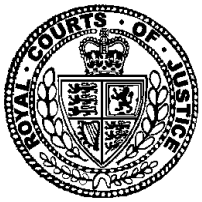

Neutral Citation Number: [2019] EWCA Crim 1398

Case No: 201803162 C1

IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT LIVERPOOL
HHJ WRIGHT
T20177586

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/08/2019

Before

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE HON MR JUSTICE EDIS
THE HON MR JUSTICE BUTCHER

- -

Between:

MARK LE BROCQ	**Appellant**
- and -	
THE LIVERPOOL CROWN COURT	**Respondent**

- -
- -

Mr. Paul Parker (instructed by **Clyde & Co**) for the **Appellant**
Ms. Anna Pope (instructed by **The Crown Prosecution Service, Appeals and Review Unit**) for the **Respondent**

Hearing dates: 19 June 2019

- -

Approved Judgment

The Lord Burnett of Maldon:

1. This is an appeal against a wasted costs order made by His Honour Judge Wright on 9 July 2018 in the Crown Court at Liverpool against Mark Le Brocq, a barrister who had appeared as defence counsel in a trial which came to an end on 26 April 2018. It concerned a nine-count indictment alleging sexual offences against a single child complainant. The judge discharged the jury following Mr Le Brocq's closing speech. He took the view that comments made in that speech had compromised the fairness of the trial. A retrial was ordered at which the defendant was acquitted.

2. The wasted costs order was made pursuant to section 19A of the Prosecution of Offences Act 1985 ("the 1985 Act"). It provided that:

   i) The appellant should pay £4,200 to the Crown Prosecution Service being the wasted costs of the aborted trial as a result of the judge having to discharge the jury due to counsel's misconduct; and

   ii) The judge made adverse observations to the determining authority that work identified by the judge may have been unreasonably done by Mr Le Brocq and should not be remunerated under the legal aid order.

3. Section 19A of the 1985 Act provides:

> "19A Costs against legal representatives etc.
>
> (1) In any criminal proceedings -
>
> (a) the Court of Appeal;
>
> (b) the Crown Court; or
>
> (c) a magistrates' court,
>
> may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with regulations.
>
> (2) …
>
> (3) In this section -
>
> "legal or other representative", in relation to any proceedings, means a person who is exercising a right of audience, or a right to conduct litigation, on behalf of any party to the proceedings;
>
> "regulations" means regulations made by the Lord Chancellor; and
>
> "wasted costs" means any costs incurred by a party -

> (a) as a result of any improper, unreasonable, or negligent act or omission on the part of any representative or any employee of a representative; or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

4. We have concluded that appeal must be allowed for reasons which follow. To understand how it was that Mr Le Brocq came to make comments in his closing speech which caused the judge concern we will need to set out in some detail the course of events touching on the evidence of the complainant and a series of admissions that were made during the trial.

The Ground Rules Hearing

5. All the evidence of the complainant was video recorded in advance of the trial in accordance with section 28 of the Youth Justice and Criminal Evidence Act 1999 ("the 1999 Act"). She was aged 15 at trial. It was common ground that in some respects she had been untruthful with the police.

6. The Ground Rules Hearing, at which the parameters of cross-examination were determined, took place on 20 December 2017. Whether the evidence is being video-recorded or whether cross-examination proceeds at the trial the modern and accepted way of dealing with cross-examination of a child witness is generally for the questions to be approved in advance by the judge to ensure that the witness is treated appropriately but without any compromise of the fairness of the trial. Mr Le Brocq sought to add a Question 25A to his list of proposed questions. It concerned a lie made by the complainant to her mother. She had told her that she had a boyfriend called Aaron who was 17, when in fact she had a boyfriend who was 19. We will call him F. Proposed Question 25A read:

> "Was that lie to cover up the truth that you were actually in a sexual relationship with a 19 year old boyfriend called F?"

7. Mr Le Brocq accepted the question would necessitate an application under section 41 of the 1999 Act governing questions about a complainant's previous sexual conduct. A written application had not been lodged. The judge excluded Question 25A stating that it was not necessary for the jury to know whether the relationship was sexual or not. He would permit the jury to be told that that F was her boyfriend but not that the relationship was sexual. The judge commented that if someone was prepared to lie, that provided enough adversarial capital without the sexual connotation. Mr Le Brocq could show the jury that he did not accept what she was saying and was entitled to make robust comment in his closing speech including about her lying. Mr Le Brocq observed that he did not want to ask a question that was not allowed and confirmed that 24 and 25 could remain as drafted but 25A went.

8. Cross-examination under section 28 took place the next day. The permitted questions were put and answered by the complainant. In answer to a question in cross-examination about why she lied about F, the complainant referred to him as a "key

witness". She was re-examined. Prosecuting counsel asked what she meant by the phrase "key witness". The complainant answered:

> "When I said he was a key witness, he was the one person that I ever told about what happened to me and I wanted to cover up the fact that, because I knew that the relationship that I had with him was in the law's eyes illegal. I didn't want to bring him into a court case because I didn't see it as it was he played a big part, but he did because he was the first person I told and he knew about what happened."

9. Immediately following the complainant's evidence, the judge commented that the final answer in re-examination,

> "…will need a little bit of editing. I think the reference about her relationship stays but being 'illegal' I think needs to come out."

10. After a short discussion with prosecution counsel alone, the judge then said:

> "I think perhaps on reflection that had better all stay in there because it is her reasons for why she did not want to reveal him to the authorities".

