Neutral Citation Number: [2023] EWHC 1957 (Admin)

Case No: CO/2384/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2023

Before:

LORD JUSTICE EDIS
and
MR JUSTICE BENNATHAN

- -

Between:

The King on the application of Crown Prosecution Service	**Claimant**
- and –	
Crown Court At Preston	**Defendant**
-and-	
Michael Mills	**First Interested Party**
-and-	
Criminal Cases Review Commission	**Second Interested Party**

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- -

Paul Jarvis (instructed by the Crown Prosecution Service) for the **Claimant**
The Defendant was not represented
Frances FitzGibbon KC, Jennifer Twite and Stephen Knight (instructed by Just for Kids Law) for First Interested Party
Philip Rule KC (instructed by Head of Legal at the CCRC) for Second Interested Party

Hearing date: 28 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 27 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BENNATHAN

Mr Justice Bennathan:

1. In this application the Claimant [the "CPS"] challenges the decision of His Honour Judge Altham, the Honorary Recorder of Preston, of 6 June 2022, that it was not necessary for the First Interested Party ["Mr Mills"] to apply to vacate his earlier guilty plea at the Youth Court before the Crown Court could proceed to hear his appeal against his convictions, following a referral by the Second Interested Party, the Criminal Cases Review Commission ["the CCRC"].

The facts

2. Mr Mills was born on 7 December 1999. He is now 22 years old. He lives at an address in Chorley in Lancashire. In May 2015, when he was 15 years old, Mr Mills was charged with eleven offences of making an indecent photograph of a child, contrary to section 1(1) of the Protection of Children Act 1978 and one offence of having indecent photographs of a child in his possession, contrary to section 160(1) of the Criminal Justice Act 1988. At the time these offences were alleged to have been committed, Mr Mills was 14 years old. In October 2014 he had told his mother that he had indecent images of children on his computer, and she notified the police the same day. The police attended the family home, arrested Mr Mills, and took his computers away for examination.

3. Mr Mills made his first appearance at Preston Youth Court on 2 July 2015 with his legal representative. The hearing was adjourned until the following day whereupon Mr Mills pleaded guilty to all 12 charges and his case was adjourned for the Youth Offending Team to prepare a report. On 16 July 2015, Mr Mills received a referral order for 6 months and was ordered to pay costs.

4. On 1 February 2017 Mr Mills submitted an application to the CCRC for his convictions to be sent to the Crown Court for an appeal. His application was drafted by Ms Jennifer Twite of *Just For Kids Law*. Mr Mills made further submissions on 1 October 2018. On 31 October 2018, the CCRC notified Mr Mills that it would not be referring his convictions to the Crown Court. Mr Mills served more submissions on the CCRC on 7 January 2019. On 21 March 2019 the CCRC again notified Mr Mills that it would not be referring his convictions to the Crown Court. Mr Mills then embarked on judicial review proceedings against the CCRC to compel it to reconsider his application. The CCRC re-opened the application on 26 July 2019 and Mr Mills made yet more submissions to the CCRC on 15 March 2021 in response to questions the CCRC had sent to Mr Mills on 15 September 2020.

5. In 2022 the CCRC concluded that there was a real possibility that, if referred to the Crown Court on appeal, Mr Mills' convictions would not be upheld, the statutory test applied by the CCRC under section 13 of the Criminal Appeal Act 1995. On that basis the CCRC referred Mr Mills' case to the Crown Court. The CCRC's Statement of Reasons is dated 2 March 2022.

6. None of the parties to these proceedings challenges the CCRC's decision to refer Mr Mills' convictions to the Crown Court and the basis of that decision is not germane to the issues we have to address, but in essence the CCRC concluded that if everything relevant had been known and properly taken into account (a) Mr Mills may not have been prosecuted; (b) any such prosecution may have been stayed as an abuse and (c)

Mr Mills may have had a defence to the matters to which he pleaded guilty. In their Statement of Reasons the CCRC approached Mr Mills' case on the basis that before hearing the appeal, the Crown Court would have to hear and grant an application for him to vacate his original guilty pleas in the Youth Court. That understanding of the correct procedure was based on a first instance decision by His Honour Judge Openshaw QC, as he then was, and it is the necessity or otherwise of that procedural step that is in dispute in this application. I note in passing that the CCRC's decision to refer included a finding of a real possibility that an application to vacate the earlier pleas would succeed.

The statutory framework

7. The two statutory provisions central to this application are section 108 of the Magistrates' Court Act 1980 ["MCA 1980"] and section 11 of the Criminal Appeal Act 1995 ["CAA 1995"].

8. Section 108 of the MCA 1980 provides, so far as relevant, as follows:-

> **Section 108 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.

