

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 18 of 2011

BETWEEN:

DWAYNE MARIO NEIL Appellant

AND

THE QUEEN Respondent

Before: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal.

2013: September 11, November 20

2014: March 18, May 15, July 3, November 21

2015: February 18, June 3

2016: January 20

2017: March 8, May 31

2018: October 23

Mr. Andrew Pilgrim QC, Ms. Kameisha Benjamin and Ms. Rasheda Edwards for the Appellant

Ms. Krystal Delaney for the Respondent

DECISION

GOODRIDGE JA:

INTRODUCTION

[1] This is the first appeal before this Court against a conviction which was recorded after the judge proceeded with a trial in the absence of the

appellant. The appeal concerns the exercise of the discretion given to a judge by **section 18 (2)** of the **Constitution**. The appellant contends that his right to a fair trial was infringed.

THE FACTUAL BACKGROUND

- [2] On 17 August 2002, sometime around 7.00 pm, two employees of the business known as Sweet Kisses Bakery Inc. were on duty. The female employee went to the back of the store. As she was returning to the cash register, she observed a man coming into the store. That man, who was wearing a cap, had his face covered with a scarf and had a gun in his hand. He told her to keep moving. On reaching the cash register, she observed another man who was pointing a gun at a male employee. This man asked her where the cash was and she pointed to the cash register. At this time the male employee was trying to open the cash register but he was unsuccessful in doing so. The female employee then opened the cash register and one of the men took out the money which was over \$400.00. She and the male employee were then escorted by the men to a bathroom at the back of the building.
- [3] After some time, the employees realised that the men had left. They then exited the bathroom and contacted the police and the owner of the business.

- [4] During the course of the investigation into the incident, the appellant and another man were interviewed and subsequently charged.

THE PROCEEDINGS IN THE HIGH COURT

Pre-Trial Proceedings

- [5] The matter was first called up on 6 December 2010. The appellant, who was on bail, was informed that his case was set for hearing in January 2011. He was advised by the court to collect his depositions and, if he so desired, to retain counsel. His sureties were both present on that date and were reminded by the court of their obligations as sureties. The appellant was also reminded of his reporting conditions.
- [6] The matter next engaged the attention of the court on 5 January 2011, at which time the appellant informed the court that he was representing himself. He stated that he was in possession of his depositions but he needed some more time to study the case. The matter was adjourned to 17 January 2011.
- [7] On 17 January 2011, the appellant was not present and the matter was adjourned. Subsequent adjournments followed.

The Trial

- [8] On 28 March 2011, the appellant and his co-accused appeared before **Worrell J** and were arraigned on a charge of aggravated burglary,

contrary to **section 25 (1)** of the **Theft Act, Cap. 155**. Both men pleaded not guilty and requested more time to prepare their case. **Worrell J** reminded them that they had appeared before the court on six occasions and indicated that the case would be adjourned until the next day. A jury was empanelled and the case was adjourned.

[9] On 29 March 2011, in the absence of the jury, the appellant informed the trial judge that he would be objecting to the written statement on the ground that he was forced to sign it and that he would be calling one witness on the *voir dire*. The appellant also indicated that he would be objecting to all but one of the oral statements attributed to him by the police officers. He further stated that he required the station diary for CID, Central Police Station.

[10] The appellant's co-accused also advised the court as to his position in relation to the alleged oral and written statements attributed to him.

[11] The written statements were then edited and the judge gave the appellant and his co-accused certain guidance as to the treatment of the evidence.

[12] The prosecutor, Mrs. Wanda Blair, then made her opening address and the police photographer gave his evidence. PC Haynes who had dealt with the appellant started his testimony and then the *voir dire* began. PC Haynes was cross-examined by the appellant as to the written statement which he

said had been given by the appellant. WPC Maynard, formerly WPC Jordan, also gave evidence corroborating PC Haynes' testimony and she was cross-examined by the appellant. The appellant then gave an unsworn statement in which he said that he was beaten by some police officers, not PC Haynes or WPC Maynard, and forced to sign the statement. The matter was adjourned until the next day for continuation of the *voir dire*.

