal. The general proposition emerged that each case must be assessed on its facts to determine whether justice requires a guilty plea to be withdrawn. In the case of '*mistake or other circumstances affecting the integrity of the plea as an admission of guilt*' the court should readily grant leave – but if the plea was entered intentionally and in full knowledge of the facts, the court is plainly entitled to exercise its discretion against granting leave. The Court commented: (at 12)

> *The substantial general proposition which emerges from these cases is that it is a matter for the discretion of the Judge presiding as to whether a plea of guilty should be permitted to be withdrawn and that* ***each case must be looked at in regard to its own facts*** *and a decision made whether justice requires that that course be taken.*
>
> *It is clear that* ***in the case of mistake or other circumstances affecting the integrity of the plea as an admission of guilt the court should readily grant leave****. But if the plea has been entered in full knowledge of all the facts and intentionally as a plea to the charge which is made, the court is plainly entitled to exercise its discretion against a withdrawal of the plea. The law regards a plea of guilty made by a person in possession of all the facts and intending to plead guilty as an admission of all the legal ingredients of the offence (R v O'Neill [1979] 2 NSWLR 583) and as the most cogent admission of guilt that can be made, for the court is prepared to act upon it and proceed to conviction or final disposal of the proceedings.*

Considering Sagiv's evidence at sentence, Lee J sated (at 14):

> *For myself I see no substance in that proposition at all. It is at its very best a submission that the appellant should be allowed to have a run before a jury. It has little to do with the reality disclosed by the evidence.* ***Where a person, having pleaded guilty, goes into the witness box and seeks to put forward a version which ameliorates the effect of the charge from the point of view of criminality, it is always for the Judge to evaluate that testimony and he may either reject it or accept it****. There is no*

> *compulsion upon him to accept an assertion as to fact and allow a plea to be withdrawn merely because it can be said that that fact, if established, would result in an acquittal. The whole of the circumstances must be considered.*

Sagiv's appeal was unsuccessful because, despite his evidence on sentence, the Court found that the facts of the case meant that 'the only conclusion open is that when the appellant entered his pleas before Judge Court to the charges which were made he was fully aware that he was pleading to charges involving importation of cocaine.' It was not a case in which the Court was satisfied that Sagiv entered his plea of guilty to the charge under the mistaken belief that it was satisfied in circumstances where he believed the substance was gold and not cocaine which may have produced a different outcome.

5.5.2 Facts Incapable of Supporting a Conviction

A person will be permitted to withdraw a plea of guilty where "upon the admitted facts he could not in law have been convicted of it": *R v Forde* [1923] 2 KB 400.

R v Glanville (No 1) (CCA(NSW), 31 July 1980, unreported); *R v Caruso* (1988) 37 A Crim R 1.

> *It is not sufficient, within the authorities, for a person who has pleaded guilty merely to establish that there was a deficiency of evidence in some respects in the committal proceeding. The formulation enunciated by Amory J [in R v Forde] was that upon the admitted facts the person could not in law have been convicted of the offence charged. This involves an ascertainment of the facts and a demonstration that they could not support the conviction.*

A plea of guilty will be set aside if, upon the admitted facts, the appellant could not in law have been guilty of the offence: *Windie v The State of WA* [2012] WASCA 61 [31]; *Parker v Western Australia* [2014] WASCA 56.

Windie v The State of WA [2012] WASCA 61

In *Windie,* the appellant was charged with robbery. He was represented by a lawyer, and initially he pleaded not guilty. Subsequent to his bail being refused, the appellant changed his plea to guilty. Upon the sentence hearing, the appellant made an application to change his plea providing an affidavit, stating he did not fully understand the charge and he was angry at the time he accepted the material facts and instructed his lawyer to plead guilty. The appeal was dismissed as it was held at [32]:

> *"The appellant was, at all material times, legally represented. Prior to entering his plea of guilty, he had seen and evidently understood the statement of material facts…The appellant told his lawyer that he accepted the facts as alleged. Those facts amply made out the elements of the offence of robbery. Having received his lawyer's advice, he decided to enter his plea of guilty. It was never the appellant's case that on the admitted facts he could not, in law, have been convicted of robbery, nor was it said that the plea of guilty was entered as a result of any impropriety."*

Contrary to this, in *Parker* the appellant was convicted on one count of attempting to pervert the course of justice. The appellant originally pleaded guilty to the charge, as he had admitted to fabricating a stolen vehicle scenario to avoid suspension of his driver's licence. The appellant then claimed that a miscarriage of justice had occurred as the facts alleged by the Crown were incapable of making out the elements of the offence. The appeal was granted, conviction was set aside and a judgment of acquittal entered.

Parker v Western Australia [2014] WASCA 56

Parker was convicted on one count of attempting to pervert the course of justice. Initially he pleaded guilty to the charge, having made a full admission to fabricating a stolen vehicle scenario to avoid suspension of his driver's licence.

The sole ground of appeal was that a miscarriage of justice occurred as facts alleged by Crown were incapable of making out elements of offence.

Appeal allowed (and conviction set aside) because the evidence was incapable of supporting proposition that appellant's acts had tendency to frustrate or deflect prosecution. The Crown conceded this point. and

5.5.3 Defence not disavowed in facts

Liberti (1991) 55 A Crim R 120

In *Liberti*, the CCA considered a situation where an agreed statement of facts contained an undisputed defence to the charge.

Mr Liberti pleaded guilty to a charge of deemed supply of prohibited drugs. The fact sheet contained a statement that Mr Liberti had intended to return the relevant drugs to their owner, for whom he was just holding them. This would establish that he was not guilty of supply if this were true.[53] Mr Liberti appealed his conviction.

The CCA considered several authorities and indicated that it could set aside a plea of guilty in the following circumstances:

1. That the appellant **did not appreciate the nature of the charges** or **did not intend to admit** that he was guilty of them or
2. The appellant, upon the admitted facts, **could not in law have been convicted** of the offence charged in law: see esp *Caroso* (1988) 49 SASR 465 at 489; 37 A Crim R 1 at 26.

