

[2025]GRC032

**IN THE ROYAL COURT OF GUERNSEY  
(CRIMINAL DIVISION)**

**Between:**

**THE LAW OFFICERS OF THE CROWN**

**Prosecution**

**-and-**

**RORY SETTLE JOHNSON**

**Defendant**

**Ruling on Basis of Plea/Newton Hearing/Reverse  
Newton Hearing**

**Case heard on: 11<sup>th</sup> April 2025**

**Decision and draft judgment handed down on: 24th April 2025**

**Judgment handed down on: 23rd May 2025**

**Before: Catherine Maureen Fooks, Judge of the Royal Court**

**Counsel for the Prosecution: Advocate L C Roffey**

**Counsel for the Defendant: Advocate S E Steel**

**Legislation, texts and cases referred to in Decision:**

Richards and Five Others v Law Officers of the Crown, Court of Appeal Judgment 1/2002

R v Underwood [2004] EWCA Crim 2256

Willey v Law Officers of the Crown [2021]GCA 064

R v Nooman [2010] EWCA Crim 2917

Blackstone's Criminal Practice 2025

Archbold Criminal Pleading Evidence and Practice 2025

**Introduction and Background**

1. This judgment is concerned with the need or otherwise for a Newton hearing or reverse Newton hearing in the above matter. The Defendant ("D") represented by Advocate Steel is one of four defendants to be sentenced in connection with the importation and supply of ketamine between April and October 2024. D is not jointly charged with any of the other defendants. He faces just one count of being concerned in the supplying of Ketamine a Class B drug as well as several RIPL offences.

2. The offences came to light when two of D's co-defendants Jenkins and O'Connor were stopped on entry into Guernsey in August 2024 and were found to have, between them, over 220g of Ketamine internally concealed. Analysis of their devices revealed earlier importations in April, May and July and the involvement of D and his remaining Co-Defendant Guilbert at different points as suppliers in Guernsey of the imported ketamine.
3. On 13<sup>th</sup> March 2025, pleas acceptable to the Prosecution ("P") were entered by all defendants including a guilty plea by D to the supplying count and he and the others will be sentenced on 16<sup>th</sup> May 2025. Prior to that hearing Advocate Roffey, who is prosecuting this matter on behalf of the Law Officers, contacted the Court by email to advise that D would be entering a guilty plea on a limited basis. The initial basis of plea which he had received from Advocate Steel was not exactly as it is now. That version was not accepted by Advocate Roffey who provided a number of messages taken from conversations between D and Jenkins which Advocate Roffey submitted undermined the basis of plea but did not require to be resolved at a Newton hearing. My views were invited. It is always helpful for counsel to alert the Court to issues in advance but my conclusion, based on what happened in this case and the other Newton case, is that, when it comes to bases of plea and possible Newton/reverse Newton situations, the matter should be considered by the Court only after a guilty plea has been entered and after a final basis of plea in a standalone document (not in an email) has been filed and the P response also filed so the true and final position can be considered. The Judge also needs enough information about the P case to be advanced at sentencing. In this case I was helpfully provided with the draft prosecution outline.
4. Advocate Steel did not ever file a proper standalone basis of plea but he did file an email dated 21<sup>st</sup> March in which he set out D's basis of plea and responded to one of the messages filed by Advocate Roffey. D's final basis of plea is that he accepts that he assisted Mr Jenkins to supply drugs on the island in exchange for free ketamine for his own personal use. D made no financial profit from his involvement. Advocate Roffey filed his submissions rejecting that basis of plea on 9<sup>th</sup> April 2025 and Advocate Steel filed a response on 11<sup>th</sup> April 2025. I heard oral submissions from them both that afternoon. The issue for determination is whether there is a need for a Newton hearing or whether this is a reverse Newton situation.

