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Case Nos: 202003249 B4
202001045 B4
202100298 B1
202000596 B1
202001408 A1
202002923 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BASILDON
Her Honour Judge Leigh
T20190046, S20180364
ON APPEAL FROM THE CROWN COURT AT WORCESTER
His Honour Judge Juckes, Q.C
T20200012, S20190381
ON APPEAL FROM THE CROWN COURT AT ISLEWORTH
His Honour Judge Connell
S20190681, S20190758
ON APPEAL FROM THE CROWN COURT AT NORWICH
Her Honour Judge Moore
S20200185

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 30/03/2021

Before :

LORD JUSTICE FULFORD, VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
and
LORD JUSTICE EDIS

- -

Between :

JOSHUA DAVID GOULD
ANTHONY MATTHEW MOFFAT
LEWIS BROWN
RENE MUGENZI
- and -
THE QUEEN **Respondent**

- -

Michael Magarian QC and Catherine Oborne for **Gould**

Danny Smith for **Moffat**
Meredoc McMinn for **Brown**
Sam Blom-Cooper for **Mugenzi**
All assigned by the Registrar of Criminal Appeals

Edmund Burge QC and **Jamie Sawyer** (Instructed by the CPS Appeals Unit) for the **Respondent**

Hearing dates: 10 and 11 February 2021

- -

Approved Judgment

Section 1 of the Sexual Offences (Amendment) Act 1992 applies in the cases of Gould and Brown. No matter relating to any complainants shall be included in any publication during their lifetimes if it is likely to lead members of the public to identify them as the persons against whom offences were committed.

Lord Justice Edis:

Introduction

1. These appeals all raise technical issues concerning the relationship between the Magistrates' Courts and the Crown Court and, in particular, about the powers which may be exercised by Crown Court judges by reason of section 66 of the Courts Act 2003 ("section 66"), and what procedures should be followed if exercising those powers. They have been listed together so that the court can consider those issues in the light of what happened in these four different cases, which are otherwise quite unconnected.

2. The central issue is how far Crown Court judges can lawfully go to try and alleviate the unfortunate consequences of serious failures by the prosecution in charging criminal offences. At a more fundamental level the cases involve consideration of the relationship between the jurisdictions of the Magistrates' Courts and the Crown Court. This relationship is an essential part of the criminal justice system. In the modern era it is governed by a formidably complicated battery of statutory provisions which have been supplemented and amended by Parliament frequently over many years. The issue involves consideration of the extent to which Crown Court judges may use the powers of a District Judge (Magistrates' Court) ("DJ(MC)") while at the same time respecting the jurisdictional limits of the different courts.

3. The first point which must be made is that it is the duty of the prosecution to stop making basic procedural errors. The quality of decision making revealed by the first three of these four cases is extremely poor. In the fourth the problem was created by what appears to have been a single typographical error which went unnoticed and is rather less culpable. We have no reason to think that they are examples of a rare problem. It is the duty of the Crown Prosecution Service to identify the cause of the problem and to solve it. In each of these cases the judges of the Crown Court have tried to ensure that justice was done in order to bring the cases to a conclusion in the interests of victims and defendants. They have tried to avoid adding to what in some cases was already unacceptable delay, often associated with long periods waiting for a postal requisition to arrive. The fact that these charges, when eventually delivered, were defective is particularly unattractive. It will shortly appear that some of the efforts made by the judges were more successful than others, but they are not to be blamed for trying to grapple with the consequences of mistakes made by others and to administer justice. We hope that this judgment may make their task easier in the future if, as appears likely, it proves impossible to eliminate this kind of problem entirely.

4. After describing the applications before us, we shall first set out the key statutory materials with which we are concerned. We shall then set out what happened in each of the four cases before us. We shall then identify and deal with the common legal issues. Finally we shall deal with the individual appeals separately. Although they are listed together to deal with the technical points, they all concern individuals and will receive entirely separate attention when we come to decide the applications. We shall refer to those seeking to appeal by their surnames in the body of this judgment. This is for brevity and does not mark a lack of respect. It also avoids the need to

consider when referring to such a person whether he is, at that point, an appellant, an applicant, a claimant in judicial review proceedings or a defendant before one of us sitting as a DJ(MC).

The applications before the court

5. Joshua Gould is now 25 years old. He was sentenced to an extended determinate sentence of 18 years with a custodial term of 10 years by Her Honour Judge Leigh at Basildon Crown Court on 30 January 2019 for a series of sexual offences involving children. He had pleaded guilty to all the offences. Over a year later he sought leave to appeal against sentence and applied for an extension of time. Those applications were referred to the full court by the single judge. When they came before the full court on 28 October 2020 the Court of Appeal Office had identified the legal issues which have caused the case to come before us, and directions were given. On 22 December 2020 an application was filed for leave to appeal against conviction and an extension of time. The Registrar has referred that application to the full court. It is those applications which are now before us.

6. Anthony Moffat is now 37 years old. He was sentenced for a number of offences of burglary on 27 January 2020 by His Honour Judge Juckes, Q.C. at the Crown Court at Worcester. The total sentence was 9 years' imprisonment. He was granted leave to appeal against that sentence by the single judge. After that, the procedural issue was detected by the Criminal Appeal Office and the parties were informed. An application for leave to appeal against conviction and an application for an extension of time was issued on 27 January 2021. We therefore have those two applications before us, and if they fail, we will deal with the appeal on its merits.

7. Lewis Brown is now 20 years old. He was 18 on 22 August 2018. He was sentenced by His Honour Judge Connell at the Isleworth Crown Court on 5 February 2020 to a total of 56 weeks' detention for three offences of breaching two Sexual Harm Prevention Orders ("SHPOs") and a breach of a suspended sentence order. 26 weeks' detention was imposed for a breach of a SHPO which occurred on 15 October 2019. 12 weeks consecutive on two charges of breach of two different SHPO which both occurred on the same day in August 2019. These two sentences ran concurrently with each other. A further 18 weeks' detention was imposed because by virtue of his convictions he was in breach of a suspended sentence order imposed on 8 July 2019 at Kingston Crown Court. A new SHPO was imposed. He sought leave to appeal against that sentence, and that application was referred to the full court by the Single Judge. It was then appreciated by the Criminal Appeal Office that there had been an exercise of the power under section 66 in this case. Although this could not be the subject of an appeal to this court, the matter has been approached on the basis that if we find that the proceedings were invalid we will deal with the matter as a Divisional Court.

8. Rene Mugenzi is now 44 years old. He was sentenced to 27 months' imprisonment for a single offence of fraud by Her Honour Judge Moore at the Norwich Crown Court on 23 October 2020. He originally sought leave to appeal against that sentence and, while that application was pending, it was discovered by the Criminal Appeal Office and Mr. Blom-Cooper, who had not appeared in the Crown Court, that the

sentence was passed after the judge had exercised powers under section 66 to correct a single number in a date in the charge from "8" to "6", the effect of which was to extend the period of the offending by two years. This led to Perfected Grounds challenging the conviction, which could only be dealt with by the Divisional Court and we will treat them as an invitation to this court to quash the conviction exercising that jurisdiction.

Section 66 of the Courts Act 2003 ("the 2003 Act")

9. Section 66 is at the heart of the problems raised in these cases. Sections 65-67 of the 2003 Act are grouped provisions which appear under this sub-heading, which may give some indication of the statutory purpose of section 66:-

> "**Flexibility in deployment of judicial resources**"

10. Section 66 provides:-

> "66 **Judges having powers of District Judges (Magistrates' Courts)**
>
> (1) Every holder of a judicial office specified in subsection (2) has the powers of a justice of the peace who is a District Judge
> (Magistrates' Courts) in relation to–
>
> (a) criminal causes and matters
>
> [a repealed provision which formerly extended scope to family proceedings]
>
> (2) The offices are–
>
> (a) judge of the High Court;
>
> (aa) Master of the Rolls;
>
> (ab) ordinary judge of the Court of Appeal;
>
> (ac) Senior President of Tribunals;
>
> (b) deputy judge of the High Court;
>
> (c) Circuit judge;
>
> (d) deputy Circuit judge;
>
> (e) recorder;
>
> (f) Chamber President, or Deputy Chamber President, of a chamber of the Upper Tribunal or of a chamber of the Firsttier Tribunal;

(g) judge of the Upper Tribunal by virtue of appointment under paragraph 1(1) of Schedule 3 to the Tribunals, Courts and Enforcement Act 2007;

(h) transferred-in judge of the Upper Tribunal (see section 31(2) of that Act);

(i) deputy judge of the Upper Tribunal (whether under paragraph 7 of Schedule 3 to, or section 31(2) of, that Act);

(j) (j) office listed—

(i) in the first column of the table in section 89(3C) of the Senior Courts Act 1981 (senior High Court Masters etc), or

(ii) in column 1 of Part 2 of Schedule 2 to that Act (High Court Masters etc);

(k) district judge (which, by virtue of section 8(1C) of the County Courts Act 1984, here includes deputy district judge appointed under section 8 of that Act);

(l) deputy district judge appointed under section 102 of the Senior Courts Act 1981;

(m) judge of the First-tier Tribunal by virtue of appointment under paragraph 1(1) of Schedule 2 to the Tribunals, Courts and Enforcement Act 2007;

(n) transferred-in judge of the First-tier Tribunal (see section 31(2) of that Act);

(o) member of a panel of Employment Judges established for England and Wales or for Scotland.

[We omit provisions concerning qualifying judge advocates]

(3) For the purposes of section 45 of the 1933 Act, every holder of a judicial office specified in subsection (2) is qualified to sit as a member of a youth court.

……..

(7) This section does not give a person any powers that a District Judge (Magistrates' Courts) may have to act in a court or tribunal that is not a magistrates' court."

11. As originally enacted, the provision only applied to a much shorter list of holders of judicial office than appears above. Those listed at the start were a judge of the High Court; a deputy judge of the High Court; a Circuit judge; a deputy Circuit judge; and a recorder. The amendment to extend that list was effected by paragraph 4 of Schedule

14 to the Crime and Courts Act 2013, which appears in Part 2 of that Schedule. Part 2 is the subject of this sub-heading which may give an indication of the purpose of the amendments:-

"**Part 2 Deployment of judges to the magistrates' courts.**"

12. The Explanatory Notes for the 2003 Act are a legitimate aid to construction in that they may explain the statutory context of a provision. The relevant part reads:-

> **"Section 66: Judges having powers of District Judges (Magistrates' Courts)**
>
> 160.Under this section a Crown Court judge will be able to make orders and to sentence in relation to cases normally reserved to magistrates' courts when disposing of related cases in the Crown Court.
>
> 161.As part of implementing the policy of greater flexibility in judicial deployment, this section provides that High Court judges, Circuit judges and Recorders should be able to sit as magistrates when exercising their criminal and family jurisdiction. The same is to apply to deputy High Court judges and deputy Circuit judges. It is not expected that extensive use would be made of the provision, but it would be possible for a Circuit judge in the Crown Court to deal with a summary offence without the case having to go back to a magistrates' court. At present, certain summary offences can be included in an indictment. If the person is convicted on the indictment, the Crown Court may sentence him if he pleads guilty to the summary offence, but if he pleads not guilty the powers of the Crown Court cease. It is intended in such cases that the judge of the Crown Court should be able to deal with the summary offences then and there as a magistrate. He would follow magistrates' courts' procedure."

13. The Explanatory Notes for the 2013 Act say this:-

> "7. Section 21 and Schedule 14 make provision for court judges to sit in tribunals, and for tribunal judges to sit as court judges.
>
> *Section 21: Deployment of the judiciary*
>
> "31. The deployment of the judiciary is a function referred to in the Constitutional Reform Act 2005 and the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). Section 7 of the CRA includes in the list of the Lord Chief Justice's responsibilities as President of the Courts of England and Wales, the maintenance of appropriate arrangements for the deployment of the judiciary of England and Wales. Part 2 of Schedule 4 to the 2007 Act provides that the Senior President

> of Tribunals has the function of assigning judges and other members to the chambers of the First-tier Tribunal and Upper Tribunal.
>
> "32. The establishment of Her Majesty's Courts and Tribunals Service ("HMCTS") on 1 April 2011 was designed to provide the Ministry of Justice with the opportunity to manage its resources more flexibly according to changing pressures and demands. However, the Lord Chief Justice and Senior President of Tribunals lack the ability to share judicial resource in order to respond to changes in demands. Section 21 introduces Schedule 14 which makes amendments that will enable the Lord Chief Justice to deploy judges more flexibly across different courts and tribunals of equivalent or lower status."

The Four Cases

Joshua David Gould

14. Gould is now 25 years old. He was arrested on 13 January 2018 because his internet connection had attracted suspicion that he had been accessing pornographic images of children. This suspected activity occurred between May and October 2017. His house was searched and three devices seized and interrogated. There was an iPhone, an M3 external hard drive and a Lenovo Laptop. Each was found to contain child pornography. In addition to images which had been acquired from the internet, there were also videos and still images of children which he had filmed himself. Those videos disclosed sexual offences against those children, including an offence of attempted oral rape of X, a two year old girl. There were films of offences of sexual assault against her, and against another two year old girl, Y. A video was also found showing Gould exposing his penis in the vicinity of Z, who may have been 7 years old at the time. Z was hiding in a wardrobe playing hide and seek at the time, and could not see what he was doing. Appreciation of this fact came late in the day, after it had been decided to charge the conduct as an offence of exposure, contrary to section 66(1) of the Sexual Offences Act 2003.

15. Gould was able to have access to X because she stayed with a relative of his from time to time, and he was also sometimes present in the house. There was one category A image of her, showing the attempted oral rape, and three category B images. These showed Gould pushing his fingers into his mouth and then hers, rubbing her head and neck and then her nappy and leggings around her vaginal area, and kissing her with his tongue. There was also a video of Y. Y was naked, and Gould was seen to be masturbating in her presence, rubbing his penis on her face and then ejaculating. There was also the video of Z. There were other images of these "live" victims (by which we mean they were directly attacked by Gould rather than shown in images or videos which he obtained from the internet) as well, so that in total there were 6 category B moving images of X and Y, and 14 still images of them in category C. His access to Y and Z had also been possible because he was trusted by their parents for family reasons, but it is unnecessary to give any further details here.