In upholding the appeal and ordering a new trial, the Court commented:

> *An accused person will not always know the legal consequences of the facts to which he pleads guilty. He or she is normally entitled, where represented, to look to the lawyers to explain those facts for their legal significance. Ultimately, the accused is entitled to look to the court before which he or she comes to offer protection from a conviction which is not, in law, sustained by the facts.*
>
> *As to the lawyers who represented Mr Liberti both before the magistrate and before Judge Ford, there was read before the Court today without objection an affidavit by Ms Janelle Ford, solicitor. She had the earlier carriage of these proceedings. It was she who appeared on Mr Liberti's behalf before Judge Ford to offer the pleas. She deposed to the fact that, at the time of the pleas of guilty before Judge Ford, she was unaware of the then unreported decision in Carey. Although no evidence was placed before the Court relating to the state of knowledge of the representative appearing for Mr Liberti when the matter was before the committing magistrate, I am prepared to infer that it was of no different quality than that of which Ms Ford gives evidence.*

[53] See *R v Cary* (1990) 20 NSWLR 292.

Beyond the duty of the accused's lawyers, there is a duty on the court receiving the proceedings pursuant to s 51.A of the Justices Act 1902 (NSW) to ensure that the accused may properly be convicted on the facts in respect of which the accused is charged: see s 51.A(l)(d)(i) of that Act. This duty fell upon Judge Ford. It is a duty which must be taken seriously, as the Parliament intended. Ultimately, its application must be assured by this Court. (per Kirby P)

5.5.4 Dissatisfaction with Sentence

Regina v Murphy [1965] VR 187

Murphy alleged on appeal that her counsel had induced her to plead guilty, in part, by indicating that she would not be sent to prison if she pleaded guilty and would thereby be able to retain custody of her child. After pleading guilty, she was sentenced to a period of custody.

The Court firmly rejected the notion that a plea could be withdrawn based on mere dissatisfaction with a consequent sentence:

> *Furthermore, there would appear to be the strongest reasons based on policy for refusing to allow an appeal from a conviction based on a plea of guilty merely because the sentence of the Court has turned out to be* ***more severe than an accused was led to expect****. The proposition that an accused, after being awarded an unexpected and unwelcome sentence following upon his plea of guilty, may then on appeal be given the opportunity of a trial by jury on a plea of not guilty with the chance of an acquittal or perhaps a lighter sentence if found guilty, needs only to be stated to be denied. And this, it would seem, is in substance the proposition advanced by this ground of appeal.*

The Court, however, left open the possibility that an overly optimistic sentence estimate, which led an innocent person to plead guilty may provide a basis to withdraw that plea.

> *I think her counsel may have been in error in his view that she would receive heavier punishment if she was found guilty after a trial, and he was wrong in his opinion that she would not be imprisoned if she pleaded guilty. If I thought she was probably innocent, and that she pleaded guilty without reference to any consciousness of guilt, but because of a muddled idea that she would thereby keep the child, I should consider her conviction a miscarriage of justice such as this Court should correct by ordering a retrial.*

Unfortunately for Murphy, the Court was not satisfied that this had occurred:

> *… after a careful examination of the depositions and the exhibits, and a full consideration of her evidence before this Court, I am not satisfied that she did not* ***plead guilty partly if not wholly through a consciousness of guilt****. The documentary evidence points very strongly to her guilt… Rather, it seems to me, much the most probable explanation of her plea of guilty is that it was entered in the belief that by that course she would minimize as far as practicable the punishment for offences she knew she had committed.*

5.6 SUBJECTIVE FACTORS

5.6.1 Stress of Proceedings

It is implicit in the reasons of Brennan, Toohey and McHugh JJ in *Meissner v The Queen* that a guilty plea may be set aside as a miscarriage of justice where it is not 'entered in the exercise of a free choice in the interests of the person entering the plea.'

In R v Wade [2012] 2 Qd R 31 Muire JA adopted Brennan J's process for determining the voluntariness of a confession from *Collins v R* (1980) 31 ALR 257; [1980] FCA 72 which related to confessions to police:

> *The conduct of police before and during an interrogation fashions the circumstances in which confessions are made and it is necessary to refer to those circumstances in determining whether a confession is voluntary. The principle, focussing upon the will of the person confessing, must be applied according to the age, background and psychological condition of each confessionalist and the circumstances in which the confession is made. Voluntariness is not an issue to be determined by reference to some hypothetical standard: it requires a careful assessment of the effect of the actual circumstances of a case upon the will of the particular accused.*

Regina v Chiron (1980) 1 NSWLR 218

In *Chiron,* the accused pleaded not guilty to a charge of rape in the District Court and the matter was listed for trial. In pre-trial argument, his lawyers unsuccessfully opposed the admission of 'similar fact' evidence. After a short judgement from the trial judge indicating that he proposed to allow the similar fact evidence. In his judgment, the judge commented that the evidence would 'sound the death knell of [Chiron's] case.' Chiron then conferred with his legal representatives, and he did. Chiron's counsel advised him 'something to the effect that I could try, but not successfully, to defend [the charge]' and indicated that it was in his interest to plead guilty. Chiron then instructed his lawyers that he would enter a plea of guilty, which occurred. Chiron appealed to the CCA against his conviction. Whilst Chiron was successful on another ground of appeal, the Court considered his claim that he had entered his plea under stress. The Court found that stress would only form the basis of an application to withdraw a guilty plea in exceptional circumstances.

Nagle CJ at CL in *R v Chiron* that the tension experienced by a defendant in the course of the trial and disappointment arising from the failure of the defendant's legal advisers to have available in the defendant's case a particular witness "are not unusual feelings experienced by an accused person at his trial and they, of themselves, would not call for the intervention of this Court".

