

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2021/0011

BETWEEN:

EVERTON WELCH

Appellant

and

THE ATTORNEY GENERAL

Respondent

Before:

The Hon. Mr. Mario Michel	Chief Justice [Ag.]
The Hon. Mr. Trevor M. Ward	Justice of Appeal
The Hon. Mde. Kimberly Cenac-Phulgence	Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett for the Appellant
Ms. Carla Brookes- Harris for the Respondent

2025: February 25;
2026: April 20.

Civil appeal - Criminal law – Trial – Sentencing – Absence of defendant – Constitutional law – Section 15(2) of the Constitution of Antigua and Barbuda - Right of defendant to be present at trial - Circumstances in which trial can properly take place in absence of defendant – Appellate restraint – Appeals against findings of fact – Whether the trial judge erred in finding that the appellant had consented to trial in his absence - Whether the accused received a fair trial

The appellant was convicted of murder committed while he was a minor. He was originally sentenced to be detained during her Majesty’s pleasure pursuant to section 3(1) of the Offences Against the Person Act. Following the judgments of the Privy Council in cases such as *Browne v The Queen* and *Director of Public Prosecutions v Mollison*, the appellant sought a declaration from the High Court that the sentence of detention during Her Majesty’s pleasure contravened his right to liberty under section 5 of the Constitution and was therefore unconstitutional. He succeeded on this challenge, and his sentence was varied to detention at the court’s pleasure, and a review of his sentence was ordered. After several stalled attempts following legal

missteps and litigation all the way to the Privy Council, the appellant appeared before Cottle, J to be properly sentenced. Submissions and arguments on sentence were conducted on 11th May 2015. Cottle, J reserved judgment. On 27th May 2015 he caused counsel for the appellant and the respondent to be notified that he would deliver his judgment on sentence that very day. Counsel for the appellant and the respondent attended but the appellant was absent, not having been notified by his counsel about the delivery of the judgment. He was sentenced in his absence.

The appellant contended that the delivery of the judgment in his absence contravened section 15(2) of the Constitution, which provides that a trial shall not take place in the absence of the accused except with his own consent, and that the judgment was therefore a nullity.

By amended notice of appeal filed 11th June 2015, the appellant advanced 7 grounds challenging the orders made by Cottle, J. For present purposes, the only relevant one is ground 1. This stated that ‘the learned judge erred in law when he handed down judgment on 27th May 2015 in the absence of the appellant and in so doing contravened the appellant’s rights as guaranteed by section 15(2)(f) of the Constitution of Antigua and Barbuda.’ On that basis, he sought a declaration that ‘the judgment of 27th May 2015 is totally invalid.’ At the hearing of the appeal the Court of Appeal directed that in light of ground 1, the appeal be suspended for the appellant to pursue a Constitutional Motion in the High Court. On 6th April 2016 the Constitutional Motion was filed. It came on for hearing before a judge of the High Court who reserved judgment.

For reasons that have not been explained, another judge purported to issue a judgment dismissing the Constitutional Motion on 22nd June 2017. The appellant appealed this order on 2nd August 2017. By Order dated 19th June 2019, the Court of Appeal allowed the appeal and remitted the Constitutional Motion to be heard by a different judge.

On 9th July 2020, the Constitutional Motion came on for hearing before Robertson, J. Robertson, J dismissed the Constitutional Motion, holding that it was open to Cottle, J on 27th May 2015 to conclude that the appellant had consented to the continuation of the criminal proceedings in his absence.

By notice of appeal filed on 10th May 2021, the appellant challenges the judgment and order of Robertson, J on the sole ground that “the learned judge erred in finding that the appellant had consented to his absence from trial, validating the judgment handed down on 27th May 2015 when he was absent”. The orders sought include: ‘(1) a declaration pursuant to section 18 of the Constitution of Antigua and Barbuda (“the Constitution”) that the Applicant’s right to the protection of the law as guaranteed by section 3 of the Constitution was contravened when a portion of the Applicant’s criminal trial, namely, the continuation of the Applicant’s criminal trial that took place on 27th May 2015 and at which a judgment was handed down, was conducted in the Applicant’s absence and in contravention of section 15(2) of the Constitution; (2) a declaration pursuant to section 18 of the Constitution that the judgment handed down on 27th May 2015 was a nullity; and (3) an order that the Applicant’s criminal trial be continued so that the directions given by the Privy Council at paragraph [12] and elsewhere of its judgment dated 9th July 2013 in the Applicant’s case be implemented with all convenient speed.’

Held: dismissing the appeal with no order as to costs, that:

1. An accused person has the right to be present at his trial, which is a component of the right to a fair trial. However, a judicial officer has a discretion whether to commence or continue a trial in the absence of the accused. In exercising this discretion, fairness to the defendant is of prime importance. The judge must have regard to all the circumstances of the case including the nature and the 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. The critical question on appeals of this nature is whether the appellant received a fair trial.

R v Hayward [2001] 3 WLR 125 followed; **Darryl Frett v The Commissioner of Police** BVIMCRAP2022/0002 (delivered 6th June 2024, unreported) followed; **R v Hales** [1924] 1 K.B. 602 followed; **R v Jones (Anthony Williams)** [2002] UKHL 5 applied.

