Neutral Citation Number: [2015] EWCA Crim 1516

Case No: 2015 02757/03032/02832/02381/02761/02760/02759/02758/02639/02629/03061/03072/03071/03070/03068/03065/03064/04742 C4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM LIVERPOOL CROWN COURT
His Honour Judge Aubrey QC
20128062/8073/8092/8095/8098

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/09/2015

Before:

LADY JUSTICE RAFFERTY
MR JUSTICE EDIS
and
HIS HONOUR JUDGE ROOK QC (SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

- -

Between:

Regina	**Appellant**
- and -	
WELSH (Snr) and 17 Others	**Respondents**

- -
- -

Sarah Whitehouse QC for the **Crown**
John McGuinness QC for the **Attorney General**
Anthony Barraclough for the **Respondents**

Hearing date: 15th July 2015

- -

Approved Judgment

Lady Justice Rafferty:

1. These 17 applications for extensions of time for making applications for leave to appeal against conviction were referred to the Full Court by the Registrar of Criminal Appeals. 1 application for an extension of time to renew an application for leave to appeal against conviction after refusal by the Single Judge by Gordon S is different from the others in another important respect, as will appear.

2. The convictions arose from two investigations into the supply of class A drugs. Both sets of proceedings were dealt with by His Honour Judge Aubrey, Q.C. in the Crown Court at Liverpool. Operation Blenheim involved the applicants CW (senior), John Bowles, Michael Cook, Christopher Amos, Kenneth Fletcher, Steven Wood, CW (junior), Mark Shields and James Edmonds. Operation Knot involved the applicants John Cooke, James Swarez, David Jolly, Roseann McCreadie, James Beck, David Law, Edward McCreadie, John Wildman and Gordon S.

3. Both concerned large scale supply of class A drugs by Liverpool based organised crime groups to their counterparts in Scotland, contrary to ss1, 1A and 3 of the Criminal Law Act 1977. In all, the investigations resulted in the prosecution of 42 people. These applicants were all convicted of, or pleaded guilty to, conspiracy to supply Class A drugs and received substantial terms of imprisonment tailored according to their level of involvement and other matters. It is not necessary to set out the details of those sentences or the facts on which the convictions were based. The convictions were all safe and the sentences just. The significance of the Scottish element of the two conspiracies is that it meant that the Crown required the consent of the Attorney General to institute the proceedings in accordance with ss1A and 4 of the Criminal Law Act 1977. That requirement in cases where the cross-border element involved Scotland was introduced by the Coroners and Justice Act 2009 with effect from 1st February 2010. Prior to that date the consent of the Attorney was only required where the case involved countries or territories outside the United Kingdom.

4. The issue on the first 17 of these applications relates only to the consequences of failure to obtain that consent until after the proceedings had been sent to the Crown Court and a Preliminary Hearing held. In the case of S, consent has never been obtained, the important difference between his case and the others. It is therefore necessary to set out the procedural history of the two sets of proceedings.

Operation Blenheim

5. The Indictment period was 1st September 2011 to 18th October 2012. 6 of the applicants were charged with conspiracy at various times on 18th and 19th October 2012. They appeared before the Magistrates' Court on 20th October 2012 when their cases were sent to the Crown Court pursuant to s51 of the Crime and Disorder Act 1998. Fletcher was charged on 24th October and sent on 26th October, Bowles on 30th October and 6th November, and Cook on 31st October and 1st November. A Preliminary Hearing was held on 2nd November 2012 in all cases but Bowles and Cook whose Preliminary Hearings were on 15th November 2012. No Indictment had been preferred by the time of the Preliminary Hearings and no arraignment took place. A timetable was set in the usual way.

6. On 24th January 2013 the Attorney General gave his consent to the prosecution of all Blenheim applicants. We have not been told of any compelling reason why that could not have been done sooner. It is apparent that the issue was in the minds of the prosecution lawyers, because the preferring of the Indictment was delayed until consent had been given.

7. On 28th January 2013 at a Plea and Case Management Hearing ("PCMH") the applicants (except for Shields whose PCMH took place on the following day) were arraigned on an Indictment preferred after consent had been obtained. Only Bowles and Cook pleaded Not Guilty. The other applicants all entered guilty pleas to conspiracy to supply Class A controlled drugs. Bowles and Cook were convicted after a trial on 22nd April 2013. Sentencing followed on various dates.

