IN THE WESTMINSTER MAGISTRATES' COURT
Before

Senior District Judge Goldspring

(Chief Magistrate)

For England and Wales

BETWEEN

NORTHERN TRAINS LIMITED

V

Mark Ballington & Jade Wylie

NORTHERN TRAINS LIMITED

V

Sarah Cooke

GREATER ANGLIA

V

Joshua Baggaley

Paul Jenkins

Sarah McKenzie

RULING

Mr O'Neill KC and Ms L Addy appeared for NRHL

Mr A Richardson appeared for Greater Anglia

Mr Gokhool appeared today only for Paul Jenkins

None of the other defendant's appeared or were represented.

Introduction

1. The above cases have been listed by the court for consideration of the legality of prosecutions by the Railway Operators using the Single Justice Procedure (SJP) .

2. The problem became known when the Department for Transport notified the Ministry of Justice that four train operating companies have, over several years, prosecuted offences through the Single Justice Procedure when this was not permissible. I was asked to deal with the legal ramifications and in conjunction with HMCTS decided to review the above case as " test" cases for the purposes of consideration of the correct legal remedy.

3. As a result of helpful written submissions by both prosecutors the issue has been narrowed to ***"what is the proper legal route to remedy the unlawful prosecutions against these defendant's"?,*** the implications are wide ranging because the same issue applies to over 74,000 cases where the same unlawful prosecutions took place.

4. Section .5(1), 'fail to produce a ticket for inspection', is a summary only non-imprisonable offence under the Regulation of Railways Act 1889.

5. The maximum penalty is a fine of £500 (level 2). Prosecutors are authorised by the Criminal Justice Act 2003 (New Method of Instituting Proceedings) (Specification of Relevant Prosecutors) Order 2016 to institute proceedings by a Single Justice Procedure.

6. The Order permits the prosecution of a "railway offence" through the SJP. The offence under s.5(1) of the 1889 Act is not included within the definition of a railway offence.

7. On one view there is potentially another issue as to whether the Secretary of State had the vires to restrict train operating companies to bye-law offences. The 2016 Order is made under s.29 CJA 2003. Section 29(5)(h) defines a relevant prosecutor as a person authorised by the Secretary of State for Justice (the Lord Chancellor) to institute criminal proceedings. Section 29(5A) says that this order must also specify whether that person is authorised to issue written charges and requisitions and SJP notices, or only written charges and SJP notices. There is nothing in the section (or the following sections) providing that the SoS can also restrict the offences which can be prosecuted. The only statutory restriction is the restriction to summary only non-imprisonable offences. However, that point has not been taken by the parties and I am proceeding on the basis of the Order as drafted.

8. In the respective submissions the following concessions are made;

> ***i.*** *The Single Justice Procedure* ***should not have been used to prosecute offences contrary to section 5(1) or 5(3) of the Regulation of the Railways Act 1889;***
>
> *ii.* *Any prosecution* ***brought for Byelaw offences was valid****.*
>
> ***iii.*** *The proceedings conducted using the Single Justice Procedure for offences contrary to section* ***5(1) and 5(3) were invalid: a single magistrate lacked jurisdiction to try the offences.***
>
> *iv.* ***All convictions and sentences imposed using the Single Justice Procedure for offences contrary to section 5(1) and 5(3) should be set aside*** *pursuant to section 142 of the Magistrates' Court Act 1980 and thereafter Greater Anglia will offer no evidence. Greater Anglia will also offer no evidence in any section 5(1) cases yet to be heard.*

v. ***Any monies paid, by way of fines or costs, should be refunded*** *in the same way as they would be for any other conviction which is subsequently appealed or set aside.*

vi. ***Both a declaration as to Nullity and setting aside pursuant to s142 MCA 190 appear permissible on their face****, the court is invited to resolve the issue but make plain both avenues are available and / or would achieve the same result.*

9. During the hearing on 19th July, I indicated that whilst I can see that the door to using S142 MCA 1980 is arguably open ,I was not persuaded it was the appropriate route, I heard further submissions and invited written submissions to deal with the cases I cited to the parties, point **vi** above emerges from those further written submissions.

The Legal framework

The Magistrates' Courts Act 1980

10. Section 16A of the Magistrates Courts' Act 1980 (as amended by Criminal Justice and Courts Act 2015) makes provision for trial by a single justice on the papers (section 16A(11)). Section 16A provides that:

"(1) A magistrates' court may try a written charge in accordance with subsections (3) to (10) if—

(a) the offence charged is a summary offence not punishable with imprisonment,

(b) the accused had attained the age of 18 years when charged, or is not an individual,

(c) the court is satisfied that—

(i) the documents specified in subsection (2) have been served on the accused, and

(ii) service of all of the documents was effected at the same time, . . .

(d) the accused has not served on the designated officer specified in the single justice procedure notice, within the period prescribed by

Criminal Procedure Rules, a written notification stating either—

(i) a desire to plead not guilty, or

(ii) a desire not to be tried in accordance with this section, and

(e) the accused has not accepted the automatic online conviction option in respect of the offence."

12. Section16B MCA 1980 provides:

"(1) If a magistrates' court decides, before the accused is convicted of the offence, that it is not appropriate to convict the accused in proceedings conducted in accordance with section 16A, the court may not try or continue to try the charge in that way.

(2) A magistrates' court may not try a written charge in accordance with section 16A if, at any time before the trial, the accused or the accused's legal representative on the accused's behalf gives notice to the designated officer specified in the single justice procedure notice that the accused does not desire to be tried in accordance with section 16A.

(3) If a magistrates' court may not try or continue to try a written charge in accordance with section 16A because the conditions in section 16A(1) are not satisfied or because of subsection (1) or (2), the magistrates' court dealing with the matter must—

(a) adjourn the trial, if it has begun, and

(b) issue a summons directed to the accused requiring the accused to appear before a magistrates' court for the trial of the written charge.

