SCCRC Scottish Criminal Cases Review Commission

Position Paper

Pleas of Guilty

Introduction

1. A person is entitled to appeal against a conviction where that conviction has proceeded upon a plea of guilty. That such an appeal is competent was recognised in Macdonald[1], which provides examples of pleading to an incompetent charge or under error as to the true nature of the charge. At least since *Paul v HMA*[2], where the appellant claimed that he had been under a misunderstanding as to the nature of the charge to which he had pled guilty, it has been recognised that the court may allow an appeal which has followed upon a plea of guilty and quash the resultant conviction. More recently, the court has been prepared to consider an appeal following upon a plea of guilty based upon additional evidence concerning the appellant's mental state at the time of the offence, it being conceded by the Crown that an assertion of miscarriage of justice would overcome any question of competency (*Carrington v HMA*)[3]. The grounds on which a plea of guilty may be withdrawn fall to be determined at common law.

2. The Commission has received three applications for review of conviction following upon a plea of guilty that have resulted in successful referrals to the High Court. In the first case the applicant was convicted of a charge of shoplifting and received a fine of £50. She was not present at the District Court at the time of her conviction and the court proceeded on the erroneous basis that she had pled guilty in writing to the offence. She had been offered the option of paying a fiscal fine in the amount of £25 but her payment was late as she had been away from home for a few weeks. She subsequently received a Complaint along with a reply form which gave her the option of pleading not guilty or of pleading guilty and providing an explanation. She provided an

[1] *Criminal Law* (5th ed) (at page 356)
[2] 1914 1 SLT 82
[3] 1994 SCCR 567 at page 571

explanation for not having paid the original fine timeously. The court took this to be a guilty plea and she was convicted. The Commission referred the case on the basis that the applicant did not enter a plea or at least did not intend to enter one and that had the applicant's case proceeded to trial she may have been acquitted.

3. **In the second case the applicant who was not legally represented was convicted of driving without an MOT certificate and driving without insurance. He ticked the box in the court-issued pro forma indicating that he wished to plead guilty but explained in the body of his reply form that he did indeed have valid motor insurance on the date libelled. The Commission considered that in these circumstances a plea of guilty should not have been recorded and that this error had led to a miscarriage of justice.**
4. **The third and most recent case, that of *Duncan Stewart*[4], is the subject of a published case report. The Commission discusses it further below.**

5. **In spite of these rare examples of successful appeals, reviews of conviction[5] arising from guilty pleas do not often result in referral. Indeed, the Commission refuses a significant majority of such cases at stage 1[6] as a result of the failure of the applications to engage adequately with the principles outlined below.**

The Commission's position

The Leading Authorities

6. **The legal position in relation to the withdrawal of a guilty plea is well established. This was summarised and clarified by the Lord Justice Clerk (Ross) in the case of *Healy v HMA*[7] and by the Lord Justice Clerk (Gill) in the case of *Reedie v HMA*[8]. In the case of *Healy* the appellant claimed that, despite having met her solicitor to discuss the charges which she faced, she did not fully**

[4] 2018 SLT 25
[5] The principles outlined in this paper do not apply to reviews of sentence.
[6] Further information about the Commission's stage 1 criteria may be found in the position paper "Referrals to the High Court: The Commission's Statutory Test"
[7] 1990 SCCR 110
[8] 2005 SCCR 407

understand the nature of the charges to which she was pleading guilty and had not therefore given informed consent in relation to the plea tendered. The decision of the court stressed that it was a recognised principle of law that there must be some finality in litigation and that:

"…it would not be in the interests of justice if individuals after they had been sentenced were permitted lightly or easily to withdraw pleas of guilty which had been tendered merely by asserting that on their part there had never been any real willingness to make the plea."