16. In addition to his images of X, Y, and Z, across the three devices he was found to have a further 240 moving and 62 still images of children (many very young) in category A, 200 moving and 73 still images in category B, and 90 moving and 750 still images in category C. These had been gathered between 8th June 2012 and 18th January 2018. Anyone who has experience of this work will know what this means. Many of the images showed very small children in extreme distress, being raped. Finally, there were 52 images of extreme pornography involving adult women having sexual relations with dogs.

17. In the end, by a process we shall describe, these offences became 8 allegations to which Gould pleaded guilty. We shall set them out together with the sentence which was imposed on 30 January 2019.

    i) Attempted rape of X, a 2 year old girl, by trying to place his penis in her mouth on 17 December 2016. An extended sentence of eighteen years with a custodial term of 10 years and a licence period of 8 years was imposed under section 226A of the Criminal Justice Act 2003. This was the total effective sentence because all other terms were concurrent.

    ii) Sexual assault on X on 21 November 2016 by placing his fingers in her mouth. There were four sexual assault offences in all, charged contrary to section 7 of the Sexual Offences Act 2003. Sentences of 3 years concurrent were imposed for each of them.

    iii) Sexual assault on X by touching her vaginal area over her nappy and leggings on 17 December 2016. 3 years concurrent.

    iv) Sexual assault on X by kissing her on her lips on 17 December 2016. 3 years concurrent.

    v) Sexual assault on Y, a 2 year old girl, by rubbing his penis on her head and masturbating himself to ejaculation, on 9 June 2012. 3 years concurrent.

    vi) A charge of making indecent photographs of children between 8 June 2012 and 13 January 2018. This related to the images of X, Y and Z. The offence was charged under section 1(1)(a) of the Protection of Children Act 1978. Three years' imprisonment was imposed concurrently.

    vii) A charge of making indecent photographs of children between 8 June 2012 and 13 January 2018. This related to the images harvested from the internet over that period. The offence was charged under section 1(1)(a) of the Protection of Children Act 1978. Nine months' imprisonment was imposed concurrently.

    viii) A charge of possessing extreme pornographic images portraying an act of intercourse with an animal which had been harvested between 8 June 2012 and 18 January 2018. This offence was charged under section 63 of the Criminal Justice and Immigration Act 2008. Three months' imprisonment was imposed concurrently.

18. There were the usual consequential orders, including forfeiture of the devices and a SHPO. These do not fall for separate consideration, although if the convictions must be quashed on technical grounds then they will also fall away.

19. Gould had made no comment when interviewed in January 2018, but wrote a letter in April 2018 saying "I have accepted my fate and now only wish to make this easier on the people I have hurt with my actions", and giving some details of what he had done. He was concerned about the effect that delay would have on other people, and said that he wanted to help "others to move on without being reminded of what I've done." It was, however, necessary to interrogate his devices and these investigations call on finite resources. It was not until 1st October 2018, after a letter of requisition requiring him to attend before the South Essex Magistrates, that he appeared before the court. The charges he then faced were not the same as the final charges listed above. Most strikingly, there was no allegation of attempted rape, or any other indictable only offence. All the offences were triable either way. There were then ten charges. They included four sexual assault charges (as did the final tally), one charge of intentionally exposing his genitals to Z contrary to section 66(1) of the Sexual Offences 2003, three charges of possession or making indecent images of children, one charge of possessing extreme pornography (the dog images), and one charge of possession of prohibited images of children contrary to section 62(1) and 66(2) of the Coroners and Justice Act 2009 (pseudo-photographs, cartoons and the like). The Magistrates, according to their record, went through the procedure stipulated by section 17A of the Magistrates' Courts Act 1980, and then took pleas of guilty to all ten charges. They committed Gould for sentence at the Crown Court under section 3 of the Powers of Criminal Courts (Sentencing) Act 2000. No criticism is made on this appeal of any of that, except that it is agreed that these ten charges were defective because they lacked any proper particulars. The sexual assault charges in particular did not identify the victims, or give any other particulars to enable Gould, or anyone else, to know what he was alleged to have done.

20. The first hearing in the Crown Court took place on 30 October 2018 before Her Honour Judge Leigh. She said that the case was not ready for sentence because a pre-sentence report would be required as she was concerned about dangerousness. She also said that the list of ten charges on the certificate of committal from the Magistrates' Court may contain duplicate charges and that she wanted that to be sorted out before sentence took place. Finally, she noted that the evidence and the case summary disclosed offences involving penetration, or at least attempted penetration. She wanted to know why there was no charge reflecting that. She adjourned the case and gave directions.

21. On 7 December 2018 the Crown Prosecution Service sent a new list of charges which included an allegation of attempted rape. There were now eight charges, and these were the ones which were ultimately sentenced as we have explained. The email to which they were attached said that they would invite the Judge to sit as a DJ(MC) under section 66. They said that they would ask the judge to vacate the pleas which had been entered in the Magistrates' Court and then the new charges could be put to Gould who could enter his pleas. Three of the original charges were deleted, namely the exposure charge, one of the charges of making indecent images of children, and the possession of prohibited images of children charge (the pseudo-photographs). The

first two of these were captured within the allegations of making indecent images of children which remained. To those seven charges was now added the allegation of attempted rape. The schedule of charges corrected the want of particularity in the original charges by giving dates and identifying the names and ages of the victims. The charge of exposure was deleted because it had at last been appreciated that at the time when his genitals were seen in the film to be exposed, the child was in a cupboard playing hide and seek, and could not see Gould. It was on this list of charges that Gould was ultimately sentenced.

22. On 22 January 2019 the case was again before the Crown Court. This was the first occasion when the Crown was represented by Mr. Sawyer, who appears before us as junior counsel for the Crown on each of these cases. He said that he was not happy that the prosecution case was properly reflected in the charges and that he wanted time to check with the police officer. Six months had elapsed between Gould's letter of April 2018 and the delivery of the original ten defective charges. Nearly three months had passed since Her Honour Judge Leigh had expressed concern about the state of the charges. The judge was understandably concerned that the case had not been put into proper order despite her observations in October. It was not Mr. Sawyer's fault, but not acceptable. We agree. This was a serious case involving a paedophile, in which the arrest was by now over two years old. The case was further adjourned after a number of issues had been mentioned. It is only necessary to set out these comments by the judge:-

> "So, procedurally, I want to make sure that this is done properly because I do not want any issue to be taken. I know Mr. Savage [defence counsel then appearing] doesn't take any issue with me sitting as a District Judge, but what I do need to know is whether I am quashing the original committal certificate and we are then re-commit – we are then sitting as a District Judge committing back up to this court."

23. At that stage there appeared to be a concern that there may have been thirteen charges and the judge was not satisfied that that was appropriate either. We do not need to set out any of the complexities surrounding this concern.

24. Sentencing took place on 30 January 2019. We will set out the procedural steps which were taken before the court proceeded to determine the sentences.

    i) Prosecuting counsel invited the judge to quash the original committal certificate. He did not identify the power to do this. The judge apparently did it, although she later said that she was amending the original certificate, see below.

    ii) Prosecuting counsel then invited the judge to sit as a DJ(MC) under section 66. He said he would lay the eight fresh charges (which had actually been delivered to the court on 7 December as we say above). He then invited the judge to permit him to lay these charges and she said:-

> "Yes. Well, let it be I'm sitting under section 66. The fresh charges are laid. So what we are doing is we are amending the old certificate so we keep the same number in relation to that. That's probably the easiest way of doing it."

iii) The judge correctly observed that in relation to the first charge, attempted rape, this was indictable only. She then said that this meant that there could only be an indication of plea in relation to that. In relation to the other charges, she said that the court would need to deal with mode of trial, although she said "we could still take pleas at that stage".

iv) Then, without more, the judge asked the clerk to the court to ask Gould for an indication of his plea to the first charge and to ask him to plead to the other seven charges. This was done and he indicated a guilty plea to the first charge and entered guilty pleas to the other seven.

v) The judge then said "The court will now reconstitute itself as a Crown Court" and identified that there was an indictment for the first charge and that it now had an indictment number. She directed that the indictment should be put, and Gould pleaded guilty.

vi) Mr. Sawyer said "Thank you your Honour. On that basis, then, your Honour, the court is seised of all eight offences."

vii) The indictable only offence had not in terms been sent to the Crown Court under section 51 of the Crime and Disorder Act 1998. Section 51 is mandatory in its terms. The other seven offences had not been sent with it under section 51(3) as is required by the mandatory terms of that provision. The original committal had been purportedly quashed and no new committal ordered. No section 17A procedure was undertaken in respect of the seven either way offences. None is required when sending under section 51, but that did not happen. Although there is not much difference between the word "sent" and "committed" in ordinary language, they are used technically to describe two different processes. When "sending" an indictable only offence, the court is not required to consider whether its powers are sufficient to deal with the case because it has no such power. When committing for sentence following conviction, it is doing so because a judicial decision has been made that the sentencing court ought to have available the sentencing powers of the Crown Court. There is, therefore, an important difference in substance between the two routes to the Crown Court.
The relevant parts of section 51 of the 1998 Act are as follows:-

> **"(1)** Where an adult appears or is brought before a magistrates' court ("the court") charged with an offence and any of the conditions mentioned in subsection (2) below is satisfied, the court shall send him forthwith to the Crown Court for trial for the offence."

(2) Those conditions are—

> **(a)** that the offence is an offence triable only on indictment other than one in respect of which notice has been given under section 51B or 51C below;
>
> **(b)** that the offence is an either-way offence and the court is required under section 20(9)(b), 21, 22A(2)(b), 23(4)(b) or (5) or 25(2D) of the Magistrates' Courts Act 1980 to proceed in relation to the offence in accordance with subsection (1) above;
>
> **(c)** that notice is given to the court under section 51B or 51C below in respect of the offence.
>
> **(3)** Where the court sends an adult for trial under subsection (1) above, it shall at the same time send him to the Crown Court for trial for any either-way or summary offence with which he is charged and which—
>
> **(a)** (if it is an either-way offence) appears to the court to be related to the offence mentioned in subsection (1) above; …."

viii) When the judge came to sentence, she began by summarising what had happened a few minutes before. She said:-

> "The original committal certificate is not correct, so I have sat as a DJ under my powers of section 66 of the Courts Act 2003, so that new charges can be laid. They are eight charges in total. I should say that all of this has been done with the full consent of the defence, Mr Savage, and he's been fully aware at all times.
>
> So those eight charges, the first one being an indictable only matter, attempted rape, was then committed as an indictable only matter, can only be committed, and the other then seven charges have been committed back and the committal certificate now corrected to represent the other matters that you fall to be sentenced for."

25. The clerk to the court noted on the court log against each of the charges and in the side bar of the Digital Case System as follows:-

> "On 30/01/19 HHJ Leigh quashed the original committal for sentence certificate on case number S20180364, then sat as a District Judge under S.66 of the Courts Act 2003 and allowed the Crown to lay this new offence schedule. Offence 1 on this list is indictable only and now appears on case number T20190046."

26. It appears therefore that the judge believed that she had committed Gould to the Crown Court. She did not say whether this was a committal for sentence (it could not have been because there had been no guilty plea) or a committal for trial, which was abolished in respect of indictable only matters by the Crime and Disorder Act 1998. The numbers quoted in the note on the Digital Case System are the "S" number for the original committal for sentence and the "T" number for the indictment which was purportedly preferred on 30 January 2019, to which Gould then pleaded guilty and for which sentence was passed.

27. The issue on this application for leave to appeal against conviction is whether these events were sufficient to clothe the Crown Court with jurisdiction to sentence Gould for any or all of the eight offences for which sentence was then imposed. This involves consideration not only of the scope of the section 66 power in principle, but also of its use in this case. A DJ(MC) would not have been able to commit Gould to the Crown Court. The only power was to send him for trial under section 51 of the 1998 Act because the list of charges contained an indictable only offence. Gould also submits that if sentence was passed lawfully, it was nevertheless manifestly excessive or wrong in principle. If he succeeds in his first application, we will have no power to consider that question.

Anthony Matthew Moffat

28. Anthony Moffat is now 37 years old. On 21 October 2019 in the Crown Court at Worcester he pleaded guilty before His Honour Judge Cartwright, sitting as a DJ(MC) and was committed for sentence under section 3 of the Powers of Criminal Courts (Sentencing) Act 2000 in respect of six offences. On 27 January 2020 he was sentenced by His Honour Judge Juckes, Q.C. for those offences. On the same day, the judge also sentenced for four further offences which had been sent for trial by the justices on 7th January 2020.

29. The offences and sentences were as follows:-

i) Burglary, 30 months' imprisonment concurrent.

ii) Burglary, 30 months' imprisonment concurrent.

iii) Theft, 12 months' imprisonment concurrent.

iv) Burglary, 3 years' imprisonment consecutive.

v) Theft, 2 years' imprisonment concurrent.

vi) Attempted theft, 18 months' imprisonment concurrent.

vii) Burglary, 3 years' imprisonment consecutive.

viii) Theft, 2 years' imprisonment concurrent.

ix) Theft, 2 years' imprisonment concurrent.

x) Burglary, 3 years' imprisonment consecutive.

30. This made up a total term of 9 years. Nine further offences of a similar kind. were taken into consideration. This simple narrative is unfortunately extracted from a procedural quagmire.

