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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2
Tuesday, 23rd May 2006

B E F O R E:
LORD JUSTICE GAGE
MR JUSTICE FORBES
MRS JUSTICE COX DBE

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R E G I N A

-v-

CHRISTOPHER SORHAINDO

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MR A HILL appeared on behalf of the APPELLANT
MR R BEYNON appeared on behalf of the CROWN

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J U D G M E N T
(As approved by the Court)

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1. LORD JUSTICE GAGE: On 23rd June, at the Snaresbrook Crown Court, this appellant faced a five count indictment. The first two counts charged him with supplying a Class A drug. The third, fourth and fifth counts charged him with, in count 3, possessing criminal property; count 4, concealing property; and count 5, attempting to obtain property by deception. On 24th June, at the close of the prosecution case, on the direction of the judge, the appellant was found not guilty of counts 1 and 2. Verdicts of not guilty were then entered. He was jointly charged with Geeta Jethva, his partner. She was acquitted of all charges.

2. On 24th June, following his acquittal on the first two counts on the indictment, the appellant pleaded guilty to counts 3, 4 and 5. On 29th June he was sentenced on count 3 to two years' imprisonment; count 4, no separate penalty; count 5, nine months' imprisonment consecutive to count 3; a total sentence therefore of 2 years and nine months. As we have said, he was jointly charged with his partner, but she was acquitted of all charges on the judge's direction.

3. This appellant now appeals against conviction and sentence by leave of the single judge. The sole ground of appeal is that the judge wrongly refused to permit the appellant to vacate his plea of guilty entered by him on 29th June 2005.

4. The facts are as follows. On 7th October 2003 police officers stopped a motor vehicle and spoke to a passenger, Jerome Grant. The police eventually took him to the police station, and during a search Grant tried to flush two packages down a toilet. Those packages contained crack cocaine and heroin wrapped in clingfilm. On forensic examination the appellant's DNA was found on one of the pieces of clingfilm.

5. On 23rd April 2004 police officers, executing a search warrant at 7b Whitta Road, where the appellant lived, found him present and eventually arrested him. The house was shared by him and Miss Jethva, his co-defendant and partner. Both were searched. During the search a Tesco carrier bag was found behind a cushion of a leather armchair in the living room. The bag contained approximately £11,000 in cash. Some cash was also found on the top of a fridge in the kitchen. The cash was analysed. After examination a large amount of the notes were found to contain diamorphine that was greater than typically found in bank notes in general circulation. Documents were also found which led to the charge of attempting to obtain a mortgage by deception - that was count 5. There is no appeal in respect of his conviction on that count.

6. In relation to the money that was found in the flat, Miss Jethva was questioned about it when she arrived at the house. She said that it was hers. She also said that a Mercedes CLK sports car found outside belonged to her.

7. The appellant was asked questions about the money at the police station. He said it was not his but belonged to Miss Jethva. He was further interviewed concerning the presence of DNA and explained that, as he was friendly with Jerome Grant's mother at the time, it was possible that his DNA could have got onto the clingfilm while, for example, he was cooking at their flat. He said that the Mercedes car belonged to Miss Jethva and that her father had helped her to purchase it.

8. During a subsequent interview on 5th July 2004, the appellant accepted that he had initially told the police that the money belonged to Miss Jethva, but in fact he said that the money was earned by him from promoting a series of raves at the Waterfront Bar. The reason that he told the police it belonged to Miss Jethva was because he had signed on for benefit and did not want to get into any more trouble than he was already in. He said that the money found in the kitchen belonged to Miss Jethva and it was her driving money.

9. We come to the trial. The Crown's case was that the money was the proceeds of drugs. Its case was that the money could not have come from raves because the security at the Waterfront Bar was such that no heroin was used at the premises. The Crown relied on the amount of diamorphine found on the notes.

