

IN THE MATTER of a Criminal Appeal

BETWEEN

**JOSEPH JUNIOR SIPA AND
TESSA JEAN EDWARDS**

Appellants

AND

THE QUEEN

Respondent

Hearing 14 June 2006

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel M Starling for Appellants
F E Guy Kidd and M J Inwood for Respondent

CRIMINAL APPEALS

10.00 am

Starling If Your Honours please, Counsel's Starling, I appear for Sipa and Edwards.

Elias CJ Thank you Mr Starling.

Guy Kidd May it please the Court, Mrs Guy Kidd and Ms Inwood for the respondent.

Elias CJ Thank you Mrs Guy Kidd, Ms Inwood. Yes Mr Starling.

Starling Thank you. I think it may be helpful if I deal with Mr Sipa very briefly for a start.

Elias CJ Well can you start by telling us what it is that your clients seek from this appeal and whether you have instructions? Because there don't seem to have been instructions at the time of the appearance in the Court of Appeal about whether they wish to have this matter treated as a conviction appeal.

Starling Yes they both wish to have the matter treated as a conviction appeal and have the matters remitted back to the District Court.

Elias CJ Well with what end? Are they going to seek to enter pleas of guilty? We have no information before us on that point, unlike some of the other cases.

Starling In my submissions the cases would be different for each of Edwards and Sipa if the matters were remitted back to the District Court. So in relation to the options that Ms Edwards would have, if the matter was remitted back to the District Court, she in fact could run the matter to trial I believe.

Elias CJ Well why should we be dealing with something on a contingent basis? What is the impediment to indicating what position she wishes to take?

Starling Well the basis for the appeal is that they wish the matters to be treated as an appeal on conviction and to have the matter remitted back.

Blanchard J But that would be pointless if they weren't going to change their pleas.

Starling Well in my submissions the case is different for each of Edwards and Sipa.

Blanchard J Not in that respect.

Starling Well in relation to, well certainly in relation to Ms Edwards, there are options that she would have had at the position she was at.

Blanchard J Does she wish to change her plea?

Starling Potentially she does.

Blanchard J Potentially?

Starling Yes.

Blanchard J What does that mean?

Starling Well there is an issue that she could run a trial if a trial was to occur, which hadn't been investigated up to the point of the sentencing indication, which would be run at the time of a trial.

Elias CJ Why shouldn't we have an unequivocal indication from her by way of affidavit or something along those lines to say that she intends to plead not guilty, if given the chance? And indeed why wouldn't we expect to see an indication that, but for the sentence indication, she would have pleaded not guilty?

Starling I think it's clear from the way the process took place that she entered her guilty plea during that sentencing indication process. So that was a basis for a guilty plea. Her Counsel was looking at running the trial for her. Mr Sipa's position I believe is different.

Elias CJ In some of the English authorities, the Courts do consider whether the sentencing indication was an inducement or put pressure on the accused to plead guilty. We don't have any indication here as to whether that was the result. We don't have a claim by the appellant that she only pleaded guilty because of that sentence indication and otherwise she would have pleaded not guilty.

Starling Well I don't have that clearly but.

Elias CJ And in the Court of Appeal, Counsel didn't have instructions as to what her wish was in terms of the plea if the matter was remitted.

Starling Counsel at the Court of Appeal did ask the Court of Appeal to remit the matter back to the District Court.

Elias CJ Yes.

Blanchard J But there's no point in the Court of Appeal remitting the matter back to the District Court if all they're going to do is plead guilty again.

Starling Well as I say, there is a difference between Mr Sipa and Ms Edwards at this point.

Blanchard J Well are you suggesting that Mr Sipa definitely won't be pleading guilty?

Starling No. No I think, I was going to start by saying in terms of Mr Sipa's case now, and I believe that he never received a sentencing indication anyway, there's no evidence that he relied on sentencing indication and all he can argue is that he's got some interest in the outcome of her indication. But in relation to Mr Sipa at this point, I really can't take an argument for him here.

Blanchard J So are you abandoning his appeal?

Starling Effectively I am. I think that I, I mean having gone through my friend's submissions and tried to find even the remotest argument for him, I believe the case for him is hopeless.

Blanchard J Do you have instructions to abandon his appeal?

Starling No, he wishes the appeal to go ahead.

Anderson J Is he aware that he is likely to be worse off if he gets it remitted to the District Court and pleads guilty because the Court of Appeal sentence is at the lowest end of the permissible range because it was a Solicitor General appeal?

