

ENGLAND AND WALES / JUDGMENT

R, M & L, R v

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Neutral Citation Number: [2013] EWCA Crim 708 IN THE COURT OF APPEAL (CRIMINAL DIVISION) ON APPEAL FROM THE CROWN COURT Case No: 201300960 C2 201300963 C2 201300962 C2 Royal Courts of Justice Strand, London, WC2A 2LL Date: 10/05/2013 Before : LORD JUSTICE TREACY MR JUSTICE EDWARDS-STUART and RECORDER OF LEEDS, HIS HONOUR JUDGE COLLIER QC (SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

- ----- Between : Regina

- and - R, M & L

- -----

- ----- J A Price QC & N Chbat (instructed by Albin & Co) for the Appellants
N Syfret QC & G Smith (instructed by Crown Prosecution Service) for the Respondent T Little
(instructed by Treasury Solicitors) as Amicus Curiae Hearing dates : 30th April 2013

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Judgment

Lord Justice Treacy : 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. This is an interlocutory appeal under Section 35(1) of the Criminal Procedure and Investigations Act 1996 pursuant to a ruling made on 15th February 2013 at a Preparatory Hearing held under Section 29 of the Act. There are two issues. Firstly, whether the hearing was correctly designated as a Preparatory Hearing. Secondly, whether the judge's ruling was correct. The judge ruled that the prosecution should be permitted to adduce hearsay evidence in the form of the complainant's Achieving Best Evidence interview together with her cross examination at the previous trial which had been recorded on tape. Although there was some supporting evidence, it was common ground that the complainant's evidence was in effect the sole and decisive evidence in the case. Without her evidence, the Crown would have no case. The three Appellants were charged on an indictment containing five counts of a sexual nature, the most serious of which was rape. At the original trial each of the Appellants was convicted on the count or counts which it faced. However, those convictions were quashed by this court, not on any ground relating to anything pertaining to the complainant, but as a result of legal misdirections by the trial judge in his summing up. This court ordered a retrial. It is necessary to give a chronology of events as they set the scene for the judge's ruling which is the subject of this appeal, and inform the grounds of appeal. We shall refer to the complainant as V. She was 16 at the time of the alleged offences, and is now 18. 03.04.11 – Events

giving rise to the charges. V went to a house where the Appellants were. Sexual activity took place that evening, of which she complained. V said it was non-consensual. The Appellants said it was consensual. 04.04.11 – ABE interview of V. 17.11.11 – V makes statement expressing wish not to attend court. She says her ABE account is correct, but does not want to proceed as she feels stressed, wants to move on with her life and does not want to have to think further about the events. 22.11.11 – Further statement from V giving additional detail about the events, but repeating desire not to attend court. After 22.11.11 – Prosecution obtain and serve witness summons on V. 28.11.11 – First trial starts. V attends court and gives oral evidence in chief after playing of ABE interview. Cross examined by three counsel. Transcript of evidence is over 250 pages. V's evidence covers three separate days. Trial lasts eight days. 09.12.11 – All Appellants convicted. 09.01.12 – V's impact statement. Says "extremely stressed out" over giving of evidence in court. Did not wish to continue because of this stress. 13. 25.05.12 – Appellants granted leave to appeal. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 09.12 – V informed of hearing date of appeal. Does not wish to attend. Warned of possible retrial. States she is unwilling to "put herself through that" again. 31.10.12 – Convictions quashed. Retrial ordered. V informed. Starts to avoid police contact. 11.11.12 – V's mother makes statement explaining V's reasons for not wanting to attend retrial. "Distressing experience". 11.12 – Letter from V confirming she had spoken the truth, but indicating that she does not want to attend retrial. 17.12.12 – Crown applies for witness summons. 19.01.13 – Witness summons issued by judge and served on V. V states she will not attend and that she intends to consult her doctor. 22.01.13 – (a) V attends GP, who provides letter saying that she is "not fit to attend for a further cross examination". (b) CPS case conference (unaware of GP's note), decides not to seek any warrant for V's arrest, and to apply, if necessary, to adduce her evidence under Section 114(1)(d) of the Criminal Justice Act 2003. 25.01.13 – Mention Hearing before the judge, who is informed of GP's letter and proposed letter to be sent to V by CPS. 29.01.13 – CPS letter delivered to V. It states that (1) in the circumstances, and in particular, having regard to the GP's letter, no warrant would be issued. (2) That there was a risk that, without V's evidence, the case would collapse. (3) V is strongly urged to attend court. (4) Special measures could be made available. V repeats that she will not attend court. 04.02.13 – Case listed for trial. V does not attend. When phone contact is made, V states she is not coming to court. GP attends court and Crown review V's medical file. Crown abandon proposed application under Section 116(2)(b) of the Criminal Justice Act 2003. Crown seeks to proceed with hearsay application under Section 114(1)(d). Judge requires further efforts to be made to secure V's attendance. Expresses need to exhaust all appropriate avenues to obtain V's attendance before hearing the application. 24. 05.02.13 – Judge drafts letter for despatch to V. The judge's letter states: "I am the trial judge in this case and am dealing with legal argument as to the consequences of your refusal to attend court to give evidence. There are a number of ways in which I might deal with this situation and in due course I will need to make decisions as to which is the correct way in the circumstances of this case. I know that you indicated when served with a witness summons that you do not intend to attend and give evidence about the allegations arising from incidents on 3rd April 2011. I have read statements setting out your position in this respect. However I would like to hear your position from you directly. My clerk will therefore ask you to accompany him to the Crown Court... If you decide to come to court with my clerk, then any

