Criminal Law Review

2016

Case Comment

Trial: R. v McCarthy

Court of Appeal (Criminal Division): Hallett LJ, Vice President, Haddon-Cave and Patterson JJ: 9 July 2015; [2015] EWCA Crim 1185

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Subject: Criminal procedure

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Case:

McCarthy (Jamie) v R. [2015] EWCA Crim 1185 (CA (Crim Div))

Crim. L.R. 145 The defendant (D) pleaded guilty on re-arraignment to wounding with intent to cause grievous bodily harm (Offences Against the Person Act 1861 s.18) and possessing an offensive weapon. D's co-accused, his mother, pleaded guilty to affray. D's mother was the victim of a burglary and her family were convinced that AS, the son of the complainant LS, was responsible. It was alleged that D and his mother saw LS in a car. D's mother ran over with D to the car, shouting and swearing. She leant in through the passenger window and swore at LS. At the same time D was standing behind her and threatening to kill AS. He pushed his way to the front of the car and lunged through the window stabbing LS with a 12-inch bladed kitchen knife. D was shouting and waving the knife around in a stabbing motion saying, "You fucking tell AS that he's dead". D and his mother then drove off. LS suffered two lacerations 11/2cm long and 3cm long. D at first pleaded not guilty on the basis that LS produced the knife and that he, D, acted in protection of his mother and caused the injuries in disarming LS. D appealed against conviction alleging that his trial counsel, W, exerted undue pressure on him and was incompetent in representing him. The court heard evidence from a number of ***Crim. L.R. 146*** witnesses who variously alleged that counsel, acting largely without solicitors, was late for the court hearing; he conducted pre-trial conferences in an unduly informal way, appearing to smell of cannabis; having earlier been confident of success, he advised D and the family that there was only a 30 per cent chance of acquittal and suggested a plea bargain, but did not explain properly the difference between s.18 and s.20 wounding; he gave D the impression that D would be pleading guilty to s.20 wounding (without intent). (D said on appeal that he would have pleaded guilty to s.20 wounding.) W gave evidence denying the allegations of unprofessionalism, undue informality and association with cannabis. He explained the elements of s.20 only because the family were asking whether the prosecution would accept a plea to a lesser offence. In so doing, he made it clear that a plea to s.20 was not on offer. W admitted that, contrary to professional rules, he did not obtain D's endorsement of his brief when D changed his plea and W made no written record of that or any conference.

Held, allowing the appeal, the Court of Appeal would only take the exceptional course of intervening if a defendant had been deprived of a defence which the court believed would probably have succeeded; and a defendant charged with an offence was personally responsible for entering his plea, and must be free to choose whether to plead guilty or not guilty. The issues were: (i) undue pressure; and (ii) inadequate representation that, individually or cumulatively, improperly narrowed D's freedom of choice. As to (i) D was undoubtedly under pressure to keep his mother out of prison (the proposal for a "deal" involved D's mother pleading guilty to affray) and by the estimate of a 30 per cent chance of acquittal, but this was common in trials of serious criminal offences; and D was a robust and articulate man. D's defence was unlikely to succeed. The complaint of improper pressure was rejected. As to (ii), before D could properly and freely plead guilty to an offence of wounding with intent contrary to s.18, his advocate had to explain all the elements of the offence to him and D had to understand that he was thereby accepting that, when he stabbed LS, he intended to cause her really serious bodily harm. On all the evidence (including notes kept by D's mother's counsel who was present at the conference) the court was satisfied that W did not properly explain the nature of the

intent necessary to establish the s.18 offence. The court was far from confident that, when D pleaded guilty to wounding with intent, he had a proper understanding of the elements of the offence. In that sense, his freedom of choice was improperly narrowed. The prosecution case on the charges of wounding and offensive weapon might have been strong, but D might have persuaded a jury that his appalling behaviour did not extend to intending to cause LS really serious bodily harm. Accordingly, the court substituted a conviction for s.20 wounding and passed a lesser sentence to reflect that offence.

Cases considered: *Boal [1992] Q.B. 591; (1992) 95 Cr. App. R. 272*; *Nightingale [2013] EWCA Crim 405; [2013] 2 Cr. App. R. 7* (p.69).

Per curiam: The case was a paradigm example of why some formality and distance was required between advocates and their lay clients; lessons should be learned by those who sought to blur the boundaries. The advocate should remain an independent and objective adviser.

Z. Ali QC and *N. Rimmer* for D.

S. Heptonstall for the Crown. ***Crim. L.R. 147***

Commentary

Was the guilty plea unsafe or a nullity? The Court of Appeal has not been entirely consistent in its approach to the consequences of finding a guilty plea to have been wrongly entered. In some cases, the resulting conviction has been labelled as "unsafe" under the Criminal Appeal Act 1968 s.2 and has been quashed; in others, the whole proceedings have been declared a "nullity" under the court's inherent jurisdiction. In still others, both terms have been used; for example, in *Nightingale [2013] EWCA Crim 405; [2013] 2 Cr. App. R. 7* (p.69), the court declared that the guilty plea was "in effect a nullity" that would be "set aside" with the conviction based on the plea being "quashed" (at [17]). If it is a nullity there is nothing to quash. (See also *Chukwu [2014] EWCA Crim 1405* at [8] and [10].)

