IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202301260/B5

Neutral Citation: [2024] EWCA Crim 342

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 13 March 2024

Before:

LADY JUSTICE MACUR

MRS JUSTICE MAY

HIS HONOUR JUDGE LICKLEY KC
(Sitting as a Judge of the CACD)

REX

V

BEN SMITH

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MS H CHAPMAN appeared on behalf of the Appellant.
MR M WILSON appeared on behalf of the Crown.

J U D G M E N T

NOTE – THE RE-TRIAL IN THIS CASE HAS NOW TAKEN PLACE. ACCORDINGLY THIS JUDGMENT IS NO LONGER SUBJECT TO REPORTING RESTRICTIONS PURSUANT TO S.4(2) CONTEMPT OF COURT ACT 1981.
IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE THIS JUDGMENT TO ENSURE THAT NO OTHER RESTRICTIONS APPLY, IN PARTICULAR THOSE RESTRICTIONS THAT RELATE TO THE IDENTIFICATION OF INDIVIDUALS

1. LADY JUSTICE MACUR: The provisions of the Sexual Offences (Amendment) Act 1992 apply. Under those provisions, no matter relating to either complainant shall, during their lifetime, be included in any publication if it is likely to lead members of the public to identify them as the victim of the offences. This prohibition will apply unless waived or lifted in accordance with section 3 of the Act.
2. This judgment is subject to an order made pursuant to section 4(2) of the Contempt of Court Act 1981, postponing publication of any report of these proceedings until conclusion of the retrial, if such takes place, in order to avoid a substantial risk of prejudice to the administration of justice in those proceedings.
3. On 22 March 2023, the appellant was convicted of two offences of rape of "C1", five offences of rape of "C2" and two offences (one in relation to each complainant) of controlling or coercive behaviour in an intimate or family relationship, contrary to section 76(1) and (11) of the Serious Crime Act 2015. He was sentenced to a total of 14 years' imprisonment. Other ancillary orders were made. This is his appeal against conviction by leave of the single judge.
4. The grounds of appeal challenge the adequacy of the judge's direction on cross-admissibility, given on both limbs of "coincidence" and "propensity", as insufficiently clear, concise and well-tailored. That is, it is submitted, that the direction was a significant one in the context of the factual circumstances in this case and required a detailed analysis of the evidence within the written and oral directions to the jury.
5. It is submitted that in that part of the direction dealing with *coincidence* the judge should

have included greater detail of the similarities and differences of the two complainants accounts . He ought to have directed the jury more carefully as to the possibility of contamination, given the indirect contact between them by an individual ("D") who was not a witness in the case. As to *propensity*, the judge did not distinguish adequately or at all between the counts alleging rape and the counts alleging controlling and coercive behaviour in an intimate family relationship. This meant the jury may have concluded or mistakenly believed that the direction meant that, if they were satisfied as to the latter conduct, they could use it as evidence that he was more likely to commit sexual offences.

6. Ms Chapman, who appears on behalf of the appellant, was not trial counsel. Mr Myles Wilson, who appears on behalf of the respondent prosecution, was trial counsel and seeks to defend the direction of the judge in this regard.

The Facts in Brief

7. The appellant (then aged 23) met C1 (then aged 16) at a Christmas family get together in 2017. Shortly thereafter a sexual relationship developed between them. The appellant was C1's first boyfriend. The relationship lasted until July 2018. Thereafter, the appellant formed a relationship with C2, then aged 19. C1 and C2 were unknown to each other.

8. In March 2021, C1 told her mother that whilst she was in a relationship with the appellant, he had raped her and had been controlling towards her. C1's mother immediately contacted the police and reported the matter. Upon hearing about the allegations D , the appellant's aunt, (who was at that time the partner of C1's mother) contacted C2 and asked how the appellant had treated her during their relationship. The appellant's aunt was not a prosecution witness but her telephone call to C2 had been

witnessed by C1's mother. C1's mother said her partner asked C2 if the appellant had ever hurt her and explained that she needed her to be honest. She said that her partner did not tell C2 what C1 had said.

