Neutral Citation Number: [2021] EWHC 147 (Admin)

Case No: CO/435/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2021

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
-and-
THE HON MR JUSTICE BRYAN

- -

Between:

RYAN HARVEY	**Appellant**
- and -	
THE DIRECTOR OF PUBLIC PROSECUTIONS	**Respondent**

- -
- -

Francis FitzGibbon QC and Kate Aubrey-Johnson (instructed by **the Howard League for Penal Reform**) for the **Appellant**
Benjamin Douglas-Jones QC and Andrew Johnson (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 17 November 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 29 January 2021.

LORD BURNETT OF MALDON:

1. This is the judgment of the court, to which we have both contributed. Ryan Harvey appeals by way of case stated from the order of District Judge Barron made at Margate Magistrates' Court of 19 October 2019 refusing his application to direct that his case be heard again pursuant to section 142(2) of the Magistrates' Courts Act 1980 ("the 1980 Act"). He entered unequivocal guilty pleas and was committed to and sentenced by the Crown Court. He sought to set aside his guilty plea to enable him to adduce evidence and argue a defence under section 45 of the Modern Slavery Act 2015 ("the 2015 Act"). Section 142 of the 1980 Act is headed "power of magistrates' court to re-open cases to rectify mistakes etc." As material it provides:

> "(1) A magistrates' court may vary or rescind a sentence or other order imposed or made by it when dealing with an offender if it appears to the court to be in the interests of justice to do so; and it is hereby declared that this power extends to replacing a sentence or order which for any reason appears to be invalid by another which the court has power to impose or make.
>
> (1A) The power conferred on a magistrates' court by subsection (1) above shall not be exercisable in relation to any sentence or order imposed or made by it when dealing with an offender if—
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> (a) the Crown Court has determined an appeal against—
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> (i) that sentence or order;
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> (ii) the conviction in respect of which that sentence or order was imposed or made; or
>
> (iii) any other sentence or order imposed or made by the magistrates' court when dealing with the offender in respect of that conviction (including a sentence or order replaced by that sentence or order); or
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> (b) the High Court has determined a case stated for the opinion of that court on any question arising in any proceeding leading to or resulting from the imposition or making of the sentence or order.
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> (2) Where a person is convicted by a magistrates' court and it subsequently appears to the court that it would be in the interests of justice that the case should be heard again by different justices, the court may so direct.
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> (3) Where a court gives a direction under subsection (2) above—
>
> (a) the conviction and any sentence or other order imposed or made in consequence thereof shall be of no effect; and
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> (b) section 10(4) above shall apply as if the trial of the person in question had been adjourned.

> ...
>
> (5) Where a sentence or order is varied under subsection (1) above, the sentence or other order, as so varied, shall take effect from the beginning of the day on which it was originally imposed or made, unless the court otherwise directs."

2. The questions stated for the opinion of the High Court by the judge are as follows:

   i) Does the Magistrates' Court have any power to allow a plea of guilty to be vacated under section 142 of the Magistrates' Courts Act 1980 once the defendant has been sentenced in the Crown Court?

   ii) In the circumstances of this case was I correct to refuse to vacate the defendant's guilty pleas pursuant to section 142(2) of the Magistrates' Courts Act 1980?

3. Ryan Harvey, who was then 17, entered unequivocal pleas of guilty before Canterbury Youth Court to offences including possession of a bladed article (a knife) in a public place and possession of significant amounts of heroin and cocaine with intent to supply (street dealing). He was committed to Canterbury Crown Court for sentence. A pre-sentence report was obtained and on 2 August 2017 he was sentenced to a detention and training order of 18 months.

4. The Howard League for Penal Reform later requested on his behalf a retrospective National Referral Mechanism ("NRM") assessment which was made and submitted by the Youth Offender Service on 7 February 2018. That is concerned with aspects of "modern slavery" which may be separate from proceedings in a criminal court but the National Crime Agency (the relevant body for the purposes of the legislation) reached a "conclusive decision" (a term of art in the legislation) in April 2018 that he was the victim of modern slavery. That conclusion does not bind the Crown Prosecution Service or a court. On 2 March 2018 Ryan Harvey was released from custody. After his release he was involved in an incident on 26 May 2018 which led to charges of dangerous driving and other related offences. The new offences were tried at the Crown Court and a defence under section 45 of the 2015 Act was advanced. On 2 April 2019 the jury returned a not guilty verdict.