explanation you give to me, will be given from behind screens. The defendants will not be in court and no one will be present in the public gallery. The defendants' legal representatives will be present. You will be asked no questions at this stage about the events of 3rd April. I would be very grateful if you would agree to come to court together with my clerk..." 25. 06.02.13 – The judge's letter, accompanied by a letter from the Crown, is communicated to V via her mother. The Crown's letter states: "In our letter of 25th January 2013 we promised you we would not apply for your arrest if you did not come to court on 4th February 2013. We stand by that promise and repeat that there are no circumstances in which the prosecution will apply for your arrest. Therefore no one is going to make you give evidence. We would of course like you to read the judge's letter and think about answering his questions, and we would also like to discuss with you ways of giving evidence. When somebody does not come to court when witness summonsed, a judge does have the power to issue a warrant for arrest to deal with "contempt" but that is not a power that can compel you to give evidence. That is true for all witnesses who are witness summonsed in every case. It is highly unusual for a power of arrest to be issued in circumstances such as these. But however unlikely and we repeat it is very unlikely, we cannot say that arrest for contempt (i.e. not coming to court when summonsed) is not a possibility." V's mother reads the letters, and police reiterate to her that "there was no way V was going to be made to come to court to give her evidence". 26. 27. 07.02.13 – V confirms to police that she has received the letters and does not want to meet the judge. This was the last communication with V or her mother. 11.02.13 – The hearing of the application under Section 114(1)(d) proceeds and is adjourned overnight, part heard. The court is invited to designate the hearing a Preparatory Hearing under Section 29(1) of the Criminal Procedure and Investigations Act 1996. Overnight a written application from all parties is prepared pursuant to Crim PR Rule 15.3. 28. 12.02.13 – Argument continues. 29. 30. 13.02.13 – The judge declares Preparatory Hearing and informs parties of decision to admit V's evidence under Section 114(1)(d). Judge hears argument on other minor

issues.

15.02.13 – Judge hands down reasons for ruling under Section 114(1)(d) and grants leave to appeal under Section 31 of the Criminal Procedure and Investigations Act 1996. Preparatory Hearing 31. The matter comes before the court at this stage because it is an interlocutory appeal permitted under the Preparatory Hearing procedures. The question, however, arises as to whether what took place below was properly designated as a Preparatory Hearing. If it was not, then this court has no jurisdiction to hear an appeal. The parties cannot confer jurisdiction by agreement, nor can the judge if he shares their view erroneously. The jurisdiction must truly exist for it to be validly exercised. 32. Section 29(1) provides: "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...he may order that such a hearing (in this Part referred to as a preparatory hearing) shall be held." It is that subsection which confers jurisdiction on a Crown Court for preparatory hearings. 33. 34. 35. As is well known preparatory hearings arose out of the Roskill report on the trial of large frauds and were first enacted by the Criminal Justice Act 1987. The Criminal Procedure and

Investigations Act 1996 extended the same facility to non-fraud cases of sufficient complexity or length. This case cannot be described as one of great complexity or length. It is concerned with sexual allegations relating to a single evening and dependent on the evidence of the complainant. The trial should be completed in the space of a week or little more, even if V were to give evidence. The Appellants, without demur from the Crown, submit that this is a serious case, and thus apt for a Preparatory Hearing because the matter at issue is a point of law or admissibility of evidence based on facts which are not in issue, the resolution of which would result in substantial benefits by reason of the ruling being determined in an interlocutory appeal. If the appeal was successful, there would be no need for a trial. Moreover, the issue of admissibility is an unusual one.