9. Section 11 of the CAA 1995 is in these terms:-

> **Section 11 Cases dealt with summarily in England and Wales.**
>
> (1) Where a person has been convicted of an offence by a magistrates' court in England and Wales, the Commission — (a) may at any time refer the conviction to the Crown Court, and (b) (whether or not they refer the conviction) may at any time refer to the Crown Court any sentence imposed on, or in subsequent proceedings relating to, the conviction.
>
> (2) A reference under subsection (1) of a person's conviction shall be treated for all purposes as an appeal by the person under section 108(1) of the Magistrates' Courts Act 1980 against the conviction (whether or not he pleaded guilty).

10. The bar to an appeal in section 108 MCA 1980 did not represent a change in the law, as section 83 of the Magistrates' Court Act 1952 imposed the same limitation on appeals to the Quarter Sessions. The appellate Courts, however, have interpreted those provisions so as to modify what would otherwise be an absolute prohibition on an appeal against conviction after a guilty plea, in decisions I will consider below.

11. Subsection 6 of section 11 CAA 1995 prohibits the Crown Court on appeal from imposing any more severe punishment than that imposed in the court below. This is in

contrast to the Crown Court's powers on an appeal under section 108 MCA 1980 without a reference by the CCRC.

12. Section 152 of the MCA 1980 states that the act applies to "juvenile courts" unless enactments specify otherwise. The effect of that provision is that although this case concerns convictions in the Youth Court, the areas of law involved are equally applicable to that court and the Magistrates' Court, and I will refer simply to the latter in this judgment for clarity and economy of expression.

13. The interaction of the normal appeal route from the Crown Court to the Court of Appeal Criminal Division and that on a reference by the CCRC, may have some relevance to an understanding of the issue in this case. The normal appeal route from the Crown Court is contained in section 1 of the Criminal Appeal Act 1968 ["CAA 1968"] in these terms:

> **Section 1 Right of appeal**.
>
> (1) …a person convicted of an offence on indictment may appeal to the Court of Appeal against his conviction.
>
> (2) An appeal under this section lies only— (a) with the leave of the Court of Appeal; or (b) if within 28 days from the date of the conviction, the judge of the court of trial grants a certificate that the case is fit for appeal.

14. The CAA 1995 modifies this for cases where the CCRC is involved as follows:-

> **Section 9 Cases dealt with on indictment in England and Wales**.
>
> (1) Where a person has been convicted of an offence on indictment in England and Wales, the Commission— (a) may at any time refer the conviction to the Court of Appeal, and (b) (whether or not they refer the conviction) may at any time refer to the Court of Appeal any sentence (not being a sentence fixed by law) imposed on, or in subsequent proceedings relating to, the conviction.
>
> (2) A reference under subsection (1) of a person's conviction shall be treated for all purposes as an appeal by the person under section1 of the 1968 Act against the conviction.

15. The powers of the Crown Court on hearing an appeal from the Magistrates' Court, as far as relevant to this issue, are set out in section 48 of the Senior Courts Act 1981:

> **Section 48 Appeals to Crown Court**.
>
> (1) The Crown Court may, in the course of hearing any appeal, correct any error or mistake in the order or judgment incorporating the decision which is the subject of the appeal.

> (2) On the termination of the hearing of an appeal the Crown Court— (a) may confirm, reverse or vary any part of the decision appealed against, including a determination not to impose a separate penalty in respect of an offence; or (b) may remit the matter with its opinion thereon to the authority whose decision is appealed against; or (c) may make such other order in the matter as the court thinks just, and by such order exercise any power which the said authority might have exercised.
>
> (3) Subsection (2) has effect subject to any enactment relating to any such appeal which expressly limits or restricts the powers of the court on the appeal.
>
> (4) Subject to section 11(6) of the Criminal Appeal Act 1995, if the appeal is against a conviction or a sentence, the preceding provisions of this section shall be construed as including power to award any punishment, whether more or less severe than that awarded by the magistrates' court whose decision is appealed against, if that is a punishment which that magistrates' court might have awarded. (5) This section applies whether or not the appeal is against the whole of the decision.

16. The traditional form of an appeal from the magistrates to the Crown Court is a rehearing, both in cases of appeals against conviction and sentence. That procedure was acknowledged and confirmed in section 79(3) of the Senior Courts Act 1981:-

> "The customary practice and procedure with respect to appeals to the Crown Court, and in particular any practice as to the extent to which an appeal is by way of rehearing of the case, shall continue to be observed."

17. That statutory preservation was itself a re-enactment of section 9(6) of the Courts Act 1971, preserving that practice from the Quarter Sessions to the then newly created Crown Courts.

