AQUITTING THE "GUILTY"? QUASHING A CONVICTION AFTER A GUILTY PLEA

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In Bouchard v Att Gen, *the Royal Court considered an appeal against conviction where the defendant had entered an unequivocal plea of guilty. Two questions arose—could the court entertain such an appeal? If so, what was the appropriate test?*

1 The facts of *Bouchard v Att Gen*[1] were straightforward but unusual. The appellant was seen driving in a manner which attracted public attention. The police attended and although the appellant's demeanour was in many respects unremarkable, his appearance and the report the officer had received gave the officer reasonable grounds to suspect that the appellant may have been driving whilst under the influence of drink or drugs. He was taken to the police station and a blood sample was taken by a forensic medical examiner.

2 The blood sample was analysed at the office of the Official Analyst and found to contain, or so it seemed, not less than 190 micrograms per litre of diazepam and not less than 4.1 micrograms per litre of tetra-hydrocannabinol. As to the diazepam, that is a pharmaceutical used to treat anxiety and was prescribed to the appellant. Tetrahydrocannabinol ("THC") is a constituent of cannabis and it is unlawful to possess it unless it is prescribed; the appellant was not prescribed cannabis.

3 The statutory provisions that the appellant had ostensibly contravened, namely driving a vehicle whilst unfit through drink or drugs contrary to art 27 of the Road Traffic (Jersey) Law 1956, is silent as to any *de minimis* levels of drugs that may be contained in the blood of a suspect and disregarded for the purpose of prosecution. However, the court learnt that the prosecuting authorities in Jersey had regard to guidance published in England and Wales on a non-statutory basis for the purpose of considering whether or not a person should be charged with an offence of driving whilst unfit through consumption of drugs.

4 The "threshold limit" according to this guidance is 550 micrograms per litre for diazepam and 2 micrograms per litre for THC. It can be

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* The author was the presiding judge in *Bouchard v Att Gen.*

[1] [2021]JRC236 (MacRae, Deputy Bailiff and Jurats Crill and Blampied).

seen that the level of diazepam in the appellant's blood sample was insufficient to warrant prosecution but the amount of THC was more than the non-statutory limit. The court noted that, notwithstanding the thresholds contained in the guidance, the guidance says:

> "The government is unable to provide any guidance on what amounts of dosage would equate to being over specified limits. There are too many variables, such as physical characteristics, where each person will metabolise the drug at different rates. Eating or drinking will also have an effect on blood concentration."

5 The appellant was prosecuted on 22 September 2020 and pleaded guilty in the Magistrate's Court on 19 October 2020. He was represented by an advocate when he pleaded guilty. The appellant was sentenced to perform community service (which he had completed before the appeal was heard) and disqualified from driving for eighteen months.

6 When the matter first came before the Royal Court on appeal it was adjourned so that, *inter alia*, the appellant and the advocate who appeared for him when he pleaded guilty could, if the appellant waived legal privilege, depose to the advice given and received by him on that occasion. The court observed that it would have been difficult to determine the case absent a waiver of privilege and the provision of such evidence.

7 The advocate who advised the appellant said that she told him that the decision on plea was entirely his; initially the appellant said that he wished to defend the allegation on the basis that he did not know how the cannabis came to be in his system. However, when the evidence was explained to him he decided to plead guilty and understood that some of the allegations of bad driving made against him—including reversing up a one-way street—had attracted the attention of a member of the public and, thereafter, the police.

8 The appellant said that he had wanted to get things over and done with when he appeared in court. He also wanted to receive credit for his plea of guilty and felt that because of the evidence before him he had no option but to enter such a plea.

9 In his affidavit, the appellant accepted that he took diazepam the night before he gave his sample of blood, but that he did not smoke cannabis on that day. He said he smoked cannabis infrequently at the time and would have smoked cannabis approximately three to five days before being arrested. On that occasion, he would have smoked a small amount, probably one to two joints containing approximately 0.3 grams of cannabis. He accepted he did not know how long cannabis stayed in the body and would not know whether or not it had "left my system" by the time he was arrested.

10 There was and could be no criticism of the advice given by the duty advocate who represented the appellant having regard to the evidence before her.

11 After his conviction, the appellant carried out some research. He said he was surprised, in view of his recollection as to his consumption of the cannabis, that there was sufficient in his blood to result in the findings recorded. His father encouraged him to appeal and he requested that the sample be re-analysed.

12 This occurred in April 2021 and, somewhat surprisingly, the analysis of the blood sample reconfirmed the presence of diazepam but indicated that there was no THC present in the sample at all.