9. C2's details were given to the police who in turn spoke to C2. She gave a similar account of the appellant raping and controlling her during their relationship. The appellant was arrested on suspicion of raping both. He was interviewed by the police and denied the allegations in their entirety. The defence case was that the allegations were untrue. Sexual relations between the appellant and each complainant were always consensual. Whilst there may or may not have been collusion between the two complainants, the appellant's aunt was a link between them and during the course of her telephone conversation with C2 it was likely that she had revealed some of the details of C1's allegations and therefore influenced the complaint made by C2.
10. The appellant gave evidence and called five witnesses to give evidence of his good character.
11. The prosecution relied upon the evidence of C1 and C2, recent complaint, distress, the significant degree of similarity in the complainants' accounts and propensity. The case was put on the basis that there was no coincidence that two girls, who did not know each other, had made allegations of a similar nature regarding the appellant's behaviour. The issue for the jury was whether the complainants were telling the truth or whether they had colluded or been influenced by each other.
12. The focus this appeal brings upon the cross admissibility direction requires that we give further detail of the allegations made by both complainants.
13. C1's evidence was that she and the appellant had sexual intercourse for the first time on 4 January 2018. The appellant had bent her over a kitchen counter and had sex with her

from behind. She just "let it happen". They had sex almost every time they saw each other thereafter. She was never comfortable with this and did not get any pleasure from it.

14. In relation to count 1 on the indictment (an offence of anal rape), they had been to the appellant's aunt's house after a shopping trip. The appellant said that he wanted to have anal sex and that he would only put the tip of his penis into her anus. However, despite her telling him not to do so, the appellant inserted his entire penis into her anus and had intercourse with her until she bled. She said she was audibly in pain but the appellant continued to have anal sex with her. She was screaming and he eventually stopped.
15. In relation to count 2, an offence of vaginal rape, she described an occasion when she and the appellant were lying on the sofa in her living room and everyone else was in bed. She said the appellant pulled her pyjama shorts to one side and inserted his penis into her vagina from behind. She did not want to have sex with him as her family were in the house. She did not tell him to stop but she said she was very "standoffish" and not being sexual back.
16. In relation to the controlling and coercive behaviour, she described how the appellant would often pin her down on her back by putting his knees on her shoulders and a pillow over her face. He would push the pillow down so she could not breathe despite kicking and scratching him to let her up. She said that on one occasion the appellant spat on her face, put his fingers inside her throat and squeezed until she could not get any air. She thought that he was just playing but said that it terrified her. He was really rough with her and she was covered in bruises. She had decided to report what had happened after reading about the Sarah Everard case. A couple of months after the relationship ended, she told a friend and her cousin what had happened. In March 2021, she told her mother

what had happened, following which her mother contacted the police.

17. C1's mother gave evidence that she became concerned as the appellant was quite rough. On one occasion, she heard C1 complaining that the appellant had hurt her so she entered the room to find the appellant kneeling on top of C1. She described C1 as being on edge and withdrawn while she was with the appellant. After the relationship ended, C1 began self-harming and became depressed and she became very protective of her mother and her two younger sisters. She described an occasion when they went to her partner's house and the appellant was there. C1 started hyperventilating and crying in the car shouting, "Drive. I don't want to be near that paedophile."
18. In March 2021, C1 had told her that the appellant had raped her anally and also told her that the appellant had pinned her down with his knees on his shoulders, spat in her face, held a pillow over her face so she could not breathe and forced himself upon her. C1's two sisters gave consistent recent complaint evidence.
19. C2 gave evidence that the appellant was "quite forward" from the first date, and from there became more aggressive and manipulative. She said that she often bled after sex and on one occasion she attended a clinic and was informed that the appellant had torn her vaginal wall. Count 4 concerned a specific incident when she woke to find the appellant having sex with her, penetrating her vagina from behind. She was shocked and confused but just let it happen. She did not say anything to the appellant until afterwards, when he seemed annoyed that she was questioning him about it.
20. Count 5 was a multiple offending count. Given as an example, the appellant grabbed her arms and forced her to sit on top of him and have sex with him despite the fact that she was crying and saying, "I don't want to". Count 6 referred to anal rape. The complainant was on all fours and the appellant behind her. She was consenting to vaginal sex;

however, the appellant aggressively inserted his penis into her anus which made her cry and to fall forwards. She asked him to stop and get off her and she was crying. The appellant said, "It's okay" as if trying to comfort her for what he had done. She said that she was shocked and that it really hurt.

