Indictment – *R. v Burrows* [2019] EWCA Crim 889, [2019] Crim.L.R. 1066, CA, 17 April 2019.

If a defendant has been charged with low-value shoplifting and has not elected to have the charge tried at the Crown Court, that offence is summary only under section 22A of the *Magistrates' Court Act* 1980. Low-value shoplifting is not one of the summary offences that can be included on the indictment under section 40 of the *Criminal Justice Act* 1988. Accordingly, where the appellant had not elected trial for low-value shoplifting, although the offence had been lawfully sent to the Crown Court (pursuant to the *Crime and Disorder Act* 1998 (CLW/98/31/8), s.51(3)(b), together with another offence for which the appellant had elected trial), it had been erroneously joined to the indictment, and his plea to the charge and the resulting sentence were a nullity and must be quashed: *R. v Maxwell (Dean)*, CLW/17/44/4, [2017] EWCA Crim 1233, [2018] 1 Cr.App.R. 5, CA. The validity of the remaining counts was not, however, affected: *R. v McGrath*, CLW/13/32/4, [2013] EWCA Crim 1261, [2014] Crim.L.R. 144, CA. Paragraph 6 of Schedule 3 to the 1998 Act provides the Crown Court with the power to deal with summary offences where an offender has been convicted on indictment. In the instant case, as the Crown had now decided to offer no evidence on the charge, a member of the court would sit as a judge of the Crown Court to allow that and for a formal verdict of not guilty to be entered.

***Archbold* 2020 references**: 1980 Act, s.22A, § 1-81; 1988 Act, s.40, § 1-128; 1998 Act, s.51, and Sched. 3, para. 6, §§ 1-24 and 1-41.

Commentary by Peter Hungerford-Welch at [2019] Crim.L.R. 1067.

COMMENT:

This is another case in which all involved failed to appreciate the implications of section 22A of the 1980 Act, which was inserted by the *Anti-social Behaviour, Crime and Policing Act* 2014 (CLW/14/11/25), with effect from 13 May 2014. Having appealed on the ground that the sentences were manifestly excessive, it was the Registrar of Criminal Appeals who spotted a "technical issue" (at [2]) relating to the theft conviction.

Under section 22A(1), theft from a shop of goods valued at £200 or less "is triable only summarily". However, section 22A(2) gives a defendant charged with such an offence the right to elect Crown Court trial. It might be thought that the position is analogous to low-value criminal damage, but "the language and structure of that section is markedly different" (*Maxwell (Dean)*, at [21]). Criminal damage is an indictable offence, which must be treated as summary only if the value of the damage is £5,000 or less (1980 Act, s.22), whereas low-value shop theft is a summary offence unless and until the defendant elects.

Nevertheless, low-value shop theft is treated as an indictable offence for certain purposes. For example, any reference in the *Police and Criminal Evidence Act* 1984 to an "indictable offence" includes a reference to low-value shoplifting (2014 Act, s.176(6)). It is also possible to be charged with attempted low-value shoplifting, even though section 1 of the *Criminal Attempts Act* 1981 otherwise only applies to indictable offences. Conversely, section 127 of the 1980 Act has not been amended, so it follows that proceedings for low-value shop theft must be brought within six months.

This defendant was charged with going equipped for stealing, common assault and shoplifting goods valued at either £52 or £53. All three offences occurred on the same occasion and were "related" for the purposes of section 51 of the 1998 Act. Having elected jury trial in respect of going equipped, that offence was sent to the Crown Court under s.51(1). Both the shop theft and the common assault were sent

under s.51(3), which requires a magistrates' court to send any "related" either-way or summary offences provided the specified criteria are met (i.e. any summary offence(s) must be punishable with imprisonment or disqualification from driving).

Mode of trial proceedings did not take place for the theft matter, so the defendant had not elected Crown Court trial and it remained a summary offence. The common assault was properly joined to the indictment under section 40 of the 1988 Act but, as previous judgments have highlighted, there was simply no power to join the theft (see *Maxwell* and *R. v McDermott-Mullane*, CLW/17/33/7, [2016] EWCA Crim 2239, [2017] 4 W.L.R. 127, DC & CA).

The correct procedure where a defendant is sent for trial under section 51(3) for an offence that cannot be joined in the indictment is as follows. Upon conviction on the indictment, the defendant should be asked whether he pleads guilty or not guilty to the summary offence(s). If he pleads guilty, the Crown Court proceeds to sentence. If he pleads not guilty, "the powers of the Crown Court shall cease" and the defendant will be remitted to the magistrates' court for trial unless the prosecution offers no evidence (1998 Act, Sched. 3, para. 6). (The other option would be for the Crown Court judge to exercise the powers of a district judge under section 66 of the *Courts Act* 2003 (CLW/03/44/22).)

Section 22A was introduced to enable low-value shop theft to be added to the list of specified offences that can be prosecuted by the police without the involvement of the CPS (*Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment) Order* 2014 (SI 2014/1229) (CLW/14/18/21)). The Association of Convenience Stores had expressed concerns that the provision would "downgrade" shoplifting, but Damian Green, then Minister for Policing and Criminal Justice, promised that "the first effect of the change will mean that more shop thieves go to court" (Anti-Social Behaviour, Crime and Policing Bill Deb 11 July 2018, col 470). Statistics show that this aim has not been achieved. Whilst Home Office figures showed an increase of almost 23% in shop theft from 2013 to 2017, a BBC freedom of information request for the same period revealed that, in 27 of 38 police forces, arrests for shoplifting fell by 17% and charges dropped by 25% over the same period (https://www.bbc.co.uk/news/uk-45512468).

Sharp LJ observes in this case that the lower courts paid "insufficient attention … to the detail" (at [11]), adding that judges "are often burdened with long sentencing lists and have a right to expect appropriate assistance from the advocates before them". Yet the ease with which an error can be made when dealing with convoluted statutory provisions is illustrated in the course of the judgment, when the court purports to quote from Schedule 3 to the 1998 Act but in fact sets out (mislabelled) text from section 51 (at [12]). The real fault here surely lies in the apparently futile decision to create an entirely new type of offence – which is summary only, except when it isn't - thereby contributing to the acknowledged "complexity of modern sentencing legislation" (at [11]).

Natalie Wortley