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Unfit to Plead or Unfit to Testify?

R v Orr [2016] EWCA Crim 889

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The appellant, a solicitor, was convicted of being concerned in a money laundering arrangement. He was first tried in 2012, but the trial was terminated when the appellant became 'unfit' shortly after his cross-examination had begun. A new trial commenced in October 2014. The appellant gave evidence-in-chief. However, on the day that the prosecution was due to commence cross-examination, the appellant was unwell. The trial judge adjourned the trial to allow the appellant to be examined by a psychiatrist. The psychiatrist, applying the principles set out in the Mental Capacity Act 2005, was of the opinion that the appellant was 'unable to participate in his trial' (at [14]). A second psychiatrist indicated that the appellant's mental state was such that he was now 'unable to give evidence in his own defence', rendering him 'unfit to plead' (at [16]). Counsel for the appellant presented two options to the judge. The first option was to continue the trial with the appellant not undergoing cross-examination, but on the condition that the prosecution could not make a closing speech. The second option was to find the appellant unfit to plead and commence a 'trial of the facts', following the procedure set out in s.4A of the Criminal Procedure (Insanity) Act 1964 ('the 1964 Act').

The trial judge eventually decided that the appellant was unfit to be cross-examined, but that he had been fit to give evidence-in-chief. The judge allowed the trial to continue, but ruled that the prosecution's closing speech must not refer to any subject that the appellant had not been in a position to meet in cross-examination. The judge directed the jury on the issue, including that the inability to give evidence was not the appellant's fault and that the jury should not speculate about the answers the appellant may have given had he been cross-examined (at [18]).

The appellant was convicted and appealed on the following grounds:

'1) If the trial judge found the appellant was unable to be cross-examined by virtue of his inability to properly respond to questions asked in cross-examination, he should have ruled that he was not fit to be tried, discharged the jury from returning verdicts and then, proceeded to a determination by the jury as to whether the appellant had done the act or made the omission charged against him in accordance with section 4A(1) of the Criminal Procedure (Insanity) Act 1964;

2) In the alternative the appellant's conviction is unsafe since he did not receive a fair trial' (at [19]).

HELD, allowing the appeal, the way in which the case progressed had not disadvantaged the appellant, as he had dealt with the Crown's case in detail in his evidence-in-chief, the prosecution's closing speech had been restricted, and the jury had been directed on the issue (at [20]-[22]). However, the issue of fitness to plead had not been dealt with correctly. Fitness to plead cannot be determined by reference to only part of the trial process. 'The capacity to be cross examined is part and parcel of the defendant's ability to give evidence in his own defence' (at [23]).

Section 35(1)(b) of the Criminal Justice and Public Order Act 1994 provides support for the contention that a finding that the appellant was unfit to be cross-examined does not necessarily determine the question of fitness to plead (at [24]). Section 35(1)(b) caters for situations when 'the physical or mental condition of the accused makes it undesirable for him to give evidence', for the purpose of determining whether adverse inferences can be drawn from the defendant's failure to testify. The trial judge's ruling was ambiguous. However, he appeared to have found that the appellant was unfit to plead, rather than it being undesirable for him to give evidence (at [27]).

The criteria for determining fitness to plead were identified in the case of *R v Pritchard* (1836) 7 C & P 303 and subsequently endorsed and refined by the Court of Appeal. Fitness to plead includes a requirement that the defendant be able to give evidence in his own defence, meaning that he can understand the questions he is asked, apply his mind to answering them, and convey intelligibly the answers he wishes to give (*R v M(John)* [2003] EWCA Crim 3452 at [24]). The trial judge appeared to have found that the *Pritchard* criteria were met up until the point of cross-examination. This 'must implicitly mean that he found that thereafter they were not met' (at [27]).

Once the trial judge had determined that the appellant was no longer fit to participate in his trial, he should have followed the s.4A procedure. Section 4A is a 'statutory mandatory requirement which cannot be avoided by the court's general discretion to order proceedings otherwise, however beneficial to the defendant they might appear to be' (at [30]). The Court concluded that 'the jury should not have been allowed to return a verdict, other than a verdict of acquittal if they were not satisfied on the evidence already given in the trial that the appellant did the act charged against him' (at [30]).