18. The test the CCRC has to apply when considering whether to make a reference, including any reference to the Crown Court and the Court of Appeal, is stated in section 13 of the CAA 1995:-

> **Section 13: Conditions for making of references.**
>
> (1) A reference of a conviction, verdict, finding or sentence shall not be made under any of sections 9 to 12B unless—
>
> (a) the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made,
>
> (b) the Commission so consider—
>
> (i) in the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the

> proceedings which led to it or on any appeal or application for leave to appeal against it, or
>
> (ii) in the case of a sentence, because of an argument on a point of law, or information, not so raised, and
>
> (c) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.
>
> (2) Nothing in subsection (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it.

The scope of the Crown Court's power to vacate a guilty plea on an appeal from the Magistrates' Court

19. Section 108 MCA 1980 contains what appears to be an absolute bar on an appeal to the Crown Court against conviction after a guilty plea in the Magistrates' Court. The higher courts have had to consider this question on a number of occasions, both before and after the introduction of the statutory bar. It is clear that the Crown Court does have a power to vacate a plea and remit to the Magistrates' Court for trial, but the circumstances where it may exercise that power are not entirely clear. This is important in the present issue because the prosecution contends that the Crown Court must exercise that power, and make a determination in favour of the appellant before it can go on to hear an appeal by way of re-hearing on a reference from the CCRC.

20. *R v Durham Quarter Sessions, ex p Virgo* [1952] 2 QB 1 contains the classic formulation of the test by Lord Goddard, Chief Justice, based on common law rather than an interpretation of statute. The predecessor provision to section 108 MCA 1980, the Magistrates' Court Act 1952, was only brought into force in June 1953. The defendant had been charged with stealing a motorbike. He had chosen summary trial and pleaded guilty, but in mitigation gave an account that was clearly a defence to the charge. The Divisional Court held that the Quarter Sessions had been correct to vacate the defendant's guilty plea and remit the case to the Magistrates' Court, on the basis that the effect of the events before the latter court had been to render the guilty plea a nullity.

21. In *R v Plymouth Justices, ex p Whitton* [1980] 71 Cr App R 322 the Divisional Court held that in the absence of any evidence at the time of the guilty plea in the Magistrates' Court such as suggested a guilty plea had been equivocal, there was no basis for the Crown Court to vacate that plea. One aspect of the decision of the Court, whether the magistrates were permitted to refuse to accept the remitted case, was later doubted but on the issue of vacating an equivocal plea, the decision is entirely consistent with the *Durham Quarter Sessions* case.

22. Lord Justice Watkins conducted a review of all the significant decisions on this topic in *R v Plymouth Justices, ex p Hart* [1986] QB 950 and reaffirmed the Court's approach that it was the events at the Magistrates' Court, and whether there was evidence of such events as ought to have led that court to have recorded a "not guilty" plea that was the test. He also made clear that the ability to remit the case to the lower

court after finding there had been an equivocal plea derived from the powers now contained in section 48 of the Senior Courts Act 1980.

23. Counsel referred in written submissions and in the hearing to the approach of the Court of Appeal Criminal Division to appeals following a guilty plea. Since there is no statutory bar on bringing an appeal against conviction to that court following a guilty plea in the Crown Court, and since that court is concerned only with the safety of the conviction, its approach to such cases is of very limited relevance to the issue in the present case.

24. The Divisional Court is not subject to the section 108 MCA 1980 limitation. In *R v Bolton Magistrates ex parte Scally and others* [1991] 1 QB 537 the Court dealt with the cases of a number of applicants who had entered guilty pleas to driving with excess alcohol in their blood. It later emerged that the tests used in all their cases may have been contaminated such as to render them unreliable. The reserved decision reviewed the boundaries of the power of the High Court to grant a quashing order wherein there had been an obvious injustice that had resulted in unequivocal pleas only proffered because of the flawed tests used by the police. The Court decided it had the power to make the quashing orders sought. In the course of his judgment Watkins LJ noted [545E] that, "*Seeing that they pleaded guilty in the magistrates' courts, they could not appeal to a crown court*". The Court also placed significant weight on the absence of any alternative remedy for the applicants, were the quashing order refused [545D to G and 548G]. The creation of the CCRC, some few years after the decision in *Bolton Magistrates ex parte Scally,* with a power to refer convictions following guilty pleas to the Crown Court on appeal from the Magistrates' Court may undermine this aspect of the Divisional Court's reasoning. Nonetheless, the proposition that a person who pleads guilty in the Magistrates' Court cannot appeal against conviction to the Crown Court unless the plea was equivocal remains sound.

25. The existence of a power in the trial court to allow a guilty plea to be vacated before sentence is well established and the criteria a court will apply are less restricted than on a later appeal. This is not the situation presently under consideration.

