

Neutral Citation Number: [2006] EWCA Crim 471
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEWES
(HH JUDGE RICHARD BROWN DL)
T20047025

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 10th March 2006

Before :

LORD JUSTICE THOMAS
MR. JUSTICE McCOMBE

and

JUDGE STEWART QC

(Sitting as a Judge of the Court of Appeal Criminal Division)

Between :

R

- and -

Leigh James O'Hare

Appellant

Respondent

(Transcript of the Handed Down Judgment of
Smith Bernal WordWave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Pamela Rose (assigned by the Registrar) for the **Appellant**
Marcus Fletcher (instructed by Crown Prosecution Service) for the **Respondent**

Judgment
As Approved by the Court

Lord Justice Thomas :

1. On 23 January 2004 between 10:30 pm and 11:00pm Robert Ford was robbed at knife point by three men in Preston Circus in Brighton. During the course of the robbery the victim's Nokia 3310 mobile phone, Lloyds /TSB cash card, £11 in cash and a bottle of red wine were taken. The appellant, Stephen Lawlor and a third man, Patrick Burke, were stopped by police in the vicinity of the robbery and a knife was found nearby.
2. They were charged with robbery, but the case against Burke was discontinued.
3. On 24 August 2004, the appellant should have attended for trial for the robbery at Lewes Crown Court before HH Judge Richard Brown DL and a jury; Lawlor did attend, but the appellant did not. The trial proceeded in the appellant's absence. On the following day 25 August 2004, the appellant and Lawlor were convicted of robbery. Lawlor was sentenced to 8 years imprisonment and the appellant was sentenced to 6 years detention in a Young Offenders Institution.
4. On 29 January 2005 he was arrested in Wales on his return from Ireland. On 1 February 2005, he appeared before Judge Richard Brown and an explanation was given for his absence, as we set out below at paragraph 27. He was sentenced by HH Judge Brown to 3 months imprisonment for failure to surrender to custody at the appointed time; that sentence was made concurrent to the sentence of 6 years.
5. He appeals against his conviction by leave of the single judge who referred the application for leave to appeal against sentence to the Full Court.
6. Some information was not available to the Court at the hearing of the appeal; we therefore ordered the provision of that further information. It was duly provided to us.

The evidence at the trial

7. The evidence given at the trial can be shortly summarised.
8. The principal witness for the prosecution was the victim, Robert Ford, a student at University:
 - i) He had been walking to a friend's house in Brighton and his route had taken him via Preston Circus where he had purchased a bottle of red wine from a "One Stop" shop. He then continued to New England Road where he became aware of two men standing by a bus stop and a third man by a statue. As he walked passed, one of the men at the bus shelter shouted something to the effect of "Hang on a minute". Thinking that this person needed directions or the time of day, he stopped. He was then grabbed by one of the men and pulled into the corner of the bus shelter where a large knife, described as a Rambo style knife with a blade 5 to 7 inches long, was held to his throat.
 - ii) His vision of the two men was not obscured; it was drizzling, but the lighting conditions were reasonable for the city.
 - a) He described the man with the knife (referred to as man number 1) as being about 5' 8/9" in height, of stocky build with short blondish hair, stubble on his face, aged about 30 and wearing a sports-type anorak.

- b) He described man number 2 as being of similar height to himself, with dark hair and wearing a similar type anorak to man 1; that man was, however, of thinner build than man 1. He thought that he had had more eye contact with the man he described man number 2.

We interpose to say that it was the prosecution case that man number 1 was the appellant and man number 2 was Lawlor.

