Neutral Citation Number: [2020] EWHC 1783 (Admin)

Case No: CO/3621/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
33 Bull Street, Birmingham B4 6DS

Date: Wednesday 8 July 2020

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

THE QUEEN
on the application of Nathan Roberts

Claimant

- and -

LEICESTER CROWN COURT

Defendant

- and -

CROWN PROSECUTION SERVICE

Interested Party

- -

Michael Haggar (instructed by **M & M**) for the **Claimant**
Anthony Lenanton (instructed by the **Government Legal Department**) for the **Defendant**
Alex Young (instructed by the **Crown Prosecution Service**) for the **Interested Party**

Hearing date: 30 April 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE PEPPERALL :

1. On 17 May 2019, His Honour Judge Brown and two lay magistrates sitting at Leicester Crown Court dismissed Nathan Roberts' appeal against his conviction for burglary. On 7 June 2019, Mr Roberts filed a request that the Leicester Crown Court should state a case in relation to two questions:

> "(1) Was the Court correct to admit hearsay evidence pursuant to s.116(2)(c) of the Criminal Justice Act 2003 where:
>
> (a) the Crown had made no enquiries into establishing a video-link to Australia (the location of the complainant) prior to the day of the hearing; and
>
> (b) the Crown had established limited contact with the complainant's mother but had not contacted the complainant himself?
>
> (2) Was the Court correct not to recuse itself from hearing the substantive appeal where:
>
> (a) comments such as 'would you really be putting that in cross-examination?' and 'do you really expect us to believe that?' were made by the bench in relation to the defence case when determining the hearsay application referred to above; and
>
> (b) the Crown supported the application for the bench to recuse itself?"

2. On 13 June 2019, the Leicester Crown Court refused to state a case on the ground that Mr Roberts' request was frivolous. Mr Roberts now seeks judicial review of the court's refusal to state a case. His claim was considered on the papers by Swift J on 12 November 2019. The judge refused permission on the hearsay ground, observing that it disclosed no error of law and was a decision upon the facts. Swift J granted, however, permission to apply for judicial review of the failure to state a case in respect of the court's decision not to recuse itself. Mr Roberts now pursues his application for judicial review on the recusal ground and renews his application for permission in respect of the hearsay ground.

THE FACTS

3. This was an unusual case. The prosecution alleged that Mr Roberts had committed a burglary on 12 February 2018 by entering Ben Jones's student accommodation at Loughborough University as a trespasser and stealing two Apple MacBook laptops, an X-box console, a bag, a top and other IT equipment valued at a total of £1,339.98.

He was clearly recorded on CCTV entering the secure block as a student left. The footage shows Mr Roberts wearing gloves, trying the door handle of another student's flat and then coming out of the Mr Jones's flat carrying a bag that he did not previously have with him. As he came out of the flat, he was filmed bumping into Mr Jones. The recording shows some conversation and the two men then descended the stairs together.

4. Following his arrest, Mr Roberts refused to be interviewed by the police. His lawyers subsequently filed a trial preparation form in the Magistrates' Court in which they stated that the issues were "mistaken ID" and alibi. Such defence was plainly hopeless in view of the CCTV footage.

5. The case was tried by the Loughborough Magistrates' Court on 23 January 2019. Neither Mr Roberts nor Mr Jones attended court. The magistrates proceeded in Mr Roberts' absence and allowed the prosecution to adduce Mr Jones's written statement as hearsay evidence pursuant to s.114(1)(d) of the Criminal Justice Act 2003. At trial, Mr Roberts' lawyer confirmed that it was now accepted that his client was shown on the CCTV footage and that accordingly identity was no longer in issue. By a defence statement filed that day, the defence asserted that no burglary had taken place and that Mr Roberts had entered and taken Mr Jones's property with his knowledge and consent. He was convicted in his absence.