[13] On 30 March 2011, when the trial resumed, the appellant was absent. His co-accused was present. After the marshal gave evidence that he had called for the appellant and there was no answer or appearance, the judge issued a bench warrant for the appellant's arrest and his sureties were summoned.

[14] On 31 March 2011, the appellant did not appear at court. The marshal gave evidence as to the appellant's absence. His sureties appeared and they both testified that they had spoken to the appellant who had stated that he was not coming to court, he was "running away". The trial judge gave both sureties until the following Monday to get the appellant to return to court. The prosecutor thereafter made an application to the court and invited the judge to exercise his discretion to continue the trial in the absence of the appellant. In making her submissions, counsel drew the

court's attention to the facts and relied on the case of **R v Jones [2002] UKHL 5 (Jones)** and an extract from *Archbold Criminal Practice 2000 Edition*.

[15] On 1 April 2011, the judge exercised his discretion and ordered that the trial should continue in the absence of the appellant. The court also ruled that the Crown had discharged its burden on the *voir dire* and the written statement of the appellant was admissible in evidence. The trial continued. The appellant did not return to court for the remainder of his trial.

[16] On 13 April 2011, the jury returned a unanimous verdict of guilty against the appellant. His co-accused was found not guilty.

[17] On 29 July 2011, **Worrell J** sentenced the appellant to 11 years and 9 months imprisonment. The appellant filed a notice of appeal against conviction the same day.

THE HISTORY OF THE APPEAL

[18] Before dealing with the substance of the appeal, we consider it important to set out in detail the history of this matter.

[19] Mr. Silbert Cadogan, attorney-at-law, was assigned by the Community Legal Services Commission (the Commission) to argue this appeal on the appellant's behalf. On 4 June 2013, Mr. Cadogan duly filed perfected grounds of appeal.

[20] However, when the matter came on for hearing on 11 September 2013, the appellant informed the Court that he was now being represented by Mr. Stan Smith, attorney-at-law. This change in counsel was confirmed by Mr. Cadogan who stated that he had appeared out of courtesy to the Court in order to explain his position and to indicate that he had returned all relevant papers to the Commission. Mr. Cadogan was granted leave to withdraw from the matter. The appeal was then adjourned to 20 November 2013.

[21] On 20 November 2013, Mr. Smith appeared and sought an adjournment which was granted and a new date was set for 18 March 2014. On that date, the Court expressed its concern about the delay in the prosecution of the appeal, and urged counsel to ensure that the matter could proceed on the adjourned date, namely, 15 May 2014. Regrettably, on 15 May 2014 a medical certificate was received on behalf of Mr. Smith. The matter was again adjourned.

[22] On 3 July 2014, the Court again expressed its concern over counsel's inability to proceed with the matter and advised him to treat the matter with some urgency. Despite the Court's admonition, on 21 November 2014, counsel was still not prepared to proceed and again requested an adjournment which was granted by the Court.

- [23] The appeal was then listed for hearing on a number of dates between February 2015 and 2016. Regrettably, adjournments were granted at Mr. Smith's request.
- [24] It must be stated here that, while the Court was extremely concerned about the delay occasioned by Mr. Smith's seeming inability to advance the appeal, it was acutely mindful of the appellant's expressed desire to have Mr. Smith represent him and so it reluctantly granted the requested adjournments.
- [25] On 18 January 2016, the Court received written communication from Mr. Smith indicating that he was out of the jurisdiction and that he was requesting a further adjournment. While the Court was in the process of explaining the reason for Mr. Smith's absence to the appellant and expressing its grave concern over the delay occasioned by his counsel's dilatory conduct in prosecuting the appeal, Mr. Andrew Pilgrim QC, who was in Court as counsel in another matter, indicated his willingness to act on the appellant's behalf.
- [26] The matter was stood down to allow Mr. Pilgrim QC to consult with the appellant. The appellant then informed the Court that he would avail himself of counsel's offer. The Court expressed its gratitude to Mr. Pilgrim QC for his intervention and willingness to assist in the

disposition of the appeal. The matter was adjourned in view of this new development so that the necessary administrative arrangements could be made by the Commission.

