JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 22/90

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS

CLINTON JOHNSON

Earl Witter for appellant

Brian Sykes & R. Brown for Crown

25th September, 22nd 23rd, 24th October & 30th November, 1990

CAREY J.A.

In the Sutton Street Resident Magistrate's Court before His Honour Mr. D.O. McIntosh on 30th November, 1989, this appellant who had pleaded guilty on 8th August to an indictment containing two counts viz, count I obtaining money by false pretence and count II conspiracy to defraud was sentenced to concurrent terms of six months imprisonment at hard labour. It was averred as follows in count I -

> "with intent to defraud, obtained from Joe Gibbs (sic) cash $35,000 by falsely pretending he was a customs spert (sic) and in a position to secure the release of a motor car, to wit 1986 Toyota Cressida motor car;"

and in count II -

> "on various dates between February and April 1988 in the parish of Kingston conspired with other persons to defraud Joe Gibson of $35,000."

On 24th October we dismissed the appeal and intimated that we would put our reasons in writing. We have now done so.

The appeal is taken against the refusal of the Resident Magistrate to allow the appellant to withdraw his plea of guilty, restore his original plea and allow the trial to continue. The relevant circumstances are these: The appellant first appeared before the Resident Magistrate on 3rd August, 1989 when he pleaded not guilty to both counts of the indictment. The clerk of the courts opened to the facts and called two witnesses over the next two days when the matter was, at the request of Mr. Witter, adjourned for continuation on 8th August at 10:00 a.m. Mr. Witter neither appeared nor made any communication whatever with the court at any time on that date. The Resident Magistrate having stood the case down until 2:45 p.m., required the appellant to continue the cross-examination of the victim which had been begun by his counsel. The notes of evidence suggest that most of the second day of hearing was taken up with the cross-examination of the victim by Mr. Witter. The effect of the appellant's cross-examination was to show that he had made attempts to make restitution although he had not in fact, made any payment. It was at this juncture that the appellant pleaded guilty and asked to be allowed to explain. He is recorded as saying (p. 11) -

> ".....passed on money to Aston Kerr who sent him to complainant in the first place and Aston Kerr is now missing.
>
> That he has a B.Sc. in Business Administration - Masters in Economics.
>
> Was approached by Kerr who told him he had assisted Gibson to import his motor vehicle, that the car had been seized - that he could recover the motor vehicle - that because of his relationship with Mr. Gibson if he did this, whereas he would be saving Mr. Gibson over $200,000.00 Import duties. Mr. Gibson would be reluctant to pay him the $35,000.00 he would be charging.
>
> He told me to tell Mr. Gibson he would recover car for $75,000.00 then $35,000.00 - so I did as he asked.

" He said after Mr. Gibson got his car the remaining $35,000.00 he would give me $10,000.00 from it.

I did it to get $10,000.00.

The learned Resident Magistrate postponed sentence to 14th August when Mr. Witter finally appeared and requested that the appellant be allowed to change his plea, but the Resident Magistrate did not accede to that request. He said that only the Supreme Court could then stop the court from passing sentence, the accused having entered an unequivocal plea of guilty to the charges.

The appellant filed an affidavit in this Court in which he sought to impugn the notes of evidence taken at his trial by the Resident Magistrate. This Court referred this affidavit to the learned Resident Magistrate for his comments with which we were furnished.

This affidavit which plainly was drafted by counsel is a remarkable document for reasons which will become self-evident hereafter. The appellant in paragraphs 4 and 5 thereof swore as follows -

"4. That on the 8th day of August, 1989 at the continuation of my trial, in the absence of my Attorney-at-Law aforesaid and without the benefit of professional advice or guidance as to the legal efficacy of my defence, I changed my plea to one of "Guilty," was convicted on both Counts of the indictment and remanded in custody for sentencing.

