Neutral Citation Number: [2022] EWCA Crim 154

Case No: 2021/01049/B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WOLVERHAMPTON
THE RECORDER OF WOLVERHAMPTON, HHJ MICHAEL CHAMBERS Q.C.
T2020/7278

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/02/2022

Before:

LORD JUSTICE FULFORD, THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
MRS JUSTICE CUTTS
and
MRS JUSTICE COCKERILL

- -

Between:

ANDREW LLEWELYN	**Appellant**
- and -	
Regina	**Respondent**

- -
- -

Gurdeep Garcha Q.C. and Kevin Jones (instructed by **Hatchers Solicitors**) for the **Appellant**
D Perry Q.C. and P Jarvis (instructed by **Crown Prosecution Service Appeals Unit**) for the **Respondent**

Hearing dates: 30 November 2021

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Approved Judgment

Lord Justice Fulford VP:

Introduction

There are no reporting restrictions.

1. This is an application for leave to appeal, the case having been referred to the Full Court by the Registrar. We grant leave.

2. In the light of the issue raised on this appeal the facts can be stated extremely briefly. At 11 pm on 7 April 2018, an ambulance crew attended an address in Market Drayton where they found the victim with serious injuries. It was not in dispute that he had been struck repeatedly in the face with a rock. He had multiple fractures to his jaw in addition to various cuts and bruises. The prosecution case was that the appellant and his co-accused were jointly acting together when they attacked and caused this serious harm to the victim following a disagreement over drugs. The appellant accepted presence at the scene of the incident but he denied participation.

3. On 8 November 2019 at the Crown Court at Shrewsbury the appellant was convicted with two others, William Bratton and Marcus Supersad, of causing grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1861. On 13 November 2019 he was sentenced to 6 years and 153 days' imprisonment.

4. On 14 May 2020, for reasons that it is unnecessary to rehearse, the appellant and his co-accused successfully appealed against their convictions. The court considered that the interests of justice required that they should be retried, pursuant to section 7(1) of the Criminal Appeal Act 1968 ("CAA"). The court's order, in accordance with section 8(1) CAA, stipulated that a new indictment should be preferred and the defendants were to be arraigned within two months, that is by 14 July 2020. In the event, the applicant was not arraigned until 30 September 2020 when he pleaded not guilty. It is now submitted that the trial which followed, and which resulted in his conviction, was a "*nullity*".

Chronology

5. It is necessary to describe the relevant chronology.

6. On 20 May 2020 those representing the appellant applied for bail on his behalf at Shrewsbury Crown Court. The application was adjourned to 22 May 2020.

7. On 21 May 2020 a fresh indictment was uploaded to the Digital Case System ("DCS") by the prosecution.

8. On 22 May 2020 the adjourned bail hearing was held at Shrewsbury Crown Court and bail was granted by Judge Barrie. The case was adjourned to the week commencing 6 July 2020 when the judge indicated arraignment would occur.

9. On 26 May 2020 Baker J, a Presiding Judge of the Midlands Circuit, assigned Judge Chambers Q.C., the Resident Judge at Wolverhampton Crown Court, as the trial

judge. Judge Chambers directed his list officer to arrange the transfer of the case.

10. On 27 May 2020 those representing the appellant sent a letter in which he applied to vary the conditions of his bail.

11. On 3 June 2020, the Crown Prosecution Service ("CPS") replied, agreeing to the variation and indicated that the Crown wished to vary the bail conditions for all defendants. There was reference to a hearing date on 4 June.

12. On 12 June 2020, those representing the appellant wrote opposing the terms of the proposed variation to his bail.

13. On 22 June 2020 the CPS sent an email to Shrewsbury Crown Court requesting a pre-trial preparation hearing ("PTPH"). The Court indicated that the case had been transferred to Wolverhampton Crown Court.

14. On 8 July 2020 the CPS sent an email to Wolverhampton Crown Court requesting a PTPH.

15. On 14 July 2020 the two-month time limit for arraignment imposed by the Court of Appeal expired. Wolverhampton Crown Court notified the CPS that they did not have the case number or details of the defendants on their system.

