



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 50

Lord Justice Clerk
Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

BRIAN MCELWAIN

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Beardmore; PDSO, Edinburgh
Respondent: Farrell; the Crown Agent

20 March 2025

Introduction

[1] This is an appeal against conviction on the basis that the sheriff at Livingston wrongly allowed a Crown motion under section 92(2) of the Criminal Procedure (Scotland) Act 1995 to proceed with a jury trial entirely in the absence of the appellant between 27 and 31 May 2024. The appellant contends first that the conditions required for an order under

section 92(2) were not met and, secondly even if they were, the sheriff erred in his assessment of the necessity of the order.

[2] The appellant was indicted for trial at Livingston Sheriff Court. He was convicted in his absence of two serious sexual offences against different female complainers, committed respectively in 2006/7 and 2015. In due course, the sheriff imposed an extended sentence, *in cumulo*, of 6 years with a custodial term of 4 years backdated to 4 August 2022.

Procedure

[3] The appellant was fully committed and remanded in custody on 4 August 2022 and indicted to a first diet on 27 March 2023 adjourned administratively to 22 May 2023 for the defence to investigate the appellant's physical and mental health.

[4] This was the start of lax case management whereby the case drifted through a series of unnecessary first diet hearings before the appellant's actions created further difficulties. The appellant was remanded in custody and investigations into any condition that might bear on his fitness for trial or, more probably what adjustments might be necessary at trial, ought to have commenced in August 2022. The first diet is intended to be the end-point of preparation and not the start; *Clarkson v HM Advocate* 2024 JC 345 at paras [22]-[26] citing the Preliminary Hearings e-Bench Book, chapter 6. A trial could have been fixed on 27 March 2023 and should have been fixed when the case called on 22 May 2023 for the reasons set out in the PH Bench Book at 6.6.4:

“Even if there is thought to be a real issue concerning fitness for trial, it is suggested that a trial should be fixed. The position would be different if there was a plea in bar of trial which could be disposed of and upheld at the preliminary hearing in which case an examination of facts would be fixed. Such a circumstance is vanishingly rare.

In almost every case, whether the accused is or is not fit to plead, there will either be a trial or an examination of facts. The witnesses will be much the same whatever

kind of hearing is required. There will rarely be any point in refraining from fixing a trial and simply continuing the preliminary hearing. Continuing the hearing in such circumstances only causes delay for accused and witnesses alike...

The fixing of a trial does not signal resolution of the question of fitness to plead. It can be converted to an examination of facts at any time as section 54(1) (b) of the 1995 Act makes clear in stating what happens when a court, at any time, is satisfied that the accused is unfit for trial. The court shall;

‘(b) discharge the trial diet or, in proceedings on indictment where the finding is made at or before the first diet (in the case of proceedings in the sheriff court) or the preliminary hearing (in the case of proceedings in the High Court), that diet or, as the case may be, hearing and order that a diet (in this Act referred to as an “an examination of facts”) be held under section 55 of this Act.’”

[5] Hearings were further adjourned on a number of occasions throughout the latter half of 2023 and into 2024. The appellant remained remanded in custody until proceedings concluded when sentence was passed on 19 July 2024. Until the ultimate trial diet called on 27 May 2024, the appellant was personally present in court only at diets on 22 May, 19 June and 17 July 2023 and to answer a warrant on 18 April 2024. By February 2024, the appellant had dismissed his solicitors. They notified the court explaining they were no longer acting and that they understood that the appellant would not be instructing another solicitor and would not agree to come to court to participate in proceedings. There is no information available to us on whether a medical report was ever obtained. A report dated 27 July 2023 was provided by a psychologist who found indications of a number of personality disorders, notably a history of alcohol and drug abuse indicating Alcohol Use Disorder and Poly-Substance Use Disorder; a record of diagnosis of Antisocial Personality Disorder and traits of Borderline Personality Disorder. His records disclosed no evidence of the appellant suffering from a mental illness. He had no contact with the mental health team whilst remanded and did not present with evidence of a mental disorder. The psychologist’s assessment disclosed no significant mental health problems.