2. An appellate court should only overturn a trial judge's findings of fact if they are plainly wrong, meaning that no reasonable judge would have reached the original decision; not how strongly the appeal court disagrees with it. Unless there is strong evidence to the contrary, appeal courts assume the trial judge considered all the evidence, not mentioning specific evidence doesn't mean it was ignored. A trial judge's factual findings shouldn't be evaluated by whether their judgment evenly summarizes the evidence, the weight given to evidence is for the judge to decide. An appeal court can only set aside a judgment for lack of balanced consideration if the conclusion is irrational. Judgments need not be perfectly worded, and appeal courts should avoid overanalysing them like statutes or contracts. When findings of fact are derived entirely or almost entirely from undisputed documentary evidence, appellate courts are in just as strong a position as the trial judge to evaluate those facts and draw inferences and the appellate court may intervene more readily, as opposed to situations where credibility and reliability of witnesses are central issues. Therefore, where the evidence is unchallenged and documentary, the spectrum shifts towards greater appellate scrutiny and less deference to the trial judge's evaluation.

Beacon Insurance Company Limited v Maharaj Bookstore Limited [2014] UKPC 21 applied; **Dr. Keith Rowley v Christo Gift and another** [2025] UKPC 37 followed; **Kwok Kin Kwok v Yao Juan** [2022] UKPC 52 applied.

3. The judge erred in finding that the appellant had consented to trial in his absence. Section 15(2)(f) of the Constitution requires the accused's own consent to the conduct of criminal proceedings in his absence. Such consent must be informed and cannot be inferred merely from the presence of counsel or from counsel's failure to object, particularly where there was no evidence that the accused knew, or had the means of knowing, that the proceedings would take place on the relevant date.

Section 15(2)(f) **Constitution Order 1981** of Antigua and Barbuda applied.

4. On the unchallenged affidavit evidence, the appellant was unaware that judgment would be delivered and could not therefore have given informed consent or waived his constitutional right to be present. The finding that consent could be inferred was unsupported by the evidence and was plainly wrong.
5. However, the absence of consent was not determinative. The critical question was whether, in all the circumstances, the appellant received a fair trial. As the only matter outstanding was the delivery of a reserved judgment on sentence, all submissions had already been fully ventilated in the appellant's presence, and experienced counsel attended and raised no objection, the appellant's interests were adequately safeguarded. The delivery of judgment in his absence did not render the proceedings unfair. Thus, while the appellant's right to be present under section 15(2)(f) was not waived, no breach of the constitutional guarantee of a fair trial was established.

JUDGMENT

- [1] **WARD JA:** This appeal challenges the finding of a judge of the High Court on a Constitutional Motion that the appellant consented to being sentenced in his absence and thus there was no breach of section 15(2)(f) of the **Antigua and Barbuda Constitution Order 1981**. A short background of the circumstances leading up to the present appeal is necessary for context.
- [2] The appellant was convicted of murder on 20th June 1994. At the time of the murder, he was two months shy of his 18th birthday. He was originally sentenced to be detained during her Majesty's pleasure pursuant to section 3(1) of the **Offences Against the Person Act**¹. Following the judgments of the Privy Council in cases such as **Browne v The Queen**² and **Director of Public Prosecutions v Mollison**³, the appellant sought a declaration from the High Court that the sentence of detention during Her Majesty's pleasure contravened his right to liberty under section 5 of the Constitution and was therefore unconstitutional. On 4th March 2011, Michel, J held that section 3(1) of the **Offences Against the Person Act** contravened the Constitution and the appellant's sentence was therefore invalid. Michel, J therefore varied the

¹ Cap. 300 of the Laws of Antigua and Barbuda.

² [2000] 1 AC 45.

³ [2003] 2 AC 411.

sentence to detention at 'the court's pleasure', with a direction that the appellant's detention be reviewed by the court at the earliest convenience to 'make its pleasure known in relation to the continued detention of the claimant.' Floyd, J undertook that review on 28th October 2011. On 14th December 2011 he ruled that to incarcerate the appellant any further would not serve the interests of justice and ordered his immediate release.

[3] However, the appellant pursued an appeal against that part of Michel, J's order which stated that he did not consider that any award of damages would be appropriate. The Court of Appeal dismissed the appeal. This decision was reversed on further appeal to the Privy Council. In a judgment dated 9th July 2013 where the Board observed that Floyd, J had not expressed a view as to what the appropriate sentence ought to have been if the appellant had been sentenced lawfully. The Board held that the question of what sentence the appellant should have served had to be addressed before it could be determined whether he was entitled to compensatory damages under the Constitution. Accordingly, the matter was remitted to the High Court to determine whether, if the proper sentence had been passed, the appellant would have been released earlier than Floyd, J's ruling, and, if so, to what amount of compensation he should be entitled.

[4] The matter came before Cottle, J on 11th May 2015 to determine the appropriate sentence that ought to have been passed on the appellant. The appellant was present and represented by Dr. David Dorsett. Counsel for the appellant and the respondent made full submissions on the issues for determination. Cottle J reserved his decision. On 27th May 2015, the court notified Dr. Dorsett and counsel for the respondent that Cottle, J would deliver his judgment that said day. Dr. Dorsett attended, and though not robed, his associate, Mr. Jared Hewlett, held for him to receive the judgment. The appellant, however, was not present. Cottle, J held that 'a sentence of at least 20 years detention with a review at that point and at subsequent periods of two years to a maximum of 26 years detention would have been apt.' However, he agreed with Floyd, J that the continued detention of the appellant after 19 years would not serve the interests of justice.

