

JERSEY / JUDGMENT

AG -v- E [2016] JRC 042 (11 February 2016)

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JUDGMENT

THE commissioner: 1. The Court held a ground rules hearing on 5 th February, 2016, in advance of the trial of the defendant on charges of indecent assault and rape due to commence on 29 th February, 2016. 2. Ruth Emsley, a chartered psychologist, had assessed the defendant as being intellectually impaired and within the lowest 5% of his age cohort. Because of his very limited command of the English language and the fact that he was not educated within the British educational system, it was not possible to conduct a comprehensive assessment of his level of intellectual functioning, but she could not rule out learning difficulties. She judged that he was likely to struggle to understand and engage in the trial process and recommended he be supported by an intermediary. 3. The Court commissioned an intermediary report from Communicourt which concluded at paragraph 3:- "Summary of findings 3.1 Mr E has considerable communication difficulties which are exacerbated by his restricted educational background and limited command of English. 3.2 His ability to prepare for and participate in his trial is likely to be affected by his impaired ability to comprehend and process complex concepts, retain key information and make informed decisions to instruct his legal team. He will need assistance to fully comprehend the evidence given by others and the complex discussions that arise throughout the court process. 3.3 Whilst it is not possible to foresee exactly how Mr E will cope with the court environment, my assessment strongly suggests that without an intermediary he will find it difficult to attend to and process information that is presented throughout his trial. 3.4 Mr E is unlikely to be able to give evidence and cope reliably with cross examination without the use of an intermediary. The use of an intermediary is likely to improve the completeness, coherence and accuracy of the oral evidence he gives." The intermediary report recommended the appointment of an intermediary for the duration of the trial and such an appointment was not opposed by the Crown. 4. On 14 th January, 2016, the Court ordered that an intermediary be appointed at the cost to the legal aid vote and ordered the holding of a ground rules hearing in advance of the trial and in the presence of the designated intermediary, Jasmin Hernon. 5. The Crown have prepared a set of ground rules which were largely agreed, but there were a number of points raised in discussion. 6. On 14 th January, 2016, the Court ordered that the precise role of the intermediary at trial and his or her involvement prior to the trial would be determined by the Court at the ground rules hearing. The intermediary report recommended that, in addition to assisting at the trial itself, the intermediary be involved:- (i) In all meetings and conferences held between the defendant and his lawyers prior to the trial. (ii) In all hearings held in advance of the

trial. (iii) In all meetings after the trial (if there is a guilty verdict), for example, with the Probation Department and at the sentencing hearing. 7. Any question of the involvement of the intermediary after the trial, again if there is a guilty verdict, can be dealt with at that time, but I need to consider the involvement of the intermediary prior to and during the trial. 8.

Intermediaries are appointed under the Court's inherent jurisdiction to ensure a fair trial (see AG v X

[2014] JRC 065A). The role of the intermediary is to facilitate communication with children and with vulnerable adults who are witnesses or defendants. In some cases in England involving vulnerable defendants, the role of the intermediary has been limited to the defendant's testimony, but according to the Advocates' Gateway Toolkit 16, paragraph 7.2 note 35, 98% of orders made under the English Court's inherent jurisdiction now cover the whole trial. In many cases in England, intermediaries have, for example, provided vital assistance to advocates when defendants are deciding whether or not to give evidence. In my view, therefore, the intermediary in this case should assist the defendant throughout the trial and not just for his testimony. 9. I have not heard argument on the extent of the assistance that might be given by the intermediary prior to the trial. It is anticipated that in this case there will be a further Plea and Directions hearing and two pre-trial hearings, one in relation to the admissibility of evidence and one in relation to a proposed amendment to the indictment. Under Article 93 of the PPCE pre-trial hearings do not form part of the trial (unlike preparatory hearings). Reasonable limits have to be placed upon the resources that are made available to a defendant. At the moment the defendant is provided with a defence lawyer and an interpreter for all meetings and hearings. An intermediary will be there to assist at the trial. In my provisional view that is sufficient to ensure a fair trial and to involve the intermediary in all meetings and hearings prior to the trial would be disproportionate. 10. The intermediary's role will therefore be limited to assisting at the trial, but if counsel for the defendant feels that the role of the intermediary should be extended, then I will hear further submissions on the issue. 11. The intermediary proposed a *modus operandi* where, rather than have the interpreter interpret the proceedings as they progress, which would be in danger of overloading the defendant with information to process, she would make a note of the proceedings and then, in a break, give the defendant, through the interpreter, an explanation in simplified form. For this she would require regular breaks and suggested that the Court should aim to have a break of 15 minutes every hour - 10 minutes for explanation and 5 minutes for recovery. This seemed a sensible way forward and the delays caused by these regular interruptions would be counter balanced by the proceedings being otherwise able to continue at a normal pace, which is not possible where everything said in Court has to be interpreted. 12. The structure of questioning the defendant would be as follows:- (i) Advocate asks question. (ii) Intermediary to accept or simplify the question. (iii) Interpreter translates. (iv) Defendant answers. (v) Interpreter translates. (vi) Next question. 13. The intermediary report suggested, at paragraph 8.2, that it might be helpful for counsel to provide questions to the intermediary in advance so that she could highlight