5. The case advanced on behalf of Mr Harvey before the judge was that it was in the interests of justice to have the earlier convictions set aside on the basis of the decision that he was a victim of modern slavery and in the light of the subsequent acquittal in the Crown Court on later charges. The judge concluded that he was being asked to use section 142 not to correct any error, defect or mistake, but rather to exercise a general power of review, which he concluded was not permissible. He referred to *R v RD* [2019] EWCA Crim 1545 as authority against the argument advanced by Mr Harvey. The judge did not think that there had been an obvious injustice in this case but would have reached the same conclusion if he thought otherwise. There was an available remedy, namely an application to the Criminal Cases Review Commission.

6. In *R v RD* the defendant had been unlawfully committed from the Youth Court and then sentenced in the Crown Court. Fancourt J, delivering the judgment of the Court of Appeal Criminal Division at [33] said:

> "The power under section 142 of the Magistrates' Courts Act is a power to rectify errors and defects, to avoid the need for unnecessary appeals to the Crown Court or the High Court, as emphasised by the Divisional Court in *R(Williamson) v City of Westminster Magistrates' Court* [2012] EWHC 1444 (Admin); [2012] 2 Cr App R 24. The power is not a general power of review; nor does it confer a function properly performed by an appellate court. It is not a power that can properly be exercised by a Magistrates' Court, as the Youth Court did in this case, where there has been a committal for sentence and the Crown Court has passed sentence for the offences in question. The orders made by the Youth Court ... were therefore unlawful." (Emphasis added)

7. Mr FitzGibbon QC, for Mr Harvey, submitted that the conclusion we have emphasised in the passage was *obiter* and therefore does not bind us. The essence of his submission is that the language of section 142(2) of the 1980 Act is wide enough to encompass the mistake he contends for here. The mistake was Mr Harvey's in failing to advance a defence in the Youth Court which was available to him. The language of section 142 is, he submitted, wide enough for the effect of directing a new trial to encompass setting aside the sentence subsequently imposed by the Crown Court. Indeed, Mr FitzGibbon accepted that the effect of such a direction would be to set aside a sentence upheld or reduced in the Court of Appeal Criminal Division. He accepted that the approach he advocated would allow section 142(2) to be used, if the interests of justice test were satisfied, to set aside unequivocal guilty pleas to offences of violence where a defendant had failed to advance a defence of self-defence, for example. The same arguments would support the use of section 142(2) after a trial where a defence was not advanced. In this case, however, the conclusion of the National Crime Agency that Mr Harvey has been the victim of modern slavery shows that he would be able to adduce evidence at a trial (there being an evidential burden on him to raise the defence) which may or may not succeed. He submitted that to require an application to the Criminal Cases Review Commission, which if successful would result in the case being referred to the Crown Court, was cumbersome and would only give him one bite of the cherry, because there would be no onward appeal if he lost. If the case were heard again in the Magistrates' Court and he lost, he could appeal to the Crown Court. Mr FitzGibbon submitted that whatever may be the position with adults, the interests of justice test must be interpreted more widely when dealing with children.

8. Mr Douglas-Jones QC submitted that we are bound by *R v* RD, which in any event was correctly decided if we are not. He submitted that Mr Harvey is seeking to use section 142(2) as a general power of review, which is contrary to established authority.

9. The Case Stated is a succinct document running to 13 pages. We find it necessary once more to say that the Case Stated sets the four corners of the factual material on which the High Court considers the appeal. The appellant has an opportunity to comment on its content and make suggestions. The Case identifies the decision in issue, the questions of law or jurisdiction on which the opinion of the High Court is asked and should include a succinct summary of the nature and history of the proceedings, the court's relevant findings of fact and the relevant contentions of the parties. If the question is whether there was sufficient evidence on which the court could reasonably

reach a finding of fact, the Case will specify that finding and include a summary of the evidence on which the court reached that finding but save in that last case the case should not include an account of the evidence received by court. This is all set out in Part 35.3(4) of the Criminal Procedure Rules 2020 which does no more than restate what has long been the position.

