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IN THE HIGH COURT OF JUSTICE CO/357/2018

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

[2018] EWHC 1367 (Admin)

Royal Courts of Justice

Wednesday, 9 May 2018

Before:

LORD JUSTICE HOLROYDE

MRS JUSTICE ANDREWS DBE

B E T W E E N :

JOHN SCOTT DOUGALL Appellant

\- and -

CROWN PROSECUTION SERVICE Respondent

J U D G M E N T

A P P E A R A N C E S

MR O GREENHALL (instructed by Lloyds PR Solicitors) appeared on behalf of the Appellant.

MR J BOYD (instructed by the Crown Prosecution Appeals Review Unit) appeared on behalf of the Respondent.

LORD JUSTICE HOLROYDE:

1 This appeal by way of Case Stated raises a short but important point as to the proper construction of section 127 of the Magistrates' Courts Act 1980, which imposes a time limit on the commencement of a prosecution for a summary offence.

2 Section 127 of the 1980 Act provides as follows:

> "(1) Except as otherwise expressly provided by any enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose.
>
> (2) Nothing in—
>
> (a) subsection (1) above; or
>
> (b) subject to subsection (4) below, any other enactment (however framed or worded) which, as regards any offence to which it applies, would but for this section impose a time-limit on the power of a magistrates' court to try an information summarily or impose a limitation on the time for taking summary proceedings,shall apply in relation to any indictable offence.
>
> (3) Without prejudice to the generality of paragraph (b) of subsection (2) above, that paragraph includes enactments which impose a time-limit that applies only in certain circumstances (for example, where the proceedings are not instituted by or with the consent of the Director of Public Prosecutions or some other specified authority).
>
> (4) Where, as regards any indictable offence, there is imposed by any enactment (however framed or worded, and whether falling within subsection (2) (b) above or not) a limitation on the time for taking proceedings on indictment for that offence no summary proceedings for that offence shall be taken after the latest time for taking proceedings on indictment."

3 The chronology of relevant events is helpfully summarised in the Case Stated. On 24 November 2015, the appellant, Mr Dougall, was involved in an incident in which, it appears, he admittedly bit another man. His explanation for doing so was that he acted in self-defence. On 3 February 2016, he was arrested, interviewed, and released on bail. He was not, however, charged until 21 July 2016, almost eight months after the incident.

4 The charge laid against him on that date was that he had assaulted the complainant, thereby occasioning him actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861. That is an offence which may be tried either on indictment or summarily; an either-way offence.

5 By section 5 of Schedule 1 to the Interpretation Act 1978, "indictable offence" means an offence which, if committed by an adult is triable on indictment whether it is exclusively so triable or triable either way. The general effect of section 127(2) of the 1980 Act, therefore, is that the time limit for a summary offence contained in subsection (1) does not apply to an indictable-only or either-way offence. There may be rare exceptions to that general rule, where a statute expressly imposes a time limit for commencing proceedings on indictment, but none of them applies in the present case.

6 The appellant made his first appearance before a magistrates' court on 18 August 2016. On that date the charge was amended to one of assault by beating, contrary to s.39 of the Criminal Justice Act 1988. That is a summary offence and may only be tried summarily. The appellant pleaded not guilty, and his case was listed for trial in the magistrates' court on 28 November 2016. There followed a number of delays and adjournments which unhappily had the effect that the trial was not concluded until 8 May 2017, when the appellant was convicted and sentenced to a community order.

7 The Deputy District Judge (Magistrates' Courts) who heard the trial ("the DDJ") was not the judge who had permitted the prosecution to amend the charge on 18 August 2016. At the commencement of the trial, it was submitted to her, on behalf of the appellant, that the court had no jurisdiction to try him because the amendment of the charge had contravened section 127 of the 1980 Act. It was submitted that section 127 showed a clear Parliamentary intention that summary offences should be dealt with speedily, and that it was not permissible to add or substitute a charge of a summary offence in circumstances such as these.

8 It was submitted on behalf of the prosecution that the amendment had been properly made and had caused no prejudice to the appellant because it resulted in his facing a less serious charge than he had done previously. The prosecution relied on the decision of a Divisional Court in *R v Scunthorpe Justices ex parte McPhee and Gallagher* [1998] EWHC 228 (Admin). The facts in the *Scunthorpe Justices* case were that the applicants had been involved in an incident on 22 October 1996, when they admittedly beat their victim and stole her trainers. On 23 January 1997 they were charged with robbery. That is an indictable-only offence. The case was to be tried on 25 April 1997. Before that date the prosecution agreed that they would accept guilty pleas by the applicants to offences of theft and common assault and would not pursue the charge of robbery. On 25 April 1997, accordingly, the prosecution applied to amend the information to charges of theft, an either-way offence; and common assault, a summary offence. So far as the charge of theft was concerned, the amendment was permitted and the applicants pleaded guilty. The justices refused, however, to permit the amendment to charge common assault, on the ground that more than six months had passed since the commission of the offence.

9 The applicants sought judicial review of the justices' decision refusing to allow that amendment. The Divisional Court granted their application and quashed the refusal to allow the amendment.

10 Dyson J, as he then was, with whom the Lord Chief Justice agreed, referred in his judgment to earlier case law. He drew from it the following three principles:

> "(1) The purpose of the six-month time limit imposed by section 127 of the 1980 Act is to ensure that summary offences are charged and tried as soon as reasonably practicable after their alleged commission.
>
> (2) Where an information has been laid within the six-month period it can be amended after the expiry of that period.
>
> (3) An information can be amended after the expiry of the six-month period, even to allege a different offence or different offences provided that:
>
> (i) the different offence or offences allege the 'same misdoing' as the original offence; and
>
> (ii) the amendment can be made in the interests of justice."

11 Dyson J went on to explain that the phrase "the same misdoing" meant that the new offence should arise out of the same, or substantially the same, facts as gave rise to the original offence. Applying those principles to the circumstances of the *Scunthorpe Justices* case, the court concluded that the justices had applied the wrong test. It was clear that the new offences did arise out of the same, or substantially the same, facts as the original offence of robbery; and since the applicants were willing to plead guilty to those lesser offences, and the prosecution was prepared to accept their pleas, the interests of justice plainly required the amendments to be made.

12 Returning to the present case, the DDJ indicates in the Case Stated that she initially questioned whether she had jurisdiction to consider the submission which was made to her, given that the amendment had been made by a court at an earlier hearing. She states, however, that if she did have jurisdiction to revisit the decision as to amendment, she confirmed it. She referred to the principles stated in the *Scunthorpe Justices* case. She noted that in the present case the original charge was an either-way offence and that there was therefore no statutory time limit applicable to the commencement of the prosecution on that charge.

13 The Case Stated then indicates that the DDJ considered the circumstances of *the Scunthorpe Justices* case and found the present case to be analogous. She says:

> "I considered that if an indictable-only offence is capable of amendment more than six months from the date of the alleged offence, then it must be the case that the court has a discretion to consider the amendment of an information alleging an offence triable either way outside the period of six months from the date of the alleged offence."

14 The DDJ was satisfied that the amended information alleged precisely the same misdoing as did the original charge. She was also satisfied, for reasons which she explained and which are not controversial, that it was in the interests of justice to grant the adjournment.

15 The DDJ concludes her very clear Case Stated by posing the following question for the determination of this court:

> "Does a Magistrates' Court have jurisdiction to try a defendant in circumstances where he is first charged with an indictable offence more than six months after the alleged offence and the charge is later amended to a summary only offence?"

16 It should be noted that this appeal was lodged outside the time limit of 10 days from the date of the decision. That delay had been explained by the appellant's solicitor, and no point is taken on behalf of the respondent. I am satisfied that it is appropriate to extend time so that this appeal may be heard.

17 On behalf of the appellant, Mr Greenhall submits that the question posed by the DDJ should be answered in the negative. He submits that section 127 of the 1980 Act lays down a clear time limit which must be observed. As to the importance of a statutory time limit on the commencement of particular criminal proceedings, he refers to the case of *J* [2004] UKHL 42. The defendant in that case had been charged with three offences of indecent assault. He submitted that his prosecution should be stayed as an abuse of process on the ground that his alleged conduct amounted to offences of unlawful sexual intercourse with a girl aged under 16, an offence subject to a 12-month time limit for prosecution, and that the charges of indecent assault were an improper attempt to circumvent that time limit. The House of Lords accepted his argument, holding that if a statutory provision was clear and

unambiguous the court could not decline to give effect to it even if its rationale was anachronistic or discredited or unconvincing.

18 Mr Greenhall says that there is no decided case which supports the decision of the DDJ in this case. He submits that her decision contravenes the clear meaning of section 127 and misapplies the reasoning in the *Scunthorpe Justices* case. Mr Greenhall argues that the *Scunthorpe Justices* case is authority that where an information or charge is laid within the 6-month time period, it may later be amended to an alternative summary-only offence if the new charge arises from the "same misdoing" and it is in the interests of justice to allow the amendment. It is not, however, authority that an information or charge laid outside the 6-month time limit may be later amended to allege a summary offence.

19 For the respondent, Mr Boyd agrees that the meaning of section 127 is clear and accepts that it precludes a magistrates' court from trying an information charging or containing a summary offence unless that information was laid within 6 months from the time when the offence was committed. He submits that the jurisdiction of a magistrates' court to try a summary offence is founded on the laying of an information. The information may be laid orally or in writing, but there must be a deliberate act of commencing the prosecution (see *Schiavo v Anderton* [1987] QB 20). He further accepts that in the circumstances of this case, the charge of assault by beating was not laid within the statutory time limit and, accordingly, he does not feel able to resist the appeal.

20 Mr Boyd submits that the DDJ's reliance on the *Scunthorpe Justices* case was misplaced because she overlooked a central factual difference between the two cases. The difference is that in the *Scunthorpe Justices* case the information had been laid within the statutory time limit, albeit that the amendment was made after that time limit had expired. But in the present case, both the laying of the information and the amendment took place outside the time limit. It was perfectly permissible to charge an offence of assault occasioning actual bodily harm some eight months after the relevant events because there is no time limit on the commencement of a prosecution of an indictable-only or either-way offence. But, submits Mr Boyd, the effect of section 127(1) is that the trial of a summary offence must be preceded by the laying of an information within the statutory time limit.

21 In my judgment, counsel are correct in their submissions. Given that the phrase "indictable offence" in s.127(2) includes an either-way offence, it may well be that the DDJ was correct in her view that the reasoning in the *Scunthorpe Justices* case, although decided with reference to what was initially a charge of an indictable-only offence, is equally applicable to a case in which the original charge is of an either-way offence. But in the *Scunthorpe Justices* case, the original charge of robbery was laid within the period of six months after the offending, and therefore within the time limited for the commencement of a prosecution for a summary offence. If, instead of the charge of robbery, the applicants in that case had from the outset been charged with theft and common assault, there would have been no bar to the prosecution of the latter summary offence. Here, however, the appellant was not charged with any offence within the period of six months after the relevant events. He was first charged with an either-way offence some eight months after the relevant events. It follows, in my judgment, that when he was charged with the offence of assault occasioning actual bodily harm on 21 July 2016, it was too late for him to be charged with an offence of assault by beating. That, in my judgment, was a crucial distinction which the DDJ overlooked. As a result, with respect to her, she wrongly treated the decision in the *Scunthorpe Justices* case as applying to the circumstances of this case, and she failed to apply the plain words of section 127 of the 1980 Act.

22 Those plain words stipulate that a magistrates' court may not try an information alleging a summary offence unless the information on which the prosecution is founded was laid within the statutory time limit. That is so, whether the information initially charges the summary offence or initially charges an indictable offence but is later amended to charge a summary offence. If no information is laid within the period of six months, but an indictable offence is later charged and then subsequently amended to charge a summary offence, that amendment does not avoid the consequence of the statutory time limit. It follows that the magistrates' court was wrong in law to permit the amendment made on 18 August 2016 and that, when the point was belatedly raised, the DDJ was wrong in law to confirm that amendment.

23 The certified question must therefore be answered “no”. Mr Boyd very properly accepts that the appropriate order in those circumstances is that appellant's conviction must be quashed.

MRS JUSTICE ANDREWS: I agree.

LORD JUSTICE HOLROYDE: Thank you very much. We are grateful to you both for your help.

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Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
admin@opus2.digital

This transcript has been approved by the Judge.