[27] Subsequently, on 3 March 2017, Mr. Pilgrim QC filed his ground of appeal and written submissions and the matter was eventually heard on 31 May 2017.

THE APPEAL

[28] The appellant challenges his conviction on the ground that the verdict of the jury in all the circumstances is unsafe and/or unsatisfactory for the following reasons:

- "1. The judge failed to take into consideration all the relevant factors when determining whether to proceed with the trial in the appellant's absence.
2. The learned trial judge failed to give adequate guidance to the unrepresented co-accused to avoid prejudice to the appellant.
3. The learned trial judge failed to adequately present the case put forward by the appellant to the jury during his summation".

The Submissions of Counsel

[29] Mr. Pilgrim QC, counsel for the appellant, submitted that, as a general rule, a defendant has the right to be present at his trial and to be represented. However these rights can be waived, and in the circumstances where they have been found to be waived, the court must

take certain factors into consideration in order to determine how to proceed.

[30] Counsel submitted that the English Court of Appeal decision in the case of **R v Hayward R v Jones R v Purvis [2001] EWCA Crim. 168 (Hayward and Jones)** provides guidance as to the factors in this regard. He contended that the trial judge failed to take into consideration all of the relevant factors before exercising his discretion in favour of proceeding with the trial in the absence of the appellant. He argued that the trial judge gave no reasons for his decision and so it is for this Court to attempt to determine how he arrived at that decision.

[31] Mr. Pilgrim QC further submitted that a critical consideration was the fact that the prosecution case was that the appellant gave a confession statement and the appellant was claiming that the confession was involuntary. The appellant was therefore severely prejudiced in the conduct of his defence. There was no cross-examination of the witnesses for the prosecution. Also, there was disadvantage to the appellant in not being able to give his account of events. Further, since the appellant was unrepresented, he never instructed counsel on how to properly conduct his case.

[32] Counsel's next complaint was that the trial judge did not warn the co-accused that he ought not to make any mention of the fact that the appellant was not present and as a result, the co-accused made certain statements in his closing address to the jury which were highly prejudicial to the appellant's case. He contended that the judge's attempt to cure the prejudice was unsatisfactory and it was only when the judge was summing up the case five days later that he gave a proper direction to the jury. In any event, the prejudice caused by the statement was so great that it could only be cured by discharge of the jury.

[33] Mr. Pilgrim's final contention was that the judge had an obligation to ensure that the appellant had a fair trial and this included assisting the appellant in putting his case to the jury. Counsel submitted that the judge spent a relatively short period of time during the summing up in dealing with the appellant's case. Therefore, the judge's duty to the appellant was not adequately discharged.

[34] In response, counsel for the respondent, Ms. Delaney, submitted that while the **Constitution** lays the foundation and the basis on which a trial judge could continue a trial in the absence of an accused, it gives no further direction on how that discretion should be exercised.

- [35] Counsel agreed with Mr. Pilgrim QC's submission that the guidelines in **Hayward and Jones** which, with one exception, were approved by the English House of Lords in **Jones** could be relevant considerations in such a case.
- [36] Ms. Delaney stressed that this was an exercise of discretion and so this Court should only interfere if the judge acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect him, mistook the facts or if he did not take into account some material consideration.
- [37] Counsel further submitted that, although the judge did not give any detailed reasons for his decision, when one looks at the facts which were before the judge at the time and the case law, it cannot be said that the judge acted on wrong principles, considered extraneous material or committed any other error. Therefore, the judge rightly exercised his discretion to continue the trial in the absence of the appellant both in light of the **Constitution** and the **Hayward and Jones** principles.
- [38] As to the second area of complaint, Ms. Delaney submitted that even though the co-accused made a statement which could appear to be prejudicial to the appellant, that prejudice was remedied by the immediate caution of the judge and there was the further direction to the jury during the course of the summation.