COMMENTARY

This is a complex case which highlights the confusion generated by both the current test for unfitness to plead and the procedure to be followed when the issue is raised. Three key issues arise from the judgment. First, the scope and interpretation of the test for unfitness; second, the stage at which a finding of unfitness to plead may be made; and third, the interplay between the unfitness to plead process and s.35 of the Criminal Justice and Public Order Act 1994.

The test for unfitness

In its 2016 report, *Unfitness to Plead* (Law Com. No.364), the Law Commission noted that '[t]he current *Pritchard* test used to assess unfitness to plead … is not consistently understood or applied by clinicians, legal practitioners and the courts' (para.1.13). In the instant case, the first psychiatrist applied the criteria set out in the Mental Capacity Act 2005 ('the 2005 Act') and concluded that the appellant lacked the necessary decision-making capacity to participate in his trial. However, as the Law Commission pointed out, decision-making capacity does not form part of the current unfitness test, in contrast with the civil capacity test under the 2005 Act (Law Com. No.364, para 1.14). Rather, the *Pritchard* test focuses on a defendant's intellectual and cognitive abilities. The test stems from the nineteenth century case of *R v Pritchard* (1836) 7 C & P 303, but has been reframed and expanded in subsequent cases. In its current form it requires a defendant to be capable of doing the following:

> '(1) understanding the charges; (2) deciding whether to plead guilty or not; (3) exercising his right to challenge jurors; (4) instructing solicitors and counsel; (5) following the course of the

proceedings; (6) giving evidence in his own defence.' (*R v M(John)* [2003] EWCA Crim 3452 at [20])

In the present case, the Court of Appeal noted that 'the capacity to be cross examined is part and parcel of the defendant's ability to give evidence in his own defence' (at [23]). The ability to give evidence means being able,

> '(a) to understand the questions he is asked in the witness box, (b) to apply his mind to answering them, and (c) to convey intelligibly to the jury the answers which he wishes to give' (*M(John)* at [24]; *Orr* at [25]).

The second psychiatrist opined that the appellant was unfit to plead because he was 'unable to give evidence in his own defence' (at [16]), thus addressing at least one aspect of the reformulated *Pritchard* test. However, the evidence of the psychiatrists was not subject to detailed examination. The first psychiatrist gave 'short oral evidence' (at [14]), and the second produced a report, which appears to have simply been accepted by both parties and the judge.

The Court of Appeal suggested that the 'unusual circumstances … may have merited a more detailed exploration of the psychiatrists' reasons and conclusions' (at [26]). In *R v Walls* [2011] EWCA Crim 443, the Court of Appeal suggested that psychiatric evidence should normally be scrutinised thoroughly where the issue of unfitness to plead is raised:

> '[S]ave in clear cases, a court must rigorously examine evidence of psychiatrists adduced before them and then subject that evidence to careful analysis against the *Pritchard* criteria ... Save in cases where the unfitness is clear, the fact that psychiatrists agree is not enough…; a court would be failing in its duty to both the public and a defendant if it did not rigorously examine the evidence and reach its own conclusion.' (*Walls* at [38])

In particular, an issue that could have been explored in the present case was whether the appellant could have continued to give evidence if assisted by an intermediary (at [26]).

The expansion of the use of special measures, including intermediaries, to assist vulnerable defendants to participate in the trial process is a major plank of the Law Commission's proposals for reform of the law of unfitness to plead. The aim is to ensure that a full criminal trial takes place wherever possible because this is the 'optimum [process] for a defendant facing a criminal allegation' (Law Com. No.364, para 2.2). The current law facilitates this to an extent, as the Criminal Procedure Rules require that

> 'the court must take every reasonable step—
> (a) to encourage and to facilitate the attendance of witnesses when they are needed; and
> (b) to facilitate the participation of any person, including the defendant' (Crim PR 3.9(3)).

Section 29 of the Youth Justice and Criminal Evidence Act 1999 ('the 1999 Act'), which provides for the examination of a vulnerable witness to be conducted through an intermediary, does not extend to vulnerable defendants. Sections 33BA-33BB of the 1999 Act, which were introduced by the Coroners and Justice Act 2009, would enable a defendant who gives evidence to be examined through an intermediary, but these sections have not been brought into force. Nevertheless, a court may appoint an intermediary for a defendant relying on 'its inherent powers and under the Criminal Procedure Rules to take such steps as are necessary to ensure that he has a fair trial' (*C v Sevenoaks Magistrates' Court* [2009] EWHC 3088 (Admin)). A defence intermediary may be appointed for the whole trial or only to assist the defendant while he is testifying (*R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin)).

