IN THE COURT OF APPEAL OF NEW ZEALAND

CA739/2015
[2016] NZCA 371

BETWEEN	GAVIN GRAHAM JARDINE Appellant
AND	THE QUEEN Respondent

Hearing: 1 June 2016

Court: Ellen France P, Clifford and Katz JJ

Counsel: Appellant in Person
J E L Carruthers for Respondent

Judgment: 4 August 2016 at 3 pm

JUDGMENT OF THE COURT

A An extension of time to file the notice of appeal is granted.

B The appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] The appellant, Gavin Graham Jardine, was found guilty after a trial before Judge Blackie in the Auckland District Court on four charges of accessing, directly or indirectly, a computer system and thereby dishonestly and without claim of right

obtaining a pecuniary advantage.[1] The total sum Mr Jardine dishonestly obtained was, the Judge found, $383,385.02. The Judge subsequently sentenced Mr Jardine to three years and eight months' imprisonment.[2]

[2] Mr Jardine has served his sentence. At the end of that sentence he was deported from New Zealand to England where he now lives.

[3] Mr Jardine appeals his conviction and sentence. Mr Jardine says that the way the police prosecuted the charges breached a range of his common law and human rights. His trial was, therefore, unfair. His trial counsel, Mr Bioletti, failed to properly represent him. As a result the defence to the charges, a claim of right, was wrongly rejected by the Judge. He says his sentence was manifestly excessive and also breached his human rights.

[4] Mr Jardine requires an extension of time because his appeal was not filed until December 2015, after he had been released from prison. In the circumstances, the Crown did not, however, oppose an extension and we grant an extension of time to file the notice of appeal accordingly.

Facts

[5] Mr Jardine came from South Africa to New Zealand in May 2008 on a visitor's visa. His intention was to investigate work opportunities, and the possibility of migration to this country. He had a return ticket for 3 June 2008. Things moved faster than anticipated. By 20 May 2008 Mr Jardine had received an offer of employment at Maclean Computing Limited as an accountant. That offer was contingent on Mr Jardine commencing work immediately, and not returning to South Africa. Mr Jardine accepted that offer. By 5 June 2008 Mr Jardine had obtained a work permit and his employment agreement with Maclean Computing came into force.

[6] Before leaving South Africa, Mr Jardine had contracted to sell his and his wife's family home. That deal got into difficulties. Mr Jardine decided to return to

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1 *R v Jardine* DC Auckland CRI-2012-004-4089, 7 March 2014.
2 *R v Jardine* DC Auckland CRI-2012-004-17992, 16 April 2014.

South Africa in September 2008 to try to sort the matter out. Mr Jardine says that, on the evening prior to his departure, the managing director of Maclean Computing (Mr Allan Maclean) approached him, told him he was very satisfied with his level of work and offered him the opportunity to acquire a 15 per cent shareholding in Maclean Computing. The details were to be discussed on Mr Jardine's return. Mr Jardine said he was delighted to accept the offer, as it gave him long-term security in New Zealand. Mr Jardine returned to New Zealand at the end of September 2008. Due, he said, to the fact he was extremely busy he did not follow up on the offer of shares. However, he was promoted and received a salary increase.

[7] Mr Jardine understood that the sale of the family residence was back on track. Unfortunately that proved not to be the case. After some time, and a further visit to South Africa, it was decided the family would move to New Zealand. Costs were incurred accordingly. Mr Jardine says that, based on what he thought they would eventually get from the failed property transaction, his increasing role at Maclean Computing and the opportunity of ownership of shares, he had a sense of financial security sufficient to incur all the associated costs.

[8] Things did not work out at Maclean Computing as expected, either. Mr Allan Maclean was to be succeeded by his son Mr Chris Maclean. Under Mr Chris Maclean's growing influence, Mr Jardine said the company's fortune deteriorated. In April 2009 Mr Allan Maclean appointed Mr Chris Maclean as Chief Executive Officer of the company. Mr Jardine said Chris Maclean placed him under increasing pressure to conceal the company's financial difficulties. Mr Jardine eventually left the employment of Maclean Computing at the end of April 2011.

