

ENGLAND AND WALES / JUDGMENT

Frimpong v Crown Prosecution Service

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Neutral Citation Number: [2015] EWCA Crim 1933 IN THE COURT OF APPEAL (CRIMINAL DIVISION) ON APPEAL FROM Inner London Crown Court HHJ Karu T20157162 Case No: 201502658 A2 Royal Courts of Justice Strand, London, WC2A 2LL Date: 16/12/2015 Before : THE RIGHT HONOURABLE LORD JUSTICE FULFORD THE HONOURABLE MR JUSTICE FLAUX and THE HONOURABLE MRS JUSTICE THIRLWALL

- ----- Between : Steven Frimpong
- and - Crown Prosecution Service
- and – Secretary of State For Justice
- -----
- ----- Appellant Respondent Intervener Leigh Webber (instructed by GT Stewart Solicitors) for the Appellant Ailsa Williamson (instructed by the CPS) for the Respondent Akhlaq Choudhury QC (instructed by the Ministry of Justice) as Intervener
Hearing date: 18 September
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Judgment

Mrs Justice Thirlwall:

1. This application for permission to appeal against sentence is directed solely to the imposition of the Criminal Courts Charge. The applicant, Stephen Frimpong, is a foreign national. On 14 April 2015 he attempted to open an account in a branch of the Halifax Bank. He used a false name and a false British passport. He was arrested and charged with a single count of possessing false identity documents with improper intention contrary to s.4(1) and (2) of the Identity Documents Act 2010.
2. On 15 April 2015 the applicant appeared before the Camberwell Green Magistrates' Court. His case was sent to the Crown Court. He was remanded in custody. Inquiries revealed that he was in the UK illegally.
3. On 29 April 2015 before HHJ Karu at the Inner London Crown Court the applicant pleaded guilty to the offence outlined above. He was sentenced to 6 months' imprisonment. He was ordered to pay the statutory surcharge (often referred to as the victim surcharge) in the sum

of £80 and to pay the Criminal Courts Charge in the sum of £900. Mr Webber, solicitor advocate for Mr Frimpong informed the court of the practice of some District Judges (Magistrates Courts) to deem the charge served by way of a period of imprisonment and invited the judge to take the same course. HHJ Karu imposed the £900 charge and directed that it be “deemed to have been served by way of his sentence of imprisonment”. She then added “but that is something that I am going to have to look into”. She did so and on 1 May the sentence was reopened under s.155 Powers of Criminal Courts (Sentencing) Act 2000. It was then adjourned for further argument to 4 June 2015.

4. At the hearing in June the judge received a detailed skeleton argument from Mr Webber. Prosecuting counsel made some observations. Having heard from both advocates the judge ordered that the defendant pay the Criminal Courts Charge in the sum of £900. That order is the focus of this application which has been referred directly to the full court by the Registrar. We give leave.
5. In addition to the comprehensive skeleton which was before the judge on 4 June 2015 we have also received further written submissions from Mr Webber. The Crown served a Respondent’s notice, an amended Respondent’s Notice and, in recent days, a further amended Respondent’s Notice. We gave permission to the Ministry of Justice (MOJ) to intervene and received written and oral submissions from Mr Choudhury QC.
6. We have read the Notes for Guidance on the Criminal Courts Charge provided to DJ (Magistrates’ Court) and lay magistrates by the Justices’ Clerks Association. We have also read the discussion on the statutory (victim) surcharge in the newsletters of the Judicial College in December 2013 and January 2014.
7. The Crown provided lengthy extracts from Hansard with a request that we should read them to determine the will of Parliament. The circumstances in which parliamentary materials may be considered by the court are narrow and well understood (see the principles set out in *Pepper v Hart* [1993] AC 598). There is no ambiguity in the statutes here. The extracts from Hansard are inadmissible. We say no more about them. The Criminal Courts Charge
8. The Criminal Courts Charge was brought into effect in respect of offences committed on or after 13 April 2015. It is the result of amendments to the Prosecution of Offences Act 1985 effected by the Criminal Justice and Courts Act 2015 which came into force on 13 April 2015. We set out the relevant provisions below: 21A Criminal Courts Charge
 - (1) A court mentioned in section 21B must, at the times listed there, order a person convicted of an offence to pay a charge in respect of relevant court costs, subject to—
 - (a) subsections (2) and (3), and
 - (b) section 21C.
 - (2) An order must not be made if the person was under 18 when the offence was committed.
 - (3) An order must not be made in a case or class of case prescribed by the Lord Chancellor by regulations.