16. On 8 August 2020 the CPS again requested Wolverhampton Crown Court to list the case for a PTPH, now providing details of the defendants. The date of the hearing was shown as "*to be fixed*".

17. On 28 August 2020 the Listing Officer at Shrewsbury Crown Court transferred the case to Wolverhampton Crown Court. It is suggested that the delay in the transfer was in large part due to both court offices being understaffed by reason of the COVID-19 restrictions.

18. On 12 September 2020 the CPS wrote again to Wolverhampton Crown Court asking for a PTPH. The date of hearing was shown as "*to be confirmed*".

19. On 30 September 2020 arraignment took place at Wolverhampton Crown Court. The appellant was represented. He and his co-accused all pleaded not guilty. The trial was fixed for 15 March 2021.

20. On 16 November 2020 a pre-trial review was held at Wolverhampton.

21. On 18 February 2021 those representing the appellant served a written application to quash the indictment as a nullity on the basis that arraignment had taken place outside the two-month time limit.

22. On 23 February Judge Chambers prepared and uploaded a "*note and chronology prepared by Crown Court*" in which he rehearsed the above chronology and, in a passage entitled "*narrative*", described how the events in June and July 2020 coincided with a period when the offices at Shrewsbury and Wolverhampton were

extremely short staffed and no trials could take place. Only one court was sitting at Wolverhampton. Trials with three defendants resumed in October 2020, and they required three court rooms. Therefore, even if the defendants had been arraigned in July 2020, the re-trial would not have been at any earlier date. He indicated his provisional view that as the defendants had been arraigned without objection it was arguable that they had waived any right to raise an irregularity concerning arraignment and in consequence the trial would not be invalid. Further, the judge suggested there was authority for the proposition that the lack of arraignment or a defective arraignment did not necessarily render invalid subsequent proceedings on an indictment.

The Application to Quash the Indictment

23. An oral hearing took place to determine the defence application to quash the indictment on 27 February 2021. Those representing the appellant submitted that the provisions of section 8 of the CAA constitute an absolute bar on any arraignment taking place outside of the two-month time limit unless an extension has been granted by the Court of Appeal. No such application had been made, which in any event would have been resisted on the grounds that the prosecution had not acted with all due diligence (it is accepted that the test is "*all due expedition*"). The arraignment on 30 September 2020 was therefore said to be unlawful and void or a nullity.

24. The Crown highlighted the extant order for a retrial from the Court of Appeal. Given there had been no objection to arraignment on 30 September 2020, the defendants had implicitly waived their right to apply to the Court of Appeal to set aside the order for retrial. It was suggested that if an application was made by the prosecution to extend the time period in section 8 (*viz*. two months), it was likely to succeed. In any event, the inadvertent procedural irregularity had not prejudiced the accused.

25. The judge noted that there was a statutory requirement for arraignment to take place within two months of the Court of Appeal's order that there should be a retrial. However, he stated that this requirement is not absolute in the sense that the Court of Appeal has a discretion to grant leave to arraign out of time. Although the Court of Appeal alone can grant an extension of time, the judge suggested a defendant is able, nonetheless, to waive his right to raise an irregularity concerning the arraignment. The judge determined that was the position in the present case, in that the appellant was deemed to know that arraignment should have been within the two-month time limit. Given he had raised no objection to arraignment outside the statutory period, the judge concluded that he had thereby waived his right to raise any irregularity concerning the arraignment.

26. Further, in the judge's view there was clear authority to the effect that the lack of an arraignment or a defective arraignment does not render invalid subsequent proceedings on the indictment. The judge referred in this context to *R v Williams [1978] QB 373* and *J v The Queen [2018] EWCA Crim 2485.* The judge observed that the trial date of 15 March 2021 which was fixed on 30 September would have been the trial date in any event. He concluded:

> "*In the present case, section 8 does not provide an absolute prohibition on arraignment taking place outside the two-month period, there has been an*

arraignment without any objection and no prejudice has been caused. Accordingly, this application is refused, and the case will proceed to trial as listed on 15th March."