- iii) Both men demanded his property. He called out for assistance to the man who had been standing near the statue. However, this man revealed that he was in league with the other two by punching him in the head. He described this man (man number 3) as slightly younger than the other two, of thinner build but of similar height to himself. He said that all three had Irish accents.
 - iv) Man number 2 made most of the demands but at some stage man number 1 and man number 2 threatened him with the knife. Man number 3, who he thought was acting as a look out, delivered gratuitous blows to his head as did the other two. The men ran off after they had obtained his (albeit incorrect) PIN number for his bank card, money, mobile phone and the bottle of red wine. He rang the police who arrived 10 minutes later.
 - v) He attended at a video identification procedure on 10 March 2004.
 - a) He did not identify the appellant as one of the robbers; he picked out the image of another as man number 1. However, at the time of doing so, he informed the identification officer that he was not entirely sure that he had made the correct identification.
 - b) He made a positive identification of Lawlor, after asking to have the video replayed. In cross-examination he denied the assertion put to him by Lawlor's counsel that by qualifying his identification with the words "I think it's number 5" (Lawlor had been placed at position 5), he had in fact not made a positive identification.
9. The police officers gave evidence that they found three men in the vicinity of where the robbery had taken place 10 minutes or so after the robbery. Two of these were Lawlor and the appellant who were both drunk and smelt of alcohol. The appellant was found to be in possession of a knife sheath, the bottle of red wine purchased by the victim and the victim's mobile phone, the latter being found in his jacket. A knife was found close to where the police had first seen the three men. In his police interview the appellant gave no comment responses to all questions put to him.
10. In his police interview Lawlor said that he was innocent; that no items from the robbery had been found on him and that he did not know the other men arrested with him. Thereafter, he gave no comment responses. Lawlor, who was 31 years of age, gave evidence at the trial. He said that on the evening of the robbery he had left his room to go to McDonald's and although he had taken some alcohol earlier in the day he was sober. After leaving McDonald's he crossed the road and was stopped by a police officer, he was not, at that stage, with anyone else, but was aware that at the time of his arrest another person was being walked to a police car. He said that he had not committed the robbery and had never before seen the two men arrested with him.

11. The events prior to the trial can be summarised as follows:
 - i) After his arrest the appellant was remanded in custody, as was Lawlor. Lawlor remained in custody until his trial. Lawlor had many previous convictions; the appellant had none.
 - ii) The appellant made a bail application on 5 February 2004 to the Crown Court at Lewes which failed. He applied to the High Court; his application was not opposed by the prosecution. He was granted bail by the High Court on 23 March 2004, with reporting and residence conditions.
 - iii) A plea and directions hearing took place on 16 April 2004. The appellant and Lawlor attended and pleaded not guilty. The matter was placed in the warned list for 21 June 2004.
 - iv) On 5 May 2004, the appellant served a defence case statement in which he denied that he had been involved. He had met the other two when out drinking. His knife had been taken by Mr Lawlor prior to the robbery to look at it. He did not know the other two were going to rob Mr Ford. He asserted that the jacket in which the stolen items were found was not his, but in fact belonged to Lawlor; they had swapped jackets and Lawlor had given him the bottle of wine. An extensive disclosure request was made on his behalf.
 - v) On 21 June 2004, the court received a letter from the appellant's solicitors seeking a mention hearing as the appellant had "failed to attend numerous appointments."
 - vi) The matter was listed for 25 June 2004. The appellant failed to attend and a warrant not backed for bail was issued.
 - vii) On 29 June 2004 there was a further hearing; Lawlor was anxious to have his case heard. His custody time limit expired on 26 July 2004
 - viii) The matter was listed for trial on 13 July 2004 at Chichester Crown Court. The appellant again failed to attend. It was believed that he had absconded to Ireland; the Garda were informed and asked to make enquiries. Although Lawlor's legal team were anxious to proceed with the matter, the case was stood out at the request of the appellant's representatives so that both men should be tried together. The Judge reluctantly decided that the trial should not proceed that day and directed that the matter be mentioned before Judge Richard Brown at Lewes, as Resident Judge, on 20 July 2004.
 - ix) On 20 July 2004, Judge Richard Brown directed that the matter come before him on 23 July 2004 for consideration of the question of whether the appellant should be tried in his absence.
12. At the hearing on 23 July 2004, counsel for the appellant (who represented the appellant in this court) put forward, as best she could, all that could possibly be said on the appellant's behalf as to why he should not be tried in his absence. The judge was referred to the decision in *Jones* in this Court (reported as *R v Hayward, Jones and Purvis* [2001] EWCA Crim 168) and in the House of Lords (reported as *R v Jones*

[2002] UKHL 5), and the Practice Direction issued by the Lord Chief Justice on 8 July 2002 by Amendment No.3 to the Consolidated Criminal Practice Direction (Bail, Failure to Surrender and Trials in Absence), to be found in the Consolidated Practice Direction at paragraphs I.13.17-19.

