

1. Toni Russo (“D”) faces an Indictment comprising 3 counts: alleged possession of herbal cannabis, on two occasions, and the unlawful cultivation of a cannabis plant. The facts are set out in paragraphs 10-23 of D’s skeleton argument in the bundle produced for the hearing. The questions for consideration at the pre-trial hearing are whether he can avail himself of a defence of medical necessity and, if unsuccessful, whether the Guernsey legislation is compatible with Article 8 of the European Convention on Human Rights (any Article 3 argument was not relied upon at the oral hearing).
2. D has provided part of his medical records for the purposes of the hearing (Folio 9 of the bundle). An expert report is not available, as the Legal Aid authorities would not pay for it. D is obviously in a very poor state of health (although he did not attend the hearing, he has been to Pre-Trial Reviews and cannot walk very well, as well as looking much older than his years). His medical presentation is formidable: he was diagnosed with HIV in 1997, suffers from Glaucoma, and bears the marks of some years of drug misuse. He suffers from AIDS-related dementia and expresses paranoid thoughts about local psychiatric services, with whom he often refuses to engage. He persistently fails to take his AIDS medication or keep appointments. (There are many letters in the bundle, a recent snap-shot can be found in the last one, from the Consultant Psychiatrist, dated 20th March, 2016). It is his strong belief that cannabis has significant medicinal properties, particularly in his own circumstances. If the result of this hearing is against him, D intends to plead ‘not guilty’.
3. The legislative framework in Guernsey is equivalent to that in England and Wales. The powers of the Secretary of State are exercised by the Committee for Health and Social Care. So cannabis and its derivatives may not be used in medicine (a doctor cannot prescribe such items) and may be possessed only for limited reasons under licence. Plainly the medicinal use of cannabis is expressly forbidden by the current legislation in both jurisdictions.
4. As Advocate Eeles frankly conceded from the outset, the problem D faces is the English case of R v Quayle [2005] EWCA Crim 1415 (Folio 1), also followed in R v Altham [2006] EWCA Crim 7 (Folio 2). If Quayle is followed also in Guernsey, that is fatal to D’s core submissions. So counsel for D urged the Royal Court not to follow the English cases referred to, but look instead at Professor Ormerod’s critical commentary on Quayle [2006] (Crim L.R. 148-153 at Folio 3). Assistance was also sought from two other cases, mentioned in that decision: Re A (2000) (Folio 5) and an Ontario case R v Parker [2000] O.J. No. 2787 (Folio 6).
5. Although, of course, not technically binding, cases of the English Court of Appeal are of high persuasive authority in Guernsey. Indeed the evidence to the Royal Commission referred to Archbold as a work of authority. Furthermore, for all intents and purposes, the legislation in Guernsey is the same. In such circumstances it will be rare indeed, or ever, for a Guernsey trial court to depart from such decision. In their skeleton the Prosecution (“P”) quoted from paragraph 77 of Quayle (paragraph 15 of skeleton). There Mance LJ (as he then was) drew attention to the requirement that a line has to be drawn at some point by the law “*in the criteria which it accepts as sufficient to satisfy any defence of duress or necessity*”. He went on further to add:

“The legal defences of duress by threats and necessity by circumstances should in our view be confined to cases where there is an imminent danger of physical injury.”

Quayle was a set of conjoined appeals dealing very much with situations akin to that now found by D. Another important point was emphasized in paragraph 75 of the judgment, which concludes:

“On the authorities ... the requirement of an objectively ascertainable extraneous cause has a considerable, or in our view understandable basis. It rests on the pragmatic consideration that the defence of necessity, which the Crown would carry the onus to disprove, must be confined within narrowly-defined limits or it will become an opportunity for almost intractable and certainly peculiarly difficult issues, not to mention abusive defences. On that basis, we consider that the Crown’s first narrow point, namely that, for the defence of necessity of circumstances to the potentially available, there must be extraneous circumstances capable of objective scrutiny by judge and jury, is valid.”