(4) A magistrates' court issuing a summons under subsection (3)(b) may be composed of a single justice."

13. Section 16C MCA 80 provides:

"(1) If a magistrates' court decides, after the accused is convicted of the offence, that it is not appropriate to try the written charge in accordance with section 16A, the court may not continue to try the charge in that way.

….

(3) If a magistrates' court may not continue to try a written charge in accordance with section 16A because of subsection (1) or (2), the magistrates' court must—

(a) adjourn the trial, and

(b) issue a summons directed to the accused requiring the accused to appear before a magistrates' court to be dealt with in respect of the offence."

14. Section 121 MCA 1980 provides that a magistrates' court shall not try an information summarily or hear a complaint except when composed of at least 2 justices unless the trial or hearing is one that by virtue of any enactment may take place before a single justice.

15. It follows therefore , in general terms, that the Single Justice Procedure may only be used where:

i. the offence charged is a non-imprisonable summary offence; ii. a defendant is 18 or above when charged or is not an individual;

iii. the court is satisfied that the relevant documents have been served on the accused; iv. that service of all relevant documents were effected at the same time;

iv. the accused has not served on the designated officer a single justice procedure notice expressing a desire to plead not guilty or not to be tried by a single justice, and

v. the accused has not accepted the automatic online conviction option in respect of the offence.

16.The Criminal Justice Act 2003 makes provision for the use of the Single Justice Procedure by Railway Operators. Section 29 sets out as follows:

"(1): A relevant prosecutor may institute criminal proceedings against a person by issuing a document (a "written charge") which charges the person with an offence.

(2) Where a relevant prosecutor issues a written charge, it must at the same time issue— (a) a requisition, or

(b) a single justice procedure notice.

(2AA) A single justice procedure notice may be issued only if—

(a) the offence is a summary offence not punishable with imprisonment, and

(b) the person being charged has attained the age of 18, or is not an individual."

17. Sections 29(2B) and (3B) make further provision about the Single Justice Procedure and service of notice.

18. Section 29(5) defines "relevant prosecutor". This includes s29(5)(h): "a person specified in an order made by the Secretary of State for the purposes of this section or a person authorised by such a person to institute criminal proceedings".

19. By The Criminal Justice Act 2003 (New Method of Instituting Proceedings) (Specification of Relevant Prosecutors) Order 2016 (the "2016 Order") "relevant prosecutor" was defined to include Railway Operators. It set out limits on the offences that Railway Operators may prosecute. Article 6 of the Order sets out that Railway Operators are a "relevant prosecutor":

"(1) For the purpose of prosecuting a railway offence—

(a) a person who is authorised to be the operator of a railway asset by a licence granted in accordance with section 8(1) of the Railways Act 1993 (licences); and

(b) a person who is exempt from being so authorised by virtue of section 7(1) of that Act

(exemptions from section 6) and has the management of a railway asset for the time being.

(2): in this article [...] "railway offence" means [...]

(a) an offence under section 5 of the Tyne and Wear Passenger Transport Act 1979

(avoidance of fare);

(b) an offence contained in byelaws made under section 46(1) of the 2005 Act (byelaws);

(c) an offence contained in byelaws which continue to have effect by virtue of section

46(4) and paragraph 2 of Part 2 of Schedule 13 to the 2005 Act; and

(d) an offence contained in byelaws saved by the Transport Act 2000, as defined by section 46(6) of the 2005 Act."

20. Article 9 of the 2016 Order makes clear the limitations on the use of the Single Justice Procedure by Railway Operators:

"The persons specified in articles 3 to 8 and any person authorised by them to institute criminal proceedings are authorised to issue only written charges and single justice procedure notices."

Discussion and Analysis

21. It follows that Railway Operators are only empowered to institute proceedings by way of a written charge and Single Justice Procedure Notice for the limited number of offences defined by the 2016 Order as "railways offences". That does not include offences contrary to section 5(1) or 5(3) of the RRA. Prosecution of those offences should not have taken place using the Single Justice Procedure.

22. The essential question is whether the errors that have taken place are such that the proceedings are invalid, (or a nullity) or not and if they are what the correct avenue is to correct the error.

23. I approach the question on the basis of analysing both routes and try to explain why I prefer declaring proceedings a nullity rather than use s142 MCA 1980 to set them aside and start again.

S 142 MCA 1980

24. There are numerous authorities on S142 MCA , what follows is necessarily only a summary of the key cases.

25. Magistrates' Court Act 1980 s.142(1) says:

> *A magistrates' court may vary or rescind a sentence or other order imposed or made by it when dealing with an offender if it appears to the court to be in the interests of justice to do so, and it is hereby declared that this power extends to replacing a sentence or order which for any reason appears to be invalid by another which the court has power to impose or make.*

26. Section 142 was extensively amended by the Criminal Appeal Act 1995; **(see *R. (on the application of Williamson) v City of Westminster Magistrates' Court [2012] EWHC 1444 (Admin) below)***

27. It has long been recognised that there is no right to appeal a conviction based on a guilty plea unless that plea was 'equivocal'***; R v Durham Quarter Sessions, ex p Virgo [1952] 2 QB 1; R v Plymouth Justices, ex p Hart [1986] QB 950***, see also s 108, MCA 1980. Section 142 was enacted to enable the magistrates' court to correct limited mistakes and errors, which would otherwise need to be adjudicated in the crown court, the High Court by way of case stated, or via judicial review proceedings (see s 111, MCA 1980).