13. In a very clear ruling, the judge held that the trial of both Lawlor and the appellant should proceed together, even if the appellant did not attend.
 - i) The overriding principle was to have regard to the overall fairness of the trial and that it should lead to a just outcome, whether the charge was serious or relatively minor.
 - ii) The appellant had voluntarily absented himself from the proceedings and in accordance with the principles as set out in *Jones* he had waived his right to be present.
 - iii) He had considered all of the factors set out in *Jones*. It was undesirable to have separate trials; in the appellant's defence case statement, the appellant claimed that the jacket he was wearing on arrest which contained some of the stolen items, in fact belonged to Lawlor. Lawlor, on the other hand, claimed no knowledge of the jacket or of the appellant. These were matters for the jury to consider when looking at the cases of both defendants together rather than in separate trials. Allowing the trials to proceed separately might in these circumstances confer a wholly unjustified advantage on the appellant which he had obtained by absconding. The system should not be open to manipulation in this way.
 - iv) The trial would therefore proceed whether or not the appellant chose to be present; if he was not, the jury would be given appropriate directions and told to consider the case for and against him on the available evidence.
 - v) More time would be given to the appellant's lawyers to make enquiries into the evidence, including consideration of the DNA evidence. That evidence (which the defence had requested to try and establish the jacket being worn by the appellant was Lawlor's) was not going to be available until the following week. He therefore directed that the trial proceed on 24 August 2004.
14. There was a further preliminary hearing, but nothing of relevance to this appeal occurred.
15. On the morning of 24 August 2004, before the trial commenced, the advocate for the appellant sought to reopen the ruling made by Judge Brown. The same submissions as had been made on 23 July 2004 were rehearsed, with the exception that the DNA evidence had been made available and was of no assistance to the appellant's defence.
16. It was common ground then and before us that if the appellant had attended his trial he would have advanced a defence.
17. The Judge refused the application in another very clear ruling which re-stated, more briefly, the reasons he had given on 23 July 2004. The judge then asked if the appellant's legal representatives were going to stay. Counsel explained that they

would not; we set out the explanation given at paragraph 32 below. Solicitors and counsel withdrew.

18. In his summing up to the jury the Judge made very clear the approach the jury should take in the absence of the appellant. He reminded the jury of the case against the appellant and its weaknesses; he told them not to speculate as to why he was absent or what he might have said had he been present. They should not assume that his failure to attend in any way established his guilt; his absence proved nothing and they had to assess the evidence and satisfy themselves that the prosecution had made them sure of his guilt. Save on one specific issue relating to the evidence which we consider at paragraph 39, no criticism is made of the summing up, nor could any possibly be made to the very careful approach of the judge to the absence of the appellant at his trial.

The applicable principles

19. It was accepted that the applicable principles are set out in *Jones* and the consolidated Practice Direction.
20. In this Court (where, as we have said it is reported as *R v Hayward, Jones and Purvis*) Rose LJ giving the judgment of the Court set out the following principles:

“22. In our judgment, in the light of the submissions which we have heard and the English and European authorities to which we have referred, the principles which should guide the English courts in relation to the trial of a defendant in his absence are these:

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.
23. We see no necessity for a defendant who is bailed to be expressly warned that, if he absconds, he may be tried in his absence, for that has been the English common law for over a century. We see no reason for the Bar's Code of Conduct and guidance to be amended. It is possible that our views may require some

amendment to be made to the statutory provisions for legal aid. But, as we have heard no argument on this aspect, we say nothing further about it.

21. The court concluded at paragraph 41 of the judgment that one of the appellants, Jones, had waived his right to be present and to be legally represented. On appeal to the House of Lords, reported as *R v Jones*, the decision of the Court of Appeal was upheld. At paragraph 13 of his speech Lord Bingham referred to the principles set out by the Court of Appeal:

“13. ... In doing so I would stress, as the Court of Appeal did in paragraph 22 of its judgment, that the discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution. If the absence of the defendant is attributable to involuntary illness or incapacity it would very rarely, if ever, be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant is represented and asks that the trial should begin. The Court of Appeal's check-list of matters relevant to exercise of the discretion (see paragraph 22(5)) is not of course intended to be comprehensive or exhaustive but provides an invaluable guide. I would add two observations only.

