

ENGLAND AND WALES / JUDGMENT

R v AB & Anor

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Neutral Citation Number: [2025] EWCR 3 IN THE CROWN COURT SITTING AT LEICESTER
COMBINED COURT CENTRE Case No: 33JJ2014424 Leicester Combined Court Centre 90
Wellington Street, Leicester LE1 6HG Date: 07/04/2025 Before : THE HONOURABLE MR JUSTICE
TURNER

- ----- Between : Rex
- v - AB and CD First Defendant Second Defendant
- -----
- ----- Harpreet Sandhu KC and Daniel Osocroft for the Prosecution Balraj Bhatia KC and James Varley for the First Defendant Jeremy Benson KC and Phil Gibbs for the Second Defendant Hearing date: 7th April 2025
- ----- Approved Judgment on Defendants' Application for a Re-Trial This judgment was handed down remotely at 14:30 on 30 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.
THE HONOURABLE MR JUSTICE TURNER THE HONOURABLE MR JUSTICE TURNER
Approved Judgment The Honourable Mr Justice Turner :

INTRODUCTION

1. 2. 3. The prosecution case is that AB, then aged 14, attacked Bhim Kohli, then aged 80, in Franklin Park in Leicester. He did so with no lawful excuse and Mr Kohli died from the injuries he sustained. At the time, AB intended to cause his victim really serious injury and so he is guilty of murder. In the alternative, he intended to cause him at least some physical injury and is thus guilty of manslaughter. AB's defence is one of defence of his co-defendant, CD. CD, then aged 12, was present at the scene and, in three separate clips, filmed part of what was happening on her mobile phone. The prosecution case is that she was a secondary party to the attack and, in particular, the act of filming the incident formed part of her encouragement to AB to assault Mr Kohli, as indeed she intended that it should. She is charged with manslaughter. Her defence, in short, is that she was an innocent bystander having no intent that AB should offer violence to Mr Kohli. Other clips were found on her phone which related to earlier incidents of violence recorded by CD and which the prosecution were given leave to adduce by way of bad character. BACKGROUND TO THE APPLICATION 4. 5. In cross-examination of CD, the prosecution explored the issue as to why

CD had stored the clips in the “My Eyes Only” section of Snapchat. In order to gain access to this material, it was necessary first to get access to the phone (“stage one”) and then to enter not only the username and password for Snapchat but also a four digit number or an alphanumeric passphrase to access the “My Eyes Only” section (“stage two”).

6. The purpose of the prosecution’s questions was to enable the jury to infer that she knew that the clips reflected badly on her conduct during the incident because she had stored them in an THE HONOURABLE MR JUSTICE TURNER Approved Judgment area access to which was protected by a second password. She was not asked in cross-examination about what information she had subsequently provided to the police about her passwords. In re-examination, in order to weaken the force of this evidence, Mr Benson KC asked CD if she had provided the police with the passwords to her phone and to Snapchat and she said that she had. 7.
8. The prosecution then raised concerns that these answers were potentially misleading. CD had indeed provided her login password and Snapchat username to the police but was recorded to have been unable to remember her Snapchat password. They applied for permission to adduce rebuttal evidence to set the record straight.
9. This application led to a closer investigation into the precise circumstances in which CD had relinquished possession of her mobile phone and what she had told the police about her username and passwords. For example, if she had parted with the phone voluntarily then, as a child, she was entitled to the safeguards provided for in sections 37 and 38 of the Police, Crime, Sentencing and Courts Act 2022.
10. However, enquiries revealed that the phone had been seized pursuant to section 32 of the Police and Criminal Evidence Act 1984 (“PACE”). There is now no dispute that CD’s phone was not provided to the police voluntarily and so the 2022 Act safeguards do not apply. It is also conceded that the police were entitled to seize her phone. However, it remains the case of both defendants that the circumstances in which she thereafter provided her stage one password were such as fatally to have undermined the fairness of the trial.
11. Initially, the defendant’s approach was that section 78 of PACE applied and that the evidence found on the phone should be excluded via that route. However, in the case of *R v Sat-Bhambra* (1989) 88 Cr. App. R. 55 the Court of Appeal ruled that the wording of section 78 precluded its retrospective application to evidence which had already been adduced. In this case, the evidence of the contents of CD’s mobile phone THE HONOURABLE MR JUSTICE TURNER Approved Judgment had already been deployed by the prosecution, without objection from the defence, during the course of the trial.
12. Accordingly, the defence application was reformulated with reference to the court’s powers under section 82(3) of PACE which provides: “(3) Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.”

