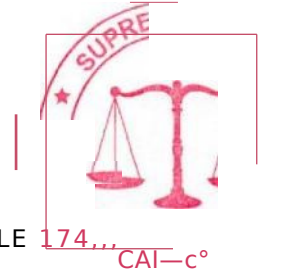


IN THE SUPREME
TURKS AND CAICOS
CRIMINAL

REGINA

and

JIM KELLY JOSEPH



BEFORE THE HONOURABLE CHIEF JUSTICE, MRS. MARGARET
RAMSAY-Mr. Clement Joseph, Senior Public Prosecutor, for the Crown
Mr. Ashwood Forbes for the Defendant
Heard on 2 August 2018

HALE

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Note of Hearing and *ex tempore* Ruling on Application to Vacate Plea

1. On 9 July 2018, the Defendant pleaded guilty to one count of keeping a firearm and to one count of keeping ammunition contrary to section 3 (1) of the Firearms Ordinance. The Defendant, who was then represented by Ms. Lara Maroof, advanced a Basis of Plea which was not accepted by the Crown and the matter was adjourned for a Newton Hearing. The Defendant subsequently applied to withdraw his plea.

Submissions

2. Mr. Forbes, in his oral submissions, advanced a number of arguments in support of the Defendant's application to withdraw his guilty plea.
3. The first was that the Defendant's guilty plea was equivocal in the circumstances where he had specifically told his former Counsel that he was not guilty. He referred the Court to a letter dated 13 July 2018 written by the Defendant addressed to the Snr Deputy Registrar in which the Defendant stated, "*I am truly not guilty*" but says that he was advised by his then attorney, Ms. Maroof, to plead guilty and had "*after much persuasion...reluctantly accepted and pleaded guilty*"
4. Mr. Forbes also alluded to a defence as he submitted that the Defendant was not the sole occupant of the residence where the firearm was found.
5. Mr. Forbes submitted that where a defendant tells his attorney he is not guilty, any plea tendered thereafter is an equivocal plea. He submitted, further, that if it is not a defendant's genuine intention to plead guilty and he is convinced by counsel that his best course of action is to plead guilty, then he is not pleading guilty of his own volition but pleading guilty under duress. If his plea was not voluntary, then he should be

6. In support of this submission, Mr. Forbes relied on *R v Sheikh, Sheikh and Sheikh* [2004] EWCA Crim 492 in which Mantell U stated at paragraph 16 that,

"It is well accepted that quite apart from cases where the plea of guilty is equivocal or ambiguous, the court retains a residual discretion to allow the withdrawal of a guilty plea where not to do so might work an injustice. Examples might be where a defendant has been misinformed about the nature of the charge or the availability of a defence or where he has been put under pressure to plead guilty in circumstances where he is not truly admitting guilt."

7. Counsel also referred the Court to the case of *Revitt, Borg and Barnes v Director of Public Prosecutions* 120061 EWHC 2266 (Admin) in which Lord Phillips CJ cited a decision of the Commission at Strasbourg in which it considered *"the guilty plea procedure."* The Commission was seized of a matter in which the defendant complained he had been put under pressure to plead guilty. In paragraph 11 of the judgment, Lord Phillips O set out the Commission's findings that,

"...under English criminal procedure, if a person pleads guilty there is no trial in the usual sense; if the Judge is satisfied that the accused understands the effect of his plea his confession is recorded, and the subsequent proceedings are concerned only with the question of sentence."

"The Commission, having examined this practice in the context of English criminal procedures and also the other systems among those States parties to the Convention where a similar practice is found, is satisfied that the practice as such is not inconsistent with the requirements of Article 6 (1) and (2) of the Convention. In arriving at this conclusion, the Commission has had regard to the rules under which the practice operates and in particular to the safeguards which are provided to avoid the possibility of abuse."

8. And stated in paragraph 12 on which Counsel placed particular reliance that,

"The 'safeguards' referred to must, it seems to us, have included the discretion that a court has to permit a plea of guilty to be withdrawn."