[9] After Mr Jardine's departure, financial irregularities were discovered. Mr Jardine had been setting up payments to himself from Maclean Computing using duplicate, false, customer invoices. He had also been diverting funds from an account with the company's former bank, to which he had procured customers to make ongoing payments. Representatives of Maclean Computing met with Mr Jardine. He declined to discuss matters in the absence of his lawyer.

[10] Maclean Computing laid a complaint with the New Zealand Police on 5 May 2011. The next day it commenced civil proceedings against Mr Jardine in the High Court at Auckland, seeking damages, at that stage of $255,392. After amendment, damages claimed totalled $411,762.09, including on account of funds that Mr Jardine had allegedly siphoned off to a company he owned, Puncturesafe NZ Limited.

[11] Mr Jardine prepared a counterclaim: in that counterclaim he would have sought damages of $600,000, being what he alleged to be the difference between what he would have had to pay for his 15 per cent shareholding in the company and the value of that shareholding at the relevant time. That counterclaim was not filed.

[12] Mr Jardine and Maclean Computing subsequently entered into a settlement of those civil proceedings. That settlement was recorded in a Deed of Resolution dated 13 December 2011. The background section to that deed recorded:

> A. Jardine was employed and contracted by Maclean between 9 June 2008 and 28 April 2011.
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> B. Maclean has issued proceedings against Jardine and Puncturesafe in the High Court at Auckland numbered CIV-2011-404-2556 (**"Proceedings"**), alleging that Jardine and Puncturesafe received funds from Maclean without entitlement or authority and claiming return of those funds. Jardine and Puncturesafe deny the allegations and the claim.
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> C. Jardine has advised Maclean that it has a counterclaim based on an alleged promise by Maclean that Jardine would receive a shareholding in the company (**"Counterclaim"**). The Counterclaim is denied by Maclean.
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> D. The parties have agreed to resolve certain matters between them on the terms below.

[13] The agreed terms of the settlement provided for:

(a) Maclean Computing to enter judgment against Mr Jardine in the total sum of $538,224.92;

(b) Mr Jardine was to make reparation payments totalling $440,000 commencing 1 June 2012 and ending 1 December 2017;

(c) provided Mr Jardine met those payment obligations, Maclean Computing would take no steps to enforce its judgment;

(d) Mr Jardine agreed to waive any rights he might have had under the counterclaim; and

(e) there was no admission of liability by either party.

[14] The next day, 14 December 2011, the police contacted Mr Jardine. An interview was held on 22 February 2012. Mr Jardine had, prior to that interview, taken advice from the lawyer who had been acting for him in the civil proceedings. Mr Jardine was advised he was being spoken to in connection with allegations made by Maclean Computing. Those allegations were summarised. At that point, the amount involved was said to be some $273,000 involving what was called "false accounting". Mr Jardine was advised he was not under arrest and was not required to make a statement.

[15] Mr Jardine discussed the position with his solicitor, and then read out a prepared formal statement.

[16] In his statement Mr Jardine freely admitted he had taken money from Maclean Computing that was not due to him. He outlined the narrative of events already recorded.[3] Mr Jardine ended his formal statement by recording that, after he had completed working for Maclean Computing in April 2011, and as his health had started to improve, he decided he needed to confess what he had done. He had engaged legal assistance and had cooperated fully with Maclean Computing leading to the settlement of the proceedings. His written statement concluded:

> 7. I consented to a civil judgement to be entered against me and my business Puncturesafe NZ Limited, and have agreed to a repayment plan with Maclean Computing Limited to repay the money back from future earning as I do not have any assets that I can sell to repay the amount.
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> 8. Maclean Computing Limited requires repayment of the money back. They would appear to be treating the matter as a civil issue rather than a criminal issue.

[3] In fact, our narrative comes largely from Mr Jardine's formal statement.

9. I am currently working on three jobs in order to meet the repayment plan agreed to with Maclean Computing.

10. I undertake to fully co-operate with the New Zealand Police in their investigations.

[17] Mr Jardine answered further questions from the police in which he confirmed that the total amount that had been taken by him was something over $380,000, and during which he again admitted his criminal liability.

