

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

**R v Clarke (Appellant) (On Appeal from the Court of Appeal
(Criminal Division))**
**R v McDaid (Appellant) (On Appeal from the Court of Appeal
(Criminal Division))
(Consolidated Appeals)**

Appellate Committee

Lord Bingham of Cornhill
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
Joel Bennathan QC
Peter Wilcock
(Instructed by Hadgkiss Hughes & Beale)

Respondents:
David Perry QC
Duncan Perry QC
(Instructed by Director of Public Prosecutions)

Hearing date:
28 NOVEMBER 2007

ON
WEDNESDAY 6 FEBRUARY 2008

HOUSE OF LORDS

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
IN THE CAUSE**

**R v Clarke (Appellant) (On Appeal from the Court of Appeal
(Criminal Division))**

**R v McDaid (Appellant) (On Appeal from the Court of Appeal
(Criminal Division))
(Consolidated Appeals)**

[2007] UKHL 8

LORD BINGHAM OF CORNHILL

My Lords,

1. On 23 April 1997 in the Crown Court at Worcester each of the appellants was convicted by a jury of causing grievous bodily harm with intent contrary to section 18 of the Offences against the Person Act 1861. For that offence each was sentenced to 12 years' imprisonment. The first appellant received a concurrent sentence for another offence and the second appellant received a consecutive sentence of 2 years' for other offences, making a total sentence in his case of 14 years'. For the purposes of this appeal, referred to the Court of Appeal by the Criminal Cases Review Commission, it is accepted that when the trial of the appellants began in April 1997, although leave to prefer voluntary bills had previously been given on two occasions, there was no signed indictment before the Crown Court. The evidence at the trial ended on Friday 18 April. On Monday 21 April 1997 the appellants were arraigned on an additional (but alternative) count of inflicting grievous bodily harm contrary to section 20 of the 1861 Act. The existing form of indictment was then amended by leave of the trial judge, a copy of the form as amended was signed by the proper officer of the court and the amended form was treated as the indictment upon which the jury convicted (although not on the added count). The short questions to be resolved in this appeal thus arise: whether the absence of a signed indictment at the outset of and during most of the trial had the legal effect of invalidating the proceedings? And, if so, whether such invalidity was cured by the late signature of the proper officer?

2. At the heart of the issues to be decided lie sections 1 and 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 which, as enacted and omitting provisions not immediately germane to this appeal, provide:

“1.–(1) Subject to the provisions of this section grand juries are hereby abolished, but where a bill of indictment has been signed in accordance with the provisions of this Act, the indictment shall be proceeded with in the same manner as it would have been proceeded with before the commencement of this Act if it had been found by a grand jury, and all enactments and rules of law relating to procedure in connection with indictable offences shall have effect subject only to such modifications as are rendered necessary by the provisions of this section and of the section next following.

(2) Where at the commencement of this Act any person has obtained the direction or consent in writing of a judge of the High Court for the preferment of an indictment under the Vexatious Indictments Act 1859, the direction or consent shall have effect as if it were a direction or consent for the preferment of a bill of indictment under this Act...

2.–(1) Subject to the provisions of this section, a bill of indictment charging any person with an indictable offence may be preferred by any person before a court in which the person charged may lawfully be indicted for that offence, and where a bill of indictment has been so preferred the proper officer of the court shall, if he is satisfied that the requirements of the next following subsection have been complied with, sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly:

Provided that if the judge or chairman of the court is satisfied that the said requirements have been complied with, he may, on the application of the prosecutor or of his own motion, direct the proper officer to sign the bill and the bill shall be signed accordingly.

(2) Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either–

- (a) the person charged has been committed for trial for the offence; or

- (b) the bill is preferred by the direction or with the consent of a judge of the High Court or pursuant to an order made under section nine of the Perjury Act 1911:

Provided that–

- (i) where the person charged has been committed for trial, the bill of indictment against him may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment;
- (ii) a charge of a previous conviction of an offence or of being a habitual criminal or a habitual drunkard may, notwithstanding that it was not included in the committal or in any such direction or consent as aforesaid, be included in any bill of indictment.

(3) If a bill of indictment preferred otherwise than in accordance with the provisions of the last foregoing subsection has been signed by the proper officer of the court, the indictment shall be liable to be quashed:

Provided that–

- (a) if the bill contains several counts, and the said provisions have been complied with as respects one or more of them, those counts only that were wrongly included shall be quashed under this subsection; and
- (b) where a person who has been committed for trial is convicted on any indictment or any count of an indictment, that indictment or count shall not be quashed under this subsection in any proceedings on appeal, unless application was made at the trial that it should be so quashed...

(5) For the purposes of this section the expression ‘judge or chairman’ includes a deputy recorder, deputy chairman, or acting chairman, and the expression ‘proper officer’ means in relation to a court of assize the clerk of assize, and in relation to a court of quarter sessions the clerk of the peace, and also includes in relation to any court such officer as may be prescribed by rules made under this section ...”

3. The genesis of these provisions is amply documented and is not in doubt. Historically, almost all cases came before a judge and trial jury following consideration of the proposed charges by a grand jury. The charges which it was proposed to prosecute were set out in what was called a bill of indictment, and that was laid before the grand jury. It heard witnesses and decided whether the case should go to trial or not. If the grand jury thought it should, they wrote on it “a true bill” (formerly *billa vera*) and handed it down. The bill so endorsed and handed down thereupon became an indictment. If they decided the case should not go to trial they marked it “no true bill” (formerly *ignoramus*): in that case there was no indictment and the case did not go to trial on the presentation of that grand jury.

