Neutral Citation Number: [2019] EWCA Crim 1270

Case No: 201605611 C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WORCESTER
MR RECORDER DALY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2019

Before :

LORD JUSTICE DAVIS
MR JUSTICE WARBY
and
MR JUSTICE JULIAN KNOWLES

- -

Between :

R	**Respondent**
- and -	
Roberts	**Applicant**

- -
- -

E. Mushtaq for the **Applicant**
A. Muller for the **Respondent**
D. Atkinson QC as **Amicus Curiae**

Hearing date : 25 June 2019

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Approved Judgment

Lord Justice Davis :

Introduction

1. On 15 February 2016 in the Worcester Crown Court the applicant was found unfit to be tried under s.4 of the Criminal Procedure (Insanity) Act 1964. At a further hearing, and when counsel had been appointed by the court to put the case for the defence, he was pursuant to s.4A of the 1964 Act found by a jury on 18 February 2016 to have done the act in respect of two offences of meeting a child following sexual grooming (s.15 of the Sexual Offences Act 2003). He was in due course sentenced to a hospital order under s.37 of the Mental Health Act 1984. No restriction order under s.41 of that Act was made. A Sexual Harm Prevention Order was also imposed.

2. Some 9 months out of time the applicant, acting in person and corresponding from a psychiatric hospital, applied (or purported to apply) for leave to appeal against the finding that had committed the acts. He also applied for leave to appeal against sentence, for bail, for leave to adduce further evidence and for a representation order. These various applications were refused by the Single Judge.

3. The applicant, still acting in person, then sought (or purportedly sought) to renew his application to the Full Court. By this time, potential procedural complications in the applicant acting in person, when previously found unfit, had been identified. Accordingly, counsel (Ms Mushtaq, who had not appeared below) was appointed by the Registrar to put the case for the applicant: and she appeared before us at the hearing and very helpfully advanced the points which she considered could properly be advanced in his interests. We were also helpfully addressed by Mr Muller (who had not appeared at the substantive hearings below) for the Crown. In addition, Mr Atkinson QC had been appointed to act as amicus curiae: and we are particularly grateful to him for the detailed submissions which he advanced on a number of the various procedural complexities arising.

4. At the conclusion of the hearing, the court was entirely satisfied that there were no available substantive grounds of appeal which were realistically arguable. Accordingly, we announced our conclusion that the renewed application was refused. However, we indicated that we would give our reasons at a later date. This essentially was because the court wished to reflect on the points of practice and procedure which this application had thrown up and which could arise in other such cases. These are our reasons.

Background

5. The background, in summary, was this.

6. At around Christmas 2003 the applicant visited the family of a young girl (IN) in Harwich. It was said that this was an address where he himself had once lived. On that visit he spoke to IN, who was then around 11, in a way which she was to say was very familiar and which made her feel uncomfortable. Contact however persisted. He had, for example, returned the following year, with presents for her and later sent a very familiar card to her. On other subsequent occasions, he had again visited her home and, further, had also been observed apparently waiting outside the house. The police were

contacted when IN at a yet later stage received a letter talking about other girls and giving details about her boyfriend. Subsequently, she was also to identify herself in a number of photographs on Bebo and Facebook posted when she was between 14 and 21 and stored on the applicant's computer and when, in one of the images, her face had been superimposed on to another person's body in a sexualised pose. At all events, the conduct of the applicant with regard to IN when she was said to be under the age of 16 was to form Count 1 of the original indictment. The pseudo photograph had also initially been charged as an offence of making a pseudo photograph of a child; but that was subsequently withdrawn when it was realised that IN could not by that time be said to have been under 16 for that purpose.

7. Then, in August 2014, the applicant approached two girls (KL and SB), each of whom was aged 13, in the computer area of a public library in Worcester (where he lived). They described him as inappropriately familiar. One said that he also talked about videos of young girls being raped. They tried to laugh his approach off. He then approached them again the following day and suggested that they go to lunch together. The day after that, he contacted them through social media, asking to be friends. Subsequently he saved their Facebook profiles and queried some of the details. In due course the two girls complained. These matters were to be the subject of what became Counts 2 and 3 on the original indictment.

