

JERSEY / JUDGMENT

HM Attorney General v Jake Marley Robertson

COURT

Royal Court

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Hearing (Criminal) reasons for permitting the Defendant to vacate his plea.

[2022]JRC144

Royal Court

(Samedi)

7 July 2022

Before :

R. J. MacRae, Esq., Deputy Bailiff, and

Jurats Austin-Vautier and Thomas

HM Attorney General

-v-

Jake Marley Robertson

Crown Advocate L. B. Hallam for HM Attorney

General.

Advocate M. P. Boothman for the Defendant.

JUDGMENT

THE DEPUTY BAILIFF: 1. On Friday 10th June 2022 we gave leave to the Defendant to vacate his plea of guilty entered before the Magistrate's Court, whereupon he was arraigned on indictment and entered a not-guilty plea and his case was adjourned for trial. We now give our reasons for permitting the Defendant to vacate his plea. 2. The principles pursuant to which the Court considers such applications were set out in the case of AG -v- F [2020] JRC 039A as follows: "The law and relevant principles involved

11. At customary law the Court had a discretion to allow a defendant to change his plea from guilty to not guilty.
12. That discretion has now been codified under Article 79 of the Criminal Procedure (Jersey) Law 2018 ("the 2018 Law") as follows:- "79 Withdrawal of guilty plea

- (1) A defendant who has entered a guilty plea may at any time, with leave of the court, withdraw that plea.
 - (2) Where the court grants a defendant leave to withdraw his or her guilty plea, the court shall give directions as to the future conduct of the proceedings.”
 13. It was not suggested by either counsel that the codification of the Court’s power to permit a change of plea has altered the principles, as set out in case law, upon which the discretion should be exercised. The approach is that the discretion should be exercised “sparingly”.
 14. In AG –v- Durkin and others [2004] JRC 068, the Bailiff said 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 (12th May, 1985) Jersey Unreported, approving a number of English cases including R-v-Drew (1985) 2 All ER 1061. ...”
 15. It is clear from consideration of similar applications that the Royal Court expects to be furnished with an affidavit sworn by the applicant. In AG –v- Donachie
- [2009] JRC 169A an affidavit was filed by the defendant in which he, inter alia, explained the history of the entry of his plea and why he wished to withdraw the plea. The court observed that a witness to a conversation that the defendant said he had had not provided an affidavit, but the police had taken a statement from that person who denied speaking to the defendant. At paragraph 11 the court said:- “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.”
16. In AG –v- O’Connell [2017] JRC 117 the defendant, as in this case, had pleaded guilty and provided a basis of plea which had been signed by him. The court had before it an affidavit sworn by the defendant, and two affidavits sworn by his previous advocate to which the advocate exhibited notes of meetings with the defendant. The court held at paragraph 11: “The defendant, as we have said, was clear why, despite the advice he had received, he pleaded guilty to Counts 1 and 3 on this agreed basis, mainly so that he could get bail. It was an unequivocal plea on clear legal advice. This is not a ground on which our discretion should be exercised for the reasons set out in the passage we have just quoted from AG – v- Donachie and for those reasons the application was refused.”

17. Criminal Procedure Rules have yet to be made under the 2018 Law laying down the procedure to be followed on applications made to withdraw a guilty plea although, as indicated, it is clear that the court will generally be assisted by an affidavit sworn by the applicant/defendant, and, if necessary, their advocate.
18. We note that under the English Criminal Procedure Rules, it is provided at Rule 25.5 that where a party “wants the court to vacate a guilty plea such a party must:” “(2) (a) apply in writing-
 - (i) as soon as practicable after becoming aware of the grounds for doing so, and (ii) in any event, before the final disposal of the case, by sentence or otherwise; and
 - (b) serve the application on –
 - (i) the court officer, and (ii) the prosecutor
 - (3) Unless the court otherwise directs, the application must –
 - (a) explain why it would be unjust for the guilty plea to remain unchanged;
 - (b) indicate what, if any, evidence the applicant wishes to call;
 - (c) identify any proposed witness; and
 - (d) indicate whether legal professional privilege is waived, specifying any material name and date.”
 19. The relevant Jersey court will always be empowered to give directions tailor-made to the circumstances of each case but, generally, in cases where the court gives directions as to the mode of determining an application to vacate a plea of guilty or (as in this case) where no such directions were sought or made prior to the hearing, we think that the Defendant must:-
 - (i) file with the Court and serve on the Crown an affidavit no less than 14 days before the hearing explaining why it would be unjust for the guilty plea to stand and indicating whether legal professional privilege in respect of representation at the time the plea was entered is waived; (ii) further, at least 7 days before the hearing, the Defendant, if legal privilege is waived or the Defendant has criticised his advocate who represented them when the plea was entered, must file with the court and serve on the Crown an affidavit sworn by the Defendant’s said advocate which responds to the Defendant’s evidence and, if necessary, exhibits records relating to the circumstances in which the guilty plea was entered; and (iii) at the same time, i.e. not less than 7 days before the hearing, file on the Court and serve on the Crown any other evidence by affidavit that the Applicant wishes to call.
 20. All such deponents, including the Defendant’s previous advocate, should be ready to give evidence and, accordingly, the case should be fixed on a date at which such parties are available to give evidence and, if necessary, be cross-examined by counsel for the Crown.