10. At the end of the prosecution case submissions were made of no case to answer. The judge held that there was no case to answer in relation to the two counts of supplying Class A drugs. It was on his direction at that stage that the jury found the appellant and Miss Jethva not guilty of counts 1 and 2. There was then an interval during which time legal advice was given by the appellant's representatives to him. We are told there was much discussion and as a result of those discussions the appellant changed his plea on counts 3, 4 and 5 to guilty. His pleas to the money laundering counts, namely counts 3 and 4, were on the basis that the money that was found at 7b Whitta Road derived from raves which he had promoted at the Waterfront Bar on four dates between 31st December 2003 and 3rd April 2004. The basis for his written plea was reduced into writing and signed by him on 24th June 2005. In the material part it reads:

> "I have pleaded guilty to counts 3 and 4 of the indictment (money laundering).
>
> I have done so on the basis that the money that was found at 7b Whitta Road was derived from raves which I promoted at the Waterfront Bar on the following dates:- 31st December 2003, 7th February 2004, 6th March 2004 and 3rd April 2004.
>
> I dispute that the money found was in any way connected or associated with the supply or possession of drugs.
>
> I do accept that at the time that I received payments for these events that I was receiving disability benefit of £75 a week."

That basis of plea was reduced to writing and handed to the judge.

11.The judge, having seen the basis of the plea, queried whether it amounted to an offence under the Proceeds of Crime Act 2002. He asked for submissions to be made to him. Both counsel for the prosecution and the defence submitted that the money found in the house was capable of being criminal property for the purposes of the Act on the basis of the plea put forward by the appellant. The judge, having heard submissions, held that the basis of plea as it stood did not amount to such an offence. In the judgment of this court, he was correct to find as he did: see the case of R v Gabriel [2006] EWCA Crim 229. It is accepted before this court that, in view of Gabriel, the judge's decision was correct.

12.The judge then went on to take the view that, in the absence of a valid basis of plea, he would sentence the appellant on the basis of the prosecution case, namely that the money found was connected with drugs. However, before sentencing the appellant, an application was made on his behalf to withdraw his guilty plea. It was made on the basis that it was clear from the purported basis of plea that the appellant did not accept the Crown's version of events and therefore did not intend to plea guilty on that basis.

13.The appellant was called to give evidence. During his evidence he said, amongst other things, that when he pleaded guilty he relied upon the advice that was given to him and, save for that advice, would not have pleaded guilty on the basis that he did. He certainly did not agree with the prosecution's case that the money was associated with drugs. Having heard his evidence and submissions made to him on behalf of the appellant, the judge refused to permit the appellant to vacate his pleas. In his ruling, he said (at page 12 letter F):

> "When giving evidence the defendant repeated on at least six occasions that his counsel had told him that the jury were bound to find him guilty, a startling proposition because it is a well-known rule of law, and I will be extremely surprised if this defendant's representative told him that the jury can, effectively having heard the case on a basis put forward by the Crown, then go to their room and come back and find him guilty on a totally different basis that had not been conducted in court. Indeed, there is ample authority to say that that couldn't be done and, even if the prosecution were to put it forward, the defence could object to it and the judge would have stopped it."

Later on in his ruling he said (page 14 letter F):

> "I remind myself that it is my discretion whether to allow him to change his plea. I also remind myself that that discretion ought to be judicially exercised and I hope I have done that. I remind myself of what the issues are, the factual issues, that were raised at a rather late stage vis-a-vis any finding or any plea of guilt.
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> At the end of the day, I am firmly of the view that this is not a genuine plea, saying 'I misunderstood the nature of the plea'. I find that it is not genuine to say, 'Because I thought, as it were, that by having a Newton hearing, I could put forward an alternative matter'."

Accordingly, as we have said, he refused to allow the appellant to change his pleas back to not guilty.

14.The short and simple ground of appeal against conviction is that the judge was wrong to refuse to permit the appellant to vacate his guilty pleas. Counsel for the appellant submits that the judge exercised his undoubted discretion wrongly and unreasonably.

15.There is no doubt that a judge has a discretion to permit a defendant to change his plea of guilty, even when he has been found guilty by a jury having himself tendered such a plea. However, for obvious reasons, the discretion to allow a defendant to vacate a guilty plea must be exercised sparingly and circumspectly.