10. This court has repeatedly issued reminders that extrinsic material should not be produced. See, for example, *Houston v Director of Public Prosecution* [2015] EWHC 4144 at [5] to [7] per Sir Brian Leveson P., and *Skipaway v Environment Agency* [2006] EWCA 983 (Admin) per Stanley Burnton J (as he then was) at [14] to [15].

11. The message continues not to get through. The appellant's initial bundle runs to 992 pages of which 540 pages consist of further documentary material (464 pages of which are referred to as "background documents"), supplemented by a further appellant's bundle with another 95 pages of factual material. The work and expense incurred in producing this vast amount of material was not justified.

12. Mr FitzGibbon recognised that *R v RD* was a formidable obstacle in the way of this appeal succeeding. We are unpersuaded that the passage we have set out and emphasised in [6] above was not part of the decision of the Court of Appeal. It was not an *obiter dictum*. It established that once the Crown Court has passed sentence section 142(2) has no application. That is abundantly clear from the statutory language. The whole scheme of section 142 is to enable the Magistrates' Court to intervene when the impact of an order only affects its own determinations. Section 142(A) shows that a sentence imposed in the Magistrates' Court cannot be varied or rescinded once a Crown Court has determined an appeal against either sentence or conviction or there has been a determination of a Case Stated in the High Court in connection with the case. Section 142(3) is to similar effect. The reference to the consequence of a direction under section 142(2) of the 1980 Act being that "the conviction and any sentence or order imposed or made in consequence thereof" is to no effect, in the context of this section, means a sentence or order of the Magistrates' Court. We do not accept that Parliament intended a mechanism designed to correct mistakes made in the Magistrates' Court which could enable that court to set aside sentences imposed by the Crown Court or Court of Appeal. That is the position whether the court is dealing with an adult or a person under 18.

13. The answers to the questions posed by the judge are: (1) the Magistrates' Court has no power to allow a plea of guilty to be vacated under section 142 of the Magistrates' Courts Act 1980 once the defendant has been sentenced in the Crown Court; (2) the judge was correct to refuse the application.

14. We would add that the circumstances of this case did not fall within the proper scope of section 142(2) of the 1980 Act at all. *Croydon Youth Court, ex parte DPP* [1997] 2 Cr. App R 411 was a case where the mistake identified in the section 142 application was a failure by the bench to listen to a tape of an interview before admitting the interview in evidence. It was argued that had they done so they would not have admitted it. McCowan LJ, at p. 416, held that the power was properly regarded as a slip rule and did not extend beyond a situation akin to a mistake. There was no mistake. The justices were told they did not need to listen to the tape. After the ruling the defendant, on advice, unequivocally pleaded guilty. He went on to observe that the defendant could not appeal to the Crown Court because of his guilty plea. It would be wrong to use

section 142(2) to obtain a rehearing as a substitute to an appeal which a defendant was precluded by law from pursuing.

15. Those who unequivocally plead guilty in the Magistrates' or Youth Court cannot appeal against conviction to the Crown Court. That is the effect of section 108 of the 1980 Act. A route to an appeal via the Criminal Cases Review Commission is available: see, e.g., *R v Nori and R v YY (Practice Note)* [2016] 1 Cr App R 28, 435 at 446 per Sir Brian Leveson P.

16. The limited effect of section 142 was restated in *Roman Zykin v Crown Prosecution Service* [2009] EWHC 1469 (Admin) in which Bean J (as he then was) stated at [16]:

> "It is clear to us from the Croydon case and the *Holme* case [*Holme v Liverpool City Justices & Crown Prosecution Service* [2004] EHC 3131 (Admin)] that section 142 does not confer a wide and general power on a Magistrates' Court to re-open a previous decision on the grounds that it is in the interests of justice to do so. It is, as Collins J said in Holme, a power to be used in a relatively limited situation, namely one which is akin to mistake or the slip rule."

