Neutral Citation Number: [2024] EWHC 848 (Admin)

Case No: AC-2023-LON-000159

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:17 April 2024

Before :

PRESIDENT OF THE KINGS BENCH DIVISION

MR JUSTICE LINDEN

- -

Between :

ELLIOTT CUCIUREAN

Appellant

- and -

CROWN PROSECUTION SERVICE

Respondent

- -
- -

Richard Thomas KC and Annabel Timan (instructed by Robert Lizar Solicitors) for the Appellant
Tom Little KC (instructed by CPS Appeals Unit) for the Respondent

Hearing date: 7 March 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 17 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Dame Victoria Sharp, P.:

Introduction

1. This is the judgment of the Court.

2. On 21 September 2021, after a trial at the City of London Magistrates' Court, the appellant, Elliott Cuciurean, was found not guilty of an offence of aggravated trespass, contrary to section 68 of the Criminal and Public Order Act 1994 (the 1994 Act). In a judgment handed down on 30 March 2022, the Divisional Court (Lord Burnett CJ and Holgate J) upheld the appeal by the Director of Public Prosecution (the DPP) from that decision by way of case stated: see [2022] EWHC 736 (Admin), [2022] QB 888. The Divisional Court ordered that the matter be remitted to the magistrates' court with a direction to convict the appellant.

3. On 29 June 2022, a guilty verdict was duly entered by the magistrates' court and, on 21 July 2022, for the offence of aggravated trespass, the appellant was sentenced by the magistrates to 10 weeks' imprisonment, suspended for 12 months.

4. On 30 July 2022, the appellant appealed to the Crown Court against conviction and sentence pursuant to section 108 of the Magistrates' Court Act 1980 (the 1980 Act). On 10 March 2023, the Recorder of London, sitting at the Central Criminal Court, refused to list the appellant's appeal against conviction on the grounds that the Crown Court did not have jurisdiction to entertain it.

5. This is an appeal by way of case stated from the Recorder of London's decision. The questions posed in the case stated are as follows:

> "[1] Was the Recorder of London, HHJ Mark Lucraft KC, right to find that s111(1) and s111(4) of the Magistrates' Court Act 1980, operate to bar an appeal against conviction to the Crown Court, where a previous application to state the case for the opinion of the High Court was made by the prosecution, and had resulted in the Divisional Court reversing the acquittal and remitting the case back to the magistrates court with a direction for that court to convict?
>
> [2] Would it have made a difference if the Divisional Court had substituted a conviction for the acquittal and remitted solely the sentence to the Magistrates' Court?"

The background

6. A summary of the factual background, based on the case stated to the Divisional Court, can be taken from that court's judgment of 30 March 2022.

7. The particulars of the offence of aggravated trespass for which the appellant was tried by the magistrates were these. Between 16 and 18 March 2021 he trespassed on land referred to as Access Way 201, off Shaw Lane, Hanch, Lichfield in Staffordshire (the Land) and dug and occupied a tunnel there which was intended by him to have the effect of obstructing or disrupting a lawful activity, namely construction works for the HS2 project.

8. Section 68 of the 1994 Act provides in part as follows:

> "(1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect— (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity, (b) of obstructing that activity, or (c) of disrupting that activity."

9. Protesters against the HS2 project had occupied the Land and the appellant had dug a tunnel there prior to 2 March 2021, when the Land was compulsorily purchased by the Secretary of State for Transport pursuant to the High Speed Rail (London – West Midlands) Act 2017. The appellant had occupied the tunnel from that date, including between 15 and 18 March 2021.

10. The HS2 project team successfully applied for a High Court warrant to obtain possession of the Land and, on 16 March 2021, they found four protesters there, one of whom was the appellant. One left immediately and two were removed from trees on the site. The appellant was found in the tunnel. Between 07.00 and 09.30 he was told that he was trespassing and given three warnings to leave. At 18.55, a High Court enforcement agent handed him a notice to vacate and told him that he would be forcibly evicted if he failed to do so. However, the appellant went back into the tunnel.

11. HS2 contractors were unable to go onto the Land until it was completely free of all protesters because it was unsafe to begin any substantial work while the protesters were still present. The HS2 team therefore instructed health and safety experts to help with the eviction of the appellant. They included a "confined space team" which had expertise in working underground and was responsible for boarding the tunnel and installing an air supply system as part of the process of extracting the appellant. He eventually left the Land voluntarily at about 14.00 on 18 March 2021. The costs incurred in removing the three protesters over this period was in the order of £195,000.

