

CANADA / JUDGMENT

Adgey v. R.

[1975] 2 SCR 426

COURT

Supreme Court of Canada

DECIDED

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Adgey v. R.

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Date

1973-10-02

Report

[1975] 2 SCR 426

Judges

Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Laskin, Bora; Dickson, Robert George Brian

On appeal from

Ontario

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Adgey v. R., [1975] 2 S.C.R. 426

Date: 1973-10-02

James Kevin Adgey (Plaintiff) Appellant;

and

Her Majesty The Queen (Defendant) Respondent.

1973: May 17; 1973: October 2.

Present: Judson, Ritchie, Spence, Laskin and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal Law—Plea of guilty at trial—Duty of trial judge—Legal aid duty counsel—Discretion of trial judge to hear evidence.

The appellant pleaded guilty to several charges of false pretences, a charge of fraud, and a charge of break, enter and theft. He was represented by legal aid counsel. After plea had been entered, the facts giving rise to each charge were related by a police officer and the appellant was afforded an opportunity to explain. The appellant was convicted. No request for the change of plea was made during the hearing. The appellant appealed to the Court of Appeal which allowed the appeal as to one of the charges and dismissed the appeal as to all other charges. The issue is whether, having heard the explanation, the judge erred in failing to strike the guilty pleas and direct trial on the charges.

Held (Spence and Laskin JJ. dissenting): The appeal should be dismissed.

Per Judson, Ritchie and Dickson JJ.: There are two stages in the proceedings in which a trial judge has a discretion so far as accepting a plea of guilty is concerned, first, when the charge is read and the plea is entered and, second, following the hearing of evidence, if the judge chooses to hear evidence. A trial judge is not bound, as a matter of law, in all cases to conduct an inquiry after a guilty plea has been entered. If however evidence is heard it may indicate that the accused never intended to admit to a fact which is an essential ingredient of the offence with which he is charged or that he may have misapprehended the effect of the guilty plea or never intended to plead guilty at all, in any of which events the judge may in his discretion direct that a plea of not guilty be entered or permit the accused to change his plea to not guilty. This discretion if exercised judicially will not lightly be interfered with. An appellant can however later change his plea if he can satisfy the Appeal Court that there are valid grounds for his being permitted to do so.

On reviewing the charges to which the appellant pleaded guilty neither the facts admitted nor the statements made following the guilty pleas justify disturbing the exercise of discretion by the trial judge.

Per Spence and Laskin JJ., dissenting: The issue here and the foundation of the appeal to the Court of Appeal was whether the trial judge erred in law in permitting the guilty pleas to stand. The accused did not have counsel until, on his third appearance in Court and on his trial at that time, duty counsel stood with him. The Legal Aid Act, R.S.O. 1970, c. 239, as amended does not deal in any detail with duty counsel but the effect of s. 21(b) which provides for duty counsel is quite different from the central provisions of the Act which entitle persons charged with indictable offences to apply for legal aid certificates and to obtain full representation by counsel. The trial Court was aware that it was a duty counsel who appeared for the accused. The fact that the trial judge did not inquire if duty counsel had had an opportunity to consult with the accused

and to ascertain the factual bases of the charges and whether the accused was willing to be represented by him should there be a plea of guilty was sufficient to require that the convictions be set aside and a new trial ordered. The duty of a trial judge respecting an inquiry into the facts on a plea of guilty is to satisfy himself that the accused understands the nature of the charge and its consequences and is unequivocal in his plea of guilty but this must be complemented by the duty of the Crown to adduce facts which, taken to be true, support the charge and conviction. In the present case on the facts narrated by the Crown there was sufficient doubt on the elements of the offence to warrant striking the plea.

[Brosseau v. The Queen, [1969] S.C.R. 181; R. v. Milina (1946), 86 C.C.C. 374; Thibodeau v. The Queen, [1955] S.C.R. 646; R. v. Forde (1923), 17 Cr. App. R. 99; R. v. Bamsey, [1960] S.C.R. 294; R. v. Slymkowich, [1954] S.C.R. 606 referred to.] APPEAL from a judgment of the Court of Appeal for Ontario dismissing an appeal from conviction on several charges of fraud and of breaking, entering and theft, appeal dismissed, Spence and Laskin JJ. dissenting.