28. Section 142(2) was considered in the case of **R v Croydon Youth Court, ex p DPP [1997]EWHC** 1465. Lord Justice McCowan held:

> *'…the purpose of s 142(2) **is accurately described in the heading as a Power to rectify mistakes.** It is generally and correctly regarded as a slip rule. [Counsel] places great reliance on the fact that those words in the heading are followed by etc. But in my judgment that cannot extend the power given beyond a situation akin to mistake. There was no mistake in the present case or anything like it. The magistrates were in fact told at the trial, according to their chairman, that it was not essential for them to listen to the tape. They did rule that the interview was admissible and the defendant, advised by counsel, did then unequivocally plead guilty' (at pp416–417).*

29. ***In R (on the application of Holme) v Liverpool Magistrates' Court [2004] EWHC 3131 (Admin),*** Mr Justice Collins stated that, theoretically, it may be possible to argue that a magistrates' court had made a mistake in sentencing if it were one based on false information presented by the defendant in mitigation.

30. In ***R v (Carl Acton) v Feltham Magistrates Court [2007] EWHC 3366 (Admin),*** Mr Justice Mitting opined, in relation to McCowan LJ's comments, that: 'I do not exclude on a proper case argument that the statement that the magistrates' court had no jurisdiction under section 142 to permit a plea to be vacated, save in the case of mistakes, to be moderately overstated. Nor do I exclude the possibility that in circumstances which in effect render proceedings before a magistrates' court a nullity, that this court can and should intervene to quash those proceedings.' practical implications of Williamson Williamson's application focused on allegations regarding the conduct of his solicitor and whether that could fall into the concept of 'mistake' under s 142(2), MCA 1980. The contention was that he had misapprehended the strength of the prosecution case against him because the legal advice of his solicitor was flawed.

31. The court held further that, even if the contention were established, it would not be a matter that fell within the remit of the provision. The main reasoning seems to point to the fact that the effect of it doing so would have resulted in the provision being used as a 'surrogate' for a full appeal based on the alleged conduct of the solicitor. Therefore, the court held that the judge had erred in law when accepting that he had, under s 142, MCA 1980, a power to remit the case for a rehearing. Thus, any arguments in relation to the reasoning behind and the exercise of that discretion became purely academic; they were of no practical significance.

32. In the ***R v Doherty and McGregor [1997) EWCA*** 2567, the Court of Appeal, with the approval of the Lord Chief Justice, referred to the Bar Council's guidance setting out the procedure to be followed. The process involves a waiver of legal professional privilege, and the Registrar of Criminal Appeals will send the grounds with an invitation for the legal adviser to comment. These comments are then considered by a single judge along with the applicant's argument. While this is the usual procedure, if necessary, the matter can be heard before a full court and are often supported by oral evidence. This process is required before a determination of allegations relating to misconduct or incompetence and then the court will consider whether this renders the conviction unsafe.

33. The court, at para [31], opined that:

> *'The purpose of s 142 as originally enacted was to enable the magistrates' court itself to correct mistakes in limited circumstances to avoid the need for parties to appeal to the Crown Court, or to the High Court by way of case stated, or to bring judicial review proceedings. …the s 142 power was designed to deal with an obvious mischief: namely the waste of time, energy, and resources in correcting clear mistakes made in magistrates' courts by using appellate or review proceedings. The removal of the short time limit in 1996 is consistent with that approach. It is the common experience of courts in all jurisdictions that mistakes, and slips are often not picked up immediately. [As] … far as the jurisdiction relating to convictions is concerned, the amendment enables the magistrates' court to exercise the power in circumstances beyond those originally envisaged [,] … but the power remains rooted in the concept of correcting mistakes and errors.'*

34. In **R v Leighton Buzzard Justices, ex parte Director of Public Prosecutions (1989) 154 JP 41** it was held that following a plea of guilty justices have no jurisdiction to dismiss the information and there was no statutory power which enabled a magistrates' court to re-open a dismissal. A dismissal was not a "sentence or other order" within the terms of s 142(1) of the Magistrates' Courts Act 1980; the words "other order" meant an order such as a conditional discharge, a probation order or an order of that sort which was akin to a sentence but not necessarily a sentence.

35. In this case counsel for the respondent had submitted that as the original proceedings had only been purported to be brought to an end and that they had never come to an end, it was open to the magistrates' court to take the view that there had been no dismissal, to allow the change of plea and (because the prosecutor was not prepared to proceed) to dismiss the proceedings. However, that was not how the justices purported to deal with the matter. They purported to decide the issue on the basis of the arguments advanced under s 142(1) and it would be wholly wrong for a result to be upheld on the basis of the failure of the prosecutor to further prosecute after the change of plea, bearing in mind that he was arguing that s 142(1) did not apply. He had not turned his mind to the question of the proceedings being a nullity and he could not be criticized for not considering that alternative way of looking at the matter.

35. The decision to dismiss the information was made without jurisdiction and it would be an appropriate decision to quash, but in the particular circumstances of the case, having regard to the relatively minor offence, the fact that there had been three court hearings and the present position of the defendant, no order would be made.

36. Per Woolf, LJ:

> *"Albeit that [it] is technically right that if an order to dismiss the proceedings is made wholly without jurisdiction so* ***that it can be said to be a complete nullity****, as happened here, there is a power for the court to disregard that decision, in my view, they should be very slow to do so.* ***They should, in my view, only do so where both the prosecution and the defence and the court accept that is the inevitable result of what has happened****, otherwise there is a very real danger – as illustrated by the facts in this case – that in their efforts to improve the situation the justices will in fact make the matter worse . . . However, in the exceptional case, which is clear and where the parties are all in agreement, it does seem to me that it would be appropriate for the magistrates in their discretion to proceed to sentence albeit that they have previously made a mistake of the sort which occurred here.*
>
> *It seems to me that to require the parties, where everyone is agreed that what happened was a nullity, to go the expense of coming to this court would be wrong and that it is preferable for the matter to be dealt with expeditiously and more cheaply by the magistrates, then exercising the jurisdiction which they have failed up to then to exercise and sentence the defendant as appropriate."*

34. In **R v Soneji [2005] UKHL 49; [2006] 1 AC 340**, again in the context of confiscation orders, the House of Lords held that the correct approach to an alleged failure to comply with a provision prescribing the doing of some act before a power was exercised was to ask whether it was a purpose of the legislature that an act done in breach of that provision should be invalid. Building on the influential analysis of Lord Hailsham of St Marylebone LC in **London & Clydeside Estates Ltd v Aberdeen District Council [1980] 1 WLR 182**, at pp. 189-190, this decision signalled a move away from the dichotomy between "mandatory" and "directory" requirements and a move towards placing the emphasis on the consequences of noncompliance – and whether Parliament can fairly be taken to have intended total invalidity: see, esp. the speech of Lord Steyn, at [14] – [23].