4. By the early 1930s grand juries were generally agreed to have outlived their usefulness and a Committee on the Business of the Courts under the chairmanship of Lord Hanworth MR, in an *Interim Report* published in March 1933, recommended their abolition. By this time almost all cases came to trial by jury following a committal by justices or stipendiary magistrates after detailed consideration of the evidence, or by the leave of a High Court judge to prefer a voluntary bill, again after detailed consideration of the evidence. (Proceedings pursuant to a coroner’s inquisition under section 5 of the Coroners Act 1887 were a small and only partial exception). The perfunctory consideration given by the grand jury was recognised to cause delay, expense and inconvenience and to add little save the occasion for a social junket. But the abolition of the grand jury posed a problem: how was a bill of indictment, in itself a document of no legal effect, to become an indictment upon which a defendant would stand trial (perhaps, in 1933, for his life) before judge and jury? This was not a trivial question since, as Sir James Fitzjames Stephen had said, in *A History of the Criminal Law of England* (1883), vol I, p 274, “The indictment is the foundation of the record in all criminal cases”.

5. The answer given by section 2(1) to the question just posed would appear to be very clear: a bill of indictment would become an indictment when duly signed by a proper officer of the court. That is what the subsection provides: “where a bill of indictment has been so preferred the proper officer of the court shall, if he is satisfied that the requirements of the next following subsection have been complied with, sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly”. This reading is entirely consistent with the provision in section 1(1) that “where a bill of indictment has been signed in accordance with the provisions of this Act, the indictment shall be proceeded with” as if found by a grand jury. It is also consistent with

section 2(3): only if the bill of indictment has been signed by the proper officer is there an indictment which is liable to be quashed. There is, as the Court of Appeal observed in *R v Stewart* (1990) 91 Cr App R 301 at 304, 306, a fundamental distinction between the preferment of a bill of indictment and the signing of the bill: it is the signing of the bill which converts it into an indictment.

6. The legislative history of these provisions strengthens this reading. As originally drafted, clause 1(1) of the Bill laid before Parliament referred to “an indictment presented” but made no reference to signing. Clause 2(1) similarly made no express reference to signing: the bill of indictment was to be submitted to the judge or chairman of the court and certified under the hand of the clerk or other officer of the court as having been so submitted, and was thereupon to become an indictment. These clauses were criticised as lacking clarity, and the amended clauses were introduced to put the matter beyond doubt.

7. Under the superseded grand jury regime the indictment was authenticated by the delivery of the bill found to be a true bill by the grand jury: *Jane Denton’s Case* (1823) 1 Lewin 53, 168 ER 956; *Giuseppe Sidoli’s Case* (1833) 1 Lewin 55, 168 ER 957. With the abolition of the grand jury it was thought necessary to substitute a new means of authentication. This was the role of the proper officer under section 2(1) of the 1933 Act. He was to sign the bill, but only “if he is satisfied that the requirements of the next following subsection have been complied with”, namely that the person charged has been committed for trial or that the bill has been preferred at the direction or with the leave of a High Court judge or pursuant to an order under section 9 of the Perjury Act 1911. It is furthermore incumbent on the proper officer in an appropriate case to have regard to the provisos to subsection (2), in particular to ensure that any counts in the bill charging offences for which the defendant has not been committed are founded on evidence disclosed in depositions and are properly joined. Thus the role of the proper officer was not envisaged as purely formal, although it would be so where the judge or chairman, himself satisfied that the requirements of subsection (2) had been complied with, directed the proper officer to sign the bill. In *R v Stewart*, above, p 307, the Court of Appeal accepted that the proper officer had satisfied himself that the person charged had been committed for trial for the offence contained in the indictment or had been the subject of a voluntary bill or an order under section 9 of the Perjury Act in compliance with section 2(2) of the 1933 Act. This is how the procedure was intended to operate. In most cases, no doubt, the proper officer’s task would be routine, but it would not always be so.

8. Until recently, the jurisdictional requirements of section 2 of the 1933 Act were strictly insisted upon. In *R v Gee* [1936] 2 KB 442 the proceedings committing the defendants for trial were held by the Court of Criminal Appeal (Lord Hewart CJ, du Parc and Goddard JJ) to be so defective that there was no lawful committal. It followed that the document purporting to be an indictment was not an indictment and the appellants could not be tried on it. Giving the judgment of the court (pp 446-447), Goddard J said: "Considering that since 1933 a committal by magistrates is substituted for a presentment by a grand jury, it is of the greatest importance that there should be no deviation from the requirements of the Statute". The convictions were quashed. In *R v Thompson* [1975] 1 WLR 1425, 1430, the prosecution fell foul of the principle "that it is only once that an indictment can be preferred upon the basis of one committal". It followed on the facts of the case that the trial had taken place upon an invalid indictment not properly founded on a committal nor preferred by leave of a High Court judge and the trial was therefore a nullity. The convictions were quashed. In *R v Cairns* (1983) 87 Cr App R 287 a High Court judge had given leave "to prefer this bill of indictment containing one count initialled by me". The trial judge, rightly thinking that this and other counts should be tried together, authorised an entirely new indictment containing these other counts and the count in the voluntary bill. While recognising the point as technical and devoid of merit, the Court of Appeal held that the judge had had no jurisdiction to act as he had under section 2(2) of the 1933 Act. It followed that the appellant had been tried on an indictment which was a nullity, and his conviction was quashed. In *R v Newland* [1988] QB 402 the trial had proceeded on an invalid indictment. While recognising (p 406) that there was no merit in the appeal at all, the appellant having pleaded guilty, his appeal was allowed and his conviction quashed.