[18] Towards the end of the interview, the police officer in question confirmed that charges would be laid, but that would not be done that day. The police were prepared to send a summons to Mr Jardine's solicitor's office, in acknowledgement of Mr Jardine's admissions and, no doubt, in anticipation that the charges would be resolved without the need for a trial. This was reflected in comments as to whether charges would be laid summarily or indictably. The police officer said that given that Mr Jardine had explained the situation and shown remorse, she did not see the benefit of "putting it through the whole trial thing". Mr Jardine's solicitor commented that everyone wanted to keep Mr Jardine afloat.

[19] Notwithstanding his formal confession, Mr Jardine ultimately decided to defend the charges. He engaged Mr Bioletti to act for him. He instructed Mr Bioletti that he considered he had a defence of claim of right. At Mr Jardine's trial Judge Blackie had little difficulty in reaching guilty verdicts on the four charges laid. In his written judgment, and not unexpectedly, he placed considerable significance on the formal statement Mr Jardine had made admitting guilt. In terms of the elements of the offence, he concentrated on the two defences that had been advanced for Mr Jardine:

(a) That the element of the charge relating to accessing a computer had not, in the absence of evidence of precisely how Mr Jardine had arranged the unauthorised transfer of funds, been established.

(b) The claim of right that Mr Jardine advanced. Based on the original offer of shares, the failure of Maclean Computing to honour that offer and the adverse impact on the business of the various unsuccessful

initiatives of Mr Chris Maclean, Mr Jardine asserted he believed he was entitled to protect his financial position. To do so, he took money from his employer.

[20] The Judge was quite satisfied that, on the access issue, the facts spoke for themselves. The Judge acknowledged that a claim of right may exist notwithstanding a false belief. But such a belief had nevertheless to be honest. Given Mr Jardine's position as an accountant, his business experience and intelligence, and (again) his frank admission of guilt, the Judge found that Mr Jardine had known what he was doing was unlawful.

[21] Maclean Computing went into voluntary liquidation on Friday 13 July 2012. Mr Jardine's defalcation was cited as one of the causes. On Wednesday 18 July 2012 a company wholly owned by Mr Chris Maclean and a business partner purchased the assets from the liquidators. Most, if not all, of the staff were employed by the new entity and the business continued to be operated from the same premises.

The appeal as argued

[22] Mr Jardine appeared and argued his appeal for himself, by audio visual link from England. Both Mr Jardine and Mr Bioletti were required for cross-examination. Once their evidence had been heard, Mr Jardine orally addressed the comprehensive written submissions he had prepared. Those submissions covered a wide range of matters. As the hearing proceeded, and as Mr Jardine acknowledged, it became clear that the two issues of particular concern to Mr Jardine, and which were central to the appeal as a whole, were:

(a) He had a sense of grievance that, notwithstanding the settlement he had entered into with Maclean Computing and his commitment to pay reparation as recorded in that settlement, the very next day the police process began which led to his trial in 2014. His assertion was, in effect, that Maclean Computing had, if not agreed then at least indicated or led him to understand, that the civil settlement would mean that criminal proceedings would not be necessary.

(b) That his claim of right defence had not been properly presented by Mr Bioletti, resulting in the Judge wrongly finding him guilty on the criminal charges.

[23] We will consider those two issues first, and then the balance of the matters Mr Jardine raised.

Criminal proceedings — a breach of Mr Jardine's human rights and an unfair trial

[24] During his cross-examination by Mr Bioletti, Mr Allan Maclean frankly acknowledged the linkage Mr Jardine had seen between the civil settlement and avoiding criminal proceedings. Mr Maclean was being questioned about the civil proceedings his company had taken against Mr Jardine, and the meeting that took place with a view to settling those proceedings. Mr Maclean had been endeavouring to recall the name of one of the lawyers involved. The Judge told him it did not matter. Mr Maclean then engaged with Mr Bioletti in the following exchange:

> A. [Mr Maclean] Yes okay. So he would have – so that was the level of discussion for discussion purposes to discuss this matter. And the meeting was specifically with a view to reaching a settlement which would avoid a prosecution as I understand it. And I confirmed that recently with my own solicitor just to make sure my memory was not faulty on that point.
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> Q. [Mr Bioletti] A settlement to avoid a prosecution?
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> A. That's in my amateur terms, yes.
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> Q. Not technically possible.
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> A. You may be right.