11. The reference to the relationship being illegal (she was under 16) could only sensibly be understood as an acceptance by the complainant that the relationship was sexual. The judge, in ruling that it should stay in the recording to be played to the jury, determined that the answer in re-examination was relevant evidence. It was relevant because the witness was explaining that she is not a habitual liar. This lie, on which the defence wished to rely, was told for a specific reason, namely to keep F out of trouble. This was not a ruling under section 41, which does not apply to questions asked by the prosecution, but a ruling on admissibility by reason of relevance. It was significant in the context of what happened later.

The Trial

12. On 22 March 2018, Mr Le Brocq sent to prosecution counsel a draft of the admissions which he invited her to include in the 'Agreed Facts' document. At No 21, the appellant included the following taken from an official document:

> "[The complainant] reports she only tells professionals limited amounts, is careful what she says, and sometimes tells them what she thinks they want to hear".

13. Prosecution counsel suggested that the admission at No 21 should include the context in which that "report" had been made, namely that the complainant was seeking to cover up the role of drugs and sex in her relationship with her older boyfriend. As a result, prosecution counsel added wording to the appellant's draft, which became No 21. The words "engaging in … activity with older boyfriend" were added, with the ellipsis included. No 21 as given to the jury was as follows:

> "21. Under the heading 'risk to self', the following is recorded: Last cut using a blade from sharpener two weeks ago, cut wrists. Self-harms when she feels angry, punches self, history of ingesting harmful products or drugs. Engaging in … activity with older boyfriend. [The complainant] reports she only tells professionals limited amounts, is careful what she says, and sometimes tells them what she thinks they want to hear. [The complainant] is happy experimenting with drugs and alcohol and plans to carry on doing so."

14. The trial started on 16 April 2018. The jury was sworn the following day. On 18 April 2018, an issue arose over questions Mr Le Brocq wished to put to the complainant's mother. He wanted to put to her that the complainant's relationship with her boyfriend was a sexual one. The following exchange took place:

> "JUDGE WRIGHT: …you can certainly put to her that her daughter tried to blackmail her….in order to ensure that her mother allowed the relationship to continue but I don't think you need to go into the nature of that relationship. Indeed, at the moment I am not going to allow you to do that. If you want to pursue that then I am afraid you are going to have to put something in writing specifically, which is obviously late, and I will consider the precise nature of the questions but for the moment it does not seem to me that it is relevant now. Do you want to pursue that?
>
> MR. LE BROCQ: It would only be to put the word sexual in front of the word relationship, the cat is out of the bag anyway.
>
> JUDGE WRIGHT: I don't think that is necessary in the circumstances.
>
> MR. LE BROCQ: I flag it up then in one further respect and this is really for my learned friend's benefit rather than anybody else, it may be that a suggestion might be made in the prosecution closing speech to the effect that how is [the complainant] able to give all this detail that she gives about the sexual conduct alleged against the defendant unless it is true.
>
> JUDGE WRIGHT: I don't know whether Miss Pope is going to do that…. Miss Pope, you are not going to suggest how could she possibly have known about these sorts of practices unless it actually happened?
>
> MISS POPE: No, I wasn't going to explore that, no.
>
> MR. LE BROCQ: That removes the problem because a possible alternative explanation was that she was in a sexual relationship with a 19-year-old boy.

> JUDGE WRIGHT: If it was an issue, and it is not going to be an issue, that's right.
>
> MR. LE BROCQ: I am grateful.

15. The Agreed Facts were read to the jury on 19 April 2018, including No 21. In the absence of the jury after they had been read, the judge said:

> "I am concerned that under paragraph 21, having made an indication that matters that relate to Section 41 and sexual behaviour involving her were not relevant and did not need to be put into this, effectively…. it's been honoured, in a sense, in the spirit but not in form. 'Engaging in … activity with older boyfriend' – join the dots up, it's blindingly obvious what that was, it should not have been in. That's not in accordance with the ruling and I'm deeply concerned that that's been done, and it shouldn't have been".

16. Prosecution counsel indicated that she accepted sole responsibility for the drafting of No 21, but the judge said it was the responsibility of both advocates. Following a short discussion, he added:

> "I've indicated my displeasure, but there's nothing I can do, it's a fait accompli".

17. The evidence concluded on 19 April. On 20 April 2018 Mr Le Brocq delivered his closing speech to the jury. There were two aspects of the speech which became the two grounds on which the wasted costs order was made.

18. The first aspect was Mr Le Brocq's description of and attack on the fairness of the section 28 procedure for cross-examination. He said:

> "The restrictions and the way that the defence are compelled to put their questions in cases of this nature these days, I suggest to you, amounts to a virtual emasculation of the defence case. It is actually capable of causing unfairness both to the defence, and indeed to prosecution witnesses, and I'll explain that to you in both regards. The potential unfairness to the defence is that we can't put our case robustly and forcefully in the way that you might think perhaps I was doing with [another adult witness]. That's a more usual type of cross-examination. As far as the video questioning is concerned and the fact that we have to submit written questions in advance and we have to have them approved by the judge and we can only ask questions in a certain way, it's basically pussy-footing around the issues and not putting them directly. We have to ask questions like, "Did he really do that?" rather than being able to put it in the way that you want to, "That's a lie, isn't it?" As far as the prosecution witnesses are concerned and the potential unfairness to them, they may be perfectly able to stand up to robust cross-examination but they don't get the opportunity to

> do so. [The complainant], in particular, is a very savvy teenage girl - she's certainly teenage now - and I'll be returning to her shortly. But she's not been properly tested in cross-examination in the way that her mother was, in the way the questioning was put to her. That prevents you, I'd suggest, from getting your best opportunity of evaluating her reliability as a prosecution witness, and it is her reliability which is the most crucial issue in this case.
>
> Now, fortunately the restrictions I'm talking about to you in relation to the way questions have to be asked no longer apply to the defence closing speech, and I do now have a much freer opportunity to address you and I am going to put it quite robustly and quite forcefully."

