**R v Gould et al – s.66 website article**

Section 66 of the Courts Act 2003 is used, at times rather liberally, by Crown Court judges to sit as a District Judge of the Magistrates’ Court (“DJ(MC)”) to correct errors in procedure which have occurred in the Magistrates’ Court prior to the Crown Court being seised of the case. S.66 was specifically enacted to afford a greater degree of flexibility and avoid the cumbersome process of cases being sent back and forth between the Crown Court and Magistrates’ Court for the correction of technical errors which cause no prejudice to parties in the proceedings.

Frankly, it is a quagmire and the case of *R v Gould* [2021] EWCA Crim 447 is forty pages of heavy-going reading about how the Court of Appeal has concluded it should (or shouldn’t) be deployed. At the heart of s.66 is the fault line between doing justice in individual cases and fealty to complex and technical statutory provisions – that fault line always has and always will exist, though it may shift from time to time. *R v Gould* puts the brakes on the current trend to prefer flexibility over formality and stresses that the principles stated by Lord Bingham in *R v Clarke and McDaid* [2008] UKHL 8 (that doing justice on the merits of the case is limited by statutory provisions which proscribe courts from doing just that, regardless of whether or not it is on a *technical* point of law) are as pertinent as ever.

This article won’t explore the rights or wrongs of that trend – as practitioners, often all we can do is see which way the wind is blowing and try to draft along unnoticed by the Court of Appeal. This article will instead hope to hold a moistened finger to the sky and give readers an indication of which way the wind is blowing at this moment in time, whilst highlighting some of the common pitfalls referred to in the use of s.66.

The cases on appeal

The facts of each case appear in the judgment and the specific principles relating to each are discussed in detail. This article will consider only the case of Gould, as the focus of the article is on the wider implications for use of s.66 going forwards.

***Gould***

*Overview of proceedings:*

* G was originally charged with ten sexual offences, which lacked proper particulars;
* G pleaded guilty to all ten charges in the Magistrates’ Court;
* G was not originally charged with an offence of attempted rape, though this was made out on the face of the evidence;
* The case came up to the Crown Court and was not ready at its first hearing, owing to the problems with the particularisation of the existing charges and the absence of the attempted rape charge;
* At the next hearing in the Crown Court, there were eight charges proposed to be put to G, including an allegation of attempted rape;
* The Prosecution invited the judge to sit as a DJ(MC) under s.66 and (1) vacate the pleas already entered, (2) quash the sending certificate, (3) allow G to enter guilty pleas to the new charges, and (4) commit them back to herself.
* The judge did this, including in respect of the attempted rape, which was indictable only. The judge purported to commit that offence to herself for sentence and sentenced G for all offences together.

*The effect, or lack thereof, of the proceedings in the Crown Court:*

* There was no power to quash the committal – this was of no effect. Such a power only vests in the Divisional Court;
* There was no power to commit the attempted rape, being indictable only, for sentence. Indictable only offences must be **sent** forthwith for trial – a plea cannot be entered in the Magistrates’ Court and therefore the case cannot be **committed** for sentence. The purported committal was of no effect;
* The decision to commit the seven other charges was irrational as there were already valid charges before the Crown Court alleging the same criminality. The purported committal was of no effect.

The result was that there was a valid committal for sentence extant before the Crown Court – the original committal for ten offences. Going forwards, on the charges the prosecution did not wish to pursue, G could apply to vacate his guilty pleas. In respect of the attempted rape, the prosecution may decide to lay that charge before the Magistrates’ Court so it can be **sent** to the Crown Court under s.51 of the Crime and Disorder Act 1998.

Lessons to be learned from *R v Gould*

The case of *R v Gould*, and the other three joined cases, demonstrates the importance of the prosecution getting it right first time. Where charges are hastily laid which do not reflect the overall criminality and do not particularise the offences, the procedural difficulties then encountered in the Crown Court are often insurmountable. Prosecutors should be mindful of the fact that a failure to make the correct procedural decisions at the outset of criminal proceedings can lead to unlawful actions being taken. Ultimately, if judges are risking criticism from the Court of Appeal for trying to correct prosecution errors, then they are far less likely to enter into the quagmire of s.66, despite it being a very useful tool. Prosecutions will have to start all over again, which benefits no one.