[25] It is clear, therefore, that Mr Maclean shared Mr Jardine's understanding that the civil settlement could obviate the need for legal proceedings. But, as Mr Bioletti observed, such an agreement is simply not possible. Once Maclean Computing took its complaint to the police, the matter was outside its control.

[26] We note here, as we think this factor contributed to Mr Jardine's concerns, that there is something of an unexplained coincidence in the police contacting Mr Jardine the day after he and Maclean Computing had entered into a civil

settlement. Mr Jardine says that was the first contact he had had with the police in relation to the Maclean Computing criminal case. At the same time, however, Mr Jardine acknowledges being stopped by the police at the border in July 2011. We infer that happened because the police were aware of the criminal complaint. In any event, and in essence, Mr Jardine's case is that proceeding with the prosecution in these circumstances was an abuse of process.

[27] In *Fox v Attorney-General* this Court held that conduct amounting to abuse of process was not confined to that which would preclude a fair trial.[4] Outside of that category the conduct would have to be:[5]

> … of a kind that is so inconsistent with the purposes of criminal justice that for a Court to proceed with the prosecution on its merits would tarnish the Court's own integrity or offend the Court's sense of justice and propriety.

[28] It is not necessary for us to consider the full scope of the abuse of process doctrine in these cases. That is because, however formulated, the present case does not get anywhere near the type of case in which the Court might intervene.[6]

[29] The significance of promises or assurances not to prosecute was considered in *R v Abu Hamza*.[7] The Court recognised that circumstances could exist where it would be an abuse of process to prosecute where an assurance that no prosecution would be brought for the relevant conduct had been given. The Court went on to say that it was not easy to define a test for those circumstances, other than that they would need to be such "as to render the proposed prosecution an affront to justice".[8] It would only be in rare circumstances that it would be offensive to justice to give effect to the public interest in prosecuting. In *Dacorum Borough Council v el-Kalyoubi* the Court observed, as regards staying a prosecution where there had been some form of assurance that no prosecution would ensue:[9]

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4 *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [37].

5 At [37]; and see *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [119] and [127]; *R v Werner* [1998] STC 550 (CA); and Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013) at [5.8]–[5.10].

6 *Wilson v R* [2015] NZSC 189 at [40](b), [60] and [80].

7 *R v Abu Hamza* [2006] EWCA Crim 2918, [2007] QB 659.

8 At [50].

9 *Dacorum Borough Council v el-Kalyoubi* [2001] EWHC Admin 1052 at [34].

> … the jurisdiction to stay must be very sparingly used. Even when some indication has been given by someone involved in the prosecution, it does not follow that the court should intervene if the prosecution later decides to proceed (see *R v Horseferry Road Magistrates' Court, ex parte DPP*). Where the indication relied upon, if given, was given by someone who had no power to give it, because he was only a junior officer in an organisation not, on the face of it, empowered to prosecute, then it should normally be regarded as of no consequence whatsoever. The court will not readily interfere with the right of a public authority charged with the duty to prosecute to execute its statutory function.

[30] Here, there was no assurance by any person in any way associated with the prosecution. If Mr Jardine had paid reparation to Maclean Computing, that would have been something for which he might well have been given credit at sentencing. But, as matters transpired, Mr Jardine did not make any of the promised payments and was, in fact, bankrupted by the liquidators of Maclean Computing whilst he was in prison. Further, the scale of the offending is another factor telling against an abuse. Accordingly, we are satisfied that the apparent circumstances in which Mr Jardine reached his civil settlement with Maclean Computing would, of themselves, not have rendered a subsequent prosecution an affront to justice. Whilst at a human level we can understand Mr Jardine's disappointment that he was unable to avoid prosecution, this ground of appeal cannot succeed.

