Hilary Term
[2025] UKSC 12
On appeal from: [2023] EWCA Crim 1207

JUDGMENT

R (Appellant) *v* Layden (Respondent)

before

Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Hamblen
Lord Stephens
Lady Simler

JUDGMENT GIVEN ON
2 April 2025

Heard on 3 and 4 March 2025

Appellant
David Perry KC
Paul Jarvis
(Instructed by Crown Prosecution Service & Review Unit (Westminster))

Respondent
Peter Wilcock KC
Catherine Oborne
(Instructed by QualitySolicitors Jordans LLP)

LORD HAMBLEN (with whom Lord Hodge, Lord Lloyd-Jones, Lord Stephens and Lady Simler agree):

1. Under section 7(1) of the Criminal Appeal Act 1968 ("the 1968 Act") where the Court of Appeal allows an appeal against conviction it may order the defendant to be retried if it appears to the court "that the interests of justice so require".

2. Section 8 of the 1968 Act sets out "Supplementary provisions as to retrial". These include, at subsection (1), that the defendant "shall be tried on a fresh indictment preferred by the direction of the Court of Appeal" and that arraignment may not take place after the end of two months from the date of the order for retrial without the leave of the Court of Appeal. A procedure is then provided whereby the prosecution can apply to the Court of Appeal for leave to arraign and the defence may apply to set aside the order for retrial. As was common ground, the purpose of these supplementary provisions is to ensure that the retrial proceedings are brought under judicial control and that the retrial takes place as soon as reasonably practicable.

3. In the present case, the retrial took place without the respondent being arraigned within two months of the order for retrial or at all. No application to the Court of Appeal was made under section 8 by either the prosecution or the defence. The respondent successfully appealed against his conviction on the grounds that in these circumstances the Crown Court had no jurisdiction to try him.

4. The central legal issue on this appeal, as certified by the Court of Appeal, is whether a failure to comply with the procedural requirements in section 8(1) of the 1968 Act deprives the Crown Court of jurisdiction to re-try a defendant notwithstanding an order of the Court of Appeal under section 7(1) of the Act.

The factual and procedural background

5. On 11 April 2013, the respondent and four others were convicted of the murder of Ian Church following a violent incident at the Bricklayers Arms in Great Yarmouth in the early hours of 5 May 2012. The respondent was sentenced to life imprisonment with a minimum term of 13 years.

6. The respondent appealed against his conviction and on 19 March 2015 the Court of Appeal gave judgment quashing his conviction on the basis that the trial judge's direction to the jury in relation to the identification evidence in his case had been inadequate.

7. On the same day, the court acceded to the prosecution's application for an order for retrial under section 7 of the 1968 Act. The court directed that:

> (1) a retrial should take place at a Crown Court to be determined by the presiding judge for the South-Eastern Circuit;
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> (2) the prosecution should prefer a fresh indictment upon which the respondent was to be retried;
>
> (3) the respondent should be arraigned upon that fresh indictment within a period of two months; and
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> (4) the respondent should be remanded into custody pending any decision of the Crown Court as to bail.

8. The process of arraignment involves identifying the defendant, reading the indictment to the defendant, and asking the defendant to plead guilty or not guilty and taking the plea.

9. The retrial was listed to be heard at the Crown Court at Norwich. The respondent's case was listed before His Honour Judge Bate on 2 April 2015 for an application for bail. The prosecution and defence were represented by counsel. The respondent was present at that hearing in custody. The court directed that an indictment should be served by 16 April 2015. It was confirmed that the estimated length of the retrial would be seven to 14 days. It was further directed that the Plea and Case Management Hearing ("PCMH") should take place as soon as possible once the indictment had been served.

10. On 14 April 2015, the prosecution served a fresh indictment, as directed by the Court of Appeal, charging the respondent with a single count of murder.

11. Within two months of the Court of Appeal's order for a retrial, on 7 May 2015, the respondent's case was listed for a PCMH before His Honour Judge Holt, the Honorary Recorder of Norwich. The respondent was present at that hearing and represented by the junior counsel who later, together with leading counsel, represented the respondent at trial. The prosecution was represented by leading counsel who with junior counsel represented the prosecution at trial.

12. No arraignment took place at the PCMH. Prosecution counsel informed the court that the case would proceed to a retrial. Judge Holt directed that the retrial should commence on 28 September 2015. Further case management directions were also made.

13. By the direction of the Court of Appeal, the respondent should have been arraigned on the fresh indictment by 19 May 2015, but no arraignment took place by that date or at any time thereafter. At no stage did the prosecution seek the leave of the Court of Appeal for the respondent to be arraigned out of time. Nor was any application made by the respondent to the Court of Appeal for an order setting aside the retrial.

14. The respondent's case was next listed for a pre-trial review on 11 September 2015, at which the parties confirmed they were ready for trial.

15. On 28 September 2015, the day fixed for the commencement of the retrial, there was an exchange between counsel and the trial judge, Judge Holt, as to whether the respondent needed to be arraigned on the fresh indictment. Before the jurors were empanelled, leading counsel for the defence, said this: "[junior defence counsel] raises a question: does he need to be arraigned because this is essentially a new indictment?" Leading counsel for the prosecution responded: "It's a re-wording of the old indictment, I don't think there's a necessity for Mr Layden to be re-arraigned but also …" whereupon leading counsel for the defence said: "Well we wouldn't take any point (inaudible)". Judge Holt then proceeded to empanel a jury. In the usual way, the court clerk informed the jury that the respondent had pleaded not guilty to the charge of murder.

16. On 14 October 2015, being the third day of their deliberations, the jury was discharged because of issues surrounding the disclosure of unused material. The retrial was then fixed to begin in April 2016.

17. The second retrial took place before Judge Holt and a jury. On 17 May 2016, the jury found the respondent guilty of murder. He was sentenced to life imprisonment with a minimum term of 8 years and 359 days.