8. The prosecution case was essentially based on the evidence of IN (and her step-father) and related communications; the photographs and pseudo photograph stored on the applicant's computer, as well as other material stored on that computer relating to young girls; the evidence of KL and SB; and the Facebook correspondence. The applicant also had been found to have a bag at his home containing, among other things, a school time-table, hairclips and marbles.

The statutory context

9. Sections 4 and 4A of the 1964 Act provide as follows:

> "4 - (1) This section applies where on the trial of a person the question arises (at the instance of the defence or otherwise) whether the accused is under a disability, that is to say, under any disability such that apart from this Act it would constitute a bar to his being tried.
>
> (2) If, having regard to the nature of the supposed disability, the court are of the opinion that it is expedient to do so and in the interests of the accused, they may postpone consideration of the question of fitness to be tried until any time up to the opening of the case for the defence.
>
> (3) If, before the question of fitness to be tried falls to be determined, the jury return a verdict of acquittal on the count or each of the counts on which the accused is being tried, that question shall not be determined.
>
> (4) Subject to subsections (2) and (3) above, the question of fitness to be tried shall be determined as soon as it arises.

> (5) The question of fitness to be tried shall be determined by the court without a jury.
>
> (6) The court shall not make a determination under subsection (5) above except on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved.
>
> 4A. – (1) This section applies where in accordance with section 4(5) above it is determined by a court that the accused is under a disability.
>
> (2) The trial shall not proceed or further proceed but it shall be determined by a jury –
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> (a) on the evidence (if any) already given in the trial; and
>
> (b) on such evidence as may be adduced or further adduced by the prosecution, or adduced by a person appointed by the court under this section to put the case for the defence,
>
> whether they are satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, that he did the act or made the omission charged against him as the offence.
>
> (3) If as respects that count or any of those counts the jury are satisfied as mentioned in sub-section (2) above, they shall make a finding that the accused did the act or made the omission charged against him.
>
> (4) If as respects that count or any of those counts the jury are not so satisfied, they shall return a verdict of acquittal as if on the count in question the trial had proceeded to a conclusion.
>
> (5) Where the question of disability was determined after arraignment of the accused, the determination under subsection (2) is to be made by the jury by whom he was being tried."

These statutory provisions are further supplemented, with regard to the Crown Court, by Rule 25.10 of the Criminal Procedure Rules. It may also be noted that, under s.5(2) of the 1964 Act, the court's power of disposal is limited to a hospital order (with or without a restriction order), a supervision order or an absolute discharge.

10. It is further to be noted that, whilst the Pritchard criteria (*R v Pritchard* (1836) 7 C&P 303*)* have been much debated, they continue to provide the underpinning approach to the assessment of fitness to plead. If an accused can sufficiently understand the course of the proceedings, by reference to those criteria, then he or she is fit to plead and be tried even though he or she may thereafter act against his or her own best interests. The matter is subject to very helpful amplification in the decision of a constitution of this court in *Marcantonio and Chitolie* [2016] EWCA Crim 14, [2016] 2 Cr. App. R 9, in particular at paragraphs 8 and 9. As there emphasised, the assessment of capacity has

to be addressed not in the abstract but in the context of the particular case: "thus the court should consider, for example, the nature and complexity of the issues arising in the particular proceedings, the likely duration of the proceedings and the number of parties". Regard should also be had to the special measures, and the use of intermediaries, that can now (under modern procedures) be available to assist an accused at trial.