27. The appellant's trial proceeded as listed, and he was convicted of causing grievous bodily harm with intent on 23 March 2021. He was sentenced to 6 years and 153 days imprisonment. Ancillary orders were made, including a restraining order for an indefinite period.

The Legal Provisions

28. Section 7 of the Criminal Appeal Act 1968 ("section 7") provides:

> **"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.
> (2) A person shall not under this section be ordered to be retried for any offence other than—
> (a) the offence of which he was convicted at the original trial and in respect of which his appeal is allowed as mentioned in subsection (1) above;
> (b) an offence of which he could have been convicted at the original trial on an indictment for the first-mentioned offence; or
> (c) an offence charged in an alternative count of the indictment in respect of which no verdict was given in consequence of his being convicted of the first-mentioned offence."

29. Section 8 of the Criminal Appeal Act 1968 ("section 8") provides, as relevant:

> "**Supplementary provisions as to retrial**
> (1) A person who is to be retried for an offence in pursuance of an order under s.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 at trial to enter a judgment and verdict of acquittal of the offence of 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 acted with all due expedition; and

(ii) that there is good and sufficient cause for a retrial in spite of the lapse of time since the order under s.7 of this Act was made.

[…]"

The Submissions

30. On behalf of the appellant, Mr Garcha Q.C. argues that the power to arraign outside the time period stipulated in section 8(1) of the CAA is a matter solely within the jurisdiction of the Court of Appeal and not the Crown Court. It is submitted that the importance of this exclusive jurisdiction was highlighted in *R v Muner Al-Jaryan* [2020] EWCA Crim 1801. Al-Jaryan's convictions were quashed on 19 March 2020 and a retrial was ordered. On the occasion of a bail application in the Crown Court on 2 April 2020, the judge hearing the application ordered that arraignment should take place no later than 18 May 2020. No steps were taken, however, in this regard. It was not until 14 October 2020 at the PTPH that it was first appreciated that Al-Jaryan had not been re-arraigned within the two-month time limit. The judge ordered that it was for this court to decide whether the case could proceed by granting leave to arraign out of time. On the application by the Crown to the Court of Appeal, Simler LJ observed, *inter alia*:

"24. It is unnecessary for us to analyse the law relating to section 8 of the 1968 Act in any great detail. We adopt the helpful summary of it provided by Gross LJ in *R v Pritchard* [2012] EWCA Crim 1285, where the following was said:

'5. The section has been considered in a number of authorities from which for present purposes, and focusing essentially on ss.(1B)(b)(i), we distil the following summary:

(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 ss.(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 Colman (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. Further citation of authority is unnecessary."

25. We too have considered the other cases to which Gross LJ referred. Given the circumstances of this case, we consider it appropriate to underscore the following points that emerge from those cases:

(1) Given that the future trial is a retrial so that inbuilt delay has occurred, it is important that it should take place swiftly.

(2) Very little will usually need to be done in terms of further preparation for trial as the case is to be retried. The prosecution papers will have been served earlier and the defence should be ready for trial.

(3) Two important stages must be accomplished with some speed: first service of the indictment, and secondly, arraignment. The focus of section 8 is upon arraignment to ensure judicial control and oversight.

(4) Arraignment engages active judicial oversight in order to ensure the case can be listed for trial at the earliest practical opportunity.

(5) When this is not done, this court only has power to permit arraignment out of time when the cumulative requirements of section 8(1B)(b)(i) and (ii) are met, that is to say the prosecution must have acted with 'all due expedition', and there must be a 'good and sufficient cause' for a retrial in spite of the lapse of time since the order of the Court of Appeal was made.

(6) The expression 'due expedition' means reasonable speed in relation to securing arraignment.

> (7) The primary duty to ensure that arraignment takes place within the time allowed is upon the crown court. Both the prosecution and the defence are required to be proactive in this regard, but ultimately it is the duty of the court to ensure the case is listed within time. Orders of the Court of Appeal usually arrive in the court office within a short space of time following the decision of the court, and prompt action by court staff is generally to be expected thereafter."

