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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2020] EWCA CRIM 1801

No. 201902662 B4

Royal Courts of Justice

Monday, 7 December 2020

Before:

LADY JUSTICE SIMLER

MR JUSTICE GOSS

HIS HONOUR JUDGE JEREMY RICHARDSON QC
(THE RECORDER OF SHEFFIELD)

REGINA
V
MUNER AL-JARYAN

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MR T. SLEIGH-JOHNSON appeared on behalf of the Appellant.

MR S. WARD appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE SIMLER:

Introduction

1 On 19 March 2020 the conviction of Muner Al-Jaryan for possession of a prohibited firearm contrary to s.5(1)(aba) of the Firearms Act 1968 was quashed and a retrial was ordered by this court (myself, Goss J and the Recorder of Sheffield). Judgment was handed down the following day. An order preventing reporting of the judgment until the conclusion of the trial was made under s.4(2) of the Contempt of Court Act 1981. We shall refer to Mr Al-Jaryan as the defendant.

2 The order of this court was that the indictment should be served within one month and that the defendant should be re-arraigned within two months. The indictment was promptly served and uploaded to the Digital Case System. However, the defendant was not arraigned on that indictment within the two-month period specified, and it was not until 14 October 2020 at a PTPH in respect of a fresh matter that the mistake was appreciated by HHJ Connell who conducted that hearing. He correctly observed that the case would have to return to this court. The consequence is that the prosecution now apply for permission to arraign the defendant just under nine months after his conviction was quashed by this court. The application is made pursuant to sections 8(1) and 8(1B)(a) of the Criminal Appeal Act 1968 (the 1968 Act). The application is opposed by the defendant who seeks an order that we set aside the order for retrial and direct a verdict of not guilty, pursuant to section 8(1B)(b) of the 1968 Act on the indictment.

3 It is unnecessary for us to set out the full background and circumstances of the case giving rise to the appeal, or the reasons why the conviction was quashed, save in the barest of outline. We do however need to set out the chronology of events leading to this application in some detail.

The facts

4 On 1 February 2017 police attended the defendant's address at Flat 11 Coopers Court, the Woodlands in Isleworth where he lived alone. Cannabis plants were being cultivated there, and when police entered the flat the defendant and another man were present. The rear windows of the flat were open, and officers saw two men running from the flat, having jumped out of the window. The defendant was arrested and his flat was searched. An eight-millimetre, blank-firing, self-loading pistol was found underneath the sofa cushion at the flat. There was no dispute that this was a firearm.

5 The defendant pleaded guilty to production of a Class B drug on 30 January 2018. He was subsequently tried for the firearm offence (which he denied) at Isleworth Crown Court in June 2019 and was ultimately convicted. At trial the disputed issue for the jury was whether the defendant knew the firearm was hidden under the sofa cushion. Significant reliance was placed by the prosecution on his confession in interview under caution that he knew that the firearm was in his flat and on the fact that he was able to provide a description of it in interview. That interview, however, took place without a solicitor present, though this was at the defendant's own election; and no appropriate adult was present notwithstanding the defendant's clinical depression, which is a mental health disorder.

6 On appeal the defendant challenged the conviction as unsafe because (among other reasons) he said the jury should have been warned of the "special need for caution before convicting the accused in reliance on the confession" (section 77 Police and Criminal Evidence Act). We allowed the appeal given the centrality of the confession, holding that the firearm

confession was unsafe given the defendant's mental health vulnerability and in the absence of the appropriate warning. The firearm conviction was accordingly quashed on 19 March 2020 and we directed a retrial with reporting restrictions in place until after that retrial.

7 The papers were sent back by the Court of Appeal Criminal Division to Isleworth Crown Court, and the deadline for re-arraignment was 19 May 2020. On 20 March 2020 a Crown Prosecution Service ("CPS") lawyer was allocated to the case and given instructions concerning preferment of a new indictment and the deadline for re-arraignment.

8 On 23 March 2020 a new indictment was uploaded to the Crown Court Digital Case System and Isleworth Crown Court was written to by the CPS advising of the deadline for re-arraignment. On 27 March 2020 a follow-up letter was sent by the CPS to the court asking for an urgent listing. On 2 April 2020 the case was listed at Isleworth Crown Court for a bail application. Bail was not then opposed by the prosecution and the defendant was granted conditional bail. He was not produced either in person or remotely, and could not, therefore, be arraigned on that date. The prosecution was ordered to upload a new indictment by 15 April 2020, notwithstanding that this had already been done. The CPS re-uploaded the new indictment later that day.

