# A HIGHLIGHT OF RECENT DRUGS CASE LAW
# APRIL 2018

***R. v Chapman (Sonny)*** **[2017] EWCA Crim 1743; [2018] 1 W.L.R. 726 (CA (Crim Div))**

The appellant, along with three co-joined appeals sought to challenge his conviction for possessing nitrous oxide with intent to supply, on the ground that nitrous oxide is an 'exempted substance' under the Psychoactive Substances Act ('the PSA'), as it is a 'medicinal product' within the Human Medicines Regulations 2012 ('the Regulations'). The Appellant argued this was because nitrous oxide undoubtedly brings benefits to human health, so it should be treated as a medicinal product within the Regulations irrespective of the purpose for which it was manufactured or circumstances of its use. Importantly, the Appellant also sought to adduce expert evidence from Professor Nutt that nitrous oxide is not a 'psychoactive substance' under the PSA, as it does not act *directly* on the central nervous system.

The Court acknowledged that the PSA was primarily aimed at 'legal highs' such as spice and mamba, although the legislation did also have nitrous oxide in its sights according to an early report by the Home Affairs Select Committee. With regard to the substantive issue, the Court held that the Regulations contemplated that the same substance may be a medicinal product in *certain* circumstances, but not others, and this should be determined by reference to the particular context it was supplied in. Thus, nitrous oxide manufactured and supplied for medicinal purposes may be covered by the Regulations, whereas in the Appellant's case, it was plainly not because (i) the canisters in question were manufactured and distributed for use in catering, and (ii) the purpose for which it was intended to supply the canisters were purely recreational and certainly did not have any beneficial effect on health.

The Court rejected the application to admit Professor Nutt's evidence. This was because, first, the Court did not find the distinction between a 'direct' or 'indirect' effect on the central nervous system to be convincing. Section 2(1) only described a psychoactive substance as 'a substance which *produces* a psychoactive effect in a person if, by *stimulating*

*or depressing* the person's central nervous system, it affects the person's mental functioning or emotional state.' It should be noted however that the Court's remarks here were *obiter*, and therefore this particular issue on interpretation was not properly argued at the appeal.

Secondly, the Court held that Professor Nutt's evidence was 'couched in the language of the prosecution's failure to prove, rather than a clear different conclusion', and 'did not grapple with [the Crown's expert] opinion nor undermine it.' The Court highlighted that it may be that for the sake of scientific purity Professor Nutt believed that the only way to resolve the issue would be to conduct a human study, yet 'that is not a legal necessity to prove the matter in a court of law.' On the other hand, it was noted that were Professor Nutt to have set out a clear explanation of how nitrous oxide does not 'stimulate or depress a person's central nervous system', this position might have been different. But as presented before it, the Court was unpersuaded that his expert evidence could support a ground of appeal.

***Regina v Deividas Grigas* [2017] EWCA (Crim) 1819**

The offender had pleaded guilty to five offences, and was given a sentence of 17 months in a YOI suspended for 24 months. The offences included two counts of supply of nitrous oxide; two counts of possession of cannabis; and one count of possession with intent to supply MDMA. The Attorney General applied for leave to refer the sentence to the Court of Appeal as unduly lenient, in particular, submitting that each of the offences relating to nitrous oxide should have merited a significant sentence of detention on their own.

The Court rejected this, and highlighted that there is no guideline dealing with the Psychotic Substances Act ("PSA'), or the many substances that might be caught by its provisions, each of which is capable of giving rise to *very different levels of harm*. In this regard, the Court took note of a letter publicly available from the Advisory Council on the Misuse of Drugs to the then Home Secretary, dated 3rd March 2015, written in the context of the passage of what became the PSA. This observed that '[nitrous oxide] appears to have few, if any, short-term adverse effects, other than mild headaches for some individuals.' The document goes on to explain that long-term abuse can cause some problems which are undoubtedly serious.

Pointing out that the harm caused by illicit substances is an important factor in determining appropriate sentencing ranges, the Court was clearly of the view that sentencing for nitrous oxide would be on the far lower end of a scale, considering its obvious lack of harmful effects relative to other criminalised substances or so-called ‘legal highs’ at which the PSA was directed. The Court did however concede that its remarks should not be treated as setting out any guidance on how to sentence in such cases. Nevertheless, it is submitted that the Court has set out some crucial points in this case which cannot be ignored in future nitrous oxide sentencing exercises, and certainly until such a time as more formal guidelines are implemented.