18. The respondent unsuccessfully sought leave to appeal against his conviction.

19. In 2018, the respondent applied to the Criminal Cases Review Commission (the "CCRC") for it to review his conviction. The CCRC declined to refer the respondent's case to the Court of Appeal. However, following the decision in *R v Llewellyn (Andrew)* [2022] EWCA Crim 154, [2023] QB 459 ("*Llewellyn*"), the CCRC invited the respondent to make a further application for a referral of his case to the Court of Appeal, on the basis that the failure of the Crown Court to arraign him on the fresh indictment within two months of the order for a retrial having been made by the Court of Appeal could impact

the safety of his conviction. Following a fresh application, the CCRC decided that there was a real possibility that the Court of Appeal would quash the respondent's conviction, and so referred his case to the Court of Appeal.

20. The respondent's appeal was heard on 12 October 2023 with judgment being handed down on 25 October 2023. The court (Lady Carr CJ, Jeremy Baker and Heather Williams JJ) quashed the respondent's conviction and certified that a point of law of general public importance was involved in their decision ([2023] EWCA Crim 1207; [2024] 3 All ER 689).

21. On 8 March 2024, the Supreme Court granted the prosecution permission to appeal.

The 1968 Act

22. So far as material, sections 7 and 8 of the 1968 Act now provide 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 the order under section 7 of this Act was made."

The decision in *Llewellyn*

23. In *Llewellyn*, following the order for his retrial, the defendant was arraigned outside the two-month period and without leave of the Court of Appeal. Neither the prosecution nor the defence made any application to the Court of Appeal and the case proceeded to trial. The defendant was convicted and appealed against his conviction on the basis that the trial judge was wrong to allow the trial to proceed, in circumstances where leave for an out-of-time arraignment had not been obtained from the Court of Appeal. The Court of Appeal (Fulford LJ (VP), Cutts and Cockerill JJ) allowed the appeal and quashed the appellant's conviction on the basis that the failure to arraign within two months had resulted in the total invalidity of the proceedings before the Crown Court. The principal reasons given by the Court of Appeal for so concluding were as follows:

> (1) The "starting point … is the power to order a retrial and the factors which underpin that decision. The power to order a retrial is exercised by the Court of Appeal. This requires the exercise of judgment by the court, weighing the public interest and the legitimate interests of the defendant" (para 37). "This provides an important element of the context when considering the supplementary provisions in section 8" (para 38).
>
> (2) "The clear purpose of section 8 is to ensure that the retrial takes place as soon as possible" (para 39). That purpose is meant to be achieved by focusing 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" (per Gross LJ in *R v Pritchard (Craig)* [2012] EWCA Crim 1285 ("*Pritchard"*) at para 5(1)).

(3) If the mandatory time limit within which arraignment is to take place has been exceeded, an application should be made under section 8, "when this court will only grant leave to arraign out of time if (i) the Crown has acted with all due expedition and (ii) there is good and sufficient cause for a retrial in spite of the lapse of time since the court's order under section 7" (para 39). These are "critical protections for an accused, protections which Parliament has reposed in the Court of Appeal (Criminal Division)" (para 40).

(4) It is not for the Crown Court to engage with the section 8 criteria. If the validity of the proceedings was to depend on where the interests of justice lie, and whether the procedural failure has caused any prejudice, that would involve bypassing the section 8 criteria and the need for them to be considered and applied by the Court of Appeal. Nor does the abuse of process jurisdiction provide substitute protection (paras 40–44).

(5) "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)" (para 45).

(6) 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 Crown 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" (para 46).

The decision of the Court of Appeal

24. The Court of Appeal concluded that *Llewellyn* was correctly decided. Its reasoning was similar and may be summarised as follows:

> (1) The "statutory purpose of sections 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" (para 19).
>
> (2) The language of section 8 is "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)" (para 20).
>
> (3) "Validity absent compliance with the requirements of section 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" (para 21).
>
> (4) The "key jurisdictional point" is that 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 section 7 … Parliament then made the jurisdiction contingent on the fulfilment of the supplemental bespoke requirements of section 8. Those safeguards provide 'critical protections for an accused' which are unique to the jurisdiction created by section 7, and Parliament expressly gave responsibility for their implementation exclusively to the appellate court" (para 23).
>
> (5) It is wrong to say that "arraignment in section 8 is merely 'a mechanism' by which to achieve the purpose of speedy trial: it is <u>the</u> mechanism, deliberately chosen by Parliament" (para 24).

25. The Court of Appeal further concluded that it was bound by the decision in *Llewellyn* in any event.

The issue

26. The issue on this appeal is:

Does a failure to comply with the procedural requirements in section 8(1) of the 1968 Act deprive the Crown Court of jurisdiction to re-try a defendant notwithstanding an order of the Court of Appeal under section 7(1) of the 1968 Act?

The parties' cases

27. In summary, the appellant's case is:

> (1) The appeal should be determined as a matter of conventional statutory interpretation.
>
> (2) This involves ascertaining the intention of Parliament regarding the consequences of non-compliance with the procedural requirements of section 8. The principle in *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340 ("*Soneji*") applies.
>
> (3) That principle is that where Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply, a flexible approach is required and "the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity" to follow from non-compliance with a statutory requirement; and this "is ultimately a question of statutory construction" (per Lord Steyn at para 23 of *Soneji*).
>
> (4) Parliament did not intend non-compliance with the procedural requirements of section 8 to result in the total invalidity of retrial proceedings.
>
> (5) The legislative history of sections 7 and 8 and a comparison with the position in Northern Ireland and Scotland supports the appellant's argument.
>
> (6) Parliament can fairly be taken to have intended that the ordinary law on arraignment will apply to section 8. A trial is not invalidated by the

absence of arraignment and a person may waive any right to be arraigned (see *R v Williams (Roy)* [1978] QB 373).