Lee J in *R v Chiron*, in addressing the circumstances in which an accused may have pleaded guilty as a result of stress, said:[9]

> *"…the fact that the appellant was under tension cannot, alone or in combination with the other matters referred to, in my view, be held to introduce an element of unfairness to the appellant in regard to the decision which he made. Tension, extreme tension, is, no doubt, experienced by many who are involved in litigation, but it is not a factor which can be regarded, except in very exceptional circumstances, which are not present here, as unfairly affecting him in the choice he makes. There are, no doubt, many factors which may operate to induce a man to admit his guilt after he has pleaded not guilty; and the decision not to fight on is not always to be expected to be*

> *based entirely on logic or reason. Being under tension may of itself induce a desire to confess to one's misdeeds which might otherwise be held in check. But, having said that, it does not by any means follow that the plea of guilty is not to be taken for what it is—an admission of guilt—'A plea of guilty duly recorded provides the strongest evidence of guilt':* R v Murphy*, or that it should, on that account, be regarded as having been unfairly obtained." (citation omitted)*

R v Hura [201] NSWCCA 61; 121 A Crim R 472

Hura was standing trial for several charges of violence and sexual assault, a number against his de facto wife, Ms Menzies. The week before his trial, Ms Menzies visited him in prison and told him she would 'tell the truth that I lied in my statement.' When she came to give her evidence, however, she maintained her statement and gave evidence consistent with the Crown case. After this evidence, Hura pleaded guilty. Hura stated in his affidavit:

> *"I entered the plea of guilty at court after Ms Menzies gave her evidence because I was shell shocked. I could not believe that she had not told the truth in the witness box. I called my solicitor over and I said:*
>
> > *'Just pull the pin.'*
>
> *I was shattered and I could not believe what was happening. I was not thinking clearly or logically. I was shocked that Ms Menzies could be railroaded into telling lies the way she did…"*

He further alleged that the prosecutor in the matter had threatened Ms Menzies to give evidence consistent with her statement and that DOCS had threatened to take her children away if she 'dropped' the charges against Hura.

His solicitor at trial gave evidence and affirmed that Hura had asserted his innocence until the point during the trial when he instructed her and his counsel to change his plea. This was an instruction he gave to her in writing. She confirmed that he was very distressed at the time he gave these instructions.

The Court heard evidence from the Crown prosecutor and DOCS denying that they had railroaded the complainant into the evidence she gave. The complainant also gave evidence on the appeal indicating she had not lied or been pressured into maintaining her statement, nor had she said anything to Hura that would give him a basis for believing she would give evidence contrary to her statement. On the contrary, Hura had pressured her to lie in court.

Concerning Hura's assertion that Ms Menzies had been railroaded into lying and that he agreed to enter his plea notwithstanding a continuing belief in his innocence, the Court found:

> *47 If that evidence were accepted by this Court then in accordance with the appropriate tests to which I have referred above, there would have been sufficient doubt as to the bona fide nature of the plea for this Court to allow the appeal and direct a new trial be held. In my view this evidence should be rejected. I am quite satisfied that the plea did represent a genuine consciousness of guilt on the part of the Appellant as at the time it was entered.*

5.6.2 Lack of Understanding

Ferrer-Esis (1991) 55 A Crim R 231

The accused initially pleaded not guilty to charges of possessing, without reasonable excuse, a quantity of cocaine over the traffickable quantity which had been imported into Australia. The accused changed his plea to guilty but then sought leave to withdraw the plea of guilty in the Court of Criminal Appeal.

The appellant claimed he had changed his initial plea of not guilty for reasons of convenience and did not understand that the plea of guilty admitted all elements of the charged offences.

There were two grounds of appeal:

i. That the conviction constituted a miscarriage of justice because he **'***did not appreciate the nature of the charge to which the pleas was entered'* (he misunderstood the offence as one of absolute liability); and
ii. That the judge should have, of his own motion, rejected the respondent's plea of guilty.

The Court accepted the principle that an accused's lack of appreciation of the nature of an offence to which a plea was entered may lead to a miscarriage of justice but ultimately rejected the veracity of the accused's evidence in substantiating his claims.

The appeal was dismissed.

5.6.3 English Proficiency

Garcia-Godos v R (Cth) [2015] NSWCCA 144

Garcia-Godos committed a number of drug-related matters to the District Court for trial. He engaged a new solicitor who entered into plea negotiations with the CDPP. The solicitor made an offer to the CDPP, which was rejected. The CDPP, in turn, made a counteroffer, which was accepted. This included a plea to an importation charge. Garcia-Godos was arraigned in the District Court with the assistance of an interpreter and pleaded guilty via audio-visual link. The matter was adjourned for a sentence hearing with disputed facts. Before the sentenced date, Garcia-Godos indicated that he would like to withdraw his guilty pleas. Toner SC DCJ heard and refused the application to withdraw the pleas of guilty. Garcia-Godos appealed against this refusal as an interlocutory order to the CCA (under s5F(3)(a) *Criminal Appeal Act* 1912). This led the CCA to review the application proceedings before the District Court. As such, it adopted Toner SC DCJs credibility findings (as he had the benefit of seeing and hearing the witnesses) and inquired as to whether his judgment was erroneous.

In the application, Garcia-Godos relied on an affidavit he had prepared. He alleged that he had never agreed to plead guilty and never told his lawyers to plead guilty. He asserted that he had understood from his lawyer that he could challenge the importation charge in evidence on sentence. He did not sign instructions to plead guilty, and when he pleaded guilty, he had not seen a statement of facts but had seen a brief of evidence. He had not understood that he was 'stuck with' the plea once it was entered. He also alleged that he had a poor command of written and spoken English and his solicitors pressured him to plead guilty. Garcia-Godos also relied on the evidence of a fellow inmate, Cornwell, who attested to his difficulties communicating in English and confusion relating to his legal advice.

The Crown called evidence from Garcia-Godos' solicitor, counsel and a junior solicitor who was present at several conferences and tendered file notes of conferences with Garcia-Godos. Toner SC DCJ was critical of the fact that signed instructions were not taken. The witnesses gave evidence consistent with the file notes that Garcia-Godos understood his decision to plead guilty and that his English was sufficient for conferences. Further, on the day the plea of guilty was entered, the solicitor held a

conference by phone with the assistance of an interpreter, during which the indictment was interpreted, and the arraignment process was explained.

The Crown also called a federal agent who had spent time escorting Garcia-Godos from Pero, who attested to his good proficiency in English.

