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Court of Appeal

*Regina *v* F

[2013] EWCA Crim 424

2013 March 14 Treacy LJ, Saunders J, Judge Milford QC

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Crime — Court of Appeal (Criminal Division) — Jurisdiction — Prosecutor's appeal — Requirement to give notice of intention to appeal "immediately after the ruling" — Hearing as to competency of witness — Judge subsequently e-mailing to counsel decision that witness not competent — Whether "ruling" — Decision confirmed at subsequent hearing in court — Prosecutor at hearing giving notice of intention to appeal — Whether requirement to give immediate notice satisfied — Whether Court of Appeal having jurisdiction to entertain prosecution's application for permission to appeal — Whether permission to be refused because defendant informed of judge's decision some time before hearing — Criminal Justice Act 2003 (c 44), s 58(4)(a) — Crim PR r 67.2(1)(a)

C

The defendant was charged with sexual offences against the complainant, who was profoundly deaf and had mild to moderate learning difficulties. The issue of competency of the complainant as a witness was considered at a hearing. Five days later the trial judge sent to counsel an e-mail marked "only for the attention of the addressee" communicating her decision that the complainant was incompetent. That e-mail was forwarded to the Crown Prosecution Service and its contents disclosed to the defendant. At the next hearing some five weeks later the judge confirmed her decision and agreed that the ruling was formally given at that hearing, whereupon counsel for the prosecution notified its intention to appeal. On the prosecution's application for permission to appeal the defendant took a preliminary point that the Court of Appeal had no jurisdiction on the basis that the e-mail had constituted the ruling and the prosecution had failed to give notice of its intention to appeal, or to request an adjournment to consider whether to appeal, immediately after it had been made in accordance with section 58(4) of the Criminal Justice Act 2003[1] and Crim PR r 67.2[2].

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On the preliminary point—

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Held, that "ruling" in section 58(4)(a) of the Criminal Justice Act 2003 and Crim PR r 67.2(1)(a) meant one given in a courtroom and did not include an informal communication by way of courtesy to counsel; that, accordingly, no ruling had been made until the hearing at which counsel had then notified the prosecution's intention to appeal, and the Court of Appeal therefore had jurisdiction to entertain the application; and that the fact that the defendant had been told informally of the judge's decision some time before the hearing at which the ruling had been given did not justify refusing permission to appeal (post, paras 18–20, 36–37).

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R v Mian [2013] 1 WLR 772, CA distinguished.

[1] Criminal Justice Act 2003, s 58(4): "The prosecution may not appeal in respect of the ruling unless— (a) following the making of the ruling, it— (i) informs the court that it intends to appeal, or (ii) requests an adjournment to consider whether to appeal, and (b) if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal."

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[2] Crim PR, r 67.2: "(1) An appellant must tell the Crown Court judge of any decision to appeal— (a) immediately after the ruling against which the appellant wants to appeal; or (b) on the expiry of the time to decide whether to appeal allowed under paragraph (2). (2) If an appellant wants time to decide whether to appeal— (a) the appellant must ask the Crown Court judge immediately after the ruling; and (b) the general rule is that the judge must not require the appellant to decide there and then but instead must allow until the next business day."

The following cases are referred to in the judgment of the court:

R v Barker [2010] EWCA Crim 4; [2011] Crim LR 233, CA
R v MacPherson [2005] EWCA Crim 3605; [2006] 1 Cr App R 459, CA
R v Mian [2012] EWCA Crim 792; [2013] 1 WLR 772; [2012] 3 All ER 661, CA
R v T (N) [2010] EWCA Crim 711; [2010] 1 WLR 2655; [2010] 4 All ER 545; [2010] 2 Cr App R 84, CA

The following additional cases were cited in argument:

R v Steele [2006] EWCA Crim 2000; [2007] 1 WLR 222; [2007] 1 Cr App R 39, CA
R v T(A) [2009] EWCA Crim 668, CA

The following additional cases, although not cited, were referred to in the skeleton arguments:

R v Coates [2004] EWCA Crim 2253; [2004] 1 WLR 3043; [2004] 4 All ER 1150; [2005] 1 Cr App R 199, CA
R v Watts [2010] EWCA Crim 1824; [2011] Crim LR 68, CA

APPLICATION for leave to appeal pursuant to section 58 of the Criminal Justice Act 2003

The defendant, F, was charged on indictment with rape and sexual assault. Following a hearing in the Crown Court on 11 January 2013 the judge on 16 January e-mailed to counsel his ruling that the complainant was incompetent to give evidence within the meaning of section 53(3) of the Youth Justice and Criminal Evidence Act 1999. On 19 February 2013 the judge in open court indicated that his ruling was formally delivered on that date.