(7) An order for a retrial under section 7 remains intact until it is set aside by the Court of Appeal on an application under section 8. It is not rendered totally invalid by non-compliance with the procedural requirements of section 8.

(8) The obligations on the prosecution in respect of a retrial are to prefer an indictment and to act with due expedition. The obligation to arraign the accused person is on the Crown Court.

(9) The decisions of the Court of Appeal in *Llewellyn* and in this case are wrong because they fail to give effect to Parliament's true intention as to the consequences of non-compliance with the procedural requirements of section 8.

28. In summary, the respondent's case is:

(1) It is accepted that the central question in this appeal is, engaging the normal rules of statutory interpretation, whether Parliament can be taken to have intended that a failure to arraign the respondent within the two-month period has the effect that the Crown Court has no jurisdiction to proceed with a retrial such that the proceedings which led to his conviction were invalid (ie it is accepted that the *Soneji* principle applies).

(2) The failure to arraign the respondent within the directed time under section 8 did amount to procedural non-compliance.

(3) The decisions of the Court of Appeal in *Llewellyn* and in this case are a correct statement of law and are supported by the historical context.

(4) The Crown Court only has jurisdiction in these circumstances because the Court of Appeal has ordered a retrial under section 7 and Parliament expressly made this jurisdiction contingent on the fulfilment of the "extra" bespoke obligation that the defendant 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.

(5) The appellant's interpretation of section 7(1) and 8 of the 1968 Act ignores the ordinary and natural meaning of these provisions, the historical context within which they were introduced and would effectively neuter the extra safeguard Parliament intended to introduce in Court of Appeal ordered retrials.

Statutory interpretation

29. The applicable principles are not in dispute.

30. The courts ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision: see, for example, *R (Quintavalle) v Secretary of State for Health* ("*Quintavalle*") [2003] UKHL 13; [2003] 2 AC 687, para 8; *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, paras 28–29 and *News Corp UK & Ireland Ltd v Revenue and Customs Comrs* [2023] UKSC 7; [2024] AC 89, para 27. This means that "the statute as a whole should be read in the historical context of the situation which led to its enactment" (per Lord Bingham of Cornhill in *Quintavalle* at para 8).

The legislative history

31. Both parties submitted that the legislative history of the 1968 Act is of importance.

32. The Criminal Appeal Act 1907 ("the 1907 Act") was the first Act to provide a general right of appeal against conviction on indictment on questions of law and, by leave of either the Court of Criminal Appeal or the trial court, on questions of fact, or mixed law and fact. The powers of the court were set out in section 4 of the 1907 Act. Where the court allowed an appeal against conviction, it was required by section 4(2) to "quash the conviction and direct a judgment and verdict of acquittal to be entered." The court, while vested with a broad power to receive fresh evidence (section 9), had no general power to order a retrial, but it did have the power (previously vested in the Court for Crown Cases Reserved) to issue a writ of venire de novo (where a purported trial "is actually no trial at all": per Lord Atkinson in *Crane v DPP* [1921] 2 AC 299, 330; and see *R v Rose* [1982] AC 822, 831).

33. In 1954, a Departmental Committee on New Trials in Criminal Cases, chaired by Lord Tucker (Cmd 9150, 1954), considered whether the Court of Criminal Appeal should be given the power to order a retrial in all cases. The Committee unanimously concluded that it should have such a power in cases involving fresh evidence, but by a majority of five to three, that there should be no general power.

34. The first power to order a retrial was introduced by the Criminal Appeal Act 1964 ("the 1964 Act"). Following the recommendations in the Tucker Report, it was limited to cases of fresh evidence. Section 1(1) of the 1964 Act provided that where the Court of Criminal Appeal allowed a conviction appeal by reason only of evidence received by the court under section 9 of the 1907 Act, and it appeared to the court that the interests of justice so required, the court could order that the appellant be retried.

35. Section 2 of the 1964 Act was entitled "Supplementary provisions as to new trials." Section 2(1) provided that an appellant was to be retried upon a fresh indictment preferred by the direction of the Court of Criminal Appeal and before such court as the Court of Criminal Appeal may direct. There was no requirement in the 1964 Act that the appellant should be arraigned on that fresh indictment or within a specified period of time.

36. Two years later, the Court of Criminal Appeal was abolished by the Criminal Appeal Act 1966 ("the 1966 Act") which created a single Court of Appeal with two divisions. The jurisdiction exercisable by the Court of Criminal Appeal was transferred unchanged to the Court of Appeal (Criminal Division). The 1966 Act repealed the Crown Cases Act 1848 and the jurisdiction to issue a writ of venire de novo was transferred to the new Court of Appeal (Criminal Division).

37. The 1968 Act introduced more wide-ranging changes, and it continues to provide the basis of the jurisdiction and practice of the Court of Appeal (Criminal Division). The 1968 Act is in three parts. Part 1 (sections 1 to 32) deals with appeals to the Court of Appeal.

38. The retrial provisions of the 1964 Act were re-enacted in Part I of the 1968 Act. Section 1 of the 1964 Act became section 7 of the 1968 Act. Section 8 of the 1968 Act was in all material respects a repetition of section 2 of the 1964 Act.

39. In Northern Ireland, a general power of retrial was created by the Criminal Justice (Northern Ireland) Act 1966 and re-enacted in the Criminal Appeal (Northern Ireland) Act 1968. Section 13 of that Act empowered the Court of Criminal Appeal in Northern Ireland, when quashing a conviction, to direct a retrial where this was in the interests of justice. The supplementary provisions as to retrials (in section 14) were largely the same as the English provisions: the retrial was to take place upon a fresh indictment preferred by direction of the Court of Criminal Appeal and before such court as the Court of Criminal Appeal may direct, or in the absence of such a direction before any court having jurisdiction to try the indictment. There was no requirement for arraignment on the fresh indictment to take place at all or within a set period of time. This remains the position under the legislation currently in force, the Criminal Appeal (Northern Ireland) Act 1980 (section 7).

