FACC No 18 of 2018

[2018] HKCFA 64

**IN THE COURT OF FINAL APPEAL OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO 18 OF 2018 (CRIMINAL)

(ON APPEAL FROM HCMA NO 410 OF 2017)

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BETWEEN

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| --- | --- |
| HKSAR | Respondent |
| and |  |
| CHAN CHI HO LINCOLN（陳子豪） | Appellant |

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| Before: | Chief Justice Ma, Mr Justice Ribeiro PJ,  Mr Justice Fok PJ, Mr Justice Cheung PJ and  Lord Phillips of Worth Matravers NPJ |
| Date of Hearing: | 29 November 2018 |
| Date of Judgment: | 21 December 2018 |

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JUDGMENT

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Chief Justice Ma:

1. I agree with the judgment of Mr Justice Cheung PJ.

Mr Justice Ribeiro PJ:

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Mr Justice Fok PJ:

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Mr Justice Cheung PJ:

1. This appeal concerns an application to reverse a guilty plea before sentence and raises an important procedural matter in such context that should be clarified.

***The facts***

1. The appellant was the driver of a private motor vehicle involved in a traffic accident that happened on 3 November 2016, in which a pedestrian was injured whilst crossing the road from a safety island. Arising from the accident, the appellant was charged with the offence of careless driving, for which he appeared before a deputy magistrate[[1]](#footnote-1) on 1 June 2017. Unrepresented, the appellant pleaded guilty to the charge and agreed with the police brief facts which were read out in court:

“The incident took place at 2:28 pm on 3 November 2016. The Defendant was driving private car KE3888 along Sheung Yuet Road in the east-bound direction, turning left into the north-bound lane of Wan Kwun Road. PW1 was crossing the north-bound lane from east to west at a safety island in the middle of Wan Kwun Road. Without due care and attention, the Defendant caused the right front wheel of the vehicle to press against PW1’s left foot. PW1 was injured in her left foot and was sent to the hospital for treatment. …”

1. Accordingly, the deputy magistrate convicted the appellant of the offence. During mitigation, the following exchange took place between the deputy magistrate and the appellant:

“COURT: Anything to say in mitigation?

DEFENDANT: Actually, I want to say that if the same thing happens, she was not hit by the front of my car, she had her foot stuck out at the roadside, the wheel of my car came into contact with her, I could not stop.

COURT: That’s right, the wheel of your car hit ……

DEFENDANT: That’s right.

COURT: Pressed her foot.

DEFENDANT: Right.

COURT: And that place was a safety island.

DEFENDANT: That’s right, but I was actually very far away from the safety island, she had her foot stuck out, I -- I mean I didn’t know how it could be avoided under the circumstances.

COURT: Safety island, if there are pedestrians standing in the safety island, is it right that you should give way -- give way to her?

DEFENDANT: That’s right, that’s not right, she -- at that time there was actually a lot of people because it happened to be lunch time, so ……

COURT: Why did you not look carefully, and not give way to the pedestrians and let them cross the road first?

DEFENDANT: No, all those people had stopped there, only the miss was at the last, the farthest back on the right hand side of the safety island. She was playing with her phone when she walked out. I had a witness by my side. Nonetheless, I admit that I was careless. But she dashed out like that from the side of my car, I actually could not avoid her. I already stopped my car immediately. Therefore, my car had not run over her, it only came into contact – you said that the front wheel of the car had come into contact with her foot.

COURT: But the facts you admitted just now stated that the front wheel of your car had pressed her foot.

DEFENDANT: Right, but what I meant to say was I already knew that her foot was at the wheel of my car. I already stopped the car immediately.”

1. After hearing mitigation, the deputy magistrate, probably in view of the appellant’s previous conviction record, adjourned the hearing to 29 June 2017 to obtain a community service report before sentencing.
2. Before the adjourned hearing, the defendant obtained legal advice and made an application to the court to reverse his plea of guilty. This was reflected in the community service report dated 28 June 2017:

“5. Regarding the present offence, Defendant indicated reservations towards the content of the Police’s Brief Facts. He recalled that on the material day, he drove his cousin’s car for test drive to a potential buyer and passed the location-in-question. When the car he drove was passing the pedestrian crossing area in a speed around 20 to 30 km/hour, he noticed there were lots of pedestrian standing on the pavement and nobody crossing the road. Unexpectedly, the victim (PW1), focusing on her mobile phone, stepped out from the pavement without noticing the road situation. While PW1’s mobile phone hit the car’s side mirror, Defendant stopped the car. He found the PW1 had fallen near the rear wheel. Subsequently, he was arrested for the present offence.

6. During interviews, Defendant insisted that he was innocent and considered the fault was not primarily out of his carelessness. Reportedly, he pleaded guilty in order to shorten the court proceeding time, but he had underestimated the legal consequences and the seriousness of the offence. Meanwhile, Defendant had sought legal advice and prepared to appeal for the case. Yet, upon lengthy discussion, Defendant also shared with the Investigating Probation Officer (IPO) that he would further heighten his awareness of the traffic condition, especially in congested area and followed traffic regulation strictly in future.