- [5] By amended notice of appeal filed 11th June 2015, the appellant advanced 7 grounds challenging the orders made by Cottle, J. For present purposes, the only relevant one is ground 1. This stated that ‘the learned judge erred in law when he handed down judgment on 27th May 2015 in the absence of the appellant and in so doing contravened the appellant’s rights as guaranteed by section 15(2)(f) of the Constitution of Antigua and Barbuda.’ On that basis, he sought a declaration that ‘the judgment of 27th May 2015 is totally invalid.’
- [6] At the hearing of the appeal the Court of Appeal directed that in light of ground 1, the appeal be suspended for the appellant to pursue a Constitutional Motion in the High Court. On 6th April 2016 the Constitutional Motion was filed. It came on for hearing before a judge of the High Court. There is an Order of that judge dated 7th December 2016 which reads: “Counsel for the parties have indicated that they will not be cross-examining anyone; and they have agreed that the matter can be considered on the written representations of the parties. Judgment reserved.”
- [7] For reasons that have not been explained, another judge purported to issue a judgment dismissing the Constitutional Motion on 22nd June 2017. The appellant appealed this order on 2nd August 2017⁴. By Order dated 19th June 2019, the Court of Appeal allowed the appeal and remitted the Constitutional Motion to be heard by a different judge.
- [8] On 9th July 2020, the Constitutional Motion came on for hearing before Robertson, J. The evidence relating to what transpired on 27th May 2015 was contained in an affidavit sworn by the appellant on 6th April 2016 to which he exhibited an earlier more detailed affidavit filed on 1st June 2015 explaining the circumstances that led to him being absent. The material parts of that affidavit are paragraphs [8] and [9]. The appellant deposed:

“[8] I am informed by my lawyer, Dr. David Dorsett, and do truly believe as follows:

⁴ ANUHCVP2017/0018 (delivered 19th June 2019, unreported).

- a. At midmorning on 27th May 2015, the clerk for Justice Cottle called my lawyer's chambers advising that Justice Cottle was now ready to issue his judgment in my matter and that accordingly he should make his way up to the High Court.
- b. My lawyer did not have his "open court regalia" and hence he asked an associate Mr. Jared Hewlett, who did have his "open court regalia" to "hold papers" for him (i.e. Dr. Dorsett) for the handing down of the judgment.
- c. Justice Cottle handed down his judgment in the presence of Mr. Hewlett and Crown Counsel representing the DPP.

[9] I was not present at the hearing of 27th May 2015. The immediacy and urgency of the phone call from court staff did not permit my lawyer to track me down by phone or otherwise so that I could be informed of the impending judgment and permit me to make arrangements so that I could present myself at the courthouse. Until the hearing of 27th May 2015, I was present at all hearings at which the judge sat in my criminal matter."

[9] The respondent's account of what transpired on 27th May 2015 was contained in an affidavit filed by Crown Counsel II, Ms. Shannon Jones-Gittens. The material paragraphs are 8 to 10, which state:

"8. That prior to the judgment, and on all other occasions when the matter came up for hearing the applicant and his attorneys were present. The Court heard evidence from the Applicant, submissions and/or arguments from all the parties involved on what should have been the proper sentence of the Applicant upon his conviction. The Court at the end of the hearing of the evidence and arguments reserved its decision on the matter and this decision was delivered on 27th May 2015.

9. With respect to paragraph 5 of the Applicant's affidavit, the judgment which touches and concerns the review of the Applicant's detention at Her Majesty's Prison was delivered by Justice Cottle on 27th May 2015. I am advised by the Director of Public Prosecutions and verily believe that whilst he was before another Court in a trial he received a message from Cottle, J's clerk that the judge was going to deliver his decision. Upon receiving this information the Director of Public Prosecutions instructed me to hold papers on behalf of the Crown.

10. When I arrived at court to receive Cottle, J's decision, the Applicant was not present but his attorney Dr. David Dorsett, though not robed, was present. Dr. David Dorsett had another counsel in the name of Jared Hewlett holding for him and he was actively giving instructions to Mr. Hewlett. At no time during the delivery of the judgment that (sic)

counsel for the applicant communicated or raise any objections or concerns about the Applicant's absence on that day."

[10] Robertson, J identified three issues for resolution:

- (1) Whether the judgment on sentence delivered on 27th May 2015 in the absence of the applicant contravened section 15 of the Constitution.
- (2) Whether the applicant consented through his counsel to being absent on the date that sentence was delivered.
- (3) Whether redress ought to be available to the applicant.

[11] Robertson, J dismissed the Constitutional Motion, holding that it was open to Cottle, J on 27th May 2015 to conclude that the appellant had consented to the continuation of the criminal proceedings in his absence. Her reasons for this conclusion are articulated at paragraph [22]:

"[22] In the circumstances of this case counsel for the applicant was present in court when the decision on sentence was being delivered. The evidence of the respondent is that although counsel for the applicant was not 'on his legs' as he was not appropriately attired, he was giving directions to counsel who was in his stead and 'on his legs'. This court notes that the applicant indicates that he did not consent to the trial continuing in his absence however this lack of consent was not communicated to the court. It was open to the court on the hearing of 27th May 2015 to conclude that there was consent from the accused himself, ("his own consent") to proceed with the continued hearing of the proceedings. Additionally, this court notes that there was no evidence before that court that the abridged notice of the hearing created an inability for counsel to communicate with his client to determine the propriety of proceeding with the trial in the absence of his client, the applicant.

