A direction under Section 40 of the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2013

IN THE ROYAL COURT OF GUERNSEY

LAW OFFICERS OF THE CROWN **Prosecution**

-v-

"Z" **Defendant**

Prosecution application in respect of Video Evidence

Application heard on: 7th November, 2016
Judgment handed down on: 23rd November, 2016

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

Counsel for the Prosecution: **Crown Advocate C G Dunford**
Counsel for the Defendant: **Advocate L C Roffey**

Cases and Materials referred to in Judgment:

Horncastle v United Kingdom [2014] ECHR 1394;

Khawaja and TaHery v United Kingdom [2011] ECHR 2127;

John v Rees [1970] Ch 345;

R v Horncastle [2010] 2 AC 373;

R v Ibrahim [2012] 2 Cr. App R. 32, CA;

R v Mansouri [2015] EWCA Crim 2376;

R v Riat [2013] 1 Cr. App. R. 2, CA;

Secretary of State for the Home Department v AE and Others [2008] EWCA Civ 1148

Article 6 of the European Convention on Human Rights.

The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2002, Section 78;

The Criminal Evidence and Miscellaneous Provisions (Bailiwick of Guernsey) Law, 2002, Sections 1, 3 and 4;

The Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2013, Section 40.

Archbold, paragraphs 11-3 and 11-3a.

DECISION

Background

1. The Prosecution ("P") apply to the Royal Court for a direction under Section 40 of the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2013, as amended ("the Law of 2013") in relation to Achieving Best Evidence ("ABE") interviews of the late complainant ("C") in a trial of the Defendant ("D"), due to begin on 13th December, 2016 on a 12 count indictment alleging rape, buggery and indecency. Pleas of 'not guilty' have been entered. It was intended that C, who was terminally ill with brain cancer would give evidence on 7th and 8th November, 2016 which would be recorded. Very sadly, C died on 27th October, 2016. P still wishes to proceed, using the ABE interviews. D opposes this application. Oral argument was heard on 7th November, 2016, after an exchange of skeleton arguments and authorities. This is the judgment reserved after that hearing.

2. The statutory framework in Guernsey is found in Section 40 of the Law of 2013 and Sections 1, 3 and 4 of the Criminal Evidence and Miscellaneous Provisions (Bailiwick of Guernsey) Law, 2002 ("the Law of 2002"). The latter Law is based on the English Criminal Justice Act, 1988, now replaced by The Criminal Justice Act, 2003 (see paragraph 9iv of D's skeleton). It should be noted that the provisions of Section 78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003, which mirror the English legislation, also apply ("PPACE"). In considering these provisions there are decisions of both the English and Strasbourg courts to take into account. The approach adopted is that decisions of the highest English Courts are of considerable persuasive authority, particularly when looking at equivalent legislation - and that decisions of the Strasbourg court need to be given great respect in view of the application of the European Convention on Human Rights ("ECHR") to the Bailiwick. In other words, Guernsey courts need to give effect to the ECHR and give decisions consistent with it, as expounded in the Strasbourg Court.

3. For the purposes of this application it will be necessary to consider Section 40 of the Law of 2013. (It is agreed, correctly by both parties that ABE interviews are covered by the legislation that will be considered). First of all, Section 4 of the Law of 2002 provides that a statement admissible under Section 1 (Section 2 not being relevant), prepared for the purposes of a criminal investigation.

> "… shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not grant leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard –
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> (i) to the contents of the statement;
> (ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not

attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and

(iii) to any other circumstances that appear to the court to be relevant.

4. Section 1 of the Law of 2002 states:

"First hand hearsay.

1.(1) Subject to subsection (4) a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if –

(a) The requirements of one of the paragraphs of subsection (2) are satisfied; or

(b) The requirements of subsection (3) are satisfied.

