Plaku, Plaku, Bourdon and the Queen and in the matter of a Reference by Her Majesty's Attorney General pursuant to Section 36 of the Criminal Justice Act 1988 and Benjamin Smith – [2021] EWCA Crim 568 (23rd of April 2021) (75 paragraphs)

This was a really useful read in which the members of the Court of Appeal considered the position regarding credit for a guilty plea. Plaku and Plaku were co-defendants in the one case. Bourdon was a case on its own, as was the reference in the Benjamin Smith case. They were all grouped together for consideration by the Court of Appeal in order that the Court could pronounce and give further guidance in the thorny area of credit.

As you know, when sentencing an offender who has pleaded guilty, **Section 73 of the Sentencing Code created by the Sentencing Act 2020 (formerly Section 144 of the Criminal Justice Act 2003)** requires the Court to take into account

(a) the stage in the proceedings for the offence at which the offender indicated the intention to plead guilty, and
(b) the circumstances in which the indication was given

The Sentencing Council's definitive guideline on 'Reduction in sentence for a guilty plea' sets out the principles a Court should follow in reducing the punitive aspects of the sentence by reason of a guilty plea. - (please note that credit is only relevant for the punitive aspects of the sentence and is not available at all when dealing with ancillary orders – penalty points, disqualifications and the rest)

The argument advanced on behalf of Plaku and Plaku was that they should have had credit in the order of 33% (third) instead of the 25% credit allowed by the Judge.

Bourdon complained that he should have received credit of 30% rather than 25%.

Smith received an Extended Determinate Sentence and Her Majesty's Solicitor General believed the sentence to have been unduly lenient, in part because credit of one third was given when the offender was not entitled to it, and applied, pursuant to **Section 36 of the Criminal Justice Act 1988** for leave to refer the case to the Court so that the sentencing could be reviewed.

The guideline published by the sentencing Council, which has been in effect since 1st June 2017, makes clear that its purpose is to encourage those who are going to plead guilty to do so as early in the Court process as possible.

The reasons why that encouragement is given are set out in **Section B** of the guideline in the following 'Key Principles':

'Although a guilty person is entitled not to admit the offence and to put the prosecution to proof of its case, an acceptance of guilt:

1 – Normally reduces the impact of the crime upon victims;

2 – Saves victims and witnesses from having to testify; and

3 – Is in the public interest in that it saves public time and money on investigations and trials.

A guilty plea produces greater benefits the earlier the plea is indicated. In order to maximise the above benefits and to provide an incentive to those who are guilty to indicate a guilty

plea as early as possible, this guideline makes a clear distinction between a reduction in the sentence available at the first stage of the proceedings and a reduction in the sentence available at a later stage of the proceedings.

The purpose of reducing the sentence for a guilty plea is to yield the benefits described above. **The guilty plea should be considered by the Court to be independent of the offender's personal mitigation'**

It appears, from the submissions made in the present cases, that there is still some misunderstanding of the guideline.

The guideline does make it plain that it is the indication of a guilty plea at the first stage of the proceedings or the entering of a guilty plea at the first stage of the proceedings which secures, without argument, the full credit of one third.

A guilty plea may well be entered at the first stage of the proceedings in the Magistrates' Court where the offence is summary-only or either-way.

Different considerations apply in the Magistrates' Court where the offence is purely indictable as no plea may be formally entered but the **Criminal Procedure Rules 2020 (see also the amendments to these Rules which came about in February and April 2021) – rule 9.7 (5)** do clearly provide for the offender to be given an opportunity **to indicate a guilty plea** at the Magistrates' Court stage, albeit no formal plea of guilty is taken prior to arraignment at the Crown Court.

An early indication of guilt at the first available opportunity on an indictable-only offence followed by the entering of a guilty plea at the PTPH hearing in the Crown Court secures, without argument, the full credit of one third.

