IN THE COURT OF APPEAL
CRIMINAL DIVISION
SITTING AT SWANSEA CROWN COURT

CASE NO 202301084/B3
[2023] EWCA Crim 1475

The Law Courts
St Helen's Road
Swansea, West Glamorgan
SA1 4PF

Wednesday 25 October 2023

Before:
THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(LORD JUSTICE HOLROYDE)

MR JUSTICE GRIFFITHS

MRS JUSTICE COLLINS RICE DBE

REX
v
GERAINT ALUN BALDWIN

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
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MR W BEBB appeared on behalf of the Applicant.
MR J SCOULLER appeared on behalf of the Crown.

J U D G M E N T
(Approved)

1. THE VICE-PRESIDENT: The applicant was tried in his absence and convicted of an offence of causing grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1861. He was subsequently sentenced to 6 years' imprisonment. He now seeks an extension of time to apply for leave to appeal against his conviction. His applications have been referred to the Full Court by the single judge.
2. The charge arose out of an incident outside a public house in July 2021, which was captured on CCTV. The prosecution alleged that the applicant, then aged in his mid-30s and a man of very large build, had become increasingly aggressive towards a Mr George, who was at the public house with his wife and friends. The prosecution case was that the applicant said that he would kill Mr George. When Mr George replied that he was out with his wife and did not want any trouble, the applicant said that he would kill her too. A member of staff asked the applicant to leave. He did so but, as he left, he made further threats to Mr George and said that he would be waiting outside for him.
3. The prosecution case was that before leaving the public house with his wife, Mr George went outside alone and, in an attempt to defuse the situation, said that he was sorry for whatever he had done and did not want any trouble. The applicant responded with mockery and further threats. Fearing that he would be hit, Mr George headbutted the applicant, who then punched Mr George unconscious. As Mr George lay on the ground the applicant kicked him in the face and then used his bare foot to stamp on the side of Mr George's face, pressing down on him. Mr George suffered multiple facial fractures and had to undergo surgery.
4. The applicant was arrested and interviewed under caution. He made no comment.
5. It is unnecessary to say more about the facts of the case. We turn to the procedural

history, which we must set out in some detail.

6. On 8 November 2021 the applicant was sent on unconditional bail for trial in the Crown Court at Cardiff. He was represented by solicitors, and appears initially to have co-operated with them. He told them that he did not wish to apply for legal aid.
7. At a plea and trial preparation hearing on 6 December 2021, he pleaded not guilty. A trial date was fixed for 27 June 2022, and the judge warned the applicant that, if he failed to attend, the trial may proceed in his absence.
8. On 17 February 2022 the applicant filed a Defence Statement, in which he denied the charges, denied the detailed allegations against him and asserted that he had acted in self-defence. He gave a number of particulars of his case.
9. At a hearing on 23 June 2022, at which the applicant was not required to be present, the trial date was vacated. The case was re-listed for trial in the Crown Court at Cardiff on 17 January 2023, which would be some 18 months after the incident.
10. We note in passing that in September 2022 the applicant was convicted by a magistrates' court of unrelated offences and was ordered to pay a fine, costs and compensation. We do not know whether he was legally represented in those proceedings.
11. On Friday 13 January 2023, the solicitors wrote to the court indicating that they had been having difficulties contacting the applicant. A case management hearing was therefore listed on Monday 16 January 2023 at Cardiff, which the applicant again was not required to attend. The court at that hearing directed that the solicitors must provide further details, that the trial should remain in the list for trial in the Crown Court at Newport on the following day, but that no witnesses should attend on that day.
12. On Tuesday 17 January 2023, the solicitors wrote to the court providing the following information.

1. At the time when the first trial date was vacated, the applicant had not put them in funds.
2. A WhatsApp message had been sent to the applicant on 24 June 2022 “informing him that the case was put back to January, requesting confirmation that he had received the message, which he confirmed he had”.
3. Between early September and late December 2022 the solicitors sent text messages and letters to the applicant, asking him to contact them to put them in funds and to discuss the preparation of his case for trial. None of these elicited any response.
4. The solicitors had made further attempts to contact the applicant following the hearing the previous day. They had called the mobile number which they held for the applicant and left a message, but he had not returned the call. They had called the landline number which they held for him. That call had been answered by a woman who said that the applicant did not live there and then hung up. They had sent a WhatsApp message which did not appear to be received or opened.