[23] As a consequence of the foregoing this court dismisses the claim of the claimant/applicant for an administrative order, declaration that the judgment handed down on 27th May 2015 was a nullity, damages and any other consequential orders....

[24] ...The administration of justice would fall into difficulty or ruin if counsel were to participate during a hearing where counsel deems there to have been an infraction of a fundamental constitutional right and to hold same as if to be an arrow in his quiver only to later launch the matter of the infraction subsequently on a constitutional challenge."

- [12] By notice of appeal filed on 10th May 2021, the appellant challenges the judgment and order of Robertson, J on the sole ground that ‘the learned judge erred in finding that the appellant had consented to his absence from trial, validating the judgment handed down on 27th May 2015 when he was absent.’ The orders sought include:

- “(1) A declaration pursuant to section 18 of the Constitution of Antigua and Barbuda (“the Constitution”) that the Applicant’s right to the protection of the law as guaranteed by section 3 of the Constitution was contravened when a portion of the Applicant’s criminal trial, namely, the continuation of the Applicant’s criminal trial that took place on 27th May 2015 and at which a judgment was handed down, was conducted in the Applicant’s absence and in contravention of section 15(2) of the Constitution.
- (2) A declaration pursuant to section 18 of the Constitution that the judgment handed down on 27th May 2015 was a nullity.
- (3) An order that the Applicant’s criminal trial be continued so that the directions given by the Privy Council at paragraph [12] and elsewhere of its judgment in the Applicant’s case be implemented with all convenient speed.”

The Issues

- [13] The appellant frames the issues on this appeal as whether the judge erred in finding as a fact that the appellant had consented to the continuation of the trial in his absence and whether there was a contravention of section 15(2) of the Constitution. The respondent identifies the issue as whether section 15 of the Constitution was breached when the judgment on sentence was delivered on 27th May 2015 in the appellant’s absence. The resolution of that issue turns on whether the judge erred in finding that the appellant had consented to the judgment being delivered in his absence.
- [14] As I see it, there are two issues on this appeal. The first is whether there was an evidential basis for the judge to find that the appellant consented to the trial proceeding in his absence. If the answer to this question is no, the question is whether the delivery of the judgment on sentencing in the absence of the

appellant without his consent deprived him of the protection of the law guaranteed under section 15(2) of the Constitution.

The Submissions

- [15] On behalf of the appellant, Dr. David Dorsett submitted that the learned judge simply got the facts wrong. The appellant's written skeleton submissions aver at paragraph 11 that "the finding 'that there was no evidence before the court that the abridged notice of the hearing created an inability for counsel to communicate with his client, the applicant' is simply not supported, **and indeed is contradicted** by the unimpeachable evidence of the appellant." (original emphasis). The evidence being referred to here is paragraph 9 of the appellant's affidavit which is recited at paragraph [8] of this judgment. Dr. Dorsett submitted that this error alone is sufficient reason to allow the appeal.
- [16] On the law, Dr. Dorsett submitted that Section 15(2) of the Constitution establishes the rule that a criminal trial, which includes the sentencing stage, shall not take place in the absence of the accused except with the accused's own consent. This rule may be departed from only when the provisos to section 15(2) are applicable or come into play. In this case, none of the exceptions was applicable. As such there was a contravention of section 15(2) when the appellant was sentenced in his absence.
- [17] It was further submitted that though section 15(2) contemplates that an accused person may waive his right to be present at trial by his own consent, this does not mean that consent can be exercised vicariously and unknowingly through counsel. Waiver of a constitutional right must be voluntary and on an informed basis of all the material facts and of the consequences of his choice. Waiver cannot be lightly inferred to have occurred. The presence of counsel and its related implications that he is acting with the accused's authority and consent, is distinct from the accused being present.
- [18] On the evidence, it cannot be said that the appellant voluntarily absented himself from the trial proceedings. It cannot be said that he was aware of the

relevant circumstances and the likely consequences because he was completely in the dark that Cottle, J would proceed to sentence on 27th May 2015. Accordingly, the appellant's absence on that day vitiates all that happened.

The Respondent's Submissions

- [19] On behalf of the respondent, Mrs. Carla Brookes-Harris submitted that the appellant has misquoted the judge's finding that there was no evidence that the abridged notice of the hearing created an inability for counsel for the appellant to communicate with the appellant that sentence would be delivered that day. The judge was not referring to the evidence before her as contained in the appellant's affidavit of 1st June 2015. Her actual statement was:

“Additionally, this court notes that there was no evidence before **that** court that the abridged notice of the hearing created an inability for counsel to communicate with his client to determine the propriety of proceeding with the trial in the absence of his client, the applicant.”

- [20] Clearly, what the judge was saying was that Cottle, J had not been told that Dr. Dorsett had not been able to communicate with the appellant to determine whether he consented to proceeding in his absence. I therefore agree that the appellant has misconstrued the judge's finding of fact on this point; a finding that was justified by the evidence presented before her given the uncontradicted evidence of Ms. Gittens-Jones that at no time during the delivery of the judgment did Dr. Dorsett communicate or raise any objections or concerns about the appellant's absence.

