Neutral Citation [2023] EWCA Crim 1207

Case No: 202300603 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM NORWICH CROWN COURT
HHJ HOLT
T20157182

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 October 2023

Before:
LADY CHIEF JUSTICE OF ENGLAND AND WALES
THE RIGHT HONOURABLE DAME SUE CARR
MR JUSTICE JEREMY BAKER
and
MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between:

STUART LAYDEN	**Appellant**
- and -	
REX	**Respondent**

- -
- -

Mr Peter Wilcock KC and Miss Catherine Oborne (instructed by the **Registrar of Criminal Appeals**) for the **Appellant**
Mr David Perry KC and Mr Paul Jarvis (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 12 October 2023

- -

Approved Judgment

.....

The Right Honourable Dame Sue Carr:

Introduction

1. On 17 May 2016 the appellant was convicted of the murder of Ian Church in Great Yarmouth in the early hours of 4 May 2012. The conviction followed a (second) retrial following the earlier quashing by the Court of Appeal of the appellant's conviction for the same offence. He was sentenced to life imprisonment with a minimum term specified under s. 269(2) of the Criminal Justice Act 2003 of 8 years and 359 days. This is an appeal against the (second) conviction upon a reference by the Criminal Cases Review Commission under s. 9 of the Criminal Appeal Act 1995.

2. The central issue is whether, in respect of a retrial ordered pursuant to s. 7 of the Criminal Appeal Act 1968 ("s. 7"; "the CAA"), the Crown Court's jurisdiction is contingent on fulfilment of the requirements in s. 8 of the CAA ("s. 8"), such that a defendant cannot lawfully be tried on a fresh indictment after the expiry of two months of the date of order for retrial, save where the Court of Appeal has given leave. In *R v Llewellyn* [2022] EWCA Crim 154; [2023] 2 WLR 121 ("*Llewellyn*") the Court of Appeal concluded that the jurisdiction was so contingent. If that is right, and/or we are bound by the decision in *Llewellyn*, then the appellant's conviction for murder falls to be quashed on the basis that it is unsafe.

The Essential Chronology and Facts

3. On 19 March 2015 the Court of Appeal allowed the appellant's appeal against conviction and directed that he be arraigned on a fresh indictment within two months. The two-month period for arraignment on a fresh indictment pursuant to s. 8 thus expired on 19 May 2015.

4. The appellant was granted bail by the Crown Court on 2 April 2015. On 14 April 2015 the prosecution served a copy of the retrial indictment charging a single count of murder. On 7 May 2015 the appellant attended a PCMH. Trial was fixed to commence on 28 September 2015, and case management directions were made. The hearing proceeded on the basis that the appellant maintained the "not guilty" plea that he had entered to the original indictment. On 11 September 2015, a pre-trial review hearing took place, with the appellant's attendance being excused.

5. Before the jury was empanelled on 28 September 2015, there was a discussion before the trial judge as to whether the appellant needed to be arraigned. The prosecution submitted that this was not necessary "because the re-trial indictment was substantially the same as the indictment on which [the appellant] had been convicted originally." Defence counsel indicated that no point would be taken on this, and the trial judge pressed ahead. The court log indicates that the appellant was arraigned a few minutes later, but the transcript does not back this up. The court clerk informed the jury in the normal way that the appellant had pleaded not guilty to the charge of murder.

6. The first retrial proceeded, but on 14 October 2015 the jury was discharged owing to issues surrounding the disclosure of unused material. The second retrial concluded on 17 May 2016, with the appellant being convicted. Leave to appeal against conviction

(on grounds unrelated to s. 8) was refused on the papers by the Single Judge in October 2016 and by the Full Court on renewal in January 2017 ([2017] EWCA Crim 216).

