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IN THE HIGH COURT OF JUSTICE

CO/1674/2019

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2019] EWHC 1895 (Admin)

Royal Courts of Justice

Thursday, 4 July 2019

Before:

LORD JUSTICE MALES

MR JUSTICE POPPLEWELL

BETWEEN :

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

- and -

OWAIN McFARLANE

Respondent

MR JAMES BOYD (instructed by Crown Prosecution Service, Appeals & Review Unit) appeared on behalf of the Appellant.

MR DAVID SPENS QC appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE MALES :

1. This is an appeal by way of a case stated by DJ (MC) Bopa Rai, sitting at Cheltenham Magistrates' Court, which asks, in effect, whether she was right to hold that two charges of wilfully obstructing police officers were time barred as proceedings had not been instituted in time.

The case stated

2. The facts of the case can be shortly stated as follows:

"3 The appellant was arrested and charged on 4 July 2018 with resisting PC Tranter in the execution of his duty, contrary to section 89(2) of the Police Act 1996.

4 The case was listed for first hearing at Cheltenham Magistrates' Court on 16 August 2018, when the defendant pleaded not guilty, and the case adjourned till 15 October 2018 for trial.

5 On 15 October 2018, the CPS applied to the court to amend the charge from resisting PC Tranter to obstructing PC Tranter. The application was granted, following which neither party was ready for trial, so a further case management hearing was held and a new trial date was set for 6 December 2018.

6 On 16 November 2018, the CPS sent by email to the defendant's solicitors and the court details of two additional charges alleging that the defendant had wilfully obstructed PC Hunter and PC Ben Smith on 4 July 2018. The email read 'Please find attached additional charges. Please be advised that we will not be continuing with the charge involving PC Tranter.'

7 On 20 November 2018 the CPS made an application to adjourn the trial due to medical incapacity of an essential police witness. A senior legal adviser agreed to an adjournment to 24 January 2019 for a further case management hearing with a provisional trial date set for 27 February 2019.

8 A request was received from the defence solicitors to adjourn the trial on 6 December 2018 in the light of the additional charges. The defence requested an oral hearing seeking an explanation as to how the new charges were being brought, and why the defendant had not been notified. The hearing was fixed for 24 January 2019.

9 At that hearing, Mr Dono representing the CPS offered no evidence in respect of the original charge, as amended, of wilfully obstructing PC Tranter, and that charge was dismissed. Mr Dono then indicated his desire to proceed with the two additional charges.

3. The District Judge recorded that the submissions of the parties were as follows:

(1) Mr Dono for the prosecution submitted that the additional charges had been laid in time in accordance with section 127 of the Magistrates' Courts Act 1980, and that by sending the additional charges by email to

the defendant's solicitors this was sufficient. Mr Dono was unaware of the procedure laid out in section 29 of the CJA 2003, and submitted that he thought the court would notify the defendant. The court corrected Mr Dono by pointing out that the obligation was on the Crown. Mr Dono confirmed that this was not done.

(2) Mr Masih submitted on behalf of the defendant that section 29(3) of the Criminal Justice Act 2003 required that any additional charge and requisition be served on the person concerned, and as the additional charges and requisition had not been served on the defendant, it was now too late to proceed with them.

4. The District Judge ruled as follows:

"The prosecution had six months in which to lay an information charging a summary offence, in accordance with section 127 of the Magistrates' Courts Act 1980; they had done this within six months. However, where additional summary offences were to be preferred, the prosecutor had to ensure that the charges and requisition were served on the person concerned, namely the defendant in accordance with section 29(3) of the Criminal Justice Act 2003. As the prosecutor conceded that this had not been done, the additional charges were now time barred and should be stayed."

The two methods of commencing summary proceedings

5. There are two methods by which summary proceedings in the Magistrates' Court may be commenced. The first and long-established method is by laying an information. Section 1 of the Magistrates' Courts Act 1980 provides that when an information "is laid before a justice of the peace that a person has or is suspected of having committed an offence", the justice may issue a summons requiring the person to appear before a court or a warrant for his arrest.
6. The second is by issuing a written charge. This method was introduced by section 29 of the Criminal Justice Act 2003.
7. In both cases proceedings must be commenced within 6 months from the time when the offence was committed as provided by section 127(1) of the Magistrates' Courts Act 1980:

"(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."

8. When proceedings are commenced by way of a written charge under section 29 of the 2003 Act, section 30(5)(a) of that Act provides that -

"(a) any reference (however expressed) which is or includes a reference to an information within the meaning of section 1 of the Magistrates' Courts Act 1980 (c. 43) (or to the laying of such an information) is to be read as including a reference to a written charge (or to the issue of a written charge)."