7. Defendant stated that his children were in young age that he was in heavy childcare work. In addition, though he showed understanding on the nature of Community Service Order (CSO), taking into consideration of the context and his interpretation of the present offence as well as time constraint, he indicated his limitation and hesitation in completing those unpaid work under CSO. In view of Defendant’s limited capacity in performing unpaid under CSO, Community Service Order is NOT recommended in this case.”

1. At the adjourned hearing on 29 June 2017, the deputy magistrate heard the application to reverse plea. On 6 July 2017, she rejected the application. On the same day, she sentenced the appellant to 150 hours of community service.

***The deputy magistrate’s reasons***

1. In her statement of findings dated 28 July 2017, the deputy magistrate explained that the application to reverse plea was made on the basis that the guilty plea was an equivocal one and therefore the conviction could not stand.[[2]](#footnote-2) The deputy magistrate understood the essential basis of the application to be that the injured pedestrian was herself at fault in the accident – she was not paying attention to the road condition when she stepped out from the safety island.[[3]](#footnote-3)
2. The deputy magistrate agreed with the defence’s submission that the place of the accident was not a zebra crossing and pedestrians did not have priority in crossing the road.[[4]](#footnote-4) However, she took the view that it did not mean that this was inconsistent with the appellant’s guilty plea. The fact that the injured pedestrian might also have been partly responsible for the accident did not mean that the appellant was not driving carelessly at the time.[[5]](#footnote-5) The deputy magistrate emphasised that the appellant understood the charge, admitted the brief facts and made an admission to the elements of the offence.[[6]](#footnote-6)
3. The deputy magistrate noted that the appellant claimed in the community service report that he chose to plead guilty to save time but had underestimated the seriousness of the offence and the legal consequences.[[7]](#footnote-7) However, the deputy magistrate observed that the defence had confirmed that the application to reverse plea did not concern an unequivocal plea. Therefore, there was no need for the court to consider “the circumstances where unequivocal pleas shall be treated as nullities”.[[8]](#footnote-8)

***The appeal before the deputy judge***

1. The appellant appealed to the Court of First Instance against his conviction. Originally, the respondent was prepared to concede the appeal before Deputy High Court Judge S T Poon on the basis that the appellant’s guilty plea was equivocal and should not have been accepted. However, the deputy judge asked the respondent to conduct further legal research on the applicable legal principles and adjourned the hearing of the appeal. At the adjourned hearing, the respondent changed its position and opposed the appeal. After hearing arguments, by a judgment dated 23 March 2018, the deputy judge dismissed the appeal.
2. In paragraphs 12 to 14 of the judgment, the deputy judge set out his understanding of the relevant legal principles:

“12. Prior to the passing of sentence, the magistrate has the power to exercise her discretion to allow a defendant to reverse his guilty plea irrespective of whether the defendant’s guilty plea is equivocal or not. Such discretion should not be exercised lightly and such discretionary power is one which should only be exercised in clear cases and very sparingly.

13. In the present case, the trial magistrate refused to exercise her discretion to allow the Appellant to reverse his guilty plea at the review hearing. The Appellant is now asking this Court to overrule the trial magistrate’s decision on exercising her discretionary power.

14. Generally, the appeal court will not interfere with the way a trial court exercises its discretion unless the decision made by the trial court in exercising its discretion is obviously unreasonable or unfair. Absenting which, the appeal court generally will not interfere with the magistrate’s decision on exercising her discretion.”

1. The deputy judge also referred to case law and observed that for a plea to be equivocal, the defendant must add to the plea of guilty a qualification which amounts to a defence.[[9]](#footnote-9)
2. The deputy judge then turned to the facts and essentially agreed with the respondent’s counsel as well as the deputy magistrate below that the fact that the injured pedestrian might have been partly responsible for the accident did not mean that the appellant was not driving carelessly. The fact remained that the appellant had clearly admitted he had been careless. What he said subsequently could merely serve to mitigate the gravity of the offence without adding any qualification to his plea of guilty.[[10]](#footnote-10)
3. As regards what the appellant had said to the probation officer as stated in the community service report, the deputy judge took the view that it had no relevance in considering whether the appellant’s plea was equivocal.[[11]](#footnote-11)
4. Treating the appeal as one against the exercise of the deputy magistrate’s discretion on whether to allow the application to reverse plea, the deputy judge concluded:

“In my judgment, the trial magistrate made no obvious error in exercising her discretionary power and I shall not interfere.”[[12]](#footnote-12)

1. He dismissed the appeal accordingly.
2. With leave granted by the appeal committee, the appellant now brings his case to this court on the substantial and grave injustice ground.