12. The Deputy District Judge (the judge) found that:

> "1. The tunnel was on land owned by HS2.
>
> 2. Albeit that the defendant had dug the tunnel prior to the of transfer of ownership, his continued presence on the land after being served with the warrant disrupted the activity of HS2 because they could not safely hand over the site to the contractors due to their health and safety obligations for the site to be clear.
>
> 3. The act of defendant taking up occupation of the tunnel on 15 March, sleeping overnight and retreating into the tunnel having been served with the notice to vacate was an act which obstructed the lawful activity of HS2. This was his intention."

13. The judge found that all four ingredients of the offence under section 68, identified in *Richardson v Director of Public Prosecutions* [2014] UKSC 8, [2014] AC 635 at para 4, were therefore present:

    i) the appellant [1] was a trespasser on the land;

[1] The appellant was the defendant in the proceedings before the judge, and the respondent to the DPP's subsequent appeal to the Divisional Court. For convenience however, we shall refer to him throughout as the

ii) the HS2 team were lawfully on the land and engaged in, or about to engage in, lawful activity;

iii) the appellant had done an act on the land, namely the occupation of the tunnel having been served with notice to vacate;

iv) which was intended by him to obstruct or disrupt the activities of the HS2 project.

14. However, the judge went on to accept a submission on behalf of the appellant which was based on the decision of the Supreme Court in *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [2022] AC 408. She decided that, given that the appellant was involved in protest activities, the prosecution was also required to satisfy the court that the prosecution and conviction of the appellant would be compatible with his rights to freedom of expression and association under articles 10 and 11 of the European Convention on Human Rights (the Convention). The judge concluded that the prosecution had not discharged this burden and the appellant was therefore not guilty of the offence with which he had been charged.

The DPP's appeal by way of case stated

15. Pursuant to section 111(1) of the 1980 Act, the DPP appealed against the acquittal by way of case stated. The questions which the Divisional Court was asked to consider by the judge were as follows:

> "1. Was it open to me, having decided that the [appellant]'s article 10 and 11 rights were engaged, to acquit the [appellant] on the basis that, on the facts found, the claimant had not made me sure that a conviction for the offence under section 68 was a reasonable restriction and a necessary and proportionate interference with the [appellant]'s article 10 and 11 rights applying the principles in Ziegler?
>
> "2. In reaching the decision in (1) above, was I entitled to take into account the very considerable costs of the whole HS2 scheme and the length of time that is likely to take to complete (20 years) when considering whether a conviction was necessary and proportionate?"

16. Three grounds of appeal were advanced by the DPP: (1) the prosecution of the appellant did not engage article 10 and 11 rights; (2) if the appellant's prosecution did engage those rights, a conviction for trespass is – intrinsically and without the need for a separate consideration of proportionality in individual cases – a justified and proportionate interference with those rights. The decision in *Ziegler* did not compel the judge to take a contrary view and undertake a fact sensitive assessment of proportionality; and (3) in any event, even if a fact sensitive assessment of proportionality was required, the judge reached a decision on that assessment that was irrational, in the *Wednesbury* sense of the term (see para 4).

17. Before the judge, the DPP had accepted that the appellant's article 10 and 11 rights were engaged, and that there was a proportionality exercise of some sort for the court to perform, albeit not as the appellant suggested. In the event, the Divisional Court did not think it appropriate to determine the DPP's first ground of appeal. The DPP had not included it in the original case stated and it did not give rise to a clear-cut point of law. The issue was also potentially fact sensitive and had it been in issue before the judge, might well have resulted in

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appellant.

the case proceeding in a different way and led to further factual findings (see paras 5 to 8). Nonetheless, the Divisional Court noted that it was highly arguable that articles 10 and 11 were not engaged at all on the facts of this case (see paras 26 to 50).

