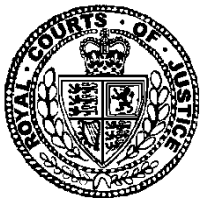

Neutral Citation Number: [2021] EWHC 1062 (Admin)

Case No: CO/3283/2020

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 April 2021

**Before** :

**LORD JUSTICE STUART-SMITH**
and
**MR JUSTICE HOLGATE**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**THE QUEEN**
**ON THE APPLICATION OF**
**AUGUSTINE OGUNSOLA**

**Claimant**

**-and-**

**CROWN COURT AT AYLESBURY**

**Defendant**

**-and-**

**CROWN PROSECUTION SERVICE**

**Interested Party**

- - - - - - - - - - - - - - - - - - - - -

**The Claimant represented himself**
**Mr James Boyd** (instructed by **CPS Appeals Unit**) for the **Interested Party**

Hearing date: 21 April 2021

Covid-19 Protocol: This judgment will be handed down remotely by circulation to the parties or their representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down will be deemed to be 10.30 am on Wednesday 28 April 2021.

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# Approved Judgment

**Lord Justice Stuart-Smith:**

## Introduction

1. This is the judgment of the Court to which we have both contributed.

2. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. No matter relating to the original complainant in the underlying proceedings shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of those alleged offences.

3. On 15 April 2019 the Claimant appeared before HHJ Rochford sitting at the Aylesbury Crown Court. He was facing an indictment that alleged offences of voyeurism and trespassing with intent to commit a sexual offence on or before 11 April 2017. In the event, the Claimant pleaded guilty to a lesser charge of harassment, which is a summary-only offence. The Claimant had previously offered to plead guilty to such a charge, but that offer was not acceptable to the prosecution until very shortly before the date of trial. His plea to the new charge of harassment was accepted and he was sentenced to a community penalty. Not guilty verdicts were entered on the two counts of the indictment. It is clear from the transcript that the Judge and Counsel believed that this was a constructive, proportionate and appropriate approach to the case because, although some of the facts of the case were not disputed, the prosecution frankly accepted that it would have faced significant difficulties in proving the sexual element of the indicted charges.

4. On 28 July 2020 the Claimant asked the Judge to state a case for the High Court. The Judge declined to do so, whereupon the Claimant issued these proceedings. By his Claim Form the Claimant sought judicial review of the Judge's decision to refuse to state a case; however the Claim Form and Grounds made clear that the substance underlying the proceedings was the Claimant's wish to overturn his conviction for the summary offence of harassment on the basis that the Court below had lacked jurisdiction to act as it did. He named the Crown Prosecution Service as an interested party and it responded as such, although it is arguable that the Director of Public Prosecutions would have been more appropriately named. On any view, this point should not and does not affect the outcome of these proceedings.

5. For the reasons set out in this judgment, we conclude that the Claimant's contentions about the lack of jurisdiction in the Court below are correct and that his conviction can and should be quashed. In reaching that conclusion we have been greatly assisted by clear, concise and impeccably fair submissions from Mr James Boyd on behalf of the Interested Party, which did not seek to oppose the Claimant's wish to overturn his conviction and explained why the Interested Party adopted that position. This judgment largely adopts the logic and content of Mr Boyd's submissions. The Claimant also made his submissions clearly and concisely both in writing and orally. We are grateful to both for their contributions.

## The factual background

6. The facts giving rise to the proceedings below may be shortly stated. The Claimant placed a recording device in the room of the complainant, with whom he was in a relationship involving at least some intimacy. It was discovered by the complainant on 12 April 2017. The Claimant asserted consistently that there had been no sexual element involved in his conduct and that he had merely wished to know whether the complainant was seeing someone else as well as him.

7. It is common ground and this hearing proceeds on the basis that no information was laid against the Claimant, nor was he charged with any offence until he was charged by the postal requisition procedure on 18 June 2018, which charged the two indictable offences to which we have referred. As will immediately be appreciated, it follows that the Claimant was not charged with any offence until well over a year after the events in question.