21. Generally it would be difficult in the absence of sworn evidence for the Defendant to persuade the Court to exercise the discretion to withdraw a guilty plea when, as indicated, such discretion is to be exercised very sparingly.” 3. As in the case of AG -v- F, there were two matters for the Court to consider: (i) Was an unequivocal plea of guilty entered; and (ii) If so, should the Court in its discretion permit the plea to be withdrawn? 4. The Defendant, in accordance with appropriate procedure, swore an affidavit on 18th May 2021. The Crown did not adduce any affidavit evidence in response and indeed did not oppose (although do not support) the application. The fact that the Crown does not oppose such an application does of course not mean that the Court will necessarily grant it as it is illustrated by the decision of the Royal Court in AG -v- Chereches [2020] JRC 035. 5. In his affidavit, the Defendant accepts that he used violence when he fought with his brother on 31st July 2021 (which gave rise to the joint allegation of grave and criminal assault) but did so in self-defence/defence of another. He said that he raised self-defence during his first interview on the day of the incident and again during his second interview on 20th October 2021. The Crown has confirmed that this was the case. 6. In the second interview, the Defendant was shown the video footage of him assaulting his brother (on the Crown’s case) which is at the heart of the prosecution case. Accordingly, he could have no doubt of the nature of the Crown’s case against him. 7. The Defendant was charged with grave and criminal assault on 4th March
2022. He did not take legal advice before his first appearance on 24th March 2022, and when attending Court on that day he requested to speak to the duty advocate but was told that there was no duty lawyer service. An usher asked him how he was going to plead and the Defendant said “Not sure, possibly guilty”. The Defendant complains that at the time he entered his plea he had not seen any paperwork except the charge sheet. He claims that he only understood the full nature of the allegation against him once the prosecution advocate summarised the case after the entering of the plea. We do not accept that – he saw the video footage in interview which is the core of the prosecution case. 8. However, the transcript of the hearing that took place before the Relief Magistrate is informative. Having given his name and date of birth and address, the charge was put to him, and he was asked how he was asked by the Relief Magistrate “How do you plead that charge?”. The Defendant replied “I am going to go guilty I believe”. The Relief Magistrate then began to say something – the only word recorded is “You ...” Presumably the Relief Magistrate was going to clarify the Defendant’s plea. Whereupon the Defendant said “Guilty”. The Relief Magistrate repeated “Guilty” and then turned to the prosecutor who said “Thank you Sir. This is a matter where the allegation is the two brothers were involved in a fight in Bonne Nuit. The allegation from both of the participants in the fight is of biting, headbutting and kicking to the head, all of those matters Sir I would take this matter outside the jurisdiction of this Court”. The Crown confirmed the date upon which the defendants were required to appear in the Royal Court and summarised the bail conditions applicable to both defendants whereupon the Defendant said “Am I able to retract my plea and get legal aid then if that’s cool, coz there’s few things in that statement that aren’t actually true”. The Magistrate then asked the Defendant if he wanted to obtain legal aid, to which the

Defendant said that he did because he was “Not happy with some of the things that had been said there”. The prosecution then suggested that “The plea remains, legal aid was obtained and then an application can be made at the next hearing”. This subsequently occurred. 9. In our view, this was not, as was argued, an equivocal plea. The Defendant entered an unequivocal plea of guilty.

10. However, he did ask the Court if he could change his plea to not-guilty within, at the very most, a minute of entering a plea and he had raised the issue of self-defence in both of his interviews. Had the Defendant been represented when he appeared in the Magistrate’s Court, then we would almost certainly have declined to exercise our discretion to permit him to withdraw his plea of guilty; the discretion that we are asked to exercise should be used “very sparingly”. However, the Defendant was unrepresented when he entered a guilty plea and within a very short period of time indeed asked the Court if he could withdraw that plea. He had given an account in both interviews (we do not comment on the strength of the evidence against him) which was inconsistent with a plea of guilty, and in the circumstances, we elected to permit the Defendant to withdraw his guilty plea.
11. Before ruling on this matter, we specifically invited counsel for the Defendant to confirm that it had been explained to the Defendant that the credit to which he would have been entitled to receive by virtue of his early plea would not be available to him if he is convicted by the jury, and thereafter sentenced on that basis. Authorities AG -v- F [2020] JRC 039A. AG -v- Chereches

[2020] JRC 035.

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