

**Judgment 41/2012**

**Law Officers of the Crown v  
Jose Marcelino Gouveia Pinto,  
Bruno Miquel Silva Loreto &  
Ruben Filipe Capontes Almeida  
Royal Court  
8<sup>th</sup> June, 2012**

---

**Application by the prosecution in a contested rape/indecent assault trial for the complainant to give evidence from behind a screen.**

**Approved Text  
08.06.2012**

**IN THE ROYAL COURT OF GUERNSEY**

<b>Between:</b>	<b>LAW OFFICERS OF THE CROWN</b>	<b>Prosecution</b>
	<b>-v-</b>	
	<b>JOSE MARCELINO GOUVEIA PINTO</b>	<b>First Defendant</b>
	<b>BRUNO MIQUEL SILVA LORETO</b>	<b>Second Defendant</b>
	<b>RUBEN FILIPE CAPONTES ALMEIDA</b>	<b>Third Defendant</b>

**Application by the Prosecution for use of screens by complainant**

**Hearing date: 29<sup>th</sup> May 2012**

**Judgment handed down: 8<sup>th</sup> June 2012**

**Before: John Russell Finch, Esq., Judge of the Royal Court**

**Crown Advocate G S Perry appeared for the Prosecution**

**Advocate C A Tee appeared for the First Defendant**

**Advocate P Lockwood appeared for the Second Defendant**

**Advocate A J Ayres appeared for the Third Defendant**

### **Cases & materials referred to:**

The Live Link Evidence (Bailiwick of Guernsey) Ordinance, 2008

Royal Court Practice Direction, No. 5 of 2008

R v Cooper & Schaub [1994] Crim. L.R. 531

R v Foster [1995] Crim. L.R. 333

R v X, Y and Z (1990) 91 Cr. App. R. 36

## **JUDGMENT**

### **Introduction**

1. This is an application by the Prosecution for the complainant in a contested rape/indecent assault trial to give evidence from behind a screen. The application is resisted by all three accused persons. I had skeletons from the Prosecution, the Second Defendant and Third Defendant to consider shortly before the oral hearing. The First Defendant's Advocate associated herself with the arguments made by the other two Advocates. The thrust of the opposition, both in written and oral form, came from Advocate Ayres for the Third Defendant, although Advocate Lockwood supplemented it with various additional points. At the conclusion of the hearing I indicated that I would issue a judgment as soon as was practicable, which I now do.
2. As is required, the Complainant (hereafter "P") has produced a statement setting out her position. I have a copy. She does not want the CCTV "live-link" system whereby she would speak from a room in the Royal Court building, but wishes to be present to give evidence. The gist of her statement is that she does not want to be seen by the "offenders" during her evidence "*and any emotions I am going through*". She feels this would detract from her ability to give evidence. She concludes that "*I want to be in the Court and give my evidence to the Judge, but I fear seeing them again would impact on my ability to do this*".

### **Guernsey Parameters**

3. Guernsey does not have the rather detailed framework applicable in England by virtue of The Youth Justice and Criminal Evidence Act, 1999. The Live Link Evidence (Bailiwick of Guernsey) Ordinance, 2008 applies to video links only, not screens. The test to apply with live links (put shortly) is the "interests of justice". One then turns to Practice Direction No. 5 of 2008. The relevant paragraphs of this are:

"4. *The occasions when an application for the use of a screen is made are likely to be few. Where such an application is made, existing practice, based on principles developed under English common law, will continue to be followed.*"

And

"6. *An application for a special measures direction should be ..... accompanied by .... a statement from the witness detailing why he would be reluctant or would decline to give evidence without the measure.*"

4. It follows that, paradoxically, it is harder in practice to obtain screens, where a witness will be physically present in the court-room than a video-link, when they will be sat in the bowels of the Royal Court building. The Prosecution submitted (especially at para 18 of their skeleton), that having this more stringent test for screens is "*incongruous with any modern day notion of the interests of justice and witness care, particularly with vulnerable victims in sexual cases*". It should be noted that the Practice Direction states, at paragraph 3:

*“For evidence to be given by way of live-link the only requirement under the 2008 Ordinance is that the Court is satisfied that it is in the interests of justice to do so”.*

The Defendants’ Advocates’ point is that the Prosecution’s submission is directly contrary to the express wording of the provisions presently applicable in Guernsey.