19. The second aspect which the judge criticised concerned the previous sexual behaviour of the complainant. Mr Le Brocq said:

> "[The complainant] is sexually precocious. Don't fall into the trap, please, and I'm sure you won't these days in any event, of thinking that she could only know about some of the things she's described because the defendant must have done them to her. It simply doesn't hold water these days. She was in a relationship at the age of fourteen with a nineteen-year-old young man. ... She refers to it as "illegal in the eyes of the law." This was in answer to a question on the video that was put to her by Miss Pope. So it appears she doesn't even agree with the law, "It's illegal in the eyes of the law," but she wanted to carry on with it anyway, and, let's not beat about the bush on this, what she was referring to was a sexual relationship.
>
> She uses expressions such as "going down" on her, and, "licking" her "out," and she is familiar with both male and female genitalia. This, members of the jury, is no wide-eyed innocent girl this is one who, at least from the age of fourteen, was sexually experienced, knowledgeable and perfectly capable of fabricating sexual allegations against this defendant."

20. Following the closing speech, the judge released the jury until the following week before starting his summing up, for reasons unconnected with the closing speech. He then addressed Mr Le Brocq directly:

> "I was surprised and extremely displeased that you have raised something that I expressly said should not be raised. It was my express direction earlier on in the stage when you wanted to raise her sexual relationship with boyfriends so far as [the complainant] was concerned, and I said that was not relevant. You said, "Subject to one matter, and that is that Miss Pope might be arguing how can she give these descriptions about what had happened and I need to raise this to show her sexual awareness and knowledge of sexual matters." At that

> juncture Miss Pope said, "I am not going to raise that or argue that that is a point," and I said to you if you were going to pursue this there needed to be a Section 41 application in writing with the matters you sought to raise. You have not, you appear to have accepted my ruling and have taken the opportunity, when you were addressing the jury, to completely subvert what I said. Now, I think it is apparent what my displeasure is and I shall consider what steps I am going to take about your conduct. That is all I intend to say at the moment in relation to that."

21. The appellant responded:

> "MR. LE BROCQ: The only restrictions in section 41 are on the adducing of evidence and questions asked in cross-examination. When it comes to comment in the closing speech, the defence can comment on any evidence that has come out in the course of the trial, and that included [the complainant's] reference to an illegal relationship in the eyes of the law, which we all know means a sexual relationship, and it included, although I didn't specifically refer to this, this time, the "engaging in……activity" that had appeared in the Agreed Facts.
>
> JUDGE WRIGHT: Yes, which I said should never have been there.
>
> MR. LE BROCQ: I'm not going to look a gift horse in the mouth. I didn't ask for it to be there."

22. The judge said that he would reflect on what steps to take.

23. The court reconvened on 26 April 2018. The judge addressed counsel before discharging the jury:

> "It is a decision that I have come to reluctantly, but I have to consider the interests of justice in the round and I have come to the conclusion that the two matters that [the appellant] made in his closing speech, the two comments, or the areas that he dealt with, concerning, first of all the Section 28 procedure and, secondly, the subverting of my ruling in relation to the sexual behaviour of the complainant, that the damage done by that cannot, in my judgment, be rectified by further directions given by me to this jury and therefore I am going to discharge them. That is my decision."

24. The Judge did not invite submissions from counsel on his proposed course. Ms Pope told us that the prosecution had not decided what they would say, if asked, because they did not know what the judge was contemplating. She told us that from her point of view the trial had proceeded as she had hoped it would. The appellant would have submitted that there was no need to discharge the jury.

25. The judge addressed the jury directly, and discharged them:

> "The reason I have taken that draconian step is because Mr Le Brocq in his closing speech dealt with two specific areas (1) relating to the procedure under which vulnerable witnesses are cross-examined before the trial, and that is regulated by the judge so that they are dealt with fairly and, secondly, his reference to you about [the complainant's] sexual behaviour in her relationship with an older boyfriend, which I had ruled upon earlier as being totally irrelevant to the merits of this case…."

26. The re-trial took place in September 2018 before another judge. The defendant was acquitted.

The Wasted Costs Proceedings

27. A wasted costs hearing was fixed by the judge for 5 June 2018. No application for wasted costs had been made by the prosecution, nor was it supported by the prosecution. Mr Le Brocq was represented by Paul Parker. He supplied written submissions which were amplified orally. The prosecution, through Miss Pope, took a neutral stance. But she was alive to the materiality of the ruling made by the judge the previous December. She referred to the relevant part of her note which contained the exchange concerning the complainant's answer in re-examination and the judge's subsequent decision about it. The judge adjourned so that further transcripts could be obtained and allowed the parties to make further submissions in writing when that had been done. Mr Parker filed further submissions on 27 June 2019. The prosecution indicated that they did not wish to do so.

28. On 9 July 2019 the judge handed down his written decision. He dealt with the principal submissions made on behalf of Mr Le Brocq. These submissions formed the grounds of appeal before us. Mr Parker submits that the judge should have accepted, and not rejected, them.

29. Mr Parker identified three procedural failings which he submitted meant that the proceedings should go no further. The judge rejected these complaints and also the proposition that any "wrong step" should lead to the summary termination of the process.