(2) The requirements mentioned in subsection (1)(a) are –

(a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness; or

(b) that –

(i) the person who made the statement is outside the Bailiwick; and

(ii) it is not reasonably practicable to secure his attendance; or

(c) that all reasonable steps have been taken to find the person who made the statement, but that he cannot be found.

(3) The requirements mentioned in subsection (1)(b) are –

(a) that the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and

(b) that the person who made it does not give evidence through fear or because he is being kept out of the way.

(4) Subsection (1) does not render admissible a confession by an accused person that would not otherwise be admissible."

5. Section 40 of the Law of 2013 states:

"Recorded evidence in chief.

40.(1) Subject to subsection (2), in criminal proceedings in respect of a relevant offence, a court may give a direction (**"a recorded evidence direction"**) that a video recording of an interview with any specified witness, other than the accused, be admitted as the evidence in chief of that witness.

(2) A recorded evidence direction may not be given in respect of a video recording if the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording should not be so admitted.

(3) Where a recorded evidence direction provides for a recording to be admitted under this section, the court may nevertheless subsequently direct that it is not to be so admitted if –

(a) it appears to the court that –

(i) the witness will not be available for cross-examination (whether conducted in the ordinary way or in accordance with any other order of the court including, but not limited to, a live link evidence direction), and

(ii) the parties to the proceedings have not agreed that there is no need for the witness to be so available, or

(b) any rules of court requiring disclosure of the circumstances in which the recording was made have not been complied with to the satisfaction of the court.

(4) Where a recording is admitted under this section –

(a) the witness must be called by the party tendering it in evidence, unless –

(i) a live-link evidence direction has been given,

(ii) any other direction has been made by a court which provides for the witness's evidence on cross-examination to be given otherwise than by testimony in court, or

(iii) the parties to the proceedings have agreed that there is no need for the witness to be called, and

(b) the witness may not give evidence in chief otherwise than by means of the recording -

(i) as to any matter which, in the opinion of the court, has been dealt with adequately in the witness's recorded testimony, or

(ii) without the permission of the court, as to any other matter which, in the opinion of the court, is dealt with in that testimony.

(5) The court may, in giving permission for the purposes of subsection (4)(b)(ii), give a live-link evidence direction or make such other order as it sees fit.

(6) Nothing in this section affects the admissibility of any video recording which would be admissible apart from this section.

(7) Where a recorded evidence direction provides for part only of a recording to be admitted under this section, references in subsections (4) and (5) to the witness's recorded testimony are references to the part of the testimony which is to be so admitted."

6. It should be noted at this juncture that D's argument (at paragraph 9 ii of the skeleton) that under Section 40(4)(a) a witness must be called, is to be read in conjunction with Section 40(6), which allows the procedure envisaged in P's applications, due to the applicability of the Law of 2002, another "gateway". Going back to that Law it is now appropriate to consider the statement of "Principles to be followed by the Court" set out in Section 3:

"3.(1) If having regard to all the circumstances the court is of the opinion that in the interests of justice a statement which is admissible by virtue of section 1 or 2 nevertheless ought not to be admitted, it may direct that the statement shall not be admitted.

(2) Without prejudice to the generality of subsection (1); it shall be the duty of the court to have regard –

(a) to the nature and source of the document containing the statement and to whether or not, having regard to its nature and source and to any other circumstances that appear to the court to be relevant, it is likely that the document is authentic;
(b) to the extent to which the statement appears to supply evidence which would otherwise not be readily available;
(c) to the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and
(d) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them."

So Sections 3(2)(a) and 4(ii) of the Law of 2002 contain identical provisions on the "risk" of "unfairness" to the accused, together with the other safeguards in those Sections. Section 40(2) of the Law of 2013 states a recorded direction in respect of a video recording: "may not be given, if the Court is of the opinion, having regard to all the circumstances of the case that in the interests of justice the recording should not be so admitted".

