The Committee will meet at 10.00 am in Committee Room 3.

1. **Criminal Procedure (Amendment) (Scotland) Bill (in private):** The Committee will consider a draft Stage 1 report.

Alison Walker
Clerk to the Committee
Tel: 0131 348 5195
The following papers are attached for this meeting—

**Agenda item 1**

Draft Stage 1 Report (PRIVATE PAPER)(TO FOLLOW) J1/S2/04/6/1

**Papers for information circulated for the 6th meeting, 2004 (session 2)—**

Criminal Procedure (Amendment) (Scotland) Bill—
- Correspondence from the Criminal Procedure (Amendment) (Scotland) Bill team J1/S2/04/6/3
- Correspondence from John Ewing, Chief Executive, Scottish Court Service J1/S2/04/6/4
- Correspondence from the Law Society of Scotland J1/S2/04/6/5
- Correspondence from ACPOS regarding forensic matters J1/S2/04/6/6

Correspondence from the Minister for Justice regarding quarterly reporting of police numbers J1/S2/04/6/7

NCH Scotland, *Where’s Kilbrandon Now – Report and recommendations from the inquiry* (members only); available online at [http://www.nch.org.uk/kilbrandonnow](http://www.nch.org.uk/kilbrandonnow) J1/S2/04/6/8

**Documents not circulated—**

A copy of the following has been provided to the Clerk:


A copy of this document is available for consultation in room 3.11 CC. It may also be obtainable on request from the Document Supply Centre.

**Forthcoming business—**

Wednesday 25 February 2004 – Justice 1 Committee meeting, Chamber
Wednesday 3 March 2004 – meeting cancelled*
Wednesday 10 March 2004 – Justice 1 Committee, Committee Room 2
Wednesday 17 March 2004 – Justice 1 Committee, Committee Room 3
Wednesday 24 March 2004 – Justice 1 Committee, Chamber
Wednesday 31 March 2004 – Justice 1 Committee, Chamber.

* denotes a change from forthcoming business previously indicated.
Dear Alison

CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) BILL

We agreed that it would be helpful if clarification of some of the issues raised in the evidence giving sessions relating to the above Bill were offered to the committee.

Bail on breach of custody time limits.

We note that both ACPOS and Her Majesty’s Chief Inspector of Constabulary raise concerns that the accused will be automatically granted bail in the event of any breach of the custody time limits. The Bill provides for the first time that an accused person who is detained in custody has a right to be admitted to bail in the event that the custody time limits are not met. We have to see this against the present situation. If the 80 day time limit is breached at the minute the accused is released, without any bail conditions and becomes subject to the 12 month time limit. The bill provides that in that situation the accused has a right to be entitled to be admitted to bail. However, the prosecutor has a right to be heard on an application for an extension to the time limit before consideration is given to allowing bail. If bail is granted the accused is required to give an address to the court where any indictment may be served in the future – something he is not required to do if he is released at present. This we believe is a safeguard which is not in the present legislation.

If the 110 day time limit is breached at the minute the accused is released from custody and is for ever free from prosecution on those charges. Lord Bonomy thought that this was a draconian remedy for what maybe merely a simple mathematical error in calculation. What the Bill seeks to achieve is that if the 110 day time limit (and the 140 day time limit if introduced) is breached then the accused should be entitled to be admitted to bail. This is not however, as suggested by HMIC, an automatic entitlement to bail. Again the Crown will require to be heard on any application for an extension to the time limit before bail is considered. In the event that bail is granted then the accused will be subject to bail conditions, and more importantly, still be subject to trial on the charges within the 12 month time limit.

We agree with HMIC when they say that when an accused person is first remanded in custody full consideration is given to each case and each is decided on its own merits with due cognisance given to matters such as the seriousness of the crime and the likelihood of the accused absconding or interfering with witnesses. HMIC are of the opinion that the same criteria should apply if a time limit
is breached. That of course will be for the judge to decide at the application for the extension and in addition he will no doubt take into account the reason for the breach of the time limit. What the bill seeks to achieve is a balance between the rights of the accused to a fair trial within reasonable time limits and the rights of the victims to expect that an accused once charged should stand trial rather than being freed on a technicality. We believe that the bill achieves that and builds in a safeguard that the accused may be considered for bail but before that is considered the Crown is given the opportunity to apply for an extension to the custody time limit. We have supplied you with numbers of applications to extend the custody time limit and the numbers granted for the years 200-2002. We would hope that the number of applications will reduce as a result of the additional time given to parties to prepare. However, we feel that HMIC has perhaps overstated the position when he seems to imply that accused persons will be granted bail automatically.

**Court Accommodation**

In reviewing the Official Record we saw that at the session on the 14th January during the evidence of Professor Cook and Christine Vallely (Official Report 14th Jan. col.476) the Convener mentions that there is no specific measure in the Bill to prevent the witnesses meeting with the accused. The context was, as you can see, in relation to court accommodation. Professor Cook in reply points out the difficulties that exist in her experience with courtroom accommodation. We have similar difficulties.

This was an area looked at by the Bill Team and was referred to in the White Paper which preceded the Bill. These points are covered in some detail in chapter 9 of the White Paper and the problems with old listed buildings. The view was that rather than focussing on the accused, any spare capacity within existing court buildings should be used for the benefit of victims, their families and vulnerable witnesses. None the less we felt that it was important to find a mechanism to minimise the anxiety caused to victims and witnesses when they meet the accused and/or his friends and supporters. Our solution is contained within the Bill at S72A (8). The provision provides that the preliminary hearing judge must review the existing bail conditions and, if appropriate, fix bail on different conditions. This would allow the preliminary hearing judge to make it a condition of bail that the accused should attend court at a time different from that of the witnesses or whatever is necessary to meet the needs of an individual case. This could go some way to preventing the 'running the gauntlet 'scenario mentioned by Professor Cook. Unfortunately not much in practical terms can be done about supporters of the accused. The provision of court room accommodation for accused or amending bail orders will not affect them. The fact of the matter is that unless there is two sources of evidence that identify them as intimidating a witness there is not much that can be done in practical terms.

The approach adopted in the Bill recognises that all cases are different and not all have witness intimidation issues e.g. many drugs cases have no civilian witnesses. It also allows the court to be appraised of any concerns that have developed since the original bail order was granted and to take whatever steps are necessary to avoid victims and witnesses encountering difficulties on the day of the trial.

**Section 14 Bail Conditions: Remote Monitoring Of Restrictions On Movement**

Section 14 (Bail conditions: remote monitoring of restrictions on movements) of the bill provides the court with the power to impose a remote monitoring condition of a bail order if following an application by a person who has been refused bail the court considers that the imposition of the condition would enable it to admit the person to bail.
The Scottish Executive notes the points raised in written and oral evidence to the Justice 1 Committee by Her Majesty’s Chief Inspector of Constabulary the Association of Chief Police Officers, the Association of Scottish Police Superintendents, the Scottish Police Federation, Victim Support Scotland and SACRO. These are dealt with below:

Her Majesty’s Chief Inspector of Constabulary and the Association of Chief Police Officers made the point:

- that electronic monitoring as a bail condition could be confused with a restriction of liberty order, leading to wrongful arrest and
- The breach process for an electronic monitoring condition should be the same as that for a restriction of liberty order.

Unlike proposals for electronic monitoring of a condition of bail:

A restriction of liberty order is a community disposal imposed by the court following conviction. Breach of a restriction of liberty order is not an offence but a breach of the order therefore the breach is notified directly to the court who decide what action should be taken. There is no police involvement in the management/enforcement of restriction of liberty orders unless a warrant for arrest is issued.

Electronic monitoring of a bail condition will be no different to any other bail condition in that breach of any bail condition is an offence which must in the first instance be dealt with by the police under section 28 of the Criminal Procedure (Scotland) Act 1995. Section 28 provides that a constable may arrest an accused without warrant who has been released on bail where the constable has reasonable grounds for suspecting that the accused has broken, is breaking, or is likely to break any condition imposed on his bail.

Guidance and training

The Executive agrees with the police associations that those agencies involved will require guidance, training and awareness of the issues. It is our intention to develop the detailed guidance and information which will form the basis of the pilot in consultation with those agencies.

Demands on police

In oral evidence to the Committee on the 10 December 2003 the police associations represented raised the issue of increased demands on the police in following up breaches.

In developing the proposals the Executive took into account the need to ensure that electronic monitoring conditions were properly targeted to the small number of cases where monitoring would provide the degree of additional security sufficient to allow someone who would otherwise be remanded to remain in the community.

The court will still apply the same level of consideration to the application for bail with the addition of an electronic monitoring condition as it would with any bail application, taking into account the right of both the applicant and the prosecutor to be heard.

Electronic Monitoring will let the police know quickly if there is a breach and there is likely to be some expectation from the court for an early response. However, the pilots will involve close consultation with the police and the judiciary will consider appropriate timescales for responses, but
as with breach of any other bail condition, the ultimate decision to respond must lie with the police taking into account other operational priorities?

**Victim Support Scotland** suggested that the option of using remote monitoring might more usefully be added to the additional conditions of bail which a court can impose at first instance and that the proposal which extends the availability of bail with specific application to those cases which would otherwise result in a custodial remand should be approached with some caution.

The provisions are targeted to ensure that those who would otherwise have been remanded can apply for bail. The provisions respond to the views of the consultation on the Future Use of Electronic Monitoring in Scotland (2000) which generally supported the introduction of monitoring on bail but warned that it should be targeted to the small number of cases where monitoring would provide the degree of additional security sufficient to allow someone who would otherwise be remanded to remain in the community.

Evidence from Home Office trials also suggested that bail had been used in place of custodial remand for some but that it had also been used as an additional bail condition for others. The evaluation recommended that a mechanism should be put in place to prevent tagging becoming an additional bail condition and to ensure that it was only used as an alternative to custodial remand. The bill provisions are intended to satisfy this test.

In cases at first instance the court has the power to refuse bail if it considers that there are circumstances which would warrant it. Additionally, Sections 22A, 32 and 112A of the Criminal Procedure (Scotland) Act 1995 provide for the Prosecutor to be heard or appeal against determination to grant bail at first instance or review. In considering bail the court will take into account circumstances surrounding the case and the information form the Prosecutor. If the court refuses bail the onus is then on the applicant to apply for consideration of bail with the addition of remote monitoring of compliance with conditions set by the court. Again, the Prosecutor has the right to be heard before the court makes a decision on this application.

**SACRO** raised the point that electronic monitoring on bail should be a condition of a bail supervision order rather than a standalone measure.

The bill provisions provide the court with the power to impose a remote monitoring condition if it considers that the imposition of the condition would then allow it to admit the person to bail. The provisions are intended as an additional measure and do not prevent the court adding other conditions, such as bail supervision. It does not however make this mandatory since bail supervision is not a mandatory condition in other circumstances.

Instead, the court has the discretion to tailor bail packages to the circumstances of the accused where it is considered necessary and appropriate. The pilot will allow the court to impose an electronic monitoring condition with a condition of bail supervision and one of the objectives of the evaluation of the pilots will be to give consideration to the usefulness of electronic monitoring used in combination with other conditions, including bail supervision.

**110 Day Time Limit In Custody Cases**

The trial of an accused person in custody requires to commence within 110 days of his full committal for trial. If that time limit can not be met then a judge of the High Court may on an application made to him extend that period. As the trial must commence within 110 days the application is to extend that period so that it expires on a date later than the actual 110th day.
For example – an accused is in custody and his 110 day is due to expire on (say) 1 August 2003. It is obvious that the time limit can not be met and an application is made to the court to extend the period by a period of two months. The application is granted. The court order will be to extend the period contained in Section 65(4) (b) of the 1995 Act (110 days) so that the 110 daytime limit will now expire on 1 October 2003.

The reality of the situation is that the accused is detained in custody for an additional two months. However, as the statute says that the trial must commence within 110 days an extended or artificial 110 day time limit has to be created regardless of the actual number of days from full committal to the expiry of the extension as granted.

I hope this is of help

Yours sincerely

Moira Ramage
Bill Team Leader
Dear Ms Walker

CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) BILL

I refer to your letter dated 29 January.

Under the provisions in the Bill the fixing of a date for trial in the High Court will, as you know, become a matter for the Court.

In order to support the Court in discharging this responsibility in a way that would meet the requirements of the Bill and make the most effective use of court time the Scottish Court Service is developing an IT based diary. This will be an extension of existing IT systems operated by the Scottish Court Service.

The electronic diary is still at the development stage and a draft specification of requirements has been prepared for discussion with a software developer. The diary is being designed to help court staff to identify possible dates and locations for a trial, having regard to matters such as statutory time limits and anticipated trial duration, to enable the court to fix a date for trial at the preliminary hearing. As court programming concerns the allocation of judicial time available for both criminal business in the High Court and civil business in the Court of Session, we are also developing the system in a way that will support the allocation of dates for hearings in civil cases as well.

I hope this information is useful to the Committee.

Yours sincerely

JOHN EWING
Dear Member

Criminal Procedure (Amendment) (Scotland) Bill

When members of the Society’s Criminal Law Committee appeared before the Justice 1 Committee on 3 December 2003, they undertook to write in connection with a number of areas. I am now pleased to confirm that the Committee has had the opportunity of considering these matters and would respond as follows:-

1. Article 14(3)(d) of the International Convention of Civil and Political Rights

The Committee has considered Article 14(3)(d) of the International Convention of Civil and Political Rights and note that specific reference is made in this section to the accused’s right “to be tried in his presence”. This is described as a “minimum guarantee” and no restrictions or exceptions appear to be placed on it. The United Kingdom ratified the Convention on 20 August 1976. Although the UK made specific comment on declarations and reservations in relation to other Articles, it did not seek to place any condition upon implementation of Article 14(3)(d) of the Convention.

However, in the commentary on implementation provided by the Office of the High Commissioners for Human Rights\(^1\), reference is made to the fact that trials in absence may proceed exceptionally and for justified reason. It is stated at paragraph 11, “When exceptionally for justified reasons, trials in absentia are held, strict observance of the rights of the defence is all the more necessary.” The commentary would, therefore, appear to envisage departure from the principle in certain circumstances. Consideration should be given to whether section 11 of the Bill, as currently drafted, reflects the obligation contained in the Convention and the limited departure from principle referred to in the commentary.

