PLEA BARGAINING

I propose to introduce the discussion by an overview of the Common Law position as regards Plea Negotiation along with a discussion of some judicial comments on the guidelines which the Court applies to aspects of Plea Negotiations. Apart from a brief review of the legislation, I will leave it to my other two colleagues to do a detailed review of the legislation in Jamaica.

1. Is there a Right to Bargain a Plea with the Crown at Common Law?

The short answer is 'yes'

It has always been open to both the Prosecution and the Defence to enter into discussion about whether the Prosecution will accept a Plea to the subsisting offence or to a lesser offence.

These discussions can be entertained with or without a further discussion as to whether the accused person would be available to give evidence for the Crown.

A PRACTICAL ILLUSTRATION

I was involved in one such case.

James G. Smith, a former Minister of Labour was charged before the Resident Magistrate's Court in connection with the misappropriation of money from the Farm Workers Programme.
His Permanent Secretary Probyn Aiken was also charged.
I represented him.
His clear instructions from the start outlined his involvement at the behest of his Minister in, the scheme. He was prepared to plead guilty to

the charges and gave me instructions to so indicate to the Director of Public Prosecution who had conduct of the Prosecution in the matter. He offered to give evidence for the Crown. There was no negotiation for the reduction of the charges against him.

In keeping with the law contained in judicial pronouncements it was considered necessary that the accused should enter the plea and the Court pass sentence on him before he gave testimony for the Crown, this was to remove any suggestion that the person had an incentive in giving evidence which would later influence the sentence to be imposed.

This was done and the *25 J. L. R. 353* contains the Court of Appeal's consideration of his appeal against the sentence of nine (9) months imprisonment imposed by the Resident Magistrate for his Plea of guilty to the offence of conspiracy to defraud. It was being urged on appeal that the circumstances warranted the imposition of a suspended sentence given all the circumstances.

Although it should be noted that there was in this case no Plea Bargaining, - it was argued that the fact of the accused giving evidence for the Crown in circumstances where he was under no obligation whatever to do so was a factor to be given consideration by the Court in determining sentence.

The Court of Appeal in giving its judgment "fully accepted" the persuasive authority of *R v Lowe [1977] 66 Crim. Appeal R 122* that the Court reduced sentences to "about one-half of the normal sentence for such offences because of his confession and his co-operation". The Court of Appeal however did not disturb the sentence imposed in this case.

It should however be noted that in a later decision, the Scottish High Court of Justiciary in ***Strawhorn v McLeod (1987)SCCR 413*** it was held that rewarding pleas of guilty with a reduction of sentence was an objectionable

practice that should not be followed. It was a form of plea bargaining that offended against the presumption of innocence.

Such judicial comment has led to the necessity to introduce legislative enactments governing the procedure of plea bargaining. It has also led to the introduction of legislation in other jurisdictions requiring the Court to set out in a reasoned decision the factors that led to the court reducing or not reducing the sentence as a result of a guilty plea. See for instance;

James Kelly Gommell et al
Vs.
Her Majesty's Advocate. etc.
[2011] HCJAC 129 2012 S.C.L. 385
20 Dec. 2011 2012 S.L.T. 484

where the High Court of Justiciary in Scotland reviewed the Law.

2. Procedural Development

Case Management Conferences And Disclosure

The modern position of full disclosure of material in the possession of the prosecution when coupled with the movement towards case management conferences also opens an additional avenue for the defence to indicate a willingness to enter a Plea where appropriate. This can either arise on the motion of the defence or it can arise because of an enquiry by the Prosecution as to what is the plea of the defence having reviewed the disclosed material. This is also an opportunity for the Prosecution to broach an enquiry as to of the willingness of an accused who is pleading guilty to a charge being available to give evidence for the Crown. Such discussion should normally only be discussed through an attorney representing an accused.

3. Can the Prosecutor Discuss with an Accused His Entering into a Guilty Plea Without His giving Evidence for the Crown?

The short answer is 'Yes'.

The real difficulty is likely to arise in circumstances where there is a discussion over whether an accused is willing to give evidence for the Crown but the defence is insisting that the prosecution should proceed against him on a lesser offence than the offence presently being charged. It is in these circumstances that there is some bargaining as to what charges an accused may be willing to plead to.

4. What Are The Factors That a Prosecutor is entitled to take into consideration in deciding whether to use an accused as a Crown Witness

Among the factors to be considered are:

(a) Is the person a participant in the commission of the offence or has the person merely been used to further the offence.

(b) Is the person's account credible

(c) Is the person a principal or minor participant in the commission of the offence

(d) Does the person provide evidence of the commission of the offence

(e) Has the person by his Plea made a frank acknowledgment of his involvement.

(f) Has the person made restitution of any proceeds received from the commission of the offence

5. The rule in Turner's case and subsequent developments

In **R v Turner (Frank Richard) (No. 1)**

(1970) 54 Cr. App. R 352 the UK. Court of Appeal had laid down that a judge should never indicate what sentence he is minded to impose. The Court made one exception, that the judge may

initiate that sentence will or will not take a particular form whatever the plea. The Court takes the position that without this rule an accused might not have complete freedom of choice as to his plea.

However the law was reviewed in

R v Karl Goodyear [2005] EWCA 888

In that case a complete record was made of the discussion in the Judge's chambers between Counsel for the Accused, Counsel for the Prosecution and the Judge: ¶19

Judge told Counsel for the Accused;

"...I do take the view that this is not a custody case." ¶24

After considering the circumstances the *Court of Appeal (Criminal Division) of the U.K.* laid down the following principles.

