Neutral Citation Number: [2024] EWCA Crim 1027

Case No: 202300672 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM WOOD GREEN CROWN COURT
Mr Recorder Robert Palmer KC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 September 2024

Before :

LORD JUSTICE SINGH
SIR ROBIN SPENCER
and
HIS HONOUR JUDGE TIMOTHY SPENCER KC
(Sitting as an additional judge of the Court of Appeal (Criminal Division))

- -

Between :

REX	**Appellant**
- and -	
ABDULRAHMAN HADDAD	**Respondent**

- -
- -

Mr Joe Weeks for the **Appellant**
Mr Bhavin Patel for the **Crown**

Hearing date: 23 July 2024

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 9 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR ROBIN SPENCER:

1. This is an appeal against conviction and sentence arising from the appellant's failure to surrender to his bail on time for the start of his trial at Wood Green Crown Court on 23rd January 2023 for offences of assault. No leave to appeal is required. By virtue of s.13 Administration of Justice Act 1960 an appeal lies as of right.

2. The trial judge, Mr Recorder Robert Palmer KC, dealt with the breach of bail at the conclusion of the trial, following the appellant's acquittal by the jury. He found the Bail Act offence proved, and imposed a suspended sentence of imprisonment, 7 days suspended for 6 months. The court record suggests that a victim surcharge order in the sum of £154 was also imposed although no such order was pronounced at the hearing.

3. The appellant lodged his own grounds of appeal initially but the Registrar granted him a representation order, and we are grateful to Mr Weeks for his assistance. We have his written grounds of appeal against conviction and sentence. We are also grateful to Mr Patel, who was prosecuting counsel at the original trial and settled the respondent's notice opposing the appeal against conviction but not (at that stage) opposing the appeal against sentence.

4. Until the day we heard the appeal on 23rd July 2024 it had been common ground between counsel that this was an unlawful sentence which would have to be quashed because the minimum period of custody that can be suspended is 14 days: see s. 277(2) Sentencing Act 2020.

5. The position changed during the hearing when Mr Patel, counsel for the respondent, submitted that the sentence was lawful after all, because (he submits) this was a sentence "as for" contempt which was not caught by the restriction in s.277(2) Sentencing Act 2020; he submits that a period of imprisonment imposed as a sentence for contempt does not count as a "sentence of imprisonment" for the purpose of s. 277(2), and it was therefore open to the judge to suspend the term of 7 days' imprisonment.

6. That begs the question whether the sentence passed here was to be treated as a sentence for contempt rather than a sentence for a Bail Act offence to which ordinary sentencing provisions apply.

7. This issue arose late on in the appeal during oral submissions. Mr Patel developed his argument by reference to various statutory provisions and case law and Mr Weeks replied on behalf of the appellant. In the course of these submissions, which had not been reduced to writing for us in advance, it became clear that there were some potentially difficult legal issues which needed to be considered carefully with the benefit of properly formulated written submissions setting out the argument that had been advanced orally.

8. In relation to the conviction appeal, oral submissions had been completed at the hearing on 23rd July. After retiring to consider those submissions we were able to announce our decision that the appeal against conviction was dismissed. We indicated that we would give our reasons in a reserved written judgment in which we would also deal with the appeal against sentence. We now do so.

9. We are grateful to both counsel for their further written submissions which are elegant and well argued.

The factual background

10. The appellant was charged with offences of s.47 assault and assault by beating, arising out of an incident on 3rd November 2021.

11. The case was sent by the magistrates' court for trial at Wood Green Crown Court. The appellant pleaded not guilty at the plea and trial preparation hearing on 20th December 2021. The case was adjourned for trial with a time estimate of two days and the appellant was granted bail.

12. There was a lengthy delay in the trial being listed, no doubt owing to the backlog arising from the pandemic. In due course the appellant's solicitors were notified that the case was in the warned list for the two week period beginning Monday 16th January 2023. This meant that the trial could be listed at short notice to start on any day during that two week period.

13. On 12th December 2022, according to their attendance note, the appellant's solicitors informed the appellant by telephone that his case was in the warned list and could be called on at any time in the two week period from 16th to 27th January. The attendance note says that the appellant was told that as the court would give only one day's notice, it was essential that he remain in telephone contact with his solicitors.

