

KADIR v R [2022] EWCA CRIM 1244: GUIDANCE ON THE USE OF LIVE LINK VIA WHATSAPP IN CRIMINAL TRIALS

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FACTS

The appellant in this case came to the UK in 1994. He lived with and was supported by the complainants' family until he married in 1995. In May 2021, he was convicted of ten sexual offences against the complainant children of that family. He was sentenced to a custodial sentence of 18 years, comprising a custodial term of 17 years and an extension period of 1 year.

At his trial, the defence case was that the allegations were malicious. The appellant said there had been an agreement that the complainants' family would bring him to the UK and financially support him. In return, he would pay them back and, should he default, his family would give the complainants' family land in Bangladesh. When his father refused to give the family the land, he said, they made up allegations of sexual abuse against him.

In addition to calling his estranged wife and a friend as witnesses, the appellant applied to adduce evidence from his half-brother in Bangladesh, Abdus Samad. The judge was willing to allow Samad to give evidence via CVP, but a satisfactory link could not be established. The defence made an application under s 32 of the Criminal Justice Act 1988 to allow Samad to give evidence by a WhatsApp video call, which could receive and transmit video and audio and be displayed on courtroom video screens. The judge refused this application. Though her reasons were not given in writing, counsel reported she was unsure whether she had the

power to permit evidence to be received by WhatsApp and could not be certain that it was a 'safe and secure' method of receiving such evidence.

The appellant appealed against his conviction in part on the ground that the judge erred in refusing to permit the video evidence of Abdus Samad to be received.

JUDGMENT

The Court of Appeal dismissed the appeal. It based its decision on the special statutory provisions in place at the time of the trial because of the Covid-19 pandemic. So that this note is useful to practitioners in 2022, we have applied the court's analysis to the law as it stands at the time of writing. The Court expressly indicated that the current law would yield a similar result to that in this case at para [39] of its judgment.

The judge did have the power to permit evidence to be received by WhatsApp video call. Subject to the interests of justice and notice requirements in s 51(4), s 51 CJA 2003 provides that:

51. The court may, by direction, require or permit a person to take part in eligible criminal proceedings through:

- (a) A live audio link, or
- (b) A live video link.

S 56(1) CJA 2003 defines a 'live video link' as a 'live television link or other arrangement' which (a) enables the person appearing by the link (P) to see and hear all other persons taking part in the proceedings who are not at the same location as P, and (b) enables all other persons taking part in the proceedings who are not at the same location as P to see and hear P.

The Court of Appeal also referred to rule 3.2(4) of the Criminal Procedure Rules as they stood at the time of the trial. These require the court, as part of its duty to further the overriding objective by actively managing the case, to direct the use of 'appropriate live links' in cases where Part 18 of the CrimPR applies. At the time of the trial, Part 18 applied whenever the court could have made a direction under s 32 CJA 1988 or s 51 CJA 2003. That part of the Rules has been removed, but it is submitted that some commentary relating to the meaning of 'appropriate live links' is still relevant to this case. In relation to the security required of an 'appropriate live link', Part 3N.4 of the Criminal Practice Directions states:

What degree of protection from accidental or deliberate interception should be considered appropriate will depend upon the purpose for which a live link or telephone is to be used? If it is to participate in a hearing which is open to the public anyway, then what is communicated by such means is by definition public and the use of links

such as Skype or Facetime, which are not generally considered secure from interception, may not be objectionable.

WhatsApp plainly meets the definition of a live video link in s 56(1) CJA 2003. It exceeds the security of Facetime and Skype by being encrypted end to end. Per [39] of the Court of Appeal's judgment, a judge in similar circumstances today would have the power to direct a live link via WhatsApp. It is for the judge in each case to make a fact-specific decision as to the circumstances of the particular case.

So why did the Court of Appeal dismiss the appeal?

GUIDANCE

WhatsApp may be acceptable as a form of live link, but the party seeking to call a witness in this way must comply with all of the procedural steps.

Before an application for a live link direction is made, the following steps must be complied with:

- Written notice of the identity of the witness must be given to the court and the prosecution (s 6C of CPIA Act 1996). The notification must be provided within 14 days of the prosecution complying with its disclosure obligations.
- If the witness is in another country, the party making the application must ensure that the country that the witness proposes to give evidence from, is willing to permit a live link of the kind sought.
 - Not all foreign governments permit nationals or others within their jurisdiction to give evidence before a court in England and Wales. As such, it may be necessary to issue an International Letter of Request to the state concerned.
 - A request can be made to the Taking of the Evidence Unit at the Foreign and Commonwealth Office to ascertain whether there are any objections from the country concerned to the providing of evidence by a live link (*Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 00286).
 - It is important for relevant enquiries to be made to assist the judge to decide whether it is in the interests of justice for a live link direction to be made.

- The administrative and technical arrangements must be checked in good time.
- Adequate information must be provided to the court to allow the judge to assess the risks which might be involved in the witness giving evidence from another country, including any risk that the witness would be under any form of pressure.

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