[2019] EWCA 86 (Crim)
No: 2018 01454 C5
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 22 January 2019

B e f o r e:

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
LADY JUSTICE HALLETT

MRS JUSTICE CARR DBE

MR JUSTICE JULIAN KNOWLES

R E G I N A
v
JOSEPH BIDDLE

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Mr Andrew D Smith QC appeared on behalf of the **Appellant**
Mr Tom Little QC appeared on behalf of the **Crown**

J U D G M E N T
(Draft for approval)

THE VICE PRESIDENT:

Background

This appeal raises yet again the issue of the policy that has been applied by Communicourt to the provision of intermediaries for defendants at trial. Where an assessing intermediary advised that a defendant required an intermediary throughout the trial but the trial judge ordered that one was necessary solely for the giving of evidence, Communicourt would not "accept bookings for giving evidence only".

On 29th August 2017, at the Worcester Crown Court, the appellant pleaded guilty to count 2 (sexual assault of a child under 13). On 1st March 2018, before Mr Recorder Butterworth, the appellant was convicted of count 1 (rape of a child under 13). On 3rd April 2018 he was sentenced to a total of six years' detention.

The appellant was acquitted of count 3 on the original indictment (sexual assault of a child under 13) and no evidence was offered against him on count 4 (also sexual assault of a child).

The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence and there are reporting restrictions in place so that the complainant's identity may not be revealed, nor may the identity of any witness under age.

Facts

The complainant and appellant knew each other. At the time of the indictment the appellant was 17 and the complainant, whom we shall call 'A', was 12. A's headmaster reported concerns about A on 2nd December 2016. A police officer and social worker spoke to her at school and she was first interviewed on 4th December 2016. The next day, she claimed

she and the appellant had engaged in sexual intercourse on the canal tow path. She changed that account as far as location of the intercourse is concerned on 13th December 2016. She then alleged that a day or two before 5th November she had been on the canal tow path when the appellant had kissed her, put his hands down her leggings and underwear, and touched her sexually. On 5th November she and the appellant had kissed whilst lying on her bed at home and then had intercourse in her mother's room.

Her account was supported in part by witnesses who confirmed that A and the appellant had been upstairs in her home for some time, that after the alleged act of intercourse blood was found on A's duvet and footage on the mobile telephone of 'J' (a friend of the appellant) on 13th December. On 5th November at 20:38, J filmed the appellant on a bed kissing the complainant. The kissing and the alleged act of intercourse were only minutes apart.

The appellant was arrested and interviewed on 14th December. He denied he had either touched or been alone with the complainant by the canal or that he had done anything other than kiss the complainant at her home address. He adopted the contents of his interview as his defence at trial.

<u>The use of an intermediary</u>

In a psychological report dated 7th November 2017, Dr Gregory stated that the appellant had been diagnosed with Attention Deficit Hyperactivity Disorder and been prescribed medication. The appellant had behavioural problems throughout his schooling and there were ongoing issues in relation to alcohol and drugs. In tests, the appellant achieved

variable scores, suggesting both strengths and weaknesses in his IQ, but indicated concerns in his ability to understand and evaluate verbally presented information and process new information. The psychologist said he had a slow processing speed and may only be able to keep one piece of information in mind at one time. This was something the psychologist recommended the court bear in mind to ensure he had a fair trial. He made some recommendations as to how the appellant's needs could be addressed.

In a report dated 2nd January 2018, a Communicourt intermediary, Melissa Patidar, agreed and made several recommendations as to the conduct of the trial. They included that the appellant required the services of an intermediary throughout the trial "to carry out continuous appraisal of his communication skills and difficulties", provide "strategies that assist", "keep the court updated during the trial, and inform the defence of his level of understanding when making decisions" and to use aids to explain key points to him.

At a very short hearing on 19th February 2018, and on the basis of a written application and the reports from the intermediary and Dr Gregory, His Honour Judge Cartwright directed that an intermediary attend to assist the appellant throughout the trial.

However, on 26th February the trial judge, Mr Recorder Butterworth, having considered the reports and the submissions of counsel, ruled that there was no need for an intermediary to attend the whole trial, save for the purpose of assisting the appellant if he gave evidence.

The intermediary, Miss Patidar, did not return to court. The Registrar sought Communicourt's assistance on why she did not return. In their response to the Court, Communicourt set out

their policy but also claimed that they were ‘directed’ an intermediary was not required. However, they also claim that they advised defence counsel on the possibility of finding an intermediary elsewhere. This tends to support the proposition that the intermediary did not return in accordance with Communicourt’s policy.