[6] The full history of pre-trial diets was as follows:

- on 22 May 2023 the continued first diet called and was adjourned on unopposed defence motion to 19 June 2023 for the defence to obtain a medical report;
- the continued diet called and was adjourned to 17 July 2023 for the defence to obtain a psychological report and for a physical examination of the appellant;
- the continued diet called and trial was fixed for 19 September 2023;
- the case called as a first diet on 4 September 2023 to hear a late objection to the admissibility of evidence that was not insisted on such that it was unnecessary for the diet to call. It should have been discharged administratively;
- a further diet convened under section 75A called on 11 September 2023. The appellant was in hospital with a physical illness and unfit to be tried on 19 September 2023 and a new trial was fixed for 11 December 2023;
- on 11 December 2023, the appellant was absent but the case called and the sheriff fixed a further diet for 21 December 2023 so that the trial could consider whether evidence might be taken on commission;
- the minutes for the continued diet make no reference to evidence on commission. The sheriff fixed a new trial diet for 4 March 2024;
- in the meantime the appellant had parted company with his solicitor and on 21 February 2024 the court fixed a diet under section 75A procedure for 26 February 2024;
- the diet called on 26 February in the absence of the appellant. The minute records that he had refused to come to court. The appellant's solicitor appeared and formally withdrew from acting. The sheriff, who would in due course preside at trial, fixed a further first diet on 18 March 2024 and a trial for 27 May 2024. He ordered that the appellant must be brought from custody for the hearing on 18 March 2024;
- on 18 March 2024 the appellant refused to come to court from prison. No lawyer appeared to represent the appellant. A different sheriff granted a warrant for his arrest, preserving the indictment under section 102A(6) with the intention that the trial would proceed at the diet on 27 May 2024;
- another sheriff presided when on 18 April 2024 the appellant appeared on warrant, now represented by new solicitors appointed by the court under section 288D on that date. The sheriff fixed a further diet in advance of trial for 13 May 2024;

- on 13 May 2024, the appellant was absent but he was represented. An amendment was made of consent to the indictment and a section 67 notice allowed. A different sheriff continued the case to trial on 27 May 2024.

The trial diet of 27 May 2024

[7] The sheriff reports that in the days leading up to the trial diet there were numerous communications passing between the Crown, GEOAmeY (the firm contracted to deliver accused persons in custody to court) and the Sheriff Clerk. The appellant's intention was to refuse to attend the trial. The Procurator Fiscal Depute advised GEOAmeY that the appellant required to be brought to court on each day of the trial diet and that "proportionate force" should be used to do so if necessary.

[8] The jury were due to be balloted on 27 May 2024. As anticipated, the appellant refused to attend court. The prosecutor advised the sheriff that GEOAmeY personnel had explained that the appellant had made threats to assault prison staff who had attended at his cell to collect him. In particular, he had threatened that if he was to be put into a van to be transported to court, he would assault officers and would engage in a "dirty protest".

[9] The prosecutor invited the sheriff to allow the trial to proceed in the absence of the appellant under section 92(2) of the 1995 Act. The sheriff did not immediately acquiesce to that motion but instead directed that the jury be balloted in preparation for the following day. He did not grant a warrant as his colleague had previously done on 18 March 2024.

[10] On 28 May 2024, the appellant persisted in his refusal to attend court. Prison staff reported to the procurator fiscal depute that the appellant "was naked and had faeces on his hands and was threatening a further dirty protest if attempts were made to transport him to court". GEOAmeY management advised that the appellant would not be moved in such circumstances. In any event, the appellant could not be brought to court by GEOAmeY

because of a lack of availability of suitable vehicles. The prosecutor accordingly moved for a warrant to allow the appellant to be brought to court by Police Scotland the following day. The sheriff granted a warrant to apprehend the appellant and bring him before the court, preserving the indictment.