14. The appellant disputes that he was told at that stage to make himself available for the full two week period. It seems that he had taken only one week off work, the first week of the warned list period, commencing Monday 16th January. He had not told his employers about the court hearing and had been reluctant to do so.

15. There was an exchange of texts between the appellant and his solicitor on Saturday 14th January, in which the solicitor confirmed that the appellant's case could be called on at any time from Monday 16th January for a two week period, and that the appellant did not need to go to court on that first Monday. In response the appellant texted his solicitor: "*I booked all week next week and I can't tell work the full story. I can't be off more than one week.*"

16. Late on the afternoon of Monday 23rd January, which was now week two of the warned list period, the solicitors learned from counsel's clerk that the trial was listed the following morning, Tuesday 24th January, at 10.30 am.

17. Within minutes of receiving that information the solicitors attempted to communicate it to the appellant. At 17:46 they phoned him but the call went straight to voicemail. The appellant says he did not pick up that message because he would have been asleep, in readiness for working his night shift as a delivery driver. The solicitor sent text messages to the appellant's phone timed at 17:46, 17:47 and 17:56. They also sent an email to the appellant timed at 17:50 stating that his case was listed the next day at 10:30 at Wood Green Crown Court, first on, asking him to confirm receipt of

the email. The appellant says this email went straight to his junk folder and he only retrieved it much later.

18. In fact the case was listed for hearing at the magistrates' court building in Hendon which was being used as an overflow court for Wood Green Crown Court.

19. It seems that the text messages sent by the solicitor were not actually received on the appellant's phone until 03:18 on the Tuesday morning. By then the appellant was, he said, at work and driving. He sent a text message to the solicitor at 03:43: "*Guess what? I'm stranded at Bournemouth. My van has broken down. I'm not going to be able to make it. Please take care of it. Why is it in the magistrates' court?"*

20. When the solicitor read the appellant's text message at about 6am he texted the appellant back: "*It's simply an overflow court. You will need to send proof. Have you called the AA or the RAC? Is there any reason why they cannot repair your van and/or take you to court? Witnesses are scheduled to appear, you cannot simply say my van has broken down."* The appellant texted in reply: "*No, I don't have to send any proof, take care of it*."

21. There followed a heated exchange between the appellant and his solicitor in text messages to and fro and in a phone call. The appellant disputed that he had been told the case was warned for two weeks. The solicitor insisted the appellant had been told. The solicitor confirmed that the appellant must be at Hendon magistrates' court that morning for his trial and that he needed to tell his employer. If he didn't attend, the court would issue a warrant for his arrest. The appellant said he hoped to be able to get to court by 4 pm.

22. The upshot was that the appellant was not at court for the start of his trial that Tuesday morning. His trial counsel explained the situation to the judge as best he could on the information available, which at that stage was not full and accurate.

23. In the event the appellant arrived at court at around 1.30pm, and the trial got underway in the afternoon. The jury was sworn and the case opened. The judge required more information from the solicitors as to the reasons for the appellant's late attendance. It became apparent to the appellant's trial counsel that he was in a difficult position professionally, as there was an unseemly conflict between solicitor and client as to what had really taken place and what had been said between them.

24. The court did not sit the following day so the trial was adjourned to Thursday 26th January. The appellant's bail was renewed.

25. On the Thursday morning the judge was informed that counsel was having what we might term "professional difficulties", with the appellant wanting to make a speech himself. The judge resolved this by explaining to the appellant what the next stages of the trial would be.

26. Before the trial resumed that morning with the jury, the judge quite properly addressed with the appellant and counsel the question of the breach of bail arising from the appellant's late arrival on the first day of the trial. The relevant Practice Direction requires such a matter to be addressed as soon as practicable: see Criminal Practice Directions 2023, section 4.2.3. We note that in the side bar on the Digital

Case System the judge gave counsel notice early that morning that this was the course he proposed to follow.

27. After some preliminary discussion about procedure and timing, on the instructions of the judge the clerk of the court put to the appellant the Bail Act offence of failing without reasonable excuse to surrender to his bail at the appointed time, contrary to 6(2) of the Act. The appellant indicated that he pleaded not guilty. The judge made it clear that he would hear from the appellant in due course and would not deal with the allegation of the Bail Act offence until the end of the trial.

