Neutral Citation no. [2006] NICC 4 | *Ref:* **DEEC5426**

Judgment: approved by the Court for handing down | *Delivered:* **25/01/06**
(subject to editorial corrections)

IN THE CROWN COURT IN NORTHERN IRELAND

THE QUEEN

v

RALPH PHILLIPS
(Application to vacate plea of guilty)

DEENY J

[1] Ralph Phillips having been charged with the murder of Mr Adrian Thompson on 1 January 2004 at Banbridge, County Down, initially instructed Mr Gabriel Ingram, solicitor who in turn instructed Mr Seamus Treacy QC and Mr Gregory Berry. Senior counsel consulted with the accused prior to a High Court bail application on 17 December 2004, which was successful. The accused then resided principally in Scotland while awaiting his trial. An initial trial date of 1 June 2005 was adjourned to 21 September 2005. Due to other commitments Mr Treacy and Mr Berry had to return the brief and Mr Ingram then instructed Mr Dermot Fee QC and Mr Neil Moore. This was several weeks before the new trial date during which the accused met Mr Moore and Mr Ingram in Belfast and for some four hours in Glasgow. There was, apparently, no discussion of anything other than a contest of the charge of murder at that time. The defendant came to Belfast on Tuesday 20 September but only saw his senior counsel on the following morning 21 September at Dungannon Crown Court. In a short consultation of about ten minutes Mr Fee explained there were difficulties facing the defence and that it was going to be a hard case to fight. The defendant, through his present solicitor, accepts that and that he was aware of that at that time, but was nevertheless determined to fight the case.

[2] I swore a jury to try Mr Phillips and his three co-accused, Rodney Clarke, Joanne McMullan and Tracy Marshall on 21 September. I refused applications for renewed bail on the part of Mr Phillips and Mr Clarke who were then remanded in custody. The defendant Mr Phillips had a further

consultation with Mr Ingram that day and both counsel in the afternoon, again on the basis that he was contesting the charges.

[3] The matter had been adjourned to Thursday 22 September on the application of counsel for the two women. On that day, at 12.18pm Mr Carl Simpson QC who appeared for the Crown applied to amend the indictment to add three fresh counts of affray, assault and, in Ms Marshall's case, possession of an offensive weapon against her and Ms McMullan. They then pleaded guilty to the new counts. The Crown accepted that and asked that the first count of murder be left on the books not to be proceeded with without the leave of the court or the Court of Appeal. Shortly before 1.00pm, after this and related applications Mr Gallagher QC, who then appeared for Rodney Clarke, correctly anticipated that the Crown would seek to rely on the pleas of the other accused against his client. Both he and Mr Fee QC for Mr Phillips asked for time to consult. It appears that on the basis of his solicitor's skeleton arguments taken on his instructions he was advised on Thursday 22 September that the guilty plea of Ms Marshall would severely weaken his defence. This was undoubtedly the case as her admission to these offences was completely inconsistent with his case that he had been quietly at home with her at the time of the incident. Further junior counsel explained that with his previous criminal record "the likely tariff in the event of an unsuccessfully contested trial was in the region of 23 or 25 years or even longer". I have not heard counsel's response in that regard. I do note that the accused was under licence until the year 2009 owing to a previous conviction for conspiracy to murder in 1994 of which he had been sentenced to 16 years imprisonment in prison. The defendant then indicated that he would change his plea to guilty. He instructs his present solicitor that he was extremely confused at this stage and felt hopeless and feared the prospect of spending the remainder of his natural life in prison.

[4] It is important to note that although certain remarks were made by learned senior counsel on the afternoon of Thursday 22 September they did not apply to re-arraign their clients. They asked the jury not be put in charge but that the matter be put back. In light of various considerations I adjourned the trial until the following Tuesday 27 September. Mr Phillips then complains that he was not consulted with "between the Thursday and the Tuesday" but see below. On Tuesday 27 September he indicated to his solicitor, Mr Ingram that he would not be pleading guilty. Mr Ingram was shocked and fetched counsel. His solicitor told him that he would have to get a new legal team in those circumstances.