8. Time for appealing against those convictions expired on 20th May 2013 in the cases of Bowles and Cook and on 25th February 2013 in all other cases. That time limit is provided by s18 of the Criminal Appeal Act 1968 which also gives this court power to extend it. No Notices of appeal against conviction were issued until June 2015. 7 appeals against sentence were dismissed on 21st May 2014, [2014] EWCA Crim 1027. Two applications for leave to appeal against sentence were refused by the Single Judge on 19th July 2013 and not renewed.

Operation Knot

9. The Indictment period was between May and November 2011. Cooke, Swarez and Wildman were charged on 3rd December 2011. The sending under s51 took place at the first appearance before the Magistrates' Court on 5th December 2011. Jolly, both McCreadies and Law were charged on 8th December 2011 and sent on the same day. Beck was charged and sent on 7th December 2011. The Preliminary Hearing for these applicants took place at the Crown Court on 23rd December 2011.

10. S's case was handled separately in the early stages. He was charged on 1st December 2011 but not sent until the 12th January 2012 when he made his first appearance at the Magistrates' Court. There was no Preliminary Hearing in his case but he appeared in the Crown Court at the same PCMH as the other applicants.

11. On 7th March 2012 the Attorney General gave consent to the proceedings (except in the case of S) and, again, an Indictment was preferred after that date. It is accepted by the CPS (and so disclosed to the defence) that the consent of the AG was not sought in the case of S. The PCMH of all applicants was on 12th March 2012 and on arraignment only Roseann McCreadie, James Beck and Gordon S pleaded Not Guilty. They were convicted on 9th July 2012, 11th June 2012, and 6th July 2012 respectively. Time for appealing against conviction therefore expired in April 2012 for most applicants and a few months later in the other three cases. S gave Notice of appeal against conviction and sentence in time. His application for leave to appeal against conviction was refused by the Single Judge and not renewed. His renewed application for leave to appeal against sentence was refused by the Full Court, [2013] EWCA Crim 2693. Beck, Roseann McCreadie and Law had applications for leave to appeal against sentence refused by the Single Judge and did not renew them. Cooke, Swarez, Jolly, Beck and Wildman had their appeals against sentence dismissed by the Full Court, [2014] EWCA Crim 53.

The way in which consent was addressed in the Crown Court

12. All applicants have all been legally represented throughout. Mr. Anthony Barraclough, who appeared before us representing them all, appeared in the Crown Court for Wood in the Operation Blenheim proceedings and for Cooke in the Operation Knot proceedings. CW (junior) has been prosecuted again subsequently, as will appear, and Mr. Barraclough was instructed. In all, 14 other advocates appeared for the applicants in the Crown Court proceedings and several different firms of solicitors were involved. A very substantial amount of specialist legal expertise was made available to these applicants and it appears that no-one enquired about whether the Attorney General had given his consent and, if so, when.

13. The single exception to that general statement is Mr. Barraclough. He tells us that in the Operation Knot proceedings he asked the Crown several times whether it had the consent of the Attorney and was told consistently that "consent was obtained and all was done properly". He says that he was happy to accept this until the recent appeal in *R v. CW and MM* [2015] EWCA Crim 906 ("CW") which we address below and which was decided on 22nd May 2015. In relation to the later case of Blenheim he says that he was unsettled about the consent issue and says

> "I have on several occasions asked for confirmation from the Crown of when consent to institute proceedings was obtained. I was told in an email on 30th January 2014 by counsel for the Crown Martin Reid (who also prosecuted CW in his subsequent case) that the CPS had obtained the consent of the AG in the following terms "I can confirm that we obtained the AG's consent to charge in respect of all defendants in Op Blenheim"."

14. We should record at this stage that in view of the published Guidance being applied by the CPS and the Attorney General which we mention below the responses which Mr. Barraclough received were not disingenuous, although it would have been better if he had been told when the consent was given. Consent was obtained within time if that Guidance were right. In truth it appears that until the issue of timing surfaced in the later case of CW (junior) and was determined by this court on 22nd May 2015 no-one paid it the attention it deserves. In dialogue before us, Mr. Barraclough said that at the time of proceedings he felt he had done as much as he could to pursue the issue, but that if he should have been more assiduous then the fault was his and not that of his clients. In fairness to him we should record that as far as the information before us is concerned, he appears to have been the only advocate who pursued it at all.