28. The trial proceeded. Regrettably there was an incident over the lunch break that day which resulted in two of the jurors having to be discharged. There was a suggestion that the appellant had communicated with them inappropriately in some way. At the end of proceedings that day the judge revoked the appellant's bail. He remained in custody for the remainder of the trial, for a total of five nights, Thursday 26th January to Monday 31st January.

29. The jury returned verdicts of Not Guilty on both counts shortly before midday on Tuesday 1st February.

The proceedings for the Bail Act offence

30. The proceedings for the Bail Act offence took place the same afternoon. The judge had asked the appellant's solicitor to attend to explain the background to the appellant's late attendance. The solicitor was permitted to attend remotely via a video link. He explained the history, much as we have already summarised it.

31. The judge then asked the appellant if he disputed anything the solicitor said. The appellant said he disputed quite a lot. He claimed that when the solicitor spoke to him at around 6am on the Tuesday morning, the day of the trial, the solicitor had suggested, quite improperly, that the appellant should call in sick so that the court could be so informed. The appellant said he decided not to do that because it would be wrong to lie to the court. He insisted at first that when he had initiated contact with the solicitor on Saturday 14th January, he still did not realise that he would have to be available for two weeks. He had even phoned the court on Monday 16th January to check. He was adamant the solicitor had not told him on 12th December that he would have to be available for a two week period. The appellant agreed in the end, however, that he had known since Saturday 14th January that the trial might start at any time during the two week period.

32. He said he had not received the solicitor's texts because he was asleep, working nights. He got up at around 2.30am start his shift at 3am. He agreed he had said in a text that his van had broken down, which was incorrect, but what he had meant was that a warning light had come on when he was travelling on the M3 motorway so he was concerned the van might break down.

33. The appellant explained that he had carried on to Bournemouth to make the delivery and then returned to London and got to court as soon as he could, arriving at about 1 pm.

34. In view of the serious allegation the appellant was making against the solicitor, the judge allowed the solicitor to reply. The solicitor denied saying any such thing. He said he had warned the appellant that if he did not attend court that morning a warrant would be issued for his arrest. He said it was clear that the "whole issue" was that the appellant had only taken one week off work.

35. The judge then gave his decision and his reasons. He recited the history at some length, and his factual findings. He said that at no time had the appellant recognised the seriousness of his conduct. He did not treat the requirement to attend court that day with any seriousness at all. By the appellant's own admission his difficulties arose because it was a new job and he felt he was unable to tell the employer that he might be required at court. His actions showed disregard for the seriousness of the Crown Court process; his attitude was that the Court would have to wait for him to attend at his convenience, he having failed to make appropriate arrangements with his work. That was not acceptable. It amounted to a breach of the Bail Act. There was no reasonable excuse for his absence from court. The judge therefore found him guilty of the offence.

36. As to penalty, the judge had regard to the relevant Sentencing Council guideline. As a result of the offence, half a day of Crown Court time had been lost. Crown Court time was precious. However the appellant did attend and had always intended to do so.

37. The judge thought it was a category 1B offence under the relevant Sentencing Council guideline, with a starting point of 21 days custody. He was mindful, however, of the fact that the appellant had spent several days in custody during the trial, time which might well not count towards such a sentence. In view also of the appellant's personal mitigation, the judge was persuaded to impose a sentence of only 7 days imprisonment which he suspended.

38. The judge's actual words in passing sentence were:

> "…the appropriate sentence in respect of this failure is one of seven days' custody which I am prepared to suspend for a period of six months".

He went on to explain to the appellant the consequences of breaching the suspended sentence.

39. No-one drew the judge's attention to the fact that the minimum period for the custodial term of a suspended sentence is 14 days.

The grounds of appeal against conviction

40. On behalf of the appellant, Mr Weeks submits that the appellant's conviction is unsafe for a number of reasons, which we summarise briefly as follows.

41. First, he submits that the appellant was not given the opportunity to apply for legal representation in relation to the Bail Act proceedings, and instead attempted to

represent himself. He relies on the well-known observations of this court in *R v Davis* (1986) 8 Cr App R (S) 64, to which we shall return.

42. Second, he submits that the way in which the appellant was invited to say whether he disputed the solicitor's version of events meant that he was not able to explain in his own words why he did not arrive on time for the start of his trial.

