Neutral Citation Number: [2022] EWCA Crim 1244

Case No: 2021 02007 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SNARESBROOK
HH Judge English
T2019 7293

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 September 2022

Before:

LORD JUSTICE HOLROYDE, VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
MRS JUSTICE FARBEY
and
THE RECORDER OF LONDON, HH JUDGE LUCRAFT KC (SITTING AS A JUDGE OF THE COURT OF APPEAL)

- -

Between :

ABDUL KADIR	**Appellant**
- and -	
THE KING	**Respondent**

- -
- -

Mark Graffius KC & Madeleine Wolfe (assigned by **the Registrar of Criminal Appeals**) for the **Appellant**
Benjamin Douglas-Jones KC & Valeria Swift (instructed by **CPS Appeals and Review Unit**) for the **Respondent**

Hearing date: 26 July 2022

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Approved Judgment

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand down will be deemed to be Wednesday 21 September 2022 at 10:30am.

Lord Justice Holroyde:

1. Can a judge presiding over a criminal trial in the Crown Court permit a witness who is outside the United Kingdom to give evidence via WhatsApp? That is one of the questions raised by this appeal, brought by leave of the full court against convictions of offences of rape, attempted rape and indecent assault.

2. The victims of those offences are three brothers, who were aged between 5 and 9 at the material times. They are entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes, no matter may be included in any publication if it is likely to lead members of the public to identify them as the victims of these offences. We shall refer to the three brothers as C1, C2 and C3. We shall also refer collectively to "the complainants" and "the complainants' family".

3. At the appeal hearing on 26 July 2022, the court considered written and oral submissions from Mr Graffius KC (who did not appear below) and Ms Wolfe for the appellant, and Mr Douglas-Jones KC (who did not appear below) and Ms Swift for the respondent. At the conclusion of the hearing we ordered that the appeal against conviction be dismissed, and indicated that we would give our reasons in a written judgment at a later date. This we now do.

Summary of the facts:

4. The appellant, then aged in his late 20s, came to the UK in 1994. He was initially supported by the complainants' family, and lived with them until he married in 1995. It was whilst living in their home that he committed the offences. For present purposes, it is unnecessary to go into any detail about the nature of the sexual abuse which the complainants described.

5. In 2017 C2, who had had no contact with the appellant for many years, chanced to see him at a mosque. He then for the first time reported to the police the sexual abuse he had suffered.

6. The appellant was arrested and interviewed under caution in May 2017. He denied C2's allegations. He did not suggest any motive for C2 to lie.

7. The police thereafter recorded evidence from C1 and C3, and interviewed the appellant again on 6 August 2017. The appellant made no comment to the questions asked, but put forward a prepared statement in which he said that the allegations were malicious. He said there had been an agreement that the complainants' family would bring him to the UK and financially support him, and that in return "I will pay them back and my parents would give them land from Bangladesh". He stated that he had paid off the debt, but his father had refused to give land to the complainants' family.

8. In May 2019 the appellant was charged and sent to the Crown Court for trial. In August 2019 he served his defence statement, in which he denied any offending. He said the agreement had been that he would work and repay the complainants' family for the costs they had incurred in helping him, and that, if he was unable to repay, his family would give the complainants' family the land in Bangladesh. He stated that he had worked and had made a number of payments to the complainants' family, who

had then paid for his wedding, on the same terms as previously. He said that he had paid his debt in 1999, but the complainants' mother believed that money was still owing. His father refused to transfer the land. He suggested that the allegations had been made against him to punish him and his family for the failure to make that transfer.

The trial:

9. At the trial in May 2021, before HH Judge English and a jury in the Crown Court at Snaresbrook, the prosecution called the three complainants as witnesses. The defence case, put to them in cross-examination, was that they were making false allegations in order to gain revenge for the failure to transfer the land in Bangladesh. Each of them denied knowing of any debt or any dispute about land. They confirmed that they had visited Bangladesh, but each denied that they had ever discussed any money or land with the appellant's father. Their mother also gave evidence. She too denied that any land had been promised to her or her late husband. She also denied that they had paid for the appellant's wedding.