13. The prosecution concede that the importance of the material found on the phone is such that it would be futile to direct this jury to disregard it. The two options open to the court are either to refuse the application or to order a re-trial. THE FACTS
14. It is now time to look more closely at the circumstances which led up to the police gaining access to the My Eyes Only section of CD's Snapchat account.
15. CD was arrested at her school shortly after 2:00pm on 2 September on suspicion of causing Mr Kohli grievous bodily harm with intent. This was the day after the incident in Franklin Park. Mr Kohli was still alive at this time but was to be pronounced dead that evening from the injuries he had sustained. It is not disputed that CD's arrest was lawful.
16. Officers had arrived at the school at 1.20pm and they met the Senior Deputy Headteacher, Mr Z. CD was, at that stage of the investigation, one of three pupil suspects and arrangements were made for each to be brought into the office separately to be arrested out of sight of the other students. It was Mr Y, the Assistant Headteacher and Dedicated Safeguarding Lead, who escorted them to the office. He too was present when each were arrested and charged.
17. In a recent statement taken from Mr Z, he said that he was conscious that he was the trusted adult in the room and he had a duty to make sure that everything was OK for the pupils. THE HONOURABLE MR JUSTICE TURNER Approved Judgment However, the police did nothing that caused him any concern otherwise he would have said something.
18. There is an entry in the school safeguarding records which provides that the parents of the pupils had not been informed of the arrests lest they should later intervene in the event that their houses were searched.
19. After CD had been ushered into the office, she was arrested and cautioned. She was made the subject of a cursory search to make sure that she did not have anything on her which was capable of harming herself or anyone else. She was asked if she had a mobile phone and she said it was in her school bag; which it was. She was then asked to give the PIN number for her phone; which she did. She was then taken to the police station. She appeared to be calm and compliant throughout.
20. CD's first interview took place later that day starting at 9.53pm and lasted about three quarters of an hour. Her solicitor and an appropriate adult were in attendance. At that stage, no attempt had yet been made to access her phone using the six digit PIN number she had earlier provided.
21. As it happened, the omission of the Snapchat password details presented no significant impediment to the police gaining access to the My Eyes Only area. On the following morning, Mr Borrill, a technician in the police Digital Forensics Unit, accessed the phone using the password provided by CD thereby getting past stage one. Snapchat was already logged in to an account and all that remained to be tackled was the four digit code to access the My Eyes Only Area. This proved to be straightforward because CD had used the same

digits as part of one of her other passwords on the device and the technician rightly guessed that the two sequences would be identical.

22. CD's second interview started at about 3pm on 3 September. Again, a solicitor and an appropriate adult were in attendance. By this stage, the clips had been retrieved from her phone and she was asked questions about them. Towards the end of that interview she was invited to fill out a two part consent form with respect to "extraction only" and "account takeover" of the data on her phone. She took her solicitor's THE HONOURABLE MR JUSTICE TURNER Approved Judgment advice and duly filled out the form. In addition to the password which she had already provided, she gave her Snapchat username but it was recorded that she could not remember her password.
23. At the trial, the evidence of the clips found on her phone was deployed as an important component of the prosecution case against both defendants. Counsel for the defendant raised no qualms as to their admissibility. The clips were referred to, and stills from the footage were featured, in the Sequence of Events. The clips themselves were played many times. Indeed, some aspects of the clips were relied upon as supporting the defence case.
THE LAW
24. Although section 78 of PACE does not directly apply because the relevant evidence has already been adduced, I consider that, in the exercise of its discretion under section 82(3), as to which there is little appellate guidance, the court is entitled have regard to the wording of section 78 as a guide as to how such discretion may properly be exercised. Section 78 provides: "...if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."
25. A relevant, albeit not determinative, consideration in deciding whether or not the court ought to exercise its discretion must involve the question of the lawfulness of the circumstances in which the evidence was obtained and, in particular, compliance with the relevant Codes of Practice.
26. The statutory basis upon which the relevant Codes of Practice take effect is to be found in Part VI of PACE comprising sections 66 and 67 of that Act.
27. Section 66(1) provides: THE HONOURABLE MR JUSTICE TURNER Approved Judgment "The Secretary of State shall issue codes of practice in connection with— (a) the exercise by police officers of statutory powers— (i) to search a person without first arresting him; (ii) to search a vehicle without making an arrest; (iii) to arrest a person; (b) the detention, treatment, questioning and identification of persons by police officers; (c) searches of premises by police officers; and (d) the seizure of property found by police officers on persons or premises."

