B-05-24

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

Ind. No. 87A of 2011

REGINA

V.

JEFFREY ALEXANDER BARNES

Appearances: **Ms. Cheryl Richards Q.C. of the Office of the Director of Public Prosecutions for the Crown**

Mr. Guy Diliway-Parry of Priestleys for the Defendant

Before: **Hon. Justice Henderson**

Heard: **May 24, 2013**

RULING

1. Mr. Barnes is charged with rape and certain related counts. He originally pleaded not guilty to the indictment on February 17, 2012. On October 22, 2012, at the request of defence counsel, Mr. Barnes was arraigned again and pleaded guilty to all three counts.

A transcript of the proceeding shows some considerable degree of reluctance on Mr. Barnes' part at the time the pleas were entered. He now applies to strike his guilty pleas.

2. The case for the Crown is and always has been a strong one. Mr. Barnes' DNA was found on certain vaginal and rectal swabs taken from the victim after the offence. He is facing other similar charges and has a previous conviction for a similar offence.

3. Mr. Barnes was represented at all material times by Ms. Lucy Organ, a competent local attorney, and Mr. John Ryder, Q.C., an experienced criminal practitioner from England.

4. On this application, the case put for Mr. Barnes is that he did not plead guilty freely and voluntarily but succumbed to undue pressure from Mr. Ryder.

5. As I have said, he pleaded guilty on October 22nd. Seven days later, on October 29th, Mr. Barnes advised counsel that he wished to withdraw his guilty plea.

6. Mr. Ryder and Ms. Organ had a consultation with Mr. Barnes at Northward Prison just prior to the entry of the guilty plea. Ms. Organ has explained in her extensive evidence and notes that she had numerous conferences with Mr. Barnes, but I take it that Mr. Ryder himself had just the one conference, on October 21st, and perhaps some abbreviated conversation with Mr. Barnes the following day.

7. Ms. Organ says in her witness statement in part:

> "In particular the findings in relation to the vaginal and rectal swabs from [the victim] were discussed and what Mr. Barnes said in relation to how his semen came to be on those swabs. Mr. Barnes

stated that he understood that the evidence pointed to him. He asked Mr. Ryder Q.C. what he suggested that he do and Mr. Ryder Q.C. said he did not know. Mr. Barnes said he had been drinking all night and had not slept and had no recollection of what happened. He went on to say that he wanted to see what happened the following day and to see if the complainant came and if she did come he told Mr. Ryder to take whatever approach he thought he should take. Mr. Ryder Q.C. asked Mr. Barnes if he was accepting responsibility and said he did not want to push Mr. Barnes that way. Mr. Barnes said he was intelligent and understood that if the complainant came to Court a course should be taken "to protect me". John Ryder Q.C. then said that the following day we would wait and see if [the victim] turned up and if she does would Mr. Barnes be willing to take responsibility and acknowledge the strength of the evidence. Mr. Barnes said "Yes"."

8. Later in her statement, Ms. Organ said:

> "Mr. Barnes then said that if [the victim] did come to Court Mr. Ryder should "approach [the matter] best way you think fit" and that he was "not going to bullshit or make an arse of yourself or me". Mr. Ryder Q.C. said that Mr. Barnes was being responsible and co-operative and it could not be easy. Mr. Barnes said it was not easy but he would survive."

9. Still later Ms. Organ said:

> "I do recall conversation regarding arguing that the DNA evidence had been planted or contaminated and Mr. Ryder saying that there would need to be "some sort of idea of how this could be done" otherwise it would make things worse. The defence expert report on the DNA did not assist us in this regard."

10. Ms. Organ stated her own conclusion from the conversation in this way:

> "I left this conference on the 21st October 2012 with the clear view that if [the victim] (the complainant) attended court the following day then Mr. Barnes intended to plead guilty. I had a conversation regarding this with Mr. Ryder Q.C. while in the car park at H.M.P. Northward and it was clear that was his view too."

11. As Mr. Dilliway-Parry observed in argument, Mr. Barnes' expressed intention cannot have been entirely clear or the conversation with Mr. Ryder, to which Ms. Organ refers, would have been superfluous.

12. Mr. Barnes has sworn an affidavit in which he gives his own recollection of the events to which I have referred. He says at paragraph seven that Mr. Ryder said that the Crown could not locate their witness at that time. He said that apparently the complainant was not on the island:

> "He asked me what I wanted to do if she did turn up. I said go ahead with the trial. He said okay then we'll prepare for tomorrow. We'll see what the judge does if she's not there.
>
> He did say that the only strong evidence that the Court had was DNA.
>
> He said it could be argued that this had been planted but that it would
>
> be difficult because of my previous conviction."

13. Later, Mr. Barnes said in paragraph 10:

> "[Mr. Ryder] said that going to Court and accusing the police of setting me up was not a good defence and that if I go in front of the Court with this argument I will be found guilty. Mr. Ryder also said that, if that happened, given my previous convictions I will be given the maximum sentence which was life."

14. At paragraph 12, Mr. Barnes says:

> "Mr. Ryder told me that if I plead guilty I would get a lesser sentence. I told him I didn't want to do life, because I didn't do anything."

15. The last part of that final sentence is, of course, a denial of guilt. It is noteworthy, that in Ms. Organ's very extensive notes she records no denial of guilt by Mr. Barnes at any time. His position expressed to his attorneys and recorded in Ms. Organ's contemporaneous notes was that he simply had no recollection of the events surrounding the alleged offence.

