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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

Respondent;

-v-

JAMES McLAUGHLIN

Applicant.

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Before: Morgan LCJ, Gillen LJ and Weir LJ

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WEIR LJ (delivering the judgment of the court)

The nature of the Application

[1] The applicant ("J") applies for leave to appeal against his conviction on 25 June 2015, following a trial before His Honour Judge Kerr QC and a jury, of one count of arson, contrary to Articles 3(1) and 3(3) of the Criminal Damage (NI) Order 1977 and one count of attempted arson, contrary to Article 3(1) of the Criminal Attempts and Conspiracy (NI) Order 1983 and Articles 3(1) and 3(3) of the Criminal Damage (NI) Order 1977. On 22 September 2015 J was sentenced to 3 years' imprisonment suspended for 3 years on the count of arson and a concurrent term of 30 months on the attempted arson count also suspended for 3 years.

The background to the charges

[2] On 8 September 2012 the police received a 999 call from the applicant's father calling from the family home at Glenshane Road, Feeny, Co Londonderry, asking that J be removed from the home where he lived with his parents. It emerged that the background to the request was that J had been out drinking on the previous evening and again on the day of the call and upon returning home had a row with his parents when he could not persuade them to give him money to resume his drinking.

[3] The prosecution evidence in outline was that police attended at the home in response to the father's call. There were two officers in each of two police cars, a

liveried Mondeo and an unmarked Skoda. The cars parked behind each other on the driveway of the home, the Skoda in front and the Mondeo behind. J was seen by the police to be sitting on the ground at the farthest end of the driveway from them and had with him a large transparent plastic container that appeared to contain petrol. J was lighting a lighter in the area of the container's open outlet. He then approached the police officers throwing liquid in the direction of one and over the bonnet of one of the police cars before setting it on fire. He then threw liquid over the other car and attempted to ignite it without success. J then made off along a laneway adjacent to the drive carrying a hurley bat and the police pursued him and restrained him when he came to a closed gate. He was arrested and taken into custody in the car that had not been ignited. The other car was entirely burnt out from the front bumper to the windscreen.

[4] When interviewed J was co-operative and answered all the questions put to him. He confirmed the reason for the disagreement with his parents, that he had petrol and a lighter when the police arrived and that they had told him to "leave them away" but that he threw petrol on one car and was not aiming at the officers. He confirmed that the car went on fire because he lit the petrol he had put on the bonnet and acknowledged that a blue lighter that the police produced to him was that which he had used. He emphasised that while he did pour petrol over the car he "wasn't looking to harm anyone else". He also said that he did not pour petrol over the second police vehicle. He explained that he had not taken his medication at the time and that he is not supposed to take medication and drink alcohol. He said that he goes "pear-shaped" without his medication. It may therefore be seen that there was no dispute that petrol had been poured over one vehicle and set alight. It was however disputed that petrol was poured on the second vehicle or that J threatened or intended harm to any person.

[5] J was prosecuted for the two counts of which he was ultimately convicted and also for:

- Arson, being reckless as to whether life was endangered.

- Attempted arson, being reckless as to whether life was endangered.

- Threatening to kill a police officer.

- Possession of an offensive weapon namely the hurley bat with intent to commit an indictable offence, namely assault a police officer.

History of malicious injury to sheep on J's family farm

[6] It is necessary for an understanding of subsequent events to explain that there has been a long history of mutilation of sheep on the farm belonging to the McLaughlin family. Despite the efforts of various agencies including the police it has proved impossible to detect the person or persons responsible.

Mr and Mrs McLaughlin and J were and remain united in their dissatisfaction at what they perceived to be the lack of effective action by various agencies and individuals to get to the bottom of this mutilation and bring it to a halt. While it might objectively be thought that the present prosecution and its catalyst, the family row between J and his parents, was entirely unrelated to the sheep mutilation it will be seen that in the mind of J and his parents the two matters were, and became inextricably, interwoven as the criminal prosecution progressed.

The history of previous trials

[7] A number of attempts had been made to conduct and complete the trial of J on charges arising from the incident:

(i) On 14 October 2013 at Londonderry Crown Court J was represented by counsel and the trial proceeded until the fourth day when J dismissed his counsel prior to the closing speeches and the judge terminated the trial, fixing a new trial date of 12 December 2013.

(ii) The case was reviewed on 8 November, 22 November, 29 November and 6 December 2013 by which point new counsel had not been instructed. The trial date of 12 December was therefore vacated.

