

ENGLAND AND WALES / JUDGMENT

Johnson v R

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Case No: 201800756B4; 2011802330B4 201802970C1 Neutral Citation Number: [2018] EWCA Crim 2485 IN THE COURT OF APPEAL (CRIMINAL DIVISION) ON APPEAL FROM THE CROWN COURT AT LEWES Her Honour Judge Barnes T20160506 AND ON APPEAL FROM THE CROWN COURT AT OXFORD His Honour Judge Daly T20170255 Royal Courts of Justice Strand, London, WC2A 2LL Date: 08/11/2018 Before : THE PRESIDENT OF THE QUEEN'S BENCH DIVISION (SIR BRIAN LEVESON) MR JUSTICE PHILLIPS and MR JUSTICE EDIS

- ----- Between : MATTHEW RAYMOND JOHNSON
- and - THE QUEEN Appellant Respondent And Between : RICKY SEAN BURTON
- and - THE QUEEN
- -----
- ----- Appellant Respondent Rebecca Upton for the Applicant Johnson
Nicholas Bleaney for the Applicant Burton Duncan Atkinson QC, Jonathan Edwards and Paul
Jarvis for the Crown Hearing date : 9 October 2018
- -----

Judgment

Sir Brian Leveson P: 1. 2. 3. These unconnected cases were tried, in separate Crown Court proceedings, on a form of indictment which had been uploaded electronically by the prosecution onto the Crown Court Digital Case System (“the DCS”). In both cases the applicant was put in charge of the jury, which returned a verdict of guilty on counts contained in that form of indictment. It was only after conviction (but before sentence) that a court official realised that the form of indictment used at trial differed from the indictment on which the applicant had been arraigned, in particular, by adding one or more counts on which the jury had returned a guilty verdict but in respect of which the applicant had not entered a plea. In each case, the prosecution’s intention had been to apply to amend the original indictment under s.5 of the Indictments Act 1915 (“the 1915 Act”) (and, if necessary, to seek to have certain new counts sent to the Crown Court for trial), but by oversight no such application was made and therefore the applicant was not re-arraigned. All parties (including the trial judge), however, proceeded on the basis and understanding that the applicant had been properly arraigned on an indictment (duly amended or otherwise validly preferred) in the form used at trial. By their counsel, the applicants both accept that they were not prejudiced in any way by the significant procedural errors

outlined above and that they had a fair trial. Nevertheless, each contend that the form of indictment on which they were tried was a nullity, the only valid indictment being the unamended original, and that their convictions should accordingly be set aside or (perhaps more appropriately) declared to be invalid. The applicants rely, in particular, on *R v Leeks* [2009] EWCA Crim 1612; [2010] 1 Cr. App. R. 5, where a guilty plea to a count purportedly added to an indictment (but without any order for amendment in fact being made), was held to be a nullity and the conviction quashed. In so doing, the court followed the approach of the House of Lords in *R v Clarke and McDaid* [2008] UKHL 8; [2008] 1 WLR 338 to invalid indictments and proceedings based on them, the invalidity in the latter case being that the bill of indictment had not been signed. 4. The Crown contends that: i) ii) following the introduction of new statutory provisions governing the preferment of indictments in 2009 (in particular reversing the effect of *Clarke and McDaid*), the form of indictments used in these trials were valid and effective, or were deemed to be so; but in any event, in the light of those changes and the modern approach to procedural irregularities and their effect, *Leeks* no longer represents the law, the proper approach being to consider the fairness of the trial, prejudice to the defendant and the safety of the conviction, not the outdated concept of nullity. 5. The applications for leave to appeal against conviction accordingly raise important issues as to the modern law relating to the preferment and amendment of indictments. They were referred to this court by the Registrar. We grant leave. Johnson also applies for leave to appeal against sentence. The Facts: *R v Johnson* 6. 7. 8. 9. 10. 11. On 23 January 2018, in the Crown Court at Lewes before Her Honour Judge Barnes and a jury, Matthew Johnson was convicted of assault occasioning actual bodily harm (count 2 on the indictment used at trial), criminal damage (count 3), applying a corrosive fluid with intent (count 7) and sexual assault (count 8). He had previously pleaded guilty to Driving whilst Disqualified (count 9). On 8 May 2018, the judge having concluded that Johnson was dangerous within the meaning of s. 229 of the Criminal Justice Act 2003 for applying a corrosive substance with intent, he was made subject to an extended sentence of 14 years', comprising a custodial term of 10 years' and an extension period of 4 years'. Concurrent determinate terms of imprisonment were imposed for the other offences. The provisions of the Sexual Offences (Amendment) Act 1992 apply in this case. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s. 3 of the 1992 Act. The facts were as follows. In September 2015, Johnson and G became partners. Johnson moved into G's flat, where she lived with her 6-year old daughter. However, by March 2016, there were serious problems with the relationship and Johnson had been excluded from the flat, although he retained a key to the front door. On 12 March 2016 Johnson forcibly entered the flat by unlocking the front door, then breaking the security chain which secured it. The prosecution case was that an incident ensued during which Johnson broke G's phone and threw the remains of it at her, only leaving the flat after his mother arrived and calmed him down. This resulted in a charge of criminal damage (count 1), of which he was acquitted. The next day, 13 March 2016, Johnson returned and again unlocked the front door. He said, "I've come to get my things and I'm done with you." G's landline phone rang, and he snapped it in half. He then rifled through her