9. The District Judge took the view that the document attached to the CPS email dated 16 November 2018 was a written charge, but that the CPS's failure to issue a requisition and to serve that requisition on the defendant personally rendered the commencement of proceedings invalid with the result that proceedings in respect of the two additional charges had not been commenced within the 6-month period.

10. Section 29 of the Criminal Justice Act 2003, as subsequently amended, provides as follows:

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

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

(a) a requisition, or

(b) a single justice procedure notice.

(2A) A requisition is a document which requires the person on whom it is served to appear before a magistrates' court to answer the written charge.

(2B) A single justice procedure notice is a document which requires the person on whom it is served to serve on the designated officer for a magistrates' court specified in the notice a written notification stating -

(a) whether the person desires to plead guilty or not guilty, and

(b) if the person desires to plead guilty, whether or not the person desires to be tried in accordance with section 16A of the Magistrates' Courts Act 1980.

(3) Where a relevant prosecutor issues a written charge and a requisition, the written charge and requisition must be served on the person concerned, and a copy of both must be served on the court named in the requisition.

(3A) Where a relevant prosecutor issues a written charge and a single justice procedure notice, the written charge and notice must be served on the person concerned, and a copy of both must be served on the designated officer specified in the notice.

(3B) If a single justice procedure notice is served on a person, the relevant prosecutor must -

(a) at the same time serve on the person such documents as may be prescribed by Criminal Procedure Rules, and

(b) serve copies of those documents on the designated officer specified in the notice.

(3C) The written notification required by a single justice procedure notice may be served by the legal representative of the person charged on the person's behalf.

(4) A relevant prosecutor authorised to issue a requisition is not to have the power to lay an information for the purpose of obtaining the issue of a summons under section 1 of the Magistrates' Courts Act 1980 (c. 43).

(5) In this section 'relevant prosecutor' means -

(a) a police force or a person authorised by a police force to institute criminal proceedings,

(b) the Director of the Serious Fraud Office or a person authorised by him to institute criminal proceedings,

(c) the Director of Public Prosecutions or a person authorised by him to institute criminal proceedings,

(ca) ...

(cb) the Director General of the National Crime Agency or a person authorised by him to institute criminal proceedings,

(d) the Attorney General or a person authorised by him to institute criminal proceedings,

(e) a Secretary of State or a person authorised by a Secretary of State to institute criminal proceedings,

(f) the Commissioners of Inland Revenue or a person authorised by them to institute criminal proceedings.

(g) the Commissioners of Customs and Excise or a person authorised by them to institute criminal proceedings, or

(h) a person specified in an order made by the Secretary of State for the purposes of this section or a person authorised by such a person to institute criminal proceedings.

(5A) An order under subsection (5)(h) specifying a person for the purposes of this section must also specify whether that person and a person authorised by that person to institute criminal proceedings -

(a) are authorised to issue written charges, requisitions and single justice procedure notices, or

(b) are authorised to issue only written charges and single justice procedure notices.

(6) In subsection (5) 'police force' has the meaning given by section 3(3) of the Prosecution of Offences Act 1985 (c. 23)."

Subsection (4) is not yet in force.

11. If the document in question in this case was a charge within section 29(1), the CPS failed to issue either a requisition or a single justice procedure notice as required by subsection (2) and failed to serve these documents on the defendant as required by subsections (3) and (3A).
12. It may be noted that Part 4 of the Criminal Procedure Rules permits service of a charge on a person's legal representatives by email (see paragraphs 4.2, 4.6 and 4.10) although a requisition cannot be served in this way unless the court so directs (paragraph 4.10). Here, therefore, if the document in question was a charge it was validly served on the defendant and the non-compliance with section 29 was limited to the failure to issue and serve a requisition or single justice procedure notice. In practical terms that failure was of no consequence in the circumstances of this case. The purpose of the requisition is to ensure that a defendant is brought before the court, but this defendant was before the court and was due to appear at the trial fixed for 6 December 2018.

