Decision on the appropriate sentencing guidelines for ADB-Butinaca in powder form.

[2022]GRC019

IN THE ROYAL COURT OF GUERNSEY

CRIMINAL DIVISION

Between:

THE LAW OFFICERS OF THE CROWN **Prosecution**

-v-

JAMES LUKE FRANK BICKLEY **Defendant**

Decision on the appropriate sentencing guidelines for ADB-Butinaca in powder form

Date of argument hearing: 5th January, 2022

PD Judgment handed down: 3rd February, 2022

Judgment handed down on: 17th February, 2022

Before: Catherine Maureen Fooks, Judge of the Royal Court

Counsel for the Prosecution: Crown Advocate C G Dunford
Counsel for the Respondent: Advocate C J Green

Authorities referred to in Decision:

Law Officers v Turner, Royal Court, 05.12.2002
Law Officers v Gints Grunte, Court of Appeal Judgment 69/2005
Dean John Hardy v Law Officers of the Crown, Court of Appeal Judgment 21/2013
Richards and Five Others v Law Officers of the Crown, Court of Appeal Judgment 1/2002
Barras, Watt and Orchard v Law Officers 04.10.2021 GCA045
Law Officers of the Crown v Stuart Jon Westmore, Royal Court, 11.4.2002
Dean Rodney Lamb v Law Officers of the Crown, Court of Appeal Judgment 15/2012
Law Officers of the Crown v Simon James Aynsley Domaille, Royal Court, 12.11.2012
Law Officers of the Crown v Marsh and Dodd, Royal Court, 28.11.2013
Law Officers of the Crown v Cronshey and Lucas, Royal Court, 26.02.2014
Jeffreys v Law Officers of the Crown Guernsey Judgment 29/2013
Noyon v Law Officers of the Crown 2007-08 GLR 169
Law Officers of the Crown v Travers, Royal Court 06.09.2021
Law Officers of the Crown v Shafaq and Williams, Royal Court, 04.01.2022
R v Kunakahakudyiwe [2020] EWCA Crim 1867

Other Materials Considered:

The Statement of Richard John Halliday, dated 17.09.2021

The Witness Statement of Darrell Jones, dated 20.10.2021

The Report of the European Monitoring Centre for Drugs and Drug Addiction, Technical report "Synthetic Cannabinoids in Europe a review", September 2021

Background

1. The Defendant in this case has pleaded guilty to two Counts on an Indictment, the first of which is the illegal importation of 29.86 grams of ADB-Butinaca, a controlled drug of Class B, a synthetic cannabinoid in powder form.

2. Both Prosecution and Defence counsel very helpfully provided me with written submissions, from Advocate Green dated the 24th November 2021 and 21st December 2021 and from Crown Advocate Dunford in consolidated form dated 2nd December 2021. There was an oral hearing on 5th January, 2022, following which further submissions were received from Advocate Green dated the 12th January 2022 and from Crown Advocate Dunford on the 11th January 2022 addressing further authorities I had found.

3. The written submissions included submissions on (1) the appropriate guidelines for sentencing ADB-Butinaca (2) the significant difference between the valuation of the drug provided by the Prosecution namely £30,000 and the valuation provided by the Defence namely £750 to £1500, (3) the extent to which a Newton hearing might be required to determine the value of the drugs and (4) whether or not both competing reports should be placed before the Jurats at the sentencing hearing. At the oral hearing, it was agreed that I would confine my consideration to the questions (1) what are the sentencing guidelines applicable to ADB-Butinaca in powder form and (2) specifically is the Royal Court bound to apply the guideline set by the Royal Court in the case of Law Officers v Turner, Royal Court, (05.12.2002) as approved in Law Officers v Gints Grunte, by the Guernsey Court of Appeal (69/2005) to the extent of the principle that "2/3 of the class A bands should generally apply to the importation of Class B drugs of a similar type being either in powder or tablet form" (paragraph 46 of Grunte) ("the Grunte guideline").

4. Put simply, Crown Advocate Dunford's case was that the Royal Court is bound to apply the Grunte guideline which Crown Advocate Dunford argues applies to all Class B drugs in powder form, not just amphetamines, which were the drugs imported in Turner and Grunte. He relies particularly on the case of Hardy v Law Officers of the Crown, Court of Appeal, 21/2013 which concerned another synthetic cannabinoid known as JWH-122. Advocate Green argued, on the other hand, that the Grunte guideline is limited in its application to amphetamines and does not apply to ADB-Butinaca which is a synthetic cannabinoid, more similar to cannabis and that the Defendant should be sentenced, therefore, in accordance with the Sentencing Guidelines in Richards (Richards and Five Others v Law Officers of the Crown, Court of Appeal 1/2002) for cannabis or cannabis resin.