### **The Applicable Legal Principles**

5. In this case there was no significant dispute between counsel as to what are the applicable legal principles. The issue was their application to the circumstances of this case. I am in the process of finalising a judgment on the issue of Newton hearings and that judgment should be read with this one.
6. The legal principles which are, by custom and in practice, applied in Guernsey to issues of Newton hearings are those applicable in England and set out in Blackstone's 2025 edition at D20.8 ff and in Archbold Criminal Pleading Evidence and Practice 2025 edition at 5A-339ff which I found helpful. As ever, care must be taken in considering the position in England where there are legislative provisions, in this case a Criminal Practice Direction 2023 9.3.3 (set out in Blackstone's) which has no direct equivalent in Guernsey. Whilst as Advocate Roffey submitted, it is technically true that this Practice Direction is not applicable in Guernsey, this particular Practice Direction is clearly derived from the English case of R v Underwood [2004] EWCA Crim 2256 and we do follow the caselaw. I found the Practice Direction (and more so the case of Underwood) of considerable assistance.
7. There are important differences in the constitution of the criminal Courts in the two jurisdictions which, in this case, are significant as sentencing in Guernsey is carried out by a collegiate bench of Judge and Jurats not a Judge alone as in England and Newton hearings are conducted with Jurats who will usually then go on with the Judge to sentence the defendant. That said, the general principles to be applied remain applicable and, in terms of procedure, I have

required a written basis of plea and a written response from P for this hearing in accordance with English practice. Written bases of plea are uncommon in Guernsey but this is a case where it is essential to have one.

8. A Newton hearing in England is one where a Judge sits alone to hear evidence to determine a factual dispute (rather than placing the matter before a jury or dealing with the matter on submissions only). In Guernsey a Newton hearing is conducted with Jurats who will usually then go on with the Judge to sentence the defendant. The principles to be applied are primarily those relating to a Newton hearing before Judge alone in England. The question of the need for a Newton hearing arises where a D pleads guilty to an offence but on a limited version of the allegations made by the P. The issue for a Newton hearing is one of fact not mitigation. This difference was the topic of some discussion at the hearing. In Blackstone's at paragraph D20.85 (see later) the difference is explained as factual where the dispute is about the immediate circumstances of the offence which is a "true Newton" situation and disputes about extraneous matters about which the prosecution witnesses are likely to have any knowledge which is a "reverse Newton" situation (an issue of mitigation). At paragraph 5A-340, Archbold sets out concisely the circumstances in which a Newton hearing is not necessary (1) where the difference in the two versions of the facts is immaterial to sentence – in which case the judge should sentence on the defence version and (2) where the defence version is manifestly absurd so that no evidence need be heard and (3) where the matters put forward by the defendant do not amount to a contradiction of the prosecution case, but rather to extraneous mitigation explaining the background of the offence or other circumstances which may lessen the sentence. This third exception is a reverse Newton situation to which I shall return. I find the Archbold definition of a Newton as where the D version contradicts the P case more helpful than the Blackstone's definition which refers to the immediate circumstances of the case.
9. The overriding consideration and the issue which the Judge required to resolve is that a defendant is sentenced on a basis which is true and proper even if that means rejecting an agreed basis of plea. It is clear from the above that the first task for the Judge is to identify whether the difference between the prosecution and defence versions amount to a dispute of fact i.e. that the defendant's version contradicts the prosecution's case or whether what the defendant is raising is by way of mitigation. The issue of materiality to sentence does not come in at this first stage but only if there is an issue of fact arising from the basis of plea.
10. In my other judgment I consider Newton hearings further but in view of my decision below that this case is not a Newton situation, I will move straight on to the topic of reverse Newton hearings or, put another way, the requirement to prove mitigation which is set out at Blackstone's D20.85 ff and the third exception as set out in Archbold 5A-340. This is mitigation rather than a dispute of fact as considered above. Usually mitigation is by way of counsel's submissions and this will often involve the putting forward of an explanation or excuse for the offending. In England, there is a whole set of applicable principles see Blackstone's D20-86-7 and Archbold 5A-340 which can be summarised as follows:
  - a. the decision whether to call evidence or rely on submissions rests with counsel not the Court. It is open to defence counsel to call evidence before, in the middle or at the end of the speech in mitigation;
  - b. the Court need not indicate that it is rejecting mitigation but that is desirable in order to give a defendant a chance to address the issues;
  - c. the Court cannot require evidence (as distinct from a true Newton situation);
  - d. the Court can reject the evidence even if unchallenged;
  - e. the prosecution can adopt a neutral stance but if there is material available to challenge what the defence is putting forward, it is perfectly proper for the prosecution to challenge the defence; and