5. I share the Prosecution’s view on incongruity. The video-link is, in most respects, a more radical special measure than screens. The test for the use of both should be the same, viz the interests of justice. But that does not mean that I can re-write the Practice Direction or augment the Ordinance because I do not like them. Certainly that should be done for future cases (at least with the Practice Direction) in my view, but that is not my function in the present application. To do so would go beyond my powers and foster judicial legislating and uncertainty – and I consider it wrong to do so. There may be a role for results - oriented jurisprudence, but not in the face of very tolerably clear provisions. Hence, I with regret, reject the Prosecution’s submission here and turn to the English common law principles.

### **Common Law**

6. One starts with the main case, referred to by both sides in argument, R v X, & and Z (1990) 91 Cr. App. R. 36. The Common Serjeant had allowed the use of screens in a child sex case. On appeal, the Lord Chief Justice said (at 40):

*“The principal ground of the complaint is that it was an unfair and prejudicial act to erect this screen, the suggestion being that the jury might have been unduly influenced, unfairly prejudiced against the defendants by seeing the screen there, and the jury might think that there was a suggestion that the person in the dock had already in some way intimidated the child who was going to give evidence. That would act in a prejudicial way to the defendant in the trial.”*

The Court of Appeal rejected the defence submission. The Lord Chief Justice went on to say:

*“The learned judge has a duty on this and on all other occasions of endeavouring to see that justice is done. Those are high sounding words. What it really means is, he has got to see that the system operates fairly: fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions as to where the balance of fairness lies. He came to the conclusion that in these circumstances the necessity of trying to ensure that these children would be able to give evidence outweighed any possible prejudice to the defendants by the erection of the screen.*

*The Court agrees with him in that view”.*

Even without the warning that was given the Court of Appeal did not think that any sensible jury could have been prejudiced in the circumstances. This is still the leading case in this type of situation.

7. The next case, which was cited at some length, was R v Cooper and Schaub [1994] Crim. L.R. 531, of which we had a transcript. The most important parts of Farquharson LJ’s judgment are (page 7):

*“Generally speaking, the provision of screens is confined to cases where children have to give evidence.”*

And (from page 8):

*“In our judgment it should only be in the most exceptional cases that apparatus of this kind should be used when an adult is giving evidence. It is by no means the case that every rape complaint, or prosecution for a sexual offence, would involve the use of such screens.”*

Then, in the light of the circumstances of the case, an “*exceptionally unpleasant*” multiple rape, the use of screens was upheld. As the judgment stressed:

*“It is undoubtedly the case, as we have already underlined, that a decision of this kind is very much within the learned judge’s discretion.”*

Advocate Ayres, on the basis of this, suggested that the facts in the present case are fundamentally different from those referred to in the judgment (para 20 of his skeleton). In particular, P only alleges she has vague impressions of what took place between her and the defendants and will thus not have to relive them in detail. Emphasis was placed by Advocate Lockwood on the observation in the Cooper and Schaub case (at page 8) that:

*“There can be little doubt in our judgment that the use of screens is prejudicial to an accused person, even where the jury are properly warned not to make any assumptions adverse to the accused person because of the presence or use of screens.”*