Advocates must know the limits of s.66 and be ready to assist the court in applying s.66:

* *“80. These important parameters within which the section 66 powers may be used have been overlooked in some of the present cases and perhaps elsewhere. It is worth restating them:-* 
  + *When the Magistrates' Court make an order which gives jurisdiction in the case to the Crown Court, whether by committal for sentence or sending for trial, that is the end of their jurisdiction in the case. In technical language they are functus officio. The Crown Court judge cannot use section 66 to make any order which the Magistrates' Court could no longer make.*
  + *There is no power in the Crown Court to quash an irregular order. Where it is plainly bad on its face, the Crown Court may hold that nothing has occurred which is capable of conferring any jurisdiction to deal with it.”*

There is therefore not a great deal to discuss in terms of trend in the majority of cases – the Court of Appeal have simply made it clear that regardless of trend, some actions are simply of no effect in law:

* *“88. However, the exercise of those powers will result in an ineffective order if the judge acts beyond the jurisdiction of the Magistrates' Court and may do so if the judge is responsible for procedural errors. If those errors are of a kind which Parliament is taken to have decided should invalidate all that follows, then that will be the result. If errors are made which are of a kind which do not undermine the jurisdiction of the court, but which mean that there has been prejudice or a substantial risk of unfairness then the same result will follow.”*

Advocates must be familiar with these limits and assist the court in determining the limits of its jurisdiction:

1. Where a power has been exercised under s.66 which lies beyond the jurisdiction of the Magistrates’ Court (quashing a committal certificate, which is a power vested only in the Divisional Court) then all that follows is of no effect;
2. Where a procedural error has been made, which is not beyond the jurisdiction of the court, but does cause prejudice or a substantial risk of unfairness (committing a matter for sentence under s.66 where there was a real possibility the magistrates would have declined to commit the matter) then all that follows is of no effect;
3. Where a procedural error has been made, which is not beyond the jurisdiction of the court, and does not cause prejudice or a substantial risk of unfairness (charging an offence of having a bladed article where in fact the correct charge is possession of an offensive weapon), then the Crown Court must decide whether or not it is in the interests of justice to correct that error using the power in s.66 or require the prosecution to start again in the Magistrates’ Court.

Therefore, advocates must **assist** the court in recognising the limits of its jurisdiction which are prescribed by law. Advocates may make **submissions** to the court on (i) the existence or extent of prejudice or unfairness, and (ii) whether the interests of justice militate in favour of or against using s.66 to correct errors.

Which way is the wind blowing?

*R v Gould* demonstrates perhaps the zenith of judges using s.66 to correct procedural errors. This is not a problem in and of itself, as it must be the case that s.66 has been purported to be used in many other proceedings where doing so was outside the jurisdiction of the court. It is no bad thing that the Court of Appeal have urged courts, with the assistance of advocates, to stop acting unlawfully.

Crown Court judges reading paragraph 92 of R v Gould are likely to be somewhat reluctant to use the power under s.66:

* *“92. … We consider that it is* ***only*** *in cases where it is quite clear that the case should be dealt with by the Crown Court, or where the exercise which is being contemplated is only designed to tie up loose ends and avoid hearings in the Magistrates' Court which are clearly unnecessary, that the section 66 power should be used.” [my emphasis]*

It is no longer, and probably never was, appropriate to request a Crown Court Judge to sit as a DJ(MC) under s.66 without giving careful consideration to the procedural intricacies of what has gone before, and the legal effect of powers exercised under s.66. Judges will be more wary of using the power, meaning any advocate who wishes for the court to use it must present to the court a complete and precise summary of the powers available.

Post-script

When a Crown Court Judge exercises the powers of a DJ(MC), they do not “reconstitute’ themselves as anything – the correct terminology is that they are simply exercising the powers of a DJ(MC). The Court of Appeal has rather humourlessly stated that for a judge to declare themself to be wearing a different hat is, apparently, of no effect in law.