

Scottish Criminal Case Reports/2010/NICOLA JANE GALLAGHER Appellant against HER MAJESTY'S
ADVOCATE Respondent - 2010 S.C.C.R. 636

**NICOLA JANE GALLAGHER Appellant against HER MAJESTY'S ADVOCATE Re-
spondent**

2010 S.C.C.R. 636

Note of Appeal Against Conviction

High Court of Justiciary

25 May 2010

[2010] HCJAC 46

*Solemn procedure—Plea of guilty—Withdrawal of plea—Plea given on legal advice received in last-minute
interview with solicitor in street— Whether conviction a miscarriage of justice*

The appellant was charged on indictment with obtaining almost £24,000 by fraud in connection with a claim for working tax credit. Her solicitor did not discuss the case with her until the morning of the hearing of a continued first diet, when he spoke to her in the street outside the court, advised her to plead guilty and said that if she did not accept his advice he would withdraw from acting and leave her to represent herself before the sheriff that day. The appellant tendered a plea of guilty under restriction of the sum to £16,000 which was negotiated by her solicitor, and the diet was continued. At the continued diet she sought and was refused leave to withdraw her appeal. She was subsequently sentenced to 12 months' imprisonment, and appealed to the High Court against conviction on the ground that the plea had been tendered as a result of improper advice and under essential error.

Held that proper practice required that the solicitor should advise the appellant in the calm atmosphere of a pretrial consultation and advise her fully of the nature of the charge, that in a charge of this kind it was undesirable that an accused should be advised on these matters for the first time at the doors of the court (para 12), that the circumstances in which the appellant was persuaded to plead guilty were unsatisfactory and that it could not be said that she made an informed decision, or that she did so after a proper opportunity for reflection (para 13), that she did not have a proper opportunity to consider the implications of the step she was being pressed to take, that the circumstances were clearly prejudicial to her and that the conviction must be regarded as a miscarriage of justice (para 14); and appeal allowed and conviction quashed.

Cases referred to in the opinion of the Lord Justice Clerk:

Duncan v HM Advocate [\[2009\] HCJAC 12](#); [2009 SCCR 293](#)

Healy v HM Advocate [1990 SCCR 110](#)

Pickett v HM Advocate [\[2007\] HCJAC 47](#); [2007 SCCR 389](#); 2008 SLT 319

Reedie v HM Advocate [\[2005\] HCJAC 55](#); [2005 SCCR 407](#); 2005 SLT 742

Rimmer, Petitioner [2002 SCCR 1](#).

Nicola Jane Gallagher was charged on indictment with contraventions of [s 35](#) of the Tax Credits Act 2002. On 28 January 2009 in Dumbarton Sheriff Court the Crown accepted a plea in the terms set out in the opinion of the Lord Justice Clerk. The case was continued for reports and, after a failure to appear, warrant was granted for Gallagher's arrest. When the case called on 21 May 2009 the appellant's then solicitor applied for leave to withdraw her plea. This was refused by Sheriff Pender. After a further continuation the appellant was sentenced to 12 months' imprisonment by another sheriff. She then appealed

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to the High Court by note of appeal against conviction on the ground referred to in the opinion of the Lord Justice Clerk.

The appeal was heard on 25 March 2010 by the Lord Justice Clerk (Gill), Lady Paton and Lord Bonomy.

For the appellant: *Wheatley QC*, instructed by *McArthur Stanton*, Solicitors, Dumbarton.

For the respondent: *Erroch AD*.

On 25 May 2010 (by which time the appellant had died and her widower was allowed to continue the appeal) the following opinions were delivered.

Lord Justice Clerk

Introduction

[1]

On 28 January 2009 at Dumbarton Sheriff Court, the appellant appeared on indictment on the following charge:

'Between 6 April 2003 and 21 July 2006, both dates inclusive at [locus] and at the HM Customs and Excise Office, Centre 1, East Kilbride you... were knowingly concerned in fraudulent activity undertaken with a view to obtaining payments of tax credit namely working tax credit in that you did knowingly and wilfully fail to disclose the earnings of Gordon Gallagher, your husband residing at [locus] and falsely state that he did not reside at said address with you, did knowingly and wilfully fail to disclose the full extent of your employment throughout said period and did from 6 December 1998 claim working tax credit in respect of your son Jack Gallagher then deceased, well knowing that you were not entitled to claim working tax credit in respect of said son and you did thus obtain the sum in cumulo of £23,927.35 to which you were not entitled and did obtain £23,927.35 by fraud: contrary to the [Tax Credits Act 2002, section 35](#).'

She pled guilty to the charge under restriction of the sum libelled to £16,000. The Crown accepted her plea of not guilty to a further charge of having, without reasonable excuse, failed to appear at an earlier diet. On 8 July 2009 she was sentenced to 12 months' imprisonment, discounted from 15 months in respect of the plea. She now seeks leave to withdraw her plea and to have the conviction quashed.