5. If the Richards cannabis/resin Sentencing Guidelines were applied to the quantity of drug in this case, the starting point for sentencing would fall within the 3 to 6 year band for amounts of cannabis up to 2 kgs, whereas if the Grunte guideline is applied, the sentencing starting point would be two-thirds of the appropriate Class A band in Richards which would be 8 to 10 years, two-thirds of which is 5.33 to 6.33 years.

6. At the hearing, Crown Advocate Dunford's case remained that the Royal Court is bound by the Grunte guideline in this case, but in oral argument he developed his case to the extent that, were I to determine that the Grunte guideline is not the applicable guideline, he could see the logic of applying the cannabis/resin guidelines from Richards for consistency rather than embarking on setting new guidelines for ADB-Butinaca, to which topic I shall return later in this judgment. It is common ground that ADB-Butinaca is not an amphetamine.

Relevant Sentencing Cases

7. It is necessary, always, to start with Richards which, at paragraph 6, indicates that the guidelines being issued by that five-man Court of Appeal, which included as its President, Sir de Vic Carey, then Bailiff of Guernsey, replaced all previous guidelines and were applicable for the future: "*We consider therefore that, where appropriate, these guidelines should be taken as replacing all previous guidance and that proper regard should henceforth be paid to them by the Royal Court in imposing sentence."*

8. The Court in Richards set out the approach to starting points with quantity of the drug and role being the primary factors supplemented by previous convictions, sophistication of the method of evading detection, overall criminality, street price (to a lesser extent) and purity in certain cases.

9. Some nearly 20 years on, the Guernsey Court of Appeal continues to refer back to the Richards Guidelines and to confirm them as the applicable guidelines in Guernsey (see the recent case of Barras, Watt and Orchard v Law Officers, 04.10.2021 GCA045).

10. The case of Richards is concerned with various Class A drugs and cannabis and cannabis resin. The Court draws heavily on a previous Royal Court case: Law Officers of the Crown v Westmore on 11 April, 2002. That case was subsequently the subject of an Appeal. I concur with Crown Advocate Dunford that Westmore itself is not relevant to my determination.

11. There are two paragraphs from Richards which I consider to be of particular relevance to the issues I have to consider. First, paragraph 11:

> "*Where the quantity of a drug is being considered, in assessing the starting-point, this should be primarily based on weight, and only to a lesser extent based on street price. Further, except in cases of very high purity, or where there is reason to believe that the drugs will be cut before being passed on, the purity of drugs will not be a factor that will be taken into account in sentencing."*

Then paragraph 13:

> *"It is for the legislature to set sentencing policy in relation to different types of drugs. It is not for the courts to say that one particular type of drug within a class is worse, or more harmful than another, or to lay down different sentencing policy for those drugs."*

12. The sentencing bands set out at paragraph 10 of Richards are divided into a set of bands for Class B cannabis, whether in the form of herbal or resinous cannabis, Class A drugs in powder form and Class A drugs in tablet form. There is no band for Class B drugs in any other form or indeed any type of Class B drugs other than cannabis. The synthetic cannabinoid, the subject of this judgment, did not exist at the time of Richards.

13. Some months after Richards in the case of Turner, Sir de Vic Carey, Bailiff, sitting as a Judge of the Royal Court, addressed the issue of Class B drugs in powder and tablet form and referred to the fact that there had been a paucity of cases.

