What happens if a defendant, having pleaded guilty, is later discovered to be unfit?

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The test for fitness to plead was first set out in the case of *R v Pritchard* [1836] 7 Car. &P. 303. The explanation of the test to a jury by HHJ Roberts QC was approved by the Court of Appeal in *R v John (M)* [2003] EWCA Crime 3452. A person is unfit to plead if he is unable to do any one of the following:-

i. To understand the charges
ii. To decide whether to plead guilty or not
iii. To exercise his right to challenge jurors
iv. To follow the course of proceedings
v. To give evidence in his own defence
vi. To instruct his legal representatives

R v Ismael [2024] EWCA Crim 301

1. The most recent case of R v *Ismael* [2024] EWCA Crim 301 deals with the situation where a guilty plea was wrongly entered by a defendant later found to be unfit.

2. Here the Court of Appeal found that the defendant could not fulfil any of the Pritchard criteria, including understanding the difference between guilty/not guilty with all the consequences each entails [63].

3. The appellant in *Ismael* [2024] EWCA Crim 301 relied on fresh evidence from two psychiatric reports prepared by two doctors. The Court emphasised that psychiatric reports should have been obtained long before sentence and were not the responsibility of the appellant. This perhaps outlines the need for lawyers to be acutely aware of any concerns they have about defendant's fitness to plead and to take the necessary steps as soon as possible.

> ‘We are quite sure that psychiatric reports directed to the question of fitness to plead could and should have been obtained by the appellant's lawyers long before sentence. That they were not was not the responsibility of the appellant. The reports provide the foundation for a successful appeal against conviction, and we admit them into evidence. We have considered them along with all the documents to which we have referred.’ [62].

4. Both parties in this case submitted that s6 Substitution of finding of insanity or findings of unfitness to plead etc was open for the Court to apply in this case. [67].

5. Section 6 of the Criminal Appeal Act 1968 reads:

> Substitution of finding of insanity or findings of unfitness to plead etc
>
> (1) This section applies where, on an appeal against conviction, the Court of Appeal, on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved, are of opinion—
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> > (a) that the proper verdict would have been one of not guilty by reason of insanity; or
> > (b) that the case is not one where there should have been a verdict of acquittal, but there should have been findings that the accused was under a disability and that he did the act or made the omission charged against him.
>
> (2) The Court of Appeal shall make in respect of the accused—
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> > (a) a hospital order (with or without a restriction order);
> > (b) a supervision order; or
> > (c) an order for his absolute discharge.

6. They did not accept that s6 was an approach open to the Court. Stating that in most of the cases in which they were referred, ‘this Court was in a position to make the finding that the case was not one where there should have been a verdict of acquittal, but there should have been findings that the accused was under a disability and *that he did the act or made the omission charged against him* (our emphasis) because in each case a jury had heard the evidence and had convicted the appellant. Where the court subsequently found that he had been unfit to plead it was entitled to rely on the findings of the jury in support of

their finding that the case was not one where there should have been a verdict of acquittal but that he did the act or made the omissions charged against him.' [67].

Discussion

7. It is perhaps significant that in *Ismael* EWCA Crim 301 the Court speculated whether a distinction should be drawn between the ability to follow proceedings at trial and the ability to make a decision about pleading guilty [13] and mentioned another case where the Court had asked the same question: *R v Marcantonio* [2016] EWCA Crim 14 [13].

8. This state of affairs creates some uncertainty. If action needs taking, the route is to apply for the defendant's plea to be vacated. The test applied by the court would be whether it would be '*unjust for the guilty plea to remain unchanged*' (Crim PR 25.5(3)(a)).

9. Criminal Procedural Rule 25.5 states:

> **25.5.**—(1) This rule applies where a party wants the court to vacate a guilty plea.
> (2) Such a party must—
> (a)apply in writing—
> (i)as soon as practicable after becoming aware of the grounds for doing so, and
> (ii)in any event, before the final disposal of the case, by sentence or otherwise; and
> (b)serve the application on—
> (i)the court officer, and
> (ii)the prosecutor.
> (3) Unless the court otherwise directs, the application must—
> (a)explain why it would be unjust for the guilty plea to remain unchanged;
> (b)indicate what, if any, evidence the applicant wishes to call;
> (c)identify any proposed witness; and
> (d)indicate whether legal professional privilege is waived, specifying any material name and date.

10. Unlike *Ismael*, where all the Pritchard criteria were met - there may be legal uncertainty where the defendant is fit to 'plead' but not to stand trial.

What points emerge for practitioners?

11. If the defendant fails all of the Pritchard criteria, it's straightforward. He is unfit to plead and stand trial.

12. If it becomes apparent before sentencing that a defendant is unfit having already entering a guilty plea, then the course is to apply to vacate the guilty plea/s.

13. But what happens if the defendant only fails some of the Pritchard criteria, given the musings in the case law of *Ismael* and *Marcantonio*? Simply put, we don't know. Of course, that ambiguity only applies if the defendant pleaded guilty, rather than being convicted after trial - otherwise there is no relevance in the defendant being fit to 'plead' but not to stand trial.

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