30. The first was based upon the failure of the judge to invite submissions from Mr Le Brocq on the question whether the jury should be discharged. In his ruling, the judge said that he had reflected carefully on the right course. He had thought that Mr Le Brocq would submit that he was entitled to say what he did, that the jury should not be discharged and that any concerns could have been dealt with by directions. The judge said that seeking Mr Le Brocq's help would be "paying lip service to consultation". Whatever he said could not have affected the outcome. The judge did not refer to the potential utility of seeking submissions from the prosecution.

31. Secondly, the judge rejected a submission based on *Chief Constable of North Yorkshire v Audsley* [2000] Lloyd's Rep PN 675 that a hearing should not take place if the costs of the wasted costs proceedings would be disproportionate to the costs in

issue. Mr Parker submitted that there should be a two-stage process as required by the then Practice Direction 48PD paragraph 2.6 applicable in the Civil Courts. This required an applicant to satisfy the court, before a hearing could proceed beyond stage one, that there was evidence which would be likely to lead to an order being made if unanswered, and that "the wasted costs proceedings are justified notwithstanding the likely costs involved". This provision is now found in CPR 46PD 5.7 which similarly applies to civil cases. The judge also rejected the submission that before he could continue, he ought to have obtained a figure for the costs wasted by the discharge of the jury and should have then taken into account Mr Le Brocq's likely costs of resisting the order.

32. Thirdly, the judge rejected a submission that the allegations against Mr Le Brocq had not been set out with sufficient clarity.

33. On the substance, the judge applied the definition of the words "improper, unreasonable or negligent" act or omission which may result in a wasted costs order in section 19A of the 1985 Act found in *Ridehalgh v Horsefield* [1994] Ch 205 at 232D to 233E discussing the cognate provision in section 52(7) of the Senior Courts Act 1981 which applies in civil cases:

> "Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not, in our judgment, limited to that. Conduct that would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
>
> "Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.
>
> The term "negligent" was the most controversial of the three. It was argued that the Act of 1990, in this context as in others, used "negligent" as a term of art involving the well-known ingredients of duty, breach, causation and damage. Therefore, it was said, conduct cannot be regarded as negligent unless it

> involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach. (1) As already noted, the predecessor of the present Ord. 62, r. 11 made reference to "reasonable competence." That expression does not invoke technical concepts of the law of negligence. It seems to us inconceivable that by changing the language Parliament intended to make it harder, rather than easier, for courts to make orders. (2) Since the applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client.
>
> … we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.
>
> In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence: "advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do;" an error "such as no reasonably well-informed and competent member of that profession could have made:" see *Saif Ali v Sydney Mitchell & Co.* [1980] A.C. 198, 218, 220, *per* Lord Diplock.
>
> We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended."

34. In respect of the first complaint (the section 28 comments), the judge identified the questions put to the complainant which suggested that she was lying to show that Mr Le Brocq had been able to establish in cross-examination the proper points he wished to make. He concluded that the heart of the complaint to the jury was that Mr Le Brocq had not been able to be "robust" or "forceful" in cross- examination. He said:

> "Of course, section 28 is there in order to protect vulnerable witnesses from just such a form of questioning. The Criminal Practice Directions 22A.8 make it clear that advocates should be reminded that that questioning must be conducted in an

> appropriate manner. Any aggressive repetitive and oppressive questioning will be stopped by the judge. In my judgment Mr Le Brocq's complaint was that he was not able to do that which advocates, had in the past over many years, been accustomed to doing. However, since *Lubemba* and the cases following it times and the winds of change have blown.
>
> His comment concerning unfairness to the prosecution witnesses was, in my view, disingenuous in the extreme.
>
> …
>
> In my judgment, applying the tests set out in *Ridehalgh* Mr Le Brocq's comments were unreasonable and/or borderline improper.

35. In respect of the second complaint (complainant's sexual behaviour), the judge referred to:

> "prosecuting counsel's failure to delete, in her proposed editing of the ABE an implicit reference to her sexual history. It was equally clear that I took the view that such questions were not relevant."

36. He continued:

> "Notwithstanding my clear ruling Mr Le Brocq sought to raise the same sorts of questions when cross-examining the complainant's mother about [her] relationship with her boyfriend. Again, I refused Mr Le Brocq permission. This was so [despite] what the complainant had said when re-examined by Miss Pope. By now it should have been crystal clear to Mr Le Brocq or any other competent advocate that my view was that the sexual nature of the complainant's relationship with her boyfriend was irrelevant and should not be raised at trial. Mr Parker argues that that there was no explicit ruling to that effect. I disagree. My approach and rulings were clear and if there was any doubt Mr Le Brocq was free to seek further clarification. In my view, no competent advocate would have been in any doubt whatsoever. …
>
> The fact that it was true that the complainant did have a sexual relationship with her boyfriend does not render Mr Le Brocq's comments admissible or relevant. The complainant's answer to Ms Pope was not edited out because it was her own explanation for why she lied about the identity of her boyfriend. …
>
> In my judgment it was improper and/or unreasonable of Mr Le Brocq to make those comments. Indeed, in the light of my attitude and rulings expressed on this issue ……. he and/or any other reasonably competent counsel would have known that the

> "sexual" nature of her relationship was irrelevant, not admissible, and should not be referred to. And in addition, he was at the very least acting "unreasonably" in failing to raise this aspect with me or to seek a ruling from me in the absence of the jury on this aspect if he honestly and genuinely believed he was or might be entitled to address the jury as he intended and in fact did.
>
> Finally, his attempt to link in her previous sexual behaviour as an explanation for her ability to describe sexual acts was spurious, unwarranted and unreasonable in the light of the exchange between us."