31. Offences (i)-(vi) in the above list had been dealt with under number S20190381 and Indictment T20190419. The Magistrates' Court had considered the two offences of dwelling house burglary and had concluded that Moffat qualified for the minimum sentence under section 111 of the Powers of Criminal Courts (Sentencing) Act 2000 and therefore sent him to the Crown Court under sections 51(1) and (2)(a) of the 1998 Act. These became counts 1 and 4 on the Indictment. They also sent under section 51(3) of the 1998 Act the offence of attempted theft and theft which became counts 6 and 3 respectively. As has been pointed out above these are mandatory provisions. When the Indictment came to be preferred in the Crown Court the prosecution added two further counts, numbered 2 and 5. Count 2 is an offence of burglary by entering the garage of the house which was burgled at the same time, and is the subject of count 1. Count 5 alleged theft of a motor vehicle using the car keys stolen in the Count 1 burglary. The six count indictment numbered T20190419 therefore reflected the four offences which had been sent to the Crown Court under section 51 of the Crime and Disorder Act 1998 by the Magistrates' Court on 21st September 2019. The offences occurred in June and August 2019.

32. Offences (vii)-(x) appeared on Indictment T202000012. Again, there was an offence of burglary of a dwelling involving theft of car keys (Count 1), and this resulted in two further allegations of theft of vehicles (Counts 2 and 3). Count 4 was a further offence of burglary of a dwelling house. These offences were perpetrated in June and July 2019. Two of them, the burglary offences, were sent for trial on 7 January 2020 under section 51(1) and (2)(a) as being indictable because of Moffat's previous record. He was dealt with in that way because the justices still believed that he had two previous qualifying convictions for dwelling house burglary. That process resulted in the creation of a second indictment which was listed for sentence at the same time as the first, on 27 January 2020.

33. On 17 October 2019, long before the second sending on 7 January 2020, counsel who then prosecuted put a widely shared comment on to the Digital Case System, dealing then of course only with indictment T20190419. The comment said:-

> "The defendant has been sent on the basis that the dwelling burglaries are indictable only under s.111 PCC(S)A. I don't think that is right - offences only count for s.111 if committed after 30.11.99 and I can only see one dwelling burglary on the defendant's record committed after that date - conviction 12.2. If I am correct then the defendant has been invalidly sent and it may be that the judge at the PTPH will be minded to sit as a DJ and to go through the Plea Before Venue procedure."

34. Counsel's reading of the previous record was correct. The Magistrates' Court made an error in thinking that the burglary offences was indictable only because of Moffat's

previous record. It was, as we have seen, an error which was to be repeated on 7 January 2020 in respect of the second set of offences.

35. Indictment T20190419 was listed before Judge Cartwright on 21 October 2019 when that note was discussed. Both prosecution and defence counsel invited the judge to sit as a DJ(MC) and to conduct a process by which he explained the plea before venue process to Moffat in ordinary language and asked him for his pleas. This is the process required of the Magistrates' Court in the case of either way offences by section 17A of the Magistrates' Court Act 1980, and Judge Cartwright went through it properly. He pleaded guilty. The judge then asked him for pleas on the other four offences before him and he pleaded guilty to them. He decided to commit them for sentence, and this is how the second case number, S20190381 came into being. There was no objection to any of this by Mr. Smith who appeared for Moffat, as he now does before us. Mr. Smith said to the judge that he did not ask for sentencing to take place then, because there were outstanding matters. The case was adjourned for these other matters (which became indictment T202000012) to reach the Crown Court.

36. On 27 January 2020 the cases came before a different judge, His Honour Judge Juckes, Q.C. Moffat was arraigned on Indictment T202000012 and pleaded guilty to all four counts. The committal for sentence was then put to him as if it had been in respect of four offences and had taken place on 21 September 2019. That was the date of the sendings for trial in respect of the T20190419 Indictment, which had been overtaken by the events of the 21 October 2019 hearing. The problem about those sendings was mentioned to the judge, but no reference to the lawfulness of the 7 January sending was made. It does not appear to have occurred to anyone to wonder why Moffat had been sent for trial on 7 January 2020 as a "third strike" burglar when it had been agreed in October 2019 that he was not. Section 111 of the PCC(S)A 2000 only bites where the new offence is committed after two earlier qualifying convictions. The fact that at the date when the 7 January 2020 sending took place Moffat had by then been convicted on two separate occasions of qualifying offences did not trigger section 111 because the offences sent on that day had been perpetrated before he was convicted before Judge Cartwright on 21 October 2019.

37. It is unnecessary at this stage to deal with the facts of the offences in any detail. It is enough to say that this was a spate of burglaries of homes, in which a common theme was the theft of car keys in order to steal valuable vehicles.

Lewis Brown

38. Brown was sentenced by His Honour Judge Connell on 5 February 2020. Again, the case became procedurally complex entirely because of prosecution errors which went undetected until a late stage. Attempts to solve the complexity using section 66 of the 2003 Act were made. There were, in this case, two committals for sentence for offences of breach of SHPOs, and these convictions placed Brown in breach of a suspended sentence order. It is probably simplest in this case to set matters out in chronological order.

39. On 5 February 2019 Brown was convicted for the second time of sexual offending. He pleaded guilty at the Crown Court at Kingston to two offences of engaging in

penetrative sexual activity with a girl between the ages of 13 and 15 at a time when he himself was under 18, contrary to sections 9 and 13 of the Sexual Offences Act 2003. He also pleaded guilty to an offence of common assault on that girl. He received a sentence of 10 months' detention. A restraining order was made, as was a SHPO ("the February SHPO") which required him to "inform public protection of any romantic relationships" and prohibited any "communication with any young persons under the age of 16 in a way which is sexual and/or contains sexual references". Each of these orders was to last five years.

40. On 17 May 2019 Brown pleaded guilty to an offence of breaching the first SHPO and to an offence of stalking. The offences were committed in February 2019, just days after the sentence referred to above had been imposed. The victim was different, and was a 15 year old girl with whom he had had a relationship the previous summer. He had been released from his custodial sentence on 11 February and he began to communicate with this victim on 13 February. Sentencing was adjourned but on that day a further SHPO ("the May SHPO") was made which, among other things, prohibited him from possessing or using any device capable of sending electronic messages unless he had prior approval from his police supervision team, and the device had the capacity to retain and display a history of communications, and which prohibited him from deleting its browsing history. He was required to make the device available for inspection on request by the police. It did not repeat the requirement to notify the police of any romantic relationships. Section 103C(6) of the Sexual Offences
Act 2003 says:-

> "Where a court makes a sexual harm prevention order in relation to a person who is already subject to such an order (whether made by that court or another), the earlier order ceases to have effect."

41. On 8 July 2019 at Kingston Crown Court a total sentence of 6 months detention was imposed, suspended for two years. This outcome was no doubt influenced by the fact that Brown had spent time in custody prior to sentence, and by a psychological assessment dated 27 June 2019. That is a bleak document which could only offer limited recommendations for sexual offending programmes because Brown, despite his pleas, denies responsibility for any sexual offending. The suspended sentence order made on 8 July 2019 required, among other things, attendance for 25 days on a Horizon programme which was a programme which did not make acceptance of guilt a precondition. Neither the psychologist nor the Pre-Sentence Report expressed any optimism about this course.

42. Breach proceedings because of disruptive behaviour at his accommodation resulted in a curfew being added to the suspended sentence order, and in August 2019 it was discovered that Brown had formed a romantic relationship without notifying the police, and had a mobile phone which he had also not told them about. Separately, Brown was arrested on 15 October 2019 for further breaches of the May SHPO by the possession of phones. It appears that he was then recalled under the licence from the February 2019 sentence.

43. On that day a postal requisition, presumably by coincidence, was issued in respect of two charges of failure to comply with the notification requirements by failing to inform the public protection unit that he had formed a romantic relationship, in breach of the February SHPO, and having a mobile phone which had automatic deletion software, in breach of the May SHPO. These allegations related to the 28 August 2019. This mystifying document does accurately record that these allegations amounted to breaches of SHPOs, and correctly gave the dates of those orders, but did not charge them in that way. The notification requirements do not prohibit romantic relationships without disclosure, or possession of mobile phones. They are notification requirements, as their name implies. Moreover, the February SHPO had ceased to exist at the moment when the May SHPO was imposed and it was not an offence of any kind for Brown to form romantic relationships without telling the police in August 2019.

44. On the following day before the Magistrates' Court Brown pleaded guilty to an offence of breaching the May SHPO on 15 October 2019 by the possession of three unregistered mobile phones which, he accepted, was a further offence committed during the operational period of the suspended sentence imposed at the Crown Court on the 17 May 2019 and for that reason was committed to the Crown Court under paragraph 11(2)(a) of Schedule 12 to the Criminal Justice Act 2003. As we have recorded above, in fact the SHPO was made on 17 May 2019, but the suspended sentence order was not imposed until 8 July 2019. The committal order therefore contained an error as to the date of the suspended sentence. The order was also in error in that it was on its face ineffective to give the Crown Court power to sentence for the substantive offence of breaching the SHPO. It only gave the Crown Court power to deal with the breach of the suspended sentence order. The Court of Appeal Office has attempted to secure clarification from the Magistrates' Court as to the power it was exercising without success. It is clear to us that the Magistrates must have intended to commit for sentence under section 3 of the Powers of Criminal Courts (Sentencing) Act 2000 in respect of the substantive offence as well as under paragraph 11(2)(a) of Schedule 12 to the Criminal Justice Act 2003. This problem was not noticed by anyone until it was identified in the Criminal Appeal Office. Had it been noticed in the Crown Court, that court could have proceeded to sentence following *R v. Ayhan* [2011] EWCA Crim 3184; [2012] 1 Cr. App. R. 27 and *R v. Burbridge* [2007] EWCA Crim 2968. This is, in effect, what it did and we do not consider it necessary to make any further order in this respect.

45. That committal for sentence was listed at Isleworth Crown Court on 13 November 2019 when Brown refused to attend. It was adjourned to 4 December 2019 and the judge noted that there were other allegations of breach of the SHPOs which were still in the Magistrates' Court.

46. On 20 November 2019 the Magistrates took guilty pleas to the two charges relating to August 2019 which had formed the original postal requisition and committed Brown for sentence under section 3 of the Powers of Criminal Courts (Sentencing) Act 2000. No one noticed that the charges were, on their face, defective because they charged the wrong offence, or that one of them relied on a SHPO which had ceased to have effect on 17 May 2019 by virtue of section 103C(6) of the Sexual Offences Act 2003.

47. On 4 December 2019 Brown appeared before His Honour Judge Curtis-Raleigh at the Crown Court at Isleworth, in respect of both committals. There were allegations which the police and CPS were still considering. The judge felt that enquiries should be made at Kingston Crown Court to determine whether the breach of the suspended sentence should be dealt with by the judge who made the order. That judge had in fact directed that any breaches should be dealt with by him. The prosecution then informed the judge that two further charges had been uploaded, because the allegations in the postal requisition had been charged under the wrong provision. They made the same allegations, but charged them as breaches of the two different SHPOs rather than breaches of the notification requirements. The judge's note on the Digital Case System reads:-

> "D is under investigation in relation to other matters.
>
> Review by CPS will be on 15.12.
>
> Adjourned to 15.1.20, to see if there are to be other matters. 60 minutes.
>
> The pleas on the other file should have been to a breach of SHPO, not notification requirements. Proper charges are now at E4 on that file. Procedure gone through of sitting as DJ as those are laid, MOT, indication of a G plea, committal to CC. Original charges then dealt with, pleas vacated, remitted and withdrawn by Crown. both counsel content that this is the proper course.
>
> All these current offences relate to a SHPO and suspended sentence imposed by Kingston CC, and everything else being equal, would seem to be more appropriate to sentence there, preferably in front of the original Judge. This court will contact KCC before the next hearing to see if they want to take it; if so, can be done administratively, and listed at KCC on 15.1, or such other date as is convenient."

48. The transcript of 4 December confirms that the new charges alleged exactly the same conduct as those which had been committed by the Magistrates on 20 November, but charged that conduct under the correct provision, as breaches of the SHPOs of February and May 2019. The judge expressed caution about what he was being asked to do, and gave counsel half an hour to check that it was lawful. Both were content that he should proceed in the way recorded in his note. Nobody told the judge about section 103C(6) of the Sexual Offences Act 2003.

49. On 15 January 2020, the cases came before a different judge, His Honour Judge Connell. He noticed that the charges which had been committed in respect of the October phones recorded the wrong date for the suspended sentence order. For the second time in this case a judge, with the agreement of both counsel, sat as a DJ(MC) under section 66. This time he exercised those powers to amend the order committing Brown so he could be dealt with for the breach of the suspended sentence order by correcting the date of the suspended sentence order. He was concerned that there was

no up to date Pre-Sentence Report and also that the psychologist's report from June had only just been made available to him, and to the defence lawyer. He adjourned the case for sentence to 5 February 2020.

50. On 5 February 2020 His Honour Judge Connell sentenced. He did so on the basis that the "romantic relationship" which placed Brown in breach of the February SHPO was with a woman who was eighteen years old. The judge accepted that Brown was intending to form a consensual relationship. He was not told that it was a breach of an order which had ceased to have effect before it occurred. One of the three phones which Brown was found to have in October had only been bought the day before by Brown's mother, and the other two did not work. He imposed an unlawful sentence for breach of the February SHPO which was concurrent with the sentence for the August breach of the May SHPO. He then imposed the sentence we record above and made a new SHPO which combined the existing two separate such orders. He had no power to do this because Brown had not been convicted of any offence which entitled the court to impose a Sexual Harm Prevention Order, and no application within section 108 of the Sexual Offences Act 2003 had been made, see ***R v. Hamer*** [2017] EWCA Crim 192. It is agreed that the unlawful sentence of 12 weeks' detention for the breach of the February SHPO and the unlawfully made new SHPO made on 5 February 2020 must be quashed. The live issues concern what remains, if anything.

Rene Mugenzi

51. Mugenzi was investigated in 2018 after the priest in charge of the Cathedral of St John the Baptist in Norwich became concerned about the apparent lack of funds in its bank account. Mugenzi was the parish treasurer and responsible for paying invoices from the account. He was an unpaid volunteer. Enquiries revealed that between 1st March 2016 and 31 May 2018 he had taken £222,099.83 from that account for his own use. There was then a long delay before he was interviewed in August 2019 and admitted his guilt. At that stage there was a contention that the initial takings may not have been dishonest because he had an intention to repay the money. Whatever the merits of this contention, it was abandoned before he was sentenced. He accepted the period of the offence and the amount taken.