11. Further, it has been emphasised in a number of authorities that a s.4A hearing is not a criminal trial: see, for example, *Wills, Masud, Hone and Kail* [2015] EWCA Crim 2, [2015] 1 Cr. App. R 27 at paragraphs 3 - 5. It can give rise to no conviction; and the only forms of permitted disposal, where a finding is made, are relatively limited. It has accordingly been held that the safeguards ordinarily available under Article 6 of the Convention do not apply in proceedings under s.4A: *H* [2003] UKHL 1, [2003] 2 Cr. App. R 2. Further, in that case it was accepted that a determination under s.4 of unfitness to be tried also did not involve a determination of a criminal charge: paragraph 11 of the judgment of Lord Bingham.

The proceedings in the Crown Court

12. On a letter of invitation from the Registrar of Criminal Appeals, (the applicant having made criticism of counsel in the proceedings below) the applicant waived privilege. In consequence we have seen contemporaneous written advices from counsel, Mr Nicholas Berry, retained by and then appointed to act for the applicant in the proceedings in Worcester Crown Court, as well as his response to the criticisms made.

13. Clearly there were potential psychiatric issues arising in this case. The applicant is well-educated (he has a degree) and of some intelligence. He had no previous convictions. He plainly had involved himself closely in the proceedings. Counsel had a conference with him on 29 June 2015, prior to a listed Plea and Case Management Hearing at which the matter was adjourned for psychiatric reports. In a detailed Advice dated 1 July 2015, counsel expressed his concerns and the reasons for his recommendation that psychiatric reports be obtained. The applicant's behaviour and comments were described as "odd": for example – and it is but one example - he had expressed seemingly obsessional views about a surveillance aircraft, in the form of a silver jet, being sent by GCHQ over Worcester, the city where he lived: a view, incidentally, which he seems to continue to hold.

14. In due course, three psychiatric reports were obtained from appropriately qualified psychiatrists. All addressed the Pritchard criteria. All concluded that the applicant suffered from paranoid schizophrenic delusions, coupled with some evidence of an Autistic Spectrum Disorder. He was assessed as not able meaningfully to instruct counsel or take part in his defence and as not fit to plead or be tried. It was also noted that he did not appear to recognise or accept that he was suffering from symptoms of mental illness. Subsequent letters to the applicant's solicitors from Worcestershire Health and Care thereafter reported a disinclination on the part of the applicant to engage with local mental health services, notwithstanding his assessed need for treatment.

15. A fitness to plead hearing was in due course held before a Recorder. The Recorder on 15 February 2016 accepted the evidence of the psychiatrists and ruled that the applicant was unfit to be tried. The applicant in his voluminous grounds and subsequent written

submissions, although he has made various criticisms of the psychiatrists' assessment and conclusions, has not challenged that finding by the Recorder. In any event, if he was intending to do so, it is clear to us that the Recorder was fully entitled to rule as he did on the evidence before him.

16. The Recorder on that occasion appointed Mr Berry then to act at the consequent s.4A hearing. That lasted between 15 and 18 February 2016. It took a somewhat unusual course in that, although IN gave evidence, Count 1 was ultimately withdrawn, in circumstances not made wholly clear to us. At all events, the matter proceeded on the counts relating to KL and SB; but the Recorder, and with the agreement of counsel, permitted the evidence relating to IN (and also including the various photographs and pseudo photograph) to be adduced under s.101 (1) (d) of the Criminal Justice Act 2003, as tending to show that the applicant had a particular sexual interest in young girls and was the more likely to have approached KL and SB with a view to committing a sexual offence.

17. The Recorder summed up to the jury; and the jury (directed to apply the criminal standard) in due course found that the applicant had done the acts so far as KL and SB were concerned.

18. It may in this regard be noted that s.4A is directed at the act or omission in question: it is not, for obvious reasons, directed at the mental element involved. However, in an appropriate case that does not preclude a jury, under s.4A, from being required to consider the purpose of a defendant acting as he did: thus the "acts" under consideration may, in some cases, need to involve at least some consideration of aspects of the mental element: see, for example, *Wells, Masud, Hone and Kail* (cited above) at paragraphs 12 and 14. This explains why the issue of the applicant's purpose in approaching the girls was before the jury in the present case.