35. In **R v Ashton [2006] EWCA Crim 794; [2007] 1 WLR 181,** at [1], the applications before the Court raised linked issues as to the consequences in law when there had been irregularity in the way in which an accused had come to be convicted and/or sentenced at the Crown Court. Dealing with the application of the principles to be derived from Sekhon and Soneji, Fulford J (as he then was), giving the judgment of the Court, said this

> *" 4. ….Indeed, these three applications demonstrate how far-reaching the effect of those authorities is likely to be whenever there is a breakdown in the procedures whereby a defendant's case progresses through the courts (as opposed to the markedly different situation when a court acts without jurisdiction). In our judgment it is now wholly clear that whenever a court is confronted by failure to take a required step, properly or at all, before a power is exercised ('a procedural failure'), the court should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that*

either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such a risk, the court must decide whether it is just to allow the proceedings to continue.

On the other hand, if a court acts without jurisdiction – if, for instance, a magistrates' court purports to try a defendant on a charge of homicide – then the proceedings will usually be invalid."

36. Gross LJ summarised the overall position as follows [45]:

"In general, the law has moved away from the "mandatory"/ "directory" dichotomy and now asks instead whether the legislature intended that the consequences of a procedural failure should entail the invalidity of the proceedings which follow. In doing so and as has been seen, the law distinguishes broadly between "mere" procedural failure and proceeding without jurisdiction. Informed acquiescence, or waiver, on the part of the accused may be of the first importance to the former but, as recounted in Ashton, waiver cannot operate to confer jurisdiction. Clarke serves as an authoritative reminder that there are instances where, however technical or lamentable it may be, a procedural requirement may be jurisdictional, so that non-compliance results in the invalidity of the proceedings which ensue, upon the appropriate application being brought in time or within any extended time. As it seems to me, the observations in Ex p. Machin and Williams epitomise this approach."

37. It is of note that in **Regina v Clarke [2008] UKHL 8; [2008] 1 WLR 338** Lord Bingham explained that a failure by a court officer to sign an indictment was a failing that went to the jurisdiction of the court such that the proceedings were rendered invalid.

38. The exercise of the power was considered in **R v (Williamson) v City of Westminster Magistrates' Court [2012] EWHC 1444 (Admin)**. Burnett J (as he was then) held at Para 31

31. "The purpose of s.142 as originally enacted was to enable the magistrates' court itself to correct mistakes in limited circumstances to avoid the need for parties to appeal to the Crown Court, or to the High Court by way of case stated, or to bring judicial review proceedings. In our judgment the introduction of the s.142 power was designed to deal with an obvious mischief: namely the waste of time, energy and resources in correcting clear mistakes made in magistrates' courts by using appellate or review proceedings. The removal of the short time limit in 1996 is consistent with that approach.

It is the common experience of courts in all jurisdictions that mistakes and slips are often not picked up immediately. … So far as the jurisdiction relating to convictions is concerned, the amendment enables the magistrates' court to exercise the power in circumstances beyond those originally envisaged. But the power remains rooted in the concept of correcting mistakes and errors. It is not a power equivalent to an appeal to the Crown Court or the High Court, nor is it a general power of review. It would be possible to construct an argument that because a magistrates' court made an error of law, and thus reached a wrong decision, it would be in the interests of justice for the matter to be remitted under s.142 for a rehearing.

However, such an interpretation would have the effect of neutering appeals by way of case stated. It would have the effect of conferring a similar power on the bench considering a s.142 application as possessed by the High Court."

39. And at [36] at [37]:

"36. We accept that there may be circumstances in which s.142(2) could be used to allow an unequivocal guilty plea to be set aside. Examples which spring to mind include cases in which a guilty plea had been entered to an offence unknown to the law. Surprising though it may seem, such errors do occur in particular in connection with repealed legislation. That would fall comfortably within the language of mistake. They may include cases where a jurisdictional bar was not appreciated by the defendant relating, for example, to a time limit or the identity of a prosecutor. There may be cases in which the proceedings were, in truth, a nullity. ***We would not exclude the possibility that s.142(2) would be apt to deal with a case in which circumstances developed (***enthesis added by me***)*** *after a guilty plea and sentence which led the prosecution to conclude that the conviction should not be sustained.*

37. However, the question in this claim is whether what the claimant alleges passed between him and Mr Mardon, and more generally his allegations concerning Mr Mardon's conduct as his solicitor, fall within the concept of "mistake" for the purposes of s.142(2). At the heart of the claimant's contention is the proposition that he misapprehended the strength of the case against him as a result of flawed legal advice. In our judgment, the circumstances relied upon by the claimant, even if they were established as being correct, do not bring the case within the ambit of the power found in s.142(2). The claimant is seeking to use that provision as a surrogate for a full appeal on the basis of the conduct of his solicitor. Such appeals are never straightforward. … In our judgment, s.142(2) of the 1980 Act does not provide an appropriate vehicle for the consideration of such matters.

