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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 29 January 2020

B e f o r e:

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
LORD JUSTICE FULFORD

MRS JUSTICE CHEEMA-GRUBB DBE

MRS JUSTICE FOSTER DBE

R E G I N A
v
DEAN THOMAS

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Mr J Barker appeared on behalf of the **Appellant**

Miss C Donnelly appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

THE VICE PRESIDENT:

The background facts

On 28 February 2019 in the Crown Court at Canterbury, before Judge Brown and a jury, the appellant, now aged 45, was convicted by a majority of 11 to 1 of causing death by careless driving when over the prescribed limit, contrary to section 3A(1)(BA) of the Road Traffic Act 1988. This was count 2 on the indictment, which was an alternative to count 1, a charge of causing death by dangerous driving of which he was acquitted.

On the same day he was sentenced to three years' imprisonment. He was disqualified from driving for four years and six months, which included an 18-month uplift pursuant to section 35A of the Road Traffic Offenders Act 1988. He was ordered to take an extended retest. A victim surcharge order was made in the sum of £170.

He appeals against conviction by leave of the single judge. He also applies for leave to appeal his sentence, the application having been referred to the full court by the single judge.

On 28 January 2018 at about 10 am, the appellant was driving a Hyundai motorcar, travelling from his partner's house to his home in Herne Bay. His route took him via the Thanet roundabout. The victim, Mr Cox was cycling on his electric bicycle, also travelling via the Thanet roundabout. The appellant's car and the victim's bicycle collided on the roundabout. The victim sadly died from his injuries 12 days later.

At the time of the collision the weather was fine, the traffic light and the roads of good repair. The appellant had been followed onto the roundabout by a witness who had a dash cam located at the front of his car which provided footage of the accident.

The appellant was arrested and taken to the police station where there were negative tests for alcohol, but he had a specified controlled drug Benzoylecgonine (“BZE”) in his blood, the proportion of which at 289 micrograms per litre exceeded the specified limit of 50

micrograms per litre.

BZE is a metabolite produced by the body when it is metabolising cocaine. He was, however, below the legal limit for cocaine and heroin. We observe that during the procedures at the police station, the appellant had difficulty staying awake.

He was interviewed later on the day of his arrest and answered all questions put to him. He stated that he had not seen the victim, he had looked both ways before entering the roundabout and the sun had been in his eyes. He said that he had taken cocaine about three days before the accident and heroin a few days before that. He indicated that he had not been affected by either drug at the material time and that he considered his driving had been fine.

Mr Flanagan, a toxicologist, gave evidence to the effect that based on the reading of BZE it was impossible for the appellant, as he had claimed, to have taken cocaine three days before. The quantity of cocaine that the appellant would have needed to consume to produce the reading we have just set out three days later would have been fatal. He calculated that the cocaine instead had been taken between 6 and 12 hours before the accident, but he was unable to be more precise than this approximation. He said that whilst the reading for cocaine was below the legal limit, it could still have affected the appellant's ability to drive. Moreover, the toxicologist described the effects of withdrawal from cocaine and heroin as being important given that these can include headaches, impaired concentration, irritability, anxiety and paranoia.

Police Sergeant Wade, an advanced driver impairment recognition officer, viewed the body-worn camera footage of a roadside field impairment test which another officer had recorded and he concluded that the appellant performed very poorly during the test and that in his estimation the appellant's ability to drive had been impaired. He viewed the

footage after the appellant had tested positive for drugs. He disagreed, therefore, with the assessment made by the officer who originally conducted the test that the appellant had not been impaired.

Police Constable Young gave evidence that the car and the road had no defects which could have caused the accident. The sun was still bright an hour after the collision but not excessively so. He referred to the Highway Code and provided his opinion as to the steps the appellant should have taken in relation to the sun being in his eyes and the fact that he was entering a roundabout.

Police Constable Chapelhow gave evidence that he attended the scene two days later, when the conditions were about the same as at the time of the accident, and the sun did not cause him to lose sight of anything significant on the roundabout and he expressed his view that he would have slowed down if the sun had in some way obscured his vision.