The ground of appeal

[2]

The appellant says that she pled guilty only because her former solicitor, Mr Matthew **Berlow** of Beltrami **Berlow**, Solicitors, Glasgow, told her that unless she did so, he would withdraw from acting and leave her to defend herself. Furthermore, she did not understand the nature of the charge to which she was pleading guilty. She therefore did not give a true and informed consent to the tendering of the plea.

Mr Berlow's comments on the appeal

[3]

At the invitation of the court Mr **Berlow** commented in writing on the grounds of appeal. His main points were that the plea was tendered with the appellant's authority; that he did not threaten to withdraw from acting in a way that would require her to represent herself, but that he explained that she might require to seek fresh representation; that the appellant's concerns were with the amount and the time scales libelled; that the appellant was a difficult and evasive client; that he judged that the interests of the client and the interests of justice would best be served by his negotiating a plea with the procurator fiscal;

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that he duly did so; that he conveyed to the appellant that the Crown case was strong; and that she pled guilty on his advice.

Procedure

[4]

In the unusual circumstances of this case, the court allowed the appellant to lead evidence in support of the averments in the note of appeal. Both the appellant and Mr Berlow gave evidence.

The evidence

[5]

The appellant said that she had had no previous experience of the criminal courts. After being interviewed by HM Revenue and Customs, she consulted a solicitor; but the solicitor left practice soon after. She then approached Beltrami Berlow. At her first meeting at their office, Mr Berlow was stuck in traffic. She saw Mr Beltrami instead. On this occasion, she signed legal aid papers. There was no discussion of the case. There was no further meeting at that office. She had one conversation with Mr Berlow on the telephone. He seemed not to be familiar with the case. He told her that he would discuss matters with her on the day. She met Mr Berlow for the first time on the morning on which she pled guilty. The question of his negotiating a plea was then discussed for the first time. Her conversation with Mr Berlow took place in the street outside the court building. It was a busy main street with buses passing. The conversation lasted for about ten minutes. She said that Mr Berlow told her in forceful terms that she would have to plead guilty and that if she did not, she would have to represent herself or explain to the court why she did not have a lawyer. Her position was that although she had not declared income, she thought that she did not have to do so until the renewal of working tax credit in July, at which point her benefits would be calculated and any adjustments would be made. Mr Berlow said that if she was admitting that she had worked but had not declared that, then she was guilty. The appellant said that she never told Mr Berlow that she wished to plead guilty. She did not ask him to negotiate a plea to a reduced amount. She pled guilty because she felt that she had no choice.

[6]

Mr Berlow said that the appellant had come to the office of his firm and instructed the firm to represent her. On that occasion she filled up legal aid forms. There was a general discussion about her case. He thought that he had seen her on that occasion; but he could not specifically recall it. It was possible that he did not meet her on that occasion. She might have met his partner. He had consulted with the appellant in the street because of the lack of interview facilities at the Dumbarton Sheriff Court annexe, which was being renovated at the time, and for reasons of privacy. He had been told by his assistant, Mr Sinclair, that the appellant had instructed him to negotiate a plea. She seemed not to understand the difference between guilt and mitigation. He told her that there were stacks of evidence against her and advised her to let him negotiate a reduced plea with the procurator fiscal. She instructed him to do so. Her general position was one of guilt. He had negotiated a plea with the procurator fiscal in the restricted sum and the procurator fiscal had agreed to drop the second charge. The figure that was negotiated was an arbitrary figure. There was no rhyme or reason to it. The appellant then gave him instructions to plead to the reduced charge. He also advised her about sentence discounts. Mr Berlow added that nothing that the appellant said to him left him in any doubt that she was guilty. He accepted that he indicated to her that he was considering withdrawing from acting for her. He felt that they (sc his firm) were compromised because she had clearly given an indication to Mr Sinclair to negotiate. When asked if he had made clear to her that she would be on her

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own, he said that he did not know if he had used those words, but that he had probably said that she would have to represent herself that day and then find new solicitors. When asked if it was possible that she took

what he said to her to mean that she had to plead guilty or look after herself, he replied yes, and that that was correct from a professional point of view.

Submissions for the parties

[7]

The solicitor advocate for the appellant accepted that a plea of guilty tendered with legal advice can be withdrawn only where it was tendered without the authority of the accused, or under some real error or misconception, or in circumstances that were clearly prejudicial to the accused (*Pickett v HM Advocate*; *Duncan v HM Advocate*). The appellant had pled guilty under a real error or misconception. She had thought that in the circumstances she had no alternative, when in truth her position was that she was not guilty. She had suffered a miscarriage of justice.

