

THE USE OF AI BY A PROSECUTION WITNESS TO PREPARE FOR CROSS-
EXAMINATION - AN ABUSE OR NOT?

R v FGD (2026) EWCA 918¹

SUMMARY OF RELEVANT FACTS

1. For the purpose of the appeal against the Recorder's terminal ruling to stay rape proceedings as an abuse of process, the appeal court assumed, as the Recorder found, that using AI the complainant had sought and obtained AI assistance to identify the questions likely to be asked of her in cross-examination and how she should answer them. The court concluded that C had accordingly been coached as a witness by AI.
2. At the trial C was cross-examined and challenged about her movements at a particular time on the evening in question.
3. Overnight she interrogated her phone and provided screen shots to the prosecution to back-up her evidence. The prosecution applied to re-call C to produce and speak to the screen-shots.
4. The defence sought disclosure of her complete phone download, which the Recorder ordered. That disclosure resulted in the discovery of the AI coaching that she had sought prior to her cross-examination.
5. Trial counsel for the prosecution appeared to concede that given the judge's finding that there had been coaching, then the only remedy available was to stay the proceedings.

THE APPEAL

6. The prosecution appealed the judge's terminatory ruling pursuant to s.58 Criminal Justice Act 2003.
7. Counsel for the appellant submitted that if prosecuting counsel had conceded a stay as inevitable, he was wrong in law to do so, as there were remedies available to the defence within the trial process to meet the issue raised including (i) an adjournment to consider the material and how to deploy it (ii) exclusion of C's evidence (iii) a submission of no case to answer or (iv) robust judicial directions.

WITNESS COACHING

8. Witness training is forbidden in all jurisdictions. Its dangers were identified by Judge LJ (as he then was) in Momodou and Liman (2005) EWCA 177. The relevant part of the judgment is set out in the appeal at (12).
9. In short the prohibition is to avoid the risk of a witness being influenced by what another person has said; whether proved to have happened or perceived to have.

¹ The court sanctioned publication of its judgment having anonymised the names of the complainant and defendant.

The risk applies to both honest and dishonest witnesses because whether deliberately or inadvertently coaching contaminated their evidence resulting in it may not being their own.

ABUSE OF PROCESS

10. The court concluded that “The consistent message from the cases is that the power to order a stay is an exceptional measure of last resort. This was emphasised very recently by Lady Carr, LCJ in R v HGF (2026) EWCA Crim 570 citing R v Ng and O'Reilly (2024) EWCA Crim 493.” (16)

THE FINDINGS

11. The court concluded that it was impossible to reach any conclusion from the appeal papers what steps the Recorder had considered in reaching his conclusion that the defendant could not have a fair trial. (17).
12. It was relevant that C had provided her ABE account shortly after complaining to the police; a matter of some years before the trial and long before resorting to AI. She had also sent relevant texts to friends at the material time. (17)
13. That being the case the whole of her evidence in chief had not been contaminated by AI. (A matter the court noted did not appear to have been considered by the Recorder in reaching his decision.) That only left her evidence in cross-examination to be assessed by the coaching AI material. (17)
14. For the court this was “.... precisely the kind of case where the trial process would be well-able to deal with any potential prejudice (to the defendant) arising from C’s resort to AI...” (17)
15. There was a further consideration. Witness coaching was often difficult to identify in its particulars as it was often done behind closed doors and not or not fully recorded. “By contrast, here, all that the AI ‘coach’ provided to C was fully recorded and could be placed in its entirety before the jury or summarised by agreement and put into agreed facts.” (18)

THE CONCLUSION

16. The court therefore found that the Recorder erred in concluding that the defendant could not have a fair trial, alternatively, that his decision to stay the proceedings was not a reasonable decision for him to have made.

FURTHER OBSERVATIONS

17. Given the concession of prosecuting counsel which clearly influenced the decision to stay, the court encouraged counsel on both sides when dealing with an application to stay for abuse, to explicitly raise and explore all the ways in which the trial process could deal with any potential prejudice so that the trial judge is able to consider and deal with each when ruling on the issue. (20)

18. The court went on to say “... that, to the extent that they are not already doing so, the National Police Chiefs Council, the Crown Prosecution Service and the Criminal Procedure Rules Committee may wish to consider how to address and regulate the use of AI in criminal proceedings. This case is unlikely to be an isolated example”.
(24)

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