

ENGLAND AND WALES / JUDGMENT

# C, R. v

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Neutral Citation Number: [2010] EWCA Crim 2578 COURT OF APPEAL (CRIMINAL DIVISION)

Case No: 2010/03155/C5 Royal Courts of Justice Strand, London, WC2A 2LL Date: 04/11/2010

Before : LORD JUSTICE THOMAS MR JUSTICE SWEENEY and MR JUSTICE SPENCER

- ----- Between : Regina
- and - C
- ----- (Transcript of the Handed Down Judgment of WordWave International Limited A Merrill Communications Company 165 Fleet Street, London EC4A 2DY Tel No: 020 7404 1400, Fax No: 020 7404 1424 Official Shorthand Writers to the Court)
- ----- Mr R Carey-Hughes QC and Ms A Faul for the Appellant Miss L Wilding and Miss C Haughey for the Respondent Hearing date: 13 October 201
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## Judgment

Respondent Appellant Lord Justice Thomas:

## Introduction

1. This is an appeal with leave of the trial judge against a ruling as to the admissibility of DNA evidence made at a hearing declared to be a preparatory hearing under s.29 of the Criminal Procedure and Investigations Act 1996 (CPIA) after the ruling had been made. 2. Three issues arose on the appeal: i) ii) Was the ruling of the judge on the admissibility correct? Should the judge have made an order for a preparatory hearing? iii) What is the proper approach to dealing with the issues of admissibility raised? 3. At the conclusion of the hearing we quashed the order for a preparatory hearing and gave our indication as to the future conduct of the trial. As a trial is to take place, we will summarise the facts as known to us in a way which will enable this judgment to be published. In this particular appeal, this does not make much difference. As the judge decided to give his ruling before he declared the hearing a preparatory hearing, he had not found the facts in a way in which we are sure he would have done had he been making the ruling in anticipation that it was a ruling in a preparatory hearing where leave would be given for an appeal to this court. An outline of the factual background The offence and the DNA analysis 4. 5. 6. In the 1980s, the victim was raped at her house. The rapist ejaculated inside her. Swabs were taken from the lower and

higher part of her vagina. They were tested at the time, but no DNA profiles were then obtained. Many years later, after there had been enormous advances in DNA technology, a further analysis was carried out by an expert employed by the Forensic Science Service (FSS) using, at first, the SGM+ process. This produced a major profile and a minor profile; there was no suggestion according to that expert that DNA from more than two persons was present. At that stage no reference profile had been taken from the victim but it was assumed that the major profile was from her. That assumption proved subsequently to have been correct; a swab was taken later from the victim which on analysis matched the major profile. The minor profile obtained was compared with DNA on the national database. There were three possible matches: two were eliminated and the third was the appellant. The sample from the appellant as referenced on the database was then upgraded and subjected to the SGM+ process. This was then compared with the minor profile obtained from the vaginal swab of the victim. It was said that there was a sufficient profile obtained from the partial profile at a sufficient number of loci to provide a match probability in the region of 1 in 100,000. The sample from the appellant was then subjected to LCN process in the manner described in Reed & Reed [2009] EWCA Crim 2698, [2010] 1 Cr. App. R 23. The minor profile was said by the FSS expert to show a match probability of 1 in over 3 million. After the analysis of the further swab taken from the victim and an analysis 7. 8. made combining the SGM+ and LCN results, a match probability of the minor profile to that of the appellant was 1 in over 50 million. In each of the SGM+ and LCN processes more than one run was made. In all six runs were made and compared with one another for stochastic effects and reproducibility. The disagreement between the experts The conclusions were set out by the FSS expert in a number of reports. An overseas academic was instructed on behalf of the appellant. Although it was not clear why it had been necessary to instruct an expert from overseas (with the considerable extra expense involved), his expertise was not challenged. He produced a report to which further reports were produced by the FSS expert in response. None of these was before us. Among the issues that were taken by the appellant's expert was that, as, in his view, the quantity of the minor profile was below 50 picograms, the stochastic effects were likely to be considerable. In a response on 20 January 2010 the FSS expert said: "The [FSS]'s DNA Interpretation model takes into account the possibility of stochastic variation, therefore in SGM+ and LCN analysis one would make an assessment of the quality of the electrophoretogram and reproducibility of the results. In my opinion stochastic variations are not an important issue in this case as aliquots from the same DNA extract have been run 6 times, the results were highly reproducible and showed no In my opinion, these significant stochastic variation. observations give a more reliable indicator of whether stochastic variation has occurred rather than the Quant value." 9. In accordance with the Criminal Procedure Rules, there was a meeting between the two experts the outcome of which was recorded in a note dated 8 March 2010 which was provided to us on the appeal. This set out the areas of disagreement which were in summary as follows: i) Whether the quantity of the minor profile was such that stochastic variations had been sufficiently taken into account. ii) Whether there were more than two contributors. iii) Whether the way in which the process of analysis carried out had properly followed the applicable protocols. iv)