13. That letter was considered by the trial judge, HHJ Richard Williams, at the hearing in Newport on 17 January 2023. The applicant did not attend. The judge sensibly took steps to ensure that the applicant’s name be called in the Crown Court at Cardiff, in case he had gone there in error, but there was no response. Counsel who had initially been instructed to represent the applicant linked in to the hearing remotely in order to assist the judge. The judge summarised the history, saying that the solicitor’s letter showed that the applicant was “aware of today’s trial date”. He concluded from the contents of that letter that he could safely find that the applicant was aware of the trial date. Defence counsel confirmed that the judge’s summary of history was “an accurate one as far as I’ve been made aware from my instructing solicitors”. Counsel expressed his continuing willingness to assist the court if he could, but said that he was without instructions to

enable him to play any effective part in the trial. He asked the court to release him from the case, and the judge did so.

14. Counsel then appearing for the prosecution invited the judge to consider issuing a warrant for the applicant's arrest and trying the applicant in his absence. The judge indicated that he had considered the relevant case law. He issued a warrant, not backed for bail, but deferred any further decision until the following morning.

15. On the morning of 18 January 2023, the applicant again was not present. The judge's understanding was that efforts to arrest the applicant pursuant to the warrant had been unsuccessful, though there was no information as to precisely what efforts had been made. The judge again reviewed the history, noting that the applicant had not engaged with his solicitor since June 2022 and had not put them in funds, so that they were no longer acting. He found that the applicant was aware of the trial date and was voluntarily absent from the trial. He concluded:

> **"**The witnesses are at court. The incident giving rise to the trial took place as long ago as 11 July 2021 and there is no reasonable prospect of the accused being apprehended and brought to court within the current timetable for the case. If the case has to be adjourned, it is likely to have to be adjourned for some time. It's not known whether efforts to arrest the Defendant on the warrant which was issued yesterday will prove successful and it seems to me that in these circumstances, the compelling interests of justice are to proceed to trial in his absence**."**

16. The trial accordingly proceeded with the applicant absent and unrepresented. The prosecution adduced oral evidence from a number of witnesses, including Mr George, and a man who had, at one point, intervened in events inside the public house. The jury saw the CCTV footage and a number of witness statements were read.

17. The evidence was concluded within the court day, and the judge then summed-up. No criticism is made of his directions of law. He directed the jury not to hold it against the applicant that he had not answered questions in interview. He then said:

> "As part of these proceedings, the defendant was required to tell the court and the prosecution about the general nature of his defence and what it was that he disputes about the prosecution case, and why. The defendant did so in a defence statement, which forms part of the digital case record. Whilst what a defendant says in a defence statement cannot be evidence in the case, it is fair and proper that you should know what the general nature of his defence is according to that defence statement. The defendant accepted being present at Fagins bar. He denied making any threats. He said the complainant was the aggressor and that he acted in self defence."

18. The judge then gave a conventional direction about self-defence. He later concluded his directions of law by saying:

> "The defendant's absence. Finally, I remind you of what I told you at the start of the trial. The defendant has previously pleaded not guilty. The fact that the defendant is not here does not affect your task, which is to decide whether or not the defendant is guilty of the charge against him. The defendant's absence is not evidence against the defendant and it must not affect your judgment."

19. The jury retired to consider their verdict shortly after 4.00 pm. They were sent home at about 4.40 pm. The judge then indicated to prosecution counsel that there had been "contact" from the applicant's solicitors. He alerted counsel to the need to consider the "novel situation" which might arise if, on the following day, the applicant surrendered to custody before the jury had reached their verdict.

20. Mr Bebb, counsel who represents the applicant in this court, has helpfully been able to add some further information. He tells us, and of course we accept from him, that on 18 January 2023, in the afternoon, the applicant contacted the solicitors after having been

told that the police had been to his parents' home. He asked the solicitors to make an application for legal aid which they were shortly to do. He had not, at that stage, been arrested. He was however arrested at 5.00 pm on 18 January, and was held overnight at a police station.

21. None of those details were known to the judge when the court sat on the morning of 19 January. The appellant was not present in the court building. The judge was told that the applicant was absent, and that there was no information as to whether he had been arrested. The judge indicated that the trial would continue, and the position would be reviewed if the applicant did attend whilst the jury were deliberating. In the event, that did not happen. In the course of the morning, the jury returned their guilty verdict and were discharged.

22. The applicant was produced before the court at 2 o'clock that afternoon. He admitted that he had failed without reasonable excuse to surrender on 16 and 17 January. He was remanded in custody to await the sentencing hearing.