- [21] Mrs. Brookes-Harris further submitted that the judge was correct to find that it was not communicated to Cottle, J that the appellant did not consent to proceeding in his absence given the uncontroverted evidence that: (a) Dr. Dorsett was present when judgment on sentence was delivered; (b) at no time did he raise any objection to the adequacy of the notice of the hearing or to proceeding in the absence of the appellant; (c) Dr. Dorsett did not indicate to Cottle, J that the appellant was unaware of the hearing; and (d) Dr. Dorsett did

not inform Cottle, J that he needed to take instructions from the appellant in order to proceed in his absence.

- [22] The respondent contends that in these circumstances there was evidence that the appellant consented and that Dr. Dorsett had the ostensible and apparent authority to receive the judgment in his absence.

Discussion

- [23] Section 15(2) of the **Constitution Order 1981 of Antigua and Barbuda** provides:

“(2) Every person who is charged with a criminal offence -

- a. shall be presumed to be innocent until he is proved or has pleaded guilty;
- b. shall be informed orally and in writing as soon as reasonably practicable, in language that he understands, of the nature of the offence with which he is charged;
- c. shall be given adequate time and facilities for the preparation of his defence;
- d. shall be permitted to defend himself before the court in person or by a legal practitioner of his own choice;
- e. shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
- f. shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, and except with his own consent the trial shall not take place in his absence -
 - (i) except where, under the provisions of any law entitling him thereto, he is given adequate notice of the charge, the date, time and place of the trial or continuance thereof and afforded a reasonable opportunity of appearing before the court;

Provided that where the foregoing conditions have been complied with, and the court is satisfied that owing to circumstances beyond his control he cannot appear, the trial shall not take place or continue in his absence; or

(ii) unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.”

[24] For these purposes a trial includes the sentencing phase, including the date appointed for the delivery of the judgment on sentence. If authority is needed for this proposition, it may be found in **Lawrence v The King**⁵.

[25] In that case, the appellant had been convicted of stealing and false accounting and was duly sentenced. However, the judge subsequently, in chambers, varied the sentence on record by substituting two years imprisonment on the counts of stealing and one year on the count of false accounting. It was held that this was a new and different sentence passed in circumstances where the judge no longer had jurisdiction to pass any sentence and the sentence was therefore set aside. In the course of delivering judgment, Lord Atkin stated:

“It is an essential principle of our criminal law that the trial for an indictable offence has to be conducted in the presence of the accused; and for this purpose, trial means the whole of the proceedings, including sentence. There is authority for saying that in cases of misdemeanour there may be special circumstances which permit a trial in the absence of the accused, but on trials for felony the rule is inviolable, unless possibly the violent conduct of the accused himself intended to make trial impossible renders it lawful to continue in his absence. The result is that sentence passed for felony in the absence of the accused is totally invalid.”

[26] Similarly, in **R v Hales**⁶ the defendant was tried for stealing a motorcycle and sidecar. The first part of the proceedings took place on October 19th, 1923, at the Oxford Assizes where he was convicted. The judge adjourned sentence pending the outcome of another case involving the defendant. Afterwards on

⁵ [1933] AC 699.

⁶ [1924] 1 K.B. 602.

October 25th at Worcester Assizes, sentence was passed upon the defendant in his absence. The court held:

“In the opinion of this Court that could not properly be done. The charge against the defendant was one of felony, and the Court had no jurisdiction to pass sentence in respect of a charge of that nature in the absence of the prisoner.”

[27] These cases reflect the position at common law. Section 15(2) of the Constitution is the guiding provision in Antigua and Barbuda in relation to the trial of a person in his absence. The constitutional imperative that a trial be conducted in the presence of an accused person is intended to secure, and is an indispensable feature of, a fair trial. Thus, the right to be present is the default position. The right serves a practical purpose. The presence of the defendant enables him to understand the proceedings, know and assess the evidence adduced and to give instructions to his counsel on how to proceed. These purposes served the overarching objective of securing a fair trial.

[28] However, the Constitution provides that a trial may proceed in the absence an accused person: (i) if he consents, (ii) if he has been given notice of the charge, date time and place of the trial or its continuation and afforded a reasonable opportunity to appear and fails to do so (save where due to circumstances beyond his control) or (iii) if his behaviour makes it impracticable for the trial to continue in his presence.

[29] The arguments in this appeal and below have focused on whether the appellant consented to be tried in his absence or put another way, whether he waived his right to be present. Absence may be voluntary, as where a defendant makes a deliberate decision to absent himself from the trial and absconds. Courts have been more ready to hold that in such circumstances the appellant has waived his right to be present. **Darryl Frett v The Commissioner of Police**⁷ was such a case. On the other hand, a defendant's absence may be involuntary in the sense that it has caused by genuine illness, incapacity or other unavoidable circumstances beyond the defendant's control.

⁷ BVIMCRAP2022/0002 (delivered 6th June 2024, unreported).

Courts must be astute to distinguish between legitimate reasons for absence and spurious or contrived voluntary absence.

