

Applications to amend an indictment and for the Court to make a declaration of nullity and/or quash convictions and/or record a change of plea in respect of the second defendant.

[2022]GRC104

IN THE ROYAL COURT OF GUERNSEY
CRIMINAL DIVISION

Between:

LAW OFFICERS OF THE CROWN

Prosecution

and

JOSHUA PAUL BAKER

First Defendant

and

BRADLEY JOHN KEVIN WATSON

Second Defendant

Case heard on: 12th October, 2022

Judgement handed down: 27th October, 2022

Before: Catherine Maureen Fooks, Judge of the Royal Court

Counsel for the Prosecution: Crown Advocate C. G. Dunford

Counsel for the First Defendant: Advocate L. C. Roffey

Counsel for the Second Defendant: Advocate A. J. Ayres

Legislation, texts and cases referred to in Decision:

The Indictments (Guernsey) Law, 1950 (Section 4)

The Customs and Excise (General Provisions) (Bailiwick of Guernsey), Law 1972 (Sections 77 (1) (b) & 77 (2))

The Misuse of Drugs (Bailiwick of Guernsey) Law, 1974

The Import and Export of Goods (Control) (Guernsey) Law, 1946 (Article 3)

The Import and Export of Good (Control) (Guernsey) Order, 2010

The Human Rights (Bailiwick of Guernsey) Law, 2000

The Magistrate's Court (Guernsey) Law, 2008 S (Section 12.1) and associated policy letter

The Magistrate's Court Act 1980 (Section 142 (2))

R v Newland (Mark Anthony) (1998) Q.B.402

R v Bell (Peter Edward) (1984) 78 Cr. App. R.

R v Ayres (David Edward) (1984) A. C. 447

R v Walker (Simon) (2018) 1 Cr. App. R. R19

R v Robinson (Anthony) (2017) WECA 936 (Crim)

DPP v Jarman (Tonie) (2013) EWHC 4391

Islington v Michaelides (Andreas) (2001) WL720264

Regina v Follett (1989) Q. B. 338

R v Williams (2017) EWCA Crim 281

J v The Queen (2018) EWCA Crim 2485

Gleeson TLR 16.10.2003

R (Williamson) v City of Westminster Magistrate's Court (2012) EWHC 1444

S v Recorder of Manchester (1971) AC 481

R v Gould (2021), EWCA Crim 447

R v Love & Hyde, 2013 EWCA Crim 257

R v Radley (1973) 58 Cr. App. R 394
Mattoccia v Italy 239691 94 2000 CECHR383
Kent Justices ex-parte Machin 1952 2Q.B. 355
Mayo Associates v Cantrade Private Bank Switzerland (CI,) Limited [1998] JLR 173
Warren v AG of Jersey (2001) UK PC 10
Law Officers v Constables of Sark and Anthony Gilman RC 2004, Judgment 3/2004
Angenent v Pring (2004) Royal Court 30 Dec 2004
HFT International Guernsey Ltd v Equinox Judgement 34 of 2006
AFR v Doyle 2nd May 2018
Le Page v Law Officers (2017) GLR 186
Law Officers v De Kock Judgement 59 of 2016

Blackstone's Criminal Practice 2022

Article by Doughty Street Chambers 16/04/2018 "Court suggests a modern approach should be taken on nullity (R v Stromberg)"

Background and Introduction

1. This Judgment is concerned with an application under section 4 of the Indictments Law 1950 ("section 4") by the Law Officers ("P") to make amendments to a 9 count Indictment ("the Original Indictment") in respect of which the Defendants were committed to the Royal Court by the Magistrate's Court on the 22nd December 2021. There is also application by P for the Court to make a declaration of nullity and/or quash convictions and/or record a change of plea in respect of the second defendant ("D2"). The applications have arisen because P has discovered that substances which were alleged to be controlled substances under the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 ("MDL"), at the time of the alleged offending were not, in fact, on those dates, controlled substances. They became so on the 28th September 2021. Thus, the three counts of importation under the Custom & Excise (General Provisions) (Bailiwick of Guernsey) 1972, (count 6 and 7 relating to D2 alone and count 8 relating to both Defendants) together with count 9 which alleges that both Defendants were concerned in supplying such a substance contrary to the MDL disclosed no offence at the material time. In those circumstances P wishes to amend the Indictment to strike out the offending counts and add new counts against D2 of illegally importing a medicinal product, as defined in the Import and Export of Goods (Control) (Guernsey) Order 2010, contrary to the Import and Export (Control) (Guernsey) Law, 1946 and against both Defendants of illegally importing a medicinal product effectively in replacement of count 6-8. Count 9 is not to be pursued.
2. The original application made by P was to amend the Indictment dated 30th March 2022 and referred to adding alternative counts. That application was superseded by the application (in the form of a second set of submissions and marked up revised indictment) dated 4th May 2022 and a further revised indictment dated 30th June 2022 ("the Amendment Application") in anticipation of a legal argument hearing on the 30th June 2022. Further supplementary submissions were filed by P dated the 15th August 2022. The application is opposed by D2 for the reasons I will set out in more detail below. Unfortunately, D2 did not file submissions until the day upon which legal argument was to be heard namely the 12th October 2022. Although the legal argument hearing went ahead at the request of all Counsel, further submissions flowed from the points raised at that hearing and I directed that P should file an application clearly setting out the orders sought. I also carried out some research of my own and sent out a list of various materials on topics including inherent jurisdiction, change of plea and quashing convictions in the Magistrate's Court on which I invited further submissions in response to which Crown Advocate Dunford filed his fourth set of submissions on 14th October 2022 ("October submissions"), to which I refer below and an email on 20th October and Advocate Ayres filed nothing further.