The Grounds of Appeal

15. In all cases the ground of appeal is simply stated. It is submitted that because ss1A and 4 of the Criminal Law Act prevent the institution of proceedings without the consent of the Attorney General and all these proceedings were instituted without such consent having been granted, they were nullities.

Extension of time

16. All applicants require very long extensions of time. Most counsel who settled Grounds did not address this question. Mr. Barraclough did, and put it this way in his Advice on Appeal dated 6th June 2015:-

> "This advice should be used to support an application for leave to appeal and for legal aid and an extension of time on the basis (if required in these circumstances) that we were misled by the Crown as to the time of the consent."

The submissions in response

17. The Respondent Crown conceded in the light of *R v CW & MM* [2015] EWCA Crim 906 ("CW") that consents were not obtained prior to the institution of the proceedings but submitted that leave to appeal out of time should be refused.

18. The Attorney confined his submissions to the effect of CW on indictable only offences. We turn to his arguments.

19. In respect of 'either way' offences consent must be obtained prior to the plea before venue ("PBV") hearing in the Magistrates' Court: *R v Lambert* [2010] 1 WLR 898 ("Lambert"). CPS Guidance (*Consents to Prosecute)* at the relevant time suggested that in indictable only cases consent should be obtained either before service of the case papers ("service"), or, if that were not possible, prior to the effective PCMH. Post-CW the CPS issued amended guidance, now reading that consent should be obtained prior to the preliminary hearing in the Crown Court.

20. The Attorney argued that the ratio in CW is that consent must be obtained prior to the preliminary or to an early guilty plea ("EGP") hearing in the Crown Court but need not be obtained before entry in the register or before sending the case to the Crown Court, pursuant to s51 of the Crime and Disorder Act 1998 ("sending").

The decision in CW and the Attorney General's submissions about its effect

21. CW was the Crown's unsuccessful interlocutory appeal against a ruling at a preparatory hearing in the Crown Court that the proceedings against the Respondents were null and void because the Attorney's consent (required under s4 Criminal Law Act 1977) had not been obtained in time. The question for the trial judge was

> "Should the Attorney General's consent to institute proceedings have been obtained before the preliminary hearing in the Crown Court?"

22. Consent had been obtained after the preliminary hearing and the Respondents argued that by then the case had proceeded beyond the formalities of charging and ensuing remands, such as would have allowed the Crown to rely on s25(2) of the Prosecution of Offences Act 1985. It reads where relevant:

> "An enactment to which this section applies –

> (a) shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence…."

23. The Judge ruled that the proceedings had been instituted prior to consent and said it was:

> "…not possible to strain the language of s25 to say that a preliminary hearing could be saved from the requirement of consent by its date"**.**

24. The question on appeal was simply expressed: were the steps taken at the hearings before consent protected by s25? There had been two: a sending and a preliminary hearing in the Crown Court.

25. The Court of Appeal identified three opportunities for institution of proceedings:

i) When the charge was entered in the register at the Magistrates' Court;

ii) When it was sent under s51;

iii) At the preliminary hearing.

26. The Court did not, and did not need to, identify which opportunity applied to indictable only offences. CPS Guidance advised that in such instances consent should be obtained either before service (50 or 70 days after sending dependent upon whether the accused were in custody or on bail), or, were that not possible, prior to the effective PCMH. Only after service can a PCMH be held, generally within 16 weeks of sending in a bail case and 13 weeks in a custody case**.** An EGP hearing can be within days of sending, and a preliminary hearing 14 - 21 days after it: CPD 3A.6 – 3A.9.

27. Considering entry in the register, when the proceedings could have been, or were, instituted, CW quoted from *Lambert**:***

> "In any sense of the word, the proceedings must have been instituted when the charge was entered into the court register".

28. *Lambert* qualified that by holding that, even were it not so, PBV was after proceedings had been instituted and outwith s25(2) of the 1985 Act.

29. The Attorney submitted that entry in the register, in the modern age of the computer often very shortly after charge, at the very least falls within s25(2). He suggested it is a formal and administrative step which automatically follows communication from the police that X has been charged with Y offence and will be before the Magistrates on Z date. The entry in the register replicates and depends on information from the police.

30. He argued that consent post-sending but pre-EGP or preliminary hearing does not render the proceedings void: *CW*. At paragraph 25, read with paragraph 26 reciting the Crown's argument that a sending was no more than an administrative step, the Court said that the hearing at which one Respondent was sent for trial was "*no more*

than an administrative step." It pointed out that although CPR 9.7(5) contemplates a question about plea at this hearing, "*there is no statutory requirement that it should be posed."* The Attorney added that it is asked only after the decision to send. The Court in CW compared and contrasted a sending with a PBV when there is a statutory requirement to ask about plea: s17A, Magistrates' Court Act 1980.