[30] Undoubtedly, the judge has a discretion to determine whether a trial should take place or continue in the absence of a defendant. The learning suggests that where a judge is considering proceeding with a trial in the absence of the defendant, a number of principles are relevant. A summary of those principles as gleaned from the case of **R v Hayward**⁸, and applied by this Court in **Darryl Frett v The Commissioner of Police** is as follows:

- (1) The accused can waive his right to be present either in whole or in part. He will be treated as having waived his right wholly if knowing or having the means to know where and when his trial is to take place he deliberately and voluntarily absents himself and/or withdraws instructions from his lawyers. He may waive his right in part if being present and represented at the outset, during the course of the trial he behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws instruction from his lawyers;
- (2) The trial judge has a discretion as to whether a trial should take place or continue in the absence of an accused and/or his legal representatives.
- (3) That discretion should 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, particularly where the accused defendant is unrepresented.
- (4) In exercising that discretion, fairness to the accused is of prime importance but fairness to the prosecution must also be taken into account. The judge has to have regard to all the circumstances of the case including: (a) the nature and circumstances of the accused's behaviour in absencing himself from the trial or

⁸ [2001] 3 WLR 125.

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; (b) whether an adjournment might result in the accused being caught or attending voluntarily and/or not disrupting the proceedings; (c) the likely length of such an adjournment; (d) whether the accused, though absent, is or wishes to be legally represented at the trial or has by his conduct waived his right to representation; (e) whether the absent accused's lawyers are able to receive instructions from him during the trial and the extent to which they are able to present his defence; (f) the extent of the disadvantage to the accused in not being able to give his account of events, having regard to the nature of the evidence against him; (g) the risk of the jury reaching an improper conclusion about the absence of the accused; (h) 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; (i) the effect of delay on the memories of witnesses; (j) where there is more than one accused and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the accused who are present.

- (5) 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.

[31] Clearly, not every principle or factor will be relevant in all situations; whether they are relevant depends on the particular facts and circumstances of each case.

[32] These principles received general endorsement by the House of Lords in **R v Jones (Anthony Williams)**⁹. The appellant and another were arrested and charged with robbery. They were arraigned and pleaded not guilty. They were granted bail and a trial date was eventually set for 1st June 1998. Neither

⁹ [2002] UKHL 5.

appeared at trial. Warrants were issued for their arrest, and the trial was rescheduled for October 1998. Again, they failed to show. The trial judge ruled that the trial should proceed in their absence, noting that further delay would be unfair to witnesses and that the defendants had deliberately frustrated the proceedings. Because the defendants had absconded, their lawyers withdrew from the proceedings, leaving them unrepresented during the trial. They were both convicted of conspiracy to rob and sentenced in their absence to 13 years' imprisonment. Jones was subsequently apprehended 14 months later and admitted to a deliberate failure to surrender to custody, for which he received an additional 12-month sentence. He appealed his conviction arguing that the Crown Court could not legally conduct a trial in a defendant's absence from its commencement. The Court of Appeal dismissed his appeal, and the House of Lords upheld that decision.

- [33] While the facts of **Jones** involved voluntary absconding by the defendants, it provides useful guidance on the compatibility of a decision to proceed in the absence of a defendant with Article 6 of the **European Convention on Human Rights** which section 15(2) of the Antigua and Barbuda Constitution mirrors.
- [34] Their Lordships seemed to express differing views on whether a defendant who deliberately absconds can be said to have "waived" their right to be present and represented at trial under Article 6 of the **European Convention on Human Rights**. Lord Bingham of Cornhill accepted the Court of Appeal's conclusion that by deliberately absconding in "flagrant breach" of bail conditions, the defendant had "clearly and expressly by his conduct" waived his right to be present and legally represented. He reasoned that someone who voluntarily chooses not to exercise a right cannot later complain about losing the benefits of that right.
- [35] Lord Nolan did not criticise the finding of waiver, stating that where a defendant has had legal advice and then makes a "deliberate and conscious choice" to take no further part, it is permissible to describe this as a waiver. Lord Hutton's view was that a deliberate decision to abscond to avoid trial justifies an

inference that the defendant had no intention of putting forward a defence, thus waiving the right in an "unequivocal manner".

[36] On the other hand, Lord Hoffmann expressed some reservation with the notion of waiver in this context. He reasoned that true waiver requires a "consciousness of the rights" being waived, and there was no evidence the defendant knew for certain the trial would proceed without him or his representatives. He preferred to say the defendant simply "chose not to exercise" his rights. Lord Rodger of Earlsferry also had reservations about the finding of waiver. Like Lord Hoffmann, he preferred to focus on whether the trial process as a whole was fair, rather than whether a formal waiver had occurred.

[37] Despite these differences in legal terminology, the judges ultimately agreed on two key points: (i) the critical question was not whether a formal "waiver" existed, but whether the proceedings, taken as a whole, were fair and satisfied the Article 6 requirements.

[38] Importantly, and especially as it relates to section 15(2) of the Constitution which mirrors Article 6 of the **European Convention on Human Rights**, it was held that the European cases interpreting Article 6 did not lay down a principle that a trial may only proceed in the absence of the accused only if there has been a waiver of the right to a fair trial. According to Lord Hoffmann:

"The question in my opinion is not whether the defendant 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...satisfied the requirements of the Convention. That, as I understand it, is the question which the European jurisprudence requires to be answered."

[39] That is the lens through which I prefer to view the issue on this appeal.