9 A further order was made that the defendant was "to be arraigned by 18 May 2020". That was the day before the deadline expired. A record made by the listing officer at Isleworth Crown Court on 2 April 2020 in respect of that same hearing reads as follows: "*Parties to arrange a convenient date for the defendant to be arraigned.*" It is clear from that record that the listing officer placed the onus on the parties to ensure a suitable date was fixed for arraignment and that it was understood by the court that this was to be by 18 May 2020.

10 Notwithstanding that understanding and the words used by the court in the order made at the hearing on 2 April 2020, it appears that the CPS misunderstood the order to mean that the defendant was to be arraigned on 18 May 2020. That understanding was held, despite the fact that counsel who appeared for the prosecution sent the CPS an attendance note in terms that might be regarded as making the position crystal clear. The attendance note, so far as material and with emphasis added, reads as follows:

> "Attendance note for 2 April 2020.
> 1. This case was listed for a Skype hearing in court 9 before HHJ Wood in respect of an application for bail following the quashing by the Criminal Division Court of Appeal of MAJ's conviction for possession of a prohibited firearm [...]
> 6. HHJ thereafter in effect treated the case as a case management hearing and made the following orders:
> (i) Crown to upload a draft fresh indictment by 4.00 pm 15.4.2020.
> (ii) <u>MAJ to be arraigned by 18.5.2020</u>.
> (iii) PTR on same day as arraignment.
> (iv) On date of PTR and arraignment MAJ to be on video at defence counsel's chambers or solicitor's office."

11 There was an application by the defendant thereafter to vary bail conditions and this was dealt with administratively on 17 April 2020. The "widely-shared comments" on the Crown Court Digital Case System have the following note:

> "This case is awaiting retrial and arraignment of the defendant. On application of the defence and with consent of prosecution bail residence condition varied".

12 There then followed almost a month between 17 April 2020 and 15 May 2020, when nothing whatever occurred. Counsel who appeared for the CPS on 2 April 2020 emailed the CPS at 3.02 pm on 15 May 2020. That was the Friday before Monday 18 May 2020. The email reads as follows:

> "Dear Louise, this case is being listed on Monday for PTR and arraignment, according to my attendance note for 2 April 2020. Is there anything I need to know? Are we still proceeding? I presume we are, unless told otherwise.
> Keep safe. Best regards, Robert."

The reviewing lawyer replied immediately, saying, "We are indeed, and all of the evidence should hopefully have been copied across to the case, so like before we are good to go ...".

13 18 May 2020 came and went and nothing whatever occurred. The case was not listed and there is no evidence that anyone, whether counsel or the lawyer at the CPS, did anything to seek to understand why not or to make alternative arrangements. On 19 May 2020 the case was updated on the CPS computer system. The next hearing date was recorded as 8 June 2020. Thereafter, at regular intervals the case was updated on the CPS computer system with what are referred to by Mr Ward in his chronology, as "dummy dates", reflecting that the CPS was waiting for the court to provide a new date. The CPS however, did nothing in this period.

14 On 4 September 2020 the defendant appeared before the Uxbridge Magistrates' Court charged with new offences, including possession of an imitation firearm. He was remanded in custody for a PTPH at Isleworth Crown Court due to take place on 30 September 2020. That hearing was adjourned administratively to 14 October 2020. Meanwhile, the CPS computer system continued to update with new "dummy dates" and 17 October 2020 was recorded as the new dummy date.

15 On 14 October 2020 there was a PTPH at Isleworth Crown Court in relation to the new matter. During the course of the hearing the retrial was mentioned because the two cases were regarded as capable of joinder. At the end of the hearing the judge made the following comment explaining the orders made:

> "In this case the Court of Appeal ordered a retrial and the defendant was meant to have been arraigned before 18 May 2020. That did not happen even though there was a bail application on 2 April 2020 where the need for arraignment was raised. The Crown will need to go back to the Court of Appeal to get leave for a new indictment. If successful, the Crown are to upload any application for joinder by 4 November 2020. The defendant is remanded in custody on this matter but on technical bail on the [retrial], which will also be listed on that date.
> NB I have asked for the log of 2 April 2020 where his Honour Judge Wood granted bail and [raised] the issue of the need for arraignment to be uploaded to the bail section of the digital case system."

16 It is against that background and in those circumstances that the prosecution make the present application under section 8 of the 1968 Act.

The legal requirements for re-arraignment out of time

17 Section 8 of the 1968 Act provides as follows:

" 8. **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 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 ss.(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 s.7 of this Act was made."

18 The prosecution application is made by Mr Ward on behalf of the CPS under section 8(1B) of the 1968 Act. The defendant, who is represented by Mr Sleigh-Johnson, opposes that application, as we have indicated, and an application is made on his behalf under section 8(1A) for an order that the order for retrial be set aside and a direction for the entry of a judgment and verdict of acquittal.