40. **Williamson (Supra)** was further considered in **RH v DPP [2021] EWHC 147 (Admin)** in which the court held 9 paras 18 and 19)

19. The reference in the final sentence of [36], namely, "We would not exclude the possibility that section 142(2) would be apt to deal with a case in which circumstances developed after a guilty plea and sentence which led the prosecution to conclude that the conviction should not be sustained" was made in contemplation of a situation such as that in R v Bolton Justices Ex p. Scally [1991] 1 Q.B. 537, which had featured in the argument before the court; see [26] to [27]. That was a case where convictions for drink-driving were quashed in judicial review proceedings following unequivocal guilty pleas when it was later discovered that the medical cleansing swabs in blood-sampling kits used by the police force in question contained alcohol. The court in Williamson was indicating that the section 142 route ***might well be*** *(enthesis added) available in such circumstances*

41.Thus, I accept it is arguable than section 142 is available is available where the Single Justice Procedure was used and it should not have been.

42. The alternative view is that S142 MCA is designed to only deal with the situation where the prosecution is valid ab initio but along the way a mistake / error has occurred, not those where and in fact the proper legal recourse is to find the prosecutions to be a nullity.

Nullity

43. In answer to me raising the line of authorities discussed below as seeming to support my preference for declaring the proceedings a nullity as well as **R v Leighton Buzzard Justices, ex parte Director of Public Prosecutions (1989) 154 JP 41**, Mr Richardson cited **R. v Ashton (John)[2006] EWCA Crim 794,** In which it was held,

> *(1) whenever a court was confronted by a failure to take a required step, properly or at all, before a power was exercised it should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be **invalid.** If the answer to that question was no, then the court should go on to consider the interests of justice generally, and most particularly whether there was a real possibility that either the prosecution or the defence might suffer prejudice on account of the procedural failure. If there was no such risk, the court must decide whether it was just to allow the proceedings to continue, R. v Soneji (Kamlesh Kumar) [2005] UKHL 49, [2006] 1 A.C. 340, [2005] 7 WLUK 669 and R. v Knights (Richard Michael) [2002] EWCA Crim 2954, [2003] 1 W.L.R. 1655, [2002] 12 WLUK 459 applied. On the other hand, if a court acted without jurisdiction, then the proceedings would usually be invalid.*
>
> *(2) In D's case, proceedings for the s.4A offence were time barred by the Magistrates' Courts Act 1980 s.127, and although the judge correctly identified s.66 of the 2003 Act as enabling any judge who was sitting in the Crown Court to exercise the powers of a district judge, a district judge would not have had the power to deal with D in relation to a summary offence brought outside the statutory time limit. Accordingly, the defects in D's case were clearly jurisdictional rather than procedural in nature. The judge acted in excess of his powers by allowing the addition of the new count. The correct result was to grant the application and to quash the conviction.*
>
> *(3) In J's case, the offences were in fact originally instituted by or with the consent of the DPP. J's initial committal for sentence was valid and the judge was entitled to exercise the powers granted to him by s.66 in order to determine the mode of trial and commit J for sentence. Thereafter there was no legal impediment to prevent the judge from passing sentence. There was no basis to challenge the conviction and J's application was refused.*
>
> *(4) In O's case, the erroneous use of the procedure under s.51 of the 1998 Act had not deprived the Crown Court of its ability to deal with him. Parliament had not intended that result and no prejudice had been identified. Although the correct procedure should be followed, if an accused were erroneously sent to the Crown Court in respect of an offence triable either way, it would often be the case that he would not be prejudiced. There were no indications that Parliament intended that proceedings would be rendered automatically invalid because an indictment had not been preferred or signed. As no prejudice or consequential injustice had been identified, there was no reason to quash O's convictions and his application was refused.*

44. In **R. v Umerji (Adam) [2021] EWCA Crim 598** it was held that as to the scope of s.51 power, s.51 and s.17A procedures were not analogous. The latter contained a clear and absolute requirement that the defendant be present, and the plea indications given by the defendant at that stage had immediate and mandatory consequences. By contrast, s.51 did not expressly require the defendant's physical presence, and any plea indications would lead only to the magistrates making certain administrative decisions. The phrase "appears or is brought before a magistrates' court" in s.51 did not necessitate the defendant's physical presence in court, **R. v Bow Street Magistrates Court Ex p. Germany [1998] Q.B. 556, [1997] 12 WLUK 278 and R. (on the application of Griffin) v City of Westminster Magistrates' Court [2011] EWHC 943 (Admin), [2012] 1 W.L.R. 270, [2011] 4 WLUK 581** applied.

45. Neither Janner nor Tarry were binding on the instant court. Insofar as Tarry decided that the defendant's physical presence was required it was reached per incuriam and the observations made therein on the need for physical presence were wrong, and the same conclusion applied to the decision in **R. v Smith (Gordon) [2015] EWCA Crim 1663, [2015] 11 WLUK 25**, Tarry and Smith disapproved. Unless there was express provision requiring the defendant's physical presence (which there was not in s.51) s.122(2) of the 1980 Act applied so that a legally represented party would be deemed not to be absent (see paras 56-57, 63-71 of judgment).

46. The Court went on to hold that If the foregoing were wrong and the magistrates could not send an absent defendant for trial pursuant to s.51, their doing so would not deprive the Crown Court of jurisdiction. Rather, it would simply render the indictment and any conviction liable to be quashed under the Administration of Justice (Miscellaneous Provisions) Act 1933 s.2(3). Section 2(2) of that Act provided that no indictment charging a person with an indictable offence was to be preferred unless certain circumstances pertained, one of which was that the defendant had been sent for trial by the magistrates. Section 2(3) provided that an indictment preferred otherwise than in accordance with s.2(2) was liable to be quashed, but only if an application to do so was made during the trial. Although some defects fell outside the scope of s.2(2) and s.2(3) and deprived the Crown Court of jurisdiction, sending an absent defendant for trial pursuant to s.51 was not one of them (paras 72-74, 80-84, 86, 90-97).