19. Following the jury's conclusion that the applicant did the acts, and the subsequent disposal on 12 May 2016 by way of hospital order, Mr Berry very properly considered whether an appeal would lie. His conclusion, expressed in an Advice dated 20 May 2016, was that it would not. The conclusion of the jury was, in his view, open to it. The making of a hospital order was the "only viable alternative" of the options open to the judge; and there was also no basis for challenging the SHPO.

Appeal proceedings

20. The grounds of appeal, prepared by the applicant himself in neat and well-ordered manuscript and frequently supplemented thereafter at very great length, range far and wide. They connote an obsessive involvement with the case and the evidence. He clearly has a good grasp of what is going on procedurally (indeed at one stage he takes a point that the Respondent's Notice was served unacceptably out of time: a point, incidentally, which we reject). He remains in hospital. He advances at exhaustive length his own explanation of and interpretation of the evidence; and comments at length on the evidence of IN, KL and SB and other evidence. He also purports to set out, not in proper form, what is said to be fresh evidence. He strongly criticises counsel for not pursuing a number of these points or for failing to raise various alleged matters of evidence. It has to be said that overall, as the Single Judge observed, the grounds of appeal "tend to suggest that his diagnosis [paranoid and grandiose delusions] is apt".

21. The Single Judge reviewed all the grounds, describing them as "repetitive and prolix"; albeit understandably without setting them out in specific detail. He considered that there was no merit in any of them. As to the criticisms of counsel, as the Single Judge observed counsel (appointed by the court) was not obliged to follow the applicant's instructions, because they were delusional. Counsel had to form a judgment and could not be criticised. In fact, many aspects of what were the applicant's purported instructions (as reflected in aspects of his grounds of appeal) would in truth only have strengthened the case against him. The sentence was also adjudged by the Single Judge to be proper.

22. At the hearing before us, Ms Mushtaq, bearing in mind her professional responsibilities, did not feel able positively to support the numerous grounds advanced by the applicant (although she made clear that she did not withdraw them) – save in one respect. She adopted and developed the ground raised by the applicant to the effect that the Recorder was wrong to permit the evidence relating to IN and related evidence (including the photographs and pseudo photograph) to go before the jury by way of bad character evidence. It was submitted that, once Count 1 was withdrawn from the jury, either the jury should have been discharged; or, at the least, the jury should have been expressly instructed that that evidence could not be relied upon with regard to the matters relating to KL and SB which they were considering.

23. Ms Mushtaq accepted that such evidence was, in principle, relevant and admissible as evidencing reprehensible behaviour: nevertheless it should, she said, have been excluded under s.101(3) of the 2003 Act or s.78 of the Police and Criminal Evidence Act 1984.

24. In this regard, she submitted that the position was different from a case such as *Creed* [2011] EWCA Crim 144. That case confirms that the bad character provisions of the 2003 Act can apply in s.4A proceedings. But Ms Mushtaq's point was that that case involved previous convictions (see the observations at paragraph 17 in that decision). The present case, however, did not involve previous convictions but involved allegations as to which, by virtue of the nature of the proceedings, the applicant was not in a position to give meaningful instructions to challenge or test. As to the photographs and pseudo photograph, there was, as she accepted, irrefutable evidence that the applicant had them in his possession; but, she said, he was also not in a position to give any explanation which he may have had for that, or to say whether he had accessed such photographs and so on. Thus it was, she says, that such evidence should have been excluded

25. When it was pointed out in argument that the admission of such evidence for such purposes had been agreed in the course of the s.4A proceedings, she was understandably reluctant positively to pursue an argument (certainly advanced by the applicant himself) of flagrant incompetence on the part of counsel below. But she maintained that it should not have happened: it was a "wrong call".

Disposal

26. We have considered the various grounds advanced by the applicant himself. It is sufficient to say that we entirely agree with the Single Judge's assessment. Ms Mushtaq was right not to pursue them. They disclose no arguable grounds of appeal.