(iii) The matter was reviewed again on 15 and 31 January 2014 by which time new counsel had still not been instructed. The trial was fixed for late February 2014 with J being told that if by then he had new counsel who needed time to prepare an adjournment would be granted but that otherwise the trial would proceed then.

(iv) On 3 February 2014 the court was informed that new senior and junior counsel had been instructed but on 10 February they applied to and were allowed to come off record.

(v) On 24 February the trial was further adjourned at the request of the defence.

(vi) On 28 April 2014 a trial again commenced before a different judge with J representing himself. However, on day three J failed to attend, the reason given being a panic attack. He did attend on day four but became agitated and after some time being allowed for him to calm down he was taken to hospital and that trial was also aborted.

(vii) The matter was then transferred to Belfast Crown Court where it came on before His Honour the Recorder. The trial was to commence on 25 November 2014 but on that day yet another set of lawyers including senior and junior counsel applied to come off record. The Recorder refused that application despite the fact that J supported it because he said they would not make what he described as his "abuse of process" application. The trial proceeded on

that day but the following day, a Tuesday, J failed to attend at court. The Recorder directed that medical evidence be obtained and the jury was sent away until the Thursday. On that day J again failed to attend and that jury was also discharged. Arrangements had however been made for J to be examined and reported on by Dr Catherine McDonnell, Consultant Psychiatrist, as to his fitness to attend at trial.

Medical Investigations

[8] When Dr McDonnell interviewed J she found him unable to manage his emotions, interrupting and volatile. He was fixed on talking about the cruelty to his animals and a sense that there was a conspiracy by PSNI, MLAs, solicitors, vets and the USPCA to hide the identity of the person who had been harming the family livestock for the past 20 years. She spoke to his parents who were also very focussed on the animal cruelty and the case in relation to it. They thought that the root cause of J's problems was the ongoing mutilation of their animals and wished the doctor to write to the PSNI about the impact of their "failed investigation" upon J's health. Dr McDonnell concluded that J was then currently suffering from acute stress and that at that time he was unfit to attend court.

[9] The Public Prosecution Service also arranged for J to be examined by Dr Fred Browne, Consultant Forensic Psychiatrist, who reported that he had seen J on 11 February 2015 and had subsequently considered J's GP notes and records and other medical reports including that of a Dr Manley, Consultant Psychiatrist, of 31 May 2013 and that of Dr McDonnell before he reported on 27 April 2015. He had also met J's parents who spoke, as they had to Dr McDonnell, chiefly about the injuries to their sheep and their belief that the police were protecting the culprit. They produced to Dr Browne a large volume of papers and photographs relating to the allegations of animal cruelty and their efforts to have the matter resolved. Dr Browne's conclusions were as follows:

> "14.2 Mr McLaughlin has a history of contact with psychiatric services and he has a substantial history of attempts at self-harm. Mr McLaughlin attributed his history of self-harm to concerns about the sheep although the medical notes and records also indicate other factors such as intoxication with alcohol and difficulties in relationships. He has had several admissions to hospital and is currently treated with tranquilisers and sedative anti-depressants. It seems that this medication is currently largely prescribed for symptomatic relief in his current situation rather than for treatment of major mental illness. Mr McLaughlin was pre-occupied throughout our interview with injuries to sheep on the family farm. He and his parents explained that many sheep had died, having apparently had their tongues cut.

Mr McLaughlin and his parents explained that these matters had been investigated and drawn to the attention of many officials but there had been no satisfactory resolution. They believed that there had been some form of cover up. Mr McLaughlin threatened that he would kill himself if the matter was not resolved.

14.3 Mr McLaughlin reported that he suffered from dyslexia. I have not seen copies of his school records or full details of psychological tests, however, it seems that he was assessed during his childhood as being of low average ability and he was subsequently found to have an IQ of 77 which would place him in the category of borderline intelligence. There is no indication that he suffers from mental handicap as defined within the Mental Health (Northern Ireland) Order 1986.

14.4 I do not consider that the available information shows that Mr McLaughlin suffers from organic mental illness or psychotic illness. There appear to be underlying difficulties in his personality and in the family dynamics.

14.5 Mr McLaughlin was able to give his account in relation to the current charges. He made it clear that he was denying the charges. Throughout the lengthy interview Mr McLaughlin was able to understand questions that I put to him, he was able to apply his mind to answering them and to express himself. In my opinion Mr McLaughlin is fit to understand the charges, to decide whether to plead guilty or not, to instruct solicitors and counsel, to follow the course of proceedings and to give evidence in his own defence. I therefore consider that he is fit to plead.