47 In particular Fulford LJ said at para 102

> *102. The Soneji principle was applied in R v Gul [2013] 1 WLR 1136. The defendant was sent for trial for a single indictable only offence. The indictment, relying on the same facts, alleged six offences triable either way but not the offence for which he had been sent to the Crown Court. The trial continued in the Crown Court. The defendant argued that the failure of the Court to follow the mode of trial procedures required by paragraphs 7 and 9 of schedule 3 to the CDA 1998* ***rendered the subsequent proceedings a nullity****. The Court of Appeal disagreed.*

48. In **R v Gould [2021] EWCA Crim 447** the court held that in relation to s.66 Courts Act 2003 it had to be determined whether the s.66 power was only exercisable in order to facilitate the Crown Court's power to deal with the cases before it, or whether it was an **original jurisdiction enabling a judicial office-holder identified in s.66 to sit as a magistrates' court**. Section 66 enabled the exercise

of powers of judicial deployment without regard to the particular office a particular office-holder held. It empowered the judicial office-holders named in it to sit as a magistrates' court exercising the power to do so vested in DJMCs. Section 66 limited the DJMC's powers which could be exercised by the listed office-holders to those powers relating to "criminal causes or matters".

49. The DJMC's power to sit as a magistrates' court had not been excluded from the jurisdiction given under s.66: accordingly, it permitted the listed office-holders to sit and act as a magistrates' court**, See R. (on the application of W (A Child)) v Leeds Crown Court [2011] EWHC 2326 (Admin), [2012] 1 W.L.R. 2786, [2011] 7 WLUK 863, Frimpong (Steven) v Crown Prosecution Service [2015] EWCA Crim 1933, [2016] 1 Cr. App. R. (S.) 59, [2015] 12 WLUK 458, R. v Dillon (Reyon Menelek) [2017] EWCA Crim 2671, [2019] 1 Cr. App. R. (S.) 22, [2017] 1 WLUK 262 and R. v Koffi (Sharon) [2019] EWCA Crim 300, [2019] 2 Cr. App. R. (S.) 17, [2019] 2 WLUK 466** (see paras 64-67, 71, 75-81 of judgment).

50. They continued .....If s.66 office-holders did not properly apply the rules which DJMCs were obliged to follow, an appeal court would consider whether the procedural flaws required the quashing of the orders made, or whether they could be overlooked or remedied, **R. v Ashton (John) [2006] EWCA Crim 794, [2007] 1 W.L.R. 181, [2006] 4 WLUK 111** applied (para.82).

51. The court concluded that the Crown Court lacked power to quash a committal by the magistrates' court or to remit a case to the magistrates' court, R. v Sheffield Crown Court Ex p. DPP (1994) 15 Cr. App. R. (S.) 768, [1994] 2 WLUK 163 applied, and if there was a bad committal, the Crown Court had no power to do anything because the origin of its jurisdiction was a committal which was valid on its face. If there was no committal, the case never left the magistrates' court and it would usually be for the prosecution to have the case listed there. It was open to a judge acting under s.66 to deal with the matter from scratch, because the magistrates' court was not functus officio, but that was not always appropriate. In that case, the magistrates' court had to be informed what had been done (paras 94-96).

52. In two of the cases under review , the Crown Court had not followed the mandatory procedure in the Magistrates' Courts Act 1980 s.17A for taking an indication of plea. **That rendered what followed a nullity and liable to be quashed, R. (on the application of Rahmdezfouli) v Wood Green Crown Court [2013] EWHC 2998 (Admin), [2014] 1 W.L.R. 1793, [2013] 10 WLUK 281 approved.**

53. In R**. v Lalchan (Nicholas Azam) [2022] EWCA Crim 736** the court held that as a matter of ordinary language, s.27(1) was drafted in imperative terms, requiring compliance. Although the subsection did not explicitly spell out the consequences of failure to obtain consent before proceedings had been instituted, the natural implication was that the proceedings were to be regarded as invalidated if consent was not obtained. Such an interpretation achieved certainty and uniformity of outcome. It was also strongly supported by the wording of the Prosecution of Offences Act 1985 s.25. Section 25(2) explicitly validated the arrest or remand of a person for any offence even where consent to the institution of proceedings had not been obtained. It was hard to see why s.25(2) would be considered necessary if the proceedings were valid anyway . The authorities pointed to the same conclusion**, R. v Angel (Robert Charles) [1968] 1 W.L.R. 669, [1968] 3 WLUK 55, R. v Pearce (Stephen John) (1981) 72 Cr. App. R. 295, [1980] 11 WLUK 182, R. v Lambert (Goldan) [2009] EWCA Crim 700, [2010] 1 W.L.R. 898, [2009] 4 WLUK 109 and R. v Welsh (Christopher Mark) [2015] EWCA Crim 1516, [2016] 4 W.L.R. 13, [2015] 9 WLUK 293 applied**. In this case, the language of the section and the statutory context and purpose spoke strongly against dismissing the s.27(1) requirement as a mere technicality.