21. Count 7 and 8 on the indictment reflected multiple occasions when the appellant had put his knees on her shoulders so she was unable to move, then put his penis into her mouth and forced her to suck it. If she was unable to breathe or wanted to him to stop, he did. She said she felt trapped and unable to speak up to him. He would ejaculate into her mouth.
22. In relation to the controlling and coercive behaviour, she recalled an occasion when the appellant held a pillow over her face for approximately 20 seconds which caused her to panic. She said that the appellant would say horrible things to her and she was afraid of him. On occasion he would grab her and bite her arm.
23. She said that in 2021, she was contacted by D. She said that D mentioned another girl but did not give her a name. D asked if the appellant had ever done anything to her and she said "Yes". D then told her that the other girl had come forward and asked if she would "help" to which she agreed.
24. In September 2021, she reported matters to the police. She said that she had not contacted the police prior to this as she did not want to go through this process. She wanted nothing more to do with the appellant and for it all to be over.
25. C2's mother said that when D contacted C2, she was reluctant for her daughter to get involved. Although C2 was shaky and upset, she agreed to speak to D. She said that C2 had never told her exactly what the appellant did to her and, if she asked questions C2 would 'break down'.

26. In cross-examination, she said that C2 ended her relationship with the appellant because she believed he was seeing other girls behind her back. There was no suggestion at that point of physical or sexual misconduct. C2 told her that she had told D that he had been mentally abusive towards her.

27. Three of C2's university friends gave evidence - one of recent complaint of controlling behaviour and bruises described as the result of rough, although not alleged non-consensual, sex. Another gave evidence of demeanour, and the third confirmed that she had been told of the tear in C2's vaginal wall, that the appellant had had sex with her whilst asleep and had held a pillow over her face.

28. The appellant denied he had ever placed a pillow over C1's head. He said they used to playfight a lot and, during the course of playfighting, his knees may have ended up on her shoulders but he was never aware of hurting her or causing her to fear that violence would be used against her. He and C1 never had anal sex and he had no recollection of having sex with C1 in her living room. There were no issues between them and no suggestion that he had mistreated C1 before now.

29. He said sex with C2 was "frequent, nice and vigorous" but was always consensual. He never placed a pillow over her head or hit her, even when they were playfighting. He never had sex with C2 when she was asleep. On one occasion his penis entered her anus accidently during the course of rigorous vaginal sex. He said that he immediately removed his penis from her anus and apologised. They stopped having sex and cuddled. It was absolutely fine.

30. They did have oral sex. It was a frequent consensual part of their love life. After a discussion in which they both agreed they wanted to try it, he inserted his penis into her mouth whilst on top of her. He knew nothing about C2's allegations prior to his arrest

and did not know that his aunt had spoken to her.

31. The prosecution's cross-admissibility application on notice, made pursuant to section 101(1)(d) prior to trial, was in short form, namely applications made to adduce cross-admissibility bad character evidence between the allegations made by the complainants C1 and C2. The prosecution case is that the defendant raped both of these complainants and was controlling and coercive towards them. This shows a propensity to be sexually and physically abusive to his partners. In addition, their separate and independent allegations rebut *coincidence* especially with the factual similarities detailed in their accounts.

32. Neither defence trial counsel (Mr Mills) in his advice on appeal nor Ms Chapman, suggest that the indictment should have been severed, and consequently both have conceded that they were not surprised by the application made on behalf of the prosecution, nor did they seek to deter the judge from acceding to the application. Their complaint is the adequacy of the direction given.

33. The judge prepared draft written directions which he shared with counsel immediately prior to summing-up the case to the jury. Trial counsel, Mr Mills, candidly acknowledges he made no complaint about lack of, nor counter suggestion as to the need for supplementation of the detail of the combined cross-admissibility direction. However, with the benefit of hindsight he now considers that there was an inadequate time for him to give proper attention to the proposed written directions. Mr Wilson, on behalf of the respondent, now concedes with hindsight, that the directions could have been better prepared.

34. The cross admissibility direction given in writing to the jury were mirrored verbatim in the oral summing-up to the following effect:

"Now you have heard evidence from two women who have told you what they say happened with the defendant. I have already told you to consider each count separately but there are two ways in which the evidence on one count may assist you when considering another count. You will judge the reliability of each witness. You will decide the extent to which her evidence can help you. Whether you wish to take evidence into account and how you wish to take evidence into account is a matter for you to decide, but you should consider it with care. You only rely on prosecution evidence which you are sure is reliable. So coincidence. Approach it in this way: first you must remember to consider each count separately. It does not follow from a verdict of guilty or not guilty for one offence that you return the same verdict for another. Secondly, you must be sure that one witness has not put her head together with another and for whatever reason deliberately made up her evidence against the defendant. Look at the evidence of each witness in turn. If you think that that has or might have happened, then you will disregard her evidence entirely, but if you are sure that the evidence has not been deliberately made up, you should go on to consider whether the evidence of one witness has been influenced in any way, either consciously or subconsciously by the evidence of another. If this might have happened, then you should treat her evidence with great care.

