

The Burden of a change of Plea

1. Our criminal courts encourage defendants to plead guilty because of a scheme put in place by the criminal justice system, which offers a discounted sentence. Hence, it may come as no surprise that to benefit from this reward the accused often may blindly enter a guilty plea but change their mind at a later stage.¹ This article discusses the extent of the discretion that can be used by the criminal courts highlighting the difficulties and the process of withdrawing a plea comparing with the jurisdictions of the US and Canada.
2. To resolve such a scenario and to preserve justice the criminal justice system has provided the accused the alternative option of altering their plea from guilty to not guilty and to proceed to trial at any stage before sentence is passed, however, this is at the discretion of the judge, and stringent on the accused offering a reason for his change of plea with an application made under rule 38.5 of the Criminal Procedure Rules.²³⁴
3. The question therefore, is how much judicial discretion can be exercised? A conclusion, which can be drawn from relevant authorities, is that the court is not obliged to agree to a change of plea, where the plea was both informed and unequivocal.⁵ It is of course counsel's duty of candour to provide and advise the client on the strength of the evidence they will put forth to the court and the

¹ Although plea figures for all prosecuted cases are not available the CPS casework statistics for 2018-2019 give the indication that 77.7% of those convicted in the magistrates' court and 70.6% of those convicted in the Crown Court pleaded guilty to the charges put to them. <https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Annual-Report-and-Accounts-2018-19.pdf>

² **38.5.**—(1) This rule applies where a party wants the court to vacate a guilty plea. (2) Such a party must—

1. (a) apply in writing—
 - (i) as soon as practicable after becoming aware of the grounds for doing so, and
 - (ii) in any event, before the final disposal of the case, by sentence or otherwise; and
2. (b) serve the application on—
 - (i) the court officer, and (ii) the prosecutor.

(3) Unless the court otherwise directs, the application must—

1. (a) explain why it would be unjust for the guilty plea to remain unchanged;
 2. (b) indicate what, if any, evidence the applicant wishes to call;
 3. (c) identify any proposed witness; and
(d) indicate whether legal professional privilege is waived, specifying any material name and date.
- <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/crim-proc-rules-2014-part-38.pdf>

³ *R v Sheikh [2004] EWCA Crim 492*

⁴ This precedence was first confirmed in the case of *R v Plummer [1902] 2KB 339* where the question, which arose, was whether the court had the power to allow the appellant to withdraw his original plea of guilty. This precedence evolved in later cases such as *S v Recorder of Manchester [1971] AC 481*, where it was held that in the context of change of plea, there is no conviction until sentence has been passed, and therefore magistrates have the discretion to permit a change of plea prior to sentence being passed. In *R v Dodd (1981) 74 Cr App R 50*, the original precedent was evolved even further, as the court of appeal held that the discretion exists even where the plea of not guilty is unequivocal; and that discretion must be exercised judicially. (See Blackstone's D12.95)

⁵ In the case of *R v McNally [1954] 2 All ER 372*, the Court of Criminal Appeal approved the trial judges decision to refuse a change of plea, after consideration were given to whether the accused had admitted guilt after understanding the nature of the charged put to him. (See Blackstone's D12.96)

advantages of pleading guilty.⁶ It is then for the client to exercise their free will and decide which plea to take, thus the rationale behind such decisions are justifiable, but would this still be the case where the accused obtained representation at a later stage after entering a plea.

4. In *Ex parte Rowland*⁷ considerations were given to the change of instructions given to the solicitor after the original plea was entered, and the conclusion that was reached was that the accused had changed her story to avoid a custodial sentence.⁸⁹ Arguably a decision to refuse an application to alter a plea following receiving legal advice, which the accused did not have access or adequate previously, can be considered to be unjust and a breach of one's right to a fair trial as in such circumstances the accused is deprived of their chance of giving an informed plea.
5. In contrast, in other jurisdictions, such as Canada, the trial judge may rescind a guilty plea at his discretion by considering factors¹⁰ such as, whether, the accused was represented by an experienced counsel in the respective jurisdiction, the accused was apprised of his position, did the accused have a valid defence, was the plea given while under pressure, did they have enough time to contemplate the decision, whether the accused had experience in the criminal justice system¹¹, and the adequacy of the judge's inquiry into the plea.¹² The onus here is on the accused to establish that his plea was wrong and it would be unjust for the court to uphold his plea.¹³ Therefore, in examining the above factors it would be apparent that the giving of an informed plea with the aid of a legal representative is of great importance in establishing whether the accused has valid grounds for having his original plea rescinded.
6. Similarly, in the United States, the courts take a somewhat more lenient approach and favour trials on merits rather than focusing on convicting the accused. This is because although it is held that the 'court may at its discretion, and shall on good cause, at any time before a sentence, permit a plea of guilty to be withdrawn'¹⁴, what is considered as a good cause, places the discretion more in favour of the accused rather than the courts itself.