Whether the samples had been handled, stored and recorded correctly. v) vi) The reproducibility of the runs. The match probability calculation. vii) The applicable statistics. Further meetings took place between the experts in May 2010, but the disagreements remained. Indeed there were further points as to the number of alleles that could properly be taken into account on the profiles obtained by the LCN process. 10. In the light of the reports of the appellant's expert, counsel for the appellant considered with the appellant's expert the overall reliability of the evidence. Although not expressly set out in any document, it was common ground before us that the appellant's expert was in effect saying that the cumulative effect of the various points was such that the DNA evidence adduced was unreliable. It was on the basis of this that counsel for the appellant made an application that the DNA evidence should be excluded under s.78 of the Police and Criminal Evidence Act 1984 (PACE). The voir dire 11. 12. 13. 14. The matter came on for hearing as a voir dire on the admissibility of the DNA evidence before the trial judge later in May 2010 prior to the commencement of the trial. No jury was empanelled. The FSS expert who had served several further reports dealing with the points raised by the appellant's expert was called to give evidence. In the course of cross-examination it was suggested to the court that the quantity of DNA on the minor profile of the male was 50 picograms; that quantity was below the stochastic threshold of 100-200 picograms established in Reed & Reed and by reason of that fact alone the evidence could not be admitted. The cross-examination extended over a period of three days. It appears that a significant part was directed at attempting to prove on the basis of the tests carried out that the quantity of the male profile was 50 picograms; there was cross examination on the Quant Duo test. There then had to be an adjournment while various points were considered. The Crown recalled the expert and called a further expert from the FSS and adduced a report from a yet further expert. We were told that the Crown's expert did not accept that the quantity of the male profile was 50 picograms and made clear that the quantity itself was not the material consideration; what was important was to take fully into account any stochastic effects and examine the reliability and reproducibility. The appellant's expert was present throughout the hearing. He did not give evidence. After the evidence had concluded, it was submitted to the judge that, if (as was submitted to be the case) the amount of the minor profile was 50 picograms, the profile was inadmissible because it was below the stochastic threshold of 100-200 picograms. It was contended that the threshold set out in Reed & Reed applied to the profile of the minor contributor and not to the whole of the DNA analysed; as it was below 100-200 picograms it was ipso facto inadmissible. The Crown in a careful and well constructed argument made clear that this was a misreading of Reed & Reed; the court had said that where quantities were below the stochastic threshold, it was the reliability of the profile that determined admissibility. There was no lower limit. The ruling on the voir dire 15. On 28 May 2010, at the conclusion of the hearing (which had extended because of the adjournment over 7 court days) the trial judge gave an ex tempore ruling. The judge held that the FSS expert had not been undermined in such a way that the evidence should be excluded under s.78 of PACE. He went on to hold that as long as the total amount of DNA met the quantity required as set out in Reed & Reed the ratio of the profiles might not matter. He agreed with the evidence of the FSS expert that it

was not the quantity of the DNA that necessarily mattered but quality and reliability. He concluded by saying that he considered the stochastic levels valid and it was sufficient to make the analysis reliable. He did not set out his conclusions in respect of the quantity of the minor male profile or other factual issues in dispute or give reasons why he considered the FSS expert had not been undermined. 16. As a decision on a voir dire under s.78 that may possibly have been sufficient. It would ordinarily have been the end of the matter, subject to any appeal in the event of the appellant's conviction at trial. The decision to declare the voir dire a preparatory hearing 17. However it is clear that it had been contended on behalf of the appellant prior to the conclusion of the argument that the judge should declare the hearing a preparatory hearing; the judge indicated at that stage that he did not agree. After the ruling had been given, counsel for the appellant applied to have the hearing declared a preparatory hearing. There was careful consideration of whether the issue fell within the provisions of the CPIA as clarified in the decision of this court in I, P, O, I & G