43. Third, Mr Weeks submits that the appellant was not given the opportunity to explain a series of miscommunications and misunderstandings between himself and his solicitor which, when properly understood, showed that he had every intention of attending on time for his trial.

44. In able and attractive oral submissions Mr Weeks developed these points. He suggested that trial counsel's role had become ambiguous in view of the evident conflict between his lay client and his professional client, and the appellant was effectively unrepresented. No question of alternative representation was raised. Fresh counsel would have been able to prepare written submissions whereas the appellant was left to explain his case as best he could, "shooting from the hip", which did not help his case.

45. In the respondent's notice Mr Patel addresses the grounds of appeal in detail. He submits that the appellant was not prejudiced by a lack of representation. He was afforded the fullest opportunity to give his version of events. The judge merely directed him to specific points he needed to address. He submits that the appellant was caught out by his own error in taking only one week off work and not telling his employer the position. He had displayed a blatant disregard for the court process by failing to prioritise the court hearing.

Discussion and conclusion on conviction appeal

46. We have considered all these submissions carefully. We are satisfied that the procedure adopted by the judge was fair in all the circumstances and that the appellant's conviction for the Bail Act offence is safe.

47. As to legal representation, the appellant's trial counsel understandably felt unable, professionally, to advance the appellant's explanations and allegations against the solicitor because there was a clear conflict between his lay client and his professional client. He did, however, ensure that the appellant had access to all the relevant material, and, once the judge had found the appellant guilty of the offence, trial counsel mitigated very effectively on the appellant's behalf, ensuring that the appellant did not receive a sentence of immediate custody. It would no doubt have been difficult to arrange immediately for separate legal representation by fresh counsel.

48. In any event, as *Davis* makes clear, the provision of legal representation is not absolute. The full quotation from the judgment of this Court, at page 66, is:

> "It is incumbent upon a court when it decides of its motion as it is entitled to deal with a Bail Act offence to give a defendant an

> opportunity of explaining himself and to invite any submission there may be from counsel who happens to be representing the defendant at that time. If a defendant is unrepresented then the court must be careful to ensure, if he requires it for the purpose of giving an explanation for absconding, that he has legal representation, or at the very least that he is given the fullest possible opportunity of offering some excuse (if he has any) for absenting himself…." (emphasis added).

49. We are quite satisfied that the appellant was given the fullest possible opportunity to explain to the judge, in his own words, why he said he had a reasonable excuse for not attending court on time for the start of his trial. That was the sole issue. The burden of proof was on the appellant, to the civil standard. We note that the appellant's explanation extends over some eleven pages of the transcript, albeit some of it is in answer to direct questions from the judge in addressing specific points. The appellant is intelligent and articulate, as the transcript demonstrates.

50. The problem for the appellant, as the judge correctly identified, was that on his own admission he had been told by his solicitor on 14th January, before the warned list period began, that he would have to be available at short notice for the start of his trial on any day within that two week period. It was incumbent on him to keep in close contact with his solicitor. He had taken an unreasonable risk in not clearing with his employer the need for a further week's leave if required. Instead, in an attempt to explain away his own error and misconduct he had tried to maintain, falsely, that he had never been told that the trial could begin on any day within the two week period. The judge was fully entitled to conclude that in these circumstances there was no reasonable excuse for his failure to attend. The problem was entirely of the appellant's own making.

51. Accordingly the conviction is safe and the appeal against conviction is dismissed.

The appeal against sentence

52. As we explained at the outset of this judgment, the suspended sentence the judge imposed was on the face of it unlawful because the minimum term of imprisonment that may be suspended is 14 days: see s.277(2) Sentencing Act 2020. In the respondent's notice, as well as in counsel's grounds of appeal, this had been accepted to be the position.

53. The contrary argument now advanced by Mr Patel on behalf of the respondent is that because the sentence was imposed for contempt, it does not rank as a "sentence of imprisonment" for the purpose of s.277(2).

54. The argument runs as follows: s.222(1) Sentencing Act 2020 sets out the various forms of custodial sentences a court may impose, including "a sentence of imprisonment". However, s.222(2) provides:

> "In subsection (1) 'sentence of imprisonment' does not include a committal for contempt of court or any kindred offence".

