



Neutral Citation Number: [2023] EWHC 2464 (Admin)

Case No: CO/2565/2023

**IN THE HIGH COURT OF JUSTICE**  
**DIVISIONAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 6 October 2023

**Before :**

**LORD JUSTICE EDIS**  
**MR JUSTICE GARNHAM**  
and  
**MR JUSTICE JOHNSON**

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**Between :**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**Claimant**

**- and -**

**THE CROWN COURT AT LUTON**

**Defendant**

**-and-**

**(1) JORDAN TONER**  
**(2) MICHAEL THOMPSON**

**Interested**  
**Parties**

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**Duncan Atkinson KC** and **Denis Barry** for the Claimant  
The Defendant and the Interested Parties were not represented  
Hearing date: 26 July 2023

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**Approved Judgment**

This judgment was handed down by release to The National Archives  
on 6 October 2023 at 10.30am.

## **Lord Justice Edis**

1. The Director of Public Prosecutions seeks orders quashing the decisions of two Recorders sitting at the Crown Court at Luton to decline jurisdiction in two otherwise unrelated cases on the ground that there had been an error in the procedure adopted by the magistrates' court in sending or committing the case to the Crown Court. The defendants in those criminal proceedings are interested parties in these proceedings, but have taken no part in them. As is conventional, the defendant, being a court, has also taken no part. We give permission to claim judicial review in both cases and will now proceed to determine the claims.
2. The challenges are as follows:-
  - (1) Michael Thompson: the challenge is to the decision of Mr. Recorder Johnson on 16 June 2023 that he had no jurisdiction to sentence the offender for offences to which the interested party had indicated guilty pleas in the magistrates' court.
  - (2) Jordan Toner: the challenge is to the decision of Mr. Recorder Cohen on 23 June 2023 that he had no jurisdiction to sentence the offender for offences incorrectly sent for trial, in view of the approach of the Court of Appeal in *R v. Clark* [2023] EWCA Crim 309; [2023] 2 Cr App R 4.
3. The case was heard at the same time as two appeals in the Court of Appeal (Criminal Division), *R v. Butt* and *R v. Jenkins*, one of which raised some similar issues.

### **Statutory and procedural framework**

4. Although we heard these cases at the same time, and we will hand down our judgments on the same day, in these Divisional Court proceedings we will follow our own decision in *R v. Butt* and *R v. Jenkins*. That judgment contains an analysis of the legal position which we simply adopt in this judgment. The Court of Appeal decision will be deemed to be handed down first, and is binding on this court.
5. That judgment contains a description of the Common Platform, which was in use at the Luton Magistrates' Court and Crown Court. It was used for both of these cases, having arrived at Luton in the first half of 2022. This means that the document which records what happened in the magistrates' court is called the "Court Extract".

### **Jordan Toner**

6. On 4 February 2022, Jordan Toner was the front seat passenger in a vehicle which was seen by police to drive through a junction against a red light. The police officers stopped the vehicle. The vehicle smelled of cannabis. Both Mr Toner, and the driver, admitted they had smoked cannabis earlier that evening.
7. In the vehicle the officers found three mobile phones, digital scales and a black Armani bag containing a plastic zip lock bag containing 16 individual bags of cannabis of various weights. The drugs and digital scales were located in the front passenger door pocket. Mr Toner's mobile phone was examined. Communications consistent with drug dealing were recovered.

8. Mr Toner was in possession of £340 cash, a bag containing cocaine, and a small bag of cannabis. DNA from the packaging linked to Mr Toner.
9. He was charged with 5 drugs offences: (1) possession of a class B drug (cannabis) with intent to supply, (2) possession of a class B drug (cannabis), (3) possession of a class A drug (cocaine), (4) being concerned in the supply of a class A drug (cocaine), and (5) being concerned in the supply of a class B drug (cannabis). All of these offences are triable either way.
10. He appeared before the Luton Magistrates' Court on 5 January 2023. The Court Extract says that the defendant indicated a plea of guilty to charges (1), (2) and (3). This document says "Indicated plea: Not guilty or none" in relation to charges (4) and (5). He was sent for trial to the Crown Court at Luton in respect of all 5 charges, purportedly pursuant to section 51(1) and 51(2)(b) of the 1998 Act. The Better Case Management Form, completed by the Legal Adviser sitting with the lay justices, sets out the charges in a different order from the Court Extract. Using the numbering in the Extract, the BCM records guilty pleas to charges (1), (2), and (3), and a guilty plea to (5) "if alternative to (1)". It records a not guilty plea to charge (4). In the space on the form where the parties are required to identify the "real issues in the case" the following appears:-