Mr Wagstaff, an expert called by the defence who was a former police officer, gave evidence that in his opinion the approach of the appellant at 21 mph, in circumstances in which he was unaware of the presence of the victim, was a reasonable speed and that it was possible that the victim remained in the appellant's blind spot throughout the incident. He agreed there were steps the appellant could have taken to deal with the sun being in his eyes. He also accepted that a driver should not take the wheel of a car if they were either tired or impaired through drugs and that if a driver did slow down this self-evidently provided a greater opportunity for additional observation.

It was agreed between the prosecution and the defence that the victim was cycling around the roundabout between 12 and 13 mph. As we have said, the appellant was driving at a constant speed of 21 mph as he approached and entered the roundabout and he did not slow down. Following the impact, the appellant reacted by braking in about 1.4 seconds

which was within the normal range.

There was a blind spot created by the A-frame pillar of the Hyundai car. It could not be determined however whether the victim was in the blind spot vis-a-vis the appellant at the material time because this depended entirely on where the appellant's head was positioned.

The trial

The prosecution case was that a combination of factors made the appellant's driving dangerous, namely the drug in his system, his tiredness and his failure to adapt his driving to take account of the sun and to make any necessary adjustments for blind spots which were the result of the design of the motorcar he was driving.

The defence case was that the accident occurred through no fault of the appellant. Rather, it was the result of the position of the sun and the restricted view the appellant had due to the design of the vehicle he was driving. It was contended that the appellant was not affected by the drugs he had taken some days previously and it was submitted that his driving had not been dangerous nor careless. Although the appellant did not give evidence, there was no adverse inference direction given to the jury in this regard. The issue, therefore, on count 2 was whether the appellant's driving fell below what would be expected of a competent and careful driver.

At the pre-trial review on 31 January 2019, the defence applied for the court to exercise its inherent jurisdiction to direct the appointment of an intermediary for the appellant throughout the trial. Reliance was particularly placed on the expert reports of an intermediary, Ms Spotswood, dated 19 December 2018, and a psychologist, Mr Robins dated 22 January 2019. Ms Spotswood described the appellant's poor schooling, his inability to concentrate or focus for any length of time (it is suggested his ability to focus independently is extremely poor) and the difficulty he has retaining information. These

problems are said to have been exacerbated by the medication he takes for chronic pain which is the result of a spinal operation and lower back, shoulder and arm difficulties. It is suggested that he does not understand what is being said to him unless the issue is introduced and reinforced in particular ways. It is contended he is highly suggestible and that word selection is problematic for him. He is easily overwhelmed by too much information or if the subject is complex or the delivery is fast. He needs to be addressed in a very clear and uncomplicated manner and sentences should only have one active part or idea. Visual aids need to be deployed to the extent possible.

Ms Spotswood indicated that it was "essential for [the appellant] to be assisted by an intermediary throughout his trial". She further recommended that he should be allowed to leave the dock and to stand in order to alleviate his pain. The court sessions should be no longer than 45 minutes. She recommended that a Ground Rules Hearing should be held prior to the start of the trial.

Mr Robins agreed with the contents of the intermediary report and recommended that the appellant should be provided with the support of an intermediary throughout the entirety of the proceedings. He found that the appellant possessed weak cognitive functioning which was in the extremely low range. This would have the consequence that he would struggle to understand all the court processes and to give instructions. The appellant also appeared to be suffering from depressive symptoms. It was likely, in his view, that the medication and depression affected the appellant's cognitive functioning.

The judge, having read the reports, ruled against the application. She indicated that the facts of the case were largely agreed and the issues were not complex. The appellant would be afforded an appropriate opportunity to discuss all relevant issues with his legal team. Regular breaks would be granted and the appellant could stand in the dock and stretch if

this became necessary. The judge concluded that the difficulties experienced by the appellant were not such that a fair trial required the appointment of an intermediary.

There was a telephone mention on 18 February 2019 during which the judge made various decisions, the reasons for which were communicated on the following day. Thereafter, on 19 February 2019, the first day of the trial, the defence made a submission that the appellant was not fit to stand trial. They relied upon an additional expert's report, that provided by Dr Cullen, a consultant adult psychiatrist, dated 17 February 2019. Dr Cullen observed the appellant is cognitively impaired due to a combination of his low IQ, the chronic and deteriorating experience of pain, the analgesic medication he is taking and his low mood. He suggested the appellant lacked "the optimal mental capacity to follow (the) proceedings and to give evidence" and that in all likelihood he would have difficulties instructing his lawyers. Dr Cullen concluded that the appellant unassisted by an intermediary was not fit to stand trial as a result of his very low IQ, chronic pain, medication and depressive illness. However, this could be rectified by the assistance of an intermediary. He essentially, therefore, agreed with the recommendation set out in the report of Ms Spotswood.

