Chapter 7: Cross-examination and re-examination

Cross-examination

Cross-examination by accused in person

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Footnote 12

Where an accused has made an application for legal aid which has not yet been determined, the court may appoint a 'cross-examination advocate' contingently under s 38(4) of the Youth Justice and Criminal Evidence Act 1999, 'the appointment to come into force only if, and when, it is established that the defendant will not be represented for the purposes of the case generally': Criminal Practice Directions 2015 (Amendment No 6), 6, 23A.1.

Previous inconsistent statements

Admissibility as evidence of the matter stated

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Footnote 74

See now, the Crown Court Compendium (July 2019), Part 1, 20–1, para 10(1) and Example 4

Young and vulnerable witnesses

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In *R v Grant-Murray* [2017] EWCA Crim 1228, a case which concerned vulnerable accused who were children, the Court of Appeal emphasised and confirmed ('if confirmation was needed') that the principles in *R v Lubemba* [2015] 1 WLR 1579 (which endorsed the criminal practice directions) applied to defendants as much as to any other witnesses (see [113] and [226]).

For an example of objectionable questioning of a vulnerable accused, the vulnerability being significant learning difficulties which may not have been apparent

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to the jury, see *R v Jones* [2018] EWCA Crim 2816. Many questions were charged, rhetorical and involved comment, and would have been objectionable whether the accused was vulnerable or not (at [99]).

Footnote 84

Concerning comment after cross-examination of a vulnerable witness which has been restricted by grounds rules, see also *R v M* [2019] 2 Cr App R 39 (5), CA at [21]. 'If any specific issues of content have been identified that the cross-examiner cannot explore, the judge may wish to direct the jury about them after the cross-examination is completed. On any view, the judge should direct the jury about them in the summing-up.'

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In paragraph 3E.4 of the Practice Directions (see the text), it is stated that, 'Where limitations on questioning are necessary and appropriate, they must be clearly defined'. In *R v M* [2019] 2 Cr App R 39 (5), CA at [21], the Court of Appeal observed that:

> '…the identification of any limitations on cross-examination should take place at an early stage. We assume this will occur at the ground rules hearing where the judge will discuss with the advocates the nature and extent of the limitations and whether they are simply as to style or also relate to content'.

As to the process by which limitations are defined, it was said in *R v Lubemba* [2015] 1 WLR 1579, CA at [43] that,

> '… it would be an entirely reasonable step for a judge … to invite defence advocates to reduce their questions to writing in advance.'

It is submitted that this applies equally to prosecution advocates intending to cross-examine a vulnerable accused or vulnerable witnesses for the accused (see *R v Grant-Murray* [2017] EWCA Crim 1228 at [113] and [226]).

Advocates may be required to submit a list of questions not only where cross-examination will be live, but also where recorded cross-examination has been ordered under section 28 of the Youth Justice and Criminal Evidence Act 1999. The value of a written list of questions is that it may ensure that advocates ask more focused and effective questions during cross-examination. See *R v Dinc* [2017] EWCA Crim 1206 at [21].

See also *R v Usayi* [2017] EWCA Crim 1394: only one point was flagged in the ground rules hearing and consequently the judge had not focused on reducing the cross-examination into writing. The court observed (at [38]) that the 'case stands as

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a reminder of the benefits of establishing the scope of cross-examination of a vulnerable witness giving evidence.'

It is also stated in paragraph 3E.4 of the Practice Directions (see the text) that, 'the court may dispense with the normal practice and impose restrictions on the advocate 'putting his case.' In *R v Lubemba* [2015] 1 WLR 1579 at [45], the Court of Appeal cast doubt on the right of an advocate to put her case at all: 'If there is a right to "put one's case" (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidation or distressing a witness …' The effect may have been to encourage what the Court of Appeal in *R v RK* [2018] EWCA Crim 603 were told was 'an increasing practice' for defence advocates not to cross-examine vulnerable witnesses, particularly child witnesses, to protect the child or avoid any suggestion of confronting the child (at [27]). Under the practice, defence advocates may, for example, ask the prosecutor and the judge to agree that the defence case may be adequately put by cross-examining another witness. In *R v RK*, the court questioned the practice of not cross-examining a vulnerable witness and re-affirmed the duty on defence advocates to put the accused's case, where possible: 'Although this court has in the past doubted the *right* to put every aspect of the defence case to a vulnerable witness, whatever the circumstances, it has not questioned the general *duty* to ensure the defence case is put fully and fairly and the witness challenged, where this is possible.'(at [27]). Accordingly, where a child is assessed as competent the court would generally expect the child to be called and cross-examined with the benefit of a range of special measures. Where the defence propose not to cross-examine a vulnerable witness who gives evidence-in-chief by video recording, the prosecutor should think very carefully before agreeing to this and the judge should think carefully before approving it. (At [29]).

In this respect, see also The Bar Standards Board Handbook, The Code of Conduct, rC15.1: 'you must promote fearlessly and by all proper and lawful means the *client's* best interests.'