If you are sure that the witnesses have not been influenced either consciously or unconsciously by each other, you may go on to consider whether there is a degree of similarity between the allegations made by the complainants. If you conclude that there is a significant degree of similarity, it is open to you if you think it right to do so to consider whether it is no coincidence that they make such similar allegations against the defendant and whether it is more likely if you are sure that it is not a coincidence, that he is guilty of one or more of the offences with which he is charged.

Now the prosecution say that here there are two girls who do not know each other making very similar allegations about the defendant's behaviour whilst in a relationship with them, including putting a pillow over their head and being rough with them. The defence, on the other hand, say that whilst there may or may not have been collusion between the complainants, there certainly was a link between them in the form of [D] and her telephone conversation with [C2] prior to her police complaint which may have revealed some of the details of [C1's] allegations and therefore influenced the complaint made by [C2]. These are the issues that you need to consider.

> Propensity. Approach it in this way: you should first decide whether the defendant is guilty of one of the offences with which he is charged. You may then consider whether he has a propensity or a tendency to commit offences of that nature. That is a matter for you. If you are not sure that he does, then your conclusion that he is guilty of one offence does not support the prosecution case in respect of another. If you are sure that he has such a tendency, then it may provide additional support for the other allegations against him, but you cannot convict solely or even mainly based on a person's propensity. Just because a person has done something on one occasion, it does not mean that he has done it on another, so propensity to commit an offence is not direct evidence that a person has committed an offence."

Discussion

35. Absent justification to sever the indictment cross-admissibility was inevitably an issue that would arise if only on the basis that two young women, who had consecutively been in a sexual relationship with the appellant, were making complaints of rape and coercive and controlling behaviour against him (see Blackstone's Criminal Practice at F13.58 - 13.59):

> "The underlying principle is that the probative value of multiple accusations may depend in part on their similarity, but also on the unlikely prospect that the same person would be falsely accused on different occasions by different and independent individuals [emphasis provided]. The making of multiple accusations is a coincidence in itself, which must be taken into account in deciding admissibility. As Lord Cross of Chelsea put it in *DPP v Boardman* [1975] AC 421 (at p.460):
>
> '... the point is not whether what the appellant is said to have suggested would be, as coming from a middle-aged active homosexual, in itself particularly unusual but whether it would be unlikely that two youths who were saying untruly that the appellant had made homosexual advances to them would have put such a suggestion into his mouth.'"

36. However, such directions on cross-admissibility are a potential minefield and call for careful consideration between judge and counsel as to how the direction should be

tailored to the facts of the case and whether the jury should be directed on one or both limbs of *propensity* and *coincidence* (see R v Brennand [2023] EWCA Crim 1384, at paragraph 41). Specifically:

> "The overarching principle is that the jury must be given directions that are relevant to and reflect the particular circumstances in which questions of cross-admissibility arise in the case, not template directions without adaptation..."

37. The prosecution application was made in good time and, albeit in very sparse terms, is clearly aimed at both limbs of cross admissibility. Nevertheless, it was unlikely to, and nor did it, prompt the judge into an early consideration of the detail and extent of the direction that should be given. Certainly, it did not lead to the careful assessment and articulation of the topic when directing the jury as occurred in the trial of Brennand.
38. Unfortunately, neither defence nor prosecution counsel picked up the slack when provided with the written directions. We are not impressed by a suggestion that there was inadequate time in which to do so. Both counsel had a responsibility to assist the judge in this respect, albeit that, at the end of the day, it was for the judge to fashion his direction on this difficult concept appropriately.
39. Absent specific complaint on behalf of the appellant, it is unnecessary for us to comment upon whether, on the relatively straightforward circumstances of these two complainants' allegations, it was necessary to direct the jury on both limbs of cross-admissibility or indeed at all. We necessarily focus upon the terms of the direction given in view of the grounds of appeal laid.
40. As this Court makes clear in Brennand, there is no logical reason why a legal direction which caters for both limbs of cross-admissibility needs to deal with *coincidence* or

propensity first. However, we conclude that logically the first issue would be to require the jury to be sure that there had been no deliberate or, alternatively, innocent taint of C1 and C2's evidence. The judge did not, when summarising the evidence, remind the jury as to his direction on the risk of collusion/contamination. However, he did remind them of the defence case that:

> "... whilst there may or may not have been collusion between the complainants, there certainly was a link between them in the form of [D] and her telephone conversation with [C2] prior to her police complaint which may have revealed some of the details of [C1's] allegations and therefore influenced the complaint made by [C2]. These are the issues that you need to consider."