9. The authority closest on its facts to the present is *R v Morais* (1988) 87 Cr App R 9. A High Court judge had given leave to prefer a voluntary bill against the appellant, who was arraigned on six counts in the voluntary bill. He pleaded not guilty, was convicted on four counts and was sentenced. Relying on section 2 of the 1933 Act, he appealed on the short ground that the voluntary bill had never been signed by the proper officer: without a signature, he argued, there could be no indictment, and without an indictment there could be no valid trial. In a judgment given by Lord Lane CJ, sitting with McCowan and Pill JJ, the Court of Appeal upheld that submission. The court found considerable value in an unreported judgment of the Court of Appeal in *R v Hodges (George David)*, 5 June 1981, in which Peter Pain J had said:

“It seems to us that it is impossible for a criminal trial to start without there being a valid indictment to which the defendant can plead, and that the bill of indictment does not become an indictment until it is signed”.

By contrast, the court derived no assistance from another unreported decision (*R v Price*, 6 November 1985) in which the facts were similar save that the defendant had pleaded guilty: the court on that occasion had considered the overall justice of the case without close attention to the jurisdictional question and without considering whether the words in section 1 of the 1933 Act were mandatory or directory. Prosecuting counsel submitted that the absence of a signature was of no consequence since, with the form signed by the High Court judge in his possession, the proper officer had had nothing to consider and had had no choice but to sign it. Lord Lane, however, observed (p 13):

“It seems to us that that argument to some extent tends to beg the question. Either the words are mandatory or they are not. If they are mandatory, it does not matter that there is nothing left for the proper officer to do except to sign. If on the other hand they are not mandatory, then it does not matter that there is something left for the officer to do and he still does not sign the indictment”.

Prosecuting counsel went on to cite *Liverpool Borough Bank v Turner* (1860) 2 De GF&J, 502 at pp 507-508, 45 ER 715, 718, where the court was enjoined by Lord Campbell LC to look at the importance of the provisions in question and to look at the real intention of the legislature in deciding what the consequences of non-compliance were intended to be. This was the approach which the court followed. As Lord Lane put it (at p 14 of his judgment)

“The answer, we feel, is to be found in the intentions of the draftsman in the first place. It seems to us that this Act was intended, so to speak, to fill the gap which was left by the abolition of the grand jury. It was intended to ensure not only that the proper requirements had been fulfilled before a trial proper could start, but that also there should be a certification by way of the signature of the proper officer to indicate that he had inquired into the situation and satisfied himself that the requirements of the subsection had properly been complied with. We have

come to the conclusion therefore that it is not merely a comparatively meaningless formality that the proper officer's signature should be appended, but it is, as the words of the Act itself *prima facie* indicate, a necessary condition precedent to the existence of a proper indictment, that the bill should be signed and only then and thereupon does it become an indictment.

Therefore in the present case there was no valid indictment, there was no trial, no valid verdict and no valid sentence.”

Recognising the technicality of the defect, the court ordered a *venire de novo* so that the case would be tried again.

10. The authority of *R v Morais* was not questioned in *R v Jackson* [1997] 2 Cr App R 497 although, on the special facts of that case, the Court of Appeal (Judge LJ, Longmore and Smedley JJ) reached a different conclusion. A number of defendants were charged in a 17 count indictment (“indictment 1”) which was duly signed. The prosecution then brought forward two fresh indictments, one (“indictment 2”) containing a single count against a single defendant and the other (“indictment 3”) containing 3 counts, substantially drawn from indictment 1, against all the defendants. The 3 counts in indictment 3 were: conspiracy to rob (count 1), possession of a prohibited weapon (count 2) and conspiracy to handle stolen goods (count 3). Indictments 2 and 3 were duly signed. Doubts then arose whether there was sufficient nexus between count 3 and counts 1 and 2 in indictment 3 to justify its joinder in the same indictment. The judge gave leave to prefer two fresh indictments, one (“indictment 4”) to contain counts 1 and 2 in indictment 3, the second (“indictment 5”) to contain count 3 in indictment 3. The judge gave leave for service of indictments 4 and 5 to be effected and directed the proper officer to sign those indictments out of time. The defendants were arraigned on indictments 4 and 5, and the trial proceeded on indictment 4, some of the defendants pleading guilty and the others being convicted. They received substantial sentences. But a problem arose because the proper officer, although directed by the judge to do so, omitted to sign the bills of indictment. The Court of Appeal rejected (p 503) the suggestion that *R v Morais* could be distinguished on the basis that it had involved a voluntary bill, but found two further and crucial distinctions. First, the counts on which the defendants had been convicted in indictment 4 had both been included in indictments 1 and 3, both of which had been signed and for that purpose, so far as necessary, checked by the proper officer. Secondly, the judge had exercised the discretion granted to him by the proviso to

section 2(1) of the 1933 Act to direct the proper officer in open court to sign indictments 4 and 5 and she had been obliged to do so, lacking (as a result of the direction) any independent jurisdiction of her own. The court declined to accept that the lawful direction of the trial judge could be frustrated and rendered valueless because the proper officer, for whatever reason, failed to follow his direction. It was not suggested in argument that this case was, on its facts, wrongly decided, and I would for my part endorse it.