handbag; when she objected, he threw her across the room, and when she got up to get her handbag from him, he bit her cheek (count 2, of which he was convicted). G ran outside and Johnson followed with a bag of clothes she had packed for him to collect. He returned to the flat, took a set of kitchen scale weights and smashed the windscreen of G's car (count 3, convicted). G took her daughter to a friend's house and stayed the night. It was alleged that Johnson went to this friend's house demanding that G come outside, but she refused and called the police; he was later arrested but G did not pursue any allegation at that time and he was released without charge. The relationship improved over the following months, but in late July G reported to the police that further incidents had occurred. She had been the subject of harassment on 16 July (part of an alleged course of conduct charged as count 6); she was assaulted and her mobile phone damaged on 17 July (counts 4 and 5). Johnson was arrested and interviewed; he provided a prepared statement denying the allegations. He was released on police bail with conditions of non-contact and a prohibition on travelling to the location of the G's flat. In the event, Johnson was acquitted of counts 4, 5 and 6. 12. 13. 14. 15. 16. At about 12:30 pm on 3 August 2016, Johnson phoned G to say he was going to hand himself in to the police, but that he wanted to meet her first; she agreed to meet and said she would take him to the police station. G drove to a public house where they met, but he said there were too many people there and suggested they drive away to talk. As G was driving, Johnson pulled on the steering wheel and forced the car into a car park. When she tried to open the door, he stopped her by grabbing her hair and hitting her in the face. When she managed to get out, Johnson came around and squirted a liquid in her face, saying that it was ammonia (count 7, convicted). She could not breathe and went to the ground, whereupon he kicked her in the head. He then put her in the back of the car, threatened her and drove to a petrol station to get water to clean her eyes, but that was not successful. Johnson then drove back to the car park, where he made G masturbate him; she obliged out of fear and he ejaculated on the central console (count 8, convicted). He then drove her to the hospital, as she had promised not to disclose how she was injured, where she got out and he drove away. He was driving whilst disqualified (count 9, pleaded guilty). G was examined by a doctor and found to be badly injured, with a risk that she might suffer permanent damage to her eyes. At the time, she reported that an unidentified woman had thrown the liquid at her. On the following day, 4 August, G told the police that Johnson was responsible for her injuries. After arrest, he provided a prepared statement denying the allegations, then giving no comment responses. The defence case at trial was that G was jealous and angry, and the allegations were attempted revenge on her part. On 3 August, Johnson said that he met G by arrangement and that he saw that she was injured. He wanted to take her to hospital but she refused and did not let him call the police. On 5 August 2016 Johnson was charged with assault occasioning actual bodily harm (it not then being known what had been thrown at G), sexual assault, driving whilst disqualified and driving with no insurance (all in relation to 3 August) as well as harassment (in relation to the period 16 July to 3 August). On 6 August 2016 he appeared at the Brighton and Hove Magistrates Court, where his case was sent to the Crown Court. On 16 August 2016 the original indictment was sent to Lewes Crown Court. On 5 September, at the Plea and Trial Preparation Hearing, Johnson was arraigned on that indictment, containing 6 counts as follows: i) ii) iii) iv) v) vi) Assault by beating on 17 July (count 4 on the trial indictment). Criminal damage on 17 July (count 5 on the trial indictment).