[39] Turning to the final submission of Mr. Pilgrim QC as to the failure of the judge to adequately put the appellant's case to the jury during the summation, Ms. Delaney argued that, having voluntarily chosen not to exercise his right to appear, the appellant could not now complain. She submitted that in the absence of the appellant at the trial and in the absence of any cross-examination of the witnesses by him, the judge put the case for the appellant as best he could in the circumstances.

[40] Ms. Delaney concluded her submissions by stating that when the summation is considered as a whole, as well as the judge's conduct of the trial, there can be no lurking doubt about the safety of the appellant's conviction and the fact that the appellant had a fair trial. She urged the Court to dismiss the appeal and uphold the conviction and sentence.

THE CONSTITUTION OF BARBADOS

[41] **Section 1** of the **Constitution** indisputably declares the **Constitution** to be the supreme law of Barbados.

[42] **Chapter III** of the **Constitution** provides for the protection of the fundamental rights and freedoms of the individual. According to **section 11**, every person is entitled to the following fundamental rights and freedoms, namely:

"(a) life, liberty and security of the person;

- (b) protection for the privacy of his home and other property and from deprivation of property without compensation;
- (c) the protection of the law; and
- (d) freedom of conscience, of expression and of assembly and association,"

However, these rights and freedoms are subject to such limitations as are contained in the **Constitution**.

[43] In particular, **section 18 (1)** gives to every person charged with a criminal offence a right to a fair hearing within a reasonable time by an independent and impartial court established by law.

[44] Specifically, **section 18 (2)** provides:

"Every person who is charged with a criminal offence-

- (a) shall be presumed to be innocent until he is proved or has pleaded guilty;
- (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;
- (c) shall be given adequate time and facilities for the preparation of his defence;
- (d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;
- (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;

- (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge,

and, except with his consent, the trial shall not take place in his absence unless he so conducts himself as to render the proceedings in his presence impracticable and the court has ordered the trial to proceed in his absence."

COURT'S ANALYSIS AND CONCLUSION

The Issues in this Appeal

[45] The attack on the safety of the conviction by the appellant is three-pronged. The first challenge is to the exercise of the judge's discretion in proceeding with the trial in the absence of the appellant. The second challenge is that the judge failed to give adequate guidance to the co-accused which resulted in prejudice to the appellant. The final one is that the judge failed to adequately put the appellant's case to the jury.

[46] We will now turn our attention to these issues.

Whether the trial judge failed to take into consideration all the relevant factors when exercising his discretion to proceed with the trial in the absence of the appellant

[47] The importance of the rights set out in **section 18 (2)** cannot be over emphasised. Of particular importance is the right of a defendant to be present at trial. In defending himself/herself before the court, a defendant who is present, or his legal representative, as the case may be, may

effectively participate in the conduct of his case. Being present allows the defendant, among other things, to: (i) cross-examine the witnesses for the prosecution; (ii) give evidence or make an unsworn statement if he wishes; (iii) call witnesses; and (iv) address the jury.

[48] However, as we have seen, the right to be present at trial is not an absolute right. **Section 18 (2)** provides two circumstances in which a trial may take place in the absence of a defendant. The first circumstance is where a defendant gives his consent to the trial proceeding in his absence. The second circumstance is where the defendant "so conducts himself as to render the proceedings in his presence impracticable and the court has ordered the trial to proceed in his absence".

[49] It is the second circumstance which is the focus of this appeal. We must therefore consider whether the appellant so conducted himself "as to render the proceedings in his presence impracticable" and whether **Worrell J** properly exercised his discretion when he ordered the trial to proceed in the absence of the appellant.

[50] We agree with Ms. Delaney that the **Constitution** does not set out the considerations and or principles which should guide a judge in the exercise of this discretion. It is therefore for this Court to determine what are the appropriate considerations and or principles.

[51] In **Hayward and Jones**, the point which arose for the determination of the English Court of Appeal was whether a trial could take place or continue in the absence of the defendant. This question was answered in the affirmative by that court. The court then proceeded to give guidance as to the principles which should guide a court in the exercise of that discretion.