11. The House was referred to two cases recently decided in other jurisdictions. The first was *Crawford v HM Advocate* 2006 JC 57, a decision of the High Court of Justiciary (the Lord Justice Clerk (Gill), Lord Osborne and Lord Johnston). Section 64(4) of the Criminal Procedure (Scotland) Act 1995 requires that indictments in proceedings before the sheriff sitting with a jury shall be signed by the procurator fiscal and that the words “By Authority of Her Majesty’s Advocate” shall be prefixed to the signature of the procurator fiscal. In the case under appeal the indictment bore a signature by a person described as “Acting Procurator Fiscal” but the words “By Authority of Her Majesty’s Advocate” did not appear. Distinguishing *Christie v HM Advocate* 2004 JC 13 in which the words “By Authority” above the signature were held to be sufficient, the court held the omission to be fatal to the indictment. The court pointed out that this unsatisfactory result was entirely the fault of the Crown and allowed the appeal.

12. The second authority was *R v Janceski* [2005] NSWCCA 281, (2005) 64 NSWLR 10, a decision of the Court of Criminal Appeal of New South Wales, sitting as a five judge court under the chairmanship of Spigelman CJ. Section 126 of the Criminal Procedure Act 1986 required an indictment to be signed by any one of a number of persons specified in the section, including a person authorised by the Director of Public Prosecutions to sign indictments, and empowered the DPP by order in writing to authorise persons to sign indictments for him and on his behalf. The appeal concerned an indictment presented at trial which had been signed by a barrister in private practice not authorised by the DPP in writing to sign indictments on his behalf. Having examined the matter in great detail, and taken account of much authority including both *R v Morais* and *R v Jackson*, the court unanimously held the indictment to be invalid. Remedial legislation has since been introduced.

13. In a notably able and attractive argument for the appellants Mr Joel Bennathan QC relied on the language of the 1933 Act, construed in its historical setting, and on the construction consistently put on it, until

recently, by the courts to make a simple but compelling submission. Sections 1 and 2 of the 1933 Act require a bill of indictment to be signed by the proper officer before it can become an indictment. The task of the court is to ascertain from the terms of the Act what Parliament intended the consequence to be if a bill of indictment is not duly signed. Setting aside extraordinary facts such as those considered in *R v Jackson*, the answer is clear: if a bill is not signed, it does not become an indictment; if there is no indictment, there can be no valid trial on indictment. Parliament did not intend that a defendant could be tried on indictment without an indictment.

14. The linch-pin of Mr David Perry QC's argument for the Crown is the recent decision of the Court of Appeal (Rose V P, Penry-Davey and Fulford JJ) in *R v Ashton, R v Draz and R v O'Reilly* [2006] EWCA Crim 794, [2007] 1 WLR 181, which must be examined in a little detail. Before the court were three applications for leave, and the facts of the three cases were different. Giving the judgment of the court, Fulford J addressed in paragraphs 4 and 5 what he described as the central issue of principle:

"4. The outcome of each of these cases essentially depends on the proper application of the principle or principles to be derived from the decision of the House of Lords in *R v Soneji* [2006] 1 AC 340, together with the earlier decision of this court in *R v Sekhon* [2003] 1 WLR 1655. Indeed, these three applications demonstrate how far-reaching the effect of those authorities is likely to be whenever there is a breakdown in the procedures whereby a defendant's case progresses through the courts (as opposed to the markedly different situation when a court acts without jurisdiction). In our judgment it is now wholly clear that whenever a court is confronted by failure to take a required step, properly or at all, before a power is exercised ('a procedural failure'), the court should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such a risk, the court must decide whether it is just to allow the proceedings to continue.

5. On the other hand, if a court acts without jurisdiction—if, for instance, a magistrates’ court purports to try a defendant on a charge of homicide—then the proceedings will usually be invalid.”

R v Sekhon [2002] EWCA Crim 2954, [2003] 1 WLR 1655 concerned a number of errors in the conduct of confiscation proceedings, some of which were held to be excusable procedural errors and others to be errors depriving the court of jurisdiction. *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340 concerned the same subject matter. The cases are significant in their rejection, building on dicta of Lord Hailsham of St Marylebone LC in *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, 189-190, the judgment of the High Court of Australia in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, para 93, and the decision of the Court of Appeal in *R v Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] 1 WLR 354, of the old approach of asking whether procedural requirements were mandatory or directory, instead asking what Parliament intended the consequence to be of non-compliance with the requirement in question. While I would myself express the decision to be made rather differently, I would accept the general validity of the distinction drawn by Fulford J in the paragraphs of his judgment quoted above. Many errors pertaining to indictments fall squarely into the procedural category, as exemplified by cases such as *R v Sheerin* (1976) 64 Cr App R 68, *R v Soffe* (1982) 75 Cr App R 133, *R v Farooki* (1983) 77 Cr App R 257 and *R v Laming* (1989) 90 Cr App R 450.

15. Having reviewed the relevant legislation, the judge turned to the three individual cases. The defects in the case of *R v O’Reilly* were held (para 42) to be clearly and wholly jurisdictional in nature, given that the court had no power to deal with the defendant. Leave to appeal was accordingly granted and the conviction was quashed. In the case of *R v Ashton* the procedural failure was judged to be minor and leave was refused. The case of *R v Draz* was more immediately germane to the present case since the second and third questions posed for consideration (para 65) were whether the judge had been correct to conclude, when following the procedure under paragraph 7 of Schedule 3 to the Crime and Disorder Act 1998, that it was unnecessary for an indictment to be preferred and, if an indictment should have been preferred, whether the absence of a signed indictment was fatal to the validity of the proceedings. Paragraph 7 of Schedule 3 to the 1998 Act opened:

“(1) Subject to paragraph 13 below, this paragraph applies where –

(a) a person has been sent for trial under section 51 of this Act but has not been arraigned; and

(b) the person is charged on an indictment which (following amendment of the indictment, or as a result of an application under paragraph 2 above, or for any other reason), includes no offence that is triable only on indictment ...

