IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

INDICTMENT NO: 0066/2020

REGINA

v.

RAYAL BENSON FORBES

Appearances:	**Mr. Neil Kumar for the Crown**
	Mr. Keith Myers for the Defendant
Before:	**Justice Frank Williams (Actg.)**
Application Heard:	**11th June 2021**
Delivery of Decision:	**24th June 2021**

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HEADNOTE

Criminal Law – Application to withdraw guilty plea pursuant to s.26 of the Criminal Procedure Rules 2019 – *Charges: Attempting to pervert the course of justice – Assault Occasioning Actual Bodily Harm – Common Assault.*

JUDGMENT ON APPLICATION TO WITHDRAW GUILTY PLEAS

1. This is an application by Rayal Benson Forbes ('the Applicant') for permission to withdraw his guilty pleas. It is being made pursuant to s.26 of the ***Criminal Procedure Rules***, 2019.

2. The defendant is charged on Indictment #66 of 2020 which contains Counts as follows:

   i. *Count 1:* Attempting to pervert the course of justice contrary to s.107(1)(d) of the ***Penal Code*** (2019 Revision) – an offence committed between the 30th May 2019 and the 10th June 2020.

      a. The Count is said to have arisen from actions that he took, by way of counselling and coercing the virtual complainant in the other counts, to get her to make false statements in order to terminate those charges against him;

   ii. *Count 2:* Assault Occasioning Actual Bodily Harm contrary to s.216 of the ***Penal Code*** (2019 Revision) – an offence committed on the 1st April 2019;

   iii. *Count 3:* Common Assault contrary to s.215 of the ***Penal Code*** (2019 Revision) – an offence committed between the 18th May 2019;

   iv. *Count 4:* Assault Occasioning Actual Bodily Harm contrary to s.216 of the ***Penal Code*** (2019 Revision) – an offence committed on the 19th May 2019.

3. On 13th November 2020, whilst represented by counsel, the Applicant pleaded guilty to Counts 1, 2, and 3, and, not guilty to Count 4. The Crown[1] confirmed that the pleas to Counts 1, 2, and 3 were accepted by the Crown "on the full facts of the case" and advised that Count 4 would remain on file on the date of sentencing.

4. The application to withdraw the guilty pleas was filed on the 10th April 2021. In support of his application, is the Applicant's three-page, handwritten statement in which he sets out what he says were the reasons for, and the sequence of events leading up to, the guilty pleas. Those reasons may be summarized as follows:

i. His *"...current position of being remanded for an extended period for the allegations*."

ii. *"[B]eing a former officer of the court I was aware of the lengthy waiting period for Grand Court appearances*."

iii. He did not plead guilty as accepting the facts;

iv. "*My situation at the time which still remains, with more urgency includes*":

a. "*The welfare of my teenage child who is in the care of my mother*"

b. "*Since my incarceration other arguevating [sic] factors is my mother's health, which she will be requiring spinal/back surgery in the very near future, which leaves her lively hood, and my son exposed with no oversight*."

[1] Mr. Kumar was not Crown counsel before the Court in November 2020.

c. "*Considering the current economic situation post pandemic. There will be no one to oversee care of my child and her small business which is her only livelihood*."

d. "*Other factors include my forced termination of employment which leaves my home position inevitable for foreclosure when my savings becomes exhausted in the very near future*."

e. "*The issue was then magnified when I was asked to sign the agreed facts a day before the sentencing*."

f. "*I signed it on instructions from my attorney and he knew I didn't agree*".

5. The application was brought to the attention of his former attorney-at-law, Mr. Nicholas Dixey ("Mr. Dixey"), for his comments, with the Applicant's waiver of legal professional privilege. Mr. Dixey submitted a statement dated 7 June 2021 in which he set out his account of the events leading up to the Applicant's pleas of guilty. In the said statement, counsel indicates that, throughout the time of his representation of the Applicant (from 14 September 2020 to 24 February 2021) he gave him full and careful advice. For example, in paragraph 19 of his statement, he asserts the following:

> "*19. I attended HMP Northward and once again advised Mr. Forbes fully in respect of the matter. He maintained that he was prepared to plead guilty on full facts to counts 1-3. We went through the endorsement in detail paragraph by paragraph. Mr. Forbes signed the endorsement and initialed*

each page. Mr. Forbes's initials and signature were witnessed by prison officer Litchmore. A copy of the signed endorsement is exhibited."