any potential difficulties and offer suggestions for re-phrasing; the intermediary could advise all parties on this as her duty is inherently to the Court. This presented the Crown with difficulty, as it had not been provided with a defence statement setting out the defendant's case. If he gave evidence, then the Crown could only decide how the line of questioning was to proceed there and then. Furthermore, questions to be asked in cross-examination would depend on the answers provided to the earlier question by the defendant. We were not dealing here with a vulnerable child witness as in *AG v X* (which involved a child aged 5) and it was clear in discussion that it was sufficient for the questions to be put first to the intermediary in the order set out above, who would have the opportunity of simplifying any question if that was necessary. 14. The intermediary report recommended that all documents that might be referred to in the trial should be translated into Portuguese; that would include the interview transcripts, any formal admissions and all witness statements. There were three issues with this. Firstly, Ruth Emsley had advised that even if documents were prepared in Portuguese the defendant was unlikely to assimilate and understand the implications of the contents without considerable support. Secondly, the editing of the transcripts and agreement on admissions had not yet been completed, and there would be logistical problems in having these documents translated in time for the trial. Thirdly, translating all these documents would involve considerable cost to the public purse which was not proportionate, bearing in mind the engagement of an interpreter and now an intermediary to assist the defendant in understanding the content of any documents referred to in the trial. In discussion, neither the defence nor the intermediary pressed for such translations to be prepared. The intermediary felt that she and the interpreter would be in a position to explain the contents of any such documents, provided they were given time in the manner set out above. 15. Toolkit 16 of the Advocates' Gateway, dated 6th March, 2015, gives this "Good Practice Example" in terms of familiarising a prosecution witness with the process of giving evidence:- "Good practice example: the intermediary arranged for the witness with a learning disability to visit the court to see the live link room and decide whether he would prefer to give evidence over the live link or in court behind a screen. When the witness was in the live link room with the intermediary, he practised answering questions read out by the court clerk in the courtroom. The questions, scripted by the intermediary and unrelated to the evidence, included a tag question. This allowed the witness to practise using the live link and it also allowed the intermediary to re-check the witness's ability to deal with a linguistically complex and powerfully suggestive tag question." 16. We were not concerned here with evidence being given by live link, but Crown Advocate Hollywood suggested that, if, as part of the defendant's familiarisation process, such a practice took place, then the Crown Advocate prosecuting (Crown Advocate Gollop) might be able to attend, so that he could assess the defendant's ability to deal with questions put to him, which would in turn assist Crown Advocate Gollop in phrasing the questions that he might wish to put to the defendant in cross-examination. The intermediary indicated that if such a practice took place, it would be during the trial in an appropriate break before the defendant gives evidence. I see no reason why such a practice should not be

afforded to a vulnerable defendant who wishes to give evidence and I will leave it to the parties to discuss. From the Court's perspective, it will facilitate such a practice if that is sought by the intermediary. 17. The draft order suggested a limit on the number of hours that the Court would sit every day, which would include time taken for breaks or other delays. I was reluctant to impose such a limit when there may be circumstances in which the Court might wish to sit for longer than the normal hours but it would only do so following consultation with the intermediary and counsel. 18. Subject to any further input from counsel I therefore propose to direct as follows:- (i) The intermediary will take her oath at the start of the trial before the jury are empanelled (and at the start of any pre-trial hearing) so that she can commence her function at the very outset. The oath will be in the following form:- "You solemnly sincerely and truly declare that you will well and faithfully communicate questions and answers, and make true explanations of all matters and things as shall be required of you according to the best of your skill and understanding." (ii) In the trial judge's opening remarks he will explain to the jury the role of the intermediary stressing the following points (as per page 103 of the Crown Bench book March 2010 edition):- (a) The intermediary is not an expert. (b) The intermediary is independent. (c) The intermediary is present to assist with two-way communication in Court. (d) The intermediary will only intervene if any communication problem is identified. There are no particular health problems of the defendant which should be identified and explained to the jury in this case. (iii) The intermediary will assist the defendant during the trial. (iv) Defence counsel will liaise with the Court to arrange a court familiarisation visit in advance of the trial and facilities will be made available at an appropriate point in a break during the trial (if requested) for the defendant to practise answering questions read out by the Judicial Greffier, scripted by the intermediary and unrelated to the evidence. (v) There will be a 15-minute break in the trial approximately every hour. (vi) The intermediary shall notify the Court if the defendant requires any other breaks, using an agreed hand signal. (vii) The questions should be in accordance with the following structure:- (a) Advocate asks questions; (b) Intermediary to accept question or ask Counsel to simplify question; (c) Interpreter translates; (d) Defendant answers; (e) Interpreter translates; (f) Next question. (viii) Questions should follow a clear chronological order; (ix) Sentences should be short with a maximum of four key words; (x) Complex sentences should be avoided; (xi) Front-loaded questions and preambles that make questions unnecessarily long should be avoided; (xii) "Tag questions" should be avoided; (xiii) If the Defendant's responses are ambiguous or lacking information, simple clarification questions should be asked. (xiv) These ground rules can be amended as the trial progresses but in consultation with the parties and the intermediary. (xv) Quite separately from the ground rules, admissions and the summary of interview will be agreed by the parties by close of business on 22 nd February, 2016, if possible. (xvi) Both parties shall be at liberty to apply. *Authorities AG v X*

[2014] JRC 065A . Crown Bench book March 2010 edition. Page Last Updated: 13 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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Prepared on 24 October 2026 · Esheria