Defence counsel does not seem to have made any attempts to find an alternative intermediary and made no application to adjourn the trial to obtain the services of another intermediary if the appellant chose to give evidence. He decided not to give evidence.

Ruling on adverse inference

On 28th February 2018 the recorder indicated he was minded to give an adverse inference direction on the appellant’s failure to give evidence, pursuant to section 35 of the Criminal Justice and Public Order Act 1994. Ms Hancox for the defence invited him to consider whether he should give the adverse inference direction in its "usual full form". The recorder noted that there was nothing in the psychologist's report indicating that it was ‘undesirable’ for the appellant to give evidence, that the case was not complex; and that the appellant had dealt with the allegations fully in interview, during which neither the appropriate adult nor the solicitor had felt the need to intervene. He also noted that he had ensured that all the recommendations about breaks had been adhered to and there had been no occasion when anyone had suggested the appellant had had any difficulty. Further, the solicitors representing the appellant and instructing Ms Hancox had not attended the trial to support the appellant. This suggested the appellant had coped. Furthermore, the appellant's conduct demonstrated his understanding of the court's process as the trial had proceeded. In those circumstances he ruled that Ms Hancox had placed before him no

sound ground to justify the conclusion that the appellant's physical or mental condition made it *undesirable*, within the terms of section 35(1)(b) of the Act, for him to give evidence and ruled the adverse inference direction would be given in its standard form.

The law on the use of an intermediary

Although the legislation providing for the use of an intermediary for a defendant is not yet in force, the courts and the Ministry of Justice have recognised the important role an intermediary may play in facilitating the proper participation of a vulnerable defendant in their trial. The issue of the use of intermediaries to assist a defendant is addressed by the Criminal Practice Direction in force at the time of the appellant's trial and several decisions, including R v Rashid [2017] EWCA Crim 2; [2017] 1 WLR 2449. Unfortunately, Mr Recorder Butterworth and the Single Judge were not referred to the Practice Direction or to the decision in Rashid either by the appellant or the respondent. We were informed during the course of today's hearing by Mr Andrew Smith QC, who now represents the appellant, that Ms Hancox did make a reference to the Criminal Practice Direction in her written application to Judge Cartwright.

In R(C) v Sevenoaks Youth Court [2009] EWHC 3088 (Admin); [2010] 1 All ER 735, Openshaw J, giving the lead judgment, set out the relevant principles to be applied when considering the provision of intermediaries for a defendant.

In R v Cox [2012] EWCA Crim 549; [2012] 2 Cr App R 6, this Court considered the safety of a conviction in a case where no intermediary had been provided, and at paragraph 29 the Court acknowledged the valuable contribution that can be made to the administration of

justice by the use of intermediaries in appropriate cases. Having made that observation, however, at paragraph 29 the Court added this:

> "That ... is far from saying that whenever the process would be improved by the availability of an intermediary, it is mandatory for an intermediary to be made available. It can, after all, sometimes be overlooked that as part of their general responsibilities judges are expected to deal with specific communication problems faced by any defendant or any individual witness (whether a witness for the prosecution or the defence) as part and parcel of their ordinary control of the judicial process. Where necessary, the processes have to be adapted to ensure that a particular individual is not disadvantaged as a result of personal difficulties, whatever form they may take. In short, the overall responsibility of the trial judge for the fairness of the trial has not been altered because of the increased availability of intermediaries, or indeed the wide band of possible special measures now enshrined in statute."

In R(OP) v Secretary of State for Justice [2014] EWHC 1944 (Admin); [2015] 1 Cr App R 7, Rafferty LJ, giving the judgment of the Court, drew a distinction between two roles that an intermediary may play in a criminal trial for a defendant. At paragraph 34 she observed:

> "The first is founded in general support, reassurance and calm interpretation of unfolding events. The second requires skilled support and interpretation with the potential for intervention and on occasion suggestion to the Bench associated with the giving of the defendant's evidence."

The court was not persuaded in that case that "it is essential an RI (registered intermediary) be available to all defendants for the duration of their trials".

The issue was further addressed in, although not determinative of, an interlocutory appeal R v R [2015] EWCA Crim 1870. R was a precursor to the full appeal in Rashid. There were two grounds of appeal, one of which was a ruling by a trial judge there was no need for

an intermediary to assist a defendant during the trial, save for when he gave evidence.

Although the Court found it had no jurisdiction to hear the ground based on the intermediary, Treacy LJ addressed the merits at paragraph 21. He stated:

> "As OP ... shows, there was no illogicality in restricting the use of the intermediary to a particular part of the trial ... The judge was also entitled to consider whether there was a need for an intermediary throughout, as opposed to whether one was merely desirable in a generalised sense."

