

# Plead Guilty and Get it Over With?

What to do when your client assures you s/he is innocent, but nevertheless wants to plead guilty. Peter Hidden QC, Senior Public Defender explains.

It is not uncommon for a client in a criminal case to tell counsel that he or she is innocent of the crime charged but, nevertheless, wishes to plead guilty. Some clients who are, in fact, guilty cannot bring themselves to confess to their legal representatives (particularly if the decision to plead guilty follows earlier protestations of innocence). Other clients, who may well be innocent, elect to plead guilty because their defence to the charge necessarily involves revealing other criminal conduct more serious than that charged or other behaviour, not itself criminal, of which they are deeply ashamed.

Barristers who have been instructed by the Aboriginal Legal Service will be particularly familiar with the situation. Many older Aborigines, especially from rural areas, have a long history of appearing without representation in magistrates' courts, and their experience of the criminal justice system taught them that conviction follows arrest as the night follows the day. Even with legal representation, they cannot break the pattern of pleading guilty "and getting it over with", regardless of the merits of their case; and it is understandable that they have no stomach for a fight which they are convinced they cannot win.

In view of the familiarity of the problem, it is surprising that there is such a divergence of opinion among members of the Bar as to how it should be resolved. While the situation may present real difficulties in individual cases and must always be handled sensitively, the ethical position of counsel is not in doubt. It is succinctly expressed in one of the draft rules of the Australian Bar Association:

## "8.5 PLEAS

- (a) It is the duty of the barrister representing a person charged with a criminal offence to advise that person generally about any plea to the charge. It should be made clear that whether the client pleads "not guilty" or "guilty", the client has the responsibility for and complete freedom of choice in any plea entered. For the purposes of giving proper advice, a barrister is entitled to refer to all aspects of the case and where appropriate may advise a client in strong terms that the client is unlikely to escape conviction, and that a plea of guilty is generally regarded by the court as a mitigating factor, at least to the extent that the client is thereby viewed by the court as co-operating in the criminal justice process.
- (b) Where a client denies committing the offence charged, but nonetheless insists on pleading guilty to it for other reasons, the barrister may continue to represent that client, but only after advising what the consequences will be, and that what can be submitted in mitigation will have to be on the basis that the client is guilty. Wherever possible, in such a case, a barrister should receive written instructions.

Provided that, a barrister acting as a Duty Lawyer in a Magistrate's Court shall not under any circumstances represent a client on a plea of guilty if the client insists on

pleading guilty, but denies having committed the offence charged."

One can see the sense of the proviso but, as barristers in this state do not act as duty lawyers in magistrates' courts, it need not concern us.

It is not necessary that a client should confess to the crime charged to his or her legal representatives before counsel can appear on a plea of guilty. All that is necessary is that it be explained to the client that by a plea of guilty he or she necessarily admits the elements of the offence, and those elements should be related to the facts of the case at hand. It should also be explained that no evidence can be tendered and no submissions can be made inconsistent with an admission of those elements. If the client accepts that course, written instructions to that effect should be obtained and counsel is then free to appear on that basis.

Of course, counsel should try to ascertain in conference why the client is adopting that stance, to ensure that it is not based upon some wholly irrational reason or some misconception as to the possible outcome of the proceedings. In particular, counsel should advise the client as to the strength of the prosecution case and the prospects of acquittal. That said, however, it is the client's right, and his or hers alone, to determine how to plead.

If the client persists with the plea of guilty but insists that evidence be called or submissions made which call into question the elements of the offence, counsel should withdraw. If, however, counsel is able to appear on the basis suggested above, he or she is free to make submissions to the court not only as to the background, antecedents and rehabilitative prospects of the client, but also on any matter in mitigation of the seriousness of the offence which appears from the evidence in the prosecution case.

The situation also arises where a client claims to have no memory of the offence as a result of a prodigious ingestion of alcohol or drugs but, in the light of the evidence in the prosecution case, accepts that he or she must have committed the offence. That client can be represented on a plea of guilty on the same basis and, indeed, the intoxication may be relied upon (for what it is worth) in mitigation.

These have long been my own views on the matter and, at a recent meeting where this issue was discussed, they were affirmed by the Bar Council. □

*"... conviction follows arrest as night follows day ..."*

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