8. The Claimant appeared at High Wycombe Magistrates' Court on 20 July 2018 and was sent for trial at the Crown Court on the two indictable charges pursuant to s. 51 of the Crime and Disorder Act 1998. He appeared before the Crown Court at Aylesbury on 21 August 2018, facing an indictment containing the two counts on which he had been sent by the Magistrates. He pleaded not guilty to each count.

9. The case was listed for trial on 15 April 2019, just over two years after the events in question. Counsel then representing the Crown proposed that the Judge should constitute himself as a District Judge (Magistrates' Courts) under s. 66 of the Courts Act 2003 and that the new charge of harassment should be put to the Claimant. It was accepted that the charge could not be added to the indictment; but, relying upon *R v Scunthorpe Justices ex p McPhee* [1998] EWHC 228 (Admin), the prosecution submitted that the original information could be amended to allege the offence of harassment and that the Judge could deal with the new charge exercising the powers of a District Judge (Magistrates' Court). If that were done, the prosecution would not proceed with the charges on the indictment. This course of action was supported by Counsel then representing the Claimant. The new charge was then put, the Claimant pleaded guilty, and the Court proceeded to sentence him for the summary offence of harassment. Though not directly material to the present proceedings, the Judge accepted that what the Claimant had done was wholly out of character. At the conclusion of proceedings the Crown offered no evidence on the two counts on the indictment and the Judge recorded not guilty verdicts.

10. The first step taken by the Claimant, now acting in person as he has since, was to try to appeal his conviction to the Court of Appeal Criminal Division. By a letter dated 13 July 2020 the Registrar of Criminal Appeals correctly advised him that, as the conviction was not a conviction on indictment, the Court of Appeal did not have jurisdiction.

11. On 28 July 2020 the Claimant applied to the Judge below for an extension of time within which to apply for a case stated, and for the Court to state a case. He proposed three questions for the High Court, namely:

> "1. Does a Magistrates' Court or a 'District Judge' 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?"
>
> *R v Scunthorpe Justices ex parte McPhee and Gallagher [1998] EWHC 228* Versus *Dougall v CPS [2018] EWHC 1367 (Admin)*
>
> 2. Are there 'Abuse of Process' issues for Prosecution to offer a change of indictment on the day of a trial of an Indictable offence to the defence which had been previously rejected when offered to Prosecution only to change its decision on the pretext that the original indictment could not be proven beyond reasonable doubt?
>
> 3. Does the above stated scenario also serve as a contravention of the Prosecutor's code?"

12. The Judge clearly considered that he had the power to extend time for the Claimant's application for a case stated; but on 26 August 2020 he declined to extend it. He set out the history, including what had happened before him on 15 April 2019 and that he had "sat as a District Judge under s. 66, amended the information accordingly and had the matter under s. 2 of the Harassment Act put to the [Claimant]. … The [Claimant] pleaded guilty to the harassment offence, and was sentenced."

13. The Judge gave his reasons for refusing to extend time. He considered that the Claimant had not provided an adequate explanation for the delay. The delay was identified as being in the order of 15 months (from April 2019 to July 2020) and the Claimant's explanation that he had difficulty in obtaining and paying for advice and representation was "not compelling". The Judge referred to the fact that the Claimant is an educated and intelligent man; that the not guilty verdicts on the two counts on the indictment could not now be set aside; and that the complainant would with reason feel let down if the conviction for harassment were to be set aside. He considered that the delay was not consistent with the objective that cases be dealt with expeditiously; and he expressed the view that, even if his decision to allow the amendment to the information was wrong, the Claimant had suffered no injustice that ought to be remedied as he had supported the course of action and taken advantage of it by pleading guilty, thus avoiding trial on the more serious allegations. For these reasons he refused to extend time as requested, with the result that the application to state a case was out of time and was refused.