"Accept being concerned in supply and possession of cannabis.  
Accept possession of cocaine but not being concerned in the  
supply of this drug."
11. On 6 February 2023 there was a hearing in the Crown Court which was adjourned to allow for the sending sheet from the magistrates' court to be corrected, and for basis of plea documents to be submitted. The error which had by then been identified was that the magistrates' court had apparently sent Toner for trial on the three counts to which he had indicated guilty pleas. They should have committed him for sentence under section 14 of the Sentencing Act 2020. It was not suggested that it was wrong to send charges (4) and (5) for trial. In due course those two charges appeared on a validly drawn indictment in the Crown Court.
12. The case was relisted on 21 February 2023. No corrected sending sheet had been received. The defendant was arraigned in relation to a two-count indictment which reflected charges (4) and (5). He pleaded guilty to charge (4) and not guilty to charge (5). These pleas were said by the judge, in a widely shared comment on the Digital Case System to be "adequate" and a basis of plea was accepted. The judge also recorded that it was "clear that Mags Court should have committed for sentence non-indictment matters."
13. There was clearly communication between the Crown Court and the magistrates' court because on 7 March 2023 this extract from the Common Platform was uploaded on to the Digital Case System by the Legal Adviser who had sat with the justices and completed the BCM Form on 5 January 2023:-

**"Case notes**

Please note I have been advised by common platform team that it is not possible to change the result on this case as there have

been subsequent hearings at the CC. I have been advised since I can't amend the team has advised all I can do is to make a case note to set out the correct provisions that should have been used for sending. Therefore, please note for TONER Offence 1. (possession with intent to class B dated 05/02/22) and 2. Possession of Class A drug dated 04/02/22 and 3. possession of Class B dated 04/02/22 should have resulted as being committed for sentence to St Albans Crown Court under section 14 of the SA 2020.

Faith Nkomo 28 February 2023, 5:03pm”

14. The case was listed for sentence on 30 March 2023. It was considered that the Court could not sentence him for offences to which he had pleaded guilty but which had been incorrectly sent for trial. The judge noted in a widely shared comment:-

“Case listed for sentence again - still not clear that the error has been addressed! The magistrates’ have not committed the offences for sentence as far as I am aware and retrospectively trying to amend the record won't help, whether it's successful or not(!). Ct to contact the magistrates’ court and this case will be listed for sentence (both Ds) on 11th May when I hope that it can proceed.”

15. On 11 April 2023, District Judge (Magistrates’ Court) Buttar, sitting in the magistrates’ court, used the power under section 142 of the 1980 Act to set aside the original sending sheet. She committed the defendant for sentence pursuant to section 14 of the Sentencing Act 2020 for the offences to which he had indicated guilty pleas on 5 January 2023.

16. The case came before Mr Recorder Cohen for sentence on 11 May 2023. He considered that he had no jurisdiction to sentence the defendant. He said:

“Having carefully considered the judgment of the Divisional Court in *R v Clark*, it was clear to me that the mistake of Luton Magistrates Court in sending the case to the Crown Court in Toner via s.51 was precisely the same as that in *R v Clark*. The higher court was very clear in *R v Clark* that the only way to correct the error of the Magistrates Court (it now being *functus officio*, having already sent the case) was for the Prosecution to judicially review its decision to send the case under s.51 of the Crime and Disorder Act 1998. In that way, the Divisional Court could thereby quash it. I adjourned the matter, pending the bringing of judicial review proceedings.”