52. On 16 April 2020 a postal requisition was issued requiring him to attend Norwich Magistrates' Court on 10 July 2020 to answer a charge which was framed as follows:-

> "Fraud by abuse of position – Fraud Act 2006
>
> Between 01/03/2018 and 31/05/2018 at Norwich in the county of Norfolk committed fraud in that, while occupying a position, namely Treasurer, in which you were expected to safeguard, or not to act against, the financial interests of The Cathedral of St. John Baptist, you dishonestly abused that position intending thereby to make a gain, namely money, for yourself, contrary to sections 1 and 4 of the Fraud Act 2006."

53. The charge contained a typographical error, in that the first date should have read "2016" not "2018".

54. On 15 July 2020 Mugenzi pleaded guilty to this charge before the Magistrates and was committed to the Crown Court at Norwich for sentence under section 3 of the Powers of Criminal Courts (Sentencing) Act 2000. It is very likely that they took this course because of the total value of the money stolen over the whole period, rather than the £14,000 or so which was taken between March and May 2018. By the date of sentence about a quarter of the total sum lost had been repaid.

55. On 16 October 2020 the case was listed for sentence. A hearing took place in chambers because Mugenzi was the subject of an assassination threat by the Rwandan Government in 2011 because of his campaigning for human rights and greater democracy in Rwanda, the country of his birth. He had been given an *Osman* warning by the police because they gave credence to the threat, as they still do. It was said that his name and address should not be published in case this gave his enemies the opportunity to carry it out. In the course of that hearing, the prosecutor told the judge that the date in the charge was wrong. The judge correctly said that this needed to be addressed in open court. In the hearing which followed counsel who then appeared for the prosecution invited the judge to amend the charge, by substituting the number "6" for the first number "8" in it. It was pointed out, correctly, that this could cause no prejudice to Mugenzi as he had known exactly what he was accused of, and had accepted it. Defence counsel said that the committal was not invalid and invited the judge to sit as a DJ(MC). The prosecution would apply to amend the charge, which should be put again and committed by the judge back to the Crown Court for sentence. The judge asked for help from both counsel about the proper procedure and then she did as she was asked. She remitted the case to herself sitting as a DJ(MC) under section 66. In that capacity she granted an application that the existing plea should be vacated and the date amended. She asked defence counsel whether he objected and said that he could not. She explained to the defendant that the procedure which was being followed was to correct a technical error and said that the allegation was going to be put again "but between the 1st of March 2016 and the 31st May 2018 and you'll be asked to enter a plea". The charge was then put to the defendant who was allowed to speak to his counsel for a very short time, and then said "guilty". After that had been done, the judge considered her sentencing powers as a DJ(MC) and decided to commit the case for sentence. She did not go through the mode of trial procedure which the Magistrates' Court must go through when dealing with offences which are triable either way, which is set out in section 17A of the Magistrates' Courts Act 1980.

56. On 23 October 2020 the case was listed for sentence. At the start, the judge suggested that the committal for sentence should be put to Mugenzi, but counsel both agreed that this was not necessary because she herself had "sent" [sic] the case to the Crown Court and so the committal was not put. The case then proceeded to sentence in the normal way. The judge noted Mugenzi's positive good character, and that about a quarter of the money taken had been recovered. She said, in a finding which is now criticised, that a large proportion of the monies taken were from charitable donations. It seemed that he had a gambling addiction, and had got into debt. She said that the case involved a gross breach of trust and placed it in category 2 for the purposes of the guideline. She noted the mitigation afforded by remorse, and the admissions and early plea. She also said that there was "delay" of "something approaching a year".

In fact, it was over two years since the investigation into the fraud had begun. She said that it was a high culpability case in category 2 for guideline purposes, which provides a range of 3-6 years and a starting point of 5 years, based on a loss of £300,000. She imposed a prison sentence of 27 months and postponed confiscation proceedings. That was the result of discounting the starting point for mitigation, and then by something over one third because of the very early admissions.

Procedural observations

57. Each of these cases involves Crown Court judges attempting to solve technical problems by sitting as a DJ(MC) under section 66. In all these cases they did so without objection from either the prosecution or the defence who were legally represented. In no case has any applicant or appellant been sentenced on anything other than an agreed factual basis. If the sentences were manifestly excessive or wrong in principle, an appeal lies to this court, but no prejudice of any kind was caused to any applicant or appellant by the use of the section 66 power.

58. It is right to record that all the judges were seeking to deal with the cases justly as required by the overriding objective in CrimPR Rule 1.1. Committals for sentence appear in busy lists and procedural tripwires are particularly undesirable in cases of this kind.

59. If we are driven to quash any convictions or sentences because they are nullities because of purely technical defects, the proceedings can start again. This is an unfortunate outcome, but the ways in which the Crown Court acquires jurisdiction to deal with cases as a result of orders in the Magistrates' Court are prescribed in all cases by statute.

60. Enquiries by the Court of Appeal Office of some of the Crown Courts have revealed that there is uncertainty about what should be done to record the exercise by a Crown Court judge of powers of DJ(MC). It appears, for example, that no uniform procedure exists for informing the Magistrates' Court that its order has been varied. The significance of that, and what should be done about it, are matters which should be considered by the Criminal Procedure Rules Committee in the light of this judgment. Where a judge sitting in the Crown Court exercises the power of a DJ(MC) to make an order which the Magistrates' Court could have made, or to make a new such order it is clear that this should be reflected in the records of the lower court. The Crown Court must therefore record what has happened and inform the Magistrates' Court.

The uses of section 66 in these cases: summary

61. On five occasions in these four cases Circuit Judges have announced that they would sit as DJs(MC). In summary, these are:-

    i) Gould: Her Honour Judge Leigh on 30 January 2019. She proceeded as we record at [24] above. She was attempting to correct a failure by the prosecution to lay the appropriate charges before the Magistrates' Court before pleas were entered there. It is submitted:-

a) That she was acting *ultra vires* the section 66 power and could not by any means correct the original errors. This relies principally on two decisions, one in the Divisional Court namely *R (W (a minor)) v. Leeds Crown Court* [2011] EWHC 2326 (Admin); [2012] 1 Cr. App. R. 13, and one in this court, namely *Frimpong v. Crown Prosecution Service (Secretary of State for Justice intervening)* [2015] EWCA Crim 1933; [2016] 1 Cr. App. R. (S) 59.

b) That in any event, the procedure she adopted was not capable of founding jurisdiction in the Crown Court in respect of the indictable only offence of attempted rape. That would have required her to send it under section 51(1) of the Crime and Disorder Act 1998, and to send the either way offences under section 51(3).

c) That in any event, the committal of the either way offences was invalid because of the failure to follow the mandatory requirements in section 17A of the Magistrates' Courts Act 1980.

d) That the appearance created by the judge causing the prosecution to seek to pursue an allegation of attempted rape which they had previous been content to charge as a sexual assault contrary to section 7 of the Sexual Offences Act 2003, and then driving that charge through to plea and sentence by a defective procedure is such that there was an abuse of the process of the court.

ii) Moffat: His Honour Judge Cartwright on 21 October 2019 was dealing with an error by the prosecution and the Magistrates' Court who had wrongly thought that Moffat had two previous qualifying convictions for dwelling house burglary which, if true, would have made the offences now before the judge indictable only. It was not true, which meant that they were triable either way. Judge Cartwright proceeded in relation to the first indictment as we explain at [35] above. It is submitted:-

a) That he was acting *ultra vires* the section 66 power and could not by any means correct the original error. Therefore, it is said, the Crown Court had no jurisdiction to deal with the offences on the first indictment. This is the same issue as arises in *Gould* and each of the other cases.

b) That, in any event, the sending of the charges which appeared on the second Indictment was bad for the same reasons as the first sending in relation to the first Indictment had been bad, and His Honour Judge Juckes, Q.C. had no power to sentence for it. The events concerning this indictment before the Magistrates' Court are set out at [32] above.

iii) Brown: His Honour Judge Curtis-Raleigh on 4 December 2019 attempted to correct the error by the police or CPS in charging breaches of SHPOs as breaches of the notification requirements. It is said that he was acting *ultra vires* the section 66 power and could not by any means correct the original

error. Therefore, it is said, the Crown Court had no jurisdiction to deal with the two offences which he purported to commit for sentence.

iv) Brown: on 15 January 2020 His Honour Judge Connell amended the charge which had been validly committed to the Crown Court because of the breach of the Crown Court suspended sentence. He corrected the date of that suspended sentence. It appears to be accepted that this was a lawful use of the section 66 power. As recorded above, on 5 February 2020 the judge wrongly imposed a concurrent sentence of 12 weeks for a breach of the February 2019 SHPO, and wrongly imposed a new SHPO of his own.

v) Mugenzi: On 16 October 2020 Her Honour Judge Moore sought to correct a typographical error in the charge by changing the date of the start of the offending from March 2018 to March 2016. The resulting committal of the new amended charge is said to have been *ultra vires* the section 66 power. Further, it is said that

a) The committal was invalid because the judge failed to follow the section 17A procedure. This is the same issue as the second Gould issue.

b) The sentence on 23 October 2020 was invalidated because the committal for sentence was not proved against Mugenzi. He was not asked whether he admitted it because both counsel persuaded the judge not to do this. It is further submitted that even if he had been asked, his admission would not have sufficed, relying on a note of a case from 1963, *R v. Jeffries* (1963) Crim. L.R. 559.

Submissions

62. The principal submissions on the section 66 power in principle were made by Mr. Magarian, Q.C. with the assistance of Ms. Oborne, on behalf of Gould, and Mr. BlomCooper on behalf of Mugenzi. Mr. Smith for Moffat and Mr. McMinn for Brown adopted those submissions and made additional submissions concerning their own cases. Mr. Burge, Q.C with the assistance of Mr. Sawyer, replied on the issues of principle and in relation to all four cases.

63. We are greatly indebted to all counsel for their assistance. We have attempted to encapsulate the submissions they made at appropriate points in this judgment.

Discussion and decisions

64. We first need to determine whether the section 66 power is (a) a power exercisable by a judge of the Crown Court which is only exercisable in order to facilitate the power of the Crown Court to deal with the cases before it, or (b) whether it is an original jurisdiction which enables a holder of one of the judicial offices identified in it to sit as a Magistrates' Court. That is a matter of construction of the 2003 Act. If the answer is (b), then further questions of law arise about when and how that jurisdiction might be exercised.

65. Section 66 is drawn in very wide terms. It appears that the original intention, as divined from the original Explanatory Notes and the sub-heading before section 65, was to increase flexibility by allowing judges of the Crown Court to exercise powers of a DJ(MC) in order to avoid unnecessary complications caused by the separate jurisdictions, constitutions, and procedures of those two courts. The Explanatory Note gives an example of a case where that power might be exercised, and suggests that it would be done in a case where the judge was also and at the same time exercising a power of the Crown Court. In 2013, the list of those who might sit as a DJ(MC) was lengthened and is no longer limited to judges sitting in the Crown Court. The purpose now, again as divined from the Explanatory Notes and sub-heading, was to enable judges from one jurisdiction to be deployed into another. There was now no question of that deployment being limited to the exercise of functions ancillary to their principal function. Neither the Master of the Rolls nor a judge of the Employment Tribunal has any functions which might require them to exercise a power of a DJ(MC). The purpose can only have been to enable those judicial office holders to be deployed as DJs(MC) and to sit as a Magistrates' Court in the, perhaps unlikely, event that this was thought desirable. Part of the current list of judicial office holders appears to have been created for one purpose, and the other part for another. Nevertheless, it would not be possible as a matter of construction to ascribe a different meaning to the provision depending on the part of the list which included a particular judicial officer holder. If a Tribunal Judge, when deployed into the Magistrates' Court, can exercise all the powers of that court, there is nothing in the section to limit the powers of the Crown Court judges or to require some formal process of deployment before they can exercise any of the powers.

66. This is an unhappy state of affairs. The original version of section 66 was widely drawn and it was necessary to look at the Explanatory Notes to find any limit on the scope of the powers it conferred. That problem became more acute after the amendment in 2013. It is necessary now for this court to attempt to construe this provision as best it can. In our judgment, the provision is now to be construed as a broad measure which enables the Lord Chief Justice and the Senior President of Tribunals to exercise their powers of judicial deployment without regard to the particular office a particular judicial officer holder holds. Similar permissive provisions appear in relation to judges of the Family Court (see section 31C of the Matrimonial and Family Proceedings Act 1984, inserted by Schedule 10 to the Crime and Courts Act 2013) and the County Court (see section 5 of the County Courts Act 1984, as substituted by Schedule 9 of the Crime and Courts Act 2013). It does not follow from the fact that the Lord Chief Justice or the Senior President of Tribunals may lawfully deploy, for example, a Tribunal judge, into the Family Court that this will happen, or that the judge concerned may take that decision for themselves. There are training and ticketing requirements which govern who may sit in these courts. Nothing before us requires us to make any decision about any aspect of that system. It is enough to observe that although section 66 is now of some age, and has frequently been used in the Crown Court and the Court of Appeal Criminal Division it has never been thought necessary for any training regime or ticketing system to be in place before a judge sitting in those courts can act under its powers. The practice developed before the 2013 amendment of judges in the Crown Court and the Court of Appeal Criminal Division exercising the powers of DJ(MC) when they considered it

appropriate to do so. Given the breadth of the language of section 66 itself there is nothing in it which renders this practice unlawful.

67. What the 2013 amendments suggest, in our judgment, is that section 66 as it now stands empowers those judicial office holders named in it to sit as a Magistrates' Court exercising the power to do so which is vested in DJs(MC). In the words of the subheading of Part 2 of Schedule 14, they may be deployed "to the Magistrates' Courts". That has clearly not happened to the Crown Court judges in the present case, but as we have said, no formal process of deployment is required as a matter of law to confer this jurisdiction. As a matter of practice, the Crown Court and Court of Appeal Criminal Division judges are able to exercise this power when they decide it is appropriate to do so.