The parties' submissions

13. That is subject to a point raised by Mr David Spens QC in his submissions on behalf of the defendant as the respondent to this appeal, that submission being that the email dated 16 November 2018 operated as a notice of discontinuance pursuant to section 23 (3) of the Prosecution of Offences Act 1985. That sub section reads:

“(3) Where, at any time during the preliminary stages of the proceedings, the Director gives notice under this section to the designated officer for the court that he does not want the proceedings to continue, they shall be discontinued with effect from the giving of that notice but may be revived by notice given by the accused under subsection (7) below.”
14. Mr Spens submits that although the requirements of Part 12 of the Criminal Procedure Rules relating to notices of discontinuance were not complied with, the email did amount to notice by the CPS that they did not want the proceedings to continue so far as the existing charge was concerned and thus amounted to a notice of discontinuance. That is not, in fact, how the matter was understood at the time. Certainly, if Mr Spens is right in his submission, nobody appears to have appreciated that the proceedings had been discontinued. We do not think it is necessary, in fact, to decide whether that was the position. If it was, however, then, strictly speaking, there were no proceedings in being relating to the existing charge and, so far as compelling the attendance of the defendant before the court was concerned, a requisition or single justice receipt of notice would have been required.
15. Mr James Boyd, for the appellant Director of Public Prosecutions, made three submissions in his written skeleton argument. The first was that the document was not a charge but an information which was laid by sending it to the Magistrates' Court so that the requirements of section 29 did not apply at all. The second was that it was the act of issuing a written charge which institutes criminal proceedings where the section 29 procedure applies, not the issue of a requisition or the service of either document. As the charges were issued in time, the proceedings were not barred by section 127 of the 1980 Act. Third, he submitted that any failure to comply with the requirements at section 29(2) and (3) or (3A) of the 2003 Act does not render the otherwise lawful institution of proceedings a nullity and can be dealt with, where appropriate, by the court's inherent jurisdiction to stay proceedings as an abuse of process.
16. Developing those submissions orally, Mr Boyd focussed primarily on the first question, whether the email dated 16 November and, more specifically, the attached document,

amounted to the laying of an information. He submitted that in a case where no requisition or other procedure was necessary in order to bring the defendant before a court, the only available procedure for adding a new charge to existing proceedings was by laying an information. Section 29, he submitted, was not available in a case where, because the attendance of the defendant before the court had already been secured, a requisition was unnecessary. Thus, in such a case, where it was sought to add a new charge to existing proceedings for which a trial date had been fixed, the only method of achieving this would be by laying an information.

17. Mr Spens QC, for the defendant, submits that the CPS's email dated 16 November was, as well as being notice of discontinuance of the existing proceedings, a clear attempt to issue a written charge pursuant to section 29 in order to commence new proceedings, and that non-compliance with the requirements of section 29(2) and (3) or (3A) renders the written charge a nullity. He submits that the document was not the laying of an information because the laying of an information without seeking the issue of a summons or a warrant is not a procedure known to the law, that it is necessary for the prosecutor to make clear which procedure is being invoked, and that the 16 November email did not explain to the court that it was intended to amount to the laying of an information, thereby inviting the court to consider whether to issue a summons or a warrant and that it was a clear attempt to invoke the section 29 procedure.

Written charge or information?

18. I do not accept that the only available procedure when it is sought to add new charges to existing proceedings for which the attendance of the defendant has already been secured is by laying an information. In my judgment the section 29 procedure is available in such a case. That includes a requirement to issue a requisition even if in some circumstances that requisition may serve no practical purposes. In other cases, it may. But in either case the section 29 procedure is, in my judgement, available. It is, therefore, in my view, unnecessary to consider whether the effect of the email was to discontinue the existing proceedings. It is better to focus on the question of what the email and attachment actually was.
19. As found in the case stated, the CPS's email read:

"Please find attached additional charges. Please be advised that we will not be continuing with the charge involving PC Tranter."
20. The attached document was headed "Further charge(s)" and set out details of two offences of obstructing or resisting a constable in the execution of his duty, in each case with the further heading "additional/amended charge". There was an asterisk which invited the person completing that document to choose between "additional" or "amended" which was not done. But it is clear, in my judgement, that these were intended to be additional rather than amended charges. They were different and new charges.
21. I would hold that the document should be taken at face value and was what it said it was, that is to say a written charge which charged the defendant with two offences as provided for by section 29(1). (I accept that it may not have used the usual pro forma document which the police or CPS would typically use when invoking this procedure which contains references to section 29 on its face, but it was nevertheless described as a charge; nor, for that matter, did it use the typical pro forma for the laying of an information). That being so, the CPS should have issued a requisition at the same time or a single justice procedure notice and should have served both documents on the defendant. Those are the

requirements of the statute. As this was a new charge, the fact that the defendant was already before the court on the existing charge for which a hearing was scheduled and on the assumption that proceedings had not been discontinued made no difference.

22. Because of the conclusions I have reached as to Mr Boyd's second and third submissions which I have summarised, it is unnecessary to decide whether a document which is or purports to be a written charge under section 29 can also qualify as an information, at any rate until such time as section 29(4) is brought into force. However, it would be confusing if a document could at the same time be both a written charge and an information as the procedure applicable in the two cases is different. In the case of an information it is for a justice of the peace to decide whether to issue a summons or a warrant; in the case of a written charge, it is the prosecutor who takes the initiative by issuing and serving a requisition or single justice procedure notice. It seems to me that there is force in Mr Spens's submission that it is important that a prosecutor seeking to commence proceedings should make clear which method he is adopting.