14. The judgment in Turner (as opposed to the sentencing remarks) does not deal with a quantity or value of the Class B drug concerned, but Crown Advocate Dunford was able to access the Prosecution papers and I the sentencing remarks so we were able to confirm that Mr Turner had been involved with 292 tablets, each tablet valued at £10-£15, giving a total valuation of £2,920 - £4,380. What the learned Bailiff says is this:

*"This is the first time the court has considered appropriate sentencing for offences involving **amphetamine*** (my emphasis) *since the guideline case in the Court of Appeal of Richards and others. Just as the paucity of cases that come before the court involving Class B drugs in powder and tablet form led to that Court feeling that it was not appropriate to lay down guidelines for the various bands of quantities, this Court would wish to point out that in laying some guidelines down today it may more readily open to review if more cases of **amphetamine*** (my emphasis) *importation and possession occur in the future.*

*The Court would also like to make the point that for practical purposes, when referring to Class B drugs in powder and tablet form, it is referring to **amphetamines*** (my emphasis). ***Other considerations may apply to other Class B drugs*** (my emphasis), *except of course cannabis, which is already the subject of guidelines. On occasions it seems that when this **particular*** (my emphasis) *drug comes in, the person involved in its importation or possession thinks he is dealing with a stronger and more lethal MDMA or Ecstasy, which is a Class A drug. He therefore enjoys a lighter disposal than he was perhaps anticipating - if persons who commit these offences ever do think of the consequences of being caught. That does not justify departing from the principle that the legislature have classified drugs with different maximum penalties so the courts should impose for offences of Class B drugs sentence is in the range of 2/3 of those for similar amounts of Class A drugs."*

15. The learned Bailiff then set out a table with bands which will be considered further in this judgment. He describes it as a set of bands for Class B drugs in powder or tablet form but it is abundantly clear that he is referring to Amphetamines and I consider that his guidelines were confined to Amphetamines.

16. Both counsel submitted that there is no explanation within the judgement as to why the learned Bailiff has adopted a sentencing band of 2/3 of Class A. Crown Advocate Dunford specifically submitted that there is no indication that value was the justification for it. Advocate Green posited that it might be because amphetamine was perceived as more dangerous than cannabis. I note that the tablets were a mixture of amphetamine and MDMA which is a Class A drug. It is not for me to speculate but it is self-evident that the learned Bailiff considered that a like for like starting point based on cannabis or cannabis resin would be too low.

17. It was submitted that the learned Bailiff in Turner was observing in the breach paragraph 13 of Richards which warns against the sub-categorisation of drugs within a Class. This overlooks the important point that Richards dealt only with the drugs with which the appeals before it were concerned, namely cannabis resin, Class A drugs in powder form and Class A drugs in tablet form. Amphetamines existed at the time of Richards, but it is clear from the judgment in Turner that there were not many cases involving them; sentencing of them was deliberately not considered as part of the Richards Guidelines. Richards does not directly apply to any Class B drug other than cannabis.

18. The next case of relevance is that of Law Officers v Gints Grunte, Court of Appeal 69/2005, in which the defendant received a 4½ year term of imprisonment for the importation of amphetamine sulphate tablets (2,146), with a value of between £21,460 and £32,190. The basis of the appeal was that the starting point was too high.

19. At paragraph 43 of the judgment, Steel JA, delivering the decision of the Court, confirmed that the guidelines set out in Richards remained the definitive authority in relation to cases concerning Class A drugs and Class B cannabis offences. She went on to say, "*The same **general*** (my emphasis) *principles as to approach apply to Class B **amphetamines*** (my emphasis) *as set out in Turner.".* The Court went on to consider Turner and made a point which I consider to be important, that the learned Bailiff had said that the guidelines contained in

Turner may be more readily open to review if more cases of amphetamine importation possession occur in the future. The Court of Appeal, at paragraph 45 said this:

> "*The Royal Court in Turner then set bands for sentencing Class B offences in powder or tablet form **(meaning amphetamine)*** (my emphasis). *For 1,000 – 2,500 tablets, the band is set at 7 to 10 years."*

20. Having said what it said at paragraph 45 and specifically referring to amphetamine, the Court of Appeal went on to say this:

> *"46. We endorse the principle that two-thirds of the Class A bands should **generally*** (my emphasis) *apply to the importation of Class B drugs of a similar type, being either in powder or tablet form."*

21. We spent some time at the oral hearing considering what words 'of a similar type' mean. I concur with Crown Advocate Dunford that Advocate Green's contention that it means of a similar type to Class A drugs, like MDMA or Ecstasy is not the natural interpretation. In my judgment, those words have to mean of a similar type to the Class B drugs in powder or tablet form, meaning amphetamines, from the previous paragraph 45. The Court was dealing with amphetamines not with any other type of Class B drug in powder form and it was not setting guidelines; it was only reviewing a Royal Court sentence based on the Turner guidelines.

