CITATION:	*Van Lam v The King* [2025] NTSC 4
PARTIES:	VAN LAM, Sem v THE KING
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	(22215268)
DECISION DELIVERED:	5 February 2025
HEARING DATE:	5 February 2025
JUDGMENT OF:	Kelly J

CATCHWORDS:

Application by defendant to withdraw pleas of guilty to two counts – whether it is in the interest of justice for leave to be given to withdraw pleas – applicant has not satisfied the onus of showing it is in the interest of justice – leave to withdraw pleas refused – unspecified disagreement with previously agreed facts – matter referred to the Criminal Callover List to fix a date for a disputed facts hearing

Maxwell v R (1996) 184 CLR 501; *Meissner v The Queen* (1995) 84 CLR 132; *R v Chiron* [1980] 1 NSWLR 218; *R v Davies* (1993) 19 MVR 481; *R v Favero* [1999] NSWCCA 320; *R v Ferrer-Esis* (1991) 55 A Crim R 231; *R v Murphy* [1965] VR 187; *Sagiv v R* (1986) 22 A Crim R 73; *White v R* (2022) 110 NSWLR 163; *Wong v Director of Public Prosecutions (NSW)* (2005) 155 A Crim R 37, referred to

REPRESENTATION:

Counsel:

Applicant:	B Wild
Respondent:	R McGlinn

Solicitors:

Applicant:	Mindil Chambers
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Kel2502
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Van Lam v The King [2025] NTSC 4
No. (22215268)

BETWEEN:

SEM VAN LAM
Applicant

AND:

THE KING
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Reasons Delivered 6 February 2025)

Background

[1] Sem Van Lam ("the applicant") seeks leave to withdraw the pleas of guilty entered to the two counts on the indictment dated 23 May 2024.

[2] The Crown opposes that application, contending that the matter should proceed to sentence on the basis of the pleas that were entered and the facts that were tendered, read, and formally agreed to on the applicant's behalf by his counsel.

Chronology

[3] The applicant was initially charged on an indictment dated 10 January 2024 with four counts. It was set down for a five day trial beginning on 29 April

2024. On 6 March 2024, that trial date was vacated and the matter was relisted for a trial to commence on 27 May 2024.

[4] On 24 May 2024, the matter was listed for plea at 10 am on 27 May 2024. The trial was not to be vacated until the entering of pleas to the revised indictment.

[5] On 27 May 2024, the applicant was arraigned on an amended indictment dated 23 May 2024 which contained two counts only; one charge of property damage (count 1) and one charge of assault (count 2). The applicant entered pleas of guilty to both counts. The agreed facts were read onto the record by the Crown prosecutor and the applicant's counsel confirmed that the agreed facts were admitted.[1] The agreed facts were tendered and marked as exhibit P1. The applicant's Northern Territory Information for Courts and Victorian Court Outcomes Report were tendered and marked as exhibit P2. The applicant's counsel confirmed that the prior criminal histories were admitted. The Crown prosecutor noted he anticipated he would be in receipt of Victim Impact Statements at a later stage and had provided written submissions dated 24 May 2024. A section 103 report was sought to assess the applicant's suitability for supervision, a Community Corrections Order, and an Intensive Community Correction Order. The matter was adjourned to 4 June 2024 for sentencing submissions and sentence.

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1 Transcript of proceedings 27 May 2024 at p 4

[6] The applicant's counsel prepared written submissions after the listing on 27 May 2024 and provided them that same day. Paragraphs [5]-[9] addressed the objective seriousness of the offending which confirmed the applicant's guilt and the relationship between the applicant and the victims of the offending. Paragraph [24] confirmed that the applicant accepted "he acted inappropriately on the day of the incident and let his anger get the better of him".

[7] Paragraphs [27]-[31] of the written submissions detailed the applicant's plea of guilty. Paragraph [28] confirmed that the applicant had "denied all of the offending as originally charged and had wished to contest the matter on several issues". Paragraph [29] confirmed that the matter resolved on a negotiated charge and factual basis.

[8] The applicant's relevant subjective circumstances were addressed in paragraphs [10]-[26].