17. The case was again listed before Mr Recorder Cohen on 23 June 2023. He again declined to sentence, and said:

“It is my strong view, having re-read *R v Clark* yet again, that this is binding authority upon me and that I have no power to

go behind it. Nor am I able to distinguish it from the case currently before me, given that the facts are entirely on all fours with each other. It is doubtless the correct current legal position that in a case involving an irregular sending sheet (where a guilty plea is entered below but the matter is sent under s.51 of the Crime and Disorder Act 1998), the Crown Court has no power to correct the error, and nor can the Magistrates Court seek to correct its mistake in light of its *functus officio* status. In the current case, [DJ(MC)] Buttar's valiant efforts to correct the Magistrates Court's earlier mistake was therefore sadly, for naught.

For the same reason, I would be in no position to sit as a District Judge under s.66 of the Courts Act 2003. I appreciate that the Prosecution now seeks to argue that *R v Clark* was wrongly decided, having misapplied the case of *R v Gould* [2021] 1 WLR before it. The Prosecution now says that in a case where the sending sheet is "bad on its face", *R v Gould*, properly interpreted, would allow me to proceed to sentence today. However, I cannot accept that this is the position. In *R v Clark*, the Divisional Court was fully apprised of the issue to be determined (ie: an incorrect sending sheet). It was open to that Court to draw any distinction with *Gould* that it wished to in order to reach a decision opposite to the one that it did. But, it was plainly the view of that Court that the only way to correct a mistake of the Magistrates of the type now described was for the Divisional Court to quash it. I am bound by that view and I abide by it."

### *Submissions*

18. Mr Atkinson KC, for the Director of Public Prosecutions, submits that the Recorder was wrong to conclude that he had no jurisdiction to sentence the defendant. The original sending sheet was bad on its face. It followed that the Crown Court had, at that point, no jurisdiction to deal with the case. However, the magistrates' court had the power to correct the position under section 142 of the 1980 Act, and that is what it did. Once the case was correctly committed to the Crown Court there was jurisdiction to sentence.

### *Discussion*

19. The judgment in the cases of *R v. Butt* and *R v. Jenkins* was handed down just before this judgment. It holds that the decision in *R v. Clark* should not be followed on this procedural issue because it is inconsistent with a series of authoritative decisions culminating in *R v. Ayhan* [2011] EWCA Crim 3184 and *R v. Gould* [2021] EWCA Crim 447. There are, in any event, distinctions on the facts between *Clark* and the present case. These are to be found in the note from Ms. Nkomo, the Legal Adviser, dated 28 February 2023 and the decision of the District Judge on 11 April 2023. The first of these, which should be read with the BCM Form, shows that the Legal Adviser made a resulting error in recording the order which the magistrates had made. They

had not sent for trial the three charges to which Toner had entered guilty pleas. They had committed him for sentence, and the Legal Adviser had made a resulting error.

20. Paragraphs [39]-[99] of the judgment of the Court of Appeal Criminal Division in *R v. Butt* and *R v. Jenkins* contain an analysis of the scope of the principle in *Ayhan*, and also of the circumstances in which a Crown Court may conclude, following *Gould*, that a sending or committal is bad on its face with the result that the magistrates' court still has jurisdiction to correct it. Following *Ayhan*, if the Crown Court concludes that there was a "resulting error" and is satisfied that the magistrates made a correct order despite the terms of the Court Extract, then it may proceed to deal with the case. This applies where the magistrates committed for sentence, but the record shows that they sent for trial. On that basis, the Case Note by Ms. Nkomo was a sufficient basis on which the Crown Court at Luton could have sentenced Toner for the three offences to which he had pleaded guilty before the justices.
21. Following *Gould* at [80], quoted at [96] of the judgment in *R v. Butt* and *R v. Jenkins*, on the facts of this case the same result could have been achieved in a different way.
22. The Court Extract in this case shows that the magistrates made an order in respect of each of charges (1), (2) and (3): "**Sent for trial under:** Section 51(1) & (2)(b) of the Crime and Disorder Act 1998 **Indicated Plea: Guilty.**" The pleas were confirmed by the Better Case Management Form which, as may often be the case, is valuable evidence of what actually happened. In the light of what happened, the sending of these three charges for trial was bad on its face and it was open to the Crown Court to hold that nothing had occurred which was capable of conferring any jurisdiction to deal with them. That is, in effect, what it did. That was a decision that the case had "never left the magistrates' court" which was not therefore *functus officio*. The DJ(MC) was then entitled to do as he did and make a valid order committing for sentence exercising the power under section 142 of the Magistrates' Courts Act 1980. The Recorder was wrong in holding that this was of no effect.
23. It follows therefore that we quash the decision of Mr. Recorder Cohen that the Crown Court has no power to sentence Toner on charges (1), (2) and (3). This decision was made by a court and involved an error of law in failing to distinguish *Clark* on the grounds we have identified and, further, in following it. This determination involves no criticism of Mr. Recorder Cohen. If those errors of law had not been made there was only one conclusion to which he could have come, namely that he was required to sentence for these offences which were properly before him. In those circumstances we will exercise the power under section 31(5)(b) of the Senior Courts Act 1981 to substitute this decision for that reached by the Recorder. The case should be listed for sentence as soon as possible in the usual way.
24. Very fairly, the prosecution has raised the issue of whether this claim is barred by section 29(3) of the Supreme Court Act 1981 which provides:-