22. At paragraph 50, the Court of Appeal said this:

> *"50. The current guidance and guidelines are of invaluable assistance, but this does not exclude or obviate the need for flexibility depending on the circumstances of an individual case stop each case must be decided upon its own facts and in the present case we follow the principle in Turner rather than the guideline bands for Class B tablets in that case."*

23. In my judgment, whilst that is not explained in any way, it is likely that it is a distinction between the principle of the two-thirds of Class A bands versus the actual table in Turner, which is mathematically more difficult to follow and which uses different sentencing bands from the Class A bands in Richards. It is to be noted that the learned judges of Appeal once again emphasised the need for flexibility and a case by case approach.

24. The Appeal in Grunte was dismissed with the Court concluding that the sentence was not manifestly excessive, even accepting that 7 years was the appropriate starting point by reference to the principle in Turner rather than the higher starting point used by the Royal Court applying the table in Turner.

25. It should not be overlooked that Grunte itself was a case concerning amphetamines rather than any other form of Class B powder. I do not find Grunte on its face to be an authority for the extension of the principle in Turner beyond amphetamines but it is necessary to consider two further decisions of the Court of Appeal in Lamb v Law Officers of the Crown, Court of Appeal 15/2012 and Hardy v Law Officers of the Crown, Court of Appeal 21/2013.

26. My attention was drawn to the case of Lamb which concerned the sentencing of Class C drugs to which the Richards guidelines do not directly apply. Class C drugs have been much more prevalent in recent years and the Royal Court had adopted a rough guideline of one-half of the Class A sentencing band.

27. Carey JA, being formerly Bailiff Carey who was part of the five-man Court of Appeal in Richards and set the Turner guidelines above, delivered the judgment of the Court of Appeal in Lamb said this at paragraph 19:

"Firstly, any starting point is to some extent arbitrary. Secondly, any starting point for one class of drugs which seeks to derive its legitimacy from mathematical comparison of the maximum sentences for that class and another class of drugs, is necessarily dependent on the respective levels of those maximum sentences, which can obviously change from time to time depending on medical and political considerations."

28. The learned Judges of the Court of Appeal declined the invitation to set down general guidelines for Class C sentencing as they considered themselves not adequately equipped on the basis of the material available in the case to set down such guidelines. They were not prepared to confirm or otherwise, that one-half of the Class A tariff is, necessarily or generally, the appropriate starting point in all Class C cases. I interpret this as a clear step away from the mathematical methodology applied in the case of Turner. I also take from the judgment that a Court seeking to set guidelines must have a considerable volume of expert evidence before embarking on such a task.

29. At paragraph 22 of Lamb, Carey JA said this: *"Before leaving this appeal one of our number* (by which he meant himself) *was the Presiding Judge in the Royal Court in the case of Turner when the Court transposed the bands in Richards applicable to Class A drugs to provide that where Class B drugs were involved the tariff should be two thirds of that for Class A. Whilst Turner is not binding and* ***amphetamine*** (my emphasis) *importations have remained rare we were told that Turner is still of relevance as a number of the EDOCS* (i.e., emerging drugs of concern commonly known as legal highs) *referred to above have been added to Class B. The problem which we identify is the arbitrariness of laying down parallel scales for the same drug depending on whether it is in capsule or powder form. Medicinal drugs in capsule form are regularly manufactured in different strengths depending on the clinical needs of patients ..... these will be issues for the Royal Court if called upon to re-visit Turner."*

30. I accept the submission of Crown Advocate Dunford that that paragraph is *per incuriam* as the Court of Appeal appeared unaware of the case of Grunte. I also accept Advocate Green's submission that the paragraph is *obiter dicta* on the basis that the case before the Court concerned Class C and not Class B drugs.

31. It is interesting to note from Lamb however, first that Carey JA still does not consider Turner to be the final word either in respect of amphetamines or (if it were a wider authority) other Class B drugs and that the EDOCs are clearly something which he considers require separate and further consideration. He considers Turner to be relevant to the issue of EDOCs, nothing more. There is nothing in paragraph 22 which leads to the conclusion that the Grunte principle or even Turner itself is authority for any drug other than amphetamines.