[5] It is right to say that on Tuesday 27th there were informal applications by counsel for time to allow them to consult with both Mr Clarke and Mr Phillips. Mr Phillips says that in the course of this he was brought to the holding cell upstairs and told by his solicitors that a particular tariff was on offer. He said that it had been indicated to him that if the defendant pleaded

guilty he could expect a tariff of 15 to 16 years with the indication being towards the lower end, namely 15 years. Something along these lines was confirmed by counsel. After they had left Mr Ingram encouraged him "to accept the deal" (but see below). Mr Phillips then asked to see his co-accused Rodney Clarke saying that he would fight the case. Counsel had no objection to that and this was apparently arranged informally with the Prison Service. Apparently Mr Clarke told the defendant that if he was in the defendant's position he would take the deal and that he would be mad not to jump at the opportunity. The defendant says that his solicitor looked into the cell through the flap on the door "about 3 or 4 times and pointed at his watch. The defendant was then taken back very briefly to the other cell. It appeared to the defendant that the court proceedings were going to commence imminently and that any decision concerning his plea would have to be taken instantly." He instructed his new solicitor, Mr Tony Caher that "under this extreme pressure, time and circumstances he indicated to his legal representatives that he would be pleading guilty." He was then brought into court almost immediately and his counsel did apply for him to be re-arraigned. He then pleaded guilty to murder in the dock at Dungannon Crown Court on that occasion.

[6] For completeness I note that it was not until Sunday 9 October that the defendant Mr Phillips asked his partner Tracy Marshall, who was on bail, to contact Mr Ingram in order to inform him that he wanted to change his plea back to not guilty.

THE LAW

[7] I turn to consider the relevant case law to which I was referred in helpful submissions by Mr Simpson QC with Mr McAughey and Mr John Orr QC who appeared with Mr Doran for the accused. In *R v McNally* 1954 1 WLR 933, C.A, a case on indictment Lord Goddard CJ stated the matter with customary conciseness.

> "The question whether a plea may be withdrawn or not is entirely a matter for the trial judge. If the court came to the conclusion that there was a question of mistake or misunderstanding, or that it would be desirable on any ground that the prisoner should be allowed to join issue, no doubt the court would allow him to do it. For example, it has been known for a prisoner charged with receiving stolen goods to acknowledge that he had received them, and to plead guilty, adding 'but I did not know that they were stolen'. In such a case the trial judge might well allow the prisoner to change his plea but it is entirely within the discretion of the judge."

It is right to note that at the beginning that there is no question in the instant case of the plea of Ralph Phillips being equivocal. Murder is murder. He pleaded guilty to it in the dock at the Crown Court.

[8] I note also, what I believe to be a thread through the case law, that this is a matter for the trial judge, and his exercise of his discretion is unlikely to be interfered with by an appellate court. That leads me to doubt the correctness of a note in Valentine's Criminal Law of Northern Ireland Folder 1, Section P regarding a case of *R v McKee* (Crown Court unreported). The following sentence is attributed to the learned County Court judge in that case. "The test to be applied is whether a reasonable independent observer would conclude that there was a reasonable possibility that his [the accused] plea of guilty was not entered voluntarily". It seems to me that the court is not concerned with the appearance of the matter to independent observer but to the exercise of its own discretion in the light of the facts known to the trial judge. Nor do I think the test is correctly expressed as I discuss below.

[9] *R v Drew* 1985 1 WLR 914 is again a decision of the Court of Appeal in England. Lord Lane follows Lord Goddard in holding, at page 919, that:

> "An equivocal plea is one qualified by words which, if true, indicate that the accused is in fact not guilty of the offence charged."