E.L. Schofield, for the appellant.

R.M. McLeod, for the respondent.

The judgment of Judson, Ritchie and Dickson JJ. was delivered by

DICKSON J.—The appellant pleaded guilty before a Provincial Court Judge to several charges of false pretences, a charge of fraud, and a charge of break, enter and theft. The appellant was represented by legal aid counsel. After plea had been entered, the facts giving rise to each of the charges were related by a police officer and the appellant was afforded an opportunity to explain. The issue in this appeal is whether, having heard the explanation, the judge erred in failing to strike the guilty pleas and direct trial upon the charges. No request for a change of plea was made during the hearing.

The judge accepted the guilty pleas on all charges and sentenced the appellant to three months on the charge of break, enter and theft. On all of the other charges, the appellant was sentenced to one year probation with suspended sentence and ordered to make restitution. The appellant appealed to the Ontario Court of Appeal. The Court of Appeal allowed the appeal as to one of the charges and dismissed the appeal as to all other charges.

There are two stages in the proceedings in which, so far as accepting a plea of guilty is concerned, the discretion of the trial judge comes into play: first, when the charge is read to the accused and a plea of guilty is entered, and, second, following the hearing of evidence, if the judge chooses to hear evidence. When a plea of guilty is entered by the accused or someone on his behalf, the trial judge may or may not accept that plea. This Court has decided in *Brosseau v. The Queen*[1], that a trial judge is not bound, as a matter of law, in all cases to conduct an inquiry after a guilty plea has been entered. In that case the accused was an Indian with a Grade II education. He was charged with capital murder to which he originally pleaded not guilty. Later, after several interviews with counsel, he pleaded guilty to non-capital murder and was sentenced to life imprisonment. He later appealed on the ground that he did not understand that a

conviction for non-capital murder entailed a sentence of life imprisonment and that he had agreed to plead guilty to the reduced charge because of his fear of hanging. Cartwright C.J. stated (pp. 188-9):

No doubt when a plea of guilty is offered and there is any reason to doubt that the accused understands what he is doing, the judge or magistrate will make inquiry to ascertain whether he does so and the extent of the inquiry will vary with the seriousness of the charge to which the accused is pleading.

Cartwright C.J. approved the statement of Sidney Smith J.A. in *Rex v. Milina*[2], and concluded at p. 190:

Failure to make due inquiry may well be a ground on which the Court of Appeal will exercise its jurisdiction to allow the plea of guilty to be withdrawn if it is made to appear that the accused did not fully appreciate the nature of the charge or the effect of his plea or if the matter is left in doubt; but in my opinion, it cannot be said that where, as in the case at bar, an accused is represented by counsel and tenders a plea of guilty to non-capital murder, the trial Judge before accepting it is bound, as a matter of law, to interrogate the accused. If the trial judge chooses to hear evidence, for the purpose of satisfying himself that the charges are well founded or in order to have a factual background prior to imposing sentence, the evidence may indicate the accused never intended to admit to a fact which is an essential ingredient of the offence with which he is charged or he may have misapprehended the effect of the guilty plea or never intended to plead guilty at all, in any of which events the judge may, in his discretion, direct that a plea of not guilty be entered or permit the accused to withdraw his original plea and enter a new one.

The discretion exercised by the trial judge is one which “if exercised judicially, will not be lightly interfered with.” per Cartwright J. (as he then was) in *Thibodeau v. The Queen*[3], at p. 654.

Counsel for the Crown submitted that the test to be applied was that formulated by Avory J. in *R. v. Forde*[4].

A plea of guilty having been recorded, this Court can only entertain an appeal against conviction if it appears (1) That the appellant did not appreciate the nature of the charge, or did not intend to admit that he was guilty of it; or (2) That upon the admitted facts he could not in law have been convicted of the offence charged.

