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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 207



No. 202102373 A3

Royal Courts of Justice

Thursday, 27 January 2022

Before:

LORD JUSTICE POPPLEWELL

MR JUSTICE GOOSE

HER HONOUR JUDGE ALICE ROBINSON RECORDER OF NORWICH

REGINA

V

SCOTT DALE

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MR D. LISTER appeared on behalf of the Appellant.

**J U D G M E N T**

LORD JUSTICE POPPLEWELL:

- 1 The sole issue in this appeal against sentence is whether the appellant should have received credit of one third for his guilty pleas, rather than the 25 per cent applied by the judge.
- 2 Cheshire police received reports of the theft of a cash machine, which included a description of a white van. When officers found a white van matching that description, it was parked next to the appellant's Land Rover. The appellant approached the officers, identified himself and said that the Land Rover was his. Officers searched the appellant and found a quantity of cash and a mobile phone. The Land Rover was also searched and officers discovered a wallet containing banknotes and further banknotes underneath the wallet which were tied with elastic bands. In the boot of the vehicle, officers found a holdall bag containing further banknotes and a food container that contained pressed white powder and a food bag containing snap bags. The powder was field tested and showed a positive indication for cocaine, with a total weight of 19.8 grams. At standard purity, the cocaine would have had a street value of between £840 and £1,400. The total amount of cash seized was £46,755.
- 3 The appellant was arrested and answered no comment to all questions in interview. He was charged with two offences:
  1. Possession of cocaine with intent to supply contrary to s.5(3) of the Misuse of Drugs Act 1971.
  2. Possessing criminal property contrary to s.329(1)(c) of the Proceeds of Crime Act 2002.
- 4 He came before the Cheshire Magistrates' Court on 1 May 2021. His solicitor filled in the relevant part of the Better Case Management form. In the box which asks "Pleas (either way) or indicated pleas (indictable only) or alternatives offered," the answer given for each offence was "NI - will be guilty plea on a basis - cannot be considered by CPS today - no funding for trial of issue on committal for sentence."
5. Where an adult comes before the Magistrates' Court on an information charging him with either way offences, the procedure which the relevant provisions in the Crime and Disorder Act 1998 and the Magistrates' Court Act 1980 require to be adopted by magistrates is that the accused must be present, the court must explain to the accused in ordinary language that he may indicate whether, if the offence were to proceed to trial, he would plead guilty or not guilty and that if he indicates that he would plead guilty, the court must proceed as mentioned in s. 17A(6) of the 1980 Act (summary trial on the basis of guilty pleas) and that he might be committed for sentence if the court were of the opinion that its own sentencing powers were insufficient. Section 17A(5) requires the court then to ask the accused whether, if the offence were to proceed to trial, he would plead guilty or not guilty and subsection (6) provides that if the accused then indicates that he would plead guilty, the court will proceed as if the proceedings constituted from the beginning the summary trial of the information and as if a guilty plea had been entered. We assume that that procedure was adopted in this case and indeed Mr Lister, on behalf of the appellant, confirmed that we should proceed on that basis. It is therefore to be assumed that the appellant in this case was personally asked for his indication of plea and that he told the magistrates that he would plead not guilty, or at least did not give an indication that he would plead guilty.
- 4 The magistrates then committed the case for trial, pursuant to s.51 of the Crime and Disorder Act 1988. A Plea and Trial Preparation Hearing took place in the Crown Court on 1 June 2021 at which the appellant was arraigned. He entered pleas of guilty on a written basis of plea, which was produced on that day. The matter was then adjourned for two

weeks to enable the prosecution to consider the basis of plea. When it came back for a mention on 17 June 2021, the Crown indicated that the basis of plea was not acceptable and the matter was listed for a Newton hearing on 22 July 2021. Shortly after the mention hearing the defence indicated to the prosecution that the basis of plea would not be maintained. The appellant was subsequently sentenced to a total of four and a half years' imprisonment on the basis that an appropriate sentence after a trial would have been six years. No challenge is made to the appropriate length of sentence after a trial.

5 The Sentencing Council definitive guideline on "Reduction in sentence for a guilty plea" ("the guideline") sets out the principles a court should follow in reducing the punitive aspects of a sentence by reason of guilty plea. It focuses on the stage at which a guilty plea is indicated, not when it is entered. It draws a clear distinction between an indication at the first stage of proceedings, which attracts a one third discount, and a plea indicated after the first stage, which subject to specific exceptions in the guideline which are not material to this appeal, attracts a discount of no more than 25 per cent. The first stage is identified as normally being the first hearing at which a plea or indication of plea is sought and recorded by the court. In this case, as in most cases, that is at the first appearance in the Magistrates' Court.