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- (4) A court must not take into account the duty under subsection (1) or any order under this section when dealing with a person (other than under this section) for an offence or for a failure to comply with a requirement mentioned in section 21B.
- (5) In this section— “court costs” means costs of providing the judiciary and the rest of the system of courts, but does not include defence or prosecution costs; “relevant court costs” means court costs incurred in connection with criminal proceedings or proceedings for a failure to comply with a requirement mentioned in section 21B, but does not include costs of providing the Supreme Court or judges of that Court. 21B Criminal Courts Charge: courts and times
- (1) A magistrates' court must make an order under section 21A at the following times—
- (a) when dealing with the person for the offence;
 - (b) when dealing with the person under Schedule 8 to the Criminal Justice Act 2003 for failure to comply with any of the requirements of a community order;
 - (c) when dealing with the person under Schedule 12 to the Criminal Justice Act 2003 for failure to comply with any of the community requirements of a suspended sentence order;
 - (d) when dealing with the person under section 256AC of the Criminal Justice Act 2003 for failure to comply with a supervision requirement imposed under section 256AA of that Act.
- (2) The Crown Court must make an order under section 21A at the following times—
- (a) when dealing with the person for the offence;
 - (b) when dealing with the person under Schedule 8 to the Criminal Justice Act 2003 for failure to comply with any of the requirements of a community order;
 - (c) when dealing with the person under Schedule 12 to the Criminal Justice Act 2003 for failure to comply with any of the community requirements of a suspended sentence order;
 - (d) when dismissing an appeal by the person against conviction or sentence for the offence.
- (3) The Court of Appeal must make an order under section 21A at the following times—
- (a) when dismissing an appeal under Part 1 of the Criminal Appeal Act 1968 against the person's conviction or sentence for the offence;
 - (b) when dismissing an application for leave to bring such an appeal. 21C Amount of Criminal Courts Charge
- (1) A charge ordered to be paid under section 21A must be of an amount specified by the Lord Chancellor by regulations.

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- (2) When specifying amounts under this section, the Lord Chancellor must seek to secure that an amount specified in respect of a class of case does not exceed the relevant court costs reasonably attributable to a case of that class.
- (3) In this section “relevant court costs” has the same meaning as in section 21A. 21D Interest on criminal courts charge ... 21E Power to remit Criminal Courts Charge
- (1) A magistrates' court may remit the whole or part of a charge ordered to be paid by a person under section 21A, subject to the restrictions in subsections (2) to (4).
- (2) It may remit the charge only if—
- (a) it is satisfied that the person has taken all reasonable steps to pay it, having regard to the person's personal circumstances, or
- (b) it is satisfied that collection and enforcement of the charge is impracticable.
- (3) It may not remit the charge at a time when the person is detained in prison.
- (4) It may not remit the charge unless each of following has expired—
- (a) a specified period beginning with the day on which an order under section 21A was last made in respect of the person;
- (b) a specified period beginning with the day on which the person was last convicted of an offence;
- (c) where relevant, a specified period beginning with the day on which the person was last released from prison.
9. The sums to be paid are set out in Schedule 1 to the Act which was introduced by the Prosecution of Offences Act 1985 (Criminal Courts Charge) Regulations 2015/796 (the Regulations). By section 21C(2) when specifying amounts under this section, the Lord Chancellor must seek to secure that an amount specified in respect of a class of case does not exceed the relevant court costs reasonably attributable to a case of that class. The specified sum payable by a person convicted in the Crown Court on his guilty plea is £900. The court has no discretion, either as to the imposition of the charge or the amount of the charge. It follows that the convicted person's ability to pay the charge is irrelevant. When passing sentence the court must ignore the liability to the charge (See section 21A(4)). Thus, whilst the court is required, when imposing a fine, to consider the means of a defendant, it must ignore his liability to pay the statutory charge. Time to Pay
10. We were told by counsel for the Crown that there is some consternation amongst practitioners because there is no power in the Crown Court to give time to pay the Criminal Courts Charge. She invited us to give some guidance. In fact the position is governed by s.141 of the Powers of the Criminal Courts (Sentencing) Act 2000, as amended, which reads: s141 Power of Crown Court to allow time for payment, or payment by instalments, of costs and compensation. Where the Crown Court makes any such order as is mentioned in Part I