26. There are, however, two decisions of the Divisional Court that suggest that the Crown Court, in hearing an application to vacate a guilty plea that occurred before the magistrates, can apply a broader test than that articulated in *ex parte Virgo* and the subsequent cases mentioned above. These decisions allow the Crown Court to vacate a plea and remit to the Magistrates' Court where the plea was entered because of duress or coercion which occurred in court at the time of the plea, albeit covertly so that the justices were not aware of it. That is what happened in *R v Huntingdon Justices ex parte Jordan* [1981] QB 857. The Court, Donaldson LJ and Bingham J, dealt with the case of a woman, Mrs Jordan, who had entered a guilty plea before the magistrates to shoplifting. She subsequently sought to vacate her plea on appeal to the Crown Court, arguing that both the initial offence and her guilty plea had only occurred due to the threats from her husband, her co-defendant at the lower court. The Crown Court held that, assuming her assertions were correct, there was nevertheless no basis to vacate what had been an unequivocal plea before the magistrates. The Divisional Court granted the application for judicial review, stating [861D to G]:

> "What is submitted in this case is that there is no other way in which a Crown Court can intervene. It is said that if Mrs Jordan

> is seeking to change her plea, then she is too late. For my part I would accept that that is so. It is said that this is not a case of an equivocal plea. As to that I am not so sure. It may be a case of an equivocal plea or it may be a case which is sui generis. But whichever it be, I am satisfied that the Crown Court had jurisdiction to inquire into this matter, and should have inquired into it. If it came to the conclusion that Mrs Jordan, when uttering the words 'guilty' was doing an act which, if she had been applying pen to paper, would have qualified for the description 'non est factum', in other words her mind was overborne by the will of another, then they could have so found and sent the case back to the magistrates."
>
> But I must explain why. I am satisfied first of all that the Crown Court ought to have jurisdiction. It is a wholly absurd situation if it is a defence for a wife to prove that she committed the crime under coercion from her husband, but she loses the right to put that defence forward or to rely on that defence if the coercion is of so grave a character that she is unable to put forward a plea of not guilty. That is not to say that the law is that. I am saying that the law ought to be that.

27. Both members of the Court cited a previous decision of the Divisional Court, *R v Crown Court at Snaresbrook, ex parte Gavi Burjore* (20 December 1979, unreported), to the same effect. The Court quashed the decision of the Crown Court and remitted the case for a rehearing.

28. In *Cooper v New Forest District Council* 12 March 1992, Divisional Court, the Court cited *Huntingdon Justices ex parte Jordan* before holding that the Crown Court was able to vacate a plea when, as was not apparent at the time of the guilty plea before magistrates, there was a valid plea in bar of autrefois convict to one of the charges the applicant had admitted. Beldam LJ said: -

> In my judgment the Crown Court does have power to consider a plea in bar notwithstanding that an appellant has pleaded guilty. It seems to me that the rule that no person should be put in peril twice for the same offence is so fundamental that, when after a plea of guilty it is contended that there are grounds on which such a plea might be based, it is incumbent on the court to enquire into the circumstances to see whether such grounds do exist.

29. More recently in *R (on the application of Khalif) v Isleworth Crown Court* [2015] EWHC 917 (Admin) Lord Burnett, Chief Justice, reaffirmed the traditional limitation on any application for the Crown Court to vacate a plea before the magistrates when he said [8]:

> One of the complaints raised in the application to the judge to state a case was that he was wrong to treat the application to appeal out of time as being an application to vacate the guilty plea. That point is not pursued. The judge was right in that

> analysis. Section 108(1) of the Magistrates Courts Act 1980 [the 1980 Act] prevents an appeal from the Magistrates' Court against conviction following a guilty plea. However, it has long been the position that the Crown Court can investigate whether the plea of guilty entered in the Magistrates' Court was equivocal. If it concludes that was the case it can direct the Magistrates' Court to rehear the matter: See *R v Rochdale Justices ex parte Allwork* [1981] 3 All ER 434, 73 Cr App Rep 319, [1981] Crim LR 719 and *R v Plymouth Justices ex parte Hart* [1986] QB 950, [1986] 2 All ER 452, [1986] RTR 283. Before embarking upon an investigation at an oral hearing the Crown Court must be satisfied that there is a prima facie case that the guilty plea entered in the Magistrates' Court was an equivocal plea. An equivocal plea was described in *Allwork* as "I am guilty but": for instance, "I plead guilty to stealing, but I thought the article was mine". The question of whether a guilty plea in equivocal is confined to considering what happened before the court. That is because the rationale for concluding that a plea was equivocal is that the magistrates should not have accepted it in the light of what they were told, but rather should have directed a not guilty plea and proceeded to trial.

30. In the same decision Lord Burnett concluded his judgment noting [21]:

> We were provided with further evidence by the Claimant of the circumstances of his journey to the United Kingdom, including a transcript of his screening interview on 21 February 2006 and a recent short statement. Neither bore upon the decision of the Crown Court. The attempted appeal to the Crown Court was conditioned by s 108 of the 1980 Act and the constraints relating to equivocal pleas. The presentation of a detailed factual case to the Criminal Cases Review Commission with a view to their investigating and making a decision whether to refer the case to the Crown Court would not be so constrained. The Claimant may choose to take advantage of that statutory scheme, but the result would be entirely a matter for the CCRC.