[11] When the case called on 29 May 2024 the prosecutor advised the sheriff that he had learned at 7.30am that Police Scotland would need a minimum of 48 hours' notice to assemble a team and secure a suitable vehicle to execute the warrant. It was understood that the appellant continued to insist that he would not attend court. The prosecutor moved to withdraw the warrant and renewed his motion under section 92(2) of the 1995 Act that the trial should proceed in the absence of the appellant. The sheriff granted the motion on the proviso that the appellant was to be invited to court each day of the trial. Evidence began to be led that afternoon. On each day of the three-day trial the appellant refused to attend court. He was convicted in his absence on 31 May 2024.

The decision to proceed in absence

[12] The sheriff reports that he was addressed on the competency of proceeding to trial in absence, specifically, whether section 92(2) of the 1995 Act provided power to do so. Defence counsel submitted that the appellant's attendance was necessary in the interests of justice; that the appellant had the right to attend his trial; that an order under section 92(2) was incompetent prior to the trial commencing and that the Crown had not taken all reasonable steps to bring the appellant to court. The inadequate resources of Police Scotland, GEOAmev and HMP Addiewell was not a good enough reason to exclude the appellant from his trial. The prosecutor accepted that excluding the appellant from trial was a step of last resort but maintained that the criteria for doing so were met. Continuing to

indulge the appellant by allowing him to frustrate proceedings would prevent the matter being adjudicated upon. The court's only viable option was to grant an order in terms of section 92(2).

[13] The sheriff considered that a proper construction of section 92(2) required account to be taken not just of the words of the section, but also of the mischief it was designed to address, the prevention of disruption of trials due to misconduct of the accused. The sheriff likened the scenario before him to an "anticipatory breach of contract". The appellant had given the clearest possible indication that he would misbehave during the trial. He had presented himself as threatening and unco-operative. Section 92(2) was wide enough, properly construed, to exclude the appellant from trial. He granted the prosecutor's motion and the trial proceeded.

Appeal submissions

Appellant

[14] Section 92(1) of the 1995 Act preserved the common law position that a trial should not proceed in the absence of the accused. Section 92(2) stood in contrast to the equivalent rule in summary proceedings, 1995 Act, sections 153 and section 150A. Where a person on summary complaint does not appear at a diet, apart from the first calling of the case, the court may proceed to hear and dispose of the case in the absence of the accused. The absence of such a provision relative to solemn proceedings was deliberate and purposeful. Parliament had the opportunity to extend the provision to solemn proceedings when it amended the 1995 Act in 2007. It chose not to. The prohibition in section 92(1) was to be interpreted as a strict one, *R v Jones* [2003] 1 AC 1 (speech of Lord Rodger of Earlsferry, explaining the position in Scotland at paras 43-46). The controlling philosophy of

section 92(1) was the same now as Hume had stated, *Commentaries on the Law of Scotland, respecting Crimes* (1844) 3rd edition, vol II, pp 269-270.

[15] The exception to section 92(1) in section 92(2) was narrow. For the court competently to order an accused's removal from the trial due to his misconduct, it must occur during the course of his trial. A trial commences for the purposes of section 92 when evidence starts to be led, *Lindsay v HM Advocate* 2005 1 JC 332. Whilst courts have accepted that absence of an accused during an administrative part of a trial does not breach section 92(1), absence during a substantive part does; *Drummond v HM Advocate* 2003 SCCR 108, *Aitken v Wood* 1921 JC 84.

[16] The appellant was absent for the entirety of his trial before a jury. The sheriff's order under section 92(2) was incompetent because the trial had not commenced before he made it. There had been a breach of section 92(1) and it followed that there had been a miscarriage of justice.