54. The court continued..... It could properly be inferred from the language of s.27(1) that part of the Parliamentary intention was not simply to protect a putative defendant from undesirable conviction, it was to protect a putative defendant from undesirable prosecution. Accordingly, the ordinary meaning and implication of the provisions of s.27(1) were supported by purposive considerations, **R. v Knights (Richard Michael) [2002] EWCA Crim 2954, [2003] 1 W.L.R. 1655, [2002] 12 WLUK 459 and R. v Soneji (Kamlesh Kumar) [2005] UKHL 49, [2006] 1 A.C. 340, [2005] 7 WLUK 669 applied.**

55. I conclude with the case of **R v Gul [2013] 1 WLR 1136,** , many of the authorities cited above were considered by the COACD and at paras 14 -19 , they reviewed much of what was relied upon by Mr Richardson**, Gul** was not cited before me originally but I circulated to the parties after the hearing on the 19th July,

56. Lord Thomas LCJ held:

> *14. The problems which arise in this case have already been considered in this court. In Haye [2002] EWCA Crim. 2476 the procedure required by paragraph 7 of Schedule 3 was not complied with when the appellant, having been sent to the Crown Court under s.51 for an offence of robbery was indicted and convicted of a single count of theft. It was conceded by the Crown that in consequence the proceedings were a nullity. After reflecting on the equivalent provisions in the Magistrates Court Act 1980, on which Mr Russell focused our attention his argument, on the basis that the defendant should have been informed of his rights and was not, this court agreed. The conviction was quashed. Haye was followed in Gayle [2004] EWCA Crim. 2937 (where the defendant was convicted on an indictment containing a single count of assault occasioning actual bodily harm). Counsel for the Crown agreed that the trial was a nullity, and the court endorsed his concession.*
>
> *15. There was no merit in either appeal. The convictions were quashed on purely technical grounds. Not long afterwards the approach of this court to procedural defects of a technical nature was examined, in the context of confiscation proceedings, by this court in Sekhon [2003] 1 WLR 1655 and in the House of Lords in Soneji [2006] 1 AC 340. The essence of these decisions is encapsulated in the headnote to Soneji that:*
>
> *"The correct approach to an alleged failure to comply with a provision prescribing the doing of some act before a power was exercised was to ask whether it was the purpose of the legislature that an act done in breach of that provision should be invalid … ".*
>
> *16. The result was the adoption by the courts of a much looser or less rigid approach to procedural failures. In Ashton and Others [2007] 1 WLR 181 this was explained in terms of defects which could fairly be described as procedural in contrast to those which went to jurisdiction. Draz was one of the cases considered in the judgment. The defendant was wrongly sent for trial under s.51 of the 1998 Act when he should have been committed for trial. The procedure in paragraph 7 of Schedule 3 was followed, but the issue for the Court of Appeal arose from the decision of the judge that it was unnecessary for the indictment to be preferred, and that even if it should have been preferred, it would not have been fatal to the validity of the proceedings that the indictment had not been signed. The court expressed the "confident" view that if Haye had been decided after Soneji and Sekhon the conviction would not have been quashed. The same reasoning would have undoubtedly been applied to Gayle.*
>
> *17. In Thwaites [2006] EWCA Crim. 3235 this court considered a committal for trial for an indictable-only offence, followed by an indictment containing a number of counts all of*

which where either way offences. The defendant pleaded not guilty to all the counts. The procedure in paragraph 7 of Schedule 3 was not followed. In short, it directly addressed the question which arises in this appeal. The court took the view that it was bound not by the decisions in Haye and Gayle, but the decision in Ashton. This approach was preferred, first, because Ashton had been decided in the light of the decisions subsequent to Haye and Gayle in the House in Lords in Soneji and this court in Sekhon, and second, by reference to the decision in this court in Clarke and McDaid [2006] EWCA Crim 1196 where, in the context of an unsigned indictment, and applying Ashton, it was held that the proceedings were not automatically to be regarded as invalid because the indictment had not been signed. As everyone knows, the decision of the Court of Appeal in Clarke and McDaid was revisited in the House of Lords [2008] 1 WLR 338.

18. The House of Lords decided that the Administration of Justice (Miscellaneous Provisions) Act 1933 led to the inexorable conclusion that a duly signed indictment was an essential pre-requirement to a valid trial. The statutory provision indicated that without a properly signed indictment the subsequent trial and verdict were nullities. When procedural errors (including failures or omissions) occurred, the answer to the question whether the processes subsequent to the errors were nullified depended on the intention of the legislation. Thus it was "inescapable" that in the 1933 Act "Parliament intended that the bill should not become an indictment unless and until it was signed by a proper officer … (and) that there could be no valid trial on indictment if there were no indictment". Nevertheless a number of different cases arising from errors relating to indictments fell "squarely into the procedural category" without invalidating the subsequent trial. Criticism of the decision in Draz did not arise from the fact that the procedure under s.51 of the 1998 Act was not followed, but it was underlined that, in effect as a matter of jurisdiction arising from an unequivocal statutory provision, a signed indictment was an essential prerequisite to the trial. The decision represented a salutary warning that not all procedural errors and omissions could be brushed aside merely because the defendant was unable to demonstrate some level of prejudice consequent on them.

19.In our judgment, in view of the reasoning in Clarke and McDaid in the House of Lords and the observations about the way in which the decisions in Sekhon and Soneji should be approached, Hayes and Gayle require re-examination. We cannot without further reflection rely on the approach taken in Thwaites, which at least in part, was based on Ashton, which it now emerges is no longer of the broad application suggested when Ashton was decided in this court. We must, we believe, return to first principles and ask ourselves whether, when properly examined, there was noncompliance with paragraph 7 of Schedule 3, and if there was, we must then address the question whether Parliament intended the consequence of non-compliance with these provisions to render any subsequent proceedings a nullity

Decision

57. Thus, the ultimate question for this court is whether, properly examined, there was non-compliance with what parliament intended when passing into law the Criminal Justice Act 2003 (New Method of Instituting Proceedings) (Specification of Relevant Prosecutors) Order 2016 through a Single Justice Procedure Notice and if there was non-compliance to address the question whether Parliament intended the consequence of non-compliance with these provisions to render any subsequent proceedings a nullity?