28. Section 67(11) of Pace provides: “In all criminal and civil proceedings any. . . code shall be admissible in evidence; and if any provision of . . . a code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.” 29. It is Code C which covers the detention, treatment and questioning of persons by Police Officers.
30. Paragraph 10.1 provides: “A person whom there are grounds to suspect of an offence... must be cautioned before any questions about an offence, or further questions if the answers provide the grounds for suspicion, are put to them if either the suspect’s answers or silence, (i.e. failure or refusal to answer or answer satisfactorily) may be given in evidence to a court in a prosecution. A person need not be cautioned if questions are for other necessary purposes, e.g.:
- (a) solely to establish their identity or ownership of any vehicle;
 - (b) to obtain information in accordance with any relevant statutory requirement, see paragraph 10.9; THE HONOURABLE MR JUSTICE TURNER Approved Judgment
 - (c) in furtherance of the proper and effective conduct of a search, e.g. to determine the need to search in the exercise of powers of stop and search or to seek co-operation while carrying out a search; or
 - (d) to seek verification of a written record...” 31. I am satisfied that the request for CD’s PIN number fell within exception (c) but, even if I am wrong, the reason for the request fell within the broader parameters of “other necessary purposes”. As the Court of Appeal observed in *R. v Miller* [2015] EWCA Crim 2553 at paragraph 24: “We note that the lettered sub-paragraphs are illustrative not dispositive of “other necessary purposes””.
32. As it happens, CD had already been cautioned before she was asked for her PIN number. However, there was no suggestion that this first caution marked the immediate prelude to a formal interview. In the event, her first formal interview did not start until 9.53 pm and, indeed, commenced with a further caution.
33. Accordingly, it may be concluded that if, in compliance with Code C, the request for CD’s PIN number could have properly been made without first cautioning her then her consensual co-operation is not vitiated by the fact that a caution was in fact given.
34. Code B which relates to searches of premises by police officers and the seizure of property found by police officers on persons or premises gives further assistance. It provides: “6.12 A person is not required to be cautioned prior to being asked questions that are solely necessary for the purpose of furthering the proper and effective conduct of a search, see Code C, paragraph 10.1(c). For example, questions to discover the occupier of specified premises, to find a key to open a locked drawer or cupboard or to otherwise seek co-operation during the search or to determine if a particular item is liable to be seized. THE HONOURABLE MR JUSTICE TURNER Approved Judgment 6.12 A If questioning goes beyond what is necessary for the purpose of the exemption in Code C, the exchange is likely to

constitute an interview as defined by Code C, paragraph 1.1A and would require the associated safeguards included in Code C, section 10.”