27. As to the point which was pursued by Ms Mushtaq, as to the admissibility of the other matters as reprehensible conduct, those matters in principle were admissible: see *Creed* (cited above). Further, the photographs and pseudo photograph were unquestionably in the applicant's possession. Given the circumstances, it would have been an affront to have withheld them from the jury: nor was there or is there anything in fact obviously to suggest that the applicant could have had any valid explanation for having such images independent of an unhealthy pre-occupation with young girls. Besides, even if it could be said that the applicant was to some extent disadvantaged by not being in a position to advance a sensible positive case on this then, as Mr Muller pointed out, that is generally inherent in the very nature of s.4A proceedings when the ability of an accused to give to those appointed to present the defence case a rational or meaningful account necessarily is limited. That being so, the agreed decision to let the evidence of IN remain in evidence, albeit as bad character evidence, was understandable. Not only would it provide explicatory context but counsel was able to point out to the jury that Count 1 had ultimately been withdrawn and to make the point that the girls may simply have misunderstood the applicant's approaches. Indeed Mr Berry in his closing speech had expressly referred to some of the applicant's communications with IN's step-father as showing that the applicant had problems with communication, and thus had a capacity to be misunderstood or misinterpreted.

28. In such circumstances, and where the evidence had remained before the jury by agreement, there is no arguable basis for an appeal on this ground. We wholly reject, for the avoidance of doubt, any suggestion of incompetence by trial counsel in agreeing to the admission of this evidence for this purpose. It is very often a delicate matter for counsel appearing at a s.4A hearing to decide how best to present the defence case: and in this case we have no basis for thinking, notwithstanding the applicant's strong complaints to the contrary, that counsel had acted anything other than properly and reasonably and in the best interests of the applicant.

29. Reviewing all the points raised, we have thus refused this renewed application in its entirety.

Procedural points

30. We consider that we should go on to address some of the procedural points that this case has thrown up and which may arise in other cases. Although no formal statistics are kept, we gather that it is estimated that the Criminal Appeal Office receives around a dozen applications for leave to appeal each year with regard to s.4 and s.4A determinations (often combined); and many of those, we gather, are prepared by applicants acting in person.

31. The first point is to consider whether an individual who has been adjudged unfit to be tried under s.4 of the 1964 Act is competent to appeal in person against that ruling or any subsequent ruling under s.4A.

32. In our view, the answer has to be no.

33. It is, as we have said, settled by authority that a s.4A hearing is not a criminal trial as such: indeed, a conviction cannot result. Likewise, a prior ruling under s.4 does not result from a criminal trial as such. However the position with regard to appeals in this

context is expressly covered by s.15 of the Criminal Appeal Act, which provides as follows:

> "(1) Where there has been a determination under section 4 of the Criminal Procedure (Insanity) Act 1964 of the question of a person's fitness to be tried, and there have been findings that he is under a disability and that he did the act or made the omission charged against him, the person may appeal to the Court of Appeal against either or both of those findings.
>
> (2) An appeal under this section lies only –
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> (a) with the leave of the Court of Appeal; or
>
> (b) if, within 28 days from the date of the finding that the accused did the act or made the omission charged, the judge of the court of trial grants a certificate that the case is fit for appeal."

34. On the face of it, since a person may under s.15 appeal with leave of the court, it might be said that that extends to an accused who is acting in person. But in our opinion that cannot be right. It cannot be right just because the accused has been judicially determined, based on expert psychiatric evidence, to be unfit to plead or stand trial. The necessarily connotes that such a person cannot be considered fit to appeal either. It can make no difference that – as here – the accused ostensibly has a keen intelligence and an awareness of the details of the case and of the procedural requirements. It makes no difference just because, as the psychiatrists have concluded and the Crown Court has accepted in the present case, the accused's approach is distorted by his mental incapacity such as to render him unfit to participate in the trial process (which is to be taken as extending to an appeal).

