Neutral Citation Number: [2021] EWCA Crim 598

Case No: 202001552 B1

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE CROWN COURT AT MANCHESTER**
**Judge Field Q.C.**
**T20167170**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2021

**Before:**

**VICE-PRESIDENT COURT OF APPEAL (CRIMINAL DIVISION)**
**(LORD JUSTICE FULFORD)**
**MR JUSTICE HOLGATE**
and
**SIR NICHOLAS BLAKE**

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**Between :**

**Regina**
**- and -**
**Adam Umerji**

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**David Perry QC and Rosemary Davidson** (instructed by **Mischon de Reya LLP**) for the **Applicant**
**Tom Little QC and James Rae** (instructed by **CPS Manchester Special Fraud Division**) for the **Respondent**

Hearing dates: **18 March 2021**

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# Approved Judgment

**Lord Justice Fulford V.P.:**

This is the judgment of the court to which all members have substantively contributed.

## Introduction

1. On 29 October 2018, in the Crown Court at Manchester (Judge Field Q.C. and a jury), following a retrial, the applicant Adam Umerji (who is also known as Shafiq Patel) was convicted, in his absence, of conspiracy to cheat the public revenue (count 1) and

conspiracy to transfer criminal property (count 2). He was sentenced, again in his absence, to 12 years' imprisonment on count 1 and 5 years' imprisonment on count 2, to be served concurrently.

2. Abdullah Allad was also convicted of counts 1 and 2 and sentenced in his absence to imprisonment for 10 years and 4 years imprisonment, respectively.

3. In advance of the first trial in 2011, Sajid Patel (the applicant's brother), Wai Fong Yeung, and Mohammed Mehtajee pleaded guilty to both counts and received total sentences of two years' imprisonment, two and a half years' imprisonment, and four years' imprisonment, respectively.

**The Application for an Extension of Time**

4. The applicant was, save briefly, unrepresented during both sets of proceedings in the Crown Court, in the circumstances analysed hereafter.

5. On 2 February 2009 the applicant was summonsed to appear on 26 February 2009 at Merseyside Magistrates' Court. The summons was issued by the Revenue and Customs Prosecutions Office ("RCPO") acting on behalf of Her Majesty's Revenue and Customs ("HMRC"), although the prosecuting authority was the Crown Prosecution Service ("CPS"). The allegation at that stage was a single charge of conspiracy to cheat the revenue of value added tax ("VAT") between 1 September 2005 and 30 April 2006. He did not attend as required but was represented by junior counsel. His case was sent to the Crown Court for trial under section 51 Crime and Disorder Act 1998 ("CDA") and he was granted bail. This application is solely concerned with his non-appearance on that date and whether the magistrates' court has the power to send an absent but represented defendant for trial in the Crown Court pursuant to section 51 CDA and, if not, whether the subsequent proceedings are invalid for want of jurisdiction.

6. Between March and December 2009 there were a number of hearings at the Crown Court at which the applicant did not appear but was represented. The indictment, which was served on 7 May 2009, charged the appellant with two counts: (a) conspiracy to cheat the public revenue, and (b) conspiracy to conceal, disguise, convert, transfer or remove criminal property. In essence, the Crown's case was that the applicant was a leading participant in a high value VAT fraud. He was represented by solicitors and counsel during the Crown Court proceedings until 6 December 2010, when his legal team notified the court that it was withdrawing. He had variously instructed three sets of solicitors during these preliminary stages of the Crown Court proceedings: Dass Solicitors, Stephen Lickrish and Associates and Ashcotts Solicitors, although the same solicitor retained conduct of the case by moving between the three firms.

7. The applicant's trial commenced on 3 May 2011. He did not appear and he chose not to be represented. His co-defendant, Abdullah Allad, also did not appear but was

represented. The trial judge (Judge Swift) ruled that the trial should proceed in their absence. On 9 June 2011, the jury returned verdicts of guilty in relation to both counts on the indictment. On 9 September 2011, the applicant and his co-defendant were sentenced to 12 years' imprisonment.

8. The applicant and Mr Allad appealed their convictions. The applicant was now represented by Mr William Clegg Q.C. and Ms Eleanor Sanderson (instructed by The Khan Partnership). On 10 March 2014, both appeals were allowed with the result that the convictions and sentences were quashed and a re-trial was ordered. The applicant's appeal succeeded because evidence which should not have been given by a prosecution witness, Mr Stone, who, whilst providing an overview of how frauds of this kind ("MTIC") operate, "*was* (wrongly) *invited to and did opine on the single issue presented to the jury in the case of these appellants, namely whether they had knowingly participated in the fraud*" (see *R v Abdullah Allad and Adam Umerji* [2014] EWCA Crim 421 at [135]). The court found, however, that the judge had been entitled to conclude that as of May 2011, the applicant had deliberately absented himself and had waived his right to attend the trial. A retrial was ordered. Shortly after the conclusion of the appeal proceedings in 2014, the applicant's solicitors notified the CPS that they were no longer acting.

9. Between December 2013 and July 2016, efforts were made to seek the extradition of the applicant and Mr Allad from the United Arab Emirates. The applicant contested the request for his extradition and, on 24 July 2016, the request was refused by the Emirati authorities.

10. The retrial took place between 17 September 2018 and 29 October 2018 in the Crown Court sitting at Manchester. The applicant and Mr Allad did not appear. They chose not to be represented. The trial judge (Judge Field) ruled that the trial should proceed in their absence. He found that the applicant was aware of the proceedings and had waived his right to attend his trial. On 29 October 2018, the applicant was convicted for a second time and again sentenced to 12 years' imprisonment.

11. Before this court, Umerji applies for an extension of time (554 days) in which to apply for leave to appeal conviction, the Registrar having referred the applications to the full court, to be listed for directions in the first instance. The applicant is privately represented. The Registrar invited the court to determine whether to consider the substantive applications at the directions hearing or at a further hearing.

12. The appellant, therefore, is an absconder. We have reminded ourselves that it is for this court to decide whether it is prepared to hear the appeal on the merits following the guidance given at in *R v Okedare and others* [2014] EWCA Crim 228 [2015] 1 Cr App R (see paragraph 35).

13. As just indicated, this proposed appeal has been brought significantly out of time and, notwithstanding the helpfully presented submissions of Mr Timothy Thompson (the representative of Mischon de Reya LLP, the firm currently representing the applicant) as set out in a statement dated 1 June 2020 in which he addresses the issue of delay, we are unpersuaded – given the overall period involved – that a satisfactory justification has been provided. The simple factual basis on which this application is made has always been evident, namely that the applicant was not present on 26 February 2009 at his first "*appearance*" in the Magistrates' Court. The applicant, junior counsel (Simon Taylor) and his then solicitors were self-evidently aware of this at the time (see [38] below). The Notice under section 51(7) Crime and Disorder Act 1998 indicates that Abdullah Allad and Adam Umerji had been sent for trial, albeit the charges concerning the latter are incorrectly described as either way offences. It required no research to uncover these circumstances. The applicant, furthermore, had positively encouraged the court to proceed in his absence. No apparent steps were taken as regards this issue for a decade, in either of the Crown Court proceedings or by way of judicial review. The issue was raised with the applicant by Mr Thompson on 15 August 2019, once his firm received instructions on 7 July 2019. There was then a gap of 9 ½ months before the grounds of appeal were served on the court, on or about 1 June 2020.

14. We accept Mr Thompson needed to make enquiries of the relevant previous representatives and, thereafter, with the Magistrates' and Crown Court. Instructions had to be sent to leading and junior counsel, who would have advised and who settled the Grounds of Appeal. Notwithstanding those undoubtedly necessary steps, taking 9 ½ months to settle the grounds of appeal on this single and obvious issue is of concern to the court. The determining factor, however, is that the applicant chose not to instruct solicitors until 7 July 2019, having been convicted on 29 October 2018. There is no sustainable justification for that period of inactivity. This very considerable period of delay, moreover, needs to be viewed against the backdrop of the unconscionable failure to challenge this issue for a decade.

15. We have followed the approach explained by this court in *Welsh & Ors* [2015] EWCA Crim 1516; [2016] 4 WLR 13, that extensions of time will be granted if it is in the interests of justice to do so. As a result, it has been necessary to consider the merits of the underlying grounds before making the decision whether or not to grant the extension requested. As Hughes LJ explained in *R v R (Amer)* [2006] EWCA Crim 1974; [2007] 1 Cr App R 150 it is necessary to demonstrate a substantial injustice in order to secure an extension of time, given this heightened test is not limited to cases involving a change in the law (see [35]). We return at the end of this judgment to the question whether the applicant has succeeded in his submission that there will be a substantial injustice if the extension of time is not granted.

## The Facts

16. As already described, the defendants were said to have been involved in a substantial VAT fraud (in this instance, a carousel or missing trader intra community ("MTIC") fraud). The allegation was that between 1 September 2005 and 30 June 2006, mobile telephones were acquired from the European Union, without payment of VAT, by a UK VAT-registered company. The telephones were then purportedly traded within the UK through a series of companies. The paper records indicated that VAT had

been paid. Thereafter, the telephones were allegedly exported, via a company called Eurosabre, whereupon fraudulent claims for VAT refunds were made. The importer in each case disappeared without accounting for the VAT, thereby causing loss to the revenue in the sum of approximately £30 million (count 1).