5. That I altered my plea to one of "Guilty" without advertence to the distinction in law and fact between the respective offences alleged in the said indictment. I did so because I was confused, unnerved by the terror of the moment and the intimidatory attitude of the Learned Resident Magistrate. The attendant or relevant circumstances were as follows:-

(a) Upon the resumption of my trial in the afternoon of the 8th day of August aforesaid, the Learned Resident Magistrate

"insisted that I continue and complete the cross-examination of the Complainant Joel Gibbs, which cross-examination had been begun by my Attorney-at-Law aforesaid. I asked the Complainant if it was not his view that I had been tricked into the dilemna I was in, by one Aston Kerr, about whom he had testified. His Honour directed the Complainant not to answer the question. I felt intimidated not just by that directive but by the stern manner in which the Learned Magistrate gave it, as well as regarded me.

(b) I proceeded to tell him of efforts I had been making to restore the Complainant's money. Thereupon His Honour asked Mr. Gibbs and the Learned Clerk of the Court whether or not this was so and both replied affirmatively. The Clerk of Court then produced a letter which the Learned Magistrate read. He then commented that it was "worthless." I explained that my wife had recently died tragically and that I was awaiting the proceeds of certain policies of insurance payable upon her death. His Honour then ruled that the letter be admitted in evidence as "Exhibit 1."

(c) The Learned Magistrate then addressed me thusly: "Mr. Johnson, so you did receive the money and authorise this letter (Exhibit 1) offering restitution?" I replied: "yes, sir." He then asked if I wished to change my plea. I replied: "No, sir." His Honour then said: "Mr. Johnson, the case against you is a very simple one. You received the money and you have promised to make restitution. You are guilty! Do you want to change your plea and stop wasting my time? You are guilty, Mr. Johnson!"

(d) I then told the Learned Magistrate that I had at all times admitted receiving the money but that I had an explanation: that I had been tricked and was not a party to any deception or dishonesty. His Honour asked for my explanation. I had commenced my explanation by telling the Magistrate how I came to be introduced to the complainant by Aston Kerr aforesaid, when His Honour in an impatient mood, told me that he did not believe what I was saying. Directing himself to a male member of the gallery, the Learned Magistrate asked: 'Do you believe him? You don't think he is guilty?" That gentleman, who had been seated to the side of the dock, rose, shrugged and said: "Could be. Could be not. I don't know, Your Honour." A ripple of laughter ran through the gallery.

"(e) His Honour then said to me: "Well, I don't believe you. You are clearly guilty. Are you going to change your plea or not?" Thereupon, resignedly, I said "Guilty, Your Honour." At no time whatsoever after my plea of "Not Guilty" at the beginning of my trial on the 3rd of August aforesaid, was I formally pleaded to the counts as alleged in the Indictment separately, or at all. In the event, when I said: "Guilty, Your Honour," in the circumstances delineated at Paragraph 5 (d) hereof, it can scarcely be suggested, I say respectfully, that I was entering an unequivocal plea to either Count. After my change of plea, the Learned Magistrate further remanded me in custody, for sentencing."

According to paragraphs 4 and 5 he changed his plea because he was denied legal advice having regard to the absence of his lawyer. According to paragraph 5 (c) he stated that he did not wish to change his plea and so stated but eventually because of the intimidatory and derisory attitude of the Resident Magistrate, he succumbed to the pressure.

The comments of the Resident Magistrate as they related to these paragraphs were as follows -

"Paragraphs 4 and 5

This trial commenced on the 3rd day of August, 1989 and was continued on the 4th day of August, 1989. On that day it was adjourned to the 8th day of August, 1989 at the request of the Defence Attorney.

On the 8th day of August, 1989 the Defence Attorney did not attend. The Accused had not heard from him. The Clerk of Courts had not heard from him. The court did not hear from him.

The case was stood down until 2:45 p.m. to await the Defence Attorney. At 2:45 p.m. the case continued without the Defence Attorney.

The Accused was asked if he wished to cross examine the witness - the Defence Attorney when he was last present had indicated an intention to cross examine that witness further.

It seemed clear that the Defence Attorney had abandoned his client.