6. Mr Roberts' appeal against his conviction was, as already indicated, heard by Judge Brown and two lay magistrates on 17 May 2019. Mr Jones was again not present. On this occasion, the prosecution sought to adduce his evidence pursuant to s.116(2)(c) of the 2003 Act on the basis that Mr Jones was outside the United Kingdom and it was not reasonably practicable to secure his attendance. The court acceded to the application.

7. Following the lunch adjournment, Michael Haggar, who appeared for Mr Roberts in the Crown Court just as he does before me, submitted that the court should recuse itself. In dismissing the recusal application, Judge Brown said that it was entirely without merit. The appeal proceeded and Mr Roberts gave evidence in his own defence. After brief deliberation, the court dismissed the appeal against conviction.

THE HEARSAY GROUND

THE APPLICATION IN THE CROWN COURT

8. The hearsay application in the appeal proceedings was made on 5 April 2019. It simply stated:

> "Mr Jones is in Australia; a fact that came to the attention of the Crown on 1.4.19. It is not practicable to get him back to give evidence."

9. If Mr Roberts wished to object to the introduction of the hearsay evidence then he was required, by rule 20.3 of the Criminal Procedure Rules 2015, to give notice of

his objection by serving an application that the court determine the question within 14 days of service of the prosecution's own notice. He did not do so.

10. Helen Marley, prosecution counsel before the Crown Court, lodged a skeleton argument in support of the hearsay application on the morning of the appeal hearing. She observed that the defence had been invited at an earlier ineffective hearing of the appeal to respond to the hearsay application but had failed to do so. As to the merits of the hearsay application, she explained that Mr Jones had been in Australia for over a month and was not due to return until the end of November 2019 at the earliest. She argued that it was "simply not practicable for him to return to this country to give evidence." She added, at paragraphs 33 and 34:

> "33. The Crown have taken a number of steps to locate [Mr Jones] and secure his attendance. It is clear that to transport him back from Australia is both costly and extremely time consuming for the witness. In addition, it is perhaps of note that the time difference between the UK and Australia cause (sic) difficulties for any video link as court sitting hours are effectively during the night in Australia.
>
> 34. The Crown have made every effort to secure his attendance; however, it has simply not been possible. It would appear that, given his circumstances, direct contact with Mr Jones is not possible and contact has to be made through his mother."

11. In fact on the previous day, Mr Roberts had belatedly filed his response to the hearsay application. It was settled immediately by Mr Haggar upon his instruction that day. Mr Haggar did not dispute that Mr Jones was in Australia, that the prosecution's only channel of communication was by email to Mr Jones's mother or that he would not be returning for some months. He did, however, argue that the prosecution had failed to show that it was not reasonably practicable to secure Mr Jones's evidence by video link. He pointed out that there was no evidence before the Crown Court as to any enquiries made as to the possibility of a video link. Ms Marley replied that a video link would require authority from the Australian government. It was, she asserted, a "pretty extensive legal application that [would] take months to resolve."

12. In allowing the application to rely on Mr Jones's statement as hearsay, Judge Brown found that the witness was in Australia and that it was not reasonably practicable to secure his attendance whether in person or by video link. The judge noted that Mr Jones was uncontactable save through his family and would not be back in the United Kingdom until at least November. As to the video link, he said that it would be a "complicated procedure that would require months, probably, in order that the necessary consents, authorisation and funding could be obtained from the authorities in Australia and in this country." The court found that that would be an "unnecessary delay." The judge added that a video link from Australia would not be a "cheap exercise" and that there was the logistical problem of a significant time difference, albeit such problem was not insurmountable.