[9] The section 103 report was completed by Community Corrections and dated 3 June 2024. It appears from the report that the applicant admitted his guilt on the offences to the author of the report who wrote:

> Although Mr Lam was co-operative throughout the s103 assessment he was somewhat hesitant to discuss his offending in great detail. He agreed his victims were known to him, however, denied an established relationship. He denied any ongoing contact with the victims. Mr Lam acknowledged he has been a longstanding user of cannabis and methamphetamine. He uses cannabis on a daily basis, methamphetamine he uses very intermittently based on availability and affordability. Mr Lam denied he was intoxicated during his offending. He identified poor anti-social associations as the main contributor to his offending

behaviour, however, it would appear these associations are likely linked via illicit drug connections.

[10] The matter came before me on 4 June 2024. Further submissions were made and the matter was adjourned to the next day, 5 June 2024 for sentencing.

[11] On 5 June 2024, I started to sentence the applicant. When I set out the agreed facts the applicant was shaking his head in the dock. I indicated that I would not sentence the applicant on the basis of the facts that had been agreed if the applicant did not in fact agree with them. I adjourned the matter to allow the applicant to talk to his lawyer. When Court resumed, defence counsel applied for leave to be removed from the record. He then withdrew that application temporarily and agreed to appear on the next occasion. The matter was adjourned to 7 June 2024.

[12] On 7 June 2024, another prosecutor appeared and presented two Victim Impact Statements. The applicant's counsel objected to the Victim Impact Statement of Ms Robinson noting that it was not properly signed and the provenance of the document was unclear given she was in custody. The matter was adjourned to 17 June 2024 for sentence and for the Crown to make enquiries about the Victim Impact Statements.

[13] On 17 June 2024, the Crown prosecutor presented the Victim Impact Statement of Karl Arnold (P3) and a Victim Report of Jenna Robinson (P4). The applicant's counsel made some brief submissions as to the weight to be afforded to the Victim Impact Statement and the Victim Report. I then

began to sentence the applicant but the applicant again indicated that he did not agree with the facts. He shook his head in evident disagreement and the following exchange occurred.

> …. Mr Lam, if you don't agree to these facts I'm not sentencing you today. I will send it back to the CCO and it will go to a disputed facts hearing. Do you understand?
>
> THE ACCUSED: I do, your Honour. I'm very well aware of that. It's just that my lawyer doesn't state that I had to take on some of these charges initially even though I shouldn't be charged with them because I pleaded not guilty properly. And that's all I want to say to it but that doesn't mean that we have to go to another disputed thing.
>
> HER HONOUR: Well, it does if you don't accept the facts. I mean, if you don't accept – I'm not going to sentence you for something that you say you didn't do. You will have to go and plead not guilty and go to a trial.
>
> THE ACCUSED: Then let's go, your Honour, because I feel like other things related. I mean, we had such a shit lawyer.

[14] Following that, defence counsel sought leave to cease acting and leave was given. I attempted to clarify the applicant's position in the following exchange:

> HER HONOUR: Are you withdrawing your guilty plea, Mr Lam? Mr Davison is not acting for you anymore.
>
> THE ACCUSED: He still is at the moment.
>
> HER HONOUR: No he isn't.
>
> MR DAVISON: I've made my application, your Honour.
>
> HER HONOUR: And in the circumstances I'll have to allow that application.
>
> So you'll have to go find another lawyer. Are you withdrawing your guilty plea to those two charges?
>
> THE ACCUSED: No, your Honour.
>
> HER HONOUR: Are you disputing any of the facts that were set out in that statement which I was told were agreed facts? Again, yes or no.
>
> THE ACCUSED: Yes.

> HER HONOUR: All right. Then in those circumstances what I need to do is to send the matter off to the criminal call over list where it will be allocated a date for a disputed facts hearing.
>
> THE ACCUSED: Yes, your Honour.

[15] The matter was then in the CCO list; the applicant's present counsel came into the matter; and the matter came before me on 20 September 2024 for case management. On that date the applicant's counsel advised that the applicant now wished to traverse the pleas of guilty. The matter was returned to the CCO list and was ultimately adjourned to 5 February 2025 for the application to withdraw the pleas of guilty to be heard.

Applicable Law

[16] The decision to permit a withdrawal of a plea is at the discretion of the Court.[2] The onus is on an accused when making such an application, that is, it is the accused who must persuade the judge to permit the withdrawal of the plea. It was held not to be a discretion that is to be exercised in only clear cases and very sparingly, as that would fetter the exercise of the discretion.

