Press Summary

2 April 2025

R (Appellant) v Layden (Respondent)

[2025] UKSC 12

On appeal from [2023] EWCA Crim 1207

Justices: Lord Hodge, Deputy President, Lord Lloyd-Jones, Lord Hamblen, Lord Stephens and Lady Simler

Introduction

Under section 7(1) of the Criminal Appeal Act 1968 ("the 1968 Act"), where the Court of Appeal allows an appeal against conviction, it may order the defendant to be retried if it appears to the Court "that the interests of justice so require."

Section 8 of the 1968 Act sets out supplementary provisions for retrials including that the defendant shall be tried on a fresh indictment (a document setting out the charges) and that arraignment may not take place after the end of two months from the date of the order for retrial without the leave of the Court of Appeal. Arraignment is a court process which involves identifying the defendant, reading the indictment to the defendant, asking the defendant to plead guilty or not guilty, and recording the plea. **[8]**

A procedure is then provided under section 8 whereby the prosecution can apply to the Court of Appeal for permission to arraign outside of the two-month period and the defence may apply to set aside the order for retrial.

As was common ground, the purpose of these provisions is to ensure that the retrial proceedings are brought under judicial control and that the retrial takes place as soon as reasonably practicable. **[1-4]**

In the present case, the retrial took place without the respondent being arraigned within two months of the order for retrial or at all. No application to the Court of Appeal was made under section 8 by either the prosecution or the defence. The respondent successfully appealed against his conviction on the grounds that in these circumstances the Crown Court had no jurisdiction to try him.

The issue on the appeal is whether a failure to comply with the procedural requirements in section 8(1) of the 1968 Act deprives the Crown Court of jurisdiction to re-try a defendant notwithstanding an order of the Court of Appeal under section 7(1) of the Act.

The factual and procedural background

On 11 April 2013, the respondent and four others were convicted of the murder of Ian Church following a violent incident in the early hours of 5 May 2012. The respondent was sentenced to life imprisonment with a minimum term of 13 years. On 19 March 2015 the Court of Appeal quashed the respondent's conviction and ordered a retrial under section 7(1) of the 1968 Act. **[5-7]** The respondent was not arraigned within two months of the order for retrial or at all. **[12-14]** On 17 May 2016 the respondent was convicted of murder following a retrial. He was sentenced to life imprisonment with a minimum term of 8 years and 359 days. **[16-17]**

On 11 February 2022, the Court of Appeal handed down a separate decision in *R v Llewellyn* [2022] EWCA Crim 154, [2023] QB 459. In that decision, the Court of Appeal quashed the defendant's conviction on the basis that the failure to arraign within two months had resulted in the total invalidity of the retrial proceedings before the Crown Court **[23].** This led to the respondent's case being referred to the Court of Appeal by the Criminal Cases Review Commission.

On 25 October 2023, the Court of Appeal gave judgment allowing the respondent's appeal. Following *Llewellyn*, the Court of Appeal quashed the respondent's conviction **[20].**

The prosecution now appeals to the Supreme Court against the decision of the Court of Appeal.

Judgment

The Supreme Court unanimously allows the prosecution's appeal and overrules the Court of Appeal decision in *Llewellyn*.

Lord Hamblen gives the judgment of the Court with which the other Justices agree.

Reasons for the Judgment

The general power to order a retrial was introduced in England and Wales by amendments made to section 7 of the 1968 Act by the Criminal Justice Act 1988. Such a general power had already been introduced in Scotland and Northern Ireland. The equivalent legislation in Scotland requires proceedings for a retrial to commence within a two-month period. In addition, it specifies that the accused will be automatically acquitted where that does not happen. It is of some significance that the amendments made to the 1968 Act, made against the background of that existing legislation, did not so specify **[46]**.

The legislative history shows that the general power to order a retrial was born out of concern that otherwise "the process of the criminal law itself is brought into disrepute when an apparently guilty man has to be freed on a technicality". This was the mischief addressed by the extension of the court's power in section 7 of the 1968 Act, as made clear in the Law Commission paper which led to it.