17. The proceeds of the conspiracy accumulated in a single account, Touchstone FCIB. The prosecution case was that the money was laundered through a series of bogus transactions between companies and eventually ended up in separate bank accounts outside the UK controlled by the applicant and his co- accused (count 2). The benefit amounted to in excess of £10 million.

18. The conspiracies were evidenced, *inter alia*, by virtue of the guilty pleas of the co-accused. The central issue at the re-trial was whether the applicant and his co-accused knowingly participated in the conspiracies.

19. Most of the evidence called at the trial was documentary. The Crown's case was that there were 307 transaction chains involving the telephones, in each of which there was a number of different missing traders. The Crown concentrated on four businesses as providing a sample of transactions to demonstrate the workings of the conspiracy. The applicant and his co-accused participated at the end of the chains of rigged transactions. They were only involved with chains where there were missing traders and they always sold out of the UK. They had no storage facilities and no distribution network. The telephones were traded at great speed, often making the paper transaction circuit in this country within a matter of hours before being re-exported. On occasions it is clear that the same telephones were then re-imported and re-exported.

20. The money used to fund the rigged market came from the company referred to above, Touchstone, and was then returned to Touchstone, together with the VAT that had been reclaimed. All the companies used the banking facilities of the First Curacao International Bank and many used the same computer access point in the UK. The Crown was able to trace monies deposited in Touchstone's account to the appellants via further companies registered in Dubai. Those companies were run by the applicant and his co-accused.

21. The applicant was arrested in September 2007. He made no comment in interview.

**The Submissions on the interpretation of section 51**

22. Sections 51 and 52 CDA are central for the applicant's submissions in this case. Section 51 and section 51A respectively address the position of adults and children and young persons. At the time of the proceedings in question (2009), these provisions were, as relevant, in the following terms:

> "**51. No committal proceedings for indictable-only offences.**
>
> (1) Where an adult appears or is brought before a magistrates' court ("the court") charged with an offence triable only on indictment ("the indictable-

only offence"), the court shall send him forthwith to the Crown Court for trial—

(a) for that offence, and

(b) for any either-way or summary offence with which he is charged which fulfils the requisite conditions (as set out in subsection (11) below).

(2) Where an adult who has been sent for trial under subsection (1) above subsequently appears or is brought before a magistrates' court charged with an either-way or summary offence which fulfils the requisite conditions, the court may send him forthwith to the Crown Court for trial for the either-way or summary offence.

(3) Where—

(a) the court sends an adult for trial under subsection (1) above;

(b) another adult appears or is brought before the court on the same or a subsequent occasion charged jointly with him with an either-way offence; and

(c) that offence appears to the court to be related to the indictable-only offence,

the court shall where it is the same occasion, and may where it is a subsequent occasion, send the other adult forthwith to the Crown Court for trial for the either-way offence.

[…]

(7) The court shall specify in a notice the offence or offences for which a person is sent for trial under this section and the place at which he is to be tried; and a copy of the notice shall be served on the accused and given to the Crown Court sitting at that place.

[…]

(11) An offence fulfils the requisite conditions if—

(a) if appears to the court to be related to the indictable-only offence; and

(b) in the case of a summary offence, it is punishable with imprisonment or involves obligatory or discretionary disqualification from driving.

(12) For the purposes of this section—

(a) *"adult"* means a person aged 18 or over, and references to an adult include references to a corporation;

(b) *"either-way offence"* means an offence which, if committed by an adult, is triable either on indictment or summarily;

(c) an either-way offence is related to an indictable-only offence if the charge for the either-way offence could be joined in the same indictment as the charge for the indictable-only offence;

(d) a summary offence is related to an indictable-only offence if it arises out of circumstances which are the same as or connected with those giving rise to the indictable-only offence.

**52. Provisions supplementing section 51 and 51A.**

(1) Subject to section 4 of the Bail Act 1976, section 41 of the 1980 Act, regulations under section 22 of the 1985 Act and section 25 of the 1994 Act, the court may send a person for trial under section 51 or 51A above—

(a) in custody, that is to say, by committing him to custody there to be safely kept until delivered in due course of law; or

(b) on bail in accordance with the Bail Act 1976, that is to say, by directing him to appear before the Crown Court for trial.

(2) Where—

(a) the person's release on bail under subsection (1)(b) above is conditional on his providing one or more sureties; and

(b) in accordance with subsection (3) of section 8 of the Bail Act 1976, the court fixes the amount in which a surety is to be bound with a view to his entering into his recognisance subsequently in accordance with subsections (4) and (5) or (6) of that section,

the court shall in the meantime make an order such as is mentioned in subsection (1)(a) above.

[…]

(5) A magistrates' court may adjourn any proceedings under section 51 or 51A above, and if it does so shall remand the accused.

[…]

23. The central contention of Mr Perry Q.C. and Ms Davidson on behalf of the applicant is that section 51(1) expressly requires the presence of the accused: "*(w)here an adult appears or is brought before a magistrates' court*". When read in its statutory context, this has the effect, it is submitted, of requiring his or her physical presence. Given he

was not at court, it is suggested the magistrates had no power to send him to the Crown Court and that all the proceedings thereafter were invalid for want of jurisdiction.

24. The central underpinnings of this argument are based on the language of section 51, together with the statutory scheme as a whole. It is said they indicate that Parliament intended that an accused person must appear in person when his or her case is sent to the Crown Court. This approach, it is averred, is supported by the relevant CPS guidance (22 November 2007 "*Sending Indictable Only Cases to the Crown Court and Committal Proceedings"*: "*(t)here is currently no provision for sending defendants to the Crown Court in their absence*") and the decision of the Divisional Court in *Lord Janner v Westminster Magistrates' Court* [2015] EWHC 2578 (Admin). The decision in *Janner* was concerned with the decision of the Chief Magistrate that Lord Janner was fit to attend court and having set out the provisions of section 51, Rafferty LJ, giving the leading judgment in the Divisional Court, briefly observed: "*(t)here exists no power in the Magistrates' Court to proceed in the absence of the accused"* at [9]. This decision was followed in *R v Tarry* [2017] EWCA Crim 97:

> "11. […] The Magistrates' Court has no power to send a defendant for trial if he is not present. That was the conclusion of the Divisional Court in Janner v CPS [2015] EWHC 2578 (Admin) and that conclusion is undoubtedly right, when considering the terms of both section 51 read in conjunction with Part 9(2) of the Criminal Procedure Rules."

25. On this basis, it is argued that section 122 Magistrates' Courts Act 1980 ("MCA") does not displace the requirement for personal attendance under section 51 CDA. Section 122 is in the following terms:

> **Appearance by counsel or solicitor**
>
> "(1) A party to any proceedings before a magistrates' court may be represented by a legal representative
>
> (2) Subject to subsection (3) below, an absent party so represented shall be deemed not to be absent.
>
> (3) Appearance of a party by a legal representative shall not satisfy any provision of any enactment or any condition of a recognizance expressly requiring his presence."

26. Mr Perry submits that section 122 has no application in the present circumstances because section 51 requires that the defendant should "*appear*" or is "*brought before*" the court.

27. It is suggested that a section 51 hearing is not merely an administrative step because, for instance, as currently provided by the Criminal Procedure Rules, the accused is afforded an opportunity of indicating his or her plea as follows:

**9.7. Sending for Crown Court trial**

(5) If the court sends the defendant to the Crown Court for trial, it must—

(a) ask whether the defendant intends to plead guilty in the Crown Court and—

(i) if the answer is 'yes', make arrangements for the Crown Court to take the defendant's plea as soon as possible, or

(ii) if the defendant does not answer, or the answer is 'no', make arrangements for a case management hearing in the Crown Court; and

(b) give any other ancillary directions.

28. This provision, as Mr Perry observes, was referred to in *R v Caley* [2012] EWCA Crim 2821; [2013] 2 Cr App R (S) 47 at [15] in the context of considering section 144 Criminal Justice Act 2003, which requires a sentencing court to take into account the point at which a guilty plea is entered. The court observed, *"(w)here the offence is indictable only it will have to be "sent" to the Crown Court, but* (an) […] *enquiry must be made at the Magistrates' Court whether the case is likely to be a plea of guilty or not. This is required by Rule 9.7(5) of the Criminal Procedure Rules,* […]*."* On this basis it is suggested that the rationale underpinning section 144 is that there is at least one hearing in the magistrates' court at which the accused appears in person and has the opportunity to indicate a guilty plea.

29. This rule was also addressed in *Welsh & Ors*:

"48 As is clear […], a section 51 hearing (i) provides an opportunity for a defendant to indicate he is going to plead guilty and (ii) the magistrates' directions will vary according to a defendant's response to the inquiry. As this court acknowledged in *CW*, there is no statutory requirement that a question about pleas should be posed at a section 51 hearing. The question is contemplated by Crim PR r 9.7(5) and not by the primary legislation. At a PBV (*plea before venue*), by virtue of section 17A of the Magistrates' Court Act 1980, there is a statutory requirement to ask the defendant about his plea. Rule 9.7(5) makes it clear that the court's obligation to ask whether the defendant intends to plead guilty at the Crown Court only arises if the court sends the defendant to the Crown Court."