The appellant Rashid took the point again on his full appeal against conviction. Lord Thomas CJ analysed the law and the background, and at paragraphs 80 and 81 stated:

> "In considering what is needed in a particular case, a court must also take into account the fact that an advocate, whether a solicitor or barrister, will have undergone specific training and must have satisfied himself or herself before continuing to act for the defendant or in continuing to prosecute the case, that the training and experience of that advocate enabled him or her to conduct a case in accordance with proper professional competence. Such competence includes the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences were grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer. These are all essential requirements for advocacy whether in examining or cross-examining witnesses or in taking instructions. An advocate would in this court's view be in serious dereliction of duty to the court, quite apart from a breach of professional duty, to continue with any case if the advocate could not properly carry out these basic tasks.
>
> A judge must therefore make the assessment of what type of assistance is required on the basis that that proper level of professional competence from an advocate is available."

He added at paragraphs 82-84:

> "In the present case, as is no doubt the position in all but the rarest of cases, the advocates were, as an ordinary part of their duties as competent advocates, able to do what was needed so that the defendant was fully able to participate in every aspect of the trial (when no intermediary was present) until the defendant gave evidence. In the event that one of the advocates asked a question that was too complex or tagged, then the judge as part of the usual trial management by any judge would have intervened to correct the

error.

...

> There could be no doubt that the order made by the judge for an intermediary during the giving of the defendant's evidence was, for the reasons we have explained, the most common form of order in what, amongst the considerable volume of cases dealt with in the criminal courts, is the rare case where the threshold of disability is crossed such that an intermediary is required when the defendant gives his evidence. For the reasons we have given, cases in which an order will be made for an intermediary to be present for the whole trial will be very rare."

Those principles have subsequently been endorsed by other decisions of this Court and have been endorsed in the Criminal Practice Direction in force since April 2016, in particular see paragraphs 3F, 11-16 and 12-13. Since delivering this judgment extempore the Court has learned that there may still be some advocates appearing in cases involving vulnerable witnesses who have not undergone training. We hope that is not the case. If it is, we suggest that judges conducting pre-trial and ground rules hearings check with the advocates instructed that they have undergone the necessary training.

Grounds of appeal

Conviction

1. The judge should not have altered the order for an intermediary to be present throughout the whole trial as made by His Honour Judge Cartwright and in any event should have allowed an intermediary for the whole trial.
2. The judge should not have directed the jury that an adverse inference could be drawn, pursuant to section 35 of the CJPOA, from the appellant's failure to give evidence. His decision to do so was Wednesbury unreasonable as a result of the withdrawal of the

intermediary.

Ground 1

Mr Smith described ground 1 as his principal ground. He reminded the Court that Judge Cartwright had exercised his discretion under CPD XIII F.13 to grant the appellant an intermediary for the duration of the trial. Judge Cartwright's order was based on a written application from defence counsel and on the reports from Dr Gregory and Miss Patidar. The application was not opposed by the Crown, who adopted a position of what they called studied neutrality. The conclusion in the intermediary's report was that the appellant required an intermediary for the whole of the trial, not just for giving evidence, if he was fully to participate. In those circumstances, Mr Smith described the decision made by Judge Cartwright as one that was informed by a fully reasoned report and supported by a psychologist's report. No doubt the judge had read the papers before coming into court and giving his decision at a short hearing. Mr Smith placed considerable emphasis on the fact of the predetermination by Judge Cartwright and invited us to distinguish the facts of Rashid and to persuade us that the Rashid principles do not apply. He conceded that Mr Recorder Butterworth was entitled to revisit the issue of the requirement for an intermediary of his own volition, but argued that he should have paid greater heed to the decision of his predecessor and greater heed to the recommendations of the experts.

Mr Smith challenged the Recorder's reasoning. He argued that the Recorder wrongly bore in mind, first, the length of the hearing before HH Judge Cartwright (two minutes), second, the cost of an intermediary throughout the trial; and third, the fact that the appellant coped well in interview. Mr Smith also maintained that the Recorder had misunderstood the role that the intermediary could play.

As far as cost is concerned, Mr Smith did not argue it is a totally irrelevant consideration, but placed emphasis on the duty on a trial judge to ensure that a defendant, particularly a vulnerable defendant, has a fair trial. This was on any view going to be a short trial; the costs were not significant given the intermediary was only going to be stood down for a day or two; and in any event there was sufficient material before the Recorder to justify whatever cost was involved.