Credit thereafter may be 25% (unless the lawyer at the PTPH hearing can persuade the Judge that there were particular circumstances which significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done – the Judge should distinguish cases in which it is necessary to receive advice and/or have sight of the evidence in order to determine whether the defendant is in fact and law guilty of the offence(s) charged and cases in which a defendant merely delays guilty plea(s) in order to assess the strength of the prosecution evidence or the prospects of conviction or acquittal i.e. the old tactical plea!) on a sliding scale down to 10% if the guilty plea is entered on the day of the trial or perhaps even less (less than10% and possibly even 0%) where the change of plea occurs during the currency of the trial.

A defendant is entitled to plead not guilty and hope that his representatives will be able to persuade the prosecution to accept a guilty plea to a different less serious offence but if the admissibility issue is resolved against him, or the prosecution decline to accept any lesser plea, and the defendant then changes his plea, he cannot expect to be given credit for his guilty plea as if it had been entered at a much earlier stage of the proceedings. In such

circumstances, the benefits of a guilty plea, identified earlier, have not accrued or have accrued to only a limited extent.

The guilty plea or the indication of a guilty plea must be **unequivocal!**

An indication of a 'likely' plea or 'probable' guilty plea is not enough as, by definition, such an indication keeps open the possibility of a not guilty plea and thus negates the advantages referred to in the 'Key Principles' Section of the guideline. Words such as 'likely' or 'probable', or anything else which places a qualification on the intended plea, should therefore be avoided.

The Court then reviewed the recent case-law in this area in which various qualifications had been put such that it was not **unequivocal.**

R v Davids [2019] EWCA Crim 553

Rv Khan [2019] EWCA Crim 1752

R v Yasin [2019] EWCA Crim 1729

Conversely, in the case of one of the defendants in **R v Bailey and others [2020] EWCA Crim 1719, the Court (at paragraph 62)**, held that full credit should have been given where the defendant's representative had completed the BCM form in terms which indicated an intention to plead guilty to an indictable-only offence, notwithstanding that a Court officer had subsequently made a potentially inconsistent entry on another part of the form.

In the case of **R v Handley [2020] EWCA Crim 3**61 the defendant's representative had written 'G indication' in the relevant box on the BCM form. The Court held that he had given an unequivocal indication that he would plead guilty and was entitled to full credit.

R v Hodgin [2020] EWCA Crim 1388 - An indication only that he is 'likely to plead guilty' is not enough.

In **Hodgin** the Court observed that the decision in **R v Hewison [2019] EWCA Crim 1278**, where full credit was allowed in circumstances which might appear to contradict that principle, turned on the wording of the form used by the Magistrates' Court in that case, which was an unauthorised version in terms which differed from those of the correct BCM form.

The revised version of the BCM form was drafted after the decision in **Hodgin**. It came into force on the 2nd November 2020.

The Section which the parties are now required to complete before the hearing includes a box requiring the following information in relation to each charge:

Pleas (either-way) or **indicated pleas** (indictable-only) or **alternatives** offered

Warning: this information may affect credit for plea

The Court considered submissions as to whether a reduction 'of the order of one third' or of somewhere between one third and one quarter should be made where a defendant does not

indicate a guilty plea at the first stage of the proceedings but communicates an intention to plead guilty before he next appears in Court.

The Court said that attention had been drawn to the clear distinction which the guideline deliberately draws between the first stage of the proceedings and any later stage.

Such circumstances in which full credit should be given in the above scenario will be rare

The Court also considered the position where a defendant faces more than one charge and does not at the first stage of proceedings give an unequivocal indication of an intention to plead guilty to all the charges. The circumstances of such cases will vary widely. In some cases it will be appropriate to view the charges separately and give the differing levels of credit which are appropriate in respect of each individually. In others it may be better to take a view across the charges as a whole and make the same reduction in each case. We do not think any guidance can be given which could be of general application (paragraph 28).