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\(^1\) Web address: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm
2. **R –v- Jones 2002 All ER 113**

During the evidence session, we also undertook to write to the Committee outlining the various safeguards which were thought to be necessary before proceeding with a trial in absence, as outlined in the case of R v Jones. I have enclosed a copy of the case for the consideration of the Justice 1 Committee and would draw the Committee’s attention, in particular, to the appendix to the case which lists the principles which should guide the English courts in relation to determining whether a trial in absence is appropriate.

The starting premise would appear to be the fact that a defendant in English law, has a right to be present at his or her trial and a right to be legally represented. The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and of his or her legal representative. Specific reference is made to the fact that the discretion to proceed in absence must be exercised with great care and only in rare or exceptional cases. It goes on to say that the judge must have regard to all the circumstances of the case but, in particular,

1. the nature and circumstances of the defendant’s behaviour in absenting him or herself from the trial, or disrupting it, as the case may be, and in particular whether the behaviour was deliberate, voluntary and such as plainly waived his or her right to appear;
2. whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings;
3. the likely length of such an adjournment;
4. whether the defendant, though absent, is or wishes to be legally represented at the trial or has by his or her conduct waived his or her right to representation;
5. whether an absent defendant’s legal representatives are able to receive instructions from him or her during the trial and the extent to which they are able to present his defence;
6. the extent of the disadvantage to the defendant in not being able to give his or her account of events, having regard to the nature of the evidence against him or her;
7. the risk of the jury reaching an improper conclusion about the absence of the defendant;
8. the seriousness of the offence which affects defendant, victim and the public;
9. the general public interest and the particular interests of victims and witnesses that a trial should take place within a reasonable time of the event to which it relates;
10. the effect of delay on the memories of witnesses;
11. where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.

It can be seen from this that there are a number of considerations which must be taken into account before the exceptional action of proceeding to a trial in absence is taken.

E-mail: libbyboid@lawscot.org.uk
3. **Paragraph 16 of the Schedule to the Bill**

This paragraph of the Schedule to the bill amends section 78 of the Criminal Procedure (Scotland) Act 1995. Where an accused person intends to state a special defence or to lead evidence calculated to exculpate him by incriminating a co-accused, he or she cannot do so unless a notice in terms of section 78 is lodged in the High Court not less than seven clear days before the preliminary hearing. Sub-paragraph (a) appears to remove the discretion which is currently available to the court to allow such notices to be lodged late “on cause shown”. In certain circumstances, there may be good reason why a notice is not lodged timeously and the Committee would therefore have some concerns about the removal of judicial discretion from this section.

Yours sincerely

Mrs Anne Keenan
Depute Director
R v Jones

[2002] UKHL 5

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD NOLAN, LORD HOFFMANN, LORD HUTTON AND

LORD RODGER OF EARSFERRY

21, 22 NOVEMBER 2001, 20 FEBRUARY 2002

Criminal law — Trial — Commencement of trial — Defendant absconding before commencement of trial — Whether court having discretion to commence trial in defendant's absence.

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In January 1998 the defendant was arraigned on a charge of conspiracy to rob and pleaded not guilty. He was bailed to appear for his trial which was fixed for 1 June 1998, but did not surrender to the Crown Court for trial and warrants were issued for his arrest. The defendant's legal representatives withdrew from the proceedings in the light of his failure to attend. The trial was relisted to commence on 5 October. By that date, the defendant had not been arrested and had not surrendered. The case was adjourned to the following day, when he had still not been arrested and had not surrendered. The judge took the view that the defendant had deliberately frustrated the attempt of the prosecuting authorities to have the case finally concluded, and ruled that the trial should begin in his absence. He was convicted and sentenced to imprisonment. The defendant was arrested at the end of December 1999, and subsequently appealed against his conviction. The Court of Appeal dismissed the appeal, holding that the defendant's trial was not unfair and that, by his conduct, he had clearly and expressly waived his right to be present and legally represented at the trial. The court nevertheless certified that a question of general public importance was involved in its decision, namely whether the Crown Court could conduct a trial in the absence, from its commencement, of the defendant. On his appeal to the House of Lords, the defendant contended that to begin a trial in the defendant's absence was inconsistent with the jurisprudence of the European Court of Human Rights, or was contrary to principle, or was apt, in practice, to work injustice.

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Held — Where a criminal defendant of full age and sound mind, with full knowledge of a forthcoming trial, voluntarily absented himself, there was no reason in principle why his decision to violate his obligation to appear and not to exercise his right to appear should have the automatic effect of suspending the criminal proceedings against him until such time, if ever, as he chose to surrender himself or was apprehended. If he voluntarily chose not to exercise his right to appear, he could not impugn the fairness of the trial on the ground that it had followed a course different from that which it would have followed had he been present and represented. Moreover, there was nothing in the jurisprudence of the European Court of Human Rights to suggest that a trial of a criminal defendant held in his absence was inconsistent with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Accordingly, the Crown Court did have a discretion to conduct a trial in the absence, from its commencement, of the
defendant. That discretion should, however, be exercised with the utmost care and caution. If the absence of a defendant were attributable to involuntary illness or incapacity, it would very rarely, if ever, be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant was represented and had asked that the trial should begin. The seriousness of the offence was not a matter which was relevant to the exercise of the discretion. The judge’s overriding concern was to ensure that the trial, if conducted in the absence of the defendant, would be as fair as circumstances permitted, and lead to a just outcome. Those objects were equally important whether the offence charged was serious or relatively minor. Furthermore, it was generally desirable that a defendant should be represented even if he had voluntarily absconded, since that would provide a valuable safeguard against the possibility of error and oversight.

For that reason, trial judges routinely advise counsel to represent a defendant who had absconded during the trial, and counsel in practice acceded to such an invitation. Such a practice was to be encouraged when the defendant absconded before the trial began. The failure to follow that practice in the instant case did not, however, give ground for complaint by the defendant since (Lord Hoffmann and Lord Rodger dissenting) his decision to abscond in flagrant breach of his bail conditions could reasonably be thought to have shown such complete indifferance to what might happen in his absence as to support the Court of Appeal’s finding of waiver. In any event, the defendant had enjoyed his convention right to a fair trial. Accordingly, the appeal would be dismissed (see [9]–[11], [13]–[20], [23], [32], [35], [36], [38]–[42], [77], below).


Notes
For a trial in the absence of the accused, see 11(1) Halsbury’s Laws (4th edn reissue) para 945.

Cases referred to in opinions
Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 All ER 97, [2001] 2 WLR 817, PC.
Brozicke v Italy (1989) 12 EHRR 371, E Ct HR.
Colozza v Italy (1985) 7 EHRR 316, E Ct HR.
Condron v UK (2001) 31 EHRR 1, E Ct HR.
Delcourt v Belgium (1970) 1 EHRR 355, E Ct HR.
Doorson v Netherlands (1996) 22 EHRR 330, E Ct HR.
Ekbatani v Sweden (1988) 13 EHRR 504, E Ct HR.
Ensslin v Germany (1978) 14 DR 64, B Com HR.
Gregory v UK (1997) 25 EHRR 577, E Ct HR.
HM Advocate v Monson (1893) 1 Adam 114, Ct of Justiciary.
Lala v Netherlands (1994) 18 EHRR 586, E Ct HR.
Millar v Dickson 2002 SC (PC) 30, PC.
Montgomery v HM Advocate, Coulter v HM Advocate [2001] 2 WLR 779, PC.

Omar v France (1998) 29 EHRR 210, ECHR.
Pelladoah v Netherlands (1994) 19 EHRR 81, ECHR.
Pfeifer v Austria (1992) 14 EHRR 692, ECHR.
Poitrinal v France (1993) 18 EHRR 130, ECHR.
Pillar v UK (1996) 22 EHRR 391, ECHR.

R v Abrahams (1895) 21 VLR 343, Vic Full Ct.
R v Berry (1897) LT Jo 110.
R v Bertrand (1867) LR 1 PC 520, PC.
R v Browne (1906) 70 JP 472.
R v Donnelly (12 June 1997, unreported), CA.
R v Howson (1981) 74 Cr App R 172, CA.
R v Jones (REV) (No 2) [1972] 2 All ER 731, [1972] 1 WLR 887, CA.
R v Tonner [1985] 1 All ER 807, [1985] 1 WLR 344, CA.

Stanford v UK (1994) Times, 8 March, ECHR.
Sweeney v HM Advocate (1893) 21 R (J) 44, Ct of Justiciary.
Van Geyseghem v Belgium App No 26103/95 (21 January 1999, unreported), ECHR.


Appeal
Anthony William Jones appealed with leave of the Appeal Committee of the House of Lords given on 27 June 2001 from the order of the Court of Appeal (Rose L), Hooper and Goldring JJ) on 31 January 2001 ([2001] EWCA Crim 168, [2001] 3 WLR 125, [2001] All ER (D) 256) dismissing his appeal against his conviction in the Crown Court at Liverpool on 9 October 1998 of conspiracy to rob, after a trial in his absence, before Judge Holloway and a jury. The Court of Appeal certified that a point of law of general public importance, set out at [1], below, was involved in its decision. The facts are set out in the opinion of Lord Bingham of Cornhill.

Stephen Solley QC and Graham Brodie (instructed by Sharpe Pritchard as agents for Quinn Melville, Liverpool) for the appellant.
David Perry and Duncan Penny (instructed by the Crown Prosecution Service) for the Crown.

Their Lordships took time for consideration.

20 February 2002. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, the question before the House, rightly certified by the Court of Appeal (Criminal Division) ([2002] EWCA Crim 168, [2001] 3 WLR 125, [2001] All ER (D) 256 (Jan)) as one of general public importance, is: ‘Can the Crown Court conduct a trial in the absence, from its commencement, of the defendant?’ To that question the Court of Appeal gave an affirmative answer, while emphasising
that the discretion to proceed with a trial in the absence, from the beginning, of the defendant is one to be exercised with extreme care and only in the rare case where, after full consideration of all relevant matters, including in particular the fairness of a trial, the judge concludes (at [22]) that the trial should proceed.

[2] The agreed facts are brief. On 18 August 1997 a robbery took place at a post office in Liverpool in the course of which some £87,000 was stolen. The appellant (Mr Jones) was arrested nearby shortly afterwards and was charged. On 3 December 1997 he and a co-defendant, Mr Roberts, were committed on bail for trial at the Crown Court in Liverpool. In January 1998 both defendants were arraigned and pleaded not guilty. A trial date of 9 March 1998 was fixed but vacated and replaced with a trial date of 1 June 1998. On 1 June 1998, neither the appellant nor his co-defendant surrendered to the Crown Court for trial and warrants were issued for their arrest. The trial was relisted to commence on 5 October 1998. Neither the appellant nor his co-defendant had been arrested by that date, and neither had surrendered. The case was adjourned to the following day, when it was listed for trial before Judge Holloway. The appellant and his co-defendant had still not been arrested and they had still not surrendered. The legal representatives acting for the appellant had previously withdrawn from the proceedings in light of his failure to attend on 1 June 1998, and at the hearing on 6 October those representing the co-defendant also withdrew from the proceedings.

[3] The transcript of the hearing on 6 October shows that the initial reaction of the judge, based on instinct and long experience, was that a trial could not begin in the absence of a defendant, whatever the reason for his absence. The judge showed obvious reluctance to embark on the trial in those circumstances. It was, however, urged upon him that further delay would be very unfair to a large body of witnesses, some of whom had undergone a very traumatic experience, and after reference to the decided cases he ruled that the trial should begin, taking the view that the defendants had deliberately frustrated the attempt of the prosecuting authorities to have the case finally concluded. He indicated that anything of advantage to the defendants would be highlighted during the evidence and that any material of assistance to the defendants would be put before the jury. The trial accordingly proceeded and the judge in his summing up warned the jury not to hold the absence of the defendants against them.

[4] On 9 October 1998 both the appellant and his co-defendant were convicted on unanimous verdicts of conspiracy to rob, and on the same day the judge sentenced each of them to 13 years' imprisonment. It was not until 14 months later, at the end of December 1999, that the appellant was arrested. He was brought before the court and admitted his failure to surrender to custody. At a hearing before Judge Holloway on 4 January 2000, the appellant was sentenced to serve 12 months' imprisonment for his failure to surrender to custody, concurrently with the sentence already imposed upon him for conspiracy to rob. The appellant sought leave to appeal against conviction and, on refusal by the single judge, renewed his application to the full court. The renewed application was listed to be heard on 16 January 2001, with other appeals raising a similar issue. The appellant was represented by leading and two junior counsel at that

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Editor's note: Paragraph [22] of the Court of Appeal's judgment is not fully set out in their Lordships' opinions. For ease of reference, we have set it out in full as an appendix at the end of the opinions.
hearing when leave to appeal was granted and his appeal heard. It was however
dismissed on 31 January 2001. Having ruled on the issue of principle, the Court
of Appeal considered the appellant’s case and (at [41]) said:

‘As the judge made clear to the jury in summing up, the only possible
explanations of the forensic evidence were either guilt or that there had been
a massive police conspiracy to contaminate the defendant’s clothing before
it was examined by the forensic science laboratory. Although the defendant,
now in custody, has been present at his appeal and able to instruct the
solictors and leading counsel who now represent him, no submission in
support of the second explanation has been advanced to this court. Nor is it
suggested that, if he had attended his trial, he could or would have provided
an innocent explanation for the contamination of his clothing, his presence
in the vicinity of the robbery or fleeing from the police, or that he was
unconnected with the walkie-talkie found near the scene. In our judgment
there is no reason, in all these circumstances, to regard his conviction as
unsafe or his trial as unfair and accordingly his appeal against conviction is
dismissed.’

No application to call fresh evidence was made to the Court of Appeal. At the
hearing on 4 January 2000 it was acknowledged by counsel representing the
appellant that his failure to appear on the date fixed for trial had been deliberate.
It was not suggested either at that hearing or in the Court of Appeal that he had
been unaware of his obligation to appear on the date fixed for the trial or that he
had been unaware of that date or that he had been unaware of the likely
consequences if he did not appear.

