5. Guilty plea – *R. v Nolan* [2022] EWCA Crim 726, [2022] 2 Cr.App.R.(S.) 45, CA, 7 April 2022.

In circumstances where the appellant had an established history of mental ill-health and where mental illness was a relevant feature of the case, in part because of his behaviour at the time of the offences and the comments he made in interview, it was unreasonable to expect him to indicate his plea before the forensic psychiatrist had advised that he was fit to plead. His solicitors and counsel were not in a position to advise him properly before that time and they were not bound to accept the assessment of the appellant's mental condition made by a senior mental health nurse immediately prior to the appellant committing one of the offences with which he was charged (of arson being reckless as to whether life was endangered), particularly given that she was a prosecution witness of fact. It was clear that the appellant had pleaded guilty at the first opportunity after the forensic psychiatrist's report was received. The instant case was therefore one to which the section F exception in the guideline on reduction in sentence for a guilty plea (CLW/17/10/10) applied and the appellant had been entitled to a sentence reduction of one-third.

***Archbold* 2023 reference**: Sentencing Council's guideline on reduction in sentence for a guilty plea, Appendix S-29.

COMMENT:

The term "fitness to plead" is something of a misnomer since it encompasses both the ability to enter a plea to the indictment and the ability to stand trial. The test remains essentially that laid down in *R. v Pritchard* (1836) Car. & P. 303, Court of King's Bench, as clarified in subsequent appellate judgments (see *R. v M (John)* [2003] EWCA Crim 3452, unreported, 14 November 2003, CA). Accordingly, a defendant will be unfit to plead if he is unable to do one or more of the following: understand the charges; decide whether to plead guilty; exercise his right to challenge jurors; instruct his legal representatives; follow the course of the proceedings; and give evidence.

As the Law Commission noted in its 2016 report (*Unfitness to Plead*, Law Com. No. 364, para. 3.8), the *Pritchard* criteria focus on cognitive deficiency and primarily the ability to understand proceedings, rather than decision-making capacity. There is no consideration, for example, of a defendant's ability to retain, use and weigh information in order to make necessary decisions about the conduct of his case. Fitness to plead is, therefore, a low threshold. A defendant may be fit to plead even where delusions mean that he is unable to act in his own best interests (*R. v Robertson* [1968] 1 W.L.R. 1767, CA) or where a mental disorder prevents him from engaging in rational decision-making processes (see, e.g., *R. v Diamond* [2008] EWCA Crim 923, unreported, 29 April 2008, CA; *R. v Moyle*, CLW/09/28/4, [2008] EWCA Crim 3059, [2009] Crim.L.R. 586, CA).

Although there is no presumption of fitness (unlike the common law presumption of sanity and the presumption of capacity in the *Mental Capacity Act* 2005 (CLW/05/15/16), s.1), a court is entitled to proceed on the assumption that a defendant is fit to plead unless and until the contrary is established in accordance with the requirements of section 4 of the *Criminal Procedure (Insanity) Act* 1964 (*R. v Ghulam*, CLW/09/39/2, [2009] EWCA Crim 2285,

[2010] 1 W.L.R. 891, CA). However, the instant case clarifies that, where a defendant has a history of mental disorder and his legal representatives have concerns about his ability to meet any of the *Pritchard* criteria, it will usually be unreasonable to expect him to indicate a plea before a psychiatric report has been obtained. The appellant (having started a fire outside a McDonald's a few days earlier, for which he had been charged with simple arson and bailed) had attended hospital claiming to have taken an overdose. After a blood test revealed no evidence of this, a senior mental health nurse carried out an assessment and concluded that the appellant "had capacity and was aware of his behaviour" and was "[not] suffering from any type of mental health issue". The appellant subsequently started a "small fire" when the nurse left the room to call him a taxi. Although the judge appears to have decided that the appellant could be expected to enter a plea at his first appearance on the basis of the nurse's assessment of the appellant's capacity the previous day, it is submitted that this approach was misconceived for a number of reasons.

First, capacity is not an abstract concept; it is decision-specific. A defendant who has capacity to make a particular decision (e.g. a decision about medical treatment) will not necessarily be able to understand all the matters referred to in the *Pritchard* criteria, which fall to be assessed in the context of the particular case having regard to the nature and complexity of the evidence and the issues (*R. v Marcantonio*; *R. v Chitolie*, CLW/16/12/2, [2016] EWCA Crim 14, [2016] 2 Cr.App.R. 9, CA). Here, for example, application of the *Pritchard* test would require consideration of the defendant's ability to understand the concept of recklessness which, in a criminal law context, does not bear its ordinary meaning (see below). Secondly, capacity fluctuates – sometimes rapidly – and it is not inconceivable that the abilities of a defendant with a history of mental disorder might deteriorate given a period of time in custody and a night in a police cell. Thirdly, the nurse was a witness to the lead index offence of arson being reckless as to whether life was endangered, and therefore lacked the independence required of a witness proffering an opinion on a matter that is properly the subject of expertise.

The Court of Appeal concluded (at [21]) that it had been "entirely appropriate" for the appellant's representatives to investigate the issue of fitness to plead before advising him to indicate a plea given his history of mental ill-health, behaviour at the time of the offence and comments in interview. The judgment also acknowledges (at [21]) that there was a need to seek independent psychiatric opinion as to the appellant's state of mind. Although he admitted in interview "that his actions in starting the fire recklessly endangered lives", he was not legally represented at that time and it is not clear whether he understood the concept of recklessness. The appellant had earlier stated that he had started the fire to "piss off" the nurse who was "doing his head in", claimed that he was "high on Librium" at the time and talked of trying to kill himself. Where a defendant's mental disorder means that he did not consider the possibility that his actions might endanger life, for example, because he was focussed on harming himself (see, e.g., *R. v Cooper* [2004] EWCA Crim 1382, unreported, 6 May 2004, CA), he will not be reckless in the subjective sense required by law (*R. v G and another*, CLW/03/37/7, [2003] UKHL 50, [2004] 1 A.C. 1034, HL). In addition to investigating the issue of fitness to plead, the appellant's representatives were also right to have endeavoured to ascertain the extent to which his mental disorder affected his cognitive processes at the time of the alleged offence.

One of the many problems the Law Commission identified with this area of law is that a defendant who admits an offence and has sufficient understanding to enter a guilty plea may nevertheless be the subject of a finding of unfitness. For example, a defendant who is capable of understanding the charges and deciding to plead guilty will be deemed unfit to plead if he would be incapable of following the course of a criminal trial. The Law Commission thought that such a defendant could not enter a guilty plea and a s.4A hearing (i.e. a "trial of the facts") would have to take place (see Law Com. No. 364, paras 1.44 and 3.138 *et seq*). In *Marcantonio* (at [8]), the Court of Appeal questioned the desirability of denying a defendant the option of pleading guilty in this situation but did not decide the point. Treating capacity to plead guilty as a separate, first-stage test would respect the legal autonomy of vulnerable defendants, enable the court to impose a sentence where appropriate and enhance victim confidence in the system. In addition, a first-instance court's Liaison and Diversion Service (if it has one) is more likely to be able to assess capacity to plead guilty as a discrete issue. This could reduce unnecessary delays where an otherwise unfit defendant wishes to enter a guilty plea at his first appearance. Further consideration of this issue by the appellate courts would be welcome should an appropriate case arise.