The prosecution sought permission to appeal against the ruling. The defendant took a preliminary point that the Court of Appeal had no jurisdiction to entertain the application because the prosecution had failed to give notice of appeal, or to request an adjournment to consider whether to appeal, immediately after the making of the ruling in accordance with section 58(4) of the Criminal Justice Act 2003 and Crim PR r 67.2.

The facts are stated in the judgment of the court.

Eleanor Laws QC for the prosecution.
Ian Dixey for the defendant.

14 March 2013. **TREACY LJ** delivered the following judgment of the court.

1 This case is to be reported as *Regina v F*. Although the judgment to be given does not identify any party by name, we make clear that any report should be in anonymised form.

2 This is an application by the prosecution for leave to appeal against a terminating ruling pursuant to section 58 of the Criminal Justice Act 2003. The defendant, F, is charged on an indictment containing one count of rape and one count of sexual assault. The complainant, H, is profoundly deaf and has mild to moderate learning difficulties.

3 The defendant is the partner of H's sister. The offences are alleged to have occurred during a visit by H to the defendant's flat on 29 April 2011. H, who was aged 24, alleges that on the occasion of the visit the defendant touched her breasts and had vaginal intercourse with her. She says that

A those acts took place without her consent. She had visited the defendant's flat in order to retrieve a pram for her sister or her cousin.

4 In interview the defendant denied the offences. He stated that he had never been alone with H.

5 The prosecution asserts that its case is supported by CCTV footage showing H's movements in the vicinity of the flat in a 15-minute period on the evening in question.

B **6** Although a complaint was made promptly, there had been a number of unfortunate delays in the case prior to 11 January 2013. On 11 January 2013 the judge held a competency hearing in relation to H, the defence having raised the issue about a month beforehand. In 2012 there had been prepared a report from Craig Flynn, a registered intermediary, who had assessed H. His report recommended special measures, including the use of C an intermediary to enable H to give her account to the court. By January 2013 Mr Flynn was unavailable and so another intermediary was instructed, Miss de la Croix. She, too, prepared a report which again recommended special measures, including an intermediary. Both Mr Flynn and Miss de la Croix proceeded on the basis that it was possible for H to give evidence. Miss de la Croix said that H had the communicative ability to give evidence.

D **7** In addition to those reports, the prosecution file included a transcript of an ABE (achieving best evidence) interview with H which had been video-recorded.

8 On 19 February 2013 the judge delivered her ruling. She found that H was not a competent witness. Her reasons were, firstly, that there were difficulties in asking H questions about body parts, without partially suggesting the answer to her by way of leading question. Her second reason E was that H had difficulty with concepts of time, and abstract concepts would also be difficult if not impossible for H to grasp, let alone answer.

9 The test of competence is set out in section 53(3) of the Youth Justice and Criminal Evidence Act 1999. It provides:

> "A person is not competent to give evidence in criminal proceedings if it appears to the court that [she] is not a person who is able to— F (a) understand questions put to [her] as a witness, and (b) give answers to them which can be understood."

10 Once the issue of competence has been raised by the defence, it is for the prosecution to satisfy the court on the balance of probabilities that its witness is competent. In determining the question of competency, the court is to treat the witness as having the benefit of any special measures which G the court has made, or proposes to make, in relation to the witness: see section 54(4). In this case it appears that the parties proceeded on the basis that the witness would have special measures, including an intermediary and a British sign language interpreter, and that the witness would give evidence over a live link. Moreover, it was intended that H's ABE video interview would be played at trial as part of her examination in chief.

H **11** Section 67 of the 2003 Act provides that the Court of Appeal may not reverse a ruling on an appeal under this Part of the Act

> "unless it is satisfied— (a) that the ruling was wrong in law, (b) that the ruling involved an error of law or principle, or (c) that the ruling was a ruling that it was not reasonable for the judge to have made."

12 The prosecution argues that the competency hearing was flawed or ineffectual and that as a result the judge's ruling was premature or wrong and/or unreasonable in the circumstances. The prosecution also argues that the judge applied the wrong statutory test in considering the competency of H.

