Neutral Citation Number: [2020] EWHC 859 (Admin)

Case No: CO/4716/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVSIONAL COURT

Courtroom No. 7
1 Oxford Row
Leeds
LS1 3BG

Date: Thursday, 12th March 2020

Before:
THE RIGHT HONOURABLE LORD JUSTICE DINGEMANS
And
THE HONOURABLE MR JUSTICE STUART-SMITH

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B E T W E E N:

DIRECTOR OF PUBLIC PROSECUTIONS

and

MR COLIN JONES

- -

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MS DALEY appeared on behalf of the APPELLANT
MR ROUTLEDGE appeared on behalf of the RESPONDENT

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JUDGMENT (Approved)

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MR JUSTICE STUART-SMITH:

1. This is the judgment of the Court.
2. The Director of Public Prosecutions appeals by way case stated against the decision of the Lay Justices sitting at Newton Aycliffe Magistrates' Court on 2 September 2019, by which they refused an application by the prosecution to amend two charges alleging common assault to add the words, 'by beating.'
3. In briefest outline, the magistrates refused the application because it was made outside the six month time limit allowed for charging summary offences, and they considered it to be contrary to the interests of justice to allow it.
4. The case stated included the following.

"**Chronology**

1. On the 9th April 2019, Colin Jones appeared at Newton Aycliffe Magistrates' Court, having being charged on the 28th February 2019 with two offences:
    - On 3rd September 2018, at Durham in the county of Durham, assaulted Alex Wilson
      Contrary to Section 39 of the Criminal Justice Act 1988, and
    - On 3rd September 2018 at Durham City in the county of Durham, assaulted Craig Phipps
      Contrary to Section 39 of the Criminal Justice Act 1988.
2. His solicitor withdrew from the case, and the proceedings were adjourned for Mr Jones to obtain alternative representation, and to appear again at Newton Aycliffe Magistrates' Court on 30th April at 2.30 p.m. by way of prison to court video link.
3. On 30th April, Mr Jones refused to appear on the video link, and not guilty pleas were entered to both charges by his solicitor. The proceedings were adjourned to 24th June 2019 at 2pm for trial at Newton Aycliffe Magistrates' Court.
4. On the 24th June 2019 Mr Jones appeared at Newton Aycliffe Magistrates' Court for trial. The trial was adjourned to 2nd September 2019 at 10 am due to difficulties obtaining Mr Jones's instructions.
5. On 2nd September 2019 Mr Jones appeared before us at Newton Aycliffe Magistrates' Court for his trial. Prior to the commencement of the trial the appellant applied orally, outside of the time limit prescribed by Section 127 Magistrates' Court Act for trying an information alleging a summary offence, to amend both charges to include the words 'by beating' so as to allege batteries. These applications were opposed by the defence."

5. We note in passing that the account of what was originally charged makes no mention of spitting or any other particulars of the defendant's conduct. There was just the bare allegation in each charge that he assaulted the named victim.
6. The case stated then set out the relevant contention of the parties as follows:

"6. We were referred by the representative for the appellant to *R v Scunthorpe Justices ex parte McPhee and Gallagher* [1998] 162 JP 635, where the prosecution sought to replace robbery with charges of theft and common assault, a summary offence. The

Divisional Court ruled that this was legitimate, even though more than six months had elapsed since the date of the original offence, but Dyson J made it clear that an amendment should only be allowed if the new offence alleged 'the "same misdoing" as the original offence.' The new offence should arise out of the same (or substantially the same) facts as gave rise to the original offence, and the amendment had to be in the interests of justice, with particular regard to the interests of the defendant. The Appellant's representative submitted that the "same misdoing" spitting had occurred here.