32. There are two additional paragraphs in Lamb which are relevant. The first is paragraph 17 where Carey JA says *"however, Class C appears to be a much wider category including many different (and an increasing number) of drugs. As a result, it may in due course become appropriate to re-visit the views expressed in paragraph 13 of Richards, namely that no differentiation should be made within different drugs in the same Class."* This coupled with paragraph 19, which effectively discourages the use of mathematical formulae based on other classes to calculate starting points, supports my conclusion that there should be no extension of that methodology on a blanket basis.

33. At paragraph 19 that the Court of Appeal, again, even with the information before it, declined to set new guidelines for Class C sentencing. It is worth observing that the Court of Appeal has fairly consistently declined to set any new guidelines and has also consistently referred appellants back to the Richards guidelines.

34. It is to be noted that within a few months of the decision in Lamb the maximum penalty for importing Class C drugs was increased from 10 years to 14 years which amply illustrates the potential pitfalls of linking the starting point for one class of drug to the maximum penalty in another class of drugs. Whilst I accept Crown Advocate Dunford's point that the Court can always adjust its starting point to reflect changes in the maximum penalties for the two classes to be compared, this is rather cumbersome and still falls foul of the contention that such an approach is arbitrary. This reinforces my conclusion that there should be no extension of that methodology.

35. Advocate Green included three Royal Court cases concerning Mephedrone (a drug of Class B) or similar drugs, namely Law Officers of the Crown v Domaille, (Royal Court, 12.11.2012), which concerned mephedrone tablets, Law Officers of the Crown v Marsh and Dodd, (Royal Court, 28.11.2013) which concerned mephedrone powder and Law Officers of the Crown v Cronshey and Lucas, (Royal Court, 26.02.2014) which concerned Flephedrone and 4-MEC which the Court noted was "likely sold as Mephedrone". The Royal Court adopted the Grunte guideline. I note that, based on Advocate Green's submissions, mephedrone is "a synthetic stimulant drug of the amphetamine and cathinone classes" so the application of the Grunte guideline for amphetamine in those cases is entirely logical and consistent with my interpretation of Grunte.

36. After the oral hearing I drew to Counsel's attention the case of Jeffreys v Law Officers of the Crown, (Guernsey judgment 29/2013) which concerns the application of the Class A Richards guidelines to Fentanyl, a synthetic opioid and a type of Class A drug which was not specifically considered in Richards. In fact Jeffreys is simply applying the earlier Court of Appeal decision of Noyon v Law Officers of the Crown, Court of Appeal 21/2013 which was the first case in which Fentanyl was considered. The Court of Appeal in Noyon received expert evidence as to the effects and dangers of Fentanyl because the Appellant was arguing that it should be treated differently from other Class A drugs. The Court of Appeal confirmed the application of the Class A Richards guidelines. They noted the market value and high risk of overdose and made reference to a conversion rate in respect of the Fentanyl as compared to Heroin. In Jeffreys, the Royal Court followed Noyon including the conversion rate and the Court of Appeal upheld the sentence. I consider Noyon to be relevant to the question I must determine as it shows the Court's flexibility in applying Richards to drugs not specifically considered within that case.

37. I turn now to the case of Hardy. In his written submissions Crown Advocate Dunford relied heavily upon this case in support of his argument that the Grunte guideline does apply to ADB-Butinaca, it being a drug of Class B in powder form.

38. In Hardy the drug was another synthetic cannabinoid JHW-122. The defendant was convicted, after trial, of importing 100gms of it in powder form. He was sentenced to 6 ½ years' imprisonment based on the Grunte guideline. The learned judge of the Royal Court identified a sentencing starting point of 6-8 years based on two thirds of the range for similar drugs of Class A.

39. The Royal Court in Hardy had before it expert evidence as to how JWH-122 might be used and specifically how it might be smoked or ingested after dissolution in acetone and then mixed at a ratio of 2gms of the drug to 35 grams of other material with leaves such as marshmallow leaves. There was evidence that the defendant had searched on his laptop for acetone and had ordered marshmallow leaves. The estimated value of the drug imported used in that way was between £43,000 and £52,000. At paragraph 22 of the judgment, Calvert-Smith JA, delivering the judgment of the Court, set out the principles applicable to drug sentencing in Guernsey since 1990. Having quoted from Westmore principles which were reiterated in Richards and specifically that contained in paragraph 13 of Richards, (see paragraph 11 above) and that Richards replaced all other guidelines, he continued:

"vi. The guidelines in Richards were supplemented by the Royal Court in Turner later the same year. The Court set ranges of sentence equivalent to those set in Richards for cannabis resin for other Class B drugs in tablet or powder form.

vii. The range of starting point for sentence for 20-100 grams of Class B drugs in powder form was set at 5-8 years and for 100-250 grams at 7-10 years.

viii. In Grunte 15.12.05 the Court of Appeal revised the relevant guideline to one of 6-8 years.

ix. In all these cases the Royal Court and Court of Appeal have stressed that the facts of the case and the role and background of the offender may be so important as to take an individual case above or below the ranges set in the cases."

