Republic v Bistoquet

(2010) SLR 308

Mr David Esparon for the republic
Mr Antony Derjacques for the accused

Ruling delivered 30 September 2010 by

GASWAGA J: The accused herein stands charged with one count of acts intended to cause grievous harm contrary to section 219(a) and punishable under section 219 of the Penal Code (Cap 158). The particulars allege that Vincent Roy Bistoquet, a labourer at Anse Royale, Mahe on 9 March 2008 at Anse Royale with intent to do grievous harm unlawfully wounded Yvon Reddy.

He pleaded guilty to the said charge after some time and also admitted the facts presented by the prosecution whereupon the court convicted him. It was, during a plea in mitigation that the Court asked his counsel whether he had explained to the accused the sentence prescribed by the law in respect of this offence, that the defence counsel changed his mind and applied for an adjournment of the case to another date to continue with the mitigation, which was granted. At the next sitting, presumably after reconsidering the severity of the offence and corresponding sentence, defence counsel applied to withdraw the guilty plea which had been tendered by the accused so that the case could go through a full trial.

That application was resisted by the prosecuting State counsel on the ground that since a conviction had been properly entered it was impossible to withdraw the guilty plea.

Mr Derjacques contended that indeed the accused pleaded guilty to the charge but prior to the court convicting him he advised the accused on the possibility of being liable to imprisonment for life whereupon he sought an adjournment to further advise his client on the matter. He also submitted that at the time of taking the plea, the accused was not aware or failed to comprehend the entire elements of the sentence and the resulting consequences. He therefore moves the court to exercise its discretion to vacate the guilty plea and instead call upon the accused to plead afresh.

In support of this application Mr Derjacques cited the case of *R v Field* (1943) Cr App R 151 (See *Archbold*, 42nd ed para 4-57) where it was held that an accused who is not represented must understand the elements of the crime while he or she is pleading and if there is no mistake, the court cannot allow a change of plea. See *R v McNully* [1954] 1 WLR 933. But if the defendant pleads guilty and it appears to the satisfaction of the judge that the defendant rightly comprehends the effect of the plea, the defendant's confession is recorded and sentence forthwith passed (see *Archbold*, 42nd ed par 4-58).

I am unable to agree with this submission since it appears to me that at the time of taking the plea the accused seemed to have clearly understood the nature and effect

of the kind of plea he tendered. No error was occasioned in this exercise.

This is further strengthened as the accused all through the proceedings enjoyed the services of an able and brilliant counsel who must have advised him on the nature of the plea to tender and the sentence prescribed.

In my view, I do not think the problem is with the plea that was tendered but with the possible sentence of life imprisonment which must have scared the accused on second thoughts during mitigation when the court asked his counsel whether he had explained to him the prescribed sentence. This presupposes that contrary to defence counsel's contention a conviction had already been entered on record. It would therefore mean that in light of the above authorities, counsel continues with the mitigation which will be followed by sentencing and the matter is closed forthwith. Besides the cited authorities seem to work against, rather than support, the accused's case.

In short, the above-cited authorities tend to suggest that once a plea of guilty (also known as a confession) is properly taken and entered on the record (charge clearly read out, and explained to accused in a language he understands and comprehends as well as admit the elements of the offence as discerned from the facts summed up and presented by the prosecution) without any mistake, then that plea of guilty or confession cannot be changed. Not every accused who wants to change what is clearly an unequivocal plea of guilty should be allowed to do so at his own convenience. See *R v Yonasani Egalu* (1942) 9 EACA 65, and *Adan v R* (1973) EA 445.

I should stress at this point that a plea of guilty has two apparent effects: first of all, it is a confession of fact; second, it is such a confession that, without further evidence the court is entitled to and indeed in all proper circumstances will act upon it and it will result in a conviction.

From the research done it appears that there are no provisions providing for a plea to be changed, but there are equally no provisions to prevent a plea being changed before the court becomes *functus officio* - a Latin phrase meaning "having discharged a duty, authority to act further is exhausted". In relation to court proceedings it really means that once a court has finally determined a case it has no more power to adjudicate upon it again. The question is at what stage of criminal proceedings does a court become *functus officio?* For example, a plea of guilty can be retracted, but is it permissible after a conviction has been entered by a Judge or Magistrate? The authorities seem to agree that when a court has determined a case by passing sentence following a plea of guilty it is *functus officio* so that, even if the accused wishes to change his or her plea the court has no power to permit the accused to do so. For instance in *Lapi v Uganda* MB 88/55, immediately after a Magistrate convicted and passed sentence on the appellants, the appellants insulted him and he increased their sentences each to 71/2 years from *7* years imprisonment. On appeal it was held that as soon as the Magistrate convicted and sentenced the appellant he had become *functus officio and* had therefore no jurisdiction to alter either the conviction or the sentence.