7. The solicitor for Mr Jones argued that we should refuse the application in the interests of justice, as the appellant was trying to introduce a completely different offence, referring us to *R (on the application of Fisher) v Weymouth Magistrates' Court* [2000] All ER (D) 1681. The charge was common assault. The defendant pleaded guilty but objected when the prosecution opened the case on the basis that it was an assault by beating as opposed to merely causing apprehension of violence. The court ruled that the stipendiary magistrate had wrongly allowed the CPS to amend the charge out of time.
8. The solicitor for Mr Jones also referred us to *DPP v Everest* [2005] 169 JP 345, where smoke from the defendant's garden fire allegedly caused a car accident. He was mistakenly charged with lighting a fire on a highway. He should have faced the entirely different charge of lighting a fire *near* a highway, but it was not until eight months after the incident, when the trial had reached the halfway stage, that the CPS applied to amend. The court said that the justices were right to refuse that application. Lighting a fire was obviously the essence of the offence, but the allegation was wholly different. We were asked to consider whether the amendment contravened Dyson J's interests of justice test. In *R v Everest* the court referred to the 'frankly lamentable' failure of the CPS from the outset to prosecute the right offence, to review the file, or do so intelligently and to seek an amendment at earlier stages of the proceedings; it was also relevant that the amendment would involve a re-trial, and that it would throw on the defendant the burden of proving a statutory defence when he had a complete defence to the original charge.
9. The solicitor for Mr Jones further submitted that the proposed amended charges would attract higher penalties than the original ones, stating that a spitting case would certainly attract an inevitable prison sentence, whereas apprehension would be a category 3. In *R v Newcastle Upon Tyne Magistrates' Court ex parte Poundstretcher Limited* [1998] EWHC Admin 251, the court accepted that a heavier fine might be imposed for an offence under the 1995 regulations, but said that nevertheless the defendant was not facing a significantly more serious offence. However, in *Shaw v DPP* [2007] All ER (D) 197, the court disapproved the substation of a new offence with a significantly heavier penalty, especially where the defendant then faced the possibility of a custodial sentence, and in *R v Everest*, an important consideration was that the new offence carried a fine at level five rather than level three."

7. It therefore appears, from the statement of case, that the main contentions being advanced were that:

1) The prosecution submitted that the amendment alleged 'the same misdoing,' as was alleged by the original offence – see paragraph six of the case statement.

2) The defence submitted that, first, the amendment should be refused 'in the interests of justice,' as the appellant was trying to introduce a completely new offence – see paragraph seven; and, second, the amendment should be refused because a charge of assault by

beating, which in this case meant by spitting, would attract a higher sentence than a charge of common assault without law – see paragraph nine of the case statement.

8. Having set the scene, the case stated recorded the advice given to the magistrates by their legal advisor, and their decision and reasons as follows:

> "10. We were advised by our legal advisor that the appellant had three previous opportunities to apply to amend the charges, and failed to do so.
>
> 11. Our legal advisor referred us to all the previously stated case law, and asked us to consider the application in the interests of justice.
>
> **Our Decision and Reasons**
>
> 12. We decided that the appellant had several opportunities to rectify the matter, and had failed to do so. We therefore deemed it appropriate to refuse the application in the interests of justice. Opportunities arose at each of the previous hearings to make a formal application, as well as to put the court and defence on notice of such intention at any stage in the proceedings following a review of the case.
>
> 13. The appellant offered no evidence in relation to both charges and they were dismissed."

9. We pause again to note that the magistrates, in giving their decision and reasons, did not address or make any finding about whether the offence that would be alleged, if the amendment was allowed, arose from the same misdoing as the offence that was currently alleged.

10. The question posed for the High Court from the case stated is, 'In all the circumstances, were we right to refuse the application to amend the charges?'