With respect, in my view this defines the rule too narrowly. I see no reason why the Court’s right to permit a withdrawal of a plea of guilty should be necessarily limited to the “admitted” facts. Statements made in the course of the inquiry following a guilty plea may, although not admitted by the Crown, justify the Court in rejecting the guilty plea and proceeding to trial. This Court in *The Queen v. Bamsey*[5], at p. 298, held that an accused may change his plea if he can satisfy the Appeal Court “that there are valid grounds for his being permitted to do so.” It would be unwise to attempt to define all that which might be embraced within the phrase “valid grounds”. I have indicated above some of the circumstances which might justify the Court in permitting a change of plea. The examples given are not intended to be exhaustive.

Turning now to the charges to which the appellant pleaded guilty; those relating to false pretences may be disposed of without difficulty. They relate to a ring obtained from Henry Birks & Sons Limited in Oshawa for \$150 by means of a worthless cheque. The ring was subsequently returned to Birks. The appellant gave no explanation with respect to this charge. Two charges concerned obtaining merchandise by false pretences from S.S. Kresge Company. The officer testified that the merchandise had been obtained by N.S.F. cheques. The appellant explained he knew when he wrote the cheques he did not have enough money in the bank to cover them. He intended to obtain money from his aunt and deposit it the next day to cover the cheques. Two other charges related also to obtaining merchandise by false pretences by N.S.F. cheques. No explanation was given by the appellant. So far as this group of charges is concerned, therefore, the position is that the accused pleaded guilty and either offered no explanation or the explanation that he intended to get money from his aunt. It was within the discretion of the trial judge to accept or reject that explanation in deciding whether to strike the pleas of guilty. I would not disturb the exercise of his discretion.

Another charge which, in my view, can also readily be disposed of is that the appellant defrauded Texaco Oil Ltd. and Peter Farano of merchandise to the value of \$674.30. The officer testified that the appellant, in about April 1970, was in partnership with one Rene Cornu. The partnership was dissolved about the end of April and Mr. Cornu permitted appellant to use Cornu's vehicle. He furnished the appellant with a Texaco credit card to provide gas for the car. The period of the loan was to be for two days only. The car was returned after two days but Cornu's attempts to recover the card were unsuccessful. The appellant used the card to have extensive repairs made to his own motor vehicle. The appellant said he did not understand the loan of the card to be only for a two day period, but did not deny the purpose of the loan was limited to the purchase of gas for the car which Cornu had loaned to him. In my view the judge was correct in accepting the appellant's plea of guilty to the charge.

Finally, the appellant was charged with unlawfully breaking and entering the cottage of Rene Cornu and committing theft therein. The officer testified that the Ontario Provincial Police found the appellant and a young woman in Cornu's cottage and that the appellant had consumed a quantity of Cornu's liquor. Mr. Cornu had returned from Cornell University unexpectedly. The appellant explained to the Court that he and Cornu had previously been business associates. It had been intended that the cottage would be rented for the summer, but about seven days before Cornu left for Cornell he and the appellant had an argument and, in the words of the appellant, "I found out he wasn't my friend any more". Notwithstanding, the appellant, according to his explanation, went to the cottage for some unexplained reason, found the grass to be waist high, told Cornu's girl friend that he was going to cut the grass and make the cottage liveable. He was at the cottage from a Tuesday morning until Friday when Cornu returned unexpectedly, accompanied by a police officer. Cornu asked the appellant what he was doing there, and in the words of the appellant, "I didn't know what to say". In explaining how he entered the appellant stated that the door of the cottage was locked but the lock did not catch. He had had a key but Cornu had apparently taken it from him.

In considering whether the judge erred in not striking the plea entered by the appellant, the significance and effect of a guilty plea must be acknowledged. In pleading guilty an accused admits having done that with which he is charged. By his plea in the instant case, the appellant admitted he broke and entered the cottage owned by Cornu and committed theft therein. His explanation served to confirm the breaking and the entry; he did not deny the theft. The highest footing upon which the appellant can put his case is that he thought he had some colour of right to do what he did. The cottage, however, belonged to Cornu. The earlier business relations and friendship had ended. Cornu had relieved the appellant of the key to the cottage. When the appellant was asked to explain his presence to Cornu and the police officer, he did not know what to say. In these circumstances it is difficult to discern any foundation upon which a claim to colour of right could properly rest: see *The Queen v. Shymkovich*[6].