13. Although Judge Brown refused to state a case on the grounds of frivolity, he did provide the following further explanation of the court's decision in respect of the hearsay application:

> "i. The hearsay application was determined on the material before the court, which did not include any mention of a drugs deal as later asserted by Nathan Roberts in the appeal hearing.
>
> ii. The court considered the following matters:
>
> a. the practicality of securing the attendance of Ben Jones who was in Australia and intended to remain there for at least a further 5 months;
>
> b. the complication in securing the video link between UK and Australia which the court was told would be a complicated process and it would take months to obtain the necessary authorization and to organise the link;
>
> c. the cost of setting up the live link and/or paying for a return air fare for Ben Jones to fly back to the UK for the hearing;
>
> d. the significant difference in time zones between the two countries making a link up extremely difficult to accommodate and requiring either the Australian court or the Crown Court at Leicester to sit outside normal court hours."

THE LAW

14. Section 116(1) of the Criminal Justice Act 2003 provides:

> "In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if–
>
> (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter;
>
> (b) the person who made the statement (the relevant person) is identified to the court's satisfaction; and
>
> (c) any of the five conditions mentioned in subsection (2) is satisfied."

15. The relevant condition in this case was that at s.116(2)(c):

> "that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance"

16. As already indicated, the defence were required by r.20.3 to serve notice of objection to the hearsay application within 14 days. Rule 20.5 provides that the court may nevertheless extend time for service of such notice of objection or indeed entertain an oral application. There was no discussion of the procedural niceties in the Crown Court, but it is clear that the court allowed the objection to be taken late.

17. In R v. Riat [2012] EWCA Crim 1509, [2013] 1 W.L.R. 2592, Hughes LJ, as he then was, explained at [7] that courts should approach applications to adduce hearsay evidence under the 2003 Act in six steps:

> "(i) Is there a specific statutory justification (or 'gateway') permitting the admission of hearsay evidence: ss.116-118?
>
> (ii) What material is there which can help to test or assess the hearsay: s.124?
>
> (iii) Is there a specific 'interests of justice' test at the admissibility stage?
>
> (iv) If there is no other justification or gateway, should the evidence nonetheless be considered for admission on the grounds that admission is, despite the difficulties, in the interests of justice?
>
> (v) Even if prima facie admissible, ought the evidence to be ruled admissible: s.78 of the Police & Criminal Evidence Act 1984 and/or s.126 of the 2003 Act?
>
> (vi) If the evidence is admitted, then should the case subsequently be stopped under s.125?"

18. As to the gateways under s.116, Hughes LJ observed, at [15]:

> "The general principle underlying the preliminary gateway questions in s.116 cases is clearly that the necessity for resort to second-hand evidence must be demonstrated. Illness, or, a fortiori death, may demonstrate such necessity. Absence abroad will do so only if it is not reasonably practicable to bring the witness to court, either in person or by video link. If the witness is lost, all reasonably practicable steps must have been taken to get him before the court: this will include not only looking for him if he disappears but also keeping in touch with him to avoid him disappearing …"

ARGUMENT

19. Mr Haggar argues the challenge to the hearsay ruling on the basis that the court erred in law in finding that it was not reasonably practicable to secure Mr Jones's attendance at trial by video link. He relies on the case of R (Rankin) v. Ipswich Magistrates' Court [2016] EWHC 2851 (Admin) in which Collins J quashed a conviction following the admission of hearsay evidence pursuant to s.116(2)(d). This is the gateway where the maker of the statement cannot be found "although such steps as it is reasonably practicable to take to find him have been taken." In Rankin, the complainant in an assault case did not attend trial in the Magistrates' Court. The only other evidence was her 999 call a few minutes after the alleged assaults. The complainant had been spoken to a week before trial and then said that she would attend court and that she was supportive of the prosecution. It was not, however, clear whether she had been told of the trial date. She did not attend court and could not be contacted. A police officer attended her address but could not find the witness. The district judge allowed the prosecution to rely on the statement as hearsay and observed that it would have been unfair to have adjourned the case since the interests of justice are best served by summary trials going ahead sooner rather than later while matters are fresh in everyone's minds.