3. In the October submissions, Crown Advocate Dunford included his final application (“the October Application”) in these terms:
 - a) A declaration (or order) that the arraignment of [D2] on the 10th March 2022 is a nullity, the offences in counts 6-8 not being offences known to law.
 - b) In the alternative if the Court does not make the above declaration (order) the Court is asked to set aside (vacate) the guilty pleas in counts 6-7, and the not guilty plea in count 8, on the basis they were a mistake in law, the court having power to rectify its own mistakes.
 - c) In the alternative, if the Court does not proceed as above, P asks the Court of its own volition, or failing which on P’s application, to set aside the pleas entered to counts 6 and 7. This is on the basis the pleas entered were equivocal.
4. For reasons of expediency, though I have considered all materials and submissions, I will concentrate on what have ultimately turned out to be the applications of P and the issues which are ultimately in dispute and I will not deal with the various other issues which arose in the course of the submissions and legal argument.
5. By the time of the hearing, the following was agreed:
 - (1) the Committal proceedings had not been invalidated by the problems with Counts 6-9 and that, if the Court gave leave to P to amend the Indictment, there was evidence before the Magistrate’s Court at Committal in support of the proposed new amended counts;
 - (2) whilst there was a problem with Counts 6-9, the remainder of the Indictment was valid;
 - (3) opposition to the application by P to make various amendments to the Indictment was limited to the amendments to Counts 6 and 7;
 - (4) there should be no further proceedings as respects the current Counts 6-8; in respect of which guilty pleas had been entered; and
 - (5) whatever the outcome of these applications, the Jurats should not be made aware of the guilty pleas entered by D2.
6. It is the Prosecution’s primary case that the Counts 6-8 are a nullity because they charge offences not known to law. D2 disputes that they are a nullity. He submits that it was open to D2 to allow the trial on Count 8 to proceed and to make an application of no case to answer on the basis that the Prosecution could not prove that the substances were controlled substances. D2 questions the power of this Court to make a declaration of nullity on the basis that such a declaration is the function of an appellate court, not one of first instance. Alternatively, P is asking this Court to quash the convictions if it is not satisfied that there is a nullity. Advocate Ayres again submits that that is the function of an appellate court only. Alternatively, P is now asking the Court to change the pleas of D2 to not guilty (or perhaps more correctly to vacate them). D2 objects to that course of action questioning the Court’s power to change/vacate a plea when it is not equivocal and/or is not the subject of a request from a defendant.
7. The essence of the case is this: P has, erroneously, but in good faith, charged offences which did not at that time exist under Guernsey law. The error was not spotted by P, nor indeed by the defence, until after committal and indeed after arraignment in the Royal Court by which time D2 had entered guilty pleas to counts 6 and 7 and not guilty pleas to counts 8 and 9. D1 has not entered any pleas at all, does not oppose P’s application to amend the Indictment and has taken a neutral stance in these proceedings. Advocate Roffey very helpfully provided the Article from Doughty Steet Chambers, which provoked some further legal debate on relevant issues.

8. P wants to amend the Indictment to ensure that the charges laid are proper ones at law and P asserts that this Court should take steps to undo the pleas, which had been entered before considering the application to amend. D2's position is that he does not take issue with the amendment of the Indictment to add a count relating to medicinal product in place of the previous count 8 (a joint charge) to which he had pleaded not guilty. He accepts that an application can properly be made so to do by the Prosecution under section 4. He takes a different stance in relation to counts 6 and 7 to which guilty pleas have been entered. He seeks to rely on those guilty pleas as preventing an application under section 4 on the basis that section 4 has no application post-conviction and, more broadly, on the basis the addition of new counts based on medicinal products offends the legal principle of *autrefois convict*. It is his submission that Counts 6 and 7 have resulted in convictions which cannot be annulled or quashed by this Court and must remain on the record, unless and until quashed by the Court of Appeal.
9. I have decided that the easiest way to set out this judgment is by topic incorporating counsel's submissions into each topic before then explaining my reasoning.

Applicable legal principles

Nullity

10. Crown Advocate Dunford asks the Court to declare counts 6, 7 and 8 a nullity, as they allege offences not known to law to the effect that they would be struck from the Indictment along with their pleas and it would be as if they never existed. He would then continue with his application to amend the Indictment and to add the new counts 6, 7 and 8 which, as I have said, arise from the evidence placed before the learned Magistrate at committal and no one has suggested that there is any difficulty in that regard, the evidence being, I am told, sufficiently interwoven with the evidence on the other counts such that it would not be capable of being excised even were Counts 6 – 8 to be declared a nullity.
11. Crown Advocate Dunford provided a number of English authorities on the question of nullity but nothing from Guernsey or similar jurisdictions. Advocate Ayres made the point that all of Crown Advocate Dunford's authorities are decisions of appellate courts and his submission was that the Royal Court is a Court of first instance and it does not have powers of an appellate court in relation to its own decisions such as the power to declare a nullity or the power to quash convictions.
12. I consider that there are three questions to be asked as follows:
 - (1) Is what happened on Count 6 – 8 a nullity; and, if so,
 - (2) does Royal Court have power to declare a nullity?; and, if so
 - (3) how should it approach application for declaration of nullity?
13. The English case law provided by Crown Advocate Dunford suggests that the distinction between something which is defective and something which a nullity is that the latter is fundamentally flawed in substance and cannot be remedied. Crown Advocate Dunford quoted from the case of R v Newland 1988 QB 402 which in itself refers to the decision in R v Bell (Peter Edward) (1984) 78 Cr. App. R. 305. At paragraph 408 of Newland the Court said that the Indictment in that case was clearly invalid but was not a nullity because it was still capable of being made good by amendment a valid Indictment. The issue in those cases was whether the proceedings as a whole were invalidated as a consequence of invalid Indictment. That is not the position in the case before me.
14. Crown Advocate Dunford relied upon the House of Lords' decision in Ayres 1984 2WLR 257 in which, on the facts, the appellants had been convicted on what was held to be an improper charge (single count) of conspiracy to defraud which was "a material irregularity" at trial. The

appeals against conviction were nonetheless dismissed as there was held to be no miscarriage of justice. Lord Bridge does consider the distinction between nullity and defective, though he doubts that it is of much assistance when considering the proviso in the context of an appeal. As quoted by Crown Advocate Dunford, Lord Bridge says this:

“If the statement and particulars of the offence in an Indictment disclose no criminal offence whatever or charge some offence which has been abolished, in which case the Indictment could fairly be described as a nullity, it is obvious that a conviction under that Indictment cannot stand.”