40. Point vi suggests that the learned judges of the Court of Appeal accepted that Turner was a guideline case for other Class B drugs in tablet or powder form. That is not how I read Turner but of course I would be bound by the decision of the Court of Appeal if that is the ratio of Hardy, if I determine that Hardy applies to the case before me and I cannot distinguish Hardy. I consider it important to read the rest of the judgment after point vi carefully to ascertain its true ratio and scope. At paragraph 29 Calvert-Smith JA sets out the submission of Advocate Merrien who appeared for the appellant which is essentially the same as the submission of Advocate Green in the case before me namely that the Grunte guideline applies only to amphetamines. At paragraph 30 and following, Calvert-Smith JA sets out the conclusions of the Court:

"30. We have come to the following conclusions:

a. The proliferation of synthetic drugs and their classification within one or other of the classes A B and C does not allow for "sub-categorisation" by the courts. The principle, clearly stated in both Westmore and Richards remains valid.

b. Synthetic cannabinoids are indeed drugs in powder form.

c. Strict application of the guidelines in this case would have suggested a starting point above 8 years bearing in mind that,

i. The quantity was at the top of the range and

ii. The existence of a serious previous conviction for the cultivation of cannabis which had attracted a sentence of 4 and ½ years.

31. The sentence eventually passed was therefore well below that which such a strict application would have indicated.

32. If the weight were to be treated as falling within the lower range applicable to cannabis resin, the same 2 aggravating features would have suggested a starting point above 6 years.

33. On no basis therefore could it be suggested that the sentence actually passed was manifestly excessive so as to require the intervention of the court.

34. We decline to devise new guidelines to cover drugs which are now appearing and are classified in one or other class. All the authorities make it clear that the guidelines are just that, and that they are not straitjackets. The state of knowledge and opinion about classified drugs is constantly changing and courts must be loyal to the decisions of the legislature in respect of those classifications. If the quantities used to smoke or ingest drugs, the ways in which those drugs are used, the vagaries of the illegal drugs market or other factors change, as they surely will, the courts must retain the flexibility to react to such changes on a case by case basis, or, if appropriate by fresh guidelines.

35. Accordingly this application for leave to appeal against sentence is refused."

41. In those concluding paragraphs, whilst the Court considered whether the sentence was manifestly excessive when the guidelines (undefined) were "strictly" applied, the learned Judges also analyse the sentence against the Richards guidelines and conclude that the aggravating factors of quantity and the previous conviction would have led to a higher starting

point and that overall, therefore, the sentence was not manifestly excessive even on the Richards guidelines for cannabis resin.

42. Advocate Green submitted that the true ratio of the Hardy case is confined the decision on sentence. Crown Advocate Dunford argued otherwise in his written submissions but in his oral submissions accepted that this was a fair point.

43. He is right to do so, in my view, because the learned Judges of the Court of Appeal did not, as they could have done, endorse the application of the Grunte guideline as applicable to JWH-122 and reject Advocate Merrien's submission. They did not do either but considered the sentence under both the Grunte guideline and Richards guidelines. As Crown Advocate Dunford observed, there was no detailed reasoning for paragraph 30. What the learned judges emphasise at paragraph 34 is that the guidelines are *"just that"* and, having set out the variables including, in effect, purity, manner of use and market conditions (value), they point to the need for the Courts to retain "*the flexibility to react to the changes on a case by case basis or, if appropriate, by fresh guidelines"*.

44. Despite having been provided with a quantity of expert information, the Court of Appeal, again, declined to devise new guidelines to cover drugs which are now appearing and are classified in one or other Class. In my judgment, had they been satisfied that the Grunte guideline definitely applied and was the only way of sentencing JWH-122, they would not have been considering the invitation to issue fresh guidelines.