18. As to Ground 2, the Divisional Court held that where articles 10 and 11 of the Convention are engaged, a court only has to be satisfied that the conviction of a defendant of a particular offence is proportionate where proportionality is an ingredient of the offence. Whether it is an ingredient of the offence will depend on the proper interpretation of the offence in question. There is no need for a court to be satisfied that a conviction would be proportionate if the offence is one where proportionality is satisfied by proof of the ingredients of the offence itself. In the case of aggravated trespass contrary to section 68 of the 1994 Act, proportionality is not an ingredient of the offence. Moreover, section 68 is itself compatible with articles 10 and 11 of the Convention in that conviction of this offence will necessarily be on the basis that facts have been established which mean that the conviction is a proportionate interference with these rights. The judge was therefore wrong to apply an additional test of proportionality once she had found that the terms of section 68 were satisfied; and was also wrong to find that the conviction of the appellant would be incompatible with articles 10 and 11 of the Convention in any event (see paras 51 to 81).

19. The Divisional Court concluded that the DPP also succeeded on Ground 3. In summary, the judge had overlooked important factors and she had also taken into account factors which were irrelevant to a proportionality exercise for an offence under section 68. The only conclusion which could have been reached on the relevant facts of this case was that the proportionality balance pointed conclusively in favour of a conviction under section 68 (if proportionality were an element of the offence). See paras 82 to 88.

20. The Divisional Court therefore answered both questions it was asked in the case stated in the negative. It allowed the DPP's appeal, quashed the appellant's acquittal and remitted the case to the magistrates' court with a direction to convict the appellant of the offence charged under section 68(1) of the 1994 Act (see para 90).

21. On 12 May 2022, the Divisional Court granted the appellant's application for leave to appeal to the Supreme Court. The points of law certified were: (1) Does the Human Rights Act 1998 require a court when determining a charge of aggravated trespass contrary to section 68 of the 1994 Act to undertake a proportionality assessment when the actions under scrutiny occurred during a protest? (2) What are the circumstances in which a court is required to carry out a proportionality assessment when determining a criminal charge when the actions alleged to constitute the *actus reus* of the offence occurred in the course of protest? (3) What principles should a court apply both at first instance and on appeal when a proportionality assessment is required? In its reasons, the Divisional Court said that the questions certified should enable the Supreme Court to consider issues of relatively narrow scope arising in the context of a prosecution for aggravated trespass. It also said that the appellant would need to review the proposed grounds of appeal to deal with Ground 3 of the DPP's appeal to the Divisional Court.

22. The Supreme Court made it clear that it would hear the case in July 2022, on an expedited basis, but in the event the appellant decided not to pursue his appeal.

The proceedings before the Recorder of London

23. Following the remittal of the case to the magistrates' court, and the appellant's conviction and sentence, on 30 July 2022, the appellant lodged an appeal to the Crown Court against both conviction and sentence. An application to list the conviction appeal was opposed by the prosecution. The prosecution accepted the Crown Court could entertain the appeal against sentence; but submitted that the Crown Court had no jurisdiction to hear the appeal against conviction.

24. On 24 February 2023, the Recorder of London heard oral argument on that preliminary issue. On 10 March 2023, he handed down judgment. He held that the Crown Court did not have *vires* to hear the appeal against conviction and he therefore refused to list it; but that the appeal against sentence should proceed.

25. In coming to his conclusion, the Recorder said that he accepted the prosecution's analysis of sections 111(1) and (4) of the 1980 Act. We address that analysis further below. The nub of the Recorder's conclusion on the *vires* issue was as follows:

> "Once the Divisional Court has considered the issues in a Case Stated Appeal there is simply no room for an appeal to the Crown Court and no right of appeal for someone in the position this applicant finds himself here. The applicant had the opportunity to appeal his conviction to the Supreme Court and has not done so."

26. On 29 March 2023, the appellant applied to state a case for the opinion of the High Court pursuant to section 28 of the Senior Courts Act 1981 (the 1981 Act) On 12 April 2023, the Recorder of London indicated that he was minded to state a case but proposed that the process be adjourned pending the outcome of the appeal against sentence. The parties agreed with that course. The appeal against sentence was heard on 23 June 2023 and succeeded to the extent that the length of the custodial term was reduced. Time to serve the draft case in relation to conviction was extended to 1 August 2023, and the case stated was sealed on 8 August 2023.

