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Neutral Citation No. [2024] EWCA Crim 67

IN THE COURT OF APPEAL  
CRIMINAL DIVISION

CASE NO 202302475/B1



Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Tuesday 23 January 2024

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE GRIFFITHS

HER HONOUR JUDGE ANGELA RAFFERTY KC  
(Sitting as a Judge of the CACD)

REX

V

MUHAMMAD HANIF ARSHAD

Computer Aided Transcript of Epiq Europe Ltd,  
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE  
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR L EGAN appeared on behalf of the Appellant.  
MS G ONG appeared on behalf of the Crown.

J U D G M E N T

LORD JUSTICE DINGEMANS:

**Introduction**

1. This is the hearing of an appeal against the appellant's convictions for rape and sexual assault. The appellant is now a 52-year-old man. The complainant has the benefit of life-long anonymity, pursuant to the provisions of the Sexual Offences (Amendment) Act 1992.
2. The appellant was convicted on 16 February 2022, in the Crown Court at Birmingham, for one offence of rape and two offences of sexual assault following a trial before HHJ Buckingham ("the trial judge") and a jury. After his arrest for these matters, police interview and the grant of bail, the appellant did not attend court hearings and, following failed attempts to locate the appellant in the United Kingdom by the police, the trial judge had directed that the trial could proceed in the absence of the appellant.
3. The appellant was subsequently sentenced to 12 years' imprisonment for rape with concurrent sentences for the sexual assaults. On 22 May 2023, a warrant for the appellant's arrest was executed because he had returned from living abroad in Pakistan. On 1 June 2023, the appellant's sentence, which had been imposed on 16 February 2022, was confirmed and a further sentence of 1 month's imprisonment for failing to surrender to custody was ordered to run consecutively to the sentence of 12 years.
4. The appellant appeals, with the leave of the single judge, on the basis that the trial judge misdirected herself and was therefore wrong to permit the trial to continue in the appellant's absence.

**The factual circumstances**

5. The appellant was an agency night care worker at an accommodation unit providing support for three vulnerable adults. The complainant had lived at the unit for about 10

years as a vulnerable person with autism and learning difficulties. On 26 March 2019, the appellant was aged 50 years, and on that date the complainant alleged that, after he had been out in the evening, he had come back to the staffroom. The appellant was there, and he had anally raped the complainant, masturbated the complainant, and forced the complainant to touch the appellant's penis. On 28 March 2019, the complainant complained to two other care workers at the home about what he said the appellant had done to him.

6. The complainant was video interviewed by the police on 29 March 2019, but this interview was conducted without an intermediary and was served as unused material. In the course of the proceedings, an intermediary's report was obtained in respect of the complainant and on 29 January 2020, a full Achieving Best Evidence video interview took place. The police also obtained evidence from two consultant psychiatrists, one of whom had been involved with the complainant's care since he was a young boy, about the complainant's medical conditions and compliant and acquiescent nature. The psychiatrist had never assessed the complainant for capacity to consent to sexual relations, although considered it unlikely that he had such capacity.
7. The appellant, who was of previous good character, was arrested on 29 March 2019. The appellant, who did not obtain legal representation at that stage, was interviewed by the police from 14.21 to 15.14 hours. The original transcript of the interview ran to 36 pages. The appellant said that the complainant had initiated the sexual activity by touching the appellant's penis and by pulling down his pyjamas and exposing his own penis. The appellant then accepted that he had placed his penis between the complainant's buttocks but denied that he had penetrated the complainant's anus with his penis and gave evidence to the effect that all of the other sexual activity between the appellant and the

complainant was consensual. He accepted that the touching of each other's penises was wrong.