23. Counsel, who had initially been instructed, was once again present to assist the court. He said that the applicant apologised for his failure to attend court. The applicant's instructions were that there had been a "communication error" between his solicitors and him. He had changed the number of his mobile phone without informing them, and he had not received any of their letters.

24. Mr Bebb puts forward two grounds of appeal. First, he submits that the judge was wrong to proceed with the trial in the absence of the applicant. He relies on the principles stated by this Court in R v Hayward [2001] EWCA Crim 168 at paragraph 22, which were approved on appeal to the House of Lords in R v Jones [2002] UKHL 5. He also relies on the observation of this Court in R v Lopez [2013] EWCA Crim 1744, that the utmost

care is necessary when deciding whether to proceed with a trial in the absence of the accused, and that such a course should rarely be adopted.

25. Mr Bebb submits that the solicitor's letter of 17 January 2023 did not provide a basis for the finding that the applicant was aware of the specific trial date. Further, he submits that there was no evidence that the applicant was ever informed that the trial had been moved from Cardiff to Newport. Mr Bebb accepts that the applicant had failed to keep in touch with his solicitors, but points to the initial period when he had been fully engaged in preparing his defence. There was, he submits, no clear evidence that the applicant had waived his right to attend his trial.

26. Mr Bebb emphasises the prejudice to the applicant caused by a trial proceeding in the applicant's absence, when he was also unrepresented, in a case where the defence of self-defence would largely depend upon the applicant's own account. Moreover, Mr Bebb submits that the judge, on 18 January, failed to make sufficient inquiries into the efforts made to arrest the applicant, and failed on 19 January to make sufficient inquiry into what had happened since the solicitor's communication the previous afternoon. As events proved, Mr Bebb points out, a short adjournment would have sufficed to enable the applicant to attend and take part in his trial.

27. The second ground of appeal is that the judge's very brief summary of the Defence Statement, which we have quoted earlier in this judgment, did not adequately set out the nature of the applicant's defence. In particular, Mr Bebb submits, fairness required the judge to say more in relation to the applicant's case as to the initial headbutt delivered by Mr George. The relevant passages in the Defence Statement were to the effect that the applicant had suffered excruciating pain, and believed that the kick which he then delivered, with an unshod foot, was reasonable in order to prevent any further assault on

him by Mr George.

28. Both grounds of appeal are opposed by Mr Scouller, who represents the respondent in this court. He submits that the judge was entitled to find that the applicant was aware of the precise date and was entitled to order that the trial proceed in the applicant's absence. He suggests that the arguments to the contrary are largely based on information which was not available to the judge at the time when the judge had to make his decisions. He goes on to submit that the applicant's case was adequately stated by the judge to the jury. In any event, it was unnecessary for the judge to say much about the facts of the incident because the CCTV footage provided the jury with a clear picture of what happened.
29. We are grateful to both counsel for their submissions, which have been very helpful to the court.
30. Before coming to our conclusions, we make an initial observation. It is regrettable that the Crown Court was only informed at a very late stage that the defence solicitors were not in funds and had not had any contact with the applicant for about 6 months. We understand the pressures on defence solicitors, and we do not wish to criticise when we have not heard from the solicitors concerned. But in circumstances where there was every likelihood that the applicant would not be represented at his trial, it seems to us that more should have been done in early January to try to contact the applicant and to notify the court and the prosecution in good time if those attempts were unsuccessful.
31. Turning to the grounds of appeal, the principles applicable to trials in the absence of the accused are encapsulated in rule 25.2 of the Criminal Procedure Rules. So far as is material for present purposes paragraph (b) of that rule provides:

> "(b) the court must not proceed if the defendant is absent, unless the court is satisfied that—

(i) the defendant has waived the right to attend, and
(ii) the trial will be fair despite the defendant's absence..."

32. At paragraph 22 of the judgment in Hayward, this court stated six guiding principles:

"1. A defendant has, in general, a right to be present at his trial and a right to be legally represented.
2. Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge, as to when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws instructions from those representing him. They may be waived in part if, being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.
3. The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives.
4. That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.
5. In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:
(i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;
(ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings;
(iii) the likely length of such an adjournment;
(iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation;
(v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence;
(vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;
(vii) the risk of the jury reaching an improper conclusion about the absence of the defendant;

> (viii) the seriousness of the offence, which affects defendant, victim and public;
> (ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;
> (x) the effect of delay on the memories of witnesses;
> (xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.
> (6) If the judge decides that a trial should take place or continue in the absence of an unrepresented defendant, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing up, to expose weaknesses in the prosecution case and to make such points on behalf of the defendant as the evidence permits. In summing up he must warn the jury that absence is not an admission of guilt and adds nothing to the prosecution case."