In finding no error with Toner SC DCJ's decision, the CCA noted:

1. Toner SC DCJ had assessed the credibility of the applicant and his witness as against that of the witnesses called by the Crown and preferred the latter. In coming to that conclusion he rejected the claim that Garcia-Godos had never instructed his lawyers to plead guilty.
2. Whilst Toner SC DCJ was critical of the solicitor and counsel for not taking signed instructions, [t]he absence of signed instructions was well and truly overcome by the content of the conference notes and the evidence from the solicitors and [counsel].
3. The evidence did not support Garcia-Godos's claim that he had little or no knowledge of English.
4. The applicant's claim that he was pressured into pleading guilty was contradicted by file notes stating, "I do not want to go to trial but I was not the principal" and "It is a matter for you whether you go to trial or plead." These file notes had not been challenged in the application.

5.6.4 Admissions After the Plea

Mao v Director of Public Prosecutions (NSW) [2016] NSWSC 946

In *Mao* an application to withdraw a plea of guilty was frustrated by admissions to the offences made in psychiatric material obtained after the plea.

Mao pleaded not guilty to charges relating to his connection to a criminal syndicate conducting identity fraud. After the Magistrate refused the accused's s 32 application, his counsel entered pleas of guilty to all charges.

The Mao later sought to withdraw some of these pleas, saying that he had not instructed his counsel to plead guilty to all charges – only some of them. He had intended to instruct his counsel that he had not committed all of the offences and was only guilty of some, adding that he did not have the assistance of his usual Mandarin interpreter at that particular time. The Magistrate refused the application to withdraw, being satisfied that the Mao's pleas of guilty were a true admission of guilt in the absence of undue influence and with a view that the withdrawal was sought for the purpose of exploiting weaknesses in the police case.

The Mao' case also relied upon a passage in *Boag:* (at 52)

> *A miscarriage of justice may occur in many different situations if a prisoner is not permitted to withdraw his plea of guilty. Such a miscarriage will be established not only where the applicant did not appreciate the nature of the plea which he had entered but also, for example, if there was no evidence upon which he could have been convicted, or if he had not intended to admit that he was guilty or if his plea had been induced by fraud or threats or other impropriety, when he would not otherwise have pleaded guilty...*
>
> *As Badgery-Parker J said in Davies [(unreported, Court of Criminal Appeal, NSW, 16 December 1993)] (at p 8), there must be shown to be some circumstance which indicates that the plea of guilty was not really attributable to a genuine consciousness of guilt... The requirement that a miscarriage of justice be demonstrated before leave*

is granted to withdraw a plea is well settled in the authorities to which I have referred. (at 37)

Mao put that by not taking this principle into account the trial judge had erred in his understanding, and application, of the relevant law to the present case.

The Court supported the Magistrate's conclusion, which was based upon the Mao's admissions consistent with guilt made to his psychiatrist for the purposes of his s32 application and a Community Corrections Officer for the purposes of a pre-sentence report – both of which he had taken into account in his reasons.

Accordingly, the appellate Court found that the Magistrate had made no error and dismissed the appeal.

5.6.5 Mental Illness

R v Wade [2012] 2 Qd R 31

Wade's matter was listed for trial, and as the jury was being brought into court, his legal representative explained that he would stand up and plead not guilty when arraigned. When arraigned, he entered a plea of guilty. While still in the dock, his legal representative asked him whether he had meant to plead guilty. He replied, 'yes' and said, 'if I can't be involved then what's the point.' Asked what he meant, he said something like, 'I'm not going to be able to keep quiet when the witnesses are speaking crap, and they will find me guilty anyway so I might as well not sit through it all, and enter the plea now.'

The Court took a short adjournment and Wade's lawyers spoke to him. They noted that he 'pacing back and forth in his cell throughout this time.' He said he did not wish to sit through a trial and that he believed he would lose his temper while witnesses were giving their evidence so that the jury would find him guilty in any event. He expressed concern that if he became frustrated with witnesses, he would get more charges. He also said that all along he had never wanted to be at the trial.

Asked by defence counsel during the conference if he wanted to maintain the plea of guilty to murder, the appellant said, 'yes.' Asked if he wanted to seek to have the plea of guilty overturned, he said, 'no.'

During sentencing, Wade became increasingly impatient about the process and what was being said by the prosecutor. He appeared agitated and stood up more than once, asking to be returned to the cells. He made outbursts about the facts, indicating his disagreement. He was sentenced to life imprisonment. He appealed his conviction.

On the appeal, Wade called psychiatric evidence from Dr. Frey relating to his mental state at the time he entered and maintained his plea.

Muir J found, at [59]:

> *The appellant's mental and emotional state was such that his ability to make a rational decision on how to plead was substantially impaired. As a result, his plea of guilty could not be said to have been made in the exercise of his free choice.*

In joining Muir J, Chesterman JJA said:

> *71. It is to be expected that every accused in a criminal trial will experience one or more of a variety of emotions; anxiety, fear and tension which, in turn, are likely to produce agitation* ***and/or depression. The degree of the emotion experienced will often be extreme. The fact that an accused experiences such emotions and pleads***

> ***guilty either because of them or while affected by them will not, at least ordinarily, be a reason for not accepting a plea of guilty as a true confession of guilt.*** *For that to happen, as the cases show,* ***"there must be a strong case and exceptional circumstances".***
>
> *72. The evidence of Dr Frey is just sufficient to make the case exceptional. The level of emotional distress and panic with a consequential inability to cope with the trial can be seen to have* ***deprived the appellant of the capacity****, at the time when called upon to plead,* ***to make a free choice in his own interests****. The appellant's mental state at the commencement of the trial was abnormal.* ***Although conscious of what he was doing, and of the consequences, the plea was compelled by psychological processes which took from him a sufficient degree of self control and awareness of his own interests that to allow the conviction to stand would amount to an injustice****.*

Khamis v R [2014] NSWCCA 152

Khamis entered a guilty plea to one count sexual intercourse without consent and was sentenced. He sought to withdraw plea on appeal on basis that his plea of guilty was no attributable to a genuine consciousness of guilt and was entered without a full understanding of the implications and consequences of doing so.