Institution of proceedings

23. On the basis that, as I would conclude, the attachment to the 16 November 2018 email was a written charge, the questions arise whether (1) proceedings were instituted in time and (2) those proceedings were a nullity because of the failure to comply with subsections (2) and (3A). As to the first question, I would accept Mr Boyd's submission that the proceedings were instituted by issuing the document. That is what subsection (1) of section 29 plainly says. It does not say, as it could have done, that proceedings are instituted by issuing both a charge and a requisition or single justice procedure notice. Necessarily, service of those documents can only take place after they have been issued. Whether service has or has not taken place cannot affect the fact that proceedings have been instituted. The time limit in section 127 of the Magistrates' Courts Act 1980 is concerned with the commencement or institution of proceedings. It is unnecessary in this case to consider precisely what amounts to the issue of a written charge (compare *Brown v Director of Public Prosecutions* [2019] EWHC 798 Admin) as, on any view, the charges attached to the email dated 16 November 2018 were issued well within 6 months of the date of the offence. Accordingly, the proceedings were commenced in time and, unless rendered invalid for non-compliance with subsections (2) and (3) or (3A), were not barred by section 127.

Nullity?

24. In my judgment, failure to issue a requisition or single justice procedure notice and failure to serve these documents were procedural defects but these did not render the institution of proceedings a nullity. There is nothing in section 29 to suggest that this is what Parliament intended and, moreover, so to hold would be contrary to the approach approved in *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340; *R v Knights* [2005] UKHL 50, [2006] 1 AC 368; and *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22. These cases were concerned with statutory time limits in confiscation proceedings under the Proceeds of Crime Act 2002 but their reasoning is more general and accords with the approach described by Lord Woolf MR in *R v Secretary of State for the Home Department ex parte Jeyanthan* [2000] 1 WLR 354, at 358E-359D.
25. That approach is, broadly speaking, that the effect of procedural defects does not depend upon whether the requirements in question should be classified as mandatory or directory but on what Parliament intended to be the consequences of non-compliance. Parliament should not be taken to have intended that the consequences of non-compliance will be to render the proceedings a nullity, except in clear cases, and, in particular, should not be taken

to have so intended when that would defeat the purpose of the legislation in question and when the non-compliance has caused no injustice to the defendant.

26. In the case of section 29 of the Criminal Justice Act 2003 there is no good reason why a failure to issue and serve the requisition should render the proceedings a nullity, still less when the charge has, as in this case, been served in accordance with the rules. To the extent that such failures do cause prejudice to a defendant, the court's jurisdiction to stay proceedings as an abuse of process provides a sufficient remedy. In the present case where the defendant was already before the court and the charge was served on his solicitors who were acting for him in the proceedings, there is no question of any prejudice at all.

Disposal

27. The question posed by the case stated is:

"Was I correct in law to conclude that the Crown cannot circumvent compliance with section 29(3) of the Criminal Justice Act 2003 by serving only the written charges on the legal representative and neither issuing nor serving any requisition on the defendant?"

28. This is, with respect, somewhat confusingly phrased but I would answer it as follows:

(1) Criminal proceedings are instituted by the issue of a written charge pursuant to section 29 of the Criminal Justice Act 2003 regardless of whether a requisition or a single justice procedure notice is issued and regardless of whether the charge and requisition or single justice procedure notice are served on the defendant in accordance with subsections (2) and (3) or (3A) of the Act.

(2) Failure to comply with the requirements of subsections (2) and (3) or (3A) does not render the proceedings a nullity but may in an appropriate case be dealt with as an abuse of process.

(3) The District Judge was wrong to conclude that the charges issued on 16 November 2018 were time barred pursuant to section 127 of the Magistrates' Courts Act 1980.

29. MR JUSTICE POPPLEWELL: I agree.

MR BOYD: I would ask for the usual order for the matter to be remitted to the Magistrates' Court to be determined by a differently constituted Magistrates' Court panel.

LORD JUSTICE MALES: Why differently constituted now that this has been resolved? Is there any reason why, if it is convenient to the court, the same judge should not hear it?

MR BOYD: It is not a big issue for the appellant. It is the usual order that is made, but I do not have any objection if remitted to be heard by the same constituted court.

LORD JUSTICE MALES: I think we will simply remit it to the Magistrates' Court and leave it to the court to list it as is most convenient to them.

MR BOYD: I am obliged.

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This transcript has been approved by the Judge