### **Relevant procedural matters**

8. The appellant was released on bail and he was charged on 16 November 2020, so that was nearly a year and 6 months after the original incident was alleged to have taken place. A postal requisition was sent to the appellant to appear at the Birmingham and Solihull Magistrates' Court on 22 December 2020. The appellant attended and was represented on that occasion by solicitors, who managed to take limited instructions from the appellant. The case was committed to the Crown Court at Birmingham with the appellant to appear on 19 January 2021 at a pre-trial preparation hearing, with all the usual warnings being given. The appellant did not attend, and it was reported he had not attended a meeting with his legal representatives.
9. The PTPH was adjourned to 22 January 2021. The appellant again did not appear and on 22 January 2021, a Bench Warrant was issued. A ground rules hearing for cross-examination of the complainant was ordered to be heard on 27 April, a section 28 of the Youth Justice and Criminal Evidence Act 1999 cross-examination of the complainant was scheduled to take place on 4 May, and a three-day trial was listed for 1 September, all in 2021.
10. It was apparent from a witness statement made by DC Morris, that police officers attended at the appellant's work address and two home addresses which had been provided for him in order to attempt to execute the Bench Warrant. Mobile phone records were interrogated, and further attempts were made to locate the appellant. Department of Work and Pensions checks were undertaken which provided an address which was also visited. By about May 2021, the best information obtained by the police

suggested that the appellant might have returned to Pakistan.

11. The appellant failed to attend at a short hearing to mention the case on 30 March 2021 and the ground rules hearing on 27 April 2021 for the video cross-examination of the complainant, pursuant to section 28 of the YJCE Act. On 1 May 2021, the prosecution sought a ruling that the section 28 cross-examination (and therefore the start of the trial) take place in the absence of the appellant. This was resisted on behalf of the appellant because there was the possibility that the appellant was still in the jurisdiction and the appellant had only provided brief instructions and the complainants evidence-in-chief had been videoed.
12. On 4 May 2021, the trial judge ruled that the cross-examination of the complainant should take place. The cross-examination was carried out in accordance with the agreed questioning on the same day and this was therefore the effective start of the trial.

**Further attempts to locate the appellant**

13. A further unsuccessful attempt was made to locate the appellant in August 2021. One occupier of premises which were visited said that he thought the appellant was in Malta. The trial was listed on 1 September 2021 but that had to be adjourned because of lack of court time. The trial was re-listed for 14 February 2022. In January 2022, another attempt was made to locate the appellant. Three premises were visited but the appellant was not located, and on 9 February, the prosecution made an application that the trial go ahead or continue on 14 February 2022. This was again resisted on behalf of the appellant.
14. On 11 February 2022, the trial judge considered the written submissions and ruled that the trial should continue and take place even though the appellant was not present. In the ruling, the judge noted that the trial had started because there had been section 28

cross-examination of the complainant, but the defence had submitted that the second part of the trial should be adjourned until the appellant had been located and detained, recording that it was still thought that the appellant was in the United Kingdom.

15. In the ruling, the judge addressed the applicable test from the decision in R v Jones and addressed the chronology of attempts to find the appellant. The judge said:

“I have reviewed all of the above evidence that has been provided to me and considered the nature and the seriousness of the allegations that the defendant faces, and the prosecution evidence as it stands -- including the 36-page comment interview, the defendant giving his explanation -- when determining how to proceed in this case.”

16. The judge recorded that the appellant would be disadvantaged by not being able to present his account to the jury but noted that that was of his own making and there was a full comment interview. The judge found that there was no risk of the jury reaching an improper conclusion from the appellant’s absence and the judge considered that there was a public interest in the trial taking place within a reasonable time.
17. The trial took place and the evidence concluded in the morning on Tuesday 15 February 2022, and the judge gave legal directions to the jury. Closing speeches took place and the judge concluded her summing-up. In the course of the summing-up, the judge told the jury that the appellant had lost contact with his legal team but that his absence could not be held against him. The jury had his interview and the cross-examination of the complainant, which the jury had watched on video. The jury retired and then reached a verdict mid-morning on Wednesday 16 February 2022.

### **The ground of appeal and submissions**

18. The ground of appeal, for which leave to appeal against conviction was granted by the single judge, was whether the judge had expressly taken into account the seriousness of

the offence which Lord Bingham in *R v Jones* had ruled should not be taken into account when deciding to order a trial in the absence of the appellant. The single judge had also granted an extension of time.