37. Mr Parker submitted that the judge had erred in discharging the jury with the consequence that it could not be said that any costs wasted by the prosecution were caused by Mr Le Brocq. The judge referred to *R v Farooqi* [2013] EWCA Crim 1649 and rejected the submission that it was authority for the proposition that the jury should not be discharged in any case where counsel had made an improper closing speech. He relied on Criminal Practice Direction 22A.8 in support of his approach. That suggests that following improper reference to a complainant's previous sexual history the judge may have to consider the overall fairness of the trial and decide whether to stop the trial or ameliorate the position with a direction. The judge approached the question on the basis of whether both the reference to sexual behaviour and the attack upon the section 28 procedure were capable of being ameliorated by directions. He considered that the comments on section 28 were a submission that the trial was not fair. As the judge who had presided over and controlled the questioning a jury might think that any direction he gave was intended to defend his own position. On that point, he said he "was therefore equivocal as to whether any direction would ensure the overall fairness of the trial".

38. He then went on to consider the second area in which he had found improper or unreasonable conduct. He said;

> "I came to the conclusion that no direction of mine could possibly cure the prejudice created in the jury's mind when considering the credibility of a witness, now just 15 years old, who was 14 years old when having a sexual relationship with someone aged 19 … Happily, because the cross-examinations had been pre-recorded it will not be necessary for either the complainant or her young teenage friend to be brought back to be cross-examined again."

39. Having reached these conclusions, the judge addressed the issue of discretion to make the order. He had been asked to consider at this stage the fact that Mr Le Brocq had incurred costs of £9,000. The Judge rejected the submission that this should inhibit the making of the order.

The Grounds of Appeal

40. The grounds of appeal repeat the arguments advanced before the judge and were refined by Mr Parker in argument before us to four broad areas:

i) *Procedural errors:* Mr. Parker submitted there was insufficient notice of the conduct said to be unreasonable, improper or negligent.

ii) *Proportionality:* The judge failed to have regard to proportionality in mind, an essential question in exercising the wasted costs jurisdiction. In particular, the costs of a wasted costs hearing were disproportionate to the costs allegedly wasted. That was clear from the outset and should have resulted in no hearing at all, especially as no application had been made by the prosecution.

iii) *Mr Le Brocq did not overstep the mark in the way the judge found he had*. Mr Le Brocq was entitled to comment on evidence the judge had allowed to go before the jury both in the re-examination and the Agreed Facts. His general criticism of the section 28 procedure was properly made.

iv) *Causation*. Errors, if errors they were, could have been remedied by appropriate jury directions. The judge should not have discharged the jury.

41. The prosecution, who stood to benefit from the judge's order, took the same neutral stance before us as they had before the judge.

Discussion

42. During the trial the judge was astute to ensure that the complainant's evidence was fairly presented to the jury in a way which did not contravene section 41 of the 1999 Act and the modern developments in the law and practice of dealing with child witnesses. He was extremely experienced in this. The pilot for pre-recording cross-examination under section 28 of the 1999 Act ran in Liverpool from 2013. The pilot was successful, and its use is to be extended further. Nothing we say should discourage judges from ensuring that trials are conducted in accordance with modern practice. The judge was clearly worried that Mr Le Brocq had not addressed the jury appropriately, given his attack on the section 28 procedure and reference to the complainant's previous sexual history. We understand the judge's caution given the original request to put a question in cross-examination which trespassed into sexual history without an application under section 41, followed at trial by a similar request in respect of the evidence of the complainant's mother.

The Procedural Issues

43. We see no merit in the procedural complaints advanced by Mr Parker. The judge had clearly identified the two concerns about the closing speech. He raised them just before he discharged the jury, and again when he explained to the jury what he was doing and why. There were transcripts of those observations available. There was no doubt about the conduct which the judge thought might fall within section 19A of the 1985 Act. First, Mr. Le Brocq's criticism of the fairness of the proceedings because of the restricted cross-examination permitted at the Ground Rules hearing in accordance with modern practice; and secondly that he had made a thinly disguised and inappropriate submission to the jury that they should not believe the complainant's evidence about the defendant because she had had other sexual experience elsewhere.

44. Wasted costs applications are usually initiated by an application from the party who has wasted the costs in question. It was unusual to make an order when no submission was made by the prosecution to support it. There was a danger that the judge would be seen to be acting in his own cause. The Criminal Procedure Rules contemplate a court making a wasted costs order on its own initiative (see rule 45.9(5) and Criminal Practice Direction part 4.2) but it is a power to be exercised cautiously, most particularly when the putative beneficiary does not support it. But that is not a free-standing procedural point.