The guideline, at Section D, makes clear that the maximum level of reduction for a guilty plea is one third. Matters such as early admissions and cooperation with the police investigation might enable a defendant to put forward mitigation which justifies some reduction in the sentence which would otherwise be appropriate before reduction for a guilty plea. So too might the action of a defendant in being the first of a number of co-accused to break ranks and plead guilty: see **R v Hodinott [2019] EWCA Crim 1642** (at paragraph 29) and **Bailey and others** (at paragraph 46). In the same way, a mitigating factor might be found if the defendant pleads guilty when his co-accused are contesting issues which might be resolved in a way favourable to him. But, we emphasise, mitigating factors of this or a similar nature must be considered on a fact-specific basis **BEFORE** the appropriate reduction for a guilty plea is determined, and **CANNOT** lead to an **INCREASE** in the level of that reduction.

In the case of **R v Price [2018] EWCA 1784** the defendant had made admissions when interviewed by the police but at the Magistrates' Court indicated a not guilty plea. He pleaded guilty at the PTPH in the Crown Court and was allowed a 25% reduction. On appeal he submitted that in view of the admissions made in the interview he should have received credit of one third. His appeal was dismissed: the plea had not been indicated at the first stage of proceedings; his admissions in interview could be taken into account as part of his personal mitigation, but did not affect the level of reduction.

Finally the Court considered the position of the defendant who had not indicated a guilty plea at the first stage of the proceedings and who asked to postpone arraignment to a later hearing. The Court said that if there was good reason for arraignment to be postponed, the Judge might be persuaded, as an exercise of discretion on the application of the sliding scale, to preserve credit of one-quarter until the next hearing.

Dealing now with the cases themselves:

Plaku and Plaku - there was a lack of clarity as to precisely what happened in the Magistrates' Court; but even if it could be accepted that no oral enquiry was made as to the intended pleas, despite the duty under **rule 9.7 (5),** it seems clear that BCM forms must

have been completed. It is not suggested that either appellant indicated a guilty plea on his form. Nor is it suggested that any formal written indication of a guilty plea was given by either appellant in advance of the PTPH. In those circumstances, the Judge was correct to reduce their sentence by one-quarter.

Bourdon – the appellant made an appearance before the Magistrates' Court. The Court record shows that he either indicated pleas of not guilty or gave no indication of plea. The BCM form, uploaded to the DCS, stated 'Guilty pleas anticipated to most of these charges at PTPH'. The defendant pleaded guilty at the PTPH. The Judge allowed 25% credit for the guilty pleas which were entered at the PTPH. This appellant failed to give an unequivocal indication of guilty pleas at the first stage of the proceedings. On the contrary, he chose to keep his options open in the hope that he would ultimately be able to plead to fewer offences. The Judge was therefore correct to limit the reduction to one quarter. He could not properly have made any greater reduction.

Smith – at the first appearance before the Magistrates' Court the 'indicated pleas' Section of the BCM form had been completed with the words 'potential indicated plea'. The 'real issues' in the case Section had been completed with the words 'none known – possible basis of plea to be mooted'. The Court record stated 'Plea of not guilty or not indicated'. At a PTPH in the Crown Court the defendant pleaded guilty to all charges. No basis of plea was put forward.

It is not entirely clear but in the exchange between Counsel and the Recorder the Recorder seemed to take the view that because the offences were indictable-only the defendant had not really had the opportunity to indicate pleas and had pleaded guilty at the first opportunity and was therefore entitled to a full one third.

The Court saying this at paragraph 74 the judgement:

'With respect to the Recorder, he was led by Counsel and fell into clear error of principle in allowing full credit for the guilty pleas. Smith could not have entered a guilty plea in the Magistrates' Court, but he could have given an **unequivocal indication of his intention to do so.** The simple fact is that at that hearing Smith **did not give an unequivocal indication of an intention to plead guilty.** At most an oral indication was given that he was 'likely' to plead guilty. As we have made clear earlier in this judgement, **a qualified indication of that kind is not sufficient to attract full credit.** Smith's guilty pleas at the PTPH could not attract more than a one-quarter reduction. We cannot accept the submission that the Recorder is entitled as an exercise of discretion to make a one-third reduction. The making of such a reduction was therefore wrong in principle. The Court did not however consider that that error of principle caused the sentence to be unduly lenient. They did grant leave to refer but they made no order on the reference.