EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2018-016-000466
[2019] NZDC 5479

NEW ZEALAND POLICE
Prosecutor

v

DONNA MARIE HIGGINSON
Defendant

Hearing:	28 February 2019
Counsel:	C A Stewart and Sergeant A Ormond for the Prosecutor D D Rishworth for the Defendant
Judgment:	27 March 2019

JUDGMENT OF JUDGE W P CATHCART
[REASONS – DISPUTED FACTS DETERMINATION ON 1 MARCH 2019]

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[1] On 1 March 2019, I issued a results judgment on the disputed fact hearing in relation to the quantity of avocados received by Ms Higginson, as represented by the representative charge.

[2] Based on trial evidence, I was sure the quantity received by Ms Higginson amounted to "near 6000 avocados" and that the commercial value for such avocados – considering relevant variables – was at a figure "near $7200".

[3] My reasons follow.

Relevant Background

[4] At the trial, as a matter of law, I needed only be satisfied beyond reasonable doubt that on at least one occasion during the relevant period Ms Higginson was criminally reckless as to the possibility the stolen avocados she received from Mr Mackey were stolen. This is because the charge was of a representative nature.

[5] However, proof of the overall quantity of avocados received by Ms Higginson during the period with reckless *mens rea* is an aggravating factor on sentence. The police must establish that fact beyond reasonable doubt.[1]

[6] On 15 February 2019, I indicated to the parties that I would likely attach material weight to the proof of the disputed fact given its significance to the sentencing outcome. Proof of the fact is material and significant to both Ms Higginson's s 106 application and, if unsuccessful, the sentence outcome.

[7] Also, on 15 February 2019, an issue arose as to whether, given the police reliance on this aggravating fact, the parties should be given the opportunity to adduce further evidence as to its existence unless I was satisfied that sufficient evidence had been adduced at the hearing or trial.[2] I gave the parties an opportunity to make further submissions on that point. Mr Rishworth signalled that I might need to hear from Mr Mackey further on the matter. And he wanted to review the notes of evidence and then make submissions on the s 24(2)(b) point.

[8] Having received those submissions, it became apparent to me the police intended to rely on material extraneous to trial evidence to prove quantum. Particularly, the prosecutor referred me to victim impact statements from the various orchard owners from whom avocados were stolen by Mr Mackey and others. The prosecutor argued this material was relevant because it bore a close relationship between Ms Higginson's offending and the offending by the thieves.

[9] I held the disputed fact hearing on 28 February 2019. During that hearing, I indicated to the parties I would not consider that extra material because I was satisfied

[1] Section 24(2)(c) Sentencing Act 2002.
[2] Section 24(2)(b) Sentencing Act 2002.

there was sufficient evidence adduced at the trial to determine quantum. I then reserved my decision and delivered a short results judgment on 1 March 2019.

Analysis

[10] The disputed fact must be determined on the trial evidence in the context of my relevant findings.

[11] Also, in reaching my findings I bore in mind the proper approach to the drawing of inferences. My function in drawing inferences was to assess the whole of the trial evidence. Speculation or guess work is not permissible. If, on an objective basis that has regard to all the circumstances, a rational alternative is not excluded, there must for that reason be a reasonable doubt on the aggravating factor. But, the mere fact some of the circumstances might arguably permit an inference inconsistent with the finding is not enough. And I was entitled to conclude that a suggestible alternative is not reasonably tenable.[3]

[12] Albeit that I was dealing with a representative charge, my findings at trial were consistent with the holding that Ms Higginson clearly received substantial supplies of stolen avocados from Mr Mackey during the period.[4] As reflected in those findings, I was sure Mr Mackey stole "massive quantities of avocados during the relevant period and sold them to Ms Higginson."

[13] Bringing the individual evidential threads together I found:[5]

> [52] On the premises of my findings, the features of this case speak for themselves. The sheer quantity of the avocados Mr Mackey sold to Ms Higginson pointed to a regular supplier but over a brief timeframe. There were no receipts between the two of them. I infer the change in delivery locations were in the main designed to keep the transactions out of heightened public view. The selection of the Botanical Gardens location in particular points to that conclusion. And the price Ms Higginson was prepared to pay for the avocados was 40 cents to 50 cents per fruit. The avocados were clearly exchanged at a gross undervalue. Ms Higginson must have known that there was a distinct possibility those avocados were stolen.

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[3] *R v Seekamut* 10 July 2003, CA82/03 at [21]; *R v Harrhaus* HC Auckland CRI-2007-004-18646, 4 June 2009.
[4] Judgment dated 21 December 2018 at [12].
[5] Judgment dated 21 December 2018 at [52].

[14] I acknowledge, as argued by the prosecutor, there was unchallenged evidence from the various orchard owners as to the quantity of avocados stolen from them during the relevant period between August 2017 and October 2017. However, the quantum stolen was not commensurate with my finding as to the quantum Ms Higginson received during the relevant period being reckless as to the possibility that they were stolen. In other words, the quantum stolen by the thieves including Mr Mackey was clearly substantially more than the quantum recklessly received by Ms Higginson. I have therefore allowed for the possibility Ms Higginson initially received avocados from Mr Mackey in the absence of reckless *mens rea* at the point of receipt.