One issue was whether Khamis' mental illness undermined the integrity of his plea. The Court considered the medical opinions of two psychiatrists. Dr Adams opined that it was reasonably likely that Khamis was suffering from paranoid schizophrenia when he entered his plea, and Dr Allnut was of the opinion that Khamis was prone to exaggerate and embellish the symptoms of his mental illness. Dr Allnut considered that even in the context of mental illness, given Khamis' familiarity with the criminal justice system, it is likely that he understood what was going on.

The Court stated:

> *Even if [the psychiatric symptoms] were active, [Dr Adams] could not say that they would have prevented him from understanding what he was being told by his legal advisors. Just because a person suffers from a mental disease, such as schizophrenia, does not mean that the person is unable to function and in particular is unable to understand what is being said to him or her.*

In joining the unanimous decision of the Court, refusing to entertain the application, McCallum J stated, at [88]:

> *The psychiatric evidence on that issue, which rests heavily on the histories obtained by each psychiatrist from the applicant, ultimately goes little higher than to establish the existence of a possibility that the applicant did not fully understand that a plea of guilty meant that he was admitting his guilt of the offence. Having regard to the context in which the plea was entered, the careful evidence of the two lawyers who were advising the applicant at that time and the unconvincing evidence of the applicant himself, I have not been persuaded that it is more than a very remote possibility.*

5.6.6 Intellectual impairment, stress and confusion, misguided motive, immediate application to withdraw plea

White v R [2022] NSWCCA 241

On 10 January 2022, White was to be arraigned to commence a trial for the murder of Scott Johnson by pushing him off a cliff at North Head in Manly in 1988. During the 20-month period between his arrest and his arraignment, he had repeatedly instructed his lawyers that he was not guilty of the murder and wished to maintain a plea of not guilty. This included a conference held at 9.40 am on the morning of the arraignment.

Despite those instructions, when White was arraigned before Wilson J at 11 a.m., he stood and pleaded guilty to the charge, which took his legal representatives entirely by surprise. The Court adjourned the proceedings for White to confer with his lawyers.[54]

In that conference, White instructed that he "maintain[ed] that [he] didn't cause Scott Johnson's death; [he] want[ed] to confirm [his] plea of not guilty; and [he] want[ed] to go ahead with [his] hearing and [his] trial." White also instructed that he was confused, stressed and worried about his former wife "coming after [him]" when he entered the guilty plea.

White then applied to withdraw his plea of guilty. The application to withdraw the plea was heard over two days. White did not give evidence. In refusing the application, Wilson J said:

> *It is difficult to accept that any innocent person who is fit to be tried, even a person who has some level of cognitive impairment, would be prepared to plead guilty to the murder of another human being simply to assuage the distress of a deceased stranger's family, or out of respect for the stranger's memory.*[55]

White was then sentenced by Wilson J to 12 years and 7 months imprisonment.

White appealed to the CCA, in overturning Wilson J's refusal to allow the plea to be withdrawn, identified the following bases for the successful appeal:

1. **Timing of the Application.** The speed with which White went from instructing his lawyers that he wanted to plead not guilty, entering a guilty plea on arraignment and then applying to withdraw the plea was consistent with his evidence that he was confused, stressed, tired, and hungry.
2. **Stress.** He said that police had been pointing him leading up to the arraignment and the presence of Mr Johnson's brother in the courtroom was 'too much.'
3. **Intellectual impairment.** Despite being fit to plead, expert evidence indicated that White was intellectually impaired, and, in combination with other factors, this supported a finding that the plea was not a true admission of guilt.'
4. **No prejudice to the Crown/Principle of Finality.** As there were only a couple of hours between entering the guilty plea and applying to withdraw it, there was limited prejudice to the Crown, and considerations of finality would not be impaired.
5. **Reason for the Plea.** White had indicated that his principal motive in pleading guilty was to be 'safe' from his former wife, who had claimed that he killed Mr Johnson. The Court considered what was said in *Messiner* about the fact that a plea can be entered for 'for all

[54] The U-Turn in White's plea was the subject of some interesting press which captured the surprise entailed: news.com.au, 'I'm guilty': Scott White pleads guilty to 1988 gay hate murder, 14 January 2022; SBS – In a Surprise U-turn, man pleads guilty almost 40 years after death of Scott Johnson, published 23 February 2023.

[55] *R v White* [2022] NSWSC 11 at 105.

manner of reasons.' Despite this, the CCA at [80] said: '*a court hearing an application to withdraw a plea of guilty must be vigilant to ensure that the plea in truth is being proffered in the interests of the person entering it. That will be most unlikely if the stated reasons for entering it are not rational or fully informed*.'

6. **Rapid U-Turn.** The fact that White had maintained a plea of not guilty for a very long time and had never instructed his lawyers that he was guilty of the offence or was considering pleading guilty deprived him of the legal advice he may have received had he indicated his intention. The Court noted that his legal advisers didn't have the chance to 'take the important and protective steps' required by r 41 of the *Barristers Rules*.
7. **Fully Aware of the Facts.** Wilson J found that White was fully aware of the facts of the prosecution case in refusing to allow him to withdraw his plea. The CCA noted that the Crown had not articulated precisely how it was putting its case as a matter of law as at the time of the White's arraignment. The Crown Case Statement did not identify the *basis or bases of liability* upon which the Crown would rely to establish murder (i.e. intentional, recklessly indifferent or constructive murder). The Court stated at [86]: '*if the Crown had not at that stage settled upon how it put its case, it may legitimately be doubted how a person of extremely limited intellect could meaningfully plead to the charge and thereby admit the elements of the offence in a sufficiently informed way*.'
8. **Triable issue**. The Crown conceded that there was a triable issue in the case, and as such, the application to withdraw the plea of guilty was not to be frustrated by it being a situation where 'the case against the accused was overwhelming.'[56]

5.7 Unrepresented Accused

Hollingsworth v Bushby [2015] NSWCA 251

In practice it is easier to get leave to withdraw a plea if it was entered when the accused was unrepresented. ***Hollingsworth v Bushby*** [2015] NSWCA 251 demonstrates that the fact a person is unrepresented is not reason alone to grant leave to withdraw a plea.