" After his cross examination of the witness the Accused man elected to change his Plea. This was of his own volition.

Accused must have had discussions with his Attorney before the trial. During the trial he did have discussions. The charges were explained to him. The Clerk of Courts had opened to the facts.

Cf more relevance is the fact that Johnson is an educated man (see evidence of Professor Carl Stone).

He was not intimidated in any way by me. He was not terrorized by me at any time.

(a) This did not take place.

(b) The Record speaks for itself.

(c) This is not true."

With respect to this extension of the record, we take the position to be thus. Where any conflict arises between the Resident Magistrate's notes of evidence and his response to the appellant's affidavit on the one hand, and the appellant's affidavit on the other, we are bound by the notes of evidence and/or the Resident Magistrate's comments. We appreciate that there are or will be occasions when errors in note-taking will arise, but what is suggested has occurred in this case, is altogether of a different character. It is an account of unjudicial conduct on the part of the Resident Magistrate in coercing an unrepresented accused to change his plea. This Resident Magistrate who is a senior and experienced Magistrate, has stated categorically -

"He was not intimidated in any way by me.
He was not terrorized by me at any time."

We do not think it can be doubted that if such conduct were proved, that it would be regarded as other than rendering the trial wholly unfair and result in the conviction being quashed and the sentence being set aside. In this case, the Resident Magistrate has denied any intimidatory language or acts "in terrorem" calculated to coerce this appellant to quiet submissiveness so that he pleaded guilty when he would rather

have not. We note that the appellant has not shown that the notes are an inaccurate representation of what rook place at the trial but attempts to extend the record by including explanations e.g. "that he had been tricked by some other person and was not a party to any deception or dishonesty—" (paragraph 5 (d)). This explanation, we would observe, he had not chosen to put before the Magistrate after his plea of guilty. In our view, by the affidavit filed, the appellant was intending to present arguments how he came to plead guilty, rather than endeavouring to provide for the benefit of this Court, a faithful and preferably contemporaneous record of what transpired before the Magistrate leading up to his change of plea and the explanation proffered by him thereafter. In the result, we are not prepared to act on material other than that provided by the Magistrate's notes of evidence.

Even if that approach were held to be incorrect and we were wholly to accept the affidavit of the appellant, we do not think it would assist him for it did not demonstrate that the appellant was labouring under any sense of misapprehension as to what he was doing. He was well aware that he was pleading guilty to the charges for he explained his role in the conspiracy to defraud Mr. Joel Gibson and was endeavouring to make restitution in whole i.e. ($35,000) not, be it noted, to the extent of his stated financial benefit of $10,000. Nowhere in his affidavit is the nature of his mistake explained, save to say in paragraph 5 that -

> "he altered his plea without advertence to the distinction in law and fact between the respective offences alleged in the said Indictment."

We are not able to appreciate what relevance the distinction he mentions, has to do with his admission of guilt. His explanation to the Magistrate revealed that his financial share

in the "scam" was limited in financial terms to $10,000, even so a not inconsiderable sum. He admitted candidly that he was required to tell Mr. Gibson a lie to induce him to participate at all, namely that it was Kerr who would be making the arrangements and not him.

Against that background, we can now proceed to consider the grounds of appeal argued before us with much pertinacity by Mr. Witter. Counsel submitted that the Magistrate failed either to recognize that he had a discretion in allowing the plea to be withdrawn or failed to exercise his discretion to allow the change. This he said was made plain when the Magistrate ruled that only the Supreme Court could then stop the court from passing sentence, but also said that he was "functus officio." Mr. Witter relied on S(an infant) v. Manchester City Recorder & Ors. (1969) 3 All E.R. 1230 in which Lord Reid at p. 1234 stated the rule as follows -

> "that the accused can apply at any time before sentence to change his plea of guilty and that it is for the court then to decide whether justice requires that should be permitted."