This is mirrored in s.305 of the Act which provides that in Chapter 5 of Part 10 of the Act (ss.286 -305) which deals with suspended sentence orders:

> "In this Chapter … 'sentence of imprisonment' does not include a committal for contempt of court or any kindred offence".

We note that s.277(2), which provides for a minimum term of 14 days for a suspended sentence, falls in Chapter 4 not Chapter 5 of Part 10, but s.305 is incorporated by reference because s.222(4) states: "For provisions about suspended sentences, see Chapter 5." Mr Patel is therefore entitled to rely for his argument on both s.222(2) and s.305.

55. Mr Patel's argument prompts examination of the true nature of the sentence imposed by the judge. Was it a sentence of imprisonment imposed for the criminal offence of failing to surrender, contrary to s.6(2) Bail Act 1976, or was it "a committal for contempt of court or any kindred offence"?

56. The argument arises from the wording of s.6(5) Bail Act 1976, which provides:

> "An offence under subsection (1) or (2) shall be **punishable** either on summary conviction or **as if it were a criminal contempt of court.**"

57. The powers of sentence are set out in s.6(7) of the Act which provides:

> " A person who is convicted summarily of an offence under subsection (1) or (2) above and is not committed to the Crown Court for sentence shall be liable to imprisonment for a term not exceeding 3 months or to a fine not exceeding level 5 on the standard scale or to both and **a person who is so committed or is dealt with as for such a contempt shall be liable to imprisonment for a term not exceeding 12 months or to a fine or to both."**

<u>The respondent's submissions</u>

58. Mr Patel submits that the wording of s.6(5) - "*punishable… as if it were a criminal contempt of court*"- engages the general provisions of s.14 Contempt of Court Act 1981, headed "Penalties for contempt and kindred offences". Section 14(1) provides:

> "In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his

> earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court."

59. Mr Patel submits that the maximum of 12 months' imprisonment imposed by s.6(7) Bail Act 1976 is an example of such a "limitation" which "applies to a period of committal". He submits that any period of imprisonment imposed on committal for contempt may be suspended, and the judge was entitled to pass a sentence of 7 days' imprisonment suspended for 6 months.

60. In support of this argument Mr Patel relies on s.45 Senior Courts Act 1981, which sets out the Crown Court's powers to deal with contempt and provides in s.45(4):

> "…. the Crown Court shall in relation to…any contempt of court, the enforcement of its orders and all other matters incidental to its jurisdiction, have the like powers, rights, privileges and authority as the High Court".

Mr Patel draws attention to the powers of the High Court, and thus the Crown Court, in Part 81 of the Civil Procedure Rules, and specifically Civ PR 81.9:

> "(1) If the court finds the defendant in contempt of court, the court may impose a period of imprisonment (an order of committal), fine, confiscation of assets or other punishment permitted under the law.
>
> (2) Execution of an order of committal requires issue of a warrant of committal. An order of committal and a warrant of committal have immediate effect unless and to the extent that the court decides to suspend execution of the order or warrant."

61. Mr Patel submits in the alternative that if the sentence passed by the judge does not rank as a period of imprisonment imposed for contempt, it was imposed for the "kindred offence" under the Bail Act of failing to surrender, and is therefore not a "sentence of imprisonment" within the meaning of s.222(1) Sentencing Act 2020 and is not subject to the restriction of a minimum of 14 days for a suspended sentence.

62. Accordingly Mr Patel submits that the sentence of 7 days' imprisonment suspended for 6 months was a lawful and appropriate sentence with which this Court should not interfere, save to correct the court record to make it clear that it was not a suspended sentence order but (presumably) a suspended committal to prison for contempt.

The appellant's submissions

63. On behalf of the appellant Mr Weeks submits that the judge did not impose, and could not lawfully have imposed, an order for committal to prison for contempt for this Bail

Act offence. What the judge intended and purported to impose was a standard suspended sentence of 7 days suspended for 6 months, which by reason of s.277(2) was an unlawful sentence and must be quashed.

64. Mr Weeks submits that the Crown Court's power to sentence for the Bail Act offence of failing to surrender derives solely from s.6(7) of the Act; the provisions of ss.14 Contempt of Court Act 1981 and 45 Senior Courts Act 1981 have no application.