The applicant (self-represented in all proceedings) was charged with 11 separate offences under the Prevention of Cruelty to Animals Act 1979 (NSW). The applicant had entered pleas of not guilty, and a contested hearing commenced. After the conclusion of evidence, the Magistrate gave the applicant an opportunity to consider changing her pleas to guilty, which she did shortly after. Before sentence, the applicant sought leave to withdraw her guilty pleas but was refused leave to do so. The applicant sought leave to appeal to the District Court, but the judge refused as she failed to observe pre-trial directions (namely, provide it in affidavit form). The applicant then applied to the Court of Appeal for relief by way of judicial review, on the basis that she was denied procedural fairness, and that it constituted a jurisdictional error on the part of the District Court. The Court of Appeal dismissed her application by majority, because the judge's refusal did not deny her procedural fairness, and she did not establish any practical prejudice that eventuated from the ruling.

[56] R v Khan [2002] NSWCCA 521 at [27], citing R v Davies and Hura.

6 PROCEDURE

6.1 HEARINGS

It is beyond the scope of this paper to detail the procedure for applications to withdraw a plea of guilty in the various relevant courts, both at first instance and on appeal. The rules for such applications will vary depending on the jurisdiction and timing of the application. Some appeals will hear evidence relating to the plea; others will review an application that was made at the first instance. Accordingly, this section aims only to scratch the surface.

An application to withdraw a plea of guilty is a matter of evidence.

In *Hikala v Constable Elliott; Treloar v Constable Elliott* [2016] NSWSC 81 a Local Court magistrate had dealt with an application to withdraw a plea of guilty in a cursory fashion.

The applicants entered pleas of guilty to certain charges while represented by a solicitor. Some months later the applicants appeared represented by new solicitors and applied to withdraw the pleas of guilty previously entered. The applicants claimed they had been pressured into the pleas by the previous solicitor.

On the date for the hearing of the traversal, Brown LCM accepted affidavits of the applicants and the applicant's previous solicitor. The applicants made their claims of inappropriate pressure in their affidavits. The previous solicitor denied any such pressure. The legal representatives applied to cross-examine the previous solicitor, and Brown LCM refused this request, saying that such matters are '*normally dealt with by way of affidavit alone.'* Brown LCM then disqualified himself from hearing the matter further, and a similar application was made to Knight LCM, who also refused to allow the applicants to cross-examine the deponent.

Button J in an appeal to the Supreme Court, set aside the orders of the Magistrates and made the following comments on the procedure to be adopted in such applications:

> *Speaking more generally with regard to principle, if there is a dispute about an important question of fact, and contradictory affidavits or written statements are relied upon by the opposing parties, then each party must have the opportunity to cross-examine the deponents that support the case of his or her opponent, except in very unusual circumstances. Our system of justice does not operate by way of determinations of issues of credibility based upon analysis of documents; perhaps that statement applies with even more force to our system of criminal justice.*
>
> *Turning specifically to disputed applications to withdraw a plea of guilty, I respectfully think that it is not the case that such matters are commonly dealt with on the papers. To the contrary, my experience is that the resolution of the vast majority of such matters requires the calling of oral evidence, because of the general principle I have set out above.*
>
> *As well as that, Howie J spoke in Wong v DPP [2005] NSWSC 129; (2005) 155 A Crim R 37 of the same need when his Honour said at [18]:*
>
> > *But where the resolution of the application depends upon the magistrate forming a view as to the integrity of a plea of guilty as an acknowledgment or confession of guilt, and where that matter can only be resolved by forming a view as to the defendant's knowledge and understanding of the effect of a*

> *plea of guilty or by determining the circumstances in which the plea was given, there is no room for short cuts or informality. There may be cases where the objective facts make it plain that a doubt must arise about the integrity of the plea, but that would be an exceptional state of affairs.*

6.1.1 Evidence

The types of evidence that may be led on an application to withdraw a plea of guilty will depend largely upon the nature of the issue raised by the application. The cases summarised above will give some insight into the type of evidence which will need to be led on such applications; these may include:

a. An affidavit[57] from the applicant.
b. Affidavits from any witnesses who support the contentions of the applicant or who can answer allegations made by the applicant.
c. Affidavits from the legal practitioners who advised the client before and at the time of the plea of guilty.
d. File notes and instructions taken by the legal practitioners.
e. Psychiatric evidence as to the mental state of the person who entered the plea of guilty.
f. The brief of evidence or parts of the brief of evidence that establishes a 'triable issue.'
g. Transcripts or recordings of the proceedings leading up to and when the plea was entered.

Different practices relate to whether the applicant or the prosecution obtains affidavits from the former legal practitioners who entered the plea. Ordinarily, an applicant will make assertions about the legal advice they were given, and it is for the prosecution to obtain and call contrary evidence. On the flip side, it is the applicant who bears the onus of proof; accordingly, if the applicant asserts that specific advice was given to them or their legal practitioner acted in a certain way and they do not call that practitioner or make them available to the prosecution, they may fail to discharge their burden of proof. The court might infer that that practitioner would not have assisted the applicant.

6.2 PRACTITIONERS WHO ADVISED ON THE PLEA

6.2.1 Ceasing to Act

It is almost always the case that the solicitor or firm of solicitors who entered the guilty plea in dispute will have a conflict of interests in traversal proceedings. Accordingly, they will be unable to act in those proceedings. The conflict of interests is two-fold: firstly, the practitioner who entered the plea is likely to be a witness in the traversal proceedings, and secondly, the application may bring the competence of the practitioner into issue, which may cause a divide between the interests of the client and those of the individual practitioner.

In *Iral*, Meagher JA criticised a solicitor who continued to act for a client on an application to withdraw a plea:

> ***[11]*** *Insofar as one can point to any evidence in the transcript against any of these conclusions, I think that evidence should be strongly discounted for the reason that Mr Hovan had evidence of a conflict of interest; on the one hand he had a client who instructed that he wished to change his plea because of certain circumstances which included the fact of non-disclosure of the elements of the offence and, on the other hand, he wanted to justify his own conduct. He should not, in the circumstances, have*

[57] The term affidavit is used loosely, some jurisdictions require 'written statements.'

acted in giving evidence and the Court should not have been anxious to place over-much reliance on it.