The judge delivered her decision in relation to the matters raised on both 18 and 19 February 2019 to the effect that the appellant was fit to plead, but she additionally stipulated that he could have the assistance of an intermediary if he chose to give evidence and if one could be made available. However, the judge emphasised that if an intermediary could not be secured, in her view the requirements of a fair trial could still be met. The appellant, she noted, had been able to give a clear account in interview. She also observed that Dr Cullen in his report did not address in full the Pritchard criteria: see R v Pritchard 173 ER 13; [1836] 7 Car & P 303. Applying the decision of this court in

Marcantonio [2016] EWCA Crim 14, [2016] 2 Cr.App.R 9, the judge determined that the case was not complex. In all the circumstances, the appellant had failed to discharge the burden on the balance of probabilities that he was unfit to stand trial.

The defence were unable to secure funding for the instruction of an intermediary within the available time span and applied on 20 February 2019 for the judge to exercise the court's powers to instruct an intermediary for the purpose of assisting the appellant during his evidence. The judge ruled against the application, indicating this was a matter for the legal aid authorities and stated that it was inappropriate in the circumstances of this case for the court to appoint an intermediary for the defence.

It is averred that throughout the trial the appellant was unable to follow the detail of the evidence and equally he was unable to provide adequate instructions as the evidence unfolded. On occasion, it is said, he became emotional and at other times he appeared to be asleep or was distracted. It is suggested he was in pain. He was unable to take meaningful notes. It is averred that as a result he was disengaged from the trial process.

Mr Barker on his behalf tells us that he was sometimes confused by the evidence that had been given in court and on occasion made comments that were at some considerable remove from the issue then under discussion. It is accepted however that the judge granted breaks when requested and on more than one occasion called for an interruption in the court proceedings because the appellant appeared to be either distressed or asleep.

The appeal against conviction

There are three grounds of appeal. First, it is submitted that the judge erred in refusing to grant the application for the appointment of an intermediary to assist the defendant for the entire course of the trial. It is argued the medical expert reports all set out that an intermediary was required for the appellant to be able to participate in the trial and that there was no

good reason for the judge not to follow those recommendations. It is suggested the judge's decision deprived the appellant of the opportunity to give evidence. It is contended there were a number of complex subsidiary issues in addition to whether the appellant saw the cyclist, namely how was he driving? Was he hungover? Was he tired? Why was he apparently feeling sleepy shortly after the accident? Was this as a result of drugs, or was there some other reason that was not the fault of the appellant? There was a question that needed to be addressed during the case as to whether the drugs would have had an effect on his consciousness and his ability to drive in a safe manner. Additionally, it is submitted there were some complex issues which he needed to consider as to the roadside test and whether he had lied during the interview and, if so, why. His instructions needed to be taken on the potential blind spot resulting from the A-frame structure of the car. It is suggested, therefore, that these were issues on which he would have to give evidence or at least have to provide instructions.

The experts as to the cause of the accident provided a joint statement, but they disagreed with each other on crucial issues that became particularly apparent when they each testified. It is suggested that if the test is whether this case came within a rare category of trial in which an intermediary should be retained, the serious nature of this appellant's disabilities were such that this threshold was readily crossed. We wish to make it clear that we do not for a moment doubt the rehearsal by Mr Barker of his concerns as to what occurred whilst the trial was unfolding.

The prosecution respond that the judge was entitled not to appoint an intermediary for the entirety of the proceedings. The appellant had participated in the necessary pretrial events which included providing answers in interview, entering a not guilty plea, signing a defence statement and agreeing to an offer of a guilty plea to count 2 only, which was

unacceptable to the Crown. Miss Donnelly, on behalf of the prosecution, has argued that Dr Cullen's report did not properly apply the Pritchard criteria.

Second, it is suggested the judge erred in finding the appellant was fit to plead and stand trial. The medical evidence was such that the appellant was unfit, particularly without the assistance of an intermediary. The Crown for their part repeat that Dr Cullen failed properly to apply the criteria in Pritchard which sets a threshold for a finding of a defendant being unfit.