10. The appellant gave evidence in his own defence. He stated that the debt owed to the complainants' family had been repaid, but they had their eyes set on the land in Bangladesh. He referred to the complainants' family having made threats and demands for the land to his own family in Bangladesh, but was unable to give any direct evidence about what had been said because he had not been present.

11. The appellant called two witnesses – his estranged wife, and a friend – who gave evidence confirming that the appellant had been indebted to the complainants' family and that land in Bangladesh had been used as a guarantee. By agreement between the parties, a document showing the ownership of the land and its value was also placed before the jury.

12. The appellant also applied to adduce evidence from his half-brother in Bangladesh, Abdus Samad (to whom, for convenience, we shall refer as Samad), but the judge refused his applications.

13. The prosecution relied, amongst other things, on the fact that the appellant had failed to mention the debt, or the land, when first interviewed under caution, and the jury were directed as to how they could view that failure as providing support for the prosecution case. No criticism is made of that, or any other, part of the judge's directions of law.

14. The jury convicted the appellant of a total of ten offences. He was subsequently sentenced to a special custodial sentence of 18 years, comprising a custodial term of 17 years and an extension period of 1 year. No appeal has been brought against that total sentence.

The rulings challenged on appeal:

15. The grounds of appeal against conviction challenge two rulings made by the judge in relation to the evidence of Samad which the appellant sought to adduce.

16. Initially, the defence wished Samad to give evidence from Bangladesh via the Cloud Video Platform ("CVP"), using a link to a solicitors' office. We were told by counsel that the judge was willing to permit the evidence to be given in that way, though there does not appear to have been any written application and we have seen no record of any formal ruling by the judge. In any event, when the proposed arrangements were tested during the trial, it proved impossible to establish a satisfactory link. The judge was then asked to permit Samad to give evidence via a WhatsApp video call, which, it was proposed, would be displayed on the large screens in the courtroom so that it could be seen and heard by the jury. As we understand it, that application was made under s32 of the Criminal Justice Act 1988 ("CJA 1988"). Again, it does not appear that any written application was ever made.

17. The judge refused the application. She was initially uncertain as to whether she had the power to permit the use of WhatsApp, indicating that informal enquiries with other judges had yielded different answers to that question. She also sought assistance from the regional body which provided IT support to the court, and informed counsel that she had been told that WhatsApp could not be used and that it was "not deemed as secure". Neither the judge nor counsel had had direct experience of WhatsApp ever having been used in this way. We were told by counsel that she concluded that WhatsApp would not be a safe and secure method of receiving evidence. Unfortunately, there is no record of her ruling. In the absence of any such record, it is regrettable that we have not been provided with any agreed note made by counsel when the ruling was given; and it does not appear that either party has asked the judge to confirm her reasons.

18. An application was then made to adduce as hearsay evidence, pursuant to s116 of CJA 2003, a short statement dated 12 October 2019 which Samad had provided to the appellant's solicitors. This statement contained one passage which is now accepted by the appellant to be inadmissible opinion. In another passage, which is accepted to be multiple hearsay, Samad stated what his parents had told him when he was growing up, about demands made by the complainants' parents. In a third passage, Samad stated that, since the appellant had stopped paying the complainants' family, they had –

> "… sent people to my village to threat my father and demanded our land. [The complainants' mother] and her sons came to Bangladesh a number of times for the last fifteen years. Each time, they came and threatened us and demanded money and land from us. They threatened us that unless we gave them our land, they will destroy the life of my brother Abdul Kadir".