14. These proceedings were then issued promptly on 15 September 2020. As we have indicated, they are framed as a challenge to the Judge's decision to refuse to state a case; but the substantial issue that the Claimant wishes to raise is whether the Judge had jurisdiction to act as he did in permitting the new summary charge of harassment to be put and the Claimant to be convicted of the offence as happened on 15 April 2019.

## The legal framework

*Preferring a new charge*

15. S. 127 of the Magistrates' Courts Act 1980 provides:

> "(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.

16. The apparently absolute nature of the prohibition in s. 127(1) is a requirement that goes to the jurisdiction of the Magistrates' Court: see *R v Wimbledon Justices ex parte Derwent* [1953] 1 QB 380,385. The effect of s. 127(2) is that s. 127(1) applies to summary-only offences; but it does not apply to "indictable offences", which in this context includes offences triable either way: see Schedule 1 to the Interpretation Act 1978.

17. S. 127(1) was considered in the *Scunthorpe Justices* case that was cited to and relied upon by the Judge below. The facts were that the applicants had been involved in an incident on 22 October 1996 when they beat their victim and stole her trainers. On 23 January 1997 they were charged with robbery, which is an indictable-only offence.

Trial was fixed for 25 April 1997, before which date the prosecution agreed that it 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 and common assault. The justices permitted the amendment to charge theft (an either-way offence) but refused to permit the amendment to charge common assault (a summary-only offence). The Divisional Court quashed the justices' refusal to allow the amendment to charge common assault. It held that, where an information had been laid within the six-month period stipulated by s. 127, it could be amended after the expiry of that period, even to allege a different offence or offences, provided that (i) the different offence or offences alleged the "same misdoing" as the originally charged offence, and (ii) the amendment could be made in the interests of justice.

18. However, the position is different if the original information was not laid within the statutory time-limit of six months. This is established by the decision of the Divisional Court in *Dougall v CPS* [2018] EWHC 1367 (Admin), to which the Judge below was not referred. In *Dougall*, as in this case, the Defendant was not charged with any offence within six months of the relevant incident. Some eight months after the incident he was charged with the either-way offence of assault occasioning actual bodily harm contrary to s. 47 of the Offences Against the Person Act 1861. When the defendant first appeared before the magistrates the charge was amended to the summary-only offence of assault by beating contrary to s. 39 of the Criminal Justice Act 1988. The Divisional Court held that the court had no jurisdiction to try the s. 39 offence because of the plain words of s. 127.

19. Giving the lead judgment, Holroyde LJ (with whom Andrews J, as she then was, agreed) identified the basis of the distinction between the *Scunthorpe Justices* case and the case in *Dougall*:

> "21. … 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 defendant 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 s.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 6 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.*" (Emphasis added)

20. We respectfully agree with, endorse and adopt the reasoning and decision in *Dougall*. They are directly applicable to the facts of the present case because no information was laid within the six-month period commencing with the incident in April 2017.

21. We note in passing that s. 40 of the Criminal Justice Act 1988 provides a limited statutory power to include counts for certain summary offences in an indictment if the charge is founded on the same facts or evidence as a count charging an indictable offence or is part of a series of offences of the same or similar character as an indictable offence which is also charged. S. 127 does not apply to summary offences included in an indictment pursuant to s. 40 of the 1988 Act: see *R v Iqbal (Faisal)* [2012] EWCA Crim 766 at [24]-[25]. The summary offences that can be included pursuant to s. 40 of the 1988 Act are listed in s. 40(3) and do not include an offence of harassment. Nor does s. 127 apply to the returning of a verdict of guilty to a summary only offence which is a true alternative verdict to an indictable offence: see *R v Smith* [2013] 2 Cr App R. 5 at [22], [31], [33]. This section too is inapplicable to the present case since an offence of harassment is not an alternative to either of the counts that were originally charged on the indictment.