- f. if the defendant gives evidence, the burden is on the defendant to satisfy the Court to the civil standard that what the defendant is saying is true.
11. Those principles seem to me to be equally applicable to Guernsey and, from enquiries made in Jersey by counsel in the other case, reflect the practice there. Based on what I have read and been told about practice elsewhere, the issue most usually arises during sentencing rather than in advance. In Guernsey mitigation is generally by submissions at the sentencing hearing. The Royal Court does, on occasion, challenge counsel as to points made in mitigation during speeches and the Court does, on occasion, reject mitigation advanced. The issue might be raised by counsel, the Judge or, indeed, a Jurat and, however it arises, it has to be managed. An adjournment might be necessary if the issue arises unexpectedly and particular evidence required but an adjournment should be avoided.
12. In Archbold there is reference to the situation where the prosecution not only dispute the defence assertions, but identifies the evidence on which the prosecution would rely to challenge them, which is the situation in the case before me. It is said that the defendant is effectively bound to adduce evidence in support of his assertions if there is to be any chance of them being accepted by the Court: see R v Nooman [2010] EWCA Crim2917.
13. Counsel's view was that if there were to be a reverse Newton hearing in this Court, because I am part of the sentencing bench and would usually be part of any decision to accept or reject mitigation, I would not direct the Jurats and send them out to consider as in a Newton hearing but would deliberate with them as part of the sentencing process in the usual way. There would need to be directions as to the burden and standard of proof. The issue of rejection of mitigation in advance of the full sentencing hearing by me as single judge was raised in submissions. My view is that, whilst the decision to have a Newton or not (at least if raised in advance) rests with the Judge alone in Guernsey, I would be uneasy about unilaterally rejecting mitigation in advance without consulting the rest of the sentencing bench.

### **Counsel's submissions**

14. Advocate Steel indicated that he will seek to mitigate on the basis of D's benefit from his role in the supply being in the form of free drugs rather than money. He set out in the basis of plea the key email exchange upon which the prosecution relies to refute the claim that D made no profit:

- *AJ (Anthony Jenkins) - Dunno what's going through your head but you've just sold and had money put into your bank not mine then not given me a bag I've asked for saying it's all gone when I've literally just watched you put it into your bag*
- *AJ - I paid you 25 to move it.*
- *AJ - Dunno what's going through your head but you've just sold and had money put into your bank not mine*
- *AJ wrote 'I paid you 25 to move it' but that's in reference to ketamine rather than money. It doesn't mean £25. RJ was 'paid' in the form of drugs only. The accusation from AJ in the messages above that RJ had personally profited was denied by RJ in the subsequent replies –*

*RJ (Rory Johnson)– What?*

*RJ - What are you on about*

*RJ - Lad are u taking the piss?*

*RJ - Call. Me.”*

Advocate Steel's instructions are that the reference to “25” is to 25g not £25 or more. He did provide me with the messages around this one but I could not see that they assisted. Advocate Roffey did not accept this basis of plea. He submitted that he cannot positively agree D's

account because it is not supported by other material and indeed is an affront to common sense bearing in mind the lengthy prison sentence risked by being concerned in the supplying of an amount of ketamine the Court may find was at least 130g. Specifically D's account is contradicted by the message set out above which would be placed before the Court were he to maintain his basis of plea. He relied particularly on the words "... you've just sold and had money put into your bank..." He submitted that the extent to which D profited from being concerned in the supply of ketamine is outside of P's knowledge and therefore should be the subject of a reverse Newton. It would be a matter for D whether he attempts to prove his mitigation by giving evidence or relying upon Adv Steel's submissions. The Court will either accept or reject that mitigation. In any event, D accepts that he has received a benefit for his role in the supplying and, in Advocate Roffey's submission, the form of the benefit is not material to sentence.