65. Nor, Mr Weeks submits, is this Bail Act offence a "kindred offence" within the meaning of s.222(1), or s.305, of the Sentencing Act 2020. He submits that there is no authority for such a proposition. He points out that in the Law Commission's current Consultation Paper on Contempt of Court (published on 9th July 2024) it is said that the phrase "kindred offence" is considered to refer to conduct punishable under a statutory provision - such as s.12 Contempt of Court Act 1981 (wilfully insulting a justice, witness or officer, etc, in the magistrates' court or wilfully interrupting or misbehaving in such proceedings) or s.14 County Courts Act 1984 (assaulting an officer of the county court) – both of which would be a contempt of court if performed in relation to a superior court - or failing to comply with an order under s.115(3) Magistrates' Court Act 1980 to enter into a recognizance to keep the peace. He points out that in each of these three examples the statutory provision specifically empowers the court to "commit" the offender to custody, thus making it clear that the punishment is akin to committal for contempt, whereas in s.6 (7) Bail Act 1976 there is no such wording.

Discussion and conclusion

66. We have considered carefully all these submissions and the authorities cited to us in those submissions, some of which we shall refer to. The other authorities cited do not assist.

67. The short issue we have to decide is whether the suspended sentence the judge passed was unlawful because the minimum term of imprisonment that may be suspended is 14 days and here the period imposed was only 7 days.

68. There is, we think, a danger of over-complicating what is in essence a simple issue.

69. The judge plainly intended to pass and thought he was passing a standard suspended sentence of imprisonment for the Bail Act offence of failing to surrender. That is why he referred to the relevant Sentencing Council guideline for failure to surrender to bail. There is, of course, no sentencing guideline for committals for contempt.

70. There is a consistent line of authority (identified below) that ss.6(1) and 6(2) Bail Act 1976 created a separate and unique criminal offence of failing to surrender, and that the commission of such an offence is not itself a contempt of court. That is why s.6(5) provides that the offence is to be punishable *as if* it were a criminal contempt. The words *"as if"* show that it does not actually constitute a contempt of court. That was made clear in *R v Harbax Singh* (1979) 68 Cr App R 108; [1979] QB 319.

71. In *Schiavo v Anderton* (1986) 83 Cr App R 228 Watkins LJ, giving the judgment of the Divisional Court, explained (at page 238):

> "Prior to the Bail Act 1976, absconding was not an offence known to the law. The only power which courts had which was in any way akin to punishment was to estreat the recognizances of an accused person when he was arrested and possibly that of his or her sureties. The offence created by section 6 is therefore unique in the sense that it has no ancestor…An offence under section 6 of the Bail Act is not a contempt of court, although it may be said to bear some relation to it in the sense that a person who commits it has acted in defiance of an essential condition of his bail, namely that he surrender so as to appear before the court at a place and at a time appointed."

72. In *R v Reader* (1987) 84 Cr App R 294, the judge had imposed a sentence of 2 years' imprisonment for absconding, treating it as a contempt of court. Leggatt J, giving the judgment of the Court of Appeal quashing the sentence of 2 years and substituting a sentence of 12 months, explained (at page 297):

> "The offence of absconding whilst on bail has never constituted a contempt of court. If there was any doubt about this point, one has only to refer to the language of the Bail Act section 6(5) itself, which provides that the offence of absconding whilst on bail shall be punishable 'as if it were a contempt of court'. No such provision would be needed if absconding already was a contempt of court, and the phrase 'as if it were' shows that it is not a contempt of court. This point has recently been underlined in the Divisional Court in *Schiavo v Anderson*…
>
> Since what the appellant committed was not a contempt of court, it was not within the scope of the Contempt of Court Act 1981." (emphasis added)

The final sentence underlined above is the short answer to Mr Patel's submission in this appeal, to the extent that it relies on s.14 Contempt of Court Act 1981.

73. In *R v Lubega* (1999) 163 JP 221 the issue was whether the judge had been correct to treat the appellant's failure to surrender as a contempt of court and impose a period of 28 days' imprisonment. Giving the judgment of the Court of Appeal allowing the appeal, Tucker J referred to *Schiavo v Anderton* and *R v Reader* as authority for the proposition that the Bail Act offence of absconding was not a contempt of court, and explained:

> "In our opinion the effect of s.6(5) is not to convert an offence under the Bail Act into a contempt of court, but simply to provide a speedy and effective alternative method of dealing with such an offence. Therefore it follows that the judge was

> not entitled to deal with the matter as a contempt of court and he erred in doing so."