This passage was quoted in Bell. It is important to read the whole passage in Ayres as Lord Bridge continues:

“But, if the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed under the proviso must depend on whether, in all the circumstances, it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant.”

15. In Walker [2017] EWCA Crim 392 the test was expressed ... as the difference between “*purely technical defects and fundamentally flawed in substance.*”.
16. During the hearing Advocate Roffey found an Article by Doughty Street Chambers on nullity, in which reference is made to the suggestion in R v Williams [2017] EWCA Crim 281 (attached) that: “*nullity is an outdated concept ... that a modern approach should be taken, which is to decide on the fairness of the trial*”. Crown Advocate Dunford submitted that the Court should approach this suggestion with care because the appeal in Williams was on “*a narrow and highly technical basis*”. He further submitted that Guernsey is not required to follow English Law where a simpler solution may be available. Indeed, he submitted there is a strong argument that in the absence of any relevant local legislation (governing the rectification of mistakes and matters covered by the CPR), Guernsey law is as it was pre-CPR i.e. the common law of Guernsey is that the court is able to declare the arraignment a nullity.
17. In terms of how the Court should approach an application for a declaration of nullity, Crown Advocate Dunford urged focus on the interests of justice and referred to a decision in which Williams has been applied – J v The Queen [2018] EWCA Crim 2485 attached) paragraph 54: “*... the primary consideration (as recognised in Malachi Lloyd Williams (above)) will be the fairness of the trial and the safety of the conviction, not the technical validity of the indictment*”.
18. Crown Advocate Dunford also relied on two further cases
 - a. Gleeson TLR 16.10.2003 in which the English Court of Appeal heavily criticised a defendant for taking a late technical point based on a prosecution error. Whilst not suggesting that D2’s conduct went so far as the conduct criticised in that case, Crown Advocate Dunford submitted that if D2’s submissions succeed, the outcome that case sought to avoid will occur here i.e. D2 will avoid trial solely due to an unforced error by P and urged focus on the fairness of the proceedings, as a whole.
 - b. Warren v AG of Jersey [2011] UKC 10, which is, as Crown Advocate acknowledged, very different from the case before me. In Warren it was said that one of the Court’s functions is to ensure “*those charged with serious crimes are brought to trial*”, on which Crown Advocate Dunford relied in support of his assertion that D2 should not seek to benefit from an unforced error by P.

19. As part of a broader point, Crown Advocate Dunford relied upon R v Robinson (Anthony) (2017) WECA 936 (Crim) which concerns the issue of a Magistrate's Court acting outside its jurisdiction to the extent that decisions are void ab initio and ex facie because they are so wrong in law as to be outside or in excess of jurisdiction. Crown Advocate Dunford's assertion was that the Royal Court has acted without jurisdiction in allowing the pleas to be entered to counts which contained offences which did not exist at the time alleged which it would not have done had it been aware of the error. This, Crown Advocate Dunford said, amounts to a gross and obvious irregularity such as to satisfy the test expressed in the House of Lords in Re MC a minor 1985 AC 528 extracted in Robinson above.
20. Advocate Ayres did not accept that what has taken place is a nullity because he maintained that it was open to him to allow the not guilty count to run and to have it dismissed upon a successful submission of no case to answer. Advocate Ayres disputed that the offences charged in Counts 6-8 were not known to law. I take him to be saying that importing of a controlled substance is an offence known to law; it has not been abolished and that P simply cannot prove an essential element of the offence. He asserts that Crown Advocate Dunford was focussed on the outcome he desired more than the Court's powers to achieve it. In response to the suggestion that a trial could continue on the not guilty count, Crown Advocate Dunford made submissions on what he said amounted to a lack of any identifiable defence to the charge.
21. There was, during the hearing, a certain amount of discussion about the practicalities of the case. Advocate Ayres was suggesting that the guilty verdicts are as far as this Court can go in those proceedings as and it should stay any sentencing as an abuse of process. Advocate Ayres maintained that D2's criminal record would have to reflect the fact of the convictions but, in his view, this was a situation about which the Royal Court itself could do nothing. Only the Court of Appeal had the power to quash the convictions or set them aside as a nullity. The Royal Court cannot put an appellate hat on. It can only prevent sentencing. Crown Advocate Dunford observed that this was wholly impractical and suggested that the impracticality in itself demonstrated the flaw in Advocate Ayres' analysis. Crown Advocate Dunford also indicated that Advocate Ayres' opposition to the undoing whether by way of nullity or otherwise of the guilty pleas was tied up with D2's wish to prevent the Prosecution from proceeding against him on the alternative offences and was taking advantage of the Prosecution's error.

The Inherent Jurisdiction of the Royal Court

22. No authority was produced to me prior to the hearing, (I suspect due in no small part to the late filing of D2's submissions and challenge to the jurisdiction of the Court) as to the extent of the inherent jurisdiction of the Royal Court and, specifically, the Criminal Division to take any of the steps sought by P in the October Application.
23. After the hearing I supplied counsel with HFT International Guernsey Limited v Equinox Judgment 34 of 2006 in which Sir Richard Collas, then Deputy Bailiff, sets out from paragraph 25 onwards what he considers to be the position on the Royal Court's inherent jurisdiction in civil matters in terms of procedural matters. He relies heavily on the decision of the Jersey Court of Appeal of Mayo Associates v Cantrade Private Bank Switzerland (CI) Limited [1998] JLR 173 upon which Lieutenant Bailiff Talbot QC also relies in his judgment in the case of Angenent v Pring (2004) Royal Court 30 Dec 2004. Both Guernsey Judges refer to the following passage from Mayo in which Smith J. A. said at page 188ff:

"In our view, the vital clue to the nature of inherent jurisdiction in its procedural setting... is necessity. The Court has a particular procedural power because it has to have to be a Court in any meaningful sense. On this basis, the power to require the attendance of witnesses, whether to testify or to produce documents, the power to control abuse of the process of the Court, the power to dismiss claims for want of

prosecution, the power to issue practice directions, the power to decide who may or may not appear before the Court, the power to correct errors of its own orders and many other powers may all be recognised as derived from a single pool, not of powers but of power drawn upon as necessity dictates. It will be observed that this approach is antithetical to a definition of inherent jurisdiction based simply on fairness or by reference to what is perceived in a particular situation to be just. If inherent jurisdiction exists to enable a Court to order a thing be done, fairness and justice will obviously be factors to be taken into account when the Court is deciding whether or not to exercise its discretion to so order, but the conclusion that it will be fair or just to order that a thing be done does not determine whether there was inherent jurisdiction to order it.”