> The onus of persuading a judge to permit the withdrawal of a plea of guilty is on the accused. Although there are statements to the effect that courts should approach attempts at trial or on appeal (after conviction and sentence) to withdraw a plea of guilty "with caution bordering on circumspection", it is important that the undoubted discretion which exists in what we have described as a first scenario case should not be fettered. In this context, we are in agreement with the observations of White J and Bollen J in *Kitchen* that the language used by Lord Upjohn in *Recorder of Manchester,* namely that the discretion should be exercised only in "clear cases and very sparingly", is neither necessary

2 *Maxwell v R* [1996] HCA 46; (1996) 184 CLR 501 at [9**]**

> nor desirable. It is apt to fetter the exercise of the discretion. It is notable that none of the other Law Lords in *Recorder of Manchester* proffered such a view. So too, in *Webb and Hay,* Debelle J said that "[i]t does not seem that the discretion should be exercised only in clear cases and very sparingly but that is not to say the discretion should be exercised liberally".
>
> For similar reasons, we would reject the argument advanced in the Director's Supplementary Submissions that an accused seeking leave to withdraw a guilty plea bears a "substantial" or "heavy onus" of proof. While the onus of proof is certainly borne by the accused in an application for leave to withdraw a guilty plea, there is no principled basis for this Court to treat that onus as any "heavier" than in other circumstances where a party seeks to persuade a court to exercise a discretion in the interests of justice.

[17] Both parties agree that that the principles to be applied are those set out in *White v R*.[3]

> A sensible distinction is to be drawn between allowing a plea to be withdrawn *before conviction* and *going behind* a guilty plea that has led to a conviction on appeal. The distinction between the two scenarios is brought home by consideration of the concept of finality, which is frequently mentioned in cases involving applications to withdraw a plea, as it was in the present case. Where a conviction has been entered and sentence passed, any attempt on appeal to disturb that outcome will necessarily impact on the finality of the verdict and sentence. On the other hand, where a conviction has not yet been entered even though the accused has pleaded guilty, nothing is final because it remains open for the Crown or the Court not to accept the guilty plea and, in the case of the Crown, to withdraw its acceptance at any time until the formal recording of a conviction and sentence. That was what *Maxwell* was all about. (citations omitted)

[18] The parties are also agreed that this case is a case where the applicant is seeking to withdraw his guilty plea before conviction. In *White*, the Court of Criminal Appeal (Bell CJ, Button and N Adams JJ) held that for a case that fell into that category "the proper test to be applied where an accused

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3 (2022) 110 NSWLR 163 ("*White*")

seeks leave to withdraw his or her plea of guilty…is whether the interests of justice require that course to be taken".[4] Both parties are agreed that this is the test to be applied on the present application. (For matters falling into the second category, the applicable test is whether there has been a miscarriage of justice.)

[19] In *White*, the Court of Criminal Appeal outlined a "non-exhaustive list of factors affecting the interests of justice" at [65]. The Court of Criminal Appeal further noted that each matter must be assessed on its own facts but there were categories where the interests of justice would warrant the withdrawal of a plea of guilty:[5] These includes cases where:

- the nature of the charge to which the plea has been entered is not appreciated: *R v Ferrer-Esis* (1991) 55 A Crim R 231 at 233;
- the plea is not "a free and voluntary confession": *R v Chiron* [1980] 1 NSWLR 218;
- the "plea [is] not really attributable to a genuine consciousness of guilt": *R v Murphy* [1965] VR 187 at 191;
- there has been a "mistake or other circumstances affecting the integrity of the plea as an admission of guilt": *Sagiv v R* (1986) 22 A Crim R 73

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4 *White* at [60]

5 Ibid at [70]

- the plea has been "induced by threats or other impropriety" and the applicant would not otherwise have pleaded guilty: *R v Cincotta* (Court of Criminal Appeal of New South Wales, Hunt CL at CL, Grove and Allen JJ, 1 November 1995)

- the plea is not unequivocal or is made in circumstances suggesting it is not a true admission of guilt: *Maxwell v The Queen* (1996) 184 CLR 501;

- "The person who entered that plea was not in possession of all the facts and did not entertain a genuine consciousness of guilt" *R v Davies* (1993) 19 MVR 481; *R v Favero* [1999] NSWCCA 320.