[2009] EWCA Crim 1793. The judge also considered a submission made by counsel for the appellant that it was possible to declare a preparatory hearing ex post facto on the basis of another judge having done the same at the Central Criminal Court. Counsel for the Crown did not resist the application. 18. The judge then accepted that he had that power. Expressing considerable reservations, he then made an order that the hearing was a preparatory hearing under the CPIA for reasons we set out more fully at paragraph 30 below and gave leave to appeal. The grounds of the appeal 19. The single ground of appeal was: "The learned trial judge wrongly ruled that the DNA evidence from [the FSS expert] was sufficiently reliable to be admitted in evidence." 20. 21. The particulars set out the contention that the level of the stochastic threshold referred to in Reed & Reed was the level of the minor profile and not the level of the whole amount analysed. In support of the wider contention that the DNA evidence was unreliable, the appellant also referred to issues in respect of the way in which the LCN process had been carried out, the FSS expert's conclusions about alleles at two loci, the number of contributors and reproducibility. It was contended that the judge should have approached the matter objectively and given full reasons as to his independent objective view that the evidence was reliable, rather than simply accepting the subjective opinion of the FSS experts. Prior to the appeal the question was raised on behalf of the appellant as to whether we should hear expert evidence. This was not pursued, but we agree with the Crown's submission that not only is there no power to do so in this type of appeal, but if there had been, it would be wholly contrary to the purpose of this type of appeal to hear evidence.

22. We turn to consider the three issues. Although we were satisfied that the preparatory hearing should not have been ordered for the reasons we explain at paragraph 28 and following below, we will set out our observations on the issue raised by the judge not only to emphasise the correct approach taken by the Crown to the expert evidence, but also as it will help explain our decision that the issue was one that should have been determined as a voir dire under s.78 and not as a preparatory hearing. Issue 1: Was the DNA evidence admissible? 23. 24. 25. It is clear from the skeleton arguments provided to us and the ruling

of the judge that the point that came to dominate the hearing before him was the question of the stochastic threshold. The other points relating to the reliability of the particular DNA testing were never considered in the ruling and no facts were set out in relation to them, though, as we have set out at paragraph 19, the other issues were relied on in the grounds of appeal. We therefore had to proceed on the basis, and it was not argued to the contrary, that the judge had reached the decision that those matters did not affect the reliability so as to enable a challenge to admissibility under s.78 of PACE. Furthermore, we consider that, although the conclusion of the judge was not expressed as fully as it might have been if he had made the decision to order a preparatory hearing prior to giving the ruling, he correctly took the view that what mattered was the quality of the minor profiles and not the quantity. Quality was shown for example in reproducibility, although the quantity would necessarily affect consideration that had to be given to the stochastic effects. This was entirely in line, it appears to us, with the evidence that had been before him and the submissions of the Crown that it was clear from paragraph 48 of the judgment in *Reed & Reed* that reliable results might be obtained from amounts below the stochastic threshold. Counsel for the Crown was correct in the submission about paragraph 48 of *Reed & Reed*. In *R v Broughton* [2010] EWCA Crim 549 (a decision not available to the judge or the parties at the voir dire because of the re-trial in a case which had attracted considerable publicity) this court had in fact made clear that the submissions advanced by the Crown in this case were entirely correct. In *Broughton*, the profiles were derived from unquantified samples of DNA of less than 100 picograms; the court concluded at paragraphs 37-33: "At these very low levels of DNA, the dangers presented by the possibility of stochastic effects, including allelic drop-out, drop-in and stutter are very real and must be fully appreciated, but they may often be addressed by repeating the process a number of times, as Professor Caddy recognised. There will of course be occasions where profiles generated from less than 200pg are wholly and obviously unreliable. We anticipate that the Crown would never seek to adduce such profiles in evidence. If it put forward such a profile, then the unreliability would be pointed out in the report of the defence expert and, if not accepted by the Crown's expert in the exchange that must take place under Part 34 of the Criminal Procedure Rules, the judge would have to consider the dispute; if they were unreliable, he would exclude them. There will be other occasions where the probative value of the profiles is more debatable. In such cases the evidence may properly be adduced and it must then be addressed and its weight established by adversarial forensic techniques. But we do not accept that these are reasons for ruling out LTDNA evidence altogether. In our judgment, the science of LTDNA is sufficiently well established to pass the ordinary tests of reliability and relevance and it would be wrong wholly to deprive the justice system of the benefits to be gained from the new techniques and advances which it embodies, in cases where there is clear evidence (adduced in the manner discussed) that the profiles are sufficiently reliable." 26. 27. In our judgment, counsel for the appellant was wrong in his view that a "knockout blow" could be achieved if he persuaded the judge that the amount of DNA in the minor male profile was below 100-200 picograms. The sole question was whether, despite the low quantity, a reliable profile could be produced. The judge accepted the evidence of the FSS expert, uncontradicted as it was by