I would dismiss the appeal.

The judgment of Spence and Laskin JJ. was delivered by

LASKIN J. (dissenting)—This appeal, brought here by leave of this Court, raises the questions whether pleas of guilty, offered by the accused to a number of charges on which he elected to be tried by a provincial judge, should not have been entered without previous inquiry or should have been struck out and pleas of not guilty entered. When he appeared before the provincial judge on February 10, 1971, the accused faced ten charges, one of fraud, one of break, enter and theft, five of obtaining by false pretences, one of theft under \$50, one of unlawful possession and one of careless driving. The theft charge and the possession charge were related, and the former was dropped as a result of what the accused said when his plea was taken. He was convicted on all the other charges. On appeal to the Ontario Court of Appeal, his conviction on the possession charge was set aside and an acquittal entered, but the appeal was otherwise dismissed.

In this Court, issue was taken with the convictions on the charge of break, enter and theft, the charge of fraud and the five charges of obtaining by false pretences. The accused, who was twenty-one years of age at the time and had no previous criminal record, was represented by duty counsel present in the Court on February 10, 1971. Counsel for the Crown very fairly conceded that the trial judge did not deal with the charges *seriatim* and ask accused what he had to say as to each, and also that the entire proceedings were somewhat imperious. After the pleas of guilty, a police inspector was called by the Crown to give an account of the investigations into the various matters out of which the charges arose. When he concluded his narration, Crown counsel appeared to take over, asking the accused whether he disputed any of those matters, and after receiving the answer “no” asked him “All right. What’s your version?”. Accused began to speak and was then told by the trial judge “Come on up here if you wish to say anything”. The record then states that the accused was called and sworn, and gave testimony which is reproduced in the transcript. He was questioned by the trial judge only. Crown counsel then said that he had no questions, and the Court asked duty counsel if he wished to question the accused and he answered that he had no questions but wished to make some submissions, and he directed them to sentence. This is not a case where the accused sought to withdraw his pleas of guilty and his

request was denied, nor is it a case where the trial judge gave consideration to a change of plea and in his discretion refused to allow it. What is alleged here, and what was the foundation of the appeal to the Ontario Court of Appeal, is that the trial judge erred in law in permitting the guilty pleas to stand.

The accused did not have counsel until, on his third appearance in Court and on his trial at that time, duty counsel stood with him. The record does not show when the duty counsel first spoke to the accused or what opportunity he had to confer with the accused or with Crown counsel on his behalf. On the careless driving charge, which is not before this Court, it was duty counsel who answered, when the accused was asked to plead, that the accused pleads guilty. Two charges of false pretences were then read, and when asked to plead to them the accused said "I don't know about one of them. Guilty, I guess". To which duty counsel said, "Don't guess. Don't do me a favour". Accused then said "Guilty", but after an intervention by Crown counsel, he said "I want to explain that. There's an explanation for that". The trial judge made a remark and the accused said "Can I say what happened?". To which the Court replied "You can have all morning to say what happened". This was followed by the Crown counsel asking the accused how he pleads to the two charges and the accused said "Guilty". During the course of the narration by the police officer of the facts as he had them respecting the charge of break, enter and theft, he spoke of a voluntary statement made by the accused whereupon Crown counsel interrupted to say "We won't bother going into that. We are agreed that he did not have anyone's permission to be there. Go ahead". There is nothing to show who was meant by "we", but if taken literally to refer to an agreement, rather than being an observation about the conclusion of the prosecuting authorities from their inquiries, it must be a reference to an agreement with duty counsel. Not only did the latter remain mute, but the accused, when sworn, gave an account of the circumstances under which he entered the premises in question (a cottage owned by a former business partner) and these indicated a possible defence of colour of right. It is difficult in these circumstances to hold that the accused was foreclosed by any agreement with his duty counsel, if indeed he agreed on the accused's behalf to what Crown counsel said.