Third, it is contended that the judge erred in deciding that it was not appropriate to use the court's inherent powers to instruct an intermediary for the appellant's evidence. The judge had permitted the instruction of an intermediary, as we have set out above, limited to the appellant's evidence, but had declined to use the court's inherent powers to appoint an intermediary when Legal Aid Agency funding had not been secured.

The Crown submit that the judge's approach was entirely correct. We are reminded that this was quintessentially an issue for the trial judge to determine and she was entitled to bear in mind the experience of counsel on both sides and in particular that of defence counsel and the opportunities that he would have to assist the appellant. The appellant moreover had the benefit of the presence of a solicitor on the first day of the trial. We are reminded particularly by Miss Donnelly that the appellant gave apparently full and comprehensible answers in interview and that without the apparent assistance of an intermediary he was able to provide instructions to his lawyers in the way that we have already outlined.

The Criminal Practice Direction gives detailed consideration to the appointment of intermediaries, including to assist a defendant. This is of particular importance given the statutory provisions for defendants to be assisted by an intermediary when giving evidence are not yet in force (section 104 of the Coroners and Justice Act 2009 which would insert

sections 33BA and 33BB into the Youth Justice and Criminal Evidence Act 1999 has not been commenced). The Practice Direction contains the following:

> "3F.12 The court may direct the appointment of an intermediary to assist a defendant in reliance on its inherent powers (C v Sevenoaks Youth Court [2009] EWHC 3088 (Admin)). There is however no presumption that a defendant will be so assisted and, even where an intermediary would improve the trial process, appointment is not mandatory (R v Cox [2012] EWCA Crim 549). The court should adapt the trial process to address a defendant's communication needs (R v Cox [2012] EWCA Crim 549). It will rarely exercise its inherent powers to direct appointment of an intermediary but where a defendant is vulnerable or for some other reason experiences communication or hearing difficulties, such that he or she needs more help to follow the proceedings than her or his legal representatives readily can give having regard to their other functions on the defendant's behalf, then the court should consider sympathetically any application for the defendant to be accompanied throughout the trial by a support worker or other appropriate companion who can provide that assistance. This is consistent with CrimPR 3.9(3)(b) (see paragraph 3D.2 above); consistent with the observations in R v Cox (see paragraph 3D.4 above), R (OP) v Ministry of Justice [2014] EWHC 1944 (Admin) and R v Rashid [2017] EWCA Crim 2; and consistent with the arrangements contemplated at paragraph 3G.8 below.
>
> 3F.13 The court may exercise its inherent powers to direct appointment of an intermediary to assist a defendant giving evidence or for the entire trial. Terms of appointment are for the court and there is no illogicality in restricting the appointment to the defendant's evidence (R v R [2015] EWCA Crim 1870), when the 'most pressing need' arises (OP v Secretary of State for Justice [2014] EWHC 1944 (Admin)). Directions to appoint an intermediary for a defendant's evidence will thus be rare, but for the entire trial extremely rare keeping in mind paragraph 3F.12 above."
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> […]
>
> "3F.16 Arrangements for funding of intermediaries for defendants depend on the stage of the appointment process. Where the defendant is publicly funded, an application should be made to the Legal Aid Agency for prior authority to fund a pre-trial assessment. If the application is refused, an application may be made to the court to use its inherent powers to direct a pre-trial assessment and funding thereof. Where the court uses its inherent powers to direct assistance by an intermediary at trial (during evidence or for the entire trial), court staff are responsible for arranging payment from Central Funds. Internal guidance for court staff is in Guidance for HMCTS Staff: Registered and Non-Registered Intermediaries for Vulnerable Defendants and

> Non-Vulnerable Defence and Prosecution Witnesses (Her Majesty's Courts and Tribunals Service, 2014).
>
> 3F.17 The court should be satisfied that a non-registered intermediary has expertise suitable to meet the defendant's communication needs."

The experience of the courts as reflected in the Practice Direction is, therefore, that there will be cases when the needs of the defendant and the circumstances of the trial will be such that an intermediary will be required for the entire trial, whilst in others, notwithstanding the defendant's difficulties, a fair trial can be secured without the appointment of an intermediary for any stage of the proceedings. There are of course other variations coming somewhere between these two extremes. An intermediary may only be necessary for a particular part or for particular parts of the trial process, such as the defendant's evidence.