31. The court in *Al-Jaryan* acknowledged the difficult circumstances created by the COVID-19 pandemic, which was capable of accounting for some of the failings, but the court observed "*simply to overlook the deadline and thus a mandatory order of the Court of Appeal is unacceptable*" (at [30]). The court decided that the prosecution had not acted with all due expedition and had failed to take urgent and purposeful steps to call to the attention of the court the absence of a firm date for arraignment well before 15 Mary 2020. The conduct revealed an absence of any semblance of urgency. The court concluded against that background that the prosecution had failed to act with all due expedition and declined, as a consequence, to give leave to arraign.

32. Mr Garcha submits that the decision in *Al-Jaryan* demonstrates the "*sanctity of the orders*" of this court. Mr Garcha accepts that his client did not suffer any prejudice as a result of the decision, save, critically, that he was tried in the absence of a decision by this court on a section 8(1B) application.

33. Mr Perry Q.C. for the respondent submits that the correct approach to the present appeal is to ask the question whether the Crown Court acted without jurisdiction, in a case in which neither the prosecution nor the defence sought to apply to this court under section 8(1) or (1A). It is noted that if arraignment had not taken place in the Crown Court by reason of an oversight on the part of the court and the parties, this would not lead to the conclusion that the trial proceedings were a nullity or invalid. The position in this regard was summarised in *R v Johnson; R v Burton* [2018] EWCA Crim 2485; [2019] 1 WLR 966 when Sir Brian Leveson P observed:

> "Arraignment
>
> 38. The Crim PR make detailed provision, in rule 3.24, for the arraignment of an accused on an indictment, it being clear that such procedure ought to take place in every case. However, it is well established (and the defendants did not argue to the contrary) that where an accused is tried for offences he denies, but without having been formally arraigned, the proceedings (and any convictions) are not a nullity. For example, in *R v Williams (Roy) [1978] QB 373* this court held that, where the accused had heard the indictment read out and the assertion that he had pleaded not guilty, without raising any objection, he waived his right to be arraigned by allowing the trial to proceed. There was accordingly no irregularity and the proceedings were valid. (The position is different in the case of a purported guilty plea: such a plea must always be entered in person as part of a proper arraignment (*R v Ellis (James) (1973) 57 Cr App R 571*.)"

34. Mr Perry relies additionally on the decision of this court in *R v Umerji (Adam)* [2021] EWCA Crim 598; [2021] 1 WLR 3580, which included consideration of the approach the court should take when it is suggested a court acted without jurisdiction:

> "99. In *R v Soneji [2006] 1 AC 340* the House of Lords held that the correct approach for dealing with a failure to comply with a requirement before a power is exercisable is to ask whether it is the purpose of the legislation that an act done in breach of that provision should be treated as invalid (paras 21–23). The focus should be on the consequences of non-compliance and on whether Parliament intended "total invalidity" to be the outcome. Alternatively, the answer may be that invalidity depends on the circumstances of the individual case, including whether there has been substantial compliance with the requirement, alternatively whether substantial prejudice has been caused by non-compliance (paras 24 and 67).
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> 100. The *Soneji* principle was applied by this court in *R v Ashton [2007] 1 WLR 181*. It was stated that where a court acts without jurisdiction the proceedings will usually be held to be invalid. However, if a court is faced with a failure to take a step before a power is exercised, which can properly be described as a procedural failure, the question is whether Parliament intended that any act done following that failure would be invalid. If the answer is no, the court should consider the interests of justice generally, and in particular whether there is a real possibility of either the prosecution or the defence suffering prejudice because of that procedural failure (paras 4–5). In deciding whether a defendant has suffered prejudice, an important consideration is whether or not he agreed to the course adopted (para 87).
>
> 101. In *R v Clarke [2008] 1 WLR 338* Lord Bingham accepted "the general validity of the distinction drawn" in *Ashton* (para 8). The only disagreement expressed by the House of Lords with the Court of Appeal's decision concerned one of the three appeals decided in *Ashton*, namely *R v Draz*. The House of Lords held that, under the then law, there could be no valid trial unless there was an indictment and a bill could not become an indictment until it was duly signed by the proper officer (paras 18–19). Accordingly, the relevant errors in *Draz* went to the jurisdiction of the Crown Court."