[17] It was the responsibility of the Crown to secure the attendance of the appellant at his trial: *HM Advocate v Welch* 2006 SCCR 87. The procurator fiscal depute had quite properly sought a warrant for the arrest of the appellant when he failed to attend. Timeous execution of the warrant would have resolved the problem. The Crown surrendered their power to enforce the attendance of the appellant by withdrawing the warrant.

Crown

[18] The language of section 92(2) ought to be interpreted in a way that best gives effect to the purpose of the provision; *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684 at para 28. The purpose of section 92(2) was to allow the court to proceed with a trial in absence because of disruptive behaviour by an accused person. The approach of the

sheriff had also been adopted in the High Court at first instance: *HM Advocate v Dailly* 1997 (unreported); *Renton & Brown Criminal Procedure 6th Edition* at 18-13, footnote 1. A more restrictive interpretation of section 92(2) would allow a disruptive accused to delay the proceedings and avoid an indictment simply by refusing to attend court for trial.

[19] Section 92(1) was intended to prevent scenarios where trials, or parts of trials, are conducted “behind the back” of the accused. This was not such a case. The appellant had been behaving in an obstructive and threatening manner. The Crown had made every effort to secure his attendance at trial. But for the appellant’s refusal, there would have been no need for a trial in absence. He had been given every opportunity to participate in his trial and was represented by experienced counsel. There was no prejudice or unfairness to the appellant and thus no miscarriage of justice. If the sheriff erred, the court could correct it under section 300A of the 1995 Act, by treating his decision as a procedural irregularity that could be justified and excused given the appellant’s refusal to attend and the failure of GEOAmey to bring the appellant to court. If the court determines there has been a miscarriage of justice, the Crown would wish the opportunity to consider seeking authority to bring a new prosecution in terms of section 118(1)(c) and section 119 of the 1995 Act.

Decision

[20] At common law, there is a requirement that a jury trial proceeds in the presence of the accused as recorded by Hume. He noted an exception in the case of treason before explaining at pages 269-270:

“It is considered, that unless the accused is present to take charge of his own interest, there can be no security for doing full justice to his case; for pleading all his defences, bringing forward all his evidence, stating all objections to the evidence on the other part, and still less for taking advantage of all those pleas and grounds of challenge, which may arise in the course of the proceedings in the trial... on these grounds, the

peremptory rule has long been settled, of requiring the personal presence of the pannel in every step, from first to last, of the trial, with the exception only of continuations of the diet.”

The observations of Lord Rodger of Earlsferry in *R v Jones, supra* at paras 43 - 46, while *obiter dicta*, are an accurate summary of the common law and of the history of legislative provision up to the date of that decision.

[21] Section 92, so far as relevant, provides:

“92 Trial in presence of accused

(1) Without prejudice to section 54 of this Act, and subject to subsections (2) and (2A) below, no part of a trial shall take place outwith the presence of the accused.

(2) If during the course of his trial an accused so misconducts himself that in the view of the court a proper trial cannot take place unless he is removed, the court may order—

- (a) that he is removed from the court for so long as his conduct makes it necessary; and
- (b) that the trial proceeds in his absence, but if he is not legally represented the court shall appoint a solicitor to represent his interests during such absence.

(2A) If—

- (a) after evidence has been led which substantially implicates the accused in respect of the offence charged in the indictment or, where two or more offences are charged in the indictment, any of them, the accused fails to appear at the trial diet; and
- (b) the failure to appear occurred at a point in proceedings where the court is satisfied that it is in the interests of justice to do so, then the court may, on the motion of the prosecutor and after hearing the parties on the motion, proceed with the trial and dispose of the case in the absence of the accused.

(2B) Where a motion is made under subsection (2A) above, the court shall—

- (a) if satisfied that there is a solicitor with authority to act for the purposes of—
 - (i) representing the accused's interests at the hearing on the motion; and
 - (ii) if the motion is granted, the accused's defence at the trial, allow that solicitor to act for those purposes; or
- (b) if there is no such solicitor, at its own hand appoint a solicitor to act for those purposes.