36. We were referred to *R v H* [2007] 2 Cr App R 6 where the House of Lords considered aspects of the Preparatory Hearing provisions. However, that case was concerned with a different issue than that which is before us. It was concerned with the inter-relationship of Sections 7 and 9 of the 1987 Act, and whether a ruling concerning disclosure made in a Preparatory Hearing was one which could be the subject of an interlocutory appeal under Section 9(11) of the Act. That case was not concerned with a consideration of the jurisdiction to declare a valid Preparatory Hearing.
37. It is notable, for example, that in the speech of Lord Mance, he repeatedly uses the phrase “once a preparatory hearing has validly been ordered”. In *H* it was common ground that there had been a validly ordered Preparatory Hearing. Their Lordships simply did not have to consider the present point.
38. We were also referred to *R v I (C)* [2010] 1 Cr App R 10. There, Hughes LJ stated that: “Virtually the only reason for directing such a hearing 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 timeframe and thus avoid the risk of many weeks of wasted trial time.”
39. 40. 41. He went on to say that the desire of one party to test a ruling by interlocutory appeal is not a good enough reason for directing a Preparatory Hearing unless the point is one of the few which is genuinely suitable for that procedure. In a number of cases this court has criticised the practice of declaring a Preparatory Hearing in order to give a right of appeal. An example is *R v Z* [2009] EWCA Crim
2476. This was a case where the ruling sought related to factually simple charges. This court declined jurisdiction, saying that it was not the kind of case at which Section 29 was directed; none of the conditions (complexity, seriousness or likely length) applied. The only potential justification in this case would relate to the criterion of seriousness. Of course any sexual allegation of the sort made in this case will be regarded as serious, whether seen from the perspective of the alleged victim or that of the defendants. But that is plainly not enough to confer jurisdiction. The sentences imposed in the original trial were in the region of 7 or 8 years. We observe that there are many sexual offences, which

on conviction attract sentences very considerably higher than those figures. Moreover, Section 29(1) refers to an offence of such seriousness. The use of the intensifier “such” is plainly intended to convey a very high degree of gravity.

42. Whilst it might be convenient for these matters to be disposed of by the declaration of a Preparatory Hearing, that is not the test which must be applied. What might be convenient in relation to one case has, as has been pointed out, considerable knock-on effects in relation to other parts of the caseload of the Court of Appeal Criminal Division, and available judicial manpower. 43. As matters have turned out, this case has not been listed until nearly three months after the ruling. As we shall point out later, by reference to the wording of Section 131 of the Criminal Justice Act 2003, the ruling made in February would, because of the passage of time, not be final, but would have to be revisited immediately before the witness was due to give evidence at some time in the future when the retrial is re-fixed in order for the ruling to have validity. The nature of this ruling was not one which could be final in any event. Thus, by making the ruling which envisaged an interlocutory appeal following, much, if not all, of the perceived advantage was thrown away.
44. Whatever the force of those observations, we come back to the point relating to the seriousness of the case. This is not, in our judgment, the sort of case to which a Preparatory Hearing should apply, and it certainly cannot be said to be one of such seriousness that the judge’s decision on this point was one which was reasonably open to him. Accordingly, we hold that we have no jurisdiction to entertain this interlocutory appeal. 45. 46. The effect of this is that on the face of things the judge’s ruling nonetheless stands as a pre-trial ruling made by the judge pursuant to Section 40 of the Criminal Procedure and Investigations Act 1996 – see *R v Ward* [2003] 2 Cr App R 20 at paragraph 26. Section 40(4), however, provides that a judge may vary a ruling if it appears to him to be in the interests of justice to do so. A judge may act of his own motion or on an application by a party to the case subject to a requirement in subsection (5) that there has been a material change of circumstances. The parties and the court may wish to consider this in the light of what we say below. The Ruling on the Hearsay Application 47. 48. 49. 50. In the light of our decision on the jurisdiction issue, in a sense what we have to say is moot. However, we heard full argument on matters pertaining to the judge’s ruling, and in deference to them, and with an eye on providing guidance as to the future conduct of this case, we set out the matters below. The Crown was unable to make its hearsay application pursuant to Section 116 of the Criminal Justice Act 2003 because none of the conditions under Section 116(2) relating to the unavailability of a witness were capable of being satisfied. A witness’ refusal to give evidence was considered by the Law Commission as a possible Section 116 ground, as it is in certain other jurisdictions, but was rejected. Thus, the prosecution had to apply under the provisions of Section 114(1)(d) which provide for the admissibility of a statement by way of hearsay evidence if it is in the interests of justice to do so, subject to having regard to any relevant factors including those identified in Section 114(2). It is clear, however, that this subsection is to be cautiously applied, lest it have the effect of circumventing Section 116. Mr Price QC emphasised this and drew attention to Section 114(2)(g) which requires the court to focus on