41. In the circumstances of this case, we regard this part of the judge's direction to have been sufficient. We note in this respect that the evidence from C2 and C1's mother, who witnessed the call, was that C2 was not provided with the details of C1's allegations. Neither prosecution nor defence sought to call D. There was nothing that we observe disadvantaged the appellant in that part of the direction.

Coincidence

42. As indicated above, the probative value of multiple accusations may depend in part on their similarity but also on the unlikely prospect that the same person would be falsely accused on different occasions by different and independent individuals. The issue taken on this limb of the direction is of a lack of particulars of the similarities and conversely the differences between the two accounts. As indicated above, the judge's identification of the similarities is sparse and generalised.
43. Ms Chapman, points out the several differences of detail in the allegations of each of the

two complainants. Whilst we are not persuaded that this in itself would unravel the legal direction on *coincidence* , we agree with her that the direction is not as helpful as it should have been and is certainly not one that we hold up as a model of its kind. It may be said to be technically complete and was in the context of the clear direction that the jury must consider each count separately, and that they were not to assume that the appellant's guilt, if so found on one count, was indicative of the guilt on the others. We regard this part of the direction as adequate and, if it stood alone, we would not, as we intend to do so, allow this appeal.

Propensity

44. This aspect of the direction had given us considerable cause for concern. The direction is imprecise and confused. Having first said that the jury's finding that the appellant was guilty of one offence may be used by them to indicate a propensity to commit similar offences of that nature, the direction then refers to additional support for the other allegations against him. This appears to be clumsy phraseology, albeit that we consider that the judge would not be in error in perhaps directing the jury, if he had applied his mind to the facts that, that if they were sure that the appellant had a propensity to be coercive and controlling in certain respects during sexual intercourse, this was a factor that could be taken into account by the jury in considering the complainant's evidence, which amounted to submission rather than consent to sexual acts. However, this was not spelt out to the jury and it is pertinent to note that Mr Wilson steers away from this course in the Respondent's Notice and in his oral submissions to us by maintaining that there was no danger of the jury using the offence of controlling and coercive behaviour as showing a propensity to rape as they are not offences of "that nature."

45. We are also concerned that the judge took no time to explain to the jury that it was in relation to each complainant that the direction of cross-admissibility applied; that is, if the jury were sure in relation to count 1 as it related to C1, that she had been raped then, if they were sure that this indicated a tendency on the part of the defendant, they would be entitled to go on to consider that when considering the evidence in relation to C2, who had also made complaints of sexual assault.

46. Further, as Ms Chapman indicates, there is nowhere in the judge's direction an attempt to help the jury in relation to what is called "double counting".

47. There is no avoiding the fact that this direction was not fit for purpose in a number of respects. In general, there is some unfortunate phraseology which is unhelpful to the jury, for example:

> "Whether you wish to take evidence into account and how you wish to take evidence into account is a matter for you to decide, but you should consider it with care."

Obviously it is not for the jury to decide how they take the evidence into account in relation to *propensity*, or *coincidence* but to follow the judge's direction upon how to do so. Further, there has been no attempt to tailor the direction to the particular facts of the case. The judge makes sparse reference to the similarity of the complainants' evidence, beyond reference to the use of a pillow and the appellant being rough. He did not point out other similarities or conversely the differences. He did not, when reminding the jury of the complainants' evidence, interweave the necessary considerations for cross-admissibility to apply. The direction on *propensity* is in the scantiest of terms. It could be said, perversely and fortunately, that the succinct nature of the direction given may well have avoided the jury from falling into error in to double counting *coincidence*

and *propensity*, but we simply cannot be sure.

Are the convictions unsafe?