He uses the same example of Lord Goddard but other examples could be given. Without elaborating on the facts of the particular case I note the dictum of Lord Lane at page 924:

> "In our judgment only rarely would it be appropriate for the trial judge to exercise his undoubted discretion in favour of an accused person wishing to change an unequivocal plea of guilty to one of not guilty. Particularly this is so in cases where, as here, the accused has throughout been advised by experienced counsel and where, after full consultation with his counsel he has already changed his plea to one of guilty at an earlier stage in the proceedings. The courts consideration of that matter also makes it clear that a judge is not bound to accept the uncorroborated assertions of an accused but must consider any evidence that the plea of guilty was not freely made and decide whether or not it is convincing."

I also note the decisions of *R v Cantor* [1991] Crim. L. R. 481 and the passage at Blackstone 2005 D11.56-58. *R v South Tameside Magistrates' Court ex parte Rowland* 1983 3 All ER 689 was a case of a defendant pleading guilty before the magistrates' court. But I note that the Court of Appeal endorsed the following advice from the clerk to the magistrates:

> "that to allow a change of plea was a matter for our absolute discretion, and that once an unequivocal plea had been entered the discretionary power should be exercised judicially, very sparingly and only in clear cases."

[10] This is not, in my view, a case of the type dealt with by the Court of Appeal in England in *R v Turner* 1970 2 All ER 283 at 284B-D and 285. For completeness, however, I draw attention to the fact that decision must now be looked at in a very different light in the light of the decision of the Court of Appeal in England in *R v Goodyear* 2005 EWCA Crim. 88. I also draw attention to *Attorney General's Reference (No. 1 of 2005) Rooney and Others* [2005] NICA 44. The Court of Appeal in England has altered the practice which had prevailed there for over 30 years by the decision in *Goodyear*. The Northern Ireland practice had always allowed for freer access between counsel and judges than *R v Turner* contemplated. The Court of Appeal in Northern Ireland in *R v Rooney* has adapted the approach in *R v Goodyear* in the light of experience and practice here in Northern Ireland to ensure that advice about sentencing from a judge is done in a recorded and open fashion. It seems to me that if it is now proper for the accused to hear the judge's view of a likely sentence on a plea of guilty from the judges own mouth, the communication of that view by counsel can scarcely constitute a persuasive ground for the grave step of vacating a plea and guilty on indictment eg. *R v McNeill* 1993 NI 46. In the instant case counsel gave their advice to the accused in the proper discharge of their duty. It is an intrinsic part of the duty of counsel to warn a client of the likely consequences of carrying out his instructions so that he may make an informed judgment for himself as to whether he wishes to pursue that course. To do otherwise might be to deny to the accused person the benefit of the knowledge and experience of counsel. It might constitute an abdication of responsibility. That is so of the solicitor instructed on behalf of an accused person also. I observe that it may seem inevitable, in the light of *Rooney* that accused persons will often ask their counsel for their opinion on what their sentence is likely to be if they are convicted after an unsuccessful contest. No doubt counsel will carefully acquaint themselves with the relevant maxima, cases and factors before expressing an opinion to their clients.

[11] *R v Phillips* 1982 74 CAR 199 involved a recidivist who was facing seven counts on an indictment at St Alban's Crown Court. His solicitors had carefully discussed the matter with him and concluded that he was not guilty

of counts 1 and 6 and so should plead not guilty but was guilty of the other counts. The prosecution were informed of this and accepted this position. On the morning of the arraignment however the solicitor's representation consisted only of a clerk of 18. The accused pleaded guilty to counts 1 and 6. This was obviously a mistake but it was not cleared up at the time and was pursued by way of an appeal to the Court of Appeal who quashed the two convictions mistakenly pleaded to. *R v William Colin John Lees* (2000, unreported, Higgins J) was an unusual case in which the accused had been subject to both gross misrepresentation and overt pressure by his counsel. Mr Justice Higgins concluded that in the light of that the accused did not have the freedom of choice to which he was entitled and that his position in the event of the pleas of guilty was misrepresented to him and that the application to vacate the pleas must be granted.

[12] The defence in their skeleton argument contend that the defendant was deprived of a genuine choice as to plea "as per *Turner*" in that the pressure of time and circumstances in which he found himself caused him to enter a plea. The reference to circumstances was the indication of a likely minimum if he pleaded guilty. As I have indicated it must be looked at afresh in the light of *R v Goodyear* which preceded and the *Attorney General's Reference in Northern Ireland* which immediately succeeded the events with which I am dealing.