19 The prosecution has two hurdles to surmount in making this application. Both must be overcome. The first is to demonstrate that they have acted with all due expedition. The second is to demonstrate that there is a good and sufficient cause for a retrial in spite of the lapse of time. If the prosecution fail in relation to one or both hurdles the defence application must succeed.

20 For the prosecution Mr Ward submits, in essence, that there was no failure by the prosecution in this case to grip the needs of the case or to ensure that all due expedition occurred. Those concerned with this matter did not fail to register that there was a statutory deadline. Instead, the CPS acted immediately upon learning of the Court of Appeal's order that the defendant was to be retried, and were fully aware of their duties and of the deadline. He relies on the prompt uploading of the new indictment and submits that the failure to re-arraign was due to a misunderstanding held by counsel and the CPS of the court order made on 2 April. The CPS mistakenly thought that re-arraignment had been fixed to take place on 18 May 2020, rather than that arraignment was to be listed by action of the parties by 18 May 2020. Once that misunderstanding occurred, Mr Ward submitted that it was liable to persist. In those circumstances it was reasonable for the CPS to proceed on the assumption or belief that arraignment did in fact take place on 18 May 2020 and the rolling "next hearing" dates appearing on the CPS computer system were simply to be expected where a defendant on bail was awaiting trial, particularly given the delays and difficulties experienced in respect of communication with crown courts and staff as a consequence of the COVID-19 pandemic. So far as the misunderstanding in particular is concerned, he relied on the email exchange between counsel and the CPS on 15 May 2020 which reveals the fact of the misunderstanding and supports the conclusion that it was reasonable in all the circumstances.

21 As for the second hurdle, Mr Ward submitted that there is plainly good and sufficient cause for a retrial notwithstanding the lapse of time since the Court of Appeal's order in the seriousness of the offence, the ability of a fair trial to take place and the absence of any real prejudice.

22 For the defendant, Mr Sleigh-Johnson submitted that the CPS's understanding or belief that the defendant was to be arraigned on 18 May 2020 was not reasonably held given what is recorded both by counsel and by the listing officer at Isleworth Crown Court. The cause of the misunderstanding can reasonably be described as a breakdown in communication and as exemplifying the fact that those concerned simply failed to register the strictness of the statutory deadline and failed to take any or adequate steps to comply with it. He submitted that the CPS plainly did not act with all due expedition. Due expedition would have involved the CPS taking active steps to ensure attempts at arraignment long before the deadline in order to allow for repeated attempts (if necessary), particularly given the pandemic, the possibility of court closures, the increased risk of involuntary absences of defendants and the difficulties in accommodating the presence of defendants in court. The purpose of the arraignment deadline is to ensure that a retrial takes place as soon as possible, and given that purpose, even if there was some sense of certainty that arraignment would take place on 18 May 2020, passively allowing the court to fix arraignment the day before the deadline and then failing to take action between 15 and 19 May, as demonstrated by the chronology, cannot on any view be described as duly expeditious conduct.

23 So far as good and sufficient cause is concerned, Mr Sleigh-Johnson submitted that although the CPS relies on agreed or uncontested evidence, the defence case relies heavily on the recollection of the defendant and the delay has been far too long: witnesses will have to rely on fading memories of stale events. For those summary reasons, there is no longer good and sufficient cause for a retrial.

Analysis and conclusions

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.

26 So far as this particular case is concerned, it is clear from the chronology to which we have already referred that there can be no criticism of the prosecution's compliance with the duty to upload the indictment for the retrial to the Digital Case System. That was done promptly on 23 March 2020, just four days after the decision of this court. We do not know from the chronology when the order of the Court of Appeal Criminal Division was officially received at the Isleworth Crown Court, but at all events, the CPS sought an early listing as shown by the emails dated 23 and 27 March 2020. There was then a bail application heard and determined by HHJ Wood on 2 April. We recognise that 2 April was during the early stages

of the COVID-19 pandemic, and we understand that the hearing was conducted in less than ideal circumstances. The judge directed that arraignment should take place by no later than 18 May 2020, and we observe that it is unfortunate that a date was not fixed there and then. The problems would have been avoided had that been done. What is clear, however, is that what occurred thereafter and the confusion that ensued as to who had the responsibility for securing compliance with the direction of the judge led to the situation with which this court is now concerned.

27 It seems to us, on any view, that 18 May 2020 was far too late a date to take as a final listing deadline. What should have happened is that the parties in consultation with one another and with the court should have secured a much earlier listing. We agree with Mr Sleigh-Johnson that this was particularly so in the circumstances of the pandemic. However, that did not occur, and indeed, nothing occurred until Friday 15 May 2020. As we have observed, there was an inquiry by counsel instructed on behalf of the prosecution of the CPS as to whether the case was listed on 18 May 2020. The assumption was made that it was so listed without any action having been taken to check, whether by the CPS reviewing lawyer or by counsel, that this was in fact the case.