Simpson J was likewise critical:

> ***[15]*** *The fact is that the conflict of interest that is apparent on the papers would remain and would be irremediable no matter what evidence emerged through cross-examination. That conclusion is reinforced by information that was frankly given to this Court by the Crown to the effect that the solicitor had been approached and asked to provide an affidavit and had declined to do so.*

That said, a practitioner need not withdraw from a matter at the first indication from a client that they wish to withdraw their plea or have made a statement suggesting they no longer adhere to it (this can happen in reports prepared for sentence or even while the client is giving evidence on sentence). If no improper pressure is placed on the client to maintain their plea of guilty, it is entirely appropriate for the legal practitioners to conference the client to determine whether they wish to adhere to their plea despite their statements and explain the benefits of doing so to them and the difficulties they will face in withdrawing the plea. If the client indicates that they will maintain the plea of guilty, the practitioner should take written and signed instructions to that effect.

If the client maintains that they wish to withdraw their plea of guilty, the practitioner will need to advise the client that they can no longer act.[58] Depending on the stage of proceedings, the practitioner may also need to make an application to the Court to withdraw from the matter (this is usually not the case if the client has already arranged new legal representation).

The client's file should be prepared and released to the new legal representatives on appropriate authority.

An application to withdraw a plea of guilty that refers to the conduct of the legal practitioners may constitute a waiver of privilege over aspects of the client's file, and the content of the file and confidential communications with the client may be disclosed to the prosecution in responding to an application. This does not constitute legal advice; a practitioner will need to satisfy themselves that privilege is waived with reference to the rules of the profession and obtaining ethical advice if necessary.

6.2.2 Becoming a Witness

The prospect of being called to give evidence in proceedings, potentially against a former client, and on allegations of incompetence is daunting. Nonetheless, the legal practitioner will be duty-bound to appear if called and disclose all relevant matters in an affidavit or written statement before the proceedings (subject to rules of disclosure).[59]

The legal practitioners' duties to the Court and the administration of justice require candour, honesty and frankness despite any personal interests or loyalty to the former client.

[58] The rules for solicitors and barristers ceasing to act in a matter go beyond the scope of this paper and must be complied with. Ethical advice is available from both the Bar Association and Law Society.

[59] Once again, assistance from the Law Society and Bar Association is available to navigate the ethical pitfalls involved in such an application and deal with the stress it entails. Senior colleagues, members of the bar and firm principles are also obliged to provide support (this includes the writer, who is happy to hear from anyone in this position).

If called for, a practitioner should provide a comprehensive account of their communications with the client about their plea. This includes admitting any faults in advice given.

In *R v Wilkes* [2001] NSWCCA 97, the Court commended a barrister who frankly admitted that they had left their client with no choice as to whether to plead guilty or not and was overly pessimistic about the client's prospects at trial:

> *47 This court should, in my view, be reluctant to dismiss the confession by an experienced public defender that he made a mistake in his assessment of the merits of the case and in the advice given…*
>
> *49 I would only wish to add that it was in the very best traditions of the bar for counsel to have taken the step that he did, to correct what he saw to be a serious error on his part, affecting the liberty of his client, and to frankly acknowledge that failing in the affidavits placed before us in the affidavits placed before us.*

On the other hand, Sully J in *Ganderton* was extremely critical of a solicitor who failed to provide detailed evidence or analysis of their conduct in advising a client about a plea:

> *The solicitor who actually appeared for the appellant at the hearing before the committing Magistrate, as well as at the hearing before Judge Flannery QC, has sworn an affidavit in connection with the present appeal. He says that he: "thought for a while as to the statutory defence, rejected the idea, and told the appellant and his mother that I could think of no other way out other than to continue to plead guilty".*
>
> *This is, to say the very least, an enigmatic exposition of the deponent's process of reasoning.* ***It might be thought that the deponent, having undertaken at all the swearing of an explanatory affidavit, would have condescended to some details of the method by which he reasoned to his conclusion****. Even more to the present point, in my opinion, is the* ***striking absence from the affidavit*** *of any attempt to propound either a reasoned re-consideration of the correctness of the original advice as related to the facts then known; or such a reasoned re-consideration based upon some additional material not previously known.*

7 EXAMPLES

The following section includes a number of examples of documents that practitioners may find useful.

The examples are not authoritative, so please keep in mind that drafting applications and instructions is a matter for the individual legal practitioner on a case-by-case basis. Legal minds may differ about the quality and correctitude of the following examples.

Whilst templates for instructions are useful time-saving devices, they should not be used without being applied to the case at hand. The document should include the actual advice given and record the client's instructions in relation to a number of matters.

Please click here for original templates that you may find useful in your practice: Resources.

7.1 PLEA OF GUILTY INSTRUCTIONS - EXAMPLE

Court Case: 2023/00186445

Solicitor Reference: ASD23456

INSTRUCTIONS TO PLEAD GUILTY

R v Roy Cole

I, Roy Cole, after receiving advice, instruct my legal practitioner to enter pleas of guilty to the following charges:

<table>
<tr><th>No.</th><th>Charge</th><th>Elements</th><th>Penalty</th></tr>
<tr><td rowspan="3">1.</td><td rowspan="3">Sexual intercourse without consent

S61I Crimes Act 1900

22 December 2022</td><td rowspan="3">That I,

Had sexual intercourse with Jacinta Turner,

Without her consent,

Knowing that she was not consenting.</td><td>14 years prison</td></tr>
<tr><td>Standard non-parole period:</td></tr>
<tr><td>7 years</td></tr>
</table>

Definitions

Sexual intercourse – Sexual intercourse includes the penetration to the introduction of a person's genitalia into the mouth of another person.

In this case, I understand that I am admitting to introducing my penis into the complainant's mouth.

Consent – A person consents to sexual activity if, at the time of the activity, they freely and voluntarily agree to participate in it. A person may, by words or conduct, withdraw consent to sexual activity at any time, and any activity after that time is without consent.

I understand that I am admitting that while the complainant initially consented to the sexual intercourse, she withdrew her consent, but I continued the sexual intercourse.

Knowledge – A person knows that another person is not consenting to sexual intercourse if they actually know that the other person does not consent, they are reckless as to whether the person consents or any belief in consent is not reasonable in the circumstances.