31. The Court noted the assurance by counsel for the Crown that an EGP or preliminary hearing no later than 28 days after sending afforded sufficient time for consent to be sought and obtained. The indictment would by then have been served.

32. The Court held that whilst the mandatory requirement to secure consent before entry into the record was moderated by the provisions of s25 only "*to a strictly limited extent*" certain steps had to be taken during a criminal case and "*it would risk an injustice were their place in the chronology to found, without more, a successful submission that proceedings were null and void."***.**

33. That s25 includes the sending of an indictable only offence reflects the character of such a hearing which does not involve consideration of the evidence, or of the merits of the charge. Its primary purpose is a prompt and efficient sending to the Crown Court, where the case really begins, so that the latter manages it from the outset.

34. S144 Criminal Justice Act 2003 ("CJA") mandates account being taken of the stage at which an intention to plead guilty is indicated. The first reasonable opportunity so to do may be at the sending in response to the CPR 9.7(5) question: *Caley* [2013] 2 Cr. App. R. (S) 47 ("Caley").

35. S2(2)(a) Administration of Justice (Miscellaneous Provisions) Act 1933 prohibits service of a bill of indictment before sending. S (2)(cc) Criminal Proceedings and Investigations Act 1996 dealing with disclosure applies where, *inter alia*, a defendant has been charged and sent for trial.

36. The Attorney submitted however that such considerations do not take a sending outside the ambit of s25(2). ***Caley*** held that the first reasonable opportunity to indicate a guilty plea was

> "…normally either at the Magistrates' Court or immediately on arrival in the Crown Court—whether at a preliminary hearing or by way of a locally-approved system for indicating plea through his solicitors."

37. The Attorney also acknowledged a power vested in the Magistrates' Court to adjourn the sending and to remand the defendant: s52 of the 1998 Act which reads where relevant:

> "52.— Provisions supplementing section 51 and 51A
>
> (1) Subject to section 4 of the Bail Act 1976, section 41 of the 1980 Act, section 115(1) of the Coroners and Justice Act 2009, regulations under section 22 of the 1985 Act and section 25 of the 1994 Act, the court may send a person for trial under section 51 or 51A above—

> (a) in custody, that is to say, by committing him to custody there to be safely kept until delivered in due course of law; or
>
> (b) on bail in accordance with the Bail Act 1976, that is to say, by directing him to appear before the Crown Court for trial.
>
> ……..
>
> (5) A Magistrates' Court may adjourn any proceedings under section 51 or 51A above, and if it does so shall remand the accused."

38. Thus where consent has not been obtained before first appearance, the case may "wait" in the Magistrates' Court until it is received, and then sent. A first appearance may be within hours of charge and it would in some cases be unrealistic and impractical to expect the Attorney to have made an informed decision in so abridged a period.

Discussion and decision on nullity argument

When are proceedings instituted in respect of indictable offences?

39. We have been invited by the Attorney to provide guidance as to when proceedings are instituted in respect of indictable offences. It is accepted that in the case of the applicants in this case the relevant consents were not obtained prior to the institution of proceedings against each of them. It follows that our guidance would not be determinative of this appeal. However, Mr John McGuinness QC, on behalf of the Attorney, submits that guidance is needed as a matter of urgency following the judgment of this Court in *R v CW & MM* [2015] EWCA Crim 906. It is not generally the function of this court to provide guidance (or legal advice) as opposed to taking decisions necessary to the determination of appeals and applications. However, the issue has been fully argued before us and we are in as good a position to address it as any court could be.

40. The current CPS Guidance (*Consents to Prosecute)* advises that in indictable only cases consent should be obtained either before service of the papers, or if that is not possible, prior to the effective PCMH. This is the guidance which has led to the practice adopted in the cases before us. CW has now decided authoritatively that it is wrong. Unsurprisingly the process of amending the guidance is already underway. The CPS, in consultation with the Attorney's Office, has already issued amended internal guidance to the effect that prosecutors should ensure that consents/permissions required are obtained <u>prior to the preliminary hearing in the Crown Court.</u>

41. Understandably the Attorney is anxious to ensure that the new Guidance represents the law correctly as to the timing of the institution of proceedings in indictable only cases. In these circumstances, we propose to consider the three stages in the proceedings identified in CW which might arguably amount to their institution" for the purposes of s4 of the Criminal Law Act 1977.