Submissions on Appeal in summary

7. For the appellant, Mr Wilcock KC argues that the Court of Appeal in *Llewellyn* rightly recognised that the Crown Court had jurisdiction only because the Court of Appeal had ordered a retrial under s. 7, underlined by the fact that the s. 8 procedure is "bespoke". Parliament had clearly intended that material non-compliance with s. 8 would have the result that the court in a subsequent trial would have acted without jurisdiction. The wording of s. 8 is self-explanatory and mandatory. The right to set aside the order for retrial for non-compliance with s. 8 was specifically reserved to the Court of Appeal. The power to refuse leave to arraign outside the two-month time limit, and to set aside an order for retrial does not require the defendant to show any prejudice other than breach of s. 8. The seriousness of the offence under consideration is no reason to dilute the requirement to arraign on fresh indictment within two months of the order for retrial. For these reasons, it is argued that the resulting conviction is unsafe. It is further said that we are in any event bound by the decision in *Llewellyn*.

8. Mr Perry KC for the respondent submits that *Llewellyn* was wrongly decided. The primary duty to arraign lies on the court. The failure to arraign within two months was a procedural irregularity, not a jurisdictional bar. It cannot have been the intention of Parliament that a failure to arraign in time should render a conviction unsafe. In particular, where, as here, the purpose of s. 8 has been satisfied (because the proceedings were brought under the court's control on a timely basis), it cannot have been Parliament's intention that a retrial in such circumstances should be treated as totally invalid. As Mr Perry put it, the "tail of arraignment" has started to wag the "dog of the substantive provision".

9. In more detail, it is argued:

   i) There is nothing in the CAA itself to suggest that the Crown Court's jurisdiction to retry will be invalid if arraignment does not take place in accordance with ss. 7 and 8;

   ii) The jurisdiction to retry derives from the order made under s. 7. If that order is not set aside on an application under s. 8(1) (by the prosecution) or section 8(1A) (by the defence), it remains in force;

   iii) The analysis in *Llewellyn* ignores the significance of s. 8(1A). If *Llewellyn* is correct, then s. 8(1A) serves no obvious purpose;

   iv) A lawful arraignment has never been a condition precedent for a lawful trial and verdict.

10. The respondent submits that it is open to us to depart from *Llewellyn* as a matter of principle. The suggestion that the facts of this case are distinguishable from those in *Llewellyn* was not pressed with any vigour by Mr Perry.

Relevant Legislative History

11. Prior to 1907 there was no general right of appeal in English law. The Criminal Appeal Act 1907 created the Court of Criminal Appeal with jurisdiction to determine appeals from defendants convicted on indictment, with powers set out in s. 4. There was no power to quash a conviction and order a re-trial. That power was first introduced by s. 1 of the Criminal Appeal Act 1964, limited to cases of fresh evidence and where it appeared to the court that the interests of justice so required. Retrial was to be upon a fresh indictment, but there was no requirement in s. 2 for re-arraignment on a fresh indictment (within a specified period of time or at all). Ss. 1 and 2 of the Criminal Appeal Act 1964 became ss. 7 and 8 of the CAA.

12. The general power to order a re-trial was introduced into the CAA by s. 43 of the Criminal Justice Act 1988 with effect from 31 July 1989. At the same time, s. 43 also inserted into s. 8(1) a requirement for arraignment within a specified (or extended) time period, and new subsections (1A) and (1B).

13. Ss. 7 and 8 now provide materially as follows:

> "7. Power to order retrial
>
> (1) Where the Court of Appeal allow an appeal against conviction…and it appears to the Court that the interests of justice so require, they may order the appellant to be retried…
>
> 8. Supplementary provisions as to retrial
>
> (1) A person who is to be retried for an offence in pursuance of an order under section 7 of this Act shall be tried on a fresh indictment preferred by direction of the Court of Appeal, but after the end of two months from the date of the order for his retrial he may not be arraigned on an indictment preferred in pursuance of such a direction unless the Court of Appeal give leave.
>
> (1A) Where a person has been ordered to be retried but may not be arraigned without leave, he may apply to the Court of Appeal to set aside the order for retrial and to direct the court of trial to enter a judgment and verdict of acquittal of the offence for which he was ordered to be retried.
>
> (1B) On an application under subsection (1) or (1A) above the Court of Appeal shall have power-
>
> (a) to grant leave to arraign; or