Starling It's been discussed with him.

Anderson J That it's very likely he'll get more through winning this appeal?

Starling Well, I mean he's aware that's a possibility.

Anderson J I'd put it higher than that myself.

McGrath J Mr Starling, what was the basis on which you suggest the Court of Appeal could have remitted back either appellant's matter given that it was dealing with a sentence appeal by the Solicitor General and did not have an application before it? And indeed in the case of Ms Edwards it was quite plain that she was giving no instructions having considered whether or not she should make an application basically for the discharge of the conviction and the remitting back of the matter to the District Court.

Starling The Crown raised at the time of the appeal that the Court of Appeal may want to consider the appeal to be one of conviction and sentence on the basis of the previous Court of Appeal decisions in **Gemmell** and **Edwards** (**R v Gemmell** [2000] 1 NZLR 695; **R v Edwards** (2000) 17 CRNZ 604). So it was the Crown effectively that.

McGrath J But if, one can well see that if the offenders or if the respondents in that appeal wanted that to happen that might be so, but as my brother Anderson's pointed out, there are risks in the matter going back to the District Court. And I wonder how the Court of Appeal could have imposed those risks on either of the present appellants by sending it back unless they indicated their consent to it and probably in jurisdictional terms, applied to have their convictions discharged.

Starling The difficulty with that certainly from their point of view at the Court of Appeal was that without knowing what the outcome would be of that case, what the different sentence would be, they couldn't be advised on in relation to if they wanted it remitted back it was more than a certain amount or less than a certain amount and it was somewhat a moveable feast.

Tipping J But didn't Counsel actually ask for it to be remitted back, thereby impliedly seeking leave to appeal?

Starling Yes.

Tipping J Against conviction. And that has to be your answer doesn't it to my brother McGrath to the extent it is an answer. I'm not saying whether it's an answer or not but that has to be the answer.

Starling Counsel for Ms Edwards at the Court of Appeal asked for the matter to be remitted back to the District Court.

Tipping J Yes. And she didn't precisely articulate the sort of jurisdictional conceptual basis for that. But clearly underpinning that request in the context was a request to allow an appeal against conviction out of time and to allow that appeal.

Starling Yes, that's how I would see it.

Elias CJ Well I'm concerned about that. Because we don't have an indication from the appellants themselves that that is their wish, to bring an appeal against conviction. And indeed in the Court of Appeal, as I mentioned before, Counsel said she had no instructions.

McGrath J Although she did raise the matter.

Elias CJ Although she had raised the matter.

McGrath J Ms Edwards was still not prepared to give instructions for an application to be brought. And Counsel I think really just, as I understand the matter, simply said I think it would be better if the matter go back.

Starling Mm.

Elias CJ Yes.

Tipping J Prefer I think was the word she used.

Elias CJ Yes.

Starling I think that's a fair reading of what happened. And certainly from Ms Edwards' point of view, not knowing what the additional penalty, what the additional sentence was likely to be, I mean she certainly had no idea of what was going to be involved in actually having the matter remitted back to the District Court.

Tipping J Can I put it to you this way Mr Starling. Is your client effectively saying through you that she now wishes to have the opportunity to

consider whether she should plead not guilty in the light of what has transpired? You're not able to tell us definitely what she's going to do. But she wants to have that opportunity, being fully appraised of the risks inherent in each course of action. Because if she pleads not guilty, gets convicted, then she's looking at a significantly longer sentence. As my brother Anderson says, if she pleads guilty, she's still looking at the potential for a longer sentence. Now are you saying as Counsel that, fully appraised of those risks, she wishes to have the opportunity to consider which way she wants to go?

Starling Yes.

Tipping J You can't put it any higher than that. She hasn't told you exactly what she wants to do definitely, but she wants to have the opportunity.

Starling No. No I wasn't trial Counsel for either of these people.

Tipping J No but you're Counsel here. And you have to tell us what she wants to do. And you can't say which way she wants to go. You have to say, I would have thought, she wants to have the opportunity to revisit her plea.

Starling Yes.

Tipping J Knowing of the potential hazards that that involves.

Starling Yes. And I think that's certainly as far as I can take it. And certainly it's been discussed with her what she could do potentially if the matter went to trial.

Tipping J Well look, I don't think you need elaborate. I think that is the long and the short of it isn't it? Knowing the risks, as it is where she stands at the moment, she wants the opportunity and she wants therefore for it to go back to the District Court to re-plead.

Starling Yes Sir, that's.

Tipping J You can't really put it any.