The Application to Amend the Case Stated

11. Before us, and as foreshadowed by the appellant's notice, which was issued on 3 December 2019, the appellant applied to amend the case statement to add further facts, namely:

> "6. Mr Jones was a serving prisoner at HMP Durham. The complainants, Craig Phipps and Alex Wilson, were prison officers.
>
> (a) About 8 am, officers were dealing with Mr Jones in his cell. Mr Jones was inside the door and was being verbally abusive to Mr Phipps as the unit manager. Without warning Mr Jones stepped forward and spat at Mr Phipps, the spittle striking Mr Phipps on his left cheek.
>
> (b) Around 12.30 pm Mr Wilson was outside Mr Jones's cell. Mr Jones began shouting and banging within his cell. Very shortly after, he spat through the small gap between the cell door and the wall, the spittle striking Mr Wilson on his right forearm.
>
> 7. When interviewed, Mr Jones gave a prepared statement in which he denied that he had spat in Mr Phipps' face. He repeated that denial when answering some questions. He made no reply in response to questions about spitting on Mr Wilson. Mr Jones said that he thought spitting was disgusting.
>
> 8. On 26 July, a defence statement was filed and served on behalf of Mr Jones.
>
> (a) At paragraph two, it set out the general nature of his defence, that he had not assaulted any prison officer on 3 September 2018 at any point that day.
>
> (b) In paragraph four Mr Jones stated, "I accept…I would regularly be argumentative back to them. I did not, however, at any point in time spit at any prison offer [sic]."
>
> (c) The opening of paragraph five was, "in relation to these allegations of common assault by spitting on two prison offers [sic] on 3 September…" before making

observations as to the involvement of the prison governors. Requests were then made as to disclosure."

12. The appellant submits that these matters should be included so that the court can assess the justices' decision in the proper context of the factual allegation made and the defence raised. The magistrates refused to include these matters on the stated ground that they, 'did not think it would be appropriate to include points that were not raised before the justices in support of or against the application to amend the charge.'
13. We are satisfied that we have jurisdiction to either amend the case stated or to return it to the magistrates – see CPR 52 EPD.9, which is paragraph 3.9 of Practice Direction 52E.
14. It is apparent that the matters that the amendment seeks to introduce have always been part of the prosecution case, and that, although the defendant denies spitting, he was always aware that the misdoing alleged against him was that he spat at the officers. What is apparent is that this is and has always been an offence about spitting, and the paragraphs which are sought to be introduced by way of amendment are material and important, and not essentially disputed save to the extent that Mr Jones denies that he spat.
15. In these circumstances we consider it to be right to allow the amendment so that the full context of the case and the decision of the magistrates may be seen.

Principles to be Applied on the Appeal

16. The Magistrates' Court Act 1980, so far as material, provides as follows:

'123(1) No objection shall be allowed to any information or complaint, or to any summons or warrant to procure the presence of the defendant, for any defect in it in substance or in form, or for any variance between it and the evidence adduced on behalf of the prosecutor or complainant at the hearing of the information or complaint.

(2) If it appears to a magistrates' court that any variance between a summons or warrant and the evidence adduced on behalf of the prosecutor or complainant is such that the defendant has been misled by the variance, the court shall, on the application of the defendant, adjourn the hearing…

127(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…shall apply in relation to any indictable offence.'

17. The principles to be applied when an application is made to amend a summons out of time are stated by the Divisional Court in *R v Scunthorpe Justices ex parte McPhee and Gallagher* [1998] EWHC 228 (Admin) as follows. Given the main substantive judgement of the court, Dyson J, with whom the Lord Chief Justice agreed, said:

"In my judgment, the following principles can be derived from the authorities:

(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."

These two conditions require a little elucidation. The phrase "same misdoing" appears in the judgment of McCullough J in *Simpson v Roberts*. In my view it should not be construed too narrowly. I understand it to mean that the new offence should arise out of the same (or substantially the same) facts as gave rise to the original offence.'

18. In *McPhee*, the court allowed an amendment to allege theft, where previously the information had alleged robbery. It held that:

> "It is clear beyond argument that the new offences of theft and common assault arose out of the same, or substantially the same, facts as the original offence of robbery. Moreover, since the prosecution was prepared to accept pleas to the lesser offences, and the applicants were willing to offer those pleas, the interests of justice plainly required the amendments to be made."