[20] There is no evidence before me that would suggest that this matter falls within one of these, as it were, pre-determined categories in which the interest of justice would ipso facto warrant leave being given to withdraw the plea. Instead, regard must be had to the non-exhaustive list of factors at [65] which include:[6]

- the circumstances in which the plea was given;

- the nature and formality of the plea, involving as it does the admission of all the formal elements of the offence;

- the importance of the role of trial by jury in the criminal justice system;

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6 *White v R* [2022] NSWCCA 241 at [65]

- the time between the entry of the plea and the application for its withdrawal;
- any prejudice to the prosecution that might arise from the withdrawal of the plea;
- the complexity of the elements of the charged offence;
- whether all of the relevant facts upon which the prosecutor intended to rely were fully known to the accused;
- the nature and extent of legal advice received by the accused before entering the plea;
- the seriousness of the alleged offending and thus the likely consequences in terms of penalty;
- the subjective circumstances of the accused;
- any intellectual or cognitive impairment suffered by the accused, notwithstanding their fitness to plead;
- any reason to suppose that the accused was not thoroughly aware of what they were doing;
- any extraneous factors that bore upon the making of the plea at the time it was made, including inducement by threats, fraud or other impropriety;

- whether the accused has been persuaded to enter a plea by reason of imprudent and inappropriate advice tendered by their legal representatives;

- any explanation that has been proffered by the accused for the application to withdraw their guilty plea;

- any consequences to victims, witnesses or third parties that might arise from the withdrawal of the plea; and

- whether, on the material before the Court, there is a real question about the accused's guilt to the charge in respect of which the plea has been entered.

a. The circumstances in which the plea was given; The nature and formality of the plea

While the plea was entered on the day the trial was to start, the matter was listed for plea in chambers on 24 May 2024 several days earlier. It was the result of negotiations between the Crown and defence counsel.

The plea was entered in the Supreme Court, not in a busy Local Court list. There was dedicated time for the matter to proceed. The respondent contends that there was no sense of urgency to force the plea on. The applicant was formally arraigned by the associate.

b. The importance of the role of trial by jury in the criminal justice system

The importance of jury trials is noted, but it does not automatically entitle a defendant to withdraw a guilty plea, entered on adequate notice of the proposed facts and after receiving legal advice.

c. The time between the entry of the plea and the application for its withdrawal

Counsel for the applicant submitted that this factor favoured the giving of leave as the plea was entered on the day the matter had been listed for trial; the trial date was not formally vacated until the plea had been entered; and there was an adjournment of only about half an hour during which the applicant received advice from and gave instructions to his then counsel.

However, although the plea was entered on 27 May 2024, counsel indicated to the Court on 24 May that the matter would be proceeding as a plea; presumably the applicant had received advice from his counsel before then and given instructions that he would plead guilty to counts 1 and 2. He first indicated that he did not accept the facts on 5 June 2024 and then again on 17 June 2024. At those stages it appeared that only the facts were not accepted, as opposed to the applicant maintaining he ought not to be bound by the pleas of guilty. On 20 September 2024, the Court was formally informed at the case management mention that the applicant wanted to traverse the pleas.

d. Any prejudice to the Crown that might arise from the withdrawal of the plea; any consequences to victims, witnesses or third parties that might arise from the withdrawal of the plea

The delay caused by the traversal of the pleas places the victims in a state of limbo of not knowing what is happening with the matter, notwithstanding pleas were entered in May 2024. Also, of course, as time passes, memories fade and the quality of the evidence deteriorates. Beyond these matters, the Crown does not assert it would suffer any prejudice if leave were given to withdraw the pleas. There had already been significant delay for which the applicant was not responsible before the matter came on on 27 May 2023.

e Whether all of the relevant facts upon which the Crown intended to rely were fully known to the accused

The onus is on the applicant to show that this factor favours leave being given to withdraw the plea and the applicant has adduced no evidence to indicate that he was not aware of the relevant facts. The proposed facts were given to the defence and defence counsel presumably took instructions from the applicant to agree to them. He has not said otherwise. Further, he did not indicate any disagreement when the facts were read onto the record and his counsel formally indicated that the applicant accepted them. It was only later, when I was summarising the facts during sentencing that he voiced disagreement. Further, the applicant has not said what facts he disagrees with. His initial position in Court when I questioned him was not

that he was not guilty of the charges but that he did not agree with all of the facts. For that reason, I referred the matter to the CCO to fix a date for a disputed facts hearing. The applicant elected not to give evidence on the hearing of this application.

In *White*, the applicant was arraigned at the outset of a voir dire. The plea of guilty was unexpected by everyone involved. The offence in *White* was murder and no factual matrix for a plea had been settled. The legal basis for the offence of murder was also not settled between the parties given the common understanding that the matter would proceed to a trial.

f. The nature and extent of legal advice received by the accused before entering the plea

The applicant has given no evidence about this.

g. The complexity of the elements of the charged offence; the seriousness of the alleged offending and thus the likely consequences in terms of penalty

The elements of the charges are not complex and the applicant has previous convictions for both property damage and offences of violence, hence is unlikely to have been confused about what he was agreeing to.