Under section 8 of the 1968 Act the Court of Appeal may grant leave to arraign outside the two-month period provided that the prosecution has acted with all due expedition and there is a good and sufficient cause for a retrial despite the lapse of time since the order for retrial. The court reviewed the authorities on section 8 **[50-55].** It concluded that para 5(3) of the guidance provided in para 5 of the Court of Appeal decision in *R v Pritchard (Craig)* [2012] EWCA Crim 1285 should be replaced by the following considerations: (i) the requirement that the

prosecution has acted "with all due expedition" is not a disciplinary provision; (ii) "due expedition" means such expedition as would be shown by a competent prosecutor conscious of his duty to ensure that the retrial proceedings are brought under judicial control and that the retrial takes place as soon as reasonably practicable, and (iii) there is no lack of "due" expedition if there is a prosecutorial delay which has no effect on the object of ensuring that the retrial proceedings are brought under judicial control and that the retrial takes place as soon as reasonably practicable. **[60-62]**

As to the wording of sections 7 and 8, the court agreed with the Court of Appeal that the procedure set out in section 8 is mandatory and should be followed. Where there has been no arraignment within two months of the order for retrial this should be brought to the attention of the Crown Court and the prosecution should make an application to the Court of Appeal for leave to arraign. Once such an application is made the Court of Appeal has jurisdiction to deal with it pursuant to section 8 **[65-66]**. In both *Llewellyn* and this case, the Court of Appeal interpreted the Crown Court's jurisdiction to conduct a retrial as being "contingent" on the requirements of section 8 being complied with. The question of when and how the jurisdiction of the Crown Court ceases raises obvious difficulties with this interpretation. Further, section 8 expressly sets out the circumstances in which the Crown Court is deprived of its jurisdiction to conduct a retrial. Those circumstances are where an order is made setting aside the order for retrial and directing the entry of a judgment and order for acquittal under section 8(1B)(b). As a matter of wording it is difficult to see how section 8 is at the same time implicitly providing that the Crown Court is deprived of jurisdiction where there is a failure to comply with the procedural requirements of section 8(1), as is reinforced by the conceptual and practical difficulties which otherwise arise **[70-72]**.

Section 8 does not express what the consequence of failure to arraign within the two-month time limit should be **[68]**. The principle in *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340 ("*Soneji")* applies. That principle is that where Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply, a flexible approach is required and "the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity" to follow from non-compliance with a statutory requirement **[69]**.

In order to consider whether Parliament can fairly have intended total invalidity to follow it is necessary to identify the alternative to total invalidity. In the present case, that alternative is an appeal against conviction on the ground that had an application been made under section 8 before the retrial, leave to arraign would have been refused and the order for retrial set aside. A conviction is obviously unsafe if it results from a retrial that should never have taken place **[80].**

The recognition that this is the alternative to total invalidity undermines the foundational reasoning of the Court of Appeal in *Llewellyn* and in this case. The section 8 procedure would not be avoided or neutered. A decision would be made by reference to the section 8 criteria and by the Court of Appeal. The defendant's section 8 protections would not be lost. If this is the relevant alternative, it is difficult to discern any good reason why Parliament should have intended total invalidity **[83-84].**

This is even clearer given the consequences of total invalidity: first, total invalidity would arise even where the purpose of section 8 is met and the case was brought under judicial control within the two-month period **[85]**. Secondly, total invalidity also results in a perverse incentive for the defendant to do nothing and allow a trial to take place without arraignment, in the knowledge that that will be a good ground of appeal **[87].** Thirdly, total invalidity would encourage a defendant to abscond and avoid being arraigned. **[90].** Fourthly, total invalidity results in a triumph of form over substance in circumstances where, had an application for

permission to arraign outside of the two-month period been made, it would have been granted **[91].** Fifthly, total invalidity of the retrial proceedings leads to leads to the anomaly that whilst a failure to arraign at all will not affect the validity of a trial, a failure to arraign timeously will render a retrial invalid **[92].** Sixthly, total invalidity may read across to "double jeopardy" retrials **[93]**. Seventhly, total invalidity undermines the purpose of section 7 and risks bringing the criminal justice system into disrepute. In a case where there has been a retrial as soon as possible, a retrial which is conducted fairly, a conviction which is otherwise safe and the guilt of the defendant is not in doubt, the conviction will nevertheless be set aside on a technicality, even in the most serious of cases **[94].**

For all these reasons, the Supreme Court allows the prosecution's appeal and overrules the Court of Appeal decision in *Llewellyn*.

References in square brackets are to paragraphs in the judgment.