"In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court."

25. This case concerns the question whether the Crown Court was entitled to sentence a defendant who had entered pleas of guilty in the magistrates' court. It is about the jurisdiction of the Crown Court in relation to matters other than a trial on indictment. In those circumstances we do not consider that judicial review is ousted by section 29(3) of the 1981 Act.

### **Michael Thompson**

#### *The Facts*

26. On 21 December 2022, police officers executed a search warrant at 6 Dumfries Court, Luton. As they arrived at the top floor of the block of flats, Michael Thompson was walking out of the flat. He was making a call at the time and the name on the screen was 'Ace'. Thompson was detained and searched. A self-seal bag containing nine plastic bags containing 2.59 grams of cocaine was found in his tracksuit top pocket.
27. Thompson was in possession of two mobile telephones. When examined, these were found to have messages indicative of the dealing of cocaine and cannabis on them, including 'mailshots'. A video was also located on one of the phones which showed packaging of herbal cannabis.
28. Also in the flat was a black wash bag containing 197-199 grams of cocaine with a street value of around £19,900, and 98 deal bags. A further 6 small push seal bags containing cocaine were recovered. One of the bags weighed 0.32 grams. Additionally, a black plastic bag containing 4.09 grams of cocaine was found on the bottom shelf of a kitchen cupboard. Thompson's fingerprints were located on the black carrier bag which contained cocaine.
29. The small one-bedroom flat was searched and there was a small cannabis crop growing in the first bedroom with plants, one heat lamp and one fan. There were 21 individual plants at different stages of growth. In addition, seven small clear push seal bags containing herbal cannabis, with a street value of £430, were recovered and an open plastic container of cannabis was found in the bottom drawer of the freezer.
30. Officers also found three sets of digital scales, two of which had residue of either white powder or cannabis, a further Nokia mobile phone, two Sim cards, several push seal clear bags and a knuckleduster.
31. Also located was £1,925 in cash, together with £530 in a box, which was located locked in a small black safe in the kitchen. The key was found on the small table in the front room. £150 was found in Thompson's wallet in the living room.
32. Thompson was interviewed on the same day, with a solicitor, and he answered no comment to all questions asked. He was re-interviewed on 22 December 2022 and provided a prepared statement in which he said he was a cannabis user and that he purchased cannabis in bulk. He said he had friends and people who came into his flat on a regular basis. He admitted possession of the knuckleduster. He said he had 2 mobile phones but other people used them. He then answered no comment to all questions asked.

#### *The Charges*

33. Michael Thompson was charged by the police with (1) production of a controlled drug, namely 21 cannabis plants; (2) possession of a class A drug (cocaine) with intent to supply; (3) possession of an offensive weapon in a private place; (4) possession of a class B drug (cannabis) with intent to supply; (5) possessing criminal property, namely £3,500 in cash. Charges (1), (2), (4) and (5) could be tried either way. Charge (3) is a summary only offence.