40. In Scotland, a general power to authorise the bringing of a new prosecution was enacted through the Criminal Justice (Scotland) Act 1980, which amended the relevant provisions of the Criminal Procedure (Scotland) Act 1975 (sections 254 and 255). By these provisions, the High Court was empowered not to order a retrial as such, but to authorise the bringing of a new prosecution after allowing an appeal against conviction. No limitation was set upon the power although any new prosecution was to be commenced within two months of the date on which authority to bring the prosecution was granted. Where the prosecution is not commenced within two months of the High Court's authority, a verdict of acquittal is to be entered. This remains the position under the Criminal Procedure (Scotland) Act 1995 (sections 118 and 119).

41. In 1986, the Law Commission prepared a discussion paper on the "*Power of the Court of Appeal Criminal Division to Order a Retrial*". It noted that all common law courts worldwide had a general power of retrial except for England and Wales whose position was "unique" (summary, para (d)). It summarised the main reasons for extending the power to order a retrial as follows (para 16):

> "The arguments in favour of extending the power of the CACD to order a retrial are obvious and have been stated many times. They are the basic arguments in favour of a criminal justice system, viz that where a man has been properly charged with a criminal offence he should receive a valid trial and, if found guilty, be sentenced accordingly. [Otherwise] [n]ot merely may a guilty man go free … but the process of the criminal law itself is brought into disrepute when an apparently guilty man has to be freed on a technicality".

42. The paper concluded that in light of the statutory reforms that had been made in Northern Ireland and Scotland, the case for extending the Court of Appeal's powers to order a retrial in England and Wales had been considerably strengthened.

43. The government signalled its agreement with the conclusion of the Law Commission paper and sought views on whether the power to order a retrial should be extended, and if so, whether there should be a rule in England and Wales like the rule in Scotland, that a second prosecution must commence within two months of the date on which the authority for a retrial is granted.

44. The general power to order a retrial was introduced into the 1968 Act by section 43(3) of the Criminal Justice Act 1988 ("the 1988 Act") with effect from 31 July 1989 by amending section 7. Section 43 of the 1988 Act also inserted into section 8(1) of the 1968 Act the requirement that after the end of two months from the date of the direction for a retrial pursuant to section 7, the appellant "may not be arraigned on an indictment

preferred in pursuance of such a direction unless the Court of Appeal give leave." Section 43(4) of the 1988 Act inserted new subsections (1A) and (1B) into section 8 of the 1968 Act.

45. Mr David Perry KC for the appellant submitted that the legislative history was significant because it showed that the present general power to order a retrial was born out of concern that otherwise "the process of the criminal law itself is brought into disrepute when an apparently guilty man has to be freed on a technicality". I agree that this was the mischief addressed by the extension of the court's power in section 7 of the 1968 Act, as made clear in the Law Commission paper.

46. Mr Perry further submitted that it was significant that Parliament had before it the example of the Scottish legislation under which the consequence of failing to bring new proceedings within the specified two-month period were precisely stated, namely automatic acquittal. A similar two-month period was specified in the amendments made to section 8 (for arraignment), but no similar or automatic consequence was stated if this was not done within the specified time. I agree that this is of some significance.

47. Mr Peter Wilcock KC for the respondent submitted that it was important to recognise that the amendments introduced by section 43 of the 1988 Act were introduced against the background of historical concerns about retrials, and in particular that they undermine finality and the principle that no person should be put in peril for a second time on the same charge. This is true but, by introducing a general power of retrial, Parliament necessarily decided that it was appropriate to override those concerns where "the interests of justice so require".

48. Mr Wilcock further submitted that it was appropriate to have regard to statements of the Earl of Caithness (then a Minister in the Home Office) (Hansard (HL Debates), 26 October 1987, Vol 489, cols 380–390) in promoting the amendments in Parliament which led to sections 7 and 8 and that to do so was in accordance with the "rule" in *Pepper v Hart* [1993] AC 593. The statements relied upon are not, however, "clear" on the issue of interpretation which the court is considering, namely, the consequences of failing to comply with the procedural requirements in section 8(1) of the 1968 Act and whether that deprives the Crown Court of jurisdiction. Indeed, they do not address this question. They are accordingly not admissible as they do not meet the third requirement laid down in *Pepper v Hart*.

The authorities

49. There have been a number of cases which have considered section 8 in the context of whether leave to arraign should be given and whether the requirements of section

8(1B)(b) are satisfied. The principles to be derived from the authorities were summarised by Gross LJ in *Pritchard* at para 5 as follows:

> "(1) The purpose of the section is to ensure that the 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.
>
> (2) The section is structured in such a way that this court has no power to give leave to arraign out of time unless the cumulative requirements of subsections (1B)(b)(i) and (ii) are satisfied.
>
> (3) 'Expedition' means 'promptness' or 'speed'. 'Due' means 'reasonable' or 'proper'. The question of 'due expedition' relates to the arraignment, not to other aspects of the preparation for the retrial. Where the deadline has been missed, the court does not look simply at the end result, nor does the court conduct a minute examination of the systems employed in the offices and chambers of those involved in the prosecution. What is involved instead has been referred to as a broad 'post mortem'.
>
> (4) The primary duty to ensure that the arraignment takes place within the time limit lies with the Crown Court concerned. However, all parties to the proceedings are also under a duty to co-operate to ensure that the defendant is re-arraigned within the two-month time limit.
>
> (5) The requirement that the prosecution should have acted with 'all due expedition' is less exacting than that for the extension of a custody time limit (where the requirement is with 'all due diligence and expedition').
>
> See [*R v Coleman*] (1992) 95 Cr App R 345; *R v Kimber* [2001] EWCA Crim 643; *R v Jones (Paul Garfield)* [2002] EWCA Crim 2284, [2003] 1 Cr App R 20; and *R v Dales* [2011] EWCA Crim 134."