15. It is to be noted that Advocate Roffey has not included the above exchange of messages in his draft outline. I believe that this is because it does not illustrate the extent of D's involvement which Advocate Roffey chooses to illustrate with a different exchange in July in which D sets out how he has dealt with a quantity of the ketamine. Advocate Roffey's focus is the extent of the involvement in what he describes as a commercial supply, with D being the "man on the ground" a matter which appears not to be in dispute. Advocate Roffey submitted that it is up to D to say what his reward was. Advocate Steel was unable to quantify the reward which he submitted is not unusual. Advocate Roffey explained that his outline was deliberately silent on the issue of reward as that is not part of the P case. What D is asserting does not contradict the P's case but is 'extraneous'.
16. Both counsel referred to the oft-cited paragraph 8 of Richards and Five Others v Law Officers of the Crown, Court of Appeal Judgment 1/2002 on the subject of starting points for sentencing of those involved in the importation and/or supply of drugs:

*"[...] The starting point has to be determined primarily by considering two factors, namely the quantity of the drugs and the involvement or role of the defendant in the commission of the offence. In that way the court assesses the extent of the criminal conduct."*

17. Advocate Roffey submitted that the dispute over D's reward is not material to sentence and does not merit any form of hearing but, were I to disagree, then it is a reverse Newton situation as the issue is outside P's knowledge. He supported his argument that the form of the benefit is irrelevant (a submission supported by Advocate Steel) with the case of Willey v Law Officers of the Crown [2021]GCA064. In that case Advocate Roffey submitted that the passage at paragraph 38 is authority for the proposition that no distinction is to be drawn between a financial reward and a non-financial one and that all that is significant is that there is a reward or advantage (as distinct from a claim that there is no reward or advantage):

*"The Appellant was, however, to receive £5000. Much was made of personal circumstances and the fact that she was coerced into participation by an abusive partner with a drugs habit who would have used the money to purchase drugs. We accept that such may well have been the case; but coercion is a regrettable but all too common feature for cases of this nature and for those involved in this pernicious and ugly trade and can seldom be taken to be a mitigating factor. In the eyes of the law, the Appellant committed this crime to secure a substantial advantage for herself albeit that advantage was to pacify a violent partner."*

I am not sure that the passage is intended to be authority in the wide sense argued by Advocate Roffey. I consider it important to read on as the learned Judges then go on to discuss the issue of coercion and to reiterate that the Court should not allow coercion short of duress to be used as mitigation lest this encourage those further up the chain to use such methods.

18. Advocate Steel challenged Advocate Roffey's comment about D's account being an affront to common sense and objected to the use of the message above as inadmissible hearsay. He invited Advocate Roffey to reconsider his rejection of the basis of plea; he declined, he remains sceptical and therefore will not accept it.
19. Advocate Steel submitted that the situation is a Newton one not a reverse Newton one because P has in the past accepted such assertions without a reverse Newton. P has evidence in the form of voluminous messages, the negative results of the search of D's home (in terms of evidence of financial gain), an absence of unexplained cash seized and a production order to prove if D has profited financially.
20. In response to my concern about the potential impact on any of the Co-Defendants and especially AJ of any finding by the Court on the disputed reward, Advocate Steel assured me that there was no indication of any conflict with other bases of pleas.
21. Notwithstanding his earlier submission that the case is a Newton one not a reverse Newton one, by the end of oral submissions, Advocate Steel seemed to be agreeing with Advocate Roffey that it is a mitigation case and that the dispute over reward should be put to the collegiate sentencing bench at the sentencing hearing.