20. Collins J considered that the district judge overemphasised the importance of an early hearing and concluded that, on the facts, such steps as were reasonably practicable to find a witness who was believed to have been co-operative had plainly not been taken. He added, at [12]-[13]:

> "12. It is essentially, as the authorities make clear, a question of fact as to whether sufficient steps have been taken. But it must be borne in mind that this case depended critically upon the complainant's evidence. As was made plain, if she had not attended and if her statement had not been admitted, there would have been no case against the defendant. Thus, her evidence was of crucial importance.
>
> 13. The admission of hearsay evidence is of course permissible, but it is of vital importance that in any given case all reasonable steps have been shown to have been taken, otherwise there is likely to be a serious injustice to a defendant who is unable in the circumstances to challenge the witness in cross-examination and if possible show that the witness' evidence is not reliable."

21. Mr Haggar also relies on R v. C [2006] EWCA Crim 197 in which the Court of Appeal allowed an appeal against a trial judge's ruling that the prosecution could rely on the witness statement of a South African witness pursuant to s.116(2)(c). The witness had initially indicated his willingness to fly to London to give evidence at the fraud trial. He subsequently directed the police's enquiry as to his travel plans to his lawyer. The lawyer made plain that the witness would not come to England to give evidence and that he refused to give evidence by video link. The Court of Appeal concluded that insufficient enquiries had been made as to the surprising change of heart and as to the possibility of encouraging the witness to give evidence by video link.

22. Mr Haggar submits that Mr Jones was the critical witness, as in Rankin, without whose evidence the case could not proceed. He argues that the efforts to trace the witness in Rankin and to obtain evidence from the witness in C were more extensive than in this case. Here, he submits, there was no real evidence that a video link had been considered. Further, he contends that the judge was wrong to seek to investigate more generally the merits of the appeal in the course of the hearsay application.

23. Alex Young, who appears for the Crown Prosecution Service, relies on the enquiries made by prosecution counsel and the CPS as to the possibility of a video link. He argues that it was open to the court to conclude that it was not reasonably practicable to secure Mr Jones's attendance. He cites R v. Castillo [1996] 1 Cr. App. R. 438, a decision under the pre-2003 law. That was a case under s.23 of the Criminal Justice Act 1988 which also allowed the court to admit hearsay evidence where the person who made the statement was outside the United Kingdom and it was not reasonably practicable to secure his or her attendance. Stuart-Smith LJ emphasised that the mere fact that it was possible for a witness to attend trial did not mean that it was also reasonably practicable for him to do so.

24. Again relying on Castillo, Mr Young argues that the judge had been right to enquire as to the issues in the case in order to consider the importance of the hearsay evidence and the prejudice that might be suffered in the event that Mr Jones's evidence could not be challenged by cross-examination.

DISCUSSION

Permission stage

25. In R v. North West Suffolk (Mildenhall) Magistrates' Court, ex parte Forest Heath District Council [1997] C.O.D. 367, Lord Bingham CJ gave guidance as to the circumstances in which a court can properly refuse a request to state a case on the grounds of frivolity. He observed:

> "I think it very unfortunate that the expression 'frivolous' ever entered the lexicon of procedural jargon. To the man or woman in the street 'frivolous' is suggestive of light-heartedness or a propensity to humour and these are not qualities associated with most appellants or prospective appellants. What the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic. That is not a conclusion to which justices to whom an application to state a case is made will often or lightly come. It is not a conclusion to which they can properly come simply because they consider their decision to be right or immune from challenge. Still less is it a conclusion to which they can properly come out of a desire to obstruct a challenge to their decision or out of misplaced amour propre. Where they do, it will be very helpful to indicate, however, briefly, why they form that opinion. A blunt and unexplained refusal … may well leave an applicant entirely uncertain as to why the justices regard an application futile, misconceived, hopeless or academic."