The differences in the labels are more than merely academic in the consequences that flow. If the conviction is unsafe and is quashed, the court can substitute an alternative verdict and re-sentence (as it did in the present case), or order a retrial; if the proceedings were a nullity, it can only issue a writ of *venire de novo* and order a fresh trial or set the matter aside without ordering anything further. (See *Booth [1999] 1 Cr. App. R. 457*). Moreover, the strength of the prosecution or potential defence cases should play no part in deciding whether the proceedings were a "nullity" [*Nightingale*], but may do so when considering the question of safety (*Lee [1984] 1 W.L.R. 578; (1984) 79 Cr. App. R. 108, 113* per Ackner LJ).

The distinction was considered by Thomas LJ (as he then was) in *Evans [2009] EWCA Crim 2243; [2010] Crim. L.R. 491*, where the court was considering the impact of incorrect advice on a decision to plead guilty. The court came down firmly in the "nullity" camp. At [51]–[53] of the transcript it states:

"We accept that we are concerned not with the general jurisdiction of this court under the Criminal Appeal Act 1968 s.2 under which an appeal against conviction is allowed if the court thinks that a conviction is unsafe. We are concerned with the special jurisdiction to grant a writ of *venire de novo* expressly preserved for this court by the Supreme Court Act 1981 s.53(2) (d).

The applicable general principle is that such a writ will be granted where the proceedings are a nullity, that is to say where a purported trial is 'actually no trial at all' (see the opinion of Lord Atkinson in *Crane v DPP [1921] 2 A.C. 299* at 330) or where there has been 'some irregularity in procedure which prevents the trial ever having been validly commenced' (see the opinion of Lord Diplock in *Rose (1982) 75 Cr. App. R. 322* at 336.

In our view, the correct approach where the appellant seeks to contend that his plea of guilty should be vacated and the proceedings declared a nullity is that set out in *Saik [2004] EWCA Crim 2936*, specifically at [57]:

'For an appeal against conviction to succeed on the basis that the plea was tendered following erroneous advice it seems to us that the facts must be so strong as to show that the plea of guilty was not a true acknowledgment of guilt. The advice must go to the heart of the plea, so that as in the cases of *Inns* and *Turner* [*note: these cases dealt with improper judicial/counsel pressure]* the plea would not be a free plea and what followed would be a nullity.'"

The court considered the question of safety in the alternative, but rejected this ground on the basis that it did not consider trial counsel's advice to have been erroneous.

Evans and *Saik [2004] EWCA Crim 2936* were referred to in *Mateta [2013] EWCA Crim 1372; [2014] 1 W.L.R. 1516; [2013] 2 Cr. App. R. 35 (p.431); [2014] Crim. L.R. 227* ****Crim. L.R. 148*** (quoting from *AM [2010] EWCA Crim 2400; [2011] 1 Cr. App. R. 35*), where the court was considering cases in which the defendant, following incorrect legal advice, had pleaded guilty to an offence to which a defence was or may have been available to him. Whilst the court in *AM* accepted that the "nullity" principle could apply to appeals involving challenges to a guilty plea, the court added (at [12]) that:

"It is, however, important not to water down the underlying concept of the jurisdiction so as to bring nullity into play purely on the basis of advice alleged to be wrong. For those circumstances, there remains a basis on which this court can intervene which is firmly grounded in the safety of the conviction". (See *Lee [1984] 1 W.L.R. 578; (1984) 79 Cr. App. R. 108*; *Boal [1992] Q.B. 591 (1992) 95 Cr. App. R. 272*.)

Neither *Evans* or *Saik*, nor *Mateta* were referred to by the court in the present case. However, reliance was placed on *Boal* and *Nightingale*.

In analysing the approaches in *Boal*, *Evans* and *Mateta*, it appears that the following conclusions can be drawn:

(a) If the evidence regarding the erroneous legal advice shows that the plea of guilty was not a true acknowledgment of guilt (such as where there was improper pressure from the judge or from counsel), the proceedings are a nullity (see *Evans*).

(b) However, where following incorrect legal advice, a defendant has pleaded guilty to an offence to which a defence was or may have been available to him, the court will consider whether the resulting conviction is unsafe. In so doing, it will consider whether the defence would quite probably have succeeded and whether a clear injustice has been done. The court saw this as being a rare occurrence (see *Boal* and *Matata*).

However, in the instant case, the court appears to go one stage further than *Boal* and *Matata*, and to have applied a more generous test. The court found that it would intervene in this exceptional case because it was "far from confident that when the applicant pleaded guilty to [section 18] he had a proper understanding of the elements of the offence. In that sense, his freedom of choice was improperly narrowed" (at [81]). The court added that it could not be argued that he had no defence on a charge of wounding with intent, and that he "may have persuaded the jury" that he did not intend to cause really serious bodily harm. This was clearly a lower test than "whether the defence would quite probably have succeeded". However, the facts of the case demonstrated that "a clear injustice" had been done which rendered the conviction "unsafe"; this was rectified by the quashing, substitution and re-sentencing.

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