any defence expert evidence. He reached the inevitable conclusion that the DNA results were sufficiently reliable as to be admissible. It was for the jury to hear the evidence and determine the weight to be attached to it. Although that is sufficient to affirm that the judge adopted the correct approach, we would add one further observation. In *Reed & Reed* there was no express consideration by the experts who gave evidence in that case as to whether the stochastic threshold of 100-200 picograms related to the amount subject to analysis or, where mixed profiles were obtained, the particular profile. However, it is clear from the whole of that decision that the court was referring to the total quantity of DNA in its reference to the stochastic threshold. Of course if, in the case of a mixed profile, the DNA relating to a particular profile comprises less than 200 picograms, problems may arise. But as was made clear in *Reed & Reed* and in *Broughton*, profiles obtained from less than 200 picograms can be reliable. It is reliability that is the issue, not the quantity, though plainly the quantity is relevant (as has been made clear) to the consideration of stochastic effects.

Issue 2: Should the judge have made the order for a preparatory hearing? Should he in any event have made it after he had given his ruling? 28. The next issue for us to consider is whether this was a case in which an order should have been made for a preparatory hearing. It is first necessary to consider whether on the criteria set out in s.29 of the CPIA (as considered in the case law of the court) there were matters which made it proper to order a preparatory hearing. The second question is whether the judge should have declared a preparatory hearing ex post facto after he had given his ruling. (a) Should the judge have ordered a preparatory hearing? 29. The statutory provision pursuant to which the judge purported to order a preparatory hearing was s.29 of the CPIA. So far as relevant it provides: “(1) Where it appears to a judge of the Crown Court that an indictment reveals a case of such complexity, a case of such seriousness or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing – (a) before the time when the jury are sworn, and (b) for any of the purposes mentioned in subsection (2), he may order that such a hearing (in this Part referred to as a preparatory hearing) shall be held.

- (2) The purposes are those of – (a) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial, (b) if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them, ..... (d) assisting the judge’s management of the trial, (e) considering questions as to the severance or joinder of charges.” 30. The judge acceded to the submission on behalf of the appellant that expert evidence in relation to DNA was so complex that this was a sufficient reason to order a preparatory hearing. In his reasons for ordering a preparatory hearing, after the event, the judge said that in 35 years experience he had never dealt with such complex scientific evidence relating to LCN DNA and that the evidence would be potentially very difficult for a jury to comprehend, which was “one of the factors to be borne in mind when one considers section 29(2)(b)”. With reference to section 29(2)(a), he said it was difficult to think of anything more material to the jury’s determinations and findings than “this highly complex forensic scientific evidence based, as it is, upon biochemistry, something which neither the court nor jurors may be expected to be experts

in.” 31. The judge then gave his reasons for granting leave to appeal against his ruling, pursuant to s.35(1) of the CPIA. He said: “It is said by the defence here that this court has exercised its discretion on a fundamentally flawed basis in science, based upon the forensic scientific evidence although I once again emphasise that the court heard evidence from the prosecution experts and heard not a word from anybody on behalf of the defence. It does seem to me that this case also falls within the parameters of the case of R –v- I in which the Court of Appeal said that the ‘interlocutory appeal procedure was suitable only for discrete issues of law which were certain to arise and which needed to be authoritatively resolved’ – I emphasise authoritatively resolved – ‘lest the trial should proceed on what might turn out to be a false footing.’ That is said to be the position here....” .