19. The judge refused that application also. Unfortunately, the transcript of her short oral ruling is imperfect and incomplete. She offered to provide a fuller written ruling if either party requested it, but neither party did. Again, therefore, the detail of the ruling is regrettably lacking. In essence, however, it appears that the judge accepted that the statement satisfied the condition in s116(2)(c), in that Samad was outside the UK and, because of the Covid-19 pandemic, it was not reasonably practicable to secure his attendance. Her reasons for refusing the application were that the contents of the statement would not have been admissible as oral evidence in the proceedings, because it was not reliable evidence and there was no clarity as to what (if anything)

Samad had seen or heard himself, and it was therefore not in the interests of justice to admit it.

The submissions on appeal:

20. On behalf of the appellant, Mr Graffius KC submitted first that the judge erred in refusing to allow Samad to give evidence via WhatsApp. He pointed out that the judge would have been content for Samad to give evidence remotely via the CVP link, from which it followed that she must have been satisfied that it was in the interests of justice for him to do so. Given that the CVP link proved impracticable, it was submitted that the judge should have regarded WhatsApp as an appropriate arrangement, enabling the witness to give live evidence about matters which were very important to the appellant's case. In particular, Samad was an important witness because he could have given direct evidence as to the threats and demands made by the complainants' parents in Bangladesh. It was submitted that the judge was wrong to decide that WhatsApp would not be a safe and secure method of receiving the evidence.

21. Secondly, it was submitted that the judge erred in excluding Samad's evidence as inadmissible hearsay. Mr Graffius argued that the evidence was of sufficient reliability to be safely left to the jury, and it was in the interests of justice that it be admitted. Insofar as it contained multiple hearsay, it was submitted that it satisfied the requirements of s121 of CJA 2003.

22. Mr Graffius went on to submit thirdly that in the light of those errors, the convictions could not be regarded as safe. He argued that the prosecution witnesses were all members of the same family, and the stark issue for the jury was whether they believed the evidence of that family and disbelieved the lone voice of the appellant. Samad's evidence would have provided valuable support for the appellant's own evidence and would have given the jury a much fuller picture to enable them fairly to evaluate the evidence of the complainants.

23. On behalf of the respondent, Mr Douglas-Jones KC resisted those submissions. He submitted first that the judge made no error of law in either of her rulings. Secondly, and in any event, he submitted that the evidence against the appellant was overwhelming and his convictions are safe.

24. These core submissions were developed in detail both in writing, and orally at the hearing of the appeal. We are grateful to all counsel for their assistance.

Evidence via WhatsApp from a witness outside the UK: the legal framework:

25. It is important to emphasise that at the time of the trial, two relevant statutory provisions were affected by temporary provisions introduced by the Coronavirus Act 2020 ("CA 2020"). Section 32 of CJA 1988, which as we have noted was relied on before the judge, had been temporarily repealed, and so could not assist the appellant. Section 51 of CJA 2003, which does not appear to have been cited to the judge, had been temporarily modified. Our focus in this appeal must of course be on the provisions in force at the time of the trial; but it should be noted that the temporary provisions in the CA 2020 have now ceased and that, with effect from 28 June 2022, the Police, Crime, Sentencing and Courts Act 2022 has further amended s51 of CJA

2003. The present terms of s51 of CJA 2003 are the subject of very helpful guidance issued by the Lord Chief Justice on 4 July 2022. Further, the recent amendments to the Criminal Procedure Rules (introduced since the hearing of this appeal) include new rules 3.35-3.39 relating to live link directions.