50. Mr Perry accepted that this was an accurate summary of the authorities but raised two criticisms of the current state of the law. First, insufficient weight has been given to the purpose of section 8 in determining whether there had been "due expedition". Secondly, this has led in some of the decisions to a failure to recognise that whether there has been "due" expedition depends on whether there has been prosecutorial delay which has had an effect on the achievement of the statutory purpose, namely to ensure that the retrial proceedings are brought under judicial control and that the retrial takes place as soon as reasonably practicable.

51. It is correct that there are Court of Appeal decisions which have addressed the issue of "due expedition" as a free-standing requirement that is to be considered regardless of its impact on the achievement of the statutory purpose of section 8. Examples include the first Court of Appeal decision on section 8, *R v Coleman* (1992) 95 Cr App R 345, and later cases adopting the same approach such as *R v Horne* The Times Law Reports (27 February 1992) and *R v Dales (Robert)* [2011] EWCA Crim 134. It is also reflected in Gross LJ's summary of the applicable principles at para 5(3) (see para 50 above). There are, however, other Court of Appeal decisions which have emphasised the impact of the alleged lack of "due expedition".

52. In *R v Saeed Majd-Sadajy* (17 May 1999), for example, a retrial was ordered on 4 March 1999, a fresh indictment was provided on 8 March and a retrial on 18 May was fixed on 10 March. It was not, however, until 14 May that it was realised by the prosecution and the Crown Court that re-arraignment had been overlooked. Leave to re-arraign was granted. In giving the judgment of the court Rose LJ (VP) stated:

> "This is a case in which, so far as the preferring of the fresh indictment and fixing a date for trial is concerned, conspicuous expedition was displayed … It is a case in which, no doubt, by 3 May, which would have been the day before the two months elapsed, they ought to have realised that the defendant had not been re-arraigned. That realisation did not befall them until, as we have said, 14 May. But we are unable to find that the fact that they had not realised by 3 May that re-arraignment, which would primarily be a matter for the Crown Court to achieve by way of listing, had not occurred demonstrates a want of due expedition on their part."

53. In *R v Jones (Paul Garfield)* [2002] EWCA Crim 2284, [2003] 1 Cr App R 20 the retrial was ordered on 28 June 2002, a fresh indictment was provided on 1 August and there was a plea and directions hearing on 2 August. At the hearing on 2 August, a provisional date for retrial was suggested of 6 January 2003, and people were working from that date towards a retrial at that time. The hearing was, however, adjourned as trial counsel were not available and it was considered that their presence was required. The

hearing did not resume until 6 September which was after the two-month period for arraignment had expired. The Court of Appeal held that arraignment could and should have taken place at the 2 August hearing but that leave to arraign should be granted. In so deciding Kay LJ stressed the following (at pp 319–320):

> "… the preferment of the bill was done with due expedition in the sense of reasonable promptness. The hearing before the Central Criminal Court on August 2 took place at a time when arraignment would have been well within the permitted period … In asking for the postponement the Crown Prosecution Service were seeking to have the resumed directions hearing at a date when it was most likely to achieve a speedy retrial because the directions would be given when trial counsel could attend. We fail to see how such actions can said to be a want of due expedition and we conclude that the prosecution have acted throughout with due expedition … The delay in arraignment will not affect the likely hearing date consequent upon the court's original order."

54. In *R v Gill (Kuran)* [2023] EWCA Crim 976 ("*Gill*") the retrial was ordered on 17 February 2023, the fresh indictment was uploaded on the Digital Case System ("DCS") on 17 March and on the same day the prosecution wrote to the Crown Court requesting notification of the listing for re-arraignment. The case was listed for a plea and trial preparation hearing on 31 March but because the fresh indictment had been uploaded to the old DCS case file the defendant was not arraigned although a retrial date was fixed for 3 July. On 6 April the prosecution wrote to the Crown Court pointing out that there had been no arraignment and asking for the case to be relisted before 17 April so that this could be done. In the event it was listed for 17 April which was a day over the two-month period. Leave to arraign was granted. In giving the judgment of the court Edis LJ stated:

> "37. … The purpose of this provision is to ensure that the case comes back under judicial control so that it can be tried as soon as possible and without further delay. The duty of the prosecution in respect of an arraignment is not an onerous one. They must proffer indictment and be represented when the court lists the matter for arraignment. If the court is failing its obligation, then no doubt they should seek to take all reasonable steps open to them to correct that failure. It is, however, to be recalled that the principal duty is on the Crown Court …
>
> 38. In this case the prosecution has actually done everything necessary to ensure that the case will be tried at the earliest

> possible date. In fact, it will be tried within five months of the order for the retrial."

55. Mr Perry placed particular reliance by way of analogy on the decisions of the Divisional Court in *R v Manchester Crown Court, Ex p McDonald* [1999] 1 WLR 841 ("*McDonald*") (which was cited and relied upon by Edis LJ in *Gill*) and *R v Leeds Crown Court, Ex p Bagoutie* (The Times, 31 May 1999) ("*Bagoutie*"). These concerned applications to extend a defendant's custody time limits under section 22(3) of the Prosecution of Offences Act 1985. This allowed for time to be extended if the court was "satisfied" "(a) that there is good and sufficient cause for doing so; and (b) that the prosecution has acted with all due expedition" (this was later changed to "all due diligence and expedition"). This was similar language to that used in the amendments made to section 8 of the 1968 Act three years later, in 1988.