(3) The court shall cause to be read to the accused each count of the indictment that charges an offence triable either way ...”

Counsel for the Crown (then as now Mr Perry) accepted (para 66) that the procedure envisaged by paragraph 7 of Schedule 3 was premised on the existence of an indictment, but argued that the absence of an indictment, of itself and without more, did not affect the validity of the proceedings because this would not accord with the intention of Parliament and no prejudice had been caused to the defendant such as to make it unjust for the convictions to stand. Fulford J in his judgment recited the terms of section 2(1) of the 1933 Act and continued:

“74 As Mr Perry has helpfully reminded us, there are several authorities which suggest that the absence of a valid indictment renders any subsequent trial a ‘nullity’: *R v Thompson* [1978] 1 WLR 1425; *R v Cairns* (1983) 87 Cr App R 287; *R v Morais* (1988) 87 Cr App R 9; *R v Newland* [1988] QB 402.

75 In *R v Morais* 87 Cr App R 9, the Court of Appeal quashed the appellant’s conviction for supplying drugs and ordered a retrial on the basis that the indictment had not been signed by the officer of the Crown Court. In that case the court concluded that the proper officer’s signature was not ‘a comparatively meaningless formality’ but a ‘necessary condition precedent to the existence of a proper indictment’ (p 14) and that in the absence of a proper indictment the trial was a nullity.

76 The decision in *R v Morais* was distinguished in *R v Jackson (Andrew)* [1997] 2 Cr App R 497. The judge directed the proper officer to sign two indictments but she failed to do so. This court held that the proper officer’s signature was a ‘meaningless’ clerical ‘formality’ and she was deemed to have signed it. In *R v Laming* (1989) 90 Cr

App R 450, the appropriate officer of the Crown Court signed the indictment on the front page rather than after the last count as required by the Indictment Rules 1971 (SI 1971/1253). On those facts, the court on appeal determined that the indictment was valid.

77. As Mr Perry has submitted, it appears, therefore, that even before the decisions in *R v Soneji* [2006] 1 AC 340 and *R v Sekhon* [2003] 1 WLR 1655 not every defect in an indictment would necessarily render it invalid, although the earlier authorities consistently made it clear that the absence of a valid indictment had the effect of rendering the trial proceedings of no legal effect. That conclusion was reached because the primary focus of the court in each of the cases was on whether the breach was of a 'mandatory' statutory provision. As we have set out above, the sea change wrought by the decisions in *Soneji* and *Sekhon* is that the court should concentrate in future on, first, the intention of Parliament (viz was it intended that a procedural failure should render the proceedings invalid) and, second, the interests of justice and particularly whether the procedural failure caused any prejudice to any of the parties, such as to make it unjust to proceed further.

78. Here, the judge and the parties proceeded on the basis that the charges before the court identified the criminality alleged by the prosecution and it was accepted there was no prejudice to the defendant in this particular case when the court dealt with him absent an indictment. We stress that usually a bill of indictment should be preferred and signed and our decision in this case should not be taken as any kind of encouragement to relax that important requirement: an indictment provides a critical safeguard in that it describes the charges an accused faces with clarity and finality. However, applying the test we have described above, there are no indications that Parliament intended that proceedings would be rendered automatically invalid because an indictment had not been preferred or signed, and given no prejudice or consequential injustice have been identified, we see no reason to quash these convictions."

Leave was accordingly refused.

16. The appeal in the present case was dismissed by the Court of Appeal (Pill LJ, Dobbs and Underhill JJ) on 25 May 2006. Giving the judgment of the court, Pill LJ summarised the contentions of the parties and concluded:

“30. The implications of the approach advocated in *Soneji* will need to be worked out in the many different circumstances in which parties rely on breaches of the rules, whether the rules appear in a statute or elsewhere. The case does, however, weaken the strict distinction between mandatory and directory requirements, consideration of which was at the heart of the decision in *Morais*. Whatever its implications in other circumstances, we consider that, in the present situation, we are bound by the decision of this court in *Ashton*, which is based on *Soneji*.

31. If the principle covers *Ashton*, where there was not even a document which purported to be an indictment, it covers the present situation in which a bill of indictment has been lawfully preferred with the consent of a High Court Judge, who initialled the bill accordingly, but the bill has simply not been signed by the officer of the court. The absence of that signature was a situation specifically contemplated by the court in *Ashton*, at paragraph 78. Applying *Ashton*, the proceedings are not rendered automatically invalid because the indictment had not been signed. No prejudice or consequential injustice having been identified, the convictions should stand.

32. We add that, given the ‘sea-change’ identified in *Ashton*, the signature, in the course of the trial, of an amended indictment by the proper officer of the court, is material. It was upon an indictment signed, and properly so-called, that convictions were entered. In the absence of prejudice to the defendants, we would also hold that the proceedings were thereby validated. That approach has something in common with the approach of the court in *Jackson* where a fiction was employed to create an indictment within the meaning of section 2(1) of the 1933 Act.”

17. Mr Perry drew attention to the approval of *R v Ashton* expressed by a number of distinguished academic authorities, who saw it as a victory of substance over formalism. It is always, of course, lamentable if defendants whose guilt there is no reason to doubt escape their just

deserts, although the present appellants, refused leave to appeal (on other points) by the single judge in 1997 and the full court in 1998, have now served the operative parts of their sentences. Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place. In this case, as in *Crawford v HM Advocate*, above, the duty in question was easy to perform, although here the failure to perform it was entirely the fault of the proper officer.