13 This was explained by the Chief Analyst, Mr Hubbard, in a statement dated 25 April 2021 and also in a subsequent report. Owing to the outcome of the analysis, the court thought it was appropriate, when it adjourned the appeal, to invite Mr Hubbard to give evidence on oath, which he did. It is not necessary to repeat the evidence that Mr Hubbard gave which is set out in the judgment. A brief summary follows.

14 It was fortunate that the blood sample in this case had been retained as usually samples are retained for a period of three months only—a period dictated by the amount of space available in the laboratory and the anticipated maximum time during which a second test might be sought. A second test of a blood sample suspected to contain drugs is only requested, on average, once or twice a year.

15 The testing of blood is a two-stage process. The first phase involves a test for a range of drugs and the second identifies the quantity of any drug located in the first test. During the first stage, also referred to as the "screening process", the sample of blood was diluted by a solvent reagent added to the blood in order to separate out the drugs within it. The reagent has the effect of pooling the drugs in one solution. The second stage involves an extract from the blood being analysed using what is called a liquid chromatography mass spectroscopy. This yielded the results referred to above.

16 Mr Hubbard said the finding of THC when the sample was first analysed could only be explained by contamination of the reagent. The reagent was made up in the laboratory in Jersey and must have been contaminated during that process which must have been a consequence of a human error.

17 When the sample of blood was re-analysed using a different reagent, the diazepam was revealed but there was no result for the presence of THC. The new reagent was made up using the same "recipe" as the old reagent but had not been contaminated. The laboratory had re-analysed

all cases where the same contaminated reagent was or may have been used. Some of those cases involved samples where THC was detected if present. THC was found to be present again in all of those cases of re-analysis and accordingly this was an error with only one consequence. Further steps have been taken to ensure that the error cannot recur.

18 However, the court knew that there was, having heard the evidence, no THC in the appellant's blood and it was this finding that led him to plead guilty. The plea was entered on the basis of evidence that was false although relied upon in good faith by the prosecuting authority. Although the appellant was a cannabis user, his use of cannabis was not, on his evidence or the evidence as a whole, sufficient to have affected his driving on this occasion. Indeed, there may have been no cannabis present in his system at the time.

19 The court gave anxious consideration as to its powers in these circumstances. The relevant statutory provision giving a right to appeal was contained in art 17 of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1999 which provided a right of appeal against sentence in the case of a person who pleaded guilty, and an appeal against conviction if he or she did not.

20 The relevant provisions (art 33) of the Criminal Procedure (Jersey) Law 2018 are to similar effect. Again there is no statutory right to an appeal against conviction in these circumstances, *i.e.* where the defendant has entered a plea of guilty. The court gave consideration as to whether or not it was appropriate to treat the appellant's appeal as an appeal against sentence and substitute "no penalty" for the sentence, or order that the defendant be absolutely discharged from the prosecution. However, that would, in relation to the disqualification, involve a rather artificial finding of "special reasons" which would not have been in accordance with authority and in any event would have left the appellant with a conviction for driving whilst under the influence of drugs.

21 There was no previous Jersey decision on all fours. However, in *Harding v Att Gen*,[2] the Royal Court considered a somewhat similar application where an appellant was permitted to appeal against a conviction notwithstanding a guilty plea in circumstances where she had not understood the evidence against her owing to her unfitness to plead.

22 Having considered the terms of art 17 of the 1949 Law, the Royal Court said:

[2] [2010]JRC167; 2010 JLR *N* [44].

"8. Miss Fogarty and Mrs Sharpe submit that notwithstanding the guilty plea, the Court retains jurisdiction to entertain the appeal and this on the authority of the case of *Bish v Attorney General* 17th May 1992 where, on different facts, the Court said this:—

> 'In this case clearly a guilty plea was entered and therefore prima facie this Court has no jurisdiction to entertain an appeal. However, a number of Jersey cases in the Poursuites Criminelles of some years ago indicate that the Court is prepared to entertain an appeal where there are particular grounds to enable it to do so. The one case which supports that suggestion is the case of *Mortell*, (1963 36 PC 163) where although the appellant had pleaded guilty, a witness came forward afterwards to show that she had been drunk at the time and therefore didn't have the necessary mens rea. And, therefore the Court was prepared to look behind her guilty plea. On the other hand the Court was not prepared to do so in three other cases, *Barrot* (1965) 36 PC 468, *Aubin* (1966) 37 PC 98 and *Luce* (1969) 38 PC 121.
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> The conclusion which we draw from these cases is that the Court will look at any case to see if it has jurisdiction where either the accused did not appreciate the nature of the offence or there were any other grounds entitling the Court to do so.'"