Concerning the types of questions permissible, in *R v Grant-Murray* [2017] EWCA Crim 128 at [114] – [115] and [194], the Court of Appeal noted that although it is particularly important to avoid tag questions because they are 'powerfully suggestive and linguistically complex', this does not mean that all tag questions will have an adverse effect on the witness; questions with two positives (eg, 'You hit her, did you?') are not necessarily complex or difficult to follow and even those with a positive and a negative (eg, 'You hit her, didn't you?') may not trouble a particular witness.

Concerning professional requirements, in *R v Grant-Murray* ibid at [226], the Court of Appeal confirmed the importance of training for the profession in the questioning of vulnerable witnesses, emphasising that '… it is, of course, generally misconduct for an advocate to take on a case where the advocate is not competent… [and] it would

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be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training.' See also *R v M* [2019] 2 Cr App R 39 (5) at [21] : '… every advocate (and the trial judge) is expected to ensure that they are up to date with the current best practice in the treatment of vulnerable witnesses.'

See also, The Code of Conduct for Barristers in The Bar Standards Handbook, r C 21.8 : 'You must not accept instructions to act in a particular matter if : ... you are not competent to handle the matter or otherwise do not have enough experience to handle the matter…'

Complainants in proceedings for sexual offences

When the restriction may be lifted

Section 41(3)(a)—an issue other than consent

Concerning the defence of reasonable belief in consent, in *R v Steltner* [2018] EWCA Crim 1479 it was held that the mere fact that a complainant may have experienced sexual activity in the past does not support an accused's assertion that she would consent to similar activity with him. (At [23]). In *R v Steltner* ibid, the complainant, who was 14 years old, only revealed to the accused that she had once been digitally penetrated in response to questions asked by the accused, gave her answer reluctantly and did not engage in flirtatious behaviour.

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Subsection 41(3)(c)—similar behaviour

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Footnote 141

In *R v Aidarus* [2018] EWCA Crim 2073, the judge was 'unquestionably' entitled to reject an application to admit sexual behavior evidence which post-dated the alleged offence by two years and was in a 'wholly different context'.

Section 41(5)—evidence in rebuttal or explanation

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In *R v Steltner* [2018] EWCA Crim 1479, the complainant, 14 years old, was referred to by the prosecution as a 'virgin'. It was held that the defence were properly prevented from admitting evidence contained in WhatsApp messages where she answered the accused's questions about her sexual experience by saying that she had on one occasion in the past been 'fingered' (digitally penetrated). In the circumstances of the case, this evidence would have had no relevance to the jury's overall assessment of the complainant, her consent or the accused's belief in the consent. The jury were told that the fact that she was a virgin did not carry with it the implication that she would not consent to sex and indeed she had said that she would consent in certain circumstances.

In *R v Aidarus* [2018] EWCA Crim 2073, evidence towards the outset of the complainant's Achieving Best Evidence (ABE) interview was that just before she was raped, there was an exchange with the accused during which he asked her for oral sex and also asked if she had performed oral sex before, to which she replied that she had not. The accused sought to admit evidence that she did have prior experience of oral sex in order to rebut a misleading impression she had given in this part of the ABE. The Court of Appeal held that in the particular circumstances of the case, the trial judge was entitled to refuse to admit the evidence. The accused's defence was that she had consented and that there was no such exchange. The judge was therefore justified in his reasoning that the evidence neither rebutted nor explained the evidence that the exchange had taken place.

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Where the evidence is elicited by questions from the judge, s 41(5) does not apply. Where such questioning and evidence is seriously prejudicial to the defence this could lead to the jury being discharged but not, it appears, to leave being granted to question the complainant on her sexual history. See *R v JG* [2018] EWCA Crim 1318 (4) at [35].

The procedure on applications under s 41

Page 228

Where the court allows the cross-examination of a witness, the court must give directions for the appropriate treatment and questioning of that witness by setting ground rules for the conduct of questioning. The defence should identify individual questions for the judge, merely identifying a topic is insufficient. See Rule 22.7(3) of the Criminal Procedure 2015, SI 2015/1490.

Footnote 173

See the Criminal Procedure Rules 2015, SI 2015/1490, r 10 and Sch., and The Criminal Practice Directions V, 22A.3.Concerning the prosecutor's duties toward the complainant where the court allows introduction of or cross-examination about her sexual behaviour, and the court's obligation to determine see r 22.3(1) of the Criminal Procedure Rules 2015 (SI 2015/1490).

Finality of answers to collateral questions

The exceptions

Evidence of physical or mental disability affecting reliability

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Footnote 214

See also *R v Mader* [2018] EWCA Crim 2454, considered in the update to **Ch 1**7. Cf *R v G(T)*, [2018] 1 Cr App R 405 (30), CA.

Additional reading

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Hoyano, 'Cross-examination of sexual assault complainants on previous sexual behavior: views from the barristers' row' [2019] Crim LR 77.

A summary of the largest empirical study of the use of evidence of past sexual behavior in sexual offences trials in England and Wales. The study examined data from cases and views from anonymous barristers directly involved. Conclusions relate to whether s 41 is working in the interests of justice, how sexual behavior evidence is handled in practice, how the prosecution should respond to s 41 applications, the need to limit prejudiced reasoning and the impact of inaccurate information about the aims and operation of s 41.

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