68. Section 66 contains only one limitation on the extent of the DJ(MC)'s powers which may be exercised by the listed judicial office holders. It is only those powers which relate to "criminal causes or matters" which may be so exercised. The terms of that limitation are very broad and if it had been Parliament's intention to exclude some powers which fall within it, it could easily have done so.

69. It is worth identifying what the powers of a DJ(MC) in relation to criminal causes or matters are. Section 25 of the Courts Act 2003 provides that a DJ(MC) is, by virtue of that office, a justice of the peace. Section 148 of the Magistrates' Courts Act 1980 says:-

> "148 "Magistrates' court".
>
> (1) In this Act the expression "magistrates' court" means any justice or justices of the peace acting under any enactment or by virtue of his or their commission or under the common law.
>
> (2) Except where the contrary is expressed, anything authorised or required by this Act to be done by, to or before the magistrates' court by, to or before which any other thing was done, or is to be done, may be done by, to or before any magistrates' court acting in the same local justice area as that court."

70. Section 26, as amended by the Crime and Courts Act 2013, provides:-

> "26 District Judges (Magistrates' Courts) able to act alone
>
> (1) Nothing in the 1980 Act—
>
> (a) requiring a magistrates' court to be composed of two or more justices, or

(b) limiting the powers of a magistrates' court when composed of a single justice, applies to a District Judge (Magistrates' Courts).

(2) A District Judge (Magistrates' Courts) may—

(a) do any act, and

(b) exercise alone any jurisdiction,

which can be done or exercised by two justices, apart from granting or transferring a licence."

71. A DJ(MC), therefore, we have concluded, has the power to sit as a Magistrates' Court. Further powers are vested in them by Schedule 4 to the 2003 Act which it is not necessary to set out here.

72. In considering whether that power has been excluded from the broad grant of jurisdiction which appears at first sight to be the result of the terms of section 66, section 45(1) of the Children and Young Persons Act 1933 appears relevant. This provision came into its present form as a result of amendments made by section 50 of the 2003 Act. It provides, so far as material:-

"45 **Constitution of Youth courts**.

(1) Magistrates' courts—

(a) constituted in accordance with this section or section 66 of the Courts Act 2003 (judges having powers of District Judges (Magistrates' Courts)), and

(b) sitting for the purpose of—

(i)hearing any charge against a child or young person, or

(ii)exercising any other jurisdiction conferred on youth courts by or under this or any other Act,

are to be known as youth courts.

73. This section starts from the premise that a Magistrates' Court may be constituted under section 66. It then provides that any such court dealing with children or young persons is to be known as a youth court. The section goes on to provide that justices of the peace must be authorised in order to sit in such a court. DJs(MC) are so authorised, and so, by section 66(3), are the judicial office holders listed in section 66(2).

74. The Explanatory Notes to section 50 of the 2003 Act explain this provision as follows:-

> "Section 50: Youth courts
>
> 118. This section sets out the framework whereby lay magistrates and District Judges (Magistrates' Court) are to be authorised to hear youth cases. The Act also enables the higher judiciary including circuit judges and recorders to hear these cases, without particular authorisation, in consequence of the extension of their jurisdiction to include that of a District Judge (Magistrates' Courts) by section 66.
>
> 119. Currently, in areas other than Greater London, lay magistrates are voted on to a specialist "panel" by other members of the bench.
>
> 120. Under this section, the "panel" system would be abolished. The Lord Chancellor will have to authorise a lay justice or District Judge (Magistrates' Courts) before he or she can sit as a member of a youth court. These personal authorisations will be valid throughout England and Wales. The Lord Chancellor will have power to make rules regarding (a) the allocation and removal of authorisations for justices and District Judges (Magistrates' Courts) to sit as members of youth courts (b) the appointment of chairmen of youth courts and (c) the composition of such youth courts.
>
> 121. It is envisaged that new rules, which provide for a more transparent selection procedure, will be published for comment. Because of the often sensitive nature of youth cases, and the specific knowledge and understanding that is required, these rules would help to ensure that only trained and suitable magistrates (or District Judges (Magistrates' Courts)) sit on youth courts.
>
> 122. District Judges (Magistrates' Courts) are in practice required to be "ticketed" for this work; that requirement is being made explicit in statute to reflect the increasing acceptance that the youth court is a specialist jurisdiction."

75. For these reasons it appears to us that as a matter of construction section 66 permits the listed judicial office holders to sit as a Magistrates' Court and to act as such.

76. This conclusion is not consistent with a number of decisions, namely *R. (oao "W" a minor) v. Leeds Crown Court* [2011] EWHC 2326 (Admin), *Frimpong v. Crown Prosecution Service and another* [2015] EWCA Crim 1933, *R v. Dillon* [2019] 1 Cr. App. R.(S) 22, and *R v. Koffi* [2019] 2 Cr. App. R.(S) 17.

77. There are also very many cases where a judge of the Court of Appeal Criminal Division has exercised the powers arising from section 66. Each member of this court has participated in such cases on more than one occasion. Examples from the materials with which we have been provided are:-

i) *R v. Ford* [2018] EWCA Crim 1751, in which William Davis J sent Lewis Ford to the Crown Court for trial of an allegation of wounding with intent contrary to section 18 of the Offences Against the Person Act 1861. The court, as a Divisional Court, had quashed a previous attempt to place the case before the Crown Court and the sending was not, therefore, ancillary to anything which was properly before the Crown Court.

ii) *R v. Buisson* [2011] EWCA Crim 1841, in which the court acted as a Divisional Court and quashed a committal for sentence and then Jackson LJ sat as a
DJ(MC) under section 66 and sentenced the appellant for a summary only

offence of common assault. This was more akin to the type of case contemplated by the original Explanatory Notes from 2003, set out in *Frimpong* at paragraph 19.

iii) *R v. Garthwaite* [2019] EWCA Crim 2357, which followed *Buisson*.

78. None of these cases involved the extensive argument about the scope of section 66 across a number of cases by which we have been assisted, or consideration of all the statutory provisions which we have found to be relevant. In particular, section 45 of the Children and Young Persons Act 1933, introduced by the 2003 Act, has not received any detailed judicial consideration. It is true that it is mentioned in passing by the court in paragraph 2 of the decision of the Divisional Court in *R. (oao "W" a minor) v. Leeds Crown Court*, but no argument about its impact on the present issue appears to have been before the court.

79. The actual decision in *R. (oao "W" a minor) v. Leeds Crown Court*, in our judgment, was that there is no power in either the Crown Court or the Magistrates' Court to remit a young person after a valid committal to the Crown Court to the Youth Court. That power exists in relation to a person who is before the adult Magistrates' Court, but *W* was not before the adult Magistrates' Court. He had been lawfully committed to the Crown Court and that Magistrates' Court (adult or youth) was therefore *functus*. Therefore, whether the Recorder of Leeds had been acting as a DJ(MC) or as a judge of the Crown Court no such power existed, as he correctly held. The Crown Court has no power to quash a committal even if it is invalid, see *R v. Sheffield Crown Court ex.p. DPP* (1994) 15 Cr App R. (S.) 768. Similarly, in *Frimpong* it was held that neither a Crown Court judge nor a DJ(MC) could make an order that a period of time in prison could operate to extinguish liability to pay the Criminal Courts Charge which arises under what is now sections 44-51 of the Sentencing Code[1], at least where

[1] These provisions appear because the Code was a consolidation and the previous provisions imposing the charge remained on force, although SI 2015/1970 deleted the schedule of sums which the courts are required to impose. This was done as a means of repealing the charge. In theory therefore it would appear that the courts are required to impose a charge and to fix that charge at zero. This is not done.

that person is not yet in default in paying that charge. Therefore, the status of section 66 was not necessary to the decision since whether sitting as a Crown Court judge or a DJ(MC) Her Honour Judge Karu had had no power to do what she was being asked to do. We do not doubt that this decision was correct, but we do consider that it is open to us to treat the observations about section 66 as extraneous to the decision and therefore not binding.

80. These important parameters within which the section 66 powers may be used have been overlooked in some of the present cases and perhaps elsewhere. It is worth restating them:-

i) When the Magistrates' Court make an order which gives jurisdiction in the case to the Crown Court, whether by committal for sentence or sending for trial, that is the end of their jurisdiction in the case. In technical language they are *functus officio.* The Crown Court judge cannot use section 66 to make any order which the Magistrates' Court could no longer make.

ii) There is no power in the Crown Court to quash an irregular order. Where it is plainly bad on its face, the Crown Court may hold that nothing has occurred which is capable of conferring any jurisdiction to deal with it.

We shall return to these points. We appreciate that this consequence of the decision in *R. v. Sheffield Crown Court* limits the power under section 66 to correct errors in committals for sentence, but it is unavoidable. If quashing is required this can only be done by a Divisional Court. We have held above that it is open to the judge in the Crown Court, as a DJ(MC), to lay and commit a new charge in the correct form. The relevant Rules Committees should consider whether an expedited and summary procedure could be adopted for the quashing by consent of unlawful committals and sendings which have been overtaken by events.

81. For these reasons we have concluded that a judge of the Crown Court or of the Court of Appeal Criminal Division is vested with all the powers of a DJ(MC) in relation to criminal causes or matters by virtue of holding that office. This includes sitting as a Magistrates' Court and includes any power which a Magistrates' Court can lawfully exercise. In the cases of these judges there is no ticketing or training requirement imposed by the Lord Chief Justice which prevents them from exercising those powers when they decide it is appropriate to do so.

82. It does not, however, follow from this that the difference between the Crown Court and the Magistrates' Court has been abolished. The powers of the Magistrates' Court are circumscribed by a statutory scheme which is complex, prescriptive and restrictive. It is not necessary that such a scheme should be quite as complex as it is, but it is obviously necessary for a court of limited jurisdiction to have those limits carefully defined. It was not the intention of Parliament in enacting the 2003 Act and the amendments in 2013 to allow the judicial office holders mentioned in section 66 to ignore the rules which the DJs(MC) would be obliged to follow. If they do not

properly apply those rules, then this court (or the Divisional Court) will consider what has happened, applying the analysis in *R v. Ashton, Draz and O'Reilly* [2006] EWCA Crim 794, to determine whether the procedural flaws are so bad that they go to the root of the exercise of the section 66 power requiring the quashing of the orders, or whether they can either be overlooked or remedied if this causes no prejudice. The court said this:-

> 4. 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.
>
> 5. 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.
>
> 9. In our view Mr Perry, for the Crown, is correct, therefore, in arguing that the prevailing approach to litigation is to avoid determining cases on technicalities (when they do not result in real prejudice and injustice) but instead to ensure that they are decided fairly on their merits. This approach is reflected in the Criminal Procedure Rules and, in particular, the overriding objective. Accordingly, as indicated above at para.[4], absent a clear indication that Parliament intended jurisdiction automatically to be removed following procedural failure, the decision of the court should be based on a wide assessment of the interests of justice, with particular focus on whether there was a real possibility that the prosecution or the defendant may suffer prejudice. If that risk is present, the court should then decide whether it is just to permit the proceedings to continue.

83. It is important to add a note of caution to this broad statement of principle. In *Clarke v. McDaid* [2008] 2 Cr App R 2 the House of Lords had to consider the particular case of a defendant who had been tried and convicted on an indictment which had not been signed, as was then required. In holding that the law required this technicality to be complied with and non-compliance rendered the trials a nullity, Lord Bingham said this about *Ashton:*-

> "17. Mr Perry drew attention to the approval of *Ashton* expressed by a number of distinguished academic authorities,

> who saw it as a victory of substance over formalism. It is always, of course, lamentable if defendants whose guilt there is no reason to doubt escape their just deserts, although the present appellants, refused leave to appeal (on other points) by the single judge in 1997 and the full court in 1998, have now served the operative parts of their sentences. Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place. In this case, as in *Crawford v HM Advocate* , above, the duty in question was easy to perform, although here the failure to perform it was entirely the fault of the proper officer".

84. Although Parliament subsequently changed the law to reverse the effect of *Clarke & McDaid* in its particular context, the proper approach to the legal requirements for criminal proceedings explained by Lord Bingham remains sound. It may be observed, however, that the House of Lords did not say that *Ashton* was wrongly decided, except in respect of the failure to follow *R v. Morais* (1988) 87 Cr App R 9, which impacted on the third case, *Draz*. Lord Bingham did say this:-

> "20. The decisions in *Sekhon* and *Soneji* are valuable and salutary, but the effect of the sea change which they wrought has been exaggerated and they do not warrant a wholesale jettisoning of all rules affecting procedure irrespective of their legal effect."

85. There were three cases before the court in *Ashton*. The court in *O'Reilly* held that adding a summary count to an indictment in respect of an offence not included within the power in section 40 of the Criminal Justice Act, which had not been committed under section 41 of that Act, and which was not brought within the six month time limit for summary only offences was a jurisdictional failure. The fact that the Crown Court judge had purported to permit this under section 66 was by the by, since no court should have permitted this. The conviction was quashed. In *Ashton* the appellant pleaded guilty to two offences in the Magistrates' Court which were triable either way and was committed to the Crown Court for sentence under section 3 of the Powers of Criminal Courts (Sentencing) Act 2000. The offences required the consent of the DPP which the prosecutor wrongly thought was lacking. The judge agreed to sit under section 66 to start the proceedings again, consent now being in place. He did so, and went through the mode of trial procedure required by section 17A of the Magistrates' Courts Act 1980, and committed for sentence again and then proceeded to sentence. It was held that the judge had been entitled to do this, although it might usually be unnecessary in view of the approach explained in paragraph 4 of the judgment, which we have set out above. In *Draz* the Magistrates' Court had wrongly proceeded on the basis that he had two previous qualifying convictions for dwelling house burglary and that therefore the allegation of dwelling house burglary before them was indictable only by virtue of section 111(4) of the Powers of Criminal Courts (Sentencing) Act 2000. They sent him to the Crown Court under section 51 of the

Crime and Disorder Act 1998. The error was discovered, and the Crown Court judge proceeded under the then paragraph 7 of Schedule 3 to the Crime and Disorder Act 1998 which provided an equivalent procedure to that in section 17A of the Magistrates' Courts Act 1980 in cases where a sending under section 51 has occurred, but no indictable only count remains on the indictment. He did not, however, require an indictment to be drawn up as was contemplated by paragraph 7. The Court of Appeal held that this failure did not deprive the Crown Court of the power to sentence, and the House of Lords did not agree in the later decision in *Clarke & McDaid*. The statutory context of these decisions no longer exists, but the approach remains valid. Formal legal requirements remain important, particularly where they govern the boundaries of the jurisdiction of the Magistrates' and Crown Courts.