Statutory framework

27. Section 108(1) of the 1980 Act provides in part as follows:

> "**Right of appeal to the Crown Court**.
>
> (1) A person convicted by a magistrates' court may appeal to the Crown Court—
>
> (a) if he pleaded guilty, against his sentence;
>
> (b) if he did not, against the conviction or sentence…"

28. Such an appeal encompasses a right to a rehearing: see section 79(3) of the 1981 Act. As Lord Bingham CJ said in *R v Hereford Magistrates Court ex parte Rowlands* [1997] 2 Cr App R 340 at 343C-D:

> "A defendant who exercises this right of appeal ….is entitled to full retrial before a judge of the Crown Court sitting with justices. The burden of proving the case is on the prosecutor, as in the magistrates' court. Full evidence may be called, whether or not it had been given in the magistrates' court. A decision is reached on the case as presented in the Crown Court. This is the ordinary avenue

> of appeal for a defendant who complains that the magistrates' court reached a wrong decision of fact, or a wrong decision of mixed law and fact."

29. Section 111 MCA 1980 provides in part as follows:

> "**Statement of case by magistrates' court**.
>
> (1) Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved; but a person shall not make an application under this section in respect of a decision against which he has a right of appeal to the High Court or which by virtue of any enactment passed after 31st December 1879 is final.
>
> (2) An application under subsection (1) above shall be made within 21 days after the day on which the decision of the magistrates' court was given.
>
> (3)…..
>
> (4) On the making of an application under this section in respect of a decision any right of the applicant to appeal against the decision to the Crown Court shall cease.
>
> (5) If the justices are of opinion that an application under this section is frivolous, they may refuse to state a case, and, if the applicant so requires, shall give him a certificate stating that the application has been refused; but the justices shall not refuse to state a case if the application is made by or under the direction of the Attorney General.
>
> (6) Where justices refuse to state a case, the High Court may, on the application of the person who applied for the case to be stated, make an order of mandamus requiring the justices to state a case." (emphasis added)

30. Of an appeal by case stated, Lord Bingham observed in *Rowlands* at 343F-G:

> "This is the ordinary avenue of appeal for a convicted defendant who contends that the justices erred in law: the usual question posed for the opinion of the High Court is whether on the facts which they found the justices were entitled to convict the defendant; but sometimes the question is whether there was any evidence upon which the justices could properly convict the defendant which has traditionally been regarded as an issue of law."

31. As the wording of section 111(1) makes clear, an appeal from the magistrates' court to the High Court by way of case stated is only concerned with issues of law and jurisdiction. The High Court does not perform the role of fact finder. An argument that a conviction was irrational or perverse on the evidence may be raised by way of case stated on the ground that the magistrates' court must have misapplied the law in coming to its verdict; but a defendant who wishes to appeal on the basis that the conviction was against the weight of the evidence, and/or to challenge the magistrates' findings of fact, should appeal to the Crown Court rather than the High Court: see *Oladimeji v Director of Public Prosecutions* [2006] EWHC 1199

(Admin). It is not open to the High Court to depart from the facts stated in the case: see *Wheeldon v Crown Prosecution Service* [2018] EWHC 249 (Admin). Save where the question is whether there was sufficient evidence on which the magistrates' court could reasonably convict, the case stated must only state the facts found by the magistrates' court: see Criminal Procedure Rules (CrimPR) Rule 35.3(4)(c)(ii)). It must not include an account of the evidence received by that court: see CrimPR Rule 35.3(5).

32. The power of the Crown Court to state a case for the opinion of the High Court derives from section 28(1) of the 1981 Act, which is in materially similar terms to section 111(1).[2] Section 28(1) provides that (subject to the provisos in subsection (2)[3]):

> "…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."

33. Section 28A of the 1981 Act then provides, in part as follows:

> "28A **Proceedings on case stated by magistrates' court or Crown Court.**
>
> (1) This section applies where a case is stated for the opinion of the High Court —
>
> (a) by a magistrates' court under section 111 of the Magistrates' Courts Act 1980; or
>
> (b) by the Crown Court under section 28(1) of this Act.
>
> (2) …..
>
> (3) The High Court shall hear and determine the question arising on the case (or the case as amended) and shall—
>
> (a) reverse, affirm or amend the determination in respect of which the case has been stated; or
>
> (b) remit the matter to the magistrates' court, or the Crown Court, with the opinion of the High Court, and may make such other order in relation to the matter (including as to costs) as it thinks fit.
>
> (4) Except as provided by the Administration of Justice Act 1960 (right of appeal to Supreme Court in criminal cases), a decision of the High Court under this section is final."