I have gone into these matters because, in my opinion, where an accused is asked, as here, to plead to a succession of charges, the fact that he is or is not represented by counsel is material to the duty that lies upon a trial judge in relation to pleas of guilty. On the record of proceedings in this case, I am of the opinion that even if the accused had been represented by retained counsel, the trial judge would have erred in law in failing to enter pleas of not guilty in respect of any charge where the accused had indicated at the time of plea that he wished to challenge the charge, or where it later appeared that the facts did not support the charge and the plea of guilty thereto. This is entirely apart from the prior obligation that rests upon a trial judge to seek assurance, especially from an unrepresented accused, that any plea of guilty is voluntary and based on an appreciation of the nature of the charges and of the consequences of such a plea. On the foregoing view of the law (and I propose to examine the authorities) the two questions that arise are whether the accused should have been treated here as if he was represented by retained counsel when it was duty counsel who appeared with him and, if so, whether the course of proceedings obliged the trial judge not to enter or to re-open the pleas.

The Legal Aid Act, R.S.O. 1970, c. 239, as amended does not deal in any detail with duty counsel. Section 21(b) provides for the establishment of a panel of lawyers to act as duty counsel. This is something quite different from the central provisions of the Act which entitle persons charged with indictable offences to apply for legal aid certificates and to obtain full representation by counsel. It is the Regulations under the Act that spell out the functions of duty counsel. Section 69 of the Regulations (R.R.O. 1970, Reg. 557) provides:

Where a person has been taken into custody or summoned and charged with an offence, he may obtain before appearance to the charge the assistance of duty counsel who shall,

- (a) advise him of his rights and take such steps as the circumstances require to protect his rights, including representing him on an application for remand or adjournment or for bail or on the entering of a plea of guilty and making representation with respect to sentence where a plea of guilty is entered...

I have already stated that the record in the present case does not show when duty counsel became involved with the accused. It does, however, indicate that the Court was aware that it was a duty counsel who appeared for and with the accused. In such a case, I think it mandatory for the trial judge to inquire if duty counsel has had an opportunity to consult with the accused and to ascertain the factual bases of the charges, and whether the accused is willing to be represented by him and to have him speak on his behalf if there should be pleas of guilty on duty counsel's advice. The record discloses no such inquiry in the present case.

This, in my view, is itself sufficient to abort the proceedings and to require that the convictions be set aside and a new trial ordered. But even on the assumption that the accused was as fully represented as if he had retained counsel, I am of the opinion, on the second question posed above, that in the circumstances of the present case the pleas of guilty should not have been entered. It is convenient to begin my canvass of the authorities with the well-known statement of Avory J. in *R. v. Forde*[7]. We are here in the field of judge-made law alone because the Canadian Criminal Code says nothing about any procedure to be followed by a trial judge either before accepting or on accepting or after accepting a plea of guilty. By contrast, Rule 11 of the Federal Rules of Criminal Procedure in the United States is as follows:

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

And in Australia, s.600 of the Criminal Code of Queensland (there is a similar provision in Western Australia) provides:

If he pleads that he is not guilty, the Court, upon being satisfied that he duly admitted before the justices that he was guilty of the offence charged in the indictment, is to direct a plea of guilty to be entered, notwithstanding his plea of not guilty. A plea so entered has the same effect as if it had been actually pleaded.

If the Court is not so satisfied, or if, notwithstanding that the accused person pleads that he is guilty, it appears to the Court upon examination of the depositions of the witnesses that he has not in fact committed the offence charged in the indictment or any other offence of which he might have been convicted upon the indictment, the plea of not guilty is to be entered, and the trial is to proceed as in other cases when that plea is pleaded.

Under the foregoing respective provisions, the trial judge is put under a duty to inquire into the propriety of a guilty plea; the nature of the inquiry is, in the language of the respective provisions, different under each of them.

R. v. Forde involved an appeal against conviction on a plea of guilty to a charge of indecent assault of a girl under age sixteen in an indictment which also charged carnal knowledge of the same girl. The prosecution elected not to proceed further on the indictment, and the question on appeal was whether the conviction could stand if the accused had a complete defence in law and in fact to carnal knowledge. Addressing himself to the question whether the Court of Criminal Appeal could entertain the appeal in view of the plea of guilty, Avory J. stated two propositions (which are in fact three) as follows:

A plea of Guilty having been recorded, this Court can only entertain an appeal against conviction if it appears (1.) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (2.) that upon the admitted facts he could not in law have been convicted of the offence charged.