86. The approach in *Ashton* has been followed on many occasions. We will cite only one. *R v. Ashford* [2020] EWCA Crim 673 is a decision which directly affects one of the cases before us, that of Brown. It holds that a court dealing with an offence of breach of a SHPO does not have a power to make a new one. An application can be made for a new order under section 103A(3)-(7) of the Sexual Offences Act, but only by the people named in that subsection. In the absence of either a qualifying offence or such an application, there is no jurisdiction to make an order and that is a jurisdictional failure, applying the *Ashton* test. However, where there *is* an application, albeit one which contains defects, the court said:-

> "19. We take a different view, however, of Parliament's intention in respect of the requirements of section 103E(3) as to the form of the application and as to strict compliance with all applicable rules of procedure. A failure to comply with one of those requirements can in our view be regarded as a procedural defect, not intended to invalidate the proceedings, and to be addressed in accordance with the principles stated in *R v Ashton* at [4]." **Observations about the exercise of the section 66 power**

87. We have therefore concluded that a Crown Court judge may lawfully exercise the powers of the Magistrates' Court under section 66 of the 2003 Act.

88. However, the exercise of those powers will result in an ineffective order if the judge acts beyond the jurisdiction of the Magistrates' Court and may do so if the judge is responsible for procedural errors. If those errors are of a kind which Parliament is taken to have decided should invalidate all that follows, then that will be the result. If errors are made which are of a kind which do not undermine the jurisdiction of the court, but which mean that there has been prejudice or a substantial risk of unfairness then the same result will follow. Correction of errors of this kind is the province of the Divisional Court and where appeals to this court have been brought which involve such errors it has often been necessary for the judges in the Court of Appeal Criminal Division to sit as a Divisional Court. The usual method is to dispense with service of a claim form, to extend time if necessary, to grant permission to seek judicial review and then to quash the offending decision and make any further necessary orders. This is the procedure which we will adopt when necessary in dealing with the present cases.

89. The judges of the Crown Court may often have little experience of procedure in the Magistrates' Court. Their staff will usually have even less. A DJ(MC) will have that expertise. They may also perhaps sit with a legal adviser in the Magistrates' Court and, if not, will sit with a Court Associate. Between them, they will have significant expertise in ensuring that the work of the court is conducted and recorded properly. This is, in itself, a reason for restraint in the exercise of the section 66 powers by judges sitting in the Crown Court.

90. If the prosecution wishes to ask the judge to sit as a DJ(MC) in order rectify some procedural error it has made, it must always be in a position to provide the judge with procedural assistance to ensure that the issue is dealt with properly.

91. If a judge is unsure about any of what he or she is being asked to do, then the safe course will sometimes be to decline to deal with anything which requires a Magistrates' Court to deal with it. The prosecution must then take its case to a Magistrates' Court. This will cause cost and delay, but as these cases have shown, that is not always avoided by proceeding under section 66.

92. Where the judge is confident that he or she is aware of the powers of the Magistrates' Court and how they should be exercised, then section 66 is a useful power which can be used to save time and cost and to rectify earlier procedural failings. In deciding how to proceed, the judge must bear in mind that a Magistrates' Court dealing with an either way offence might have decided that it should not be committed for sentence. The fact that it has wrongly come before the Crown Court should not result in a defendant being denied that possible outcome. A Crown Court judge should also be aware that Magistrates' Courts, particularly Youth Courts, may have a different approach to sentencing and a defendant who would wish to be sentenced in the lower court should not be deprived of the possibility that this may happen because of procedural failures by the prosecution. We consider that it is only in cases where it is quite clear that the case should be dealt with by the Crown Court, or where the exercise which is being contemplated is only designed to tie up loose ends and avoid hearings in the Magistrates' Court which are clearly unnecessary, that the section 66 power should be used.

93. When the section 66 power is used, it must be used properly and the judge must proceed in the way which would be required of the Magistrates' Court. It is not necessary for a judge to "reconstitute" himself or herself as anything. It is, however, necessary to explain, with reasons, exactly what powers are being exercised and why. This is so that all concerned are aware of the extent of any powers which are being employed, and so that the lawfulness or otherwise of what is being done can be considered expressly at the hearing and subsequently if necessary, on appeal or judicial review. The Crown Court judge, in cases where the appeal route is important, should consider whether the proposed use of the power will create difficulties in that part of the result might be appealed to the Crown Court and part to the Court of Appeal Criminal Division. If exercising the power (and the original Explanatory Notes to section 66 of the 2003 Act suggest that this is not a bar to its exercise) the judge must be explicit and clear about which sentences are imposed as a DJ(MC) and which as a judge of the Crown Court. That must appear in the Order and, as we have said, must also appear in the records of the Magistrates' Court. We suggest that

rigorous thought about these questions will reveal at least some of the cases where it would actually be better to leave the Magistrates' Court to deal with its own work.

Quashing committals and "remitting" cases from the Crown Court to the Magistrates' Court

94. We have observed above that there is no power in the Crown Court to quash a committal by the Magistrates' Court. That power is vested in the Divisional Court. We cited *R v. Sheffield Crown Court* at [79] above. It is necessary to add something further about that decision, because it may have been misunderstood on occasions. That case concerned a decision by a judge of the Crown Court to "remit" a case to the Magistrates' Court for sentence having wrongly found that the committal for sentence was invalid.
Kennedy LJ, with whom Scott Baker J agreed, said this:-

> "It necessarily follows that the decision of the Crown Court in the present case is erroneous. It must be set aside and the Crown Court must now be instructed to proceed to sentence. But in any event, as Mr. Lewis has pointed out. the Crown Court had no power to go behind the order of the magistrates' court which committed these matters to the Crown Court for sentence. That order was, on the face of it, a valid order. If it was to be challenged, it could only be properly challenged in this Court.
>
> "The position can be different where the order is obviously bad on the face of it, for example, where a case has been purportedly committed for trial when the offence is one which can only be tried summarily: see for example *R v.Norwich Justices* [1950] 2
> K.B 569, but that is not this case."

95. That concept appears also in *Ashton* where Fulford J, as he then was, at paragraph 5 set out at [82] above, explains the distinction by reference to an example. Trial on a charge of homicide would be "obviously bad on the face of it", in the words of Scott Baker LJ.

The distinction there made was approved expressly by the House of Lords in *Clarke & McDaid* at paragraph 14, where Lord Bingham said:-

> "While I would myself express the decision to be made rather differently, I would accept the general validity of the distinction drawn by Fulford J in the paragraphs of his judgment quoted above. Many errors pertaining to indictments fall squarely into the procedural category, as exemplified by cases such as *R v Sheerin (1976) 64 Cr App R 68 , R v Soffe (1982) 75 Cr App R 133 , R v Farooki (1983) 77 Cr App R 257* and *R v Laming (1989) 90 Cr App R 450* ."

96. It may be that the use of the apparently technical word "remit" has led to confusion, as exemplified in the case of Gould, about the powers of the Crown Court in relation to committals. If there is an obviously bad committal, the Crown Court has no power to do anything because the origin of its jurisdiction is a committal which is at least valid on its face. If there is no such committal the case has never left the Magistrates' Court where jurisdiction remains. It will usually be a matter for the prosecution to have the case listed there so that it can be sorted out. The Crown Court has no power to do anything by way of an order to remit a case. It will no doubt inform the Magistrates' Court what has occurred, but that is not the same thing as making an order in a case where there is no jurisdiction. Whether the Crown Court judge, acting under section 66, may deal with the matter from scratch instead of leaving it to the justices is a separate matter to which we will turn in the case of Moffat. Such a course is technically open because the Magistrates' Court is not *functus* but this does not mean that it will always be appropriate to proceed in this way. If that is what is done, then again, the Magistrates' Court must be informed what has been done in its name.

97. We shall address one submission made by Mr. Burge QC about Gould at this point, because it illustrates the point. He submitted that the original ten charges contained numerous defects, of varying degrees of seriousness, whose combined effect was to render the committal either bad on its face, or invalid applying the principles explained in *Ashton.* They were so bad that they were nullities and so were the pleas and the subsequent committal for sentence. They simply had to be ignored and the case had to be re-started with proper charges, which is what he says is the effect of what Her Honour Judge Leigh did.

98. The sight of the prosecution relying on the depths of its incompetence to extricate a serious and distressing case from the procedural nonsense it has created is not attractive. It is also misconceived. These charges were indeed incompetently drawn and lacked proper particulars. Each of them did, however, charge an offence known to law in each case against a named person who accepted his guilt and did not want any more particulars. It is quite clear from his letter of April 2018, months before the charges were drawn, that he knew what he had done. He gives an explanation of the exposure charge involving Z and the hide and seek game in order to try and assist. The problem with the charges, in reality, was that they charged as sexual assault an attack on X which the judge said should really be an allegation of attempted or actual penetrative sexual assault. It was established that there was no penetration of the child's mouth, which meant that the activity could only be charged as an attempt, which was then done at the judge's suggestion. There was a concern expressed by the judge about duplicity, where she said:-

> "JUDGE LEIGH: Yes. But also, the – the – the committal certificate is a mess, it's bad for duplication. [To the prosecutor] I have 10 matters on the committal certificate. I have counts 2 and 3 look exactly the same, as does cou – as – as does number eight. So, at the moment they are bad for duplicity. The same is said for five and nine, both pseudo images, who both have the same exhibit numbers. So, at the moment the committal certificate is defective and needs to be

> corrected because the court needs to know exactly what each count relates to.
>
> And at the moment to me it looks as though I've got duplication. More importantly, it doesn't appear, and I'll ask Mr Savage this, no P-S-R for dangerousness was asked at the Magistrates' Court. Is that right?

99. The want of particularity was regrettable and could have led to confusion, but this could have been sorted out by providing particulars. The judge made no finding that there actually was duplicity (which occurs when two or more offences are charged in one charge, not when one offence is charged twice). She made no finding that the charges were bad on their face and when she purported to quash the committal she did not say that she was doing it because the charges lacked particularity. As we have said above, three of the original charges were deleted and particulars given of the remaining seven when the fresh charges were drawn. The original charges were clear enough to enable that to be discerned.

100. Accordingly, we reject Mr. Burge's submission that this committal was "bad on its face" so that the Crown Court never acquired jurisdiction to deal with it. These charges were defective but that defect was clearly in Lord Bingham's "procedural category" as described above.

Section 17A Magistrates' Courts Act 1980: Mode of Trial

101. We shall set out section 17A in the form in which it was at the time when these cases were determined. Amendments were made to section 17A(4)(b) in December 2020 to accommodate the Sentencing Code:-

> **17A.— Initial procedure: accused to indicate intention as to plea.**
>
> (1) This section shall have effect where a person who has attained the age of 18 years appears or is brought before a magistrates' court on an information charging him with an offence triable either way.
>
> (2) Everything that the court is required to do under the following provisions of this section must be done with the accused present in court.
>
> (3) The court shall cause the charge to be written down, if this has not already been done, and to be read to the accused.
>
> (4) The court shall then explain to the accused in ordinary language that he may indicate whether (if the offence were to proceed to trial) he would plead guilty or not guilty, and that if he indicates that he would plead guilty—
>
> (a) the court must proceed as mentioned in subsection (6) below; and

> (b) he may (unless section 17D(2) below were to apply) be committed for sentence to the Crown Court under section 3 or (if applicable) 3A of the Powers of Criminal Courts (Sentencing) Act 2000 if the court is of such opinion as is mentioned in subsection (2) of the applicable section.
>
> (5) The court shall then ask the accused whether (if the offence were to proceed to trial) he would plead guilty or not guilty.
>
> (6) If the accused indicates that he would plead guilty the court shall proceed as if—
>
> (a) the proceedings constituted from the beginning the summary trial of the information; and
>
> (b) section 9(1) above was complied with and he pleaded guilty under it.
>
> (7) If the accused indicates that he would plead not guilty section 18(1) below shall apply.
>
> (8) If the accused in fact fails to indicate how he would plead, for the purposes of this section and section 18(1) below he shall be taken to indicate that he would plead not guilty.
>
> (9) Subject to subsection (6) above, the following shall not for any purpose be taken to constitute the taking of a plea—
>
> (a) asking the accused under this section whether (if the offence were to proceed to trial) he would plead guilty or not guilty;
>
> (b) an indication by the accused under this section of how he would plead.
>
> (10) If in respect of the offence the court receives a notice under section 51B or 51C of the Crime and Disorder Act 1998 (which relate to serious or complex fraud cases and to certain cases involving children respectively), the preceding provisions of this section and the provisions of section 17B below shall not apply, and the court shall proceed in relation to the offence in accordance with section 51 or, as the case may be, section 51A of that Act.

102. This procedure is mandatory because it contains important safeguards for a person appearing in the Magistrates' Court on an offence which is triable either way. It requires the court to communicate directly with that person "in ordinary language" so that it is clear in open court that the person understands the procedure and what the consequences of indicating a guilty plea may be. The procedure taken as a whole is designed to ensure that the right to trial by jury is not lost through ignorance. It is very important that it is complied with not only for this reason, but also so that in the

event that there is a committal for sentence, the Crown Court will know that the guilty plea was properly taken if any issue should arise about it. There is no transcript of proceedings before the justices and one purpose of the statute is to achieve a situation where the Crown Court can safely assume that this significant procedure has been properly undertaken.