24. Talbot LB also refers to the dictum of Lord Morris in Connelly v DPP [1964] A.C. 1254, at page 1301, in which it was said:

“there can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules in practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process.”

25. Collas DB refers to the decision of the case as set out in the headnote

“The boundaries of the Royal Court’s inherent jurisdiction could not be precisely defined, for there was no unifying principle behind the instances in which it could be invoked. It was clear, however, that it was derived solely from necessity, in that the Royal Court had to be able to exercise such powers as were needed to make it effective as a court. In the context of civil proceedings, “necessity” referred to the need to protect or enforce the legal rights in relation only to issues raised by the parties to proceedings then before the court. The court’s inherent jurisdiction could not be invoked simply on the basis of fairness or to do justice in a given situation (although fairness and justice would be major factors to take into account), nor was it available to provide new remedies at will. Rather, whether the court’s inherent jurisdiction allowed it to wield any particular power was to be established using traditional legal reasoning from precedents relating to the existence, merits, consequences of and alternatives to the use of that power.”

26. Reference was also made to the Magistrate’s Court decision of AFR v Doyle (2nd May 2018) in which Judge McKerrell referred to the cases of Angenent and Mayo before concluding that, despite the statutory nature of the Magistrate’s Court, it may have some inherent jurisdiction.

The Royal Court’s Power to quash its own convictions

27. In his original submissions and at the hearing, Crown Advocate Dunford was not asking the Court to quash the convictions, as his focus was on declaration of nullity and even now, though he asks the Court to do so, if it does not declare a nullity, he submits that there is no lawful conviction to quash. The thrust of his October submissions is more that the Court has an inherent power to rectify its own mistakes, akin to the slip rule applying the general principles from HFT and AFR v Doyle.

In the Royal Court case of R v Sark Constables & Gilman, Judgement 3/2004, the Royal Court, in exercise of its inherent jurisdiction had, quashed the convictions and sentence imposed on Mr Gilman by the Court of the Sénéshal of Sark on the grounds that the summons alleging commission of fishing offences was insufficiently particularised, which cast doubt on the

validity of his guilty plea and was bad for duplicity, which led to the conclusion that there was injustice to Mr Gilman and failed to satisfy the requirements of Article 6 of ECHR.

In Gilman, the Royal Court was sitting as a higher Court. The question is whether the Royal Court has power to quash its own convictions. Advocate Ayres submitted emphatically that no Court can quash its own convictions. Crown Advocate Dunford, in his October submissions, disagreed. He prayed in aid section 12 of the Magistrate's Court (Guernsey) Law 2008 which says specifically:

"The Magistrate's Court may

(a) quash a conviction by the Magistrate's Court, or

(b) vary or rescind a sentence or other order imposed or made by the Magistrate's Court when dealing with an offender, if it appears to the Magistrate's Court to be in the interests of justice to do so."

28. It goes on to say that, when the Magistrate's Court exercises those powers, the conviction and any sentence or order imposed or made in consequence is of no effect, in other words, one goes back to the drawing board and there is provision later on in the section for the Court to determine that another Magistrate should sit.

29. The policy letter which led to the 2008 Law explains why section 12 has been included as follows:

"Persons convicted in error – power to rectify

45. Circumstances may arise – fortunately very rarely – where the Judge sitting in the Magistrate's Court might, in good faith but erroneously, convict a person in error as to a matter of law e.g. where the Law or Ordinance under which that person was charged has been amended or repealed and the offence no longer exists; or sentence a person to a fine or term of imprisonment greater than that for which legislation provides. In such cases in which the person concerned will not have been in any way responsible for the error, and the decision of the Judge is invalid, it is not considered appropriate that he or she should have to resort to the cost of an appeal in order to put the matter right. Accordingly it is recommended that the Magistrate's Court may vary or rescind that sentence or order; and the power should extend to reversing a finding of guilty and to replacing a sentence or order which for any reason appears to be invalid, by another sentence which the Magistrate's Court has power to impose or make. Such provisions have operated beneficially in England under Section 142 of the Magistrates Courts Act 1980, as amended by Section 26 of the Criminal Appeal Act 1995 and in the Isle of Man under its Criminal Jurisdiction Act 1993.{..}"

30. No caselaw on the exercise by the Guernsey Magistrate's Court of these powers was produced so it is reasonable to look at Blackstone's which considers at D2273 the use of Magistrate's Court Act 1980 section 142(2) to which reference is made in the Policy Letter. The terms of that section are not the same as section 12 but give power to set aside a conviction in the interests of justice and the case reheard by the same or a different Magistrate. The commentators of Blackstone's explain that the power is to be used to correct an error of law or defect in procedure in a relatively limited situation namely one which is akin to mistake or the slip rule. The scope is limited; it is not a wide and general power of review. At section D22.76 they consider specifically the use of section 142 where the accused has pleaded guilty. They quote Burnett, J at paragraph 33 of R (Williamson) v City of Westminster Magistrate's Court 2012 EWHC 1444 as saying that the purpose of section 142 was to enable the Magistrate's Court itself to correct mistakes so as to avoid the need for the parties to appeal to the Crown Court or to the High Court by way of case stated or to bring judicial review proceedings. It is specifically stated that it is not a power equivalent to an appeal and is not intended to be a

circumvention of an appeal which could not be pursued because the person had unequivocally pleaded guilty. They go on again to quote Burnett, J paragraph 36 as saying that the Court accepted “*there may be circumstances in which section 142(2) could be used to allow an unequivocal guilty plea to be set aside. His Lordship suggested that a case in which a guilty plea was entered to an offence unknown to law would be an example since it would fall comfortably within the language of mistake*”.