30. The applicant's contention is that the section 51 procedure is to be treated as being analogous to the plea before venue process under section 17A MCA, where the section expressly provides that the process must be conducted in the presence of the accused. Section 17A as presently formulated provides:

> **"17A. Initial procedure: accused to indicate intention as to plea.**
>
> (1) This section shall have effect where a person who has attained the age of 18 years **appears or is brought before a magistrates' court** on an information charging him with an offence triable either way.
>
> **(2) Everything that the court is required to do under the following provisions of this section must be done with the accused present in court.**
>
> (3) The court shall cause the charge to be written down, if this has not already been done, and to be read to the accused.
>
> (4) The court shall then explain to the accused in ordinary language that he may indicate whether (if the offence were to proceed to trial) he would plead guilty or not guilty, and that if he indicates that he would plead guilty—
>
> (a) the court must proceed as mentioned in subsection (6) below; and
>
> (b) he may (unless section 17D(2) below were to apply) be committed for sentence to the Crown Court under section 14 or (if applicable) 15 of the Sentencing Code if the court is of such opinion as is mentioned in subsection (1)(b) of the applicable section.
>
> (5) The court shall then ask the accused whether (if the offence were to proceed to trial) he would plead guilty or not guilty.
>
> (6) If the accused indicates that he would plead guilty the court shall proceed as if—
>
> (a) the proceedings constituted from the beginning the summary trial of the information; and
>
> (b) ssection 9(1) above was complied with and he pleaded guilty under it.
>
> (7) If the accused indicates that he would plead not guilty section 18(1) below shall apply.
>
> (8) If the accused in fact fails to indicate how he would plead, for the purposes of this section and section 18(1) below he shall be taken to indicate that he would plead not guilty.
>
> (9) Subject to subsection (6) above, the following shall not for any purpose be taken to constitute the taking of a plea—

(a) asking the accused under this section whether (if the offence were to proceed to trial) he would plead guilty or not guilty;

(b) an indication by the accused under this section of how he would plead.

(10) If in respect of the offence the court receives a notice under section 51B or 51C of the Crime and Disorder Act 1998 (which relate to serious or complex fraud cases and to certain cases involving children respectively), the preceding provisions of this section and the provisions of section 17B below shall not apply, and the court shall proceed in relation to the offence in accordance with section 51 or, as the case may be, section 51A of that Act." (our emphasis)

31. The general observation relied on by Mr Perry is that if the contrary position prevails, criminal proceedings against an accused facing an indictable-only offence (along with any related either-way or summary offence) could be commenced and completed, including a Crown Court trial and the imposition of a custodial penalty, without the defendant ever having appeared before any court. If the accused is overseas, there would be no need to apply for extradition until after he or she has been tried, convicted and sentenced. It is observed that this would be in marked contrast with the position of an accused facing either-way offences who, as just set out (subject to limited statutory exceptions), must attend the mode of trial hearing in person. With summary offences, furthermore, there are restrictions on imposing or executing sentences of imprisonment in the absence of the convicted individual, although he or she can be tried in their absence.

32. It is suggested that there is nothing to indicate that Parliament intended to create a scheme in which the more serious alleged offenders could be convicted without ever attending court whereas those charged with lesser offences are required to attend, at the very least, the plea before venue hearing.

33. Mr Perry contends that the power in section 52 CDA to remand an accused in proceedings under section 51 is based on a presumption that the defendant will be in court. He suggests that the magistrates have no power to impose bail on an accused who has not previously been bailed and who is not before the court having failed to answer a summons.

34. It is highlighted that in addressing the exercise of powers by magistrates' courts under Rule 9.2 of the Criminal Procedure Rules, "*(3) (t)he general rule is that the court must exercise its powers in the defendant's presence*", with certain exceptions.

35. Mr Perry argues that the critical distinguishing feature of the structure of the MCA is the distinction that the Act creates between the processes relevant to summary trials, at which the presence of the defendant is not required (unless he has been bailed to attend), and preliminary proceedings in relation to trial on indictment, at which his presence is required, unless certain statutory exceptions apply. Mr Perry highlights that section 2(1) MCA provides the magistrates' court with "*jurisdiction to try any*

*summary offence*" whereas under section 2(2) the court has jurisdiction under sections 51 and 51A CDA in respect of any offence committed by a person who appears or is brought before the court. It is remarked that section 9(1) MCA, which governs the procedure at a summary trial provides:

> "On the summary trial of an information, the court shall, **if the accused appears**, state to him the substance of the information and ask him whether he pleads guilty or not guilty." (emphasis added)

36. This, it is contended, reflects the clear statutory intention that the presence of the accused is not required in all summary proceedings. Section 11 MCA allows the magistrates' court to try an accused in his or her absence, subject to certain limitations. Section 10 MCA (adjournment of a summary trial), additionally, in contrast with section 52(5) CDA, does not require the court to remand the accused in all cases if there is an adjournment.

37. Mr Perry provided the court with an historical exegesis of the relevant predecessor provisions governing the transfer of proceedings from the magistrates' court to the Assizes, the Quarter Sessions and the Crown Court. Going even further back in time, Mr Perry observed surrogacy was not permitted for trial by battle or ordeal. This interesting and helpful analysis, along with certain other submissions by Mr Perry, is addressed below in our discussion of the merits of this application.

38. Mr Little Q.C. and Mr Rae for the respondent submit that "*(i)t is difficult to conceive of a more technical and unmeritorious set of circumstances than those arising in this application for permission to appeal against conviction*" advanced by an absconder who, notwithstanding the lapse of time and lack of any appeal against his conviction in 2018, "*remains in Dubai picking and choosing from afar when (a) to engage with the criminal justice system in this jurisdiction and (b) to instruct and sack lawyers*". The applicant's counsel, moreover, attended court on 26 February 2009 with a bundle of authorities and provisions to support the argument that the accused should be deemed to be present. It was argued before the magistrates' court that there was no power to issue a warrant for his arrest because he had attended through his legal representative.

39. The Crown submit that, properly construed, section 51 does not require the appearance of a defendant in the magistrates' court provided they are legally represented when, at this "*administrative hearing*", they are sent to the Crown Court to stand trial for an indictable-only offence. It is suggested that the appearance of the defendant by his lawyer is permitted pursuant to section 122 MCA, and that they will be present, or deemed not to be absent, unless an enactment expressly requires personal presence ("*expressly requiring his presence*").

40. It is argued by the respondent that there is good reason why Parliament established different arrangements as regards personal presence for, on the one hand, a venue hearing at which important procedural and constitutional safeguards are required to be addressed and, on the other, a section 51 sending hearing which, as Mr Little suggests, is administrative in nature, resulting in the case being sent forthwith to the Crown

Court. He highlights, arguably critically, the different wording in the relevant statutory provisions, to which we return hereafter.

41. Additional support for the respondent's submission is the effect of the way in which other statutory provisions relating to the magistrates' court use the phrase *"appears or is brought before".* By way of example, section 4 of the Bail Act 1976 which so far as is relevant states:

> "**General right to bail of accused persons and others.**
> (1) A person to whom this section applies shall be granted bail except as provided in Schedule 1 to this Act.
>
> (2) This section applies to a person who is accused of an offence when—
>
> (a) **he appears or is brought before a magistrates' court or the Crown Court** in the course of or in connection with proceedings for the offence, or
>
> (b) he applies to a court for bail or for a variation of the conditions of bail in connection with the proceedings.
>
> […]" (our emphasis)

42. Mr Little highlights that in *Baxter v The Chief Constable of West Midlands* (unreported 6 May 1998 CO/436/98) the Divisional Court considered an appeal by way of case stated on a refusal to grant bail. Whilst, as Mr Little observes, the circumstances were unusual and the judgment is brief, it would appear that the court did not consider that the words of section 4(2)(a) of the Bail Act 1976 (which are essentially the same as section 51 of CDA) required the defendant to be present in court. Schiemann LJ stated:

> *"Mr Nawaz* (counsel for the applicant) *has been unable to point us to any section in any Act which specifically provides that in magistrates' courts an applicant for bail needs to be or has a right to be personally present. As I see it, section 122 of the Magistrates Court Act, which provides in broad terms that an absent party represented by a legal representative shall be deemed not to be absent, would point to the fact that you can proceed by advocate and not in person in certain circumstances."*

43. Mr Little contends that *Lord Janner v Westminster Magistrates' Court* and *Tarry*, as relevant to the present question, were wrongly decided. It is highlighted that there was seemingly no argument in either case as to whether "*(t)here exists* (a) *power in the Magistrates' Court to proceed in the absence of the accused*", and the judgments contains no analysis of the point in addition to the quotations set out above. Neither the provisions of section 122 MCA nor the distinction between section 51 and section 17A appear to have been brought to the attention of the two constitutions.

44. Part 9 of the Criminal Procedure Rules were not in force in 2009; indeed, there were no procedural rules in relation to sending other than those in primary legislation. It is

argued that section 51 as then in force should not be interpreted in light of a rule that was introduced in 2012 for case management and not for jurisdictional purposes. In any event, Mr Little contends that section 69 of the Courts Act does not empower the Criminal Procedure Rules Committee to require the attendance of a defendant unless there is an underlying statutory or common law requirement to this effect. Section 69 is in the following terms:

> "**Criminal Procedure Rules**
>
> **(**1) There are to be rules of court (to be called "Criminal Procedure Rules") governing the practice and procedure to be followed in the criminal courts.
>
> (2) Criminal Procedure Rules are to be made by a committee known as the Criminal Procedure Rule Committee.
>
> (3) The power to make Criminal Procedure Rules includes power to make different provision for different cases or different areas, including different provision —
>
> (a) for a specified court or description of courts, or
>
> (b) for specified descriptions of proceedings or a specified jurisdiction.
>
> (4) Any power to make Criminal Procedure Rules is to be exercised with a view to securing that-
>
> (a) the criminal justice system is accessible, fair and efficient, and
>
> (b) the rules are both simple and simply expressed."

