Application made by the Defendant for a ruling regarding the applicable sentencing band from the case of Richards to be applied to his forthcoming sentencing for (inter alia) fraudulent evasion of the relevant prohibition on importation of Delta-9-tetrahydrocannabinol ("Δ^9-THC") cannabis in liquid form which is a Class A drug under the Misuse of Drugs (Bailiwick of Guernsey) Law 1974 as amended. The drug imported is in two forms the first being 10.1 milligrams of paste and the second being 283.2 millilitres of liquid.

[2022]GRC069

IN THE ROYAL COURT OF GUERNSEY
(CRIMINAL DIVISION)

Between:

ALEXANDER LAMB **Applicant**

and

LAW OFFICERS OF THE CROWN **Prosecution**

Application by the Applicant for ruling on sentencing band to be applied to Delta-9-tetrahydrocannabinol

Case heard on: 21st April 2022

Decision handed down on: 22nd April 2022

Ex tempore Judgment handed down: 4th May 2022

Before: Catherine Maureen Fooks, Judge of the Royal Court

Counsel for the Applicant: **Advocate S E Steel**
Counsel for the Respondent: **Advocate J McVeigh**

Legislation, texts and cases referred to in Decision:
Richards v Law Officers of the Crown (2000-02) GLR247
The Law Officers of the Crown v Bickley dated 17th February 2022
Dean John Hardy v Law Officers of the Crown, Court of Appeal Judgment 21/2013
Law Officers of the Crown v Noviks [2019] GRC031

Background/Introduction

1. This judgment is concerned with an application made by the Defendant for a ruling regarding the applicable sentencing band from the case of Richards to be applied to his forthcoming sentencing for (inter alia) fraudulent evasion of the relevant prohibition on importation of Delta-9-tetrahydrocannabinol ("Δ^9-THC") cannabis in liquid form which is a Class A drug under the Misuse of Drugs (Bailiwick of Guernsey) Law 1974 as amended. The drug imported is in two forms the first being 10.1 milligrams of paste and the second being 283.2 millilitres of liquid.

2. I had the benefit of skeleton arguments filed by both counsel together with other materials filed and both counsel addressed me orally. I am grateful to them for their succinct and considered submissions.

The Richards guidelines and other Guernsey cases considered

3. The Richards guidelines give guidance in terms of factors to be taken into account and in the form of sentencing tables for various drugs including Class A drugs in powder and tablet form. There is no specific guidance as to Class A drugs in other forms. At paragraph 5 the learned Judges of Appeal said this:

> *"It cannot be stressed too strongly that this Court is not attempting to establish for the Royal Court some sort of inflexible code which covers all of the issues involved in sentencing for such offences, some of which must as yet be unknown and incapable of anticipation. These are general guidelines only. Sentencing is always a matter for the Court's discretion. It is an art and not a science."*

4. They went on at paragraphs 8 and 11 to give general guidance to the Royal Court when sentencing drug trafficking offences. In paragraph 8, the learned Judges indicated that there are two primary factors, 'quantity and role', which are used to assess the extent of the criminality. There may be aggravating factors increasing the criminality of the offender such as sophistication of the methods of evading detection and relevant previous convictions."

   At paragraph 11 they said:

> 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."*

5. The sentencing bands from Richards most relevant to this case are as follows:

Bands of Class A drugs in powder form	
1 – 20 grams	7 – 9 years
20 – 50 grams	8 – 10 years
50 – 100 grams	9 – 12 years
100 - 250 grams	10 - 13 years
250 – 400 grams	11 – 14 years

6. Whilst properly acknowledging that the Royal Court is not bound by previous decisions of the Royal Court on individual sentencing cases, Advocate Steel drew attention to the case of Noviks 15th May 2019 in which Deputy Bailiff McMahon (as he then was), in delivering the Court's sentencing remarks, explained that steroids of class C in liquid form in that case would not be equated directly with powder and that the Court had considered it appropriate to reduce the weight by a factor of 10 to give more appropriate ranges. Advocate McVeigh urged me not to treat this case as any sort of precedent especially as there was no input into the calculated reduction from the Sates Analyst.