of Schedule 9 to the Administration of Justice Act 1970 (orders against accused for the payment of costs or compensation), the court may—

- (a) allow time for the payment of the sum due under the order;
 - (b) direct payment of that sum by instalments of such amounts and on such dates as the court may specify. The Criminal Courts Charge is mentioned in Part I of Schedule 9. It follows that there is power in the Crown Court when making the order to allow time for payment or payment by instalments. As a matter of fact HHJ Karu ordered that the charge be paid by 20 July or the day after his release from prison. Assuming it has not been paid the appellant is now in default.
11. There is no power in the Crown Court to impose a sentence of imprisonment in default of payment. Section 139 of the Powers of Criminal Courts (Sentencing) Act 2000 has not been amended to extend it to either the Criminal Courts Charge or the statutory (victim) surcharge.
12. There is no power in the Crown Court to remit the charge. That power rests only in the Magistrates' Court. The provisions as to remittal (see section 21E) make it plain that those who do not pay the charge before completing a prison sentence may not seek to have the charge remitted until a specified period after completing the sentence. The appellant's case
13. Mr Webber has addressed us with eloquence and enthusiasm. He accepts, as he has throughout, that HHJ Karu was bound to impose the Criminal Courts Charge in the sum of £900. This was a conviction in the Crown Court on a guilty plea. It is the appellant's case that under s.66 of the Courts Act, HHJ Karu, as a circuit judge, was entitled to exercise all the powers of a District Judge (Magistrates' Courts) (DJ(MC)). She was entitled to use the enforcement mechanisms contained in the Magistrates' Court Act 1980. This includes, he submits, the power to issue a warrant of commitment and also the power to detain a defendant in the court-house instead of committal to prison. Had the judge correctly understood her powers, she would have made an order by which the Criminal Courts Charge would be deemed paid by the term already served. That is what she did originally. She changed her mind on 4th June because she was in error as to the scope of her powers and as to the effect of the statutory provisions. Accordingly, we should overturn the order of 4th June and reinstate the original order. The alternative, as Mr Webber puts it, is this. The appellant, who has no means, will not pay the charge. At the end of his sentence he will either be released or further detained pending deportation. If he is deported the charge will not be paid. If he is not deported the charge will remain outstanding until a Magistrates' Court remits it or makes an order of commitment as a result of which it will be deemed paid. His suggested course reduces a prolonged process to a single event. It is quick, efficient and in accordance with the overriding objective as defined in the Criminal Procedure Rules. The question for this court is whether it is lawful.