19. In submissions before us this afternoon, Mr Egan conceded that the appellant had waived his right to attend but submitted that, based on the Criminal Procedure Rules, the real question was whether it was unfair to proceed in the appellant's absence which always assumed that there would have been a waiver of right to attend. Here, the judge had not taken sufficient account of the unfairness to the appellant of continuing with the trial. Mr Egan relied on the judge's reference to the seriousness of the offence as being an irrelevant matter taken into account by the judge.

20. Ms Ong submitted that the reference to the seriousness of the allegations was in the context of considering the fairness of the process in the absence of the appellant, because it was followed by reference to the full comment 36-page interview and the relevant factors which the judge had then carefully balanced. Even if the reference to seriousness was wrong, this did not invalidate the exercise of discretion because the discretion was exercised properly, and the convictions were, in any event, safe. We are very grateful to Mr Egan and Ms Ong for their helpful written and oral submissions.

### **Relevant legal provisions**

21. In *R v Jones* [2002] UKHL 50; [2003] 1 AC 1, the House of Lords confronted the issue of whether it was possible to exercise a discretion to order a trial to start of a defendant in their absence, and approved the decision of the Court of Appeal in *R v Hayward and Jones* [2001] EWCA Crim 168; [2001] QB 862, to the effect that such a trial was permissible. (The further appeal in the House of Lords concerned only the appellant Jones, because the appellant Hayward had succeeded on his appeal in the Court of

Appeal). The House of Lords held that such a discretion to order a trial, in the absence of the defendant, should be exercised with great caution and only after there had been a close regard to the fairness of the proceedings.

22. The Court of Appeal, in that case, considered that the defendant had waived his right to attend but Lord Rodger and Lord Hoffmann doubted there had been a waiver because the trial judge in his ruling had said that he had himself never heard of a situation where a trial could take place in the absence of a defendant, and it was assumed that the defendant could be in no better position to know that the trial might take place in his absence.
23. Lord Hutton considered that a deliberate decision to abscond from the trial amounted to a waiver. The House of Lords held that it was not necessary for the defendant to have waived his right to appear at the trial in order for the discretion to be exercised, although it was obviously relevant that the defendant had made a deliberate decision to abscond.
24. The position has now developed from *R v Jones* in the Criminal Procedure Rules. These now provide, and provided at the relevant time of the decision in this case, at rule 25.2(b) that:

“the court must not proceed if the defendant is absent, unless the court is satisfied that—  
(i) the defendant has waived the right to attend, and  
(ii) the trial will be fair despite the defendant’s absence ...”

25. The fact that a waiver is required explains why defendants are warned that, if they do not attend the hearing of a trial, the hearing may proceed in their absence.
26. In *R v Jones* the House of Lords also agreed with the guiding principles set out by the Court of Appeal, in *R v Hayward and Jones*, save that Lord Bingham did not agree that the seriousness of the offence, as set out in paragraph 22(5) (viii) of the decision of the Court of Appeal should be considered as a relevant factor. This was because the judge’s



overriding concern should be to ensure that the trial, if conducted in the absence of a defendant, would be as fair as the circumstances permitted (see Archbold 2024 paragraph 3-223 and Blackstone's Criminal Practice 2024 at A7.56) which was not affected by the seriousness of the offences. The guiding principles set out in paragraph 22 of the judgment of the Court of Appeal in *Hayward and Jones* are:

“1. A defendant has, in general, a right to be present at his trial and a right to be legally represented.

2. Those rights can be waived, separately or together, wholly or in part, by the defendant himself...

3. The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives.

4. That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.

5. In exercising that discretion, fairness to the defence is of prime importance...”

27. The Court then set out specific factors to reflect on, including at (viii) the seriousness of the offence which, as already noted, Lord Bingham did not approve as a relevant factor.

Those relevant factors are considered below. The final principle was:

“6. If the judge decides that a trial should take place or continue in the absence of an unrepresented defendant, he must ensure that the trial is as fair as the circumstances permit.”