45. In the alternative, if the court finds that section 51 does require the attendance of the accused, then Parliament could not have intended that if a defendant does not attend by consent, the entire proceedings thereafter will be a nullity.

**Discussion on the application of section 51**

46. The evolution of the present provisions is the natural starting point when considering the merits of this application. The Indictable Offences Act 1848 (the "1848 Act") provided the magistrates' court with the power to secure the attendance of those who had committed or were suspected of having committed an indictable offence, if not already in custody, by issuing a warrant or summons to appear at a specified time and place (see sections 1, 8 and 9). As to the committal decision, the language of the 1848 Act – in the context of the present issue – is significant, namely that when *"any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence* […] the justice or justices, before they commit the accused for trial, shall take various steps *"in the presence of such accused person* […]." The statute thereafter lists the parts of the process for which the accused's presence was necessary, such as questioning witnesses and taking statements on oath (depositions)

(see section 17). Once the depositions were read to the accused, an opportunity was then afforded to him or her to respond to the charge, and if the evidence was sufficient, the individual would then be committed for trial, in custody or on bail (see section 25). It is clear, therefore, that the Act distinguished between two events: the accused "*appearing*" or being "*brought before*" the justices, on the one hand, and the particular identified steps that needed to occur in his or her "*presence*", on the other.

47. Over the ensuing 170 years, this procedure has been varied by a number of statutes, in a process that has reflected changes in the approach of the legislature to practice, procedure and circumstances.

48. Minor amendments were made to the 1848 Act by the Criminal Justice Act 1925 which included the requirement that when witnesses were examined before the examining justices, the deposition should be read to the witness "*as soon as may be*" *"in the presence and hearing of the accused".*

49. The Magistrates' Courts Act 1952 provided replacement provisions for proceedings preliminary to trial on indictment. Section 2(3) provided jurisdiction over indictable offences, "*(a)magistrates' court for a county or borough shall have jurisdiction as examining justices over any offence committed by a person who* ***appears or is brought before the court****, whether or not the offence was committed within the county or borough*" (our emphasis). As to the part of the committal proceedings that needed to be conducted in the presence of the accused, by section 4(3), "*(e)vidence given before examining justices* ***shall be given in the presence of the accused****; and the defence shall be at liberty to put questions to any witness at the inquiry*" (our emphasis). Otherwise, the magistrates needed to consider whether there was sufficient evidence to put the accused on trial by a jury, and if so, they were to commit him for trial (see section 7).

50. A substantial change occurred in 1967 when by section 1 Criminal Justice Act 1967 it became possible to commit a defendant for trial on the basis of written statements without the court considering the contents of them, unless the defendant was unrepresented or a represented defendant indicated an intention to make a submission of insufficient evidence.

51. The 1952 Act was replaced by the Magistrates' Courts Act 1980, the relevant provisions of which are set out above and analysed below.

52. An expedited procedure for the transfer of indictable-only offences to the Crown Court in lieu of committal has been effected in stages, beginning with the Criminal Justice Act 1987. This statute provided for a transfer process in serious fraud cases where a notice of transfer was served by a designated authority before the magistrates had begun to inquire into the offence as examining justices. The functions of the magistrates thereon ceased in relation to the case, save as regards consideration of bail. The provisions in this regard are of particular relevance. If the defendant to

whom the notice of transfer relates had been remanded in custody by the justices, the court was able to order that his detention continued or it could release the individual on bail, with or without sureties (see section 5(3)). However, the section expressly provided that the court was able to exercise these powers without bringing the accused before the court only if he had given his written consent and the court was satisfied that he knew the notice of transfer had been issued. There was, importantly, otherwise no requirement for the individual whose case was being transferred to be brought before the magistrates' court. If the accused was on bail at the time the notice was served, the requirement that he answer bail in the magistrates' court was terminated (unless the notice of transfer specified otherwise) and the defendant was required to attend the Crown Court on the date given in the notice. Section 51B CDA contains the current formulation of this provision.

53. The Criminal Justice Act 1991, as of 1 October 1992, implemented a transfer process in relation to certain sexual offences involving children when the notice of transfer had been served before the magistrates' court began inquiring into the case as examining justices (see section 53). On service of the notice of transfer, the functions of the magistrates' court ceased. Similar provisions as those in the preceding paragraph (serious fraud cases) were implemented in relation to custody and bail, and the provision again expressly provided that the defendant needed to be brought to court as regards decisions on custody or bail unless he had given his written consent and the court was satisfied he knew the notice of transfer had been issued. Again, there was otherwise no requirement for the individual whose case was being transferred to be brought before the magistrates' court and if the accused was on bail at the time the notice was served, the requirement that he answer bail in the magistrates' court was terminated (unless the notice of transfer specified otherwise) and the defendant was required to attend the Crown Court on the date given in the notice. Section 51C CDA contains the current formulation of this provision.

54. Essentially identical provisions were provided by the War Crimes Act 1991 for an offence charged under section 1 of that Act (war crimes) that "*reveals such complexity*".

55. Committal proceedings were further reformed by the Criminal Procedure and Investigations Act 1996 which inserted section 5A into the 1980 Act limiting the evidence that examining justices could consider to written evidence, but section 4 of the 1980 Act continued to require the presence of the accused when any evidence was tendered before examining magistrates.

56. On 4 January 1999, section 51 CDA 1998 came into force and abolished committal proceedings in relation to indictable only offences, replacing the procedure with a process of sending to the Crown Court. We consider this provision in greater detail below. But before turning to section 51, it is useful to consider the effect of these earlier provisions. Although the accused, for the purposes of committal proceedings, either "*appeared*" or was "*brought before the court*", his or her personal appearance was only required when certain parts of the process were undertaken, perhaps most significantly when a witness gave live evidence, which needed to occur either "*in the presence and hearing*" or "*in the presence*" of the accused. When the opportunity to transfer certain cases was created, the landscape changed significantly: as described above, save for considerations relating to custody or bail for those who had been

remanded in custody by the magistrates' court, there was no requirement for the accused to attend until the case was listed at the Crown Court, on the date specified in the notice of transfer.

57. Mr Perry submits that it is clear from the legislative history that the personal presence of the defendant has always been required at the procedure by which proceedings for indictable offences are "*transferred*" to the Crown Court (however that procedure has been described), subject to very limited exceptions as provided for by statute. With great respect to Mr Perry, we disagree with that analysis. Indeed, the opposite is the case. Although with historical committal proceedings, the accused would appear or be brought before the court, the stages which needed to take place in his or her presence were precisely delineated and related, principally, to when witnesses gave live evidence and when a deposition was taken, and the processes associated thereto. With the introduction of the transfer process for serious fraud cases, certain sexual offences concerning children and war crimes, the defendant was not required personally to attend court as part of this new procedure unless he had been remanded in custody by the magistrates, and either he had not given his consent or the court was not satisfied he knew the notice of transfer had been issued, or both. Accordingly, we consider that under the historic provisions the presence of the defendant has only been required for a lawful committal or transfer when this was expressly stipulated in the relevant statute, for instance when that certain elements of the procedure needed to take place "*in the presence and hearing*" or "*in the presence*" of the defendant.

58. We turn next to the wording of current provisions. The sending provision in section 51 CDA shares with the plea before venue scheme in section 17A MCA, in essence, the same relevant formulation which extends back at least until the 1848 Act. Under section 51(1) it reads, "*(w)here an adult* ***appears or is brought before a magistrates' court*** *("the court") charged with an offence triable only on indictment*" and for section 17A(1), "*where a person who has attained the age of 18 years* ***appears or is brought before a magistrates' court*** *on an information charging him with an offence triable either way*" (emphasis added). Mr Perry argues that the section 51 procedure is analogous to the plea before venue process under section 17A MCA. In addition to paragraph 48, set out above at [29], he relies on an additional paragraph of *Welsh* in which the court observed:

> "55 We do not accept that it is possible to distinguish between a PBV (*Plea Before Venue*) in respect of offences triable either way and a sending under section 51 in respect of indictable offences on the basis that the latter is purely an administrative step and the other features of a section 51 hearing are governed by the Criminal Procedure Rules and the Consolidated Practice Direction and not the Act. We have looked at the current section 51 procedure as a whole, and conclude that a magistrates' court is required to make decisions, following the mandatory requirement that a defendant be asked if he intends to plead guilty in the Crown Court."

59. If Mr Perry is correct in this interpretation that the two procedures are analogous, there would be no need for there to be any further elaboration: for both the sending and the plea before venue procedures, the requirement in section 51(1) and section

17A(1) – subject to any express exceptions – would be that the accused must be present. That contention is substantively undermined by the addition within section 17A MCA (in every version since 4 July 1996) of the stipulation in subsection (2) that "*(e)verything that the court is required to do under the following provisions of this section must be done with the accused present in court*". This provision would be otiose if Parliament had intended for the earlier words to have that effect. Section 51 (in force since 4 January 1999), it is to be emphasised, does not stipulate that the sending must be done with the accused present in court.