***The law***

1. For reasons that will become apparent, it is necessary first to set out and clarify some relevant legal principles on reversal of guilty pleas.
2. *First*, there is a crucial distinction between an equivocal plea and an unequivocal plea of guilty. A plea is equivocal if the defendant adds to his plea of guilty a qualification which, if true, may show that he is not guilty of the offence charged.
3. The distinction is crucial because only an unequivocal plea can be accepted by the court. The court cannot accept an equivocal plea; it has no discretion in the matter.
4. The position is best explained by O’Connor J (as he then was) in his lead judgment in *P Foster (Haulage) Ltd v Roberts*:*[[13]](#footnote-13)*

“In my judgment, a clear distinction must be drawn between the duties of a court faced with an equivocal plea at the time it is made and the exercise of the court’s jurisdiction to permit a defendant to change an unequivocal plea of guilty at a later stage of the proceedings. A court cannot accept an equivocal plea of guilty: it has no discretion in the matter; faced with an equivocal plea the court must either obtain an unequivocal plea of guilty or enter a plea of not guilty. For a plea to be equivocal the defendant must add to the plea of guilty a qualification which, if true, may show that he is not guilty of the offence charged. An example of this type of qualification is found where a man charged with handling a stolen motor car pleads ‘guilty to handling but I didn’t know it was stolen’. It is not every qualification which makes a plea of guilty equivocal; for example, the burglar charged with stealing spoons, forks and a camera, who pleads ‘guilty but I did not take the camera’ is making an un-equivocal plea to burglary.

Once an unequivocal plea of guilty has been made, then the position is entirely different. From this stage forward until sentence has been passed the court has power to permit the plea of guilty to be changed to one of not guilty, but the exercise of this power is entirely a matter of discretion.”

1. *Secondly*, whether a plea is equivocal is to be determined “at the time it is made”.[[14]](#footnote-14) If the guilty plea is accompanied by a qualification of the type described above, it is an equivocal plea, and the court cannot and must not accept it. If it is not, it is an unequivocal plea, based on which the court is entitled to convict the defendant of the offence charged. If, after conviction, the defendant says to the court during mitigation, or to a probation officer when preparing a report for sentencing purposes, something that if it had been said at the time the plea was taken would have amounted to a qualification of the type described above, that does not turn the unequivocal plea into an equivocal one. The plea remains an unequivocal one.
2. *Thirdly*, a “conviction” is not complete, and the court does not become *functus*, until sentence is passed. It follows that in the scenario described in the preceding paragraph, where something emerges after conviction but before sentence, which, if true, may show that the defendant is not guilty of the offence charged, the court has a discretion to allow a change of plea. In fact, given that the discretion is one ultimately based on the interests of justice, the court should, whether on application or of its own initiative, consider exercising its discretion to reverse the plea once it becomes aware of the full picture.
3. However, the case law does not always speak consistently with the propositions stated above. In particular, there are cases which speak of an otherwise unequivocal plea becoming or taking on the character of an equivocal plea by reason of what transpires at a later stage of the proceedings.
4. Amongst the cases cited to this court, *Lee Fu-yuen v The Queen*[[15]](#footnote-15)was a case concerning the employment of under-age persons, which the magistrate thought constituted an absolute offence. The defendants pleaded guilty and were convicted accordingly. In mitigation, the defendants said they thought and believed that the girls in question were over 18. On appeal, in relation to the jurisdiction and discretion to allow a reversal of plea, the court rightly said:

“The learned Magistrate is not functus officio unless and until sentence has been passed. Even when the plea in mitigation reveals that an offence has not been committed the learned Magistrate, was still in a position, if he thought fit, if he saw any justification, to reverse a plea of guilty to one of not guilty and enter a plea of not guilty. If the Magistrate considered that the offence charged was not one of an absolute offence then he would, and I think he should, have entered a plea of not guilty for the Appellants at the time.”[[16]](#footnote-16)

However, later on in the judgment, after holding that the offence was not an absolute one but required proof of knowledge of the age of the girls, the court treated the defendants’ guilty pleas as “equivocal” ones,[[17]](#footnote-17) and held that the trial before the magistrate was a “nullity”.[[18]](#footnote-18) This terminology was, with respect, wrong.

1. Likewise, in *HKSAR v Wang Jing-yun*,[[19]](#footnote-19) the applicant pleaded guilty to attempted arson with intent and was convicted accordingly. During mitigation and from the reports obtained by the court for sentencing purposes, it emerged that the applicant’s case was that actually she had no intention to set fire to the premises in question; rather, what she intended was simply to frighten her husband (the victim). The Court of Appeal treated the case as one involving an “equivocal plea”,[[20]](#footnote-20) by reason of what was said in mitigation and in the reports. It said:

“A conviction is not complete until sentence has been passed … and in our view the court below ought, at the latest by the time the reports had been read, have been alerted to the fact that what was being said by the applicant was inconsistent with her plea, and ought then to have raised the matter with the solicitor for the applicant … Ms Wong, for the respondent, very properly concedes that the conviction should not be allowed to stand, and we agree. She accepts that even at the initial stage when it was asserted in mitigation that the idea on the applicant’s part was merely to threaten, the plea took on the character of an *equivocal* one.”[[21]](#footnote-21) (emphasis added)

