

## Chapter 10

### 10.8 Amending the indictment

The essential principle is that set out in s 5(1) of the Indictments Act 1915.

An indictment may be amended under s 5 by adding new counts to it, or by adding a new defendant to it. The test is – is the indictment defective and if so, is the proposed amendment necessary to meet the circumstances of the case, without causing any injustice?

In *R v Booker* [2011] EWCA Crim 7, [2011] 3 All ER 905, the Court of Appeal upheld an amendment of the indictment at a retrial. The retrial had been ordered by the Court of Appeal, following an appeal against conviction on a count alleging conspiracy to supply a Class A drug, namely cocaine. The prosecution applied for permission to add a new defendant, RB, against whom evidence had emerged during the original trial. During the retrial, RB gave evidence that clearly undermined Booker's defence. The Court of Appeal ruled that there is no general principle that, on a retrial, previously absent co-conspirators cannot be added to the indictment; although there may be circumstances where to do so would constitute an abuse of process. An example of such abuse might be where the prosecution was found to have deliberately delayed in charging the new defendant so that he was 'available' to be added onto the indictment at a retrial, rather than having been tried separately before the retrial of the original defendant took place. The Court observed that

'a defendant may often be in a worse position at a retrial, amendment or not, because further evidence has emerged, or is better presented, and he cannot normally complain about that.'

In *R v Thompson* [2011] EWCA Crim 102, the Court of Appeal considered s 5 once more, this time in the context of adding counts for further offences which allegedly were committed by the defendant *after* he had been committed for trial on the original offences and a Plea and Case Management Hearing had taken place in the Crown Court. The Court of Appeal ruled that s 5 conferred a broad discretion on trial judges with regard to amending an existing indictment. Whereas there was a restriction placed on the addition or substitution of counts on an indictment by s 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 (see Manual at **10.6** and compare Criminal Procedure Rule 14.2(5)), no such limitation was placed on judges when considering an application to amend an existing indictment. On such an application, the concern was solely with possible injustice, particularly to the accused.