[13] In approaching this matter the court will bear in mind the accused's right at common law to a fair trial and under article 6 of the European Convention of Human Rights. However, while the need to prevent the conviction of the innocent will be regarded as of the first importance, the court should place in the balance the need for criminal cases to be resolved within a reasonable time, a principle again to be found since Magna Carta and in the European Convention. Re-trying somebody who has pleaded guilty obviously militates against that. Furthermore victims, their families and witnesses have all a legitimate interest in a plea of guilty not being set aside lightly or for a slight reason. I take into account the decision of the Court of Appeal in *R v White* 2000 NI 172. See also *S (an infant) v Recorder of Manchester* [1971] AC 481 and *R v Dodd & Ors* [1982] 74 CAR 50.

[14] I draw the following conclusions from my consideration of the authorities:

(1) If a plea of guilty is in fact equivocal the court would normally not receive it in the first place or would vacate it on application.

(2) If the plea is unequivocal, the court still retains a discretion to permit the plea of guilty to be vacated and a plea of not guilty entered, before sentence is passed.

(3) The discretion must be exercised judicially, taking into account any relevant considerations and excluding any factor which is irrelevant.

(4) The discretion will only be exercised very sparingly, particularly on a trial on indictment or where the accused had legal representation.

(5) The discretion could be exercised, inter alia, where the accused had pleaded guilty mistakingly or due to misrepresentation or where his will was overborne so that his plea was not entered voluntarily. (*R v Phillips*; *R v White; R v Lees*).

(6) The trial judge has a discretion to determine what submissions or evidence he or she requires in order to exercise their discretion judicially. If the instructions put forward by an advocate in submissions on behalf of an accused seeking to vacate a plea of guilty have been shown to the previous advocate or legal advisor of the accused who either does not dispute them or proposes qualifications which are accepted by the accused, then it is likely that no sworn evidence need be called. If, however there is a material conflict of evidence or other good reason the court may resolve the matter by hearing sworn evidence. (*R v Dodd*; *R v McComish & Donegan* [1996] NI 466).

[15] I now consider the matter in the light of the chronology and my view of the law. The case for the applicant was ably set out by Mr John Orr QC with whom Mr Doran appeared. They had submitted a skeleton argument on behalf of the defendant. It was largely based on detailed instructions which had been taken, by their solicitor, from Ralph Phillips.

[16] Mr Orr QC had consulted with Mr Dermot Fee QC who had been furnished with a copy of this skeleton argument setting out the factual contentions of the defendant. Mr Fee had only four observations to make to Mr Orr QC with regard to the matter. The first was that after the court rose on Thursday 22 September Mr Fee had had the prison van brought back as it departed with his client Mr Phillips in order that a further consultation should take place. This did happen. This is relevant to the fact that there was then no consultation over the weekend until Tuesday 27 September. Mr Fee also clarified that a document referred to as signed by the defendant in one consultation was not material for these purposes. Thirdly he objected to the reference in the skeleton argument to a "deal" which he said was language that had never been used to the defendant. Mr Orr on his behalf readily accepted that and explained that this was the defendant's word.

[17] The defendant accepted that there had been a consultation on the afternoon of Thursday 22 September and there was therefore no significant difference between him and his then senior counsel. It may be that learned junior counsel then acting for Ralph Phillips or his solicitor G R Ingram might not agree with everything attributed to them. But in the light of the view that

I formed about the case it did not seem necessary to ascertain their views. Subject to the minor points made by Mr Fee QC I have therefore taken Mr Phillips' case at its height.

[18] Further, in the skeleton argument the phrase "extreme pressure of time and circumstances" was used as justifying this application. However in argument Mr Orr QC wisely did not put the matter so far but did maintain there was pressure of time and circumstances which caused him to vacate his plea.

[19] It seems to me that for a considerable number of reasons this was in fact a weak application of this kind. I mention some of the reasons that seem to me relevant.