26. At the time of the trial, s51 of CJA 2003, so far as is material for present purposes, provided –

> "**51 Live links in criminal proceedings**
>
> (1) A person may, if the court so directs, take part in eligible criminal proceedings through – …
>
> (b) a live video link. …
>
> (2) In this Part 'eligible criminal proceedings' means - …
>
> (c) a trial on indictment … in the Crown Court for an offence …
>
> (3) A direction may be given under this section –
>
> (a) on an application by a party to the proceedings, or
>
> (b) of the court's own motion.
>
> (4) But the court may not give a direction for a person to take part in eligible criminal proceedings through … a live video link unless –
>
> (a) the court is satisfied that it is in the interests of justice for the person concerned to take part in the proceedings through … the live video link,
>
> (b) the parties to the proceedings have been given the opportunity to make representations …
>
> (4A) The power conferred by this section includes power to give
>
> … (c) a direction for a person who is outside England and Wales (whether in the United Kingdom or elsewhere) to take part in eligible criminal proceedings through … a live video link …
>
> (6) In deciding whether to give … a direction under this section the court must consider all the circumstances of the case.
>
> (7) Those circumstances include in particular –
>
> (a) in the case of a direction relating to a witness –

> (i) the importance of the witness's evidence to the proceedings;
>
> (ii) whether a direction might tend to inhibit any party to the proceedings from effectively testing the witness's evidence;
>
> (b) in the case of a direction relating to any participant in the proceedings –
>
> (i) the availability of the person;
>
> (ii) the need for the person to attend in person;
>
> (iii) the views of the person;
>
> (iv) the suitability of the facilities at the place where the person would take part in the proceedings in accordance with the direction;
>
> (v) whether the person will be able to take part in the proceedings effectively if he or she takes part in accordance with the direction."

27. The meaning in this context of "a live video link" was defined as follows by s56(2D) of CJA 2003 –

> "A 'live video link', in relation to a person (P) taking part in eligible criminal proceedings, is a live television link or other arrangement which -
>
> (a) enables P to see and hear all other persons taking part in the proceedings who are not at the same location as P, and
>
> (b) enables all other persons taking part in the proceedings who are not at the same location as P to see and hear P."

28. By rule 3.2 of the Criminal Procedure Rules, the court was under a duty to further the overriding objective by actively managing the case. By rule 3.2(2)(h), active case management included "making use of technology". By rule 3.2(4) –

> "Where appropriate live links are available, making use of technology for the purposes of this rule includes directing the use of such facilities, whether an application for such a direction is made or not – …
>
> (c) for receiving evidence under one of the powers to which the rules in Part 18 apply (measures to assist a witness or defendant to give evidence)."

29. Two points must be made about rule 3.2(4). First, it should be noted that at the time of the trial, the rules in Part 18 applied not only to a special measures direction but also, by rule 18.1(e), to a direction for a witness to give evidence by live link under s32 of CJA 1988 or s51 of CJA 2003. Rule 18.24 contained provisions as to an

application for such a live link direction, including a requirement that an applicant for a live link direction must, unless the court otherwise directs, identify the place from which the witness will give evidence.

30. Secondly, the meaning of "appropriate live links" is explained in part 3N.4 of the Criminal Practice Directions. The word "appropriate" –

> "… is not a term of art. It has the ordinary English meaning of 'fitting' or 'suitable'. Whether the facilities available to the court in any particular case can be considered appropriate is a matter for the court, but plainly to be appropriate such facilities must work, at the time at which they are required; all participants must be able to hear and, in the case of a live link, see each other clearly; and there must be no extraneous noise, movement or other distraction suffered by a participant, or transmitted by a participant to others. What degree of protection from accidental or deliberate interception should be considered appropriate will depend upon the purpose for which a live link or telephone is to be used. If it is to participate in a hearing which is open to the public anyway, then what is communicated by such means is by definition public and the use of links such as Skype or Facetime, which are not generally considered secure from interception, may not be objectionable. If it is to participate in a hearing in private, and especially one at which sensitive information will be discussed – for example, on an application for a search warrant – then a more secure service is likely to be required."