9. Mr. Forbes submitted that in the circumstances where the Defendant had been put under pressure to plead guilty, the Court should permit him to withdraw his plea.

10. The Court drew Mr. Forbes' attention to paragraph 17 of the decision in *Revitt* which states:

"If after an unequivocal plea of guilty has been made, it becomes apparent that the defendant did not appreciate the elements of the offence to which he was pleading guilty, then it is likely to be appropriate to permit him to withdraw his plea- see R v South Tameside Magistrates' Court, ex parte Rowland [1983] 3 All ER 689 at p 692 per Glidewell U. Such a situation should be rare, for it is unlikely to arise where the defendant is represented and, where he is not, it is the duty of the Court to make sure that the nature of the offence is made clear to him before a plea of guilty is accepted."

and asked Counsel if there was anything in the Basis of Plea to suggest that the Defendant had not appreciated the elements of the offence to which he had pleaded.

11. Mr. Forbes responded that there were two stories before the Court: the one told in the Basis of Plea and the one told to the Court by the Defendant in his letter of 13 July 2018 in which he says he is not guilty and that the plea and the Basis of Plea were not tendered voluntarily. He submitted that if a defendant has a genuine defence, it is not for his attorney to persuade him to plead guilty and that the Court should exercise its
12. Mr. Joseph submitted, on behalf of the Crown, that the starting point was for the Court to ask if the plea was equivocal, a word whose ordinary meaning is "*clear and unambiguous*"
13. If the plea was equivocal, then the Court should, consistent with the learning in **Archbold** 2018 ed., ask itself, did anything occur during the proceedings which should have led the justices to consider whether they should exercise their discretion and
14. Adverting to the Defendant's written submissions, Mr. Joseph submitted that neither the harshness of the minimum sentence nor the Defendant's previous good character are relevant considerations. He relied in support of this submission on an excerpt from Dana Seetahal SC Commonwealth Caribbean Criminal Practice and Procedure 1" Ed. in which she summarises the applicable principles, at page 121, as follows:

"if, however, it is clear that the defendant pleaded guilty in circumstances where there was no possibility of a mistake, the court is not bound to allow a change of plea: i3 v McNally [1953] 1 WLR 933. Therefore, if it appears that a defendant simply fears, because of his attitude on hearing the facts, that the judge may give him a heavy sentence, a change of plea should not be allowed on this basis alone."
15. On the question of whether the plea was equivocal, Mr. Joseph contended that it was demonstrably unequivocal and voluntary. In support of this contention Mr. Joseph relied on the Defendant's admissions made to the police on the occasion of the search. In particular, Mr. Joseph relied on the Defendant's statement to the police that he had found a firearm but had gotten rid of it and later, when the firearm was found in his
16. With respect to the spent shell found in the Defendant's gym bag which was found during a search of his car, Mr. Joseph relied on the evidence of Officer Gemma Parris that, when confronted, the Defendant told her that he had kept the spent shell in order
17. Mr. Joseph also relied on a Facebook post which the Defendant stated might be his "*final post*" and in which he stated that "*fajs men we sometimes make mistakes*" and "*IV have to go away for a little while but just know my love will always and forever be*
18. Mr. Joseph submitted that, although a plea of guilty tendered with legal advice may be withdrawn, it should be withdrawn only where it was tendered without the accused's authority or under some real error or misconception or under circumstances which were clearly prejudicial to him. He relied in support of this submission on an extract from Renton and Brown Criminal Procedure 6th Ed at paragraph 16-09.
19. He submitted that the Basis of Plea which is signed by the Defendant makes it clear that his plea had been tendered with his authority and that he had no misconceptions as to the offences with which he was charged but was aware of the elements of the

The Basis of Plea offered an explanation for keeping the firearm and ammunition which did not go to liability but only to mitigation.