1. In *Fong Loy v The Queen*,[[22]](#footnote-22) the defendant, on a charge of assisting an offender, pleaded guilty and admitted the brief facts. He added immediately a qualification that he was threatened by the offender with assault to assist him – thus suggesting a defence of reasonable excuse. He was nonetheless convicted. On those facts, the court, on appeal, rightly concluded that the plea was equivocal, and could not be allowed to stand. However, it went on to give guidance on situations where the qualification only came into the picture during mitigation:

“Of course I am aware that a person pleading guilty often in purported mitigation says something that he hopes will be accepted as a mitigating factor, but which he does not wish to be taken as being in derogation of his plea. Where this occurs the magistrate is quite entitled to inquire from him whether or not he is serious in making such an allegation and furthermore the magistrate would be entitled to tell him that such an allegation is not consistent with a plea of guilty or with the agreed facts. On that being pointed out to a defendant he not infrequently indicates that the matter in derogation of plea is not put forward seriously. However he is under no obligation to elaborate and if he stands by such a remark at that stage, a plea of not guilty should be entered.”[[23]](#footnote-23)

1. In view of some of the terminology employed by the courts, there is a need to clarify the relevant law. On first principles, a guilty plea is an answer of admission of guilt by a defendant given in reply to the court’s demand to plead. Based on the guilty plea, and very often together with the defendant’s agreement with the police brief facts,[[24]](#footnote-24) the court may make a finding of guilt and enter a conviction against the defendant of the offence charged, without requiring proof of the offence by evidence at trial.
2. By definition, an equivocal plea, sometimes referred to as a “guilty but …” plea,[[25]](#footnote-25) that is, a guilty plea accompanied by a qualification of the sort described above, is an ambiguous, “yes and no” type of answer. Unless clarified, it does not possess the necessary quality in terms of an admission of guilt that would entitle a court to make a finding of guilt and dispense with a trial to prove the offence charged by evidence. For this reason, it cannot be accepted and form the basis of a conviction. And for this reason, an equivocal plea or a conviction resulting from the erroneous acceptance by the court of such a plea is often described as a “nullity”. And also for this reason, when the true picture is subsequently revealed, the conviction which is founded on such an insufficient basis must be set aside; no discretion is involved.
3. However, if the guilty plea is unequivocal when it is made, the court is quite entitled to make a finding of guilt on the basis of the admission. Whatever happens at a later stage of the proceedings before sentence cannot alter the prior, historical fact that there has been made by the defendant an unequivocal admission of guilt. In other words, what happens subsequently cannot change the nature or character of the defendant’s earlier admission of guilt by his guilty plea. Whether the court has the power or discretion to allow a withdrawal of the guilty plea by reason of the subsequent development is quite another matter. An unequivocal guilty plea, once given, is a historical fact. It cannot “become” or be “turned into”, nor can it “take on the nature of”, an equivocal plea by what happens afterwards.
4. As may be gleaned from the House of Lords’ decision in *S (An Infant) v Recorder of Manchester*,[[26]](#footnote-26) the confusion probably crept in because prior to that decision, it had been thought that in summary proceedings in the English magistrates’ courts, once a conviction, in the sense of a finding of guilt, was entered by the court following a guilty plea, the court had no power to allow a reversal of plea; the court had become *functus* so far as conviction was concerned. Not surprisingly, this *functus* rule could lead to injustice in circumstances where after conviction it emerged that the defendant might not be guilty of the offence charged or for some other reason should be given a chance to contest the proceedings. That led the courts, over the years, to adopt some “rather artificial practices”[[27]](#footnote-27) to get around the difficulty created by the supposed *functus* rule. One of these was to label an unequivocal plea when made an equivocal one by reason of what transpired at a later stage of the proceedings, in which event, so it was reasoned, the plea or the conviction would become a “nullity” and the conviction could be quashed on that basis. The situation was by no means satisfactory, as Lord Upjohn explained:

“These cases lead understandably enough, in order to do justice to the accused, to some rather artificial practices such as accepting a plea of guilty provisionally, as explained by Widgery J. in [*Reg. v. Blandford Justices* [1967] 1 Q.B. 82](https://login.westlawasia.com/maf/wlasia/ext/app/document?src=doc&linktype=ref&crumb-action=replace&docguid=I33E5E4A0E42811DA8FC2A0F0355337E9); or in the ‘guilty but ...’ cases, an expression used by Lord Goddard C.J. in [*Reg. v. Durham Quarter Sessions, Ex parte Virgo* [1952] 2 Q.B. 1](https://login.westlawasia.com/maf/wlasia/ext/app/document?src=doc&linktype=ref&crumb-action=replace&docguid=I42990400E42811DA8FC2A0F0355337E9) to describe the type of case where the accused pleaded guilty but then or at some later stage of the trial showed that he misunderstood the nature of the plea for his explanation showed that he should have pleaded not guilty.”[[28]](#footnote-28)