35. How, then, can such an accused appeal? To deny him or her altogether the opportunity to appeal would be to deny him or her the right conferred under s.15 itself. The point is not covered in the current form of the Criminal Procedure Rules. But the answer is, in our opinion, as given in section D9 of the Guide to Commencing Proceedings in the Court of Appeal Criminal Division (as issued in August 2018). That states that the accused can seek to appeal against a finding of unfitness to plead or that he did the act or made the omission charged *by the person appointed to represent the accused*. The same approach is taken in the Practitioner's Guide to the Court of Appeal Criminal Division 2nd ed. (edited by Alix Beldam and Susan Holdham) at paragraph 9 – 004.

36. It may be objected that that gives such an accused a more limited opportunity of appeal than is available to a defendant convicted at a criminal trial who, ordinarily, may seek to appeal in person. But that would not be a principled objection: just because a determination under s.4 or s.4A is not to be compared to a conviction at all.

37. A further possible objection going the other way might be that counsel who acted in the s.4 and/or s.4A proceedings in the Crown Court can have no authority to pursue an appeal on behalf of the accused given that the accused has been adjudged unfit. But that objection too would run counter to the conferring of a right of appeal under s.15 of the 1968 Act. As stated in the Court of Appeal in *Antoine* [1999] 2 Cr. App. R 225 at p.237:

> "It is plain that a person or persons appointed to conduct the defence under section s.4A(2) must also have authority to appeal under section 15 of the 1968 Act if it is judged appropriate to do so."

By parity of reasoning the same likewise, in our view, applies also to any appeal against the prior determination of unfitness under s.4.

38. Accordingly, once a finding of unfitness has been made and where there is a subsequent determination by the jury that the accused did the act or omission charged, it is the duty of the person appointed by the court to present the defence case to consider, as a matter of professional obligation, whether an appeal might properly lie against either determination or, indeed, against the ultimate disposal (that in fact is precisely what Mr Berry of counsel entirely properly did in the present case.) It is a matter for that person to assess whether there are properly arguable grounds. In making such assessment the appointed person may have such regard, if any, as thought appropriate to the "instructions" of the accused. That will be a matter of judgment in each case. But those "instructions" will not bind the representative: just because they emanate from a person adjudged to be unfit to participate in the trial process.

39. If the appointed person considers that there is no arguable ground of appeal and declines to settle a Notice of Appeal, it follows that there can be no valid appeal. The accused will not be competent (in terms of mental fitness) to pursue an appeal in person: nor will the accused be competent (in terms of mental fitness) to instruct fresh counsel or solicitors to pursue an appeal on his or her behalf.

40. However we do not think that it would be best practice for the Criminal Appeal Office, acting administratively, simply to reject such an application at the outset without there being any judicial consideration as to whether it is in the interests of justice for a person to be appointed to put the case for the applicant. We think that the better course would be first to check with the appointed representative in the Crown Court that no arguable grounds of appeal were identified as available; and then to refer the papers to the Single Judge to review the papers and consider, under s.31B of the 1968 Act, whether to give any procedural direction that such a person be appointed. If the Single Judge can find in the papers nothing to suggest properly arguable grounds then no such direction will be given and the application will be rejected by the Single Judge: and there can thereafter be no right of renewal to the Full Court. In so rejecting the application, the Single Judge will be finding that the application is to be rejected on the ground that it is ineffective by reason of lack of mental capacity on the part of the applicant to pursue it; but the Single Judge will no doubt in any event give such reasons as the Single Judge thinks fit with regard to the grounds actually sought to be advanced, in indicating that they in any event lack arguable merits sufficient to justify appointing a person to put the case. If, on the other hand, the Single Judge considers on the papers that there potentially may be arguable grounds (notwithstanding that the appointed representative in the Crown Court has identified none) then we think it a legitimate exercise of the powers available that the Single Judge be entitled to direct that fresh counsel be appointed to consider whether there are viable grounds of appeal and, if there are, to settle them and then present the case on behalf of the accused in the Court of Appeal: first before the Single Judge – preferably the same Single Judge - on the papers and then (if, and only if, leave to appeal is granted or the application is referred) before the Full Court. If fresh counsel, on the other hand, is so appointed but concludes (in

common with the appointed representative in the Crown Court below) that there are no viable grounds to be advanced, then the matter is again to be referred back to the Single Judge, who will then doubtless reject the application.