6. It follows that this decision is authority for the proposition summarized in paragraph 14 of P’s skeleton that the defence can only be said to be available when an accused person can be considered to be acting reasonably and proportionately, in order to avoid a threat of death or serious injury. On the facts in the present case that is far from the situation with D. Evidence for this can be extracted from the medical records already mentioned. On 12th September 2014, Dr King wrote that he is *“showing evidence of personality changes and particularly has a persistently disordered belief that cannabis and “God” will treat his HIV disease. He has therefore I think ceased taking any HIV medication. This is worrying as I believe it is having some effect on his cognitive function”*. On 24th March 2016, a consultant psychiatrist observed that D *“... remains generally sceptical about the conventional medical model for treating physical and medical illness and said he would not consider restarting his HIV medication or using any psychotropic medication”*.
7. Two other matters need consideration. Professor Ormerod’s commentary on Quayle (Folio 3) has been mentioned. This emphasizes the case of Re A and propounds a test of necessity as needing to avoid *“inevitable and imparable evil”*. This can, it is claimed, be something less than a threat of death or serious injury. This is not, with respect, of much practical help. This civil case was based on unusual and heart-rending circumstances relating to the fate of conjoined twins (or one of them). As P’s skeleton points out (at paragraph 28), there were warnings in the judgments which the commentary appears not to have heeded. Ward LJ in his conclusion referred to the *“unique circumstances for which this case is authority”* and Walker LJ said that: *“In the absence of Parliamentary intervention the law as to the defence of necessity is going to have to develop on a case by case basis”*. Concluding that: *“It should not be regarded as a further step down a slippery slope because the case of conjoined twins presents a unique problem”*. In Quayle, at paragraph 52, Mance LJ concluded his consideration of Re A by saying:

“This reasoning in our view underlines the danger of Mr Fitzgerald’s approach so far as that seeks to extract from the cases from the very different area of medical intervention, general principles to be applied across the whole area of duress by threats or necessity by circumstances.”

Another point is that however weighty the views of an eminent academic commentator may be, it is decided cases that courts should have regard to when considering what the legal position in actuality is.

8. Mance LJ also discussed the Ontario case of Parker referred to earlier. This is relied upon by D in relation to the human rights aspect of the case. The facts are clearly distinguishable from the present situation – put shortly, Mr Parker was in constant risk of serious injury or death from epileptic fits. On the facts found the Ontario Court of Appeal considered he had no effective alternative to using cannabis to control this. He was also taking his conventional medication as prescribed. The issue was the constitutionality of the prohibition against possession or cultivation of cannabis when the accused claims that he requires it for medical

purposes. The Court of Appeal under the Canadian Charter struck down the relevant legislation. After referring to Parker Mance LJ went on to state, in paragraph 68:

“... in certain matters of social, medical and legislative policy, the elected government of the day and Parliament are entitled to form overall policy views about what is best not just for particular individuals, but for the country as a whole, in relation to which the courts should be cautious before disagreeing.”

And in paragraph 69:

“On the material before us, so far as it is appropriate for us to express any view, we would not feel justified in concluding that the present legislative policy and scheme would conflict with the Convention.”

9. Mance LJ went on to say, in paragraph 80 of his judgment, after referring to a previous decision:

“The case is an old one, and the law has developed, so that we need not consider it further. But the underlying theme, that a continuous and deliberate course of otherwise unlawful self-help is unlikely to give rise to the defence has itself, in our view, continuing relevance.”

In paragraph 81 the point is made in quite specific language:

“Where there is no imminent or immediate threat or peril, but only a general assertion of an internal motivation to engage in prohibited activities in order to prevent or alleviate pain, it is also difficult to identify any extraneous or objective factors by reference to which a jury could be expected to measure whether the motivation was such as to override the defendant’s will or force him to act as he did.”

10. As mentioned in paragraph 4, if the case of Quayle is applied in Guernsey, that is an end to D’s contentions. There is no good reason why it should not be followed. It is of high persuasive authority, deals with a very similar statutory scheme of regulation, and covers a great deal of the same ground as D’s case: it is on all fours with the present matter, so accordingly the defence put forward by D is not one that should be left to the Jurats. Standing back for a moment, this is not one of those situations where applying a decision leads to a feeling of regret on the particular facts. Although “*hard cases make bad law*” this is not one of them. The factual merits behind D’s submissions are undermined by the medical records, which place him entirely in a different situation from, e.g., that in Parker. D is in a very unfortunate state, and although entitled to his opinions, has hardly assisted in his treatment over the years.

J R Finch
Judge of the Royal Court