The provision of intermediaries for defendants has recently suffered a setback with the introduction of amendments to the Criminal Practice Directions in April 2016, which provide that defence intermediaries should be appointed only 'rarely', and appointment for the duration of a trial should be 'extremely rare' (CPD, 3F.13). The Court of Appeal clearly concluded that the present case, in which the issue of the appellant's capacity to testify arose part way through giving his evidence, was such a rare case that the judge ought to have considered intermediary provision. Adjustments had already been made to the trial process to enable the appellant to participate. The provision of an intermediary ought at least to have been considered, particularly as the appellant had apparently indicated 'that he would like to carry on giving evidence and to have the opportunity of answering questions put in cross examination' (at [18]). Whether it would have been possible to obtain a defence intermediary at short notice so as to enable the defendant to continue to testify and to be cross-examined is another matter. Difficulties in finding and funding defence intermediaries are well known (see, for example, *R v Cox* [2012] EWCA 249. See also P. Cooper and D. Wurtzel, 'A day late and a dollar short: in search of an intermediary scheme for vulnerable defendants in England and Wales' [2013] Crim LR 4).

The Court of Appeal thought that the judge's ruling on the issue of unfitness to plead was ambiguous. The judge found that the appellant was 'not fit to undergo cross examination' but that 'up until that point (underlining supplied) the *Pritchard* criteria were met' (at 27]). In the view of the Court of Appeal, the judge had 'thereby implicitly determined that the appellant was no longer able to fully participate in his trial within the *Pritchard* refined criteria' (at [29]). In referring to 'full participation', the Court adopted, in part, the terminology used by the Law Commission in its reform proposals. The Commission's proposed test would focus upon the 'capacity to participate effectively' (see Law Com. No.364, Chapter 3 and draft Bill Clauses 3(2) and 32(2)). The Commission favours incorporating a non-exhaustive list of relevant abilities, including the ability to give evidence.

The Commission rejected the suggestion that there was a need to explain what 'giving evidence' requires, as 'the lack of elaboration does not appear to be problematic as the test is currently framed' (para. 3.106). The present case would suggest otherwise. The Court of Appeal accepted that the wording of s.35 of the Criminal Justice and Public Order Act 1994 (see below) supports the proposition that a finding that a defendant is 'unfit to give evidence in cross examination does not necessarily determine the question of "fitness to plead"' (at [24]). This suggests that someone who is unfit to be cross examined may nevertheless be fit to plead, whereas being able to give evidence in his own defence requires 'the capacity to be cross examined' (at [23]). The Court did not elaborate upon the distinction between 'fitness to give evidence in cross examination' and 'capacity to be cross examined', so perhaps some guidance on this issue is needed.

The s.4A procedure

An unusual aspect of the present case is that the issue of unfitness to plead arose as the appellant was about to be cross examined. This seems to have caused a degree of confusion as to the options available to the trial judge. The Court of Appeal observed that the judge could not have been assisted by the fact that junior counsel and Queen's Counsel for the appellant made different, and sometimes inconsistent, submissions as to whether and how the trial should proceed. They applied to discharge the jury, indicated that they would not be 'implacably opposed' to the trial continuing and argued that the prosecution should be barred from making a closing speech, although the legal basis upon which the judge could so order is unclear. It appears that the judge was not asked to

formally rule on either the issue of unfitness to plead or the question whether a hearing under s.4A of the 1964 Act was required.

The Court of Appeal proceeded on the basis that the judge had found that the appellant satisfied the *Pritchard* criteria at the point at which he was to be cross- examined. In doing so, the Court confirmed two important points. First, where a defendant satisfies the unfitness to plead test, the s.4A procedure must be followed; it is mandatory, not discretionary. Second, where a defendant becomes unfit part way through the proceedings, a s.4A hearing (often known as a 'trial of the facts') must commence at that stage.