31. There is nothing within section 142(2) or the commentary which indicates who ought to make the application, but the Criminal Procedure Rules provide that the power may be exercised on an application by a party or on the Court’s own initiative. The wording of section 12 of the 2008 Law in Guernsey is similarly wide and does not prescribe who should make an application.
32. Crown Advocate Dunford relied upon the passage from Williamson to support his argument that the Royal Court must have an inherent power to rectify mistakes, in order to ensure fairness and to avoid unnecessary appeals on points that can be rectified, simply by the lower Court without causing injustice. He said that Advocate Ayres’ argument that the Royal Court had no power to quash convictions (or declare a nullity), due to the availability of an appeal, sits very uncomfortably with the English Law and the general swift and effective administration of criminal justice in Guernsey. He referred to HRT as authority for inherent jurisdiction of the Royal Court and AFR v Doyle, which made it a basic requirement that it must be a necessary procedural power for the Court to operate as a Court. He argued that there was a necessity here in avoiding protracted distracting legal arguments or unnecessary appeals and that necessity can be considered in the context of the necessity of ensuring proceedings for serious criminal offences are not distracted by side issues that have no relevance to the delivery of justice.

Autrefois convict

33. Advocate Ayres’ objection to the deletion of the current counts 6 and 7 and replacement with new counts is founded on his intention to raise autrefois convict in other words that D2 should not face any new counts based on the illegal importation of medicinal products because he has already been convicted on the old counts based on importation of controlled substances which are substantially the same offence.
34. No decided case could be found from the Court of Appeal or the Royal Court in which the existence of autrefois convict (or autrefois acquit) in Guernsey is determined. Crown Advocate Dunford did deal with principles in his submissions and he provided extracts from Blackstone’s on the position in English Law (prior to Parliament’s decision to legislate to remove them). I note that paragraph D12.21 starts as follows:

“For an autrefois plea to succeed, the earlier conviction or acquittal relied on by the accused must have been by a Court of competent jurisdiction and the proceedings must not have been ultra vires.”

35. The commentators then go on to consider the case law specifically Kent Justices ex parte Machin 1952 2QB 355 where it was found that the Magistrates had acted ultra vires in connection with the procedure for determining mode of trial and Lord Goddard CJ stated that the prosecution were entitled to re-charge D as he “*has never been technically in peril and he could now be tried over again*”. If it is the case that counts 6 and 7 are to be viewed as a nullity or as this Court acting ultra vires in accepting the pleas, any argument as to autrefois become much more difficult to maintain.
36. At the heart of autrefois convict lies the principle that a defendant should not be put “in peril”. It is said at D12.24 of Blackstone’s to be a species of abuse of process. At paragraph D12 – 27 it is said that “a plea of autrefois convict can only be based upon a complete adjudication against

the accused, including the final disposal of the case by passing sentence. The underlying rationale of the plea was to prevent double punishment.

37. In S v Recorder of Manchester 1971 AC-481 there was consideration of what “conviction” means in the context of autrefois “convict”. Lord Reid said that the authorities cited strongly suggest that it is not a good plea unless the earlier case was carried to “conclusion” and that it cannot conflict with the power to allow a plea of guilty on an Indictment to be changed.
38. It is to be noted that D2 is not, at this stage, raising any autrefois argument in respect of the deletion and replacement of Count 8. In his written submissions D2 had argued that there was also an issue with the replacement of one count with another based on precisely the same facts and essentially involving the same allegation but under different legislation. In oral submission Advocate Ayres accepted the Prosecution’s argument that count 8 could be deleted and a new count could be added to an Indictment even if it consisted of a new offence.

The scope of jurisdiction as to Change of Plea

39. Another way of dealing with the counts 6 and 7 is to undo the guilty pleas by way of changing them or perhaps more correctly, vacating them. This was not extensively rehearsed in the written submissions prior to the hearing but was the subject of oral submissions at the hearing and Crown Advocate Dunford has included it as his third alternative in the October Application.
40. Crown Advocate Dunford argued at the hearing that the Court could change the guilty pleas to not guilty pleas on the analogy of equivocal plea and that it would be perfectly proper for the Court so to do. There was no extensive discussion of the possibility that in fact the pleas to counts 6 and 7 are equivocal although there was reference to the ability of a defendant to apply to the Court for a change of plea based on poor advice.
41. For his part, Advocate Ayres argued at the hearing that the Court had no power to force a change of plea on D2 at this stage. He had pleaded guilty and he did not want to change his pleas. In Advocate Ayres’ submission, the only circumstances in which a plea can be changed is by the Court when there is an equivocal plea or at the request of the defendant. Advocate Ayres referred to the English Criminal Procedure Rules, Rule 25.5, which is concerned with the procedure.
42. We had not considered, at that point, what was written in Blackstone’s about change of plea so I provided to counsel the relevant references. At paragraph D12 – 94, reference is made to the House of Lords in S v Recorder, a case involving change of plea in the Magistrate’s Court but in which their Lordships confirmed that a trial by Indictment a guilty plea may be changed at any time. Indeed, it was acknowledged at the hearing before me that the Court is not functus in respect of change of plea even after conviction.
43. Crown Advocate Dunford referred to two other passages in Blackstone’s on change of plea. The first is at D12.92: wherein it is said that a change from guilty to not guilty “... *represents an assertion that an accused has realised that he or she did not commit the offence after all.*”, which Crown Advocate Dunford submitted reflects the current position. The second is at D12.97, in which it is said that, when a defendant is represented when entering a guilty plea, it will be very difficult to convince the Court that the plea was entered in error. Crown Advocate Dunford submitted that, in the unusual situation in this case, it does not matter that D2 was represented – all counsel fell into error in this case, including Advocate Ayres.
44. An issue before me is the power of the Court to change a plea in the absence of a defendant’s request. The answer appears to be found in paragraph D12.95 of Blackstone’s where reference is made to the case of Gould (2021), EWCA Crim 447, in which the learned Judges of the English Court of Appeal said this:

“112. We are prepared to accept that the court has a power to direct that a guilty plea be vacated even when the person who entered it does not seek that course, or even opposes it. The discretion to allow a change of plea from guilty to not guilty has long been recognised, see for example Plummer [1902] 2 KB 339, and the review of the position in R. v. KC [2019] EWCA Crim 1632. The discretion does not originate in statute, but at common law and it appears to us that it would be wrong to say that there are no circumstances in which a court could direct that guilty pleas are vacated contrary to the wishes of the defendant. The criminal process throws up novel situations constantly and it is unwise to say that something may never happen. The facts of R v. Palazu show that cases can reveal many unusual situations, and a degree of flexibility is required to meet extraordinary cases. Such a power, though, must obviously only be exercised sparingly and when the interests of justice so require. It is unlikely to be appropriately used in order to rescue the prosecution from a muddle of their own making. More usually in cases where it appears that an important element has been misdescribed in the charge, to the adventitious advantage of the defendant, powers of amendment are more likely to be deployed, when available. That may cause a defendant to seek to be allowed to vacate a plea, which would no doubt often be allowed. (See R. v. JW (CACD 21 April 1999), cited in Love & Hyde).”

45. The “*muddle of its own making*” is reference to the learned Judges’ palpable irritation at a number of prosecution errors across the four cases considered in the appeal and beyond, which the various Crown Court Judges had tried to correct. The applicable statutory provisions were described as “formidably complicated”.

46. R v Palazu concerned an equivocal plea and does not address the issues before me, but R v Love & Hyde is of some assistance. In that case the defendants had pleaded guilty to burglary but there was no reference to the building being a dwelling, which was relevant to the Court’s sentencing powers. The prosecution’s application to amend the Indictment was opposed. The Judge vacated the pleas, allowed the amendment and the defendants were re-arraigned. The appellants’ argument on appeal was the same as Advocate Ayres’ before me, namely that the Court had no power to vacate the guilty pleas and that Section 5(1) of the Indictments Act (of which section 4(1) is a copy), could not be invoked after guilty pleas had been entered. Reference was made to R v JW in which the Court of Appeal had held that the entry of a plea was not the end of the trial and referred to S v Recorder of Manchester. The learned Judges in R v Love, relying on JW, held that there was power to amend the Indictment notwithstanding that Appellants had entered guilty pleas and there was no injustice in the amendment on the facts. They went on to say at paragraph 12:

“12. We have been shown nothing to support the submission that the judge had no power to vacate the applicants’ pleas of guilty in the absence of an application by them or on their behalf to vacate those pleas. It appears to us that the court must have that power. But the point does not in fact matter one way or the other for present purposes. That is because it is established by JW that the judge could have dealt with the case by offering the applicants an opportunity to vacate their pleas but allowing their pleas to stand as pleas to the amended indictment if they did not wish to vacate them. In substance that is exactly the position that was reached by the alternative route adopted in this case, that is by vacating the pleas and allowing the applicants to enter fresh pleas. Since they did enter fresh pleas of guilty the end result was exactly the same as if the judge had adopted the course approved in JW.”

47. The learned Judges in Gould considered R v Love to be “not powerful authority” for the existence of a power to change plea other than on defendant’s application but they nonetheless found that the power existed (see paragraph 112 above). It is worth noting that in JW, the Judge

offered the defendants the opportunity to be re-arraigned and they declined so she proceeded on the basis that the guilty pleas to the original counts stood as pleas to the amended counts. The learned Judges in that appeal considered that there was no injustice. She had done all that was required of her. It must be remembered that these cases are appeals.

Stay

48. There was some discussion in the oral hearing as to whether or not the Court would have the power to stay the offending counts if they were to remain on the Indictment at all. Advocate Ayres questioned the power of the Court to order a stay but nonetheless submitted that the Court should not allow those counts to proceed to sentence. There are examples of cases in which the Court's inherent power to stay proceedings has been considered, Le Page and the Law Officers 2017 GLR 186, de Kock judgment 59 of 2016 and see Blackstone's D11.112 where the English Court's power to quash Indictments or indeed cancel an Indictment is considered and there is reference to stay.

Amending an Indictment

49. The applicable legislation is section 4(1) of the Indictments (Guernsey) Law 1950 which says this:

“Where before trial, or at any stage of a trial, it appears to the Court that the Indictment is defective, the Court shall make such order for the amendment of the Indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice.”

50. There is a dearth of case law in Guernsey as to the amendment of Indictments. It happens that I had issued a judgment earlier in this year but that judgment is embargoed. I did make certain sections of it available to counsel in case it was of assistance though of course, it is not binding. In that judgment I analysed the English Case Law which I found to be of considerable assistance albeit that the issue of Indictments in England is much more technically complex than the position in Guernsey. I concluded that the approach I should follow is as follows: is there a defect in the Indictment within the broad definition of “defective” (referring to the case of R v Radley 1973 58 Cr. App. Rx 394). If so then the amendment (which includes allowing the addition of new counts alleging new offences by substitution) should be made subject to the proviso that there must be no injustice so having regard to the merits of the case. The question is: can the amendment be made without injustice and, if and only if it can be made without injustice, then it should be made.

51. There was very little difference between counsel on the general operation of section 4. It was accepted that it gives the Court a wide power to allow amendments to Indictments applying a broad definition of “defective” subject always to the proviso that there should be no injustice. In the case of Pople 1951 1KB53 to which Crown Advocate Dunford refers at paragraph 22 of his original submissions, The Court of Appeal said this:

“the argument for the Appellants appear to involve the proposition that an Indictment in order to be defective must be one which in law did not charge any offence at all and therefore was bad on the face of it. We do not take that view. In our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person. This is part of the broadening of the definition of defective in the English Case Law. A count on an Indictment which alleges conduct which is not an offence at all must surely be defective.”

Crown Advocate Dunford submitted that “defective” encompassed counts which were a nullity. It is accepted by all that this application is being made at an early stage in the proceedings which minimises the risk of injustice.