14. First, I do not think that "the seriousness of the offence, which affects defendant, victim and public", listed in paragraph 22(5)(viii) as a matter relevant to the exercise of discretion, is a matter which should be considered. The judge's overriding concern will be to ensure that the trial, if conducted in the absence of the defendant, will be as fair as circumstances permit and lead to a just outcome. These objects are equally important, whether the offence charged be serious or relatively minor.

15. Secondly, it is generally desirable that a defendant be represented even if he has voluntarily absconded. The task of representing at trial a defendant who is not present, and who may well be out of touch, is of course rendered much more difficult and unsatisfactory, and there is no possible ground for criticising the legal representatives who withdrew from representing the appellant at trial in this case. But the presence throughout the trial of legal representatives, in receipt of instructions from the client at some earlier stage, and with no object other than to protect the interests of that client, does provide a valuable safeguard against the possibility of error and oversight. For this reason trial judges routinely ask counsel to continue to represent a defendant who has absconded during the trial, and counsel in practice accede to such an invitation and defend their absent client as best they properly can in the circumstances. The current legal aid regulations provide for that contingency: see the Criminal Defence Service (General) (No 2) Regulations 2001 (SI 1437/2001). It is in my opinion a practice to be encouraged when the defendant absconds before the trial begins. But the failure to follow it here gives no ground for complaint by the appellant. The Court of Appeal said in their judgment, at para 41:

"This defendant, as it seems to us, had, clearly and expressly by his conduct, waived his right to be present and to be legally represented."

That conclusion has not been challenged on behalf of the appellant and is in my opinion a tenable conclusion. While there is no direct evidence to show that the

appellant knew what the consequences of his absconding would be, there is nothing to suggest a belief on his part that the trial would not go ahead in his absence or that, although absent, he would continue to be represented. His decision to abscond in flagrant breach of his bail conditions could reasonably be thought to show such complete indifference to what might happen in his absence as to support the finding of waiver. I note, however, the reservations expressed by my noble and learned friends concerning the finding of waiver, and recognise the force of their reasoning. If, contrary to my opinion, the Court of Appeal were wrong to make the finding of waiver, and I am wrong to accept it, I would nonetheless hold that the appellant enjoyed his convention right to a fair trial, for all the reasons given by my noble and learned friend Lord Rodger of Earlsferry.

22. At paragraph 11, he had re-iterated the general principles:

“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. Thus there would be no cross-examination of prosecution witnesses, no evidence from defence witnesses, 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 and almost inevitably lead to conviction. The answer to this contention is 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 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.”

23. The majority of the House agreed with Lord Bingham in the passage which we have cited that the Court of Appeal were correct in holding that the appellant Jones had waived his right to attend and to be represented. The minority, Lord Hoffman and Lord Rodger did not agree. In *Jones*, Lord Hoffman made clear that waiver required consciousness of the rights that were being waived; there was nothing to show that the appellants in that case had known that the trial would proceed in their absence if they did not turn up. Lord Rodger preferred to deal with the case on the basis that the appellant in that case had not unequivocally waived his right to be present:

54.... His absence simply meant that he was not in a position to exercise either of these rights when the judge decided to proceed with the trial. The question then comes to be whether there has been a breach of the appellant's rights under article 6. As Mr Perry submitted, that question falls to be determined on a consideration of the whole of the proceedings, including those in the Court of Appeal.

55. In arguing that the proceedings did not meet the requirements of article 6, Mr Solley referred to a number of decisions of the European Court of Human Rights. Lord Bingham has analysed them and I accordingly need not do so. While they provide useful guidance on particular points, the court has been at pains to emphasise that "it is not the court's function to elaborate a general theory in this area": *Colozza v Italy* (1985) 7 EHRR 516, 524, para 29. In saying this, the court was recognising that the contracting states have many different systems of procedure. The means by which they secure a fair trial in the absence of the defendant are correspondingly various. Here the issue has to be determined by looking at the way in which the courts handled the problem under English criminal procedure and by deciding whether, in the result, the appellant can be said to have had a fair hearing. In that regard the decisions of the Court of Human Rights relating to very different procedures can be of only limited assistance.