Harassment between 16 July and 3 August (count 6 on the trial indictment). Assault occasioning actual bodily harm on 3 August (omitted from the trial indictment). Sexual assault on 3 August (count 8 on the trial indictment). Driving whilst disqualified on 3 August (count 9 on the trial indictment). Johnson pleaded not guilty to all but driving whilst disqualified, which he admitted. 17. On 14 September 2016, the CPS wrote to Johnson's solicitors in the following terms: "Please find enclosed an amended indictment in respect of this matter. The Crown will apply to amend the indictment at the next court hearing pursuant to section 5 of the Indictments Act 1915. In respect of counts 1-3 an additional statement prepared by [G] will be served with service of this case disclosing these new offences. The Crown will invite the Crown Court Judge to sit as a District Judge at the next occasion, pursuant to section 66 of the Courts Act 2003, and send the new offences to the Crown Court. The Crown will then apply for the defendant to be arraigned on the new amended indictment." 18. 19. 20. 21. The new form of indictment, which was uploaded onto the DCS, added a count of Criminal Damage in relation to 12 March (new count 1), ABH and Criminal Damage in relation to 13 March (new counts 2 and 3) and replaced the count of ABH on 3 August with Applying a Corrosive Fluid with Intent (count 7). The last of those changes followed the forensic examination of the complainant's injuries and the identification of the liquid which was squirted in her face as ammonia. At no time did Johnson's representatives indicate that there would be any objection to the amendment to the original indictment. However, despite the case coming before for the court on numerous occasions, the matter was never resolved. The defence statement nevertheless addressed all the allegations in the new form of indictment which Johnson disputed. On 9 May 2017, the case was listed for trial. Johnson attended at court (having been granted bail at the expiry of the custody time limits) but thereafter absconded, and a bench warrant was issued for his arrest. In his absence, the need to amend the indictment was discussed in court, but the prosecution did not make an application. The warrant was executed on 11 September 2017. The trial was re-listed for 15 January 2018 and proceeded on the basis of the new form of indictment, except that count 9 (driving whilst disqualified) had been removed from the document used at trial because Johnson had pleaded guilty to that count. The only application to amend the indictment was to correct the particulars of count 3 (Criminal Damage on 13 March) as the details of the car in question were incorrect. Johnson was therefore never arraigned on counts 1, 2, 3 and 7 of the new form of indictment, although no objection taken when it was put to him at the start of the trial that he had pleaded not guilty to all eight counts on the form of indictment and he was put in charge of the jury on that indictment in terms that he had pleaded not guilty. In the event, on 23 January 2018 the jury convicted Johnson on counts 2, 3 and 7 (as well as count 8, on which he had been arraigned). Sentence was adjourned to 2 March 2018, in particular for an assessment as to whether he was dangerous. 22. After conviction but before sentence, when the court clerk attempted to add the verdicts to the court system, it became apparent that no application had been made to amend the original indictment and that there had been no arraignment on the new version. The prosecution made an application in writing to amend the original indictment. On 2 March 2018, after hearing oral argument, the judge ruled in favour of allowing the amendment, asking whether Johnson wished to be re-arraigned on it; defence counsel declined on his behalf. After a further adjournment for a full pre-sentence report, on 8 May 2018, sentence was passed and the case concluded. The Facts: R v

Ricky Sean Burton 23. 24. 25. 26. 27. 28. On 8 March 2018, in the Crown Court at Oxford before His Honour Judge Daly and a jury, Ricky Sean Burton was convicted of one offence of having custody or control of a counterfeit currency note and a second of tendering a counterfeit currency note. On 15 March, the applicant was sentenced to 12 months' imprisonment on each count, to run concurrently. The facts were as follows. On 29 March 2017 Scott Reed entered a shop and attempted to purchase a packet of folic acid using a counterfeit £20 note, purportedly issued by Clydesdale Bank. The manager of the shop was suspicious and used an ultraviolet pen to test its authenticity. He considered it to be a counterfeit and told Reed that he would be keeping the note, and Reed left. Reed was seen to meet Burton and they left the area together. The police were called. In the meantime, Burton was seen on CCTV to go to a car, move it and then re-join Reed, by which time Reed was surrounded by police. Both were arrested, and 18 further counterfeit notes were found inside the car which Burton had moved. In his defence statement, Burton's case was that he and Reed had stopped at a McDonalds to get something to eat and found the notes in an envelope near a parked car. He claimed that he believed the notes were genuine and also was unaware that Reed was attempting to use the notes to make a purchase. On 23 August 2017 the original indictment was uploaded onto the DCS, containing two counts. The first count, having custody or control of a counterfeit currency note, named both Burton and Reed. However, the second count of passing a counterfeit currency note named only Reed. On 15 September 2017 both were arraigned on that original indictment and they pleaded not guilty. On 19 October 2017 the prosecution uploaded a new form of indictment which included Burton in the second count on the basis that the passing of the counterfeit note was a joint enterprise. The prosecution, however, at no point applied to amend the original indictment and neither Burton nor Reed was re-arraigned. The trial commenced on the 5 March 2018, with no suggestion that there was any problem with the new form of indictment, which was read to the jury in the presence of the defendants and both counsel. On 8 March 2018, after the applicant had been convicted on both counts on the new form of indictment, the fact that no application had been made to amend the original indictment and that there had been no arraignment on the new version came to the court's attention. The judge heard further argument, but declined to take any action, ruling that the trial had been valid and that any complaint about the form of the indictment had been waived by the defence. The Procedure for the Indictment of Offenders 29. Prior to November 2009, it was a strict requirement that a bill of indictment (that is, a draft indictment) be signed by the proper officer of the court in order to become an indictment on which there could be a valid trial. Section 2(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933 ("the 1933 Act") provided: "Subject to the provisions of this section, a bill of indictment charging any person with an indictable offence may be preferred by any person before a court in which the person charged may lawfully be indicted for that offence, and where a bill of indictment has been so preferred the proper officer of the court shall, if he is satisfied that the requirements of the next following subsections have been complied with, sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly." 30. In *R v Clarke and McDaid* (above) the bill of indictment before the Crown Court had not been signed when the trial began. It was not until the evidence had concluded that the existing form was amended with leave of the trial judge and the amended version was signed by the proper officer. The jury convicted on that signed version. The House of