32. We cannot agree with the reasons given by the judge. In the first place the scientific evidence relating to LCN DNA may have been complex, but it was perfectly capable of being presented intelligibly to the jury, provided the judge exercised his powers of case management rigorously in accordance with the principles this court set out in Reed and Reed. He could have done this at a case management hearing or, if admissibility was challenged, on a simple voir dire. Secondly, the only real point in ordering a preparatory hearing in this case was to permit an appeal. However, there was for the reasons we have set out no issue on which an appeal properly lay. 33. In fairness to the judge, we should point out that he was correct in his first and instinctive reaction not to go down the path he eventually did. He had in mind (although he did not identify it at that point) the guidance of the Vice-President (Hughes LJ) on the topic of interlocutory appeals in the decision of this court in I, P, O, I & G. That guidance was repeated and re-emphasised by Hallett LJ in Z [2009] EWCA Crim 2476. At paragraph 22 Hughes LJ said: “Given the co-extensive powers of case management outside the preparatory hearing regime, courts ought to be very cautious about directing a preparatory hearing under section 29 CPIA or section 7 CJA 1987; in particular, the desire of one party to test a ruling by interlocutory appeal is not a good enough reason for doing so, unless the point is one of the few which is genuinely suitable for that procedure (see para 21 above) and there is a real prospect of such appeal being both capable of resolution in the absence of evidence and avoiding significant wastage of time at the trial.” Paragraph 21, referred to, included the following passage, which is particularly apposite in the present case: “We should add that this case illustrates the complications introduced where the preparatory hearing regime is invoked. It is emphatically not the case that most heavy fraud or similar cases will nowadays call for a preparatory hearing. Virtually the only reason for directing such a hearing nowadays is if the judge is going to have to give a ruling which ought to be the subject of an interlocutory appeal. Such rulings are few and far between and do not extend to most rulings of law. An interlocutory appeal can be a most beneficial process in a few, very limited, circumstances. If a discrete point of law arises, its resolution in this court, can if necessary be accomplished within a very short time-frame and this can avoid the risk of many weeks of wasted trial time. On the other hand, many points of law decided in the Crown Court turn out to be fact sensitive and to appear differently, or for that matter, to go away, by the time the evidence has been

heard.....". The exceptional circumstances required for a preliminary hearing were emphasised again in CJ (7 October 2010). 34. It follows from what we have said that the judge should never have declared that this was, or ordered, a preparatory hearing under s.29 of the CPIA. We bear in mind the observations of this court in Attorney-General's Reference (No. 1 of 2004) [2004] 2 Cr. App. R. 27, at paragraph 61: "...if...the judge has addressed the issues of complexity and length, in the context of the declared purposes of any preparatory hearing, and decided to proceed on the basis that the potential advantages outweigh the disadvantages, this Court will be reluctant to set aside what under the section, and, on the facts of the individual case, is a matter for judicial assessment and decision by the trial judge." Nevertheless, for the reasons we have already given, we had no hesitation in concluding that his order cannot stand and must be set aside. There was no relevant material on which the judge could have properly concluded that the case fell within section 29(1), and therefore no jurisdiction to make an order for a preparatory hearing. It followed that this court similarly lacked jurisdiction.

(b) Should the judge have ordered the hearing ex post facto?