19. In subsequent cases, amendments have been disallowed where:

> 1) The amendment added an offence that was more serious, and the defendant had already pleaded guilty to a lesser offence – see *R (on the application of Fisher) v Weymouth Magistrates' Court* [2000] All ER (D) 1681 at [24].
>
> 2) The failure to prosecute the right offence from the outset was 'lamentable' and the new, more serious offence gave rise to a statutory defence that was not available in relation to the original defence, thereby placing the burden of proof on the defendant immediately before a trial that had not been prepared on that basis – see *R ex parte DPP v Everest* [2005] EWHC 1124 (Admin) at [16]-[21].

Application of the Principles to the Facts of this Case

20. In our judgement, it is plain that, adopting the principles outlined above, the offences that would be charged if the amendment were allowed would allege the same misdoing as the original offences. The point was not formally conceded by Mr Routledge, but he wisely concentrated on questions of delay and the overall justice of the case.
21. Although charged as an assault rather than an assault by beating, it is plain beyond argument that the original offences were based upon allegations that the defendant spat at the two officers and that his spittle landed on them. No one was in any doubt about that, least of all the defendant, because his defence statement addressed these allegations head on as the central substance of the case against him. His defence was that he did not spit at the officers at any time.
22. In our judgement, it would be too technical an approach to rely solely on the fact that the original charge was a charge of assault, which does not require the actual infliction of unlawful force, although that comes into the reckoning when looking at the overall justice of allowing the amendment. What needs to be considered at this stage, as *R v Scunthorpe Justices ex parte McPhee and Gallagher* makes clear, is whether the new offences arise out of the same or substantially the same facts as gave rise to the original offences.
23. Leaving aside the technically correct observation that an offence of spitting so that the spittle lands should be charged as an assault by battery, there was never any doubt in anybody's minds that the original offences arose out of allegations that the defendant spat at the officers; so, too, do the new offences.
24. The magistrates did not address this point, but we have no doubt that, if they had done so, they should have reached the same conclusion as we have done. Instead, the magistrates appear to have concentrated solely upon the fact that there had been earlier opportunities to amend that were not taken.
25. Mr Routledge, in submissions that were as concise as they were helpful – and they were very concise – concentrates on three main points. First, he says that it is important that

defendants are charged with the correct offence from the outset so that they may know the case they have to prepare to meet. Second, he points out that the original summons was not issued until over five months after the incident giving rise to the charges which, if anything, heightens the need to get it right first time and means that applications to amend are likely to be made, if at all, out of time. Third, he submits that although the new and the original offences have a statutory maximum sentence of six months, a charge of assault, properly so-called, might result in a form of discharge whereas a charge of battery would, in his submission, inevitably lead to a more substantial sentence which, because Mr Jones was and is detained, would mean a custodial sentence.

26. As against that, Ms Daley submits that there would be no difference in the way that the defendant would have to meet the new and original charges; and that if presented and proved as a case of spitting there would be no material difference in sentence. Furthermore, as a matter of fact the first hearing occurred more than six months after the events complained of, so that any application to amend would have been out of time even at the first hearing. Furthermore, it is apparent that the delays before an effective first hearing were caused by the initial withdrawal of the defendant's first solicitor and then the defendant's refusal to appear by video link on 30 April 2019. It seems possible that those difficulties may have been at least partially due to mental health issues on the part of the defendant, but those elements of the delay cannot be attributed to fault on the part of the prosecution.

27. These material features form no part of the reasoning of the magistrates as set out in the case stated. Reviewing the case as a whole, we consider that these features, taken in conjunction with the fact that this was always a case about spitting, should have led the magistrates inexorably to conclude that the amendment should be allowed. The misdoing in this case gave rise to serious issues that should, in the circumstances of this case, be brought to a proper resolution at trial.

28. In our judgement, it is clearly in the interests of justice that this amendment should be allowed, and that the case should proceed. We therefore answer the question, 'In all the circumstances, were we right to refuse the application to amend the charges?' in the negative.

End of Judgment