*S. 66 of the Courts Act 2003*

22. S. 66, under the heading "Judges having powers of District Judges (Magistrates' Courts)", provides:

> "(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.
>
> (2) The offices are—
>
> […]
>
> (c) Circuit judge;
>
> (d) deputy Circuit judge;
>
> (e) recorder.
>
> […]

> (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."

23. Until recently the weight of authority has tended to the view that the power conferred by s. 66 is 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. However, in *R v Gould and Others* [2021] EWCA Crim 447 the Court of Appeal held that this view was incorrect and that the power conferred by s. 66 is an original jurisdiction which enables the holder of one of the offices itemised in the section (including a Judge of the Crown Court) to sit as a Magistrates' Court and to act as such: see [64], [75]. 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: see [81].

24. Other principles were authoritatively established or re-stated in *Gould*, including that 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: see [80(i)], [93].

*Applications to state a case*

25. Pursuant to s. 111(2) of the Magistrates' Courts Act 1980, an application to a Magistrates' Court to state a case "shall be made within 21 days after the day on which the decision of the magistrate's court was given." There is no discretion to extend the 21-day time limit: see *R. (Mishra) v Colchester Magistrates' Court* [2018] 1 Cr App R. 24 at [39].

26. S. 28 of the Senior Courts Act 1981 provides that:

> "(1) … Any order, judgment or other decision of the Crown Court may be questioned by any party to the proceedings, on the ground that it is wrong in law or is in excess of jurisdiction, by applying to the Crown Court to have a case stated by that court for the opinion of the High Court."

27. Although CrimPR r 35.2(1)(a) stipulates a time limit of 21 days for making such an application to the Crown Court to have a case stated, it does not do so in terms that preclude the extending of that time limit. To the contrary, CrimPR r 35.2(2)(d)(i) provides that, if the application is made to the Crown Court, it "must … include or

attach any application for … an extension of time within which to apply to state a case."

28. We accept that the 21-day time limit for making an application to a Magistrates' Court to state a case cannot be extended but that the 21-day time limit for making an application to the Crown Court to state a case can be.

**Discussion and conclusions**

29. We can see no rational point of distinction between the facts of the present case and the facts of *Dougall*. It is common ground that no information was laid within 6 months of the incident. S. 127 therefore applies as explained in *Dougall*. The absence of any information within six months went to jurisdiction and could not be cured either by purporting to amend what had gone before (since no information had been laid within time) or by purporting to lay a new information (since the time for doing so had long passed by 15 April 2019). The fact that an indictable offence was charged more than six months after the incident does not give rise to a power to amend or otherwise introduce a summary offence at a later date: see *Dougall* at [22].

30. It seems to us that this analysis is also consistent with the recent decision in *Gould*. That said, it is not necessary or desirable to treat this case as a vehicle for general and abstract consideration of the ramifications of the decision in *Gould*, but they are (and were recognised by the Court in *Gould* itself to be) potentially far-reaching.

31. We are therefore of the view that the Claimant's conviction for harassment should be set aside if there is a legitimate route that enables the Court to do so. At this point a further aspect of *Gould* comes into play because, both when accepting the Claimant's guilty plea and when sentencing him for the offence of harassment, the Judge was sitting as a Magistrates' Court. The application which the Claimant made to the Judge to state a case was therefore an application that was made to the Judge acting in the capacity in which he had been sitting when accepting the guilty plea and acting on it i.e. as a Magistrates' Court exercising the powers conferred on him by s. 66. It is common ground that the Claimant's application to the Judge to state a case was made more than 21 days after 15 April 2019. Since the application was being made to the Judge sitting as a Magistrates' Court it must follow that the time for making the application could not be extended: see s. 111 of the Magistrates' Court Act. It therefore appears that the Judge's refusal to state a case was correct, albeit for different reasons.