45. In my judgement, the ratio in Hardy is limited; it is not a guideline case. It concerns methanone (also known as JWH-122) and is not automatically applicably to ADB-Butinaca. It follows that I do not consider that Hardy represents clear authority from the Court of Appeal binding on the Royal Court that the Grunte guideline applies to ADB-Butinaca.

46. There have been two cases recently in the Royal Court dealing with synthetic cannabinoids. The Royal Court case of the Law Officers v Travers, 6th September 2021, regarding PINACA in liquid form which was effectively sentenced gram for millilitre on weight using the Richards cannabis guidelines. No arguments were advanced either for or against that approach. There is also the more recent case of Law Officers of the Crown v Shafaq and Williams (Royal Court, 04.01.2022) which concerned ADB-Butinaca in liquid form. It is to be noted that was the final product in that it had already been diluted ready for use. Bailiff McMahon, when delivering the sentencing remarks of the Court, said that the Richards guidelines were not directly applicable but that the principles contained therein were helpful in determining the sentencing starting point. He referred to role and the matters in paragraph 11 of Richards. He explained that the Court had taken the starting point from the Richards cannabis guidelines based on weight alone and then considered whether weight was the only factor or whether the starting point should be modified to take account of street value. The Court in that case, based on the information it had about value and about ADB-Butinaca in that form, determined that there should be no modification. Advocate Green submitted that there was a risk of inconsistency were I to determine that ADB-Butinaca in powder form should be sentenced under the Grunte guideline like an amphetamine when the same substance in a different form has been sentenced in the same way as cannabis. In my judgement that is not a reason in itself for me to shy away from making a decision that Grunte covers ADB-Butinaca in powder form, were that to be my conclusion, as I am not bound by other decisions of the Royal Court. I am dealing with ADB-Butinaca in powder form rather than in liquid form as in Shafaq and Williams.

47. In this jurisdiction we regularly look to English practice and case law for guidance. In the area of criminal sentencing, however, that guidance is more limited as it has long been recognised that Guernsey's sentencing policies differ from those in England and that that distinction is justified in the circumstances in which we find ourselves. Drug sentencing is a particular exception where Guernsey has a distinct policy endorsed by the Court of Appeal.

48. Nonetheless, as England, a much larger jurisdiction, is also faced with an ever-growing number of new drugs, it is informative to look at how the English Court is dealing with the sentencing of those drugs.

49. In England, sentencing has largely been reduced into very clear and regimented sentencing guidelines. For drugs there are two factors: culpability i.e. role and harm: i.e. quantity and the guidelines are divided into categories which set out quantities of various types of drug from each of the three classes. In view of difficulties which arose by listing drugs which were then immediately replaced with slightly different compounds, thus defeating the listing, the English sentencing policy has changed and in 2016 the Psychoactive Substances Act was passed which focusses on the effects of a particular drug rather than a list of banned substances. The maximum sentence under the 2016 Act is 7 years' imprisonment.

50. As far as I could ascertain, ADB-Butinaca is listed as a Class B drug in England.

51. Following the oral argument, I found the English case of R v Kunakahakudyiwe [2020] EWCA Crim 1867 in which the Court of Appeal heard an appeal against sentence for ADB-Butinaca. The judge in the Court below had used the guidance for cannabis. At paragraph 17 of the judgement Cheem-Grubb J delivering the judgement of the Court of Appeal said this: *"The Prosecution's initial assertion was that the closest proximation to mamba or spice in the formal sentencing counsel guidelines would be ketamine and amphetamine but this was challenged, particularly by counsel representing this applicant, during the course of the sentencing hearing. The result was that the prosecution withdrew its contention and the judge was invited to sentence on the basis that the closest approximation as to harm was cannabis itself. This was a significant achievement on the part of counsel for the applicant."*

52. At paragraph 20 it was said: *"it is always important to remember that any guideline is guidance rather than a rigid framework. That is particularly so when the guideline for a conventional drug such as cannabis is being applied to a far more powerful synthetic substitute which can be produced and sold much more cheaply."*

53. In the final analysis, the learned Judges of the Court of Appeal upheld the sentences saying this: "*Overall, we express our firm view that the judge imposed procedurally sound and legally correct sentences, albeit given the appalling destruction that such synthetic substances caused to their users and wider society more robust sentences could well have been expected.*"

54. In my judgement, this case demonstrates both the difficulties which all courts are currently facing in connection with synthetic cannabinoids and other new drugs and the need for a flexible case by case approach even in a jurisdiction which has much more restrictive sentencing guidelines. Whilst the Court of Appeal clearly viewed the application of the guidelines for cannabis as producing an arguably lenient sentence, they did not go so far as to determine that it was the wrong approach.