- When an accused enters a plea it must be voluntary without improper pressure. ¶30 also ¶ 5
- There is to be no bargaining with or by the Judge (¶30) - There must be an agreed written basis of plea. Unless there is, the Judge should refuse to give any indication ¶ 62
- The request for an indication must come from the accused
- The advocate must have written authority from his client to seek an indication ¶64
- It is permissible for the Judge to indicate what would be the maximum penalty he would impose ¶54
- The Judge always retains the right not to indicate his position ¶57
- Or to defer his indication of his position ¶58

- The only circumstance in which it is permissible for a judge to volunteer his position is if the judge is in a position to say that whatever the circumstances, guilty plea or no guilty plea the court will not impose a sentence of a particular type.

- If after a reasonable opportunity to consider his position in the light the indication, the defendant does not plead guilty, the indication will cease to have effect. ¶61

- The Judge should never even appear to be involved in a 'plea bargain'. ¶67

- Any discussion between the prosecution and the defence and or the defence and the Court should be done through a counsel representing the accused so as to avoid the appearance of improper pressure that could arise if the discussions were directly between the prosecution and the accused man. ¶68

A judge was entitled to give an indication of likely maximum sentence on a guilty plea following on a request from the defendant in the Crown Court. The practice in **R v Turner** need no longer be followed.

Coercive Plea Bargaining amounting to a flagrant denial of justice has been recognized by the Courts as a basis for rejecting such as approach for example the Canadian Courts have recognized the concept in the case;

United States of America v Cobb

[2001] 1 SCR 587 *where it held* *@ ¶52*

> *"By placing undue pressure on Canadian citizens to forego due legal process in Canada, the foreign state has disentitled itself from pursuing its recourse before the Courts and attempting to show why extradition should legally proceed. The intimidation bore directly upon the very proceedings before the extradition judge."*

6. Can A Court Examine the Prosecution's Decision To Use An Accused As a Crown Witness

It is doubtful that there can be an examination by the trial court of the Prosecution's decision itself.

However to the extent that the trial court in reviewing the soundness and cogency of the case presented is entitled to satisfy itself on the quality of the evidence the court will have to answer any question that arises in relation thereto. But it should be bore in mind that the Prosecutor's conduct is not being investigated.

It should also be noted that there may be no element of Plea Bargaining or plea negotiation being involved. Take two examples of a possible situation.

There may be no bargaining as the person may have pleaded guilty to the offence with which he is charged and offered to give evidence for the Crown. Such was the case with Probyn Aiken. His issue on appeal was whether in sentencing him the Resident Magistrate had paid due regard to, among other factors, the nature of his assistance to the Crown. There was no consideration of whether there had been any plea negotiation, nor the effect thereof.

At the other extreme where there is also no Plea Bargaining or negotiation is a situation in which the prosecution comes to the decision not to charge a possible accused or to withdraw charges against an accused person.

The Prosecution may make that decision in one of two vastly different circumstances, either because –

(a) the Prosecution decides the person's involvement is miniscule, or

(b) the prosecution is of the view that the person is not involved and should not have been charged or should not be prosecuted.

Of course the Prosecutor may come to his decision based on his uncertainty as to which of the two categories the person falls in but he is certain that the person falls into one or other of the categories.

7. The Legislative Intervention

Notwithstanding the state of the common law which in my view permits the Plea Bargaining it was considered desirable to introduce legislation in Jamaica which would govern the principles which should guide both the prosecution and the Courts in carrying out their various functions in the event of their being some negotiation in the entering of a guilty plea.

The Act, **The Criminal Justice (Plea Negotiations and Agreements) Act** was passed by Parliament in 2005 and further amended in 2012

Section 5 refers to the Director of Public Prosecution's power

(1) to withdraw or discontinue charges

(2) to accept a plea to a lesser offence.

It provides for plea negotiations anytime before judgment *Section 4 (1)*

Such negotiations shall be held only through an attorney-at-Law *Section 6 (2).*

It requires any plea agreement be in writing *Section 7*

Section 8 (1) (b) requires the Director of Public Prosecution to inform the victim of the **substance and reasons** for any agreement concluded and of the victim's entitlement to be present at court when the Court is considering the agreement.

Section 10 says that the Judge or Resident Magistrate shall not be bound to accept any plea agreement

The question arises: is the judge or Resident Magistrate required to approve the agreements but look at *Section 12 (2)* & *(3)* & *Section 13*

Section 15 (2) lays down that the maximum sentence of imprisonment shall be 2/3 of the prescribed maximum.

R v Dougall (Robert) [2010]EWCA Crim. 1048

A recent decision of the Court of Appeal in the U.K. has addressed the question of a plea agreement being entered into under the Serious Organized Crime and Police Act 2005 Section 73. In that agreement the Director of the SFO submitted that in return for the assistance promised by the accused the court should impose a suspended sentence. The Trial Court imposed a 12 month sentence and on appeal the Court of Appeal held that;

> "*it was contrary to principle for a plea agreement to be entered into where the prosecution and defence agreed what the sentence would be. Responsibility for sentencing decision in case of fraud or corruption was vested exclusively in the courts. There were no circumstances in which it might be displaced. Nevertheless the Court held after a review of all the circumstances of the case that the argument that the sentence should be suspended was very powerful....and in light of the guidance given, it was appropriate for the 12 month sentence be suspended.*"

RICHARD SMALL

12th November 2012