[5] The certified question raises a question of principle, but it fails to be
answered in the factual context of this case. It is particularly important to note
that the appellant was arraigned and pleaded not guilty in January 1998, but that
his trial did not then commence (see R v Tonner [1985] 1 All ER 807, [1985] 1 WLR
344). He was bailed to appear at his trial on 1 June 1998. He had the benefit of
legal aid to instruct, and did instruct, solicitors and counsel to represent him at his
trial. He knew the date of the trial and of his obligation to attend and deliberately
decided to absent himself for reasons of his own. He had no reason to believe that
the trial would not proceed in his absence or that his legal representatives would
be able to represent him if he did not appear.

[6] For very many years the law of England and Wales has recognised the
right of a defendant to attend his trial and, in trials on indictment, has imposed an
obligation on him to do so. The presence of the defendant has been treated as a
very important feature of an effective jury trial. But for many years problems
have arisen in cases where, although the defendant is present at the beginning of
the trial, it cannot (or cannot conveniently or respectably) be continued to the
end in his presence. This may be because of genuine but intermittent illness of
the defendant (as in R v Abraham (1895) 21 VLR 343 and R v Howson (1981) 74 Cr
App R 172); or misbehaviour (as in R v Berry (1897) LT Jo 110 and R v Browne
(1906) 70 JP 472); or because the defendant has voluntarily absconded (as in R v
Jones (RFW) (No 2) [1972] 2 All ER 731, [1972] 1 WLR 887 and R v Shaw (Elvis)
(1980) 2 All ER 433, [1980] 1 WLR 1526). In all these cases the court has been
recognised as having a discretion, to be exercised in all the particular
circumstances of the case, whether to continue the trial or to order that the jury
be discharged with a view to a further trial being held at a later date. The
existence of such a discretion is well-established, and is not challenged on behalf of the appellant in this appeal. But it is of course a discretion to be exercised with great caution and with close regard to the overall fairness of the proceedings; a defendant afflicted by involuntary illness or incapacity will have much stronger grounds for resisting the continuance of the trial than one who has voluntarily chosen to abscond.

[7] In *R v Abrahams* (1895) 21 VLR 343 at 347 Williams J opined that if an accused person failed to appear at trial and was found, when the trial came on, to have absconded, he had clearly waived his right to be present and the prosecution might elect to go on with the trial in his absence; in such event, the judge would exercise his discretion whether to allow the trial to continue, paying particular attention to whether the defendant was represented. But those were not the facts of that case, and these observations must be treated as obiter. It was not until 1991 that the lawfulness of commencing a trial on indictment in the absence of the defendant came before the court as a matter for decision. It may well be that the more restrictive approach taken in earlier days towards the bailing of defendants charged with serious offences helped to ensure that such defendants did appear at their trials. The mandatory terms of the Bail Act 1976 have led to the grant of bail even to defendants, such as the appellant, who might well be thought suitable subjects for custodial restraint pending trial. Be that as it may, the issue fell to be decided in *R v Jones, Planter and Pengelly* [1991] Crim LR 856. In that case three defendants stood trial charged with a number of offences, but after some days, two of the defendants, who were on bail, absconded and the recorder aborted the trial against all three defendants and discharged the jury. When the case was listed to be tried on a second occasion, one defendant appeared and the other two did not. The trial judge ordered that the trial should begin against the absent defendants as well as the defendant who was present, and on appeal it was argued that he should not have begun the trial against the absent defendants. That contention was rejected. As appears from the transcript of the judgment of Lord Lane CJ, giving the judgment of the court, it was held to be quite plain in principle that there was a discretion in the judge to order a trial to continue, or indeed to start, not only where a person had voluntarily absented himself but also, as Griffiths LJ had held in *R v Howson* (1981) 74 Cr App R 172, where he had been involuntarily absent. A similar ground of appeal of appeal was advanced, unsuccessfully, in *R v Donnelly* (12 June 1997, unreported). The House must now decide whether it should overrule this authority as being inconsistent with Strasbourg jurisprudence, or contrary to principle, or apt in practice to work injustice. Counsel for the appellant submits that the authority should be overruled on all those grounds.

[8] The European Court of Human Rights and the Commission have repeatedly made clear that it regards the appearance of a criminal defendant at his trial as a matter of capital importance (see, for example *Poitrimol v France* (1993) 18 EHRR 130 at 146 (para 35); *Pelladooh v Netherlands* (1994) 19 EHRR 81 at 94 (para 40); *Lala v Netherlands* (1994) 18 EHRR 586 at 597 (para 33)). That court has also laid down (1) that a fair hearing requires a defendant to be notified of the proceedings against him (see *Colozza v Italy* (1985) 7 EHRR 516 at 523–524 (para 28); *Broziczek v Italy* (1989) 12 EHRR 371); (2) that a person should as a general principle be entitled to be present at his trial (see *Ekbatani v Sweden* (1988) 13 EHRR 504 at 509 (para 25)); (3) that a defendant in a criminal trial should have the opportunity to present his arguments adequately and participate effectively (see
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(a) *Bustlin v Germany* (1978) 14 DR 64 at 145; *Stanford v UK* (1994) Times, 8 March; 
(4) that a defendant should be entitled to be represented by counsel at trial and on 
appeal, whether or not he is present or has previously absconded (see *Delcourt v 
Belgium* (1970) 1 EHRR 355 at 366–367 (para 25); *Potrimitol’s case* (at 146, 147 
(paras 34, 38)); *Pelladoah’s case* (at 94 (para 40)); *Lala’s case* (at 597–598 (paras 
33–34)); *Van Geyseghem v Belgium App No 26103/95* (21 January 1999, unreported) 
(b) (para 34); *Omar v France* (1998) 29 EHRR 210 at 233 (paras 41–42)). The right to 
be defended has also been described by the European Court of Justice of the 
European Communities as a fundamental right deriving from the constitutional 
traditions common to the member states of the European Union (see *Krombach v 

(9) All these principles may be very readily accepted. They are given full effect 
by the law of the United Kingdom. But the European Court of Human Rights has 
ever found a breach of the European Convention for the Protection of Human 
Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights 
Act 1998) where a defendant, fully informed of a forthcoming trial, has 
voluntarily chosen not to attend and the trial has continued. In *Bustlin’s case* 
(1978) 14 DR 64, in which proceedings were continued during the absence of the 
defendants caused in large measure by self-induced illness, the proceedings were 
held to have been properly continued. In *Potrimitol’s case* (1993) 18 EHRR 130 at 
145 (para 31) the court questioned whether a full hearing on appeal could be 
required by a defendant who had waived his right to appear and defend himself 
at trial. In *Van Geyseghem’s case* (para 28) the court was not concerned that the 
applicant had not wished to avail herself of her right to attend an appeal hearing.

In a concurring opinion in that case Judge Bonello held that the presence of a 
defendant during his trial was basically his right, not his obligation. There is 
nothing in the Strasbourg jurisprudence to suggest that a trial of a criminal 
defendant held in his absence is inconsistent with the convention.

(10) In turning to general principle, I find it hard to discern any principled 
distinction between continuing a trial in the absence, for whatever reason, of a 
defendant and beginning a trial which has not in law commenced. If, as is 
accepted, the court may properly exercise its discretion to permit the one, why 
should it not permit the other? It is of course true that if a trial has begun and run 
for some time, the inconvenience to witnesses of attending to testify again on a 
later occasion, and the waste of time and money, are likely to be greater if the trial 
is stopped than in the case of a trial that has never begun. But these are matters 
which, however relevant to the exercise of discretion, provide no ground for 
holding that a discretion exists in the one case and not in the other. The common 
law of Scotland, as I understand, provided, and s 92(1) of the Criminal Procedure 
(Scotland) Act 1995 now stipulates, that no part of a trial on indictment may take 
place outwith the presence of the accused. The law of England and Wales, while 
conferring a right and imposing an obligation on the defendant to be present at a 
trial on indictment, has never been held to include any comparable rule. If a 
criminal defendant of full age and sound mind, with full knowledge of a 
forthcoming trial, voluntarily absents himself, there is no reason in principle why 
his decision to violate his obligation to appear and not to exercise his right to 
appear should have the automatic effect of suspending the criminal proceedings 
against him until such time, if ever, as he chooses to surrender himself or is 
apprehended.
[11] Counsel for the appellant laid great stress on what he submitted was the inevitable unfairness to the defendant if a trial were to begin in his absence after he had absconded. His legal representatives would be likely to regard their retainer as terminated by his conduct in absconding, as happened in this case. Thus there would be no cross-examination of prosecution witnesses, no evidence from defence witnesses, and no speech to the jury on behalf of the defendant. The judge and prosecuting counsel, however well-intentioned, could not know all the points which might be open to the defendant. The trial would be no more than a paper exercise (as Judge Holloway at one point described it) almost inevitably leading to conviction. The answer to this contention is, in my opinion, that one who voluntarily chooses not to exercise a right cannot be heard to complain that he has lost the benefits which he might have expected to enjoy had he exercised it. If a defendant rejects an offer of legal aid and insists on defending himself, he cannot impugn the fairness of his trial on the ground that he was defended with less skill than a professional lawyer would have shown. If, after full professional advice, he chooses not to exercise his right to give sworn evidence at the trial, he cannot impugn the fairness of his trial on the ground that the jury never heard his account of the facts. If he voluntarily chooses not to exercise his right to appear, he cannot impugn the fairness of the trial on the ground that it followed a course different from that which it would have followed had he been present and represented.

[12] Considerations of practical justice in my opinion support the existence of the discretion which the Court of Appeal held to exist. To appreciate this, it is only necessary to consider the hypothesis of a multi-defendant prosecution in which the return of a just verdict in relation to any and all defendants is dependent on their being jointly indicted and jointly tried. On the eve of the commencement of the trial, one defendant absconds. If the court has no discretion to begin the trial against that defendant in his absence, it faces an acute dilemma: either the whole trial must be delayed until the absent defendant is apprehended, an event which may cause real anguish to witnesses and victims; or the trial must be commenced against the defendants who appear and not the defendant who has absconded. This may confer a wholly unjustified advantage on that defendant. Happily, cases of this kind are very rare. But a system of criminal justice should not be open to manipulation in such a way.

[13] I would accordingly answer Yes to the certified question and dismiss this appeal. In doing so I would stress, as the Court of Appeal did in that the discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution (see [2001] 3 WLR 125 at (22)). If the absence of the defendant is attributable to involuntary illness or incapacity it would very rarely, if ever, be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant is represented and asks that the trial should begin. The Court of Appeal’s checklist of matters relevant to exercise of the discretion (at [22](3)) is not of course intended to be comprehensive or exhaustive but provides an invaluable guide. I would add two observations only.

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

[15] Secondly, it is generally desirable that a defendant be represented even if he has voluntarily absconded. The task of representing at trial a defendant who is not present, and who may well be out of touch, is of course rendered much more difficult and unsatisfactory, and there is no possible ground for criticising the legal representatives who withdrew from representing the appellant at trial in this case. But the presence throughout the trial of legal representatives, in receipt of instructions from the client at some earlier stage, and with no object other than to protect the interests of that client, does provide a valuable safeguard against the possibility of error and oversight. For this reason trial judges routinely ask counsel to continue to represent a defendant who has absconded during the trial, and counsel in practice accede to such an invitation and defend their absent client as best they properly can in the circumstances. The current legal aid regulations provide for that contingency (see the Criminal Defence Service (General) (No 2) Regulations 2001, SI 1437/2001). It is in my opinion a practice to be encouraged when the defendant absconds before the trial begins. But the failure to follow it here gives no ground for complaint by the appellant. The Court of Appeal said in their judgment (at [41]): ‘This defendant, as it seems to us, had, clearly and expressly by his conduct, waived his right to be present and to be legally represented.’ That conclusion has not been challenged on behalf of the appellant and is in my opinion a tenable conclusion. While there is no direct evidence to show that the appellant knew what the consequences of his absconding would be, there is nothing to suggest a belief on his part that the trial would not go ahead in his absence or that, although absent, he would continue to be represented. His decision to abscond in flagrant breach of his bail conditions could reasonably be thought to show such complete indifference to what might happen in his absence as to support the finding of waiver. I note, however, the reservations expressed by my noble and learned friends concerning the finding of waiver, and recognise the force of their reasoning. If, contrary to my opinion, the Court of Appeal were wrong to make the finding of waiver, and I am wrong to accept it, I would none the less hold that the appellant enjoyed his convention right to a fair trial, for all the reasons given by my noble and learned friend Lord Rodger of Earlsferry.

LORD NOLAN.

[16] My Lords, I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Bingham of Cornhill. For the reasons he gives, I too would dismiss this appeal. In view of the importance of the case, however, I would wish to add a few words of my own on two aspects of the matter.

[17] First, in common, I believe, with all of your Lordships, I would hold that under English law the discretion of the trial judge to proceed with the trial in the absence of the defendant exists in principle (subject to the satisfaction of all the appropriate safeguards) not only after but before the trial has begun, though naturally it will have to be exercised with even greater care in the latter case. The decision on this point of the Court of Appeal in R v Jones, Planter and Pengelly [1991] Crim LR 856 was in my judgment correct and should be upheld.

[18] Secondly, I would not for my part criticise the conclusion of the Court of Appeal ([2001] EWCA Crim 168 at [41], [2001] 3 WLR 125 at [41], [2001] All ER (D) 256 (Jan) in their judgment, that 'this defendant ... had, clearly and expressly by his conduct, waived his right to be present and to be legally represented.' In
the case of an absconding defendant the critical question for the judge, as it seems to me, is whether the defendant has deliberately and consciously chosen to absent himself from the court. If so, then normally, no doubt, the judge would make an express finding to that effect, and would summarise his reasons for the finding. In the present case the judge made no such express finding but clearly drew an equivalent inference. The point need not, however, detain us, because no objection has been taken to the inference drawn by the judge. That being so, it would seem to me that, where, as in the present case, a defendant has had the advantage of legal advice and representation at all stages prior to the commencement of the trial, his deliberate and conscious choice to take no further part in the proceedings could permissibly be described as a waiver of his rights of attendance and of legal representation at his trial, both at common law and under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). But acknowledging the force of the views expressed by my noble and learned friends Lord Hoffmann and Lord Rodger of Earlsferry, and bearing in mind the near impossibility of the trial judge’s task, if he had to be satisfied of the defendant’s knowledge of the full extent of his rights before deciding whether those rights had been waived, I would prefer to express my conclusion in this appeal in agreement with my noble and learned friend Lord Bingham on this broader basis that, even if there were no waiver, the appellant none the less enjoyed the convention right to a fair trial.