### **Discussion/Application of Legal Principles to the Facts**

22. I will first set out the nature of the dispute as that will provide the key as to whether this is a Newton hearing or reverse Newton situation and or, indeed, neither. D is charged with being concerned in the supplying of ketamine to another between 1<sup>st</sup> April and 31<sup>st</sup> October 2024. D accepts that he was involved in such supplying between April and July by acting as a middleman between his Co-defendant Jenkins and various purchasers of the ketamine which was imported on the occasions as set out in the P draft outline. D is not disputing the content of the P outline. He positively asserts that he made no financial gain but was paid in kind. P asserts that P does not need to prove what reward D received as part of the elements of the offence. P's outline does not contain ref to the messages which P say cast doubt on D's claim as to reward but it is clear that, if there is a hearing on the issue, P will challenge D on general grounds (common sense as P puts it) and with specific references to certain messages. In his comments to the Court on the draft of this judgment, Advocate Roffey indicated that he proposes to include the message at paragraph 14 in the final outline, if D maintains his stance.
23. The first question I need to answer is whether the issue in dispute i.e whether D participated only to receive ketamine for his personal use (amount unquantified) is an issue of fact so a Newton falls to be considered or an issue of mitigation in which case the issue is one of reverse Newton. Advocate Roffey submitted that it is not a Newton situation but a reverse Newton one i.e. an issue of mitigation, not fact. Advocate Steel submitted at an early stage that it is a Newton issue on the basis that P has the material with which to prove the matter, as set out above.
24. Richards is the leading case in Guernsey on sentencing for supplying of drugs. There are other cases which deal with other specific drugs but the twin considerations of quantity and role when setting the starting point remain as a thread running through those other cases. In Richards itself the issue of reward or expectation of reward is not mentioned in the passage concerning role but it is mentioned in the course of the analysis of the cases which were the subject of the appeal. The reward or expected reward is relevant to the sentencing exercise.
25. Although we have the case of Richards, it is reasonable to look at the English Sentencing Guidelines to see whether there is any assistance to be derived on the issue of reward. The relevant Guideline is S1-23-20. In that Guideline the expectation of financial or other

advantage is a factor in determining the level of role when assessing culpability. In England, quantity of the drug goes to the issue of harm.

26. In my judgment, the distinction between fact and mitigation is not always cleanly drawn but it is important to start with the prosecution case to determine whether what is being advanced by a defendant contradicts it or is extraneous to that case. It must be remembered that factual issues can be mitigation in the sense of mitigating factors relating to the offence as opposed to personal mitigation such as a defendant's good character (in the broad sense), mental health struggles, losses or background. The fact that an issue is relevant to sentence does not make automatically make it factual for determination, if disputed, at a Newton hearing. Further, the fact that an issue is outside the prosecution's knowledge is not determinative of it being mitigation, as is clear from the English caselaw. In this case P considers that it could challenge D's assertion as to reward on general grounds and with the messages but that, in my judgment is not determinative of the issue being factual rather than mitigation. For me, the key lies in the outline and the elements of the offence. The outline is silent as to reward. Reward is not a part of the P case. Financial gain is not an element of the offence. The issue of role is factual in terms of what was done to commit the crime, here being concerned in the supplying and that is not in dispute. Another side to role is reward or motivation but that I consider to be more of a mitigation issue in this case being extraneous to P and personal to D.
27. In my judgment, what D is advancing is not an issue of fact forming part of the P case so there is no need for a Newton hearing and I do not need to consider the issue of materiality as to sentence or absurdity by way of exceptions to the need for a Newton. The issue is a reverse Newton situation. It is perhaps unusual to be considering a reverse Newton ahead of the sentencing exercise but that is where we are. In this case we know that P will dispute what D is going to say and that is helpful as otherwise the hearing could be delayed and there are three other defendants to consider. In accordance with the principles above, it is for Advocate Steel and his client to decide how to proceed with mitigation whether by way of submissions or submissions and evidence. It will be for the full sentencing bench, in the usual way, to decide what to make of the mitigation advanced. For my part, I am somewhat sceptical of D's claim to such a limited reward but I have not yet heard the full mitigation. I am certainly not prepared to make any ruling about it as a single Judge. I see it as a matter for the full sentencing bench.
28. As I indicated to counsel at the end of oral submission, as this issue has been aired in advance, it is only fair and appropriate for the Full Court to be asked (if D wishes) and to give an indication whether it accepts the mitigation or not so D can decide what to do but he needs to be ready to deal with it there and then as it has been raised in advance.
29. There is one point which was not addressed in submissions and that is the impact on any future drug trafficking proceedings of a finding by the Full Court that it either accepts or rejects D's claim as to reward. Counsel may wish to consider this.

### **Decision**

30. My decision is that this is not a Newton situation. It will be for D to decide how to present the mitigation, knowing that it will be disputed. Counsel may apply for any further directions they consider necessary.

**Catherine Maureen Fooks**  
**Judge of the Royal Court**

**23rd May, 2025**