7. **It was held that, in order to quash the conviction, it would have to be shown that the plea had been tendered under some real error or misconception, or in circumstances which were clearly prejudicial to the accused. The appellant claimed that she had not properly understood the relevant legal procedure. The court, however, was satisfied that she must have understood what was meant by pleading guilty to a charge. The alterations to the indictment by way of deletion suggested that the sheriff would have made the applicant aware of the terms of the charges. The court held that where an individual has a charge read over to her and has confirmed that she pleads guilty, the only reasonable conclusion that can be drawn is that she willingly accepts the allegations in the charge.**

8. **The court returned to this subject in *Reedie,* where the Lord Justice Clerk (Gill), at paragraph 11, stated:**

"A plea of guilty constitutes a full admission of the libel in all its particulars (Healy v HM Advocate). It is not a conditional admission that is subject to reconsideration in light of a subsequent decision of the court (*Dirom v Howdle* 1995 SCCR 368), nor, in our view, in the light of a subsequent verdict in the trial of another party on the same charge. In view of the conclusive nature of such a plea, it can be withdrawn only in exceptional circumstances (*Dirom v Howdle*): for example, where it is tendered by mistake (*MacGregor v MacNeill* 1975 JC 54) or without the authority of the accused (*Crossan v HM Advocate* 1996 SCCR 279). There is little scope, if any, for the

withdrawal of a plea that has been tendered on legal advice and with the admitted authority of the accused (*Rimmer, Petitioner*)[9]".

9. It was made clear at paragraph 14 that:

"The court must proceed, in our view, on the principle that an accused who pleads guilty as libelled to a crime does so because he committed it."

General Principles

10. Having considered the relevant authorities, the Commission considers that the following general principles may be taken from them:

- **The finality of legal proceedings being an important legal principle, the court will generally proceed on the basis that a person who pleads guilty to a charge accepts that he has committed the relevant crime[10] ;**

- **A conviction which has resulted from a plea of guilty will only be quashed in exceptional circumstances, for example where it can been shown that the plea was tendered under some real error or misconception, or in circumstances which were clearly prejudicial to the accused[11];**

- **In considering whether there has been any misunderstanding by an accused in relation to the charge to which he is pleading guilty, relevant considerations will be whether there have been any deletions to the charge, whether he was legally represented and whether the plea has been confirmed with the accused by the trial judge[12] ;**

- **A conviction which has resulted from a plea of guilty will not normally be quashed where the error which is relied upon results from a failure by**

[9] 2002 SCCR 1
[10] *Healy v HMA; Reedie v HMA*
[11] *Healy v HMA*; *Reedie v HMA*; *Dirom v Howdle* 1995 SCCR 368*; MacGregor v MacNeill* 1975 JC 57; *Crossan v HMA* 1996 SCCR 279*; Gallagher v HMA* 2010 SCCR 181; *Slater v HMA* 1987 SCCR 745; *Blockley v Cameron* 2013 SCCR 181; *McGough v Crowe* 1996 SCCR 226
[12] *Healy v HMA*

an accused to instruct his solicitor or counsel in relation to information within his control[13] or from an expectation by an accused of a lesser sentence[14] ;

- Where there has been a plea of guilty, the question is always whether the tests in *Healy v HMA* and *Reedie v HMA* are satisfied. This is the case even if there is fresh evidence to suggest that the plea ought not to have been tendered[15] .

- The principles set out in *Anderson v HMA*[16] as to defective representation have no application in the context of a prosecution resolved by a plea of guilty[17].

Legal Advice/Change of Law Cases

11. In *Dirom v Howdle*, the complainer in a bill of suspension sought to have quashed a conviction resulting from a guilty plea to a charge under the Dangerous Dogs Act 1991. She argued that if her solicitor had been aware of the decision of the court in another, at the time of the plea unpublished case dealing with the same section, he "*might* have offered different advice…on the basis that she *might* have had a defence". In declining to pass the bill, the court noted that the solicitor did not require access to the decision in the other case to advise the complainer that she was entitled to put the defence. Although the complainer may have been "in error as to the effect of the law", the circumstances were not sufficiently "special" to justify granting her the remedy she sought.

12. In *McLean v HMA*[18], the court refused an appeal following the decision in *Cadder v HMA* in which the appellant argued that he would not have been advised to plead guilty if he had known that his police statement was

[13] *Pirie v McNaughton* 1991 SCCR 483 although cf *Boyle v HMA*1976 JC 32
[14] *Whillans v PF Edinburgh* [2010] HCJAC 91
[15] *Ashok Kalyanjee v HMA* [2014] HCJAC 44
[16] 1996 SCCR 114
[17] *Pickett v HMA* 2007 SCCR 389. See the Commission's position paper "Defective Representation" at paragraph 3
[18] 2011 SCCR 507

inadmissible. The court on that occasion stated that there was "no practice…under which an accused person, having tendered a plea of guilty following a judicial ruling, can have his conviction set aside if that ruling is subsequently overturned."