26. In my judgment, the hearsay ground is properly arguable and Judge Brown was wrong to refuse to state a case. The conventional remedy in such circumstances is for this court to make a mandatory order requiring the Crown Court to state a case. Should Mr Roberts wish to pursue his challenge, the matter would then have to return to the Administrative Court to hear the appeal by way of case stated. As McNeill LJ observed in R v. Ipswich Crown Court, ex parte Baldwin (Note) [1981] 1 All E.R. 596, such procedure is sometimes essential where the challenge "bristles with factual difficulties" such that the only convenient and proper way to get the matter before the High Court is by case stated. But in other cases where the findings of fact are not in doubt and especially where there is already a reasoned judgment of the Crown Court or a clear and full explanation as to why the lower court believes the application to state a case to be frivolous, sending the case back for a case to be stated is, as Simon Brown LJ (as he then was) observed in R v. Thames Magistrates' Court, ex parte Levy, The Times, 17 July 1997, an "absurdly inconvenient" procedure that "advances the resolution of the substantive issue not one jot." In such cases and where the challenge to the decision of the lower court is properly arguable, the appropriate course will often be to give permission to apply for judicial review thereby avoiding the need for a case to be stated at all: Sunworld Ltd v. Hammersmith & Fulham London Borough Council [2000] 1 W.L.R. 2102.

27. In this case, such pragmatic solution is particularly appropriate:

    27.1 There was no evidence called on the hearsay application, rather it was made on agreed facts.

    27.2 There is a transcript of Judge Brown's ex tempore ruling on the application.

    27.3 Although Judge Brown refused to state a case, he helpfully set out his reasons for concluding that the application was frivolous.

    27.4 Mr Roberts has been in custody for some time and it would be both unfair and unnecessary to delay further the resolution of his case by sending this matter back to the Crown Court only for it then to have to come back to this court.

    27.5 Both parties are content with this course.

28. Accordingly, I grant permission to apply for judicial review of the Crown Court's decision upon the hearsay application. There is no need to remit this case and I will proceed to consider the challenge upon its merits.

Substantive challenge

29. The Crown's application for permission to rely on hearsay evidence was thin. Of course, had Mr Roberts complied with his obligation to file his objection to the hearsay evidence in good time then the prosecution might well have put proper evidence before the court as to the practicability of a video link to Australia. In any event, the defence did not dispute the essential facts relied upon.

30. Plainly it was possible for the matter to be put back in order for a video link to be organised with Australia; alternatively for further investigation as to the practicability of such link. Indeed, that is the course that I might well have favoured had I been hearing Mr Roberts' appeal. That said, the court properly considered the gateway question of whether it was reasonably practicable to secure Mr Jones's attendance either in person or by video link. In answering that question, the court was right to take into account the substantial hurdle of the time difference between the United Kingdom and Australia, the likely cost, delay and practical problems of arranging the link to a student on his gap-year travels with whom the Crown did not have direct contact.

31. Accordingly, and with some hesitation, I conclude that the Crown Court did not err in law and was entitled to conclude that the gateway question was met in this case. That conclusion of itself did not mean that the hearsay evidence would necessarily be admitted. It is, however, a definitive answer to this ground since this case only concerns a challenge to the first step identified by the Court of Appeal in Riat, namely whether the application was within the gateway at s.116(2)(c) of the 2003 Act.

32. I also accept that Judge Brown did not err in seeking a better understanding of the issues in this case. Such enquiries might well have been relevant to steps 2 and 5 as identified in Riat.

THE RECUSAL GROUND

THE APPLICATION IN THE CROWN COURT

33. When Judge Brown concluded his ruling on the hearsay application, Ms Marley raised the question of whether the court should recuse itself. She did not formally argue for recusal but rather raised the issue for consideration on the sole basis that the court had seen the Preparation for Effective Trial form filed in the Magistrates' Court in which Mr Roberts had given a different account. That was material, she observed, that the Crown Court would not ordinarily have when hearing an appeal against conviction.

