Court of Queen's Bench of Alberta

Citation: R v Breitkreutz, 2022 ABQB 403

Date: 20220609
Docket: 180594889Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Arnold Breitkreutz

Accused

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

Introduction

[1] Mr. Breitkreutz is charged with defrauding investors in Base Finance Ltd. in an amount exceeding five thousand dollars contrary to section 380(1)(a) of the *Criminal Code*. He previously pleaded guilty to this charge and admitted facts for the purposes of his guilty plea and sentencing. Later a mistrial was declared and his guilty plea was vacated. The Court concluded that he "was not sufficiently informed of the consequences of his guilty plea."

[2] At the commencement of the current trial, the Crown brought an application to have Mr. Breitkreutz's prior guilty plea and admitted facts admitted into evidence. The Crown's position is

that the guilty plea and admitted facts are informal admissions that may be used against Mr. Breitkreutz in the current trial.

[3] Counsel for Mr. Breitkreutz submits that the guilty plea and admitted facts were premised on incorrect legal advice. As such, admitting the guilty plea and admitted facts into evidence renders the court's decision to vacate the guilty plea meaningless. If the Court's conclusion that Mr. Breitkreutz was not informed of his legal rights is to be taken seriously, neither the guilty plea nor the admitted facts arising from the same plea bargain may be admitted into evidence in the current trial.

Background

[4] Prior to the original trial, counsel for Mr. Breitkreutz brought an application to exclude certain evidence that the RCMP obtained from the Alberta Securities Commission (ASC) pursuant to s 8 of the *Charter*: ***R v Breitkreutz,*** 2021 ABQB 193 (Dilts J). This type of application is commonly referred to as a ***Jarvis*** application: ***R v Jarvis***, 2002 SCC 73. Mr. Breitkreutz took the position that the ASC improperly used its statutory investigative powers to further a criminal investigation. Justice Dilts dismissed the ***Jarvis*** application concluding that "the RCMP was entitled to receive and to use the information that was gathered by the ASC using its statutory powers up to and including October 23, 2015, including the information compelled from [the Royal Bank of Canada]..." (para 56).

[5] Mr. Breitkreutz explained that he and his counsel had expected to win the ***Jarvis*** application. By their actions and advice, it is clear that Mr. Breitkreutz's counsel considered the admission of the RBC records that the RCMP received from the ASC to be a serious blow. As a result, Mr. Breitkreutz and his counsel decided to resolve the pending trial and to appeal the decision in the ***Jarvis*** application.

[6] The Crown and counsel for Mr. Breitkreutz negotiated a guilty plea and a reduced sentence. A document titled "Admission of Facts" setting out facts supporting the guilty plea was drawn up by the Crown, approved by counsel for Mr. Breitkreutz, and signed by Mr. Breitkreutz.

[7] On March 22, 2021, Mr. Breitkreutz appeared in Court and pleaded guilty. The Crown read the Admission of Facts into the record and Mr. Breitkreutz stated his agreement with the Crown's recitation of the facts on the record.

[8] Later Mr. Breitkreutz realized that by pleading guilty he had forfeited his right to appeal the pre-trial ruling in the ***Jarvis*** application. He retained new counsel who explained the situation to the Crown. The Crown agreed that Mr. Breitkreutz had not been informed of his legal rights. On November 5, 2021, Justice Dilts vacated his guilty plea and declared a mistrial.

Use of Guilty Plea

[9] Justice Watt explained in ***R v Lo***, 2020 ONCA 622 at para 68 that "a guilty plea is a formal in-court admission by an accused that they committed the offence to which the plea has been entered." The Crown in the present case seeks to enter Mr. Breitkreutz's prior guilty plea as an informal admission. The Crown relies on Justice Watt who continued at para 70 of ***Lo*** to explain that "formal admissions made in prior proceedings may be tendered and received in evidence in later proceedings. For example, a plea of guilty in a prosecution for a provincial or criminal offence may be received in evidence in subsequent civil or criminal proceedings."