60. Mr Perry has sought to avoid this conclusion by arguing that section 17A(1) MCA requires the presence of the accused before the court whilst section 17A(2) simply ensures that the accused remains present in court whilst the section 17A procedure takes place. With respect to Mr Perry, we find this submission significantly artificial. It would mean that the statute not only provides, as Mr Perry submits, for the accused to be personally present when he or she "*appears or is brought before the court*", but that, additionally, it was necessary for the legislation to stipulate that the accused should not depart during the notably short procedure of indicating his or her plea.

61. We consider section 18 MCA (the initial procedure on information against adult for offence triable either way) is relevant in this context, in that this provision relating to the functions of the magistrates' court as regards either way offences secures the presence of the accused by similar express terms as section 17A(2):

> "18(1) Sections 19 to 23 below shall have effect where a person who has attained the age of 18 years **appears or is brought before a magistrates' court** on an information charging him with an offence triable either way, and
>
> (a) he indicates under section 17A above that (if the offence were to proceed to trial) he would plead not guilty, or
>
> (b) his representative indicates under section 17B above that (if the offence were to proceed to trial) he would plead not guilty.
>
> (2) Without prejudice to section 11(1) above, **everything that the court is required to do** under sections 19 to 22 below **must be done** before any evidence is called and, subject to subsection (3) below and section 23 below, **with the accused present in court**.
>
> (*We interpolate to indicate these include the decision as to allocation: section 19; the procedure when summary trial appears more appropriate: sections 20 and 20A; the procedure when trial on indictment appears more appropriate: section 21; and the requirement that certain offences triable either way to be tried summarily if value involved is small: section 22.*)
>
> […] (our emphasis)

62. Again, a clear distinction is drawn between the accused appearing or being brought before a magistrates' court, on the one hand, and certain proceedings that must be

conducted when he or she is present in court (save for an exception for disorderly conduct) and when section 23 applies (as follows):

> **"Power of court, with consent of legally represented accused, to proceed in his absence.**
>
> (1) Where—
>
> (a) the accused is represented by a legal representative who in his absence signifies to the court the accused's consent to the proceedings for determining how he is to be tried for the offence being conducted in his absence; and
>
> (b) the court is satisfied that there is good reason for proceeding in the absence of the accused,
>
> the following provisions of this section shall apply.
>
> (2) Subject to the following provisions of this section, the court may proceed in the absence of the accused in accordance with such of the provisions of sections 19 to 22 above as are applicable in the circumstances.
>
> […]"

63. In our view, whilst Mr Perry is undoubtedly correct that the MCA does not require the presence of the accused in all summary proceedings, we are unpersuaded by his contention that his or her personal presence is required for the procedures relating to either-way and indictable-only offences, unless the statute provides an express exception. In our judgment, it all depends on the language used in the relevant statutory provision, and on this basis the section 51 and section 17A procedures are not analogous. As just set out, for the latter there is clear and absolute requirement for the accused to be present, unless the disorderly exception applies (section 17B). Under the section 17A procedure the indications then given by the defendant have immediate and mandatory consequences for the next stages in the proceedings. These include – if a not guilty plea is indicated – considering whether the case is more suitable for summary trial or trial on indictment (section 19 MCA) and, if the former, whether the accused consents to summary trial or wishes to be tried on indictment (section 20 MCA). The accused may ask for an indication as to sentence, and if one is given, he or she has the opportunity of revising the earlier indication as to plea. With section 51, there is no such express requirement for the accused to be present and there is a process based, not on primary legislation, but on the current version of the Criminal Procedure Rules, that simply gives the accused the opportunity of indicating his or her plea, which, depending on the answer, will lead the magistrates to make certain administrative decisions. We recognise that Mr Perry submits that the section 51 procedure must be considered as a whole. Nonetheless, for the purposes of answering the question as to whether it is mandatory for the accused to be present at the section 51 hearing, we do not accept that the two different types of proceedings are to be described or treated as being significantly alike.

64. In this context, Mr Little appositely refers to paragraph 7(2) of schedule 3 CDA. This provision addresses the situation of a defendant who has been sent to the Crown Court pursuant to section 51 for an indictable only offence but when the accused is arraigned in the Crown Court, there are no indictable-only offences remaining on the indictment. In this situation, the Court is required to undertake what is in effect a plea before venue procedure. In these circumstances paragraph 7(2) requires that, "*(e)verything that the Crown Court is required to do under the following provisions of this paragraph must be done with the accused present in court.*" It is notable, therefore, that in order to stipulate the personal presence of the accused, the legislators, in the relevant legislation and in this context, chose this historic unequivocal formulation.

65. This judgment is restricted to the interpretation of words, *"appears or is brought before a magistrates' court*" within the present context and we do not seek to provide guidance as to the impact of this formula in other circumstances. But, that said, it is untenable to argue, as a general proposition, that this expression necessitates the personal presence in court of the accused. As described above (see [41] and [42]), section 4 of the Bail Act 1976 describes the general right to bail of accused persons and others. By section 4(1) a person shall be granted bail unless certain exceptions apply. The section applies to a person who is accused of an offence when "***he appears or is brought before a magistrates' court or the Crown Court*** *in the course of or in connection with proceedings for the offence*" (our emphasis) or applies to a court for bail or a variation of conditions. As Schiemann LJ indicated in *Baxter* [see [42] above), nothing within the Bail Act specifically provides that in the magistrates' court an applicant for bail needs to be personally present, and in reaching that decision consideration was given to section 122 MCA which tends to indicate that in the applicant can, in certain circumstances, proceed by his or her advocate and not in person.

66. Although the analysis of Lord Bingham CJ in *R v Bow Street Magistrates' Court, ex parte Government of Germany* 1998 QB 556 was concerned with the defendant's committal for extradition in the absence of the fugitive, it provides support for the respondent's submission that section 51(1) does not require the attendance of the defendant: if they are legally represented, absence will not act as a jurisdictional bar. The court accepted that the procedure in extradition committal proceedings was analogous to that prescribed for committals by justices to higher courts. Per Lord Bingham at 562A-C:

> *"Secondly, reliance is placed on section 122 of the Magistrates' Courts Act 1980 in its treatment of legal representatives as representing the party, unless there is a statutory provision which requires the party personally to be present. Thirdly, it is submitted that there is no jurisdictional bar to committing someone in custody or on bail in their absence. This, it is argued, remains a discretion of the magistrate, rarely exercised, but available to be exercised in an appropriate case. I would for my part accede to that submission. In these sections I can find nothing which provides that these proceedings, even including committal, cannot take place in the absence of the alleged offender.*

67. In *R (Griffin) v Westminster Magistrates' Court and Anor* [2011] EWHC 943 (Admin); [2012] 1 WLR 270, a further extradition case, the claimant was wanted in France pursuant to a European Arrest Warrant on suspicion of murder, having returned to the United Kingdom. He was arrested, brought before the magistrates' court and remanded in custody. He was found to be unfit to stand trial and was transferred to a hospital pursuant to section 48 of the Mental Health Act 1983 before being returned to the prison system. He made two serious attempts to commit suicide. At the extradition hearing, the district judge, having concluded that the claimant was capable of giving instructions to his representatives and was fit to plead, reserved her decision as to extradition. Before judgment was given the claimant took an overdose of medication as a result of which he had to be detained in hospital and was unfit to attend court on the day on which judgment was to be given. The claimant's counsel applied for an adjournment because of his failure to appear. The district judge refused to adjourn and ordered the claimants extradition. The claimant sought judicial review of the refusal to adjourn on the ground that by reason of section 10 of the Extradition Act 2003 ("EA") and section 11 of the Magistrates' Courts Act 1980, and notwithstanding section 122 of the 1980 Act, the court should not have proceeded in his absence. Section 10 EA(1) provides (using the same language as section 17A(1) MCA and section 51(1) CDA): *"(t)his section applies if a person in respect of whom a Part 1 warrant is issued* ***appears or is brought before*** *the appropriate judge for the extradition hearing*" (our emphasis). Section 11(2A) MCA in dealing with general provisions concerning the non-appearance of the accused, sets out "*(t)he court shall not proceed in the absence of the accused if it considers that there is an acceptable reason for his failure to appear.*"

68. Against that background Collins J concluded:

> "33. […] Mr Butt sought to argue that section 10(1) of the 2003 Act did expressly require the claimant's presence. I do not agree. While there is nothing in the 2003 Act which expressly permits the court to proceed in the defendant's absence, there is nothing which expressly requires his presence and the importation of the powers of justices when trying an information summarily clearly recognises that section 122 of the 1980 Act will apply. Since this deems presence where the defendant is represented, it clearly overrides section 11(2A).
>
> 34. It follows that the district judge was right to take the view that she had jurisdiction to proceed to give judgment in the claimant's absence. While in Ex p Government of Germany [1998] QB 556 the court was concerned with the powers of examining justices, it recognised that the court had an inherent power to commit in the defendant's absence if it could do so without any injustice to the defendant: see per Lord Bingham of Cornhill CJ, at p 562B, and Jowitt J, at p 563B. I see no reason why in dealing with extradition cases the court should not have a similar inherent power. This would only very rarely be exercised if the defendant's representative did not consent, but I have no doubt that the power exists."