23 The Royal Court in *Harding* went on to recite the facts of *Mortell v Att Gen*.[3] In *Aubin v Att Gen*,[4] the Royal Court (Bois, Deputy Bailiff, presiding) held that the appeal against conviction on a guilty plea could not be entertained as "the appellant had fully appreciated the facts which constituted the charge against him at the Police Court which he had admitted".

24 As to *Barrot v Att Gen*[5] and *Luce v Att Gen*,[6] the brief judgments of the Royal Court on appeal merely recorded that the appellants pleaded guilty and there were no grounds upon which the court could entertain their appeals—accordingly they were dismissed.

25 Following *Harding*, the Royal Court has a power under its inherent jurisdiction to entertain an appeal against conviction notwithstanding the entry of a guilty plea, either where the appellant did not appreciate the nature of the offence or, in the view of the court in *Bouchard*,

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[3] (1963) 36 PC 163.
[4] (1966) 37 PC 98.
[5] (1965) 36 PC 468.
[6] (1969) 38 PC 121.

whether there were other grounds upon which the court ought to grant leave.

26 In *Bouchard*, the appellant did understand the nature of the offence and the court said:

> "in our view, the Court must be extremely careful when identifying other circumstances when grounds may exist entitling the Court to entertain an appeal against conviction against a background of a guilty plea." [7]

27 The court concluded by saying that there would need to be "wholly exceptional circumstances" to exist in order for the court to entertain and allow such an appeal, and the court said that it would not "purport to identify such circumstances in advance as they would depend on the facts of the case." The court was satisfied that in the particular circumstances of the case, namely:

> "where the appellant elected to plead guilty exclusively by reference to expert evidence that, in fact, was entirely wrong, and demonstrated to be so, thus undermining the entire basis of the conviction, the Court has a jurisdiction to consider an appeal against conviction."[8]

The court quashed the conviction.

28 The court's attention was not drawn to the decision of the Royal Court on appeal in *Jeune v Att Gen.*[9] In this 2000 case, the Royal Court considered an appeal against conviction and sentence in circumstances where the appellant had pleaded guilty and was ordered to pay a fine because she had not paid for the use of a public car park when collecting her grandchildren from school. However, there was a non-statutory agreement between the school and a States Department to the effect that those delivering or collecting children from school were entitled to use the car park for a short period without paying. The court held that it had jurisdiction to entertain the appeal notwithstanding the appellant's guilty plea if the appellant did not appreciate the nature of the offence or there were other grounds entitling the court to do so. The court considered there were no grounds for concluding that the guilty plea was tainted by mistake, duress, fraud or should be regarded as a nullity and accordingly the appeal against conviction was dismissed. However, the appeal against sentence was allowed. The circumstances in *Jeune* were plainly different from the facts of this case.

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[7] [2021]JRC236, at para 36.
[8] *Ibid*., at para 37.
[9] 2000 JLR *N*–42a.

29 Interestingly, shortly after the decision of the Royal Court, the English Court of Appeal in the case of *Tredget v R*[10] (8 February 2022) considered a reference from the Criminal Cases Review Commission against conviction. The Court of Appeal outlined the development of the law on appeals following a plea of guilty and set out the following categories where a defendant may seek to appeal a conviction after pleading guilty:

(1) Where the plea was vitiated—examples include equivocal or unintended pleas and a plea following an adverse and wrong ruling as to law, or a plea vitiated by improper pressure or incorrect legal advice.

(2) Where the proceedings were an abuse of process such that it was unfair to try the defendant at all or there was a fundamental breach of art 6 of the European Convention on Human Rights.

[It is plain that these first two categories of case have an application on the facts before the court in *Bouchard*.]

(3) Finally, the Court of Appeal identified a third category at paragraph 162 of the judgment of Fulford, LJ:

> "In the case of category 1, the ordinary consequences of the public admission of the facts which is constituted by the plea of guilty are displaced by the fact that the plea was vitiated, whether in fact or by reliance on error of law. In the case of category 2, the ordinary consequences of the public plea are irrelevant, because the defendant ought not to have been subjected to the trial process (or to that form of trial process) at all. But ordinarily, the plea of guilty, by a defendant who knows what he did or did not do, amounts to a public admission of the facts which itself establishes the safety of the conviction. There remains, however, a small residual third category where this cannot be said. That is where it is established that the appellant did not commit the offence, in other words that the admission made by the plea is a false one."[11]