The analysis of the drugs in this case

7. Advocate Steel asked the Prosecutor to establish whether the States Analyst could equate the liquid Δ^9-THC into an equivalent powder or solid weight in a similar way to that done in the

Noviks' case. As Advocate McVeigh rightly submitted, the answer received from the States Analyst, John Bullock, was not a direct answer to that question but was more detailed information than would usually be supplied as to the concentration of the THC in the paste and the liquid. The answer was:

> *"… within these exhibits there were two distinct THC containing exhibits. The 1 gram pots containing the yellow paste had a THC concentration of roughly 50% (around 500 mg), whereas the 30 ml liquids each contained (according to the product label) 300 mg of THC. Overall there was about 10 grams of paste (containing approx. 5 grams (5000 mg) of THC) and around 280 grams of liquid (containing approx. 2.1 grams (2100 mg) of THC."*

The Application and submissions of counsel

8. Based on that information Advocate Steel for the Defendant asked me to rule that the weight of the drug is to be treated as 5 grams for the paste and 2.1 grams for the liquid totalling 7.1 grams which would place the total within the lowest band of Richards namely 1 to 20 grams with an indication of a 7 to 9 year starting point. He did acknowledge that the weights he puts forward are of the drug in its purest form and that very high purity is an aggravating factor under paragraph 11 of Richards.

9. Advocate McVeigh opposed this proposal and submitted that the weight should be the actual weight of the paste and liquid (equating millilitres to grams) and pointed to cases where that has been the approach of the Court in other Royal Court sentencing matters. Were the actual weights used, the total would be 293.3 and the starting point would be, therefore, in the fifth band namely 11-14 years. There is consequently a material difference in starting point between the two proposals.

10. Advocate Steel contended that Advocate McVeigh's proposal would be unfair as it would inflate the weight of the powder by a factor of 40 in the case of the liquid. Advocate McVeigh, on the other hand, drew attention to the fact that the weights adopted by Advocate Steel are not even very high purity but are in fact 100% purity which she says would not be an appropriate approach to sentencing; it would undermine the sentencing regime as it currently operates. Advocate McVeigh submitted that the Court should not go down the road of isolating the drug in its purest form as this is not in line with the approach in Richards and would result in considerable work for the analyst. She referred to some figures as to purity from the Drugwise website for 2014-6 which gave an average purity for cocaine of 70-90% and for crack cocaine 64 to 74%. She urged that it would be a difficult and dangerous road to factor into sentencing the purity of Class A drugs.

11. Advocate Steel responded that, on the question of additional work for the analyst, the Court should be more concerned with achieving a fair outcome for a defendant facing sentencing in such a serious offence where liberty is at stake than the potential for additional work for the analyst. He went on to clarify that he was not suggesting that the Court should generally be looking to isolate the actual drug from other component parts, for example, in cocaine (in respect of which the Defendant has also to be sentenced) but he submitted that it would not be inconsistent to include within the weight of cocaine to be sentenced whatever cutting agents were present whilst excluding the 50% of the paste and vast majority of the liquid in the case of the Δ^9-THC in this case on the basis, first, that the paste and liquid are distinguishable from powder and tablets within the Richards guidelines and, secondly, that there is no evidence that the remaining 50% of the paste and the liquid are in any way harmful. In response to the latter point, Advocate McVeigh submitted that there is nothing said in Richards as to the nature of any cutting agent, harmful or otherwise.

12. I posed the question as to whether there might be a difference here between the paste which has a high concentration of powder and might be not dissimilar to powdered drugs mixed with cutting agents and the liquid where there is a very high volume of non-THC liquid. In this case it happens that we know the concentration of Δ^9-THC in the paste. As Advocate McVeigh said, we would not usually have that data. Advocate Steel accepted that the paste is more similar to powder than the liquid but that even if the whole 10g of paste goes in as the weight, if his figure (2.1g) is taken for the Δ^9-THC in the liquid form the total weight would be in the lowest band. He accepted that the paste contains a very high concentration of Δ^9-THC such as to attract consideration of an aggravated starting point under paragraph 11 of Richards. He submitted that the Court does not have to take the full liquid weight into account when applying a set of sentencing bands designed to apply to powder. Advocate McVeigh urged caution on treating the liquid as a low purity as mitigation as that is not a feature of Richards; only high purity as an aggravating factor is mentioned. I do not have to determine this point, but I observe that there is nothing within the Richards guidelines which prevents the court, in appropriate cases, from treating a lack of purity as a mitigating factor. The Richards guidelines are just that, guidelines.

13. Although Advocate Steel's written submission contained some reference to the lower classification of Δ^9-THC in England (Class B) and it appeared that he might be suggesting that the Royal Court should be taking that into account, he confirmed that it is accepted that it is a Class A drug in Guernsey. He also did not ask me to consider the material and submissions concerning the nature of THC oil.

Discussion

14. It is true that the Guernsey Court, in common with courts in other jurisdictions, is having to adapt its sentencing policy to encompass the many and varied new drugs. Neither Advocate McVeigh nor Advocate Steel had found anything of direct assistance from any other similar jurisdictions. Some jurisdictions have looked to prescriptive guidelines but in Guernsey to date, the Royal Court, endorsed by the Court of Appeal, has continued to operate under the Richards guidelines which provide a flexible framework for sentencing in respect of drug trafficking offences.