6 The rationale for the reduction of sentences for guilty pleas is reflected in Section B of the guideline in the following terms:

"Although a person is entitled not to admit the offence and to put the prosecution to proof of its case, an acceptance of guilt:

1. Normally reduces the impact of the crime upon the victims;
2. Saves victims and witnesses from having to testify; and
3. Is in the public interest in that it saves public time and money on investigations and trials.

.....

The purpose of reducing the sentence for a guilty plea is to yield the benefits described above."

7 In *R v Hodgkin* [2020] EWCA Crim 1388, this Court reviewed a number of cases in which the indication which was given in the Magistrates' Court was that a guilty plea was "likely". It held that such an indication could not attract a one third discount because it was equivocal. What was required to attract the one third discount was an unequivocal indication of a guilty plea at the first stage. That approach was endorsed in the recent decision of this Court in *R v Plaku* [2021] EWCA Crim 568; [2021] 4 WLR 82 in which the court again said at [26(i)] that what was required was an unequivocal plea of guilty.

8 What is here meant by "unequivocal" is not determined by whether there is, or is to be, a basis of plea. It is trite law that the admission comprised within a guilty plea is to the offence and not necessarily to all of the facts or inferences for which the prosecution contend: see for example *R v Cairns* [2013] EWCA Crim 467; [2013] Crim App R (S) 73. Absent a basis of plea, that is an acceptance of guilt on the basis of the prosecution case. A plea of guilty on a basis is an acceptance of guilt of the offence charged, but an assertion of circumstances which are or may be relevant to sentencing. Such a plea is not prima facie equivocal as to guilt. It is an acceptance of guilt which will result in a conviction. The basis need not necessarily be identified prior to entering or indicating a plea.

- 9 *Hodgin* was concerned with an offence of conspiracy, which is triable only on indictment. The appellant in this case was charged with either way offences: see s.25 and Sch.4 of the Misuse of Drugs Act 1971 and s.334 of the Proceeds of Crime Act 2002. In indictment only offences there can be no entry of plea at the Magistrates' Court because there can be no trial there, and the indication required in order to attract a one third discount is of a plea which will later be entered on arraignment in the Crown Court. By contrast, for either way offences, guilty pleas are in effect entered at the Magistrates' Court, resulting in conviction by the magistrates, followed where appropriate by committal to the Crown Court for sentence pursuant to s.14 of the Sentencing Act 2020. That is the effect of the relevant provisions in the Crime and Disorder Act 1998 and the Magistrates' Court Act 1980. Section 50A of the 1998 Act sets out the way that Magistrates' Court must proceed when an adult appears before it charged with an either way offence. So far as currently relevant, the court is required by subsection (3)(b)(i) to proceed in accordance with s.17A to 20 of the 1980 Act. As we have indicated, s.17A(5) of the 1980 Act requires the court to ask the accused whether, if the offence were to proceed to trial, he would plead guilty or not guilty. The question in the Better Case Management form, which the defendant is required to complete prior to the hearing, is the precursor to that question being put by the court. If when the question is asked the indication is of a guilty plea, the magistrates treat the hearing as a summary trial, and enter the convictions, pursuant to s.17A(6) and s.9 of the 1980 Act. The effect of s.17A(6) and s.9(1) of the 1980 Act is to treat the indication of a plea as a plea. Section 17A(6) is in effect a deeming provision which converts an indication of a guilty plea into a guilty plea: see *Westminster City Council v Owadally* [2017] EWHC 1092 (Admin) at [27] and [45(i)]. If, on the other hand, the indication is of a not guilty plea, or no indication of plea is given, the court goes on to consider whether the case is suitable for summary trial or trial on indictment and if the latter, commits the case for trial at the Crown Court: see ss. 17A(7), (8), 8(1), 19(1) and 21 of the 1980 Act, and s.51(1) of the 1988 Act.
- 10 In line with the distinction, the Better Case Management form asks for "pleas" in either way offences or "indicated pleas" for indictable only offences. Although the statutory language for either way offence is also directed to an "indication" of plea, the language used on the form reflects the reality that an indication of a guilty plea at the Magistrates' Court to an either way offence is normally treated as plea to it at a summary trial and will result in a conviction at the Magistrates' Court.
- 11 This is also reflected in the illustrative flowchart which is attached to the guideline. It shows that for either way offences the defendant will be asked for a plea and that if it is a guilty plea, it will prima facie attract a one third discount whether sentencing is by the magistrates or at the Crown Court upon committal for sentence, whereas if there is a not guilty plea or no indication, the discount available will be 25 per cent or less. For either way offences in order to attract the one third discount an indication of a guilty plea must be an unequivocal and current acceptance of guilt, which may be immediately relied upon to found a conviction in the Magistrates' Court.
- 12 If there is to be a basis of plea, the appropriate place in which to record that fact in the Better Case Management form is under the rubric of "Real issues in the case", because it is simply irrelevant to the question being asked about whether there is a plea (in either way offences) or indication of plea (indictable only offences). It is irrelevant to guilt or conviction; its relevance is only to sentencing. The version of the form introduced in November 2020 expressly states that if there is a limited basis of plea, details should be inserted under "real issues in the case"; see *Plaku* at para.24. Although the newer form was not used in this case, for reasons which are unknown to us, both versions make clear that what is required in the pleas box is an unequivocal indication of current acceptance of guilt of the offence charged if it is to amount to an indication of a guilty plea. That is so whether guilt is

accepted on a full facts basis or by reference to a basis of plea asserting more limited culpability.