Defence of claim of right

[31] Mr Jardine asserts that Mr Bioletti did not, as instructed, advance what Mr Jardine saw as his claim of right to act in the way that he had. There was affidavit material that Mr Jardine had provided to Mr Bioletti that was not put before the Court. To the extent that Mr Bioletti did advance that defence, he did so in an ineffective and, essentially, negligent way.

[32] Mr Jardine's belief that he had a claim of right justifying what would otherwise be criminal actions tantamount to theft is, in our view, fundamentally misguided. Mr Jardine based that alleged claim of right on Mr Allan Maclean's promise of a shareholding in Maclean Computing, the failure of Mr Maclean to honour that promise and the negative impact on what might have been the value of Mr Jardine's shares in Maclean Computing, had that promise been honoured, of the actions of Mr Chris Maclean. As Mr Allan Maclean acknowledged, the prospect of

Mr Jardine acquiring shares at some point in the future may have been discussed. It has to be said, however, that Mr Allan Maclean's recollections of any such conversation were considerably less certain than those of Mr Jardine. That is perhaps understandable: what might have been something of a casual remark by Mr Allan Maclean, the managing director, could have been given greater significance by Mr Jardine, the prospective permanent migrant to New Zealand concerned about establishing his financial security. But, like the trial Judge, it is not feasible in our view that a trained professional accountant like Mr Jardine could have honestly believed he could steal money from Maclean Computing to, as he put it, protect the value of what otherwise would have been his investment in the company.

[33] Even if Mr Jardine had been a shareholder, his ability to limit what he saw as the damage caused by Mr Chris Maclean would have been limited, if not non-existent. Mr Jardine suggested that, as a shareholder, he would have had equal rights in management decisions. Given that all he was promised was a 15 per cent shareholding, it is not credible, in our view, that Mr Jardine could have had an honest belief that what he was doing was justified.

[34] In our view, and as Mr Bioletti realistically recognised, the best Mr Bioletti could do — as he did — was to remind the Judge that a false or objectively unreasonable belief may nevertheless form the basis of a genuine claim of right. But the claim of right has to be genuine, that is honest. Mr Jardine's frank and honest acceptance of the wrongfulness of his actions, when he first spoke to the police in February 2012, provided an insuperable barrier to that claim succeeding. The prosecution, recognising that it had the task of negating the existence of a claim of right, did in any event address the Judge on it. The Judge noted the disputed status of the offer of shares, but went on to assess the claim of right on the assumption that a formal offer had been made, and accepted. The Judge said:

> [19] … Assuming it had, how could it be lawful to take in excess of $380,000. The Crown contend that the incredulity of honest belief is illustrated by the fact that many of the fraudulent transactions occurred before the issue of shares was ever raised (according to the evidence of Mr Jardine taken from his statement) and after he had realised that the offer of shares was never going to materialise. The Crown contend the true motive for fraudulently transferring the money arose out of Mr Jardine's

> admitted financial difficulties, following his immigration to New Zealand in 2008.
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> [20] Mr Jardine's statement to the police does not assist in "claim of right" being a serious consideration. His conduct was discreetly deceptive. A claim for funds for shares was never advanced to his employer. Even when admitting his wrongdoing, he never had any qualification that he had an honest belief as to entitlement.
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> [21] "Claim of Right" is an issue where there is a belief in a legal entitlement, albeit a mistaken belief. But that belief must nevertheless be honest. In this case, the Crown contend that there is an inherent improbability to honest belief. Mr Jardine is an intelligent man. He is an accountant. He occupied a senior position within his employer's firm. If there ever was an offer of shares, why did he not do something to promote it? He knew what he was doing was unlawful.

The Judge's assessment of that claim of right reflects our own analysis.