[10] The present case should be distinguished from ***Lo*** and similar cases where the prior proceedings were of a different nature. For example, in ***Lo***, the prior proceeding was a professional disciplinary proceeding. In the present case, we are dealing with the same accused facing the same criminal charges following the vacating of a guilty plea. Criminal charges are different because of the constitutionally-protected presumption of innocence and the Crown's obligation to prove guilt beyond a reasonable doubt.

[11] Justice Dilts found that the plea in the present case was not informed because Mr. Breitkreutz was not advised of the legal consequences of his guilty plea. The guilty plea was vacated accordingly. The question in the present application is what use can be made of that guilty plea now that it has been vacated.

[12] The Supreme Court of Canada in ***Thibodeau v R***, [1955] SCR 646 considered whether a vacated guilty plea could be used against an accused who had precipitously pleaded guilty prior to engaging counsel. The Court held at para 26 "on the trial of an accused who has pleaded not guilty evidence that he had previously pleaded guilty to the charge but had been allowed to withdraw such plea is legally inadmissible; from which it, of course, follows that evidence of the former plea can neither be given for the prosecution nor elicited from the accused in cross-examination."

[13] The Crown describes ***Thibodeau*** as an "anomaly" and submits that the law has evolved since 1955. The Crown relies on the Ontario Court of Appeal in ***R v Dietrich***, [1970] 3 OR 725 which distinguished ***Thibodeau*** on the basis that the guilty plea in that case was allowed to be withdrawn by the court of first instance whereas in ***Dietrich*** the guilty plea was quashed on appeal. The Court held at para 22 that "[t]he cases other than ***Thibodeau*** establish that testimony or statements of an accused on a previous trial or occasion may be treated as an admission at a subsequent trial for the same offence. It is difficult to see why a plea given at an abortive trial of this type should stand in any different position."

[14] Justice Hill in ***R v Baksh***, 2005 CanLII 24918 (ONSC) wrestled with the seeming inconsistency between ***Thibodeau*** and ***Dietrich***. The issue in ***Baksh*** was the admissibility of an Agreed Statement of Facts that was entered as an exhibit in Mr. Baksh's first trial, but Hill J considered the law applicable to the admissibility of guilty pleas in his reasons.

[15] The mistrial that gave rise to the dispute over the use of the agreed facts from the first trial in ***Baksh*** was not a result of the ineffective assistance of counsel. Instead, it resulted from both counsel for the defendant and Crown seeking to make fundamental changes to the defence and charges following the closing of the Crown's case.

[16] Justice Hill at para 92, citing ***Thibodeau***, explained that "a guilty plea in a former proceeding is not inevitably admissible in a successive proceeding, for example, where in the discretion of the first court the guilty plea was withdrawn for good cause." After referring to ***Kercheval v United States***, 274 US 220 (1927), Hill J summarized at para 93 that "where good cause has been shown founding discretion for withdrawal or striking of the guilty plea, the subsequent use of the plea would effectively nullify the original jurisdiction for its elimination as a judicial admission."

[17] The distinction made by Hill J in ***Baksh*** between cases where the guilty plea was withdrawn for "good cause" and cases like ***Baksh*** where a mistrial results from other causes is consistent with the principles set out in ***R v Wong***, 2018 SCC 25. The idea that "constitutionally

enshrined protections," including the presumption of innocence, require that a guilty plea must be informed (***Wong*** para 62 *per* Wagner CJC dissenting, but not on that point) sits uncomfortably with the use of that same guilty plea in a subsequent trial of the same accused on the same charges.

[18] Setting aside Mr. Breitkreutz's guilty plea means that the presumption of innocence is restored. t would be incongruous if after a guilty plea is set aside it could then be used as evidence in a subsequent trial for the same charge. As the US Supreme Court observed, "[t]he withdrawal of a guilty plea is a poor privilege, if, notwithstanding its withdrawal, it may be used in evidence under the plea of not guilty" (***Kercheval v United States*** quoting ***White v State***, 51 Ga 286 at 289).

