

JERSEY / JUDGMENT

AG -v- Sim [2014] JRC 176 (18 September 2014)

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JUDGMENT

THE COMMISSIONER: 1. The defendant is to stand trial today for one count of grave and criminal assault. He has been assessed by Ruth Emsley, a Forensic Psychologist, as having an intellectual and cognitive functioning in the extremely low range, within the lowest 1% of his age group. He was found to have a full-scale intelligence quotient of 65. A learning disability could not be ruled out. 2. Ruth Emsley recommended that he be supported by an Intermediary during the trial. An intermediary was appointed on 5 th September, 2014, on the basis that a decision as to whether an Intermediary was required for the trial and to what extent, would be made on production of a report. That report was produced by Communicourt and considered at a late grounds rule hearing yesterday. The author, Miss Rebecca Fletcher, who I refer to as "the Intermediary", has recommended that the defendant should be assisted both at the trial and when he is giving evidence and she made a number of specific recommendations which I will come to in a moment. Her findings are summarised at paragraph 3 of her report as follows:- "3.1 Mr Sim has considerable communication difficulties which are masked by his ability to hold superficial conversations. 3.2 Mr Sim's ability to prepare for his trial is likely to be affected by his impaired ability to comprehend and process complex concepts and make informed decisions to instruct his legal team. 3.3 Whilst it is not possible to foresee exactly how Mr Sim will cope with a challenging and novel court environment, my assessment 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 Sim's difficulties in comprehending and processing verbal information at speed will impact on his ability to understand the case against him and fully participate in his trial. He is unlikely to fully comprehend the evidence given by others and the complex discussions that arise throughout the court process. 3.5 Mr Sim will have difficulty retaining key information, and will not be able to use writing to assist his memory due to his poor literacy skills. 3.6 Mr Sim 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." 3. Advocate MacRae did not oppose the involvement of an Intermediary but reminded me that the appointment of an Intermediary, which does have cost implications, was a matter for the discretion of the trial Judge. He pointed to three matters in particular. 4. Firstly Ruth Emsley's finding that the defendant is not particularly suggestible. She

says at paragraph 2.14:- "Scores in Mr Sim's case do not indicate that he is susceptible to accepting messages given to him in social situations and there is evidence that he maintains what he believes to be correct under pressure to change this view. However, performance in this assessment indicated impaired memory leading to an inability to recall information both in conditions of immediate and delayed recall." Secondly, the transcript of his first police interview where he had appeared able to answer some questions, responding "no comment" to those which appeared to touch upon the alleged assault. Thirdly, the results of the tests carried out by the Intermediary which he thought indicated that the defendant had not done that badly. 5. Taking first the issue of suggestibility, whilst it is true that this was a concern for the defendant in AG v O'Driscoll

[2014] JRC 065A , where he was assessed as being highly suggestible, in that case an Intermediary was appointed to assist at the trial but not when the defendant was giving evidence. He had a full scale IQ of 78, with his overall cognitive function being in the borderline range, not extremely low as here. Suggestibility, whilst important, is not in my view the sole criteria. 6. I note that under Section 33(b)(a)(6) of the Youth Justice and Criminal Evidence Act 1999 the condition for the appointment of an Intermediary for a defendant who is aged over 18 is "that he suffers from a mental disorder or otherwise has a significant impairment of intelligence and social function". The defendant in this case does not suffer from a mental disorder as defined in the Mental Health Act 1983 , as far as I am aware. He may have a learning disability but that is a diagnosis, not a disease or illness. What is clear is that he does have a significant impairment of intelligence. His lack of suggestibility did not detract from the recommendations of both Ruth Emsley and the Intermediary that he did need the assistance of an intermediary during the trial. 7. The transcript of the defendant's first interview with the police was not of great assistance to me as there is enormous difference, in my view, from reading a transcript and actually witnessing and gaging the demeanour of the defendant in that interview. In contrast to the facts in O'Driscoll there had, as I understand it, been no assessment of the defendant as to whether he was fit for that first interview without an appropriate adult. The Intermediary pointed out that his ability to hold superficial conversations masks his considerable communication difficulties. 8. As to the tests carried out, it seems to me that the defendant fared badly, but to be fair to the Advocate MacRae, he had been given scant time to read through the annexures attached to the report. By way of example, in his short-term memory and comprehension test, he scored 4½ out of 10. Under the heading of "Receptive Vocabulary", at paragraph 14.4 the Intermediary indicated his raw score of 136 meant that his understanding of words' meanings is similar to that of a child aged about 11 years old. "This meant that he would struggle to understand the complex language in court." At paragraph 15.4 she says:- "Importantly he struggled with a wide range of sentence types that a person aged over 14 would be expected to understand. Overall he passed 15 out of 20 blocks demonstrating a difficulty in understanding a wide range of sentence types and similar to a child in primary school." Turning to paragraph 16.7 she said that:- "His level of auditory working memory was similar to that of a child in primary school. He was