13 However, before we address those grounds there is a preliminary point which is taken by the defendant. It is argued that this court has no jurisdiction to hear this appeal because the prosecution failed to comply with the terms of section 58 and Crim PR r 67.2(1)(a)(2). In particular it is submitted that the terminating ruling was made on 16 January 2013 and was communicated to the defendant, and that no notice was given of the prosecution's decision to appeal either to the judge or to the defence until 19 February 2013.

14 Rule 67.2(1)(a) requires an appellant to tell the Crown Court judge of any decision to appeal "immediately" after the ruling against which the appellant wants to appeal. As was confirmed in *R v T (N)* [2010] 1 WLR 2655, that strict obligation exists, notwithstanding the absence of the word "immediately" from section 58(4) of the Act.

15 The factual position is this. The hearing took place on 11 January 2013. At the end of the hearing the judge said that she would give her ruling in the following week. From the transcript, the judge's comments implicitly envisaged a ruling to be given in open court. What in fact happened was that on 16 January the judge e-mailed her ruling to counsel. That was later forwarded to the Crown Prosecution Service. The court did not, in fact, reconvene until 19 February 2013, but in the interim the prosecution had considered the e-mail and had decided that it would appeal. On that date the court had listed the matter "for judgment".

16 When the court reconvened counsel for the prosecution referred to the e-mail as the judge's "proposed judgment in this case" and inquired whether "for present purposes that is your judgment?" The judge confirmed that it was, and said that it was not necessary to repeat what was in the e-mail. The prosecutor said that what was in the e-mail was what they had expected to be in the court's judgment and so, having considered that, the prosecution wished to appeal "that ruling formally being delivered on 19 February 2013". To that observation the judge replied "Yes". The prosecution then proceeded to give the necessary undertakings.

17 The point which is taken is that the prosecution had been aware for some time prior to 19 February of the judge's e-mail and had not indicated to the defence any intention to appeal, (at least certainly not before 16 February 2013); nor had the prosecution so notified the judge at any point prior to 19 February. Accordingly, the rules had not been complied with and this court has no jurisdiction.

18 We do not consider that this objection has substance. It is plain from a reading of the terms of section 58 and rule 67 that the ruling after which the prosecution must indicate its desire to appeal is a ruling given in the court room. The judge had proceeded by rather more informal means, which did not involve making a ruling in court, or anything which would be recorded as a formal order of the court prior to the hearing of 19 February. Accordingly, we do not consider that judgment was delivered until 19 February when the judge confirmed that her e-mail represented her ruling on the matter in open court.

A **19** Quite apart from the inconsistency of the more informal procedure with the language of the statute, it seems to us that the informal procedure adopted is one which has the potential to be bedevilled with imprecision if it were to suffice as a step in proceedings requiring immediate action by the prosecution. The e-mail was not something that the judge had proposed or indicated to the parties. The transcript implies a ruling at a further court hearing. The e-mail itself, beyond stating that the prosecution's application B is not granted, makes no order of any sort relating to the consequences of the ruling or the next stage in the proceedings.

20 There was in this case an undesirable degree of informality surrounding what happened. It is easy to envisage various practical problems arising if an e-mail of this sort were to suffice. These provisions under the terminating ruling legislation are strict, and an informal procedure C is wholly inconsistent with them. The e-mail which was sent to counsel contained the warning that it was intended "only for the attention of the addressee". We regard this informal procedure as a courtesy by the judge to counsel, but no more. It would be wrong to accord it the status of a formal ruling triggering the strict rules applying to appeals against terminating rulings. We reject the argument as to jurisdiction.

D **21** We turn to the substance of the application. This court has considered the ABE interview and accompanying transcript. It shows that H was, with the assistance of sign language interpreters, able to give a comprehensible account of her allegations relating to both offences charged. We do not say that the process was a straightforward one, but with time and patience an account emerged which revealed alleged offences and when, where and how they came to take place. By the time of the hearing the judge E had not seen the DVD recording of the ABE interview. She asked to see "perhaps half a dozen questions" so as to get the flavour of it. We understand that a relatively brief extract was played in court. Then, using the proposed special measures, including an intermediary and a signing interpreter, prosecuting counsel asked H questions of a general nature, to which she responded satisfactorily. Counsel then started to embark on F questions asking H to point to different parts of her body. At that point the signing interpreter intervened, indicating that any question posed would have to be leading in part because the interpreter would have to point to a body part as part of the question. There then followed a discussion involving the judge, the interpreter and prosecution counsel about the difficulties posed by this situation. The interpreter could not use finger G spelling to see whether H could understand the name of the body part because he was unprepared for that. The intermediary suggested that drawings or pictures might be used, but that suggestion was not taken up. In the event the prosecutor asked no more questions.