1. Lord MacDermott expressed a similar sentiment when he said:

“I think this is all too confusing and difficult to be sound. And the confusion becomes worse confounded if, as I am inclined to think may have happened in some of the cases, the ‘guilty but ...’ or equivocal factor was only revealed to the court by statements made in mitigation during the sentencing stage of the proceedings. These fine distinctions between what pleas are acceptable and what not, between the equivocal and the unequivocal, between provisional acceptance and final acceptance of the plea made, and between one stage and another of the same proceedings owe much to the introduction of what I have called the functus doctrine and suffice in themselves to cast a grave doubt on its validity.”[[29]](#footnote-29)

1. After reviewing the authorities and overruling some key decisions, the House of Lords clarified that as a matter of law, a magistrates’ court does not become *functus* until the passing of sentence. “Conviction” – in the sense of the final disposal of a case – is not complete at the stage of “conviction” – in the sense of a finding of guilt; it is only complete when sentence is passed. [[30]](#footnote-30) The important consequence of this clarification, for our present purpose, is that henceforth, there is no longer any need or indeed justification for continuing with the previous artificial practices to get around a non-existent rule and do justice.
2. This was made clear by Lord Upjohn when he said:

“The court, whether High Court, quarter sessions or a court of summary jurisdiction, retains full jurisdiction over all matters before it until sentence, that is, until the final adjudication of the matter; and the reasoning in *Sheridan’s* case and the cases of *Grant* [1936] 2 All E.R. 1156; *Guest* [1964] 1 W.L.R. 1273, and [*Gore Justices* [1966] 1 W.L.R. 1522](https://login.westlawasia.com/maf/wlasia/ext/app/document?src=doc&linktype=ref&crumb-action=replace&docguid=I478675B0E42811DA8FC2A0F0355337E9), which followed that reasoning must be treated as overruled. In future it will be quite unnecessary to accept a provisional plea or to resort to the ‘guilty but ...’ artifice. If the court upon all the facts before it, thinks it is proper to accept a plea of guilty then the court may permit that plea to be withdrawn and a plea of not guilty accepted at a later stage up to sentence, that is, until the complete adjudication of conviction.”[[31]](#footnote-31)

1. The true position has been made doubly clear by O’Connor J, following *S*, in the passage from *Foster* already cited above.
2. In other words, for our present purpose, an equivocal plea is a guilty plea which when made is accompanied or immediately followed by a qualification of the type described in *Foster*. Absent such a qualification, the plea is an unequivocal one. Anything that is said or comes to light after conviction cannot and does not turn the unequivocal plea to an equivocal one. Rather, its significance lies in that it may form the basis of an application to invoke the court’s discretion to allow a reversal of plea.
3. Continuing with my review of the relevant legal principles, *fourthly*, the discretion to allow the reversal of an unequivocal plea after conviction (but before sentence) is an unfettered one, although it has been said that it should be “exercised in clear cases and very sparingly”.[[32]](#footnote-32)
4. This suggestion of a cautious approach is not difficult to understand. A plea of guilty is, as it should be so regarded by all defendants, a serious plea. It must not be lightly made without full consideration. The policy of certainty and finality dictates against allowing a reversal of an unequivocal plea without good reason. As McCowan LJ observed in *R v Croydon Youth Court*:[[33]](#footnote-33)

“… the interests of justice also include the interests of the courts and the public that people who have pleaded guilty with the advice of counsel should continue to be regarded as guilty and that there should be certainty and an end to litigation.”

1. Moreover, where sentencing is adjourned, any possible prejudice to the prosecution due to any change of circumstances following conviction must be borne in mind. Furthermore, time and costs in preparation of reports may be wasted. The court’s diary position may have changed. Other court users’ timetables could be affected.
2. However, ultimately, how the court’s discretion should be exercised must turn on the facts. As O’Connor J said in *Foster*, “the exercise of this power is entirely a matter of discretion”.[[34]](#footnote-34) More recently, Lord Phillips of Worth Matravers CJ (as his Lordship then was) said in the English Court of Appeal in *Revitt v Director of Public Prosecutions*:[[35]](#footnote-35)

“16. What principles should govern allowing an application to withdraw a guilty plea? In *S (An Infant) v Recorder of Manchester* [1971] AC 481, 507 Lord Upjohn observed that the discretionary power was one which should ‘only be exercised in clear cases and very sparingly’. That guidance is not of great practical assistance. Better general guidance appears from the comments of Lord Morris of Borth-y-Gest, at p 501:

‘The duty of a court to clear the innocent must be equal or superior in importance to its duty to convict and punish the guilty. Guilt may be proved by evidence. But also it may be confessed. The court will, however, have great concern if any doubt exists as to whether a confession was intended or as to whether it ought really ever to have been made.’

17. If after an unequivocal plea of guilty has been made, it becomes apparent that the defendant did not appreciate the elements of the offence to which he was pleading guilty, then it is likely to be appropriate to permit him to withdraw his plea – see *R v South Tameside Magistrates’ Court, Ex p Rowland* [1983] 3 All ER 689, 692, per Glidewell J. Such a situation should be rare, for it is unlikely to arise where the defendant is represented and, where he is not, it is the duty of the court to make sure that the nature of the offence is made clear to him before a plea of guilty is accepted.