As to the test for the court to apply in those circumstances, it was not appropriate for the court to follow the approach that applied to convictions by a jury following a not guilty plea. After a trial there must be an analysis of the evidence or a trial process leading to a conclusion that a conviction was unsafe—see *Rushton v Att Gen*,[12] referred to in greater detail below, and following cases for the approach established

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[10] [2022] EWCA Crim 108; [2022] 4 WLR 62; [2022] Crim LR 407; [2022] 2 Cr App R 1.
[11] [2022] EWCA Crim 108, at para 162.
[12] 1989/174, Royal Ct, October 16th, 1989.

by case law in Jersey in respect of appeals against conviction from the Magistrate's Court to the Royal Court. However, where there was a guilty plea, the submission that the conviction cannot be supported having regard to the evidence was inappropriate. In such a case it would normally be possible to treat the conviction as unsafe only if it was established that the appellant *had not* committed the offence, not that the appellant *may not have* done so.

30 The Court of Appeal summarised the position thus:

> "An important common element across the three categories, therefore, is that the circumstances relied on by the appellant need to be established by him or her. That is merely an application of the normal rule that it is for an appellant to demonstrate that his conviction is unsafe. By way of summary, for the first category, the matters vitiating the plea must be demonstrated (*e.g.* that the plea was equivocal, unintended or affected by drugs etc.; there was a ruling leaving no arguable defence; pressure or threats narrowed the ambit of freedom of choice; misleading advice was provided or a defence was overlooked). For the second category, it must be shown that there was a legal obstacle to the defendant being tried for the offence or there was a fundamental breach of the accused's right under article 6 (whether he or she was guilty or not), and for the third category, it needs to be established that the appellant did not commit the offence. If that standard is not met, we would not expect an appeal against conviction following a guilty plea to succeed."[13]

31 Although the terms of the decision of the Court of Appeal are not precisely in the same terms as the decision of the Royal Court on appeal in *Bouchard*, the outcome is the same.

32 In the case of appellants in Jersey who wish to appeal their conviction having pleaded guilty they must, *inter alia*, establish on appeal that they in fact had not committed the offence that they had admitted. The test established in *Rushton v Att Gen*, where the Royal Court is considering an appeal against conviction where the appellant had pleaded not guilty before the Magistrate, has no application. Where the complaint made by an appellant is regarding the evidence that was given at trial, the Royal Court's approach is as set out in *Rushton*:

> "The court of course has on many occasions said that its duty in looking at an appeal on conviction from the Magistrate below is to examine the transcripts to see if there is evidence on which the Magistrate concerned could properly have come to the decision he

[13] [2022] EWCA Crim 108, at para. 173.

> did. If there was that evidence, then even though the court might not necessarily have come to the same decision, the court does not lightly interfere with it. The court has to be satisfied that there was insufficient evidence for the Magistrate to have come to the decision he did, or that he drew the wrong conclusions and inferences from the evidence before him."

The test set out in art 26 of the Court of Appeal (Jersey) Law 1961 has no application as that is concerned with appeals from the Royal Court to the Court of Appeal. No further appeal to the Court of Appeal lies from the decision of the Royal Court on appeal from the Magistrate.

33 Although the court in *Bouchard* was not referred, and did not refer, to *Archbold* in the course of argument, it is plain from the decision of the Court of Appeal in *Tredget* that the observations as to the applicable test on appeal in these circumstances contained in *Archbold*, at para 7.46 (2022 ed) was wrong when it was suggested that the approach was the same as for defendants who pleaded not guilty with the focus being on the safety of the conviction.

34 As to cases in the small residual category of cases where the admission made by the plea is a false one, examples in the English authorities are *R v Verney*,[14] where the appellant had been in prison at the time of the alleged offence and therefore could not have committed it, and *R v Jones*,[15] where DNA evidence analysed decades later exonerated the appellant. Accordingly, the Royal Court in *Bouchard* was correct to identify that there would need to be wholly exceptional circumstances to allow an appeal of a defendant who has freely entered an unequivocal guilty plea in circumstances where they had received adequate legal advice and there was no legal defect in the proceedings or incorrect ruling that had led to the entry of the plea. The appellant must prove that they have not committed the offence which they had previously admitted.

Robert MacRae has been the Deputy Bailiff of Jersey since January 2020. He held the office of Her Majesty's Attorney General from May 2015 until his appointment as Deputy Bailiff.

[14] (1909) 2 Cr App R 107.
[15] [2019] EWCA Crim 1059.