Starling No, that's my position.

Tipping J And why and what might happen later is not for us to wrestle with.

Starling That's my position.

Tipping J It's just whether you should have or she should have that opportunity.

Starling Yes that's my position.

Elias CJ Well I'm concerned still about the informality of this because we do not have a properly constituted appeal against conviction. And if she requires opportunity, I am wondering whether she should be provided that opportunity before this appeal goes ahead. That's really why in other cases people have put before the Court affidavits from the clients indicating that they do wish to have the, to proceed with an appeal or at least that the appeal is properly constituted by a notice of appeal signed by the appellant. We don't have anything like that in this case and I think it's troubling.

Starling Well to date, well I mean, I don't have those things.

Elias CJ No.

Starling So really I can't help you.

Elias CJ It may be that perhaps we need to, I need to confer with my colleagues about this matter. I might just ask Ms Guy Kidd if she has any comment to make on the interchanges we've had.

Guy Kidd May it please the Court, the Court will be aware from the written submissions that have been filed on behalf of the respondent that they were aimed quite clearly at the issue as set by this Court, quite the technical issue, of whether or not the Court of Appeal should have given both appellants that opportunity to appeal against conviction. Where we are going today appears to be going into a full on appeal against conviction. The Court will be aware from my written submissions it is the Crown approach that if we were getting into that realm that there needed to be evidence from the appellants as to their reliance, what they would have done if they had got a different plea indication.

Tipping J It's pretty obvious isn't it that she relied on the sentence indication. I think the better point surely is that we don't know why she wants to have this opportunity.

Elias CJ Or if.

Tipping J Or if. Well I personally would be, but we may need to retire and consider this. If Counsel tells me that she wants that opportunity being fully aware of the risks, I'd be inclined, subject to discussion, to accept that.

Guy Kidd Well if the Court is going into that realm, the Crown's position would be that there should be affidavit evidence before the Court about the position.

Elias CJ But is your position really that this is a very technical appeal and that the matter, if we are convinced that opportunity should have been given to regularise the position, that the matter should be remitted

formally to the Court of Appeal to enable notice of appeal supported by affidavits to be considered by that Court?

Guy Kidd Yes Your Honour.

Elias CJ Yes.

Guy Kidd That is what I understood the process would be if this appeal was allowed.

Elias CJ Yes.

Guy Kidd It may be more appropriate to deal with it all here but that would need to be done with that evidence.

Elias CJ Yes.

Guy Kidd And Your Honour Justice Tipping's point that the Crown position is it can't be accepted that she relied on that indication, just for the arguments that immediately following that, she pleaded for the first time to a much lesser charge with a lesser maximum sentence.

Tipping J Well I haven't got a closed mind on that. But it just struck me that the other point was a stronger and better one for our immediate purposes.

Guy Kidd Yes, yes.

Tipping J Yes.

Guy Kidd And just the, I'll just address the matter which was raised by my friend about the Crown's approach. I think this Court has before it my submissions from the Court of Appeal which of course were filed before I knew whether there would be any evidence affidavits filed on behalf of the respondents in that matter. And I just indicated that if the Court accepted, this is right at the end of my submissions, para 76 in the Court of Appeal, that if the Court accepts that Ms Edwards' sentence requires reconsideration and that the imposition of a sentence of more than two years is appropriate, the Crown notes Ms Edwards may have grounds for an appeal against conviction as occurred in **R v Edwards**. And in the event this occurs, the Court may wish to offer the respondent the opportunity to treat her opposition to this appeal as an appeal against conviction. Now in fact Counsel for Ms Edwards never sought that opportunity and I agree with the position as accepted by my learned friend that the Court were asking her, well what shall we do? What does your client wish to do? And her advice was she had raised it and she had no instructions as to what her client wished to do if the Court was minded to increase the sentence.

Elias CJ So is your position that she was given an opportunity and didn't take it in the Court of Appeal and that therefore there's no occasion to remit the matter to the Court of Appeal to provide her with that opportunity.

Guy Kidd Yes effectively she had that opportunity and she didn't seek to appeal against her conviction.

Tipping J Would there have been any merit in the Court of Appeal being faced with a rather difficult position with Counsel, perhaps Counsel herself was in a difficult position, but simply saying we will adjourn this and you've got to give, your client's got to give a clear indication of what she wants to do. That's what I'd be tempted to do if I'd been presiding in the Court of Appeal. Simply say, we can't do it on this. We've got to have it clear from you.

Guy Kidd Yes.