48. There is no full transcript of C1 and C2's evidence, but we proceed on the basis that the critique provided in defence trial counsel's advice on appeal is correct. There were obviously several jury points to be made and Ms Chapman reminds us of them. We have little doubt that these points were made on the appellant's behalf.
49. Mr Wilson, on behalf of the prosecution, maintains that there was strong and cogent independent evidence, in relation to each complainant individually, and that the direction as to *coincidence* and *propensity* mattered little in the overall aspect of the strength of the case against him.
50. Unfortunately, we cannot accept that submission. The prosecution made application for the direction of cross-admissibility on both limbs to be given and made play of the same in advancing the case. This was a case in which it is impossible to ignore that a direction on cross-admissibility may have held some real significance to the jury's discussions and conclusions. Ultimately, we cannot be satisfied that these convictions are safe.
51. Consequently, we allow the appeal against conviction.
52. LADY JUSTICE MACUR: Mr Wilson.
53. MR WILSON: I ask for leave, please, to retry the defendant on those counts.
54. LADY JUSTICE MACUR: All of them?
55. MR WILSON: Yes.
56. LADY JUSTICE MACUR: Ms Chapman.
57. MS CHAPMAN: Yes, I cannot argue against that.
58. LADY JUSTICE MACUR: We allow the appeal. We quash all of the convictions. We

order a retrial on all of the convictions. We direct that a fresh indictment be served within 28 days of this order. The appellant will be re-arraigned on the fresh indictment within 2 months. The venue for retrial shall be determined by the presiding judge for the circuit, which is the northern circuit. The question of whether the appellant will be held in custody or bail will be reserved to the trial judge. The Registrar is to obtain a transcript of the sentencing remarks, if not already available, in order that that may be provided to the Crown Court if, on retrial, convictions ensue. And as already noted, we make an order under section 4(2) of the Contempt of Court Act 1981 restricting reporting of the proceedings until after the conclusion of the retrial.

59. I amend one of the directions I have given. I am going to please ask that not only shall the venue for retrial be determined by the presiding judge for the circuit, but he should also determine the judge who is to try this appellant in due course.
60. LADY JUSTICE MACUR: Ms Chapman, is there anything further?
61. MS CHAPMAN: No, there is not. Thank you.
62. LADY JUSTICE MACUR: Mr Wilson, is there anything further?
63. I should remind you, Ms Chapman, on behalf of your client, that his legal aid will not continue automatically.
64. MS CHAPMAN: No.
65. LADY JUSTICE MACUR: Therefore, it will be necessary for an application to be made for legal aid and representation orders, and those applications need to be made in writing to the Legal Aid Agency, CAT, Level 6, Union Street, L3 9AF; there is a DX 745810 Liverpool 35 but you can get the address again if needs be from our Associate below.
66. MS CHAPMAN: Thank you very much.
67. LADY JUSTICE MACUR: You will want to have a conference post-hearing.

68. MS CHAPMAN: Yes, I had said that I need not do it now because I will see him separately later in the week.
69. LADY JUSTICE MACUR: Mr Wilson, there is recent authority about the necessity on getting an indictment drafted and submitted on time. There is no leeway in respect of that. It is also necessary, from the point of view that this needs to be seized by the Crown Court so that any ancillary orders may be made.
70. MR WILSON: Yes, I will make sure that is done.
71. LADY JUSTICE MACUR: Thank you very much indeed.
72. MS CHAPMAN: Before my Lady rises, as far as the issue as to his costs are concerned in respect of these proceedings, he privately funded these particular proceedings. I do not know whether or not any costs would be available to him because I do not know what his eligibility criteria were for legal aid in the lower court.
73. LADY JUSTICE MACUR: Well, he was actually given a representation order by the single judge and it was then said that he was being represented privately and therefore that representation order was dismissed. But it seems to me on those circumstances that he is going to have a bit of difficulty persuading us that…
74. MS CHAPMAN: I think that is right. I tried to find what the regulations are but certainly in the lower court, in those circumstances, where someone elects to pay privately, they would still be entitled to their costs but only at legal aid rates.
75. LADY JUSTICE MACUR: Okay. Have you put in a schedule for costs?
76. MS CHAPMAN: I will ensure that is done. But the reality, whatever the schedule would say, the Court only has the power to allow costs at legal aid rates in any event which would only be on a fixed hearing basis.
77. LADY JUSTICE MACUR: Well, we will consider your schedule when it comes.

78. MS CHAPMAN: Thank you.

79. LADY JUSTICE MACUR: Obviously you must serve a copy of that on the prosecution and because it would come from them, would it not, not from the legal aid fund, which might be a reason not to consider favourably the application that you make if it was a decision freely entered into by the appellant, but we will see what you say. If you are going to make that application then you should make the application, in writing, with written submissions, by 4.00 pm on Friday.

80. MS CHAPMAN: Thank you.

81. LADY JUSTICE MACUR: Any submissions in response by 10.00 am on Monday morning, please.

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