> (b) to set aside the order for retrial and direct the entry of a judgment and verdict of acquittal, but shall not give leave to arraign unless they are satisfied-
>
> (i) that the prosecution has acted with all due expedition; and
>
> (ii) that there is a good and sufficient cause for a retrial in spite of the lapse of time since under s. 7 of this Act was made…"

The Decision in *Llewellyn*

14. In *Llewellyn* the defendant's conviction for causing grievous bodily harm with intent was quashed by the Court of Appeal on 14 May 2020. The Court of Appeal ordered, pursuant to s. 8, that a new indictment should be preferred and the defendant arraigned within two months. In the event, the defendant was not arraigned until 30 September 2020. Trial was fixed for 15 March 2021. In February 2021 the defence served a written application to quash the indictment as a nullity on the basis that he had not been arraigned on the fresh indictment by 14 July 2020. The prosecution response included the assertion that the defendant had implicitly waived his right to apply to set aside the order for retrial, a submission which the trial judge accepted. The trial judge also concluded that lack of arraignment did not render invalid subsequent proceedings on the indictment, relying on *R v Williams (Roy)* [1978] QB 373 ("*Williams*"). The defendant went on to be convicted, from which conviction he appealed to the Court of Appeal.

15. The Court of Appeal allowed his appeal on the basis that the failure to arraign within two months resulted in the total invalidity of the proceedings. This was so, notwithstanding that it was accepted that the retrial would not have taken place any earlier in any event, and that there was no prejudice to the defendant resulting from the failure (see [22] and [32]). Its reasoning was summarised in the following paragraphs:

> "45. The essence of the present issue is that the Crown Court only has jurisdiction in these circumstances because the Court of Appeal has ordered a retrial under section 7. But Parliament expressly made this jurisdiction contingent on the fulfilment of the obligations set out in section 8(1), viz. that the appellant is to be tried on a fresh indictment preferred by direction of the Court of Appeal and that he or she cannot be arraigned on that fresh indictment *after* the end of two months from the date of the order for his retrial *unless* the Court of Appeal gives leave.
>
> 46. In our view, it follows that Parliament clearly intended that material non-compliance in the Crown Court with the provisions of section 8 would have the result that the court in a subsequent trial would have acted without jurisdiction, resulting in the "total invalidity" of the later proceedings. The restricted timetable for arraignment and the bespoke procedure for the Court of Appeal alone to grant leave to arraign outside

> the two-month time limit, based on this court being satisfied that the prosecution acted with all due expedition and that there remains a good and sufficient cause for a retrial, mean that Parliament did not intend that this procedure could simply be avoided, intentionally or otherwise, thereby depriving an accused of a substantive and unique protection which, for the reasons set out above, would be unavailable in the Crown Court. The decision in *Al-Jaryan* [2021] 1 Cr AppR 25 reveals the potential importance for an accused of this procedural failure being considered by the Court of Appeal.
>
> 47. We add, finally, that these strict requirements are not to be balanced against such considerations, for instance, as to whether the appellant "cloaked the arraignment with legal effect" by failing to make an application under section 8(1A) or the suggested partial or complete "waiver" relied on by the judge. Furthermore, we do not consider that there is any equivalence between the *invalidity* of a trial following an unlawful arraignment in the context of a retrial and the *validity* of a trial conducted in the absence of an arraignment in the ordinary course of events after the case has been sent by the Magistrates' Court. The critical distinguishing factor is to be found in the provisions of sections 7 and 8 which relate solely to a retrial." (Emphasis in original.)

16. The Court of Appeal refused to certify a point of law of general importance for the purpose of an application for leave to appeal to the Supreme Court.

Was the decision in *Llewellyn* correct*?*

17. The central question is whether Parliament can be taken to have intended that a failure to arraign a defendant within the two-month period in s. 8 (or such longer period as the Court of Appeal has permitted on application by the prosecution) in all circumstances has the effect that the Crown Court has no jurisdiction to proceed with a retrial. The focus is on whether Parliament can fairly be taken to have intended "total invalidity" (see *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340 at [23]). Considerations of the fairness of the proceedings or prejudice to the defence only arise if, on proper construction of the statutory provision, Parliament did not intend that an act done in breach of the statutory requirement should be invalid (see *R v Lalchan* [2022] EWCA Crim 736; [2022] QB 680 ("*Lalchan*") at [39]).