Under these propositions, an appellate Court should interfere to set aside a conviction made upon a plea of guilty if it be the case that (1) the accused did not understand the nature of the charge before pleading; or (2) the accused did not unequivocally plead guilty to the charge as properly understood; or (3) the accused, on the facts offered in support of the charge, could not in law have been convicted of the offence charged.

The first two propositions above-noted point to a duty of the trial judge prior to entering any plea to satisfy himself that the accused understands the nature of the charge or charges against him and is unequivocal in offering a plea of guilty to them. The third proposition involves a different aspect of the matter, relating as it does not to the nature of the charge or to the unmistakable character of the plea, but rather to the facts necessary to support a conviction; in short, it relates to the factual accuracy of the plea and not to its voluntariness and its appreciation. Moreover, this third proposition depends on facts being put before the trial judge following the plea.

A plea of guilty carries an admission that the accused so pleading has committed the crime charged and a consent to a conviction being entered without any trial. The accused by such a plea relieves the Crown of the burden to prove guilt beyond a reasonable doubt, abandons his non-

compellability as a witness and his right to remain silent and surrenders his right to offer full answer and defence to a charge. It is important, therefore, that the plea be made voluntarily and upon a full understanding of the nature of the charge and its consequences and that it be unequivocal. In these respects, representation by counsel is an important consideration; but since the plea is that of the accused and not of his counsel, a trial judge should still satisfy himself of the matters above-mentioned. These do not immediately engage any factual issues which might, however, arise if the accused seeks to qualify his guilty plea by explanatory comments either at the time it is entered or later before termination of the proceedings.

The foregoing duty of the trial judge, more or less in the terms stated, was considered in a series of cases in the British Columbia Court of Appeal, culminating in *R. v. Milina*[8] which distinguished, properly in my view, between the duty as I have put it and the factual underpinning of the guilty plea. As to the latter, it was the view of the Court (in the words of Sidney Smith J.A. for the majority, at p. 381) that “when an accused person pleads guilty it is not the law that the magistrate must go into the facts in order to satisfy himself that the accused is in fact guilty”. In short, the view taken in *Milina* is that although there is an affirmative duty of the trial judge to satisfy himself that the accused understands the nature of the charge and its consequences and is unequivocal in his plea of guilty, there is no such duty to be satisfied of the accuracy of the plea, that is of its factual support. Since, ordinarily, facts are presented by the Crown with respect to sentence and there may be a narration as well by the accused, the question arises whether the trial judge should at that stage be required to assess conflicting versions in order to decide whether there is a factual basis for the plea.

If the trial judge has such a duty, as expressed in *Milina*, to be satisfied of the accused’s understanding and appreciation of a plea of guilty, how is it discharged? In *Milina* itself the Court said that “the cases will be rare indeed in which a magistrate will feel himself obliged to make any special inquiry when the accused, as here, is represented by counsel” (at p. 381 of 86 C.C.C.). I confess to some difficulty in understanding what is meant by “special inquiry”, but I assume that the Court did not mean dispensation with any inquiry where the accused has counsel. Whatever the Court in *Milina* may have meant, this Court in *Brosseau v. The Queen*[9], appears to have said exactly that. In *Brosseau*, the question of law upon which leave to appeal was given was as follows:

Did the trial judge err in law in accepting the appellant’s plea of guilty to non-capital murder without making inquiry to satisfy himself that the appellant understood the nature of the charge and the effect of such a plea?

That was a case where the accused, a Cree Indian, was illiterate (he had a grade 2 education) and was described by his counsel as a “primitive”. He had been charged with murder but at the opening of trial the indictment was amended to read “non-capital murder”, and to this the accused pleaded guilty. In his appeal to the provincial appellate Court he alleged that he was told by his lawyer that if he did not plead guilty to the charge he would be sentenced to hang, that he was scared and pleaded guilty although he was drunk at the time of the offence and drunk when he gave a statement to the police.