33. Turning to the first ground of appeal, we see the force of Mr Bebb's submissions and we accept that the manner in which the judge addressed the issues he had to decide is open to some criticism. In particular, the judge would have been wise to identify more fully than he did in his rulings the information he was given about efforts made to arrest the applicant and about the contact which the defence solicitors made with the court on the afternoon of 18 January 2023. He should also have expressed his assessment of the factors listed in Hayward. That said however, we are not persuaded that the judge's decisions to commence and, later, to continue the trial in the absence of the applicant were outside the legitimate boundaries of his discretion. We think it is important to consider those decisions sequentially and, in doing so, to avoid falling into the trap of investing the judge with the benefit of the hindsight which this court now has.

34. We have no doubt that on 17 January 2023 the judge was entitled to find that the applicant was aware of the specific trial date. Although the solicitor's letter of that date was worded rather imprecisely, common sense and experience strongly suggest that the

WhatsApp message, which the applicant had admittedly received in June 2022, would have informed him of the precise trial date and would not simply have referred to the month of January. That inference is reinforced by the consideration which Mr Scouller urges upon us, that a firm privately instructed and not in funds would have a particular incentive to make clear to their client the precise date of his trial, and therefore the date by which they would need to be in funds. It is further confirmed, in our view, by defence counsel's acceptance of the accuracy of the summary given by the judge on 17 January. In any event, even if the applicant had only been told in June 2022 that his trial would be some time in the following January, the burden was on him to ensure that he ascertained the specific date so that he could comply with his duty to surrender to his bail.

35. By the admission which he made on the afternoon of 19 January 2023, the applicant was later to admit that he had no reasonable excuse for his failure to surrender. But on 18 January, when the judge decided that the trial should commence, there was no excuse or explanation whatsoever, whether reasonable or otherwise. The information available to the judge was to the effect that the applicant had in effect disabled himself from being represented, by making no application for legal aid but then failing to put his solicitors in funds. There was nothing to suggest that the applicant had taken those steps because he had actively wished to represent himself. His failure to attend court had to be viewed in the context of his failure over the preceding 6 months to make any contact with the solicitors who were still representing him. The possibility that the applicant may have gone to the wrong court had rightly been considered by the judge on the previous day, and excluded by the confirmation that the applicant had not answered his name when it was called in the Crown Court at Cardiff. The judge understood, correctly, that the applicant had not been arrested pursuant to the warrant. The judge was therefore entitled

to proceed on the basis that the applicant had simply chosen not to instruct his solicitors, and not to attend the trial date of which he was aware, and had thereby waived his right to be present and represented.

36. In short, the judge was, in our view, entitled to make the following assessment of the factors mentioned in paragraph 22(5) of Hayward:

(i) On the information available the applicant's behaviour was deliberate, voluntary and a waiver of his right to appear.

(ii) It was reasonable to expect that the applicant could be arrested within a fairly short time, but there was no basis for any confidence that he would be arrested or would attend voluntarily during the short time slot for the trial, which had been listed for several months.

(iii) The likely length of any adjournment was therefore substantial.

(iv) By his conduct, the applicant had waived his right to representation.

(v) Not applicable. because he had waived his right to representation.

(vi) The applicant would certainly be at a disadvantage in not being able to give evidence in support of his defence of self-defence; but that was by his choice.

(vii) Any such risk could be cured by the appropriate direction which the judge was later to give.

(viii) It was a very serious offence and the victim and other witnesses had already been waiting some 18 months.

(ix) There was a strong public interest in the trial taking place forthwith, provided that could be done without compromising the fairness of the trial.

(x) Further delay would be likely to make it harder for witnesses to recall details of the events, although the CCTV footage was available as a clear indication of the violence

outside the public house.

(xi) Not applicable.

37. We would add that the information now available to this court is no more helpful to the applicant. It is now apparent that he had not only changed his mobile phone number without telling solicitors, but had also moved address without telling them. He had failed to make any contact with his solicitors for months. These were highly culpable failures on the part of a man who knew he was facing trial on a very serious charge. An explanation has today been provided of why the solicitor's most recent attempt to contact him on the landline number which they held for him proved fruitless. It is not a satisfactory explanation.