8. It can therefore be appreciated on what basis the defence submissions were made. The present matter is not one of the “*most exceptional cases*”. Reference was also made to the terms of P’s supporting statement, which does not indicate a refusal to give evidence, unless a screen is provided. Decisions of the English Court of Appeal, of course, are not binding on Guernsey courts, but are very likely to be followed, especially where the subject-matter is the same. On the basis of the Cooper and Schaub case Advocate Ayres’ submission (para 24 of the skeleton) is that there “*are no exceptional circumstances in the case which would justify the use of screens*”.
9. The judgment in Cooper and Schaub with great respect, struck me as too rigid and resonated with the thinking of a period when the needs of witnesses were not accorded the rather more enlightened treatment aimed for today. The period since that case (1994) has seen such a change. A decision which is of considerable assistance is R v Foster [1995] Crim. L.R. 333, together with a useful commentary from Professor D. Birch. The case involved a decision to allow a screen for an adult witness. The appeal was based on Cooper and Schaub on the basis that it was only in very exceptional circumstances that screens should be ordered for adult witnesses. On appeal, the Court of Appeal upheld the judge. The X, Y and Z case was the legal test to apply, i.e. to see that justice was done. The Cooper and Schaub case had not intended to put any gloss on that test to limit it in any way. Farquharson LJ was doing no more than saying that it was not in every rape case where screens would be thought necessary. If he was putting a gloss on it he was not right to do so. The commentary points out that Farquharson LJ’s “*exceptional circumstances*” starting-point for the use of screens is not followed here and the “*risk of prejudice is a factor to be considered by the judge in striking an appropriate balance, but it is no more than that*”. Nor here did the Court of Appeal see any strength in screens being per se prejudicial to a defendant. The decision is pre-eminently one for the trial judge; would no reasonable judge, properly directed, allow the use of screens in the case? This decision seems logical and balanced, and I propose to follow it. It is wholly consistent with the spirit of the stem X, Y and Z case.
10. The Jurats are not unaccustomed to the use of screens and to a direction on prejudice, which I tend to express in terms making it clear that screens are capable of being used for defence witnesses as well. As a general proposition the deployment of screens is not outlandish or a novelty worthy of comment and speculation. The suggestion (see para 35 of Advocate Ayres’ skeleton) that his client would suffer “*serious disadvantage and prejudice*” is not made out. In her statement P indicates, as already mentioned, that she wants to be able to present her “*best evidence to the court and I believe the screen will enable me to do this*”. She adds: “*I don’t want to see them and any reaction they may give to things that I am saying as I feel this would impede and detract from my ability to give my best evidence*” and “*I think the screen*

would help allay these serious concerns I have". In para 36 of his skeleton argument, Advocate Ayres reposted by submitting:

*"She has already been shown to have changed her story in the comfortable environment of the Rape Suite and should not be extended the dangerous courtesy of being allowed such conditions as will facilitate her doing exactly the same thing in court."*

He added:

*"This case has everything to do with the right of the Third Defendant to confront his accuser and nothing to do with the convenience, comfort or protection of the identity of the complainant."*

11. Making allowance for that fact that some forms of rhetoric may not appear to best advantage in the medium of cold and unsympathetic print, this is with respect, going rather too far. The Rape Suite is hardly a location of comfort and the rights of P are a legitimate concern. Similarly, the remarks earlier in the skeleton, especially at paras 27 and 28, refer to an obsolete view of sexual cases, which is no longer applicable. That is one of the reasons why the requirement of corroboration in such cases has been banished both in England and in Guernsey. Things have moved on a great deal since these observations quoted were made. The approach to a rape case should be a calm, rational consideration of all the evidence, with the burden lying on the Prosecution in all respects to prove the allegation to the criminal standard before a tribunal unencumbered by pre-conceptions of any sort and looking at the case fairly on its own merits. Hot air and emotion must be strangers to such a process. The ultimate end is fairness to all involved. Proper directions on prejudice and, if found justifiable, the question of corroboration, following the abolition of the compulsory rule, will be part of the proceedings.

### **Conclusion**

12. I have followed the authorities and sought to strike an appropriate balance. The risk of prejudice, in my judgment, is inconsiderable and will be allayed by an appropriate direction. It is in the interests of justice that P feels able to tell her story without avoidable encumbrance, and the Prosecution application succeeds, on common-law principles. The best protection for a defendant who may be wrongly-accused is a fair trial, free of irrelevant and obtrusive considerations and conducted in as calm an atmosphere as can be achieved.
13. Application granted.

**J R Finch**  
**Judge of the Royal Court**  
**8<sup>th</sup> June 2012**