35. Against the backcloth of those principles, Mr Perry contends that Parliament did not intend that the consequence of the failure to make an application to this court under section 8(1) should be to invalidate the proceedings that followed it. He suggests that it would be an unexpected outcome if a trial following an **unlawful arraignment** in the context of a retrial could be "*nullified*" in every case, but a trial conducted in the **absence of an arraignment** in the ordinary course of events after the case was sent by the Magistrates' Court should not be. He submits that there was no prejudice to the appellant given he makes no complaint about the trial leading to his conviction. He highlights that the appellant failed to make an application under section 8(1A). Indeed, it is suggested that the appellant "cloaked the arraignment with legal effect"

by failing to come to this court before the trial, albeit Mr Perry did not seek to support the judge's reasoning as to the potential effect of "waiver".

36. Mr Perry emphasises that the Crown does not want to give licence to prosecutors simply to ignore the provisions of section 8.

Discussion

37. In our judgment the starting point for this appeal 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. The court will ordinarily entertain submissions, written or oral, before reaching a decision. The test is whether "*the interests of justice so require*" (see section 7 (1)). The editors of *Court of Appeal Criminal Division: Practitioners Guide* (eds. Master Alix Beldam and Susan Holdham, second edition 2018) have helpfully distilled the authorities as to at least some of the matters which the court may take into account in this context:

- the seriousness of the alleged offence;
- the length of time since the commission of the alleged offence;
- whether any custodial sentence has been served;
- whether there has been a substantial confiscation order or confiscation proceedings are still outstanding;
- the appellant's age;
- whether either party is in a position to call all the necessary evidence;
- whether there has been such adverse publicity that a fair trial is no longer possible;
- the extent to which any fresh evidence undermines the strength of the case against the appellant.

38. It is clear, therefore, that this is not necessarily an easy decision, and the competing factors may be finely balanced. This provides an important element of the context when considering the supplementary provisions in section 8, to which we now turn.

39. The proceedings leading to the original trial, followed by the appeal, will usually have taken a significant period of time. The clear purpose of section 8 is to ensure that the retrial takes place as soon as possible. As Gross LJ observed in *R v Pritchard,* that purpose is meant to be achieved by focussing on arraignment: "*once that has taken place, the case will be back under judicial control and the matter can be left to the judge to ensure that the retrial occurs at the earliest practical opportunity*" (see [29] above). If the mandatory time limit within which arraignment is to take place has been exceeded, it is clear that pursuant to section 8 the trial should not then take place unless an application is made under section 8, when this court will only grant leave to arraign out of time if i) the prosecution 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.

40. These, in our view, are critical protections for an accused, protections which Parliament has reposed in the Court of Appeal (Criminal Division). The provisions of section 8 provide a signal distinction from other instances of procedural failure which may occur during the course of first-instance proceedings. Mr Perry contends that the Crown Court proceedings will be valid even if the section 8 (1) procedure – which is dependent on a decision of the Court of Appeal – is avoided *in toto*. Following this procedural failure, if Mr Perry is correct, the factors which the Court of Appeal must assess on a section 8(1) application would not fall to be considered at all. Indeed, it is no part of the Crown Court judge's function to decide whether or not "*there is good and sufficient cause for a retrial in spite of the lapse of time since the order under s.7 of this Act was made*" which is part of the test under section 8 (1B). This is a matter exclusively reserved by Parliament for the Court of Appeal. If, as submitted by Mr Perry, this failure is properly to be described as a procedural failure which Parliament did not intend would necessarily lead to an invalid trial, the Crown Court judge, applying *Soneji* and *Ashton*, should instead consider the interests of justice generally, and in particular whether there is a real possibility of either the prosecution or the defence suffering prejudice because of that procedural failure. Thus here, in terms of the hearing of the retrial, it is not suggested that the appellant suffered any prejudice. Rather, the prejudice is the removal of the protection provided by the Court of Appeal as enshrined in the section 8 procedure, which may have resulted in there being no trial at all.