7. D placed particular reliance on Khawaja and TaHery v The United Kingdom [2011] ECHR 2127, a decision of the Grand Chamber, following a decision adverse to the UK by the Fourth Chamber in 2009. The decision is annexed to D's skeleton. D referred to paragraphs: 127, 128, 131, 142 and 147 of the Grand Chamber's decision in the skeleton. The case was concerned with the application of Article 6 of ECHR to cases where the evidence of "absent witnesses" (through death or fear) had been received, leading to convictions. Paragraph 147 includes the following relevant observations (after noting that receiving such evidence will not necessarily breach Article 6(1)):

> "… At the same time where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching of scrutiny … The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place."

In P's skeleton, attention was drawn to the English Court of Appeal and Supreme Court decisions in R v Mansouri [2015] EWCA Crim 2376 (appended to P's skeleton) and R v Horncastle [2010] 2 AC 373.

8. There was an interesting "dialogue" between the English Supreme Court and the Strasbourg Court which lead to the Grand Chamber decision in Khawaja, largely exemplified in the Horncastle case. The latter reached Strasbourg in 2014 [2014] ECHR 1394, a unanimous Chamber decision which upheld the reasoning of the Supreme Court and finding no violations of Article 6. The apotheosis of Khawaja is particularly well set-out in the current edition of *Archbold* at 11-3 and 11-3a. One important English decision came from the Court of Appeal in R v Ibrahim [2012] 2 Cr. App. R. 32, CA, a case also cited in P's skeleton. As *Archbold* points out, the tenor of that decision is that "while there may be differences in approach as between the Supreme Court and the Grand Chamber, these differences may be more of form than of substance …" P also referred to R v Riat [2013] 1 Cr. App. R. 2, CA, where it was explained that, "there is no general rule that hearsay has to be shown to be reliable before it can be admitted, or before it can be left to the jury".

9. To use an imperfect analogy it appears the Strasbourg jurisprudence has been subject to some sort of filtration process in the municipal courts. It is necessary to see what the cases decide. A workable "aide memoire", according to *Archbold*, is found in the Riat case:

> "The court added that hearsay must not simply be "nodded through"; a focussed decision must be made, involving a careful assessment of (a) the importance of the evidence to the case, (b) the risks of unreliability, and (c) whether the reliability of the evidence can properly be tested and assessed; it follows that matters such as the circumstances of the making of the statement, the interest or disinterest of the maker, and the means of testing such reliability, are all directly material at this point, as is any other relevant circumstance …."

That with respect is a very helpful exposition of what should be involved and, moreover, is wholly consistent with the Guernsey statutes quoted earlier. Accordingly, the facts and merits available at this stage need to be assessed in the light of these considerations. As indicated in paragraph 6 above, the legislation comes down to "unfairness" to an accused and, more generally "the interests of justice".

Facts and Merits

10. Of course, no evidence has been received in these criminal proceedings. D was involved in civil proceedings to which the lesser burden of proof applicable in such cases was used. If the charges are made out to the criminal standard, D is an odious sexual predator deserving of condign punishment. Added to this is the wish to do justice to a young person, dead well before her time. The recent ABE interviews, which come over as well-conducted by a trained officer are not a comfortable experience. If presented to the Court a direction in the most emphatic terms about avoiding emotionalism and sentiment and considering them rationally would be needed. In this context it is worthwhile to quote from the submissions of the third party intervener in the Khawaja case, referred to in paragraph 115 of the decision:

> "It was instructive to remember the warning of Megarry J (in John v Rees [1970] Ch 345) that "the path of the law [was] strewn about with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event were completely answered ….. Sedley LJ had observed in Secretary of State for the Home Department v AE and Others [2008] EWCA Civ 1148 [that it is] "seductively easy to conclude that there can be no answer in a case of which you have only heard one side"."

To which might be added the common experience of any court-room advocate who either has an impressive, damning to the other side, witness statement or compelling witness in chief, then sees these evaporate under skilled cross-examination and come to nothing.