56. The most striking feature of the trial in this case was, of course, that the defendants were not in court and there was no one to represent them. Mr Solley suggested that the significance of this could be gauged from Judge Holloway's assessment that, for this very reason, the defendants were likely to be found guilty by the jury. By contrast, at the next stage, in the Court of Appeal, the appellant was present at the hearing. He was also represented by senior and junior counsel, just as he was represented by senior and junior counsel before your Lordships' House. For these hearings he enjoyed the benefit of legal aid from public funds. The courts and legal system thus made no attempt to prevent him from being represented. In this respect his predicament is quite different, for instance, from that of the defendant in the proceedings before the appeal court at Aix-en-Provence in *Poitrinol v France* 18 EHRR 130. Here, in the Court of Appeal the appellant had every opportunity to exercise his rights to be present and to be represented. Mr Solley argued that this was too little, too late. But it is a matter to which your Lordships are entitled to attach considerable importance since it is plain that the representation was effective and that the Court of Appeal paid careful attention to the arguments advanced on behalf of the appellant. This is conclusively demonstrated not only by their meticulous judgment considering the points made by counsel, but also by the fact that, while the appellant's appeal against conviction was refused, his appeal against sentence resulted in the sentence being reduced from 13 to 11 years' imprisonment.

57. The question must therefore be whether the hearing in the Court of Appeal, with the appellant fully and effectively represented, was such that, when the proceedings in this case are considered as a whole, one can say that the appellant has had a fair hearing in terms of article 6 even though he was not represented before the jury.

24. The Consolidated Criminal Practice Direction provides:

I.13.17. A defendant has a right, in general, to be present and to be represented at his trial. However, a defendant may choose not to exercise those rights by voluntarily absenting himself and failing to instruct his lawyers adequately so that they can represent him and, in the case of proceedings before the Magistrates' court, there is an express statutory power to hear trials in the defendant's absence

(s11 of the Magistrates' Courts Act 1980). In such circumstances, the court has discretion whether the trial should take place in his/her absence.

I.13.18. The court must exercise its discretion to proceed in the absence of the defendant with the utmost care and caution. The overriding concern must be to ensure that such a trial is as fair as circumstances permit and leads to a just outcome

I.13.19 Due regard should be had to the judgment of Lord Bingham in *R v Jones* [2002] UKHL 5 in which Lord Bingham identified circumstances to be taken into account before proceeding, which include: the conduct of the defendant, the disadvantage to the defendant, public interest, the effect of any delay and whether the attendance of the defendant could be secured at a later hearing. Other relevant considerations are the seriousness of the offence and likely outcome if the defendant is found guilty. If the defendant is only likely to be fined for a summary offence this can be relevant since the costs that a defendant might otherwise be ordered to pay as a result of an adjournment could be disproportionate. In the case of summary proceedings the fact that there can be an appeal that is a complete rehearing is also relevant, as is the power to re-open the case under s142 of the Magistrates' Court Act 1980.

The appellant's explanation for his absence

25. We first consider the appellant's explanation for his absence. It was accepted by counsel for the prosecution that if we accepted his explanation, then it would be strongly arguable that the trial should not have gone ahead in his absence. A statement by the appellant dated 9 February 2005 explaining his absence was made available to the court. An application was made on his behalf to give evidence in accordance with that statement. We decided in the interests of justice and in the overall fairness of the proceedings to hear that evidence.