As far as the appellant's account in interview is concerned, Mr Smith explained that at that time he had been supported by an appropriate adult, as well as a legal representative, and therefore it was not relevant to the decision to refuse him the services of an intermediary whilst he gave his evidence.

Finally on this ground, Mr Smith suggested that the judge had misunderstood the nature and extent of the assistance that an intermediary could provide. The judge expressed his views about the potential assistance to be provided by an intermediary in this way:

> "It does not seem to me that there is any need or indeed anything to be gained by there being someone sat next to him and for there to be an intermediary during the course of the whole trial ...
>
> It is often misunderstood both by intermediaries and others that they are not there to support a defendant, they are there simply to assist with communication issues."

Mr Smith disagreed with this assessment, because the intermediary had suggested her role would go much further than assisting with communication issues when the appellant gave evidence.

During the course of submissions, Mr Smith was invited to identify any stages of the trial when difficulties arose or may have arisen. He responded by saying that the difficulties may have not been obvious to those at the trial and may not be obvious on any analysis of the transcripts of the proceedings.

Ground 2: adverse inference

Mr Smith reminded us that it was common ground that Mr Biddle was someone who required the assistance of an intermediary to give effective evidence; the recorder had accepted this in his first ruling. By the close of the Crown's case at the latest, it was clear that Communicourt was not going to provide an intermediary to support the appellant in giving evidence. Mr Smith argued that the reality was that an application to adjourn the trial at that stage would have been of no practical effect, it being such a short trial, and that is probably why one was not made.

Mr Smith challenged the judge's questioning of Ms Hancox in that he asked her what more the intermediary could have brought to the process of the defendant giving evidence other than ensuring compliance with the intermediary's suggestions. This questioning ran counter to his earlier ruling and acceptance that one was required to assist communication.

Mr Smith maintained that the factual circumstances of this case were similar to those contemplated in R v Burnett [2016] EWCA Crim 1941 at paragraph 25, in which the court held that it would be ‘undesirable’ for a defendant to give evidence within the meaning of section 35(1)(b), “where it would be unjust to draw an adverse inference because a

defendant may not be able to do himself justice when giving evidence". He insisted this appellant, absent an intermediary, could not do himself justice. It was therefore *undesirable* (in the terms of the section) for him to have given evidence.

Mr Smith did not suggest that there was any material before the court or before the recorder to suggest that there was a link between the absence of the intermediary and the decision not to give evidence, but he claimed it was a relevant factor and it was one that was raised by Ms Hancox to an extent when she invited the Recorder not to give a direction 'in its full form'.

Again, Mr Smith recognised the trial judge had a wide discretion in reaching the decision that he would give an adverse inference direction (as set out in Burnett at paragraph 28). However, even allowing for that wide discretion, he insisted this is a case where the direction should not have been given; and in the context of the factual matters for the jury to determine, namely whether or not the appellant had raped a child under 13, it was a significant matter and one that served to undermine the safety of the conviction, either standing alone or taken cumulatively with ground 2.

Our conclusions

Ground 1

As Mr Smith conceded, Mr Recorder Butterworth was fully entitled to revisit the issue of whether an intermediary was required throughout the trial and to take a different view from that taken by Judge Cartwright. We do not need to determine whether Judge Cartwright

explored the issue in as much depth as the recorder, (as Mr Tom Little QC, who now appears for the prosecution, claimed), because it is common ground that the recorder was not bound either by the recommendation of the intermediary or by Judge Cartwright's ruling. The issue for us is whether the recorder's decision was wrong and outwith the broad discretion and judgment available to him. Before making his decision, the judge heard evidence and argument on whether an intermediary was necessary for the entirety of the trial. He discovered that the intermediary had not read the appellant's interview and was unable to point to any part of the trial, apart from giving evidence, when it would be necessary to communicate with him through an intermediary. The appellant was represented throughout by a competent advocate, in a relatively short trial at which the evidence given by the principal prosecution witness was given with the assistance of an intermediary. It followed that the questions were phrased in such a way it was easy for her to understand and for the appellant to understand. Breaks were taken as necessary, and defence counsel made no request for further time or suggested to the judge, that her lay client had difficulty following and participating in the trial. She made no reference to such difficulties when she drafted the grounds of appeal. The fact that her instructing solicitors did not send a representative to attend the trial each day tends to indicate they too were satisfied of the appellant's ability to follow the trial, with Ms Hancox's assistance. The issue was straightforward: after the kissing on the bed did sexual intercourse occur? The appellant himself has never suggested he had any difficulties in understanding that issue or participating in the trial.