LORD HOFFMANN.

[19] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Rodger of Earlsferry. I agree with both of them. Like Lord Rodger, I am not comfortable with the notion that the defendants waived their rights under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Waiver requires consciousness of the rights which have been waived. I agree that there is nothing to show that the defendants must have known that if they did not turn up on the date set for trial, it would proceed in their absence and without representation on their behalf. I would prefer to say that they deliberately chose not to exercise their right to be present or to give adequate instructions to enable lawyers to represent them.

[20] But I do not read the European cases as laying down that a trial may proceed in the absence of the accused only if there has been a waiver of the right to a fair trial. The question in my opinion is not whether the defendants waived the right to a fair trial but whether in all the circumstances they got one. It is whether on the particular facts of the case the proceedings, taken as a whole and including the appellate process, satisfied the requirements of the convention. That, as I understand it, is the question which the European jurisprudence requires to be answered. For the reasons given by my noble and learned friends, with which I entirely agree, I think that the Court of Appeal ([2001] EWCA Crim 168, [2001] 3 WLR 125, [2001] All ER (D) 256 (Jan)) was right to hold that there had been no infringement of art 6. I would therefore dismiss the appeal.
LORD HUTTON.

[21] My Lords, a person charged with a criminal offence has a right to be present at his trial and to defend himself in person or by instructing counsel to represent him. This right is recognised by the common law and by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

[22] In the present case the appellant was granted bail and, with full knowledge of the date on which his trial for the offence of robbery was due to commence, absconded before that date so that he was not present in court on that date and on subsequent dates on which his trial was relisted to commence. The judge decided to proceed with the trial and the appellant was convicted by the jury. The issue which arises on this appeal is whether in such circumstances the Crown Court can conduct a trial in the absence of the defendant.

[23] I consider that the authorities make it clear that a court has power to proceed with a trial when the defendant has deliberately absconded before the commencement of the proceedings to avoid trial, although it is clear that the power to proceed in such circumstances should be exercised by the trial judge with great care.

[24] The authorities also show that there are two stages in the approach to be taken to the matter. The first stage is that although the defendant has a right to be present at his trial and to put forward his defence, he may waive that right. The second stage is that where the right is waived by the defendant the judge must then exercise his discretion as to whether the trial should proceed in the absence of the defendant.

[25] The matter was discussed in the judgments of the court in Victoria in R v Abrahams (1895) 21 VLR 343 where the defendants were present at the commencement of the trial but were absent at a later stage due to illness. Williams J said (at 346):

"The primary and governing principle is, I think, that in all criminal trials the prisoner has a right, as long as he conducts himself decently, to be present, and ought to be present, whether he is represented by counsel or not. He may waive this right if he so pleases, and may do this even in a case where he is not represented by counsel. But then a further and most important principle comes in, and that is, that the presiding Judge has a discretion in either case to proceed or not to proceed with the trial in the accused's absence."

[26] Hood J stated (at 353):

"All that we are here deciding, in my opinion, is that the presiding Judge may in misdemeanours proceed without the presence of the prisoner, where the absence is voluntary. He has in law a discretion, but that discretion should be exercised with great reluctance, and with a view rather to the due administration of justice than to the convenience or comfort of anyone."

[27] In R v Jones (REW) (No 2) [1972] 2 All ER 731, [1972] 1 WLR 887 the defendant absconded during his trial which the judge ordered should continue in his absence. He was convicted and eight months after his conviction applied for an extension of time for leave to appeal, and his application was refused by the Court of Appeal. The Court of Appeal held that the judge had exercised his
discretion properly and cited with approval the judgments in R v Abrahams. Roskill LJ stated:

“This court respectfully adopts that language as correctly stating the position. The only question this court has to decide is whether Judge Gillis exercised his discretion properly. In the view of this court he plainly did so exercise it ... To grant this application at this stage would, in the view of this court, be to put a premium on prisoners jumping bail; it may even have the effect of encouraging others to do so. It may also have as a side-effect, increasing the reluctance of a court in a very long trial to grant bail lest the applicant's conduct be repeated by others. To put a premium on jumping bail is something which this court is not for one moment prepared to countenance. This application is entirely without merit, notwithstanding the skill with which it has been advanced. There is no ground whatever for granting this extension of time. The applicant has brought this entirely on his own head, and he must now take the consequences. The application therefore is refused.’ (See [1972] 2 All ER 731 at 736, [1972] 1 WLR 887 at 892.)

[28] In R v Jones, Planter and Pengelly [1971] Crim LR 856, where the defendants were absent from the commencement of the trial, Lord Lane CJ stated:

‘It is quite plain in principle that there is a discretion in the judge to order a trial to continue or indeed to start in these circumstances, not only where a person voluntarily absents himself, but also, as the judgment of Griffiths LJ in R v Howson (1981) 74 Cr App R 172 indicates, where he has involuntarily been absent.’

[29] Mr Solley QC, for the appellant, relied on the decision of the United States Supreme Court in Crosby v US (1993) 506 US 255. In that case the defendant did not appear at the commencement of his trial and the trial proceeded in his absence and he was convicted. The Supreme Court allowed his appeal. However I do not consider that that decision supports the appellant’s case because it was based on r 43 of the Federal Rules of Criminal Procedure which provided:

‘(a) PRESENCE REQUIRED. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,

(1) is voluntarily absent after the trial has commenced ...’

Blackmun J stated (at 262):

‘The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial. Because we find Rule 43 dispositive, we do not reach Crosby’s claim that his trial in absentia was also prohibited by the Constitution.’
Moreover, there are other statements by United States appellate courts cited in the judgment of the Supreme Court which give support to the view that, in the absence of a provision such as s 43, there is no reason of substance for distinguishing between the absence of a defendant at the commencement of a trial and his absence at a later stage. Thus in Crosby's case itself the intermediate appellate court stated:

'It would be anomalous to attach more significance to a defendant's absence at commencement than to absence during more important substantive portions of the trial.' (See (1990) 917 F 2d 362 at 365.)

And in Virgin Islands v Brown (1975) 507 F 2d 186 at 189 another appellate court stated that there are no 'talismanic properties which differentiate the commencement of a trial from later stages'.

Mr Solley also sought to rely on the jurisprudence of the European Court of Human Rights. Article 6 of the convention provides that in the determination of any legal charge against him a person is entitled to a fair trial and art 6(3)(c) provides that a person has the right 'to defend himself in person or through legal assistance of his own choosing'.

In my opinion the jurisprudence of the Court of Human Rights does not assist the appellant. There is no decision of that court relating to a case where a defendant, with full knowledge of the date on which it was to commence, deliberately absconded before his trial at which, if he had been present, he would have been able to exercise the right given by art 6(3)(c).

In Colozza v Italy (1985) 7 EHR 516 where the applicant was declared by a judge to be untraceable and it was not established that the notice of the criminal proceedings had been personally served on him and he was convicted in his absence, the court stated (at 524-525):

'... In conclusion, the material before the Court does not disclose that Mr. Colozza waived exercise of his right to appear and to defend himself or that he was seeking to evade justice. It is therefore not necessary to decide whether a person accused of a criminal offence who does actually abscond thereby forfeits the benefit of the rights in question ...'

As was pointed out by the Government, the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time limit for prosecution or a miscarriage of justice. However, in the circumstances of the case, this fact does not appear to the Court to be of such a nature as to justify a complete and irreparable loss of the entitlement to take part in the hearing.'

In Poitrinal v France (1993) 18 EHRR 130 at 145 (para 31) the court stated:

'Proceedings held in an accused's absence are not in principle incompatible with the Convention if the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact. It is open to question whether this latter requirement applies when the accused has waived his right to appear and to defend himself, but at all events such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance.'
This defendant, as it seems to us, had, clearly and expressly by his conduct, waived his right to be present and to be legally represented. Thereafter the course of the trial was, as it seems to us, as fair as it could be, the defendant having waived those rights. Prosecuting counsel (whose duty under paragraph 11.1 of the Bar Council's Code of Conduct was not to attempt to obtain a conviction by all means at his command and not to regard himself as appearing for a party, but to lay before the court fairly and impartially the whole of the facts which comprised the case for the prosecution) and the judge did all they reasonably could to ensure that the trial was fair, in the unusual circumstances prevailing.' (See [2001] 3 WLR 125 at [41]).

Secondly, the position of the defendant was safeguarded by his right to appeal against his conviction to the Court of Appeal. He exercised this right and the Court of Appeal conducted a careful review of the evidence against him and concluded at [41] of its judgment that 'the case against the defendant was in our view overwhelming'.

[36] My noble and learned friends Lord Hoffmann and Lord Rodger of Earlsferry have expressed reservations about the finding of the Court of Appeal as to waiver. As I have stated I consider, with respect, that the Court of Appeal was entitled to make this finding. But I would add that it is self-evident that the right given by art 6(3)(c) of the convention to the defendant to defend himself in person or to instruct counsel to defend him is a right to be exercised by the defendant himself—it cannot be exercised on his behalf by someone else. Therefore even if the finding could not be made in the present case that there was an unequivocal waiver by the defendant, I consider that where no defence was put forward at the trial in consequence of the defendant's deliberate decision not to be present, there was no violation of the right given to him by art 6(3)(c)—rather the defendant chose not to exercise that right. As Salmon J stated in delivering the judgment of the Divisional Court (constituted by himself, Lord Parker CJ and Ashworth J) in Re C, born- Waterfield [1960] 2 All ER 178 at 181, [1960] 2 QB 498 at 508–509:

'The applicant was treated with complete fairness and indeed was shown every consideration by the French court. He was fully apprised of the very strong case that he had to meet, and repeatedly given the fullest opportunity of meeting it. He elected not to do so and on three separate occasions, without any excuse, he failed to appear in person before the French court. Accordingly, it certainly does not lie in his mouth to complain that the case was dealt with in his absence.'
Whilst this observation was not made with reference to art 6(3)(c) I consider that it is equally applicable to it.

[37] Mr Solley further relied on the principle stated in R v Bertrand (1867) LR 1 PC 520 at 534 (which was referred to in the judgments in R v Abrahams (1895) 21 VLR 343):

'It is a mistake, moreover, to consider the question only with reference to the Prisoner. The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party. This remark very much lessens the importance of a Prisoner’s consent, even when he is advised by Counsel, and substantially, not, of course, literally, affirms the wisdom of the common understanding in the profession, that a Prisoner can consent to nothing.'

Mr Solley submitted that the public interest in the proper administration of justice free from doubt or chance of miscarriage required a defendant to be present at his trial at its commencement or at any rate for some part of it, to ensure that the case of the prosecution was properly challenged and tested, and that there could not be public confidence in the reliability of a conviction if the defendant had not been present at his trial.

[38] The discretion of a judge to proceed with a trial in the absence of the defendant is one to be exercised with great care, but in my opinion there can be circumstances where in the interests of justice a judge is entitled to decide to proceed, particularly when the defendant has deliberately absconded to avoid trial. Some of the circumstances in the present case were described as follows by the trial judge, Judge Holloway, in his careful ruling:

"There are 35 live witnesses due to give evidence today, some of whom are civilians who must have experienced a quite terrifying event when they were held up by armed, masked men and this robbery took place. Some of the civilian witnesses have already indicated that they are less than happy to attend on a future occasion. Some of the prosecution witnesses have already been dispensed with because of the concern that they have about continual delay ... In normal circumstances I am bound to say that my reaction initially to the proposition was that it would seem wrong to pursue any criminal trial, and particularly one as serious as this, in the absence of either a defendant or indeed in the absence of any assistance from counsel or solicitors on their behalf. But on the other hand there is another competing interest which seems to me to take precedence over that particular one and that is that there are 35 witnesses outside court who have come here for the second time today and who are anxiously awaiting the prospect of having to give evidence and in view of the defendants’ deliberate absenting of themselves the trauma that some of them have experienced during the course of this incident is unlikely to go away until such time as they actually have had this case finally dealt with either with the defendants pleading guilty, which is obviously not their intention, or indeed the trial taking place and a jury coming to a decision ... this is a strong case for the prosecution where clearly the defendants have frustrated and deliberately frustrated the authorities in trying to have this case finally concluded ... I cannot in all conscience feel it is appropriate that those witnesses should be made to wait for what could be 6, 12, 18 months, two years or some other period of time well into the future by which time some may not be willing to give evidence, some may have
passed on, some may have gone to another part of the world, emigrated; all sorts of problems can arise which would then be to the advantage of these absent defendants.

In these circumstances I consider that the judge was entitled to come to the conclusion that the trial should proceed and, in my opinion, as I have stated, the public interest in a just result was safeguarded by the fair and careful way in which the judge and prosecuting counsel conducted the trial and by the right of the defendant to challenge his conviction in the Court of Appeal.

[39] I am in respectful agreement with my noble and learned friend Lord Bingham that the matters relevant to the exercise of the discretion set out by the Court of Appeal in para [22](5) of its judgment constitute a most valuable guide, and I further agree with the observations which he makes in respect of that list in his speech at [14], [15].

[40] For the reasons which I have given I would answer the certified question in the affirmative and would dismiss this appeal.

LORD RODGER OF EALSFERRY.

[41] My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Bingham of Cornhill, in draft. I agree with him that the appeal should be dismissed, but on the matter of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) I would reach that result by another route.

[42] As Lord Bingham has explained, there is a tract of authority showing that for many years English courts have had the power to continue a criminal trial in the absence of the defendant. Understandably, counsel for the appellant did not seek to challenge these cases. While there may be pragmatic arguments to suggest that there is a difference between a trial that begins in the absence of the defendant and a trial that begins with the defendant present but has to continue in his absence, I can identify no difference of principle between the two situations. That being so, as a matter of principle, there must indeed be power for the English courts to start a trial when the defendant absconds. That power does not appear to have been explicitly recognised in the cases until the decision of the Court of Appeal (Criminal Division) in R v Jones, Plantar and Pengelly [1991] Crim LR 856. In the present case the Court of Appeal ([2002] EWCA Crim 168 at [22](3), [2001] 3 WLR 125 at [22](3), [2001] All ER (D) 256 (Jan)) (Rose LJ) reviewed the authorities and concluded that in English law 'the trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives'. Having had the advantage of considering the analysis of the English authorities in Lord Bingham's speech, I would respectfully agree with it and with Rose LJ's conclusion as to the effect of those authorities.