22 We have seen a witness statement showing that the intermediary had brought anatomical drawings for use and that after the parties' questions had ceased, H saw them and indicated animatedly that she could point to H places where she could recall being touched.

23 Counsel for the defendant asked some questions of a general nature, to which H was able to give intelligible answers. The judge then asked questions from which it became clear that the witness had difficulty dealing with concepts of time and abstract matters. It became apparent that those

topics had not been covered by those assisting H in their assessment. After that the judge moved on to submissions. A

24 The prosecution argues that, having regard to the ABE interview and the responses which H had been able to make both to prosecution and defence counsel before difficulty was encountered over parts of the body, time and abstract concepts, it would have been appropriate for the judge to regard H as competent, but to keep that under review during the trial. The reports from the intermediaries had supported competence to understand and answer questions and to describe, as long as questions were put in a simple fashion and as long as appropriate assistance from an intermediary and signing interpreter was provided. In addition, the prosecution argues that the decision as to competency was flawed because the difficulty over the body parts issue, which was identified by the judge as a reason for regarding H as not competent, was a reflection of the questioner's inability to find an effective and appropriate method of asking questions at the competency hearing. The problem arose over an issue of ability to communicate with H in a non-leading way, rather than an issue of H's comprehension and thus her competence. The attempts of counsel and judge to deal with the body parts issue represents a failure by them to communicate in a way which would enable the witness's competence to be properly tested. We note that the intermediary's suggestion of asking the witness to identify body parts by reference to pictures was not adopted. B C D

25 As this court indicated in *R v Barker* [2010] EWCA Crim 4 at [42], the trial process must cater for the needs of witnesses. The competency test is not failed because the forensic techniques of the advocate or the processes of the court have to be adapted to enable the witness to give the best evidence of which he or she is capable. It is our clear conclusion that the hearing did not effectively explore H's ability to communicate. E

26 We do not underestimate the difficulties of questioning vulnerable witnesses. It requires not only training, flexibility and sensitivity, but also time and patience. It seems to us that when difficulties were encountered, it became apparent that the intermediary had not had sufficient time to carry out a full assessment of H's skills which might enable communication to take place. Questions of time and more abstract concepts ran into difficulty when the judge, in an effort to obtain an answer to the witness's understanding of the seasons, posed questions about what a daffodil looked like. When the intermediary said that she did not think that the witness knew a daffodil as such, the judge said that she did not wish to ask any further questions. F

27 We have come to the conclusion that in the circumstances the exercise carried out was not a fair test of the witness's competency. The shortcomings of this process seem to us to owe much to a lack of preparation and a lack of ability to respond flexibly to the difficulties which arose. There are now substantial materials available to those who have to deal with the questions of competency and the use of intermediaries. We draw attention to the publication *Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court*—a Report of the Working Group of the Advocacy Training Council of the Bar published in 2011. In the same vein the Crown Court Bench Book has a section dealing with intermediaries. Relevant issues are also discussed by this Court in *R v Barker*, particularly at paras 33–43. G H

A **28** In response to the submissions made, in his helpful written submissions to the court Mr Dixey argued that the procedure indicated in *R v MacPherson* [2006] 1 Cr App R 459, paras 25–26 was followed. That authority gives the briefest of references to the practicalities of handling competency issues. Since that judgment was given, matters have moved on considerably and much more detailed guidance is now available, not least in *R v Barker* [2010] EWCA Crim 4; [2011] Crim LR 233 and elsewhere.

B **29** The defendant also submits that the judge adopted the correct test of competency, as set out in section 53(3), the prosecution having submitted to the contrary. True it is that in her ruling the judge had set out the appropriate test, but she based her conclusion that H was not a competent witness firstly on the body parts issue. In relation to that the judge proceeded on the basis that the interpreter would have to point to the body C part in question and that in doing so it would shed little or no light on the witness's true understanding of the question.