103. The consequences of a failure to follow this procedure were considered by the Divisional Court in *R (oao Rahmdezfouli) v. The Wood Green Crown Court and the London Borough of Barnet* [2013] EWHC 2998 (Admin). The court there applied the analysis in *Ashton* to this situation and followed a long line of authority in holding that a failure to follow this procedure by the Magistrates' Court renders what follows a nullity and liable to be quashed. We have no doubt that this decision is correct. That conclusion is reinforced by the careful analysis of the position by the Divisional Court in an appeal by case stated in *Westminster County Council v. Owadally and Khan* [2017] EWHC 1092 (Admin).

104. In the present cases four Circuit Judges have sought to act as DJs(MC) and to commit persons for sentence. Her Honour Judge Leigh in Gould and Her Honour Judge Moore in Mugenzi did not follow the section 17A procedure. His Honour Judge Cartwright in Moffat and His Honour Judge Curtis-Raleigh in Brown did so. The failure in Gould was part of a larger failure, involving:-

i) committing an indictable only offence for sentence, and

ii) failing to follow section 51 of the Crime and Disorder Act 1998; and

iii) quashing an existing committal when there was no power to do that.

105. The failure in Mugenzi was part of a much less significant process. The judge was simply attempting to correct a date so that the charge reflected what everyone agreed (certainly by that stage) Mugenzi had done.

106. The first issue which arises is whether the rule in *Rahmdezfouli* should be applied where the Crown Court judge has exercised the jurisdiction of a DJ(MC) in order to correct some defect in a committal for sentence, and where the section 17A procedure was properly followed when that committal occurred in the lower court. In such cases, if the charge which is dealt with by the Crown Court judge is substantially the same as that which had been committed then the defendant will have had all the necessary safeguards and they are not undermined by whatever defect now required correction. Did Parliament intend that a failure to follow this procedure in those circumstances would render everything which followed a nullity? This issue arises most clearly for decision in Mugenzi, rather than in Gould for the reason just stated. We shall deal with it when we deal with his case below.

Vacating pleas

107. In two of these cases Crown Court judges have vacated guilty pleas. His Honour Judge Curtis-Raleigh did this in the case of Brown on 4 December 2019, see [47] and [48] above, in respect of the defective committal charges from the committal of 20 November 2019. He did this with the consent of both counsel having given them time

to research the position. Her Honour Judge Moore did this in the case of Mugenzi when granting a prosecution application that the guilty plea to the original unamended charge which had been committed for sentence should be vacated so that the charge with the proper date range could be put. Again, there was no objection to this course. In Gould, the committal was wrongly quashed which presumably was intended to vacate the pleas. In Moffat the case had been (twice) wrongly sent to the Crown Court for trial under section 51 of the Crime and Disorder Act 1998, so there were no pleas to be vacated.

108. The submission is made by Mr. Edmund Burge QC that there is a power in the court to order that unequivocal pleas to a valid charge or count should be vacated even when the person who has entered those pleas does not seek this, and continues to assert his guilt. This is a necessary step in his argument in some of these cases that there was power to vacate pleas and start again in order to rectify prosecution errors. It is a novel concept. The court enquired in argument whether there was any authority to support it and was referred to *R v. Palazu* [2020] EWCA Crim 1627 and *R v. Love and Hyde* [2013] EWCA Crim 257. In the latter case Richards LJ, giving the judgment of the court, said:-

> "12. We have been shown nothing to support the submission that the judge had no power to vacate the applicants' pleas of guilty in the absence of an application by them or on their behalf to vacate those pleas. It appears to us that the court must have that power."

109. In the next sentence, the court indicated that it did not matter in that case whether the power existed or not. This is not powerful authority for the existence of the suggested power.

110. The Criminal Procedure Rules deal with applications to vacate guilty pleas in Part 25.5.
It says:-

> **Application to vacate a guilty plea**
>
> 25.5.—
>
> (1) This rule applies where a party wants the court to vacate a guilty plea.
>
> (2) Such a party must—
>
> (a) apply in writing—
>
> (i) as soon as practicable after becoming aware of the grounds for doing so, and
>
> (ii) in any event, before the final disposal of the case, by sentence or otherwise; and (b) serve the application on—

(i) the court officer, and

(ii) the prosecutor.

(3) Unless the court otherwise directs, the application must—

(a) explain why it would be unjust for the guilty plea to remain unchanged;

(b) indicate what, if any, evidence the applicant wishes to call;

(c) identify any proposed witness; and

(d) indicate whether legal professional privilege is waived, specifying any material name and date.

111. This rule assumes that the "party" who is expected to apply to vacate a plea is the person who entered it, the defendant. The requirement that it be served on the prosecutor suggests that it will not have originated from the prosecutor. Whether that is right or not, the need for a written application setting out certain matters is expressed as a mandatory requirement. We regard that as important. There is flexibility in the Rules about even mandatory requirements contained within them, but we would expect courts to insist on written applications in matters of this kind.

112. We are prepared to accept that the court has a power to direct that a guilty plea be vacated even when the person who entered it does not seek that course, or even opposes it. The discretion to allow a change of plea from guilty to not guilty has long been recognised, see for example *Plummer* [1902] 2 KB 339, and the review of the position in *R. v. KC* [2019] EWCA Crim 1632. The discretion does not originate in statute, but at common law and it appears to us that it would be wrong to say that there are no circumstances in which a court could direct that guilty pleas are vacated contrary to the wishes of the defendant. The criminal process throws up novel situations constantly and it is unwise to say that something may never happen. The facts of *R v. Palazu* show that cases can reveal many unusual situations, and a degree of flexibility is required to meet extraordinary cases. Such a power, though, must obviously only be exercised sparingly and when the interests of justice so require. It is unlikely to be appropriately used in order to rescue the prosecution from a muddle of their own making. More usually in cases where it appears that an important element has been misdescribed in the charge, to the adventitious advantage of the defendant, powers of amendment are more likely to be deployed, when available. That may cause a defendant to seek to be allowed to vacate a plea, which would no doubt often be allowed. (See *R. v. JW* (CACD 21 April 1999), cited in *Love & Hyde*).

Proving a committal for sentence

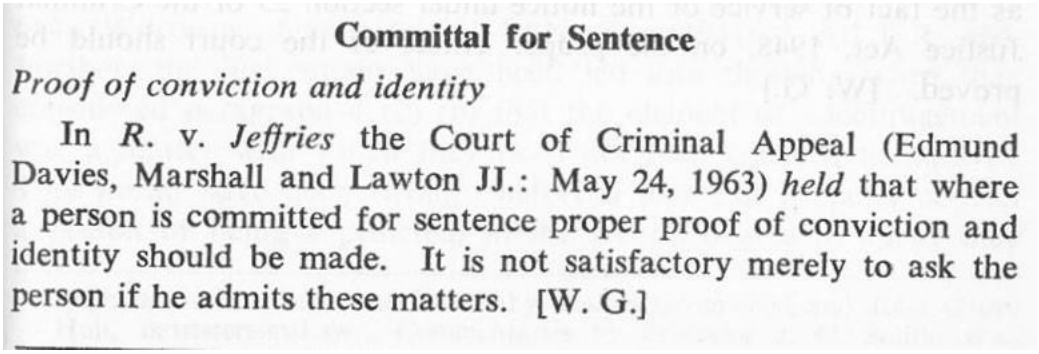
113. The final point of general application we wish to address before turning to the individual cases arises in the case of Mugenzi, see [61(v)(b)] above. Mr. Blom-Cooper

relies on *R v. Jeffries* (1963) Crim. L.R. 559 to contend that the following exchange between judge and counsel at the start of the sentencing hearing means that sentence was passed without jurisdiction.

> "JUDGE MOORE: Can either of you remember, has the committal for sentence been put yet? It probably hasn't.
>
> MR OLIVER: I don't think it has but, as an abundance of caution ---
>
> JUDGE MOORE: Yes, let's just put it.
>
> MR OLIVER: --- it certainly should be put again.
>
> MR YOUELL: Well, I think last time we actually – we actually dealt with everything. We dealt with the plea and the sending.
>
> JUDGE MOORE: Oh, yes, that's right. Yes.
>
> MR OLIVER: In fact, your Honour sent it, so ---
>
> MR YOUELL: I think we've covered everything, your Honour, last time.
>
> JUDGE MOORE: So ready to go as far as the parties are concerned?."

114. That last question is not answered on the transcript but matters then proceeded to sentence, so there must have been non-verbal assent.

115. In fairness to Mr. Blom-Cooper, this was not at the forefront of his argument, but it is hard to imagine a less meritorious submission. It relies on a Note from the 1963 Criminal Law Review of a decision which has been excavated by counsel's industry from the distant past. It is not clear from the brief note what the circumstances of the case were, and it may well be that they justified some observation of the kind recorded in the Note. However, we do not accept that the court was intending to establish that there must be evidence of identity in all cases, even where the person before the court accepts that the conviction and committal relates to him or her. This does not reflect the practice which has been followed for, at least, decades. The case note is as follows:-



Committal for Sentence

Proof of conviction and identity

In *R.* v. *Jeffries* the Court of Criminal Appeal (Edmund Davies, Marshall and Lawton JJ.: May 24, 1963) *held* that where a person is committed for sentence proper proof of conviction and identity should be made. It is not satisfactory merely to ask the person if he admits these matters. [W. G.]

116. Where, as here, there is no doubt that the person before the court is the person who was committed for sentence in respect of the charge which the court is about to deal

with, the failure to establish that by asking him to confirm it is not a jurisdictional failure rendering the sentencing process invalid.

The Four Individual Cases

117. Before embarking on these decisions, we make it clear that in the cases where we rule that the process was flawed and must be begun again, if so advised, we cannot go on and consider whether, on the merits, the sentence imposed below was manifestly excessive or wrong in principle. It would be quite wrong, therefore, for any future sentencer to hold himself or herself bound by the sentence imposed to date. In expressing no view about these sentences, we are not to be taken as indicating approval of them.

Gould

118. We have expressed some decisions as we have dealt with the common points of law above. These are:-

i) The purported quashing of the committal for sentence on the original ten charges was without jurisdiction and should not have happened. The pleas to those charges were lawfully entered and conveyed Gould's desire to admit what he had done. If particulars were required for greater clarity they could and should have been provided.

ii) The decision to allow an indictable only offence to be charged and then to commit it by amending a committal which had been purportedly quashed was bad on its face. Her Honour Judge Leigh would have had the power to send it under section 51 of the Crime and Disorder Act 1998 to accompany the ten existing charges which had been validly committed for sentence. That, however is not what she did.

119. In our judgment the defective process by which the attempted rape allegation came before the Crown Court was a jurisdictional failure which renders all proceedings on it null.

120. Further, the decision to commit the seven charges which replicated some of the existing charges was also void. This was because:-

i) There were already valid charges before the Crown Court reflecting this criminality, and the decision to allow seven new ones was irrational.

ii) The only lawful means of sending the new charges arose under section 51(3) of the 1998 Act, and this did not happen.

121. We therefore sit as a Divisional Court and grant permission to apply for judicial review of the decisions of Her Honour Judge Leigh to:-

i) Quash the original committal;

ii) Allow eight new charges to be laid before her as a DJ(MC);

iii) Take pleas to those charges: those convictions are quashed;

iv) Commit the new charges for sentence;

v) Impose sentence on the eight new charges.

122. We dispense with issue and service of the claim form and abridge all necessary time limits. We quash those decisions. The consequence is that the conviction which resulted in the extended sentence has been quashed and so is that sentence. That disposes of Gould's applications for leave to appeal against conviction and sentence.

123. The result is that the original committal remains to be dealt with by the Crown Court and it will be for the prosecution to decide whether to lay a charge of attempted rape before the justices so that they can send it to the Crown Court under section 51 of the 1998 Act. If so, they must proceed with care and speed, as all matters must be dealt with together. They must, of course, give particulars of the original charges. In respect of those which they do not wish to pursue, Gould will no doubt wish to apply to vacate his pleas and that will no doubt be granted.

124. Gould has been in custody for a long time, but whether the sentence imposed by Judge Leigh was appropriate or not, these offences will inevitably carry a substantial sentence and it is not appropriate that he should have bail. We have considered whether to make an order postponing publication of this judgment in Gould's case until the conclusion of any trial which may take place if he is charged again with attempted rape and pleads not guilty. We have concluded that such an order is not necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings (which are probably "imminent"). That is because the nature of the permitted reporting is constrained by the strict liability rule, and by the limited scope of the defence in section 4(1) of the Contempt of Court Act 1981. It is inconceivable that Gould's convictions on the existing charges and his confession when pleading guilty to attempted rape before Her Honour Judge Leigh would be excluded from evidence on any such trial. That being so, there is nothing in this judgment which would not be before the jury in any event.

125. In view of the history of this matter, we consider that the venue for the sentencing should be determined by the Lead Presiding Judge of the South Eastern Circuit as we consider that it should not be dealt with at Basildon Crown Court.

Moffat

126. As we have explained above, His Honour Judge Juckes, Q.C. sentenced for offences which arrived before him in two tranches and by different routes. Those which had been committed by His Honour Judge Cartwright on 17 October, see paragraph [33] above, were quite wrongly joined by those which were sent by the justices on 7 January 2020.