[15] As reflected in my finding at [52] the combination of relevant individual threads of evidence produced a clear pattern of offending by Ms Higginson. That was reflected in my findings relating to: choice of different delivery locations; the "sheer quantity" of avocados received; the absence of receipts; and the gross undervalues offered by Ms Higginson to the thief, Mr Mackey.

[16] In reaching my finding on quantum, I took into account Mr Mackey was essentially stealing avocados via carload which he estimated to be around 1200 avocados per load.[6] For instance, he described an initial delivery of avocados to Ms Higginson as being a "boot-full" with avocados also along the back seats and in the footwells of the vehicle. He described that load as "being really full" to the extent an observer could not see through the back window.[7]

[17] Also, as reflected in my judgment, I found Mr Mackey was delivering avocados to Ms Higginson in accordance with a crude supply-to-order arrangement. This was reflected in the variable number of crates that Ms Higginson provided to him. Mr Mackey said it varied in number between "50, 60, sometimes 30".[8] Also, I accepted during this pattern of supplies no receipts were exchanged. And that Ms Higginson was prepared to pay 40 cents per avocado, but sometimes the price went up to "about 50 cents" per avocado.[9]

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[6] Notes of evidence (NOE) at 25.
[7] Judgment dated 21 December 2018 at [16].
[8] Judgment dated 21 December 2018 at [18].
[9] Judgment dated 21 December 2018 at [24].

[18] Also, as reflected in my findings, the location of the delivery of the avocados varied. One location was by the Botanical Gardens in Gisborne. And there were several occasions when Ms Higginson picked up avocados at Mr Mackey's then associated address of [address deleted] during which Ms Higginson observed the suspect loading process from the respective vehicle into crates and then into her truck. And I infer that multiple locations selected were indicative of receipt of several carloads of avocados.

[19] The general pattern was also reflected in the text evidence albeit text traffic was limited. In one of those texts on 23 September 2017, Mr Mackey encouraged Ms Higginson to buy a load of avocados which he estimated to be valued at $1260. There was haggling over the price with Mr Mackey eventually offering to sell the load for $900. All generally indicative of undervalue. And for present purposes, that text exchange is consistent with the general pattern that each carload must have contained nearly 1200 avocados.

[20] Also, it is speculative to suggest the evidence proved beyond reasonable doubt that all the avocados Mr Mackey stole came from the four orchard owners whose evidence was admitted by consent. And, it is clear Mr Mackey sold some of the stolen avocados to other persons, including the individual referred to as "[Marvin]".[10]

[21] Essentially, the prosecutor argued that when compared to Mr Mackey's six relevant theft charges two carloads per day of 1000 avocados would equal around 12,000 avocados less "a small amount" that went to "[Marvin]".[11] That is said to equate to roughly half of the avocados that the thieves were convicted of stealing.

[22] For Ms Higginson, Mr Rishworth argues the "best scenario" is there has been around three carloads of avocados delivered from which an estimate of 3200 only can be made which could include the avocados sold by Mr Mackey to "[Marvin]".[12] Also, during oral argument, Mr Rishworth emphasised that the cognisable text message traffic occurred only between 23 September and 11 October 2017 and that therefore

[10] NOE at 53 and 61.
[11] Memorandum of police prosecutor re quantum dated 25 February 2019 at [44].
[12] Defence memorandum re disputed facts dated 25 February 2019 at [33]-[34].

the likely period of offending is somewhere between mid-September to October 2017. I took that into account.

[23] Also, there was no suggestion the gross undervalue of the avocados materially altered during the offending. As recorded in the judgment, I found that the price that Ms Higginson was prepared to pay of between 40 cents to 50 cents per avocado was at gross undervalue.

[24] In the end, a conservative approach was called for. My trial findings were consistent with a pattern of conduct by Ms Higginson. Also, I infer that as the pattern continued the reckless-*mens-rea* element became increasingly entrenched, especially towards the latter period of Ms Higginson's dealings with Mr Mackey. The totality of the evidence and the pattern reflected in my findings led me to the conclusion that at the very least six carloads of avocados were received by Ms Higginson during the period at a point when she was deliberately taking a conscious risk those deliveries were stolen avocados. Also, I concluded a conservative estimate of around 1000 avocados per carload was justified. For all the reasons, I was sure the quantum was near 6000 avocados.

[25] A similar conservative approach was called for in relation to fixing a commercial price for the stolen avocados. The unchallenged evidence was that the commercial value of the avocados stolen from the various orchards varied between $1 to $2 per fruit. There are obvious market variables in that price range. In the end, I found beyond reasonable doubt that the commercial value of the 6000 avocados was near $7200.

[26] For all these reasons, I found Ms Higginson with reckless criminal intent received near 6000 avocados commercially valued at a figure near $7200.

W P Cathcart
District Court Judge