Tipping J Either you do want the opportunity or you don't.

Guy Kidd But in the end she had no instructions to appeal.

Tipping J Well yes but.

Guy Kidd And she made it quite clear, she indicated she'd spent over an hour with the client and the client didn't really know what she wanted to do.

Tipping J Well.

Elias CJ But directions could have been given that the matter was adjourned so that a properly constituted appeal against conviction could be filed or whatever.

Guy Kidd Yes.

Tipping J And if not.

Elias CJ And if not, yes.

Guy Kidd Yes, that could have happened.

Tipping J That would have forced it to a head. To simply say you either file an application for leave to appeal against conviction out of time by a certain date or you don't. If you don't, that's the end of it.

Guy Kidd Yes. That could have been done.

Anderson J Could still be done.

Tipping J Could still theoretically be done.

Guy Kidd Yes.

Blanchard J I'm not too sure that it should just turn on an opportunity unless there's a clear indication that the opportunity will be availed of. Because otherwise it's a totally empty exercise with no advantage to Ms Edwards to have the matter go back to the District Court and have her then say, well I'm pleading guilty anyway.

Guy Kidd Yes.

Blanchard J So it seems to me that there should at least be an indication that she wishes to plead not guilty.

Guy Kidd That would give some reality to the process that we're going through.

Blanchard J I mean there might be a rare case in which a genuine reason could be put forward for saying that a decision had to be deferred but it would be a rare case.

Guy Kidd And certainly by this stage one would expect that she would know and have an intention as to what she will do.

Tipping J Well if she doesn't know now, she never will.

Guy Kidd No.

Blanchard J Yes.

Elias CJ I'm just concerned about the formalism of the way we're being invited to proceed. Mr Starling did you want to add anything to that?

Starling Certainly the position that Ms Edwards' Counsel took in the Court of Appeal was, I think it was difficult because Ms Edwards I mean really had no idea at that stage if the sentence would be increased although I mean we'd advised both of them that it was more than likely that the sentence would be increased. But for her the issue was whether it would be increased by months or years.

Blanchard J Had the Court of Appeal given no indication of whether it was likely to increase the sentence? And if it had gone that far, had it said how much the sentence might be increased by?

Starling They, I think we were certainly aware that the sentences were going to be increased but we were certainly unclear how long they would be increased by. So we were unable to advise either client in that regard.

Blanchard J It must have been pretty clear the home detention was going out the window though.

- Starling Yes and that's, I think it's something that indicates very strongly that Ms Edwards was in fact influenced by the sentencing indication. I mean it was clearly, as the Court of Appeal said, a very light, in fact a manifestly inadequate sentence.
- Tipping J It just shows the whole problem with these jolly sentence indications this case doesn't it? I mean I'm not asking you to comment on that, I'm just ruminating aloud.
- Starling Well I'm happy to comment because, I mean most of what I do is criminal work in the lower Courts. And I mean my friend actually, helpfully, has provided some extra cases today and I understand that there is certainly some difficulty in I think the Australian position and in England with other Courts being seen as being too light for sentencing indications. And in fact allowing people to get sentences which higher Courts wouldn't support.
- Tipping J Is that as a kind of carrot so that they plead? Putting it very, very bluntly.
- Starling Yes and certainly as a defence lawyer, and that's all I do, that's how defence lawyers see sentencing indications, especially in the summary jurisdictions. So unlike this case, the summary jurisdiction with status hearings, it's a very informal process. The Judge really just has the file in front of him for a few minutes and will give indications which Counsel often will advise their clients to jump at.
- Tipping J That's very candid of you.
- Starling Well that.
- Tipping J That's what it's all about.
- Starling Mm. Well and certainly.
- Tipping J But then of course sometimes it doesn't come off by one means or another. You get another Judge or the Crown is unkind enough to appeal or whatever.
- Starling And that's certainly why in the summary jurisdiction, and certainly in Christchurch in the trial jurisdiction, the Judge that gives a sentencing indication in the trial jurisdiction will tend to be the sentencing Judge. In the summary jurisdiction there's always that chance that if a report's called for, then another Judge will get the case and then certainly things can change then. But most defence Counsel, certainly at summary jurisdiction, would want that Judge to sentence a person on the spot if possible.
- Elias CJ Yes but when imprisonment is inevitable, whether or not there's leave to appeal for home detention, certainly the Court of Appeal has

indicated that they wouldn't expect sentencing indications to be given before reports and victim impact statements have been obtained. So I mean this whole process. And that I think is really what's in the practice note too isn't it?

