Chapter 5: Witnesses

Competence and compellability

The accused

For himself

Page 125

The accused's right to give evidence if he wishes to, is an essential aspect of the right to a fair trial (*R v Welland* [2018] EWCA Crim 2036 at [1] and [18]).

Where the accused wishes to give evidence but an issue arises as to whether he is genuinely able to do so because of illness, his advocate should be given proper opportunity to obtain medical evidence to ascertain whether special measures might enable him to give evidence without undue risk to his physical and mental health. *R v Welland* [2018] EWCA Crim 2036 at [19] and [21]).

Where his advocate makes an application for time to obtain medical evidence, the judge should avoid speculating on what such evidence might show and should not proceed without intermission where the effect is that the accused, against his wishes, does not give evidence. (*R v Welland* [2018] EWCA Crim 2036 at [20]).

Where the accused, wishing to give evidence, has been genuinely unable to, it is incumbent on the judge to direct the jury about the consequences of that fact, in particular, that they have not been able to hear the accused's first-hand account and assess its credibility, including the extent to which it might conflict or be consistent with the evidence of other witnesses (*R v Welland* [2018] EWCA Crim 2036 at [22]).

In addition, the judge should consider the extent to which the jury require guidance on specific significant points not covered in the accused's interview, but which the prosecution has raised in the course of the trial and which the accused has not had the opportunity to address. When directing the jury, it is inappropriate to say that the accused has the judge's 'permission' not evidence since this is not a matter in the gift of the judge.

Children and persons with a disorder or disability of the mind—criminal cases

The test for competence

Page 133

The fact that a judge or interpreter has difficulties in communicating with a child does not necessarily mean that the child cannot satisfy the test for competence. See *R v F (JR)* [2013] 1 WLR 2143, CA.

The procedure

Page 134

Footnote 73

See also *R v MH* [2012] EWCA Crim 2725 at [54]: the witness will be incompetent not merely because time has passed, but where the passage of time has affected the competence of the child.

Witnesses in criminal cases

Page 149

Concerning the role of the judge in applications for orders compelling the attendance of witnesses in the Crown Court, see *R v Dania* [2019] EWCA Crim 796 at [41] – [42]. It was stated that when considering, under s 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965, whether the witness has material evidence to give, the judge should not trespass into the territory of the jury by forming her own view of the witness's credibility. However, the judge is entitled to consider whether the witness can at best give only peripheral evidence echoing what has already been given or adduced in the form of admissions. Additionally, there may be rare situations where there is a clear basis for the judge to decide that the witness is incapable of belief.

The witnesses to be called

Page 150

Where the witness is incapable of belief, the witness does not need to be called or tendered for cross-examination because his evidence cannot assist the jury: *R v Dania* [2019] EWCA Crim 796 at [37].

Where a witness summons is sought in a criminal trial in the Crown Court to compel the witness's attendance, the judge may consider, albeit in comparatively rare circumstances, that the witness is incapable of belief and thus does not have material evidence to give for the purposes of s 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965: see *R v Dania* ibid at [42].

Additionally, the prosecution have an obligation 'to keep their evidence under review and are entitled to change their assessment of whether a witness is capable of belief;' evidence that appears to be merely inconsistent at the outset of a trial may become, in the light of other evidence that is given, incapable of belief. *R v Dania* ibid at [37].

Special measures directions for vulnerable and intimidated witnesses

Page 151

in family proceedings special measures are available under the Family Procedure (Amendment No 3) Rules 2017 (SI 2017/1033, Part 3A 1-12). The Family Court has a duty to consider the vulnerability of a witness and to provide assistance to protected witnesses by making 'participation directions' for measures such as intermediaries or live links, to help the witnesses participate and give evidence .The Rules are supplemented by a Practice Direction which provides for the holding of a Ground Rules Hearing: PD 5.2 – 5.7.

Special measures directions

Video-recorded evidence-in-chief

Page 155

Footnote 227

In *R v Sothilingham* [2019] 4 WLR 17, CA at [30], the Court of Appeal acknowledged changes to practice since *R v Popescu* [2010] EWCA Crim 1230 and the context in which the principles in that case now operate: the jury are trusted with written directions, routes to verdicts, written summaries of agreed facts and jurors themselves take notes. However, the court held that the principles do still apply where the judge allows contentions written material to go before the jury.