52. The difference between P and D2’s counsel was the application of section 4 to counts 6 and 7 in respect of which guilty pleas have been entered. D2’s point is a simple one that the Court has the power to amend an Indictment “*before trial, or at any stage of trial*” and that as effectively there has been no trial and the matter has proceeded straight to conviction by virtue of a guilty plea, which is the end of the trial it is not open to P to seek to amend count 6 and 7 or to have them deleted from the Indictment. Advocate Ayres casts Crown Advocate Dunford’s applications as an attempt to circumvent the inapplicability of section 4.
53. At the hearing, Crown Advocate Dunford appeared to accept that section 4 was not available if the guilty pleas are not undone in some way, although his earlier written submissions suggest otherwise. His answer is that the Court must first deal with counts 6 and 7 and either strike them out as a nullity or quash the convictions or reverse or vacate the guilty pleas so that counts 6 and 7 are either not on the Indictment at all, have no pleas entered in respect of them or have not guilty pleas entered to them by D2. All of these routes would, he submitted, open the gateway for P to make an application under section 4 to delete the existing counts 6 and 7, if they remain, and replace them with the new and lawful counts based on medicinal products. Crown Advocate Dunford has not specifically addressed the case of R v Love though I did ask counsel for any submissions on it.
54. Before leaving this topic I should mention that Crown Advocate Dunford submitted that section 4(6) of the Indictments Law which states:

“Any power of this court under this section shall be in addition to and not in derogation of any other power of the court for the same or similar purposes”

leaves intact the Court’s inherent powers to amend Indictments.

Human Rights and Fairness

55. The Defendants’ right to a fair trial under Article 6 of ECHR incorporated into Guernsey law by virtue of the Human Rights (Bailiwick of Guernsey) Law 2000 is engaged and section 6 requires me to exercise my function in a way compatible with that Article 6 right. The case of Mattoccia v Italy 23969/94 2000 [ECHR 383] is cited in Archbold. In that case the Court sets out the general principles applicable to criminal matters which include the accused being given the facts and legal basis of the accusation against him promptly and in sufficient detail to enable him to prepare an adequate defence. Paragraph 61 of the judgment deals specifically with changes to the accusation “as concerns the changes in the accusation, including the changes in its “cause”, the accused must be duly and fully informed thereof and must be provided with adequate time and facilities to react to them to organise his defence on the basis of any new information or allegation”.

Discussion

56. I have kept at the forefront of my mind the right of the Defendants to a fair trial in this case. I am required by section 4 of the Indictments Law to consider specifically the risk of injustice as a result of any amendment to the Indictment which is a separate consideration. I have also considered the wider issue of the interests of justice.
57. Crown Advocate Dunford’s first application was to amend the Indictment. The amendments are largely unopposed. Counts 6-8 are the focus of this decision. They all allege the same offence of importing a controlled substance when the substance was not, at that time, a

controlled substance. D2 concedes that Count 8 to which a not guilty plea was entered can be amended by deletion and substitution of a charge based on the substance being a medicinal product (thereby, in my judgment, accepting that the Count is defective) but he objects to the amendment of counts 6 and 7 because he has pleaded guilty which he says renders section 4 of the Indictments Law inapplicable as the plea and record of conviction is an end to the trial and he also indicates a wish to raise *autrefois convict*.

58. Crown Advocate Dunford's October Applications seeks a declaration of nullity, quashing of convictions or change of plea which he urged me to consider first as being necessary to deal with the irregular proceedings and to clear the guilty pleas off the record thus removing any obstacle to an application to amend under section 4. He has been clear throughout his submissions, including those of 20th October, that his primary submission is that the proceedings were a nullity but that, if I do not agree, then the other alternatives of quashing convictions or changing the pleas are open to me.
59. As set out above, after the hearing, further materials have been considered one of which is the case of Love which, if directly applicable, appears to provide an answer to all of the issues. In that case there had been guilty pleas but the Court of Appeal held that they did not impede an application under the English equivalent of section 4 as the trial was not over until sentence had been passed. This relies upon S v Recorder which, as the commentators of Blackstone's note, was in the context of change of plea. It could be fairly said that amendments to Indictments and changes of plea are inextricably linked. I am not bound by English caselaw but where the statutory provisions are identical, as here, such caselaw is highly persuasive. There is a distinction between Love and the present case namely that, in Love (as in other cases considered) the earlier guilty plea was to a valid offence, just the wrong offence.
60. Leaving the case of Love for the moment, I turn to Crown Advocate Dunford's October Applications which collectively urge me to take steps to regularise the proceedings primarily on the basis that those relating to Counts 6-8 (and 9) are a nullity. He did not urge me simply to amend the counts despite the guilty pleas because he has conceded that the guilty pleas prevent the section 4 application. Advocate Ayres' position is that section 4 has no application and that no steps can be taken by me to undo those convictions/vacate the pleas.
61. Whilst nothing could be found in terms of authority for the Royal Court's inherent criminal jurisdiction. I am quite satisfied, based on the Guernsey cases of HFT and Angenent that its inherent powers are extensive. In contrast with the Civil Division, the Criminal Division has few statutes and written rules and operates largely under its inherent jurisdiction. There are no statutory rules as to pleas which restrict its powers.
62. P's preferred remedy is for me to declare the proceedings in respect of Counts 6 – 8 a nullity, which would cause them and their associated pleas to disappear. It would be as though they had never existed. I have no hesitation in concluding that the Royal Court has, within its extensive suite of inherent powers, the power to declare a nullity. Crown Advocate Dunford urged me to do so on the basis that the Court discloses no offence known to law. The example given in the case law of an offence not known to law is of an offence charged under a statute which has been abolished. I have a lingering doubt that the situation in this case is entirely analogous. In the case before me, the offence of unlawful importation of a controlled substance exists and the conduct alleged amounts to an offence had it occurred after 28th September, 2021. I consider Advocate Ayres' point that he could have made a successful no case to answer submission in respect of count 8 in that an essential element could be proven to have some force. Whilst I concur entirely that, had the Royal Court known that the counts disclosed no offence, it would have been unlikely to have allowed guilty pleas to be entered, it is an error which is arguably capable of rectification and that points away from the whole process being a nullity. Although I see the force of Crown Advocate Dunford's point that the comment in Williamson about nullity being outdated must be read in context, the English Courts appear to be moving away

from nullity and I note particularly that in the case of Ayres (1984) their Lordships effectively side-stepped the issue of nullity to focus on the proviso. Nullity is a technically complex area and there are, in my judgment, other simpler alternatives available to me which meet the justice of the case. Declaring a nullity is not necessary in this case, even were I satisfied that there is one. On that basis, therefore, I am not going to declare a nullity.