34. Turning to defence counsel, there was then the following exchange:

> *"Judge Brown:* You should know, Mr Haggar, so should your client, this. We have not been provided with any antecedents, I have no idea what his antecedents are or, indeed, if he has any. We have not been provided with any material except that which in the course of our discussions we have referred to. We did not even have the statement of Jones; well, I think I did actually, but my colleagues did not. No, well, I think I am speaking for myself and we will consult if we need to. I cannot see how you can begin to get off the ground an application which says we should not try it. What do you say?
>
> *Mr Haggar:* Well, your Honour expressed, I think, some comments about the nature of my instructions and perhaps indicated a view on them before starting this trial.
>
> *Judge Brown:* I have not formed a view. I have an open mind. I do not approach it without forming a provisional opinion though, of course, I do not. That is how one does one's job, but the important point is one keeps an open mind until the final word has been said. There we are.
>
> *Mr Haggar:* And very finally, your Honour pointed out the comments on the PET form were very different to what was later intended to be relied upon, and that information would not normally be available to a bench such as yourself."

35. Judge Brown then ruled on the recusal application. He said that it was without any merit. He added simply:

> "To the extent that we may have heard material that normally would not be introduced, namely his statement of his proposed defence in the pre-trial material that was placed before the magistrates, and I am far from satisfied we

> should not know about it, but assuming we should not, we will put it out of our minds."

36. After the lunch adjournment, Judge Brown pointed out that Mr Roberts had referred to the fact that identity had initially been in issue in his appellant's notice. Accordingly, the judge observed, the change of case was before the court in any event.

THE REFUSAL TO STATE A CASE

37. In refusing to state a case on this question, Judge Brown explained:

> "The application to recuse was not, contrary to the Applicant's skeleton, supported by the prosecution. The prosecution raised, in a neutral way, the question as to whether the court having heard the hearsay application should go on to hear the appeal. The court indicated that given its ruling it could see no reason why it should not hear the full appeal, since there could be no possible prejudice to the appellant if they heard the appeal."

ARGUMENT

38. Mr Haggar does not persist in the argument that the court should have recused itself because it had seen the pre-trial form. He is right not to do so. While the information given on such pre-trial forms is provided in order to assist the court and any application by the prosecution to introduce such material into evidence should normally be refused pursuant to the court's discretion under s.78 of the Police & Criminal Evidence Act 1984 (R v. Newell [2012] EWCA Crim 650, [2012] 1 W.L.R. 3142), the fact that Mr Roberts' defence had changed was referred to in his appellant's notice and was accordingly put before the court by the defence.

39. Mr Haggar does, however, argue that the court ought to have recused itself by reason of prejudicial comments made by Judge Brown during the course of the hearsay argument. At the start of Mr Haggar's submissions before the Crown Court, he told the court that the issue was consent and that Mr Roberts' case was that the two men had been spending time together that day when Mr Jones asked him to go up to his flat and take his bag. The judge queried whether Mr Roberts was a fellow student and was told that he was not. A little later, Judge Brown asked:

> "You are actually going to be arguing to us that this student who has lost his MacBook, his Microsoft X-box, a laptop and other items has given them away to this man, who he passed walking out of his flat when he happened to come home by chance one night? Is that what you are seriously going to be arguing to us?"

40. Mr Haggar sought to deflect the question and ask the judge to focus on his legal argument. In the course of argument, it was identified that Mr Roberts had refused to be interviewed by the police, that he had initially indicated that his defence was identification and that consent was first put forward as an issue in a defence statement served on the day of trial below.

41. During Ms Marley's submissions in reply to the hearsay application, Judge Brown said:

> "I mean, there is a – I speak for myself, not my colleagues, because we haven't yet had a chance to discuss this – but I can see there is a very obvious reason for suspecting that we have here somebody who is manipulating the process in every way that is possible to try and take tactical advantage of somebody being out of the UK …
>
> I'm not daft … As I say, I'm not speaking on behalf of us all, I'm speaking on behalf of myself. But having said that, the point is made by Mr Haggar: what have you done to try and get him here? Because however ludicrous a defence might seem – and I'm not prejudging – somebody has a right to put it before a court …"

42. A little later, the judge noted that the defence case was that three months before his finals, Mr Jones gave his laptop away with all of his coursework on it. The judge then said to Mr Haggar:

> "You are entitled and, indeed, you are duty-bound to make points on behalf of your client and follow his instructions. We understand and respect that. But we are entitled and duty-bound to make comments that strike us as being appropriate and calling for an answer. Is it really going to be said to us by your client that this man gave away to a person he had met before, but can't be called an acquaintance, the crucial electronic equipment three months before the end of his degree?"