42. **The date when the charge was entered on the register.** Mr McGuinness describes this as the "purist" interpretation applying the approach adopted in *Lambert* [2009]

EWCA Crim 700 in respect of an offence contrary to s12(2) of the Terrorism Act which was triable either way. In *Lambert* Thomas LJ (as he then was) said in paragraph 19:

> "However, there can be no reason for contending, as a matter of language and context, that the time at which proceedings were instituted in respect of the defendant under the Terrorism Act 2000 was any later than the time at which the defendant was brought to court following the charging and when the charge was entered onto the court register."

43. Mr McGuinness submits that the Court immediately qualified that statement by adding:

> "Even if that were not correct, it would be impossible to contend that the statutory provisions in s17A of the Magistrates' Courts Act 1980 which set out detailed steps the court was to take during the course of a plea before venue hearing were not steps taken after proceeding had been instituted."

44. The Court in *Lambert* went on to hold that the plea before venue hearing did not fall within the scope of s25 (2) of the Prosecution of Offences Act 1985. S25(2) of the 1985 Act permitted only those actions which were necessary to apprehend, charge and remand an offender in custody or on bail to be taken before the relevant permission or consent had been obtained, and did not extend to a PBV hearing.

45. The entry of a charge on the register in the Magistrates' Court can occur within a very short time (sometimes literally minutes) of the charging process. It may be no more than an entry posted on a computer which automatically follows communication from the police that a named person has been charged with a particular offence and will be appearing at the Magistrates' Court (on bail or in custody) on a particular date. It follows that the entry in large measure will replicate (and will be dependent on) information from the police. Mr McGuinness contends that the modern process of entering the charge on the register is a formal and administrative step, and accordingly does not in itself involve the institution of proceedings. We agree. Given the speed at which a charge may be entered upon the register following charge, s25(2) of the Prosecution of Offences Act 1985 would in many cases be rendered virtually redundant by the 'purist' interpretation. In our view, an analysis of the real nature of entering a charge upon the register leads us to the view that a required consent/permission need not be obtained before that process is undertaken. It is within the scope of s25(2) in that it is purely part of the administrative process which follows arrest, charging and remand in custody or on bail.

46. **The date when the case is sent to the Crown Court, pursuant to s51 of the Crime and Disorder Act 1998**. The Attorney further submits that s25 of the 1985 Act operates to include within its ambit the hearing in the Magistrates' Court at which an indictable only offence is sent to the Crown Court pursuant to s51 of the 1998 Act. Mr. McGuinness contends that:

    i) the s51 hearing does not involve any consideration of the evidence against the defendant, or the underlying merits of the charge;

ii) the principal purpose of the s51 hearing is to facilitate the sending of the case to the Crown Court so that the Crown Court (as the court of trial) has management of the case from the outset.

iii) the rationale behind the introduction of the s51 procedure is to avoid delay because in reality the life of the case begins at the Crown Court.

47. The answer to this submission depends upon the nature and character of a s51 hearing. The considerable streamlining of progress of a criminal case through the courts in recent years was reviewed by Hughes LJ (as he then was) in *Caley* when considering whether there is always a formal opportunity in the Magistrates' Court for a defendant to indicate he accepts he is guilty. At paragraph 15, he said:

> "Where the offence is an "either way" offence, the magistrates are required to conduct mode of trial proceedings under the Magistrates' Courts Act 1980, and if the case is suitable for Crown Court trial, then a formal committal follows. The mode of trial proceedings in the Magistrates' Court include the requirement that the defendant will read the charge and given the opportunity (if he wishes) to indicate that he will plead guilty: see ss17A(3) and 4. Where the offence is indictable only it will have to be "sent" to the Crown Court, but a similar enquiry must be made at the Magistrates' Court whether the case is likely to be a plea of guilty or not. This is required by the Rule 9.7(5) of the Criminal Procedure Rules, as well as more generally by Rule 3.8. Both Rule 9.7(5) and para.IV41.3 of the Consolidated Criminal Practice Direction ensure that the management directions given by the magistrates at the time of sending will vary according to the answer. A preliminary hearing for the plea to be taken in the Crown Court, and "as soon as possible" will be directed where a plea of guilty is directed but (unless there is another reason for such a hearing), not otherwise. A case management hearing in the Crown Court will be directed if no such indication is given. In other words, there is always a formal opportunity in the Magistrates' Court for the defendant to indicate that he accepts he is guilty."