14.6 Mr McLaughlin complained that he had difficulty understanding larger complex words. This was not particularly evident at interview. However I recommended that the proceedings are expressed in simple words and that checks are made to ensure he has adequate understanding, rephrasing if necessary.

14.7 Mr McLaughlin has previously demonstrated difficulties coping with the stress of the court situation. He may wish to consult with his general practitioner in advance of the court case in order to ensure that his

> medication is optimised. It would be important that he continues to refrain from abuse of alcohol. Mr McLaughlin indicated that he wished to represent himself in court and that he was determined to use the court case to highlight the problems he and his family have been experiencing with their sheep. I expect that Mr McLaughlin may well find the court case very stressful, both on account of his underlying difficulties in coping and his wish to use the court case to draw attention to the problem with the sheep, rather than focussing on the charges he is facing. One way that Mr McLaughlin could reduce the stress for himself would be to allow his lawyers to represent him in court, although I appreciate that that is a decision for Mr McLaughlin to make and I consider that he is capable of making that decision."

The final trial

[10] On 22 June 2015 the matter again came on for trial at Belfast, this time before His Honour Judge Kerr QC. The defence team which the Recorder had declined to allow to come off record at the previous trial renewed its application and the judge acceded to the application when J told the judge "they are not representing me, they are sacked. I want them removed." The judge told Mr McLaughlin that the "abuse of process" application which he wished to have considered would be dealt with by him after the jury had been sworn but before evidence in the trial commenced. There were some amendments to the indictment including the addition of two counts of arson *simpliciter* to which J pleaded not guilty and J was then put in charge of the jury. The jury was sent to its room and J handed up what he called his "abuse of process application" to the judge and the judge retired to consider it before receiving oral submissions, the jury being sent away until the following day, a Tuesday.

The "abuse of process" application

[11] The document extends to several pages and appears to have been compiled by someone other than J. It comprises a diffuse litany of complaints about the various counsel and solicitors who had at various times been instructed, the judges who had sequentially presided over the various trials and included allegations of entrapment, corruption, refusal to allow material concerning the animal cruelty to be admitted, tampering with evidence, failure to take account of J's "learning difficulties" and J's inability to attend court due to panic attacks or to present his own case. Accompanying this document was a GP report by a Dr Tedders dated 30 April 2014 indicating that on that date (which should have been the third day of the second trial in Londonderry) J had attended his surgery having had a panic attack at home and concluding:

> "His mother informs me that James is acting as his own counsellor in a criminal case. Bearing in mind his low IQ and the enormous stress he is under it does not seem reasonable to expect this man to conduct his own defence."

[12] Having retired to read these documents together with the medical reports of the psychiatrists; Drs Manley, McDonnell and Browne, the judge then sat again to hear submissions in relation to the application. He first clearly explained the meaning of "abuse of process" and then asked J to explain why he considered that such had occurred in his case. J repeatedly said that he could not defend himself and needed a proper legal team. When it was pointed out that he had sacked his legal team that morning J said that that had happened because they would not present his "abuse of process" application. The judge ruled that the application did not establish an abuse of process. J expostulated, claiming inter alia, that by rejecting his "abuse of process" application the judge was in turn abusing him. The judge suggested he might like to have a McKenzie Friend and prosecuting counsel, Mr Henry, who the transcript makes clear behaved throughout the trial with conspicuous fairness, suggested that a registered intermediary might help and provided the contact details for the service to J. The judge also said that, if J told him what questions he wished to have asked, he could put the questions to the police for him but he would need to know what J's defence was. The trial then adjourned until the following day.

The further course of the trial

[13] On that next day, the Tuesday, J failed to attend. A phone call had been received from his mother to say that he was suffering panic attacks and would see a doctor on the next day, the Wednesday. The judge said he would require evidence by Wednesday morning and directed that a message be sent to J's mother that he would review the matter then and decide in the light of any information received whether the trial should proceed with or without J's presence. The jury was again sent away.