26. The appellant's evidence can be summarised as follows:

- i) He had attended the Plea and Directions Hearing on 16 April 2004. He appreciated that he was charged with a very serious offence for which if convicted the sentence would be harsh, that if he failed to attend the trial, this would be taken seriously and that he would be remanded in custody. He recalled being told that the case would be put into the warned list and that he should maintain contact
- ii) He was visited by three men in Brighton a few weeks after his birthday (21 April); they asked him if his name was O'Hare. All then punched him round the head and nose; he had a broken nose. They told him that he would not be allowed to give evidence; he would be harmed. They mentioned Lawlor's name. He was scared as to what would happen to him and took the threat seriously. Before that he had intended to attend his trial. He was sure that Lawlor had arranged this, as he would be giving evidence against Lawlor.
- iii) He was so frightened that he then and there went to the station and went home to Ireland. He did not tell the police as that would amount to "grassing". He

did not seek medical attention, as his nose was only slightly broken and he had had threats to his life. He did not seek medical attention in Dublin as it was then alright.

- iv) He did not think of telling his solicitor; prior to that he had been in regular contact with his solicitors and trusted them. He did not contact them from Ireland as he did not have their phone number or any other way of contacting them. He had their address. His partner (who had had his child) had moved to Leeds; he maintained contact with her.
 - v) His uncles in Ireland found out through other travellers who it was who was threatening him; they sorted it out. He was not prepared to name his uncles as they would not like him to disclose their names and it had nothing to do with them; they had been in trouble and if he disclosed their names, he would be in trouble with them.
 - vi) He only returned to the UK when he was no longer in fear; he was arrested on the motorway on his way back to Brighton to give himself up; it was all sorted out and he could give evidence.
27. This account was in substance the same as that given to the court on 1 February 2005. In assessing his evidence we have taken into account his good character. We do, nonetheless, reject his evidence as untruthful. If he had been threatened and injured in the way claimed, he would have had to seek medical attention. He did not do so. Once in Ireland, there was no reason for him in the interval between the time he claims he was attacked at the end of April 2004 and the commencement of the trial in August 2004 for him not to have contacted his solicitor to explain the position. We are sure that he deliberately absconded as he was frightened of the prospect of conviction and the long prison sentence he would receive; the explanation of threats made to him was untrue.
28. We do not therefore need to consider the course this court would have taken if the appellant's evidence had been accepted. We therefore turn to consider the case on the basis that he had deliberately absented himself.

The appellant's contentions

29. On behalf of the appellant, it was contended that
- i) He should not have been tried in his absence.
 - a) He was 18 at the time; he may not have understood the consequences of absconding
 - b) This was a trial with few witnesses.
 - c) He had made a no comment interview and his explanation was not before the jury.
 - d) If the appellant had been present, he would have contradicted Lawlor's account and would have given his explanation for the possession of the mobile phone. That explanation would have been that he had swapped

jackets with Lawlor. The evidence from the police custody record was that there was a tube of anti-biotic cream found in the jacket the appellant was wearing; medication (voltarol pills) which was found on Lawlor, according to his custody record, was medication the appellant claimed was his. However the items had subsequently disappeared. A statement had been obtained from a pharmacist that the appellant had been prescribed these pills. This evidence supported the contention that they had swapped jackets.

- e) It was not in the interests of justice that both he and Lawlor be tried together; Lawlor was going to deny he knew the appellant and the only purpose of a joint trial was for the appellant to blame Lawlor.
- ii) The issue in the trial was one of identification; it was prejudicial to have asked the jury to compare a photograph of the appellant with the description given by the victim, particularly where the appellant had not been picked out on an identification parade.
- iii) There was no exploration of why the third man was not charged

Our conclusion

The exercise by the judge of his discretion to proceed with the trial

- 30. We consider that the judge exercised his discretion correctly on the information known to him:
 - i) On the basis of the information before the judge, the judge rightly concluded that the appellant had voluntarily absented himself.
 - ii) This was clearly a case where the defendants ought to have been tried together; if the appellant had been tried on his own, he would have gained the obvious advantage that Lawlor would not have been present to contradict his account that the jackets had been swapped.
- 31. The fact that this was a very serious offence made no difference; as Lord Bingham pointed out in the passages in his speech to which we have referred, the objective is to secure as fair a trial as the circumstances permit; the objects are equally important, whether the offence charged be serious or relatively minor. A judge of the Crown Court should not be reluctant to hear a case in the absence of the defendant merely because the charge is a very serious one.