We think the law is clear that a judge has a discretion to allow an accused to withdraw a guilty plea and enter a plea of not guilty: R. v. McNally (1954) 1 W.L.R. 933. In that case Lord Goddard C.J., stated the law in these terms -

> ".....The question whether a plea may be withdrawn or not is entirely a matter for the trial judge. If the court came to the conclusion that there was a question of mistake or misunderstanding, or that it would be desirable on any ground that the prisoner should be allowed to join issue, no doubt the court would allow him to do it. For example, it has been known for a prisoner charged with receiving stolen goods to acknowledge that he received them, and to plead guilty, adding "but I did not know that they were 'stolen.'" In such a case the trial judge might well allow the prisoner to change his plea, but it is entirely within the discretion of the judge."

Further, we do not doubt that that discretion also applies where a plea of "not guilty" is first entered, which is then changed to one of "guilty" and again sought to be changed to one of "not guilty." Whatever the situation, the important question will be what are the considerations which should incline a judge to exercise his discretion to allow the plea of not guilty to be withdrawn.

We think such a plea may be withdrawn if it was entered by mistake. R. v. Clouter & Anor. (1859) Cox's C.C. 237 - In that case, the plea of guilty was allowed to be withdrawn under a misconception of the nature of the charge, the appellant having stated that when he pleaded guilty to a charge of forgery, he merely meant to say that he was the person who had utterred the document, he was ignorant of the fact of its being forged. A common example of this is the "guilty with explanation" plea usually made upon a charge of assault or wounding. The explanation is then offerred that the injured person hit or cut the offender first. A judge invariably directs a plea of not guilty to be entered and proceeds to trial. See also R. v. Rapp (1923) 4 D.L.R. 1033.

Because the law attaches such importance to a plea of guilty in open court, no further proof of the accused's guilt is called for. It is essential therefore that that plea should be made without pressure. It was held in R. v. Inns (1974) Cr. App. R. 231 that when an accused makes a plea of guilty under pressure and threats, he does not make a free plea and the trial starts without there being a proper plea at all, and all that follows is a nulity. We would include under this head a situation where the court suggests that on a plea of not guilty that that plea should be withdrawn and a plea of guilty entered. See R. v. King 15 Cr. App. R. 13 where it seemed also that there

was a mistake on the part of the accused as to the nature of the charge.

In our view therefore, unless it can be shown that the appellant was coerced into pleading guilty or entered such a plea acting under some misconception of the nature of the charge, the plea will be held to be unequivocal. In those circumstances, it would be entirely proper for a court to exercise its discretion not to allow the plea to be withdrawn. See R. v. South Tameside Magistrate's Court, ex parte Rowland (1983) 3 All E.R. 689. We think our view of the law is reinforced in the judgment of O'Connor J., in P. Foster (Haulage) Ltd. v. Roberts (1978) 2 All E.R. 751 at pp. 754 - 755 -

> " In my judgment, a clear distinction must be drawn between the duties of a court faced with an equivocal plea at the time it is made and the exercise of the court's jurisdiction to permit a defendant to change an unequivocal plea of guilty at a later stage of the proceedings. A court cannot accept an equivocal plea of guilty: it has no discretion in the matter; faced with an equivocal plea the court must either obtain an unequivocal plea of guilty or enter a plea of not guilty. For a plea to be equivocal the defendant must add to the plea of guilty a qualification which, if true, may show that he is not guilty of the offence charged. An example of this type of qualification is found where a man charged with handling a stolen motor car pleads "guilty to handling but I didn't know it was stolen." It is not every qualification which makes a plea of guilty equivocal: for example, the burglar charged with stealing spoons, forks and a camera, who pleads "guilty but I did not take the camera" is making an unequivocal plea to burglary. Once an unequivocal plea of guilty has been made, then the position is entirely different. From this stage forward until sentence has been passed the court has power to permit the plea of guilty to be changed to one of not guilty, but the exercise of this power is entirely a matter of discretion. This is clearly stated by all or [illegible] in S(an infant) v. Manchester City Recorder. In that case the appellant, aged 16, had pleaded guilty to attempted rape before a juvenile court; the hearing was adjourned for three weeks for reports and on the adjourned hearing the appellant was legally represented and his solicitor applied to withdraw the plea of guilty on the ground that

> "the youth had made many previous spurious confessions and that his confession of guilt was unsafe. The justices refused the application on the ground that they were functi officio and had no power to grant it. That decision was upheld in the Divisional Court but the House of Lords allowed the appeal."