[14] On the Wednesday J again failed to attend. He had provided a handwritten letter from a doctor which was apparently difficult to read. It did however contain the words "patient is unfit to act as his own counsellor as he suffers from severe anxiety and panic attacks and this would be the case ongoing ….". Mr Henry referred the judge to the authorities concerning the presence of an accused at trial and provided him with copies. The judge immediately observed that he was faced with a conflict between the objective of completing the trial in the interests of both the prosecution and, probably, J and the principle that courts find it very hard to contemplate a trial without either the defendant or any legal representatives for him being present. He asked Mr Henry to take instructions on the attitude of the PPS to the situation and pointed out that the medical evidence provided did not say that J was not fit to attend court but rather that he was unfit to represent himself. Having

taken instructions Mr Henry indicated that the prosecution favoured an approach suggested by the judge, namely that J be not arrested but rather written to telling him that the court did not consider that the medical report provided an excuse for his absence and that the trial would commence on the following day, that it would be in his best interests to attend but that whether he attended or not the court would protect J's interests by asking relevant questions. The letter was directed to be delivered by hand to J personally and the jury was yet again sent away for the day.

[15] On the next day, 25 June, J remained absent. It was confirmed that a police officer had delivered the court's letter into J's hand at his home on the previous evening. The judge had meanwhile received a letter from J's GP, Dr Tedders, which repeated that the doctor considered J unable to represent himself but did not say that J was not fit to attend court. The judge then indicated that he had decided in those circumstances that, if the prosecution chose to continue, the trial should proceed in J's absence, the court doing its best to protect his interests. The prosecution did wish to proceed.

[16] The jury was then brought in and the trial accordingly commenced with the prosecution opening followed by evidence comprising, *inter alia*, the following:

(i) Police photographs showing the burned police Mondeo at the scene and a transparent 5 gallon container in which a petrol coloured liquid can be seen.

(ii) A female police officer from the unmarked Skoda gave evidence of having arrived at J's home at about 5:15pm. There was another officer in her car and two others in the liveried Mondeo which had followed the Skoda into the driveway and parked behind it. She had seen J with a hurley bat in one hand and a lighter in the other and with a container of liquid between his legs. J was shouting threats and had tried to throw petrol at her but it did not reach. She had backed away, drew her gun and shouted a warning to J to put the container down. He had not complied but poured petrol over the Mondeo and lit it with the lighter and the car went up in flames. J then poured petrol on the Skoda and tried to light it but it did not burn. J then ran off up an adjacent laneway carrying the hurley bat. Two of the other constables ran after J while J's parents had emerged from their home and his father had tried to extinguish the fire with a bucket of water. The officer had subsequently seized two hurley bats, a blue cigarette lighter from J's jeans back pocket and a golf club. The fire brigade had arrived quickly and extinguished the fire in the burning vehicle and hosed down the Skoda in which J was then taken to custody. The judge asked this witness searching questions which established that the police officers all had time to get clear of the car before it was set on fire and that J had not harmed anyone. The judge then explained to the jury that because J was not present or represented it was his task as the judge to make J's case as best he could on the materials available to him which was why he had questioned the police woman.

(iii) A male police officer gave corroborative evidence to that at (ii) above and confirmed that he and a colleague had pursued J up the laneway and caught up with him at a gate where J had the hurley bat and was shouting. He was sprayed with CS spray and then arrested. Again, this officer was vigorously questioned by the judge to test his evidence.

(iv) The other two police officers gave confirmatory evidence and again were questioned by the judge in a manner helpful to J.

On the next day J was still absent. The following evidence was given:

(v) The crew commander from the NI Fire Service was called. She had been in charge of the first fire appliance to arrive at the scene. She found the Mondeo on fire and had the fire extinguished and also had the Skoda hosed down because she was told that petrol had been poured on to it. The judge questioned the witness and elicited that there was room at the scene for anyone outside the vehicles to move away and out of danger or risk of injury and that there would have been no risk either from smoke inhalation. Furthermore he established that, contrary to what lay people might think, the risk of the burning car exploding was low.

(vi) The evidence continued with J's interviews and charging before which, in the absence of the jury, the judge had satisfied himself that the interviews did not commence until the evening of the day following that of his arrest, that he had first been passed fit for interview by a medical officer and was accompanied at interview by a solicitor and an appropriate adult. Further, the interviews had been edited to remove any inadmissible, irrelevant or potentially prejudicial material. When the evidence of interview had been given before the jury the judge again questioned the detectives to establish that the appropriate adult had been present because the interviewing police felt that J was displaying signs of being emotionally vulnerable, that police realised that he had learning difficulties, that despite having no obligation to answer questions he had answered virtually every one and had co-operated fully in the interview process.