[43] In arguing that there was no power to allow a trial to begin in the absence of the defendant, counsel for the appellant drew attention to the position in Scotland where, subject to one exception, under solemn procedure the accused must be present throughout his trial. Under that system it is indeed impossible for the court to begin or continue a trial when the accused absconds. The controlling philosophy of Scots law on this matter is the same today as 200 years ago when, in his Commentaries on the Law of Scotland, Respecting Crimes (1844), Vol II, pp 269–270, Baron Hume wrote:
Let us now suppose, that the accused is absent at calling the libel, but the
prosecutor appears and insists. With one exception, which was introduced
in evil times, in cases of treason, it has been our invariable custom, that on
no sort of proceeding can here take place, as for trial of the crime libelled. It
is considered, that unless the accused is present to take charge of his own
interest, there can be no security for doing full justice to his case; for pleading
all his defences, bringing forward all his evidence, stating all objections to the
evidence on the other part, and still less for taking advantage of all those
pleas and grounds of challenge, which may arise in the course of the
proceedings in the trial. Besides, (though this is certainly an inferior
consideration,) the Judges ought not to be called on to apply or declare the
law, except in circumstances which afford the means of carrying their
sentence into effect. On these grounds, the peremptory rule has long been
settled, of requiring the personal presence of the pannel in every step, from
first to last, of the trial, with the exception only of continuations of the diet;
so that if he even withdraw at the last stage of all, after a verdict of guilty has
been returned against him, still the court cannot proceed to apply the
sentence of the law.

I refer also to Alison's Practice of the Criminal Law of Scotland (1833), p 349.
Although not mentioned by Hume, there was in fact some statutory support for
the rule in s 10 of the Criminal Justice Act 1587, providing, inter alia, that all the
witnesses and proof were to be 'allegit, ressonit and deducit to the assyse in
presence of the paittie accusit in face of judgement and na utheris wayes'. This
provision was, somewhat prosaically, consolidated in s 145(1) of the Criminal
Procedure (Scotland) Act 1975 as 'no part of a trial shall take place outwith the
presence of the accused' and is now to be found in s 153(1) of the Criminal
Procedure (Scotland) Act 1995. If, for instance, an accused falls ill during the trial
and cannot attend, the trial must be adjourned until he is fit or, if that is not
practicable, the diet must be deserted pro loco et tempore, authority being given
to the Crown to start fresh proceedings when the accused recovers. So the
requirement for the accused to be present at his trial is applied consistently.

[44] The only significant change to the Scottish system since Baron Hume's
time is that statute now confers a specific power on the trial judge to order the
accused to be removed if he misconducts himself so as to make it impossible for
a proper trial to take place. In the case of an unrepresented accused, the court
must appoint counsel or a solicitor to represent his interests during his absence
(see s 153(2)). This exception was enacted in 1980 after doubts had arisen as to
whether the judge had any such power at common law to allow a trial to proceed
in the accused's absence even where he was disrupting it. The contrast with the
flexible approach of English law could not be more stark.

[45] Hume was, of course, well aware of the risk that accused persons would
abscond and so make a trial impossible. He explains (Vol II, pp 270–271) how in
his day the courts tackled the problem by pronouncing a sentence of futiliation or
outlawry in order either to compel 'those wicked and dangerous persons, who
abscond owing to consciousness of their guilt' to appear in court or else to drive
them 'out of the country'. Alison's Practice, (pp 349–354) is to the same effect.
The system of futiliation was still being operated at least as late as the end of the
nineteenth century (see HM Advocate v Monson (1893) 1 Adam 114 at 116 and
Sweeney v HM Advocate (1893) 21 R (J) 44). It was eventually abolished by s 15(2)
of the Criminal Justice (Scotland) Act 1949. Nowadays the penalty for failing to
appear for trial is somewhat less drastic. If on bail, the accused who fails to appear can be prosecuted for breach of the relevant condition of his bail. In solemn proceedings, the maximum sentence is imprisonment for two years. Alternatively, proceedings may be taken for contempt of court, again with a maximum sentence of two years' imprisonment. It would be idle to pretend that these sanctions are so effective that accused persons never fail to attend for trial and never abscond during their trial.

[46] Under the Scottish system, if an accused absconds before or during the trial or is taken ill during the trial and cannot attend, jurors and witnesses may well be inconvenienced. There is also a risk that recollections may fade before the accused is traced and brought back for trial. Sometimes, it is true, a trial has to proceed against only some of the accused when, ideally, all should have been tried together. Depending on the circumstances, that may be thought to affect the presentation of their case either by the Crown or by the other accused. But Scots law has always struck the balance in this way between the rights of the accused and these wider interests of justice. So courts and prosecutors accept the position—especially, perhaps, because dock identification of the accused is the norm and trials, which are structured accordingly, really require his presence. In any event in 1975, and again in 1995, Parliament endorsed the balance as previously struck by the law of Scotland. The significant point is that, for whatever reason, Parliament has never legislated in the same way for England and Wales to require the trial to take place in the presence of the defendant. More particularly, Parliament has refrained from doing so, even though the English courts have for many years been exercising a discretion to allow trials to be completed when the defendant is not present. The inference which I draw is that, for England and Wales, Parliament remains content for these matters to be regulated by the exercise of a judicial discretion, weighing the relevant factors, including, where appropriate, a defendant's flagrant decision to abscond.

[47] In describing the approach which courts should adopt in the light of the authorities on English law and on the convention, the first two principles which the Court of Appeal laid down were these:

'(1) A defendant has, in general, a right to be present at his trial and a right to be legally represented. (2) Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws instructions from those representing him. They may be waived in part if, being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.' (See [2001] 3 WLR 125 at [22].)

Applying those principles to the appellant's case, the Court of Appeal held (at [41]): 'This defendant, as it seems to us, had, clearly and expressly by his conduct, waived his right to be present and to be legally represented.' The attractions of that robust approach are obvious. For my part, however, I am not satisfied that in the circumstances of this case the appellant can be said to have waived these rights under art 6 of the convention.
The European Court of Human Rights has held in Poitrinal v France (1993) 18 EHRR 130 at 145 (para 31) that any waiver of a defendant's right to appear and to be represented at his trial—

'must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance.'

The court was there applying its previous decisions to the same effect in Pfeifer v Austria (1992) 14 EHRR 692 at 712 (para 37) and earlier cases. The Privy Council adopted that approach to waiver of a right to a fair hearing before an independent and impartial tribunal in Millar v Dickson 2002 SC (PC) 30. Lord Bingham of Cornhill held (at [31]) that for these purposes 'unequivocal' meant 'clear and unqualified'. A defendant could not waive a right if he was unaware that he could make the claim in question. I refer also to the opinion of Lord Hope of Craighead (see paras [54], [55]).

In this case I am unable to find anything in the acts of the appellant that would amount to a clear and unqualified election not to claim his rights under art 6 to be present or to be represented. Nor, of course, was there anything which could have acted as a safeguard attending any waiver of such important rights. Lord Bingham has pointed out that the appellant did not formally challenge the finding of the Court of Appeal that, by his conduct, he had waived these rights. None the less, the matter was aired in the course of the hearing before your Lordships. Moreover, it concerns the application of the appellant's convention rights and it is accordingly a matter about which the House must itself be satisfied.

The appellant and his co-defendant certainly knew that a trial was to take place in their case. It had originally been fixed for 9 March 1998 but that date was vacated at the instance of the defence. The defendants last attended the police station in accordance with the terms of their bail in March 1998. Neither appeared for trial on 1 June of that year. Nor did they attend for trial on 5 or 6 October, by which time it had become clear that they had both absconded in order to avoid standing trial. The appellant was not represented at the hearings in October.

These facts certainly justify the inference that the appellant knew that he would not be present when his trial was due to take place. That does not, in itself, justify the conclusion that he had waived his right to be present or to be represented at any trial of the charges against him. Such an inference could be drawn only if one could be satisfied that the appellant not only knew that the trial was due to take place when he would be absent, but also knew that it could take place even though he was not there and even though he was not represented. In Taylor v US (1973) 414 US 19 the United States Supreme Court felt able indeed to draw such an inference in a case where the defendant had absconded during his trial, leaving behind a judge, jury and witnesses ready to continue. In the circumstances of this case, however, neither inference can readily be drawn.

So far as the first is concerned, it is sufficient perhaps to notice that the initial reaction of the very experienced judge, Judge Holloway, was that no trial could take place in the absence of the defendants. He had never heard of such a thing and neither had the colleagues whom he consulted. An official at the Criminal Appeals Office thought that it might be possible—but he could not put his finger on a case. It would, I believe, be rash to attribute to the appellant
greater knowledge of the arcana of English criminal procedure than Judge Holloway and his colleagues actually possessed. Doubtless, the appellant would have been aware that, if eventually brought to justice, he would be punished for absconding to avoid trial. But I see no proper basis for going further and assuming that he would actually have known that he was liable to be tried and sentenced in his absence. I am accordingly unable to draw the conclusion that the appellant had unequivocally waived his right to be present at any trial.

[53] The inference that he had waived his right to representation at any trial of the charge against him is even more difficult. One would have to infer that the appellant knew that, if the court decided to proceed to try him in his absence, it would do so in a situation where no counsel or solicitor was there to represent him on the very serious charge of armed robbery. In fact, at the hearing on 6 October 1998, the appellant was unrepresented from the outset, while the counsel and solicitor for his co-defendant withdrew from acting at the hearing. We were told that, in certain other cases, when a trial has proceeded in the absence of the defendant counsel have agreed to remain in court and to act, even in a limited way, on behalf of the defendant. The Court of Appeal [2001] 3 WLR 125 at [22][5](v)) indeed envisaged that this might happen in future cases and that the presence or absence of representation would be a factor to be considered by the judge in deciding whether the trial should proceed in the absence of the defendant. There is nothing in the Court of Appeal's narrative of the facts to show whether the appellant knew that no counsel or solicitor would appear on his behalf at the hearing on 6 October or that the trial judge was likely to exercise his discretion by going on with the trial without the appellant being represented. In these circumstances I am again unable to conclude that, merely by deliberately absconding, the appellant had unequivocally waived his right under art 6(3)(c) of the convention to be represented by counsel at any trial of the charges against him.

[54] For these reasons I prefer to deal with the case on the basis that the appellant had not unequivocally waived his right to be present or to be represented under art 6(3)(c). His absence simply meant that he was not in a position to exercise either of these rights when the judge decided to proceed with the trial. The question then comes to be whether there has been a breach of the appellant's rights under art 6. As Mr Perry submitted, that question falls to be determined on a consideration of the whole of the proceedings, including those in the Court of Appeal.

[55] In arguing that the proceedings did not meet the requirements of art 6, Mr Solley referred to a number of decisions of the European Court of Human Rights. Lord Bingham has analysed them and I accordingly need not do so. While they provide useful guidance on particular points, the court has been at pains to emphasise that '[i]t is not the Court's function to elaborate a general theory in this area' (see Cezelzic v Italy (1985) 7 EHRR 516 at 524 (para 29)). In saying this, the court was recognising that the contracting states have many different systems of procedure. The means by which they secure a fair trial in the absence of the defendant are correspondingly various. Here the issue has to be determined by looking at the way in which the courts handled the problem under English criminal procedure and by deciding whether, in the result, the appellant can be said to have had a fair hearing. In that regard the decisions of the Court of Human Rights relating to very different procedures can be of only limited assistance.
The most striking feature of the trial in this case was, of course, that the defendants were not in court and there was no one to represent them. Mr Solley suggested that the significance of this could be gauged from Judge Holloway’s assessment that, for this very reason, the defendants were likely to be found guilty by the jury. By contrast, at the next stage, in the Court of Appeal, the appellant was present at the hearing. He was also represented by senior and junior counsel, just as he was represented by senior and junior counsel before your Lordships’ House. For these hearings he enjoyed the benefit of legal aid from public funds. The courts and legal system thus made no attempt to prevent him from being represented. In this respect his predicament is quite different, for instance, from that of the defendant in the proceedings before the appeal court at Aix-en-Provence in Portirinal v France (1993) 18 BHRR 130. Here, in the Court of Appeal ([2002] EWCA Crim 168, [2001] 3 WLR 125, [2001] All ER (D) 256 (Jan)) the appellant had every opportunity to exercise his rights to be present and to be represented. Mr Solley argued that this was too little, too late. But it is a matter to which your Lordships are entitled to attach considerable importance since it is plain that the representation was effective and that the Court of Appeal paid careful attention to the arguments advanced on behalf of the appellant. This is conclusively demonstrated not only by their meticulous judgment considering the points made by counsel, but also by the fact that, while the appellant’s appeal against conviction was refused, his appeal against sentence resulted in the sentence being reduced from 13 to 11 years’ imprisonment.

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

In the course of summarising the principles to be applied by courts in relation to the trial of a defendant in his absence, Rose LJ indicated (at [22](4)) that the discretion to allow a trial to take place or continue in the absence of the defendant—

‘must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.’

