

JERSEY / JUDGMENT

AG v Donachie [2009] JRC 169A (27 August 2009)

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JUDGMENT

THE commissioner: 1. The defendant has applied to have his plea of guilty vacated. 2. The background is as follows. On the 3rd March, 2009, he was arrested at his home on suspicion of having committed larceny as a servant and was interviewed on the same day. During interview the defendant denied making refunds from the PDQ machine at Chex Limited, Orchard Street, St Helier into his personal bank account. On the 4th March, 2009, the defendant was charged and brought before the Magistrate's Court where he reserved his plea. He was remanded in custody until his next appearance before the Magistrate on the 1st April, 2009. The Court also declined jurisdiction to deal with the case. Messrs Mourants were appointed under the legal aid scheme to act on behalf of the defendant and a bail application was made on the 4th March, 2009 which was successful and the defendant was released on conditional bail pending the committal date. 3. Following advice the defendant agreed to a paper committal, given the evidence contained within the committal bundle, and the case was subsequently committed to the Royal Court on the 15th April, 2009. On receipt of the indictment, in which a general charge had been broken down into 24 counts of larceny as a servant, the defendant was advised as to pleas by Messrs Maurant. Having considered that advice the defendant entered guilty pleas to all of the counts on the indictment on the 15th May, 2009, involving amounts in excess of £14,000. 4. On the 3rd June, 2009 the defendant instructed his lawyers that he was not guilty of the offences. He was asked to reflect on his position and having done so he subsequently instructed his lawyers that he wished to change his plea. As a result the defendant now applies to vacate his guilty pleas to all of the counts on the indictment and to substitute not guilty pleas. 5. It is clear that the defendant understood the nature of the charges and had received legal advice from experienced Counsel over a 6 week period prior to entering into guilty pleas on arraignment. His pleas were unequivocal. 6. In AG v Durkin and Others

[2004] JRC 068, pleas were allowed to be changed, although they were held to be equivocal. The Crown's case had entirely changed. There had initially been one conspiracy involving three people; there were now two, one involving three people and one involving two. The original indictment no longer accurately reflected the alleged criminality. In the case before us there has been no change in the nature of the charges, nor to the evidence against the defendant since pleas were entered. In terms of an unequivocal plea, the Court

stated in Durkin at paragraph 14:- "There is clear authority that the law of Jersey in this respect is similar to that in England, namely that, although there is a discretion to allow withdrawal of an unambiguous guilty plea and its substitution by a plea of not guilty, this is a discretion to be exercised very sparingly, particularly where the plea is entered with the benefit of legal advice (see AG -v- O'Brien (12 th May, 1985) Jersey Unreported, approving a number of English cases including R-v- Drew

(1985) 2 All ER 1061) for a recent decision confirming there is such a discretion and that it is a matter for the trial judge which will not be interfered with by the Court of Appeal unless the judge has misdirected himself or the decision is wholly unreasonable, see R -v- Sheikh

(2004) EWCA Crim 492 ." The defendant, therefore, has to convince this Court that we should exercise our discretion in the light of the fact that it should do so "very sparingly" . Archbold 2008 edition, gives examples of when a plea may be withdrawn which includes circumstances where the defendant was wrongly advised he has no defence, where the prosecution case does not establish the ingredients of the offence, or where there has been a material mistake of fact, as in Donkin v AG

[1991] JLR N 8a. None of this applies in this case. 7. Mourants were correct to advise that a guilty plea provides mitigation. In his affidavit at the end of paragraph 3 the defendant says "I decided to follow my lawyers' advice and enter guilty pleas." He did so of his own free will out of fear of imprisonment. A similar situation arose in R v Bow Street Stipendiary Magistrate ex parte Roche Times, February 5, 1987, when it was held that it was:- "the proper exercise of discretion to reject an application to withdraw a plea of guilty made without the benefit of legal advice, when the magistrate believed the application was made through fear of the imposition of a custodial sentence." (see the extract from Archbold , 4-187). In Roche there was a similar fear to this case, although in Roche the plea was entered without the benefit of legal advice and the Magistrate's refusal to exercise his discretion was upheld. 8. So why has the defendant changed his mind? His affidavit says that he was approached by a former colleague working at the shop, Mr Jamie Ball, in St Helier and quoting from his affidavit he says this at paragraph 7 and 8:- "7. After a while he left but as he was leaving he told me, and I quote as exactly as I can remember "John," who I understand to be the owner of Chex, "knows you didn't do it but because the money was going into your account he didn't want to point the finger at others." Jamie went on to say the following; "I have been smart, I have been doing it but the money has been going into my sister's account."

8. I was stunned when Jamie told me that, I believe that my brother Scott, who was nearby, also heard what Jamie had told me. I remember thinking at the time that in the light of what Jamie had told me I could not risk going to prison for something I had not done." His brother, Scott, has not provided an affidavit. The police have, however, taken a statement from Jamie Ball in which he admits going in to St Helier on the occasion referred to but denies speaking to the defendant. As to what he is alleged to have said he dismisses this as "total rubbish" . 9. The defendant accepts that just over £14,000, belonging to his employer

Chex Limited, was credited to his account over the period from the 25 th May, 2008 to the 4 th February, 2009, and that it was spent. He earns between £14-15,000 a year and does not contest the prosecution assertion that on all but two occasions refunds were made to this account when he had become overdrawn or when the balance fell below £10. We are told by the prosecution that there is also evidence to show that he was using his card at the time of many of the transactions. The defendant's defence appears to be that others were using his card, firstly to pay these refunds into his account and then using his card to spend that money from his account; all of this completely unbeknownst to him. The prosecution say there is no evidence to support any such explanation. 10. Mr Tremoceiro asks us not to follow the Bow Street Magistrates case which he says is "harsh". The defendant has entered into a plea for the wrong reason, fear of imprisonment, and should now be given the opportunity to have the prosecution case tested. That, Mr Pedley says, is not a ground under Jersey or English Law for vacating a plea, and we agree. 11. In our view to allow the defendant's application would be to set at nought the clear policy of the Court that its discretion is to be used sparingly. There are good reasons for this as Mr Pedley points out. There are witnesses in all crimes who need to get on with their lives. A change of plea brings the matter back into uncertainty, and that is particularly so in this case where the defendant is pointing the finger at one of his colleagues, Jamie Ball. Furthermore it prolongs the court process. We have no doubt that this is not a case where our discretion should be exercised in favour of the defendant and the application is refused. Authorities AG v Durkin and Others

[2004] JRC 068 . Archbold 2008. Donkin v AG

[1991] JLR N 8a. R v Bow Street Stipendiary Magistrate ex parte Roche Times, February 5, 1987.

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