The absence of legal representation

- 32. There can be little doubt that it would have been preferable, particularly in the light of the speeches in *Jones* if the appellant had been represented at the trial.
 - i) The explanation provided to us, at our request, by the partner at the appellant's solicitors was that in the light of the decision in *Jones* and after advice from the Professional Ethics Guidance Team at the Law Society, she decided to withdraw as she was without instructions. The Guidance Team had referred her to Rules 12.08 (Care and skill) and 12.12 (termination of retainer) of the

Guidance to the Professional Conduct of Solicitors, 1999; Rule 12.12.2 provides that a solicitor cannot continue to act where the solicitor is unable to obtain clear instructions from a client. She had unsigned proof of evidence taken immediately prior to the bail application to the High Court and a defence case statement signed by the appellant on 5 May 2004 when she last had contact with him, but she had not had an opportunity to take instructions on the prosecution witness statements, the exhibits, the further disclosure obtained and the service of the defence case statement or the additional evidence. On 24 August 2004, it was her view that she was without instructions from her client and unable to present a defence.

- ii) The position of counsel is set out in the Bar Council's Rules of Conduct at section 15.3.1 and .2 of the Written Standards for the Conduct of Professional Work:

“15.3.1. If during the course of a criminal trial and prior to final sentence the defendant voluntarily absconds and the barrister's professional client, in accordance with the ruling of the Law Society, withdraws from the case, then the barrister too should withdraw. If the trial judge requests the barrister to remain to assist the Court, the barrister has an absolute discretion whether to do so or not. If he does remain, he should act on the basis that his instructions are withdrawn and he will not be entitled to use any material contained in his brief save for such part as has already been established in evidence before the Court. He should request the trial judge to instruct the jury that this is the basis on which he is prepared to assist the Court.

15.3.2 If for any reason the barrister's professional client does not withdraw from the case, the barrister retains an absolute discretion whether to continue to act. If he does continue, he should conduct the case as if his client were still present in Court but had decided not to give evidence and on the basis of any instruction he has received. He will be free to use any material contained in his brief and may cross-examine witnesses called for the prosecution and call witnesses for the defence.

- iii) The explanation provided to us by counsel who appeared for the appellant on 24 August 2004 (who was not counsel who had represented the appellant at earlier hearings and before us) was that he withdrew because the appellant's solicitors were withdrawing because they had insufficient instructions; as he had neither instructions from the solicitors nor from the appellant, he did not consider his presence would be of assistance.

- 33. In the light of these provisions and of the advice given to the solicitor, no possible criticism can be made of counsel or of the solicitor withdrawing. However this was a case, as will be many, where although the judge did carefully point out the weaknesses of the prosecution case, it would have been a clear additional safeguard to the fairness of the trial that if counsel or solicitors on the appellant's behalf had been present and ensured that all points that could properly be put forward in the absence of evidence from the appellant were clearly before the jury.

34. We must assume that these provisions must have been carefully considered by the Bar Council and the Law Society in the light of the speeches in *Jones*. Although we do appreciate the difficulties that legal representatives are put in if a client absconds, we consider that in the light of paragraph 15 of the speech of Lord Bingham in *Jones* and the circumstances of this case, that the Law Society and Bar Council should reconsider their rules of conduct. The attendance of legal representatives who had received instructions at an earlier stage provide, as Lord Bingham made clear at paragraph 15, a valuable safeguard and would, for the reasons we have given, have done so in the circumstances of the present case. We would hope that the Legal Services Commission would continue to fund representation in such circumstances, for the assistance of the court and in the interests of justice.

Waiver

35. No evidence was adduced before us as to what the practice at Lewes was as to warning a defendant who was granted bail that a trial might proceed in his or her absence if he or she did not attend. In view of the observations of this court in *Jones* at paragraph 23, it might have been thought unnecessary. We hope that position will now be reconsidered and it be made clear to each defendant that if he fails to attend a trial, the consequences may well be that the trial will proceed in his absence and without legal representation. An analysis of the speeches in the House of Lords points to the conclusion that, if waiver is to be established, then knowledge of, or indifference to, the consequences of being tried in his absence and without legal representation would have to be proved. A direction to the defendant (of the nature suggested) upon the grant of bail as the provision to the defendant of a written statement (to the same effect) would, we think, generally provide an incontrovertible means of proof.
36. We have taken into account that the appellant was 18 at the time. Nonetheless we are sure that the appellant appreciated that by absconding the trial was likely to proceed in his absence. As he made no attempt to contact his solicitor from Ireland, he plainly appreciated that his solicitor would be unable to put forward a case on his behalf at trial and arrange representation for him. In those circumstances, we consider that the appellant waived his rights.