[52] As stated earlier, on appeal, the House of Lords in **Jones** approved the **Hayward and Jones** principles with certain modifications. There, Lord Bingham made the following observations at para 6:

“6. For very many years the law of England and Wales has recognised the right of a defendant to attend his trial and, in trials on indictment, has imposed an obligation on him to do so. The presence of the defendant has been treated as a very important feature of an effective jury trial. But for many years problems have arisen in cases where, although the defendant is present at the beginning of the trial, it cannot (or cannot conveniently or respectably) be continued to the end in his presence. This may be because of genuine but intermittent illness of the defendant (as in *R v Abrahams (1895) 21 VLR 343* and *R v Howson (1981) 74 Cr App R 172*); or misbehaviour (as in *R v Berry (1897) 104 LT Jo 110* and *R v Browne (1906) 70 JP 472*); or because the defendant has voluntarily absconded (as in *R v Jones (REW) (No 2) [1972] 1 WLR 887* and *R v Shaw (Elvis) [1980] 1 WLR 1526*). In all these cases the court has been recognised as having a discretion, to be exercised in all the particular circumstances of the case, whether to continue the trial or to order that the jury be discharged with a view to a further trial being held at a later date. The existence of such a discretion is well-established, and is not challenged on behalf of the appellant in this appeal. But it is of course a discretion to be exercised with great caution and with close regard to the overall

fairness of the proceedings; a defendant afflicted by involuntary illness or incapacity will have much stronger grounds for resisting the continuance of the trial than one who has voluntarily chosen to abscond."

[53] In our view, the second circumstance in **section 18 (2)** is concerned with a defendant who deliberately does an act or engages in behaviour which has the effect of rendering it impracticable for the trial to proceed in his presence. The obvious examples of such conduct are misbehaviour or disruption of the trial or where the defendant absconds. Of course, absence due to involuntary illness or incapacity would not be regarded as an example of conduct which would entitle a judge to proceed with the trial in the defendant's absence, and a judge who is in receipt of the relevant medical certificate would be under a duty to adjourn the trial until a later and convenient date.

[54] In this case, during the *voir dire*, the appellant gave an unsworn statement after he had cross-examined the prosecution witnesses. The trial was adjourned to allow him to call his witnesses the next day. He did not turn up on the adjourned date and no message was received by the court from him explaining his absence. The judge summoned the appellant's sureties, who informed the court under oath that the appellant had stated that he was not coming to court, he was "running away". A further adjournment did not result in the appellant's appearance.

[55] This action by the appellant showed that he had no intention of being present for the continuation of his trial. Or, to put it another way, the appellant deliberately and voluntarily absented himself from his trial. Faced with this state of affairs, it was therefore not unreasonable for **Worrell J** to conclude that the appellant's conduct had rendered the proceedings in his presence impracticable.

[56] On this point, in **Hayward and Jones**, the English Court of Appeal stressed that a defendant has a general right to be present at his trial and a right to be legally represented. This position is reflective of those fundamental rights enshrined in **section 18 (2)** namely, that a defendant is entitled to be present at his trial and defend himself or be defended by a legal representative.

[57] That court noted, however, that these 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.

[58] Having arrived at the conclusion that the defendant had by his conduct rendered the conduct of the proceedings in his presence impracticable, the next consideration for **Worrell J** was whether he should exercise his discretion to allow the trial to continue in the appellant's absence.

[59] This brings us to a review of the **Hayward and Jones** principles and we must now determine whether these principles are relevant to the case before us.

[60] In **Hayward and Jones**, Rose LJ emphasised that, in exercising the discretion whether to conduct or continue a trial in the absence of the defendant, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. He stated that 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 absencing 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)
- (ix) the general public interest and the particular interest of the 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."

[61] Rose LJ stressed that once the judge has decided that the trial should take place or continue in the absence of an unrepresented defendant, the obligation rests on the judge to ensure that the trial is as fair as the circumstances permit. In particular, the judge must 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. Most importantly, the judge must warn the jury in summing up that absence is not an admission of guilt and adds nothing to the prosecution case.