16.In the case of R v Sheikh and others [2004] 2 Cr App R 228, Mantell LJ, giving the judgment of the court at paragraph 16, page 232, said:

> "It is well accepted that quite apart from cases where the plea of guilty is equivocal or ambiguous, the court retains a residual discretion to allow the withdrawal of a guilty plea where not to do so might work an injustice. Examples might be where a defendant has been misinformed about the nature of the charge or the availability of a defence or where he has been put under pressure to plead guilty in circumstances where he is not truly admitting guilt. It is not possible to attempt a comprehensive catalogue of the circumstances in which the discretion might be exercised."

17.Here the judge, having heard the appellant give evidence, concluded that his decision to plead guilty and raise a different basis for his guilty pleas than on the facts alleged was a sham and simply a means to avoid the full consequences of his unequivocal plea.

18.For the respondent, Mr Beynon submits that, having heard the appellant give evidence, the judge was quite entitled to exercise his discretion in the way in which he did. He submits that he was entitled to reject the appellant's evidence and was entitled to find that his pleas, on the basis of plea put forward, was a sham. He refers to the fact that the appellant had the benefit of an advice from counsel and that his plea was unequivocal. Reliance is placed by Mr Beynon on the court's decision in R v Sayed and others [2005] EWCA Crim 2386.

19.We have carefully studied the judgment of the court in Sayed. It is right to say that the facts are rather different from the facts in this case. Mr Beynon concedes that that is so. At paragraph 34 of the judgment in Sayed, the court said:

> "In the present case it was not disputed (1) that the plea was unequivocal, (2) that Sykes had had a full opportunity to reflect upon it before entering it, (3) that he had the benefit of appropriate advice, (4) that he is of at least average intelligence, (5) that he was completely capable of understanding what the charge involved and what the consequences of a plea of guilty were and (6) he was not mistaken or in ignorance of those consequences. Nor, indeed, was any improper pressure alleged by Sykes on the part of the judge or his lawyers or by the prosecution."

The court went on in a later passage in the judgment to refer to facts found by the judge, adding this:

> "The position is that the appellant Sykes never gave any indication what his true defence to this allegation was in the event that he was permitted to vacate his plea."

20. We recognise the force of the submissions made by Mr Beynon and others that he has put before the court in his skeleton argument. However, the facts of Sayed are different from this case. The appellant in that case, as is clear, had never put forward what his true defence was. In this case the difference is that, rightly or wrongly, the appellant all along said that the money found in his house was money obtained from raves. This was his defence which he put forward throughout in response to the prosecution case. It was only when he was advised that it did not amount to a defence to counts 3 and 4 that he changed his plea.

21. In our judgment, there can be no doubt that he was advised at the close of the prosecution case that his version of how he acquired the cash did not provide a defence to counts 3 and 4, although that was not the way that the case was put against him by the prosecution. Both defence counsel and the prosecution counsel argued that his basis of plea did not provide a defence to these two counts. The judge rejected these submissions, and we have already said that in our judgment he was right to do so. But having done so, the judge appears to have given no weight to the fact that the appellant had manifestly pleaded guilty on the basis of wrong advice. In the circumstances it seems to us very difficult to find, as the judge did, that the appellant was, by his plea, acknowledging unequivocally that the money found in his house was the proceeds of crime involving drugs.

22. There is also before this court, that was not before the judge, letters from defence counsel at trial and the appellant's solicitors, disclosing the advice which was given to the appellant. Defence counsel at trial states that it was made clear to the appellant that he must make up his own mind whether to plead guilty. He was told that the prosecution would continue to assert the case that the money was connected with drugs and that the judge might direct a Newton hearing. Defence counsel wisely asked the appellant to endorse his brief before pleading guilty. What was endorsed on counsel's brief was as follows:

> "I, Christopher Sorhaindo, wish to plead guilty to Counts 3 and 4 (Money Laundering) and Count 5 (att. deception). In relation to counts 3 and 4 I do so on the basis that I was earning money from organising raves (events) and receiving state benefits (disability benefit at 75 pw) at the same time. I understand that the judge may not accept my version of events and may wish to hear further evidence to decide whether he accepts my version. I make this decision of my own free will taking into account the advice of my legal representatives."