As this court observed in R v Grant Murray [2017] EWCA Crim 1228, at paragraph 225, there have been very significant improvements in recent years to ensure vulnerable defendants participate effectively. These include "the provision of intermediaries for defendants when necessary" (paragraph 225).

As set out above, in the Practice Direction it is observed that the appointment of an intermediary for the defendant's evidence will be a rare occurrence and that it will be exceptionally rare for a whole trial order to be made. That projection as to frequency serves as an important reminder to judges that intermediaries are not to be appointed on a "just-in-case" basis or because the report by the intermediary, the psychologist or the psychiatrist has failed to provide the judge with a proper analysis of a vulnerable defendant's needs in the context of the particular circumstances of the trial to come. These are fact-sensitive decisions that call for not only an assessment of the relevant circumstances of the defendant, but also the circumstances of the particular trial. Put otherwise, any difficulty experienced by the

defendant must be considered in the context of the actual proceedings which he or she faces.

Criminal cases vary infinitely in factual complexity, legal and procedural difficulty, and length. Intermediaries should not be appointed as a matter of routine trial management, but instead because there are compelling reasons for taking this step, it being clear that all other adaptations to the trial process will not sufficiently meet the defendant's needs to ensure he or she can effectively participate in the trial. The assessment in the Practice Direction as to the number of instances when this is likely to occur, albeit an important reminder to the judge to apply the most careful scrutiny to these applications, cannot derogate from the need to appoint an intermediary as identified by the Lord Chief Justice in Grant Murray "when necessary".

It follows that these applications need to be addressed carefully, with sensitivity and with caution to ensure the defendant's effective participation by whatever adaptation of the usual arrangements is required. The recommendation by one or more experts that an intermediary should be appointed is not determinative of this issue. This is a question for the judge to resolve, who is best placed to understand what is required in order to ensure the accused is fairly tried. The guidance given in R v Cox [2012] EWCA Crim 549, [2012] 2 Cr.App.R 6 at page 63 is important in this regard:

> "29. We immediately acknowledge the valuable contribution made to the administration of justice by the use of intermediaries in appropriate cases. We recognise that there are occasions when the 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 represent 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. It would, in fact, be a most unusual case for a defendant who is fit to plead to be found to be so disadvantaged by his condition that a properly brought prosecution would have to be stayed. That would be an unjust outcome where, on the face of the evidence, a genuine complaint has properly been brought against the defendant. If the question were to arise, this court would have to re-examine whether the principles relating to fitness to plead may require reconsideration."

In this regard it is important to bear in mind the judgment of the Vice President in R v Biddle [2019] EWCA Crim 86, [2019] 2 Cr.App.R 2:

> "39. The principles, as set out in Rashid and the Practice Direction, are clear: the intermediary can make a recommendation based on the material they have considered but it is just that — a recommendation. Ultimately it is for the trial judge to decide, having considered all the material, whether and to what extent an intermediary is necessary […]"

In Cox the court gave a helpful guide of the extent to which the court proceedings can be modified to ensure effective participation if an intermediary is not appointed or none is available:

> "21. […] [The judge] underlined ... the word 'effectively'. He examined 'a complete raft of procedural modifications to the ordinary trial process' which would be appropriate in the situation which now obtained. These included short periods of evidence, followed by twenty minute breaks to enable the appellant to relax and his counsel to summarise the evidence for him and to take further instructions. The evidence would be adduced by means of very simply phrased questions. Witnesses would be asked to express their answers

> in short sentences. The tape-recordings of the interview should be played, partly to accustom the jury to the appellant's patterns of speech, and also to give the clearest possible indication of his defence to the charge. For this purpose it was an agreed fact before the jury that 'Anthony Cox has complex learning difficulties. He could understand simple language and pay attention for short periods'. This was a carefully crafted admission to ensure that proper allowances would be made for the difficulties facing the appellant without creating any risk that the jury might reflect on the evidence in the context of the question of whether or not the appellant was potentially dangerous."

We would stress that this passage from Cox remains an excellent rehearsal of at least some of the steps that can be taken to accommodate a vulnerable defendant's needs without having to resort to appointing an intermediary.