(2C) It is the duty of a solicitor appointed under subsection (2) or (2B)(b) above to act in the best interests of the accused.

(2D) In all other respects, a solicitor so appointed has, and may be made subject to, the same obligations and has, and may be given, the same authority as if engaged by the accused; and any employment of and instructions given to counsel by the solicitor shall proceed and be treated accordingly.

(2E) Where the court is satisfied that—

(a) a solicitor allowed to act under subsection (2B)(a) above no longer has authority to act; or

(b) a solicitor appointed under subsection (2) or (2B)(b) above is no longer able to act in the best interests of the accused,

the court may relieve that solicitor and appoint another solicitor for the purposes referred to in subsection (2) or, as the case may be, (2B) above.

(2F) Subsections (2B)(b) and (2E) above shall not apply in the case of proceedings—

(a) in respect of a sexual offence to which section 288C of this Act applies; or

(aa) in respect of an offence to which section 288DC of this Act applies;

(b) in respect of which section 288E of this Act applies; or

(c) in which an order has been made under section 288F(2) of this Act....”

[22] It is clear that when Parliament introduced the statutory predecessor of section 92 it

restated the common law requiring a jury trial to proceed in the presence of the accused.

The exception now forming subsection 92(2) was introduced into section 145 of the Criminal

Procedure (Scotland) Act 1975 by the Criminal Justice (Scotland) Act 1980. It was the first

statutory exception rendering it permissible to proceed in the absence of the accused in a

jury trial. The subsection 92 (2A) relaxation of the general rule, introduced later by the

Criminal Procedure (Amendment) (Scotland) Act 2004, does not apply in this case as no

evidence was led in a trial in which the appellant was present before failing to appear. The

Crown seek to persuade us that subsection 92(2) does apply. Even if it does not, they

propose that there was no miscarriage of justice.

[23] There are three preconditions in section 92(2). Two are explicit: first, misconduct

occurring during the course of the trial, and second, the misconduct is such that the court’s

view is that a proper trial cannot take place unless the accused is *removed*. That last word

signals a third precondition, that the accused is participating in the trial in a place such that

he can be removed. Until the emergency legislation introduced during the COVID-19 pandemic, currently Coronavirus (Recovery and Reform) (Scotland) Act 2022 schedule 1 paragraph 6 sub-paragraphs 6-12, made it possible for persons otherwise obliged to attend a trial to do so remotely, an accused had to be within the court room hearing the trial before he could be removed under section 92(2). In this case the appellant was not attending remotely. He was not present at the trial at all.

[24] Accordingly, the statutory requirement expressed in section 92(1) was breached. Proceeding in the absence of the appellant was not authorised by section 92(2). Further, the appellant was remanded in custody and therefore under the control of the state and could be compelled to attend.

[25] We can readily understand the frustration felt by the sheriff. We recognise that he was motivated to ensure that elongated proceedings, in which there were two vulnerable witnesses both waiting to give evidence with special measures about a serious sexual crime inflicted on them, were brought to a conclusion. He was understandably concerned about the impact on witnesses and the jurors. In England, the common law permits a trial to proceed in absence of the defendant; *R v Jones*. It is also possible to have an Article 6 fair trial in the absence of the accused in certain circumstances, *Bertino v Italy* [2024] 1 WLR 1483 and the cases cited there.

[26] In Scotland, unless and until the Scottish Parliament provides to the contrary, or further refines section 92, a trial of a natural person in solemn proceedings requires the presence of the accused except in the circumstances permitted under subsections 92(2) and (2A). Section 92(1) has been described as a peremptory provision departure from which will generally, but not invariably, constitute a miscarriage of justice, *Drummond*. In that case, the appellant accepted that the judge requiring him to leave the courtroom during his

evidence, for a legal matter to be raised with his counsel who was agreeable to his removal, had not caused actual prejudice. Nevertheless, this was held to constitute a miscarriage of justice. The court recognised that it may be different if it could be affirmed with certainty that no prejudice to the accused could possibly have occurred.