13. **The Commission's *Stewart* referral provides a counterpoint to *Dirom* and *McLean.* The appellant had pled guilty to a charge under s3ZB of the Road Traffic Act 1988 of causing death whilst driving when disqualified and uninsured. At the time, the authorities suggested that that offence did not require fault (in relation to standard of driving) on the part of the driver. The Crown, defence and sheriff proceeded on this basis. There was no suggestion that the appellant's had been at fault in respect of the quality of his driving. Subsequently, the Supreme Court held that an element of fault was necessary to constitute the offence. The court in *Stewart* first distinguished the comments in *McLean* on the basis that any change in that instance was to the adjective rather than substantive law. The court acknowledged that the legal professionals had been entitled at the time of the guilty plea to the view that the law did not favour the applicant's position. It considered that this amounted to a substantial error or misconception, and quashed the conviction.**

14. **Accordingly, it appears to the Commission that a change to the substantive law may render an earlier plea a "real error or misconception". What is required, however, is something more than the sort of judicial clarification of an area of law that had become available subsequent to the plea in *Dirom.***

Example Cases

15. **The following are examples of circumstances which have led to the quashing of a conviction following upon a plea of guilty:**

    - **Where the appellant had been approached on behalf of his co-accused's solicitor and had been persuaded to allow that solicitor to act for him and to tender a plea of guilty on his behalf – *McGough v Crowe*[19];**

[19] 1996 SCCR 226

- **Where there had been a misunderstanding as to the plea being tendered on behalf of the appellant, resulting in an ambiguous verdict – *Slater v HMA*[20];**
- **Where the appellant was advised by her solicitor to plead guilty at a hurried first meeting in the street on the morning in which she was due in court – *Gallagher v HMA*[21];**
- **Where hurried, dubious legal advice was provided to the appellant outside the courtroom, with no explanation that it was not necessary to enter a plea of guilty at the hearing that followed, or that it would be difficult to withdraw if tendered – *Blockley v Cameron*[22].**

16. **The following are examples of circumstances which have not led to the quashing of a conviction following upon a plea of guilty:**

- **Where the appellant had been legally represented but, due to his own inattention, had failed in his own duty to give proper instructions to his solicitor with regard to a possible defence – *Pirie v McNaughton*[23];**
- **Where the appellant was charged with dangerous driving and pled guilty in the belief that he was charged with speeding but did not seek to withdraw his plea on being informed by the sheriff of the terms of the charge and the possible disposal prior to sentencing. No real error or misconception. – *Bieniwoski v Ruxton*[24];**
- **Where the appellant's solicitor had advised him to plead guilty to a charge of attempted murder in view of the overwhelming evidence against him and the appellant submitted at appeal that he had acted under duress and had been wrongly advised. The solicitor had discharged his professional duties correctly – *Duncan v HMA*[25];**
- **Where the appellant pled guilty to a charge of breach of the peace in circumstances that may not, it was argued, have amounted to the crime. There was no real error or misconception, and as the charge amounted**

[20] 1987 SCCR 745
[21] 2010 SCCR 636
[22] 2013 SCCR 181
[23] 1991 SCCR 483
[24] 1997 SLT 1173
[25] 2009 SCCR 293

to a crime under the law, there was no clear prejudice such as to amount to a miscarriage of justice. – *Bowes v McGowan*[26];

- Where the appellant had been labouring under a misapprehension as to the severity of the sentence that he could expect to receive – *Whillans v PF Edinburgh*[27];
- Where the appellant who had pled guilty to the murder of his two sons sought substitution of a conviction for culpable homicide on the basis of fresh evidence that at the material time his responsibility was diminished by reason of a personality disorder – *Ashok Kalyanjee v HMA*[28].

Specific Considerations

17. Where an applicant applies to the Commission for a review of conviction having previously tendered a plea of guilty, he should explain to the Commission why he believes that there are exceptional circumstances justifying the acceptance of his case for review. If he fails to do so, it is unlikely that his case will be accepted for a stage 2 review.
18. In considering whether an applicant may have suffered a miscarriage of justice following upon a conviction resulting from a guilty plea the Commission is likely to require the defence papers in order to ascertain the applicant's instructions, the advice he received in relation to his guilty plea and the circumstances in which he pled guilty. It may also need to interview the representatives to gather their recollections.

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[26] 2010 SCCR 657
[27] [2010] HCJAC 91
[28] [2014] HCJAC 44