Lord Bingham has stressed this caution and I would do so too. I should also wish to associate myself with his comments as to the desirability of a defendant being represented even if he has voluntarily absconded. The decision of Judge Holloway to proceed with the trial in the absence of the defendants and in the absence of any representative was therefore exceptional. In taking it, he had regard to a number of factors. One, of course, was the fact that the defendants’ absence was not due to illness or some other misfortune but to a deliberate decision on their part to abscond. The judge also took into account the fact that there were 35 witnesses who had come to court for the second time and who were anxiously awaiting the prospect of giving evidence. Their trauma following the robbery would be unlikely to go away until the defendants’ guilt or innocence was determined in one way or another. If the trial did not proceed they would have to wait for an indefinite period, at the end of which some might not be willing to give evidence, some might have died and others might have emigrated. All kinds of problems could arise which would then be to the advantage of the
defendants. In having regard in this way to the potential interests of the victims, jurors and wider public as well as to the rights of the accused, the judge was acting consistently with the established jurisprudence on art 6. The Court of Human Rights has recognised that in an appropriate case the interests of the defence are balanced against those of witnesses or victims called upon to testify (see Doorson v Netherlands (1996) 22 EHRR 330 at 358 (para 70)). The wider public interest is always a factor to be kept in mind in applying art 6 (see Brown v Stott (Procureur Fiscal, Dunfermline) [2001] 2 All ER 97, [2001] 2 WLR 817). The judge’s decision to proceed with the trial in this case was, of course, one of the matters which the Court of Appeal examined. They considered various criticisms which counsel for the appellant had made of the judge’s decision but they concluded (at [41]):

‘In our judgment, the judge’s exercise of discretion is not susceptible to effective challenge. He directed himself correctly in accordance with the law. He had very clearly in mind the possible prejudice to the defence if the trial proceeded without the defendant being present or represented. He did not have regard to any irrelevant factor. He reached a conclusion to continue with the trial which, in the light of his inevitable finding that the defendant had deliberately absented himself from court and from contact with his lawyers many months before trial, was well within the ambit of his discretion.’

[59] The first thing to notice is, therefore, that in deciding to go ahead with the trial, the judge exercised a discretion which under English law will only rarely result in proceedings being taken in the absence of a defendant. The Court of Appeal examined the judge’s exercise of that discretion in the circumstances of this case and held that his decision to proceed was sound, being well within the ambit of what he could properly do, having regard to the various factors which he mentioned. The fact that a judge has to make a positive decision to allow a trial to proceed in the absence of a defendant and the fact that only in exceptional cases will it be proper to do so are fundamental elements of the scheme for ensuring that any such proceedings will be fair. The reasoned decision of the Court of Appeal that the judge was justified in proceeding with the trial in the particular circumstances of this case is therefore an initial pointer towards the fairness of these proceedings.

[60] In turning to examine the course of the trial, it is necessary to bear in mind the broad outline of the case against the appellant. The evidence is described by Rose LJ (at [37]). I therefore need mention only the salient points.

[61] The armed robbery happened at Euston Street Post Office in Liverpool. A police officer, PC Mangan, chased the appellant and arrested him in a yard about 500m away from the locus. The prosecution case was based not just on the evidence of the victims, bystanders and police officers but also on scientific evidence relating both to a jacket found near the yard and to the appellant’s clothes. Moreover, there was evidence that the robbers had been consulting to one another by radio. A walkie-talkie, like one which the appellant had bought some time before, was found near him. He was the holder of a licence for such a radio.

[62] In the face of this powerful body of evidence connecting him with the robbery there were only two possible ways in which the jury could have concluded that the appellant was not guilty. First, they might have concluded that he had been the victim of one or more dishonest policemen who had falsified the evidence, in particular by contaminating the clothing, to make it look as if the
situation where the defendants were neither present nor represented. The members of the jury were directed that they had to reach their verdict on the evidence which they had heard and on nothing else. They were not to speculate. These directions are of a familiar kind, but the judge stressed that, where the defendants were unrepresented, it was particularly important for the jury not to speculate. They were also told, specifically, that they must not speculate as to the reasons for the defendants’ absence and that they should not assume that the defendants’ failure to attend court in any way at all established that either or both of them were guilty. The jury should carefully assess the evidence as they would have done if the defendants had been present and had been represented by counsel. The judge also told the jury not to assume that the fact that the defendants had not been there to give evidence in any way at all helped the prosecution to prove their case. It was vitally important for the jury to remember that there was no burden placed on a defendant to prove that he was not guilty.

[67] These directions, carefully designed to deal with the particular situation that had arisen, were no mere formality. On the contrary, given the experience of judges and practitioners over many years and in various jurisdictions, it is proper to proceed on the basis that the jury, having taken an oath to do justice, will in fact have duly applied the directions when considering their verdicts. Indeed the system of trial by jury depends upon this assumption. I refer to the observations of Lord Hope in Montgomery v HM Advocate, Coulter v HM Advocate [2001] 2 WLR 779 at 810 and to the authorities which he cites. As he notes, the Court of Human Rights attaches importance to directions to a jury which are specifically designed to deal with a difficulty that has arisen in the proceedings. Pullar v UK (1996) 22 EHRR 391 at 404-405 (paras 37-41) and Gregory v UK (1997) 25 EHRR 577 at 594-595 (paras 46-48) may serve as examples. It is appropriate for this House also to attach importance to these directions.

[68] At this stage the various strands relating to the trial can be drawn together. The judge carefully considered whether to allow the trial to go ahead in the particular circumstances. The Court of Appeal reviewed his decision and supported it. At the actual trial various steps were taken to make due allowance for the fact that the appellant was neither present nor represented. Prosecuting counsel took care to lead the evidence fully and in a way that did not conceal any weaknesses. The possible lines of defence were put before the jury. Although no evidence was led to support those lines, the appellant can point to none that could have been led. The jury, who had taken the appropriate oath, were given specific directions that they were not to speculate as to the reasons for the defendants’ absence and that the burden of establishing their guilt rested on the prosecution, just as if the defendants had been present. All these are important factors to be taken into account when considering the fairness of the proceedings as a whole.

[69] When the appellant was eventually apprehended, he appealed against his conviction and sentence. The nature of that appeal and the powers of the Court of Appeal are of relevance for the purposes of art 6 of the convention. In considering the appeal against conviction, the Court of Appeal were applying the test in s 2(1) of the Criminal Appeal Act 1968 under which they had to allow the appellant’s appeal if they thought his conviction was unsafe. In Condron v UK (2001) 31 EHRR 1 at 24 (para 65) the Court of Human Rights emphasised that, where the issue was raised, the Court of Appeal required to consider whether the appellant’s rights under art 6 had been secured.
... the question whether or not the rights of the defence guaranteed to an accused under Article 6 were secured in any given case cannot be assimilated to a finding that his conviction was safe in the absence of any enquiry into the issue of fairness."

Here the Court of Appeal ([2001] 3 WLR 125, [2001] All ER (D) 256 (Jan)) followed that approach. Rose LJ expressed (at [41]) his conclusion on the appellant's appeal against conviction in these words:

"In our judgment there is no reason, in all these circumstances, to regard his conviction as unsafe or his trial as unfair and accordingly his appeal against conviction is dismissed." (My emphasis.)

[70] So the proceedings in the Court of Appeal allowed the appellant to advance arguments not merely on the substantive merits of his conviction but also on the fairness of the trial. The Court of Appeal had power to consider both aspects and, as their judgment and their conclusion show, they were conscious of the need to examine both aspects and they did so.

[71] Mr Solley argued that, even though the Court of Appeal could and did review the merits of the conviction and the fairness of the proceedings in this way, the appeal process was insufficient to ensure the fairness of the proceedings under art 6. What was required, he said, was that the appeal should be conducted before a court which could rehear the evidence. In this connection he relied on the observation of the European Court in Poitrimol v France (1993) 18 EHRR 130 at 145 (para 31):

"Proceedings held in an accused's absence are not in principle incompatible with the Convention if the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact."

Here, he said, the appellant had been unable to obtain a fresh determination from a court in a trial in which he had been present and represented. It is true, of course, that there has been no new trial of that kind. But, as it explained in Cozoza v Italy (1985) 7 EHRR 516, the court is not concerned to lay down general doctrines in this area. The passage in Poitrimol's case has to be read in the context of this case, involving a particular form of French proceedings.

[72] M Poitrimol had been tried in the tribunal correctionnel in Marseilles where, though absent, he had been represented. While he appealed against his conviction, he made no complaint about the fairness of those proceedings. His complaint was that the subsequent proceedings before the cour d'appel at Aix-en-Provence had been unfair. There is nothing to suggest that those proceedings would have involved anything more than pleadings on behalf of M Poitrimol. The appeal court refused his request to be tried inter partes in his absence because there was an outstanding warrant for his arrest. It therefore tried the case without M Poitrimol being present or being represented by his counsel, but under art 410 of the Code of Criminal Procedure the proceedings were conducted 'as if he [had been] present'. The appeal court eventually ruled that the pleadings on his behalf were inadmissible and upheld the judgment of the lower court in its entirety. The significance of the proceedings being conducted as if M Poitrimol had been present was that he thereby lost the right of a defendant in proceedings in absentia to use the art 489 procedure to render the
judgment null and void by simply applying to the court to set it aside and to rehear the case. His only possible recourse against the judgment was an appeal to the cour de cassation, but that route was blocked by a (separate) rule that no such appeal lay where there was an outstanding warrant for his arrest. In these circumstances the Strasbourg court held that there had been a breach of art 6 of the convention.

[73] It is apparent, therefore, that the observation on which Mr Solley relied was made in a very particular context where the appeal court at Aix had refused to consider the submissions of M Poitrimol's lawyer and had also effectively cut off any further redress, whether by a rehearing before the appeal court or by an application to the cour de cassation. In effect, he had no means of having his case heard at all.

[74] Here, by contrast, the appellant has been able to appeal, with the benefit of legal aid, not only to the Court of Appeal but indeed to your Lordships' House. The Court of Appeal would not, of course, ever rehear a case in the sense of having all the witnesses led before them. That is not part of the English system, for in that system justice can be done without it. But the Court of Appeal have full powers to consider any legal issue, to consider the transcript of the relevant parts of the evidence and to receive additional evidence if they consider it necessary or expedient to do so in the interests of justice (see s 23(1)(c) and (2) of the 1968 Act). Having considered any additional evidence, the Court of Appeal may, of course, decide to refuse the appeal. But, equally, they may decide to allow the appeal outright or they can allow it and, if they consider that the interests of justice so require, order a retrial—at which the defendant would, of course, be represented. The House has recently given guidance on the exercise of these powers in R v Pendleton [2001] UKHL 66, [2002] 1 All ER 524, [2002] 1 WLR 72 and has stressed that the Court of Appeal should consider a conviction to be unsafe if the additional evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. In my view, under the English system, these wide powers of the Court of Appeal are sufficient, even in the case of a trial in absence, to allow the court to monitor and secure the fairness of the proceedings.

[75] For present purposes, the mere existence of the power to receive additional evidence is significant. The appellant could have invoked it if his absence or lack of representation had actually meant that the jury reached their verdict in ignorance of potentially exculpatory evidence. Of course, he could not in fact suggest this and therefore he could not invoke this particular power. But it was available: that is one of the guarantees of the fairness of the proceedings.

[76] In the event, the Court of Appeal, having these extensive powers and being conscious of them, reviewed both the safety of the appellant's conviction on the merits and the fairness of the proceedings as a whole. Not surprisingly, in view of the evidence against him, counsel for the appellant appears to have mounted no real challenge to the merits of his conviction. The Court of Appeal were satisfied that, on the merits, the conviction was safe. Applying their great experience, for the reasons which they gave in considerable detail, they also came to the view that the proceedings, albeit unusual, had indeed been fair. It would be impertinent to say more than that this was a view which they were entitled to reach and which should be accorded great respect.
[77] When the whole of the proceedings, before the trial court and in the Court of Appeal, are taken into account in this way; it can be seen that the appellant's rights under art 6 have not been infringed. The other challenges to the proceedings must also be rejected for the reasons given by Lord Bingham. I would accordingly dismiss the appeal.

Appeal dismissed.

APPENDIX

In our judgment, in the light of the submissions which we have heard and the English and European authorities to which we have referred, the principles which should guide the English courts in relation to the trial of a defendant in his absence are these: (1) A defendant has, in general, a right to be present at his trial and a right to be legally represented. (2) Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws instructions from those representing him. They may be waived in part if, being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him. (3) The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives. (4) That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented. (5) In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular: (i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear; (ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings; (iii) the likely length of such an adjournment; (iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation; (v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence; (vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him; (vii) the risk of the jury reaching an improper conclusion about the absence of the defendant; (viii) the seriousness of the offence, which affects defendant, victim and public; (ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates; (x) the effect of delay on the memories of witnesses; (xi) where there is more than one
defendant and not all have absconded, the undesirability of separate trials, 
and the prospects of a fair trial for the defendants who are present. (6) If the 
judge decides that a trial should take place or continue in the absence of an 
unrepresented defendant, he must ensure that the trial is as fair as the 
circumstances permit. He must, in particular, take reasonable steps, both 
during the giving of evidence and in the summing up, to expose weaknesses 
in the prosecution case and to make such points on behalf of the defendant as 
the evidence permits. In summing up he must warn the jury that absence is 
not an admission of guilt and adds nothing to the prosecution case.'
Dear Ms McNeill

CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) BILL

I refer to your letter of 29 January 2004 to Mr Keith Eynon, Head of the Strathclyde Police Forensic Science Laboratory, requesting information as to the operation and prioritisation processes of Strathclyde Police Laboratory. Mr Eynon has informed me that he has spoken with Claire Menzies-Smith of your staff who has clarified the type of information requested. In that regard, Mr Eynon considers that, as Chair of the Forensic Science Programme Board, I would be best placed to provide a response which details the wider national perspective on these issue.

The first issue to highlight is the ongoing Forensic Science Project. This commenced in 2001 for the purposes of rationalising the provision of forensic science to Scottish police forces with a view to establishing a single national Forensic Science Service under the aegis of Common Police Services. Part of this work included the rationalisation of services, with core services retained by all laboratories and certain specialist services identified for provision at Centres of Excellence, with each Laboratory being identified to provide at least one specialist service.

The research stage of the project is now nearing completion and a final project report and implementation plan is expected to be submitted to the Programme Board in the next few weeks. Following this, an Implementation Manager will be appointed to drive the implementation and provide centralised management support to the service prior to the advent of Common Police Services legislation, scheduled for April 2006. Standards and protocols for the provision of services will be developed further during the implementation stage of the project.

On a more immediate note, I have recently formed part of the Forensic Science Protocols Sub-group established under the remit of the Criminal Justice Protocols Steering Group. This group, in consultation with Heads of Forensic Science in Scottish Police Forces, has developed a document detailing protocols for the delivery of Forensic Services between the Police and the Crown. This document (copy attached) is currently in the final draft stage and is likely to be approved in the very
near future. As part of this work, standards were also agreed for the presumptive testing of all controlled drugs in Scotland, a development which will impact considerably on the backlogs currently experienced in forensic laboratories. A General Minute on this decision is attached for your information.