31. It is clear that the power of the Crown Court to vacate a guilty plea on appeal from the Magistrates' Court is circumscribed. It is not as broad as the power of a trial court to permit a change of plea before sentence, or the power of the Court of Appeal Criminal Division to entertain an appeal against conviction following a plea of guilty in the Crown Court. It applies to an equivocal plea, that is one which the justices ought not to have accepted. Whether it extends to cases where the plea was entered under duress exerted in court at the very moment when the plea was entered, as held in *Huntingdon Justices ex parte Jordan,* may perhaps be open to question. The defence of marital coercion which was a part of the reasoning has now been abolished by statute. Whether it extends to the quite different situation which applied in *Cooper v New Forrest District Council* may be even more so. These decisions are not easy to reconcile with the line of authority that was expressed with clarity in *Durham Quarter Sessions, ex p Virgo*, affirmed after a review of all the relevant statutes and

precedent in *Plymouth Justices, ex p Hart* and confirmed more recently by Lord Burnett CJ in *R (on the application of Khalif) v Isleworth Crown Court*. One argument that troubled the Court in both *Huntingdon Justices ex parte Jordan* and *Cooper v New Forrest District Council* was the lack of any alternative means to secure justice. But the decision in *Bolton Magistrates ex parte Scally* might provide one such means, and the creation of the CCRC definitely does so. It is not necessary now to decide precisely what is the scope of the power of the Crown Court. The important thing for this case is that it is limited, and it is not at all clear that the Crown Court would have power to allow Mr Mills to vacate his unequivocal plea entered in the circumstances set out above. Neither is it necessary to say anything about whether *Bolton Magistrates ex parte Scally* would be decided the same way now, when such appellants can seek a referral of their cases by the CCRC rather than appealing by case stated to the Divisional Court.

The decision at Preston Crown Court

32. In March 2022 Mr Mills' case was listed at Preston Crown Court for directions after the CCRC's reference. The CPS wished to contend that the Crown Court should not proceed to an appeal by way of rehearing, until Mr Mills had successfully applied to vacate his pleas in the Youth Court. Written arguments were exchanged. The stance of the CPS and Mr Mills were the same as in the hearing before us. The CPS relied on a decision in the Crown Court of the Honorary Recorder of Preston, His Honour Judge Openshaw QC, in the case of *R v. F*, March 2002. The CCRC had mentioned *F* in its Statement of Reasons and had proceeded on the basis that the Openshaw judgment represented the law but, in the CCRC's view, on the facts of Mr Mills' case that hurdle might be overcome.

33. In *F* HHJ Openshaw QC was dealing with a CCRC reference and concluded that before the appeal could be heard and resolved, the Crown Court had to allow the earlier pleas to be vacated. In essence his ruling was founded on the absence in section 11 CAA 1995 of any words that repealed or disapplied section 79(3) of the Senior Courts Act 1981 (see [16-17] above), which provision preserves the customary practice of the Crown Court, particularly when hearing appeals. As that practice included the need to vacate a plea in the court below, that necessity subsisted notwithstanding the reference by the CCRC. Further, the effect of vacating a plea was to remove the consequent conviction, and that was a matter for the courts, not the CCRC. The Judge did, however, take the view that the fact the Crown Court was dealing with a reference allowed the court to consider vacating the pleas on a much broader basis than the usual limits of an equivocal plea, and further held that the whole scheme of the 1995 Act showed that Parliament's intention was that convictions referred to the Crown Court should be resolved by that court, and thus he declined to remit the case back to the Magistrates' Court.

34. His Honour Judge Altham, the Honorary Recorder of Preston, having heard argument on 16 May 2022 delivered a reserved judgment on 6 June. In his carefully reasoned ruling the Judge found that the words of the CAA 1995 pointed irresistibly towards not requiring the preliminary stage of vacating pleas: the terms of section 11 (see [10] above), "*A reference .... of a person's conviction shall be treated for all purposes as an appeal"* would not be met if the Crown Court inserted a preliminary stage that could deny a referred person any substantive appeal. HHJ Altham also asked, rhetorically, what jurisdiction the Crown Court would have to hear the appeal, as if it

permitted Mr Mills to vacate his pleas of guilty there would be no convictions left against which he could appeal. It is this decision that the CPS seek to have quashed in the instant application.