34. There is therefore no appeal from the decision of the High Court in a criminal case on a point of law or jurisdiction referred to it by the magistrates' court or by the Crown Court by way of case stated, other than to the Supreme Court. Such an appeal can only be made with the leave

[2] There is one distinction. Only a party to the proceedings may appeal from the Crown Court by way of case stated, whereas a party and a person aggrieved may appeal from the magistrates' court by way of case stated.
[3] Subsection (2) provides in part that section 28(1) "shall not apply to— (a) a judgment or other decision of the Crown Court relating to trial on indictment…"

of the High Court or the Supreme Court, which shall not be granted unless the High Court certifies "that a point of law of general public importance is involved in the decision and it appears to that court or to the Supreme Court, as the case may be, that the point is one which ought to be considered by the Supreme Court." See section 1 of the Administration of Justice Act 1960.

The submissions of the DPP

35. As mentioned earlier, the Recorder of London accepted the analysis advanced on behalf of the prosecution by Mr Tom Little KC, which was (and is) to this effect.

36. First, section 111(4) of the 1980 Act should be given a purposive construction, taking into account the importance of finality of litigation and the avoidance of multiple co-existing appeal routes. On the appellant's construction of section 108, a defendant's right of appeal to the Crown Court from a conviction in the magistrates' court, is untrammelled regardless of the outcome of a section 111 appeal to the Divisional Court, or even the Supreme Court if the case gets that far. Further, any appeal to the Crown Court could be followed by an appeal to the High Court by way of case stated (by either the defence or the prosecution) under section 28A of the 1980 Act. And, as the decision of the Crown Court under section 108 would not be on a matter relating to a trial on indictment, the appeal could also be followed, subject to the issue of leave, by an application for judicial review under section 29(3) of the 1981 Act.[4]

37. Secondly, the effect of the proposed appeal is to invite the Crown Court to disagree with the Divisional Court's decision that the appellant was guilty as charged and with the direction to convict. The proposed right of appeal is therefore abusive and/or contrary to the principle of finality.

38. Thirdly, as a matter of construction, the words "On the making of an application under this section…" in section 111(4) of the 1980 Act refer to <u>any</u> application to state a case, whether by the defendant, the prosecution or any other person. It follows that an application under section 111(1) to state a case which results in a direction to convict, extinguishes all rights of appeal to the Crown Court, whoever makes the application. Further, only the defendant has a right to appeal under section 108 of the 1989 Act. And as the defendant is (by definition) the only party that can "lose" a right of appeal to the Crown Court under section 111(4) the reference to "the applicant" in that subsection can only be a reference to the defendant.

39. The prosecution's application in the present case therefore extinguished the appellant's right of appeal under section 108. It is conceded that had the Divisional Court ordered a retrial (rather than directing a conviction) the position would have been different. This was because any subsequent appeal to the Crown Court would not operate to undermine or contradict the conclusion of the Divisional Court.

Discussion: Question 1

40. In his review of the Criminal Courts of England and Wales (2001) chapter 12, para 29, Lord Auld described the current structure for appealing decisions of the magistrates' courts as

[4] Section 28(3) provides that subject to the provisions of this Act and to rules of court, the High Court shall, in accordance with section 19(2), have jurisdiction to hear and determine— (a)any application, or any appeal (whether by way of case stated or otherwise), which it has power to hear and determine under or by virtue of this or any other Act; and (b) all such other appeals as it had jurisdiction to hear and determine immediately before the commencement of this Act.

"very confusing". Of this there can be no doubt, as there are three potential avenues for challenging decisions made by magistrates' courts – viz, (for the defendant in the typical case) an appeal by way of rehearing, against conviction and sentence to the Crown Court; (for the defendant and the prosecution and a person aggrieved) an appeal by way of case stated on a point of law to the High Court, and (for the defendant and the prosecution) an application to the High Court for judicial review. Further, if either party is dissatisfied with the decision of the Crown Court on appeal, there is then a further route of appeal on a point of law, by way of case stated, to the High Court.

41. As Lord Auld went on to say, this very confusing structure "makes for duplicity of proceedings, much unnecessary jurisprudence on the extent and differences between the respective jurisdictions, both as to which should be used and in what order."

