

ENGLAND AND WALES / JUDGMENT

Josephs, R v

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Neutral Citation Number: [2009] EWCA Crim 2800 IN THE COURT OF APPEAL CRIMINAL DIVISION No: 200806947 D2 Royal Courts of Justice Strand London, WC2A 2LL Thursday, 17 December 2009 B e f o r e: LORD JUSTICE HUGHES VICE PRESIDENT OF CACD MRS JUSTICE RAFFERTY DBE MR JUSTICE HEDLEY

- ----- R E G I N A v VERNE EWAN JOSEPHS
- ----- Computer Aided Transcript of the Stenograph Notes of WordWave International Limited A Merrill Communications Company 165 Fleet Street London EC4A 2AY Tel No: 020 7404 1400 Fax No: 020 7831 8838 (Official Shorthand Writers to the Court)
- ----- Mr G Shaw appeared on behalf of the Appellant Mr F Currie appeared on behalf of the Crown
- ----- J U D G M E N T LORD JUSTICE HUGHES: The sole issue in this appeal against conviction is whether the absence of a signature of the officer of the Crown Court on the form of indictment on which the appellant was eventually tried is fatal under the principle explained in R v Clarke and McDaid [2008] 2 Cr App R 2 at 18, [2008] UKHL 8. In this case the problem arose because whilst he was awaiting trial for one offence the defendant committed another similar one. Everybody in the case saw that the object needed to be (a) to achieve a combined trial on both allegations and (b) to do so without delay, especially since, whilst he had been on bail (evidently) after the first charge the defendant was now in custody. Notwithstanding those laudable aspirations, if what has happened means that the appellant has been tried without there existing a proper indictment, his trial is a nullity and his convictions cannot stand. The sequence of events was as follows. On 16 January 2007, the police found about £3,000 worth of crack cocaine at a flat which the appellant rented, but where it seems he did, or did not principally, live. He was charged with the offence of possession with intent to supply. He duly appeared before the Justices and was committed to the Crown Court for trial in regular fashion upon that allegation. A bill of indictment was properly signed by the duly authorised officer of the Crown Court on 6 April 2007. It thus became an indictment (see section 2(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933). Some weeks later on 24 May 2007, the appellant, who had been on bail, was re-arrested. His home had been searched and two further wraps of crack cocaine had been found together with some cutting tools. He was accordingly charged with a second offence of possession with intent to supply. Thereafter he was unsurprisingly remanded in custody and it was plain to everybody that there needed to be a combined trial

for two almost identical offences. On 2 July 2007, the case was listed at the Crown Court for management. What occurred happened with the full and explicit assent of the defendant's advocate then appearing. He was right to wish to achieve a single and accelerated trial. The difficulty arises out of precisely what then occurred. The Crown applied to HHJ Tabor QC to sit in his capacity as District Judge (Magistrates' Court) under the powers contained in section 66 of the Courts Act 2003. In that capacity the Crown asked the judge to commit the appellant for trial on the second allegation. There is no doubt that that section confers the powers of a District Judge (Magistrates' Court) in relation to criminal causes and matters upon, amongst others, all Circuit Judges. HHJ Tabor correctly asked the appellant's solicitor if he had any objection to that course and was told that he had none. Accordingly the judge acceded to that application and he said: "I shall commit this case to this court from the Magistrates' Court." Next the Crown asked for a direction that the new count be joined with the existing one. Counsel referred the judge to what he described, no doubt accurately, as his "draft indictment" containing both allegations. The appellant's advocate again expressly assented. Said the judge: "Well there we are. We will join the indictment. Counsel can be at liberty at a later stage if they want to object to joinder." By those last words the judge was correctly preserving the Appellant's right to seek a direction under section 5(3) of the Indictments Act 1915 for separate trials of the two counts, if so advised. However, no such application was ever made, plainly realistically, and in due course in October 2007 the appellant was tried upon both counts and was convicted of both. It transpires that no signature was ever placed on the document containing both counts, which was the document upon which the appellant was tried. That document had been given a different number in the Crown Court Office from the number allotted to the original signed one-count indictment. The absence of signature was not known at the time of trial. However, now that it is known Mr Shaw, who did not appear below, contends, on behalf of the appellant, that it is fatal to the conviction and relies upon *R v Clarke and McDaid*. In *Clarke and McDaid* the House of Lords held that the effect of the provisions of sections 1 and 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 is that when a defendant arrives at the Crown Court from the Magistrates' Court the officer of the Crown Court is vested with a responsibility, which is not purely formal, to see that the process by which he has arrived has been properly complied with, whether it be committal, transfer, voluntary bill, or otherwise. What the statute says is that it is the officer's signature which converts the bill of indictment, which means, in effect, a draft, into an indictment. Moreover, the statute requires the existence of an indictment to try the defendant. If there is no indictment, says *Clarke and McDaid*, his trial is a nullity. That, the House of Lords held, is the inescapable consequence of the continued existence of sections 1 and 2 of the 1933 Act. There is not much doubt that those sections were enacted at a time when it was necessary to provide such a certification procedure in substitution for the pre-existing procedure of a bill of indictment being handed down by a grand jury. Whether in modern times of near automatic transfer to the Crown Court of all offences which are triable only on indictment, and of committal without consideration of the evidence in the vast majority of either way offences, such a certification procedure continues to be a practical necessity is a question for