unaware when he was making mistakes in the tasks, indicating that he would not always realise when he has processed only part of the question or sentence." She said that:- "In court he may not realise when he has not understood or misunderstood a question or piece of information". And a final example in terms of reading:- "He was able to read simple sentences that [she] wrote for him in non-cursive well-spaced writing, but he will not be able to read complex written material such as reports or follow written transcripts of interviews." 9. It is now well established that the Court has the power to appoint an Intermediary exercising its inherent jurisdiction to secure a fair trial; see AG v O'Driscoll and AG v Coote

[2013] JRC 228 . Each case will, of course, depend on its own facts, but the defendant here has a very significant impairment of intelligence which places him in the extremely low range. As Advocate Binet said, without such assistance he will be on his own, unable to participate effectively in the proceedings and as a witness. The case may be straight forward for us but it is not straight forward for him. 10. Granting the application will not open the door in my view to defendants generally seeking assistance of this kind, bearing in mind that he functions within the lowest 1% of his age group. Advocate MacRae referred me to R v Cocks

[2012] EWCA Crim 549 where every sensible step had been taken to identify an intermediary for a defendant who had communication difficulties unsuccessfully and the trial therefore proceeded without an intermediary. On appeal it was held that it would not have been right to have stayed the trial on this account. The trial judge had managed to conduct the trial with appropriate caution resulting in a fair trial. In contrast in the case before me, an intermediary has been identified, has produced a report and is available to assist the defendant. Cocks is not authority for the proposition that I should, notwithstanding the defendant's communication difficulties, decline that assistance. 11. As indicated last night, I do therefore conclude that as recommended both by the Psychologist and the Intermediary, the defendant should have the assistance of an Intermediary at the trial and when giving evidence. 12. A number of specific points arise:- (i) The Intermediary made a number of recommendations for his preparation for trial which the defence will need to organise and the Court will do its best to facilitate in the very short time available. (ii) Subject to counsel's input on the wording, the Jury will need to be informed in my opening remarks to them that an intermediary has been appointed by the Court to assist the defendant who has communication difficulties. It will be stressed that she is independent of the prosecution and the defence and is not an expert, but is there to facilitate two-way communication between the defendant and the other participants in the trial to ensure that communications with the defendant are as complete, coherent and accurate as possible, and that she will only intervene if a communication issue is identified. (iii) I would suggest that the Intermediary should take her oath or make the declaration at the start of the process before the Jury are empanelled so she can commence her function at the very outset. (iv) The Intermediary will make a hand signal to me if at any stage of the trial the defendant should need a break or is in difficulty or for intervention when the

defendant is giving evidence and I will do my best to make sure I keep my eye on her. (v) There will be regular breaks to check that the defendant understands proceedings, has time to consider the evidence, ask questions, point out any statements with which he disagrees and make his lawyer aware of any facts which should be put forward for his defence. (vi) Before giving evidence and at his request the oath will be read out to him using no more than four words at a time and I would ask the Greffier to make a note of that. 13. In terms of the general recommendations of the Intermediary when communicating with the defendant, I accept her recommendations that counsel should use clear concrete language, use simple every day words and phrases, speak slowly to allow him time to process, keep sentences short, re-focus his attention if he is going off at a tangent and to check that he has understood. Ordinarily I would have considered accepting her specific detailed recommendations set out in paragraphs 7.5.1 - 7.5.12 of her report, but this hearing is taking place so close to the trial that to incorporate them into rules at this stage would, in my view, be unduly burdensome. The facts of this case are very limited and adhering to the general recommendations, combined with the presence of the Intermediary beside the defendant when he gives evidence, I am confident that we can deal with any difficulties that may arise and thus ensure a fair trial. Authorities AG v O'Driscoll

[2014] JRC 065A . Youth Justice and Criminal Evidence Act 1999. Mental Health Act 1983. AG v Coote

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