41. This disjunction could only be avoided if the Crown Court judge were somehow asked to engage with the criteria under section 8. In our judgment it would be undesirable – indeed wrong in principle – for the Crown Court judge to be invited to speculate as to what the Court of Appeal's conclusion would have been on a section 8 (1) application. As set out in the preceding paragraph, it is no part of the Crown Court judge's function to decide whether or not "*there is good and sufficient cause for a retrial in spite of the lapse of time since the order under s.7 of this Act was made*" (see section 8 (1B)).

42. Similarly, the abuse of process jurisdiction does not provide a substitute protection for the accused, by way of either a category one or a category two application to stay the proceedings. For category one, this would be on the basis of delay; for category two, that it would be unfair for the accused to be tried (see *Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42).

43. It is to be stressed that an application to stay proceedings for category one abuse based on delay cannot succeed unless prejudice has been caused to the accused (which is not, necessarily, a determinative consideration under section 8). Additionally, it has been clearly established that it is only exceptionally that abuse of process applications on the grounds of delay will succeed because a fair trial will usually be possible given the best safeguard against unfairness is to be found in the trial process and the evaluation of the evidence by the jury (see *F(S)* [2011] EWCA Crim 1844; [2012] QB 703 at [45]).

44. Category two abuse of process requires a balance of the competing interests (see *D Ltd v A* [2017] EWCA Crim 1172 at [35]); whereas this court's focus on a section 8 application is confined to the two matters we have rehearsed above. For category two

abuse of process, the court must balance the public interest in ensuring that those who are charged with serious crimes are tried against the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means (see the speech of Lord Steyn in *Latif* [1966] 1 All ER 353, at page 113). Furthermore, as Lord Salmond observed in *DPP v Humphrys* [1977] AC 1 at page 46, a judge does not have "*any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought*".

45. The essence of the present issue is that the Crown Court only has jurisdiction in these circumstances because the Court of Appeal has ordered a retrial under section 7. But Parliament expressly made this jurisdiction contingent on the fulfilment of the obligations set out in section 8(1), *viz.* that the appellant is to be tried on a fresh indictment preferred by direction of the Court of Appeal and that he or she cannot be arraigned on that fresh indictment **after** the end of two months from the date of the order for his retrial **unless** the Court of Appeal gives leave.

46. In our view, it follows that Parliament clearly intended that material non-compliance in the Crown Court with the provisions of section 8 would have the result that the court in a subsequent trial would have acted without jurisdiction, resulting in the "*total invalidity*" of the later proceedings. The restricted timetable for arraignment and the bespoke procedure for the Court of Appeal alone to grant leave to arraign outside the two-month time limit, based on this court being satisfied that the prosecution acted with all due expedition and that there remains a good and sufficient cause for a retrial, mean that Parliament did not intend that this procedure could simply be avoided, intentionally or otherwise, thereby depriving an accused of a substantive and unique protection which, for the reasons set out above, would be unavailable in the Crown Court. The decision in *Al-Jaryan* reveals the potential importance for an accused of this procedural failure being considered by the Court of Appeal.

47. We add, finally, that these strict requirements are not to be balanced against such considerations, for instance, as to whether the appellant "*cloaked the arraignment with legal effect*" by failing to make an application under section 8(1A) or the suggested partial or complete "*waiver*" relied on by the judge. Furthermore, we do not consider that there is any equivalence between the **invalidity** of a trial following an unlawful arraignment in the context of a retrial and the **validity** of a trial conducted in the absence of an arraignment in the ordinary course of events after the case has been sent by the Magistrates' Court. The critical distinguishing factor is to be found in the provisions of sections 7 and 8 which relate solely to a retrial.

48. For these reasons we quash the appellant's conviction.

49. We would finally wish to observe that there was a clear absence of guidance for the learned judge as to the consequences of a failure to follow the section 8 provisions. We entirely understand the reasons why he was minded to follow the course taken, particularly in the current circumstances which have placed such a premium on court time.

Postscript

50. Reporting restrictions were imposed while the court considered an application, which was refused, for the court to certify a point of law of general public importance for consideration by the Supreme Court. The court declined to order a retrial. All reporting restrictions have now been lifted.