48. As is clear from this analysis, a s51 hearing (i) provides an opportunity for a defendant to indicate he is going to plead guilty and (ii) the magistrates' directions will vary according to a defendant's response to the enquiry. As this Court acknowledged in CW, there is no statutory requirement that a question about pleas should be posed at a s51 hearing. The question is contemplated by Rule 9.7(5) of the Criminal Procedure Rules, and not by the primary legislation. At a PBV, by virtue of s17A of the Magistrates' Court Act 1980, there is a statutory requirement to ask the defendant about his plea. Rule 9.7(5) makes it clear that the court's obligation to ask whether the defendant intends to plead guilty at the Crown Court only arises if the court sends the defendant to the Crown Court.

49. The principal purpose of s51 is to act as the mechanism by which an indictable only offence is sent as soon as possible to the court of trial (i.e. the appropriate Crown Court.) This is not inconsistent with the rule enshrined in s2(2)(a) of the Administration of Justice (Miscellaneous Provisions) Act 1933 that no bill of indictment may be preferred unless the defendant has been sent for trial. Nor is it

inconsistent with the fact that by virtue of Part 1 of the Criminal Proceedings and Investigations Act 1996 (the disclosure provisions), the statutory disclosure obligations of the Crown are engaged once (but not before) a case has been sent under s51.

50. The Attorney also reminded us of the confirmation by counsel for the Crown when addressing the court in *CW and MM* that the Attorney would be afforded sufficient time for consent were proceedings deemed instituted at a preliminary or early guilty plea (EGP) hearing in the Crown Court no later than 28 days after sending.

51. We have considered s52 of the 1998 Act which contains "the provisions supplementing ss51 and 51A" of the Act which we have set out above. S52(5) provides the power for the Magistrates' Court to "adjourn proceedings under s51 or 51A" and provides that if it does so shall remand the accused.

52. First, it is noteworthy that the draftsman used 'proceedings' to describe a s51 hearing. The same word is used in s4 of the 1977 Act. If it is given the same meaning in both Acts this resolves the issue.

53. Second, as Mr McGuinness acknowledged, s52(5) enables a Magistrates' Court to grant an adjournment where consent has not been obtained in time for the hearing. This safeguard gives the Attorney time to reach an informed decision if the first appearance follows shortly after arrest and charge. Mr McGuinness suggests that adjournments to obtain consent might cause delay and hold up the progress of a case out of the Magistrates Court. However, the delay is only likely to occur in cases which Parliament intended to protect with s25(2) of the Prosecution of Offences Act 1985.

54. In our view consent is required to be obtained prior to the sending pursuant to s51 of the Crime and Disorder Act 1998. Whilst entry in the register is within the protection afforded by s25(2), close analysis of the statutory provisions reveals that a sending under s51 is not, and proceedings must have been instituted at this stage.

55. We do not accept that it is possible to distinguish between a PBV in respect of offences triable either way and a sending under s51 in respect of indictable offences on the basis that the latter is purely an administrative step and the other features of a s51 hearing are governed by the Criminal Procedure Rules and the Consolidated Practice Direction and not the Act. We have looked at the current s51 procedure as a whole, and conclude that a Magistrates' Court is required to make decisions, following the mandatory requirement that a defendant be asked if he intends to plead guilty in the Crown Court.

56. We are fortified in our view by the terms of s52(5) which allows a Magistrates' Court to adjourn proceedings should it think fit. If the Attorney has not had a reasonable time in which to make an informed consent, the court is likely to grant an adjournment for the minimum time necessary. That does not mean that other appropriate preparations will have to be put on hold. The submission that this will introduce delay is of limited force. It is obviously essential that proceedings properly instituted are managed efficiently and without delay. While there is a possibility that they may never be instituted the devotion of substantial resources to their management by the court is less obviously in the public interest. We have referred

already to the indication in CW that 28 days should suffice. If the Magistrates' Court granted an adjournment of that length and then sent the case to the Crown Court, we would expect the Crown Court to manage the case on the assumption that the prosecuting authority will have used the time to good effect. There is also force in Mr. Barraclough's submissions that in many cases time will be saved by bringing forward the point at which consent is sought. In investigations such as the present the arrests do not come as a surprise to the police or the CPS. They are planned. A charging decision is then made by the CPS which involves a formal assessment of the evidence and an application of the Code for Prosecutors well known test. There is no reason why the Attorney cannot make arrangements with the CPS to ensure that he is provided with information at the earliest possible stage. Finally, while the Attorney must consider each case separately, where the only reason why consent is required is that the case involves a cross-border element involving Scotland a consistency of approach may evolve which will make these decisions less complex.