[19] An equally important premise of our system of criminal justice is the right to effective assistance of counsel: ***R v GDB***, 2000 SCC 22 at para 24. To allow a guilty plea that the Crown concedes and the Court has found to be predicated on incorrect legal advice to be used against an accused in a subsequent trial for the same charge would substantially undermine the right to effective assistance of counsel. An accused that is successful in setting aside a guilty plea by reason of ineffective assistance of counsel should not continue to be burdened by the consequence of the past ineffectiveness of counsel in a new trial. To allow Mr. Breitkreutz's guilty plea to be used in the present trial would undermine confidence in the justice system.

[20] A further unfairness flowing from the admission of a prior guilty plea was identified by the New York Court of Appeals in ***People v Spitaleri***, 9 NY 2d 168 (NY 1961). ***Spitaleri*** involved a guilty plea that was set aside by reason of ineffective assistance of counsel. Prior to ***Spitaleri*** the principle in ***Kercheval*** applied only in federal courts and not in New York state courts. The Court explained that an almost inevitable consequence of admitting a prior guilty plea is that the accused will have no practical choice but to take the stand to explain away the prior guilty plea. The Court concluded "[w]e should say flatly and finally that a plea so allowed to be withdrawn is out of the case forever and for all purposes" (at 173).

[21] ***Thibodeau*** is not an anomaly; it remains good law. The policy that informs *Thibodeau* is amply explained in the US cases cited and is consistent with the principles that inform the withdrawal of guilty pleas set out in ***Wong***. Mr. Thibodeau's guilty plea was vacated because he made it hastily without the advice of counsel whereas Mr. Breitkreutz's guilty plea was vacated because it was misinformed. There is no meaningful difference between the position of Mr. Thibodeau and Mr. Breitkreutz. Accordingly, Mr. Breitkreutz's prior guilty plea is legally inadmissible.

Use of Admitted Facts

[22] A typical plea bargain includes an agreement to plead guilty and stipulation to a set of facts that satisfy the elements of the charges to which the accused is to plead guilty. The accused's agreement to facts supporting the charge is necessary to satisfy the requirement in *Criminal Code* s 606(1.1)(c). In the present case, the agreed facts were also prepared for the purpose of sentencing pursuant to *Criminal Code* s 724(1). In exchange, the Crown agrees to seek a reduced sentence. Because the agreed facts must support the charge to which the accused pleads guilty, admitting agreed facts would nullify the exclusion of a guilty plea.

[23] The law, however, seems to contemplate that after the vacating of a guilty plea by reason of ineffective assistance of counsel, the admission of agreed facts in a subsequent trial on the

same charges is possible. Slatter JA in ***R v Rushiti***, 2020 ABCA 99 at para 6 explained in *obiter dicta* that where a guilty plea is set aside on appeal by reason of ineffective assistance of counsel, an agreed statement of facts "is, at least, *prima facie* admissible at any new trial as an admission against interest."

[24] Justice Slatter's use of the words "*prima facie* admissible" implicitly recognizes that an agreed statement of facts may nevertheless be excluded if its prejudicial effect outweighs its probative value: ***R v Mohan***, [1994] 2 SCR 9 at 21. Indeed, the Court must have such discretion if it is, in appropriate cases, to give full effect to the vacating of a guilty plea for good cause.

[25] Mr. Breitkreutz testified that he had two things on his mind when he accepted the plea bargain: (1) the prospect of appealing the pre-trial ruling; and (2) the reduced sentence offered by the Crown. He gave little consideration to the content of the agreed facts as it was irrelevant to the two matters that preoccupied him. Essentially, for Mr. Breitkreutz, agreeing to the facts proposed by the Crown was ticking a box on the way to his appeal of the pre-trial ruling.

[26] The preamble to the Admission of Facts is a repetition of the guilty plea. The preamble specifically states that Mr. Breitkreutz committed the offence that he is charged with, identifies the relevant section of the *Criminal Code*, and uses wording taken from the *Criminal Code*. The preamble to the Admission of Facts contains no facts; instead, it offers a conclusion of guilt.