69. We consider that helpful guidance was provided as regards this issue by the decision in *R v Liverpool City Magistrates' Court, ex parte Quantrell* [1999] 2 Cr App R 24. In that case, the applicant was unable through ill-health to attend committal proceedings. His solicitor attended, having been instructed by the applicant to consent to committal under section 6(2) of the Magistrates' Court Act 1980. At the hearing both the applicant's solicitor and those representing the prosecution were content for the section 6(2) committal to take place. The justices, however, were advised by their clerk that they had no power to commit him in his absence, nor power to extend his bail to the Crown Court hearing. The justices therefore declined to pursue the matter further. On the application for judicial review the court determined that the justices had power to commit when the accused was not present in person, including granting bail in his absence. Collins J, concurring with Buxton LJ on the approach to be taken to section 122 MCA as regards committal proceedings (in obiter remarks), stated as follows:

> "[…] it seems to me that the purpose of section 122 (MCA) is to enable matters to proceed in the absence of a defendant provided he is represented. The 1980 Act is drafted, not surprisingly, on the assumption that the defendant is going to be present at court. That is why we find in section 122(2) the provision that a party represented is deemed not to be absent. It seems to me that the purpose of subsection (3) of section 122 is, as it says, to prevent that deeming provision applying only where a relevant provision expressly, and not merely implicitly, requires his presence. […] In those circumstances, like Buxton L.J., I take the view that it is open to the magistrates, in a case such as this, to decide to undertake committal proceedings, including the stage of committing for trial in the absence of a defendant. I, like Buxton L.J., emphasise that it is open to the justices, but they are not bound to do so."

70. We do not consider the decisions in *Janner* and *Tarry* are binding on us. Indeed, we doubt that there was an issue between the parties on the present point in either case. Insofar as *Tarry* does represent a decision that presence is required it was reached *per incuriam* without consideration of the statutory scheme and the authorities we have cited. We have no doubt that the observations on the need for personal presence were wrong. The same conclusion applies to the decision in *R v Smith (Gordon)* [2015] EWCA Crim 1663, in the sense that Edis J, under the aegis of section 66 of the Courts Act 2003, concluded that the accused needed personally to attend court for the purposes of sending him for trial. Again, there was no consideration of the present issue. The current formulation of the Criminal Procedure Rules (see [27] above) does not materially assist on the legislative intention when the Crime and Disorder Act 1998 was passed, when there was no relevant rule in existence. In any event, the Rules are not primary legislation. The CPS guidance was based on an interpretation of section 51 which, as we have explained, is incorrect (see [24] above).

71. We are grateful to Mr Perry for his persuasive and well researched submissions, but we are unable to accept them. Section 122 MCA, as drafted, applies unless there is an express provision requiring the accused's presence and there is no such stipulation in

section 51. Following *DCC Holdings (UK) Ltd v Revenue and Customs Commissioners* [2010] UKSC 58; [2011] 1 WLR 44 we have been careful to ensure that the statutory purpose is clear and that the application of section 122 in this context will not lead to "*an unjust, anomalous or absurd result*" (see [37], per Lord Walker JSC citing Nourse J in *Inland Revenue Comrs v Metroland (Property) Finance Ltd* [1981] 1 WLR 637, 646). Mr Perry agreed that the word "*appears*" that is found repeatedly in different legislative provisions (including in the expression "*appears or is brought before*") is chameleon and takes its colour and meaning from its statutory context. He does not argue that it necessarily requires the individual's personal presence. The earlier statutory provisions expressly set out which particular aspects of the magistrates' court stage of indictable proceedings needed to occur in the presence of the accused, prior to the case proceeding to the Quarter Sessions, the Assize or the Crown Court. In our judgment, this approach has been replicated in the current provisions, of which sections 17A and 18 of the Magistrates' Courts Act and section 51 Crime and Disorder Act are the most relevant in the present context. We have no doubt that section 122 permits the accused to be absent for the purposes of a case being sent to the Crown Court under section 51, as correctly submitted over a decade ago by the applicant's then counsel to the justices on 26 February 2009. It is to be stressed that whether the accused is to be present or absent is a matter for the court to decide. We do not accept, therefore, that Parliament chose this short administrative hearing as the single point in time when a defendant facing an indictable-only offence must personally be before the court. If such a requirement were to be imposed, logically a hearing in the Crown Court would more rationally be identified, such as the Plea and Trial Preparation Hearing when important decisions are made as to the future conduct of the proceedings. On this ground, subject to our decision on the application to extend time, the application for leave to appeal against conviction must be refused.

**Submissions and Discussion on Invalidity**

72. We have additionally considered the position if a different view were to be taken and the sending by the Magistrates of an indictable-only offence to the Crown Court in the absence of the accused did not comply with section 51 CDA. Would that deprive the Crown Court of jurisdiction or automatically invalidate the subsequent proceedings in the Crown Court?

73. Mr Perry accepted that an application could be made for judicial review to quash the sending of the case by the magistrates. There have been cases where this Court has reconstituted itself as a Divisional Court in order to do this (*e.g. Tarry* at [13] (see [24], [43] and [70] above). However, in practice it may well be that an accused would not think it worthwhile for him to pursue a claim for judicial review before the trial in the Crown Court has taken place. All that would happen is that a fresh section 51 hearing would be held which the accused would be compelled to attend. In the present case there is no reason to think that the applicant would have performed a somersault by applying for judicial review after he had instructed counsel to persuade the magistrates that they had jurisdiction to send him for trial at the Crown Court without him being physically present.

74. We therefore need to consider the impact of the accused not being present at the section 51 hearing on the jurisdiction of the Crown Court. It is common ground that this derives from section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933, entitled "*(p)rocedure for indictment of offenders*." As originally enacted, this provided (so far as relevant):

> "(1) Subject to the provisions of this section, a bill of indictment charging any person with an indictable offence may be preferred by any person before a court in which the person charged may lawfully be indicted for that offence, and where a bill of indictment has been so preferred the proper officer of the court shall, if he is satisfied that the requirements of the next following subsection have been complied with, sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly:
>
> Provided that if the judge or chairman of the court is satisfied that the said requirements have been complied with, he may, on the application of the prosecutor or of his own motion, direct the proper officer to sign the bill and the bill shall be signed accordingly.
>
> (2) Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either—
>
> (a) the person charged has been committed for trial for the offence; or
>
> (b) the bill is preferred by the direction or with the consent of a judge of the High Court or pursuant to an order made under section nine of the Perjury Act 1911:

> Provided that—
>
> (i) where the person charged has been committed for trial, the bill of indictment against him may include, either in substitution for or in addition to counts charging the offence which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment;
>
> (ii) a charge of a previous conviction of an offence or of being a habitual criminal or a habitual drunkard may, notwithstanding that it was not included in the committal or in any such direction or consent as aforesaid, be included in any bill of indictment.
>
> (3) If a bill of indictment preferred otherwise than in accordance with the provisions of the last foregoing subsection has been signed by the proper officer of the court, the indictment shall be liable to be quashed:
>
> Provided that—
>
> (a) if the bill contains several counts, and the said provisions have been complied with as respects one or more of them, those counts only that were wrongly included shall be quashed under this subsection; and
>
> (b) where a person who has been committed for trial is convicted on any indictment or any count of an indictment, that indictment or count shall not be quashed under this subsection in any proceedings on appeal, unless application was made at the trial that it should be so quashed."

75. Provided that the requirements of section 2(2) were satisfied, section 2 (1) authorised a bill to be preferred which, upon being signed by "*the proper officer of the court*", would become an indictment upon which the trial could proceed.

76. Section 2(1) replaced the former grand jury procedure which was abolished by section 1 of the 1993 Act (see *R v Clarke* [2008] UKHL 8; [2008] 2 Cr App R 2 at [4] to [7]). The signing of the bill by the proper officer provided an alternative method for authenticating a bill. In addition, the officer was required to be satisfied that the requirements of section 2(2) had been met. Therefore, for example, he would need to be satisfied that the person charged had been committed for trial by the magistrates. Where the proviso to section 2(2) applied, the officer also had to be satisfied that any counts in the bill charging offences for which the defendant had not been committed were founded on the evidence before the justices and were properly joined.

77. Section 2(3) provided that if a bill had been preferred "*otherwise than in accordance with*" section 2(2) but had been signed by the proper officer it was "*liable to be quashed*". As Lord Bingham stated in *Clarke* at [5]:

> "… only if the bill of indictment has been signed by the proper officer is there an indictment which is liable to be quashed."

He stated that there was a fundamental distinction between the preferment of a bill and the signing of a bill by the proper officer. It was the signing of the bill which converted it into an indictment. The House of Lords held that without such an indictment there could not be a "trial on indictment." Any trial conducted without a signed indictment would not be valid and any conviction resulting would be quashed.

78. It is important to note that the decision in *Clarke* turned upon the effect of section 2(1) of the 1933 Act. The failure to sign the indictment was not a matter falling within section 2(2) and could not therefore fall within the provisions of section 2(3) dealing with certain grounds upon which an indictment was "*liable to be quashed*". Section 2(2) delimited the circumstances in which a bill could be preferred, including the charges it may contain, whereas section 2(1) addressed the next stage, imposing an absolute requirement that a preferred bill be considered and signed by the proper officer.