41. It may be that there could be a case where an applicant claims subsequently to have recovered mental capacity, such that he may say that an appeal can properly be pursued either by new counsel instructed by the applicant or by the applicant in person. That will not be accepted in the absence of appropriate fresh (ordinarily psychiatric) evidence. If, however, such evidence is lodged in support of the application for permission to appeal, along with the appropriate formal application for leave to adduce such evidence and any necessary application for an extension of time, then again the papers are likewise to be referred to the Single Judge: who will then consider whether it is in the interests of justice for a person to be appointed to put the case for the applicant and to give the appropriate procedural direction under s.31B.

42. A further question that has also been raised is whether a person who has been adjudged unfit can be invited on a proposed application for permission to appeal (and in particular where the conduct of the advocate in the Crown Court is criticised) to waive privilege.

43. For the reasons given above, it is difficult to see, in the future, how such a situation could arise where the accused purports to act in person. In cases where an appeal is properly pursued by the appointed representative (or fresh counsel appointed by the Court of Appeal) and in situations where – over and above the procedural requirements set out in *McCook* [2014] EWCA Crim 734, [2016] 2 Cr. App. R 30 – the question of waiver of privilege may arise, then it is plain that the accused cannot himself or herself meaningfully waive privilege: again, just because he or she has been adjudged unfit. The matter therefore will be one for the appointed representative or fresh counsel to decide in each case, acting in what are considered to be the best interests of the accused and having regard to the normal obligations to the court.

44. In the present case, we note, the applicant, acting in person, was asked by the Registrar if he was prepared to waive privilege (in view of his criticisms of counsel): and he did so. That was, we consider, strictly an incorrect procedure. But no unfairness has arisen in this particular case. Where privilege has not been waived, criticisms of counsel will not ordinarily prosper. Besides, Ms Mushtaq, subsequently appointed by the court to represent the interests of the accused, pursued no objection on that issue.

45. Mr Atkinson did, in fact, suggest that privilege does not arise in such situations at all. He pointed out that the role of the appointed representative in the Crown Court under s.4A is a special one: in that such person has been appointed by the court to present the case for the defence and has not as such been instructed or retained by the (unfit) accused. That, we accept, is correct so far as it goes. But we think it goes too far then to say that privilege does not attach at all to the communications passing between the (unfit) accused and counsel appointed to present the case for the defence. We consider that such communications are made in confidence and are made for the purpose of presenting, or considering the presentation of, the defence case. Of course it will be entirely a matter for the judgment of counsel in the Crown Court to decide what use, if any, can be made of purported "instructions", if any, given by the accused. Not infrequently it doubtless will not be appropriate to give effect to such "instructions", having regard to the best interests of the accused and the professional duties owed to the court. Nevertheless, privilege attaches to them.

46. A further point raised is as to the use of forms. Thus far a proposed appeal against a s.4 and/or s.4A determination has been required to be brought under the standard form NG applicable to all proposed appeals against conviction or sentence. There is no jurisdictional objection to that. Although proceedings under s.4A, at all events, are not ordinary criminal proceedings as such (as discussed above), Rule 39 of the Criminal Procedure Rules applies to all appeals under Part 1 of the 1968 Act: and s.15 is included in Part 1 of that Act. That said, the standard form NG is hardly apposite in all respects for proposed appeals against s.4 or s.4A determinations: for example, it includes references to bail and to the potential for making loss of time orders, which are hardly going to be relevant to appeals of such a kind. Thus we suggest that it might be considered appropriate to review the contents of the form of appeal to be used in cases such as these.