32. We see no insurmountable hurdle in the way of this Court extending time to challenge the substantive matter in issue, namely the Claimant's conviction for harassment. In granting the Claimant permission to bring these Judicial Review proceedings, the singe judge expressly recognised that the "essence of the complaint" was the fact of the Claimant's conviction. He also expressly recognised that the application was being made out of time but observed that

> "there are unusual circumstances which justify a lengthy extension of time. The Claimant was represented by lawyers at trial who assured him that the case could be disposed of in this way. Despite the fact that it was inappropriate to do so, the trial judge and the Interested Party were content to act under

> the misapprehension that it was proper. The Claimant cannot be criticised for not spotting the illegality of this course when lawyers in court did not do so.
>
> The Claimants' explanation for delay thereafter is that he was assured after the event by his then solicitors that the process adopted was proper and only realised that they were wrong when he studied the relevant law for himself. Thereafter he mistakenly tried to appeal to the CACD which delayed matters even further This is an understandable mistake by a litigant in person when the case was apparently disposed of by a circuit judge sitting at a Crown Court building from where appeals are normally made to the CACD."

33. We think it likely that the single judge intended to give the Claimant permission to challenge the legality of his conviction out of time. However, lest there be any doubt about it, we have considered the matter afresh. In doing so we have given anxious consideration to the matters that weighed with the Judge below when refusing to state a case, which we have summarised at [13] above. We recognise and assert the desirability of prompt finality in litigation; and we give considerable weight to the concern that may be felt by the complainant on learning that the conviction is to be set aside. However, on the information that is available to this Court, we think that it is possible to attach undue weight to these factors. In agreement with the single judge, we would not criticise the time that it has taken the Claimant to get to the point of issuing these proceedings. Furthermore, the seriousness of the underlying allegations is tempered by the prosecution's frank acceptance that proof of the sexual element of the offences that were alleged in the indictment faced significant difficulties. The information disclosed by the transcript of the hearing demonstrates that this concession was (at least) reasonable.

34. We part company from the Judge below in his assessment that the Claimant had suffered no injustice as he had supported the process and thereby avoided a trial on the more serious counts. The Claimant is not to be criticised for supporting a process that was presented to him as being lawful and appropriate. Furthermore, although it is correct that a trial of the indicted charges was avoided, it cannot be assumed that the prosecution would have proceeded with a trial of the indicted charges or, if it had, that the outcome would have been adverse to the Claimant. It may fairly be said that it was for the prosecution to decide how to proceed against the Claimant; and that it chose to offer no evidence in relation to the indicted charges and to propose and pursue an alternative course which, for the reasons we have outlined, was illegitimate.

35. For these reasons we wish to resolve the substance of the Claimant's complaint and see no impediment to doing so by extending time (if it has not already been extended) for the Claimant to challenge the legality of his conviction for harassment. Having given that extension of time, we quash the conviction and sentence for the reasons given above.

36. The Claimant included in his Claim Form and Grounds a claim for damages. We are unable to see any basis for such a claim. There is no hint of any party acting in bad faith and the Claimant was not detained as a consequence of the erroneous conviction: see s. 9(3) of the Human Rights Act 1998 and Article 5(5) of the Convention.

37. The Claimant also included in his Claim Form and Grounds a request for what would amount to advisory guidance to the Police and other relevant parties on the management of the Claimant's personal information, including his DNA and fingerprints. We understood from the Claimant at the hearing that he has issued separate proceedings in relation to such matters and that he was not pressing us to deal with them. Whether that was the intended effect of his submission or not, we decline to engage with these matters because (a) they are academic on the information that is presently available to this court and (b) we would not contemplate entering that relative minefield without hearing from other affected parties, none of whom have been joined in these proceedings.

38. In the result, and for the reasons set out above, we quash the Claimant's conviction for harassment and the sentence imposed by the Court below, dismiss his claim for damages, and decline to engage with questions relating to the management of his personal information.