Under s.4(4) of the 1964 Act, 'the question of fitness to be tried shall be determined as soon as it arises'. When the issue arises at an early stage, however, the court may postpone the determination of fitness 'until any time up to the opening of the case for the defence' provided 'it is expedient to do so and in the interests of the accused' (s.4(2)). If the question of unfitness is deferred to the opening of the defence case, the defence can make a submission of no case to answer, potentially resulting in an acquittal, before the issue of unfitness to plead has to be determined (s.4(3)). As the Law Commission explained in its consultation paper:

> 'It [is] therefore possible for the accused to avoid a finding of unfitness to plead if the jury returned a verdict of acquittal at the close of the prosecution case, because they were directed to do so on the basis that there was insufficient evidence for a properly directed jury to convict. This [is] significant because it provide[s] an opportunity for the accused to avoid the outcome of a disposal under section 5.' (*Unfitness to Plead*, Law Com. CP No.197, para.2.13)

Once the court has found that a defendant is unfit to plead, s.4A is engaged and the trial cannot proceed or further proceed. Instead the jury must determine whether the defendant 'did the act or made the omission charged against him as the offence' (s.4A(2)(b)). In the present case, having implicitly found that the appellant was unfit to plead, the trial judge was obliged to convert the trial into a 'trial of the facts'. His failure to follow the mandatory provisions of s.4A rendered the conviction unsafe, despite the fact that the trial had otherwise been fair.

Section 35 of the Criminal Justice and Public Order Act 1994

The case raises a further important issue: the question of where the distinction lies between being 'unfit to plead' and having a physical or mental condition which makes it 'undesirable' for a defendant to give evidence for the purpose of s.35(1)(b) of the Criminal Justice and Public Order Act 1994. The Court of Appeal referred to s.35(1)(b) as support for the contention that a finding that a defendant is unfit to give evidence in cross-examination does not necessarily determine the question of fitness to plead (at [24]). The Court also took the view that, at the heart of the respective contentions of appellant and respondent, was the issue of 'whether the extent of the appellant's disability … [rendered] him "unfit to plead" rather than making it "undesirable for him to give evidence"' (at [28]). This suggests that, in the context of the present case, the Court may have considered 'unfit to be cross examined' as analogous to 'undesirable to give evidence', rather than 'unfit to plead'. However, the Court did not resolve the issue of where the distinction lies between 'unfit' and 'undesirable'. The judgment is, therefore, helpful only in so far as it confirms that there is a difference between the two concepts.

While there is set criteria for determining unfitness to plead, judges have wide discretion in applying s.35(1)(b). In *R v Friend*, the Court of Appeal declined to spell out a test, finding that the clarity of the

language of s.35 'is such that it is not necessary to supplement the Act with a test' ([1997] 1 WLR 1433 (CA), 1443). In the same case, the Court indicated that most of those who satisfy s.35(1)(b) on account of a mental condition will also be unfit to plead (at 1440). In subsequent cases, s.35(1)(b) has been applied very restrictively (see, for example, *R (on the application of DPP) Kavanagh* [2005] EWHC 820 (Admin); *R v Ensor* [2009] EWCA Crim 2519; *R v D* [2013] EWCA Crim 465). Thus, the grey area in which a defendant can be fit to plead, yet suffer from a mental or physical condition which makes it undesirable for them to give evidence, appears to be very small. Arguably, the courts should reconsider the need for a test or guidance for the application of s.35(1)(b). Although the trial judge's attention was not specifically drawn to s.35, such guidance could have been helpful in the present case; it could have assisted the judge in determining how to proceed and made his position less ambiguous.

Guidance on the application of s.35(1)(b) could also clarify the relevance of factors which do not form part of the unfitness to plead test, such as the possible impact of testifying on the health or wellbeing of the defendant, and the defendant's ability to give evidence effectively (i.e. the quality of his evidence). A clear distinction between 'unfit to plead' and 'undesirable to give evidence' is also important because of the different outcomes. A finding that it is undesirable for a defendant to give evidence does not mean that the defendant is barred from giving evidence, nor that the trial cannot proceed in the usual way. It simply means that adverse inferences should not be drawn if he chooses not to testify or answer any question. On the other hand, if the defendant is unfit to plead, a 'trial of the facts' must be held, at which the defendant's *mens rea* is not in issue, a different type of finding is reached than in ordinary trials, and judges have different (and limited) disposal options, including the option to make a hospital order. The significant difference between the two outcomes supports a contention that the distinction between 'undesirable' and 'unfit' should be greater than envisaged in *R v Friend*. A broad definition of 'undesirable to give evidence' would ensure that vulnerable defendants who are fit to plead, yet suffer from a condition which may affect their testimony, are not disadvantaged by their decision to remain silent. In respect of the present case, given that the trial judge considered the appellant's mental health an absolute bar to cross-examination, there can be little doubt that he was unfit to plead rather than it being undesirable for him to give evidence.

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