30 In our judgment, the judge substituted the issue of the interpreter's difficulties in communicating for the test of whether the witness could understand questions and give intelligible answers.

31 The second limb of the judge's reasoning related to difficulty with concepts of time and other more abstract concepts. In this respect the D procedure adopted was for the reasons already mentioned an unsatisfactory way of testing the witness's understanding and ability to make herself understood. It did not represent, in our judgment, a valid or thorough test, and so the judge's conclusion in this respect is thereby undermined.

32 It is further submitted by Mr Dixey that the ruling was essentially a decision of fact and an exercise of judgment based on evidence heard by an E experienced judge. As we have said, we do not underestimate the difficulties confronting the judge below, but we have found that the procedure was so flawed that the conclusions reached cannot be relied on as any fair test of competency.

33 Finally it was argued that, since the burden of proof was on the prosecution, their failure to ask appropriate questions should preclude them from appealing this matter. We regard the failure which took place as one F which, for whatever reason, was not solely that of the prosecution. Whilst it can in no sense be said to be the fault of the defendant, the reality is that what was intended to be a test of competency was seriously flawed. Moreover, there were in our judgment strong indications that H did indeed satisfy the competency test. They are: (a) the ABE interview; (b) the reports from the intermediaries; and (c) the ability by both counsel at the hearing to G pose questions which were understood and which received intelligible answers. The judge herself recorded in her ruling that H could understand and answer questions posed in a simple and uncontroversial manner.

34 Those matters were not addressed in the judge's ruling. Instead, the judge based herself on what transpired when difficulties arose in the hearing, but which in our judgment represent a failure by those involved to engage in a true and fair test of competency.

H **35** The interests of justice are plainly broad enough to encompass the interests of the alleged victim in having the opportunity to have her competency to give evidence considered properly by the court. The exercise carried out below fell short of that. It led to a ruling by the judge which cannot be sustained. Although the defendant is in no way at fault for what

occurred, that does not mean that this court should decline to grant the relief sought. Nor does the reference by the defendant to other asserted delays and failures by the prosecution and the history of these proceedings provide a reason why leave should not be granted.

36 We have considered Mr Dixey's submissions about the very substantial delays which have occurred in this case and the fact that the defendant was told of the judge's ruling by defence counsel or solicitors after the e-mail had been sent to defence counsel. That was a disclosure which was not authorised by the e-mail. It serves to illustrate the problems which arise when informal procedures are adopted. Counsel, however, makes the point that the defendant had been informed through those channels of the judge's apparent ruling on the issue of competency. We view the situation as one which is very different from that which obtained in *R v Mian* [2013] 1 WLR 772, where the defendant was told in court at the time of the judge's ruling in court that the proceedings against him were being terminated. That situation is not comparable to the present one.

37 Accordingly, we are not persuaded that this is a case for refusing leave. We grant leave.

38 We conclude that section 67 is satisfied. We find that the ruling was wrong in law and that it was not a reasonable one for the judge to have made. Accordingly, we reverse the ruling on the lack of competency and we order that the proceedings are resumed in the Crown Court pursuant to section 61(4)(a), the judge below having adjourned those proceedings.

39 It will be a matter for the parties to consider how the matter should proceed below. The defendant might seek a fresh competency hearing. Alternatively, the parties may agree to proceed without pursuit of the competency issue, at least initially. The authorities make clear that, even if competency is assumed or ruled upon in favour of the witness by the judge, the judge is under a continuing duty to keep the matter under review. Moreover, a party is not precluded from raising the issue during the course of the trial if matters develop in a way which justifies it. When there is material of the sort which was available in this case, for example the ABE interview and the reports, the court and the parties should carefully consider whether a competency hearing is, in fact, necessary at the initial stage of the case. In some circumstances such a hearing may serve to do no more than cause delay, increase expense and put unnecessary strain on the witness. Those, however, are matters for the parties and the judge to consider at the resumed hearing.

40 We conclude our judgment by expressing our deep concern about the delay which has occurred in this case. The allegations which were made were raised as long ago as 29 April 2011. Accordingly, we direct that the resident judge at the court concerned be informed of this court's judgment and of this court's great concern that the matter be listed as a matter of extreme urgency.

Application granted.
Appeal allowed.
Crown Court proceedings to be resumed.

PHILIP RIDD, Solicitor