23. The advice given to him, as the judge found, was erroneous. However, there is, in our judgment, a considerable difference between a defendant acknowledging guilt in respect of cash acquired as a result of criminal activity involving drugs and acknowledging guilt on an alternative basis which the judge subsequently found did not amount to a crime. In the circumstances, although the judge rejected the appellant's evidence, we have concluded that the exercise of his discretion was flawed in that he failed to give any, or at any rate any sufficient, weight to the fact that the appellant had been given erroneous advice.

24. This matter was considered by two different judges when considering the appellant's application for leave to appeal. The single judge who granted leave referred to the fact that the judge had correctly ruled that the basis of the plea did not amount to a guilty plea, and went on:

> "Once he had so ruled [that is the judge], he had - in effect - decided that the defendant had entered his plea as a result of erroneous legal advice and he should, therefore, have acceded to an application by the applicant to vacate his plea.
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> In fact, the judge refused to do so, basing his decision on the cogency of the evidence against him. This had a number of unfortunate consequences: first, it denied the applicant the right to have those matters tried by a jury. Secondly, it allowed the defendant to plead guilty upon a wholly different basis to that asserted by the prosecution. Thirdly, it gave rise to the judge sentencing the defendant on a wholly different basis to that which he admitted.
>
> With hindsight, one can see that a better course would have been to have required - and considered - the basis of plea before discharging the jury."

25. With those observations this court agrees. In our judgment, this is one of those rare cases where not to allow a defendant to change his plea might work in an injustice. Accordingly, we have concluded in the circumstances that this conviction cannot be regarded as safe and we quash it.

26.LORD JUSTICE GAGE: Are there any applications?

27.MR BEYNON: My Lord, yes. There has been a confiscation order. Clearly, ancillary matters such as those are important, particularly where Class A drugs are concerned. Although we obviously give consideration to the length of sentence, we would invite the court to order a re-trial on those counts.

28.LORD JUSTICE GAGE: He is obviously still in custody.

29.MR BEYNON: He is, he is due shortly to be released, I gather. If it were for that matter alone it perhaps would not be the application, but there are confiscation issues that clearly we would submit are important.

30.LORD JUSTICE GAGE: Yes, I see. Mr Hill?

31.MR HILL: My Lords, yes.

32.LORD JUSTICE GAGE: You cannot really resist that, can you?

33.MR HILL: I cannot resist the application that has been made. May I say the appellant had been on bail running up to his trial of course.

34.LORD JUSTICE GAGE: We will think about that. You are asking for bail now, are you?

35.MR HILL: Yes, indeed. I do not make any submissions about the Crown's position as to re-trial. I think in the circumstances I cannot oppose that matter.

36.LORD JUSTICE GAGE: No. Do you want to say anything about bail, Mr Beynon?

37.MR BEYNON: I have no submissions, my Lord.

38.LORD JUSTICE GAGE: We will go and consider that for the moment.

(The court adjourned for a short time)

39.LORD JUSTICE GAGE: You do not resist an application for bail, Mr Beynon?

40.MR BEYNON: No, my Lord.

41.LORD JUSTICE GAGE: What were the terms of his bail before?

42.MR BEYNON: They may have been unconditional.

43.MR HILL: 7b Whitta Road, a condition of residence.

44.LORD JUSTICE GAGE: He should live at his address at 7b Whitta Road. Any other conditions?

45.MR HILL: No other conditions.

46.MR BEYNON: We will allow the appeal, quash the convictions, that is to say convictions on counts 3 and 4. He has already served, presumably, nine months?

47.MR HILL: He has, indeed.

48.LORD JUSTICE GAGE: We specify that the count 3 and 4 offences should be re-tried. We direct a fresh indictment be preferred. We direct that he be re-arraigned on the fresh indictment within two months and that the re-arraignment takes place at a venue to be directed by the senior presiding judge of the South Eastern Circuit. We direct that he be admitted to bail now on the terms as before, namely that he lives at 7b Whitta Road, Forest Gate, E7.

49.You will want a representation order for the re-trial?

50.MR HILL: Thank you, yes.

51.LORD JUSTICE GAGE: We direct that the defence have a representation order for the re-trial.

52.MR HILL: May I ask the court's forgiveness. It is Manor Park, not Forest Gate, E12, I apologise.

53.LORD JUSTICE GAGE: Thank you very much.