42. Turning to the instant case, at first blush, it may seem odd that following a successful appeal by the prosecution against an acquittal by the magistrates' court, a direction by the Divisional Court to the magistrates' court to convict, can be followed by an appeal by the defendant thus convicted (by way of rehearing) to the Crown Court. However, in our judgment, the preservation of a defendant's right of appeal to the Crown Court in such circumstances follows inexorably as a matter of construction, from the various statutory provisions engaged; and in particular, from the clear meaning of subsections (1) and (4) of section 111 of the 1980 Act.

43. Section 111(1) permits an *"application"* to be made to the High Court by any party or person aggrieved about a *"proceeding"* of a magistrates' court, on the ground that the proceeding is wrong in law or is in excess of jurisdiction. Subsection (2) of section 111 provides that "An *application* under subsection (1) above shall be made within 21 days after the day on which the decision of the magistrates' court was given. Subsection (4) of section 111 provides that "On the making of *an application* under this section in respect of a decision *any right of the applicant* to appeal against the decision to the Crown Court shall cease. Subsection (5) of section 111 provides that "If the justices are of opinion that *an application* under this section is frivolous, they may refuse to state a case, and, if *the applicant* so requires, shall give him a certificate stating that the application has been refused; but the justices shall not refuse to state a case if the application is made by or under the direction of the Attorney General." Subsection (6) of section 111 provides that "Where justices refuse to state a case, the High Court may, on the *application* of the person who applied for the case to be stated, make an order of mandamus requiring the justices to state a case."

44. With respect to Mr Little (albeit his argument on the language and meaning of section 111(4) was not pressed with any vigour at the hearing before us) it is obvious that *the applicant* for all of these purposes, and in particular for the purposes of section 111(4), is the party or person aggrieved, making the application under section 111(1). And it is *that applicant* who loses any right to appeal against the decision to the Crown Court which they may have had.

45. This analysis is reinforced, if reinforcement were needed, by the fact that rights of appeal to the Crown Court are not limited to appeals by defendants under section 108 of the 1980 Act. Defendants also have rights of appeal to the Crown Court under section 45 of the Mental Health Act 1983 and section 42 of the Counter Terrorism Act 2008. The prosecution have a right of appeal under section 14A(5A) of the Football Spectators Act 1989 and section 147(3) of the Customs and Excise Management Act 1979. And there are various rights of appeal accorded to *"persons"* more generally, as listed in Part 34 of the CrimPR at Rule 34.1(1)(d). The formulation "*any right of the applicant to appeal against the decision to the Crown Court*

shall cease" in section 111(4) means that any person who applies to state a case under section 111(1) loses any right which *they* have to appeal to the Crown Court in respect of that proceeding.

46. Mr Little submits that section 111(4) bites in the event of an application to state a case which results in the High Court directing a conviction, but not if a retrial is ordered. There are two reasons for rejecting this argument. First, this interpretation simply cannot be derived from or read into the plain language of the section. Secondly, the proposed distinction, based as it is on the outcome of the application to state a case, is entirely inconsistent with the fact that the loss of the right of appeal to the Crown Court occurs "on the *making* of an application" under section 111 i.e. before the outcome of the application is known. Indeed, it takes effect even if an application to state a case under section 111 is subsequently abandoned: see *R. v Winchester Crown Court Ex p. Lewington* (1982) 4 Cr. App. R. (S.) 224, DC.

47. The language of section 111 of the 1980 Act therefore leaves no room for Mr Little's purposive and/or policy-based arguments. On the contrary, properly construed, the purpose of section 111(4) is clear and comprehensible: it is to impose a choice on a party to any proceeding before a magistrates' court or who is aggrieved by the conviction, order, determination or other proceeding of the court: they may appeal to the Crown Court for a rehearing on questions of fact and law, or they may appeal to the High Court on questions of law or jurisdiction. But they may not do both. The position of course of the appellant, is that he had done neither.

48. It is in this context worth recording, as Lord Bingham pointed out in *Rowlands* at paras 2 and 3, that the business of magistrates' courts is in the main handled according to the highest standards; but as in all other courts, errors may be made and procedural lapses and irregularities may occur; and the appeal rights conferred by Parliament on those convicted in the magistrates' court under sections 108 and 111 of the 1981 Act, protect convicted defendants against the possibility of injustice. That protection would be subverted in our view, if a successful appeal by a prosecutor on a point of law to the Divisional Court, followed by a direction to convict, could deprive a defendant of any appeal rights at all (regardless of the merits or otherwise of the magistrates' original findings of fact) including the ability the defendant would otherwise have had to challenge those findings of fact had the magistrates not erred in law in the first place.