18. The normal principles of statutory interpretation are engaged. The words of the statute have primacy and are to be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the legislative purpose, which is an objective concept. There is no general assumption that a failure to comply with procedural requirements is to be categorised as a mere technicality. As the court stated in *Lalchan* at [39], to label a failure as procedural tells one nothing about the consequences of failure to follow the procedures.

19. It is common ground that the statutory purpose of ss. 7 and 8 is to ensure that retrial takes place as soon as possible. The purpose is intended to be achieved by a focus on arraignment. Once arraignment has taken place the case will be back under judicial control and the matter can be left to the judge to ensure that the retrial occurs at the earliest practical opportunity (see *R v Pritchard (Craig)* [2012] EWCA Crim 1285 ("*Pritchard*") at [5(1)]).

20. We start with the language of s. 8. The words are clear and mandatory in terms. A defendant who is to be retried "shall" be tried on a fresh indictment "but" "may not be arraigned" on the indictment beyond two months of the direction for retrial (without leave). This simple construction is consistent with the legislative purpose identified above.

21. Validity absent compliance with the requirements of s.8 would depend on an evaluation of justice based on criteria other than those expressly provided for by Parliament. Objectively, that cannot have been what Parliament intended. When introducing the general power to order a retrial, and the requirement for arraignment, Parliament could have legislated for a timetable governed by different benchmarks, such as overall expedition, judicial control or prejudice. It chose not to, opting for a two-month period for, as Mr Wilcock put it, a "timed and tangible" event, namely arraignment.

22. The respondent's essential position is that compliance with the requirements of s. 8 is not a fundamental pre-requisite to a lawful trial ordered under s. 7, relying in particular on *Williams*. However, *Williams* involved a trial on indictment originating in the Magistrates' Court, where there are no statutory provisions governing the timing of arraignment (or arraignment at all).

23. This leads to the key jurisdictional point. On retrial following the quashing of a conviction by the Court of Appeal, the Crown Court only has jurisdiction as a result of the order of the Court of Appeal made under s. 7. As highlighted in *Llewellyn* at [8], [40] and [46], whether or not to order a retrial is "not necessarily an easy decision, and the competing factors may be finely balanced". Parliament then made the jurisdiction contingent on the fulfilment of the supplemental bespoke requirements of s. 8. Those safeguards provide "critical protections for an accused" which are unique to the jurisdiction created by s. 7, and Parliament expressly gave responsibility for their implementation exclusively to the appellate court.

24. It is in this context wrong to say that arraignment in s. 8 is merely "a mechanism" by which to achieve the purpose of speedy trial: it is the mechanism, deliberately chosen by Parliament. Nor do we accept that weight should not be attached to the requirement of arraignment because s. 8 is a "provision of its time", and in some way outmoded. As was stated in *Lalchan* at [39], there is no "modern approach" that means that the only matter that ought ever to concern a court is the fairness of the proceedings or the presence or lack of prejudice to a defendant.

25. We do not consider that the result of our construction leads to absurd results in practice. Two scenarios were posited by the respondent:

    i) Where a defendant voluntarily absented themselves before arraignment, it would be necessary to produce them in court before being able to proceed.

This, it was submitted, would cause "logjams". Mr Wilcock submitted that this was not the case, relying on CPR 3.32(4)(a) (and s. 6 of the Criminal Law Act 1967). The rule provides that in respect of each count in an indictment read to or placed before the defendant, if the defendant declines to enter a plea, the court must treat that as a not guilty plea (absent unfitness to plead). We harbour doubts as to whether the provisions relied upon are apt to cover the situation where a defendant is wholly absent, even if deliberately so. But, whether or not Mr Wilcock is right, the potential practical difficulty highlighted does not persuade us that a different construction of s. 8(1) is justified. Amongst other things, the situation could only arise where i) the Court of Appeal has ordered a retrial; ii) the defendant in question is granted bail; and iii) they fail to attend court on the date scheduled for arraignment. Such a combination of events is unlikely to occur with sufficient frequency as to cause any serious problem of "logjams";