14. A similar issue has arisen on at least two previous occasions in respect of the enforcement of the statutory (victim) surcharge. In *R v Holden* [2013] EWCA Crim 2017 a recorder imposed the surcharge. He then purported to exercise his powers under s.66 of the Courts Act 2003 and sat as a District Judge. He ordered that 1 day's imprisonment in default of the charge be deemed to be served. The charge was quashed for other reasons and the Court of Appeal further observed, correctly, that there was no power in s.139 of the Powers of Criminal Courts (Sentencing) Act 2000 to permit the fixing of a default term for a victim surcharge. A different constitution of this court had come to the same conclusion in *R v John Burke* [2013] EWCA Crim 1092. That remains the position in respect of both the victim surcharge and the Criminal Courts Charge.
15. Because it was not necessary to do so neither constitution of this court considered the scope of s.66 of the Courts Act 2003, nor did they consider other powers of enforcement available to the magistrates. We shall consider them in turn.
16. Section 66 of the Courts Act 2003 Judges having powers of District Judges (Magistrates' Courts)
 - (1) Every holder of a judicial office specified in subsection (2) has the powers of a justice of the peace who is a District Judge (Magistrates' Courts) in relation to—
 - (a) criminal causes and matters...
17. The office of Circuit Judge is specified in subsection (2). We accept for the purposes of this appeal that the question of the enforcement of the Criminal Courts charge is a criminal matter within subsection (1)(a).
18. Mr Choudhury describes the power in s.66 as “the ability of the Crown Court to reconstitute itself as a Magistrates’ Court”. That description is not entirely apt. Section 66 provides that a judicial office holder, here a circuit judge, may exercise the powers of a DJ (Magistrates’ Courts) in criminal causes and matters. The Crown Court does not become a Magistrates’ Court. Our reading of the section is consistent with the interpretation given by the Divisional Court in *R (W) v Crown Court at Leeds* [2011] EWHC 2326 at paragraph 29. The issue in that case was whether a judge of the Crown Court could remit to the Youth Court a young person who had been correctly committed for trial to the Crown Court with an adult. The adult had pleaded guilty and an application was made for the young person’s case to be sent back to the youth court. It was accepted that there was, on the face of it, no power in the Crown Court to do so. In upholding the decision of the Recorder of Leeds that a judge of the Crown Court had no power to act as invited, the Divisional Court considered a number of submissions made on behalf of the young person. Sir Anthony May P considered the submission that the judge could have used his powers under s.66. At paragraph 29 he said “The valiant attempt to use section 66 of the Courts Act 2003 to achieve what everyone considers is desirable in the present case, in my judgment does not work. Section 66 of the 2003 Act provides for judges holding certain offices, including circuit judges, to have the powers of a justice of the peace who is a district judge (magistrates’ court) in relation to

criminal causes or matters. The tentative suggestion is that it was open to Judge Collier QC to sit as a district judge...in order to revisit the issue of the mode of trial under section 24 of the Magistrates Court Act 1980 in order to achieve an appropriate result now that the adult had pleaded guilty.

29. This, in my judgment does not work for the simple reason that the matter is no longer in the magistrates court to be revisited. Judge Collier QC had to sit, or the individual judges of the Crown Court had to sit, and act as judges of the Crown Court....”
19. The explanatory notes to the section read: “Under this section a Crown Court judge will be able to make orders and to sentence in relation to cases normally reserved to magistrates’ courts when disposing of related cases in the Crown Court. As part of implementing the policy of greater flexibility in judicial deployment, this section provides that High Court judges, Circuit judges and Recorders should be able to sit as magistrates when exercising their criminal and family jurisdiction. The same is to apply to deputy High Court judges and deputy Circuit judges. It is not expected that extensive use would be made of the provision, but it would be possible for a Circuit judge in the Crown Court to deal with a summary offence without the case having to go back to a magistrates’ court. At present, certain summary offences can be included in an indictment. If the person is convicted on the indictment, the Crown Court may sentence him if he pleads guilty to the summary offence, but if he pleads not guilty the powers of the Crown Court cease. It is intended in such cases that the judge of the Crown Court should be able to deal with the summary offences then and there as a magistrate. He would follow magistrates’ courts’ procedure.”
20. In *X v R* [2012] EWCA Crim 1610 this court (sitting also as a Divisional Court) acknowledged that a practice had grown up in the Magistrates’ Courts whereby summary matters were adjourned, knowing that the offender was due to appear at a Crown Court on other matters and the Crown Court was invited to deal with the summary matters at the same time by the expedient of arranging for a circuit judge to sit as a DJ(MC). In *X* the Crown Court judge sat on his own in order to pass sentence on a youth in respect of matters on indictment and he sat on the same occasion with justices as a Youth Court in dealing with all other matters. The basis upon which this was done was not explored by the Divisional Court. We infer that the judge invoked his powers under section 66 for reasons of expediency and savings of time and cost and there was no prejudice to the offender. On the contrary he had the benefit of all matters being dealt with together. Whilst this use of section 66 is rather broader than envisaged by the explanatory note (which is not part of the statute in any event), it was not disapproved of by this court. Walker J pointed out that the approach requires a careful analysis of the powers of the judge in that situation. At paragraph 3 of the judgment he set out a number of steps that a Crown Court judge must take before adopting the course taken in that case. We agree.
21. We turn now to consider the nature of the powers of the District Judge (Magistrates’ Courts) that the judge was invited to exercise. Section 41 Administration of Justice Act 1970