The Extension of Time Applications

57. The proceedings instituted before the Attorney gave consent would (or at least should) have been treated as a nullity by the Crown Court had the matter been raised prior to conviction. They would then have been instituted properly and the convictions recorded and sentences imposed exactly as they were. This would have been procedurally inept but relatively sparing of the resources of the criminal justice system. Had an appeal been issued within 28 days of conviction this court would have quashed the convictions and ordered retrials (or perhaps granted a writ of *venire de novo*). This would have been very wasteful although probably less so than taking the same course now.

58. As we have recorded, the applicants' counsel in their Grounds appear to have regarded the extension of time as something of a formality. We do not agree. S18 of the Criminal Appeal Act provides the 28 day time limit and the discretion to extend it. It has not been submitted that it does not apply in this case. It reads:-

> "18.— Initiating procedure.
>
> (1) A person who wishes to appeal under this Part of this Act to the Court of Appeal, or to obtain the leave of that court to appeal, shall give notice of appeal or, as the case may be, notice of application for leave to appeal, in such manner as may be directed by rules of court.
>
> (2) Notice of appeal, or of application for leave to appeal, shall be given within twenty-eight days from the date of the conviction, verdict or finding appealed against, or in the case of appeal against sentence, from the date on which sentence was passed or, in the case of an order made or treated as made on conviction, from the date of the making of the order.
>
> (3) The time for giving notice under this section may be extended, either before or after it expires, by the Court of Appeal."

59. The discretion is unfettered by statute but the principles by which it is exercised have emerged over the years since the Criminal Appeal Act 1907. That Act also contained

a time limit for giving Notice of Appeal and a discretion to extend it. In particular, the court has considerable experience of dealing with appeals based on a change in the law post conviction.

60. The approach to extending time in a quite different case was recently considered and re-stated in *R v. Thorsby* [2015] EWCA Crim 1, [2015] 1 Cr App R (S) 63. The court had imposed sentences which involved a failure to comply with its statutory obligation to give credit for time spent on a qualifying curfew. The court held that long extensions of time should be granted where a sentence had been imposed and was being served which exceeded the sentencing powers of the court. Pitchford LJ said:-

> "13 The Criminal Procedure Rules r.65.4 , requires the applicant to make an application for an extension of time when serving the notice of appeal and to give reasons for the application. Neither the Criminal Appeal Act nor the Rules limit the discretion of the court on the issue whether an extension of time should be granted. In this court's experience the principled approach to extensions of time is that the court will grant an extension if it is in the interests of justice to do so. There are, however, several components that contribute to the interests of justice. The court will have in mind the public interest in the proceedings of the Court generally, in particular in the finality of Crown Court judgments, the interests of other litigants, the efficient use of resources and good administration. However, the public interest embraces also, and in our view critically, the justice of the case and the liberty of the individual. As Sir Igor Judge, then President of the Queen's Bench Division said in *Gordon [2007] EWCA Crim 165; [2007] 2 Cr. App. R. (S.) 66* (p.400) at [31], speaking of the need for the Crown Court to specify the number of days spent in custody to count towards sentence under the original s.240 regime:
>
> > "31. The imperative is that no prisoner should be detained for a day longer than the period justified by the sentence of the court."
>
> Where there is no good reason why an applicant should not have complied with well-known time limits this court will be unlikely to grant an extension of time unless injustice would be caused in consequence. Accordingly, the court will examine the merits of the underlying grounds before the decision is made whether to grant an extension of time. The judgment is judicial and not merely administrative."

Change of law

61. The Crown relied on a "change of law" submission to support its argument that, at the relevant time, in indictable only cases consent was understood to be timeous so long as obtained pre-PCMH. The CPS Guidance which we have referred to above was to that effect. The court should therefore apply its usual approach to change of law cases and refuse the necessary extensions.

62. In our view there has been not a change of law but an improved understanding of the unchanged law. We briefly rehearse the well established approach of the courts.