In R v Rashid Yahya [2017] EWCA Crim 2, [2017] 1 Cr.App.R 25, the court similarly emphasised the need for the advocates to ensure that the case is presented in a readily comprehensible way, particularly as to how the evidence is elicited. The competence expected of the advocates includes:

> "80. […] the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences were grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer […]"

We would add two final general matters. First, practitioners should be alert to the possibility that a defendant may have comprehension or communication difficulties and they should assess whether to request a Ground Rules Hearing to address this potential problem. Second, in cases where there are substantive comprehension or communication difficulties, intermediaries can, in the right case, provide useful assistance to counsel in advance of or during the trial in obtaining the defendant's instructions.

Against that background, we turn to the rulings by the judge who considered each of the applications with care and in relation to which she gave detailed reasons. Taken in order,

we consider as regards ground 1 that her original decision on 31 January 2019 was unimpeachable. The judge considered the two reports, those from Ms Spotswood and Mr Robins, and she focused on the circumstances of the case. She concluded:

> "This is a very different case from one in which the factual evidence is complex (and) controversial."

That appraisal was unlikely to change during the trial. The appellant, she concluded, would have the opportunity in advance of the trial to discuss the evidence and issues with his legal team and that "there is far less need that he follows what will in reality be matters that are not in dispute […]" It was indicated that she would afford regular breaks and that allowance would be made for the pain the appellant was experiencing such as moving about in the dock. The straightforward nature of the case is to be emphasised, in that any dispute in the case was within a relatively narrow compass. The evidence had clearly been explained to the appellant in advance of the trial as exemplified by the fact, as we have already indicated, that he was able to provide a defence statement and through his counsel he was able to offer the prosecution a guilty plea to count 2 if the Crown agreed not to proceed on count 1. There is no suggestion that the judge failed to conduct the trial in the way she had outlined during the hearings in advance of the trial, or that either counsel used language which would have made it difficult for the appellant to follow what was occurring in court. Mr Barker acknowledges that the judge on occasion intervened when she, with her clear view of the appellant in court, became concerned that he was not concentrating on what was occurring.

In this context, it is useful to contrast the present case with the difficulties experienced in R v James Pringle [2019] EWCA Crim. 1722. In that case, the court confronted the particular

problem that can occur when an intermediary is not prepared to attend for the limited purpose of the defendant's evidence (as envisaged by the judge) and in the event the accused is left without intermediary assistance (see paragraph 83 and additionally Biddle at paragraph 39, in which latter case this court expressed its concerns as to the occasions when intermediaries decline to assist in those circumstances). There had been no Grounds Rules Hearing in Pringle (see paragraph 99) which the court determined should have been held "to give guidance as to what form of questions would and would not be appropriate, to take a properly assessed decision about providing regular breaks and to consider seriously the other special measures requested" (see paragraph 101).

The problems that then followed in Pringle are an object lesson as to the type of pitfalls that need to be avoided:

> "103. We have carefully considered the full transcript of the evidence and have taken into account the detailed submissions made by [prosecuting counsel] as to how he sought to accommodate the issues raised by the intermediary's report in his conduct of the cross examination. We do not doubt that [he] did his best to do so, but we nevertheless have a number of concerns about the appellant's evidence […] For example, it is apparent that he was asked at length about matters of peripheral relevance; that he was at times confused by the questioning and in his answers; that he was prone to speak very quickly and in an unclear manner; that he did not have regular breaks despite at times seeming to need them; and that there was, in particular, some very real difficulty with his ability to deal with cross-examination about his police interview that was not addressed by giving him a copy of the interview to follow – indeed, as it seems to us, that itself became a source of distraction and confusion for him as very important questions followed as to why he answered some but not other police questions."

Furthermore, there was no clear explanation provided to the jury in Pringle as to why one defendant had an intermediary and the other did not. As this court found, the jury should have been provided with some explanation as to why there was a need for intermediaries for both defendants, at least by way of a sufficient summary of the reasons, along with

information as to the appellant's difficulties to enable them properly to assess the way he answered questions in interview and gave evidence in court. Depending on the circumstances, it may be possible to provide a summary of the reasons contained in the report, accompanied by directions (see paragraphs 87, 107 and 108) on the basis that in appropriate cases an intermediary can be regarded as an expert, and a summary of the relevant parts of the report can be admitted as hearsay evidence.