Lords quashed the conviction, holding that the absence of a signed indictment at the outset of and during most of the trial had invalidated the proceedings and the signing of the indictment at a late stage in the trial could not validate the invalid proceedings already conducted. Lord Bingham of Cornhill explained the analysis as follows: “18. What did Parliament intend the consequence to be, when it enacted sections 1 and 2 of the 1933 Act, if a bill of indictment was preferred but not signed by the proper officer? The answer to the question now is the same as it should have been given then. It is inescapable: Parliament intended that the bill should not become an indictment unless and until it was duly signed by the proper officer.

19. It is necessary to consider a second question. What did Parliament intend the consequence to be if there were a bill of indictment but no indictment? The answer, based on the language of the legislation and reflected in 70 years of consistent judicial interpretation, is again inescapable: Parliament intended that there could be no valid trial on indictment if there were no indictment...” 31. 32. Lord Bingham recognised, (at [22]), that Parliament might be prompted to pass legislation to address the problems where the bill of indictment is not signed, is signed late or by someone who is not the proper officer or is partially signed, and so on. In *R v Leeks* (above) an initial valid indictment existed, but at trial a revised version, containing a new second count, was put to the appellant by the clerk of the court, notwithstanding that no order had been made for the amendment of the original pursuant to s. 5(1) of the 1915 Act, which provides as follows: “Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice...” 33. The appellant pleaded guilty to the new second count, but on appeal against his conviction contended that, applying the essential proposition to be drawn from *Clarke* and *McDaid*, the revised indictment used at trial was no more than simply a piece of paper and that the proceedings which followed were a nullity. The Court of Appeal upheld that contention, rejecting the counter-argument that the making of an order to amend could be inferred in the follows terms (at [26]): “26. It appears that the researches of counsel have not been able to identify any authority on the question of what is the effect when all parties, including the judge, anticipated that an order would be made for amendment but, by oversight, one was never made. We have to make a decision ourselves on the matter. We are clearly of the view that such an error falls at the fundamental rather than the minor end of the spectrum... It is true that there is a factual and analytical distinction between the situation in this case and that in *Clarke* and *McDaid*; but ultimately, in our view, the principle and approach has to be the same. Amendment of indictment is a serious matter and not a mere matter of formality. Section 5(1) clearly requires the court itself to exercise discretion, and positively requires the court to ‘... make such order...as the court thinks necessary.’” 34. On 12 November 2009, s. 2 of the 1933 Act was amended (with retrospective effect) by the Coroners and Justices Act 2009. The amendment included the removal from