43. Mr Haggar volunteered that there might have been another man involved and that the laptops were not in any event working. There was then the following exchange:

> "*Mr Haggar:* So, there was a third person there. There was a deal that was happening in relation to the third person and the complainant. I think payment for the deal was going to be in parts of laptops. So the laptops were, in fact, not working. It was a method of paying some transaction.
>
> *Judge Brown:* What sort of deal are you talking about? Are you implying drugs?
>
> *Mr Haggar:* I have no instructions on that. I don't know the background, really. My client simply says that he was, in essence, a middle man. There was a third person and he – well, I suppose the point for this case is my client was asked by the complainant to go an up take the bag. So in other words, when he entered the premises, he did so with consent."

44. Mr Haggar argues that the judge's comments indicated that he had already taken an adverse view of Mr Roberts' appeal and were particularly inappropriate since the judge was sitting with lay magistrates. A fair-minded and informed observer would,

Mr Haggar submits, conclude that the judge had already made up his mind. Mr Haggar relies not just on the judge's remarks, but also on Ms Marley's own observation that the judge had expressed strong views of incredulity as to the defence case. While Mr Haggar accepts that Judge Brown had made clear that he had an open mind, he argues that the court should place little weight on such protestations.

45. Mr Young argues, by analogy with O'Neill v. HM Advocate (No. 2) [2013] UKSC 36, [2013] 1 W.L.R. 1992, that the recusal point was taken too late. In any event, he argues that the fair-minded and informed observer is not unduly suspicious or sensitive. Here, he argues, the judge initially thought that consent was the sole issue and that Mr Roberts offered no explanation for the seemingly astonishing assertion that this student had simply given away his computer equipment. He points out that the judge did not repeat his comments once he understood that the defence asserted that the equipment was given to Mr Roberts in part payment for some deal. Further, he submits that it is very common for judges to express provisional views.

DISCUSSION

46. A court should recuse itself on the grounds of apparent bias where "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": Porter v. Magill [2001] UKHL 67, [2002] 2 A.C. 357, per Lord Hope at [103]. In this case, it is not suggested that the court had some independent disqualifying interest in the litigation before the Crown Court but rather that Judge Brown had pre-judged the defence case before hearing any evidence or argument on the substantive appeal.

47. In O'Neill (supra), the same judge presided over a sexual offences trial and a subsequent murder trial. Following conviction at the end of the first trial, he described the appellants as "evil, determined, manipulative and predatory paedophiles of the worst sort." He thereafter presided over the murder trial without objection until after the appellants had been convicted. Lord Hope observed that in such circumstances the fair-minded and informed observer would take into account the delay in raising the question of apparent bias. I reject Mr Young's submission, based upon O'Neill, that the fair-minded and informed observer in this case would hold against Mr Roberts' argument that there had been delay in making the recusal application. While it is true that the application was not made in the course of the hearsay argument during which the judge's remarks were made, the application was made immediately after the lunch break once counsel had had an opportunity to reflect on the morning's events and, no doubt, take instructions. Recusal applications should never be made without very careful thought, and it would be unfair to hold a brief period of reflection against Mr Roberts. The position here was entirely different from that in O'Neill.