31. Given that Samad was a proposed defence witness, it is necessary also to refer to s6C of the Criminal Procedure and Investigations Act 1996 ("CPIA Act 1996"), which, so far as is material for present purposes, provides –

> "**6C Notification of intention to call defence witnesses**
>
> (1) The accused must give to the court and the prosecutor a notice indicating whether he intends to call any persons (other than himself) as witnesses at his trial and, if so –
>
> (a) giving the name, address and date of birth of each such proposed witness, or as many of those details as are known to the accused when the notice is given; …
>
> (3) The accused must give a notice under this section during the period which, by virtue of section 12, is the relevant period for this section.
>
> (4) If, following the giving of a notice under this section, the accused –
>
> (a) decides to call a person (other than himself) who is not included in the notice as a named witness …

> he must give an appropriately amended notice to the court and the prosecutor."

32. The effect of s12 of the 1996 Act, and of regulation 2(3) of the CPIA Act 1996 (Defence Disclosure Time Limits) Regulations 2011, is that the relevant period referred to in s6C(3) is the period of 28 days beginning with the day on which the prosecutor complies, or purports to comply, with its initial duty to disclose under s3 of the 1996 Act.

33. In relation to an application for a live link for a witness who is in another country, it is necessary also to bear in mind the principle that one state should not seek to exercise the powers of its courts within the territory of another state without the permission (on an individual or a general basis) of that other state. It cannot be presumed that all foreign governments are willing to allow their nationals, or others within their jurisdiction, to give evidence before a court in England and Wales via a live link. In some states, it may be necessary for the UK to be asked to issue an International Letter of Request (ILOR) to the state concerned. The guidance recently issued by the Lord Chief Justice, at paragraph 18, explains this important point as follows:

> "Where the participant is abroad, then (depending on the country concerned) the court will wish to consider whether a live link would risk damaging international relations so as to be contrary to the public interest. The factors to consider, and the checks that can be made, are set out in *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 00286 (IAC)."

The judgment in *Agbabiaka* explains that a request can be made to the Taking of Evidence Unit at the Foreign and Commonwealth Office, to enquire whether it is aware of any diplomatic or other objection from the country concerned to the providing of evidence by a live link.

34. Although that recent guidance had not been issued at the time of the trial, the judge specifically drew the attention of the parties to this issue and provided them with a copy of guidance issued by the Crown Prosecution Service ("CPS"). That guidance, whilst obviously directed to prosecutors, included the following passage which was also relevant to defence representatives:

> "Some countries will allow requests to be arranged and conducted through informal channels, through a police to police basis, or even via direct contact with the witness from the UK. However, in many countries, a direct approach to a voluntary witness is not permitted and an ILOR will be required to establish a live link at trial.
>
> Many countries will rarely, if ever, make use of live link in criminal proceedings and will not have the necessary equipment. In these cases, it is vital that the prosecutor considers these issues at an early stage as it is probable that the request to set up a live link in such cases will take many months of planning. In some countries a live link will not be technically possible, although is possible that the requested

> state will allow the UK to supply the necessary equipment and expertise."

35. The CPS guidance also included a non-exhaustive list showing the approach adopted by a number of countries. This list did not identify Bangladesh as a country which required an ILOR or from where a live link was not possible.

36. In addition to the potential for diplomatic objections, it is necessary in this context to bear in mind both the administrative burden on court staff which is likely to arise if a witness is to give evidence from another country via a live link, and the risks which may arise. As to the latter, paragraph 19 of the Lord Chief Justice's recent guidance explains –

> "The court does not have the same level of control over those participating in court proceedings remotely that it does over those who are physically present in the courtroom. It follows that a live link potentially gives rise to risks that will need to be considered. This is not likely to be an issue for professional participants, but in some cases it may be an issue for others. Defendants or witnesses might misuse the remote access that is provided by a live link so as (for example) to record the proceedings or take screen shots that depict the jury or a witness. A witness giving evidence by live link, from premises other than the court, might be subject to off-screen pressures that will not be evident to the court. If the participant is outside the jurisdiction then these risks may be greater. For the purpose of section 1 of the Perjury Act 1911, evidence from outside the United Kingdom by live link is treated as being made in the proceedings (section 52A(5)). It is unlikely that sanctions for contempt (eg putting screenshots on social media / breaching reporting restrictions) could in practice be imposed."

