**Title: Proceeding in absence: the “default position” in magistrates’ courts?**

*R v Rathor* [2018] EWHC 3278

Keywords: Adjournments; Medical Certificates; Slip-rule

R applied for judicial review of a District Judge’s decision to refuse an application to adjourn his trial and to proceed in R’s absence. He also challenged the Judge’s subsequent refusal to set aside that decision under s.142 Magistrates’ Courts Act 1980 (MCA 1980).

R was charged with assaulting C on 9th December 2016. There were no witnesses to the alleged incident; “it was one person’s word against another’s” (at [2]). His trial was due to take on 4th December 2017. This was the fourth time the case had been listed for trial, having been adjourned on three previous occasions. On the first two occasions, the prosecution successfully applied for adjournments to allow them further time to review CCTV evidence. The third time the trial was listed, it was adjourned due to lack of court time.

On the evening of 3rd December 2017, R felt unwell and attended a walk-in centre. At court the following day, his advocate applied for an adjournment and produced a medical certificate stating that R had “suspected food poisoning” (at [4]). The CPS opposed the application on the grounds that the case was now almost a year old and the medical certificate did not state that R was unfit to attend court. The Judge stood the matter down for R’s advocate to take further instructions.

The advocate returned and informed the court that he had spoken to R, who was suffering from vomiting and diarrhoea and was unable to leave his house. Any adjournment would be relatively short, as the trial could take place on 16th January 2018.

The defence application to adjourn was refused and R was convicted in his absence. The court’s response to the application for judicial review stated that the Judge had regard to the principles set out in *R v Jones* [2001] EWCA Crim 168 when refusing to adjourn, although it did not state “how he had regard to [them], or indeed what if any, reliance he placed on the various factors that had to be balanced” (at [8]). The Judge did not indicate that he believed R had provided “spurious evidence or that his absence was designed to frustrate the process” (at [12]).

R had been attended by a doctor later the same day and a further medical certificate was obtained, which made clear that R had been unfit to attend court. On 20th December 2017, the case was listed before the same Judge, who was invited to rescind the conviction in the exercise of his powers under s.142 MCA 1980. Relying on the decision in *Houston v Director of Public Prosecutions* [2015] EWHC 4144 (Admin), the Judge declined to do so on the basis that s.142 is “only to be utilised as a form of slip rule to set aside mistakes” (at [17]).

**Held, granting the application and quashing both decisions,** the Judge appeared to have approached the application on the basis that proceeding in R’s absence was the “default position” (at [15]). Although a judge is not bound by a medical certificate that does not deal with the defendant’s fitness to attend court, “the fact that a certificate has been provided must be taken into account” (at [12]).If the Judge had considered that R’s excuse was spurious or designed to frustrate the process, he should have expressly said so; it was not appropriate to leave such a conclusion to inference (at 11]).

The Judge was also obliged to consider whether it would be contrary to the interests of justice to refuse an adjournment. There was no explanation “as to why it was felt that getting the case on fast trumped the inability of the defendant to give evidence in his own defence” (at [14]). The decision to refuse the adjournment “was infected so much by an error of law” that it must be quashed (at 15]).

*Obiter:* In subsequently declining to exercise his powers under s.142 MCA 1980, the Judge relied on *Houston v DPP* (above). This decision was contrary to a line of other authorities which took a wider approach to s.142. The Judge ought to have asked himself whether he would have refused the adjournment if the second medical certificate had been available when the application was made, to which the answer was “plainly no” (at [21]).

**Commentary:**

Section 11 of the MCA 1980 provides that where an adult fails to attend court at the time and place appointed for the trial, “the court shall proceed in his absence unless it appears to the court to be contrary to the interests of justice to do so.” The defence advocate’s contemporaneous note of the Judge’s ruling indicated “that [the Judge] considered that the default position was that the case should go forward in the defendant’s absence” (emphasis in original) (at [15]). However, “[the Judge] was also entitled, and indeed obliged, to consider whether it would be contrary to the interests of justice to refuse the adjournment” (at [13]). Furthermore, s.11(2A) provides that “the court shall not proceed in the absence of the accused if it considers that there is an acceptable reason for his failure to appear.” The Divisional Court concluded that the Judge either had not considered the provisions of subsection 2A, “or else, if he did, he gave no adequate reasons for finding that there was no acceptable reason for [R’s] failure to appear” (at [15]).

