

JERSEY / JUDGMENT

AG -v- X [2014] JRC 065A (13 March 2014)

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JUDGMENT

THE DEPUTY BAILIFF: 1. On 6 th March I heard argument on the possibility of appointing intermediaries for the child complainant and for the Defendant in this prosecution. The child complainant 2. I sat on th February, 2014 and ordered the preparation of a report by an intermediary upon the child complainant in this case, who is five years of age. The report is by B, a registered intermediary, and she makes recommendations on special measures that ought to be taken in relation to the child. 3. The intermediary has seen a copy of the child's school report and had conversations with her class teacher, head teacher and parents. She has also had the opportunity of meeting the child on three or four occasions, two of them spent in the school classroom with her and the other when she spent the day with the child and her mother at their home address. B describes the child as being very shy at the first meeting, but on the second occasion, she was happy to talk to B as part of a group but not individually. On the third visit at home, the child relaxed. 4. The intermediary's report is extremely helpful for the purposes of developing ground rules, which will be the subject of further discussion at the next directions hearing. I noted at the hearing on 6 th March, 2014, that there was no substantial criticism of the report by Advocate Bell and that there were no questions on her report that he wanted to put to her. 5. The intermediary's conclusions are as follows:- (i) The child has the ability to communicate and to give evidence in court. However the assessment strongly suggested that the use of an intermediary with whom the child is familiar is likely to enhance the quality (completeness, coherence and accuracy) of the evidence which she gives. (ii) The main concerns about the child are her age and her consequent level of understanding the questions; and also her extreme shyness in unfamiliar environments with people she does not know. (iii) When she feels comfortable, the child presents with good concentration and receptive (understanding) and expressive (spoken) language skills for her age. 6. Given the child's age and her shyness, I have directed that the following special measures be taken to protect the child complainant:- (i) As this is a sex offence case, the public gallery will be cleared while her evidence is given. Officially accredited media representatives will be permitted to remain. (ii) Prior to giving evidence, the child is to have the opportunity for further meetings with the intermediary in order to build up an adequate rapport with her. (iii) The child should have a familiarisation visit to the Court. As the Court of Appeal is sitting in the Royal Court during the week immediately preceding the trial, the probability is that the best occasion for that visit will be Friday afternoon. The visit is to take place with the intermediary and a familiar police officer. Counsel are requested to be present

dressed as they will be for trial the following week, though initially with gowns removed. They should have their gowns available. The child should have the opportunity to watch the recording of her ABE interview for memory refreshing on the first Monday of the trial. (iv) The child will wait in the waiting room near the LiveLink room where she can play before giving her evidence, which will be taken at 10.00 am on the second day of the trial. When she gives evidence, the intermediary will be present in the LiveLink room with her. If it should be necessary, breaks will be taken after no more than 30 minutes and less if the intermediary alerts me that a break is necessary. The child will have a familiar toy with her during her questioning. 7. None of the directions given above were opposed by Advocate Bell on behalf of the Defendant. What he did oppose however was the proposal that at the ground rules hearing the content of the questions which he would ask would be agreed in advance. He submitted that the Defendant was not obliged to disclose his case, and he contended that the Court did not have jurisdiction to require to be told what questions were to be asked by way of cross examination. 8. Advocate Bell also did not wish to have to ask any questions through the intermediary. He pointed out that in her report, B said that the child had a good attention span for her age. She had had four interviews with the police, each lasting approximately an hour, and she appeared to be a robust child capable of answering questions if she wanted to do so. 9. As I indicated at the directions hearing on 13th February, 2014, I am determined both that the Defendant should have a fair trial, and that the risk of damage, particularly emotional damage, to this child from the trial process is reduced to a minimum, if not removed. If the content of the questions is not suitable for putting to a five year old child, there is a risk that the evidence of the child will not be as coherent or accurate as if the intermediary has been able to have some input into how the questions should be asked. It is therefore in the interests of a fair trial for the Defendant that the content of the questions should be provided to the intermediary in order that any comments might be made which will ensure that the questions when ultimately put are put in a way which is likely to lead to the most accurate evidence being given that the child is able to give. 10. I also do not think it is in the interests of the Defendant for either the intermediary or me as trial judge to be interrupting the flow of questions. It seems to me likely that the jury will react adversely towards defence counsel, and arguably therefore also the Defendant, if the trial judge and the intermediary were to feel obliged, for the protection of the child, regularly to interrupt the cross-examination. For those two reasons, it seems to me that the requirements of a fair trial coincide with the requirements that this child be protected. 11. In any event, I do not consider that a requirement on the Defendant's advocate to disclose the content of questions to the child amounts to a disclosure of the defence. As I indicated on the previous occasion, this is not a case where the Defendant is obliged, through his counsel, to put his case to the complainant. Advocate Bell describes the complainant as a robust child, but she remains a child, and a child who is only five years old at that. She is far too young to cope with having the Defendant's case formally put to her. It follows that any requirement to disclose the content of the questions which are to be put to her does not amount to a requirement to disclose the Defendant's case. 12. The provision of the content of the questions nonetheless is subject to undertakings from the intermediary and from the Crown Advocate that the content of the questions will not be discussed with anyone until the cross-examination takes place, whether such person be the child, her parents or relatives, the police or