(vii) The judge also established through the officer in charge of the case that J was a person with no previous convictions and of clear character. The evidence for the prosecution thereupon concluded.

Directions of No Case to Answer and evidence on behalf of J

[17] The judge of his own motion granted directions of no case to answer on the original two counts of arson and of attempted arson, being reckless as to whether life was endangered. He then directed that because J had made the case in his police interviews that he had not taken his medication and as a result may not remember or be sure what he had done, that the jury should be told a little of J's psychiatric

background and history. He did this by extracting passages favourable to J from the reports of Dr Manley and Dr Browne. He also indicated to Mr Henry that he would not permit him to address the jury in closing to which Mr Henry very properly responded that he had not intended to apply to do so.

[18] The judge then brought in the jury and informed them that he was withdrawing the two more serious arson charges from them and leaving the remaining charges for their consideration. He read them the extracts from the psychiatric reports that he had earlier discussed with Mr Henry and then proceeded to charge the jury.

The jury verdicts

[19] Later that afternoon the jury returned with verdicts. It had been unable to agree on one count, found J guilty of the added counts of arson and attempted arson *simpliciter* and not guilty on the remaining counts. The judge discharged the jury from the need to reach a verdict on the outstanding count and directed that J be informed of the jury's verdicts. The prosecution was asked to consider whether it would seek a retrial on the outstanding count with the judge strongly indicating his view that little was to be gained by having a further trial on that count. Unsurprisingly perhaps, the prosecution decided that it would not be in the public interest to seek a retrial on that one outstanding count.

Sentencing

[20] On 22 September 2015 the judge sentenced J who had been advised to obtain legal representation for the sentencing hearing but did not do so. He did however attend on this occasion. The judge had directed a pre-sentence probation report and sought further information as to what help might be available for J but J would not co-operate with that latter assessment. The Probation Service had indicated that a community-based disposal would not work as J would not co-operate with them even though, as the judge put it, "that would remove the risk of a potential sentence of imprisonment in his case" which the judge considered on the facts to be entirely appropriate in a contested case of setting fire to a police car. He accordingly imposed sentences of 3 years for the arson of the Mondeo and 30 months for the attempted arson of the Skoda and then turned to the question as to whether these sentences should immediately be served and said as follows:

> "This young man is 32 years of age, it is quite clear that he has a complete obsession in relation to the issue of the damage, as he sees it, to his sheep. This has led to all of the pent-up aggression there is between him and the police service and indeed to virtually any organisation he comes in touch with. Whilst I personally believe it would have been of assistance for him to have some psychiatric or psychological help it is through his own actions that

> that is not possible and he will not co-operate with the Probation Board so probation is meaningless in this case. I have to make a stark choice whether or not it is necessary that this man go immediately to prison or that I give him an opportunity to stay out of trouble by means of a suspended sentence. I have considered whether it would be appropriate in this case to send this man directly to prison. He still refused to accept any element of culpability for these offences and still maintains the attitude that he has maintained throughout in relation to the police service.
>
> Having looked at his general record it seems to me that the offending, which is now over 3 years old, is directly related to this incident. There is no evidence that this man presents a danger to the community in any other capacity, nor is there any evidence that he is a person who is liable to commit a large number of offences, or further offences, apart from the issue that he has with the police in relation to this issue. I think in these circumstances it is proper for the court to take a lenient view in the hope and expectation that this is something which is related solely to this particular incident.
>
> Accordingly, what I intend to do is suspend the [sentences I have imposed]. I anticipate, and hope, the defendant will not commit any further offences which will require that sentence to be put into effect immediately."

The appeal to this court

[21] The applicant applies to this court for leave to appeal. He has put in a lever arch file extending to 213 pages which is signed on its cover page by J and, perhaps significantly, also by his parents. Much of its original content appears to have been written on behalf of J by one or both of his parents. The first 10 introductory pages and then a chronology of 19 pages and then a 9 page document headed "Abuse of Process" together contain a long repetitive and disorganised series of complaints about, among others, the police, judges, barristers and solicitors concerned in the various trials, psychiatrists, MLAs, MPs, government ministers, veterinary surgeons and the USPCA. The only discernible point of direct relevance to the application is the suggestion that the events in question were a "suicide rescue attempt" because it is said that the police had on two previous occasions been called out because J had threatened suicide and therefore, it is contended, the police who attended on this occasion should have known that. However, at page 152 of the submitted file a transcript of the 999 call is contained. In the conversation between Mr McLaughlin