Proportionality

45. We do not accept the proportionality argument based on *Chief Constable of North Yorkshire v Audsley* (supra). A precise read-over from the regime which applies under the Civil Procedure Rules and associated Practice Directions is inappropriate. It will always be necessary in the context of a wasted costs order in the criminal courts to have an eye to the expense of investigation of the conduct and subsequent hearing. Will it be wholly disproportionate to the costs allegedly wasted? But the issue here was whether the prosecution costs of a contested trial over the course of a week, possibly aborted as a result of improper, unreasonable or negligent behaviour of counsel, should be paid by him. True it is that the wasted costs hearing lasted a little over half a day (it was expected to take a couple of hours) but it cannot be said that was inappropriate or disproportionate. The level of fees charged by solicitors and counsel who act for legal representatives facing wasted costs orders in the criminal jurisdiction will inevitably be more generous than that paid to publicly funded lawyers in the Crown and Magistrates' Courts. It will not be uncommon for more to be expended in defending a wasted costs order than the sum in issue. But if that possibility were to stop applications in their tracks, the jurisdiction would be substantially curtailed. The rules and practice direction contemplate a swift and summary approach to wasted costs, having due regard to procedural fairness. Yet there will be cases, and this was one, where the issues identified by the judge could not be considered without further investigation. The judge here was faced with the costs of a trial which had been aborted when he discharged the jury. We do not think he can be faulted on grounds of potential expense of the wasted costs proceedings (of which he had no advance information) from embarking on the course he did.

The Substance

46. We turn to whether the judge was right to conclude that Mr Le Brocq's conduct during his closing speech was improper, unreasonable or negligent in the sense explained in *Ridehalgh.*

The comments on the complainant's previous sexual history

47. The judge had ruled in December 2017 that Q25A could not be asked. He also ruled at trial that there could be no cross-examination of the complainant's mother about the complainant's relationship with her boyfriend without an application under section 41 of the 1999 Act being made and granted. These rulings bound Mr Le Brocq. He abided by those rulings.

48. That was not the end of the story. The judge ruled that the re-examination of the complainant should not be edited to exclude her reference to her sexual relationship

with her boyfriend. The only basis upon which that evidence was before the jury was because it was relevant, otherwise it would have been edited out. We have discussed in [11] above the circumstances in which the judge, contrary to his first thoughts, was persuaded by the prosecution to leave the re-examination unedited. That placed the evidence before the jury. It was reinforced by Agreed Fact 21.

49. This was an example of evidence being double edged. The prosecution wanted it before the jury because it provided an explanation for the admitted lies. The defence saw it as providing an explanation of why a 14-year-old girl was familiar with a range of sexual matters, discovered other than by sexual contact with the defendant, even though the prosecution were not making the suggestion that her knowledge must have been acquired through the defendant's agency. Both the re-examination and the Agreed Fact enabled the prosecution to ask the jury to assess her lies in their proper context. It follows, with respect to the judge, that the criticism of the appellant for agreeing to prosecution counsel's draft of Agreed Fact 21 was misplaced and so too was his observation that he had ruled the complainant's sexual history irrelevant.

50. The question for the judge was whether it was improper or unreasonable for the defence to comment on the evidence that was before the jury for some purpose other than that for which the prosecution had sought to adduce it. Was counsel for the defendant obliged to ignore it? And if not, what properly could he say?

51. The judge's reaction to the introduction of Agreed Fact 21 did not sit comfortably with his earlier ruling on the evidence given in re-examination. It nonetheless exposed his understandable nervousness about how the complainant's previous sexual history would play out before the jury. The judge was critical of Mr Le Brocq for not raising what he intended to say to the jury beforehand in order to seek a ruling. Perhaps some counsel would have done so, particularly as the combination of events in December 2017 and during the trial had left the position in an unclear state. Others might have inquired of the judge what he intended to say about the previous sexual history in the summing up. But we do not consider that real criticism can attach to Mr Le Brocq for failing to follow this course.

52. Given, therefore, that there was clear evidence before the jury that the complainant had been in a sexual relationship with a 19-year-old boyfriend, we are unable to agree with the judge that any reference to it by Mr Le Brocq in his closing submissions violated a ruling under section 41 of the 1999 Act. But on the other hand, it would not have been right for Mr Le Brocq to have approached the matter on the basis that since the "cat was out of the bag" he could say what he liked about the sexual behaviour of the complainant.

53. The philosophy which underlies section 41 of the 1999 Act has two principal components. First, the fact that a complainant has previous sexual experience does not make her more likely to consent to sex. The question of consent is at the heart of many allegations of rape and sexual offending but was not relevant in this case. Secondly, the fact that a complainant has been sexually active, even promiscuous, has no bearing on general credibility. These were described by McLachlin J in *R v Seaboyer* [1991] 2 SCR 577, 630G-H as the "twin myths". The statutory provision is thus astute to ensure that evidence of a complainant's previous sexual history is not introduced for the purpose of supporting arguments to either effect.

54. The exceptions found in the statutory scheme, discussed in *R v A (no 2)* [2002] 1 AC 45, include adducing evidence of previous sexual activity to avoid a conclusion that the detail of the complainant's account (especially a young complainant) must have come from sexual offending by the defendant: see Lord Hope of Craighead at [79]. That observation should be read in light of *R v MF* [2005] EWCA Crim 3376. This court discussed the reality that in the modern world, whether through the agency of chatter with school friends or sex education in schools (and we would add the ubiquity of pornography) children might often have much more knowledge of these things than those their age in previous generations.

55. The judge's evaluation of the seriousness of Mr Le Brocq's conduct was coloured by his belief that he (the judge) had ruled that the evidence was completely irrelevant and thus that Mr Le Brocq was making his submission to the jury in flat contradiction of a ruling. With the greatest of respect to the judge, that was not the case.