35. We recognise that very occasionally it may be only during the course of a pre-trial hearing that the need to order a preparatory hearing emerges. In Attorney General's Reference (No.1 of 2004) referred to above, Lord Phillips CJ said at paragraph 62: "There will be cases which obviously fit within the relevant statutory criteria and purposes. There will be others where these issues are not as clear-cut. The judge may, for example, decide to start the investigation on the basis that he has in mind to make a pre-trial ruling under Part IV [of the CPIA], and then, during the course of the argument, decide that on analysis the relevant criteria are established. As a matter of jurisdiction, we see no reason why, having heard from both sides and exercising his discretion, the judge may not conclude that a preparatory hearing should be ordered and start then and there." However, what is impermissible (as happened in the present case) is to declare retrospectively, and after the relevant ruling has been given, that the hearing has been a preparatory hearing. S.29 of CPIA empowers the court to order that a preparatory hearing shall take place. It does not empower the court to declare or order that a preparatory hearing has taken place, when in fact it has not. 36. The judge was plainly uneasy about declaring a preparatory hearing ex post facto, but seems to have gained comfort from a passage in the opinion of Lord Mance in H

[2007] 2 A. C.270: "Once a preparatory hearing has validly been ordered, the power to make a ruling under section 9 is thus on any view exercisable – whatever the direct or dominant object of the application or ruling – whenever the judge reasonably considers that it would also serve a useful trial purpose within one of the heads in section 7(1) to make such a ruling" (emphasis added). In submissions, and in giving his reasons, the judge seems to have regarded the use of the word "whenever" as some indication that a preparatory hearing can be ordered at any time, even after the relevant ruling has been given. The word "whenever" relates to the subsequent making of rulings after and only after a preparatory hearing has validly been ordered. 37. There are also good practical reasons

why a preparatory hearing, if it is really necessary, should be ordered well in advance and in accordance with Part 15 of the Criminal Procedure Rules 2010. It concentrates the minds of the advocates, and the judge, on the precise formulation of the issues upon which the ruling is to be given and on the facts he will be required to find. The judge will have in mind, in formulating and expressing his ruling, that it is likely to be subjected to close scrutiny by the Court of Appeal. In short, the whole hearing has to be far more sharply focussed than this hearing was. Issue3: What procedure should have been followed in the light of the objection to admissibility raised by the appellant? 38. As we have set out, the decision of counsel for the appellant to challenge the admissibility of the evidence was made on the basis of an application under s.78. Although no signed statement had been produced by the appellant's expert instructed, 39. 40. it was accepted, as we have set out, that the totality of the points that he was making had amounted to an assertion by him that the evidence was so unreliable that it should not be admitted. The type of hearing that occurred in the present case emphasises the importance of strict adherence to Part 33 of the Criminal Procedure Rules 2010, and to the guidance which this court gave in *Reed & Reed* at paragraphs 131-132. If the rules and guidance are properly observed, there are likely to be few cases where a voir dire will be necessary to determine whether the Crown's expert evidence in relation to DNA should be excluded under s.78 of PACE. It is clear that an expert instructed for the defence who disputes the evidence in relation to DNA given by the Crown's expert must set out his reasoning and conclusions in proper detail in a witness statement, duly signed and containing a declaration of truth (Rule 33.3). The court will then order the opposing experts to prepare a statement for the court of the matters on which they agree and disagree, giving their reasons (Rule 33.6). If, after such a meeting, the defence expert maintains his view that the overall deficiencies in the way the process has been followed or the conclusions reached are so extensive that the evidence is so unreliable that it should not be admitted, he must make a duly signed and verified statement identifying the shortcomings in the methodology and results of the Crown's expert, and the reasons for asserting that such shortcomings fundamentally undermine the reliability of the Crown's DNA evidence to the point that it should be excluded. It would not be proper for an advocate for a defendant to embark on an application under s.78 of this kind without such a statement from a duly qualified expert which has been provided to the court and to the Crown. At the hearing on admissibility under s.78, the judge will manage the hearing so that it is confined within defined issues and during which both experts would be expected to give evidence. We recognise that sometimes, despite the best efforts of the parties and their experts, points may arise in evidence on a voir dire which have not been foreseen, through non-disclosure or otherwise, but the judge will be astute to manage the hearing so that it does not become the type of protracted hearing that occurred in this case. Furthermore such hearings are not to be used for the ulterior purpose of cross examining experts in advance of the trial; the court must ensure that this does not happen. 41. Had the procedure we have outlined been followed rigorously in the present case, it is likely that the expert instructed on behalf of the appellant would have acknowledged that in principle a profile said to be the

appellant's could still be reliable, even if the amount of DNA in that profile was below 200 picograms, provided the necessary reproducibility had been demonstrated. It certainly should have been encompassed by a hearing measured within the hours of a single sitting day.

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