63. Absent special or particular reasons, leave to appeal out of time on change of law grounds will not succeed: *R v Cottrell, R v Fletcher* [2007] EWCA Crim 2016; [2008] 1 Cr App R 107 ("*Cottrell*"). Social and public considerations take the matter beyond a narrow focus of an individual conviction, the law as subsequently understood is irrelevant, and there should so far as possible be finality and certainty in the administration of criminal justice: *Cottrell.*

64. In *R v Mitchell* [1977] 65 Cr App R 185 the court said:

> "…an apparent change in the law or, to put it more precisely, the previous misconceptions about the meaning of a statute have been put right, does not afford a proper ground for allowing an extension of time in which to appeal against conviction."

65. Where the conviction was proper under the law as at trial it stood, leave is granted only to cure a substantial injustice: *R v Ramzan and others* [2006] EWCA Crim 1974 [2007] 1 Cr App R 150. Hughes LJ said that a defendant seeking leave to appeal out of time is generally expected to point to something more than the mere fact that the law has changed, been corrected, or developed. If the appeal is effectively based on a change of law, and nothing else, but the conviction was properly returned after a fair trial it is unlikely a substantial injustice occurred.

The law at trial and conviction

66. At plea or conviction in the instant cases the most recent judgment on consent was *Lambert*. The reader would have derived the information that whilst proceedings were instituted when the accused was brought to court and the charge entered onto the record, at PBV he "came to court to answer the charge" because of the mandatory question as to plea intention. PBV was not a procedural step "rescued" by s25. The court did not isolate consideration of offences triable only on indictment where there was a sending and then a preliminary hearing in the Crown Court.

67. Three earlier decisions of the Court of Appeal reviewed when proceedings are instituted: *R v Elliott* (1985) 81 Cr App R 115 and *R v Whale and Lockton* [1991] Crim LR 69 held that that stage was when the accused came to court to answer the charge. *R v Bull* (1994) 99 Cr App R 193 held that as a consequence of s25 an accused could be arrested and remanded without the absence of consent proving fatal. These decisions all pre-date the sending procedure and many other modern attempts to streamline the criminal justice system. The construction of s51 has been central to our decision and the test established those cases should now be read in the light of *Lambert, CW* and this decision.

68. CPS Guidance when these applicants were moving through the system was that consent in indictable only cases should be obtained before service or, at the latest, before PCMH. This appeared on the CPS website and any defence lawyer could easily ascertain the principles by which the CPS and the Attorney were likely to act. If they

wished to challenge that approach on the basis of *Lambert* it was open to them so to do.

69. No applicant submitted at the sending or preliminary hearings that proceedings were invalid. By the PCMH consents had been obtained.

70. These applications do not involve a change in the law. Rather, they demonstrate the need for a sharpened appreciation of unchanged law. In *Lambert* and CW this court conducted an exercise in statutory construction and explained the law. This corrected what appears to have been a widely shared misapprehension as to the meaning of s4 of the Criminal Law Act 1977, s25 of the Prosecution of Offences Act 1985 and ss 51 and 52 of the Crime and Disorder Act 1998. It did not, however, change the law.

Substantial injustice

71. As Hughes LJ explained in *Ramzan* the need to demonstrate substantial injustice to secure an extension of time is not limited to change of law cases properly so called. Indeed a case such as the present could be regarded as an *a fortiori* illustration of the need to satisfy that test. Where there is a true change in the law, the applicant can do nothing until the law is changed. Where, as here, the applicants were able at all times to argue for the law as it has now been declared to be, their failure to do so counts against them on their extension of time application. On technical matters such as this, the applicants depend on the advice they receive and it is not unfair to hold them to their approach to the proceedings having regard to that advice. If the point had been taken before conviction it would not have done any applicant any good at all. The failure to raise or pursue any complaint about the obtaining of consent is therefore entirely understandable. It follows that, to succeed, the applicants must demonstrate substantial injustice. Mr Barraclough, for all of them, conceded that he could not advance the suggestion that any had endured substantial injustice. Consent was obtained in all cases save S's.

72. Consent was obtained before arraignment. There has been no suggestion that the trials, pleas and sentences were other than fair and unimpugnable. No substantial injustice has been established.

73. There is no reason to extend time, and these applications are rejected.

74. That is an end to the matter save in the case of S when consent was never obtained. He lost the *spes* of a refusal by the Attorney. We therefore adjourn that appeal and invite further submissions from all the parties as to the appropriate course now to be taken.