47. We finally turn to the issue of the legal costs of an appeal where the accused is represented.

48. As stated in *Antoine* (cited above) at p.237:

> "It cannot have been intended that a person disabled by mental incapacity who has obtained leave to pursue an appeal under section 15 of the 1968 Act should be effectively denied the opportunity to exercise that right for want of financial resources."

We entirely agree. In the event, the court in *Antoine* made an order that the appellant – whose appeal was dismissed – should have his costs out of central funds. The court in fact stated that, had they not reached such a conclusion, they would in the alternative have held the appellant entitled to legal aid under the then provisions of the Legal Aid Act 1988 and related regulations.

49. In the Crown Court, as we understand it, the grant of legal aid that will ordinarily have been made in favour of a defendant can extend to the costs of the s.4 hearing: for the criminal proceedings will continue to trial unless a determination of unfitness is first made under s.4: and see s.15(2) and s.17(2)(c) of the Legal Aid Sentence and Punishment of Offenders Act 2012. But in cases where a determination of unfitness *is* made, the position then changes: because the representatives appointed to present the defence case (who will usually be those thus far acting in the earlier stages of the proceedings) will now have been appointed by the court and in circumstances where a s.4A hearing is not a criminal proceeding as such. So the costs order for the s.4A proceedings in the Crown Court appropriately then should be costs out of central funds: that is so provided by s.19(3) of the Prosecution of Offences Act 1985, and regulations thereunder, and by rule 45.1 of the Criminal Procedure Rules.

50. On an appeal to the Court of Appeal, the same point arises. A legal aid representation order should not be granted. But in this context by s.16(4) and (6) of the 1985 Act the court is in terms empowered to make a defendant's costs order, extending to legal costs, by way of payment out of central funds where an appeal against a finding of unfitness or finding that he did the act or omission charged is allowed: see also rule 45.4 of the Criminal Procedure Rules. Section 16A (as introduced by amendment) appears to have the effect, however, that such costs are capped at legal aid rates.

51. But what if an appeal fails? The statutory provisions are silent on the point. But the court in *Antoine,* taking a broad approach, held that the statutory provisions of s.19(3) of the 1985 Act and related regulations, which give power to make an order for costs out of central funds for a s.4A hearing in the Crown Court, likewise are to be taken to apply for appeals: see at p.237 of the judgment. Accordingly by these means the advocate appearing on an unsuccessful appeal can be remunerated by an appropriate costs order at that stage.

52. Consequently if the Single Judge has granted leave to appeal in such a case, or referred the application to the Full Court, then the appropriate defendant's costs order can be made by the Full Court at the conclusion of the appeal. (It appears to be an oddity of the current statutory provisions and regulations that if such appeal succeeds then legal costs paid out of central funds under s.16 and s.16A of the 1985 Act are apparently capped at legal aid rates; but costs ordered to be paid out of central funds under s.19(3) of the 1985 Act and related regulations where the appeal is dismissed apparently are not so capped. If that is indeed so – and we need express no concluded view, especially since we received no argument on the point -then it tends to confirm the need to have one set of express, coherent and comprehensible rules governing the position. But the fundamental point is that where an appeal against a s.4 or s.4A determination is reasonably and properly brought then, win or lose, the legal representatives should be remunerated.) If the Single Judge refuses leave to appeal, then that judge determines whether to make a costs award out of central funds in respect of the legal costs of the application for leave to appeal.

53. In the present case, we add, Ms Mushtaq was granted by the Registrar a legal aid representation order to appear at the hearing before us. It follows from the foregoing that, strictly, that was incorrect. It will be revoked and be replaced by an order that her costs be paid out of central funds.

Post-script

54. We add that, since a number of these matters as variously discussed above are not currently the subject of the Criminal Procedure Rules, it may be that the Criminal Procedure Rules Committee would wish to consider whether to introduce any new rules to cover the position.

Permission to cite this judgment is given.