- s. 2(1) of the requirement that a bill of indictment be signed in order to become an indictment and introducing a new restriction (in s. 2(6ZA-6ZC)) on objecting to the indictment after the commencement of the trial by reason of any failure to observe rules as to the manner and time in which bills of indictment are to be preferred. The section, as revised in 2009 and subsequently, now provides as follows: “2. Procedure for indictment of offenders
- (1) Subject to provisions of this section, a bill of indictment charging any person with an indictable offence may be preferred by any person before a court in which the person charged may lawfully be indicted for that offence... and it shall thereupon become an indictment and be proceeded with accordingly:”
 - (2) Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either-
 - (a) The person charged has been sent for trial for the offence; or (aa) The offence is specified in a notice of transfer under section 4 of the Criminal Justice Act 1987 (serious and complex fraud); or (ab) The offence is specified in a notice of transfer under section 53 of the Criminal Justice Act 1991 (violent or sexual offences against children); or (ac) the person charged has been sent for trial for the offence under section 51 (committal proceedings for indictable- only offences) of the Crime and Disorder Act 1998 (“the 1998 Act”); or
 - (b) the bill is preferred by the discretion of the ‘criminal division of the Court of Appeal or by the direction or with the consent of a judge of the High Court... or (ba) the bill is preferred with the consent of a judge of the Crown Court following a declaration by the court under paragraph 8(1) of Schedule 17 to the Crime and Courts Act 2013 (court approval of deferred prosecution agreement); or
 - (c) the bill is preferred under section 22B(3)(a) of the Prosecution of Offences Act 1985. Provided that
 - (i) where the person charged has been sent for trial, the bill of indictment against him may include, either in substitution for or in addition to any court charging an offence specified in the notice under section 51D(1) of the Crime and Disorder Act 1998, and counts founded on material which in pursuance of regulations made under paragraph 1 of Schedule 3 to that Act, was served on the person charged, being counts which may lawfully be joined in the same indictment; (iA) in a case to which paragraph (aa) or (ab) above applies, the bill of indictment may include, either in substitution for or in addition to any count charging an offence specified in the notice of transfer, any counts founded on material that accompanied the copy of that notice which, in pursuance of regulations under the relevant provision, was given to the person charged, being counts which may be lawfully joined in the same indictment; (iB) in a case to which paragraph (ac) above applies, the bill of indictment may include, either in substitution for or in addition to any count charging an offence specified in the notice under section 51(7) of the 1998 Act, any counts founded on material which in pursuance of regulations made under paragraph 1 of Schedule 3 to that Act, was served on the person charged, being counts which may be lawfully joined in the same indictment; (ii)

a charge of a previous conviction of an offence... may, notwithstanding that it was not included in such notice or in any such direction or consent as aforesaid, be included in any bill of indictment and in paragraph (iA) above the “relevant provision” means section 5(9) of the Criminal Justice Act 1987 in a case to which paragraph (aa) above applies, and paragraph 4 of Schedule 6 to the Criminal Justice Act 1991 in a case to which paragraph (ab) above applies

- (3) If a bill of indictment has been preferred otherwise than in accordance with the provisions of the last foregoing subsection... the indictment shall be liable to be quashed: Provided that-
- (a) if the bill contains several counts, and the said provisions have been complied with as respect one or more of them, those counts only that were wrongly included shall be quashed under this subsection; and
- (b) where a person who has been sent for trial is convicted on any indictment or any count of an indictment, that indictment or count shall not be quashed under this subsection in any proceedings on appeal, unless application was made at the trial that it should be quashed.
.....
- (6) Criminal Procedure Rules may make provision for carrying this section into effect and, in particular, provision as to the manner in which and the time at which bills of indictment are to be preferred before any count and the manner in which application is to be made for the consent of a judge of the High Court... for the preferment of a bill of indictment. (6ZA) Where a bill of indictment is preferred in accordance with subsections (1) and (2), no objection to the indictment may be taken after the commencement of the trial by reason of any failure to observe any rules under subsection (6) (6ZB) For the purposes of subsection (6ZA) the trial commences at the time when a jury is sworn to consider the issue of guilt or whether the accused did the act or made the omission charged, or, if the court accepts a plea of guilty before the time when a jury is sworn, when that plea is accepted. (6ZC) The references in subsection (6ZB) to the time when a jury is sworn to include the time when that jury would be sworn but for the making of an order under Part 7 of the Criminal Justice Act 2003.” 35. The Criminal Procedure Rules (“the Crim PR”) (expressly referred to in s. 2(6) of the 1933 Act) contain the following provisions as to the manner and time in which bills of indictment are to be preferred as follows: “The indictment: general rules 10.2. – (1) The indictment on which the defendant is arraigned under rule 3.24 (Arraigning the defendant on the indictment) must be in writing and must contain, in a paragraph called ‘count’-
- (a) a statement of the offence charged that-
- (i) describes the offence in ordinary language, and (ii) Identifies any legislation that creates it; and
- (b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant.