indeed anyone else. 13. Disclosure of the content of the questions should mean that there is no difficulty about the child answering the questions directly. I therefore do not consider it necessary at present to rule that the intermediary should re-order the question for the child, or in any sense provide or explain the child's evidence. However, B herself says that it is not possible to foresee how the child will cope with the Court environment. The potential stress of that situation could lead to her functioning at a lower level than was observed at the time the child was assessed. I may therefore be asked by the Crown or the intermediary (or of course even the Defendant) to reassess the role of the intermediary as the child gives her evidence. Intermediary for the Defendant 14. I had presented to me a psychological report on the Defendant by Dr Cari Carstairs, a clinical psychologist. He has a full scale IQ of 78. His scores on the four indices were in line with this, and his overall level of cognitive functions is in the borderline range. He is not therefore at the same level as AG-v-Coote

[2013] JRC 242 , where the defendant had an IQ of 68 and the principles set out in R-v-Masih [1986] Crim. 395 were applied by this Court. 15. The psychological report on the Defendant shows that he is not diagnosed as having a learning disability, but he is likely to experience some difficulty in keeping up with his peers in a wide variety of situations that require thinking and reasoning ability. Thus far, it seems to me that the clinical psychologist's report does not suggest any special measures. 16. However, Dr Carstairs goes on to suggest that the Defendant is highly suggestible, and markedly more compliant than the average adult. He appears to give in to leading questions and is susceptible to changing his answers in response to negative feedback. He is likely to be compliant with authority figures, and to give in easily when pressured. He is said to be easily frightened by authority figures and may tend to avoid demanding situations where he can, and when he is uncertain about something will often accept what others tell him. 17. The Defendant is said to have a reasonable understanding about the legal system and the process of going to trial, but to have some difficulties in analysing information, weighing up different options and distinguishing between relevant and irrelevant facts. Dr Carstairs is of the opinion that he may not be able to apply adequate reasoning to think with his advocate about his legal situation, although he does appreciate that his lawyer is there to "look after my case" and that he is entitled to a fair trial. Dr Carstairs recommends regular breaks in the proceedings so that the Defendant's legal team can explain what is happening and what the implications are. 18. The defence also put before me an addendum report from Dr Carstairs which really contains similar information and an affidavit from a Ms Nicola Moore, a barrister employed by Advocate Bell's firm. Ms Moore deposes that she has had conduct of the day to day preparation of the case for the Defendant, and has now spent approximately 10 hours in conference with him. After their most recent meeting, she had grave concerns that the Defendant was not able to understand the legal concepts upon which he was being advised, nor to make informed decisions as to the matters on which the advice was given. 19. It was on the combination of this evidence that Advocate Bell submitted that an intermediary needed to be provided for the Defendant. He said that without extra assistance there would not be a fair trial. The Defendant would not be able

to give instructions properly, and would not be able to understand the issues which arose during the course of the trial. Advocate Bell informed me that an intermediary could be available at the time of trial, although it might be difficult to have any detailed intermediary report prepared before then. Nonetheless his appointment would not result in any application to adjourn the trial. 20. For the Attorney General, Crown Advocate Redgrave pointed out that Dr Carstairs has presumably heard of intermediaries in court process such as these, but she does not suggest one. He says that the factual issues are not complicated, and the Court can do the job of ensuring that counsel asks simple questions which can be understood. He agreed that there should be ground rules as to how is cross-examination of the Defendant should take place. 21. Advocate Bell relied upon the case of C-v-Sevenoaks Youth Court

[2009] EWHC 308 for the proposition that an intermediary was necessary. This case concerned an application for permission to apply for judicial review. The defendant was aged 12, due to face trial at the Sevenoaks Youth Court on charges of assault with intent to rob, and theft. It was clear the claimant/defendant had complex mental health issues. It was said on his behalf that he required an intermediary so that he could properly understand the evidence, give instructions, prepare for and follow the trial, and if necessary give evidence on his own behalf. The Sevenoaks Youth Court revoked an earlier decision which had authorised the appointment of an intermediary, and the Legal Services Commission had refused funding for an intermediary. It was those decisions which the claimant sought permission to challenge. 22. The chartered clinical psychologist who gave a report on the claimant said that he had longstanding emotional and behavioural disorders. As he was waiting to see her, his behaviour was unmanageable; he was running about and shouting aggressively. At the meeting he presented as being severely overactive with extremely poor concentration and low tolerance. Although his lack of concentration was such that she could not complete a formal assessment of intellectual functioning, such tests as she could do were suggestive of a learning disability, possibly coming within the range of "exceptionally low". This would place the claimant/defendant within the bottom second percentile. His comprehension was considerably below his chronological age. She confirmed the longstanding diagnosis of attention deficit hyperactivity disorder, which was not adequately controlled by the medication currently prescribed. He also suffered from a personality disorder known as an oppositional defiance disorder, and she thought he presented with many of the symptoms of Asperger's syndrome. 23. A review of those facts shows that this was an entirely different type of case from the present one, but the case certainly does demonstrate that the Court is prepared to examine, in England, any application for an intermediary for a defendant, as opposed to a prosecution witness. I consider that to be the right approach to apply in Jersey as well. If the facts justify it, an intermediary should be appointed for a defendant, and if necessary charged to the legal aid fund. In my view, the Court has an obligation to appoint an intermediary to assist a defendant if without that assistance the defendant would not be able to have a fair trial. 24. In the instant case, I am satisfied that an intermediary is not necessary for the