56. In *McDonald* Lord Bingham CJ identified the purposes of the Act and the Regulations specifying the maximum custody period and stated that the legislation must be interpreted and applied with these objectives in mind. He also said as follows in relation to what is meant by "due expedition" (at p 847):

> "The condition in section 22(3)(b) that the prosecution should have acted with all due expedition poses little difficulty of interpretation. The condition looks to the conduct of the prosecuting authority (police, solicitors, counsel). To satisfy the court that this condition is met the prosecution need not show that every stage of preparation of the case has been accomplished as quickly and efficiently as humanly possible. That would be an impossible standard to meet, particularly when the court which reviews the history of the case enjoys the immeasurable benefit of hindsight. Nor should the history be approached on the unreal assumption that all involved on the prosecution side have been able to give the case in question their undivided attention. What the court must require is such … expedition as would be shown by a competent prosecutor conscious of his duty to bring the case to trial as quickly as reasonably and fairly possible."

57. In *Bagoutie* Lord Bingham held that subsections (a) and (b) of section 22(3) had to be read together and were "linked" requirements. He stated:

> "It seems clear to me, however, that the requirement of due expedition or due diligence or both is not a disciplinary provision. It is not there to punish prosecutors for

> administrative lapses; it is there to protect defendants by ensuring that they are kept in prison awaiting trial no longer than is justifiable. That is why *due* expedition is called for. The court is not in my view obliged to refuse the extension of a custody time limit because the prosecution is shown to have been guilty of avoidable delay where that delay has had no effect whatever on the ability of the prosecution and the defence to be ready for trial on a predetermined trial date.
>
> …
>
> It seems to me plain that Parliament has intended to insist that prosecutors cannot seek extensions where the need for the extension is attributable to their own failure to act with due expedition and has been at pains to make that clear by setting the requirement out in clear terms on the face of the statute. It does not, however, appear to me that there is anything in the language of the Act in either version which shows that these are independent and free-standing requirements. I repeat that I can see no reason why Parliament should have wished to oblige the court to refuse an extension of a custody time limit because there has been some avoidable delay, even where this has not had any effect on the beneficial object which the statute is intended to achieve, namely the objective of keeping defendants in prison awaiting trial for no longer than is justifiable".

58. Although the contexts of custody time limits and retrials are different, and although the purposes of the relevant statutory provisions are also different, I agree with Mr Perry that Lord Bingham's statements do inform how the similarly expressed requirements of section 8(1B)(b) should be approached. In particular, it should be interpreted consistently with and so as to give effect to the purpose of section 8. In the light of the guidance provided by *McDonald* and *Bagoutie*, this leads to the following conclusions:

> (1) The requirement that the prosecution has acted "with all due expedition" is not a disciplinary provision.
>
> (2) "Due expedition" means such expedition as would be shown by a competent prosecutor conscious of his duty to ensure that the retrial proceedings are brought under judicial control and that the retrial takes place as soon as reasonably practicable.

(3) There is no lack of "due" expedition if there is a prosecutorial delay which has no effect on the object of ensuring that the retrial proceedings are brought under judicial control and that the retrial takes place as soon as reasonably practicable.

59. Adapting the reasoning of Lord Bingham in *Bagoutie,* I can see no reason why Parliament should have wished to oblige the court to refuse an application for leave to arraign because there has been some avoidable delay, even where this has not had any effect on the beneficial object which the statute is intended to achieve, namely the objective of ensuring that that the retrial proceedings are brought under judicial control and that the retrial takes place as soon as reasonably practicable.

60. Adopting this purposive interpretation of the requirement of "due expedition" means that it is wrong to consider that issue by reference solely to the arraignment. This is supported by further considerations. First, doing so is contrary to the general and unqualified terms in which section 8(1B)(b)(i) is expressed. Secondly, it means that in a case in which there had been no prosecutorial delay in relation to an arraignment which does not take place within two months, but serious prosecutorial delay leading to the postponement of the retrial, that would not be a matter which the court could take into account when considering whether the prosecution had acted with due expedition—a perverse result. Thirdly, it means that the focus is on a matter which is the responsibility of the Crown Court rather than the prosecution. Finally, it is to be noted that this broader, purposive approach is to the benefit of the defendant since it enables the court to consider the issue of due expedition by reference to all the circumstances rather than the narrow issue of arraignment.

61. For all these reasons, I conclude that sub-paragraph (3) of Gross LJ's summary of the applicable principles at para 5 in *Pritchard* should be replaced by the considerations set out in para 58(1), (2) and (3) above.

The wording of sections 7 and 8

62. Under section 7 a retrial may only be ordered where the court is satisfied that "the interests of justice so require". The context in which the "Supplementary" provisions of section 8 fall to be considered is therefore one in which it has been determined that a retrial is in the interests of justice.

63. An order for a retrial confers jurisdiction on the Crown Court to conduct the retrial even before the new indictment is preferred (see *R v X* [2010] EWCA Crim 2368 at para 8). Unless the Court of Appeal reserves jurisdiction to deal with a particular matter, the court responsibility thereafter in relation to the directions given by the Court of Appeal when ordering the retrial rests with the Crown Court (*R v X* at para 9). Once the Crown

Court has jurisdiction then, save in relation to reserved matters, the Court of Appeal's jurisdiction ceases (*R v X* at para 5). The order for retrial vests in the Crown Court both the power and the duty to conduct a retrial.

64. Section 8 is in mandatory terms in that the defendant "shall" be tried on a fresh indictment and that he "may not" be arraigned after the end of the two-month period unless the Court of Appeal gives leave.

65. I agree with the Court of Appeal that this means that the procedure set out in section 8 should be followed. Where there has been no arraignment within two months of the order for retrial this should be brought to the attention of the Crown Court and the prosecution should make an application to the Court of Appeal for leave to arraign. Once such an application is made the Court of Appeal has jurisdiction to deal with it pursuant to section 8.

