



[2] Now Mr Foley says there was in fact a second assailant, another neighbour, Mr T. Mr Foley says Mr T must have entered Ms Lawrence's flat after his own attack and departure, and renewed the attack on Ms Lawrence.

[3] If so, this unfortunate woman was the victim of not one but two quite unrelated murderous attacks in her home, late at night. And again, if so, the second assault must have occurred within just five minutes of first assailant's departure.

[4] Mr Foley says he did not receive proper advice before pleading guilty. He asserts trial counsel error, and the denial of his fair trial right. Primarily on that basis he appeals his conviction.

### **Background**

[5] As trial counsel error is alleged, Mr Foley has waived privilege. So far as relevant we set out the advice and instructions given. We record that counsel, Mr Simon Shamy, had taken the precaution of keeping admirably detailed file notes. Like Mander J before us, we find those file notes to be reliable. Mr Shamy was cross-examined on his affidavit and those file notes in the High Court when Mr Foley sought vacation of his guilty plea. Mander J accepted Mr Shamy's evidence and preferred it to Mr Foley's where the two varied. Mr Shamy was not cross-examined before us.

[6] Mr Foley and Ms Lawrence were neighbours. They became lovers. The relationship ended on 4 June 2012. That day Mr Foley received a trespass notice from Ms Lawrence. Five days later, at about 11 pm on 9 June 2012, Mr Foley visited Ms Lawrence's flat alone. He went there to discuss their relationship problems. At 1.08 am the next morning he called 111. The call ended at 1.13 am. He then left the property. Ambulance and police staff arrived at 1.18 am and 1.20 am respectively. Shortly thereafter they found Ms Lawrence alone in a pool of blood, covered by a blanket. She was taken to hospital with life-threatening head injuries. On 30 June 2012 Ms Lawrence died.

*Version 1 — Mr Foley confesses*

[7] When Mr Foley rang 111 at 1.08 am on 10 June 2012 he told the operator he had hit Ms Lawrence on the head with a metal bar — “gave her a couple of hits over the head” — and that she was in a bad way, unconscious and bleeding seriously.

[8] Mr Foley then went to his friend Mr Sullivan’s home to stay the night. He told Mr Sullivan that Ms Lawrence “went into her house, I followed her in and I banged her.” He handed Mr Sullivan a jemmy bar. He said words to the effect, “This is what I hit her with, I don’t want to get you involved”.

[9] Later that morning Mr Foley handed himself in to the police. He told them he had hit Ms Lawrence with a garden gnome on the back of her head, twice. He said he had disposed of the gnome in a river.

*Version 2 — Mr Foley “realises” there was a second assailant*

[10] Mr Foley says he read the autopsy report by Dr Sage on 12 March 2013. He saw that Ms Lawrence had suffered six or seven wounds. He himself was responsible for only two. He says that at that point he realised there had to have been another assailant.

[11] He believes this assailant to be another neighbour, Mr T. According to Mr Foley, Mr T was also currently a lover of Ms Lawrence. Despite that status (which, it may be observed, Mr T denies) Mr Foley believes that Mr T, rather than aiding the stricken Ms Lawrence, instead seized the opportunity after Mr Foley left and before the emergency services arrived to finish her off.

*Version 3 — Mr Ecclestone confesses*

[12] In January 2015, Mr Foley obtained a letter from a Mr Ecclestone, in which the author admitted to murdering Ms Lawrence. Mr Foley forwarded this letter to the Court, his counsel and to the Crown Solicitor. He instructed his counsel to call Mr Ecclestone to give evidence that he administered the fatal blows.

[13] Disaster then befell this theory. On 26 January 2015 Mr Foley discovered that Mr Ecclestone had written a number of such confessions. In one he admitted to killing Scott Guy. In all he admitted to four separate murders. The Ecclestone explanation was abandoned.

*Procedural history — August 2014 – January 2015*

[14] Significant delays attended this prosecution. Much of that was due to Mr Foley's changes of counsel. But in August 2014 he engaged Mr Shamy. Trial then was set for 9 February 2015.

[15] In November 2014 Mr Shamy was instructed to inquire whether Crown would oppose a 10 year minimum period of imprisonment (MPI) if Mr Foley pleaded guilty. The Crown indicated it would oppose a 10 year MPI. Mr Foley instructed his counsel to prepare for trial on the basis Mr T had entered Ms Lawrence's home and struck her with more blows after Mr Foley left and that those blows caused her death.