15. By way of recent example, in the case of The Law Officers of the Crown v Bickley dated 17th February 2022, I was asked to determine whether the Grunte guidelines for the sentencing of Class B drugs in powder form (the drug in that case being amphetamine) applied to ADB Butinaca, a controlled drug of Class B, a synthetic cannabinoid in powder form. For the reasons contained in my judgment, I ruled that those guidelines apply only to amphetamines and drugs similar to amphetamines and did not, therefore, apply to the synthetic cannabinoid ADB Butinaca. At paragraph 62, I said this:

> *"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."*

16. Following my ruling in Bickley that the Grunte guidelines did not apply, the sentencing Court in Bickley applied the general guidance to Class B drugs contained within the Richards guidelines. The Court had to work out, therefore, how to deal with the weight of the powder and how to set a starting point. Various submissions were made and the Court was presented

with a calculation as to the weight of the powder when combined with liquid as an illustration of what it might look like as a finished product for use. The value was in dispute. The Court considered the various submissions and ultimately concluded that, in that case, it would aggravate the starting point it had taken because of the purity of the powder to arrive at an appropriate revised starting point but disregard the illustration based on the weight of the possible finished product. The Court used its flexible jurisdiction under the Richards guidelines to arrive at what it considered to be the right starting point and ultimate sentence.

17. In Bickley at para 58 I also referred to the case of Hardy:

> *"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 it establishes new guidelines."*

18. Advocate Steel confirmed that he was not asking me to consider setting new guidelines for Δ^9-THC. In his submission, he referred to paragraph 13 of Richards in which it is made clear that it is for the legislature to set sentencing policy in relation to different types of drugs within the same class and he referred to paragraph 60 of Bickley in which I expressed my reluctance to embark on such an exercise. In that case he was clear that the relevant guidelines and sentencing bands are those pertaining to Class A drugs in powder form (not tablets). Thus, the sole issue for me is whether to rule and, if so, what to rule as to how the Δ^9-THC is to be treated for sentencing purposes.

19. At the start of the hearing in the matter before me on 24th April 2022 I posed the question to counsel as to whether what I was being asked to determine was really a ruling on a legal matter or was, rather, trespassing into the territory of the sentencing bench comprised of the Jurats and the presiding Judge on the day of sentence. The role of the presiding Judge in Royal Court sentencing hearings is to direct the Jurats on matters of law including directing them to the relevance sentencing guidelines. The choice of sentencing band, application of aggravating and mitigating factors, the totality principle and all other sentencing matters are left to the discretion of the Jurats and the presiding Judge who retire to deliberate together.

20. Whilst counsel acknowledged that I might conclude that no ruling should be made, they nonetheless both asked me to make a ruling. Advocate Steel refined his ruling into whether the Court should treat the paste and/or liquid as equivalent gram for gram to Class A powder when applying the sentencing band for Class A powder or whether the matter should be left to the Jurats. Advocate McVeigh's desired ruling would be that the total weights should be taken and the high purity noted as a possible aggravating factor for the Jurats to determine. She felt uncomfortable that there might be no ruling and thus the Jurats (really the sentencing bench) would be left without particular assistance.

21. There is some force in Advocate Steel's description of the two different proposed rulings put forward by A and P as "square pegs in round holes" and, in my judgment, that in itself is a pointer towards a conclusion that the rulings sought are not truly legal rulings but trespassing into the territory of the sentencing bench. Having considered all that was submitted on paper and orally, I do not consider it appropriate for me to make any ruling as to how the Court should assess the weight of the paste or liquid as part of its sentencing exercise. I consider that this would be the usurping by me of the role of the sentencing bench. It will be a matter for submissions as to the weight, appropriate band, aggravating and mitigating factors and other relevant sentencing considerations.

22. The sentencing bench is uniquely well placed with all its combined experience to assess the various submissions made and to work within the Richards guidelines to set an appropriate starting point and ultimate sentence. I consider that what I said in paragraph 62 of Bickley

regarding the application of Richards to ABD Butinaca is equally applicable to the application of Richards to Δ^9-THC.

23. There was discussion as to whether there would be a need for any further evidence in the event that I were not to make any ruling but leave the matter to the sentencing bench. Obtaining information as to dosage was raised but it would appear that there is none available locally. In other cases, that sort of information has sometimes come from defendants. The question of what evidence is to be placed before the court for its consideration is a matter for counsel. Of course, the sentencing bench might request further information but that is not something which can be dealt with at this stage.

Decision

24. For the reasons above I decline to make any ruling in this matter.

25. I direct that this judgment should not be published or reported until after the sentencing of the Applicant.

Catherine Maureen Fooks
Judge of the Royal Court

4th May 2022