[8]

The advocate depute submitted that a guilty plea could be withdrawn only in exceptional circumstances (*Reedie v HM Advocate*). The appellant had given instructions that the plea should be tendered. She now sought to withdraw her plea for reasons that might relate to the sentence imposed. The advocate depute remarked that the standard of representation that the appellant had received might have fallen short of the ideal. For example, there was no written record of the instructions given. Nevertheless, the court should prefer Mr **Berlow**'s evidence that he had acted in accordance with the appellant's instructions. The plea having been properly tendered, it was not open to the appellant to go back on it.

Decision

[9]

The essence of the Crown's opposition to this appeal is straightforward. The appellant admits that she agreed to plead to the reduced charge and gave instructions to that effect. That, in the submission of the Crown, is the beginning and the end of the matter. I do not agree. The solicitor advocate for the appellant submitted that the appellant pled guilty under error. I do not agree with that either.

[10]

In my opinion, we should decide this appeal by considering the general question whether the circumstances in which the plea was tendered were demonstrably prejudicial to the appellant (*Healy v HM Advocate*, Lord Justice Clerk Ross at p 118). In my opinion, they were.

[11]

It would be unfortunate if in deciding this appeal we had to attempt to resolve the conflicts in the evidence of the appellant and Mr **Berlow**, particularly since Mr **Berlow** was not represented in these proceedings for his own interest. I think that that course is unnecessary in the circumstances. From the evidence that we have heard there are, I think, five indisputable points. First, there is no direct evidence that before the day of the hearing the appellant had ever evinced a desire, orally or by letter, to plead guilty. Second, it seems to be accepted by Mr **Berlow** that, as the partner dealing with the appellant's case, he had no meeting with her to discuss the case, and may not have met her at all, before the day of the plea. Third, Mr **Berlow** did not give his critical advice to the appellant to plead guilty until the morning of the hearing, and then only minutes before the case was due to be called. Fourth, he gave this advice in a conversation on the pavement of a main

road that was busy with traffic and passers-by. Fifth, he gave the advice with the clear and overt warning that if the appellant did not accept it, he would withdraw from acting and leave her to represent herself that day before the sheriff.

[12]

This was a serious charge. It concerned alleged contraventions of

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statutory provisions on entitlement to benefit. It involved a substantial sum of money. In such a case, in my view, proper practice required that in the calm atmosphere of a pretrial consultation Mr **Berlow** should advise the appellant fully on the nature and significance of the charges and take her informed instructions. On a charge of this kind it is undesirable that the accused person should be advised on these matters for the first time at the doors of the court.

[13]

The circumstances in which the appellant was persuaded to plead guilty were unsatisfactory on any view. It cannot be said that she made an informed decision; or that she did so after a proper opportunity for reflection. It is clear from the evidence of Mr **Berlow** that the first advice that he formally tendered to the appellant as her defending solicitor was tendered in the conversation on the pavement outside the court shortly before the case was to be called. Mr **Berlow** was concerned to emphasise that the court premises were cramped and that he probably took the appellant outside for privacy. I can scarcely regard the pavement of a busy street as a suitable location for a discussion of such importance. It surprises me that Mr **Berlow** had left it until then to have this discussion rather than consult with the appellant well in advance and in the privacy of his own office.

[14]

The advocate depute rightly reminded us that the appellant pled guilty on legal advice (*Rimmer, Petitioner*). That is a significant consideration. However, it is necessary for us in this case to consider the manner and the circumstances in which the advice was given. Even on the assumption that Mr **Berlow** had had the case fully precognosced, it is plain that he gave his advice to the appellant at a hurried first meeting in circumstances of time and place that were inappropriate to the seriousness of the charge. Moreover, he gave his advice to the appellant under the stressful warning that if she refused to accept it, he would leave her to represent herself. I conclude that the appellant did not have a proper opportunity to consider the implications of the step that she was being pressed to take. In my view, the circumstances were clearly prejudicial to her. The conviction must therefore be regarded as a miscarriage of justice.

[15]

I hope that occurrences such as this are rare. I repeat what I said in *Reedie v HM Advocate* (at para 11). In view of the conclusive nature of a plea of guilty, the court will allow it to be withdrawn only in exceptional circumstances. The court will not entertain an appeal of this kind if it is prompted only by the fact that the sentence imposed was greater than the appellant had been led to expect.

Disposal

[16]

I propose to your Ladyship and your Lordship that we should allow the appeal and quash the conviction and sentence.

Lady Paton

[17]

I agree with your Lordship in the chair and have nothing to add.

Lord Bonomy

[18]

I agree with your Lordship in the chair. There is nothing I wish to add.

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COMMENTARY

Although this case can be seen as a relaxation of the approach of the court to motions to withdraw a plea of guilty, it should be noted, as the Lord Justice Clerk indicated, that circumstances in which it is likely to be followed will be very rare.