18. What did Parliament intend the consequence to be, when it enacted sections 1 and 2 of the 1933 Act, if a bill of indictment was preferred but not signed by the proper officer? That, as I think both parties agree, is the question to be answered in this case. Although section 1 has been repealed and section 2 has been amended, it is not suggested that the answer to the question has changed. The “always speaking” principle has no application. The answer to the question now is the same as should have been given then. It is inescapable: Parliament intended that the bill should not become an indictment unless and until it was duly signed by the proper officer.

19. It is necessary to ask a second question. What did Parliament intend the consequence to be if there were a bill of indictment but no indictment? The answer, based on the language of the legislation and reflected in 70 years of consistent judicial interpretation, is again inescapable: Parliament intended that there could be no valid trial on indictment if there were no indictment. Parliament has never enacted, with reference to proceedings on indictment, a provision comparable with section 123 of the Magistrates’ Courts Act 1980, but even that section has received a restrictive interpretation: see *New Southgate Metals Ltd v London Borough of Islington* [1996] Crim LR 334-335.

20. The decisions in *R v Sekhon* and *R v Soneji* are valuable and salutary, but the effect of the sea-change which they wrought has been exaggerated and they do not warrant a wholesale jettisoning of all rules affecting procedure irrespective of their legal effect. This indeed the Court of Appeal recognised in *R v Ashton*, as earlier in *R v Sekhon*. I cannot, however, accept the basis upon which the court in *R v Ashton* distinguished its earlier decision in *R v Morais*. As is evident from the passage of Lord Lane’s judgment from page 14 of the report quoted in paragraph 9 above, but not quoted in *R v Ashton*, a passage carrying all the authority of that distinguished judge, the court was not focusing on

the mandatory/directory issue but was asking itself the right question. Pill LJ, although a party to the earlier decision, erred in thinking otherwise. I can see no basis upon which the court in *R v Ashton* could properly depart from the precedent in *R v Morais*, which was clearly binding on it. The court in the present case was, as a result, placed in a difficult position. The decision in *R v Morais* was, in any event, correct.

21. Neither party attached great significance in argument to the late signing of the amended bill in this case, the appellants because (in their submission) it could not validate an invalid trial almost concluded, the crown because (in its submission) the proceedings called for no validation. The appellants' submission is to be preferred. The appellants having been arraigned and tried without a valid indictment, I do not think the somewhat adventitious addition of a signature at the eleventh hour, without (one assumes) any consideration of the counts already in the document, could throw a blanket of legality over the invalid proceedings already conducted.

22. Parliament has had many opportunities over the past two decades to reverse the effect of *R v Morais* and the cases which preceded it had it chosen to do so. It has not. It may now be prompted to do so. Such legislation would no doubt seek to address not only the problems raised by the present case and *R v Morais* but also, for instance, cases where the bill of indictment is signed late, or signed by someone who is not the proper officer, or partially signed, and so on. These are matters better addressed in legislation than by piecemeal judicial decisions.

23. The appeals must be allowed and the appellants' convictions quashed. They are entitled to their costs in the Court of Appeal and the House out of central funds, to be assessed in the usual way.

LORD SCOTT OF FOSCOTE

My Lords,

24. I have had the advantage of reading in advance the opinion prepared by my noble and learned friend Lord Bingham of Cornhill. I regret but agree with his conclusion that the appeals of the two appellants must be allowed and their convictions quashed and agree with

the compelling reasoning that has led him to that conclusion. My regret is that their convictions have had to be quashed on account of a defect in the proceedings that most would regard as a technicality.

LORD RODGER OF EARLSFERRY

My Lords,

25. I have had the advantage of considering the speech of my noble and learned friend, Lord Bingham of Cornhill, in draft. I am in complete agreement with it. Accordingly, for the reasons which he gives, along with the additional observations of my noble and learned friend, Lord Brown of Eaton-under-Heywood, I too would allow the appeals.

26. In my view, the decision of the Court of Appeal in *R v Morais* (1988) 87 Cr App R 9 was plainly correct. The whole scheme of the legislation shows that without an indictment there cannot be a valid trial and, on the express language of section 2(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933, the only step which changes a bill of indictment into an indictment is the signing of the bill by the proper officer of court. That step is accordingly indispensable.

27. The Court of Appeal's decision to the contrary appears to have been based on the significance which their Lordships attached to the decision of this House in *R v Soneji* [2006] 1 AC 340, as interpreted and applied in *R v Ashton* [2007] 1 WLR 181, where, at p 205, para 77, Fulford J described it as contributing to a "sea change" in the approach of the courts.

28. The true significance of the decision in *Soneji* lies, however, in the approval of the view that any classification into mandatory or directory is the end of the relevant inquiry, not the beginning, and that the better test is to ask "whether it was a purpose of the legislation that an act done in breach of the provision should be invalid": *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390, para 93, per McHugh, Gummow, Kirby and Hayne JJ.

29. In *R v Soneji*, having applied that approach, for the reasons given in the speeches, the House concluded that it was not a purpose of the legislation that confiscation orders imposed without respecting the requirements of the statute should be invalid. In *R v Morais* (1988) 87 Cr App R 9, Lord Lane CJ adopted essentially the same approach, but concluded, at p 14, that, for the legislature, the requirement for the court officer's signature to be appended was a necessary condition precedent to the existence of a proper indictment. As Lord Bingham has shown, that was not only a correct, but an inevitable conclusion both from the language of the statute and from the legislative history.