56. The submission made by Mr Le Brocq (quoted in full in [19] above) was that because the complainant was, as he put it, "sexually precocious", and when aged 14 she was in a relationship with a man of 19, the jury should not "fall into the trap" of believing that her knowledge of sexual matters could only have come from the defendant. He commented upon her reference to the relationship being "illegal in the eyes of the law" as suggesting that she does not agree with the law. That observation was gratuitous and irrelevant to any issue in the trial. It suggested, albeit obliquely, that her attitude to underage sex went to her credibility. He continued by saying:

> "She uses expressions such as "going down" on her, and, "licking" her "out," and she is familiar with both male and female genitalia. This, members of the jury, is no wide-eyed innocent girl this is one who, at least from the age of fourteen, was sexually experienced, knowledgeable and perfectly capable of fabricating sexual allegations against this defendant."

57. The first part of this passage gives detail which might be thought to support the core submission being made, namely that her knowledge of matters sexual came from someone other than the defendant. But in our view, this passage trespasses into the second of the twin myths we have identified. It suggests that she is capable of fabricating the allegations because she is sexually experienced. There is room for debate about whether the words meant only that because the complainant was sexually experienced, she knew about the acts alleged against the defendant; or whether what was being suggested was that because she was not "innocent" she was not worthy of belief in a more general sense. But juries do not analyse a passage in a closing speech as a student does a text for the purposes of an examination. We think that the message that the jury would have taken from this passage is that they should not believe this complainant because she was a 14-year-old girl who was sexually active. If that is what was intended it was wrong to suggest it.

58. It does not need section 41 of the 1999 Act, nor its statutory predecessors, to establish the proposition that evidence of past sexual activity in itself does not support a submission that a complainant is more likely to have consented to sex or is generally lacking in credibility. Comments to that effect in closing speeches from advocates are simply not appropriate.

59. It is submitted that Mr Le Brocq's purpose was to close the door on any thought that the jury might have that the complainant knew of what she described in her evidence only because of the alleged offending of the defendant. Despite the prosecution not having made the submission, we do not consider that it was wrong to make the point given that the evidence was before the jury. The point could have been made very simply by saying something along these lines:

> "It is not suggested by the prosecution that the complainant's knowledge of sexual matters came from the alleged actions of this defendant. That must be right because you have heard from her own mouth that she was sexually experienced."

60. The language Mr Le Brocq used is open to criticism. That said, the judge's core finding, namely that the observations were made in frank breach of an order, is not in our judgment sustainable. We sympathise with and understand the judge's mounting concern as the trial progressed. But we not think that Mr Le Brocq's comments fall within the scope of section 19A. In any event, they could have been dealt with in the summing up.

The Attack of the Section 28 Procedure

61. Mr Le Brocq's criticism of the section 28 procedure, in truth, related to the use of the Ground Rules procedure which requires questions to be formulated in advance and made subject to a ruling from the judge. These hearings are a feature of section 28 cases, but are found in all cases involving such witnesses, whether their cross-examination is to be recorded in advance of the trial or not. Such hearings are a fundamental part of the way in which evidence is now presented from young and vulnerable witnesses. They result from statutory provisions, the Criminal Procedural Rules, Criminal Practice Directions and decisions of this court which are sensitive to the witnesses at the same time as making sure that the trial is fair.

62. The Ground Rules hearing is designed to ensure that the account of a complainant is properly challenged. It is too frequently overlooked that the purpose of cross-examination is to elicit evidence. It ensures that the evidence of a witness is properly tested when in conflict with the case of the party cross-examining. It is not designed to be an opportunity for theatricality nor for an advocate to demonstrate robustness in the sense of being antagonistic or as the judge put it, engaging in "aggressive, repetitive and oppressive questioning" (see [34] above). The purpose of cross-examination is not to discomfort, harass or abuse a witness for the sake of it.

62. We agree with the judge that the submission that the trial was not fair ("virtual emasculation") because counsel had been prevented from cross-examining the complainant in the antagonistic way we have just described, and the more general attack on the section 28 procedure should not have been made. In *R v. Mahomud (Shuayb)* [2019] EWCA Crim 667, a case where cross-examination took place with an intermediary, the Vice-President giving the judgment of the court said of counsel, at [26]:

> "However, he was entitled to suggest that the appellant was sheltered from more robust questioning by the provision of an intermediary. That is a standard argument advanced and indeed

> this court has endorsed more than once that a judge should direct the jury that the effect of a special measure may mean that an advocate may not ask questions of the witness in the usual form."

The word "robust" can have a number of meanings. We do not read this passage as being inconsistent with what we have said. The Ground Rules procedure imposes some limitations on cross-examination which might otherwise have been proper. It is not unreasonable for counsel to make that point, in the restrained way described by the Vice-President at the end of that passage. It may be appropriate in many cases for the judge to give a succinct reminder to the jury of the modern way of dealing with some witnesses, and the reason for it. What cannot be said, or implied, is that the trial was unfair because the defence has been "emasculated" by rulings made by the judge, or by the procedure itself.

63. The judge is the ultimate guarantor of a fair trial in accordance with practice and procedure sanctioned by Parliament, the rules and practice directions and decisions of this court. It is wrong for counsel to attack the system, because it amounts to going behind the ruling made at the Ground Rules hearing. That proposition might be tested in this way. At a Ground Rules hearing an advocate may present for consideration any questions he believes it appropriate to ask in cross-examination. If any are disapproved, counsel could not properly submit to the jury that he had been prevented from asking a line of, or particular, questions, even if the submission were surrounded by elegant protestations that he was abiding by the ruling and had no intention of going behind it: compare *R v Fahy* [2002] Crim LR 596. It is not appropriate to submit that the system is unfair because it does not permit a form of cross-examination which young and vulnerable may see as intimidating and confusing. The rules nowadays do not permit "tag questions" or lengthy questions to be put to vulnerable and child witnesses. That is because they are not understood by the witnesses who therefore are not able to give their best evidence. Neither is it appropriate to allow aggressive, repetitive and oppressive questioning.