17. *R (Williamson) v City of Westminster Magistrates' Court* [2012] Cr App R 24 was a case to similar effect. It was argued that the defendant's solicitor misapprehended the strength of the case against him and gave flawed advice to plead guilty. Para 31 of the judgment explained:

> "The purpose of s.142 as originally enacted was to enable the magistrates' court itself to correct mistakes in limited circumstances to avoid the need for parties to appeal to the Crown Court, or to the High Court by way of case stated, or to bring judicial review proceedings. In our judgment the introduction of the s.142 power was designed to deal with an obvious mischief: namely the waste of time, energy and resources in correcting clear mistakes made in magistrates' courts by using appellate or review proceedings. The removal of the short time limit in 1996 is consistent with that approach. It is the common experience of courts in all jurisdictions that mistakes and slips are often not picked up immediately. … So far as the jurisdiction relating to convictions is concerned, the amendment enables the magistrates' court to exercise the power in circumstances beyond those originally envisaged. But the power remains rooted in the concept of correcting mistakes and errors. It is not a power equivalent to an appeal to the Crown Court or the High Court, nor is it a general power of review. It would be possible to construct an argument that because a magistrates' court made an error of law, and thus reached a wrong decision, it would be in the interests of justice for the matter to be remitted under s.142 for a rehearing. However, such an interpretation would have the effect of neutering appeals by way of case stated. It would have the effect of conferring a

> similar power on the bench considering a s.142 application as possessed by the High Court."

18. It continued at [36] at [37]:

> "36. We accept that there may be circumstances in which s.142(2) could be used to allow an unequivocal guilty plea to be set aside. Examples which spring to mind include cases in which a guilty plea had been entered to an offence unknown to the law. Surprising though it may seem, such errors do occur in particular in connection with repealed legislation. That would fall comfortably within the language of mistake. They may include cases where a jurisdictional bar was not appreciated by the defendant relating, for example, to a time limit or the identity of a prosecutor. There may be cases in which the proceedings were, in truth, a nullity. We would not exclude the possibility that s.142(2) would be apt to deal with a case in which circumstances developed after a guilty plea and sentence which led the prosecution to conclude that the conviction should not be sustained.
>
> 37. However, the question in this claim is whether what the claimant alleges passed between him and Mr Mardon, and more generally his allegations concerning Mr Mardon's conduct as his solicitor, fall within the concept of "mistake" for the purposes of s.142(2). At the heart of the claimant's contention is the proposition that he misapprehended the strength of the case against him as a result of flawed legal advice. In our judgment, the circumstances relied upon by the claimant, even if they were established as being correct, do not bring the case within the ambit of the power found in s.142(2). The claimant is seeking to use that provision as a surrogate for a full appeal on the basis of the conduct of his solicitor. Such appeals are never straightforward. … In our judgment, s.142(2) of the 1980 Act does not provide an appropriate vehicle for the consideration of such matters."

19. The reference in the final sentence of [36], namely, "We would not exclude the possibility that section 142(2) would be apt to deal with a case in which circumstances developed after a guilty plea and sentence which led the prosecution to conclude that the conviction should not be sustained" was made in contemplation of a situation such as that in *R v Bolton Justices Ex p. Scally* [1991] 1 Q.B. 537, which had featured in the argument before the court; see [26] to [27]. That was a case where convictions for drink-driving were quashed in judicial review proceedings following unequivocal guilty pleas when it was later discovered that the medical cleansing swabs in blood-sampling kits used by the police force in question contained alcohol. The court in *Williamson* was indicating that the section 142 route might well be available in such circumstances.

20. An argument that a defendant failed to adduce evidence which might have led to an acquittal or failed generally to pursue a defence that it is later asserted was available

(such as modern slavery or self-defence) is not something that falls within section 142(2) of the 1980 Act. In short, in the present case, there is nothing in the nature of a mistake or error that would justify the use of section 142(2) to vacate the pleas. The remedy open to Mr Harvey is to make an application to the Criminal Cases Review Commission.

21. That conclusion is not affected by another line of cases that were drawn to our attention which relate to trials in the Magistrates' Court that had proceeded in the absence of the defendant and where an application was subsequently made under section 142 to re-open the trial: *R v Ealing Magistrates' Court ex parte Sahorta* (1998) 162 JP 73; *The Queen on the Application of Manorgale Limited v Thames Magistrates' Court* [2013] EWHC 535 (Admin); *Houston v DPP, supra* and *R (Suraj Rathor) v Southampton Magistrates' Court* [2018] EWHC 3278 (Admin).

22. In the result, the appeal is dismissed.