35. The provision of a key to open a locked drawer may readily be considered to be jurisprudentially equivalent to the provision of the PIN number to an otherwise inaccessible electronic device. I note, in this regard, that the “Home Office Guide and Financial Immigration Enforcement Investigations: Digital devices – seizure and retention, and data extraction policy Version 3.0” provides: Criminal 36. “Requesting a PIN number from a suspect where a device has been seized. A request for a PIN number in order to facilitate the search of a device does not constitute an interview for the purposes of PACE. The request for a PIN number for the purpose of searching a device is similar to requesting a key to access a premises or cupboard, etc. for the purpose of search and, as such, the request does not amount to a PACE interview.” 37. I recognise that this version was published after the date upon which CD’s PIN number was requested and is directed towards immigration enforcement. However, there is no valid basis upon which it could be contended that the underlying legal principle involved is any different in all cases to which Code C applies and there has been no change in the law since September 2024 which would indicate that the analysis would be inapt in this case.
38. The evidence of DCI Brenton is that in Leicestershire, and nationally, it is the practice to request device access information following seizure and prior to interview. Of course, mere general practice does not, of itself, lend legitimacy to an otherwise flawed approach but it is, at least, reassuring to learn that my interpretation of the legal position THE HONOURABLE MR JUSTICE TURNER Approved Judgment is reflected in the procedure that it is believed the police follow in practice in what must, in this digital age, be very common circumstances. I am therefore satisfied that the request for CDs’ s phone was not made in breach of the PACE codes of practice. 39. THE RESIDUAL DISCRETION
40. This is not, however, an end to the matter. I must still consider whether the admission of the evidence (having regard to all the circumstances, including the circumstances in which the evidence was obtained) would have such an adverse effect on the fairness of the proceedings that I should order a retrial. As the Court of Appeal held in R v Samuel
- [1988] Q. B. 615: “It is undesirable to attempt any general guidance as to the way in which a judge’s discretion under section 78 or his inherent powers should be exercised. Circumstances vary infinitely. Mr. Jones has made the extreme submission that, in the absence of impropriety, the discretion should never be exercised to exclude admissible evidence. We have no hesitation in rejecting that submission, although the propriety or otherwise of the way in which the evidence was obtained is something which a court is, in terms, enjoined by the section to take into account.”
41. Accordingly, I put in the balance that I find no breach of Code C to be involved in this case and, even if I were to be wrong on this, any such breach was neither deliberate nor flagrant. And so it is that I move to other aspects of the case.

42. The defence point to the fact that CD was only twelve years old at the time of the request. Her teachers were present but she had no appropriate adult or legal advisor. She was placed in handcuffs. The police station, where a formal interview could have taken place, was nearby. In the event, no attempt was made to access her phone until the day after her arrest and first interview. If CD had not provided her stage one password then access to her phone would have required the application of “brute force”. According to the technician who accessed CD’s phone this can take between a few hours to a number of years. In CD’s case, the password was six digits long which meant that there were a million different permutations. The technician found it impossible to say how long it would have taken to crack the code except that the process was likely to be successful in the end.
44. The prosecution draw attention to a pro forma consent form which had been signed by CD on 3 September. The form is in two parts relating to internet connection (extraction only) and internet connection (account takeover). Both contain the following wording: “I give this consent freely and voluntarily, without fear, threats, coercion or promises of any kind. I have been advised of my right to refuse this access and to seek legal advice, if required. I acknowledge that if further incriminating material is identified as a result of the access that has been granted, I may be subject to further criminal proceedings. I am also aware that if I refuse this consent, the above accounts may be accessed by Police via alternative methods.”
- 46.
45. CD did have legal advice from a solicitor before and when providing the information she gave in this form but her stage one PIN code had by then already been deployed to access her phone and the My Eyes Only area. It thus remains a matter of speculation both as to what legal advice CD would have been given about disclosing her stage one password had such advice been given before she disclosed it and as to the time it would have taken the technicians to crack the code had she refused to provide it.
47. There are, however, a number of more general points to be made about the purposes to be served by section 78 and, by close analogy, section 82(3).
48. Fairness is a broad and, in some cases, an elusive concept. It has a number of facets not all of which are mutually exclusive. Thus each case must be judged on its own facts. THE HONOURABLE MR JUSTICE TURNER Approved Judgment
49. An important element in any given case may be the extent to which the alleged unfairness has the potential to taint the reliability of the evidence obtained. That, however, does not apply in this case. The accuracy of what the film clips portray is undiminished by the circumstances in which they were obtained.
50. The defence would argue that there remains the consideration of fairness to the defendants in that it would, in the circumstances of this case have been open to the police, and maybe even desirable, to provide CD with further layers of protection beyond those mandated by the Codes. However, there also is a strong public interest in the detection and prosecution of

crime and, in particular, serious crime. In conclusion, I am not satisfied that, in the circumstances of this case, it would be right to exercise my discretion to order a retrial and decline so to do. 51.

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