127. We have reservations about the process conducted by His Honour Judge Cartwright because he was dealing with a case which had been sent by the justices on a completely false basis. He concluded that the sending which was before him was bad on its face, and that he should sit as DJ(MC) to start the proceedings again. He had

jurisdiction to do this under section 66 as we have explained, but in many cases it would be wrong to proceed in this way nonetheless. We have, in the end, concluded that it can be upheld in this case because of the concession by Mr. Smith, who has appeared for Moffat throughout, that the justices would inevitably have committed for sentence had the proper procedure been followed. That concession is properly made. On the facts of this case it was clear that the use of the section 66 power could not deprive Moffat of any procedural protection. It follows that in many cases this power should not be used. An offender who pleads guilty to a single offence of burglary of a dwelling and has only one previous conviction for that offence, perhaps of some age, might properly be dealt with by the Magistrates. A category 3 burglary has a guideline starting point of a community order, and the sentencing range only extends to 26 weeks. It would be wrong to expose him without argument before the justices to the powers of the Crown Court simply because the prosecution has misinformed the court about his record. Moffat is not such a case. He has a terrible record (although not for dwelling house burglary prior to present events). The first sending involved three offences of burglary. Offences (i) and (ii) in the list at [28] above involved the burglary of a house at 0430am while the occupants were asleep in bed. They were not disturbed. Offence (ii) involves burgling the garage of the property on the same occasion where valuable property was stolen. Offence (iv) involved another burglary at night of a house whose occupants were asleep. On this occasion a motor vehicle was stolen using stolen car keys, and Moffat was found in the act of trying to steal another. He ran off. Valuable property was stolen. These facts show that Moffat must have had at least one accomplice who escaped in the stolen car. The justices sent him for trial because they were misinformed about his record, but had they been correctly informed they would inevitably have committed him for sentence. That being so, we accept that His Honour Judge Cartwright acted appropriately in using his power under section 66 to regularise the position. He was careful to comply with the section 17A Magistrates' Courts Act 1980 procedure and, if he was right to exercise the power, he did it properly. He did not have power to quash the original sending, but we do, exercising our powers as a Divisional Court. The original sending must be quashed in the same way as that in Gould. It was not necessary for this to happen before His Honour Judge Cartwright could lawfully sit under section 66 of the 2003 Act to start the proceedings again, and to commit the case for sentence having followed the section 17A procedure correctly. We have suggested at [80] above that the Rules Committees should consider how these superseded committals or sendings might be efficiently tidied up.

128. The sending on 7 January 2020 was unlawful and it is a yet further source of concern that having made the original error in respect of the first sending, the prosecution was able to allow it to be repeated.

129. We consider that we can and should again sit as a Divisional Court. We will proceed in the same way as we have done in the case of Gould. We quash the decision of the justices to send the case for trial on 7 January 2020. In contrast to the way in which His Honour Judge Cartwright dealt with the first unlawful sending, His Honour Judge Juckes, Q.C. simply proceeded to sentence on the second sending when nothing had happened to give him jurisdiction to do so. This means that the sentencing in respect

of them by His Honour Judge Juckes, Q.C. was without jurisdiction and must fall away.

130. We considered whether one of us should exercise powers under section 66, in the presence of Moffat who would perhaps have to attend physically, so that that judge can comply with section 17A of the Magistrates' Courts Act 1980. That judge would hear any submissions which may be made and rule on them. In view of what we say about Judge Cartwright's decision at [127] above, it appears likely that the result would have been a committal of these cases to the Crown Court for sentence. However, on investigation it has become apparent that there were four charges before the Magistrates' Court on the 7 January 2021, and there are concerns about the state of the documentation. There were two charges or burglary and two of theft. The provisions of section 17A(1) and (3) of the Magistrates' Court require an information and a charge which must be written down respectively. The existence of these documents in proper form needs to be checked. Further, as we have said above, there are no rules prescribing the way in which the Magistrates' Court would record the decision of a judge of this court acting under section 66 of the 2003 Act, or how the Crown Court would record a committal for sentence made in this way. A decision on bail would have to be made, and, if the committal were in custody, recorded properly and communicated to the prison. The possibility of error in this respect is such that we have decided simply to quash the order made by the Magistrates' Court on 7 January 2020 and all subsequent proceedings on it. The effect of that is that the case remains in the Magistrates' Court and the prosecution may serve proper documentation on Mr. Moffat and his legal advisers and have the case listed before the Magistrates' Court so that, if it is considered proper, and if Mr. Moffat pleads guilty to them, he can be committed properly for sentence to the Crown Court. That listing should take place within 14 days of this judgment being handed down. If that is what happens, we would request that the subsequent Crown Court proceedings should be dealt with by His Honour Judge Burbidge, Q.C., the Honorary Recorder of Worcester. This is an example of this court exercising the caution we have enjoined on all courts before exercising the powers of a DJ(MC) under section 66 of the 2003 Act.

131. The Single Judge granted leave to appeal against the total sentence of nine years imposed in a case where, on one view, pleas were entered before the charges were properly formulated. That appeal remains outstanding, and will be listed after the sentencing by His Honour Judge Burbidge, Q.C., if that is how those charges are dealt with. Any application for leave to appeal against his sentences for charges (vii)-(x) can be listed at the same time before the full court, with the appeal to follow immediately if granted. If, in the light of what happens in the proceedings below, Moffat decides not to pursue his appeal, it is open to him to abandon it in the usual way. The application for leave to appeal against conviction is refused. In respect of the first sending we have held that the convictions were lawful and safe. In respect of the second sending the convictions fall away as a result of its sending being quashed, which renders all subsequent proceedings on it null.

Brown

132. We have already indicated that the SHPO imposed at Isleworth was unlawful because there was no conviction for an offence which gave the Crown Court power to impose a SHPO and no application had been made by the Metropolitan Police. We therefore grant leave to appeal against sentence, and allow the appeal to that extent. That order will be quashed. Having been in existence until now, it may have terminated the May SHPO because of section 103C(6) of the Sexual Offences Act 2003. Whether that is so or not, it may be prudent for an application to be made as a matter of urgency since it appears clear that such an order is required.

133. The conviction for breaching the February SHPO which occurred in the Magistrates' Court on 20 November 2019 and which resulted in a committal for sentence must be quashed because the order had ceased to have effect before the conduct occurred which was said to be a breach of it. We will sit as a Divisional Court adopting the same procedure as is described above and quash that conviction and the committal for sentence, and the concurrent sentence which was imposed in respect of it therefore falls away.

134. The charge in respect of the February SHPO could not be saved, but we have concluded that the order of His Honour Judge Curtis-Raleigh in respect of the charge relating to the August breach of the May SHPO was effective. The original defective charge, alleging a breach of a SHPO as an offence contrary to section 91(1)(a) and (2) of the Sexual Offences Act 2003 of failing to comply with notification requirements, was bad on its face. To make this clear, we will set out the relevant charge:-

> **"Sex offenders register - fail comply with notification requirements - SOA 2003.** On or before 28/08/2019 at Flat 34, Margaret Cassidy House, Bath Road. Hounslow, UB7 0ET, being a relevant offender within the terms of section 80 of the Sexual Offences Act 2003, failed without reasonable excuse to comply with the notification requirements as provided by Part 2 of that Act in that you had in your possession a mobile phone as prohibited by Section 3 and this device contained software that automatically deletes communication content as prohibited by section 4 of the SHPO imposed on 17/05/19 at Kingston Crown Court. **Contrary to section 91(1)(a) and (2) of the Sexual Offences Act 2003"**

135. It therefore fell back into the Magistrates' Court (actually the Circuit Judge sitting under section 66) where it was withdrawn. The procedure for committing the new and correctly drawn charge for sentence as recorded by the judge on the digital case system was properly carried out. As with Moffat, there was no possible doubt about the case as a whole being properly before the Crown Court, because of the breach of the Crown Court suspended sentence order of which the judge was aware. This was, therefore, an exercise of the section 66 power which we are prepared to uphold.

136. The purported amendment of a charge which had been committed for sentence to the Crown Court, as His Honour Judge Connell did on 15 January 2020, would not be an

appropriate use of the power under section 66. The Magistrates' Court was *functus* and he could not change that by sitting under section 66. However, as we have pointed out above, the committal was defective in form because it should have contained a committal under section 3 of the Powers of Criminal Courts (Sentencing) Act 2000, as well as the committal under paragraph 11(2)(a) of Schedule 12 to the Criminal Justice Act 2003 in relation to the suspended sentence order. We have held that this was an error which did not deprive the Crown Court of the power to sentence, following *R v. Ayhan* [2011] EWCA Crim 3184; [2012] Cr. App. R. 27. The error as to the date of the suspended sentence order in the committal under paragraph 11(2)(a) of Schedule 12 to the Criminal Justice Act 2003 did not therefore deprive the Crown Court of the power to sentence, see paragraphs 8(1)(b)(ii) and 11 of Schedule 12 to the Criminal Justice Act 2003. It was open to the Crown Court to proceed to deal with the suspended sentence breach on the committal order as it stood, ignoring the obvious error as to the date. We shall return to this when dealing with the next case.

137. There is no arguable appeal against the total term of 56 weeks detention which has in any event now been served, having been imposed on 5 February 2020. The term is unaffected by the removal of one of the two sentences of 12 weeks detention for the two alleged breaches of the SHPOs in August 2019. The breach which we have quashed related to an attempt to start a consensual relationship with an 18 year old woman. The possession of a prohibited phone at the same time was a sufficiently serious breach to justify the sentence of 12 weeks on its own. Its occurrence soon after the imposition of the suspended sentence order and shortly before the further October breaches involving phones required consecutive terms. The contents of the reports on Brown show that there is no mitigation apart from youth, and, given the history, the time had come for a significant custodial sentence.

138. We make no order in respect of those parts of His Honour Judge Connell's order which we have not quashed, which therefore remain valid, save that the surcharge order is varied from £149 to £140. It should have been imposed by reference to the date of the offence for which the suspended sentence was imposed, rather than the date when it was dealt with.

Mugenzi

139. We grant leave to appeal against sentence but decline to take any remedial action by quashing anything done in the Crown Court. The procedure adopted was flawed but unnecessary. There was a valid committal on which sentence was lawfully passed. We shall consider whether the sentence was manifestly excessive.

140. We consider that the procedure which the parties persuaded the judge to follow was unnecessary. The charge contained an obvious typographical error which could simply have been ignored by agreement. The true position was agreed. If the parties had insisted on a piece of paper to correct the position, Mugenzi could have asked the judge to take the offending between March 2016 and March 2018 into consideration when sentencing on the valid committal for sentence.

141. Blackstone, Criminal Practice 2021 says this:-

> D11.31
>
> Since divergence between a count and the evidence as to date is not in itself fatal to conviction, it may be unnecessary for the prosecution to apply for the indictment to be amended on such a divergence becoming apparent (*Dossi (1918) 13 Cr App R 158*; but see *Bonner [1974] Crim LR 479*, where the Court of Appeal apparently overlooked the point). However, as a matter of practice, it may be preferable to eliminate the divergence by an appropriate amendment, thus avoiding confusing the jury.

142. This is an observation about indictments, but there is no reason why the approach should be any different in respect of charges. That being so, it was for the judge to decide the basis of sentence in the ordinary way and she was not constrained by the obvious typographical error. There was, as we have said, no dispute about the basis of sentence and that step was not required of her.

143. If, contrary to our view, it was necessary to cure the typographical error we consider that the attempt to do this by exercising the power of a DJ(MC) under section 66 of the 2003 Act, and perhaps under section 142 of the same Act, was flawed. The Magistrates' Court, having committed the case for sentence, no longer had any jurisdiction over the case. In technical language, it was *functus officio* as we have explained above.

144. The judge embarked on an unnecessary process which was on its own terms flawed. The charge which was committed for sentence was not bad on its face. It was therefore properly before the court for sentence. There was no power to "remit" it to the Magistrates' Court. The amendment to it which was then ordered was beyond the power of the Magistrates' Court. The mode of trial procedure required by section 17A did not then occur. All of those steps were nullities.

145. That leaves the original charge, properly committed and properly before the Crown Court. As we have said, the proper course for the judge was to sentence on that charge, resolving any factual issues about the basis of sentence in the usual way. We therefore proceed to consider the sentence which she passed in the sentence appeal for which we have given leave.

146. We agree with the judge about the classification of the offence as a category 2A offence. There was a serious and sustained breach of trust. The starting point of 5 years fell to be reduced in the range because the starting point is based on a loss of £300,000, and the sum stolen in this case was a little over £220,000. Further discounts were then to be made to reflect a series of separate matters of mitigation.

147. First is the delay. None of this was the fault of Mugenzi. It was around 2 years and not the year which the judge took as the period. It was a straightforward case with full admissions and it is extraordinary that it took as long as it did for the matter to be brought before the court.

148. Second is the fact that Mugenzi has lived under a credible threat of assassination by the government of Rwanda since 2011. He received an *Osman* warning then and has

received regular police input ever since. His family are at some risk, as well as him. In extradition proceedings in London in 2015 he gave evidence in a public court, as is recorded in the decision of the Divisional Court in *Government of Rwanda v. Nteziryayo and others* [2017] EWHC 1912 (Admin). The evidence was accepted. It is inappropriate for a court in dealing with sentencing to express preference for one side or the other in a political argument, and it would be wrong to do so. The *Osman* warning is a matter of record, however, and is to be taken into account as a seriously adverse event for Mugenzi and his family whatever the rights and wrongs of the political argument. Further, the act of assisting in the system of justice in the UK is a laudable one, especially where it involved credit. We consider that this is a matter of mitigation which was not sufficiently taken into account by the judge. The strain of living under such conditions can only be imagined. The cause of the offending appears to have been the development of a gambling habit. There was, however, no evidence of any link between the assassination threat and the commission of this offence.

149. About 25% of the loss had been paid back , and Mugenzi appeared to be genuinely remorseful for what he had done.

150. In addition, we note that the judge had said that rather more than the full credit of one third was appropriate in the circumstances of this case. This is an outcome not permitted by the Guideline on Reduction for Guilty Pleas, and we read this remark as meaning that she took into account his contrition and co-operation prior to charge as an additional source of mitigation before discounting for the plea.

151. It is clear that the judge made a significant discount from the starting point of 5 years before allowing the plea discount. That first reduction must have been itself about one third, to take the starting point down from 60 months to a little under 40 months. The reduction for the guilty plea then reduced it further to the final sentence of 27 months. It is clear that the judge had all the facts of the case and the matters which properly went to mitigate the sentence firmly in mind when reaching the sentence she did. Theft of this amount of money, over this period of time, and from a Church when in a position of trust, would commonly attract a sentence of 5 years or thereabouts after a trial. It was a matter for the judge to weigh up what she knew about the offence and the offender and to make an allowance for this mitigation, which she clearly did. In our judgment, although we have given leave to appeal, the sentence was not manifestly excessive.