[16] On 17 December 2014 Mr Shamy asked Mr Foley to consider seeking a sentence indication. There was a risk of a longer MPI if it came out at trial that Mr Foley had unlawfully entered the deceased's home. Mr Foley instructed his counsel to seek a sentence indication. The instruction records, "I understand that the indication would be on the basis that I hit the decease on head [sic] about 8 times".<sup>3</sup>

[17] On 25 January 2015 he instructed Mr Shamy to call Mr Ecclestone to give evidence that he administered the fatal blows.

[18] On 26 January 2015, after the Ecclestone explanation exploded, Mr Foley returned to the theory that Mr T had killed Ms Lawrence. Mr Shamy emphasised that there was no evidence such an event had taken place. Mr Foley signed confirmation he had been advised there was no evidential foundation for this theory, and instructing Mr Shamy to defend the charge on the basis Ms Lawrence was killed

---

<sup>3</sup> Mr Foley repeated that acknowledgment in a further instruction dated 29 January 2015.

by someone else. It is worth setting out here the written instruction Mr Foley gave his counsel that day:

I, Timothy Joseph Foley of Christchurch, Prison Inmate, confirm:-

1. That I have instructed my counsel Mr SJ Shamy that I no longer wish to call Jason Ecclestone as a defence witness.
2. I confirm that, in the absence of Mr Ecclestone, Mr Shamy has advised me that there is no evidence that anyone else struck Michelle Lawrence with an iron bar subsequent to my leaving her house.
3. I also confirm that Mr Shamy has told me that although, I suspect that [Mr T] may have killed Ms Lawrence, there is no evidence apart from my own suspicions that this was the case. Particularly, I confirm that Mr Shamy has told me that even if [Mr T] was having a sexual relationship with Michelle Lawrence, this of itself does not prove that he killed her. Other aspects of evidence such as his drug dealing and possession of a rifle come back to my own evidence. These issues on their own do not prove that [Mr T] entered her house and killed Michelle Lawrence.
4. Mr Shamy has told me that he cannot accuse [Mr T] of murder in Court unless there is evidence to show that [Mr T] was the murderer.
5. I confirm Mr Shamy's advice that the issue of [Mr T] having committed the murder but the Police not having found evidence is speculation and is very unlikely to gain favour as a substantive defence with a jury in my trial on the charge of murder.
6. In light of the above, my instructions to Mr Shamy are to continue to defend the charge on the basis that I only caused two injuries to Michelle and she must of [sic] been killed by someone else.

[19] On 29 January 2015 Mr Shamy reviewed evidence suggesting Mr Foley had entered Ms Lawrence's home through a window, using a jemmy bar to open it. There was a footprint on the windowsill, and Mr Foley's fingerprints had also been found there. The likelihood of an MPI of 16–17 years was discussed if a home invasion was inferred. Mr Foley again gave instruction for a sentence indication to be sought.

*Procedural history — February 2015*

[20] On 3 February, less than a week before trial, Mr Shamy met Mr Foley and discussed difficulties with the defence. He and his junior advised a plea of guilty before trial, so as to receive credit on the MPI. An MPI of 10–12 years was anticipated, whereas the Crown was seeking 14 years. The Crown did not seem to

be relying on home invasion as an aggravating consideration. If that changed at trial, an MPI of up to 17 years could be anticipated.<sup>4</sup> Mr Foley advised he would plead guilty after a sentence indication hearing.

[21] The following day Mr Shamy advised the Crown would now be alleging home invasion. Mr Foley instructed he wished to proceed to trial.

[22] Mr Foley met his counsel at Court later that day. He was advised there was no viable defence. Mr Shamy's evidence was that this exchange followed:

Mr Foley instructed me that he wanted me to cross-examine [Mr T]. I advised Mr Foley that I could cross-examine [Mr T] on matters arising out of the evidence, however I could not put it to him that he was guilty of murder because there was simply no evidence in that respect. Mr Foley advised me that he would give evidence that [Mr T] was guilty of murder, however I advised him that he could not do that because he did not know.

[23] Around the same time Mr Foley lost privileges in prison and went on a hunger strike. The trial was rescheduled for 11 February 2015.