- (5) For the purposes of section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933-
 - (a) a draft indictment constitutes a bill of indictment
 - (b) the draft, or bill is preferred before the Crown Court and becomes the indictment-
 - (i) Where rule 10.3 applies (Draft indictment generated electronically on sending for trial), immediately before the first count (or the only count, if there is only one) is read to or placed before the defendant to take the defendant's plea under rule 3.24 (1)(c), (ii) When the prosecutor serves the draft indictment on the Crown Court officer, where rule 10.4 (Draft indictment served by the prosecutor after sending for trial), rule 10.5 (Draft indictment served by the prosecutor with a High Court judge's permission), rule 10.7 (Draft indictment served by the prosecutor on re-instituting proceedings) or rule 10.8 (Draft indictment served by the prosecutor at the direction of the Court of Appeal) applies, (iii) When the Crown Court approves the proposed indictment, where rule 10.6 applies (Draft indictment approved by the Crown Court with deferred prosecution agreement). Draft indictment generated electronically on sending for trial 10.3.- (1) Unless the Crown Court otherwise directs before the defendant is arraigned, this rule applies where-
 - (a) a magistrates' court sends a defendant to the Crown Court for trial;
 - (b) the magistrates' court officer serves on the Crown Court officer the notice required by rule 9.5 (Duty of magistrates' court officer); and
 - (c) by means of such electronic arrangements as the court officer may make for the purpose, there is presented to the Crown Court as a count-
 - (i) each allegation of an indictable offence specified in the notice, and (ii) each allegation specified in the notice to which section 40 of the Criminal Justice Act 1988 applies (specified summary offences founded on the prosecution evidence). Draft indictment served by the prosecutor after sending for trial 10.4.- (1) This rule applies where-
 - (a) a magistrates' court sends a defendant to the Crown Court for trial; and
 - (b) rule 10.3 (Draft indictment generated electronically on sending for trial) does not apply.
 - (2) The prosecutor must serve a draft indictment on the Crown Court officer not more than 28 days after serving under rule 9.15 (Service of prosecution evidence) copies of the documents containing the evidence on which the prosecution case relies." 36. 37. Crim PR 10.5 to 10. 8 make provision for preferment of a bill of indictment in the other situations mentioned in rule 10.2(5)(b)(ii) and (iii). The effect of the revised version of s.2(1) of the 1933 Act and the Crim PR was considered by this court in R v W(P) [2017] 4 WLR 79. It was explained by Treacy LJ in these terms: "19. Some play has been made before us about the formal requirements for a valid indictment before the court. Those submissions, it seems to us do not appear to recognise the fact that there have been significant changes in the relevant formalities. The correct analysis as it seems to us is as follows. Prior to the amendment of

section 2 of, and Schedule 2 to the Administration of Justice (Miscellaneous Provisions Act) 1933 by the Coroners and Justice Act 2009, it was a requirement of the 1933 Act that a bill of indictment be signed by the proper officer of the court in order for it to become an indictment. The legal position now is that once a bill of indictment charging a person with an indictable offence for which he may lawfully be indicted in the Crown Court has been preferred, it becomes an indictment (see section 2(1) of the 1993 Act and Archbold: Criminal Pleading, Evidence and Practice 2016 (2015), para 1-

191. Accordingly lack of signature does not invalidate an indictment.
20. The Criminal Procedure Rules 2015 at r.10.1, require service of a draft on the Crown Court no more than 28 days after service of prosecution evidence. Service can now be effected by electronic means. Accordingly it seems to us that a signature is no longer needed to make an indictment valid. An indictment is preferred within the meaning of section 2(1) of the 1993 Act, once it is electronically entered onto the court digital system at the Crown Court. The consequence is, as section 2(1) provides that “it shall thereupon become an indictment and be proceeded with accordingly”. Arraignment 38. The Crim PR make detailed provision, in rule 3.24, for the arraignment of an accused on an indictment, it being clear that such procedure ought to take place in every case. However, it is well established (and the appellants did not argue to the contrary) that where an accused is tried for offences he denies, but without having been formally arraigned, the proceedings (and any convictions) are not a nullity. For example, in *R v Williams* [1978] QB 373 this court held that, where the accused had heard the indictment read out and the assertion that he had pleaded not guilty, without raising any objection, he waived his right to be arraigned by allowing the trial to proceed. There was accordingly no irregularity and the proceedings were valid. (The position is different in the case of a purported guilty plea: such a plea must always be entered in person as part of a proper arraignment (*R v Ellis* (1973) 57 Cr App R 571)). The modern approach to nullity 39. In *R v Malachi Lloyd Williams* [2017] EWCA Crim 281 this court rejected the argument that the indictment on which the appellant was tried was a nullity because counts relating to separate incidents had been mis-joined in that indictment. The court recognised that the point would not arise in future due to the introduction of Crim PR 10.2 (4), but nevertheless expressed the following general view in relation to technical arguments that indictments or proceedings were a nullity (per Lord Thomas of Cwmgiedd CJ at [33]): “We would hope that in future the court would take the view that the highly technical law in relation to nullity is an outdated concept that should no longer prevail, that a modern approach should be taken, which is to decide on the fairness of the trial, prejudice to a defendant and the safety of the conviction.” These observations were cited with broad endorsement in connection with a different procedural irregularity in *R v Stromberg* [2018] 2 Cr App R 5 (per Lord Burnett of Maldon CJ at [35]). The Submission
40. Ms Upton and Mr Bleaney, counsel who appeared both on these appeals and at the trials below for Johnson and Burton respectively, submitted that the reasoning in *Leeks* remains unaffected by subsequent developments and is directly applicable to the facts of these cases.