whether oral evidence of the matter stated can be given and, if not, why not. Such an approach would apply in any event, but in this case there is a complicating factor by reason of Section 131 of the Act. Section 131 was overlooked at the hearing below. All parties proceeded on the basis that the witness was available since she was alive and well, and living and working in a place close to the court centre. Section 131 provides: Evidence at retrial For paragraphs 1 and 1A of Schedule 2 to the Criminal Appeal Act 1968...(oral evidence and use of transcripts etc at retrials under that Act) there is substituted – “1 Evidence

- (1) Evidence given at a retrial must be given orally if it was given orally at the original trial, unless –
 - (a) all the parties to the retrial agree otherwise;
 - (b) section 116 of the Criminal Justice Act 2003 applies (admissibility of hearsay evidence where a witness is unavailable); or
 - (c) the witness is unavailable to give evidence, otherwise than as mentioned in subsection (2) of that section, and section 114(1)(d) of that Act applies (admission of hearsay evidence under residual discretion).” 51. This provision only applies to retrials ordered by this court. It would not apply to a retrial ordered by the Crown Court after, for example, a jury disagreement. Paragraph 1(1)(c) is the relevant part. The witness’ evidence must be given orally unless that sub-paragraph applies. The sub-paragraph has a dual requirement. First, that the witness is unavailable to give evidence out with the terms of Section 116(2), and secondly, that Section 114(1)(d) applies. 52. In giving his ruling the judge said at paragraph 7.2: “V is not an unavailable witness; she is available and none of the conditions set out in Section 116(2) apply.” 53. At paragraph 7.4 he said: “Whilst V is available as a witness, her evidence in the “traditional” way is not. She has made it clear that even if brought to court following the issue of a warrant, she would refuse to give evidence...” 54. Having recited relevant history, the judge continued at 7.14: “There was a point at which I believed that had I secured V’s attendance, she may well have been persuaded to give some evidence in the same way as many reluctant witnesses are persuaded to do. However, having reviewed all the material in this case I no longer take this view.” 55. 7.15: “I am satisfied that even had I secured the attendance of V... her determination not to give evidence based upon her settled decision not to relive these events; the fact that she had given her account and been challenged upon it at length in a trial; the effect of that and that of hearing the result of the appeal; and (in her words) “now moved on” with her life would have been maintained.”
56. Mr Price QC submitted that on the face of things the judge had treated the witness as being available so that paragraph 1(1)(c) was not satisfied. However, he acknowledged that the judge’s findings at paragraphs 7.14 and 7.15 might have provided a basis for a finding of unavailability had the judge directed his mind to the point. Mr Price conceded for the purposes of his argument that a refusing witness might be unavailable within the terms of Section 131. His submission, however, was that on the facts of this case, V could not be described as unavailable. 57. 58. 59. 60. 61. Our attention was drawn to this court’s

observations at paragraph 87 of R v Horncastle [2009] 2 Cr App R 15, to R v Riat & Others [2013] 1 Cr App R 2 at paragraphs 15 and 16, and to R v Shabir [2012] EWCA Crim 2564 at paragraph 64(3),