79. Parliament reversed the effect of *Clarke* by the Coroners and Justices Act 2009. The substituted version of section 2(1) of the 1933 Act removed the requirement for a bill to be signed by a proper officer in order to become an indictment. A new section 2(6) authorised the making of criminal procedure rules for dealing with, *inter alia*, the manner in which and time at which bills of indictment are to be preferred. Where a bill is preferred in accordance with section 2(1) and (2) no objection to the indictment may be taken after the commencement of the trial (as defined) on the grounds of any failure to observe those rules (sections 2(6ZA) to (6ZC)). Accordingly, in *R v Johnson* [2018] EWCA Crim 2485; [2019] 1 Cr App R 10 defendants who were tried and convicted on additional counts in relation to which the indictment had not been amended and they had not been arraigned, were treated as having pleaded not guilty. The trial had neither been invalid nor a nullity.

80. We return to section 2(2) and (3) of the 1933 Act as originally enacted. Subsection (2) provided that a bill could not be preferred in respect of an indictable offence, unless the person charged had been committed for trial by the magistrates or the voluntary bill procedure followed (or a court had ordered a prosecution for perjury). However, that prohibition began with the words "*subject as hereinafter provided*". It was not an absolute prohibition.

81. By section 2(3) Parliament laid down the legal consequences of a failure to comply with section 2(2). If a person was convicted on an indictment where there had been a failure to comply with section 2(2), the indictment was liable to be quashed and, where that happened, it would follow that any conviction on that indictment would also be quashed.

82. But the prohibition was made subject to two provisos. Under proviso (a), where a count had been wrongly included in the indictment, only that count would be quashed under section 2(3) and not the whole indictment. Proviso (b) stipulated that in any appeal against conviction, neither the indictment nor any count of the indictment was to be quashed on the grounds of a failure to comply with section 2(2), unless an application had been made at the trial that it be so quashed. In those circumstances it would also follow that the conviction could not be quashed on those grounds. The objectives of

these provisions are self-evident. There is no reason why a point capable of falling within section 2(2) is incapable of being raised at the trial. It is contrary to the interests of justice that a defendant who fails to take such a point during the trial should seek to raise it on appeal if convicted. That would involve a considerable and unjustifiable waste of resources.

83. It is significant that section 2(3) referred to an indictment which is "*liable to be quashed*". It did not suggest that non-compliance with section 2(2) resulted in the trial being treated as a nullity. In *R v Stromberg* [2018] EWCA Crim 561; [2019] QB 14 Lord Burnett LCJ said at [35] that if the word "*nullity*" is being used to refer to something which can be ignored with legal impunity, that is not the position in relation to a conviction or sentence by the Crown Court or, we would add, the trial process. The important point is that if a ground for quashing, or invalidity, relating to non-compliance with section 2(2) was not raised at the trial, it could not be raised on appeal. Conversely, if such a point was raised unsuccessfully at the trial, the Court of Appeal could quash a conviction if the trial judge's ruling was wrong in law.

84. For the purposes of the present application, the 2009 Act did not alter the substance of section 2(2) and (3) of the 1933 Act. It reflected the fact that committal for the trial of indicatable only offences had been replaced by the sending of such offences to the Crown Court under section 51 CDA. At the time when the magistrates sent the applicant for trial section 2(2) and (3) provided:

> "(2) Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either—
>
> (a) the person charged has been sent for trial for the offence; or
>
> (aa) the offence is specified in a notice of transfer under section 4 of the Criminal Justice Act 1987 (serious and complex fraud); or
>
> (ab) the offence is specified in a notice of transfer under section 53 of the Criminal Justice Act 1991 (violent or sexual offences against children); or
>
> (ac) the person charged has been sent for trial for the offence under section 51 (no committal proceedings for indictable-only offences) of the Crime and Disorder Act 1998 ("the 1998 Act"); or
>
> (b) the bill is preferred by the direction of the criminal division of the Court of Appeal or by the direction or with the consent of a judge of the High Court; or
>
> (c) the bill is preferred under section 22B(3)(a) of the Prosecution of Offences Act 1985.
>
> ……

> (3) If a bill of indictment preferred otherwise than in accordance with the provisions of the last foregoing subsection has been signed by the proper officer of the court, the indictment shall be liable to be quashed:
>
> Provided that—
>
> (a) if the bill contains several counts, and the said provisions have been complied with as respects one or more of them, those counts only that were wrongly included shall be quashed under this subsection; and
>
> (b) where a person who has been [sent] for trial is convicted on any indictment or any count of an indictment, that indictment or count shall not be quashed under this subsection in any proceedings on appeal, unless application was made at the trial that it should be so quashed."

85. There are many examples of convictions being quashed on appeal on a ground which would have fallen within the scope of section 2(2) of the 1933 Act, after the appellant had unsuccessfully raised the point before the trial judge. *In R v Gee* [1936] 2 KB 442 the procedure followed by the examining justices had been so defective that there had been no lawful committal. An objection to the wrongful joinder of a count was upheld in *R v Lombardi* [1989] 1 WLR 73 and likewise the lack of evidence from the committal proceedings to support an additional count in *R v Dixon* (1991) 92 Cr. App. R. 43.

86. But as Mr Perry pointed out, there are some defects which deprive the Crown Court of jurisdiction and are outside the scope of section 2(2) and (3). As we have seen, formerly they included a failure to comply with the requirements for the authentication of a bill (see *Clarke*). In this context, we note the decision in *R v Cairns* (1983) 87 Cr. App. R. 287, where it was held that the trial judge had no power under section 2(2) of the 1933 Act to authorise a fresh indictment to replace two indictments, one based upon a committal and another based upon a voluntary bill authorised by a High Court Judge.

87. There are also cases where a conviction has been quashed by the Court of Appeal because the trial court lacked any jurisdiction to proceed on an indictment, irrespective of whether the point was raised in the court below. In *R v Lamb* [1968] 1 WLR 1946 the trial court lacked jurisdiction from the outset. The accused was committed for trial on two offences in the Offences against the Person Act 1861 which had recently been abolished. An additional count was added to the indictment for an offence under the Firearms Act 1937. At the trial the counts relating to offences which has ceased to exist were quashed and the defendant was convicted on the additional count. The Court of Appeal quashed that conviction on the basis that the accused had never lawfully been committed for trial and so no indictment could be preferred, and the additional count could not lawfully have been added as an amendment of that indictment.

88. Sometimes the Crown Court may lose jurisdiction to proceed on an indictment because the underlying committal, or nowadays sending, albeit originally valid, has subsequently fallen away. This is illustrated by *R v Thompson* [1975] 1 WLR 1425 (as explained by Lord Lane CJ in *R v Follett* [1989] QB 338.) In *Thompson* the committal for trial was valid (see page 1427C.) However, the indictment preferred did not contain

any of the charges upon which the accused had been committed. The trial judge rejected an application to amend the indictment and then ordered that it be quashed. On appeal it was held that the judge had not been empowered to grant leave for a fresh indictment to be preferred, because once he had quashed the first indictment, the committal to the Crown Court had served its purpose, it was spent, and the accused had been entitled to be discharged. To avoid that loss of jurisdiction a second indictment should have been preferred before the first indictment was quashed or stayed.

89. The legal flaw in *Lamb* did not fall within section 2(2) or section 2(3)(b) of the 1933 Act. The prohibition at the beginning of section 2(2), upon which section 2(3) is dependent, is only concerned with preferring a bill which charges an indictable offence, not a bill charging something which either is not an indictable offence or is not even an offence at all. The circumstances in *Thompson* did not fall within section 2(3)(b) because (1) at the time when the indictment was preferred the committal had been valid and (2) the Crown Court had only subsequently ceased to have jurisdiction when the judge quashed what was the only indictment before the court at that time.

90. In this case we are faced with a very different situation, namely a putative error in the procedure followed by the Magistrates Court when it decided to send the applicant for trial. Did the legal nature of that error fall outside the ambit of section 2(2) and (3) so as to deprive the Crown Court of all jurisdiction from the outset? Or was it an error of a kind which rendered any indictment based upon that committal "*liable to be quashed*" under section 2(3) if the point was pursued in the Crown Court, but not otherwise on appeal. We reject the former and consider that the latter is correct.

91. The function of the Magistrates' Court under section 51 is relatively limited. The court will consider, for example, whether the allegation which it is being asked to send to the Crown Court is or is not an indictable-only offence. If it is, the magistrates are obliged to send it forthwith to the Crown Court. They have no discretion in the matter. As described above, it does not seem to us that the presence of the accused is necessary to enable this particular function to be discharged. The magistrates no longer have the function of deciding whether evidence discloses a *prima facie* case that the alleged offence was committed. The interests of an accused may adequately be protected by his being represented in court, *a fortiori* where he agrees to that course. Any error made on whether the matter sent for trial is an indictable-only offence is capable of being raised in, and remedied by, the Crown Court.

92. Again, as set out above (see [27]) a further purpose of a section 51 hearing is to afford an opportunity for the accused to give an indication of plea (Crim PR 9.7(5)), which is likely to be relevant to any sentence subsequently imposed. If it is indicated that the accused intends to plead guilty in the Crown Court, the Magistrates Court must give directions so that the Crown Court is able to take that plea as soon as possible. If a not guilty plea is indicated, or no answer is given, the magistrates must give directions for a case management hearing to be arranged in the Crown Court. The magistrates may also give ancillary procedural directions. Mr Perry also submits that the purpose of the section 51 hearing is to put the accused on notice of the charge and their obligation to attend the Crown Court.