6. The contents of paragraph 21 of counsel's statement are also of relevance. They read as follows:

"*21. On 12 November 2020 Mr. Forbes pleaded guilty on full facts to counts 1-3, which the Crown accepted. Ms Oko was then tasked with preparing the summary of facts. The purpose of the summary was to assist the sentencing judge by condensing the complainant's ABE interviews (the first of which ran to some 138 pages) and excluding references to the counts or charges that were not being proceeded with. It was always understood that the defence review would be by way of a comparison of the summary with the complainant's ABE interviews, rather than taking any substantive issue that could impact upon sentence. Mr. Forbes had indicated to the court through me that he had pleaded guilty on full facts to counts 1-3, which of course was consistent with our discussions when he signed the endorsement.*"

SUMMARY OF SUBMISSIONS FOR THE APPLICANT

7. On behalf of the Applicant, Mr. Myers sought to stress that, in making this application, it was not being sought to put any blame on counsel who previously represented the Applicant, in putting across what he said was the subtleness of the Applicant's point. This application, he argued, complies with the requirements of the relevant rule. The bases of the application were matters that were peculiar to the Applicant. These factors were the catalyst that led the Applicant to enter the guilty plea when he did not accept the facts, it was submitted.

8. At paragraph 3 of the Applicant's written submissions it is also submitted that:

> "*...to allow the current pleas [to remain] would be unjust and, in the circumstances, not to allow Mr. Rayal Forbes to withdraw the guilty plea would be deemed 'unjust'.*"

SUMMARY OF SUBMISSIONS FOR THE CROWN

9. On the Crown's behalf, Mr. Kumar submitted that: "*It is not suggested by the applicant that he was under undue pressure from the court or his attorney*."

10. Mr. Kumar submitted that the Applicant seems, in broad terms, to be putting forward two main bases for the application, namely (i) the pressures that he faced that led him to enter the guilty pleas; and (ii) that he does not accept the contents of the Agreed Statement of Facts document and would not have entered the pleas if his counsel had not advised him to do so.

11. He reviewed several authorities which set out general principles for guidance in applications to withdraw guilty pleas, and among them are:

i. ***R v KC***[2];

ii. ***R v Nightingale***[3]; and

iii. ***Garfield Silburn Jr v The Queen***[4].

[2] [2019] EWCA Crim 1632
[3] [2013] EWCA Crim 405
[4] Criminal Appeal 16 of 2019 (3rd of February 2021)

12. In relation to the issue raised of "pressures", Mr Kumar submitted as follows at paragraph 23 of the Crown's written submissions:

> "*23. Respectfully, the applicant's argument regarding pressure does not advance the contention that it would be unjust not to allow a change of plea; the argument is without merit and should be rejected*."

13. In relation to the second issue, at paragraph 27 of the written submissions, it was submitted as follows:

> "*26. There is no suggestion that Mr Dixie (sic) has acted improperly in accordance with that duty. The apparent criticism levelled by the applicant is that he did not accept all aspects of the agreed statement of facts. However, at the time he entered his plea, the Applicant had been advised by a very experienced attorney and entered a guilty plea accordingly*."

The application, therefore, ought to be refused, he submitted.

THE LAW

14. In the ***Criminal Procedure Rules***, 2019, the procedure for an application to withdraw a guilty plea is set out at paragraph 26 as follows:

> "***Application to withdraw a guilty plea***
> ***26***. *(1) This rule applies where the accused wants to withdraw a guilty plea.*
> *(2) The accused must apply to do so —*
> *(a) as soon as practicable after becoming aware of the reasons for doing so; and*
> *(b) before sentence*

(3) The application must (unless the court otherwise directs) be in writing and where the application is in writing, the accused must serve the application on —

(a) the court officer; and

(b) the prosecutor.

(4) The application must —

(a) explain why it would be unjust not to allow the accused to withdraw the guilty plea;

(b) identify —

(i) any witness that the accused wants to call; and

(ii) any other proposed evidence; and

(c) state whether the accused waives legal professional privilege, giving any relevant name and date.

(5) The court shall consider the matters stated under paragraph (4) and may in its discretion, grant or refuse an application made in accordance with this rule, as the justice of the case requires.

(6) The court may, for the purposes of paragraph (5) —

(a) list the case for directions;

(b) ensure that the accused understands where necessary, the import of waiving privilege; and

(c) give direction for the application to be sent to the previous attorney-at-law (together with a confirmation that privilege has been waived), for the detailed comments of the previous attorney-at-law to be incorporated in a witness statement."

15. This procedure has been followed. That having been done, the decision of whether to grant or refuse an application to withdraw a guilty plea is one that falls to the exercise of the court's discretion. This must be exercised judicially (see the case of ***R v Dodd (Eric Henry) & Others***[5], for example).