Analysis and Conclusions

[40] At the conclusion of the hearing of the appeal this Court ordered that the transcript of the proceedings before Cottle, J be obtained and filed. We thought

that this would provide the best evidence as to what transpired on 27th May 2015 as it relates to what, if anything, was said about the absence of the appellant, and in particular whether the judge made any enquiries in that regard. By affidavit filed on 7th March 2025 but only brought to this Court's attention on 26th February 2026, the Court was advised that the transcript was unavailable. The Court can only proceed on the evidence contained in the affidavits sworn by the appellant and Ms. Gittens-Jones.

Whether there was an evidential basis for finding that the appellant had consented to the trial continuing in his absence

[41] Robertson, J found as a fact that the appellant had consented to the trial continuing in his absence. This finding of fact cannot be lightly impugned by an appellate court, which is not at liberty to simply substitute its view of the facts for those of the trial judge. Consistent with settled authority, an appellate court cannot overturn findings of fact of a trial judge merely because it would itself have come to a different view: **Dr. Keith Rowley v Christo Gift and another**.¹⁰ It may only do so where the judge's findings of primary facts are plainly wrong which connotes that either there was no evidence to support the finding, or the finding was based on a misunderstanding of the evidence, or the finding was one that no reasonable judge could have reached, being outside the bounds within which reasonable disagreement is possible: **Kwok Kin Kwok v Yao Juan**.¹¹ A recent succinct recap of the salient principles that govern appellate restraint is contained in the judgment of the Privy Council in **Dr. Keith Rowley v Christo Gift and another**, adopting the dicta of **Volpi v Volpi**¹², the leading recent case in England and Wales on the subject:

“(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

(ii) The adverb ‘plainly’ does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached

¹⁰ [2025] UKPC 37.

¹¹ [2022] UKPC 52.

¹² [2022] 4 WLR 48.

a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

[42] In the context of this case, where the evidence before the judge was consisted entirely of affidavit evidence without any cross-examination of witnesses, I find apposite the observations of Lord Hodge in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**¹³:

"16. In *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372 Lord Hoffmann referred to the advantage that a judge at first instance had in seeing the parties and the other witnesses when deciding questions of credibility and findings of primary fact. He suggested that an appellate court should also be slow to reverse a trial judge's evaluation of the facts and quoted from his earlier judgment in *Biogen Inc v Medeva plc* [1997] RPC 1, 45:

'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact

¹³ [2014] UKPC 21.

expression, but which may play an important part in the judge's overall evaluation.'

17. Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. In *re B (a Child)* (above) Lord Neuberger at para 60 acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary fact and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in *Whitehouse v Jordan* [1981] 1 WLR 246, 269-270:

'[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.'

See also Lord Fraser of Tullybelton, at p 263G-H; *Saunders v Adderley* [1999] 1 WLR 884 (PC), Sir John Balcombe at p 889E; and *Assicurazioni Generali SpA v Arab Insurance Group* (Practice Note) [2003] 1 WLR 577 (CA), Clarke LJ at paras 12-17. Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum."

- [43] In summary, when findings of fact are derived entirely or almost entirely from undisputed documentary evidence, appellate courts are in just as strong a position as the trial judge to evaluate those facts and draw inferences. In such cases, the advantage of the trial judge in assessing the credibility of oral evidence is less significant, and the appellate court may intervene more readily, as opposed to situations where credibility and reliability of witnesses are central issues. Therefore, where the evidence is unchallenged and documentary, the spectrum shifts towards greater appellate scrutiny and less deference to the trial judge's evaluation.

[44] Distilled, the authorities instruct that an appellate court should only overturn a trial judge's findings of fact if they are plainly wrong, meaning that no reasonable judge would have reached the original decision; not how strongly the appeal court disagrees with it. Unless there is strong evidence to the contrary, appeal courts assume that the trial judge considered all the evidence; not mentioning specific evidence doesn't mean it was ignored. A trial judge's factual findings should not be evaluated by whether their judgment evenly summarises the evidence; the weight given to evidence is for the judge to decide. An appeal court can only set aside a judgment for lack of balanced consideration if the conclusion is irrational. Judgments need not be perfectly worded, and appeal courts should avoid overanalysing them like statutes or contracts. When findings of fact are derived entirely or almost entirely from undisputed documentary evidence, appellate courts are in just as strong a position as the trial judge to evaluate those facts and draw inferences.

[45] Approaching this case with those principles in mind, on the evidence, it is fair to say that there was nothing to contradict the appellant's assertion that he had not been notified that the trial would continue on 27th May 2015. Absent such knowledge, there could be no informed consent to the trial proceeding in his absence or waiver of his right to be present. There is no evidence that the appellant knew or had the means to know that his trial would continue on 27th May 2015, but deliberately and voluntarily absented himself. On the evidence, the judge gave extremely short notice of his intention to deliver his judgment on the same day.