22. The starting point is Section 41 of the Administration of Justice Act 1970 which provides that any sum mentioned in Schedule 9 of that Act which, as we have already said, now includes the Criminal Courts Charge, shall be treated for the purposes of collection and enforcement, as if it had been adjudged to be paid on conviction by a Magistrates' Court being "(a) where the order is made by a magistrates court, that court, and
- (b) in any other case, such magistrates' court as may be specified in the order". This permits a Magistrates' Court to use all the powers of collection and enforcement in the Magistrates' Court Act 1980 whether the charge was imposed by a Magistrates' Court or by the Crown Court.
23. In practice the general enforcement of court and victim surcharges, compensation and costs is now carried out in one of two ways, (1) the enforcing Magistrates Court is specified by the Crown Court or (2) it is not and enforcement is dealt with by the area enforcement office and the Defendant's local magistrates Court or the Court which sent the case to the Crown Court.
24. For the appellant to succeed in this case would first require HHJ Karu to have specified herself as a Magistrates' Court under Section 41(b). That is not permissible for two reasons: first, as a matter of construction, an individual DJ (MC) is not a Magistrates' Court. Second, such an approach would cut across the mechanism for collection and enforcement which Parliament has determined shall be a matter for the Magistrates' Courts.
25. In our judgment this would go well beyond anything permitted by section 66 and the appellant fails at this first hurdle. Even were the appellant able to overcome this problem there are further difficulties.
26. Mr Webber relies on s.76 of the Magistrates' Court Act 1980 which reads: 76 – Enforcement of sums adjudged to be paid
- (1) Subject to the following provisions of this Part of this Act, and to section 132 below ... 1 Where default is made in paying a sum adjudged to be paid by a conviction or order of a magistrates' court, the court may ...issue a warrant committing the defaulter to prison.
27. In this case there had been no default. On the contrary the judge gave the appellant time to pay. He could not have been in default. It follows that Section 76 was not applicable.
28. Furthermore s.41(9) of the Administration Act provides: "Where a magistrates' court has power to commit a person to prison for default in paying a sum due under an order enforceable as mentioned in this section, the court shall not exercise the power unless it is satisfied that all other methods of enforcing payment have been tried or considered and either have proved unsuccessful or are likely to do so". It cannot be said here that all other methods of enforcing payment were considered.
29. The combination of those two factors disposes, we think, of this part of the argument which cannot be rescued by reliance on s.82 to which we now turn.

