**Mode of trial (low-value shoplifting)** – *R. v Harvey* [2020] EWCA Crim 354, unreported, 11 March 2020, CA.

**Legislation**: Section 22A of the *Magistrates’ Courts Act* 1980 provides, so far as is material, “(1) Low-value shoplifting is triable only summarily. … (3) ‘Low-value shoplifting’ means an offence under section 1 of the *Theft Act* 1968 in circumstances where – (a) the value of the stolen goods does not exceed £200, … (4) for the purposes of subsection (3)(a) … (b) where the accused is charged on the same occasion with two or more offences of low-value shoplifting, the reference to the value involved has effect as if it were a reference to the aggregate of the values involved.”

                The words “charged on the same occasion” in section 22A(4)(b) should be construed as referring to when the accused appears before the magistrates’ court to answer the charges (which may be on a number of different occasions, until the moment of allocation), even if they were not charged, for example, within the same postal requisition. Sentencing powers for a spree of low-value shoplifting should not depend on the means by which proceedings were instituted; and there is also a need to adopt a consistent interpretation of “charged on the same occasion” in sections 22(11) and 22A(4)(b).

***Archbold* 2020 references**: 1968 Act, s.1, § 21-15; 1980 Act, ss.22 and 22A, § 1-77 and 1-81.

Parliament has, from time to time, grappled with the thorny issue of making low-value theft a summary-only offence: see, for example, the Report of the James Committee, Cmd 6323/1975, which proposed that theft of most objects below £20 should be summary only (£168.88 in today's money, according to the Office of National Statistics Composite Price Index, accessed 26 March 2020), and the ill-starred Criminal Justice (Mode of Trial) Bills 1999 and 2000. Such proposals have been heavily resisted on the basis that any defendant accused of an offence of dishonesty should have the right to elect jury trial. Quite what is objectively fairer about a jury trial rather than a summary trial is never convincingly articulated.  
   By inserting section 22A into the 1980 Act, Parliament has created a hybrid offence. All this has achieved is that the prosecution cannot contend that low-value shop theft should be tried at the Crown Court and a magistrates' court cannot allocate such matters to the Crown Court for trial, or commit for sentence pursuant to section 3 of the [Powers of Criminal Courts (Sentencing) Act 2000](http://www.legislation.gov.uk/ukpga/2000/6/contents) ([CLW/00/21/23](https://www.criminal-law.co.uk/Members/Item/00/21/23)). This despite the fact that the defendant may have matters of dishonesty outstanding at the Crown Court. The exception to this is where a defendant is "charged on the same occasion" with more than one offence of low-value shop theft and the aggregate of the values involved exceeds the £200 limit.  
   In the instant case, the Crown argued that values should only be aggregated under section 22A(4) if the accused was charged with the offences by the police on the same occasion, or if they were contained in the same postal requisition (at [11]). He submitted that to interpret the phrase "charged on the same occasion" as a reference to the date the accused appears before a magistrates' court creates "room for confusion", as an accused may appear a number of times before allocation takes place (at [13]).  
   The same phrase appears in section 22(11), which applies to offences of low-value criminal damage and aggravated vehicle-taking (where damage is caused). In this context, CPS legal guidance states that a defendant is "charged on the same occasion" if the offences are "put to [him] in court on the same occasion".  
   However, section 22(11) differs from the analogous low-value shop theft provision in two key respects. First, section 22(11) applies only if "it appears to the court that [the offences] constitute or form part of a series of … offences of the same or a similar character", and it is well-established that values may not be capable of aggregation if the offences are too remote because they are distant in time and place or involve different types of property (R. v Hatfield JJ, ex p. Castle [1981] 1 W.L.R. 217, DC; R. v St Helen's Justices, ex p. McClorie [1983] 1 W.L.R. 1332, DC; R. v Braden (1988) 87 Cr.App.R. 289, CA). Section 22A contains no such requirement, although it is conceded that multiple shop thefts in a short space of time are likely to be sufficiently similar to satisfy that test in any event.  
   Secondly, the CPS legal guidance expressly states that the proposed approach to section 22(11) is necessary to preserve the accused's right to elect trial by a jury. It points out that a literal construction of "charged on the same occasion" would enable "the prosecution to avoid election for trial by bringing the defendant to court on different dates for each offence".  
   In the present case, the court thought that the guidance was "right" to guard against the potential for "artificial manipulation of the charging procedure by the prosecution" (at [19]) and therefore to construe section 22(11) as referring to the appearance of the accused at court to answer the charges. The court concluded that a "similar policy concern" arises in the context of section 22A. Yet the concerns expressed regarding a literal construction of section 22(11) do not apply to section 22A(4), because a defendant charged with low-value shop theft always retains the right to elect trial on indictment by virtue of section 22A(2). Further, the court's interpretation does not preclude manipulation, particularly where the charge and requisition procedure is used, as different dates could be specified for the accused's appearance at court  
   Parliament could have avoided uncertainty as to interpretation by simply using the wording "appears on the same occasion": the court has rather stretched an ordinary interpretation of what "charged on the same occasion" means. Nevertheless, it is submitted that the court's decision is correct for the alternative reason posited, namely that "sentencing powers for a spree of low-value shoplifting should not depend on the means by which proceedings are instituted" (at [20]). The low-value shop theft provisions were introduced to enable such offences to be dealt with by post and prosecuted by the police in the absence of the defendant where the offence is admitted. It was always envisaged that prolific shoplifters would appear in court, certainly "where a custodial sentence [is] in prospect" (HL Debates, 12 November 2013, vol. 749, col. 710). The risk of confusion contended for by the Crown seems unlikely; the prospect of multiple appearances prior to allocation is slim given the emphasis on speedy summary justice and the duties under rule 3.9 of the [Criminal Procedure Rules 2015](https://www.criminal-law.co.uk/Members/StatutesService/36) (SI 2015/[1490](http://www.legislation.gov.uk/uksi/2015/1490/contents/made)) ([CLW/15/28/20](https://www.criminal-law.co.uk/Members/Item/15/28/20)) (including the requirement to take a plea). This, along with the "need to adopt a consistent interpretation" (at [20]) of the same phrase across two different sections of the same statute, provide ample justification for the court's decision to reject a literal approach.

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