In relation to the MDMA, though the sentencing range started at three and a half years’ custody, the Court highlighted the offender’s exceptional mitigation, including his age, but in particular, the fact that he – someone who was dependent on drugs – had since managed to free himself of that dependency. The Court emphasised that this should be given due weight and more generally regarded as powerful mitigation.

***R. v Ajayi (Richard)*** **[2017] EWCA Crim 1011 (CA (Crim Div))**

The Court considered the increasing prevalence of “cuckooing”, which involves organised retail drug dealers from large metropolitan centres travelling to a smaller provincial community to sell drugs, assisted by using local premises of known users from which they operate.

In cuckooing operations, large supplies of drugs are not kept locally but restocked through supply runs from the metropolitan centre. Vulnerable individuals are often exploited to assist with the accommodation and supply of the drugs. If the offence clearly establishes a cuckooing operation, the court should – through careful examination – reflect this in sentencing, either in (i) the assessment of the *role* of the offender, or (ii) by treating it as an aggravating factor at step two of the applicable drugs sentencing guideline. It may also mitigate the position of a vulnerable recruit who has clearly been exploited.

*Leading role:* The Court stated that those organising such an operation from major cities appear to fall clearly within a leading role. It may be that a person who operates as a local

manager or enforcer will also fall within a leading role. In this regard, sentencing judges should consider carefully factors consistent with a leading role such as expectation of substantial financial gain, substantial links to, and influence on, others in the chain, and directing or organising buying and selling on a commercial scale.

*Significant role*: Those who do not fall within a leading role, but who are involved in the process of cuckooing will *ordinarily* fall into a significant role. Where others are involved in the operation by pressure, influence, intimidation or reward, this should be given particular weight in the assessment of culpability and in determining whether a move upward from the starting point is appropriate.

*L*ower *role*: Those who work within such an operation and seek to have a lesser role ascribed to them should expect those claims to be examined with care.

***Regina v Benny Planken* [2017] EWCA Crim 1807**

The Appellant was sentenced as part of a large-scale drugs conspiracy to import 2,426 kilogrammes of drugs, made up of heroin, cocaine, MDMA, amphetamine, and cannabis. The Court attributed a range of roles within the conspiracy, with B, the head of the operation receiving a sentence of 36 years' imprisonment. This included 9 years' imprisonment for the importation of the cannabis.

The Appellant was only convicted in relation to the cannabis and was sentenced to 11 years' imprisonment for playing a relatively limited role in the offence. . He appealed, arguing, inter alia, that there was an unjust disparity between his sentence and the sentence passed on B. Dismissing the appeal, the Court pointed out that B had pleaded guilty to this count, and, more importantly, the sentences which the judge passed on B for this and other class B drugs counts were not the lead sentences and they were 'subsumed' in the longer sentence which the judge passed on B for the importation of class A drugs.

The Court emphasised that where sentences fell to be imposed on a number of co-conspirators – particularly in large-scale drugs conspiracies – all of whom had different roles and not all of whom are to be sentenced for the same counts, '*it is very dangerous for this court to intervene in a careful calibration of sentences as between counts and as between*

*co-conspirators*.' That is particularly the case when the sentencing judge has presided over a long trial. Moreover, it would be very dangerous for the appellate court to draw inferences from the length of sentences that are passed by the sentencing judges on counts that are *not the lead counts*.

**A. Regina v Amour Shebani [2017] EWCA Crim 750**

The Appellant was convicted of two counts of possessing a controlled Class A drug with intent to supply. The only evidence against him was two prints found on some of the outer black plastic packaging containing small wraps of cocaine and heroin. These were seized three months prior to the Appellant's arrest, having been found with another offender, O. It was accepted that the appellant and O were known to each other, and that they had visited each other's homes prior to O's arrest.

The Appellant made a submission of no case to answer on the basis that the jury could not reject the possibility that his prints had been left on the bag in circumstances not relating to the drugs found. The judge was satisfied there was a case to answer, and that a jury were entitled to conclude that the explanation for the presence of the Appellant's fingerprints on wrapping was that he had participated in the wrapping of the drugs, *if there was no other reasonable explanation for the presence of his fingerprints*.

The Court of Appeal dismissed the appeal, and noted that the finding of a fingerprint at the scene of a crime may or may not call for the owner to give an explanation. The test must be: "can one think of alternative explanations, applying common sense to all the surrounding circumstances?" In this case, there was an 'elaborate complex construction' of packaging containing 400 wraps of Class A drugs with a high value. There were three pieces of bin liner packaging as the outer casing, two of which carried the Appellant's fingerprints. It was fair to expect the defendant to put forward an alternative explanation in such circumstances.