This Court, with Spence J. dissenting, dealt with the question of law before it in these terms:

Failure to make due inquiry may well be a ground on which the Court of Appeal will exercise its jurisdiction to allow the plea of guilty to be withdrawn if it is made to appear that the accused did not fully appreciate the nature of the charge or the effect of his plea or if the matter is left in doubt; but in my opinion, it cannot be said that where, as in the case at bar, an accused is represented by counsel and tenders a plea of guilty to non-capital murder, the trial Judge before accepting it is bound, as a matter of law, to interrogate the accused.

In his dissenting reasons, Spence J. adverted to what was said in *Milina* that an inquiry may be proper where “the accused may be a foreigner, or illiterate, or the charge is one of unusual complexity or of an unusually grave nature”; and he concluded that in the case before him the trial judge could not rely merely on the fact that the accused was represented by counsel as making any inquiry unnecessary before recording the guilty plea.

If in the *Brosseau* case no inquiry at all was required because the accused was represented by counsel, I can think of no case in which an inquiry would be necessary when there is counsel, unless the inquiry is precipitated by some remonstrance by the accused at the time he pleads guilty or later in the proceedings, as, for example, when the Crown narrates facts relevant to sentence. If the sentence is mandatory, the narration becomes unnecessary although it was given in *Brosseau*; and if there is no narration, then, according to *Brosseau*, matters so grave as whether an accused understands the charge against him, and appreciates the consequences and voluntarily accepts them without trial, require no initiative of inquiry by the trial judge but are satisfied by the mere presence of counsel when the accused pleads guilty. This is a situation which, in its generality, I find unacceptable.

A trial judge cannot, of course, be faulted if he makes some inquiry, but it is conceivable that he may as a result wrongly conclude that a plea of guilty should be recorded. If he makes no inquiry at all, in reliance on the presence of counsel of whatever experience, *Brosseau* indicates that an appeal based on facts which might have moved the trial judge to refuse a plea of guilty, or at least to seek some assurance about the plea, will fail. What is left then, as a basis for contesting a plea of guilty by a represented accused, is any remonstrance by the accused or any obvious factual defect in the Crown’s case in respect of the charge, revealed in the post- plea or post-conviction proceedings before the trial judge. If a proper inquiry is made, any subsequent remonstrance would lose its force unless sufficiently weighty to require the trial judge to reconsider the recorded plea of guilty.

No doubt, a trial judge must have regard to the factual accuracy of a plea of guilty if facts to underpin it are offered. If those advanced by the Crown do not sustain the charge and conviction, then the plea of guilty must be struck out, and there is nothing in *Brosseau* that is at odds with this conclusion. I readily agree, moreover, that if the accused gives a version of the facts, after a narration by the Crown, which is different from that of the Crown, the trial judge would in effect be holding a trial after a plea of guilty if he was bound to assess the respective versions as to their credibility and weight. However, either the narration by the Crown or by the accused or by both

may raise a question not only as to the factual accuracy of the plea but as well as to the propriety of the plea of guilty in terms of the accused's understanding and appreciation of it and its unequivocal character. This is not a point that was involved in *Brosseau*. Nor is it likely to arise very frequently if there is the prior inquiry, to which I have already referred, when the accused is arraigned.

The duty of the Court respecting an inquiry as to the "legality" (if I may make such a compendious reference) of the plea of guilty, must, it seems to me, be complemented by a duty of the Crown to adduce facts which, taken to be true, support the charge and conviction in that aspect of the matter. It would, in my view, be unsatisfactory to leave to the discretion of the Crown whether or not to adduce facts supportive of the charge and conviction. The trial judge could undoubtedly call for them, but the issue at that stage ought not to involve him in anything more than being satisfied that what is alleged, taking it to be true, completes the elements of a conviction on a plea of guilty; and this would be so even where the facts could have no bearing on sentence because, in the particular case, it is mandatory.