However, it would appear it is still arguable whether in East Africa a court is *functus*

officio after recording a conviction but before passing sentence (as is the position in the instant case). In other words, does the court have discretion to allow the accused to change his plea to one of not guilty after convicting him on a plea of guilty? Originally the East African Court of Appeal held the view that having convicted an accused on his own confession a Judge or Magistrate had deprived himself of all powers save the power to pass sentence. This was in the case of *Okello v Republic* (1969) EA 378. In this case the High Court of Kenya was following a decision of the Court of Appeal in *Yusufu Maumba v Republic* (1966) EA 167, a case from Tanzania. In *Maumba*, the appellant pleaded guilty to five counts and was convicted accordingly. The Magistrate deferred sentence until after trial of the 6th count. Subsequently the prosecution withdrew the 6th count and sought to amend the charge. After explaining the amendments to the appellant the Magistrate convicted and sentenced him to a term of imprisonment and corporal punishment. His appeal to the High Court was dismissed. On further appeal, the Court of Appeal held:

> The trial Magistrate had convicted the appellant and he had no power to quash the conviction, nor did he purport to do so. While that conviction remained in force the appellant could not be charged with or convicted of what was substantially the same offence. Therefore the proceedings which followed the first conviction were without jurisdiction and are a nullity. We strengthened in our opinion by the case of *R v Guest* which shows that in England a court which has convicted an accused person is "functus officio" except as regards the power to pass sentence.

However, the English case of *R v Guest* [1964] 3 All ER 385 which "strengthened the opinion" of the Court of Appeal in *Maumba's* case was overruled by the House of Lords in *S(an infant) v Manchester City Recorder and Others* [1969] 3 All ER 1230. The facts of this case are that the court adjourned to obtain a medical report as to the mental condition of the accused (an infant), now appellant who had pleaded guilty and was convicted. At the resumption of the hearing his counsel applied for his plea of guilty to be changed to one of not guilty. The Magistrates refused the application on the ground that they were *functi officio.* The appellant applied to the Divisional Court for an order of certiorari bring up quash the appellant's conviction and for an order of mandamus directing the trial court to enter a plea of not guilty and to proceed with the trial of the case. The Divisional Court dismissed the application but gave leave to appeal to the House of Lords. Allowing the appeal the House of Lords held:

> a court of summary jurisdiction which had accepted a plea of guilty to an offence charged is not in law debarred from permitting at any time before sentence a plea of not guilty to be substituted.

Until this case, in English law Magistrates had no power to allow a change of plea after conviction. According to the House of Lords however, the Law Lords saw no reason why a different rule applied to powers of Magistrates in summary proceedings. This was the decision which was followed by the Court of Appeal of Eastern Africa later in 1973, departing from the 1966 case of *Maumba*.

In the real life of a Judge's time in court, it not infrequently happens that on the first occasion the accused pleads guilty or indicates that he is pleading "guilty". But on a

subsequent occasion he reconsiders his plea and wants to change it to one of "not guilty". In such a case he may be allowed to do so. The law is such that where an accused person pleads guilty to a charge, the court has a discretion to allow him to change his plea from one of guilty to one of not guilty, provided that such change of plea is sought to be made at any stage of the trial before sentence is passed or before a final order disposing of the case is made. See B D Chipeta, *A Magistrate's Manual*.

The case of *Kamundi v R* (1973) EA 540 fortifies this position. What transpired in this case is that after convicting the appellants on purported pleas of guilty, the Magistrate adjourned to allow the prosecution to produce the criminal records of the accused persons. At the next sitting the appellants' advocate submitted that the pleas of guilty were ambiguous. The Magistrate held that the pleas were unequivocal on their own conviction and refused to allow the appellant to change his plea.

On second appeal, it was argued that a magistrate should be able to alter a plea of guilty at any time before pronouncing sentence. The Court held, at page 545:

> The whole purpose and intention of the Criminal Procedure Code is to see that justice is done, and justice cannot be effected if a plea of guilty is entered as the result of ignorance or misunderstanding. The court must have a judicial discretion to allow a change of plea before it has finally disposed of the case. It is common practice to allow the accused person during the course of trial to change his plea of not guilty to one of guilty and we can see no reason why the court should not have similar powers to change a plea of guilty to one of not guilty. A further question arises, when does a magistrate's court become functus officio and we agree with the reasoning in *Manchester City Recorder* case that this can be when the court disposes of a case by a verdict of not guilty or by passing sentence or making some order finally disposing of the case.

I am persuaded by the above reasoning of their Lordships and this court endorses the *Karnundi* and *Manchester City Recorder* cases. It therefore follows that this application will be allowed.

Be that as it may, it must be observed that the decision of a court in a criminal matter as to the guilt of an accused person is either an acquittal or a conviction. That decision is reached either upon an admission of the truth of the charge, which is a plea of guilty, or after hearing the entire evidence; and one could argue, that only an appeal court has power to alter such a finding. However, it would appear that the wide interpretation given to the word "conviction" by the House of Lords is to safeguard against the possibility of an accused person having to suffer a penalty as a result of a conviction based upon an equivocal plea of guilty or a plea of guilty by mistake.

Accordingly, the earlier conviction entered herein based on a plea of guilty is vacated and the accused called upon to answer to the charges afresh. I so order.

Record: Criminal Side No 24 of 2008