[27] The Advocate Depute recognised that because of his absence the appellant did not hear the evidence and see the witnesses as they gave it and so did not have the opportunity to comment on it to his counsel. The appellant did not have the opportunity to discuss with his counsel a Crown motion to amend the indictment by changing the time covered by charge 2 to make it a year earlier than originally libelled. He did not have the opportunity to give evidence. Whilst we recognise that these are all consequences of choices made by the appellant, it was within the sheriff's power to compel the attendance of a person remanded in custody by the state. The sheriff's colleague had previously compelled attendance by granting a warrant. The trial sheriff granted a warrant at trial before acquiescing in its withdrawal. What he should have done, despite the delay it would have caused, was to adjourn the trial until the warrant was executed and the appellant was brought to court. He was told this could be done within two days. He could also have explored whether the appellant could attend remotely from prison. Had he taken either of these courses, and the trial commenced, then if the appellant sufficiently misconducted himself, section 92(2) would have permitted him to remove the appellant and proceed with the trial in his absence. The unreported case of *Dailly* adds nothing as only the adjournment of the trial occurred in the absence of the appellant. He was represented and counsel made the motion to adjourn in his interests.

[28] As a generality, it is competent under section 300A(2) of the 1995 Act for this court to excuse a procedural irregularity in the earlier proceedings. There are conditions under

subsection 300A(4); it must appear to us that it arose because of a mistake or oversight or for some other excusable reason and we must be satisfied it would be in the interests of justice to excuse the irregularity. Subsection 300A(5) defines a procedural irregularity in paragraphs (a) to (e):

- “(5) A procedural irregularity is an irregularity arising at any stage of proceedings—
- (a) from—
 - (i) failure to call or discharge a diet properly;
 - (ii) improper adjournment or continuation of a case;
 - (iii) a diet being fixed for a non-sitting day;
 - (b) from failure of—
 - (i) the court; or
 - (ii) the prosecutor or the accused,
 to do something within a particular period or otherwise comply with a time limit;
 - (c) from failure of the prosecutor to serve properly a notice or other thing;
 - (d) from failure of the accused to—
 - (i) intimate properly a preliminary objection;
 - (ii) intimate properly a plea or defence;
 - (iii) serve properly a notice or other thing;
 - (e) from failure of—
 - (i) the court; or
 - (ii) the prosecutor or the accused,
 to fulfil any other procedural requirement.”

Somewhat faintly, the Advocate Depute proposed that we could consider there was a failure by the accused, the prosecutor or the court to ensure he was present at trial. Suffice to say that we find that the conduct of the whole trial in the absence of the appellant, in breach of section 92(1), is not a mere procedural irregularity under section 300A that it would be in the interests of justice to excuse.

[29] In these circumstances, we are unable to do other than conclude that there was a miscarriage of justice. We shall fix a hearing for parties to address us on disposal under section 118 of the 1995 Act.

Postscript

[30] As we have narrated at paragraph [9] above, on 27 May 2024, the sheriff did not resort to section 92(2) before holding a remote ballot in the absence of the appellant. He did not err in doing so. *Drummond* was decided long before the introduction of a remote ballot procedure where the start of a jury trial occurs in two stages and the court in 2005 was not contemplating such a procedure. We are aware that a number of courts have commenced the ballot process in the absence of an accused. Doing so does not render conviction following trial a miscarriage of justice. First, in *Lindsay* the court concluded that the trial has not commenced for the purposes of section 92(1) where there is an adjournment before the leading of evidence commences. Secondly, it is a situation where, so long as the accused is represented, it can be affirmed with certainty that there is no prejudice as there is nothing the accused could competently do under the 1995 Act at that stage that would not still be open before the jury is sworn.