35. **The submissions**

36. We received written and oral submissions on behalf of the Claimant and both interested parties. I express my gratitude to all Counsel for their exhaustive research and focused submissions. To summarise them:

i) On behalf of the CPS, Paul Jarvis argued that neither the statutory scheme nor any practical difficulty required or permitted a defendant referred by the CCRC to avoid the need to vacate their earlier guilty pleas before the Crown Court could entertain their appeal. Absent that preliminary stage, argued Mr Jarvis, it would be open to any defendant to apply to the CCRC many years later and proceed directly to an appeal by way of rehearing at a time so distant from their impugned conduct that the prosecution would have no realistic possibility of presenting their case, regardless of the merits at the time of the original proceedings. He relied on the Openshaw judgment as persuasive authority. In argument Mr Jarvis developed the further argument that to allow a reference by the CCRC to, in effect, vacate the earlier guilty plea would be to place a defendant who took that route at an unjustified advantage to one who pursued an appeal under section 108 MCA and applies for an extension of time and the vacation of the guilty plea invoking the jurisdiction of the Crown Court described above.

ii) On behalf of Mr Mills, Francis FitzGibbon KC, Jennifer Twite and Stephen Knight argued that the words of section 11 CAA 1995 were simple and unambiguous, making clear that appellants referred by the CCRC are entitled to an appeal by rehearing whether or not they had originally entered guilty pleas. They commended and adopted the decision of His Honour Judge Altham and prayed in aid the observations of Sir Duncan Ousley, in giving the CPS permission to apply for judicial review, who expressed the view that while the decision of HHJ Altham was "*plainly right*", the status of Judge Openshaw's decision should be considered by this Court. Counsel also submitted that the arguments of both the CPS and the CCRC were mistaken in portraying the stance of Mr Mills and HHJ Altham as being that the CCRC reference automatically vacated the historic plea, whereas in fact the plea continued to stand until vacated by the court but did not prevent the Crown Court from conducted an appeal by rehearing. It was further submitted on Mr Mill's behalf that the CCRC was mistaken in its assertion that the Openshaw judgment had been routinely applied in other references without causing any difficulties. Two discrete applications were made on Mr Mills' behalf, first that the Court should deny the CPS any remedy on the basis of their conduct of the appeal, and second to call evidence to show the CCRC were mistaken in asserting the Openshaw judgment had been widely applied. In the course of the hearing Mr FitzGibbon, wisely in my view, did not pursue either application: the former as he accepted the point made by Sir Duncan Ousley of the need to resolve the conflicting judgments of HHJ Altham and HHJ Openshaw QC; the latter as in argument the Court expressed the view that our

central focus should be what the law is, and what the CCRC viewed as the current practice was of limited relevance.

iii) The central concern of the CCRC, as expressed in written and oral submissions by Philip Rule KC, was to retain the important constitutional distinction between the roles of the CCRC and the courts, whereby only the courts have the power to overturn or uphold convictions. Mr Rule made it clear in the course of the hearing that were the interpretive options to be the preservation of the need to apply to vacate, *or* a finding that the CAA 1995 simply circumvented that step, thus leaving the original convictions in place unless and until overturned by an order of the Crown Court, then the CCRC's stance would simply be to seek to assist the Court rather than urge either option upon us.

Discussion

37. The words used by the legislature are the starting point, as always. The words of section 11(2) of CAA 1995 state, "*A reference under subsection (1) of a person's conviction* ***shall be treated for all purposes as an appeal*** *by the person under section 108(1) of the Magistrates' Courts Act 1980 against the conviction (****whether or not he pleaded guilty****)*[emphasis added]*"*: In my view the words "*treated for all purposes as an appeal*" can only mean, in the way the term "appeal" is used in this legal context, an appeal by way of rehearing. Thus, the CAA 1995 empowered the CCRC to oblige the Crown Court to hear an appeal. If I was in any doubt on the point, which I am not, the addition of the bracketed words, "*whether or not he pleaded guilty"* puts the position beyond argument.

38. Were the position otherwise, the insertion of the preliminary stage of an application to vacate a plea would frustrate the purpose of section 11. If the application to vacate was refused, the applicant would never have an appeal. If the application were granted, there would be no conviction left against which the Crown Court could entertain an appeal and it could only remit the case for a rehearing, the point made with great clarity by HHJ Altham in his ruling on the point. Mr Jarvis, for the CPS, attempted to persuade us that the word "appeal" can be used so broadly so as to encompass the preliminary stage of an application to vacate. The strongest support for this comes from *R v Plymouth Justices, ex p Hart* which held that when the Crown Court found there had been an equivocal plea they could remit to the magistrates for a rehearing, under the provisions now re-enacted by section 48 of the Senior Courts Act 1980, which allows such a remission "*On the termination of the hearing of an appeal the Crown Court".* While I accept there may be occasions where the preliminary stage could be analysed as part of an "appeal", the inevitable implication of the CPS's stance would be to extinguish the possibility of any other, fuller appeal in the Crown Court, and such a limitation simply fails to meet the breadth of the language of section 11. This point was not satisfactorily resolved in *F.* There, HHJ Openshaw found that section 79(3) SCA 1981 required an application to vacate a guilty plea before a re-hearing could take place, but then felt free to modify the customary practice of the Crown Court to give effect to the CAA 1995 by broadening the scope of the power to vacate pleas following a reference by the CCRC and conducting an appeal by rehearing in a case where the plea was vacated rather than remitting the case to the Magistrates' Court. This was an inconsistent and logically unsupportable approach to

the impact of section 11 of the CAA 1995 on the practice in relation to appeals in the Crown Court.