16. In trying to arrive at a decision in this application, I have considered several authorities, among them the case of ***R v Brahmbratt***[6]. That case involved an appeal by a solicitor who had pleaded guilty to charges relating to: "*conspiring to convey a List A article into a prison (count 1) and two counts of conspiring to convey a List B article into a prison*

[5] (1982) 74 Cr. App. R 50, at 57
[6] [2014] EWCA Crim 573

(counts 2 and 4)."[7] These charges were brought pursuant to the ***Misuse of Drugs Act***, 1971. The appellant in that case signed endorsements to the effect that he was pleading guilty of his own free will. He later sought to change his pleas. Paragraphs 19 and 26 of the judgment, set out hereunder, are sufficient to indicate the basis of his application and the court's treatment of it:

> "*19. On the application to vacate the plea, the Appellant claimed he had only pleaded guilty because he felt pressurised by the circumstances. He insisted he was not in his right mind at the time. He told us he was "confused, distressed, feeling suicidal and fearful".*
>
> *26. We have concentrated on the appellant's mental state as requested. We have no hesitation in finding that there was no basis whatsoever for the application to vacate the pleas of guilty. Unfortunately we found little in what the appellant said remotely credible. He gave us the clear impression of someone prepared to say or do anything to escape the consequences of his actions*."

17. The case of ***R v Nightingale***[8] (cited by the Crown) also provides useful general guidance in considering this application. In that case, the appellant was successful on his appeal to the England and Wales Court of Appeal against his conviction by a court-martial for ammunition offences that had been based on a guilty plea. The court there held that the learned judge advocate general who had presided over the court martial erred by giving an unsolicited indication of sentence, which, the court found, had the effect of creating inappropriate additional pressures on the appellant. The court stated at paragraphs 16 and 17 of the judgment:

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[7] (Paragraph 1 of the judgment)
[8] [2013] EWCA Crim 405

"*16. … The question is whether the uninvited indication given by the judge, and its consequent impact on the defendant after considering the advice given to him by his legal advisers on the basis of their professional understanding of the effect of what the judge has said, had created inappropriate additional pressures on the defendant and narrowed the proper ambit of his freedom of choice.*

17. Having reflected on the facts in this case, we conclude that the appellant's freedom of choice was indeed improperly narrowed. Accordingly, the plea of guilty is in effect a nullity. It will be set aside. The conviction based on the plea will be quashed."

18. The general guidance that was given in that case is to be found at paragraphs 10 to 12 of the judgment and is as follows:

"*10. Against those facts we must consider the relevant principles of law. It is axiomatic in our criminal justice system that a defendant charged with an offence is personally responsible for entering his plea, and that in exercising his personal responsibility he must be free to choose whether to plead guilty or not guilty. Ample authority, from R v Turner [1970] 2 QB 321 to R v Goodyear [2005] 1 WLR 2532, which amends and brings Turner up to date, underlines this immutable principle. The principle applies whether or not the court or counsel on either side think that the case against the defendant is a weak one or even if it is apparently unanswerable. In view of the conclusion that we have reached, we shall express no opinion whatever of our view of the strength of the case against the appellant.*

11. What the principle does not mean and cannot mean is that the defendant making his decision must be free from the pressure of the circumstances in which he is forced to make his choice. He has, after all, been charged with a criminal offence. There will be evidence to support the contention that he is guilty. If he is convicted, whether he has pleaded guilty or found guilty at the conclusion of a trial in which he has denied his guilt, he will face the consequences. The very fact of his conviction may have significant impact on his life and indeed for the lives of members of his family. He will be sentenced -- often to a term of imprisonment. Those are all circumstances which always apply for every defendant facing a criminal charge.

12. In addition to the inevitable pressure created by considerations like these, the defendant will also be advised by his lawyers about his prospects of successfully contesting the charge and the implications

for the sentencing decision if the contest is unsuccessful. It is the duty of the advocate at the Crown Court or the Magistrates' Court to point out to the defendant the possible advantages in sentencing terms of tendering a guilty plea to the charge. So even if the defendant has indicated or instructed his lawyers that he intends to plead not guilty, in his own interests he is entitled to be given, and should receive, realistic, forthright advice on these and similar questions. <u>These necessary forensic pressures add to the pressures which arise from the circumstances in which the defendant inevitably finds himself</u>. <u>Such forensic pressures and clear and unequivocal advice from his lawyers do not deprive the defendant of his freedom to choose whether to plead guilty or not guilty;</u> rather, the provision of realistic advice about his prospects helps to inform his choice." (Emphasis added)

19. What these paragraphs illustrate is the harsh reality that, once a defendant becomes engaged in the criminal justice system, pressures of various sorts are bound to result. There will be what is described in the case ***R v Nightingale***[9] as the "forensic pressures" of considering legal advice and deciding on the best way forward when a criminal charge is brought. Apart from those, additional pressures will necessarily ensue and are a natural result of: (i) a defendant being remanded in custody – especially for an extended period; and (ii) the effect of the focussing of attention on the effect of the outcome of the case on one's future. Among the considerations that will no doubt affect a defendant are, for example: (a) the prospect of having to serve a period of imprisonment and being separated from one's family; (b) having a criminal record; and, perhaps, (c) losing one's employment. One would expect that, facing criminal proceedings as a defendant will inevitably generate these pressures. These pressures, I would expect, will naturally affect most, if not all, defendants to different degrees; or, put another way: it would be surprising to find a defendant who does not experience pressures of one kind or another as a result of having criminal charges brought against him. Not unnaturally, the pressures

[9] *Supra*

experienced will vary in kind and degree from defendant to defendant according to the personal circumstances of each; but pressures there are certain to be.