In the present case, I am of the view that on the facts narrated by the Crown, if believed, there is sufficient doubt on the elements of the offence of break, enter and theft to warrant the striking of the plea. The offence requires proof that what was done was knowingly done without consent of the owner, and I hold that the Crown's narration does not carry that element. The situation is different with respect to the other offences that are involved in this appeal. As to them, if the success of the appeal depended on alleged shortcomings in the factual accuracy of the plea, they are not made out.

The overriding concern is, however, the failure of the trial judge to make any inquiry at all of the accused or his counsel as to whether he understood the charges, whether he appreciated the consequences of a plea of guilty to them and whether he was unequivocal in admitting guilt. On the footing that he was represented by retained counsel, the inquiry could be short. I see no denigration of the reputation of counsel if such an inquiry is made. The trial judge should have no difficulty in making the inquiry in a manner that does not give the impression that counsel is either being bypassed or that his qualification is challenged. The matter is one of the trial judge, who is called upon to enter a conviction without a trial, being certain that the accused is fully aware of what is involved in, and is content to stand by, his plea of guilty.

In *McCarthy v. United States*[10], the Supreme Court of the United States considered Rule 11 of the Federal Rules of Criminal Procedure, quoted above, in a nonconstitutional context (as contrasted with the later case of *Boykin v. Alabama*[11] and emphasized its provision that the accused must be addressed personally, although in that case he was represented by retained counsel. I do not see this as an invariable requirement under the procedure that I would envisage here, but it does indicate that the Rule is not regarded as demeaning counsel's position. I cannot conceive that any counsel recognizing the gravity to an accused of a plea of guilty, would be affronted simply because reassurance is sought by the trial judge.

There is data in the United States that shows that “guilty pleas and not trial serve as the major mechanism for disposition of criminal defendants”: see Note, *The Trial Judge’s Satisfaction as to Voluntariness and Understanding of Guilty Pleas*, [1970] Wash.U.L.Q. 289. We are short of such data here. Statistics Canada does not, or rather does not yet, keep statistics on the subject. Some attempts on a modest scale have been made in this country to provide data on guilty pleas. Professor M.L. Friedland in his book, *Detention Before Trial* (1965), includes a study of the work of the Toronto Magistrates’ Courts (as they were then) for the six month period September 1, 1961 to the end of February, 1962 and this shows that 70 per cent of the cases involving indictable offences were disposed of on guilty pleas. Professor John Hogarth in a recent book, *Sentencing as a Human Process* (1971), includes a study of seven indictable offences reflected in 2396 cases, and in these nearly four out of five offenders pleaded guilty (see p. 270). These are very small samples, and I refer to them as the merest indicators of a situation which has been more fully documented in the United States. I note that in the *McCarthy* case, the Supreme Court of the United States stated that in 1968 eighty-six per cent of all convictions in federal district courts were the result of pleas of guilty or *nolo contendere*: see 394 U.S. 459, at p. 463, n. 7.

In my opinion, the reasons for having confirmation of the voluntariness, understanding and appreciation of consequences where guilty pleas are offered stand above any need of statistical support that such pleas are the means by which most charges of indictable offences are disposed of. In the present case, which is one where the trial judge made no inquiry at all and hence did not record the guilty pleas in the exercise of any discretion (indeed, there was even no indication of any discretion on whether there should be an inquiry), I would allow the appeal and direct a new trial on the charges which were the subjects of the appeal to this Court. I do not think that this is a case for the application of s. 613(l)(b)(iii) of the Criminal Code.

Appeal dismissed, SPENCE and LASKIN J.J. dissenting.

Solicitor for the appellant: Edmund L. Schofield, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

[1] [1969] S.C.R. 181.

[2] (1946), 86 C.C.C. 374.

[3] [1955] S.C.R. 646.

[4] (1923), 17 Cr. App. R. 99.

[5] [1960] S.C.R. 294.

[6] [1954] S.C.R. 606.

[7] [1923] 2 K.B. 400, 17 Cr. App. R. 99.

[8] (1946), 86 C.C.C. 374.

[9] [1969] S.C.R. 181.

[10] (1969), 394 U.S. 459.

[11] (1969), 395 U.S. 238.

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