[46] Robertson, J gave three reasons why Cottle, J could infer consent. First, because the appellant's attorney was present and 'giving directions to counsel.' Secondly, although the appellant averred that he had not consented to the trial continuing in his absence, this lack of consent was not communicated to Cottle, J. Thirdly, there was no evidence before Cottle, J that the abridged notice of the hearing created an inability for counsel for the appellant to communicate with the appellant to determine the propriety of the sentence being delivered

in his absence¹⁴. The judge did so even while accepting that the use of the words “own consent” in section 15(2)(f) of the Constitution denotes that the defendant must give his personal consent. Her interpretation of the section is captured at paragraph [21] of the judgment:

“Interestingly, the introductory provisions to section 15(2)(f) reads ‘...and except with **his own consent** the trial shall not take place in his absence’. This court cannot help but reflect on the fact that the framers of the Constitution’s choice to use the words “*his consent*” would have been sufficient to convey the giving of consent by the accused, however saying “*his own consent*” seems to be an attempt at emphasis and to personalize the consent to the accused in question. Generally, an attorney at law has an ostensible authority in matters before the court. However, it would appear that on the matter of an accused’s right to be present at the trial the ostensible authority may be insufficient and that the court must be satisfied that the authority to proceed arose from the accused himself. This is usually evidenced by expressed consent of the accused or of the accused through the attorney at law on record unless of course the circumstances of the particular case fall within the stated exceptions of section 15(2)(f) of the Constitution. Generally, the court wants to ensure that the consent is clear and unequivocal.”

[47] In light of this interpretation, her conclusion at paragraph [22] that ‘It was open to the court on the hearing of 27th May 2015 to conclude that there was consent from the accused himself, (“his own consent”) to proceed with the continued hearing of the proceedings’ seems inconsistent with her recognition that the appellant’s consent must be his own and expressed personally or through his counsel. The appellant’s evidence was that he did not consent. The judge provided no reason for disbelieving or doubting this assertion and there is no evidence that Dr. Dorsett represented to Cottle, J that he had the appellant’s express consent to proceed in his absence.

[48] From the authorities examined, cases of waiver, whether by absence or behaviour or illness requires at the least that the defendant be aware of the proceedings. That element is missing from this case. Without it, I am not prepared to draw an inference of consent or waiver. I would therefore hold that

¹⁴At paragraph 22.

Robertson, J's finding that the appellant consented to the trial continuing in his absence is not supported by the evidence and is plainly wrong.

- [49] In my view, this was a case of involuntary absence due to the appellant's unawareness of the proceedings because of his counsel's failure to notify him once he became aware that judgment would be delivered that day. The appellant's affidavit makes no mention of any effort at all made by Dr. Dorsett to contact him. It merely says that "the immediacy and urgency of the phone call from court staff did not permit my lawyer to track me down by phone or otherwise so that I could be informed of the impending judgment and permit me to make arrangements so that I could present myself at the courthouse". If indeed this was the case, Dr. Dorsett failed in his duty to inform Cottle, J that he had not contacted the appellant and failed in his duty to either seek to stand the matter down until he could do so or obtain the appellant's instructions to proceed in his absence.

Whether sentencing the appellant in his absence render the trial unfair and in breach of section 15(2)(f)

- [50] Notwithstanding my finding that the appellant was unaware of the hearing and could not consent to it proceeding in his absence or waive his right to be present, the real question is not whether there was waiver or consent but whether in all the circumstances the appellant received a fair trial although absent. For the reasons that follow, I am satisfied that he did.
- [51] The only outstanding business on 27th May 2015 was the delivery of the judgment on sentence. All submissions on sentencing had been previously fully ventilated in the presence of the appellant on 11th May 2015. Dr. Dorsett was present for the delivery of judgment and raised no issue or objection to proceeding in the absence of the appellant. The judgment was read and a written copy was made available to all parties. In Lord Bingham's words, '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 interest of that client, does provide a valuable safeguard against the possibility of error and oversight.’¹⁵

[52] Dr. Dorsett’s presence sufficiently safeguarded the appellant’s interest and there is nothing in the evidence to suggest that delivery of the judgment in the absence of the appellant in the circumstances of this case rendered his trial unfair. The fact that counsel of Dr. Dorsett’s tremendous experience and with a reputation for fiercely and fearlessly defending his client’s interests raised no objections, suggests that he himself saw no unfairness or prejudice to the appellant in proceeding with the delivery of the judgment in his absence. I find there was none.

[53] I would dismiss the appeal for the reasons given herein with no order as to costs, consistent with the practice of this Court in claims of this nature.

[54] The Court apologises for the delay in delivery of this judgment. At the conclusion of the hearing of the appeal on 25th February 2025 this Court made the following orders:

- (1) The Registrar of the High Court shall produce and make available to the Court and to counsel for the parties, a copy of the transcript of the proceedings in this matter on 27th May 2015, if available, within 28 days of the date of this order.
- (2) If the transcript is produced to the Court and to the parties, the parties are required to file further submissions in this matter within 21 days of receipt of the transcript.
- (3) The judgment of the Court will be delivered after receipt of the further submissions by counsel or notification by the Registrar of the High Court that the transcript is not available.

¹⁵ At paragraph 15.

[55] Regrettably, it was not until 26th February 2026 that the panel was notified that an affidavit of non-availability of transcript had been filed since 7th March 2025. This administrative oversight has led to the delay in the delivery of this judgment and is deeply regretted. The Court thanks the parties for their patience.

Disposition

[56] For the aforementioned reasons, it is therefore ordered as follows:

(1) The appeal is dismissed.

(2) There is no order as to costs.

I concur.
Mario Michel
Chief Justice [Ag.]

I concur.
Kimberly Cenac-Phulgence
Justice of Appeal [Ag.]

By the Court

Chief Registrar