Hearsay evidence: the legal framework:

37. The relevant statutory provisions, to be found in sections 114, 116 and 121 of CJA 2003, were not affected by the CA 2020. So far as is material for present purposes, those sections provide:

> "**114 Admissibility of hearsay evidence**
>
> (1) In any criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if –
>
> (a) any provision of this Chapter or any other statutory provision makes it admissible, …
>
> (d) the court is satisfied that it is in the interests of justice for it to be admissible.

(2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following matters (and to any others it considers relevant) –

(a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;

(b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);

(c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;

(d) the circumstances in which the statement was made;

(e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be give and, if not, why not;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it."

"**116 Cases where a witness is unavailable**

(1) 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.

(2) the conditions are –

… (c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance …"

> "**121 Additional requirement for admissibility of multiple hearsay**
>
> (1) A hearsay statement is not admissible to prove the fact that an earlier hearsay statement was made unless –
>
> (a) either of the statements is admissible under section 117 [business documents], 119 [inconsistent statements] or 120 [previous statement by the witness],
>
> (b) all parties to the proceedings so agree, or
>
> (c) the court is satisfied that the value of the evidence in question, taking into account how reliable the statement appears to be, is so high that the interests of justice require the later statement to be admissible for that purpose.
>
> (2) In this section 'hearsay statement' means a statement, not made in oral evidence, that is relied on as evidence of a matter stated in it."

38. As Mr Graffius submitted, relying in this regard on *R v Riat* [2012] EWCA Crim 1509 at [33] and *R v Friel* [2012] EWCA Crim 2871 at [26(5)], the judge in considering those statutory criteria was not required to be satisfied, as a condition of admissibility, that the evidence was reliable (s114(2)(e) and s121(1)(c)). The question for the judge, when determining admissibility, was whether the hearsay evidence was potentially safely reliable. Put another way, the judge was required to decide whether the hearsay evidence of Samad lacked sufficient reliability to be safely left to the jury.

Analysis: the first submission:

39. To answer the question identified in paragraph 1 of this judgment, under the temporary provisions of s51 of CJA 2003 in force at the material time the judge did have the power to direct that Samad could give evidence from Bangladesh via WhatsApp, if satisfied that it was in the interests of justice for her to do so. WhatsApp was capable of being an "other arrangement" which could meet the definition of a live video link in s56(2D) of CJA 2003. Given that it uses end-to-end encryption, it was capable of being regarded as sufficiently secure for use, in particular in the context of giving evidence in open court. We would add that a judge in similar circumstances today would similarly have the power to direct a live link via WhatsApp under the statutory provisions which are now in force, though it would of course be for the judge concerned to make a fact-specific decision in the circumstances of the particular case. If and insofar as the enquiries which the judge made led her to believe she lacked such a power, then she was misinformed.

40. However, it was for the appellant, as the party making the application for a live link direction, to provide the judge with all the requisite information. That was not done. Furthermore, there was a regrettable failure to take, in good time, the necessary steps to prepare the ground before applying for a live link direction in relation to Samad. We do not wish to be unfairly critical of the appellant's representatives who, like others at the time of the trial, were grappling with unfamiliar temporary legislation

and the Covid-related difficulties which were affecting trials in the Crown Court. It is however necessary to identify a number of respects in which the application was seriously deficient.

41. First, s6C of CPIA Act 1996 was not complied with. The requirements of that section apply, of course, to a witness who will give evidence in person as well as to a witness who will give evidence via a live link. But for obvious reasons, a failure by a defendant to comply with the requirements in respect of a witness who is in another country is likely to give rise to additional difficulties for the prosecution in investigating the proposed witness, and for the court in considering the application.