The Divisional Court’s criticisms of the District Judge centred on his failure to consider the “key principles” set out in the Court of Appeal’s judgment in *R v Jones* [2001] EWCA Crim 168, at [22] (and subsequently approved by the House of Lords in the same case – see [2002] UKHL 5). In the present case, Andrews J placed “particular emphasis” on the need for fairness to both parties in deciding whether to accede to an application to adjourn, adding that the court should have regard to all the circumstances,

in particular, the nature and circumstances of a defendant's behaviour in absenting himself from the trial, … and in particular whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear at the trial; … the likely length of such an adjournment; the presence or otherwise of legal representation; whether he could give instructions in his absence; and most importantly perhaps, the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him. (at [7])

It is unclear why the Divisional Court focussed on the *Jones* principles, which govern the adjournment of trials on indictment. Following the judgment in *Jones,* the Divisional Court in *CPS v Picton* [2006] EWHC 1108 (Admin)laid down criteria to be considered on applications to adjourn summary proceedings. While adhering to the core principles established in *Jones,* there are some differences of both substance and emphasis, reflecting the fact that summary justice is supposed to be “simple” and “speedy” and that substantial efforts have been made to tackle the so-called “adjournment culture” and improve case progression in the summary jurisdiction (see *Delivering Simple, Speedy Summary Justice*, July 2006, DCA 37/06 and *Stop Delaying Justice,* available at <https://www.lccsa.org.uk/stop-delaying-justice/>). The *Picton* criteria incorporate a reminder that “[m]agistrates should pay great attention to the need for expedition … delays are scandalous; … summary justice should be speedy justice”. Accordingly, applications for adjournments in magistrates’ courts “should be rigorously scrutinised” (*Picton* at [9b]).

Applying the *Picton* criteria, the decision in the present case would undoubtedly have been the same. At [9(d)], *Picton* requires a magistrates’ court to consider whether the defendant “will be able fully to present his defence and, if he will not be able to do so, the degree to which his ability to do so will be compromised”. It is essential for a court to address this issue because a defendant’s right to give evidence is an essential aspect of a fair trial (see, for example, *R v* *Welland* [2018] EWCA Crim 2036 and A. Owusu-Bempah ‘The Interpretation and Application of the Right to Effective Participation’ (2018) 22(4) E & P 321). The ability to give evidence is particularly important “where proceedings involve an assessment of personality and character of the accused and his state of mind at the time of the offence” (Romanov v Russia (2007) 44 EHRR 23, at [108]). The present case inevitably involved such an assessment, as only R and the complainant had been present at the time of the alleged offence and “[i]t was one person’s word against another’s” (at [2]).

At [9e], *Picton* directs the court to consider “the likely consequences of the proposed adjournment, in particular its likely length and the need to decide facts while recollections are fresh.” R’s trial could have taken place on 16th January, which was less than six weeks away. The incident was already almost 12 months old and it could hardly be said that a further, relatively short delay would hinder the recollections of either R or the Complainant (who had himself waited two months before contacting the police).

*Picton* contains a reminder (at [9h]) that it is the duty of the court “to do justice between the parties”. The court must take into account “the history of the case, and whether there have been earlier adjournments and at whose request and why” (*Picton* at [9[f]). In the present case there had been three previous adjournments, none of which were attributable to R; indeed two of the earlier adjournments appear to have been the fault of the prosecution.