[24] On 9 February 2015 Mr Foley met with his counsel. He was advised the evidence was overwhelming and there was no credible defence open. If he gave evidence he would be cross-examined extensively on his changes of theory and lack of hard evidence of another assailant.

[25] Trial began on 11 February. Mr Foley advised Mander J he wanted to represent himself so he could present the argument Mr T had committed the crime in his opening statement. The Judge explained Mr Foley would not be able to raise illegitimate matters that went beyond the proper ambit of an opening. Mr Shamy was then re-engaged as counsel. An adjournment to confer further was given. Mr Shamy then indicated to the Judge that Mr Foley wanted to plead guilty, but that he was concerned about Mr Foley's fitness to do so as a result of the ongoing hunger strike. The matter was stood down until the next day.

[26] Mr Foley then ended his fast. On 12 February 2015, after sleeping on the question of whether to plead guilty, Mr Foley again advised counsel he would plead

---

<sup>4</sup> Due to s 104 of the Sentencing Act 2002.

guilty. He did not agree with all aspects of the summary of facts. He was advised this could be discussed with the Crown and agreed prior to sentence. He confirmed in writing he would plead guilty on the basis he murdered Ms Lawrence by hitting her “approximately eight times with an iron bar”.

[27] Mr Foley was then arraigned and entered a plea of guilty.

*Procedural history — March – May 2015*

[28] On 3 March Mr Foley advised Mr Shamy he wanted to change his plea. Mr Shamy advised he could dispute facts without changing the plea, but that if he wanted to withdraw the plea Mr Shamy could not continue to act. Mr Foley pursued his application to withdraw the plea. New counsel, Mr Hembrow, appeared for him.

[29] Mander J rejected the application to vacate plea.<sup>5</sup> After a very careful analysis of the evidence (including cross-examination of Messrs Foley and Shamy) the Judge said:

[67] I am satisfied that Mr Foley’s entry of plea on the morning of 12 February was of his own volition. He was not subject to any impediment which rendered his plea other than informed and considered. There is an obvious degree of stress and pressure associated with such a decision, and particularly so in relation to such a serious charge. However, I am satisfied that by the time Mr Foley entered his plea on 12 February, the actions he had previously taken in prison relating to his food intake did not bear upon or impede his ability to make a rational decision to plead guilty. He was not subject to any improper pressure from his counsel. To the contrary, Mr Shamy had taken steps to ensure Mr Foley was in a fit condition to understand the significance of his guilty plea. I am satisfied Mr Foley was fully appreciative of the merits of his position at the time he pleaded guilty and was properly placed to make his decision.

[30] On 7 May 2015 Mr Foley was sentenced to life imprisonment. An MPI of 11 years and eight months was imposed.

**Appeal**

[31] Mr Foley drafted and filed his appeal in June 2015. He was represented by counsel thereafter, but both withdrew. After Mr Foley was transferred to Invercargill

---

<sup>5</sup> *Foley v R* [2015] NZHC 829.

Prison, Mr Hugo Young was appointed counsel assisting to bring some order to the appellant's argument.

[32] Four grounds of appeal were advanced:

- (a) Mr Foley pleaded guilty on the basis of incorrect advice, namely that his trial counsel were unable to advance his proposed defence nominating Mr T as the person who struck the fatal blow or blows and therefore the person who committed the murder.
- (b) When Mr Foley pleaded guilty, he did not intend to admit guilt for committing the murder.
- (c) Mr Foley's ability to plead guilty was affected by his ill-health and other circumstances as a result of his hunger strike, being housed in the prison "at risk unit", losing access to his trial material and being placed under unfair pressure as a result of the allegation of unlawful entry continuing to be a live issue at the time of this trial and subsequent plea of guilty.
- (d) As a result of "various improprieties" in relation to the conduct of the prosecution (including the police investigation and failure to apprehend Mr T in relation to unrelated offending) his trial was unfair and there was an abuse of process by the prosecuting authorities.

[33] At the hearing before us Mr Young was disposed to say nothing in relation to the second, third and fourth grounds of appeal. We consider he was right to exercise that restraint. Mr Foley himself presented some arguments on those points.

[34] We record that at the hearing of this appeal in November all suppression orders made in the High Court were discharged other than in relation to the identity of Mr T.