Snr and the police call handler there is no mention whatever of suicide or of rescue. The material part of the transcript reads:

"Police:	And how may I help you this afternoon?
Caller:	I want the police to call out, I have a young fellow here, a son of mine James McLaughlin.
Police:	Uh huh.
Caller:	He is the worse of what could I say, he could be drugged or anything here, he has a golf stick here and he is going out and threatening to break the windows here in the house …
Police:	Right, and had he been out anywhere?
Caller:	Yes he was out last night … he has just arrived here at the minute.
Police:	So he is under the influence of something, you are not sure?
Caller:	I don't know, ah, but at the minute he would be dangerous so I want the police to call out here and arrest him.
Police:	And he has got a golf club in his hand you say/
Caller:	Yes, he is being abusive here to the wife here.
Police:	And he hasn't hit anybody or anything. No?
Caller:	No, but I would think it would not take long for ah they had him before, they had him arrested before, back a ween of months ago.
Police:	OK, leave it with me and I will get someone out to you …"

[22] The nature of the remainder of the documents contained within the file consists of the medical reports to which reference has earlier been made with commentary on passages contained therein and materials concerning the sheep mutilation including 27 pages of photographs showing injured sheep.

[23] When J appeared before this court he informed it that he was representing himself and that he intended not to make oral submissions but to rely upon the file which he had submitted. The court was concerned lest points that might validly be made in J's favour be overlooked and therefore requested the Attorney General to appoint an *amicus* and Mr David McAllister was accordingly appointed. We received helpful submissions from Mr McAllister and from Mr Henry for which we are grateful. As a result of those we are satisfied that the relevant questions for us to consider are:

(i) Was the trial judge right to proceed with the trial in the absence of J or anyone to represent him and was the resulting trial fair?

(ii) Ought the "abuse of process" application have succeeded?

(iii) Does this court have a sense of unease about the correctness of the guilty verdicts?

Was the judge right to proceed with the trial?

[23] When the question of proceeding in the absence of J arose the judge recognised immediately that as a matter of principle an accused should be present throughout his trial and that dispensing with that presence may only occur in exceptional and rare circumstances and that courts find that course hard to contemplate. The judge was referred by Mr Henry to the relevant paragraphs in Blackstone's Criminal Practice where the principles from the leading authorities are set out *in extenso*. One of the circumstances therein identified in which a trial may proceed in the absence of an accused is where his absence is voluntary. In relation to this exception in the leading case of Hayward [2001] QB 862 the English Court of Appeal set out the following principles which a trial judge ought to apply when dealing with an absent defendant as follows:

> "(a) An accused has, in general, a right to be present at his trial and a right to be legally represented.
>
> (b) Those rights can be waived, separately or together, wholly or in part, by the accused himself:
>
> (i) they may be wholly waived if, knowing or having the means of knowledge as to when and where his trial is to take place, he deliberately and

voluntarily absents himself and/or withdraws instructions from those representing him;

(ii) they may be waived in part, if, being present and represented at the outset, the accused, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.

(c) The trial judge has a discretion as to whether a trial should take place or continue in the absence of an accused and/or his legal representatives.

(d) That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the accused is unrepresented.

(e) In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:

(i) the nature and circumstances of the accused's behaviour in absenting himself from the trial or disrupting its continuation, and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;

(ii) whether an adjournment might result in the accused being caught or attending voluntarily and/or not disrupting the proceedings;

(iii) the likely length of such an adjournment;

(iv) whether the accused, though absent, is, or wishes to be, legally represented, at the trial or has waived his right to representation;

(v) the extent to which the absent accused's legal representatives are able to present his defence;

(vi) the extent of the disadvantage to the accused in not being able to give his account of events, having regard to the nature of the evidence against him;

(vii) the risk of the jury reaching an improper conclusion about the absence of the accused (but see (f) below);

(viii) the seriousness of the offence to the accused, victim and public;

(ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;

(x) the effect of delay on the memories of witnesses;

(xi) where there is more than one accused and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.

(f) If the judge decides that a trial should take place or continue in the absence of an unrepresented accused, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing-up, to expose weaknesses in the prosecution case and to make such points on behalf of the accused as the evidence permits. In summing-up he must warn the jury that absence is not an admission of guilt and adds nothing to the prosecution case."