20. Mr. Joseph submitted that there was no evidence before the Court to suggest that he was pressured into entering a plea when he did not intend to.
21. With respect to the submission that the Defendant was not the sole occupier of the premises, Mr. Joseph submits that this does not provide the Defendant with a defence. The other person present when the search was conducted was discharged by the Crown when the DNA results showed she had not handled the firearm.
22. In response to Mr. Joseph's submissions, Mr. Forbes stated that the Defendant, who doesn't wear jewellery, denied telling the officer that he intended to use the spent shell to make a pendant and further, that the Facebook post on which Mr. Joseph relied was not

RULING

23. The learning in **Archbold** is that the starting point in determining an application to withdraw a guilty plea is to determine whether the guilty plea is equivocal. In the case at Bar, the plea was clear, unambiguous and in writing, signed by the Defendant with an invitation to the Court to hold a Newton Hearing to determine the basis of plea no doubt as a prelude to inviting the Court to consider whether there were special circumstances on which the Defendant could rely to avoid the mandatory
24. There is nothing in the material before the Court that suggests that the Defendant has a defence under the **Firearms Ordinance** to which he did not advert when he entered his plea so as to bring this matter within paragraph 16 of *R v Sheikh and Others* on which the Defendant relies nor is there anything to suggest that the Defendant did not appreciate the elements of the offence to bring the matter within the authority of *Revitt and others*
25. As stated by Lord Philipps CJ in the *Revitt* case it would be rare for a plea to be entered in ignorance of the elements of an offence by a defendant who is represented.
26. The Defendant suggests that Counsel improperly pressured him to enter a guilty plea. In his letter of 13 July to the Snr. Deputy Registrar, he states that he was "*intimidated by how much time I could face if it goes to trial aside from the time I could do if I plead guilty.*" This suggests that the plea was tendered in consideration of advice that he might receive a lesser sentence. In the Scottish case of *Duncan v HM Advocate 2009 SCCR 293* referred to in Renton and Brown Criminal Procedure at paragraph 16-09, the Court stated

"The fact that a plea was given because counsel advised that conviction was likely and a plea would lead to a lesser sentence, is not regarded as a plea given under pressure."
27. The length of the sentence likely to be imposed has clearly weighed on the Defendant since he entered his plea. Indeed, it is the first ground of the application, but as stated in the extract from Commonwealth Caribbean Criminal Practice and Procedure relied on by

"If, however, it is clear that the defendant pleaded guilty in circumstances where there was no possibility of a mistake, the court is not bound to allow a change of plea: R v McNally [1953] 11 WLR 933. Therefore, if it appears that a defendant simply fears, because of his attitude on hearing the facts, that the judge may give him a heavy sentence, a change of plea should not be allowed on that basis alone."

28. There is no possibility of mistake. The Defendant had legal advice. There are only two elements of the offence: keeping a firearm/ammunition, knowing it is a firearm/ammunition. His plea is to both elements of the offence. The Basis of Plea does not suggest a defence to the charges which justice requires he be allowed to advance at a

29. As Lord Phillips U stated in *Revitt*, in an application to vacate a

"19. The onus lies on a party seeking to vacate a guilty plea to demonstrate that justice requires that this should be permitted. As Kennedy U said in Maguire, "...the court will be slow to allow such a change of plea unless there is some obvious reason why it is appropriate in the circumstances to allow it."

30. As was said by Lord Morris of Borth-y-Gest in the case of *S (an infant) v The Recorder of Manchester* cited in *Sheikh's* case at paragraph 16,

"The court will, however, have great concern if any doubt exists as to whether a confession was intended..."

31. In the instant case, however, none of the material before the Court raises any doubt whether the Defendant's confession of guilt was intended and made with a full understanding of the elements of the offences of keeping a firearm and ammunition. The arguments that have been made on his behalf suggest that change of plea is sought largely out of a concern with respect to the length of the sentence that the Defendant now

32. The application is

DATED THIS 2ND DAY OF 11TH MARCH 2011


CHIEF JUSTICE