28 As circumstances transpired, the case was not listed on 18 May 2020 and at some point that must have become clear to counsel for the prosecution and/or the reviewing lawyer. But notwithstanding that, once again, nothing whatever occurred. There is nothing to suggest that counsel who attended court contacted the CPS lawyer to say that the case was not in the list, nor that the lawyer contacted the Crown Court to query why the case was not in the list, given the significance of 18 May as the last day before the deadline. Had urgent action been taken even at that point, no doubt an urgent listing could have been made for 19 May 2020. Mr Ward was unable to explain why nothing at all appears to have happened on 18 May 2020. It is clear to us that no alarm bells were sounded in either Isleworth Crown Court or the CPS then or in the weeks and months that followed. Equally, it is right to say that the defence did nothing to alert the court to the fact that nothing had been done to secure compliance with the deadline for arraignment. From the chronology with which we have been provided, it is clear that the CPS computer system simply showed on at least six occasions that the case was either not listed or had been given dummy dates. The critical deadline set by the Court of Appeal was therefore missed without any alarm having been raised, and it was only on 14 October 2020, when the defendant appeared before Isleworth Crown Court on a new charge and indictment, that this case was spotted as having been missed. On that occasion it became apparent that the case had been overlooked and the judge correctly observed that the parties would need to return to this court in order to seek permission for arraignment out of time.

29 In simple, terms it seems to us that nothing was done beyond 2 April 2020 by the Crown Court or the CPS, or indeed the defence, to secure a date for arraignment in court. Even when 18 May 2020 approached, it appears that nothing was done to alert the court to the fact that an important deadline was imminent. Even after the deadline passed, nobody sought to remedy the situation. Months passed before the problem was noted by a judge who was dealing with a new and unconnected case which happened to be in the same crown court and involving this defendant.

30 We appreciate that Isleworth Crown Court and all the parties in this appeal were labouring in difficult circumstances, as we have observed, during the early stages of the response to the COVID-19 pandemic. That may account for some of the failings, but simply to overlook the deadline and thus a mandatory order of the Court of Appeal is unacceptable, and we have concluded that it cannot be characterised as anything approaching reasonable speed on the part of the prosecution. Accordingly and for these reasons, we are not satisfied

that the mandatory requirement within section 8(1B)(b)(i) is met. We are not satisfied that the prosecution acted with all due expedition. In our judgment, the prosecution should have taken urgent and purposeful steps to call the attention of the court to the absence of a firm date for arraignment well before 15 May 2020, but at the very latest on 15 May 2020. The conduct after that date reveals the absence of any semblance of urgency.

31 Given that conclusion, it seems to us that we do not have to consider whether there is good and sufficient cause for a retrial within section 8(1B)(b)(ii), and since any conclusion we express would be academic, we prefer to express no view in relation to this hurdle.

32 Accordingly, we refuse leave to arraign the defendant outside the two months permitted by section 8(1) of the 1968 Act. Furthermore, we grant the application made by the defendant, pursuant to section 8(1A) of the 1968 Act to set aside our order for a retrial dated 19 March 2020. We direct Isleworth Crown Court to enter judgment and verdict of acquittal on count 2 of the original indictment, which is the count upon which he was to be retried.

33 Finally, we consider it might be helpful for us to give some guidance as a means of endeavouring to avoid any repetition of the delay that has occurred in this case and that has led us to accept the submissions of the defendant. Firstly, we emphasise that it is the duty of the CPS to upload the new indictment to the Digital Case System at the first reasonable opportunity after the decision of the Court of Appeal Criminal Division. Secondly, once the notification from the Registrar of Criminal Appeals arrives at the crown court, usually within a very short time after the conclusion of the case, and usually accompanied by the order of the full court, the crown court should list the case before a judge for directions or pre-trial review on a fixed day within one month of the order of the Court of Appeal Criminal Division to enable arraignment to take place. Thirdly, the date so fixed should not be altered or adjourned without the express permission of the Resident Judge, and only then to a date within two months of the order of the Court of Appeal. It is recommended this be no later than several days before the expiry of the deadline. If the above regime is adopted, that will mean that there is proper judicial oversight and control of the date for arraignment and will lead to securing the earliest reasonable trial date. Should there be any lack of expedition on the part of either party, it can be corrected by the intervention of the court at an early stage. The second and third stages are pivotal to the efficient operation of the retrial process when that is what has been directed by the Court of Appeal.

34 In conclusion, for the reasons we have given, we refuse the application by the CPS to allow arraignment nine months after we ordered a retrial. We grant the application of the defence to direct an acquittal of the defendant. We lift the order made under s.4(2) of the Contempt of Court Act 1981, and this will enable our judgment handed down on 20 March 2020 to be reported.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.