A court is also obliged to take into account the reason for the application to adjourn and, “if it arises through the fault of the party asking for the adjournment, that is a factor against granting the adjournment, carrying weight in accordance with the gravity of the fault” (*Picton* at [9f]). It was plainly not R’s fault that he had gastroenteritis if that were true. There was some independent support for his symptoms, in the form of a medical certificate from the previous evening, which confirmed R’s attendance at a local walk-in centre and suggested he was suffering from “food poisoning”. In *M v Burnley, Pendle and Rossendale Magistrates Court* [2009] EWHC 2874 Admin (at [22]), Langstaff J accepted that a court faced with an application to adjourn “will need to be careful to distinguish genuine reasons for a defendant not being present from those reasons which are spuriously advanced or designed to frustrate the process”. *R v Bolton Magistrates’ Court, ex parte Merna* [1991] Crim LR 848, confirmed that if a court entertains doubts about evidence put forward to support an application to adjourn, it “should ordinarily express its doubts and thereby give the defendant an opportunity to resolve them” (at [10]).

In the present case, the Judge was unhappy with the medical certificate and allowed R’s advocate time to take instructions. The advocate spoke to R and returned to court to explain that R was in bed with diarrhoea and vomiting. If true, R plainly had an acceptable excuse for his absence and the adjournment should have been allowed pursuant to s.11(2A) MCA 1980. By proceeding in R’s absence, the Judge implicitly rejected R’s explanation, but this was not sufficient. When considering an explanation for non-attendance, “the court must consider the reasons given in the evidence and expressly (I stress *expressly*) state the conclusions for rejecting evidence… [A] conclusion that the excuse provided by the defendant for his absence is spurious or designed to frustrate the process should not be left to inference” (at [11]). As the Judge had not explicitly rejected the explanation provided by R’s advocate, his decision could not stand.

A more difficult situation would be that of a defendant who is unable to produce a medical certificate because he claims to be suffering from sickness and diarrhoea and to have been advised not to attend his GP’s surgery. Public Health England and the NHS regularly issue guidance urging those with such symptoms to remain at home to avoid infecting others (see, for example, <https://www.nhs.uk/%2Fconditions%2FNorovirus%2FPages%2FIntroduction.aspx>). *Picton* confirms (at [9a]) that the appellate courts are normally unlikely to intervene in a decision to adjourn, which is “a decision within the discretion of the trial court”. However, the present case suggests that, in order to justify adjourning in such a situation, the court will need to expressly conclude that the excuse provided is spurious and/or designed to frustrate the trial process.

A final point on this issue is the content of medical certificates. The Divisional Court referred on several occasions to the fact that the original certificate provided by R did not comply with the Criminal Procedure Rules (CrimPR) because it did not address the issue of whether R was fit to attend court. However, it is not the CrimPR but the Criminal Practice Directions (CrimPD) that deal with the content of medical certificates. CrimPD 5C.5(c) provides that a medical certificate should state, “*if it is not self-evident*, why the ailment prevents the defendant attending court” (emphasis added). It was arguably self-evident in this case that R could not attend court, particularly given his explanation as to his symptoms, which the Judge had not rejected. A certificate should, however, indicate “when the defendant is likely to be able to attend court” (CrimPD 5C.5(d)), and the present certificate did not do so. Quite how a court is to ensure the medical profession are cognisant of, and comply with, the CrimPD is not addressed. CrimPD 53.C confirms that “a court is not absolutely bound by a medical certificate” and that the practitioner providing the certificate “may be required by the court to give evidence”. Forcing a busy GP to attend court to explain why s/he has failed to comply with the CrimPD and to address any unanswered questions is an option that is unlikely to be attractive to any sensible tribunal.

As to the s.142 point, the Judge took a narrow approach and interpreted the statutory provision as a “slip rule” to rectify mistakes. On the basis of the information that was before him at the time he made the decision to proceed in R’s absence, the Judge was satisfied that he had not made a mistake. The Divisional Court confirmed (*obiter*) that the power under s.142 is exercisable where:

“(i) the earlier decision to proceed in the defendant's absence would not have been reached had the full facts been known and (ii) the reason why the full facts were not known was not attributable to any fault on the part of the defendant.” (at [23]).

By the time of the s.142 application, the Judge had a medical certificate that expressly stated that R had been too unwell to attend court. He would not have reached the same decision had the full facts been known, and it was not R’s fault that his GP had been unable to visit R until after the trial in his absence had concluded.