48. There was nothing wrong with the judge probing the issues in this appeal from the outset. Early identification of the real issues in a case is very helpful to any tribunal. Further, it was potentially relevant to the hearsay application. Much difficulty in this case might have been avoided if the defence had better explained the issue from the

outset. The answer to the judge that the issue was one of consent inevitably raised more questions that it answered. Given Mr Roberts' instructions, it is curious that Mr Haggar did not explain that the issue was whether the electronic equipment had, by agreement, been taken in part payment for a transaction. Ideally the defence would have been in a position to explain clearly that the alleged transaction involved the sale of cannabis, but I note, in fairness to counsel, that he was not given instructions as to the nature of the transaction until the lunch adjournment.

49. In my judgment, the fair-minded and informed observer would recognise that the defence as initially outlined to the Crown Court was somewhat far-fetched. Mr Haggar was asserting, without any further explanation, that Mr Jones gave his consent to a relative stranger to enter his student accommodation and help himself to valuable electronic equipment three months before his university finals, but then made a complaint of burglary to the police. It is not surprising that judicial eyebrows were raised and the observer might well consider that the judge raised a pertinent question in asking whether that was seriously going to be argued.

50. The fair-minded and informed observer would take the judge's comment about reason for suspecting that there was possible manipulation of the court process in its proper context. The judge was addressing the prosecution's own written argument to that effect in circumstances where Mr Roberts had initially indicated that the issue was identification and had not notified the Crown that Mr Jones was required as a witness until it was clear that he would not be available. Properly read, Judge Brown was making clear that, whatever the suspicion, the real question was what the prosecution had done to secure Mr Jones's evidence. Seen in that context, it was an observation that effectively neutralised the prosecution's argument about possible manipulation. That said, the observer would also conclude that the judge was endorsing the prosecution's argument about possible manipulation.

51. As an abstract concept, the judge was right to say to the prosecution that "however ludicrous a defence might seem … someone has a right to put it before a court." It was, however, an unwise observation since, taken with the judge's obvious scepticism as to the consent case, the fair-minded and informed observer would conclude that the judge was indicating that the defence in this particular case might be ludicrous. Against that, such observer would notice that the judge did not express any further scepticism as to the defence case once Mr Haggar explained that Mr Roberts asserted that the student consented to his equipment being taken as part payment for a transaction. The judge then had an explanation that, if true, made sense and identified the issue to be determined upon the appeal.

52. Not only is it sensible to seek to identify the real issue at the outset of a hearing, but it is often helpful when a judge makes clear that a particular issue is troubling him or her. Doing so allows the advocates to seek to address the concern. That said, I consider that whatever his understandable reservations as to the defence of bare consent, it would have been wise for the judge to have been more circumspect in his language at the start of this appeal, especially when sitting with lay magistrates.

53. I accept Mr Haggar's submission that Judge Brown's insistence that he kept an open mind is not of itself of any weight. As Lord Hope observed in Porter v. Magill, at [104], such protestations are unlikely to be helpful to the fair-minded and informed observer. Equally, I am not assisted by Ms Marley's witness statement. The transcript shows that her recollection that there was a joint application that the court should recuse itself, based both on the judge's incredulity as to the defence case and the fact that the court had heard evidence that would not ordinarily be admitted at trial, was mistaken.

54. Drawing these threads together, I consider that the fair-minded and informed observer would conclude that while Judge Brown was initially very unimpressed with the suggested defence of bare consent, he was satisfied that the issue had been properly identified once it was explained that the equipment was in part payment for some transaction. He expressed no further scepticism once the true issue had been identified; indeed, he accurately divined that the defence might be hinting at a drug deal. I therefore conclude that the court was right to dismiss the application that it should recuse itself.

55. As Swift J identified, the argument to the contrary was not, however, hopeless and accordingly I consider that Judge Brown should not have refused to state a case. That said, in accordance with the approach explained at paragraphs 25-27 above, there would be no benefit in remitting this matter to the Crown Court.

CONCLUSION

56. I therefore grant permission to apply for judicial review of the Crown Court's decision upon the hearsay application, but dismiss the claim on both the hearsay and bias grounds.