ii) Where the parties have overlooked the requirement for arraignment within time but both prosecution and defence wish to proceed nevertheless (and without seeking an extension of time from the Court of Appeal). If *Llewellyn* is correct, they could not waive the requirement, but would be forced to delay the proceedings by making the necessary application to the Court of Appeal. Were such (unusual) circumstances to arise, we accept that this would be the consequence of *Llewellyn*, but do not consider that the result is objectionable as a matter of principle. Ss. 7 and 8 create a statutory regime for retrial which expressly mandates procedural control at appellate level.

26. Mr Perry further submitted that a requirement for a causative link between the absence of an arraignment and delay would be consistent with the approach adopted under the custody time limit regime, as seen in *R (Gibson and another) v Crown Court at Winchester* [2004] EWHC 361 (Admin); [2004] 1 WLR 1623. However, as Mr Wilcock pointed out, the context in such cases is materially different and there is no meaningful comparison to be drawn. Compliance with custody time limits does not found the court's originating jurisdiction in any way.

27. Equally, we are not assisted by the line of cases in which this court has considered applications made by the prosecution under s. 8(1) for leave to arraign the defendant after the two months period has expired. Mr Perry placed particular reliance upon two cases where the application for leave was granted, where, he said, the decision to do so was influenced by the fact that delay in arraigning the defendant had had no causative effect upon the date of the trial: *R v Jones* [2002] EWCA Crim 2284; [2003] 1 Cr App R 20 and *R v Smith* [2007] EWCA Crim 519 (*"Smith*"). It was submitted that this indicated a recognition that a failure to arraign on a timely basis was not necessarily fatal if the legislative purpose of ensuring that the trial took place as soon as possible was nonetheless satisfied.

28. However, the decision in each of these cases simply reflected an application of the second of the s. 8(1B)(b) criteria. The absence of any adverse impact on the trial timescale is plainly one of the relevant features for the court to consider when applying that criterion to the facts of the particular case, but it sheds no significant light on the question of what Parliament intended the consequences to be when no s. 8(1) application has been made to this court. (If in fact there is anything to be gained from *Smith*, it is that it supports the decision in *Llewellyn*: at [8] Goldring J (as he then

was) stated that the prosecution was right to take the view on the first day of trial that the matter could not proceed without an order under s. 8(1B).)

29. We have also considered the respondent's submission that s. 8(1A) would be otiose if the absence of lawful arraignment meant an absence of jurisdiction in any event. However, a defendant could face a situation where they are not arraigned and the prosecution has not made an application under s. 8(1). The defendant might then want to make their own application to bring the criminal proceedings to an end, thereby removing the possibility of an order under s. 8(1). This is underscored by the respondent's acceptance that the prosecution could make an application to the Court of Appeal under s 8(1) at any point up until verdict.

30. Finally, we note that, although the effect of the decision in *Llewellyn* in the present case may be to enable an otherwise unmeritorious defendant to succeed, the strict application of statutory provisions with similar consequences is in line with, for example, the court's approach to prosecution failures relating to appeals against terminating rulings under s. 58 of the Criminal Justice Act 2003. Failure to comply with the requirements of s. 58 means that the court has no jurisdiction to hear the appeal (see *R v Arnold* [2008] EWCA Crim 1034; [2008] 1 WLR 2881*; CPS v C* , *M and H* [2009] EWCA Crim 2614; and *R v T(N)* [2010] EWCA Crim 711; [2010] 1 WLR 2655).

31. In summary, for the reasons set out above, we conclude that Parliament can fairly be taken to have intended "total invalidity" in the event of a failure to arraign a defendant within the two-month period stipulated in s. 8 (or such longer period as the Court of Appeal may have allowed).

32. We turn then to the facts of this case. It is common ground that:

    i) The appellant was not arraigned on a fresh indictment within two months of the order for a retrial following the quashing of the appellant's conviction;

    ii) At no time did the prosecution obtain an extension of time for such arraignment under s. 8 (and arraign within any extended period).