63. I am also satisfied that the Royal Court's extensive suite of inherent powers includes the power to quash its own convictions, as well as those of lower Courts and to rectify mistakes. I am fortified in that conclusion by the statutory powers given to the Magistrate's Court to do precisely the same. The Royal Court's inherent powers cannot surely be any less extensive than the powers afforded to the Magistrate Court, largely a creature of statute.
64. I am also satisfied that, adopting the common law in England, as we often do in Guernsey, in the absence of anything prescribed to the contrary, the Royal Court has the power to vacate guilty pleas and can do so at any time before sentence has been passed. It is clear that the power can be exercised, albeit sparingly, on the application of P. There is no direct authority that the English Court can do so of its own motion but I am satisfied that the Guernsey Court can, on the basis that it is an instance of the Court exercising its inherent power to rectify mistakes. The effect of exercising the power to vacate the pleas is that they and the convictions to Counts 6 and 7 would be struck from the record and there would be no pleas entered to those counts.
65. As a matter of principle, I am satisfied that, independently of any application to amend, steps should be taken to rectify the errors and that it would be contrary to all notions of justice, and indeed D2's Article 6 rights, that convictions would remain recorded against D2 when he has not committed the offences alleged. This is so despite his resistance to any steps to undo those convictions for the reasons set out in the following paragraphs.
66. It is important to consider the nature of the error in this case. It is an unforced error and Advocate Ayres did not seek to ascribe any bad faith to it. The English Court of Appeal in Gould displayed considerable frustration and irritation at the low standards of prosecuting and numerous errors and was clearly wanting to limit assistance to the prosecution to rescue it from a muddle of its own making. A different view was taken by the English Court of Appeal in Gleeson that P should not be frustrated by an error where there is no risk of an unfair trial. Fortunately, in Guernsey, such errors by P are rare. The error here is not taking due notice of the date from which the substance was a controlled drug. D2's pleas of guilty, entered early, indicate acceptance that the importation was unlawful. Those pleas were entered in error. If the counts are amended, there is no doubt that D2 can have a fair trial. There are differences between the elements of the old and new offences but the only unfairness which D2 raised is that he should not face trial for importation of the substance as a medicinal product as this would amount to *autrefois* convict.
67. The existence of *autrefois* convict was not argued to any great extent before me and I do not consider it necessary or appropriate to determine now whether it exists in Guernsey or not. Based on the English principles and authorities, I do not consider it to be a sustainable argument in the circumstances of this case. There is authority from S v the Recorder noted above that it can only arise where the D has been sentenced as only then does the "peril" arise. In this case, even on Advocate Ayres' submission that sentence should be stayed, there is no risk of sentence on both sets of counts so there is no "peril". I regard D2's maintenance of the guilty pleas as an obstacle to amending the indictment as an unattractive argument. Not only is D2 seeking to rely on an unforced error of P, but also on his own counsel's error in allowing guilty pleas to be entered to charges which disclosed no offence. There can be little doubt that those pleas cannot stand. Were D2 to ask to vacate the guilty pleas, I would not hesitate to allow him to do so on the basis of mistake or, despite his being represented, on account of erroneous advice as Advocate Ayres fell into the same error as P in considering the counts to be valid.

68. I turn to the Amendment Application. I must decide whether the existence of the guilty pleas is an impediment to an application under section 4. I find that they are not as the trial is not over until sentence is passed and I rely on the case of Love as highly persuasive authority for that conclusion.
69. I have to be satisfied that the Indictment is defective. I am satisfied that there is a number of defects in the Indictment which require amendment, not limited to counts 6-8 which are clearly defective.
70. The application is opposed as respects Counts 6-8. I am satisfied that counts 6, 7 and 8 are all wholly defective by reason of the same defect in that they charge conduct which was not at the time an offence under the statute named in the Court, in which case leave to amend by deletion and substitution of the new proposed counts should be given provided that no injustice will be caused to either Defendant by the amendment. I cannot see any injustice, (whether by reason of any lost opportunity to argue *autrefois* convict or otherwise) in allowing the deletion of these wholly defective counts and the substitution of three new counts referring to the illegal importation of medicinal products which reflect the criminality alleged against the Defendants. The penalty for those offences is considerably lower. There is no breach of Article 6 as there is no difficulty in relation to the understanding of the counts of the charges being faced or in having sufficient time before the trial in January, 2023 to prepare a defence. The issue has been live for many months.
71. I am firmly of the view that, in the case before me, if Counts 6 -8 are amended, there should be re-arraignment. Once new pleas are entered on re-arraignment, the pleas to the deleted counts are effectively vacated in any event but, independently from the Amendment Application, I do not consider it to be in the interests of justice for the guilty pleas and record of conviction to stand whatever happens on re-arraignment.
72. In all the circumstances, I exercise my power to vacate the guilty pleas in this unusual case. I am quite satisfied that no injustice is caused to D2 by the vacation of the pleas and there is no breach of his Article 6 rights.
73. I have also considered, as it was discussed at the hearing, the possibility of simply allowing the Prosecution to add the new counts and then effectively severing the Indictment to leave the offending counts on a separate Indictment which would not be placed before the Jurats and with which we would deal at the conclusion of the trial of the revised Indictment. This would effectively be a stay of the Indictment containing the offending counts. I am not attracted to this as sooner or later the offending counts have to be grappled with and it is my view that, as the Court is now aware of issues, the time for grappling with those counts is now.

Decision

74. My decision is that:

- 1) P's application to amend the Indictment in accordance with the revised draft indictment dated 30th June 2022 is granted and
- 2) the guilty pleas to Counts 6 & 7 are vacated.

Catherine Maureen Fooks
Judge of the Royal Court