Parliament and not for the courts. It does need widely to be known that that remains the law, at least until Parliament changes it. There is one qualification to that general proposition and it is to be found in the proviso to section 2(1) of the 1933 Act. The proviso reads as follows: SMITH BERNAL WORDWAVE "Provided that if the judge or chairman of the court is satisfied that the said requirements have been complied with, he may, on the application of the prosecutor or of his own motion, direct the proper officer to sign the bill and the bill shall be signed accordingly. In R v Jackson [1997] 2 Cr App R 497 this court considered that proviso. It ruled that where the judge, having heard argument about the contents of the indictment and reached a conclusion which entailed the creation of a fresh indictment, went on to direct that the fresh indictment be signed, that direction removed from the officer of the court any independent function of certification. It meant that thereafter the officer of the court's signature was mere formality and accordingly the absence of such signature could not frustrate the explicit direction of the judge that it be put there. That decision was expressly approved in Clarke and McDaid: see paragraph 10. Next there is no doubt that an indictment may properly contain charges which have been the subject of separate committals, transfers or sendings to the Crown Court. For that general proposition: see Groom [1997] 62 Cr App R 242, Townsend [1997] 2 Cr App R 540 and the consolidated Criminal Practice Direction paragraph IV 34.2 set out conveniently at the 2010 edition of Archbold paragraph 1/218. Those cases do not, of course, involve lack of signature. Next is the general proposition that there is undoubtedly power to amend an existing indictment by adding to it a further count, provided at least that that count is either disclosed on the evidence on which the case has passed through the Magistrates' Court, or there has been a separate committal in relation to it. The power to amend is given by section 5 of the Indictments Act 1915. Section 5(2) directs that where an indictment is thus amended the court officer should place a note of the amending order on the indictment. That is a directory provision. Failure to accomplish it does not invalidate the amendment providing that the judge's order is sufficiently clear. For that proposition see R v Leeks [2009] EWCA Crim 1612. How then are those various propositions to be applied to the existing case? First the judge did have power to commit. We have to say that his decision to do so was procedurally flawed because there is no sign that anybody invited him to go through the mode of trial procedure, which is required by sections 17A to 21 of the Magistrates' Courts Act 1980. The defendant ought to have been asked for an indication of his plea. If he indicated that it was not guilty, or would be not guilty, then the judge should have proceeded to consider under section 19 whether summary trial or trial on indictment was the more suitable. However, in this case the defendant would clearly have indicated a not guilty plea since that was his maintained stance throughout the proceedings. Moreover the judge would clearly have regarded trial on indictment as suitable given (1) the nature of the serious charge and (2) the fact that the defendant was already awaiting trial on indictment for an almost identical offence. Thereafter the committal procedure, this being an either way offence, would inevitably have taken place without consideration of the evidence pursuant to section 6(2) of the 1980 Act. All the statements were in section 5A(3) form; the defendant was represented; no submission of no case was to be advanced. SMITH BERNAL

WORDWAVE The law is that defects in the committal process can be capable of rendering the committal a nullity, particularly if the rights of the defendant are ignored, for example, if he is not put to his election where that arises: see, for example, R v Barnet Justices, ex - parte Wood 993 Crim L. R. 38 and R v Simons 1953 37 Cr App R 120. It is, however, equally clear that not every procedural error has that effect, and it is clear that Parliament has not prescribed that the consequence of any defect in mode of trial proceedings should be a nullity. That is clear from those cases and also from the principle to be gathered from the cases of R v Sekhon [2002] EWCA Criminal 2954,

[2003] 1 Cr App R 34 at page 575 and R v Soneji 2005] UKHL 49, [2006] 2 Cr App R 20 at page 298.

The procedural defects in the mode of trial procedure in the present case caused the defendant no conceivable injury, indeed they were encouraged by his advocate for the very good reason that committal was inevitable and indeed in the defendant's own interests. We are therefore quite satisfied that it was a valid committal. It remains true that there is no question of this defendant having suffered any injury in this case. His position is exactly the same as it would have been if a document combining the two counts had been duly signed. Nevertheless, if Clarke and McDaid applies he has been convicted where there was no indictment and such convictions cannot stand. Whether Clarke and McDaid applies or not is in this case, and no doubt in others, a question of fact. There could, we agree, have been an amendment, but it is perfectly clear, we are constrained to say, that HHJ Tabor was never asked to amend the existing indictment and he clearly never did so. There could have been a direction to sign a combined indictment, but we are constrained to say that HHJ Tabor was never asked to do that and he never did do it. In those circumstances we are satisfied that the defendant was tried upon a document which was not an indictment. His convictions are a nullity and must be set aside. Mr Shaw invites us not to direct a venire de novo on the grounds that the defendant was convicted now two years ago and has served a significant part of his sentence. The sentence was one of eight years. He will so far have served around half of the custodial part of that term. If he should subsequently be convicted, any judge sentencing him will take that into account. We have no doubt whatever that the proper order in this case is an order for venire de novo. He must be tried all over again. The moral of the case for prosecutor, defence advocates and judges faced with the very sensible practical course, such as was sought in the present case, is for the judge to say at the conclusion of his consideration of the merits of the application, "I direct that an indictment containing the following counts be signed." If that is done Jackson will apply and even if the officer of the court fails to append a signature the trial will be valid. LORD JUSTICE HUGHES: Where is he to wait in the meantime, Mr Shaw? He has been in custody. SMITH BERNAL WORDWAVE MR SHAW: He has been, yes. LORD JUSTICE HUGHES: Is there any reason why he should not stay there? MR SHAW: We will have to consider your judgment. At this moment my Lord, I cannot give you-- LORD JUSTICE HUGHES: In the meantime the defendant will remain in custody. He can, of course, if there be merit in it, make an application for bail to Gloucester Crown Court. SMITH BERNAL WORDWAVE

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