[27] The body of the Admission of Facts contains some non-controversial facts that Mr. Breitkreutz agreed were true in his *voir dire* cross-examination. Other parts of the Admission of Facts are disputed. Not surprisingly, the disputed paragraphs set out the key facts that the Crown must establish to prove guilt.

[28] Paragraph 3 of the Admission of Facts sets out dealings between the ASC and the Royal Bank of Canada with which Mr. Breitkreutz had no involvement. Paragraph 4 sets out the conclusions of the forensic audit performed by the Crown's expert accountant. Mr. Breitkreutz stated in his *voir dire* evidence that he made no attempt to verify the accuracy of the Crown's forensic accountant's work. Mr. Breitkreutz's admission of paragraphs 3 and 4 is of little or no probative value as he had no knowledge of the actions of others, nor did he attempt to verify the forensic accountant's conclusions.

[29] Mr. Breitkreutz testified in his *voir dire* cross-examination that he was motivated to make the statements in his Admission of Facts, in part, by the prospect of a more lenient sentence. The law is clear in the context of statements or confessions to persons in authority that "[a]n explicit offer by the police to procure lenient treatment in return for a confession is clearly a very strong inducement, and will warrant exclusion in all but exceptional circumstances." (***R v Oickle***, 2000 SCC 38 at para 49). The inducement renders the confession or statement against interest unreliable (*ie* not probative) and thus it should be excluded (para 68).

[30] The plea bargain in the present case can be distinguished from an offer of leniency from police by reason that the accused was represented by counsel and may be presumed to not be as vulnerable as an unrepresented person dealing with police following an arrest. But such a distinction does not hold when, as here, the Court has found that the accused was not informed of the legal consequences of a guilty plea. An inducement to stipulate to facts supporting a guilty plea in the absence of the effective assistance of counsel, renders the admitted facts unreliable for the same reasons that confessions to police procured by inducements are unreliable.

[31] While Mr. Breitkreutz agreed that his statements were voluntary, he prefaced that concession by saying that he was acting on the advice of counsel. In the context of confessions to police, the voluntariness inquiry focuses on "the ability of the accused to make a *meaningful choice* whether or not to confess" (Sidney N. Lederman, Alan W. Bryant, and Michelle K. Fuerst, *The Law of Evidence in Canada*, 4th ed, (LexisNexis: Toronto, 2014) at §8.44) [emphasis in original]. In the case of guilty pleas, the question is whether the accused was informed of the legal consequences of the plea. The reason, of course, to require that an accused be informed of the legal consequences of the plea is so that the accused may make a meaningful choice. Even if Mr. Breitkreutz may be said in a colloquial sense to have acted voluntarily in agreeing to the Admission of Facts, because he was labouring under a misapprehension of the legal consequences of his plea due to the ineffectiveness of counsel, he cannot be said to have been making a meaningful choice. Accordingly, the facts set out in the Admission of Facts are unreliable and not probative.

[32] The Admission of Facts is prejudicial as its use would call into question the fairness of the trial. Viewed as a whole, there is little to distinguish the Admission of Facts from the guilty plea which I have ruled inadmissible. To effectively let the guilty plea in through a backdoor by allowing the Admission of Facts which arose from the same plea bargain into evidence would undermine the presumption of innocence: ***R v Fucile***, 2020 ABCA 189 at para 31 citing ***R v Handy***, 2002 SCC 56 at para 139.

[33] The prejudicial effect of the Admission of Facts outweighs its probative value. The Admission of Facts must be excluded.

Conclusion

[34] The Crown's application to admit into evidence Mr. Breitkreutz's guilty plea and the Admission of Facts is dismissed.

Heard on the 6th day of June, 2022.
Dated at the City of Calgary, Alberta this 9th day of June, 2022.

Colin C.J. Feasby
J.C.Q.B.A.

Appearances:

Brian Holtby, QC & Shelley Smith
for the Crown

Cale W. Ellis-Toddington
for the Accused