Returning to the present case, given the jury were provided with a comprehensible and straightforward summary of what the appellant said in interview and he chose not to give evidence, difficulties of the kind in Pringle did not arise. However, it is important to note that the conviction in Pringle was quashed *inter alia* because of the deficiencies in the trial process just rehearsed, resulting in real unfairness to the defendant and an unsafe verdict (see paragraph 109).

As regards the submission on 19 February 2019 that the appellant was not fit to plead if an intermediary was not appointed (ground 2), again we note the careful analysis of the judge. In our view she correctly determined that this case essentially involved an objective assessment by the jury of the standard of the appellant's driving based on largely agreed evidence. She bore in mind the summary of the appellant's interview following his arrest when he appeared to have a clear recollection of having been blinded by the sun and having not seen the cyclist despite having looked to his left and to his right. We note that his interview occurred before he had major surgery, which is said to have had an adverse effect on his disability. He had set out in interview that he had not been tired or affected by drugs.

As rehearsed above, the judge identified that Dr Cullen's report failed sufficiently to address the Pritchard criteria in the context of the facts of the present case. In R v Marcantonio the

court held as follows:

> "7. It seems to us, however, that in applying the Pritchard criteria the court is required to undertake an assessment of the defendant's capabilities in the context of the particular proceedings. An assessment of whether a defendant has the capacity to participate effectively in legal proceedings should require the court to have regard to what that legal process will involve and what demands it will make on the defendant. It should be addressed not in the abstract but in the context of the particular case. The degree of complexity of different legal proceedings may vary considerably. Thus the court should consider, for example, the nature and complexity of the issues arising in the particular proceedings, the likely duration of the proceedings and the number of parties. There can be no legitimate reason for depriving a defendant of the right to stand trial on the basis that he lacks capacity to participate in some theoretical proceedings when he does not lack capacity to participate in the proceedings which he faces. It is in the interests of all concerned that the criminal process should proceed in the normal way where this is possible without injustice to the defendant. Moreover, it seems to us that such an approach is essential, given the emphasis which is now placed on the necessity of considering the special measures that may assist an accused at trial. (See, for example, Walls [2011] EWCA Crim 443; [2011] 2 Cr App R 6) The effectiveness of such measures can only be assessed in the context of the particular proceedings."

With respect, we agree that Dr Cullen, although he considered the Pritchard criteria, failed to make any, or any sufficient assessment of the appellant's difficulties in light of the nature and complexity of, and the challenge posed by, the particular proceedings he faced. The judge sustainably concluded that the appellant had failed to establish on the balance of probabilities that he was unfit to plead. As the judge indicated, an intermediary would have been beneficial for the purposes of giving evidence but if one was not available he would still be able to receive a fair trial. As she observed, he would be able to testify in a way that recognises and addresses his particular problems.

The judge declined to use the court's powers to engage an intermediary if that step became necessary (ground 3). The Practice Direction indicates that at her discretion this step was open to her, and for convenience we repeat the relevant paragraph:

> "3F.16 Arrangements for funding of intermediaries for defendants depend On the stage of the appointment process. Where the defendant is publicly funded, an application should be made to the Legal Aid Agency for prior authority to fund a pre-trial assessment. If the application is refused, an application may be made to the court to use its inherent powers to direct a pre-trial assessment and funding thereof. Where the court uses its inherent powers to direct assistance by an intermediary at trial (during evidence or for the entire trial), court staff are responsible for arranging payment from Central Funds. Internal guidance for court staff is in Guidance for HMCTS Staff: Registered and Non-Registered Intermediaries for Vulnerable Defendants and Non-Vulnerable Defence and Prosecution Witnesses (Her Majesty's Courts and Tribunals Service, 2014)."

The judge did not indicate why she chose not to utilise the court's powers. However, although we readily appreciate the appellant had a range of significant difficulties, the issues he needed to address were notably straightforward and were relatively few in number, and we have reached that conclusion, notwithstanding the comprehensive summary provided by Mr Barker as to what he submits are the complexities of this case, which we set out earlier. By way of summary, he needed to testify as to whether he was tired or under the influence of drugs whilst driving, whether the sun was in his eyes, whether his view was obstructed by the structure of the car, whether he had looked properly for other road users as he approached the roundabout and whether he saw the cyclist. There were no doubt other subsidiary issues such as the roadside test and a consideration of the layout of the roundabout on which his instructions would have been required, but as we have just set out, the issues on which he would principally have had to concentrate whilst giving evidence were few in number and straightforward in nature. With clear, precise questioning and with appropriate breaks, these subjects could have been addressed successfully without the assistance of an intermediary, albeit the latter would no doubt have assisted in the process if retained. It follows that we do not fault the judge for not

using the court's inherent power to appoint an intermediary.