20. It is my view that, those pressures being put forward by the Applicant in support of his application, are no different from those that any defendant would reasonably be expected to face. They are not exceptional in nature or degree so as to make it unjust for him not to be allowed to change his plea.

21. In ***R v Jeffrey Alexander Barnes***[10], Henderson, J at paragraph 22 of his judgment, in refusing an application to withdraw a guilty plea, after reviewing a number of authorities, made the following observations:

> "*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*."

22. In the instant application, nothing has been put before me to indicate any misapprehension by the Applicant of the facts or relevant law or any mistake or misunderstanding on his part.

23. In relation to the Applicant's allusion to counsel's not properly advising him, and to his not being in agreement with the facts, there are a number of observations to be made:

[10] Ind. No. 87A of 2011

i. I see nothing on the material presented that would cause me to doubt the assertion of counsel who represented the Applicant when he pleaded guilty (at the time of the plea, counsel of some 16 years at the Cayman Islands bar), that he pleaded guilty to "the full facts". As counsel has asserted in his statement, the endorsement having been signed, the intention was to condense the substance of the Achieving Best Evidence (ABE) interview which ran to 138 pages; not to take issue with the facts outlined therein;

ii. When one reads the Social Inquiry Report (SIR) at page 9, the Applicant can be taken to have admitted the offences to the probation officer. This is what is noted, among other things:

> "*Mr. Forbes stated that the "offences happened but Miss Cruz-Sampson exaggerated her statements". Client was asked to specify the exaggerations but declined to do so*."

iii. When the Applicant's letter to the court, preparatory to being sentenced, is read, it appears also to be a full admission; seeking primarily to persuade the court to be lenient. At the first paragraph of the letter he says the following:

> "*I am writing this letter to express my sincere remorse for the irresponsible behavior [sic]. I engaged in. I know that there is no excuse or satisfactory explanation for my conduct and I accept complete responsibility for what I have done."*

iv. In the endorsement that he signed, dated 12 November 2020, the Applicant states the following at paragraphs 1 and 6 thereof:

> "*1. I have considered carefully all of the evidence in this case, and in particular the interviews of the complainant Thelma Cruz-Sampson and the voice messages it is said that I sent to her and exchanges of WhatsApp messages.*
>
> *6. I further confirm that this document has been explained to me in simple English, and I understand its contents. I further confirm that I have confidence in my representation.*"

24. All these considerations, therefore, cause the Applicant's challenge on this front (signing without agreeing to the full facts) to ring hollow. It does not amount to a sufficient basis on which to establish his assertion that it would be unjust not to allow him to withdraw his guilty pleas.

25. Apart from these matters that I have already discussed, there is yet another consideration: this court is enjoined by s.4 of the ***Criminal Procedure Rules*** 2019, to apply the overriding objective to its consideration of all criminal cases. The requirement is that: "*criminal cases be dealt with justly*." Section 4(3) sets out what "dealing with cases justly" entails. These are the words of that sub-section:

"*(3) Dealing with a criminal case justly includes —*

(a) dealing with the prosecution and the defence fairly;

(b) ensuring the protection of all the rights of an accused;

(c) considering the interests of the accused, witnesses, victims and jurors and keeping them informed of the progress of the case, as necessary;

(d) dealing with the case efficiently and expeditiously;

(e) ensuring that appropriate information is available to the court particularly when bail or sentence is under consideration; and

(f) dealing with the case in ways that take into account —

(i) the gravity of the offence;

(ii) the complexity of what is in issue;

(iii) the consequences for an accused and others who may be affected;

(iv) the needs of other cases; and

(v) allotting the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

26. Sub-section (4) is also of importance. According to that section:

"(4) The court must seek to give effect to the overriding objective when the court —

(a) exercises any discretion given to the court by these Rules; or

(b) interprets the meaning of any rule or practice direction."

27. In considering this application and deciding how to exercise my discretion on this application, I have borne in mind and sought, as is my duty, to advance the overriding objective. It is clear to me that where, as I have found to be the case in this application, an Applicant has not made good any of the grounds of his application which, therefore, lacks merit, it would not be in keeping with (and in fact would run counter to) the overriding objective to grant that application.

28. In the result, the application to withdraw the plea of guilty, being wholly unmeritorious, is refused. The sentencing of the Applicant should now proceed

Dated this the 24th day of June 2021

Justice Frank Williams (Actg.)
Acting Judge of the Grand Court