Defendant to have a fair trial. However, although the evidence is a little marginal, I am satisfied that it would be helpful for an intermediary to be appointed. This is particularly so to ensure that the Defendant can give reliable instructions to his counsel in the event that any change in plea comes to be considered, or any new plea has to be entered - and I note that the indictment is subject to minor amendment - and additionally I consider it would be helpful to ensure that during the breaks which I contemplate having during the trial, the intermediary can assist Advocate Bell and his team in ensuring that the Defendant understands what in broad terms has been happening during the trial to that point. 25. I also agree that the ground rules hearing which is listed to take place on 19 th March, 2014, should consider ground rules which apply to the Defendant as well as to the child witness. At present I do not think it is necessary for there to be discussion as to the content of the questions put to the Defendant, but there should certainly be discussion as to the way in which the questions are to be formulated, having regard to this Defendant's identified vulnerabilities. 26. I do not at present think it is necessary for the intermediary to assist the Defendant while he is giving evidence. However, that is a matter that can be revisited at the time. The intermediary will as I understand it be in Court, and at any time during the course of the Defendant's evidence, it will be open to Advocate Bell to make an application which, with the advice of the intermediary, he considers to be appropriate to ensure that the Defendant is treated fairly. 27. Thus the intermediary for the Defendant is authorised, at the cost of the legal aid fund, and the extent of the intermediary's assistance will be as described above. 28. I close this preliminary judgment with a brief statement that I recognise that there is continuing duty on me as the trial judge to ensure the fairness of the trial. I note in particular the case of R-v-Cox

[2012] EWCA Crim 549 , where Lord Judge, CJ, said this: "We immediately acknowledge the valuable contribution made to the administration of justice via the use of intermediaries in appropriate cases. We recognise that there are occasions when use of an intermediary would improve the trial process. That, however, is far from saying that whenever the process would be improved by the availability of an intermediary, it is mandatory for an intermediary to be made available. It can, after all, sometimes be overlooked that as part of their general responsibilities judges are expected to deal with specific communication problems faced by any defendant or any individual witness (whether a witness for the prosecution or the defence) as part and parcel of their ordinary control of the judicial process. When necessary, the processes have to be adapted to ensure that a particular individual is not disadvantaged as a result of personal difficulties, whatever form they may take. In short, the overall responsibility of the trial judge for the fairness of the trial has not been altered because of the increased availability of intermediaries, or indeed the wide band of possible special measures now enshrined in statute. 30. In the context of a defendant with communication problems, when every sensible step taken to identify an available intermediary has been unsuccessful, the next stage is not for the proceedings to be stayed, which in a case like the present would present a gross unfairness to the complainant, but for the judge to make an informed assessment of whether the absence of

an intermediary would make the proposed trial an unfair trial...". 29. I respectfully agree with those comments on the role of the trial judge. 30. Here of course we do not have a wide band of possible special measures now enshrined in statute, but in my judgment there is an inherent jurisdiction, and indeed both a statutory and common law obligation to ensure a fair trial, and this provides the legal basis for the orders which I am making in this case. ABE interview 31. I have already ordered that the child's evidence in chief will be given by play of the ABE interviews, and that these be redacted so as to contain only what is relevant. I have been given a redacted version reducing the interviews to the total of about an hour to an hour and a half's duration. This is a good start. 32. In my view, the interview can be reduced further in length. I direct the parties to attempt to reduce them to a version lasting a half hour to play. That is quite enough for a five year old to be expected to watch and quite enough for the purpose of subjecting her to cross examination. The redactions and omissions can be balanced by appropriate admissions; and of course the police officers taking the interviews can be questioned on longer extracts if the defence so wish. 33. I would wish a further version to be with me by close of business on 11 th March, 2014. Authorities AG-v-Coote

[2013] JRC 228 . R-v-Masih [1986] Crim. 395. C-v-Sevenoaks Youth Court

[2009] EWHC 308 . R-v-Cox

[2012] EWCA Crim 549 . Page Last Updated: 23 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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