LORD CARSWELL

My Lords,

30. Having been convicted in 1997 of serious crimes and sentenced to substantial terms of imprisonment, the appellants now seek to have their convictions quashed on the ground that the voluntary bills of indictment had not been signed by the proper officer. The Court of Appeal was of opinion that compliance with the requirement of such signature was not necessary in every case. They considered that where no prejudice to the appellants had been caused by the omission it would not have been the intention of Parliament that their conviction should be quashed as invalid. The argument presented on behalf of the appellants, which has been accepted by your Lordships, is that the requirement of signature by the proper officer is an integral and essential element in the presentation of an indictment and that its omission is fatal to the validity of a conviction on a charge contained in that indictment.

31. I see much attraction in the decision of the Court of Appeal, for the prevailing trend is in general against regarding procedural steps as mandatory requirements and in favour of the conclusion that in the absence of prejudice to any party Parliament did not intend that failure to observe the requirement of signature should entail invalidity. I am sympathetic to this approach, which dictated the conclusion of the Court of Appeal in this appeal and in *R v Ashton* [2006] EWCA Crim 794, [2007] 1 WLR 181, but I have been persuaded by the appellants' arguments and agree with your Lordships that the appeals should be allowed. In considering these issues I have derived assistance from the history of the function of the grand jury in its presentment of

indictments and from comparison with the parallel legislation in Northern Ireland.

32. The procedure of the grand jury in the presentment of crimes was founded almost wholly upon ancient usage and not upon statutory enactment: Huband, *Juries in Ireland* (1896) p 116. It was closely similar in Ireland to that obtaining in England, as the institution was imported from English law. The grand jury, or jury of presentment, was of great antiquity, having been created by Henry II in the Assize of Clarendon in 1166. It evolved over time from its early function of presenting an accusation against an accused based on the jurors' own knowledge into its later form. In that form, which was the prevailing procedure in England until 1933 and in Northern Ireland until 1969, any person could appear before the grand jury with a bill of indictment, although in more recent times that was almost invariably the function of the prosecuting authority. The indictment found by the grand jury and presented to the court was the foundation of the record in all criminal cases, being the statement on oath by the grand jury that the prisoner committed the offence charged.

33. A bill, or draft indictment, was indorsed with the names of the witnesses whom it was proposed to call before the grand jury and taken by the solicitor for the prosecution to the grand jury room. The steps then followed were set out in Stephen, *A History of the Criminal Law of England* (1883), vol I, p 274:

“The grand jury sit by themselves and hear the witnesses one at a time, no one else being present except the solicitor for the prosecutor if he is admitted. The name of each witness examined before the grand jury is initialled by the foreman; and when they have heard enough to satisfy themselves that a prima facie case is or is not made out against the prisoner, they endorse upon the indictment ‘ a true bill,’ or ‘ no true bill,’ as the case may be (in the days of law Latin the endorsements were ‘Billa Vera’, or ‘Ignoramus’), and come into court and hand the indictments to the clerk of assize or clerk of the peace, who says, ‘Gentlemen, you find a true bill,’ or ‘no true bill’ as the case may be, ‘against A. B. for felony or misdemeanour.’ If the finding is ‘no true bill,’ the matter drops and the prisoner is discharged, though he is liable to be indicted again. If the finding is ‘a true bill,’ the trial proceeds and the ‘bill’ becomes an indictment.”

The indorsement of the grand jury was parcel of the indictment and the perfection of it: Huband, *op cit*, p 188; *R v Ford* (1607) Yelverton 99. The bill had to be delivered in open court as the finding of the grand jury: Huband, p 189; *R v Thompson* (1846) 1 Cox CC 268. In some assize courts in Northern Ireland it was literally handed down from the gallery of the court, placed in a clip at the end of a long pole held by a tipstaff in the body of the court. It was the affirmation of the bill in court which constituted the indictment, not the words of the indorsement, which were only evidence of the assent or dissent of the grand jury: 2 Hale PC 162. Accordingly the bill was good even if not signed by the foreman, when it had been delivered in court and read in his presence: *Giuseppe Sidoli's Case* (1833) 1 Lewin 55, and cf *Jane Denton's Case* (1823) 1 Lewin 53.

34. I have dwelt upon the grand jury procedure at some length because I think that it illuminates the purpose of Parliament in passing section 2(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933, providing for the signature of the proper officer to a bill of indictment. The legislative history, set out in paragraph 6 of the opinion of my noble and learned friend Lord Bingham of Cornhill, confirms that the introduction of this procedure was not a matter of mere administrative convenience. It was to be the step by which the bill of indictment, which is only a draft, became converted into the indictment, which was and is the foundation of the criminal trial of the accused. It was intended to replace the finding by the grand jury and its presentment of the indictment in open court. As such it appears clear that it was regarded by Parliament as a significant step which could not be omitted without the validity of the procedure being affected.

35. The procedure adopted by the Parliament of Northern Ireland forms a contrast. Grand juries were finally abolished (having gone from quarter sessions in 1926) by section 1 of the Grand Jury (Abolition) Act (Northern Ireland) 1969. Section 2(1) provided, as amended:

“Subject to the succeeding provisions of this section, an indictment may, notwithstanding anything to the contrary in any enactment or rule of law, be presented to [the Crown Court] although not found by a grand jury.”