42. No written notice of Samad's identity was given at any stage. An indication was given at a pre-trial hearing on 25 October 2019 that the defence may be calling witnesses from abroad and that a court room with live link facilities would therefore be needed; and an indication was given at a pre-trial review on 29 April 2021 that tests of a live link would be made at court. But no notice was ever given of the identity of the witness or witnesses concerned, and it appears that Samad was first named to the prosecution in the course of the trial. There was, accordingly, no sufficient opportunity for appropriate investigations to be made. That was, in the terms of s51(7)(a)(ii) of CJA 2003, an inhibition on the prosecution's ability effectively to test his evidence.

43. Secondly, it was accepted on behalf of the appellant that no steps were taken to establish whether Bangladesh was willing to permit a live link of the kind sought. The judge conducted her own researches, and helpfully provided the parties with the fruit of those researches, in the form of the CPS guidance to which we have referred in paragraph 34 above. That guidance did not list Bangladesh as a country which would require an ILOR, and from what we were told at the appeal hearing it may well be that Bangladesh would not have raised any diplomatic or other objection. The judge, however, had only the non-exhaustive list of countries in the CPS guidance which she herself had located. No request or enquiry, formal or informal, had been made of any relevant authority in Bangladesh. For the purposes of s51(7) of CJA 2003, Samad was both a witness to whom paragraph (a) applied and a participant to whom paragraph (b) applied. The failure to make any relevant enquiry meant that the judge lacked vital information in deciding whether, in the light of the factors listed in those paragraphs, it was in the interests of justice for a live link direction to be made.

44. Thirdly, and no doubt because the identity of the proposed witness was only revealed to the prosecution and to the court in mid-trial, no sufficient care had been taken to check the adequacy of the proposed arrangements in good time, or to consider suitable alternative arrangements should any technical or other problem arise. The submissions at the appeal hearing did not make it entirely clear to us why the proposed CVP link was unsuccessful, and a Microsoft Teams link was said not to be possible, when it was said that a WhatsApp link would succeed; but whatever the reason, the difficulty – or the possibility that there would be a difficulty - should have been identified much sooner. We note that, on top of the technical difficulties, Samad apparently did not have, or have access to, an email address; and the application was being made at a time when all official buildings in Bangladesh either had closed, or were about to close, for a period of several days to celebrate Eid.

45. These failures left the judge in a most difficult position. She was confronted in mid-trial with an issue of which no sufficient notice had been given, and for which no adequate or timely preparations had been made, and was asked to permit the giving of evidence from abroad via a medium which was not commonly used in criminal courts at the time.

46. As we have said, the judge did have the power to make a live link direction on the basis that the witness would give evidence via WhatsApp. If – which is far from clear – she refused the application on the basis that she had no power to grant it, then she was (through no fault of hers) in error. But even if she had been fully informed as to her power, she had no sufficient basis on which she could possibly exercise it in the appellant's favour. We do not see how the appellant can derive any assistance from the judge's willingness in principle to approve a CVP link. Nor can we accept the submission that the judge was able to, and did, make a proper assessment of all the factors listed in s51 of CJA 2003. She had no information about the attitude of the Bangladeshi authorities. The prosecution had had no opportunity even to verify Samad's identity, let alone to investigate any matters which might be relevant to his credibility. It is very difficult to see how the proposed arrangement – involving counsel holding the mobile phone connected to a phone held by Samad – could satisfy the requirements in paragraphs (a) and (b) of s56(2D); and even if those requirements could be met, it is difficult to see how the judge could have exercised effective control over what was happening in her court.

47. Finally, there was a dearth of information to enable the judge to assess the risks which might be involved in Samad giving evidence from Bangladesh, including any risk that he would be under any form of pressure from any other person. It does not appear there was even any clarity as to where precisely he would be when giving his evidence.

48. In those circumstances, the judge could not properly have concluded that the preconditions of a grant of leave under s51(4) of CJA 2003 – that it would be in the interests of justice to make a live link direction, and that the prosecution had had a sufficient opportunity to make representations – had been satisfied. Her decision to refuse the application for a live link was therefore correct. We accordingly reject the appellant's first submission.