A belief that a person consents to sexual intercourse is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out if the other person consents.

Negotiations

I understand that if I plead guilty to this charge, I will gain the advantage of having the following charges withdrawn:

No.	Charge	Elements	Penalty
2.	**Sexual intercourse without consent** S61I *Crimes Act 1900* 10 December 2021	That I, Had sexual intercourse with Jacinta Turner, Without her consent, Knowing that she was not consenting.	**14 years prison** **Standard non-parole period:** **7 years**

Standard non-parole period

I understand that the matter I'm pleading guilty to has a 7-year standard non-parole period. My lawyers have explained this to me, and I understand that the standard non-parole period is a guidepost to the Court. This guidepost represents the non-parole period a person would expect to receive if they were to take such a matter to trial and be found guilty. This guidepost doesn't include considerations of my subjective circumstances.

Plea of guilty

I understand that by pleading guilty, I admit each element of the offence above. My lawyer explained the elements to me.

I understand that **I have the responsibility** for choosing whether to plead guilty to the offence and **I have the complete freedom** of choosing to plead guilty or not.

I have been advised that I have a right to a trial in this matter and that the prosecution will need to prove the allegations beyond a reasonable doubt before I can be convicted of these matters.

I understand that by pleading guilty to these offences, I admit that I am guilty of them to the whole world.

Defences and evidence

My lawyer has provided me with a copy of the brief of evidence in this matter. My lawyer has discussed the effect of the evidence available to the prosecution with me.

I have previously told my lawyers that the complainant was consenting to sexual activity on the night alleged and/or it entirely appeared to me that she was consenting to sexual activity.

My lawyers have told me that if the complainant was consenting, or if I reasonably believed she was consenting, I am not guilty of the offences. I can take this matter to trial where a jury would determine my guilt or innocence in relation to these matters.

I now accept that she was not consenting and that the belief I held about her consent was not reasonable.

Discount

I understand that if I plead guilty to the offence above before this matter is committed to the District Court, I will receive a 25% discount on the imposed sentence. I understand that if I plead not guilty and take this matter to trial, I will not receive any discount on sentence.

Facts on sentence

I have read and acknowledged the statement of facts in relation to this matter attached to this document. My lawyer has explained the importance of the facts to me in relation to my plea and any sentence. I understand that this statement of facts binds me unless I raise an objection now.

My lawyer has discussed that the facts in this matter may be challenged or changed through negotiation or a disputed fact hearing. I do not object to the facts attached to this document and agree to them as the facts upon which I will be sentenced.

Sentence

I understand that when I am being sentenced, I cannot give any evidence, and my lawyer cannot tender, any evidence that contradicts the elements of the offences I have pleaded guilty to or the agreed facts.

I understand that my lawyer cannot guarantee a particular sentencing result and that the penalty will be entirely at the court's discretion. I understand there is no correct sentence for my offending, but a range of sentences might be imposed. I understand that the most likely sentence will be one of imprisonment. My lawyer has explained the following things to me:

1. That I will be sentenced in the District Court.
2. The maximum penalties for the offences.
3. Any applicable standard non-parole periods; and,
4. The type and range of sentences I might receive.

Appeal rights

My lawyer has advised me that I may have the right to appeal my sentence and that there are time limits for lodging an appeal. I understand that I must advise my lawyers if I wish to appeal once the sentence is imposed.

Signed:

…….. …….. / /

Name Signature Date

I, Joseph Smith, a legal practitioner, have given advice in relation to this matter and have explained and read this document to the client. I am satisfied that the client enters a guilty plea upon proper legal advice and as an exercise of their own free choice.

…….. …….. / /

Name Signature Date

7.2 APPLICATION TO THE LOCAL COURT

Application to the Local Court

Act and Section under which application lodged: Common Law

Order/s Sought:

1. That the court give leave for the applicant to withdraw his plea of guilty entered at Downing Centre Local Court on 22 January 2022 to H234253234/1 Common Assault.

Grounds for Application:

1. The applicant is not guilty of the offence.
2. The plea was entered on 22 January 2022 by the applicants solicitor in error.

Other relevant Information:

(E.g. Date of birth, Licence number, other relevant charges, alternative address)

Signature of Applicant:
(Signature not required if applicant is a police officer or public officer)

Signature of Registrar:
(Signature not required if applicant is a police officer or public officer)

Application filed at:
Date of filing application:

Court Registry Use Only **Payment Stamp**
Date Court Attendance Notice Filed:
Place of Filing:
(If different from place of first listing):
Court Reference Number:
Fees (circle): Paid / Waived / Remitted / Exempt

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7.3 APPLICATION FOR LEAVE TO APPEAL

Appellant: James Smith
Date of Birth: 28 December 2001

Address: 1/33 Elizabeth Street, Redfern NSW 2016
CNI: 1234566643

Licence Number: N/A

Magistrate: N. Conway LCM

Place of Conviction: Downing Centre

Date of Conviction: 22 January 2024

Offence(s): H334246247 – Common Assault

Select appropriate option:

☐ I apply to the District Court for leave to appeal to file Notice of Appeal outside of 28 days.

☒ I apply to the District Court for leave to appeal against a conviction entered after a plea of guilty (does not apply to severity appeals).

☐ I apply to the District Court for leave to appeal against an Apprehended Violence Order made by consent.

☐ I apply to the District Court for leave to appeal against an Apprehended Violence Order made in my absence.

A Notice of Appeal is attached.

The grounds upon which I seek leave to appeal are:

1. I am not guilty of the offence.
2. The plea of guilty entered by my solicitor, Mr Michael Wozza, on 13 December 2024 was not a free and voluntary confession.
3. I was not given adequate legal advice before a plea was entered, and I was not aware that I had a defence of self-defence available to me.

Signature of appellant:

Dated: 22 January 2024
at: Sydney

Important Note:

1. **A Notice of Appeal must be attached to this application.**
2. **The lodgement of this application for leave to appeal does not stay proceedings.**
3. **The District Court will not generally grant leave to appeal unless all rights for review by the Local Court of this conviction or order have been exhausted.**