### **Primary appeal ground: trial counsel error**

[35] The correct approach to conviction appeals following a guilty plea has been set out in a number of cases.<sup>6</sup> Only in exceptional cases will such an appeal succeed. The appellant must show that a miscarriage of justice will result if the conviction is not overturned. Where the appellant fully appreciates the merits of his position, and makes an informed decision to plead guilty, the conviction cannot be impugned.<sup>7</sup>

[36] One such exceptional circumstance that will result in a miscarriage of justice is where erroneous advice by trial counsel has induced a defendant to plead guilty on a mistaken belief that no tenable defence exists. But two critical qualifications must be borne in mind before such an appeal ground may succeed:

- (a) whether a tenable defence exists at all;<sup>8</sup> and
- (b) if so, whether the defendant was unaware of that defence and made no informed decision to abandon it — for instance in order to secure ulterior advantage such as the withdrawal of other counts or to obtain a discount on sentencing.<sup>9</sup>

### *Submissions*

[37] Mr Young submits that trial counsel erred by advising the appellant he could not accuse Mr T of committing the murder (the additional blows) and thereby run his defence on that basis. A basis for accusing Mr T of committing the murder would have arisen had Mr Foley given evidence himself. He would have provided an evidential basis supporting the contention that a third party was involved in the assault incident. He would give evidence he struck the victim only two blows. The medical evidence was clear that a greater number than that had been struck. It followed that if Mr Foley did not strike all the blows, someone else must have been involved. Hearsay evidence that Mr T was in a sexual relationship with Ms Lawrence was available from Mr Foley and from an independent witness, a

---

<sup>6</sup> See for example *R v Le Page* [2005] 2 NZLR 845 (CA); *R v Merrilees* [2009] NZCA 59; and *Nixon v R* [2016] NZCA 589.

<sup>7</sup> *R v Le Page*, above n 6, at [16].

<sup>8</sup> *Penniket v R* [2016] NZCA 154 at [8]; and *R v Chin* CA43/04, 10 June 2004 at [34].

<sup>9</sup> *R v Merrilees*, above n 6, at [35].

Mr Anderson. Mr T is said to have admitted to Mr Anderson that he slept on an occasion with Ms Lawrence. Mr T of course denied that was the case. Mr Young submits that if Mr T could have been shown to have lied to the police in that denial that might provide circumstantial evidence that he had “something to hide”. Mr Foley might also be permitted to give hearsay evidence that Ms Lawrence feared Mr T.

*Analysis*

[38] In our view this ground falls at the first hurdle. No tenable defence is apparent.

[39] Mr Foley admits attacking Ms Lawrence and striking her twice with a heavy object. His account to the 111 operator was “she’s quite bad”, was lying on the floor, unconscious, was bleeding from the head, seriously and to such an extent he could not control it. He repeated the admission of the attack to his friend Mr Sullivan, and to the police, the same day.

[40] This supposed defence rests upon the fantastic proposition that in the merely five minutes between Mr Foley ending his conversation with the 111 operator (conducted while standing beside Ms Lawrence) at 1.13 am and the police arriving at 1.18 am, another man also in a relationship with Ms Lawrence entered the property and, rather than rendering assistance to the stricken victim, instead renewed and completed the attack upon her.<sup>10</sup>

[41] Furthermore, the defence depends almost entirely on evidence that might be given by Mr Foley. In particular as to restraint in his admitted attack upon Ms Lawrence. Mr Foley did not pretend to have seen Mr T commit the offence. Rather he would have given evidence that he saw him at the door of his own flat when he left Ms Lawrence’s flat after assaulting her. Mr T of course lived close by. Nor does Mr Anderson’s evidence as to the supposed admission by Mr T of a sexual relationship with Ms Lawrence provide any evidential foundation for Mr T having attacked Ms Lawrence. Mr Shamy so advised Mr Foley, and correctly.

---

<sup>10</sup> The 111 call had begun at 1.08 am: see [6] above.

[42] Mr T denied both a sexual relationship with Ms Lawrence and any attack upon her. He would have been called as a Crown witness. Had the attack on Mr T's account of events been pursued, as Mr Foley wished, a considerable counter-attack on Mr Foley's veracity might have been expected in cross-examination. It may be observed that Mr Foley has 85 prior convictions for dishonesty and what was reported at the time of sentencing as "a habit of telling grandiose lies, distortion of thinking ... and system of denial."