39. Although the CCRC referral mechanisms to the Crown Court and the Court of Appeal are different, there is support for my conclusions in a comparison of the two. The powers of the CCRC to refer cases to the Court of Appeal and the Crown Court are in sections 9 and 11 respectively: subsections (2) of both sections are in very similar terms:

i) Subsection 2 of section 9:

> A reference under subsection (1) of a person's conviction shall be treated for all purposes as an appeal by the person under section1 of the 1968 Act against the conviction.

ii) Subsection 2 of section 11:

> A reference under subsection (1) of a person's conviction shall be treated for all purposes as an appeal by the person under section 108(1) of the Magistrates' Courts Act 1980 against the conviction (whether or not he pleaded guilty)

40. Neither section 9 or section 11 CAA 1995 specifically modify or disapply the preliminary filter stages of the normal appeal process, "leave" under section 1 CAA 1968, and the need to vacate a previous guilty plea by way of section 108 MCA 1980 and consequent jurisprudence. It seems to me that the provisions of CAA 1995 that apply to the two types of CCRC referrals must have been drafted to be consistent with one another. The effect of a CCRC reference to the Court of Appeal avoids the need for leave to be given and an extension of time granted by the Court. In just the same way, section 11(2) removes the procedural hurdle presented by section 108 of the MCA and its bar to appeals following guilty pleas. It does not follow from this that the effect of the referral is to vacate the plea.

41. If the effect of section 11 CAA 1995 is to simply circumvent the "vacation of plea" stage in a CCRC referral to the Crown Court, the fear that the CCRC may exceed its role by overturning convictions is without substance. The conviction stands until quashed by the Crown Court.

42. Mr. Jarvis relied on a concern expressed in *F* that the effect of holding that a CCRC reference avoids the section 108 MCA 1980 limitation could lead to appeals by way of rehearing being advanced long after the criminal conduct that had led to the original conviction. Both the passage of time and the police's disinclination to carry on investigating and securing evidence of a crime once the accused pleaded guilty, could pose an impossible burden on the police or prosecution in seeking to prove a case at an appeal by way of rehearing. Why should an appellant by way of a CCRC reference be given the advantage of starting with a clean slate when an appellant by the normal route would have to reopen his or her plea? In my view there is a perfectly sound legal route to avoid disadvantaging the police or prosecution in the situation envisaged by the CPS's argument, but first there is a need to be realistic about how the CCRC functions.

43. The *Criminal Cases Review Commission Annual Report and Accounts 2021/2022* reveals that since it began its work in 1997, the CCRC has referred about 3% of the applications it received. In 2021/2022 the CCRC referred 26 cases, including that of Mr Mills. The time between an application being made and referred for appeal by the CCRC is hugely variable. In Mr Mills' case his referral was just over 4 years after his application. This may not be a typical figure, but it provides an illustration of how long and arduous a process the CCRC route to an appeal can be. It seems unlikely that any would-be appellant would cynically choose to wait for some years then apply to the CCRC to gain advantage over the otherwise restrictive provisions of section 108 MCA 1980. Further, in the situation hypothesised by the CPS, the CCRC are hardly likely to refer a case back when the passage of time denies them any detailed knowledge of the events surrounding the conviction. In addition, the CCRC's test for referral is within section 13 CAA 1995 and, in the absence of "*exceptional circumstances*", will not refer a conviction for appeal unless there has already been an appeal attempted and the new application is based on fresh evidence or argument. A final and irrefutable indication that Parliament intended to treat those referred to the Crown Court by the CCRC in a different manner than those pursuing the normal route is that section 11(6) provides, "*On a reference under this section the Crown Court may not award any punishment more severe than that awarded by the court whose decision is referred*", in contrast to the practice on a normal appeal to the Crown Court whereby the customary rehearing, as preserved by section 79(3) of the Senior Courts Act 1981, leaves an unsuccessful appellant against conviction or sentence at risk of a harsher penalty. It does not seem to me, therefore, arguable that Parliament intended to treat CCRC referees and normal appellants in an identical manner, nor is the prospect of a would-be appellant taking tactical advantage of the two routes to appeal, were that ever the suggestion, remotely likely given the rigours and uncertainties of an application to the CCRC.