93. In *R v Bow Street Magistrates' Court ex parte Government of Germany* (see [66] above), Lord Bingham CJ stated that requirements in extradition legislation for the magistrates to explain certain matters to a requested person could be satisfied by an

explanation being given to that person's legal representatives. It was a procedural matter which did not go to the validity of the court's order (page 561 E-F.)

94. We see no reason why the same approach should not apply to the obligation to explain contained in Crim PR 9.7 (5). Nor do we see why an indication of whether the accused intends to plead guilty or not guilty in the Crown Court may not be given by his duly authorised legal representative, *a fortiori* where the accused has applied for and obtained the court's approval to his absence from the section 51 hearing. Any such indication is not a plea and is not binding on the accused when he reaches the Crown Court, irrespective of whether he was present at the section 51 hearing. An indication of plea is only relevant to the making of limited procedural directions by the Magistrates and to credit for plea if the accused does in fact plead guilty in the Crown Court which, of course, he may only do in person (*R v Ellis* (1973) 57 Cr. App. R 571; *R v Williams* [1978] QB 373).

95. Mr Perry pointed out that in sending a person to the Crown Court the Magistrates must remand the accused either in custody or on bail (see section 52 of CDA 1998). However, as we have already discussed at [65] it has been held that bail may be granted without the accused being present in court.

96. In the light of this analysis, we conclude that, even if section 51 is treated as requiring the accused to be physically present, that requirement does not deprive the Magistrates' Court of any jurisdiction to send indictable-only charges to the Crown Court. Likewise, if that requirement is breached, the Crown Court is not deprived of jurisdiction to try the matter on indictment. Instead, the requirement for the accused to be produced at the section 51 hearing is entirely procedural in nature.

97. In our judgment, if contrary to our primary conclusion, an accused could not lawfully be sent for trial under section 51 in his absence, he would not be entitled to raise this point unless he did so in the Crown Court under section 2(2) and (3) of the 1933 Act and asked for any indictment based upon that sending to be quashed. It follows, that if, like the applicant, an accused failed to ask the Crown Court to quash the indictment on this ground, section 2(3) would prevent him from raising that point in this Court. On this alternative ground, subject to our decision on the application to extend time, the application for leave to appeal against conviction must be refused.

**Submissions and Discussion on the Soneji principle**

98. Even if the non-attendance of the accused at a section 51 hearing were to be treated both as unlawful and as falling outside section 2(2) and (3) of the 1933 Act, the question still remains what would be the legal consequence of that breach of section 51(1) CDA? Does it automatically mean that both the sending by the Magistrates' Court and the subsequent trial in the Crown Court were rendered invalid, with the result that any conviction has to be quashed on appeal?

99. In *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340 the House of Lords held that the correct approach for dealing with a failure to comply with a requirement before a power is exercisable is to ask whether it is the purpose of the legislation that an act done in breach of that provision should be treated as invalid ([21] to [23]). The focus should be on the consequences of non-compliance and on whether Parliament intended "*total invalidity*" to be the outcome. Alternatively, the answer may be that invalidity depends

on the circumstances of the individual case, including whether there has been substantial compliance with the requirement, alternatively whether substantial prejudice has been caused by non-compliance ([24] and [67]).

100. The *Soneji* principle was applied by this court in *R v Ashton* [2006] EWCA Crim 794; [2006] 2 Cr App R 15. It was stated that where a court acts without jurisdiction the proceedings will usually be held to be invalid. However, if a court is faced with a failure to take a step before a power is exercised, which can properly be described as a procedural failure, the question is whether Parliament intended that any act done following that failure would be invalid. If the answer is no, the court should consider the interests of justice generally, and in particular whether there is a real possibility of either the prosecution or the defence suffering prejudice because of that procedural failure ([4] – [5]). In deciding whether a defendant has suffered prejudice, an important consideration is whether or not he agreed to the course adopted ([87]).

101. In *Clarke* Lord Bingham accepted "*the general validity of the distinction drawn*" in *Ashton* ([8]). The only disagreement expressed by the House of Lords with the Court of Appeal's decision concerned one of the three appeals decided in *Ashton*, namely *R v Draz*. The House of Lords held that, under the then law, there could no valid trial unless there was an indictment and a bill could not become an indictment until it was duly signed by the proper officer ([18] – [19]). Accordingly, the relevant errors in *Draz* went to the jurisdiction of the Crown Court.

102. The *Soneji* principle was applied in *R v Gul* [2013] 1 WLR 1136. The defendant was sent for trial for a single indictable only offence. The indictment, relying on the same facts, alleged six offences triable either way but not the offence for which he had been sent to the Crown Court. The trial continued in the Crown Court. The defendant argued that the failure of the Court to follow the mode of trial procedures required by paragraphs 7 and 9 of schedule 3 to the CDA 1998 rendered the subsequent proceedings a nullity. The Court of Appeal disagreed.

103. Under Schedule 3 it was for the court to decide whether summary trial or trial on indictment was more appropriate. The accused was not given a right to summary trial. He simply had an entitlement to make representations on that aspect. Where the court failed to give an opportunity for such representations to be made, there was nothing in the legislation to stop the defendant applying for a summary trial. If the court had decided that summary trial was more appropriate, then the defendant could have elected for trial by jury. He had no corresponding right to elect for summary trial ([23]). Accordingly, the only defect in the process had been a failure to invite the defendant to make submissions about mode of trial. That failure would have been readily curable by the defendant making an application for summary trial and so there was no reason to think Parliament intended such a failure to vitiate subsequent proceedings in the Crown Court ([24]). Furthermore, there had never been any suggestion that, given the option, the defendant would have chosen summary trial ([25]).

104. For the reasons given previously, we are in no doubt that the reference in section 51(1) to the accused appearing or being brought before a Magistrates' Court should be treated as a procedural requirement. Parliament could not have intended that, where the accused was represented at a section 51 hearing but not present in person, either the sending to the Crown Court or the subsequent proceedings in that Court should inevitably be treated as vitiated. Any requirement for the accused to be present could

not go to the jurisdiction of either court. Whether the proceedings should be treated as invalidated would have to depend on the circumstances of the case.

105. Where, as in the present case, the accused has agreed or asked that he should be represented by an advocate rather than appear in person, it is difficult to see how any relevant prejudice could be shown unless *perhaps* something prejudicial to the accused occurred which is unlikely to have happened if he had been physically present. For example, if there were to be reliable evidence that the advocate did not act in accordance with clear instructions from his client, it may conceivably be possible to show that an order made by the Magistrates would have been significantly different if the accused had been present. However, bearing in mind the limited scope of a section 51 hearing, we would expect cases of genuine prejudice in such circumstances to be rare. That view is reinforced by the fact that most problems of this nature can and should be raised in the Crown Court and are likely to be capable of being remedied, in so far as that may be necessary, at that stage. Such problems should not be stored up for use in this Court in the event of a conviction.

106. In the present case there has been no attempt to suggest, let alone demonstrate, that the applicant has suffered any prejudice whatsoever from the fact that he was sent for trial under section 51 without him being physically present. A number of preliminary hearings were conducted in the Crown Court at which the applicant was represented, but no point was taken about the invalidity of the sending decision or the subsequent proceedings. At the hearing of this application the Court was told that the applicant left the jurisdiction at least by March 2009, and is residing in the Gulf. Accordingly, it cannot be said that in relation to the sending of the applicant for trial, the prosecution acted so as to circumvent extradition laws.

**Extension of Time**

107. To recapitulate, the applicant chose not to attend his trial or to challenge the sending by way of judicial review, but he subsequently instructed a legal team to appeal against conviction on his behalf. No point was taken in that appeal on the validity of the initial decision under section 51. The appeal succeeded in March 2014 on one ground and a retrial was ordered and took place. The applicant absented himself again. Still no point was taken about the validity of the decision on 26 February 2009 to send him for trial. Instead, the issue was not raised until the present application for leave to appeal on 1 June 2020, some 9 years after his conviction at the first trial and 1 year 7 months after his conviction at the retrial.

108. As already rehearsed (see [12] above), the court may take into account the fact that the applicant is an absconder as a factor weighing against an extension of time (see *Okedare* at [40]). In view of the history of this case, we consider that this factor must be given very substantial weight.

109. It follows from our conclusions set out above that the applicant will not suffer any substantial injustice or prejudice as a result of a refusal to extend time (see *Welsh* at [15] above). Instead, the interests of justice would be gravely prejudiced if this application were granted given his failure to take any point by way of judicial review or in the Crown Court hearings as regards his absence from the section 51 hearing, a

procedure which he had actively sought and encouraged (prior to absconding by March 2009). For these reasons, we refuse the application for an extension of time. Indeed, given that it is unarguable that the absence of the applicant from the hearing on 26 February 2009 deprived the Magistrates' Court of jurisdiction to send him for trial or the Crown Court to try him, the present application, advanced over a decade after the relevant court hearing, is a flagrant abuse of the court's process.

**Conclusion**

110. We refuse the application to extend time to apply for leave to appeal against conviction.