*The Proceedings in the Magistrates' Court*

34. He appeared before the Luton Magistrates' Court on 23 December 2022. The agreed position of the parties, the Better Case Management Form and the Applicant's contemporaneous record of the hearing were all to the following effect:
- (1) The Court undertook the procedure to determine the appropriate venue for trial of the offences, pursuant to section 17A, Magistrates' Court Act 1980;
  - (2) The Court declined jurisdiction in relation to the offences contrary to section 5(3), Misuse of Drugs Act 1971 and section 329, Proceeds of Crime Act 2002. These offences were sent to the Crown Court pursuant to section 51(1) and (2)(b), Crime and Disorder Act 1998;
  - (3) Thompson pleaded guilty to the offences contrary to section 4(2), Misuse of Drugs Act 1971 (production of cannabis) and section 141, Criminal Justice Act 1988 (offensive weapon). He was committed to the Crown Court for sentence for these offences, pursuant to section 14, Sentencing Act 2020.
35. The Better Case Management Form records "GP" in relation to the charges of production of cannabis and possession of an offensive weapon in a private place. The charges of possession with intent to supply are recorded as "NG Plea indicated" and "NGP" is recorded in relation to money laundering. The "Real Issues" box contains the words "denies intent to supply". The Legal Adviser has recorded that no PSR was recorded in relation to Guilty Pleas entered/indicated saying "There were also NG pleas indicated to other linked offences". This note, recorded in Part 2 of the BCM Form, at or after the hearing, confirms what actually happened.
36. This is at odds with the result recorded on the Common Platform which recorded that each of the offences, including the summary only offence relating to the offensive weapon, had been sent for trial pursuant to section 51(1) and (2)(b), Crime and Disorder Act 1998.

*The Crown Court*

37. Thompson appeared before the Crown Court at Luton on 30 January 2023. He faced a three-count indictment, which included the offences contrary to section 5(3) of the Misuse of Drugs Act 1971 and section 329 of the Proceeds of Crime Act 2002. He was arraigned and pleaded guilty. His case was adjourned for the preparation of a psychiatric report. His case was listed for sentence for all five offences on 2 May 2023. It was at that stage identified that the magistrates' court record did not record his guilty pleas. As this was contended to be an error on the face of the record, the case was adjourned to allow the magistrates' court record, if appropriate, to be corrected.



38. The magistrates' court Legal Adviser responded on 3rd May as follows:

“It is correct that I was the LA in court on that date but I had assistance with resulting on that date so do not know if the case was resulted by me on CP.

I have looked at the result recorded on 23.12.22. On the plea page it shows the following:-

Produce class B cannabis – plea is blank and court directs trial by jury

Poss with intent to supply class A crack cocaine – indicated not guilty – court directs trial by jury – then guilty plea

Poss offensive weapon in private place – plea is blank

Poss with intent to supply class B cannabis - indicated not guilty – court directs trial by jury – then guilty plea.

Acquire/possess criminal property - indicated not guilty – court directs trial by jury – then guilty plea

The results as recorded above are recorded incorrectly. It may be that the guilty plea was an indication and recorded in the wrong place. All the offences appear to have been sent rather than any committed for sentence. The court certainly would not have taken a plea on the poss offensive weapon in a private place as it is a summary offence. No plea would have been taken and the Crown invited to make representations as to whether it was linked to the matters being sent for trial.

I cannot remember the hearing as it was back in December. I cannot be satisfied from looking at the record that the error is that there was guilty pleas that were committed for sentence as I would have normally noted that on the BCM form and reflected that with further information. Pleas are often indicated on the BCM form following a determination of trial venue after no indication of plea. I am not prepared to simply amend the result due to the enquiries that I have made.

The case will need to be re-listed before the court rather than a resulting amendment.”

39. It is not clear which record the Legal Adviser is describing here. The Court Extract which is on the Digital Case System does not record any pleas. The words “then guilty plea” in relation to the three offences which were properly sent for trial and to which Thompson pleaded guilty in arraignment in the Crown Court cannot refer to anything which happened on 23 December 2022. It is no criticism of her to say that her response to the request for assistance did not resolve the problem.