In each case there was a valid indictment on which the appellant was arraigned, and which was at no time amended. The revised draft indictment was intended to be introduced by way of amendment, but that was simply never done, so that the original remained the only “true bill”. The revised version used at trial was no more than a piece of paper which had not been sanctioned by the court or the subject of a re-arraignment. The proceedings, based on the revised draft indictment, were therefore a nullity.

41. Ms Upton pointed out that the above analysis reflects the position set out in the letter from the CPS dated 14 September 2016, in which it was recognised that an amendment to the indictment was necessary and would be applied for at the next hearing.
42. Ms Upton further contended that the trial judge, in Johnson’s case, had no power to order that the original indictment be amended at the time that she did. She argued that, whilst s. 5(1) of the 1915 Act provides for amendment “at any stage of a trial”, that did not permit amendment after the jury had returned a verdict, at which point the trial was over. In any event, Ms Upton submitted that amending the indictment at that point made a mockery of the process of indictments and arraignment.
43. During the course of argument, Mr Bleaney acknowledged that the effect of the appellants’ contentions, if accepted, would not be limited to Burton’s conviction on the second count (to which he was added in the revised indictment) being quashed or declared invalid. That consequence would also apply to Burton’s conviction on the first count and to the convictions of his co-accused (Reed) on both counts, notwithstanding that they were placed on those counts in the original indictment. Those convictions would be nullities because the entirety of the proceedings on the form of indictment used at trial would be so declared.

Analysis

44. 45. 46. 47. 48. 49. 50. There is no doubt that, in both these cases, the proper course would have been for the indictment to have been amended (and any new counts formally ‘sent’ to the Crown Court if they could not otherwise be joined on the basis of evidence previously served) and for the accused to have been re-arraigned. There is also no doubt that if any of the procedural errors had resulted in unfairness to the appellants or otherwise called into question the safety of their convictions, this court would intervene. The question on these appeals, however, is whether such procedural errors, in what was otherwise a fair trial process, require a determination that the proceedings, and the resulting convictions, were invalid. The primary issue, therefore, is whether the form of indictment on which the trial proceeded had been “preferred” within the meaning of s. 2 of the 1933 Act, as amended in 2009, with the result that the draft became an indictment “to be proceeded with accordingly”. The amended s. 2 of the 1933 Act now simply provides that a draft indictment may be preferred “by any person” before the court, imposing no restrictions on that process, but providing, in s. 2(6), that the Crim PR may make provision for the manner and timing of such preferment. The basic method of preferring a draft indictment under the rule 10 of the Crim PR, as confirmed by the decision in W(P) (above), is the service of such a draft on the

Crown Court by uploading it onto the DCS. Rule 10 makes provision for the appropriate process in various situations, including where the draft is generated electronically by the magistrates' court (rule 10.3) or where it is served by the prosecutor after sending by the magistrates (rule 10.4), in the latter case not more than 28 days after the service of prosecution evidence. Those rules must of course be complied with, and necessary extensions of time obtained (see rule 10.2(8)). But s. 2(6ZA) of the 1933 Act provides that, if a draft indictment has been preferred in accordance with subsections (1) and (2), no objection may be taken to the indictment after the commencement of the trial by reason of any failure to observe any of those rules. That provision, introduced in 2009 following the decision in *Clarke and McDaid* and at the same time as the removal of formal requirements in relation to the preferment of draft indictments in s. 2(1), is a broad anti-technicality provision, clearly intended by Parliament to prevent belated technical objections to the validity of a form of indictment and the proceedings which follow. It complements the pre-existing requirement that any application to quash an indictment on the basis that the draft indictment included counts which were not permitted under s. 2(2) had to be made at the trial. It follows that we accept the submission of Duncan Atkinson QC, for the Crown, that the revised draft indictments in these cases were preferred by being uploaded on the DCS. Any objection that the prosecution had not complied with the detailed rules in relation to such preferment was lost when the trial commenced. The second issue is whether the fact that there was an existing unamended indictment (being the only one on which the accused had been arraigned) nevertheless rendered the indictment or the proceedings a nullity, notwithstanding that the draft had been preferred and so became an indictment within s. 2 of the 1933 Act. 51. The main thrust of the argument advanced on behalf of the appellants is that the continuing existence of the original indictment in some way renders proceedings on the revised form of indictment invalid, particularly given that the appellants had each case been arraigned on only that original indictment. Again, however, whilst it is clear that the procedure was flawed in these cases, there is no basis for a finding that the trial was a nullity. Neither of the two aspects relied upon (existence of another indictment and lack of arraignment) give rise to invalidity for the following reasons: i) ii) As Mr Atkinson has set out in his helpful skeleton argument, an accused may have two or more indictments outstanding against him for the same offence: *Poole* [1961] AC 223, referred to in *Blackstone's Criminal Practice* (2019) at para D11-22. It is clear that the existence of a prior indictment does not prevent the prosecution preferring one or more fresh indictments, although the prosecution must elect between them. In the present cases there was a clear election to proceed with the fresh indictments. Further, and as set out above, the fact that the appellants were not arraigned on the fresh indictments does not invalidate proceedings in circumstances where they disputed the charges. The fresh indictment was read in their presence, as was the (assumed) fact that they had pleaded not guilty.