49. Mr Little is right that the legislation has the potential to give rise to a number of appeals and challenges. But this arises from the nature of the appellate structure to which we have referred; and in the instant case, from the plain meaning as we consider it to be, of the relevant legislation.

50. We would add that we do not accept that the pursuit of an appeal to the Crown Court once the Divisional Court has directed a conviction, is inevitably an abuse because it invites the Crown Court to contradict the decision of the Divisional Court.

51. The Divisional Court in this case ruled on the questions of law on which its opinion was sought, assuming the facts to be as set out in the case stated for the purposes of that appeal. Applying those facts to the law as it found it to be, the Divisional Court obviously considered that the only rational conclusion the (district) judge could have reached was that the appellant was guilty of the section 68 offence. The Divisional Court made no findings of fact itself. If the appellant now pursues an appeal against conviction to the Crown Court, this will be a rehearing. Though the Crown Court may come to a different conclusion to the judge on the

facts, the Crown Court would be bound, as a matter of precedent, by any points of law decided by the Divisional Court (in particular as they arise in this case relation to section 68 of the 1994 Act). No question of contradiction therefore arises.

52. We were referred to the decision of the Queen's Bench Division in *R (Drohan) v Justice of County Waterford* (1900) 2 IR 307. We do not find it of great assistance, albeit the outcome is not inconsistent with the outcome of this case. *Drohan* concerned the (now repealed) Summary Jurisdiction Act 1857, the relevant terms of which (sections 6 and 14) were different to the relevant provisions of the 1980 Act (and section 28A of the 1981 Act, in the case of section 6). The Divisional Court had directed a conviction by the Justices at Petty Sessions. It was subsequently held that the defendant nevertheless had a right of appeal against that conviction to the Quarter Sessions. The decision of Sir P O'Brien LCJ, with whom Gibson and Madden JJ agreed (Murphy J dissenting) was that the conviction was a subsequent and separate event to the original decision of the Justices. It was therefore open to the Quarter Sessions to review the findings of fact of the Justices which had led them to their original decision.

53. Finally, it should be emphasised that in this appeal we have of course simply addressed the points of law raised in the case stated in relation to jurisdiction. Nothing was said about the basis of the appellant's proposed appeal to the Crown Court. The substantive merits of that appeal and of any points the prosecution may wish to raise in opposition to it, must therefore await the hearing before that court.

Discussion: Question 2

54. The question is, "Would it have made a difference if the Divisional Court had substituted a conviction for the acquittal and remitted solely the sentence to the Magistrates' Court?" On the facts of this case, Question 2 does not arise for decision. However, our answer to it (as was the agreed position of counsel, as stated briefly in argument) is "No."

55. The relevant powers of the High Court are set out in section 28A of the 1981 Act: see para 33 above. In the present case, the Divisional Court exercised its powers under section 28A(3)(b) to remit the case back to the magistrates' court with a direction to the magistrates to convict. This the magistrates did on 29 June 2022, with the matter having been formally listed before them in order that this could be done. The court record which the court officer is under a duty to keep (see CrimPR 5.4) will then have been amended to record a conviction, rather than an acquittal. The Divisional Court might instead have exercised its power under section 28A(3)(a) to reverse the decision of the magistrates' court. Nonetheless, the conviction would still have been, as it is now, a conviction by the magistrates; and recorded as such at the magistrates' court on the relevant court record. The precise method of disposal by the Divisional Court (remittal with a direction to convict, or reversal and the substitution of a conviction for an acquittal) might be material to the date of conviction, as recorded by the magistrates' court, but in our judgment it is otherwise immaterial to the issues raised in this appeal.

Conclusion and outcome

56. For the reasons given above, our answer to both Questions 1 and 2 is in the negative. The application by the DPP to state a case and the subsequent direction of the Divisional Court to convict the appellant did not extinguish the appellant's right of appeal under section 108 of the 1980 Act in relation to that conviction. It would have made no difference if the Divisional

Court had substituted a conviction for the acquittal and remitted the sentence only to the magistrates' court.

57. The appeal is therefore allowed. The case will be remitted to the Crown Court for the appeal against conviction to be listed.