40. The case was further adjourned on 5 May 2023 to allow the parties to make representations to the Legal Adviser, sharing their recollections of the hearing on 23 December. Mr. Recorder Andrew Johnson presided over this hearing, and all subsequent hearings in the Crown Court. He also invited the prosecution to provide a statement from its agent at the magistrates' court as to what had occurred.
41. On 13 June, the prosecution preferred a new indictment which included the production offence (section 4(2), Misuse of Drugs Act 1971), and a section 51 Schedule relating to the summary only offensive weapon offence. On 16 June 2023, Mr Recorder Johnson concluded that this indictment could not be valid, because it included offences to which Thompson had already pleaded guilty, and he proceeded to sentence for the other three offences which had validly been sent to the Crown Court. He declined to sentence for the two offences which had been admitted in the magistrates' court, and directed that the prosecution should indicate whether they sought to proceed with those or not. He deferred sentence on the three counts on the Indictment which, everyone agrees, were validly before him. That sentence is deferred on terms until December 2023.
42. In reaching his conclusion, the Recorder relied on the decision in *Clark*. He said:-

“In that case, the justices were recorded as having sent for trial offences which, it was agreed, had been admitted. The Court of Appeal rejected a joint submission that this was merely an administrative error, which the Crown Court could look behind. The Court concluded that the error was a fundamental one which failed to confer jurisdiction on the Crown Court. The sending for trial was ‘obviously invalid because a guilty plea had been entered and there was therefore no jurisdiction in the magistrates’ court to send the breach offence for trial’. The error could not be rectified by either the magistrates’ court or the Crown Court. It was necessary for the unlawful sending to be quashed, which could only be done by the High Court, and thereafter a committal for sentence effected, before the Crown Court could proceed to sentence the defendant. It seems to me that the same must be true here. There is no dispute that the defendant entered guilty pleas. There was, therefore, no jurisdiction to send the offences for trial – so there was either an unlawful sending, or there was a lawful (but unrecorded) committal for sentence.”

43. The Recorder's reasons for refusing to allow the prosecution to prefer a new indictment were that “it would be irrational for me to permit the defendant to enter a guilty plea before this court to offences that both parties maintain he admitted and was convicted of by the magistrates’ court.” Also, he observed that such an approach had not been adopted in *Clark*. Further considering *Clark* he observed (at paragraphs 18-19):

“If this case cannot be distinguished from *Clark*, then there is no jurisdiction to proceed to deal with the production of cannabis and of the possession of an offensive weapon in a private place by means of the committal for sentence. It seems

to me that whether this case can be distinguished from *Clark* depends on whether I can look behind the extract produced by the magistrates' court. If the extract is correct, there was an unlawful sending, but if I can look behind it, both parties say that it is wrong and simply does not reflect what was happened in that court."

44. He continued:-

"In *Clark*, the Court of Appeal held at [19] that '*the only evidence of what the Magistrates did is the sending sheet itself*'. The Court also referred at [12] to the sending sheet as being the '*primary*' record. That suggests it is not a conclusive record. It seems to me, therefore, that the Crown Court could properly conclude from other evidence that there has been a committal for sentence. Such evidence could, for example, be in the form of a witness statement from a lawyer present at the hearing at which it is contended that the committal took place."

45. The Recorder had afforded the Crown Prosecution Service the opportunity to put before him evidence as to what had happened in the Magistrates' Court, as this could take precedence over the content of the sending sheet. No such evidence was provided. It appears that the advocate who had appeared for the prosecution declined to make a statement, having no recollection of the matter. The Recorder therefore concluded:

"...it seems to me that the position the court is left with is that there is no evidence before it of the committal for sentence, and therefore *Clark* cannot be distinguished. Given the number of occasions on which the case has been listed, I consider that the time has now come for me to proceed to sentence on the indictment."

### *Discussion*

46. In this case, unlike that of *Toner*, there is no statement from the Legal Adviser saying that the Court Extract was created in error and mis-recorded the valid order which the magistrates had made. There is also no order of the magistrates' court under section 142 of the Magistrates Courts Act 1980 which corrects that error. These were the two distinguishing features in *Toner* which might have led the Recorder in that case to hold that *Clark* did not require him to decline to sentence. In their absence, in our judgment the Recorder in this case was right to hold that he was bound by *Clark* not to sentence for the two offences which had not been committed for sentence following the guilty pleas. The situation which confronted him was very much the same as that in *Clark*. The Court of Appeal in *R v. Butt* and *R v. Jenkins* has held that *Clark*, which led him to that conclusion, was wrongly decided and should not be followed.