- (5) and (6). Each of those decisions was concerned with frightened witnesses, but Mr Price QC submitted that the observations apply to the present situation. Put shortly, those authorities show that the need to resort to hearsay evidence must be clearly demonstrated. They show that every effort must be made to get the witness to court, and that the court has a responsibility to take all possible steps to enable a fearful witness to give evidence. In this case the judge clearly understood this principle, as the chronology above at 4th February 2013 shows. Mr Price's argument was as follows. Even if the judge could be construed to have found that the witness was unavailable, this finding was flawed in the light of the events of 5th and 6th February. All reasonable steps had not been taken to secure the attendance of the witness. The judge had been prevented from doing what he wanted to do, namely to speak to the witness and test the position with her. It was at paragraph 7.15 an impermissible speculation to say that had V attended court, she would not have given evidence. She had been reluctant to give evidence prior to the original trial, yet after summons had given evidence. It was well-known that reluctant witnesses, once they attended court, could be persuaded to give evidence. He drew attention to the observation at paragraph 87 of Horncastle, that it was of "a special importance that assurances are never given to potential witnesses that their evidence will be read." The Crown argued that the judge had taken sufficient steps to ensure the attendance of V at court. He was entitled to conclude that she would continue to refuse to give evidence, and he could be regarded as treating her as an unavailable witness in the circumstances. In our judgment, the letter delivered on 25th January set the context by indicating that no warrant would be issued. The judge sought to deal with that position by drafting his letter, which was delivered on 6th February. However, that letter was accompanied by the Crown's letter which stated in terms that "no one is going to make you give evidence". That message was repeated in the same letter and orally the following day. We regard that accompanying letter as neutralising the judge's attempt to ensure that all reasonable steps were taken to procure evidence from the witness prior to consideration of the application to adduce hearsay evidence. Once V had seen the 62. 63. accompanying letter, it must or may well have robbed the judge's invitation to come to court to discuss the position with him of any meaning. It must have conveyed a message that continued refusal would be accepted. Accordingly, we consider that, viewed objectively, and through no fault of the judge, it cannot be said that all reasonable steps had been taken to secure V's attendance so that the stage had not been reached in which the court could properly hold that it was appropriate to consider the admission of hearsay evidence. In those circumstances we have come to the conclusion that the judge's decision was flawed because he had not given appropriate consideration to or appreciated the effect of the Crown's letter delivered 6th February. Had he done so, he would have appreciated that the situation was as we have just described. We further agree, for the same reason, that the judge's conclusion that the witness would not give evidence, in the light of that letter, could

not be sustained. It follows, therefore, that the judge's decision was flawed. There was no consideration of Section 131 (which had not been drawn to the attention of the judge); the judge had not considered whether in the circumstances V was "unavailable" within the meaning of that section; the judge was not entitled to proceed on the basis that by the time of his decision the requirement to take all reasonable steps to put the evidence of the witness before the court in the normal way had been taken. Accordingly, had this been a validly designated Preparatory Hearing, we would have allowed the appeal and quashed the judge's ruling.

64. We had asked in advance of the hearing to hear argument on the construction to be given to paragraph 1(1)(c) of Section 131 in the context of Sections 116 and 114 of the Act. We heard submissions from Mr Price QC, for the Appellants, and Mr Little, acting as Amicus Curiae, whose arguments were adopted by Mr Syfret QC, on behalf of the Crown.
65. Mr Price urged upon us a narrow construction, pointing out that Section 131 adopts the initial position that if oral evidence was given at the first trial, then it should be given at the second trial. Historically there were limitations on the power of this court to order a retrial. Consequently, the court should regard the provision as to unavailability as an obstacle intentionally placed in the statute in the same way that on retrial ordered by this court, there are restrictions on what counts could appear on the indictment and upon the sentence which could be imposed by the court below.
66. Mr Little submitted that a broader view should be taken. Paragraph 1(1)(c) itself admitted of the possibility that a witness might be unavailable to give evidence in a way not mentioned in Section 116(2). The sub-paragraph could only have meaning if there was some other route by which a witness could be unavailable beyond the situations described in Section 116.
67. We agree with the submission made by Mr Little. The sub-paragraph plainly contemplates unavailability other than that described in Section 116(2). The test of unavailability cannot be a purely physical one, since under Section 116(2)(e) a witness who is in fear will frequently be physically available at court, and may indeed have given evidence on a voir dire so as to satisfy the court that he or she is genuinely in fear. 68. 69. 70. It would be anomalous if a witness who had given evidence at a trial and who had been cross examined, but who refused to give evidence at a retrial ordered by this court, could not have the possibility of his evidence being received on the grounds of unavailability, whereas a witness who had given evidence at a Crown Court-ordered retrial or a witness who had not given evidence at all in a trial would have their refusal to give evidence considered only under the provisions of Section 114 without the additional hurdle imposed by Section 131. A witness who has already given evidence at a trial may have been rendered more vulnerable by that experience. The expectation of fortitude in a witness referred to in Riat may be affected by a witness' experience of having given evidence. It seems to us therefore that the reference to unavailability of a witness in Section 131 is one which should be at least capable of covering the situation where a witness refuses to give evidence on a retrial. That is not to say that the mere fact of refusal will necessarily mean that the witness is to be considered