38. Looking at the matter overall, it is, with respect, disingenuous of the applicant to refer to the circumstances as a communication error. The reality is that he had simply ceased contact with his solicitors for months before the date when he knew he would be tried on a serious charge. We note also that, even when he learned the police had been looking for him at his parents' home on 18 January 2023, he did not attend the court voluntarily.

39. The judge of course had to take into account the fact that the trial date was already 18 months after the incident, that the witnesses were present at court and that a new trial date would likely be a substantial period in the future. At no point during the short trial was the judge informed that the applicant had been arrested pursuant to the warrant. Although the defence solicitors made contact on the afternoon of 18 January 2023, the applicant did not attend court or take any other step to surrender to his bail. The judge could not know how lengthy any adjournment would prove to be if he paused the trial to await further information and the attendance of the applicant.

40. Given that these circumstances have arisen from the applicant's own choices and failures,

we are unable to accept the submission that in the circumstances of this case the judge should have made more inquiries and allowed more time than he did.

41. We emphasise that we are not concerned with, and therefore do not address, the position which would have obtained if the applicant had attended court before the jury had returned their verdict. We do however observe that although there is no longer an absolute rule that no further evidence should be given to the jury after the summing-up, this court confirmed in R v Dunster [2021] EWCA Crim 1555; [2022] 1 Cr App R 12, at paragraph 32, that it is not possible, at that stage, to re-open the evidence generally or to permit further speeches to be made.

42. As to the second ground of appeal, the judge rightly told the jury that the purpose of the Defence Statement was to set out the nature of the defence case and he told the jury what the defence was. We are not persuaded that in the circumstances of this case the judge was required to do more than he did. The judge had a power, under section 6(e) of the Criminal Procedures and Investigations Act 1996, to direct that the jury be given a copy of the Defence Statement, if he was of the opinion that seeing it would help the jury to understand the case, or to resolve any issue in the case. Here, he was entitled to proceed on the basis that those criteria were not satisfied. The appellant was not entitled to have the document put before the jury or read in its entirety as if it were his evidence.

43. As to Mr Bebb's specific criticism, which we have noted at paragraph 21 above, there had been no waiver of legal professional privilege: for the judge to have read to the jury some part or parts of the Defence Statement, but not others, would therefore have involved the judge in making editorial decisions, in circumstances where he did not know whether the applicant would still wish to put forward a case in precisely the same terms. Moreover, having viewed for ourselves the CCTV footage, it seems to us that there was a

clear potential for any such selection by the judge to have the inadvertent and unintended consequence of actually making matters worse for the applicant.

44. We are satisfied that the applicant received a fair trial. He was absent from it, and unrepresented, by choice. The judge took appropriate steps to ensure the fairness of proceedings by his directions of law and by his summary of the case which the applicant had put forward in his Defence Statement. In those circumstances, grateful though we are for the advocacy of Mr Bebb on behalf of the applicant, we are satisfied that the conviction is safe.

45. The explanation given for the delay in giving notice of appeal is not entirely satisfactory. We would nonetheless have been willing to extend time, if we had thought there was merit in the grounds of appeal. As it is, no purpose will be served by an extension of time because an appeal has no prospect of success. The applications for an extension of time and for leave to appeal against conviction are accordingly refused.

46. Mr Bebb and Mr Scouller, can I just, through you, try to beat once again a drum which I am afraid I regularly have to beat. It is not enough for Bar clerks to email the court a matter of hours before a listed hearing before the Court of Appeal in the apparent belief that a simple administrative decision can be made as to whether or not counsel can attend remotely. It is not an administrative decision, it is a judicial decision. Time is needed for the court to consider it. Mr Bebb, I am afraid there was a request for you yesterday which I refused, because I was travelling to this building, as was the associate to whom the email was forwarded, and by the time each of us saw it, it was too late to do anything about it, even if minded to do so. I am sorry if it caused inconvenience in other proceedings, but a request that comes so late can't really be expected to prosper. So do, please, spread the word at the Bar, it is not an administrative decision. It is not a box

which can be ticked within a minute or two. Time is required. If counsel are going to say, 'I'm part heard in a trial', that is not something which has crept up unnoticed only a couple of hours earlier. There is plenty of time to warn us in advance.

47. MR BEBB: Noted my Lord. Thank you.
48. THE VICE-PRESIDENT: Thank you both for your assistance. Mr Bebb, particularly, you had a difficult task, and thank you very much.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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