I trust that this information is of value to you, however please do not hesitate to contact Sergeant Gary Ritchie of my staff on the above number if there is anything further you require.

Yours sincerely

[Signature]

Secretary
Crown Office & Procurator Fiscal Service
National Forensic Science Protocol

Service Level Agreement between the Procurator Fiscal and the Police regarding the scientific examination of productions

February 2004
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Introduction

1. As a general rule, commissioning of work will be achieved by the relevant police force lodging the items to be examined at the Laboratory, together with the relevant standard form instructing the work to be done and giving written authorisation for the work by the appropriate person (e.g. Procurator Fiscal). The standard form will contain all relevant information, such as: contact in PF office (PF, PD, PFD, PO etc); the date of offence; date police report received by the Procurator Fiscal; any relevant court dates; the accused’s status (e.g. bail/custody etc); the productions to be examined; the nature and extent of the examination required; the date by which the work must be completed and a scientific report produced.

2. Except in drugs cases, and subject to what is said below, the scientific examination of productions will not generally proceed without specific instructions from the Procurator Fiscal.

3. Work maybe commissioned and authorised before or after a report is submitted to the Procurator Fiscal.

4. Any reference to “the report” in this document will refer to the standard police report, unless otherwise specified.

5. Any reference to “Procurator Fiscal” in this document will refer to the Procurator Fiscal, or the person in the Procurator Fiscal’s office to whom the case has been allocated as intimated on the standard form as detailed at para 1 above.

6. When a standard form is submitted to the police it will be copied to the laboratory, and vice versa.

7. The police can consult the Procurator Fiscal at any stage in the investigation regarding the instruction of scientific work.
Before a report is submitted to the Procurator Fiscal

8. In the following circumstances it will be appropriate for the police to instruct the scientific examination of productions before a report is submitted to the Procurator Fiscal:
   (i) When investigating a crime, to obtain sufficient evidence to allow a report to be submitted for the consideration of the Procurator Fiscal;
   (ii) When investigating a major or serious incident, to determine whether or not crime has been committed;
   (iii) When investigating a complaint against police, to prepare a report for submission to the Area Procurator Fiscal;
   (iv) When investigating a fire, to determine whether it requires to be reported to the Procurator Fiscal, where:
       (i) life has been endangered,
       (ii) serious injuries resulted, or
       (iii) death has been caused (whether or not a crime has been committed and a suspect identified); and
   (v) When investigating a sudden or suspicious death (subject to paras 30 and 57 below).

Criminal Investigations

9. If during the investigation into a crime scientific examination of productions is necessary to identify whether there is sufficiency of evidence, the police will instruct the necessary examination. The report submitted to the Procurator Fiscal will therefore contain a reference to the outcome of the scientific examination. No further action need be taken by the Procurator Fiscal other than to order that a copy of the scientific report be lodged as a production. Standard form [A] instructing the lodging of the scientific report should be sent to the Reporting Officer and copied to the forensic science laboratory.

10. In cases of doubt or difficulty as to whether sufficient investigation has been carried out to allow a report to be submitted to the Procurator Fiscal, the Procurator Fiscal should be consulted by the investigating officer.

11. It is recommended that the investigating officer consult the Procurator Fiscal in advance of submitting a report in all major criminal investigations and in particular in a case involving homicide or potential homicide.

12. The investigating officer must commission laboratory work to obtain sufficient evidence to justify the submission of a report. Before commissioning any further laboratory work beyond that necessary to provide sufficient evidence to justify the submission of a report, the investigating officer must consult the Procurator Fiscal.
**Submitting a report before the scientific examination of productions**

13. If there is enough evidence to justify charging an accused and reporting the case to the Procurator Fiscal without carrying out a scientific examination, the case will be reported and the productions will be retained by the police pending the Procurator Fiscal’s instructions.

14. For example, in a serious assault case where the victim identifies the accused and there is other evidence such as a confession or eyewitness evidence, the case will be reported without any scientific examination. Any productions will be retained but will not be examined by the Laboratory unless the Procurator Fiscal instructs that this should be done. The instruction to examine productions should be sent to the Reporting Officer and copied to the forensic science laboratory.

**Drugs Cases**

**Cases which are likely to result in Summary Proceedings or Alternative to Prosecution**

15. A report may be submitted to the Procurator Fiscal without obtaining full analysis of the substance in the following circumstances;

   (i) *Cannabis and its derivatives*
   
   The substance has been identified by a presumptive test carried out by two suitably experienced officers, or by a presumptive test carried out by one suitably experienced officer corroborated by an admission as to the nature of the drug or by other evidence tending to identify the drug. (The test requires to be corroborated because the matter can go to trial on the basis of the presumptive test).

   (ii) *Brown powders suspected of containing diamorphine*
   
   The substance has been identified by a police presumptive test or a presumptive test carried out in the laboratory by a single forensic scientist or technician.

   (iii) *White powder/tablet(s) suspected of containing amphetamine or ecstasy*
   
   The substance has been identified by a police presumptive test or a presumptive test carried out in the laboratory by a forensic scientist or technician.

   (iv) The controlled drug or medicinal product is in a sealed container bearing a label identifying the contents of the container or the substance has a characteristic appearance having regard to its size shape, colour and manufacturer’s mark, and the substance has been identified by an authorised forensic scientist in terms of Section 282 of the 1995 Act.
16. Full Laboratory analysis must be carried out in circumstances (ii) & (iii) above if a plea of not guilty is tendered and evidence of the identification of the drug is required for trial.

**Cases which are likely to proceed by way of solemn procedure**

17. In cases that are likely to proceed by way of petition, a report may be submitted to the Procurator Fiscal without obtaining full analysis of the controlled substance where evidence of the identification of cannabis and its derivatives, ecstasy, diamorphine or amphetamine has been obtained by a police or laboratory presumptive test.

18. Where the accused is Committed for Further Examination (CFE) *in custody* the result must be confirmed by laboratory analysis prior to Full Committal (FC), otherwise the Procurator Fiscal will specify a date by which the full scientific report is required (see table below).

19. A report may be submitted to the Procurator Fiscal on the basis of a presumptive test carried out by suitably experienced police officers or by forensic scientists. In such cases the substance will be retained by the police or laboratory until such time as the Procurator Fiscal gives an instruction to have the substance lodged with the laboratory and a full analysis carried out.

20. A report should be submitted to the Procurator Fiscal after a full analysis has been carried out.

**Road Traffic Cases Involving Alcohol or Drugs**

21. Where evidence of the level of alcohol or drugs in a blood or urine sample is necessary before a report can be submitted to the Procurator Fiscal, analysis of the sample may be authorised by the officer in charge of the case. If there is doubt as to sufficiency of evidence in regard to other crucial matters the Procurator Fiscal should be consulted before analysis is instructed.

**Forensic Chemist**

22. A forensic chemist may be called out when a person is detained or arrested in relation to an offence involving a suspected drug for which either no field test is available or the officer carrying out the test encounters significant problems. The forensic chemist should not be called out unless it is intended to detain the suspect in custody for report in custody to the Procurator Fiscal and evidence of the nature of the substance is required to submit such a report.
Serious Crime
23. Any laboratory work which is commissioned before a police report is submitted to the Procurator Fiscal will be authorised by the appropriate Senior Investigating Officer. It is expected however that the nature and extent of the work commissioned will have been discussed with the Procurator Fiscal prior to submission of the items and authorisation.

Major or Serious Incidents
24. The senior investigating officer, in consultation with the Procurator Fiscal if necessary, should commission and authorise Laboratory work to determine whether a crime has been committed. If and when it is determined that a crime has been committed, the rules relating to the investigation of a serious crime should apply.

25. The Forensic science laboratory will provide a 24-hour call out facility for major crimes or incidents.

Complaints Against Police
26. Any scientific work required to be carried out to allow a full report to be submitted to the Area Procurator Fiscal maybe commissioned and authorised by the Deputy Chief Constable responsible for the investigation of such complaints. The Area Procurator Fiscal should be consulted in advance in cases of doubt or difficulty if instructions have not already been given following submission of the initial report.

Fire Investigations
27. A fire investigation scientist may be required to attend a scene of a fire in the following circumstances:
   - Where death has resulted or is likely to result or where persons have been seriously injured
   - Where the fire is significant and suspicious and the investigating officer considers the attendance of a scientist desirable.

28. The investigating officer should seek the advice of the Fire Service and Identification Branch and scenes of crimes officers who are in attendance at the fire.

29. The responsibility for requesting the attendance of a fire investigation scientist is that of the Senior Investigating Officer before a report of the
fire is submitted to the Procurator Fiscal. The Procurator Fiscal may be consulted in advance of a report being submitted.

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**Sudden or Suspicious Deaths**

30. No work in relation to the investigation of a sudden or suspicious death should be commissioned without the express authority of the Procurator Fiscal whether or not the matter has been reported by means of a standard police report to the Procurator Fiscal. The Procurator Fiscal should instruct all necessary work and give written authorisation for that work together with the timescale to be observed.

In cases of urgency, where there is insufficient time for the police to obtain the relevant standard form from the Procurator Fiscal, verbal instructions will suffice. In that event the work proceeds on the authority of the senior investigating officer, the Procurator Fiscal will complete the standard form instructing the work as soon as possible thereafter and fax or e-mail this to the police and copy to the laboratory.

31. The Forensic science laboratory will provide a 24-hour call out facility for suspicious deaths and major crimes or incidents. The Procurator Fiscal should be consulted in relation to suspicious deaths.

32. Where scientific work requires to be carried out before the submission of a police report to the Procurator Fiscal, every endeavour should be made to have that work carried out to allow the police to report the matter to the Procurator Fiscal within 28 days of the offence being committed.

33. If submission of a criminal case to the Procurator Fiscal is delayed beyond the 28 days, the Reporting Officer will require to explain to the Procurator Fiscal the delay. It is accepted that by prioritising serious and urgent work in the laboratory, police may fail to meet the target for submission of a police report timeously.

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After a report is submitted to the Procurator Fiscal

Summary Cases

34. Once the report has been submitted to the Procurator Fiscal (in respect of a criminal case or a death) it is the Procurator Fiscal’s responsibility to instruct any scientific examination of productions.

The report does not disclose a sufficiency of evidence

35. Where scientific examination is required to achieve a sufficiency of evidence, the Procurator Fiscal will advise the investigating officer who will instruct the necessary work and resubmit the report. This work will be commissioned and authorised by the police as set out in the pre-report section above.

The report does disclose a sufficiency of evidence

36. Where the available evidence is sufficient without the scientific examination of productions, examination should only be instructed in exceptional circumstances.

37. If the report discloses a sufficiency of evidence but the Procurator Fiscal requires further work to be carried out, the Procurator Fiscal will complete standard form [B], specifying the productions to be examined, the analysis required and the date by which it is to be completed. This form should be sent to the Reporting Officer and copied to the Forensic science laboratory.

38. In non-drug cases where the Procurator Fiscal decides, after the accused pleads not guilty, that an examination should be carried out, standard form [C] should be sent to the Forensic science laboratory and copied to the Reporting Officer, identifying the productions which require to be examined and specifying the date by which the scientific report must be submitted with reference to the intermediate diet date.

39. It is essential that the request for forensic analysis is made as early as possible to allow for service at or before the intermediate diet. In any case where late instructions are contemplated the case should be discussed with the Laboratory.

Drugs Cases

40. Where there is a sufficiency of evidence but the Procurator Fiscal requires scientific work to be carried out prior to marking the case, the Procurator Fiscal will submit standard form [D] to the Reporting Officer (and copy to the lab) specifying a date by which the work must be completed.
41. In drugs cases summary proceedings may be raised on the basis of field testing or presumptive testing. In the event that a full analysis is required for trial the Procurator Fiscal will send standard form [E] to the Forensic science laboratory and copy to the Reporting Officer.

42. In cases where the accused is reported in custody & the laboratory has carried out some analysis before the accused's first appearance in court, the full analysis can continue without further instruction (although the report will require to be specifically requested).

43. Where a drugs case is reported, other than on the strength of a presumptive test, there is normally no need for the Procurator Fiscal to instruct the laboratory to analyse the drugs as the analysis will have been completed before the case is reported to the Procurator Fiscal (although the report will require to be specifically requested).

44. Where scientific work is required to provide evidence at a summary trial and the accused is on bail or ordained to appear, the Procurator Fiscal will fax or e-mail standard form [E] to the Forensic science laboratory, and copy to the Reporting Officer, the next working day after the pleading diet. The scientific report must be submitted to the Procurator Fiscal not later than 8 weeks after the instruction.

45. Where scientific work is required to provide evidence at a summary trial and the accused is remanded in custody, the Procurator Fiscal will fax or e-mail standard form [E], to the Laboratory, and copy to the Reporting Officer, on the same day as the pleading diet. The scientific report must be submitted to the Procurator Fiscal not later than 14 days after the instruction.

Solemn Cases

Pre-petition Cases

46. Some analysis may be required by the Procurator Fiscal at the pre-petition stage. Where this is required, the Procurator Fiscal will discuss the case with the laboratory and Reporting Officer before completing standard form [F] specifying the productions to be examined, the analysis required and the date by which it is to be completed (see table below). The form will be sent to the Reporting Officer and copied to the Forensic science laboratory.

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Priority Petition Warrants

47. In certain circumstances the Procurator Fiscal may have to precognosce witnesses before the accused has been apprehended, for example, where there are vulnerable witnesses. The Fiscal may therefore require forensic examination to be completed at this stage. Where this is necessary, the Procurator Fiscal will discuss the case with the laboratory and Reporting Officer before completing standard form [G] specifying the productions to be examined, the analysis required and the date by which it is to be completed (see table below). The form will be sent to the Reporting Officer and copied to the Forensic science laboratory.