unavailable. A trial judge will have to consider with care the circumstances of refusal, just as he will in the other situation where a witness is not physically unavailable, namely fear. Amongst the circumstances to be considered will be whether all reasonable efforts have been made to obtain oral evidence from the witness at the retrial, the reasons for the refusal, whether either party has contributed to the situation leading to the refusal to give evidence, and whether the court is satisfied that it is in the interests of justice for the evidence to be admitted, having regard to all relevant factors, including those identified in Section 114(2). 71. Our conclusion is in line with the comment of Henriques J in *R v Venn & Deakin*

- [2009] EWCA Crim 2541 where at paragraph 22 he said: “Our attention has been drawn to Section 131 of the 2003 Act. It brings the admissibility of evidence at retrial into line with the range of hearsay exceptions in the 2003 Act. As the editors of Blackstone point out, the most important change wrought by Section 131 is the incorporation of the inclusionary discretion (the safety valve) from Section 114(1)(d).”
72. We appreciate that this was a situation of some difficulty and delicacy. The matter appears to have been complicated by the fact that police officers, in giving necessary support to V in the course of these proceedings, had built up a relationship with her, and were concerned about being seen to go back on their word or breaking a trust. There is no reason to doubt that the experience of the first trial for V had been a very unpleasant ordeal, and we understand that the situation needs to be handled sensitively. 73. This type of situation is most likely to arise in the case of vulnerable witnesses, whether the context is one of domestic violence, sexual assault or other types of case. There is, however, a triangulation of interests; the alleged victim, the accused, and the wider public interest in seeing significant criminal allegations pursued. It is not suggested that in every case the prosecution or the court, each of whom has the means of compelling attendance under the Criminal Procedure (Attendance of Witnesses) Act 1965, must necessarily proceed to the ultimate step of arresting the witness under warrant or treating the witness as being in contempt of court. The court’s powers are discretionary and are to be used in the context of the case before the court. 74. However, in this case where the witness summons had been issued and served on 19th January 2013 on the basis, as Section 2 of the 1965 Act requires, that the court was satisfied that it was in the interests of justice to do so, notwithstanding the witness’ already clearly demonstrated reluctance to attend, we consider that for the reasons stated, insufficient had been done, even in this difficult case, to procure the witness’ attendance at least for the judge to assess the position prior to considering the hearsay application.

Conclusion

75. 76. 77. The judge’s ruling cannot be set aside by this court as this court does not have jurisdiction. The ruling, which stands as a ruling pursuant to Section 40 of the Criminal Procedure and Investigations Act 1996, is however capable of variation. That will be a matter for the Crown Court to consider of its own motion or on application by any party. Given our

finding that the Crown's letter, delivered with the judge's letter, effectively neutralised what the judge was seeking to achieve, the court may wish to consider what further steps can be taken. They may include further correspondence from the court or, as was suggested in the hearing before us, a telephone conference call between the judge and the witness (monitored by the parties) so as to see what can be achieved. It would be a matter for the judge to consider what further steps, if any, should be taken. It is, however, clear to us that with the passage of time since the judge's ruling, that that ruling could not stand in any event. The provision in Section 131 is that the witness is unavailable. That must represent the state of affairs at or shortly before the point at which the witness is due to give evidence. Experience shows that a witness' availability may fluctuate. Reluctance to give evidence is a typically fluctuating situation. Accordingly, any decision based on unavailability in circumstances like these, must be made in proximity to the point at which the witness will have to give evidence. We envisage a hearing very shortly before the trial is due to start at which the court will have to decide how to proceed. If further steps are taken with the witness, a decision on the application, including the question of unavailability, will need to be made in the light of the facts as then known. 78. Those, however, are matters for the court below to consider in the light of such guidance as this judgment has given.

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