18. It may happen, and again this is likely to be rare, that the court hearing an application to withdraw a guilty plea will or should appreciate that the facts relied upon by the prosecution do not add up to the offence charged. In such circumstances, justice will normally demand that the defendant be permitted to withdraw his plea. *R v Bournemouth Justices, Ex p Maguire* [1997] COD 21 appears to have been such a case.”

1. In my view, the overriding consideration, in the exercise of the discretion, must be the interests of justice. As Lord MacDermott said in *S*:[[36]](#footnote-36)

“Once made, a mistaken plea may be properly accepted and the mistake may never stand revealed. But if, as can happen, the truth comes to light during the second stage of the proceedings, when the question of what to do with the accused is under consideration, why should it not be acted upon and a changed plea of not guilty allowed where the interests of justice so require? There is no good reason for thinking that such a course would create an administrative problem or open the door to a widespread abuse of process.”

1. In the type of case under consideration, where there is material appearing in mitigation or the reports, which tends to suggest that the defendant may not be guilty of the offence charged, the interests of justice would, in a normal case, weigh heavily in favour of allowing a reversal of plea. Of course, where, for instance, the court has a real doubt that what is subsequently asserted is only a recent fabrication to avoid the consequence of, say, a heavy sentence following a guilty plea, the court may certainly probe deeper into the matter before deciding how its discretion should be exercised.
2. It must also follow from the above discussion that once one reserves the label of an “equivocal” plea to a plea that is accompanied or immediately followed by a qualification of the type described in *Foster* at the time the plea is made, leaving all post-conviction qualifications as cases seeking to invoke the court’s discretion to allow the change of an unequivocal plea, one is no longer constrained to look for a qualification of the type mentioned in *Foster* in these post-conviction cases, when considering how the court’s discretion should be exercised. In other words, whilst *Foster* describes, for the purpose of deciding whether a plea is equivocal, the requisite qualification as one which, if true, may show that the defendant is not guilty of the offence charged, this need not be the threshold that a defendant in a post-conviction case must reach in order to successfully invoke the court’s exercise of discretion. Depending on the facts, even in a case of doubt about the merits of the defendant’s case (as per his story), the court may still think that its discretion should be exercised in favour of allowing a reversal of plea, so that the matter can be properly tried at trial, bearing particularly in mind that in deciding an application to change plea, the court should avoid conducting a mini-trial on the merits of the case on the basis of what the defendant now asserts before it.
3. Needless to say, the circumstances that may give rise to an application to reverse an unequivocal plea are not limited to those involving a qualification of the type discussed above.
4. As this court has explained in *HKSAR v Shum Wan Foon*,[[37]](#footnote-37) where the unequivocal plea of guilty was in fact entered into as a result of duress, inducement or misrepresentation, the plea is in substance a nullity, and the court’s discretion may only be judicially exercised by allowing a change of plea.[[38]](#footnote-38) This court has also emphasised that where any of these vitiating factors is suspected, the court must make sufficient inquiries to determine whether there is any truth in the suspicion, without which there would not be a sufficient basis to decide how the court’s discretion should be exercised.[[39]](#footnote-39)
5. Examples of applications based on circumstances other than post-conviction qualifications of the type discussed are many. In *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Roche*[[40]](#footnote-40) and *R v South Tameside Magistrates’ Court, ex p Rowland*,[[41]](#footnote-41)the respective defendants both applied (unsuccessfully) to reverse their guilty pleas for fear of a custodial sentence. The defendant in *Foster*, on the other hand, based his application on an (alleged) mistake of law that his lawyer had made.

***The approaches below***

1. It should be apparent from the discussion of the law above that the approaches of the deputy magistrate and the deputy judge in the present case were, for understandable reasons, flawed.
2. For the deputy magistrate, what she had taken from the appellant was an unequivocal plea. What the appellant relied on to reverse his plea only emerged after the plea was made and conviction entered, that is, during mitigation and in the community service report. Although the application to reverse plea was made to her on the basis that the plea was equivocal, it was nonetheless an application to reverse that plea, on which the deputy magistrate had a discretion to exercise. She was correct in deciding that the plea before her was unequivocal. To decide that, all she ought to have considered was the circumstances at the time the plea was taken. What happened during mitigation or was said in the report was quite irrelevant to the question of whether the plea was equivocal.
3. However, the deputy magistrate’s decision that the plea was unequivocal did not, contrary to what she thought, dispose of the application to reverse plea. By that stage, she had assertions before her which if true would suggest that the appellant was not guilty of careless driving at all, even though the application to reverse plea was made on the wrong footing that the plea was equivocal. The deputy magistrate was therefore wrong, as a matter of approach, to simply refuse the application to reverse the guilty plea once she ruled that it was not equivocal,[[42]](#footnote-42) without considering how her discretion should be exercised in light of the material emerging during mitigation and from the community service report.
4. As for the deputy judge’s approach to the appeal against conviction, again understandably, he shared the mistake of the deputy magistrate in thinking that the only issue he had to deal with was whether the plea was equivocal.[[43]](#footnote-43) Like the deputy magistrate, he also came to the right conclusion that the plea was unequivocal. He was right in thinking that in deciding whether the plea was equivocal, what was said in the community service report was irrelevant,[[44]](#footnote-44) but was wrong in taking into account what was said during mitigation in determining the question. Although, as explained, the deputy magistrate had never gone on to consider whether she should exercise her discretion to allow the reversal of plea once she had ruled that the plea was unequivocal, somehow the deputy judge wrongly thought that she had, and concluded his judgment by saying that he could not discern any obvious errors on the part of the deputy magistrate and therefore was not prepared to interfere with her exercise of discretion.[[45]](#footnote-45)