We wish to emphasise that it is critical that the reports provided by experts in support of applications to appoint an intermediary for a defendant and in support of an application that the accused is not fit to plead, address not only the vulnerabilities of and the difficulties experienced by the defendant, but also the way in which those factors potentially relate to the particular proceedings he or she faces. What is required by way of assistance for a defendant may vary greatly between, for instance, a simple shoplifting case and a multi-handed trial involving cut-throat defences and complex bad character applications. Context is critical.

We are grateful for the submissions of Mr Barker in support of this appeal against conviction and we acknowledge the diligent way in which he represented the appellant in the court below and in his presentation of this appeal. However, notwithstanding the undoubted difficulties experienced by the appellant, we consider that proper allowance was made to enable him to participate effectively, and it follows that the appeal against conviction is dismissed.

<u>The appeal against sentence</u>

The judge concluded entirely appropriately that the appellant approached the roundabout at 21 mph and did not slow down or stop, a step that was particularly necessary given the glare of the sun which could have been dealt with by adjusting the sun visor, as well as by lessening the speed of the vehicle. This was also necessary to ensure that the road ahead was clear when entering the roundabout. His driving abilities were seriously compromised by tiredness and the after-effects of the drugs he had taken only hours before he started driving. He lied about when he had taken the drugs in order to justify the fact that he was driving when he knew he should not have done so because of the withdrawal

symptoms. The judge observed that the Highway Code enjoins drivers to watch out for and give plenty of room to cyclists. The guideline for death by careless driving when under the influence of drink or drugs et-cetera identifies cyclists as vulnerable road users. Although criticised by the appellant for doing so, the judge in our view correctly derived such assistance as she was able from this guideline, making allowance for the obvious relevant differences. She identified the correct bracket for the starting point as being that of other cases of careless or inconsiderate driving, given that this was more than a case simply of momentary inattention. Thereafter, the judge did not tie herself to any particular category or level within the guideline recognising that the reading for cocaine was well below the legal limit and that for heroin was too low to be measured. However, the reading for BZE was more than five times the limit. She took into account his earlier disqualification many years before for driving whilst under the influence of alcohol, albeit she made allowance for the age of this offence. Otherwise, the appellant had eight convictions for 11 offences spanning the years from 1995 to 2007, including convictions for dishonesty and robbery. He was sentenced to an indeterminate sentence in 2007 for an offence of robbery and had been recalled as a result of the present conviction.

In addition to the complaint that the judge inappropriately referred to the guideline set out above, it is submitted the appellant's culpability was mitigated by the fact that his view was likely to have been impaired through no fault of his own, as agreed by the experts based on the structure of the car and that he was not driving any faster than other road users at the time. In our view, those were all matters which would have been canvassed during the trial and the jury convicted the appellant.

The judge reduced the sentence because the appellant's cognitive impairment and low IQ lessened his culpability because they would have affected his decision-making abilities.

She gave heed to his physical difficulties and the impact of a custodial sentence on this particular appellant given his particularly onerous circumstances. It would perhaps have been helpful if the judge had indicated her starting point before allowing for aggravating and mitigating factors, but ultimately we must assess whether the sentence she passed was manifestly excessive.

Albeit, as we have said, the judge did not indicate her overall starting point, this was otherwise a flawless sentencing exercise in which the judge yet again carefully and succinctly explained her reasoning. Her approach to culpability was correct and due allowance, as we have already stressed, was made for the appellant's undoubted difficulties. In our judgment, this sentence is not, in all the circumstances, manifestly excessive.

It is not to be forgotten in this exercise that a victim personal statement from Priscilla Cox, the wife of the deceased, was before the Crown Court. It is critical not to underplay the devastating consequences for this family that has been the inevitable result of this appellant's actions. We have read that statement with great care and we greatly regret the impact this tragic case has had on the deceased's family.

Given the complex issues in this case relating to the appellant, in the context of the somewhat unusual nature of the charge, we consider that these grounds of appeal against sentence were properly arguable, sentence having been referred by the single judge. We therefore grant leave but dismiss the appeal against sentence.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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