Section 2(2), which is similar to section 2(2) of the English 1933 Act, specifies the conditions one of which must be satisfied before an indictment may be presented, the most important of which are that the

person charged has been committed for trial or that the indictment is presented with the leave of a judge. Subsection (3) gave specific power to a judge to order an entry of “No Bill” in the Crown book if satisfied that the depositions or committal statements do not disclose a case sufficient to justify putting the accused on trial. Finally, subsection (8) preserved the procedure formerly adopted, save as provided by section 2. That procedure was governed by the Indictments Act (Northern Ireland) 1945 and the rules made thereunder, now replaced by the Crown Court Rules (Northern Ireland) 1979. Nowhere in these provisions is there any requirement for the bill of indictment to be signed by any person, nor has there ever been a practice of signature, save that a judge giving leave to present a voluntary bill generally signs the bill at the conclusion of the leave hearing.

36. This shows that there is no *a priori* requirement that some defined step be taken in order to convert a bill into an indictment, nor did the abolition of the grand jury leave a gap which necessarily required the provision of something to fill it. That conversion may under the Northern Irish legislation take place through presentment of the bill to the Crown Court, although the indictment will not be valid unless one of the conditions set out in section 2(2) of the 1969 Act is satisfied. It also shows, however, that when the 1933 Act was brought into law in respect of the courts in England and Wales Parliament deliberately required the interposition of such a defined step, viz the signature of the bill by the proper officer.

37. The Court of Appeal felt able to follow its previous decision in *R v Ashton* [2006] EWCA Crim 794, [2007] 1 WLR 181 rather than the earlier decision in *R v Morais* (1988) 87 Cr App R 9. It may be noted, however, as Lord Bingham has pointed out (para 20 above), that in his judgment in the latter case Lord Lane CJ did pose the question in terms of the intention of the draftsman and did not confine himself to considering the dichotomy between mandatory and directory provisions. It may therefore be open to question whether the court in *Ashton* was free to decline to follow *Morais*. That is, however, of lesser consequence now that the matter has come before the House, which is in a position to determine the issue for itself.

38. I am, as I have stated, sympathetic to an approach which eschews formalism and technicality, and if a proper construction of section 2 of the 1933 Act permitted, I should be very ready to hold that the absence of a signature did not invalidate the indictment and the trial of the appellants. I too have found the conclusion inescapable, however, that in

enacting section 2 Parliament intended that the affixing of the signature of the proper officer should be more than a technicality and that it should constitute an essential part of the procedure of presentation or preferment of an indictment to the court. I am accordingly unable to hold that the legislative intention was that the indictment and trial could be valid in the absence of the signature.

39. I would allow the appeals and quash the convictions. Since the appellants have served out the sentences, no question of a new trial arises.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

40. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill and am in full agreement with it. As my Lord's opinion so clearly demonstrates, the Court of Appeal in *R v Morais* (1988) 87 Cr App R 9, asked itself the correct question (consistently with the approach later more explicitly directed by the House in *R v Soneji* [2006] 1 AC 340) and gave the correct answer, and the same answer is compelled here. Of course this will produce from time to time unsatisfactory results. Guilty men may go free or if not free have to be retried following a *venire de novo* (as was ordered in *Morais* itself). A retrial will involve delay, expense and inconvenience and may cause particular witnesses (for example rape victims) considerable distress. But the problem is easily enough avoided and will only occur if the Crown is at fault. In any event Parliament can always alter the position if it chooses.

41. The one further authority which I think worthy of brief mention is *Seal v Chief Constable of South Wales Police* [2007] 1 WLR 1910, where the House by a majority held that civil proceedings brought without leave in respect of acts done pursuant to the Mental Health Act 1983 are of no effect. There, as here, *Soneji* was deployed to argue that Parliament cannot have intended such inconvenient and sometimes unjust results to follow from a failure to comply with the statutory requirement. There, as here, it was submitted that the procedural requirement in question was merely a formality. The argument failed. As Lord Bingham put it (at para 17):

“...Parliament must, in legislating as it did, have recognised the risk that hard cases, such as Mr Seal’s, may occur, but have considered the occasional occurrence of such a case to be a price worth paying for the reassurance and protection given by [the relevant sections] to those whose very important and often difficult task it is to care for the mentally ill.”

I myself (at para 74) described the requirement as being “to safeguard prospective defendants from being faced with proceedings (which might not be sufficiently meritorious to deserve leave) unless and until a High Court judge thought it appropriate that they be issued.”

42. I acknowledge, of course, that two members of the Committee reached the contrary conclusion but I would note that both of them thought there to be a material distinction in this context between criminal and civil proceedings—Lord Woolf at para 34 and Baroness Hale at para 51. Neither questioned the correctness of cases like *R v Angel* [1968] 1 WLR 669 where criminal proceedings for a sexual offence brought without the required consent of the DPP were held to be a complete nullity notwithstanding they had proceeded to conviction and sentence. Not only is the present failure one in criminal proceedings but it is in any event to my mind closer in character to the failure in *Seal* than to that in *R v Secretary of State for the Home Department ex parte Jeyanthan* [2000] 1 WLR 354—which I described in *Seal* (also at para 74) as “essentially a failure to use the prescribed form of application for leave to appeal with the consequential omission of a declaration of truth.” Here, to paraphrase Lord Lane CJ in *Morais*, the legislation was designed to ensure that the proper requirements have been fulfilled before a trial proper can start, a fact to be certified by the signature of the proper officer indicating that he has properly satisfied himself that this is so. So, at least, it was perceived by those who enacted it. In short, the signature (which thereby translates a bill of indictment into an indictment) is no less a condition precedent to a proper trial than is the consent (whether of a High Court judge for a civil claim or the DPP for a criminal prosecution) required for the commencement of valid proceedings under the Mental Health Act.

43. For these brief reasons, and more particularly those set out in Lord Bingham’s opinion, I too would allow this appeal and make the order which he proposes.