[35] Mr Jardine also alleged that Mr Bioletti had failed to act on instructions to assert his entitlement to receive at least part of the sums originally alleged by the prosecution to have been dishonestly obtained. That is not correct. One of the exhibits to Mr Jardine's affidavits listed those expenses: they totalled some $7,000. As Judge Blackie's judgment records, Mr Bioletti succeeded in establishing that around $9,900 of the amounts said by the prosecution to have been unlawfully obtained, were amounts properly due to Mr Jardine.[10] We are satisfied that the rest of Mr Jardine's complaints as to Mr Bioletti's representation of him are equally without foundation.

[36] We conclude, therefore, that neither of those two grounds of appeal succeed.

[37] We turn now to consider the balance of the matters raised by Mr Jardine.

Other breaches of Mr Jardine's rights

[38] Mr Jardine advanced three further alleged breaches of his rights. He said that, during his interview, the police offered him a glass of water but failed to deliver it. On that basis, the evidence of his confession should be declared inadmissible. If Mr Jardine had reminded the police that he wanted a glass of water, we are sure one would have been provided to him. There is nothing in that complaint.

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[10] *R v Jardine,* above n 1, at [18].

[39] In its opening, the Crown referred to the settlement of the civil proceedings. The Judge asked, "A civil judgment?" The prosecutor replied, "That is correct".

[40] Mr Jardine argued that that reference breached his right to the benefit of the presumption of innocence. We do not agree. Acceptance of civil liability, and a reference to that acceptance, does not represent any admission of criminal responsibility, nor any basis for a finding of criminal responsibility. Here, however, Mr Jardine's frank confession of his criminal responsibility to the police when interviewed was relevant to the defence of claim of right, going as it did to the honesty of the asserted belief. That is all Judge Blackie was referring to when, at sentence and as Mr Jardine noted, he commented it was surprising that when it came to the charges that were laid before the Court Mr Jardine had not pleaded guilty. In the circumstances, that is little more than a statement of fact.

[41] Finally, Mr Jardine challenged the reliability and honesty of a number of the Crown witnesses. We do not need to consider that matter in any detail. In our view, there simply is no basis for those assertions by Mr Jardine. Whether or not the Judge accepted the evidence of the witnesses was a matter for him.

Appeal against sentence

[42] Mr Jardine challenged his sentence on two grounds:

(a) parity; and

(b) insufficient discount for personal circumstances.

[43] Judge Blackie sentenced Mr Jardine to three years and eight months' imprisonment. He did so on the basis, amongst other things, of the decision of this Court in *Mears v R*.[11] That case involved an offender who had systematically defrauded her employer of $380,000 over a period of six years. There the Court of Appeal upheld a starting point of four years and six months' imprisonment. Judge Blackie adopted the same starting point for Mr Jardine. Mr Jardine endeavoured to argue that, by comparison with *Mears*, his starting point should have been three

[11] *Mears v R* [2014] NZCA 30.

years and eight months' imprisonment. Notwithstanding the equivalence of the amounts at issue in each of the two cases, Mr Jardine pointed to the fact that the largest single charged amount in *Mears* was $273,000. Attributing the four years and six months' starting point to that amount, Mr Jardine argued that his largest charge, of $225,000, should therefore have attracted a three year and eight months' starting point, as should his offending overall. That submission misunderstands the principles of sentencing. In both cases the starting point was fixed by reference to the total amount of money dishonestly obtained. That in one case a single charge may involve a greater amount of money than a single charge in another case makes no difference. There is nothing in that.

[44] Mr Jardine also claimed that the discount Judge Blackie allowed was insufficient. In effect, Mr Jardine argues that from a starting point of three years and eight months, he should received a good character discount of 15 per cent, a discount of 10 per cent to acknowledge the lack of family support he would experience and a discount of some almost 20 per cent (eight months) on account of the time that elapsed before he was eventually tried. In other words, Mr Jardine sought a total discount of some 45 per cent. That is, with respect, unrealistic. In our view, the 20 per cent discount Judge Blackie allowed, 10 per cent for previous good character and 10 per cent for Mr Jardine's relative isolation as a recent migrant, was appropriate.

Result

[45] Mr Jardine is granted an extension of time to file his notice of appeal and his appeal against conviction and sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent