Neutral Citation Number: [2009] EWCA Crim 1612

Case No: 200900866/C3

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Monday, 6th July 2009

B e f o r e:

LORD JUSTICE KEENE

MR JUSTICE HOLMAN

THE RECORDER OF NOTTINGHAM
(Sitting as a Judge of the CACD)

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R E G I N A

v

DAVID EDWARD LEEKS

- -

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Mr R Bryan appeared on behalf of the **Applicant**
Mr A McGee appeared on behalf of the **Crown**

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J U D G M E N T

1. MR JUSTICE HOLMAN: This is an application for leave to appeal against conviction which has been referred to the Full Court by the Registrar of this court.

2. The fundamental issue on this application is as to the validity of a count which was added to an indictment without the court making an order for amendment as required by section 5(1) of the Indictments Act 1915. On the facts and in the circumstances of this case, the point might be regarded as technical in the extreme. However, as Lord Bingham of Cornhill said at paragraph 17 of his speech in the case of R v Clarke and McDaid, to which we will refer more fully later:

> "Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply 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."

3. The essential background facts to this application are as follows. On 18th September 2006 this applicant was driving his car in Basildon in Essex. A pedestrian began to cross the road from the applicant's left-hand side. The car struck the pedestrian, who died shortly afterwards in hospital.

4. It has never been in issue that the applicant had shortly beforehand been drinking alcohol at a pub. He said as much to witnesses at the scene. Moreover, when police arrived he was asked to, and did, supply a specimen of breath at the roadside which was positive. He was arrested and taken to the police station. Here, however, he refused to provide any further specimen for testing for the volume of alcohol in his blood. Initially the applicant was charged on an indictment which was, and is, a completely valid indictment, properly signed by an officer of the court. It charged a single count, namely causing death by careless driving and refusing to provide a specimen of breath contrary to section 3A(1)(c) of the Road Traffic Act 1988. The particulars of the offence were that the applicant:

> "... on the 18th day of September 2006 caused the death of [the victim] by driving a mechanically propelled vehicle on a road... without due care and attention and within 18 hours after that time was required to provide a specimen of breath, pursuant to section 7 of the Road Traffic Act 1988 but without reasonable excuse failed to do so."

5. This indictment was fixed for trial in the Basildon Crown Court, due to start on Monday 8th October 2007. The indications were that the applicant proposed to plead not guilty. Although we do not know all the details, it seems that at one stage a serious issue was being raised with regard to causation of the accident itself.

6. It appears that the victim also had a considerable quantity of alcohol in his blood, and the suggestion was that he had, in effect, darted into the road at so late a stage that it would have been impossible for the applicant to avoid the collision, even if he had driven with complete care and attention.

7. The case was listed "for mention" on Friday 5th October 2007 before His Honour Judge Clegg who sits regularly at the Basildon Crown Court and who seems to have been identified by then as the trial judge. As we understand it, part of the reason for that "mention", which had been listed on the application of the defence, was due to certain issues as to outstanding disclosure, to which we need not refer.

8. However, it is plain that as the date for trial drew close, the prosecution and in particular their intended trial counsel, Mr Caudle, had become increasingly concerned as to whether they could properly prove the case that was alleged in the indictment. The reason for that was that there had, or may have, been certain irregularities at the police station, such that the police were not lawfully and regularly requiring the applicant to provide a further specimen. Thus they might not have been able to prove that he had failed to do so "without reasonable excuse". The way in which the prosecution inclined to face up to that problem was to seek to add a second count to the indictment, namely one of causing death by careless driving when unfit through drink, contrary to section 3A(1)(a) of the Road Traffic Act 1988.

9. As regrettably some times happens, different counsel were actually present at court on 5th October 2007, from the intended trial counsel. Mr Caudle was not present and instead Mr Wyatt appeared on behalf of the prosecution. It is quite plain that before they went into court that day Mr Wyatt, on behalf of the prosecution, and Mr Paxton, who was appearing that day on behalf of the defence, had some discussion about this proposed added and alternative count. The applicant himself was not present at court at all that day which, as we have said, was simply listed "for mention". From transcript Volume I, one sees following taking place:

> "MR PAXTON: In terms of the indictment, your Honour will have seen----
>
> JUDGE CLEGG: I do not have an indictment. I have a piece of paper that says indictment and there is absolutely nothing on it.
>
> MR WYATT: Your Honour, I can pass up what is, unfortunately, a provisional indictment. I spoke to Mr Caudle this morning, who was instructed in this case....
>
> JUDGE CLEGG: Right. Just let me have a look at this [viz plainly referring to what was handed up and described as a provisional indictment]. Causing death by careless driving and refusing to provide a specimen.
>
> MR WYATT: If I can interrupt your Honour, it is Count 2 that will form the subject matter of the final indictment. Mr Caudle has advised that Count 2 be added in substitute of Count 1, but something has been lost in the translation and it has been added as an alternative, which is not correct. The final indictment, which will be ready on Monday, your Honour, will be Count...

JUDGE CLEGG: I do not know why the Crown are making difficulties for themselves.

MR PAXTON: Your Honour, in fairness, I will not go through all the factual history or the history of Mr Caudle's and my conversation recently, but actually when one examines the procedure in detail at the station Mr Caudle has, in my view rightly, observed that there are difficulties.

JUDGE CLEGG: I see.

MR PAXTON: He has come to a conclusion -- in fact I have seen different difficulties but come to the same conclusion -- and he indicated to me about two weeks ago that the Crown were going to amend the indictment and proceed on that second count. So there has been some discussion. I do not have my client here today, that was our request, and so I cannot say that I formally agree to the amendment, but that is a matter that can be resolved on Monday.

JUDGE CLEGG: Yes ..."

The discussion in court on the Friday then passed to other matters. Pausing there, one can plainly see that nowhere in the passage that we have quoted was Judge Clegg actually asked to make a ruling or decision, or to make an order for the amendment of the indictment, and quite plainly he did not do so. In that passage Mr Wyatt had referred to "a provisional indictment". He had said that the "final indictment ... will be ready on Monday" and Mr Paxton had referred to the issue of amendment being "a matter that can be resolved on Monday".

10. Monday 8th October was, as we have said, the date fixed for trial. On this occasion, however, different counsel appeared for the prosecution, namely, Mr G King. Before a jury was empanelled, the defence sought from the judge a ruling on the question whether or not the prosecution could adduce in evidence before the jury, on the proposed new count, the readout obtained when the breath test was administered at the roadside. The Crown plainly wished to rely on the actual readout and the actual volume of alcohol in the applicant's blood that that readout indicated. The defence, on the other hand, contended that the essence of the charge was that he was "unfit to drive through drink"; and that although it was open to the prosecution to adduce evidence that he had drunk alcohol and was unfit to drive, they could not, on that count, adduce the actual readout itself. There was very considerable argument on this point extending to some 37 pages in transcript.

11. It is right to say, and Mr McGee on behalf of the Crown presses this point very strongly upon us today, that the whole of that argument is plainly predicated on an assumption that the court either has made, or will make, an order under section 5(1) of the Indictments Act 1915, permitting an amendment to add the count. However, at no stage at all during the transcript of the argument itself was the court formally asked to

make that amendment, and at no stage did the judge do so. His ruling appears at page 37F of the transcript. Judge Clegg began by saying:

> "In this case the defendant is charged with an offence contrary to section 3A of the Road Traffic Act 1988..."

Pausing there, in that opening sentence the judge was not identifying whether the offence was one arising under paragraph (c), or paragraph (a) of subsection (1), but referring only generically to section 3A of the Act. At page 38B to E, he said:

> "I need not go into a great deal of detail, but it would appear that mistakes were made at the police station, as a result of which counsel for the Crown has decided not to proceed for an offence under section 3A(1)(b)[sic] - which is causing death by careless driving having consumed so much alcohol that it exceeds the prescribed limit of alcohol in breath - but for an offence under 3A(1)(a), namely that the defendant at the time was unfit to drive through drink or drugs.
>
> Because there is no Lion intoximeter reading, because there is no blood alcohol analysis, the Crown now seek to rely on the readout from the roadside breath device. It is to be noted they say that they are entitled to do that by any admissible means available to them."

12. Pausing there, Mr McGee on behalf of the Crown today very strongly relies on that passage and submits that it is implicit within it that Judge Clegg either has already made an order permitting the amendment, or is proposing to do so; or even implicitly by that very passage is doing so.

13. Plainly, however, there is no express reference to the judge exercising any such power in that paragraph. The passage is merely a recitation of the decision of the Crown not to proceed under one paragraph but, rather, under another. In our view it is a more accurate description of that passage that the judge makes an assumption that leave has been given, rather than that he actually implicitly grants leave. The judge then continued with his ruling and at the end of it simply ruled as follows:

> "Accordingly I rule that it would be inadmissible for the Crown to seek to adduce the readout from the roadside breath test device. However, it would be perfectly proper - and indeed Mr Paxton concedes this - for them to adduce evidence that a roadside test was administered, that the defendant failed it, and that that constitutes an indication that the proportion of alcohol was likely to exceed the prescribed limit, but it cannot actually be determinative of that issue. That is my ruling."

14. It might have been expected that following on that ruling the trial would then have got underway on 8th or 9th October 2007. However, other events had also taken place outside the courtroom on the morning of Monday 8th October 2007, which led the defence to seek to argue that the whole trial was now tainted by an abuse of process.

15. It is not necessary for us to say much about that, for it is not germane to what we have to decide today, but explains the subsequent chronology. In essence, it seems that there was a period, perhaps only of minutes, during the morning of 8th October 2007 when the representative of the Crown Prosecution Service had said that the prosecution would accept a plea to a lesser offence, simply of driving without due care and attention. That intimation was rapidly withdrawn, but it led the defence to submit that it was now an abuse of process to proceed on the proposed more serious count. This in turn led to decisions that the abuse of process argument would have to be heard on an altogether different occasion; a different advocate would have to represent the prosecution; statements would have to be made as to what was said by the various actors that morning; and that it was preferable that the abuse of process ruling should be made by a different judge and therefore at a different court. So it came about that the abuse of process argument was only heard and ruled upon about a year later in the Chelmsford Crown Court by His Honour Judge Ball QC. He ruled against the defence abuse of process submission and the case was fixed for trial in the Chelmsford Crown Court on 4th November 2008. As we understand it, it was still the intention of the applicant at the start of that day to plead not guilty in reliance on the issue as to causation that we have indicated. Apparently, when he arrived at court, or went into the courtroom, and saw relatives of the deceased, the applicant was so struck that he decided at the very last minute to change his plea to one of guilty.

16. By now, there was what we will call a piece of paper in circulation that was headed "indictment". It has all the appearance of an indictment and contains upon it two counts. The first count is a repeat of the count that was in the original indictment that we have already quoted in full. Count 2 charged:

> "CAUSING DEATH BY CARELESS DRIVING WHEN UNFIT THROUGH DRINK contrary to section 3A(1)(a) of the Road Traffic Act 1988.
>
> PARTICULARS OF OFFENCE.
>
> [The applicant] on the 18th day of June [sic, but it should have said September] 2006 caused the death of [the victim] by driving a mechanically propelled vehicle... on a road... without due care and attention and at a time when he was unfit to drive through drink."

That piece of paper is nowhere signed by an officer of the court and does not contain anywhere upon it any endorsement pursuant to section 5(2) of the Indictments Act 1915 that the original indictment had been amended.

17. We have now at Volume VI a transcript of the arraignment itself. It proceeded as follows:

> "THE CLERK OF THE COURT: Would you stand up, please? David Edward Leeks, you are charged with causing death by careless driving and refusing to supply a specimen of breath ----

MR CAUDLE: No, that is the wrong indictment.

JUDGE BALL: No, it is the wrong indictment. There should be an indictment dealing with 'whilst unfit'. A copy is coming.

THE CLERK OF THE COURT: David Edward Leeks, on this indictment you are charged with causing death by careless driving when unfit, contrary to section 3A(1)(a) of the Road Traffic Act 1988, in that on the 18th day June 2006 you caused the death of [the victim] by driving a mechanically propelled vehicle, on a road... without due care and attention at a time when you were unfit to drive through drink. Do you plead guilty or not guilty?"

THE DEFENDANT: Guilty.

THE CLERK OF THE COURT: You plead guilty. Please sit down."

Mr Caudle then referred to the error in the date, which should have specified September rather than June and that, in effect, was corrected. Following the plea of guilty the judge proceeded to sentence this applicant to 2 years' imprisonment and disqualified him from driving for 7 years. There has never been any subsequent attempt to seek to appeal from that sentence. So it might have seemed that this matter ended.

18. However, on 14th January 2009 His Honour Judge Ball QC, who had presided on 4th November 2008 and who is the resident judge of the Chelmsford Crown Court, wrote a letter or memorandum which he circulated to all relevant people and bodies including the Registrar of this court. It begins:

"When court staff were dealing with the paperwork connected with the final disposal of this case it came to their attention that no form of a signed amendment to the indictment existed. I have conducted a detailed research of the court files and the various hearings, and I have obtained transcripts of the hearings at Basildon Crown Court when the issue of the amendment was raised and formed part of the discussion about the progress of the case. Whilst it is apparent that from a very early stage all parties agreed that the indictment would be amended by the addition of a second count alleging 'death by careless when unfit' [section 3A(1)(a) Road Traffic Act 1988] it appears that no formal application was ever made to add this count, either at Basildon or Chelmsford Crown Court, nor was it ever formally endorsed as having been added. It was to this count that the defendant entered his plea of guilty on 4th November 2008.

Although there may be arguably significant distinctions between this case and the leading authority of R v Clarke and McDaid ... it seems right that we bring this state of affairs to the notice of the parties as soon as possible ..."

So it is that this application now comes before us today.

19. Section 5 of the Indictments Act 1915 (as amended) provides as follows:

> "5(1)Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice ...
>
> (2)Where an indictment is so amended, a note of the order for amendment shall be endorsed on the indictment, and the indictment shall be treated for the purposes of the trial and for the purposes of all proceedings in connection therewith as having been signed by the proper officer in the amended form."

20. We have set out at length all the relevant passages in the various relevant hearings that took place in this case. It is plain that in none of them did the court, whether Judge Clegg in Basildon or Judge Ball in Chelmsford, expressly make any order at all for the amendment of the indictment. Perhaps for that very reason, no note was ever endorsed on the indictment of any order for amendment having been made.

21. On behalf of the applicant, Mr Bryan, who appeared for him at the final hearing on 4th November 2008, makes the short submission that what took place in this case became simply a nullity. His client was arraigned and pleaded guilty to an imaginary indictment, with a supposed count upon it which in reality never lawfully existed because no court had ever made an order for the amendment. He relies in particular on the authority of the House of Lords in R v Clarke and McDaid [2008] UKHL 8. There is, undoubtedly, a factual and analytical distinction between that authority and the facts and circumstances of the present case. In the case of R v Clarke and McDaid a full trial on pleas of not guilty took place upon an indictment which turned out never to have been signed at all until a late stage of the trial. The House of Lords held that in those circumstances the indictment itself and all that subsequently followed had to be treated as a nullity. After an examination of the statutory provisions relevant to that case and considerable authority, Lord Bingham of Cornhill said at paragraph 19:

> "It is necessary to ask a second question. What did Parliament intend the consequence to be if there were a bill of indictment but no indictment? The answer, based on the language of the legislation and reflected in 70 years of consistent judicial interpretation, is again inescapable: Parliament intended that there could be no valid trial on indictment if there were no indictment...."

In this case there plainly was, and remains, a valid indictment, namely the original indictment signed by an officer of the court and containing the single count that we have quoted and described. Mr Bryan submits, however, that the essential proposition to be drawn from Clarke and McDaid must apply with equal force when a count has purportedly been added without any judge or court exercising a discretion under section 5(1) of the Indictments Act 1915, and actually making an order for the amendment as that subsection requires. He submits that the piece of paper which was in circulation at

the hearing on 4th November 2008 and which was handed to the clerk, from which she put a charge to this applicant, was ultimately speaking no more than simply a piece of paper.

22. On behalf of the prosecution, Mr McGee stresses, first, that there is the factual and analytical distinction between Clarke and McDaid and the present case. In that case, the whole proceedings were never founded on any indictment at all, whereas in the present case the proceedings were, and remained, founded on a valid indictment, namely the original indictment. He says, and we do not demur, that there is a spectrum of errors and irregularities that may occur in relation to indictments and the contents of indictments. They range from the fundamental, such as an indictment not being signed at all, which render the proceedings a nullity, to minor procedural errors which may readily be corrected. He submits that the facts and circumstances of the present case fall towards the minor rather than the fundamental end of that spectrum.

23. In regard to the fact that there was no endorsement of any order for amendment on the indictment, as section 5(2) requires, he refers to the case of R v Ismail (1991) 92 Cr App R 92. In that case it appears that a judge had made an order under section 5(1) for amendment of the indictment, but a note of that order was never endorsed on the indictment itself, as section 5(2) requires. As to that, this court said at page 95 of the report:

> "It is true that that step [viz endorsement] was not taken as it should have been. It is suggested by counsel for the appellants that that indicates this was not an amendment but was a fresh indictment. We do not take that view. We take the view that was an oversight on the part of the staff. It certainly is not an oversight which in itself invalidates the amendment which we find to have been made."

24. We, for our part, completely accept that approach in relation to the matter of endorsement, as required by section 5(2). Endorsement is a purely administrative act which is required to be done by staff of the court, pursuant, and indeed in obedience, to an order by the court made pursuant to subsection (1). There is no element of discretion and it seems entirely appropriate and correct that a mere administrative failure to carry out that mechanical step should not render the amendment and subsequent proceedings on it a nullity. So, in the present case, the fact of itself that there was no endorsement on the indictment is not, in our view, in any way fatal to what subsequently occurred.

25. However, the requirements of subsection (1) are entirely different. That subsection requires the court itself to exercise a discretion and positively to make an order. Mr McGee submits that there is "a wealth of inferential material that the court gave implied leave to amend." He bases that, in particular, on the events of Monday 8th October 2007. He submits that the whole argument that took place that day about reliance upon the readout from the roadside breath test can only have had any sense or purpose if Judge Clegg already had made, or at any rate intended to make, an order for amendment of the indictment. He says, correctly, that all parties expected and intended an amendment to be made; that all parties acted as if the amendment had been made;

and that the applicant voluntarily pleaded guilty to the intended count 2 on 4th November 2008.

26. It appears that the researches of counsel have not been able to identify any authority on the question of what is the effect when all parties, including the judge, anticipated that an order would be made for amendment but, by oversight, one never was made. We have to make a decision ourselves on the matter. We are clearly of the view that such an error falls at the fundamental rather than the minor end of the spectrum referred to by Mr McGee. It is true that there is a factual and analytical distinction between the situation in this case and that in Clarke and McDaid; but ultimately, in our view, the principle and approach has to be the same. Amendment of an indictment is a serious matter and not a mere matter of formality. Section 5(1) clearly requires the court itself to exercise a discretion, and positively requires the court to "... make such order... as the court thinks necessary..." In our view, even if this may be described on the facts of this case as a technicality, it is a technicality of the kind referred to by Lord Bingham of Cornhill in the quotation with which we began this judgment. Further, as Lord Brown of Eaton-under-Heywood said in his speech in R v Clarke and McDaid at paragraph 40:

> "But the problem is easily enough avoided and will only occur if the Crown is at fault. In any event Parliament can always alter the position if it chooses."

27. There is little doubt that what happened in this case would not have happened if there had been continuity of counsel between the 5th and 8th October 2007, or between those occasions and 4th November 2008. If Mr Caudle or Mr Bryan or His Honour Judge Ball on 4th November 2008 had not thought that there had already been an order for amendment of the indictment, such an order could plainly have been made by Judge Ball himself on 4th November 2008. But neither he nor Judge Clegg ever made such an order.

28. In our view, this plea of guilty and the subsequent conviction on the plea and the sentence are all founded on a nullity. We accordingly grant leave to appeal and quash the conviction and sentence. We stress that that leaves in place the original valid indictment upon which the prosecution may now seek to proceed with or without further application for amendment.

29. MR BRYAN: May I mention one thing in relation to that? My recollection is that although there was that valid indictment, I think no evidence has been offered on that, so there is nothing really left of that.

30. MR MCGEE: That is entirely right my Lords. In light of that, in light of your Lordships having quashed this conviction on the basis that it is a nullity, the Crown makes an application for a write of venire de novo in this case?

31. LORD JUSTICE KEENE: The appellant has, of course, served I think about 8 months so far, has he not?

32. MR MCGEE: He has.

33. LORD JUSTICE KEENE: But on the other hand also disqualified for 7 years. That will fall as well if there is no retrial. What do you want to say about a retrial?

34. MR BRYAN: This case is now coming up for 3 years old, the facts of it. There has been a lot of difficulties, none of which emanated from the appellant himself and as your Lordship observed he has been in custody since 4th November 2008 and it has substantially...

35. LORD JUSTICE KEENE: It is a serious case though where somebody died as a result where your client, clearly as a result of his plea, was acknowledging his unfitness through drink to be driving at the time.

36. MR BRYAN: I cannot dispute that. It just seems a little unfair and again to put him through the process.

37. MR JUSTICE HOLMAN: You anticipated he would be. We have seen either an advice from you or a letter from your instructing solicitor. I cannot put my fingers on it, I think I find it now.

38. MR BRYAN: Your Lordship is quite right.

39. MR JUSTICE HOLMAN: Which plainly says the only effect is that the prosecution no doubt will come back again. I am just looking for it?

40. MR BRYAN: In fact my submission is that it is not for this court to make an order in that respect. The court has made the order on the conviction then it is for the prosecution to decide whether they want to recharge him or not.

41. LORD JUSTICE KEENE: The prosecution is asking us to make an order for retrial. We need not go into that. We will make an order for retrial. The indictment must be preferred by the Crown. We give leave for that fresh indictment to be preferred. The appellant, as he now is, must be arraigned on that fresh indictment within 2 months of today. Venue to be determined by the presiding judge of the south eastern circuit? (Pause) Venue to be determined by the presiding judge of the south eastern circuit or one of the presiding judges. Is there anything further anyone wants to raise?

42. MR BRYAN: My Lord yes the procedure now will take again many, many, many months. May I ask for--

43. LORD JUSTICE KEENE: I do not see why it should take many, many months. This matter is clear in everyone's mind I would hope. Are you asking for bail?

44. MR BRYAN: Yes. I know there has been an application. Anything on bail?

45. MR MCGEE: In the circumstances...

46. LORD JUSTICE KEENE: He had bail until he pleaded. (Pause) Yes, we will grant bail. Was it unconditional below?

47. MR BRYAN: I believe it was.

48. LORD JUSTICE KEENE: That is right. Unconditional bail. Thank you both very much indeed. (Pause) Did you hear that, Mr Bryan, raising the question of reporting restrictions pending the retrial. Are you making any application in that respect?

49. MR BRYAN: I am not making--

50. LORD JUSTICE KEENE: We have had a highly technical argument today, not one which is likely to cause any potential prejudice.

51. MR BRYAN: I have no submissions.

52. LORD JUSTICE KEENE: Very well. Thank you for raising it.