44. There could be cases referred for appeal to the Crown Court where the passage of time creates serious evidential difficulties in an appeal by way of rehearing. In that regard, it should be recalled that the plea of guilty is an admission of guilt which would be admissible in evidence at the re-hearing. In argument in this case, the Court raised the possibility of the use of section 74 of the Police and Criminal Evidence Act 1984 ["PACE"], whereby a subsisting conviction raises a presumption of guilt, rebuttable on the civil standard of proof. Mr Jarvis, for the CPS, made the very sound point that an appeal hearing that started with even a civil standard presumption of guilt could hardly be consistent with the idea of an appeal by way of rehearing. This is obviously right. The same problem, however, does not touch an alternative route to the admission of the earlier guilty plea, namely section 76 of PACE which permits the admission of a confession subject to a series of safeguards. No doubt there would be cases where the CPS, in the light of the CCRC's researches, would choose not to seek to adduce the earlier plea as confession evidence, and any such application could be declined by the judge hearing the case either by way of the section 76 safeguards or the general exclusionary provisions of section 78 of PACE. Nonetheless, the existence of this possible route to reliance on an earlier guilty plea does answer the concern raised in argument by Mr Jarvis and in his judgment by Judge Openshaw. The admission of guilt, if admitted in evidence, would be *prima facie* evidence of guilt. In the absence of any compelling explanation of why it does not prove the offence a court could then dismiss the appeal on the merits.

45. The Court of Appeal have previously considered the use of an earlier guilty plea as a confession in *R v Rimmer* [1972] 56 Cr App R 196, a case in which a defendant charged with the burglary of a sailor's suit had pleaded guilty to the theft of the same, then later persuaded the magistrates, for reasons that do not appear in the law report, to allow him to vacate his plea. Thereupon, after the suit had been returned to the sailor who had left with his ship, the accused elected trial by jury. At his trial the judge, the Deputy Chairman of the Quarter Sessions, permitted a police officer to give evidence of the withdrawn guilty plea both to explain the absence of the mate of the same ship, a witness of some significance who had by then also sailed away, and on the grounds that it went to the general picture before the jury. The Court of Appeal held that the Deputy Chairman had been wrong to admit the earlier plea without considering whether its prejudicial impact outweighed its probative value, and without making any enquiry as to why the lower court had permitted the plea to be withdrawn. The Court of Appeal then dismissed the appeal under the proviso on the basis of the strength of the evidence against the appellant Rimmer. In giving the judgment of the Court Lord Justice Sachs held that a guilty plea amounted to a confession and was potentially admissible. That is plainly right. His Lordship also commented [201]:

> Whether in any individual case the evidence as to the previous plea and its withdrawal should be admitted into evidence is plainly a matter for the discretion of the trial judge, who must most carefully examine whether indeed the probative value does exceed the prejudice which would be induced by the admission of such evidence. In the vast majority of cases in practice the result of such an examination would be that the evidence would not be admitted. Indeed, the occasions on which it is likely to be regarded as admissible will, of their nature, be rare. In each case that question must be decided, as it was in the present case, by an examination of the relevant facts upon what is often referred to as a trial within a trial.

46. There are a number of reasons, with respect, for treating Sachs LJ's observations on the admission of such confession as being a "rare" occurrence with great caution, at least in the present context. The Court in *Rimmer* was dealing with a plea which had been withdrawn with the permission of a court, whereas in the present situation, a rehearing after a CCRC reference, no such decision will have been made. Further, the observations in *Rimmer* were made long before the passage of PACE which changed this area of the law profoundly and sets out the applicable tests within both sections 76 and 78 of that Act. In my view the decision whether to admit an earlier guilty plea as a confession is one to be taken by the Judge in any appeal on the basis of the criteria within the statute, but without any predisposition to either admission or exclusion.

47. My conclusion on the central issue in this application is proffered significant support by the observations of Lord Burnett, Chief Justice, in *R (on the application of Khalif) v Isleworth Crown Court* [2015] EWHC 917 (Admin) at [21], that,

> The attempted appeal to the Crown Court was conditioned by s 108 of the 1980 Act and the constraints relating to equivocal pleas. The presentation of a detailed factual case to the

> Criminal Cases Review Commission with a view to their investigating and making a decision whether to refer the case to the Crown Court would not be so constrained. The Claimant may choose to take advantage of that statutory scheme, but the result would be entirely a matter for the CCRC.

48. Although *obiter*, so recent an articulation of the law by the Lord Chief Justice is obviously of great significance.

Conclusion

49. As will be apparent from the discussion above I would, if my Lord agrees, refuse the Claimant's application for judicial review of the decision of His Honour Judge Altham of 6 June 2022 and endorse the conclusion he reached. This appeal should now proceed in the Crown Court by way of a re-hearing.

Lord Justice Edis

50. I agree.