***The appellant’s version of events***

1. Turning now to what emerged after conviction in the present case, both the deputy magistrate and the deputy judge were right to say that the fact that the injured pedestrian may have been partly responsible for the accident does not necessarily mean that the appellant has not driven carelessly. But this begs the question as to whether the appellant was really giving a version of events in mitigation and in the community service report, under which he was not driving carelessly at all.
2. The deputy magistrate and the deputy judge were also right in saying that the defendant had repeatedly admitted that he was careless in the accident. However, the fact remains that he was never asked to elaborate on the reasons why he considered himself to have driven carelessly, and he never did. As such, his admissions added nothing to what he had already admitted to when he agreed with the brief facts which stated, again without elaboration, that he had driven “without due care and attention”.
3. In my view, what the deputy magistrate and deputy judge have both failed to appreciate was that according to the appellant’s story, when the collision occurred, the front of the appellant’s vehicle had already travelled past the injured pedestrian. It was the injured pedestrian who, without paying attention to the road condition and whilst playing with her mobile phone, stepped out from the safety island unexpectedly and ran into the side of the vehicle and got hit by its offside mirror and front wheel. The appellant was in effect saying that it was the pedestrian who hit the side of his vehicle, rather than his vehicle hitting her. That was why he repeatedly said he did not know what he could have done to avoid the accident.
4. The deputy magistrate said to the appellant during the course of his mitigation that when approaching the safety island, he ought to have slowed down his vehicle. However, there was nothing in the brief facts to say that the appellant was driving at an excessive speed at the time. According to the appellant, he managed to stop his vehicle immediately after collision. Moreover, as the deputy magistrate recognised in her statement of findings, the place of the accident was not a zebra crossing and pedestrians had no priority to use the road.
5. Furthermore, the appellant also told the magistrate during mitigation that in fact, his vehicle was driving past the safety island at some distance (measured sideways) from it, so it was not a case of his driving too close to the safety island when driving past it. Rather, according to the appellant, it was the pedestrian who, unlike all other pedestrians who remained standing at the safety island at the time, suddenly stepped out from the safety island and collided with the side mirror of his vehicle and got hit by its front wheel.
6. Thus understood, what has been described by the appellant, if true, may show that he was not driving carelessly in the accident at all. But even if there was any doubt about his guilt on the basis of his own version of events, the application to reverse plea was not an occasion for the deputy magistrate to conduct a mini-trial on bare assertions. In my view, what had transpired should have been sufficient to alert the deputy magistrate to the possibility that the appellant was not guilty as charged, and in the interests of justice, he should not have been denied his day in court – notwithstanding his ill-considered guilty plea, particularly when no real prejudice would appear to result to the prosecution or others by a reversal of plea.
7. As mentioned, the deputy magistrate did not exercise her discretion given her view that her ruling that the plea was unequivocal concluded the application to reverse plea against the appellant. Therefore, on appeal, there was no bar to the deputy judge exercising the court’s discretion in the matter, which, unfortunately, he did not do. If he had realised the true position, he ought to have exercised his discretion to allow the change of plea and quashed the conviction accordingly.
8. However, Mr Sean, for the respondent, argues that as things now stand, the matter should be remitted to the magistrates’ court “for inquiries” to be made regarding whether the appellant should be allowed to reverse his plea, apparently basing his argument on what this court has said in *Shum Wan Foon*. With respect, that represents a misreading of this court’s judgment. In *Shum Wan Foon*, the basis for the application to reverse plea was that the defendant was misled by his former lawyers into pleading guilty. It was thus incumbent upon the magistrate to make sufficient inquiries to ascertain the basis of the defendant’s application and to decide if it was sound in fact and in law, before he could properly exercise his discretion on the application. The duty to make sufficient inquiries was said in that context. Here, the appellant’s story has emerged sufficiently clearly from the mitigation and the community service report, based on which the court’s discretion can be properly exercised. Whether the appellant should be believed on his story would be a matter for trial. Indeed, as I have explained, the court’s discretion should have been exercised in favour of granting the application to reverse the plea. There is therefore no point in remitting the matter back to the magistrates’ court to conduct any further inquiries. Rather, the application should be allowed and the conviction quashed.

***Disposition***

1. For these reasons, I would allow the appeal, set aside the order of the deputy judge, and order that the appellant’s appeal against conviction be allowed and his conviction quashed. Given that the appellant has already served the sentence of 150 hours community service, which is by no means a light sentence for a careless driving conviction, I would, exceptionally, not order a retrial.[[46]](#footnote-46)
2. As for costs, I would make an order *nisi* that the respondent pay to the appellant his costs before us and before the deputy judge, to be taxed if not agreed.