The fairness of the proceedings

37. However, we do not base our decision solely on waiver. We have considered whether in all the circumstances, in the light of what is known to this court, whether the whole of the proceedings, including the proceedings in this court, were fair and in conformity with Article 6.
38. We accept that the appellant's defence was not before the jury; he was not, as we have been told, able to contradict Lawlor's account or explain his possession of the mobile phone. That was, however, a consequence of what we have found, after hearing the appellant's evidence, a deliberate decision to abscond; in this court, the appellant has had a full opportunity to put forward his explanation. No unfairness, taking the proceedings as a whole, can therefore result from any consequence of his deliberate decision to abscond, which after hearing his evidence, we concluded is what happened. He cannot having taken that course impugn the fairness of the trial on the basis that it might have followed a course different to that which it would have

followed if he had been present. For example, as we have set out, it was his case that his possession of the victim's mobile phone was explained by the fact that Lawlor had swapped jackets with him; he sought to support this by reference to the custody record. However his evidence and further instructions to his solicitors were essential to making this case; by absconding, he deprived himself of the opportunity of doing so.

39. We have also considered the contention made that the judge erred in his summing up to ask the jury to compare the description of the appellant with a photograph of the appellant. There was no error. The judge pointed out to the jury the fact that the appellant was not picked out on the identification parade; they were asked to consider the description given by the victim against a photograph of the appellant taken immediately after the arrest to see if that would rule out the appellant.
40. There was very strong evidence against the appellant as we have set out. He had a fair trial and in this court we have given him a full opportunity to explain his absence. We are therefore sure that the conviction was safe and the proceedings, taken as a whole, entirely fair and in compliance with Article 6.

The appeal against sentence

41. Because the appellant had voluntarily absented himself, the judge could not obtain a pre-sentence report which he might well have done in view of the appellant's previous goof character and youth, despite the inevitability of a custodial sentence. The judge in passing sentence took into account his previous good character and the fact that he was younger than Lawlor, but sentenced, as he rightly stated, on the basis of the seriousness of the offence and the fact that the public were entitled to be protected from attacks such as this. The judge made clear that this type of robbery was becoming increasingly prevalent and this was a particularly serious example, as the victim had been attacked by three people and had had a knife held to his throat.
42. It was contended on behalf of the appellant that his absence had meant that there was no pre-sentence report, no mitigation and no chance for him to address the respective roles of those involved. He had not been able to put forward character witnesses.
43. On the hearing of the appeal, we considered that given the appellant's previous good character, it would be just to obtain a report from the probation service. We therefore directed that such a report be provided and that the appellant provide any submissions on it in writing.
44. The report sets out that the appellant continued to deny his participation in the offence, though he accepted that he was present and had provided the knife to Lawlor, as he carried a knife for his own protection because he had "dodgy" friends. He was assessed by the probation officer as having a high risk of re-offending. Whilst he has been in prison, he has participated in various educational courses, including GCSEs, but has been the subject of a Governor's adjudication for criminal damage.
45. It was submitted to us on his behalf that he had the substantial mitigation of his previous good character, a difficult childhood as his parents had been killed and he had a young child; the offence was out of character. Lawlor had as the judge pointed out a very bad record as he had a very large number of previous convictions in this

jurisdiction and in Ireland; he had been sentenced on 30 April 2004 to 4 years imprisonment for robbery and attempted robbery and was at the time of the commission of the offence under licence, having been released from the custodial part of the sentence on 31 December 2003, a matter of weeks before the commission of the offence.

46. In the circumstances, having regard to the appellant's previous good character, the matters set out in the report and his youth, we consider that the sentence of six years was too high in the light of the information now before the court. We grant leave to appeal against sentence, quash that sentence and substitute for it a sentence of five years imprisonment. To that extent only is this appeal allowed.