49. Before leaving this first ground of appeal, we emphasise the need for early consideration and preparation of any applications – whether by the prosecution or by the defence – for witnesses to testify from another country via a live link. The relevant statutory provisions and Criminal Procedure Rules must be complied with; appropriate steps must be taken to ascertain whether the foreign state concerned has any objection to a person within its territory giving evidence as proposed to a court in England and Wales; and the technical and practical arrangements must be tested in good time, so that alternative ways of adducing the evidence can be considered if necessary.

Analysis: the second submission:

50. The defence wished to rely on Samad's statement as hearsay evidence that demands had been made and threats had been issued by the complainants' family to the appellant's family in Bangladesh. The fact that those demands and threats had been

uttered was the "matter stated" for the purposes of s116(1) of CJA 2003. Mr Graffius placed particular emphasis on the passage in Samad's short statement which we have quoted at paragraph 18 above. We are unable to accept his submission that the clear meaning of that passage is that Samad himself was present on the occasions mentioned and could therefore give direct evidence of the threats and demands he says were made. On the contrary, we regard the passage as notably unclear as to when, if at all, Samad was present and what, if anything, he personally heard. If the appellant wished to put Samad forward as an important witness of fact, his representatives had had many months to clarify, and if necessary amplify, the contents of the statement. No doubt the expectation had been that Samad would give his evidence orally via some form of live link, and would therefore be able to clarify relevant details; but in the event, reliance was being placed on an application to read the statement to the jury as hearsay evidence. That statement was simply inadequate for the judge to be satisfied that Samad could have given direct evidence of the "matter stated". We therefore agree with the judge that, although the condition in s116(2)(c) of CJA 2003 had been met, the application failed under s116(1)(a) because it had not been shown that Samad would have been able to give admissible oral evidence of the alleged threats and demands.

51. As to the attempt to rely on another part of Samad's statement as multiple hearsay, the appellant faced a similar difficulty. The relevant passage was hopelessly lacking in any detail as to when or in what circumstances Samad had been told things by his parents when he was "growing up", and it was unclear as to whether they were talking about demands made to them, or to one of them, or to the appellant or to some other member of the family. If that short passage had been read to the jury, it could only have served as an invitation to them to speculate as to its meaning. The judge in those circumstances could not be satisfied in accordance with a121(1)(c) of CJA 2003.

52. As to the alternative application under s114(1)(d) of CJA 2003, the appellant again faced similar difficulties, and the problems which we have mentioned in paragraphs 40-47 above were again relevant. The judge was clearly entitled to conclude that it was not in the interests of justice for the statement to be admitted as evidence of any "matter stated".

53. We therefore reject the appellant's second submission.

Analysis: the third submission:

54. The real issue in the case was whether the jury were sure that the sexual abuse occurred. The complainants all said it did. In cross-examination they maintained their allegations and explained why they had not reported the abuse until many years later – a delay which was in any event difficult to reconcile with the defence assertion that they were maliciously making false allegations because they were determined to obtain the land in Bangladesh. The appellant denied that he had done anything wrong. He too gave evidence and the jury were able to assess him. His failure initially to mention the supposed motive for the making of false allegations was a point which the jury could properly regard as counting heavily against him.

55. We are wholly unpersuaded that the inability of the appellant to adduce the contents of Samad's statement, whether given in oral evidence by Samad via a live link or read to the jury as hearsay evidence, casts any doubt on the safety of the convictions. The

prosecution had agreed to the adducing of documentary hearsay evidence as to the ownership and valuation of the land, which supported the appellant's case to the extent that it confirmed there was a valuable asset in the ownership of the appellant's family in Bangladesh. The contents of Samad's statement added little: they were lacking in detail and ambivalent in their terms. It was realistically accepted that the prosecution case at trial was a strong one. We are satisfied that the convictions are safe, and accordingly reject the third submission.

56. It was for those reasons that we dismissed the appeal.