47. This creates a difficulty as to what order this court should now make.

48. The Court Extract was obviously in error in that it failed to record any pleas or indications of pleas. It also recorded that the defendant had been sent for trial under

section 51(1) and (2)(b) of the Crime and Disorder Act 1998 for a summary offence. Otherwise, it was accurate (so far as entries material to this claim are concerned). Unlike that in Toner's case, it did not record the two guilty pleas on its face, immediately below the record which recorded that these offences had been sent for trial. The email from the Legal Adviser did not clear matters up, and did not enable the Recorder to form a clear view that the magistrates had taken pleas and committed for sentence.

49. The Recorder is obviously not to be blamed for following the decision of the Court of Appeal Criminal Division. It was binding on him if it could not be distinguished. He was, in any event, willing to receive evidence from the Crown Prosecution Service and the Legal Adviser to enable him to form a view about what the magistrates had actually ordered and did not regard the Court Extract as the conclusive record of what had been done. It was not his fault that he received little or no useful information as a result of this approach. The result was that the evidence before him was very similar to that in *Clark* and he felt bound to follow that decision.
50. We consider that the evidence of the Better Case Management Form shows clearly that there were indicated guilty pleas in the magistrates' court to the either way offence of production of cannabis and the summary offence of possession of an offensive weapon in a private place. These should not therefore have been sent for trial, but could properly be committed for sentence: see section 50A(3)(b)(ii) of the Crime and Disorder Act 1998. The production of cannabis offence could be committed under section 14 of the Sentencing Act 2020. The record shows that the court "directed trial by jury", which was an error of resulting but is very likely to reflect a decision by the justices that their sentencing powers were likely to be inadequate. The overall circumstances which presented themselves to the justices at this hearing also strongly suggest that they are very likely to have reached this conclusion. The possession of an offensive weapon could lawfully have been committed for sentence under section 20 of the Sentencing Act 2020.
51. We have been concerned by the email from the Legal Adviser which admits of doubt as to what the magistrates actually did. It is also surprising that the court was invited to proceed on the agreed position of the parties as to the pleas which were tendered, when the prosecutor later declined to confirm that position in a statement. The uncertainty which prevails over that hearing is regrettable, and, we would hope, not likely to be common in other cases. Nevertheless, once the court is allowed to consider and to give effect to the Better Case Management Form, the position is clear enough.
52. We consider that, on a proper understanding of the law, the Crown Court had two choices when dealing with the two charges which had been admitted in the magistrates' court where the record showed they had been sent for trial. These were either:-
  - i) To hold that the record of what had happened in the magistrates' court was bad on its face and that nothing had occurred there which could confer jurisdiction on the Crown Court to deal with these two charges. They therefore remained in the magistrates' court which was not *functus officio*. The Crown Court judge may decide to sit as a DJ(MC) under section 66 of the Courts Act 2003

and, if so, may also decide to exercise the powers of the magistrates' court under section 142 of the Magistrates' Courts Act 1980.

or:-

ii) To hold that it is sufficiently clear from all the evidence that the either way offence was committed for sentence under section 14 of the Sentencing Act 2020, and the summary only offence was committed for sentence under section 20 of the Sentencing Act 2020, and to proceed to sentence on this basis.

53. We therefore quash the decision of the Recorder not to sentence on the two relevant offences, the effect of which was to leave them in limbo. This was a decision which involved an error of law, but this is not a situation where, but for that error, there was only one decision the Crown Court could have made. Therefore, under the terms of section 31(5A) of the Senior Courts Act 1981 this court is not entitled to substitute its own decision for that of the Crown Court. Our only course therefore is to remit the matter to the Recorder for him to decide which of the two courses of action we have identified is the correct one. It is preferable that the Recorder should have control over the management of this case hereafter because this is an ongoing process which is being managed by him. He is best placed to decide what, if any, impact these two further charges may have on the decision he made to defer sentence in relation to the other matters, and how they should most justly be disposed of.