Whilst the recorder was not taken to the relevant authorities or the Practice Direction, in our judgment he applied the principles correctly. The recorder gave full reasons for his

decision and he was best placed to make it. Given the short nature of the trial and Judge Cartwright's ruling but a week earlier, we accept that other judges may have reached a different conclusion. But we also agree with Mr Little that this case does not come close to one of those *very rare* cases referred to by Lord Thomas CJ in Rashid or in the Practice Direction. Accordingly, we found no substance in that ground.

Before turning to the second ground, we add some observations on Communicourt's policy as at the time of trial. We should emphasise that we have not heard submissions from them during this hearing. We have seen an email from their general manager, we have read their response to the Registrar, and we have seen their policy as stated by Ms Patidar in January 2018.

In the email from the general manager, he stated:

> "On the rare occurrence that someone has the specific difficulties that would only require an intermediary at the point of giving evidence, we would recommend that they had intermediary assistance only at that stage of their trial. This is not the case of Mr Biddle as outlined in the intermediary report."

He attached the company's policy entitled 'Decision making in respect of intermediary appointments for defendants'. At paragraph 8 the company states:

> "Decisions about when an intermediary is required need to be made on a case-by-case basis. If the assessing intermediary is of the view that the defendant would not fully understand the prosecution case and be able to instruct his/her legal team without the use of an intermediary, Communicourt will not accept a booking which is only for the point of giving evidence."

We do not know whether that policy still exists in January 2019, but to our knowledge it was still in operation in October 2018 and affected the conduct of another trial in Nottingham.

We understand the perceived difficulties for the intermediary and possibly for defendants in instructing intermediaries solely for the giving of evidence, but, as Mr Little and several judges have observed, it is not for Communicourt to dictate the duration of the need for an intermediary. The principles, as set out in Rashid and the Practice Direction, are clear: the intermediary can make a recommendation based on the material they have considered but it is just that - a recommendation. Ultimately it is for the trial judge to decide, having considered all the material, whether and to what extent an intermediary is necessary. Only in a very rare case will an intermediary be required for the duration of the trial. Communicourt's policy, as it seems to us, turns that test on its head and suggests that if a defendant requires an intermediary for giving evidence, it is only in a rare case that he or she will not require an intermediary for the duration of the trial. In our view, Communicourt's stated policy of only providing an intermediary for the giving of evidence alone if the assessing intermediary so recommends is wrong and should be revisited. If the company accepts instructions to assess a possibly vulnerable defendant, they should also accept they will abide by the trial judge's directions.

Ground 2

Where the judge had ruled that the defendant should have the services of an intermediary to give evidence and one was not available, we again agree with Mr Little that some judges may have decided not to give the adverse direction. However, that is not the test that we have to apply. Section 35(1)(b) of the 1994 Act provides an exception to the general rule that a jury may draw an adverse inference from the failure to give evidence if:

"…(b) It appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence."

The judge has a wide margin of judgment and discretion, as was made clear in Dixon [2013] EWCA Crim 465; [2014] 1 WLR 525. It does not follow from the fact that an accused has a physical or mental condition that it is necessarily 'undesirable' within the meaning of the subsection for him to give evidence. The trial judge must consider all the material before him or her including the expert opinion, albeit he or she is not bound by it. In this case, the recorder considered all the material before him including the appellant's ability to respond to questioning by police on a straightforward issue he undoubtedly understood.

Had there been material to suggest that there was causative link between the absence of an intermediary to assist the appellant to give evidence and the decision not to give evidence, no doubt he would have borne that very much in mind. It may have tipped the balance in favour of not giving an adverse inference direction. But there was nothing before him or before us to indicate there was such a causative link. We assume that had there been any link between the two, privilege would have been waived and this would have been at the forefront of Ms Hancox's submissions to the judge that the full direction should not be given. Furthermore, we would have been told.

We repeat that the appellant seems to have had no significant difficulty in giving his account to police officers or (we assume) to his legal representatives, and nothing suggests that he failed to follow what the complainant had said in her evidence. All parties knew that if the appellant chose to give evidence the recorder was determined to follow the intermediary's recommendations and ensure that he was able to give a full and fair account

of himself, so that tag questions, overlong and overcomplicated questions would be avoided, and he would be given proper breaks.

Accordingly, despite his very best efforts, Mr Smith has not come close to establishing to our satisfaction that the decision to give an adverse inference direction was Wednesbury unreasonable. For those reasons, the appeal must be dismissed. We are indebted to both Mr Smith and Mr Little for the quality of their submissions.

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