74. In the light of these authorities and as a matter of statutory construction we are quite satisfied that the judge in the present case was not imposing a term of imprisonment for contempt by way of committal. He was simply imposing a sentence of imprisonment for a criminal offence.

75. Furthermore, if Mr Patel's argument were correct, and the effect of s. 6(5) meant a judge in this situation is imposing a sentence for contempt, several startling consequences and anomalies would follow.

76. First, if the judge is sentencing for contempt, the range of options is very limited, generally only imprisonment or a fine. This range is extended somewhat by amendments to s.14 Contempt of Court Act 1981. In the case of an offender under 18 an attendance centre order may be made (s.14(2A)), and in the case of an offender suffering from a mental disorder, a hospital order or guardianship order may be made (s.14(4)). There is, however, no power to impose a community order. The power to make a community order arises only if an offender is convicted of an offence "punishable with imprisonment": see s.202(1) Sentencing Act 2020. The Law Commission, in its current Consultation on Contempt of Court, highlights this lacuna and provisionally proposes that community sentences should be available as a sanction for contempt of court: see paras 10.132 -10.139.

77. We should add that Mr Patel argued to the contrary in his written submissions, and suggested that a community order is already available for contempt as an alternative to imprisonment, because CivPR 81.9(1), which we have set out in full at [60] above, entitles the court dealing with a defendant found to be in contempt of court to impose any "other punishment permitted under the law". We reject that submission. A community order is a creature of statute, and available (as we have indicated) only if the offender has been "convicted of an offence". Mr Patel concedes, however, that "on the face of it" a community order must be available for the Bail Act offence, because even on his primary argument that this is sentencing for contempt, the offence is "punishable with imprisonment" within the meaning of s.202(1) Sentencing Act 2020, even if committal for contempt would not be a "sentence of imprisonment" for the purpose of the suspended sentence provisions in s.222(1) and s.305.

78. Second, if the Crown Court in sentencing for this Bail Act offence is (or must be treated as) sentencing for contempt with the options only of imprisonment or a fine, and is precluded from imposing a community order, this flies in the face of the Sentencing Council's guideline for the s. 6 Bail Act offence of failure to surrender to bail. The guideline provides that for each of the three categories of harm one of the sentencing ranges (depending on culpability) includes a community order. Of particular significance, category 1 refers exclusively to failure to attend a Crown Court hearing, so the offence will necessarily have been proved in the Crown Court (as in the present case) and is therefore punishable, pursuant to s.6(5), "*as if it were a criminal contempt of court*". Yet, for culpability level C the guideline starting point (category 1C) is a medium level community order, and for level B (category 1B) the

range begins at a high level community order. If Mr Patel's primary argument were correct, the imposition of a community order would be impossible and unlawful.

79. Third, it must be appreciated that a judge in the Crown Court may be sentencing for the Bail Act offence of absconding in one of two different situations, as s.6(7) makes clear. The first is where the offender has been convicted of the Bail Act offence in the magistrates' court and has been committed for sentence to the Crown Court. In this first situation there can be no doubt at all that the judge would be sentencing for the summary Bail Act offence found proved in the magistrates' court and no question of sentencing "as if it were a criminal contempt of court" could arise. The wording of s.6(7) precludes this: "…*a person who is so committed or is dealt with as for such a contempt shall be liable to imprisonment….".* The second situation is where the judge in the Crown Court has found the Bail Act offence proved, and moves to sentence. Applying the words of s.6(7), the offender falls then to be "*dealt with as for such a contempt*". It cannot conceivably be correct that in the first situation the judge is entitled to pass a standard sentence of imprisonment or the permitted alternative of a community order, subject to all the relevant provisions of the Sentencing Act 2020, but that in the second situation the judge's powers are confined to those applicable to punishment for contempt, i.e. imprisonment or a fine. There could be no justification in logic or in law for such a conflict.

80. Fourth, and by the same token, it would also follow, if Mr Patel's primary argument were correct, that the magistrates' court upon conviction of the summary offence would be able to impose a community order whereas the judge in the Crown Court, upon convicting the offender, could not do so. That too would be an unjustifiable anomaly.

