49/94

SUPREME COURT OF VICTORIA

TUDMAN v FLOWER

Hansen J

23 August, 9 September 1994 — (1994) 73 A Crim R 321

CRIMINAL LAW – PLEAS OF GUILTY – PRIORS READ OUT – PLEA IN MITIGATION COMMENCED – DISPUTE WITH POLICE SUMMARY – "CONVICTION" – MEANING OF – WHETHER DEFENDANT CONVICTED – PLEAS OF GUILTY MARKED WITHDRAWN BY MAGISTRATE – PROCEEDING ADJOURNED FOR PLEA OF NOT GUILTY – WHETHER MAGISTRATE HAD POWER TO CHANGE PLEA.

After taking pleas of guilty to two charges, declaring two other charges struck out and hearing an agreed summary of the facts, a magistrate found the charges proved and was informed of the defendant's prior convictions. During the plea in mitigation, a dispute arose as to the amount of compensation payable and whether the victim was being blamed for the incident. Accordingly, the magistrate withdrew the pleas of guilty and adjourned the proceeding for a plea of not guilty. Upon application for judicial review—

HELD: Review granted. Order set aside. Charges to which pleas of guilty entered to be heard and determined according to law.

1. Conviction is the determination of guilt. There can be no conviction until by some act on the part of the court it has indicated a determination of the question of guilt.
***R v Tonks and Goss* [1963] VicRp 19; [1963] VR 121, applied.**

2. Having regard to the finding that the charges were proved, the request for prior convictions and the commencement of the plea, an act on the part of the court occurred to indicate a determination of the question of guilt. Accordingly, the defendant was to be regarded as having been convicted.

3. In relation to the pleas of guilty, there had been no application by the defendant to change the plea nor was it a case where the pleas were properly to be treated as pleas of not guilty. Accordingly, the magistrate had no power to change the pleas of guilty to pleas of not guilty.

4. Observation: Magistrates should ensure that the consent to summary jurisdiction is entered in the Court records against those charges requiring consent.

HANSEN J: *[After setting out the facts and the nature of relief sought in the originating motion, His Honour continued]...* **[8]** The application as amended raised two points. First, whether the plaintiff was convicted on 7 September 1993. Secondly, whether the magistrate acted correctly in treating the plea of the plaintiff as no longer a plea of guilty but one of not guilty. As to the former point, the first defendant concedes, and the parties agree, that at the stage the proceedings had reached the plaintiff was to be regarded as having been convicted. As to the second point, the first defendant, at an early stage in the hearing of the appeal, stated that no argument would or could be presented to support the course taken by the magistrate. It is a shame that this approach was not taken at an earlier stage but all that must now be regarded as water under the bridge and the parties are to be congratulated for now taking a common sense approach to the situation.

The authorities contain much discussion of what constitutes a "conviction" and the difference between a conviction and sentence. Conviction and sentence are quite different things. Conviction is the determination of guilt while sentence is the ultimate judgment of the court in the matter. See *R v Tonks & Goss* [1963] VicRp 19; [1963] VR 121; *S v Recorder of Manchester* [1971] AC 481 and *Griffiths v R* [1977] HCA 44; (1977) 137 CLR 293; (1977) 15 ALR 1; (1977) 51 ALJR 749.

In *Tonks* the Full Court decided that the making of pleas of guilty and their recording by the bench clerk on the presentment and entry in the record book of the court did not **[9]** constitute a conviction so as to establish a plea of *autrefois convict*. It was held that the entries on the presentment and in the record book were mere minutes or memoranda of an administrative character. At pp127-128 the court said -

> "The review of the authorities which we have made satisfies us that a plea of guilty does not of its own force constitute a conviction. In our opinion it amounts to no more than a solemn confession of the ingredients of the crimes alleged. A conviction is a determination of guilt, and a determination of guilt must be the act of the court or the arm of the court charged with deciding the guilt of the accused. It may be that even a determination of guilt will not in all cases amount to a 'conviction', for the latter term may be used in a particular context as meaning not merely conviction by verdict when no judgment is given, but conviction by judgment (*vide*, *Burgess v Boetefeur* (1844), 7 Mann. & G. 481, and Hale's *Pleas of the Crown*, vol. 1, p.686); but there must at least be a determination of guilt before there can be a conviction. There can accordingly be no conviction on a count to which an accused pleads guilty until by some act on the part of the court it has indicated a determination of the question of guilt."