33. In these circumstances, the Crown Court did not have jurisdiction to try the appellant.

Are we bound by the decision in *Llewellyn* in any event?

34. Given our free-standing decision as set out above, this is not the place for a detailed examination of the relevant principles of stare decisis, and we address them only shortly. In civil proceedings, the Court of Appeal can depart from its own decisions in three circumstances, namely conflict between two Court of Appeal decisions; incompatibility with a decision of the Supreme Court; per incuriam (in the sense of being demonstrably wrong by virtue of ignorance of a statutory rule or binding authority) (see *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 (CA)).

35. It is well-established that the Court of Appeal in its criminal jurisdiction does not apply the doctrine with the same rigidity: see *R v Simpson* [2003] EWCA Crim 1499; [2004] QB 118 ("*Simpson*") at [32]. However, the authorities reveal that the circumstances in which the Court of Appeal will feel able to depart from a previous

appellate decision are still limited. It will only do so where, for example, what should have been a central issue for the court had not been considered (see *R v Sekhon* [2002] EWCA Crim 2954; [2003] 1 WLR 1655). As confirmed in *R v Varma* [2010] EWCA Crim 1575; [2011] QB 398 at [30], *Simpson* does not establish that the appellate court is entitled to disregard a decision on a distinct and clearly identified point of law, reached after full argument and close analysis of the relevant legislative provisions. Nor do any of the other authorities relied upon by the Respondent (such as *R v Barton* [2020] EWCA Crim 575; [2021] QB 685 (where the Court of Appeal modified the rules of precedent to accommodate a direction of the Supreme Court that an otherwise binding decision of the Court of Appeal should no longer be followed); *R v Reed* [2021] EWCA Crim 572; [2021] 1 WLR 5429 (which involved a conventional application of the per incuriam principle); and *R v Ahmed (Nazir)* [2023] EWCA Crim 281; [2023] 1 WLR 1858 (which involved precedent principles governing the exercise of the sentencing discretion, where it has long been recognised that there is a greater degree of flexibility)).

36. In the present case, there is a previous decision of the Court of Appeal from only last year on the very point in issue. There is no material distinction to be drawn on the facts. (The fact that the appellant appeared in the Crown Court within the relevant two-month period, or indicated maintaining a not guilty plea on that occasion, cannot assist the respondent. The bald fact is that there was no re-arraignment.) There are no conflicting lines of authority on the same question. Indeed, it was accepted as correct without hesitation by the Court of Appeal in *R v Supersad* [2022] EWCA Crim 1166. There is no basis for saying that *Llewellyn* was decided in ignorance of a relevant statutory provision or authority, and Mr Perry KC for the respondent fairly conceded as much. Indeed, the same leading and junior counsel have appeared for the prosecution in both appeals. In so far as they referred us to the forerunner legislative provisions to ss. 7 and 8, and the case law concerning applications for leave under s. 8 to arraign beyond the two-month period, and did not do so in *Llewellyn*, it cannot sensibly be argued that the decision in *Llewellyn* was reached per incuriam as a result. Those materials are cited primarily in order to support the submission that the purpose of s. 8 is to ensure that a retrial takes place at the earliest opportunity. The court in Llewellyn was fully alive to this, saying as much in terms at [39] and citing *Pritchard*.

37. Thus, for the sake of completeness, we would consider ourselves bound to follow *Llewellyn* in any event.

Conclusion

38. For the reasons set out above, the Crown Court did not have jurisdiction to retry the appellant. His conviction for murder is unsafe and must be quashed. The appeal will be allowed.

39. We recognise that this is to permit the appellant's conviction for a most serious offence to be set aside for procedural error in circumstances where the conviction was otherwise sound, and in circumstances where no prejudice arose out of the failure in question. However, the legislation is unambiguous. The situation was entirely avoidable. There was ample opportunity for the appellant to be rearraigned at or before the PCMH and in any event within the relevant two-month period. Judges and practitioners involved in retrials following orders of the Court of Appeal under ss. 7

and 8 should be in no doubt as to the importance of strict compliance with what are clear procedural requirements.