16. At paragraph 14, Mr. Barnes said, "I said whatever. I don't care anymore. In essence I gave up." At paragraph 18: "Throughout the arraignment I felt under huge pressure, both from my attorneys and the Court." It is entirely unclear what he means by pressure from the Court. At paragraph 19 "When I went down to the cells I immediately regretted bowing to the pressure." Paragraph 20 "The next day (or the day after) I called Miss Organ and told her that I wanted to change my plea again." That conflicts with Ms. Organ's recorded recollection that she received those instructions seven days later.

17. In summary, Mr. Barnes says that he pleaded guilty only with considerable reluctance as he felt under what he termed "huge pressure". He says that he told Mr. Ryder that he "didn't do anything".

18. Ms. Organ's notes do not show that Mr. Barnes ever denied committing the act. He said, "He had been drinking all night and had not slept and had no recollection of what had happened." Her notes do confirm that Mr. Barnes pleaded guilty only with considerable reluctance. I was the trial judge at the time of the plea, and I can confirm observing an air of reluctance on the part of Mr. Barnes when he entered his pleas.

19. I turn to a consideration of the authorities.

20. I have a discretion to allow a defendant to change his plea from guilty to not guilty at any time prior to sentence being imposed. That principle is established firmly in *Parsons v. Recorder of Manchester and Others* [1971] A.C. 481, a decision of the House of Lords.

21. The discretion exists even where the plea of guilty was unequivocal. See in that regard *Reg. v. Dodd* (1982) 74 Cr. App. R. 50, (Court of Appeal). The discretion must be exercised judicially: see *Dodd*. In general, it has been said that the discretion "must be exercised sparingly and circumspectly": see *R. v. Sorhaindo* [2006] WL 1783196, Court of Appeal Criminal Decision.

22. The authorities suggest that the discretion to allow a change of plea would ordinarily be exercised in a defendant's favour if it appears that his plea was entered under a misapprehension about the facts or the applicable law. They also suggest that reluctance on the part of a defendant to plead guilty followed by a change of heart soon after the plea is entered, if unaccompanied by any sort of mistake or misunderstanding, will not ordinarily suffice to justify a change of plea.

23. Lord Lane addressed that proposition in *Regina and Drew* [1985] 1, W.L.R. 914 as follows:

> "It plainly cannot be said that whenever the judge discovers that the plea of guilty is being entered reluctantly he must decline to allow it and instead require it to be treated as a plea of not guilty. Judges no doubt often appreciate that a plea of guilty is being entered reluctantly

> from the mere fact of the accused having earlier pleaded not guilty to the offence. In our judgment only rarely would it be appropriate for the trial judge to exercise his undoubted discretion in favour of an accused person wishing to change an unequivocal plea of guilty to one of not guilty. Particularly this is so in cases where, as here, the accused has throughout been advised by experienced counsel and where, after full consultation with his counsel, he has already changed his plea to one of guilty at an earlier stage in the proceedings."

24. It is sometimes said that a guilty plea must be unequivocal. In a sense that is correct. But the word refers to the way in which the plea is entered and not primarily to the state of mind of the defendant. Thus, if a defendant says he "pleads guilty with an explanation," the Court will wish to hear the explanation before deciding to accept the plea because the explanation may in fact amount to a defence. The defendant may not understand that what he thinks should mitigate the sentence would in law amount to a complete answer to the charge. On the other hand, the mere fact that a defendant is equivocal about whether to admit his guilt or not is not ordinarily a circumstance which vitiates the plea: see the discussion in *Revitt and Others v. DPP* [2006] 1 WLR 3172.

25. Any mental infirmity on the defendant's part will tend to support an application to strike a plea.

26. The absence of legal advice before entry of a guilty plea argues in favour of striking the plea and conversely advice from experienced counsel beforehand is a circumstance favouring dismissal of the application to strike: see *R. v. Peace* [1976] Crim. L.R. 119, Court of Appeal Crim. Div. The Court is reported as having said this:

> "What had to be shown was that the apparent plea of guilty was no plea at all because it was made under pressure or threats or the like in circumstances in which the defendant had no free choice but was

> driven to adopt a certain course whether he liked it or not. It was a little like the situation where an appellant sought to say that an abandonment of his appeal was a nullity: *Medway* [1976] Crim. L.R. 118. In the present case the facts did not make the plea a nullity. A defendant who pleaded guilty following advice of the kind given, albeit he did so unhappily and regretfully, could not be said to have lost his power to make a voluntary and deliberate choice. It would be a serious matter if it were accepted that when counsel gave strong advice indicating the prospect of being found guilty and the alternative of pleading guilty it could be said that the plea was forced on the defendant. It was a question of fact in every case."

27. Thus, counsel is permitted to express his advice to his client in robust terms as long as he is not so overbearing as to suppress the client's ability to choose freely between a guilty plea and a trial.

28. In conclusion, Mr. Barnes does not say he was suffering from any misunderstanding of the facts or the law when he entered his guilty plea. He does not suffer from any mental infirmity. He does not deny guilt directly but says only that he has no memory of what may have taken place at the time of the alleged offence. In this regard, I accept Miss Organ's evidence based on her contemporaneous note. He was well advised by both senior and junior counsel prior to entry of the plea. The case for the Crown was very strong. I do not doubt that Mr. Barnes felt pressure to plead guilty and did so with considerable reluctance. I am also of the view that Counsel's advice to him was expressed assertively but not inappropriately.

29. In these circumstances, I am satisfied that the guilty plea should not be struck. The application is dismissed.

Dated this 24th day of May, 2013

Henderson, J.

Henderson J.
Judge of the Grand Court