Conclusion

52. In our judgment, in each of these cases, the indictment, the trial process and the convictions which resulted were all valid and the appeals are dismissed. The reasoning of this court in Leeks was firmly based upon the strict approach taken by the House of Lords in Clarke and McDaid to indictments and their validity, but that decision and its approach was fully reversed by revision of s. 2 of the 1933 Act in
2009. It is clear, therefore, that Leeks no longer represents the law.
53. We emphasise that our conclusion should not in any way be taken to condone a lax or informal approach to the preferment of draft indictments, amendments to existing indictments or arraignments. As this court has emphasised on numerous occasions, compliance with the Crim PR (and getting procedures right first time) is of paramount importance to the efficient working of the criminal justice system, both in individual cases and overall. 54. Indeed, as this case demonstrates, the modern practice of uploading draft indictments onto the DCS, intended to be convenient for all parties and to improve efficiency, is capable of leading to confusion and serious error if care is not taken to ensure that appropriate steps are taken to apply for orders to amend existing indictments and/or to ensure re-arraignment. The risk of multiple versions and uncertainty as to which is the “true bill” is obvious. We emphasise that it is the duty of both prosecution and defence representatives to ensure that steps are taken to regularise the position as the case progresses and, in particular, that the form of indictment used at trial has received all necessary consideration. In that regard, it would also obviously be good practice for trial judges to enquire of counsel whether there were any outstanding issues in relation to the indictment before it is read before the jury at trial: whether that should be incorporated into a rule is a matter for the Criminal Procedure Rule Committee. However, if, notwithstanding, such obligations and practices, a trial proceeds on the basis of a form of indictment which was not properly dealt with, the primary consideration (as recognised in Malachi Lloyd Williams (above)) will be the fairness of the trial and the safety of the conviction, not the technical validity of the indictment. 55. In view of our conclusion above, the question of whether the Judge Barnes had the power to amend the original indictment in the case of Johnson after the jury’s verdict does not arise. Mr Atkinson recognised that there are difficulties in extending the power under s. 5(1) of the 1915 Act to a stage after the trial has concluded with the return of verdicts. We are inclined to agree, but do not need decide the point. Johnson’s Application for Leave to Appeal sentence
56. Ms Upton did not contend that the custodial terms imposed on her client were manifestly excessive. The sole proposed ground of appeal is that, although the question of dangerousness properly arose as Johnson was convicted of applying a corrosive substance with intent, the judge did not have sufficient evidence before her to justify a finding that Johnson posed a significant risk of causing serious harm to members of the public through the commission of further specified offences. It was therefore wrong in principle, Ms Upton submitted, to impose an extended sentence. 57. 58. The facts of the offences of which he was

convicted, involving the deception and manipulation of a vulnerable partner in order to carry out a planned and sustained attack on her (including throwing ammonia in her eyes, causing serious damage and lasting psychological injury), are sufficient in themselves to justify the judge's conclusion that Johnson constitutes a serious danger to women and in particular to future partners. That conclusion is further supported and fortified by his appalling record. By the age of 26, he had amassed 29 convictions for 85 offences, including robbery (in 2011) and causing grievous bodily harm (in 2013). Although Johnson had never previously been convicted of an offence of the gravity of this offending, the judge took time (twice adjourning for reports) and conducted a careful sentencing exercise. Her determination that he was dangerous is not open to serious criticism. It is simply not arguable that the sentence was wrong in principle or manifestly excessive. This application is refused.

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