[62] It seems to us that these principles commend themselves as relevant principles which should guide judges in the exercise of the **section 18 (2)** discretion.

[63] In considering whether the judge properly exercised his discretion, it is important to examine the competing factors which the judge had to balance in arriving at his decision. The record has revealed the following:

1. The appellant, being fully aware of the date for the continuation of his trial, deliberately and voluntarily absented himself.
2. The trial was adjourned for two days but the appellant never presented himself to the court.
3. The evidence of the sureties indicated that it was unlikely that the appellant would do so in the immediate future.
4. The appellant had clearly indicated at the start of his trial that he was exercising his constitutional right to represent himself and therefore the question of his legal representative continuing to present his defence did not arise.
5. There was a co-accused who was present at all times and who had an interest in having the trial continue.
6. The offence for which the appellant was being tried was alleged to have been committed in 2002 and the trial was taking place nine years later.
7. There was the public interest aspect in that any further delay could have contributed to the erosion of public confidence in the justice system, having regard to the general public interest that trials should take place within a reasonable time.
8. The witnesses for the prosecution were available to give evidence and indeed one witness had been at court for the two days when the trial was adjourned because of the appellant's absence.

[64] Although the judge did not give reasons for his decision, when all these factors are weighed in the balance, we are of the opinion that the judge's decision to continue the trial in the absence of the appellant cannot be deemed to have been an improper exercise of discretion.

[65] We have therefore concluded that we ought not to interfere with the judge's exercise of his discretion.

Whether the trial judge failed to give adequate advice to the unrepresented co-accused to avoid prejudice to the appellant

[66] In the course of his closing address to the jury, the co-accused, after saying that he was never associated with the appellant who was a stranger to him and who was alleged to be his partner in crime, stated at **p 399 lines 4 to 12** of the transcript:

"But I state to you here today that this is not true and if there were any truth to this and we were such associated, I could and most likely will very well be where he is right now or actually not where he is, not actually with him but likewise running and hiding from the court and the law, but here I am today in your presence representing myself and fighting for my rights to prove my innocence to you, and all I hope is that you hold me in no relations whatsoever to Dwayne Neil and his obvious act of guilt."

[67] After the co-accused had made these remarks, the judge stated:

"I think you cannot say that -- the fact that Mr. Neil isn't here, I have to tell the jury that that does not in anyway mean that he is guilty or anything like that, so I don't think you can say that. Okay? Yes. Go ahead."

[68] The appellant's complaint here is that the co-accused's comment was so prejudicial that it could only have been cured by the discharge of the jury. Counsel's alternative argument was that the manner in which the judge sought to cure the prejudice was unsatisfactory and that the later warning came too late in the proceedings.

[69] The judge cautioned the co-accused about his statement which could be regarded as being prejudicial to the appellant. During the course of his summation the judge directed the jury about the appellant's absence. For example, the judge stated at **p 410 line 14** to **p 411 line 3**:

"You will recall that when Mr. Kristen Beckles was addressing you, he made reference to the fact that Mr. Neil was not present and that he was running away and he made reference to an issue, to that particular issue at which point in time I cautioned him, Madam Foreman and your members, and I indicated to him that no such inference can be drawn in respect of Mr. Neil's absence and I am cautioning you again today, Madam Foreman and your members, that no such inference can be drawn that Mr. Neil is guilty due to the fact that he is absent from the court. So you will bear that in mind, Madam Foreman and your members, when you are evaluating the evidence and deliberating in respect of this matter."

[70] In our opinion, the judge gave the jury the appropriate warnings concerning the appellant's absence. We do not agree that the direction given by the judge at the time the comment was made was deficient. Even if it were, any alleged prejudice was countered by the directions given

during the course of the summation. Further, the jury would have retired with that direction foremost in their minds.

Whether the judge failed to adequately present the case put forward by the appellant to the jury during his summation

[71] With regard to this ground, there is no doubt that it was the duty of the judge to ensure that the appellant had a fair trial. This duty included ensuring that the case for the appellant was properly put to the jury.