66. The fact, however, that section 8 is expressed in mandatory terms does not answer the *Soneji* issue. All statutes in relation to which the *Soneji* principle arises for consideration are likely to be expressed in mandatory terms. The problem is that the consequences of non-compliance with those mandatory requirements are not stated.

67. Section 8 does not specify what the consequences are to be where:

(1) There is a retrial with no arraignment.

(2) There is a retrial with an arraignment after the two-month period but without the leave of the Court of Appeal.

(3) There is no arraignment within the two-month period and no application to the Court of Appeal under section 8(1) or 8(1A).

68. In these circumstances, the *Soneji* principle applies. In so concluding, I have due regard to the observations of Lord Bingham in *R v Clarke (R v McDaid)* [2008] UKHL 8; [2008] 1 WLR 338 at paras 17 and 20 and his statement that *Soneji* does not mean a "wholesale jettisoning of all rules affecting procedure irrespective of their legal effect".

69. Section 8(1B)(b) expressly provides for circumstances in which the jurisdiction of the Crown Court will cease, namely where an order is made setting aside the order for retrial and directing the entry of a judgment and order for acquittal. The clear implication is that, subject to such an order being made, the jurisdiction of the Crown Court subsists.

70. The question of when and how the jurisdiction of the Crown Court ceases raises obvious difficulties with the Court of Appeal's interpretation of section 8. In both *Llewellyn* (para 45) and this case (paras 2, 23), the Court of Appeal interpreted the Crown Court's jurisdiction to conduct a retrial as being "contingent" on the requirements of section 8 being complied with. But what does this mean and how does it work? Does it mean that the Crown Court ceases to have jurisdiction as soon as two months pass without there being an arraignment? That is not what section 8 states and to deprive a court of jurisdiction requires clear language. It would also mean that the Crown Court was precluded from taking any further steps to ensure that there was a speedy retrial. It is also inconsistent with the ability to apply to the Court of Appeal for leave to arraign. This must clearly relate to extant proceedings, as must the power to set aside the order for retrial. Does it mean that the Crown Court ceases to have jurisdiction once the hearing of the retrial begins without there being an arraignment or timely arraignment? Again, that is not what section 8 states and the concept of the Crown Court having jurisdiction to conduct a retrial at all times up to the moment of commencement of the hearing of the retrial is incoherent and impracticable.

71. Mr Wilcock was unable to address these difficulties. He suggested variously that the Crown Court's jurisdiction does not "crystallise" into a power to conduct the retrial until the procedural requirements of section 8 are met. Alternatively, its jurisdiction automatically "ceases" after two months if there is no arraignment. Further or alternatively, the Court of Appeal retains a parallel jurisdiction over the proceedings until there is an arraignment. None of these suggestions make conceptual or practical sense. Nor are they consistent with the Court of Appeal's decision in *R v X*.

72. The essential point is that section 8 expressly sets out the circumstances in which the Crown Court is deprived of its jurisdiction to conduct a retrial. Those circumstances are where an order is made setting aside the order for retrial and directing the entry of a judgment and order for acquittal under section 8(1B)(b). As a matter of wording it is difficult to see how section 8 is at the same time implicitly providing that the Crown Court is deprived of jurisdiction where there is a failure to comply with the procedural requirements of section 8(1), as is reinforced by the conceptual and practical difficulties outlined above.

The purpose of sections 7 and 8

73. The purpose of section 7 is to preserve the integrity of the criminal justice system and to avoid it being brought into disrepute by allowing an apparently guilty person to be freed on a technicality.

74. The purpose of section 8 is to ensure that the retrial proceedings are brought under judicial control and that the retrial takes place as soon as reasonably practicable.

75. Both purposes are relevant to whether Parliament can fairly have intended total invalidity to follow from non-compliance with the procedural requirements of section 8.

Can Parliament fairly have intended total invalidity to follow from non-compliance with the procedural requirements of section 8?

76. In order to consider whether Parliament can fairly have intended total invalidity to follow it is necessary to identify the alternative to total invalidity.

77. In most cases involving the *Soneji* principle the alternative will be an evaluation of the consequences of the procedural failure, whether any prejudice might be caused and whether any injustice might arise if the validity of the statutory process is affirmed notwithstanding the breach of the procedural requirement (see, for example, *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Co Ltd* [2024] UKSC 27; [2024] 3 WLR 601, at para 61). The complication in the present case is that the required procedure related to an application to the Court of Appeal rather than the Crown Court and that the statute specified the criteria by reference to which any such application was to be determined.

78. In such circumstances it is entirely understandable that the Court of Appeal should have considered that for procedural non-compliance to be addressed by a determination made by the Crown Court, based on considerations of justice, would be contrary to the statutory scheme. Under section 8 this is a matter for the Court of Appeal and is to be determined by reference to the statutory criteria. Such a determination by the Crown Court is not, however, the relevant alternative to total invalidity.

79. If there is no arraignment before retrial (as in this case), or a late arraignment without leave of the Court of Appeal (as in *Llewellyn*), and conviction on the retrial, the defendant has the right to appeal against conviction under section 1 of the 1968 Act. Under section 2 such an appeal will be allowed if a conviction is unsafe. In this specific context, it would be a good ground of appeal if it could be shown that, had an application been made under section 8 before the retrial, leave to arraign would have been refused and the order for retrial set aside. A conviction is obviously unsafe if it results from a retrial that should never have taken place.

80. Mr Perry on behalf of the Crown accepted that this would be a good ground of appeal against conviction.

81. In such an appeal against conviction the question of whether there should be a retrial in the light of procedural non-compliance would be determined by the Court of Appeal and by reference to the statutory criteria. The only difference is that it would relate

to a hypothetical application rather than an actual application but that does not preclude the court from applying the statutory criteria. Such a hypothetical application should be determined on the basis that it was made immediately before the commencement of the retrial. This would be to the advantage of the defendant since it would involve the maximum possible period of time over which there might be prosecutorial delay and the maximum lapse of time since the order for retrial.