- 13 Where a defendant does not make such an unequivocal indication of a guilty plea to either way offences, it results in the process thereafter being one which is directed towards a trial in the Crown Court. That will generally involve greater use of public time and money than if the trial process were concluded in the Magistrates' Court with convictions there and the committal to the Crown Court were a committal only for sentence, rather than a committal for trial. The greater use of public time and money that that involves is a frustration of one of the purposes expressly identified in the guideline as justifying full credit of one third for a guilty plea at the first opportunity.
- 14 Against this background, it is clear that what happened in this case was that there was no unequivocal indication of a guilty plea at the Magistrates' Court so as to attract the maximum one third discount. The Better Case Management form itself began with the shorthand "NI" meaning no indication, which necessarily meant that the matter would have to be committed to the Crown Court for trial, not merely for sentence. That too was the consequence of the accused himself indicating when asked by the magistrates for his indication that there would be a not guilty plea or at least failing to indicate that there would be a guilty plea. The Better Case Management form did not indicate a current acceptance of guilt in unequivocal terms. It referred to a guilty plea in the future, not as a matter of present acceptance of guilt so as to support the immediate entry of convictions. What the appellant did necessarily resulted in what happened next involving the process going forwards towards a trial in the Crown Court.
- 15 The adverse impact of such a course in terms of wasted public time and money is illustrated by what happened in this case. Prior to arraignment at the PTPH, a number of steps preparatory to a trial took place: two further statements of police witnesses were prepared, one from a scenes of crime investigator; one from the interviewing officer; the CPS prepared a disclosure management document; and a nine-page schedule of unused material had been prepared and completed by the police for review by the Crown Prosecution Service. All this would have been unnecessary had the committal merely been for sentence, even on an as yet unidentified basis of plea, as indeed would have been the PTPH itself at which arraignment took place.
- 16 In summary, therefore, the appellant's failure to indicate unequivocal pleas at the Magistrates' Court, which is something he could perfectly well have done on a basis of plea, but did not, is fatal to his argument that he should have been given a full one third discount.
- 17 We should add three observations. First, at the sentencing hearing the judge said that the plea was not unequivocal, because it indicated that the plea would be on a basis. That was in our view justified by the fact that what happened in this case was not only an indication that there would be a plea on a basis, but also the rubric "no indication of guilt". By implication, therefore, what was being said was not that there would be a plea of guilty on a basis come what may, but rather that there would be a plea of guilty on a basis if that basis were accepted. That does not amount, as the judge rightly concluded, to an unequivocal indication of guilt.
- 18 Secondly, although this is not a necessary part of our reasoning in dismissing the appeal, the highly exculpatory basis of plea later advanced by this appellant was clearly untenable, as is apparent from its immediate abandonment when rejected by the Crown. The evidence relied on against the appellant was not complicated and was fully and clearly summarised in the material available to him and his solicitor at the Magistrates' Court. There was no

reason why the appellant could not have entered an unequivocal plea on a full facts basis at the Magistrates' Court in his case.

- 19 Thirdly, we should mention the reference on the Better Case Management form to "no funding for trial of an issue on committal for sentence". We were told by Mr Lister that this reflected his understanding that the legal aid fee where there is a committal for sentence is the same whether or not there is a Newton hearing. That is of course no reason for a defendant who accepts his guilt not to indicate unequivocal pleas at the Magistrates' Court, if appropriate on a basis. The funding of representation for the sentencing process is a matter for the executive. It is not a valid reason for failing to accept guilt at the earliest opportunity.
- 20 Mr Lister at some points in his submissions appeared to be inviting us to say that the appeal should be allowed because the appellant had clearly been ill-advised by his solicitor to give no indication of a plea on the basis of the solicitor's desire for a greater fee. However, we are quite unable to investigate or draw any conclusions about what advice was given at the Magistrates' Court merely from what is on the Better Case Management form. We have to proceed on the basis of what is on that form in relation to indications of plea and the assumption, which Mr Lister has confirmed we should make, that the accused was himself given explanations by the magistrates as to what would happen, and was himself asked whether he would plead guilty. He did not do so.
- 21 The appeal is therefore dismissed.

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**CERTIFICATE**

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This transcript has been approved by the Judge.