[20] Firstly the defendant is a man of mature years. He is not a very young person. There is no suggestion that he is a person of limited intellectual ability. He is not a very elderly or unwell person. Indeed having now had had a not inconsiderable opportunity to observe him in the dock on a number of occasions he has always seemed to me both composed and self-confident.

[21] As I pointed out in open court I had been furnished with his criminal record at the time of his plea of guilty. It was a substantial record including a sentence of some 16 years in prison. Mr Carl Simpson QC, rightly submitted that the proper inference to be drawn from this was that he was a person familiar with the courts who knew the significance of something as important as a plea of guilty. I add that that must be particularly so of any plea of guilty on indictment with the formal procedure that surrounds that.

[22] I would point out that it is particularly so in this case where he had not only been previously arraigned and pleaded not guilty but on Tuesday 27 September at the request of his senior counsel was re-arraigned and pleaded guilty. The fact that he was pleading guilty to the crime of murder is also relevant in this respect. There are certain offences of a statutory nature the exact import of which might be misunderstood by a lay person. It is not unknown for counsel to ask their solicitors to assist an accused person in making their way through a lengthy indictment if they are pleading guilty to some counts and not to others. Clearly that is not this case. He pleaded guilty to the wholly unambiguous charge of the murder of Adrian Thompson.

[23] As Crown counsel submitted he must have been clearly aware of the consequences of that. It is a reasonable inference from the above points that he is somebody who would have been well able to seek further advice if he required it.

[24] It is particularly so in this case where his co-accused Rodney Clarke, at one point, indicated through his counsel that he might well change his plea

on the same count but ultimately did not do so. His counsel sought permission to withdraw from the case as they had been embarrassed. Such leave was given. Fresh solicitor and counsel were subsequently instructed on behalf of Rodney Clarke.

[25] This very event took place only a few minutes after the plea of guilty of Ralph Phillips. He must have therefore been very well aware of his right to maintain his earlier denial of guilt in this charge, even if it might mean that he would have to be represented by fresh counsel or solicitor.

[26] It must be said in fairness to Ralph Phillips that he does not claim that he was put under any proper pressure of any kind by his then counsel or solicitors. I take this opportunity to make that clear.

[27] As appears from the chronology he had been warned, understandably, by Mr Fee QC that there were difficulties in the case. He was then presented on Thursday 22 September with the important information that his co-accused Tracy Marshall had pleaded guilty. She pleaded guilty to the fourth count on a freshly prepared indictment dated 22 September 2005 namely that she had with her in a public place, namely Leemount Park Banbridge, on 1 January 2004, an offensive weapon, namely a baseball bat. Furthermore she pleaded guilty to the fifth count of assaulting Adrian Thompson causing him actual bodily harm. She also pleaded guilty to a sixth count of affray contrary to common law. It is clear therefore that she was admitting to a role in the events prior to the fatal assault on Mr Thompson. These pleas were completely at odds with the case made by Ralph Phillips that he was in his house with his partner, Tracy Marshall and took no part in these events. She exposed his alibi, in effect, as a false one.

[28] In the light of that it was not remotely surprising that, having consulted with his counsel and solicitors, that he indicated through counsel that he was "almost certain" to apply for a re-arraignment when the court sat again on Tuesday 27 September.

[29] There were two Crown witnesses who clearly identified him at the scene and had identified him at a parade conducted by the Police Service of Northern Ireland. These two witnesses, A and C, attended at the opening day of the trial when the jury was sworn. Although a curtain protected their identity from the public they were seen both by the jury and by myself. They seemed to be responsible and respectable adults. The defence had been given an opportunity to identify them to ensure they had no animus against the accused.

[30] I apply the conclusions of law outlined above at paragraph [14]. Having carefully considered this matter I am satisfied that the accused did not plead guilty as a result of any misrepresentation, misapprehension or mistake

and nor as a result of any undue pressure. I am satisfied in the exercise of my discretion that I should refuse the application to vacate his plea of guilty and I do so.