82. Adopting this approach affords significant protections to the defendant in the event of non-compliance with the section 8 requirements. First, the defendant has the right to apply to set aside the order for retrial under section 8(1A). Secondly, if, for whatever reason, this right is not exercised, the retrial takes place and there is a conviction, the defendant has the right to appeal that conviction on the grounds that had a section 8 application been made the order for retrial would have been set aside. Thirdly, that issue is to be determined on the basis of the position immediately before retrial, which is to the maximum advantage of the defendant.

83. The recognition that this is the alternative to total invalidity undermines the foundational reasoning of the Court of Appeal in *Llewellyn* and in this case. The section 8 procedure would not be avoided or neutered. A decision would be made by reference to the section 8 criteria and by the Court of Appeal. The defendant's section 8 protections would not be lost. If this is the relevant alternative, it is difficult to discern any good reason why Parliament should have intended total invalidity. This becomes even clearer when one considers the consequences of total invalidity.

84. First, total invalidity may arise irrespective of whether the object and purpose of section 8 has been met. Thus it may occur even though the fresh indictment was preferred promptly upon the direction of the Court of Appeal; the case was brought under judicial control within the two-month period specified in section 8(1); within that two-month period the defendant unequivocally indicated (without an arraignment taking place) that he intended to contest the fresh indictment; and the retrial was listed to take place and did take place at the earliest opportunity.

85. Indeed, the present case is an example of how this may arise. The fresh indictment was preferred promptly; the case was brought under judicial control within the two-month period at a PCMH; it was always clear that the defendant intended to plead not guilty to the fresh indictment; the failure to arraign the defendant did not cause any delay; and the retrial was listed as soon as reasonably practicable.

86. Secondly, total invalidity results in the perverse incentive for the defendant to do nothing. Rather than exercising the right to apply to set aside the order for retrial under section 8(1A) the defendant is better placed by refraining from so doing and, in the event

that the retrial results in a conviction, acquiring an unassailable ground of appeal on jurisdictional grounds.

87. This is a point made by the Law Commission in its recent consultation paper on Criminal Appeals (CP No 268). As it states at para 9.113:

> "*Llewelyn* creates a perverse incentive for a person facing retrial. If the prosecution has not arraigned in time, the defendant can go back to the CACD to have the order for retrial revoked. This may not be successful, and instead the CACD might extend the time. If, however, the defendant lets the case proceed to trial without the prosecution seeking leave to arraign out of time, they are guaranteed the opportunity to seek to quash the conviction."

88. Mr Wilcock suggested that such a situation is unlikely to arise very often as there is a professional obligation to draw procedural irregularities to the court's attention rather than reserve them to be raised on appeal. However, *Llewellyn* is itself an example of how this may occur since, as Mr Perry informed us, that was a case in which the defence were aware of section 8 but decided not to make an application under section 8(1A).

89. Thirdly, total invalidity results in a perverse incentive to abscond. If no arraignment means total invalidity then there is an obvious incentive for a defendant to avoid being arraigned. The Court of Appeal, at para 25(i), recognised that this was a "practical difficulty" but considered that it was unlikely to occur with sufficient frequency as to cause "serious problems". However, the existence of the incentive means that it is likely to become more frequent and the Court of Appeal's answer does not address the point of principle; indeed, it recognises it.

90. Fourthly, total invalidity means that a conviction will be set aside for a failure to comply with the section 8 procedural requirements even where it is clear beyond peradventure that leave to arraign would have been given had the requisite application been made—a triumph of form over substance.

91. Fifthly, total invalidity leads to the anomaly that whilst a failure to arraign at all will not affect the validity of a trial, a failure to arraign timeously will render a retrial invalid. This is a further point made by the Law Commission (at para 9.115):

> "It is also anomalous that a complete failure to arraign does not normally render a trial invalid, but late arraignment on a retrial ordered by the CACD renders the proceedings invalid."

92. Sixthly, total invalidity may read across to "double jeopardy" retrials. As the Law Commission observed at para 9.125:

> "We think that a similar problem may apply in relation to 'double jeopardy' retrials where there is compelling fresh evidence following an acquittal. The wording of the legislation governing these retrials is modelled on the provisions in the CAA 1968 and it is likely therefore that the court would interpret the relevant provision as having the same effect as in *Llewelyn*."

93. Seventhly, and most fundamentally, total invalidity undermines the purpose of section 7 and risks bringing the criminal justice system into disrepute. In a case where there has been a retrial as soon as possible, a retrial which is conducted fairly, a conviction which is otherwise safe and the guilt of the defendant is not in doubt, the conviction will nevertheless be set aside on a technicality, even in the most serious of cases. As the Law Commission observed (at para 9.116):

> "We think that the strict application of this rule risks leading to the release on purely technical grounds of people who are factually guilty and have been found to be so by a properly directed jury on evidence which has not been challenged. This is not in line with the principle of acquitting the innocent and convicting the guilty, and is liable to bring the justice system into disrepute".

94. Bearing in mind the wording of sections 7 and 8, the purpose of those provisions, the alternative to total invalidity and the consequences of invalidity, as outlined above, I conclude that Parliament cannot fairly have intended total invalidity to follow from non-compliance with the procedural requirements of section 8.

Conclusion

95. For all these reasons, I conclude that a failure to comply with the procedural requirements in section 8(1) of the 1968 Act does not deprive the Crown Court of jurisdiction to re-try a defendant notwithstanding an order of the Court of Appeal under section 7(1) of the 1968 Act. I would therefore allow the appeal and overrule the Court of Appeal decision in *Llewellyn*.

96. As agreed by the parties, the respondent's conviction on Count 1 of the indictment shall be restored and the issue of the respondent's continuation of bail, surrender to custody and any ancillary matters shall be remitted to the Court of Appeal.