⁶ South Tameside Magistrates' Court, *ex parte Rowland* [1983] 3 All ER 689

⁷ *Ibid* 6

⁸ Blackstone's D12.97

⁹ Article 6 of ECHR

¹⁰ *R v Adgey*, 1973 (SCC), [1975] 2 SCR 426, *per* Dickson J (3:2), at para 49, *R v Joseph*, 2000 BCSC 1891 (CanLII), [2000] BCJ No. 2850 (Q.L.)(B.C.S.C.), *per* Taylor J at para 48, *R v Stockley*, 2009 NLCA 38 (CanLII), *per* Roberts JA(3:0), at para 7, *R v Nevin*, 2006 NSCA 72 (CanLII), *per* Bateman JA(3:0), at para 20

¹¹ *R v Joseph*, 2000 BCSC 1891 (CanLII), [2000] BCJ No. 2850 (Q.L.)(B.C.S.C.), *per* Taylor J at para 48

¹² *R v Brun*, 2006 NBCA 17

¹³ *R v Adgey*, 1973 (SCC), [1975] 2 SCR 426

¹⁴ Florida Rule of Criminal Procedure 3.170(f)

7. Moreover, if the accused can demonstrate that they involuntarily entered a plea because it was entered under mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances that would affect the defendant's rights¹⁵, the court ought not to fetter with their discretion and must grant the motion made by the accused to withdraw their plea, as it would be in the interest of justice and in all circumstances fair to do so. The appellate division, however, will not hesitate to intervene in erroneous,¹⁶ inadequate,¹⁷ mistaken¹⁸ pleas.

8. What this suggests is that the courts of England and Wales have departed from the overriding objective of fairness and protection of individual rights and have adapted to a more subjective approach, which focuses on efficiency and promptness of convicting the accused.

9. Another problem that exists within this approach is that if the accused chooses to alter their plea, upon receiving legal advice, the judge may wish to hear evidence before deciding the issue from both the accused and those representing him, or any document evidencing the advice given and the decision taken if the court considers this to be in the interest of justice. The accused will then have to consider *waiving privilege*, for such evidence to be disclosed to the court. The accused must also consider whether disclosure of such evidence would result in his case being undermined.¹⁹²⁰

10. This, in essence, is problematic in itself, as legal privilege is central both to safeguarding access to justice and the protection of individual rights. If those accused are given the condition of waiving privilege in return for access to justice arguably their social autonomy would be brought into question, as a result of which the accused will become selective with the information they will provide to those representing them.²¹ Furthermore, by setting such a precedent those accused are deprived of the ability to legitimately explore the limits of legality and justice²², and

¹⁵ *Yesnes v. State*, 440 So.2d 628, 634 (Fla. 1st DCA 1983)

¹⁶ *R v Crown Court at Huntingdon, ex p Jordan* [1981] 2 All ER 872 and most recently *R v Salman Malak* [2018] EWCA Crim 1693

¹⁷ *R v Chikho* [2016] EWCA Crim 2300

¹⁸ *Reedie v HM Advocate* [2005] HCJAC 55; *Duncan v HM Advocate* [2009] HC JAC AC12

¹⁹ <http://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Change-of-plea-1.pdf>

²⁰ Part 38.5 (3) (d) of the Criminal Procedural Rules

²¹ *Three Rivers District Council v Governor and Company of the Bank of England (No.6)* [2004] UKHL 48, [3]

²² Stephen L. Pepper 'Counselling at the limits of the law: An exercise in the jurisprudence and ethics of lawyering' (1995) 104 *Yale Law Journal* 1545

those representing cannot provide a fully-informed advice and act in the best interest of their clients if the accused becomes fearful of disclosing full information to their new legal representative.²³

11. The path to altering a plea is not a risk-free process for those representing either, as there may exist allegations that the legal representative may have influenced the decision of the accused to plead guilty by giving them the hope of acquittal or a lesser sentence. The question, which arises here, is what constitutes as giving hope to the accused?
12. In *R v Inns*²⁴, the eventual guilty plea was rendered a nullity when counsel acted as a conduit to pass a threat or promise from a judge.²⁵ In this case, the defence counsel had acted per his professional duties, yet the original plea entered by the accused was considered a nullity. Had counsel acted differently he would still be in breach of his professional duty and would be held accountable for it, thus what this case demonstrates is that one's adherence could also result in one breaching their duty.
13. This is a clear conflict, which would need to be addressed by the Criminal Justice System and its respective regulatory body, for it is not only the accused who would need the protection of the legal system but also those who represent and advise the accused. If one is given a clear set of rules to follow in acting within the profession, then those rules should bear no risk for those following them.
14. In conclusion, it is recommended for the courts to take guidance from other jurisdictions such as Canada and United States to formulate a much fairer system, by protecting the rights of the accused, which, can be by way of the following:
 - Exercising a greater extent of discretion, which would promote the overriding objective and ultimately assist those most vulnerable who do not have any apprehension of what the charges brought against them entail or what consequences the plea they enter may carry.

²³ J. Auburn, *Legal Professional Privilege: Law and Theory* (Hart, 2000), also see guidance for counsel from the Bar Council: <http://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Change-of-plea-1.pdf>

²⁴ *R v Inns* (1974) 60 Cr App R 231

²⁵ Blackstone's D12.103

- Departing from refusing to grant permission for a plea to be altered, whereby the accused had neither legal advice nor a representative when contemplating their original plea. This would result in a fairer trial being conducted and an informed plea to be entered and would be in line with Article 6 of ECHR.
- Redesign the process of giving evidence at court by focusing more on whether the accused has a plausible defence to validate their intention of altering their plea rather than requesting for evidence as to why the original plea was entered in the first place. This will ideally shield confidentiality and legal privilege, as the accused will not need to waive their legal privilege in exchange for justice.
- Offering more protection and guidance to those representing, so that they are protected against both breaching their duties and allegations of influencing the decision of the accused to plead guilty.

15. To conclude, by modifying the current legislation, the UK could successfully formulate a much fairer, sustainable, and effective system in place, which would not be prioritising conviction over the protection of individual rights.

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