What clearly emerges is that the Magistrate has a discretion which he must exercise.

Mr. Witter contended that the learned Resident Magistrate failed to exercise his discretion because of his erroneous view that he was "functus officio." It was clear as well he argued, that the appellant pleaded guilty under a mistake.

In our view, when the learned Resident Magistrate used the term "unequivocal plea of guilty", he meant to convey that he was satisfied that the appellant was perfectly well aware of the nature of the charges against him and meant to confess his guilt. We note as well the phrasing of the ruling -

> "in all the circumstances, (the court) felt obliged to proceed to sentence."

We cannot in the light of that language, agree with the submissions of counsel. In our consideration of counsel's submission that the Resident Magistrate expressed the view that he was "functus," we would remark that the Resident Magistrate's notes do not record his making any such statement. What the notes do record is Mr. Witter's putting that forward as a gloss of the Magistrate's views which he had expressed earlier to counsel in refusing the application to allow the plea to be withdrawn. We very much doubt whether the Magistrate could have used such a term when he had to continue the trial by considering and imposing sentence. When he wrote what he described as "Findings," he used the phrase "irrevocable" in relation to the plea of guilty. We think that adjective must have been used as a synonym of "unequivocal" because he found that there was no mistake by the appellant as to the nature of the charge. He

pointed out (at p. 25) that -

> " There is no denial of the prosecution case that Mr. Johnson obtained $35,000.00 from the complainant by falsely pretending he would be able to obtain the release of his car for him.
>
> There is no denial that Aston Kerr was party to this conspiracy.
>
> In any event the prisoner an intelligent man by all accounts gave an irrevocable plea of guilty.
>
> This might have been because his Attorney had seemingly deserted him - but he did so to say he did his evil deed to obtain $10,000.00 is certainly not a defence."

Despite Mr. Witter's endeavours, we were never altogether clear what was the evidence of mistake showing the state of mind of the appellant. We think what the appellant stated to the Resident Magistrate was quite clear in that it showed that he was not the prime mover. But he knew that his co-conspirator Aston Kerr who had decamped with the $35,000 was not in a position to clear any car through the customs. He was indeed silent about Mr. Kerr's credentials. The learned Resident Magistrate was not insensible to the appellant's qualifications - a B.Sc. and a M.Sc. degree in Economics. We were not persuaded by Mr. Witter's attempts to show that this appellant was some naive youth, providing a service for reward. The appellant never told his victim that was the position. The Crown's case at all events did not tally with the appellant's account nor did Mr. Witter's argument accord with the facts as disclosed by his client. It seems to us, plain that the appellant had admitted his guilt at a very early stage and before the matter reached the court viz., at his first interview with the police. All his attempts thereafter were intended to secure time to repay the sum of $35,000. The Resident Magistrate afforded the appellant further time to make that restitution but to no avail. All this confirms the view that at no time was the appellant acting under any mistake whatever.

Mr. Witter also tried to show that the Crown had not proved its case when the appellant pleaded guilty. This desperate argument ignores the fact in this case that the prosecution had opened to the facts. Thus the appellant was well aware of the facts to be adduced against him. In any event, we do not accept the argument. There was sufficient evidence of the nature of the fraudulent scheme and a confession of the appellant that he had received the money pursuant to the scheme and that he would repay it. But that argument fails for another reason, which we have already given namely, that the pea of guilty is an admission of guilt and renders further proof or the calling of further evidence wholly unnecessary.

Counsel has said everything which could be said on behalf of the appellant, and to what he has urged, we have given careful consideration. But we were satisfied, for the reasons we have stated, that this appeal cannot succeed.