[43] In our view no jury would have entertained a reasonable doubt as to Mr Foley's guilt by considering Mr T (or any other person) may have undertaken a second murderous attack on Ms Lawrence in the five minute timeframe available that night. That is sufficient to dispose of this ground of appeal.

[44] It is not therefore necessary to give close consideration to whether counsel's advice was or was not correct. The ethical obligation of criminal defence counsel is not to attribute to another person the offence with which the defendant is charged unless (1) it is necessary for the defence to do so and (2) the allegation is justified by facts and circumstances arising out of the evidence in the case or reasonable inferences drawn from them.<sup>11</sup> Similarly, any cross-examination proposition must have foundation "by reference to credible information in the lawyer's possession".<sup>12</sup>

[45] However, as we read the evidence below, Mr Shamy expressed a willingness to put to Mr T that he was having an affair with Ms Lawrence, would get angry with her at times, and was in the doorway of his unit when Mr Foley left at 1.13 am. Had this line of cross-examination yielded a positive response, Mr Shamy might then have had a foundation to suggest in cross-examination that Mr T had entered Ms Lawrence's flat. Depending on the outcome of that step, it might have been put to Mr T that he was culpable. And had that been done, submission might have been made to the jury that Mr T might have attacked Ms Lawrence. The evidence also shows Mr Shamy was willing to submit that another unnamed person may have attacked Ms Lawrence, and that a reasonable doubt should exist as to Mr Foley's

---

<sup>11</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008, r 13.13.4.

<sup>12</sup> Rule 13.10.2. See Anthony Willy and James Rapley *Advocacy* (Thomson Reuters, Wellington 2013) at [10.3.2]; *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 200; and *Rondel v Worsley* [1969] 1 AC 191 (HL) at 227.

guilt. Nothing in this entirely proper approach closed off the possibility of Mr Shamy pursuing in cross-examination a foundation for submitting the murder was in fact committed by another. Had it been necessary for us to do so, therefore, we would not have found trial counsel error.

### **Secondary appeal grounds**

[46] The remaining grounds of appeal are set out at [32] above. They were addressed briefly by Mr Foley in person. As we have noted, counsel assisting, Mr Young, was not disposed to address these matters.

[47] We consider there is nothing in these grounds.

[48] It is convenient to start with ground 3: that Mr Foley's ability to plead guilty was affected by ill health as a result of his hunger strike and stress. This was the subject of an extremely careful and thorough judgment by Mander J below. Nothing put to us by Mr Foley either in writing or orally persuades us that there was any error by the Judge in reaching his conclusion to the contrary.

[49] That disposes also of ground 2: that in pleading guilty Mr Foley did not intend to admit guilt. Whether or not that is the case, he made a free and informed decision to enter that plea. In doing so he was motivated, significantly, by a desire to obtain credit for the plea and avoid a Crown allegation, and judicial finding, of home invasion. Each aspect was successful. The Crown summary of facts was not premised on the basis of home invasion. The final sentence of an MPI of 11 years and eight months was significantly less than that sought by the Crown.

[50] Ground 4 advances allegations of deficiencies in the police investigation, in particular of Mr T. This confronts however the fatal difficulty that (1) Mr Foley had confessed to attacking Ms Lawrence (2) there was no basis then to infer that any other person had been involved in the five minutes between his ending the 111 call and the police arriving, and (3) Mr Foley did not suggest the existence of a second assailant — let alone Mr T — until some nine months after the crime had been committed. This is not a case where it can be said that evidence has been lost because of omissions by the police involving bad faith, or where the lost evidence

would have been of real assistance to the defence.<sup>13</sup> We agree with Mr Lillico that the likelihood of any further evidence creating a reasonable doubt was extremely low given the 111 call, Mr Foley's statement to the police, his admission to Mr Sullivan and luminal testing undertaken at the time of the crime which showed footprints from Ms Lawrence's flat to Mr Foley's but to no other.

## **Result**

[51] The appeal against conviction is dismissed.

Solicitors:  
Crown Law Office, Wellington for Respondent

---

<sup>13</sup> *R v Harmer* CA324/02, 26 June 2003 at [91].