64. The judge did not primarily base his decision to discharge the jury on this part of the closing speech. He found that it was "unreasonable and/or borderline improper". We agree that this description of the section 28 process was unreasonable in the *Ridehalgh* sense. But the judge himself was "equivocal as to whether any direction would ensure the overall fairness of the trial". We have no doubt that these inappropriate comments were capable of being ameliorated by a short, tailored direction. That would have explained why the modern approach to vulnerable and child witnesses is taken and would have directed them to ignore that part of the closing speech in which they had been invited to reject the evidence of the complainant because counsel had not been permitted to cross-examine her inappropriately. It might have included a reference to the purpose of cross-examination. That is to elicit evidence which undermines the original account given by the witness and to explain inconsistencies. It is not to provide opportunities for aggressive questioning for its own sake. The procedure followed in this case was that ordained by legislation and the relevant rules. It was unquestionably fair. The judge might have added that the questions asked of the complainant challenged her account in all material respects in which it differed from the defendant's and put squarely before the jury his case, namely that she had fabricated her account.

Discharging the Jury

65. Mr Parker submitted that the judge erred in discharging the jury with the consequence that, regardless of how Mr Le Brocq's conduct is viewed, it was not the real cause of the wasted costs. At the heart of this error, he submitted, was the judge's decision not to seek submissions from the parties before doing so.

66. We are troubled by the decision not to seek counsel's submissions. It is not altogether unheard of for something to happen during a trial which leads the judge to believe that the jury should be discharged from its task of delivering its verdict and for the parties' advocates to agree that the situation is irremediable. Whilst not unheard of, it is rare. We can think of no circumstances in which the judge should dispense with the need for canvassing the submissions of the parties before discharging the jury on account of something which has happened during the trial. The judge noted in his ruling on wasted costs the nature of the submissions that Mr Le Brocq was likely to make. That was no reason for not having heard them. Submissions from the prosecution would clearly have been of assistance. It is likely that had the judge heard submissions from both parties he would not have discharged this jury. He would have been reminded of the history of how the complainant's sexual relationship with her boyfriend came to be before the jury, of the relevant authority surrounding discharge of juries and the nature of directions that might be given to remedy any legitimate concern the judge had.

67. This court is sometimes asked to consider whether a judge's refusal to discharge a jury, given the underlying events causing concern, has resulted in an unsafe conviction. The judge's assessment is based on an understanding of the dynamics of the trial which the Court of Appeal cannot match. Only rarely does it result in disagreement. The question we are being asked to consider is the obverse. Such a course is specifically mentioned in CrimPD 22A.8:

> "When evidence about the complainant's previous sexual behaviour is referred to without an application, the judge may be required to consider whether the impact of that happening is so prejudicial to the overall fairness of the trial that the trial should be stopped and a retrial be ordered, should the impact not be capable of being ameliorated by way of judicial direction."

68. This Practice Direction contemplates cases where stopping the trial on these grounds might be required. The major factor will be the ability of the judge to ensure the fairness of the trial notwithstanding the admission of inadmissible evidence. In this case, the judge himself had admitted the evidence. The question was whether counsel had made inappropriate comment about admissible evidence which was before the jury. This is an easier situation for a judge to deal with by direction to the jury than a case where they have heard something, perhaps something very striking, which they should not have heard at all.

69. As we have noted, Mr Le Brocq's inappropriate comments on the section 28 process were, in our judgment readily curable with a short direction to the jury. Mr Parker submitted that the decision of the Court of Appeal in *R v Farooqi* [2013] EWCA Crim 1649 requires the court to decline to discharge the jury in all cases such as this. That

overstates the position. It was an extraordinary case during which, at almost every point in a very long trial, counsel for one of the defendants misbehaved in cross-examination and then during his closing speech. The trial judge had to spend well over an hour in summing up correcting the errors made by counsel and directing the jury to ignore what he had said. The judge rejected an application from a co-defendant to discharge the jury despite the repeatedly egregious nature of counsel's transgressions. That decision was upheld by the Court of Appeal. In giving the judgment of the court, Lord Judge CJ made the general position clear at [103]:

> "When issues like this arise, the starting point however, and this requires emphasis, is that the overwhelming likelihood is that the appropriate response is for the trial to continue to its conclusion. The derailment of a trial, whether on the basis of deliberate or inadvertent misconduct by counsel, must remain the exception. The judge is vested not only with authority over the conduct of the trial, but with the means, through careful and unequivocal directions to ensure that the jury, with its own interest in the fairness of the trial process, understands the criticisms properly made by the judge for which counsel is responsible, and does not, unless directed to do so, visit them on either his client, or any of the remaining defendants."

70. We have concluded that the circumstances which confronted the judge after counsel's closing speech fell a very long way short of justifying the discharge of the jury.

Conclusion

71. For these reasons we conclude that the wasted costs order must be revoked. In summary because:

i) The objectionable aspects of counsel's submissions about the Ground Rules procedure could have been dealt with by appropriate directions;

ii) The judge overstated the seriousness of counsel's misconduct in his submissions about the sexual behaviour of the complainant because the relevant evidence was properly before the jury. Counsel was not prevented from commenting on it altogether. He strayed beyond the bounds of appropriate comment. The judge was yet to give legal directions. Directions would have cured the difficulty;

iii) This was not a case where the observations of counsel in his closing speech called for the discharge of the jury.