As far as consequences to the applicant are concerned, both the Crown and defence counsel have submitted that from the material available for the plea, it is unlikely that the applicant would be sentenced to a term of actual

imprisonment, but is likely to serve a form of imprisonment in the community (such as a wholly suspended sentence or an intensive community corrections order). Although serious, this is not a case where the consequences to the applicant if leave to withdraw the plea is refused would be extremely serious.[7] (It should be noted that *White* was a plea to a charge of murder.)

h. The subjective circumstances of the accused; any intellectual or cognitive impairment suffered by the accused

Based on the defence submissions on the plea and the s 103 report, there is no material to suggest that the applicant lives with any substantial impairments that would affect his ability to appreciate the ramifications of entering a plea of guilty. It is noted that the applicant in *White* was intellectually impaired, though he was ultimately fit to enter a plea.

i. Any explanation that has been proffered by the accused for the application to withdraw their guilty plea

The defence has adduced no evidence and proffered no explanation for his change of position other than that he wants the matter to go before a jury.

j. Any consequences to victims, witnesses or third parties that might arise from the withdrawal of the plea

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7 The applicant may well be worse off if he is permitted to withdraw the guilty pleas as, in that case, the Crown intends to file an ex officio indictment charging the more serious count 3 (unlawful entry) in addition to counts 1 and 2 (property damage and assault). Should he be found guilty of the more serious charge, he may well face actual prison time.

The Crown has not asserted that the withdrawal of the plea may have adverse consequences to witnesses or third parties.

k. Whether, on the material before the court, there is a real question about the accused's guilt to the charge in respect of which the plea has been entered

On the material before the Court including the s 103 report where the applicant discussed the offending and his relationship with the victims there would not appear to be any real question about the accused's guilt. Counsel for the applicant contended that the applicant's remarks to the author of the s 103 report were equivocal, but in my view the conversation as reported proceeded on the basis of an acceptance of the applicant's guilt.

[21] The instant matter may be regarded as a plea of convenience, noting the negotiated basis of the charges on the indictment for plea and the amended facts. In *Meissner v The Queen*,[8] Dawson J (in dissent) held:

> It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. <u>The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence</u> and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence. But the accused may show that a

8 (1995) 84 CLR 132 at [157]

> miscarriage of justice occurred in other ways and so be allowed to withdraw his plea of guilty and have his conviction set aside. For example, he may show that his plea was induced by intimidation of one kind or another, or by an improper inducement or by fraud.

[22] In the present case, the appropriate test is whether it is in the interest of justice for leave to be given to withdraw the plea, not whether there has been a miscarriage of justice. Nevertheless, Dawson J's remarks about the nature of a plea of convenience are relevant.

[23] In *Wong v Director of Public Prosecutions (NSW)*,[9] Howie J was presiding over an appeal from a Local Court Magistrate's decision to refuse to allow a guilty plea to be withdrawn. At first instance, the applicant did not give evidence and the applicant's solicitor effectively gave evidence at the bar table on behalf of the applicant to progress the application to withdraw the pleas. His Honour observed:

> I simply do not comprehend how a court can resolve that issue or determine that question without evidence from a person who entered the plea of guilty. It may well be the case that evidence from the legal representatives who acted for the defendant at the time the plea was entered might need to be placed before the court.

[24] Counsel for the applicant contended that it would not be fair to allow the Crown to proceed to trial on count 3 alone (which was withdrawn as part of the negotiated settlement) without allowing the applicant to contest counts 1 and 2. However, despite earlier indicating that the Crown would file an ex officio indictment charging count 3 if there was a disputed facts hearing, the Crown now has no intention of re-laying count 3 on a fresh indictment

9 (2005) 155 A Crim R 37 at [16]

unless the applicant withdraws his plea to counts 1 and 2 so the situation does not arise.

[25] The applicant has not satisfied the onus of showing that it is in the interest of justice for leave to be given to withdraw the guilty pleas on counts 1 and 2.

[26] ORDERS:

(a) Leave to withdraw the pleas of guilty to counts 1 and 2 is refused.

(b) The mater is referred to the Criminal Callover List on 6 February 2025 to fix a date for a disputed facts hearing.