Lord Phillips of Worth Matravers NPJ:

1. I agree with the judgment of Mr Justice Cheung PJ.

Chief Justice Ma:

1. The court unanimously allows the appeal and makes the order referred to in paragraph 62 of this judgment. As to costs, we make an order *nisi* that the respondent pay the costs of the appellant in this appeal and the appeal before the deputy judge, such costs to be taxed if not agreed.  Should any party seek a different order as to costs, written submissions should be lodged with the Registrar (and served on the other party) within 14 days of the handing down of this judgment, with liberty on the other party to lodge and serve written submissions in reply within 14 days thereafter.  If no written submissions are received seeking a different order as to costs before the expiry of the relevant period, the order *nisi* will become absolute.

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| (Geoffrey Ma)  Chief Justice |  | (R A V Ribeiro)  Permanent Judge |  | (Joseph Fok)  Permanent Judge |

|  |  |  |
| --- | --- | --- |
| (Andrew Cheung)  Permanent Judge |  | (Lord Phillips of Worth Matravers)  Non-Permanent Judge |
|  |  |  |

Mr Edward M H Chan, instructed by N K Lee & Co, for the appellant

Mr Eddie Sean, SADPP and Ms Elisa Cheng, PP of the Department of Justice, for the respondent

1. Ms Chiu Wai‑yee. [↑](#footnote-ref-1)
2. Para 4. [↑](#footnote-ref-2)
3. Para 7. [↑](#footnote-ref-3)
4. Para 9. [↑](#footnote-ref-4)
5. Paras 10 and 13. [↑](#footnote-ref-5)
6. Para 14. [↑](#footnote-ref-6)
7. Para 8. [↑](#footnote-ref-7)
8. Para 12. [↑](#footnote-ref-8)
9. Para 18. [↑](#footnote-ref-9)
10. Paras 19-21. [↑](#footnote-ref-10)
11. Para 24. [↑](#footnote-ref-11)
12. Para 25. [↑](#footnote-ref-12)
13. [1978] 2 All ER 751, 754j to 755c. It was cited and applied by the Court of Appeal in *HKSAR v Ng Chi Wai* [2012] 3 HKLRD 356, para 19. [↑](#footnote-ref-13)
14. *Foster*, 754j. [↑](#footnote-ref-14)
15. [1978] HKLR 522. [↑](#footnote-ref-15)
16. Page 524. [↑](#footnote-ref-16)
17. Page 529. [↑](#footnote-ref-17)
18. Page 529. [↑](#footnote-ref-18)
19. CACC 326/2005, 30 May 2006. [↑](#footnote-ref-19)
20. Paras 1 & 15. [↑](#footnote-ref-20)
21. Paras 14 & 15. [↑](#footnote-ref-21)
22. Criminal Appeal No 856 of 1978, 20 September 1978. [↑](#footnote-ref-22)
23. Page 2. [↑](#footnote-ref-23)
24. Which, when properly drafted, should cover all elements of the offence charged and contain nothing which would suggest a defence. [↑](#footnote-ref-24)
25. *R v Durham Quarter Sessions, ex p Virgo* [1952] 2 QB 1, 7. [↑](#footnote-ref-25)
26. [1971] AC 481. [↑](#footnote-ref-26)
27. Page 507C. [↑](#footnote-ref-27)
28. Page 507C-D. [↑](#footnote-ref-28)
29. Page 496B-C. [↑](#footnote-ref-29)
30. Pages 489C-E, 498G-499E, 504D-E, 504F & 507E-F. [↑](#footnote-ref-30)
31. Page 507E-G. [↑](#footnote-ref-31)
32. *S*, 507G/H, per Lord Upjohn. [↑](#footnote-ref-32)
33. [1997] 2 Cr App R 411, 417. [↑](#footnote-ref-33)
34. Page 755b/c. [↑](#footnote-ref-34)
35. [2006] 1 WLR 3172, 3179. [↑](#footnote-ref-35)
36. Page 493F-G. [↑](#footnote-ref-36)
37. (2014) 17 HKCFAR 303. [↑](#footnote-ref-37)
38. Paras 11, 12 & 15. [↑](#footnote-ref-38)
39. Paras 13-17. [↑](#footnote-ref-39)
40. Unrep, The Times, 5 February 1987. [↑](#footnote-ref-40)
41. [1983] 3 All ER 689. [↑](#footnote-ref-41)
42. Statement of findings, para 15. [↑](#footnote-ref-42)
43. Judgment, para 17. [↑](#footnote-ref-43)
44. Para 24. [↑](#footnote-ref-44)
45. Para 25. [↑](#footnote-ref-45)
46. Similarly, in *Shum Wan Foon*, this court, exceptionally, did not order a remitter. One significant reason was that the appellant had already served his 6-month term of imprisonment (para 33). [↑](#footnote-ref-46)