This passage was referred to with approval in *R v Jerome & McMahon* [1964] Qd R 595; 59 QJPR 57 and in *Griffiths*. The requirement in the passage in *Tonks* is "a determination of guilt" which is "the act of the court ... charged with deciding the guilt". This "determination" or "act" may be seen to have occurred either in an express statement of the court or on a consideration of the relevant circumstances. In *Griffiths* it was held that a "conviction" had occurred in circumstances in which the accused had pleaded guilty, the plea had been accepted but the judge did not formally convict the accused while remanding him for sentence in twelve months on the condition that he should enter into a **[10]** good behaviour bond for that period. Barwick CJ said of this, at p304 -

> "I am also clear that the judge did accept the plea of guilty in the sense that it not only established guilt but warranted the entry of a conviction. In my opinion the judge did convict the applicant ... The applicant, in my opinion, was convicted and, indeed, the order which the judge made was made on the basis that it was an order on conviction."

In other words, the course of events indicated that the judge was proceeding "on the footing that the accused is convicted" (p302).

The plaintiff relied on the finding that the charges were proved, the request for prior convictions and the commencement of the plea in mitigation as proof of such a "determination" or "act" having occurred. The contention finds support in the earlier authority of *R v Grant* (1936) 26 Cr App R 8; (1936) 2 All ER 1156, and *R v Sheridan* (1937) 1 KB 223; (1936) 2 All ER 883, although the latter case must now be read in the light of the comments made about it by the House of Lords in *Recorder of Manchester*.

In *Grant* the Court of Criminal Appeal held the appellant entitled to rely on a plea of *autrefois convict*. After pleading guilty the magistrate had not passed sentence forthwith but had remanded him on bail for a report. When the magistrate received the report he changed his mind and decided to commit for trial. The critical act was that the magistrate had found guilt.

Sheridan was a similar case. The defendant pleaded not guilty and the court, after hearing evidence, announced that it found the defendant guilty. Previous convictions were then proved whereupon the court committed the defendant for trial. The Court of Criminal Appeal held that in those circumstances **[11]** there had been a conviction, and that in order to support a plea of *autrefois convict* it was not necessary that the conviction be followed by sentence.

These cases have clear parallels with the present case. It was no doubt for these reasons that the parties have agreed on a declaration that the plaintiff was convicted on 7 September 1993 of the two charges to which he pleaded guilty. The declaration will be granted. In my opinion the plaintiff was "convicted".

The second point concerns the power of the magistrate to alter the pleas of guilty to pleas of not guilty, or to treat the pleas as so altered. It does sometimes happen that a defendant in pleading guilty makes statements which cast doubt upon the plea. In *R v Tatnell* [1962] Qd R 11, Hanger J in a judgment with which Mansfield CJ agreed, said, at p14, that -

> "... though the prisoner has in fact announced a plea of guilty to a charge, yet where he makes statements, at the time or before sentence, which show that his plea was intended to be an admission only of facts which would not be sufficient to substantiate the offence charged, or that he alleges facts which would amount to a defence to the charge, then in these circumstances, he should be treated as pleading 'not guilty'."

This passage was referred to and applied by Gibbs J, as he then was, in *Jerome*. In that case statements were made which showed that the plea was "... intended to be an admission only of facts which would not be sufficient to substantiate the offence alleged". In a later passage, at pp 603-604, Gibbs J stated the principle to be that -

> "... where a prisoner in the one breath pleads guilty and makes it clear that he in fact denies the existence of a vital element of the offence **[12]** charged against him the judge should have power to direct a plea of not guilty to be entered notwithstanding that the accused, whether it be through lack of appreciation of the significance of what was going on, through sheer contumaciousness, or through a desire to achieve some technical advantage, adheres to his wish to enter a plea of guilty."