[72] Mr. Pilgrim QC complained that there was no cross-examination of the prosecution witnesses, no evidence from defence witnesses and therefore the trial could never have been fair in the absence of the appellant.

[73] In **Jones**, Lord Bingham had this to say in relation to similar arguments made by counsel for the appellant:

"[11] Counsel for the appellant laid great stress on what he submitted was the inevitable unfairness to the defendant if a trial were to begin in his absence after he had absconded. His legal representatives would be likely to regard their retainer as terminated by his conduct in absconding, as happened in this case. Thus there would be no cross-examination of prosecution witnesses, no evidence from defence witnesses, and no speech to the jury on behalf of the defendant. The judge and prosecuting counsel, however well-intentioned, could not know all the points which might be open to the defendant. The trial would be no more than a paper exercise....almost inevitably leading to conviction. The answer to this contention is, in my opinion, that one who voluntarily chooses not to exercise a right cannot be heard to complain that he has lost the benefits which he might have expected to enjoy had he exercised it. If a defendant rejects an offer of legal aid and insists on defending

himself, he cannot impugn the fairness of his trial on the ground that he was defended with less skill than a professional lawyer would have shown. If, after full professional advice, he chooses not to exercise his right to give sworn evidence at the trial, he cannot impugn the fairness of his trial on the ground that the jury never heard his account of the facts. If he voluntarily chooses not to exercise his right to appear, he cannot impugn the fairness of the trial on the ground that it followed a course different from that which it would have followed had he been present and represented."

[74] It must be stressed that the summing up took place in circumstances where the appellant had deliberately and voluntarily not attended his trial. He had absconded. Nevertheless, the judge, during the course of his summation:

- (i) told the jury on a number of occasions that they were not to treat the appellant's absence as any indication of guilt- **p 410, lines 11 to 14; p 411 line 22 to p 412 line 4; p 412 lines 9 to 13; p 517 lines 10 to 15;**
- (ii) informed them that they should not speculate as to the reason for the appellant's absence, **p 411 line 22 to p 412 line 2;**
- (iii) gave the **section 137 of the Evidence Act, Cap. 121** warning that the un-initialed orals may be unreliable;
- (iv) told the jury that the appellant's defence was that he did not make the alleged oral statements and that he was not involved in a plan to burgle Sweet Kisses Inc, **p 424 lines 3 to 4; p 439 lines 3 to 10; p 440 lines 8 to 11; p 510 line 21 to p 511 line 4; p 521 lines 1 to 6;**
- (v) informed the jury that any doubt as to whether the appellant gave a written statement should be resolved in his favour **p 427 lines 7 to 10;**
- (vi) instructed them that if they were of the opinion that the appellant was beaten by the police officers in order to give the written statement, or threatened in any way or given any inducement, then they were to reject the

- written statement and the oral statements, **p 428 lines 5 to 15; p 444, lines 9 to 15, p 509 line 19 to p 510 line 1;**
- (vii) warned the jury that the fact that there was no cross-examination of the witnesses by the appellant did not mean that they were to leave that evidence as if it were unvarnished, **p 451 line 25 to p 452 line 2;**
 - (viii) reminded them that their duty was to examine the evidence to see whether the Crown had made them feel sure of the appellant's guilt, **p 452 lines 8 to 15;**
 - (ix) told the jury of the burden and standard of proof, **p 509 line 9 to 10; p 511, lines 24 to 25; p 521 lines 13 to 19;**
 - (x) informed the jury that the appellant had pleaded not guilty and had put the Crown to proof, **p 518 lines 6 to 18; p 520 lines 22 to 24;**

[75] Having regard to the above, we have concluded that the judge gave the appropriate directions and adequately put the appellant's case to the jury.

The appellant's complaint on this aspect of the case is not justified.

[76] In the circumstances, we do not agree with counsel's contention that the verdict is unsafe or unsatisfactory.

DISPOSAL

[77] For the reasons set out above, we dismiss the appeal and affirm the conviction.

Justice of Appeal

Justice of Appeal

Justice of Appeal