11. D's skeleton at paragraph 17-21 goes over certain alleged factual defects and inaccuracies in C's interviews. P has conceded that the case "rests substantially on the evidence of C", which is rather understating it, in these circumstances as it rests almost wholly upon her evidence. Advocate Roffey in his able oral submission indicated that, in the normal run of things, he might have had two days of cross-examination of C. It is not proposed to go over all the points he makes in the skeleton, some are of more importance than others. Having carefully considered them it would appear that items set out in paragraph 18 are the sort of alleged discrepancies that would occur in oral evidence and the case would still "run" to be put in the hands of the Jurats, with the exception of the matter relating to the 17th birthday, car present from D and the vagueness of recall. Similarly, paragraph 19 is potentially significant in undermining C's recollection. Crown Advocate Dunford described the matters set out in paragraph 20 as D's "best point" and he is correct. The discrepancy in dates as to when C went to the Family Planning Clinic, April/May or November 2005 is potentially weighty. In

paragraph 21 reference is properly made to C's ABE interviews in 2009, where many allegations were left out by her. She did not proceed with this complaint. Such a scenario is not uncommon in serious sexual cases involving young complainants and is not prima facie as significant as D suggests. Nevertheless, it is still something that cannot now be put. In paragraph 17, Advocate Roffey has listed responses to P's suggestion of corroborative evidence, which may or may not be valid, but again cannot be put to C, even though upon reading them items a) to e) do not appear very strongly effective – but that is only on the material now available.

12. Both sides have referred to the question of delay. This is not determinative of the present application. D is entitled to change his Advocate; P is entitled to take time in assessing and evaluating, as well as preparing the prosecution of very serious charges in a difficult situation. This factor is not a crucial one in the circumstances and no fault is attached to either side.

Observations on the Facts and the Authorities

13. The test that is applied in the present case is that alluded to at paragraph 9 above, taken in essence from the case of Riat and others. In considering this, careful note is also taken of the ECHR decision in Horncastle, which was referred to. The enquiry is very much facts-specific and boils down as well to complying with the statutory requirements also mentioned above, namely "unfairness" and "the interests of justice". So using the classification in Riat:

> "(a) importance of the evidence - There is no dispute that it is the very heart of P's case. To borrow the words of the trial judge quoted e.g. in paragraph 15 of the Grand Chamber decision in Khawaja "no statement, no count one". Here, in the absence of the ABE interviews, no counts at all;
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> (b) risks of unreliability - Taking the more weighty points made on behalf of D, there are potentially significant discrepancies which cannot now, unfortunately, be put. There might well be satisfactory answers or explanations and persons have been convicted of serious offences when there are manifest discrepancies in the Prosecution's evidence, but we are left just with C's account and it cannot be challenged or explored. In particular C's earlier complaint cannot be examined;
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> (c) testing an assessment of evidence - There is little here to add to that which has been said in (b). On what has been put forward the core basis of P's case rests on C's word. Whatever took place between C and D did not take place in the presence of witnesses. D's proposed defence witness on one of the charges relates to the circumstances of that charge only. D's skeleton is correct in paragraph 17 when it emphasizes "the inherent dangers of the prosecution case proceeding on C's sole and decisive evidence".

Conclusion

14. The case has been properly brought by P and properly argued. It was right that this difficult question be decided by the court. Both Advocates have argued well. On the facts, and applying this decision strictly to these unusual and sad circumstances, it would be unfair to D to admit this ABE evidence. It is not only absolutely fundamental to the whole case, but incapable of legitimate exploration by the defence. Article 6(1) ECHR requirement as to fairness would therefore not be obtained. "Sufficient counterbalancing measures" are not able to be put in place in this case. Hence D's argument succeeds and the ABE evidence cannot be admitted. For the sake of completeness it should be noted that the same decision would have been likely under Section 78 of PPACE.

15. Application refused.

J R Finch

Judge of the Royal Court