28. There have been examples of cases where the Court of Appeal has found that judges have failed to have sufficient regard to the fairness of the proceedings. In *R v Amourichi* [2007] EWCA 3019, this Court set aside a decision to try a defendant in his absence,

where he had not been produced by the Prison Service, where there was some doubt about the defendant's willingness to attend trial. In that case, the Court of Appeal did not endorse the judge's failure to consider all of the disadvantages to the defendant of not being able to give evidence in support of his defence of self-defence.

### **A proper exercise of discretion**

29. In our judgment, in this case, the judge was right to find that this trial could continue in the absence of the appellant. The judge addressed the relevant factors when considering whether to order the trial to take place. It is right to say that the judge had considered the seriousness of the allegations the defendant faced, but this was in the context of considering the prosecution evidence as it stood, including the 36-page interview (the defendant giving his explanation), so that the judge could consider the fairness of the proceedings before the judge separately addressed the relevant factors.
30. We note that in *R v Jones* itself it seems that the trial judge had referred to the seriousness of the armed robbery which had taken place, in his ruling, as appears from paragraph 38 of the judgment of the House of Lords in *R v Jones*, and that reference had not been found to have invalidated the exercise of the discretion in that case.
31. In any event, we consider that the judge was right to exercise her discretion in the very particular circumstances of this case to continue with the trial, notwithstanding the need for great caution to be exercised before a trial is heard in the absence of the defendant. As to the relevant factors highlighted in paragraph 22(5) of the judgment of the Court of Appeal in *R v Hayward and Jones*: (1) the nature and the circumstances of the appellant's behaviour in absenting himself from the trial was voluntary and, as Mr Egan fairly accepted, the appellant plainly waived the right to be present. This was because the appellant had deliberately absented himself and travelled out of the jurisdiction. There

was no indication from the evidence before the trial judge about whether he would ever return; (2) whether an adjournment would resolve the matter. There were in fact numerous adjournments to try to ensure that the appellant would be present, albeit one was caused by the absence of court time; (3) the likely length of such an adjournment. This was a very material factor because the likely length of an adjournment to enable the appellant to return was, on the information before the judge, unlimited. The appellant had disappeared; it seems he had gone abroad. It was not likely that he would ever return; (4) whether the defendant, although absent, wished to be represented or had waived his right to representation. In fact, the appellant was represented throughout and (one can see from the transcript of the proceedings) with conspicuous care and skill; (5) whether the defendant's representatives were able to receive instructions from him and the extent to which they could present his defence. The appellant had provided a full interview before he was represented by legal representatives in which his case had been set out. Those instructions had been reflected in the questions which were put to the complainant in cross-examination under section 28 of the YJCE Act; (6) as Mr Egan pointed out in argument this afternoon, the next factor is perhaps the most relevant. This is the extent of the disadvantage to the appellant in not being able to present his account of events. This was a very material factor, but it was considered carefully by the judge. The defence was consent. There were real difficulties in establishing that defence, given the complainant's vulnerabilities, as set out by the psychiatrists in their evidence, but it was a matter to be decided at trial. The absence of the appellant would make that defence very difficult to sustain; (7) the risk of the jury reaching an improper conclusion about the absence of the appellant. Mr Egan accepted that the jury was properly directed not to assume guilt because of the appellant's absence but submitted that there was still a risk

that the jury would consider that the appellant had absented himself because of the strength of the case against him. In our judgment, the judge dealt with this fairly and properly; (8) the general public interest that a trial should take place within a reasonable time. The allegations did date back to 26 March 2019, and it was in the interest of the complainant and the witnesses to resolve the matter. Finally (9) the effect of the delay on the memories of the witnesses. As Mr Egan pointed out, the complainant's evidence had been cross-examined already, under section 28, and therefore his evidence was complete. There was, however, also important evidence from those to whom the first complaints were made.

32. We have had a close regard to the fairness of the proceedings. We consider that, with his defence before the jury, and the inevitable further delay which was caused by the appellant's decision to abscond and disappear abroad, the balance weighed in favour of continuing this trial, even in the absence of the appellant.

### **Conclusion**

33. In all these circumstances, we can find no error of law in the judge's ruling, and we are sure that the convictions are safe. The appeal is dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: [rcj@epiqglobal.co.uk](mailto:rcj@epiqglobal.co.uk)