55. Both Counsel had supplied me with expert reports which deal with the nature and value of the ADB-Butinaca in the case before me which is an issue for another day. Advocate Green additionally provided the report of the European Monitoring Centre for Drugs and Drug Addiction which contains a lot of information about synthetic cannabinoids but which I acknowledge is not accepted as expert evidence by Crown Advocate Dunford and which was not considered at the oral hearing.

Conclusion

56. The Guernsey Court of Appeal has consistently reinforced the general application of the Richards guidelines to sentencing for drug-trafficking offences. Those guidelines have been

supplemented in the Court of Appeal decisions in Grunte (affirming the guideline principle in Turner as above set out) and Noyon.

57. The guideline in Turner, which I consider to be clearly confined to amphetamines, was created almost 20 years ago and Bailiff Carey (as he then was), its creator, left very much open the possible need for its review. My reading of Grunte is that it sets the Grunte guideline for amphetamines or Class B drugs in powder or tablet form similar to amphetamines and goes no further. Carey JA's obiter comments in paragraph 22 of Lamb, which concerned Class C drugs, do no more than affirm that Turner was concerned with amphetamines, point to his view of the relevance of Turner to EDOCs and repeat, (*per incuriam* and *obiter*), that Turner might need to be re-visited. I consider the case of Lamb to be of assistance to me as it points away from mathematical formulae based on comparing the maximum sentences of two different classes of drugs. Hardy is of particular relevance as it was concerned with a synthetic cannabinoid. Whilst I accept that, by reading paragraphs 22 vi. to vii. and 30 b. and c. together, one might conclude that the learned Judges are stating that the Grunte guideline applies more widely to Class B drugs in powder form, in my judgement, the true ratio of Hardy is confined to its facts and the dismissal of the appeal against sentence in respect of JWH-122.

58. I am particularly struck by paragraph 34 of Hardy which points to either a continuation of the current system whereby the Court uses the guidelines it has on a case by case basis factoring in value, purity and method of use or establishes new guidelines.

59. I conclude that Hardy is not binding authority on the Royal Court for the sentencing of ADB-Butinaca which leaves the Royal Court with the Richards guidelines and its flexible approach based on those guidelines or setting new guidelines.

60. The setting of new guidelines would require this Court to consider paragraph 13 of Richards which warns against sub-categorisation of drugs in a Class and makes it clear that it is for the legislature to set sentencing policy in relation to different types of drugs within the same class. The legislature has classified ADB-Butinaca as a Class B drug. Not all cannabis related drugs are Class B – for example Δ9-THC which is a Class A drug. I would take some persuading that it would be appropriate for the Royal Court to embark on setting new guidelines for ADB-Butinaca.

61. There is another point to be made about the setting of new guidelines and that is what information the Royal Court would need were it to embark on that task. In my judgement, new sentencing guidelines could only be set by this Court after having heard proper expert evidence and argument, if appropriate, as to the nature and effect of a particular substance. I note, however, that the Court of Appeal, even when faced with expert evidence, has declined, on more than one occasion, to establish new guidelines.

62. My conclusion is that the Royal Court should apply the Richards guidelines generally to the case before me. This does not mean, however, that a gram for gram comparison by weight with cannabis is the only criterion for the starting point when the sentencing band is for cannabis and cannabis resin and the drug in this case is a powder, not directly covered by those guidelines. Richards is about so more than the sentencing bands which are, in any event, only a guide. As the learned Bailiff said in Shafaq and Williams, it gives the Court principles with which to set a sentencing starting point and matters to take into account in sentencing. Those matters include, in appropriate cases, value and purity.

63. In the case before me, I do not consider that the significant difference in the two values put forward by the Prosecution and Defence can be ignored and it may be that the Court would be assisted by submissions and possibly expert evidence on issues such as purity, how to assess quantity and about how the drug would be prepared for use as it is in powder form and not, for

example, as in Shafaq and Williams, already prepared for use. These issues need to be considered further once this judgment has been handed down and considered by counsel.

64. I record my gratitude to counsel for their careful and helpful submissions.

Catherine Maureen Fooks,
Judge of the Royal Court

17th February, 2022