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CFE & FC

48. The Procurator Fiscal can ask for the accused to be committed for further examination (CFE) for a period of up to 8 days without being able to demonstrate a legal sufficiency of evidence. However, when seeking full committal (FC), the Procurator Fiscal must be able to demonstrate to the court that there is a fully corroborated case. The Fiscal may therefore require forensic examination to be completed between CFE and FC to obtain a sufficiency of evidence. Where this is required, the Procurator Fiscal will discuss the case with the laboratory before completing standard form [H] specifying the productions to be examined, the analysis required and the date by which it is to be completed (see table below). The form will be sent to the Reporting Officer and copied to the Forensic science laboratory.

49. In exceptional circumstances, work may be commissioned and carried out under the authority of the senior investigating officer, or other appropriate senior police officer, on the verbal instructions of the Procurator Fiscal who will complete the relevant standard form thereafter and make it available as soon as possible.

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Custodies

50. When accused person is detained in custody after full committal, time for further investigation is very limited. The Procurator Fiscal's Office will intimate the name of the member of staff with whom the allocated forensic scientist can discuss the extent of the scientific examination. This might be a Precognition Officer (PO), a Procurator Fiscal Depute (PFD) or a Principal Depute (PD) depending on local practice.

51. The Procurator Fiscal will submit standard form [I] not later than 3 working days after FC & the PO, PFD or PD who has been allocated the case will seek to have an early meeting or discussion with the senior investigating officer. A full scientific report requires to be submitted to the Procurator Fiscal **within 50 days of the instruction.**
52. The Procurator Fiscal must be advised as soon as any circumstances arise which may result in the target date being missed. The Procurator Fiscal will agree an alternative timescale with the laboratory including provisional scientific reports as necessary.

53. Where it is apparent to the laboratory that work cannot be done within the specified time scale, the matter must be discussed with the Procurator Fiscal and a timescale agreed together with any preliminary or provisional scientific reports thought necessary as work advances.

**Bail Cases**

54. Where an accused person is liberated on bail, the Procurator Fiscal’s Office will intimate the name of the member of staff to whom the case has been allocated for precognition. This person will discuss the case with the senior investigating officer before completing standard form [J] specifying the productions to be examined, the analysis required and the date by which it is to be completed. Form [H] will be submitted not later than 4 weeks after CFE. The form will be sent to the Reporting Officer and copied to the Forensic science laboratory.

55. Where bail has been granted, the scientific report should generally be received within 5 months of the instruction and always within 6 months of CFE.

**Investigation of Deaths**

56. In the event that a report of a death requires further inquiry which is not connected to a criminal inquiry, the Procurator Fiscal will instruct and authorise any necessary scientific work. Standard form [K] will be sent to the Reporting Officer and copied to the Forensic science laboratory.

57. The PF requires to complete the investigation within the 12 weeks of the date of death. The Procurator Fiscal will instruct any scientific work not later than 2 weeks after the date of death and the scientific report will be submitted not later than 7 weeks after the instruction.

**Complaints Against the police**

58. Generally, the scientific analysis will have been carried out before the report is submitted to the Procurator Fiscal. However, if any further scientific analysis is required by the Procurator Fiscal, standard form [L] will be sent to the Reporting Officer and copied to the Forensic science
laboratory within 7 working days of receipt of the police report. The Full Scientific report will be submitted to Procurator Fiscal not later than 7 weeks after the instruction.
## Time Limits for Scientific Analysis

### 59. "The Procurator Fiscal will issue instruction (by e-mailing the standard form to the Police and to the Forensic Lab) not later than…" "An Interim Report (for the purpose of establishing a sufficiency) will be submitted to the PF not later than…" "The Full Scientific report will be submitted to Procurator Fiscal not later than…"

<table>
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<th>Summary Cases</th>
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<tr>
<td>Custody</td>
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<td>Priority Bail</td>
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<td>CFE custody</td>
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<td>Priority Bail</td>
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<td>Priority Petition Warrants</td>
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<td>Pre-petition Cases</td>
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<td>Bail</td>
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<td>CAP</td>
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<td>Death</td>
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### 60. “Priority Bail” is a bail case which the Fiscal requires to deal with under custody timescales. These include cases involving vulnerable witnesses or accused and Murder cases.

### 61. If in individual cases there are exceptional circumstances which render the relevant timescale impossible, the laboratory should intimate this to the Procurator Fiscal immediately by e-mail (copied to the Police). The Fiscal and laboratory will then agree an extended timescale for the submission of the full scientific report (and any interim reports). The details on the relevant standard form should be amended accordingly and resubmitted.
# Classification of Standard Forms

## 62.

<table>
<thead>
<tr>
<th>Standard Form</th>
<th>Purpose</th>
<th>Sent to</th>
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<tbody>
<tr>
<td><strong>Analysis has been carried out before submission of Police Report</strong></td>
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<td></td>
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<tr>
<td>A</td>
<td>Issued by the Fiscal to instruct the lodging of the scientific report where the police have instructed the scientific analysis before reporting the case to the Procurator Fiscal. (Para 9 above)</td>
<td>Sent to the Reporting Officer and copied to the forensic science laboratory</td>
</tr>
<tr>
<td><strong>Analysis is required after submission of Police Report</strong></td>
<td></td>
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</tr>
<tr>
<td>B</td>
<td>Issued by the Fiscal if the police report discloses a sufficiency of evidence but further work scientific requires to be carried out</td>
<td>Sent to the Reporting Officer and copied to the forensic science laboratory</td>
</tr>
<tr>
<td>C</td>
<td>Issued by the Fiscal following a not guilty plea in non-drug cases.</td>
<td>Sent to the Forensic science laboratory and copied to the Reporting Officer</td>
</tr>
<tr>
<td>D</td>
<td>Issued by the Fiscal in drugs cases where there is a sufficiency of evidence but further scientific work to is required prior to marking the case.</td>
<td>Sent to the Reporting Officer and copied to the forensic science laboratory</td>
</tr>
<tr>
<td>E</td>
<td>Issued by the Fiscal following a not guilty plea in drug cases where proceedings were raised on the basis of a presumptive test and a full analysis is now required for trial.</td>
<td>Sent to the Forensic science laboratory and copied to the Reporting Officer</td>
</tr>
</tbody>
</table>

## Solemn Cases

<table>
<thead>
<tr>
<th>Standard Form</th>
<th>Purpose</th>
<th>Sent to</th>
</tr>
</thead>
<tbody>
<tr>
<td>F</td>
<td>Issued by the Fiscal at pre-petition stage. The Procurator Fiscal will discuss the extent of the examination required with the laboratory.</td>
<td>Sent to the Reporting Officer and copied to the forensic science laboratory</td>
</tr>
<tr>
<td>G</td>
<td>Issued by the Fiscal in relation to priority petition warrant cases. The Procurator Fiscal will discuss the extent of the examination required with the laboratory.</td>
<td>Sent to the Reporting Officer and copied to the forensic science laboratory</td>
</tr>
<tr>
<td>H</td>
<td>Issued by the Fiscal between CFE and FC to obtain a sufficiency of evidence. The Procurator Fiscal will discuss the extent of the examination required with the laboratory. (Para 47 above)</td>
<td>Sent to the Reporting Officer and copied to the forensic science laboratory</td>
</tr>
<tr>
<td>I</td>
<td>Issued by the Fiscal when the accused is detained in custody after full committal. The Procurator Fiscal will discuss the extent of the examination required with the laboratory.</td>
<td>Sent to the Reporting Officer and copied to the forensic science laboratory</td>
</tr>
<tr>
<td>J</td>
<td>Issued by the Fiscal when the accused is liberated on bail. The Procurator Fiscal will discuss the extent of the examination required with the laboratory.</td>
<td>Sent to the Reporting Officer and copied to the forensic science laboratory</td>
</tr>
</tbody>
</table>

## Other Categories

<table>
<thead>
<tr>
<th>Standard Form</th>
<th>Purpose</th>
<th>Sent to</th>
</tr>
</thead>
<tbody>
<tr>
<td>K</td>
<td>Issued by the Fiscal where a death requires further inquiry which is not connected to a criminal inquiry</td>
<td>Sent to the Reporting Officer and copied to the forensic science laboratory</td>
</tr>
<tr>
<td>L</td>
<td>Issued by the Fiscal in relation to a complaint against the police.</td>
<td>Sent to the Reporting Officer and copied to the forensic science laboratory</td>
</tr>
</tbody>
</table>

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ANNEX I : Presumptive Testing

Cannabis and its derivatives
Cannabis can be identified by a presumptive test carried out by two suitably experienced officers, or by a presumptive test carried out by one suitably experienced officer corroborated by an admission as to the nature of the drug or by other evidence tending to identify the drug. Corroboration is required because the matter can go to trial on the basis of the presumptive test.

Diamorphine
Although the presumptive test cannot distinguish between Diamorphine and Morphine, Morphine would not normally occur as a brown powder – it would be expected as a liquid or in tablet form.

The presumptive test is reliable in the environment it operates in – ie, where there are other indications of what the substance is.

Ecstasy
The reference in Schedule 2 to the Misuse of Drugs Act is to a generic compound. Ecstasy is libelled as;
   “a controlled drug, namely a compound, or compounds of the type specified in paragraph 1(c), part 1 of Schedule 2 to the aforementioned Act commonly known as “ecstasy” and being a Class A drug in terms of said Act”.

Consequently, although the presumptive test for ecstasy cannot differentiate between MDA, MDMA, MDEA and MBDB, it is of no moment. Whichever particular variant of the drug is involved, the reference to the generic paragraph will cover them all.

To augment the reliability of the presumptive test result, the tablet itself will usually bear a logo familiar to police officers. The presumptive test for ecstasy type drugs is the same as for Diamorphine, and a very definite black colour is observed, which is simple to interpret.

Amphetamines
The presumptive test cannot distinguish between Amphetamine and Methylamphetamine, however, both are class B drugs. Whether a particular powder is one or the other is of no importance. The Crown can libel the substance as “Amphetamine or Methylamphetamine”.

An accused can plead guilty as libelled, on the basis that both are class B drugs, or he can opt for one or the other. If a plea of not guilty is tendered there will be a full analysis.

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GENERAL MINUTE TO ALL LEGAL STAFF NO. DRAFT

PRESumptive Testing of Controlled Drugs other than Cannabis

Purpose

1. To advise all legal and precognition staff of new arrangements for the presumptive testing of controlled drugs other than cannabis and its derivatives, to be implemented nationally following a successful pilot in Strathclyde.

Priority

2. Immediate. The new arrangements for presumptive testing will contribute in reducing backlogs in the Forensic Science Laboratories.

Background


4. However, prior to a pilot in Strathclyde in November 2002, unless the Lord Advocate had approved a specific exception, proceedings were not commenced on the basis of field tests in respect of any other controlled drugs.

5. Following the success of the pilot, the Lord Advocate has approved a change in policy in this area

New Instructions

• summary cases

6. Summary proceedings may be commenced on the basis of a positive presumptive test carried out as follows: -

• Presumptive testing of powders suspected of containing diamorphine will be carried out by a police officer who has received appropriate training.

• Presumptive testing of “Ecstasy” type drugs will be carried out by a police officer who has received appropriate training.

• Presumptive testing of “white powders”, namely those suspected of containing amphetamine, will be carried out by a forensic scientist within the laboratory.
In the event of a not guilty plea being tendered, the drug should be returned to the laboratory for full analysis.

- **Petition cases**

7. In petition cases, similar to the position vis-à-vis cannabis and cannabis resin, proceedings may be commenced on the basis of a positive field test in respect of diamorphine, “Ecstasy” type drugs and amphetamine. However, the result must be confirmed by laboratory analysis prior to full committal or service of an indictment where the accused has not been fully committed.

8. As a full corroborated analysis will be carried out in every summary case, involving diamorphine, “Ecstasy” type drugs and amphetamine, in which the accused pleads not guilty, and prior to full committal in every petition case involving these drugs, there is no reason to have two police officers or two forensic scientists carry out the presumptive test. Therefore, only one police officer or forensic scientist will carry out the presumptive test.

9. It should be noted that the presumptive test for “white powders” cannot distinguish between amphetamine and methylamphetamine. So as to retain presumptive testing for “white powders” there will be a requirement to libel a single charge with an alternative therein, alleging possession of “amphetamine or methylamphetamine”. As both drugs are designated as class B in terms of the Misuse Of Drugs Act 1971 the exact identity of the drug is not thought to be of significance at the commencement of proceedings. If an accused wished to plead guilty as libelled at the first calling of the case in summary proceedings, then a plea of guilty to either one or other drug may be accepted given that they are of the same classification. It may be that the defence may be able to advise of the appropriate plea if they have particular information as to what drug had been possessed. In solemn proceedings the result will have been confirmed by laboratory analysis prior to full committal or, where the accused has not been fully committed, service of an indictment. At full committal a fresh petition, reflecting the result of the full laboratory analysis of which drug was possessed, should be served on the accused.

NORMAN McFADYEN
Crown Agent

February 2004
Quarterly Reporting of Police Numbers

I am writing to let you know about a change of practice which we plan to make shortly. Hitherto, the practice when referring to police officer numbers in official publications and in answer to Parliamentary Questions has been to do so on a head count basis using returns submitted quarterly by police forces.

However, given rising numbers of part-time officers, a decision was taken some years ago that it would make more sense to report police officer numbers on a whole time equivalent basis. As a result, since September 2000, figures have been collected from forces to identify the hours worked by part-time officers, so that whole time equivalent totals can be derived for each quarter. We now have some three years of such information and this is considered to be a sufficient period to enable a change of basis to go ahead. This will put police officer numbers on the same basis as the police support staff numbers, where there are proportionally more part-time workers.

Between September 2000 and December 2003, the number of part-time officers rose from 217 to 391 and the whole time equivalent number of officers rose from 14,782 to 15,483, compared to a rise in the head count figures from 14,870 to 15,617. However, the percentage increase in the whole time equivalent count differs only marginally from the rise in head count (4.7% as compared to 5.0%). While we believe the former more meaningfully reflects the movement in police numbers, it may still be appropriate to refer from time to time to head count figures for some purposes. Where we do so, we will seek to make clear what basis is being used.

I can advise that Her Majesty’s Inspectorate of Constabulary also intends to adopt this approach in future.

I will shortly be putting into the public domain a time series on both bases, up to December 2003, through a Parliamentary Answer.

I am writing a similar letter to Annabel Goldie.

Cathy Jamieson
Minister for Justice
Scottish Executive
2 February 2004