58. I accept the cases on nullity are a mixture of cases relating to Magistrates Courts powers and jurisdiction and trial on indictment but the essence of them is jurisdictional as against procedural flaws and the proper approach to them , they all speak as to the event never having taken place in law and therefore a nullity or invalid but given the issue is, as agreed by all , jurisdictional and not procedural , the answer , to my mind, is clearly yes, parliament did not envisage these offences being prosecuted through the SJP , they should never have been brought through SJP in the first place , that is, to my mind, a paradigm Nullity, the submission that Ashton and Cain are authority to the contrary falls away as a result of the approach taken to Ashton in all the above cases but particularly in **Gul.** The language and approach of the COACD in all these cases, which are recent, is as to nullity, even if they interchange the language with validity / invalidity.

59. The submission that Nullity is an "outdated concept' " appears to have flowed from ***R v Stromberg***, but the reference to invalidity rather than nullity there is in the context of consent being given later in proceedings than is required in law and the quote and in ***R v Williams (Malachi)*** is in the context of a court failing to order separate trials where counts were not founded on the same or similar facts. In that context, the issue taken with the term 'nullity' is about using it as a blunt instrument to resolve issues in proceedings where the question of fairness should instead be considered, that is inapposite here , it isn't a question of fairness but an ab initio jurisdictional bar, in that context the references are not analogous.

60. Further here the nullity is in the written charge itself and so if that is nullity ab initio, there is in fact nothing left, contrary to the submissions there is not a valid charge, the prosecutors had no power to issue a charge. That contrasts with a situation where the police issue a written charge and Single Justice Notice (SJN) for an imprisonable offence, they can issue a written charge, only the SJN is wrong, so the charge survives.

61. The position is thus, on my reading of the authorities, S142 MCA is arguably available, however I am unpersuaded that the words " ***We would not exclude the possibility*** and ***might well be*** provide a legally sound basis for preferring the use of S142 over nullity or that nullity is not the proper approach, I prefer legal certainty over ambiguity, the language in the cases considering the lack of jurisdiction unequivocally uses the terminology of and principles of nullity.

62. The whole premise of s. 142(1) is that the case can validly be tried (even if to an inevitable acquittal), it's just that there has been a mistake (or similar) in the way the court reached its verdict, which Parliament has given the court a power to put right, the purpose aimed at properly brought prosecutions where something has gone wrong, the effect of nullity is as though the proceedings never existed, after all, s142 setting aside and a NG finding does not truly reflect the position for some if not many cases, void ab initio does as does nullity ,some of those prosecuted, had they been prosecuted through the " normal" route, would have undoubtedly been guilty, does a setting aside and offering of no evidence leading to an acquittal truly reflect the position or does a declaration that the proceedings null as if they never occurred better encapsulate the position?

63. The answer logically and legally must be no, no prejudice is caused to the defendant's , the merits are not in issue, it is if they were never prosecuted, that reflects the practical and legal reality and causes no prejudice to any party.

64. Given my ruling I only need briefly deal with extraneous considerations such as expedience and proportionality of the method of correcting to be used.

65. S142 MCA 1980 requires notice on the parties , a listing at the original court, a ruling that S142 MCA 1980 is in the interests of justice and then a re-listing (albeit it could be on the same occasion) and then the O.N.E or withdrawal of charges. The practical problems are obvious.

66. Declaring all relevant prosecutions a nullity requires a simple declaration by the court and that is all, the court could even list all relevant cases together and do so. The overriding objective and particularly in summary justice fall in favour of the most expedient and procedurally straightforward method of disposal where alternatives are available.

67. For all these reasons I am satisfied the correct approach is to declare each of the above cases void ab initio and a nullity and I do so.

Ancillary Issue

68. In addition to the issue ruled on above both prosecutors invited me to rule on the lawfulness of prosecuting railway offences following an unsuccessful appeal of a penalty fare, it is not thought that is the position with any of the above cases.

69. Both prosecutors provided written and oral submissions on the law, broadly agreeing the position in law is as follows;

> *Regulation 11(3) contains a clear prohibition on the instigation of proceedings for Byelaw offences, or offences contrary to section 5(3)(a) or (b) of the RRA after an appeal against a penalty fare has been determined. The Railway Operator has the opportunity either within 21 days of receipt of the appeal or prior to determination of the appeal (whichever is the shorter) to cancel the penalty fare and bring a prosecution. It is therefore not deprived of any avenue otherwise open to it. It is simply given a time limit in which to make a decision about which route to pursue. Having made a decision, deliberately, or by acquiescence, the possibility of prosecution is brought to an end. There is nothing within the regulation to suggest that the right to prosecute is resurrected after the penalty fare appeal process has concluded. There are good reasons to prefer such an interpretation: first, appropriate use of the State's resources: an appeal process, with several levels, should not take place only then to become redundant if a Rail Operator chooses to bring a prosecution, second, it is undesirable to have an independent appeal process and criminal court effectively determining the same substantive issues where they could reach different determinations, third, finality, fourth, an individual appealing a penalty fare is required to set out their grounds for doing so, and may make any representations they wish to: the effect is they may both set out an evidential account, and self-incriminate – there would be unfairness if criminal proceedings could follow that process.*
>
> *It follows that any prosecution of a Byelaw offence, or section 5(3)(a) or (b) RRA offence, following an unsuccessful appeal of a penalty fare was invalid.*

70. Whilst the 2 prosecutors agreed the law as above they took different positions on what the remedy might be , however, I have declined to deal with the issue here for the following reasons

1. None of the cases before me engage the issues
2. Magistrates' courts do not have an appellate supervisory jurisdiction to determine abstract points of law.
3. Any ruling would therefore be academic, stripped of context and would not be even persuasive authority. It would spend court time to no purpose at this stage.

4. Those cases affected can be subject to separate consideration in the correct forum, although the issue is "live" within HMCTS and further listings to look at that issue may be necessary**.**

Paul Goldspring

Senior District Judge (Chief Magistrate) for England and Wales

15th August 2024.