The agreement that the magistrate had no power to substitute a plea of not guilty involves the conclusion, which in my view is correct, that the statements made in the course of the plea did not come within the statements of principle in *Tatnell* or *Jerome*. Nor had there been an application to change the plea. It is, of course, not to be denied that a plea of guilty can be changed after "conviction" in the sense of a finding of guilt; see *Recorder of Manchester* and *Griffiths.* But this was not a case in which an application to change plea had been made or in which the plea was properly to be treated as a plea of not guilty.

The issue concerning the correctness or otherwise of facts alleged in the plea by the plaintiff's solicitor could – if really thought necessary – have been dealt with in the course of the plea; see *R v Chamberlain* [1983] VicRp 110; [1983] 2 VR 511; (1982) 14 A Crim R 67. That did not require the magistrate to treat the plea of guilty as withdrawn. For these reasons the declaration sought will be granted.

The parties made submissions on costs, the plaintiff seeking its costs and the first defendant submitting there should be no order. In my view it is appropriate that the plaintiff have his costs of the application. I have considered the submissions made on the question of costs and in particular the submission on behalf of the first defendant that the magistrate acted of his own volition without an **[13]** application by the prosecutor to treat the pleas as pleas of not guilty. Even if the prosecutor on 7 September 1993 was under the impression that the matter was being adjourned for consideration of facts in the course of the plea, the attitude of the prosecution thereafter and until some time into the hearing of the application before me has been to support the actions of the magistrate and to seek to press on with the hearing of the four charges as though the defendant's plea to each was not guilty. The prosecution could have taken a different course which in all probability would have avoided the very considerable costs and delay which have since occurred.

There is one final matter. The extracts of the entries in the register that were provided by the magistrate when he provided his notes in relation to the reasons given on 28 February 1994 indicate that the plaintiff consented to summary jurisdiction on the charge of unlawful assault but no such indication appears in relation to the charge of intentional damage to property. This is curious, and must have been a mistake as unlawful assault was not an indictable matter but intentional damage was and the Magistrates' Court had no jurisdiction unless *inter alia* the plaintiff consented to the summary jurisdiction; see *Magistrates' Court Act* 1989, s53(1)(b). I assume this to be a mere error in recording. It is however to be noted that the same error in recording appears in the like extracts (provided in the same way) for the proceedings on 7 October 1993. It is most important that the records of the Magistrates' Court be accurate in all respects.

[14] The orders will be -

1. Leave is granted to the plaintiff -

(a) to amend the originating motion by adding to the Statement of Relief or Remedy Sought the following paragraph—

"11. A declaration that at the Magistrates' Court on 7 September 1993 the plaintiff was on a plea of guilty convicted of a charge that -

(i) at Mulgrave on 7 February 1993 he did intentionally and without lawful excuse damage property belonging to another, namely a silver Corona coupé, the property of Mr Jaworski and valued at $700,

(ii) he did at Mulgrave on 7 February 1993 drive a motor vehicle on a highway, namely the South-Eastern Arterial, carelessly, in circumstances set forth in an agreed Summary of Offence read to the court (and referred to in Exhibit GK4 to the affidavit of Gabriel Kuek affirmed 18 April 1994) and that consideration of any sentence to be imposed in relation to those charges is required to be dealt with by the Magistrates' Court according to law."

(b) To amend the Grounds for Relief or Remedy Sought by adding the following paragraph-
"15. The Magistrates' Court on 7 September 1993, 7 October 1993 or 28 February 1994 did not have any right, power or authority -
(a) to require the plaintiff to change his plea,
(b) to substitute for the plea entered by the plaintiff any contrary or other plea."

2. A declaration in the terms of the said paragraph 11 of the Statement of Relief or Remedy in the originating motion as amended.

[15] 3. An order that the order or ruling of the Magistrates' Court made on 7 September 1993 and/or 7 October 1993 that the plaintiff's plea be or be treated as a plea of not guilty on the said two charges be set aside.

4. An order that the said two charges be heard and determined by the Magistrates' Court constituted by a different magistrate in accordance with law and these declarations and orders.

5. An order that the applicant's costs, including reserved costs, be paid by the first defendant.

APPEARANCES: For the plaintiff Tudman: Mr DA Perkins, counsel. Kuek & Associates, solicitors. For the first defendant Flower: Mr PC Golombek, counsel. Ronald C Beazley, Victorian Government Solicitor.