81. Fifth, it is necessary to bear in mind the nature and consequence of committal to prison for contempt, as compared with the imposition of a sentence of imprisonment for an offence. In the case of the former, as s.14 Contempt of Court Act 1981 makes clear, the court always retains the power "*to order his earlier discharge*". In other words, it is always open to the offender to purge his contempt. A person sentenced to imprisonment for an offence has no such right.

82. Sixth, the nature and form of a suspended order of committal to prison for contempt is very different from the nature and form of a suspended sentence imposed for an offence pursuant to the provisions of Chapter 5 of Part 10 of the Sentencing Act 2020, ss.286-305. A suspended committal order is sometimes framed in terms that the committal to prison will not be enforced provided that the contemnor takes certain specified action to remedy the contempt. Sometimes enforcement is simply suspended for a set period provided the offending conduct is not repeated. This begs the questions: what action would have to be taken, and by whom, and for what scope of "breach", if the suspended sentence in the present case is to be treated as a suspended order for committal for contempt rather than a standard suspended sentence?

83. Finally, and for completeness in addressing Mr Patel's submissions, we do not consider that the s.6 Bail Act offence of failing to surrender constitutes a "kindred offence" for the purpose of s.222(1) Sentencing Act 2020. The examples given by the Law Commission which we have summarised at paragraph [65] of this judgment seem to us to explain the scope of what must have been intended by the use of the phrase "kindred offence" in the present context.

84. For all these reasons we are quite satisfied that although the judge was entitled to impose a suspended sentence of imprisonment for this Bail Act offence, the sentence he passed was unlawful because the minimum term that may be suspended is 14 days, and here the term imposed was only 7 days. It follows that the suspended sentence must be quashed.

Disposal

85. We have considered carefully what sentence or other order we should substitute.

86. The judge was rightly concerned that the period of 5 days which the appellant had served on remand during the trial would not count towards a sentence of immediate imprisonment, had he imposed such a sentence. It clearly would not have counted, because it was not time served in relation to the Bail Act offence but in relation to the offences of which he was ultimately acquitted. The judge therefore needed to take into account in some other way that the appellant had served the equivalent of a 10 day sentence of immediate imprisonment.

87. It would be quite wrong for us to substitute a suspended sentence of 14 days' imprisonment, the lawful minimum. The requirement in s.11(3) Criminal Appeal Act 1968 that where a sentence is quashed on appeal any sentence we pass in its place must not be such that the appellant is more severely dealt with overall than he was dealt with in the court below, does not strictly apply here because this appeal is brought under the Administration of Justice Act 1960, not the Criminal Appeal Act 1968. However, we consider that the same principle of justice and fairness applies and precludes that course, even if we were otherwise minded to take it.

88. We are acutely conscious that 18 months have now passed since this suspended sentence was imposed. It was ordered to be suspended for 6 months only. So far as we are aware, the appellant has committed no further offence which would have put him in breach of the suspended sentence (had it been lawfully imposed).

89. In the unusual circumstances of this case, in particular the fact that the appellant has served the equivalent of a 10 day sentence of imprisonment in connection with proceedings in the Crown Court in which he was ultimately acquitted, we had initially been minded to impose instead a conditional discharge for a period of 6 months. However, such an order would take effect from the date when this judgment is handed down, with the result that the sanction of breach would be hanging over the appellant for a further 6 months, a total period of some 2 years after he was convicted of the Bail Act offence. It was only ever envisaged that he would be at risk of the matter being revisited for 6 months, and in that period he has not apparently reoffended.

90. In these circumstances we see no purpose in imposing a conditional discharge. Instead we impose an absolute discharge.

91. It is evident from the transcript of the sentencing hearing that the appellant was concerned to know whether the imposition of the suspended sentence meant that he would have a criminal record. No doubt Mr Weeks will advise the appellant as to the effect of an absolute discharge, as explained in s.82 Sentencing Act 2020.

92. We also note that even if a victim surcharge order could lawfully have been imposed, the judge did not make, i.e. pronounce, such an order. Accordingly that order cannot stand. In any event we observe that there is no power to make a victim surcharge order when an absolute discharge is imposed: see s. 42(5) Sentencing Act 2020.

93. We therefore allow the appeal against sentence. We quash the suspended sentence and in its place we order an absolute discharge. We also quash the victim surcharge order.