[24] The principles set out by the English Court of Appeal in Hayward were considered and commended by the House of Lords in Jones [2003] 1 AC 1, Lord Bingham endorsed the Court of Appeal's guidelines with two reservations:

"(1) The seriousness of the offence should not be considered – the principles would be the same whether the offence was serious or minor; and

(2) Even if the accused absconded voluntarily, it would generally be desirable that he should be represented."

[25] Applying the relevant applicable principles to the facts of the present case it is clear that J deliberately absented himself from the trial after having been arraigned and put in charge of the jury on the counts that he faced and subsequent to the trial judge's refusal of the "abuse of process" application. He gave no indication before leaving that he would not return on the following day and indeed had asked whether the judge could write out the questions for him to ask the police officers which the judge agreed to do if J told him what his defence was. There was not any medical evidence that he was unfit to attend court, only that in the opinion of the GP he would not be able to conduct his own defence. As to that he had in the course of each of the trials dismissed successive teams of experienced criminal lawyers and in relation to the final trial had supported the application of the last legal team to withdraw by telling the judge that he wanted them removed. The judge made every effort by having messages hand delivered to J both before continuing with the trial and then while it continued so as to encourage J to attend.

[26] This court considers it to be clear that J, probably supported by one or both of his parents, sought to prevent his trial by the twin stratagems of dismissing his lawyers and failing to attend at court. The nature and strength of the evidence against him on the counts upon which he was convicted were in any event such that it is difficult to see how his defence could conceivably have been presented to any greater advantage by counsel or by J himself than it was by the judge. Indeed, at one point Mr Henry politely suggested to the judge that the nature and vigour of his questioning of prosecution witnesses might suggest to the jury that the judge was taking J's part, an impression which the judge was careful to allay in the course of his charge to the jury. The judge further explained that the jury must not hold it against J that he was not present or draw any adverse inference from that fact or the fact that therefore he had not given evidence.

[27] In the view of this court the judge was in all the circumstances plainly right to take the exceptional course of continuing with this trial. The need for fairness applies not only to a defendant but also to the prosecution and we are satisfied that unless the judge had proceeded as he did J's twin stratagems would have effectively and unfairly contrived to make the holding of his trial impossible. Having decided to proceed in J's voluntary absence the judge did everything possible to and did ensure the fairness of the trial and in doing so also achieved compliance with the requirements of Article 6 of ECHR.

Ought the "Abuse of Process" application to have succeeded?

[28] We can deal with this question shortly. The so-called "abuse of process" application whose character has already been described had nothing whatever to do with this prosecution. The all-absorbing pre-occupation of J and his family with the injuries to their sheep had nothing to say to the facts of the present case which all stemmed, as J conceded in his police interviews, from the fact that he had had a row with his parents when he returned home intoxicated and belligerent causing his father to send for the police. The advice of successive experienced lawyers as to its

irrelevance was not accepted, leading to their withdrawal and/or dismissal. There was no prospect of its succeeding as they had recognised and advised and as the final trial judge correctly ruled. It became an irrelevant though major distraction from the material evidence in the case. Even now it continues to be the cornerstone of the file submitted in support of this appeal. We consider that the so-called "abuse of process" application was wholly without merit and that the judge was entirely right to reject it.

Does this court consider that the verdicts of guilty were unsafe?

[29] We consider that the case against J of setting fire to one police car and attempting to set fire to the other was overwhelming. Indeed, he admitted burning the first car in the course of his interviews. The logical explanation for his efforts to manipulate the trial process, which succeeded in the previous aborted trials, is that he understood full well that the prospects of an acquittal were remote. The conduct of the trial was conspicuously fair on the part of both judge and prosecutor and this court is satisfied that the verdicts are safe. It has no sense of unease about their correctness.

The Sentences

[30] Finally we say a word about the sentences passed. The judge gave careful consideration to the construction of the sentences, he recognised that immediate custodial sentences would have been fully warranted and he realistically assessed that it would be pointless to attempt to design a community-based disposal that might provide some therapeutic assistance for J because there was no hope that J would co-operate. Accordingly, in order to avoid imposing what we agree would have been quite justified immediate custodial sentences he decided to suspend their operation having appropriately warned J, who had presented himself for sentencing, of the consequences of committing further offences.

[31] This court considers that those sentences were very lenient and could not remotely be characterised as being either wrong in principle or manifestly excessive.

[32] Accordingly, leave to appeal against conviction and sentence is refused.