30. Section 82 MCA reads: Restriction on power to impose imprisonment for default
- (1) A magistrates court shall not on the occasion of convicting an offender of an offence issue a warrant of commitment for a default in paying any sum adjudged to be paid by the conviction unless- (a) in the case of an offence punishable with imprisonment, he appears to the court to have sufficient means to pay the sum forthwith; (b) it appears to the court that he is unlikely to remain long enough at a place of abode in the United Kingdom to enable payment of the sum to be enforced by other methods; or (c) On the occasion of that conviction the court sentences him to immediate imprisonment, or detention in a young offender institution for that or another offence or he is already serving a sentence of custody for life, or a term of imprisonment, ...detention under section 9 of the Criminal Justice Act 1982 [section 108 of the Powers of Criminal Courts (Sentencing) Act 2000] or detention in a young offender institution.
31. Even had the judge purported to exercise the powers of a DJ(MC) she would not have been doing so as a magistrates' court on the occasion of convicting an offender of an offence. It is inescapable that the occasion of convicting occurred before her as a judge of the Crown Court. The case had been sent by the Magistrates to the Crown Court. There was and is no mechanism for sending it back.
32. Section 82(1A), inserted by the Criminal Justice and Courts Act 2015 constitutes, as Judge Karu found, a further insuperable obstacle. It reads A magistrates' court may not issue a warrant of commitment in reliance on subsection (1)(c) for a default in paying- (a) a charge ordered to be paid under section 21A of the Prosecution of Offences Act 1985 (criminal courts charge), or (b) a surcharge ordered to be paid under section 161A of the Criminal Justice Act 2003.
33. Mr Webber contends that this leaves open to the magistrates (and therefore to the judge here) the gateways at s.82 (1) (a) and (b). We disagree. The three subsections are disjunctive. Where (c) applies, as here, subsections (a) and (b) do not. Section 82(1A) has the effect only of preventing the issue of a warrant for default in paying the Criminal Courts Charge where subsection (c) applies. It does not have the effect of permitting a warrant under (a) or (b). Subsections (a) and (b) apply only where (but for the proposed warrant) the offender would remain at liberty. That is not the case here.
34. The effect of s.82(1A) is to prevent what the judge was being asked to do in this case ie to deem the charge paid on the day that sentence is imposed.
35. Mr Webber next relies on s.135 which appears in part VII of the MCA 1980. It reads: Detention of offender for one day in court-house or police station. (1)A magistrates' court that has power to commit to prison a person convicted of an offence, or would have that power but for section 82 or 88 above, may order him to be detained within the precincts of the court-house or at any police station until such hour, not later than 8 o'clock in the evening of the day on which the order is made, as the court may direct, and, if it does so, shall not, where it has power to commit him to prison, exercise that power. (2)A court shall

not make such an order under this section as will deprive the offender of a reasonable opportunity of returning to his abode on the day of the order.

36. It is not arguable that the court had a “power to commit to prison” for failing to pay the charge since, as we have already explained, the appellant had been given time to pay. Even if it might be argued that the power to impose a sentence of imprisonment was a separate “power to commit to prison” the power under section 135 is an alternative to a prison. Where, as here, a sentence of imprisonment is imposed section 135 is of no application.
37. Finally Mr Webber referred us to section 136 MCA which reads 136 Committal to custody overnight at police station for non-payment of sum adjudged by conviction. (1)A magistrates’ court that has power to commit to prison a person in default of payment of a sum adjudged to be paid by a summary conviction, or would have that power but for section 82 or 88 above, may issue a warrant for his detention in a police station, and, if it does so, shall not, where it has power to commit him to prison, exercise that power.
38. There was no default. This power does not arise. We need say no more about it.

Conclusion

39. We are satisfied that none of the powers upon which Mr Webber sought to rely would have permitted a District Judge (Magistrates’ Court) to take the course he advocated. It follows that even were HHJ Karu entitled to invoke s.66 and act as a District Judge (which we are satisfied she was not) it would not have permitted her to deem the charge paid in some way by a sentence of imprisonment or order of committal.
40. In this case the immediate imposition of the Criminal Courts Charge was inevitable. The judge’s order was correct and this appeal must be dismissed.
41. We add that, apart from the very few cases where a defendant has the means to pay immediately upon the charge being imposed, it is very rarely, if ever, proper for a court not to give time to pay.
42. Whilst this specific issue is not material to our decision it follows from this judgment that if, as we have been told, a practice has developed in which the District Judge (Magistrates’ Courts) imposes an immediate term of imprisonment together with the Criminal Courts Charge and on the same occasion a period of imprisonment in respect of the non payment of the charge just imposed, this is unlawful and must stop.
43. Finally, this being an unsuccessful appeal against sentence we are required to impose the Criminal Courts Charge in the sum of £200. We so order and direct that there be 7 days to pay.

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