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Divisional Court: Tried Together: Separating Trials on Committal for Young Offenders

Tried Together: Separating Trials on Committal for Young Offenders

R (on the application of W and M) v Oldham Youth Court [2010] EWHC 661 (Admin)

Cath Crosby

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This application concerned cases for judicial review of a decision to commit two young offenders to the Crown Court for trial under s. 24 of the Magistrates' Courts Act 1980 in circumstances where the charges were rightfully joined. The defendants, W, aged between 11 and 12 at the time of the alleged incidents, and M who was aged 13, stood accused of sexual offences against the same victim, W's four-year-old male cousin, L. It was suggested that the alleged rape by M took place on a separate occasion.

M admitted he had raped L when interviewed. W was charged with two offences of rape and one of sexual assault of L; the three incidents showing an escalation of severity which was capable of being regarded as a serious aggravating factor. On the first occasion the 11-year-old W had put his naked penis on the boy's buttocks; a little later, now 12 years old, he had inserted his penis. On the final occasion, the available evidence suggested that W may have masturbated in the bathroom to get an erection and, with pants still lowered, gone into the bedroom where the four-year-old boy was, lowered his clothing, parted his buttocks and inserted himself fully. W had originally denied these acts to his family, but later admitted to his mother and the police what he had done. On 31 July 2009, District Judge Richardson had made orders committing the two youths for trial at the Crown Court noting that it was unclear how the two defendants had come to abuse the same victim. The district judge had applied a test of whether or not there was a real prospect of a sentence being imposed in excess of two years' detention. He noted that these were 'grave crimes', the aggravating features being the nature of the offence; that there were repeat offences; the age of the victim and the effect it had on him and his family; an abusive family relationship; and a breach of trust. He found that the case came within *R (on the application of H) v Southampton Youth Court [2004] EWHC 95, [2005] 2 Cr App R (S) 30*, and that there was a real prospect of a sentence being imposed on the defendants in excess of two years. However, in the Divisional Court, Langstaff J noted that it seemed that the district judge had made no distinction between the two boys' cases and had fallen into an error of law when determining whether or not M should have been committed, committing him simply because he was committing W.

Held, allowing the application in part, where offences are factually linked, young offenders must be considered separately when determining the appropriate venue for trial, even though this may result in one alleged young offender going for trial in the magistrates' court, whereas another might be committed to the Crown Court. W's application was dismissed as there were grounds for the committing judge to think that a court might (though not necessarily would) wish to impose a sentence in excess of two years under s. 91 of the Powers of Criminal Courts (Sentencing) Act 2000. The committal decision in respect of M was quashed.

Commentary

When committing young offenders for trial under s. 24 of the Magistrates' Courts Act 1980 in circumstances where several defendants are charged together it is important that the court considers the position of each defendant separately, as emphasised by Leveson J in *R (on the Application of H) v Southampton Youth Court* above, approved by Smith LJ in *R (on the application of W) v Brent Youth Court* [2006] EWHC 95, (2006) 170 JP 198, and further endorsed by the Vice President of the Court of Appeal (Criminal Division). This approach may well result in one defendant being tried in the youth court whilst another is committed to trial in the Crown Court.

The district judge in the instant case had approached the matter of venue by starting with s. 24 of the 1980 Act and then applying a test of whether or not there was a 'real prospect of a sentence being imposed in excess of two years' (words not directly from the statute, but from authority which had considered the wording of the statute) and felt that there was. He had also acknowledged that he was making a decision based upon the Crown's case whilst not considering the maximum sentences available. However, it was clear from the district judge's notes that he had considered the boys together as a package, and Longstaff J stated that no blame should attach to him in this regard 'because he was not addressed to the effect that he should do anything different' (at [7]), neither was he referred to the words of Smith LJ who had clearly stressed the relevant principles in the *Brent* case referred to above.

Langstaff J referred to s. 37 of the Crime and Disorder Act 1998 and s. 44 of the Children and Young Persons Act 1933, finding that a sentencing court must have regard to the welfare of a child or young person (at [10]). Furthermore, together with s. 152(1) of the Criminal Justice Act 2003, the main objective of the youth justice system was the prevention of offending by young persons. The correct approach was therefore to follow the guidance offered in Leveson J's judgment in *R (on the application of H) v Southampton Youth Court* [2004] EWHC 95, [2005] 2 Cr App R (S) 30 at [33]-[35] as higher authority had suggested his words could not be improved upon:

1. The general policy of the legislature is that those who are under 18 years of age and in particular children of under 15 years of age should, wherever possible, be tried in the youth court. It is that court which is best designed to meet their specific needs. A trial in the Crown Court with the inevitable greater formality and greatly increased number of people involved (including a jury and the public) should be reserved for the most serious cases.
2. It is a further policy of the legislature that, generally speaking, first-time offenders aged 12 to 14 and all offenders under 12 should not be detained in custody and decisions as to jurisdiction should have regard to the fact that the *exceptional* power to detain for grave offences should not be used to water down the general principle. Those under 15 will rarely attract a period of detention and, even more rarely, those who are under 12.
3. In each case the court should ask itself whether there is a real prospect, having regard to his or her age, that this defendant whose case they are considering might require a sentence of, or in excess of, two years or, alternatively, whether although the sentence might be less than two years, there is some unusual feature of the case which justifies declining jurisdiction, bearing in mind that the absence of a power to impose a detention and training order because the defendant is under 15 is not an unusual feature.

In light of these words which the district judge had referred to appropriately, W's challenge was based upon the judge having reached a wholly unreasonable decision. In reviewing this decision, Longstaff J observed (at [10]) that the question was whether the district judge 'or someone in his position was entitled to come to the view on the material before him' that there was a real prospect of a sentence being imposed of more than

two years. He was not deciding that question or whether there might be such a prospect.

As no plea has been entered at that stage, the question of reasonable prospect has to be determined 'having regard to the realities of a case' (at [15]). This will include any aggravating factors, matters that will or may be prayed in mitigation, and the 'possibilities and probabilities' that there may be a guilty plea. Furthermore, he observed that it cannot be considered simply from the stance that there will necessarily be a trial or a guilty plea. The assessment of the matter must be a general one which must take account of the prosecution's case at the highest within reason.

As the committal with regard to M was quashed, his case would need to be considered and a venue be determined by the magistrates' court in line with the clear principles proposed by Leveson J in the *Southampton* case.