Footnote 228

In addition to the evidence being difficult to follow on the screen (for whatever reason), a 'good reason' might simply be poor audio quality; there will need to be a discussion of the issue between the judge and the advocates: see *R v R* [2017] EWCA Crim 1487 at [48].

Pages 155-156

Where the jury are permitted to retire with transcripts, it is incumbent on the judge to give a clear and emphatic warning not to give disproportionate weight to the transcripts. See *R v R* [2017] EWCA Crim 1487. See also, the Crown Court Compendium (July 2019), Part 1, 3-6, para 13 and Example 3. Compare *R v Sothilingham* [2019] 4 WLR 17, CA.

In *R v R* ibid at [52], it was stated that where an issue arises as to whether the jury should have received transcripts in retirement, the Court of Appeal will consider the following questions:

(i) what was the approach of the defence to the problem;
(ii) did the approach amount to agreement by the defence that the jury should have the transcripts in retirement;
(iii) what warnings did the judge give, and were they sufficient; and
(iv) how does all of this impact on the safety of the conviction?

'Agreement by the defence' (see (ii) above), refers to agreement before or at the time a decision is made that the jury should receive the transcripts, not after they have received them by mistake. Where the defence are placed in a difficult position as a result of the jury having been given transcripts by mistake, acquiescence as a pragmatic response to the mistake is not necessarily 'agreement'. *R v R* ibid at [54].

In *R v Hampson*, [2019] 1 WLR 3243 at [21], the Court of Appeal laid down the following six principles concerning best practice where the court has made an order for special measures under s 28.

1 At the ground rules hearing, the judge should discuss how and when limitations on questioning will be explained to the jury during the trial.
2 If the discussion has not taken place at the ground rules hearing, or matters have changed, it should take place before the recording of the cross-examination is played to the jury.
3 The judge will then be able to give the standard direction required by s 32 of the 1999 Act with a direction on the limitations the judge has placed on questioning, before the recording of the cross-examination is played.
4 The judge should, if necessary, have a further discussion with the advocates before closing speeches concerning limits on questioning and any areas where the limitations have had material effects, so that the advocates will know the jury can be addressed on these areas.
5 The judge should remind the jury in summing up, of limitations imposed and identify areas where there may have been a material effect.
6 Where written directions are provided to the jury, the judge should include with the standard direction under s 32, a general direction on the limits imposed on cross-examination.

In respect of para 3 above, see also the Crown Court Compendium (July 2019), Part 1, 3-6, paras 3 and 4.

Witness anonymity

Page 168

Under s 91 of the Act, where an order has been made, the court may discharge or vary the order on an application by a party to the proceedings or on its own initiative if there has been a material change to the circumstances since the relevant time and where it is appropriate to do so in view of the provisions of s 88 and 89.

R v Aziz [2018] EWCA Crim 2412, provides an example of a case where the judge was correct to refuse an application to vary anonymity orders, in respect of two undercover police officers, made on the basis that they had been discredited during cross-examination. Submissions concerning evidence allegedly planted were wholly speculative; there was no arguable basis for thinking that evidence relating to past complaints against the officers would pass the threshold for admissibility under s 100 of the Criminal Justice Act 2003 as evidence of bad character relevant to credibility; and the anonymity orders had not prevented the accused from making points they would otherwise not have been able to make.

Page 170

Footnote 299

See also, *R v Brown* [2019] EWCA Crim 1143: where the witness is untraceable, it may be potentially admissible under the *res gestae* principle and under s 114(1)(d).

Additional reading

Page 171

Cooper and Mattison, 'Intermediaries, vulnerable people and the quality of evidence: an international comparison of three versions of the English intermediary model' (2017) 21(4) E & P 351.

A review of intermediary models in three jurisdictions- England and Wales, Northern Ireland and New South Wales in Australia. Aspects of law and procedure are compared, for example, statutory tests for eligibility, the test being widest in Northern Ireland because it includes vulnerable accused). The authors observe that little scientific research has been done into the extent to which intermediaries facilitate the completeness, accuracy and coherence of testimony. Research will be needed to justify the cost of developing intermediary schemes and using them more widely.

Fairclough, 'Speaking up for injustice: reconsidering the provision of special measures
through the lens of equality', [2018] Crim LR 4.

An article which considers the law's commitment to the principle of equality in respect of special measures. The argument is made that in respect of vulnerable accused, there is a lack of equality in law and practice which significantly jeopardises fairtrial rights.