Starling Yes and until the Court of Appeal case, I was unaware of what the guidelines were for the Judges for sentence indications.

McGrath J And they're for summary.

Elias CJ I think you're right, that's for summary matters, they're not for indictables.

McGrath J No. For indictable offences normally a Judge would only be involved in this process after committal, would he not? So he'd have the briefs in front of him or her.

Starling In Christchurch, Counsel have the option of indicating to a Judge that they're seeking a sentence indication so time is put aside in one of the pre-trial call-over lists.

Tipping J This is before committal?

Starling This is before, mm.

McGrath J Before committal?

Starling (Nods)

McGrath J So the material would be fairly sparse?

Starling Well.

McGrath J In the most serious area of criminal practice.

Starling Well certainly in that jurisdiction though, Judges want to get all information in front of them that's available. And Crown have a role in that. Although I think it's clear from this case that the Crown certainly felt that their role in this sentence indication was very limited. In fact it was.

McGrath J Just as a matter of interest, and I'm not thinking of this case where you weren't advising the appellants, is it your practice to warn people, when you are telling them they've had an offer they must jump at, that it might not stick, the Crown might be lurking in the background and there is such a thing as a Crown appeal?

Starling No I don't because I mean I think until this case, I mean I was aware of the **Edwards** decision. So I mean I was aware that if a different Judge deals with the matter.

McGrath J Yes.

Starling The person may have a right to vacate the guilty plea. But I mean I wasn't aware of a case of this nature where there had been a Solicitor General appeal.

McGrath J I take it really the possibility of, I mean while Counsel are aware of the **Edwards** and **Gemmell** decisions, I take it that really the prospect of a Crown appeal in this area is sufficiently remote that Counsel don't see a need to warn those who are deciding whether or not to accept what's indicated to them. That Counsel just, it's not an issue really.

Starling No and certainly in this case Counsel hadn't considered that or warned on that basis.

Anderson J In terms of the practice note, and indeed English practice, a Judge is not to give an indication of the length of a sentence, only whether it will be custodial or community based or so on. But in the case before us the Judge indicated a length of sentence. Now is that a common occurrence?

Starling Well yes it is. And that's why I was very surprised to see the practice note. Because in a case like this Counsel, I mean Counsel know the person's getting a prison sentence. So I mean there's no point asking for an indication which is your client's going to prison.

Anderson J Yes.

Starling I mean that's, I mean.

Anderson J That's what leads to this very sort of problem that we've got.

Starling What Counsel want to know is just how long the person's going to prison for.

Tipping J And that's what the accused wants to know too I suspect.

Starling Mm. So certainly in summary jurisdiction, it works more on the practice note basis, that a Judge will say, Mr Starling your client's not going to jail and that's all we get told and then we'll advise the client, you're looking at community work or maybe a fine. But that's all we get at probably summary jurisdiction. But certainly in this jurisdiction, all Counsel care about is the number, is the basic length.

McGrath J And home detention eligibility I suppose.

Starling Well that, in relation to this case with Ms Edwards, the indication was a sentence in which home detention would be an option, so certainly

there was no promise in the indication that she would get leave to apply for home detention. Only that the sentence would be two years or less.

Elias CJ So she'd be eligible.

Tipping J Mm.

Starling She'd be eligible but the Judge wasn't saying that he would give it to her. But I think it's fair to say that I think her Counsel was surprised that she got 21 months and not two years.

Tipping J When I was in practice it was Counsel's responsibility to advise on the likely sentence. It now seems to have shifted to being the Judge's responsibility.

Elias CJ I wonder whether we might take a short adjournment and come back and it may well be that we'll want to hear you out on the appeal. But I'd like to just consider where we're getting to. Thank you.

Court adjourns 10.32 am

Court resumes 10.55 am

Elias CJ Yes we're concerned that the appeal is moot. We have decided we will not proceed to hear the appeal until affidavits are filed by the appellants indicating that, if they are successful on a conviction appeal to the Court of Appeal, they would enter pleas of not guilty to the charges. Such affidavits are to be filed within 21 days and without them the appeals will be dismissed.

Mr Starling, we would be expecting that Counsel would draw to the attention of the appellants the consequences of electing to proceed along the lines that have been discussed in Court today. There will be a transcript of the hearing available for you if you need it for those purposes.

Starling Thank you.

Guy Kidd May it please the Court.

Elias CJ Thank you for your assistance Counsel.

Court adjourns 10.57 am