

Special measures application – witness to give evidence from behind a screen not visible to the defendant. Viewing the available best evidence (ABE) recording to refresh complainant’s memory, directions to jurors about transcript of interview and leave for prosecution to ask additional questions.

[2023]GRC018

**IN THE ROYAL COURT OF GUERNSEY
(CRIMINAL DIVISION)**

Between:

LAW OFFICERS OF THE CROWN

Prosecution

-and-

A

Defendant

Re: Special Measure Applications

Judgment handed down: 12th April 2023

Before: Catherine Maureen Fooks, Judge of the Royal Court

Counsel for the Prosecution: Crown Advocate C G Dunford

Counsel for the Defendant: Advocate L C Roffey

Cases, legislation and texts referred to in Decision:

The Live Link Evidence (Bailiwick of Guernsey) Ordinance 2008

Practice Direction No 3 of 2013 Special Measures

The Criminal Justice (Sex Offenders & Miscellaneous Provisions) (Bailiwick of Guernsey) Law 2013

English CPD V Evidence 18C

Pinto v Law Officers Judgment 12 of 2013

X, Y and Z, [1990] 91 Crim App R 36

Watford Magistrate’s Court ex parte Lenman, [1993] Crim LR 388

Taylor [1995] Crim LR 253

R v Popescu [2010] EWCA Crim 1230

R v Sothilingham (Prashad) [2018] EWCA Crim 2884

Blackstone’s Criminal Practice 2023, paragraph D14.47

Introduction

1. In this matter, there have been several applications for special measures and an application for a recorded evidence direction, as respects the Complainant's Achieving Best Evidence interview ("ABE"). Earlier this year, I granted and gave reasons for so doing:
 - 1) the Prosecution's application under The Criminal Justice (Sex Offenders & Miscellaneous Provision) (Bailiwick of Guernsey) Law 2013 for the complainant's ABE to be played as evidence in chief and under The Live Link Evidence (Bailiwick of Guernsey) Ordinance 2008 for her to give the remainder of her evidence via Live Link.
 - 2) the Defence application under the Court's inherent jurisdiction for the witness, DW to give evidence from behind a screen. The concern she expressed is that people from the public gallery would be able to see her. She expressed no particular concern about the Defendant being able to see her.
2. Neither of those applications was opposed. I was satisfied that the measures met the interests of justice test. This is an indecency case involving young witnesses under the age of 18 now, who were younger at the time and who are understandably anxious about giving evidence in public involving sexual matters. It is important that their evidence is given as best it can be.

Screens

3. Subsequently, Crown Advocate Dunford for the Prosecution filed a further application for special measures, this time invoking the Court's inherent jurisdiction, for PW1, who is now 17 years old, to give evidence from behind a screen. In her statement, she explained that she did not want the Defendant to see her but she understood that the rest of the Court would see her. She said that would be less intimidating and she would be more comfortable. In her statement she does not directly address the issue of those being in the public gallery being able to see her. She does refer to "*a bit of a falling out*" and possible repercussions of her giving evidence.
4. The procedure and test for use of screens in Guernsey is contained in Practice Direction No. 3 of 2013, paragraph 3:

"Guernsey does not have detailed legislative provisions equivalent to those in force in England. In particular we have no provisions relating specifically to "vulnerable witnesses" apart from Section 1(3) of the [Live Link] Ordinance. The utilisation of special measures, accordingly, will not require classification of a witness as "vulnerable", unless it is also intended that a witness is screened or obscured from the view of the defendant."

and the last sentence of paragraph 4:

"The question of vulnerability, should it arise, will then need to be dealt with separately."

It is clear from the Practice Direction that the test for the use of screens is the interests of justice test, which is contained in The Live Link Evidence (Bailiwick of Guernsey) Ordinance 2008.

5. Paragraph 7 of the Practice Direction says this:

"An application for special measures direction should be made in advance of the hearing, at which the evidence is to be given. It should be accompanied by a brief outline of why the measure is sought and a statement from the witness detailing why he would be reluctant or would decline to give evidence without the measure. In the case

of a child witness, such statement could be provided by a person who has spoken to the child and could represent the child's view on his behalf. Copies of such documents should be served on the opposing party in advance of the hearing of the application”.

6. The statement filed by the witness, PW1, did not directly address that she would be reluctant or would decline to give evidence were the special measures not granted. In view of this and her specific request that the Defendant not be able to see her, which the Practice Direction states requires a finding of vulnerability, I wanted to be sure that I was applying the right test, so I invited submissions and we had a brief hearing at which I granted the application and said that I would give reasons later.
7. It is not unusual to look at current English practice and procedure where the provisions are at least similar, as they are here. Blackstone's Criminal Practice 2023, paragraph D 14.47 contains a reference to witnesses requesting screens which has *“the incidental effect of preventing the accused from seeing the witness testify”*. The commentators go on to say this, *“note however the Court of Appeal has held that the right of the accused to see his or her accusers should be denied in only rare circumstances where the witness has been intimidated or where there is an Anonymity Order”*. There is then a reference to two English cases, Taylor [1995] Crim LR 253 and Watford Magistrate's Court ex parte Lenman, 1993 Crim LR 388.
8. The passage in Blackstone's continues, *“and in such circumstances, even where the witness testifies from behind a screen, a video camera can be discreetly positioned so as to enable the accused to see the witness whilst the screen prevents the witness from seeing the accused”*.
9. In the case of Taylor, the witness was screened but the defendants could see her on a television screen. That case was primarily concerned with an Anonymity Order. There are references made in that case to a further case X, Y and Z, 1990 91 Crim App R 36. That case concerned the evidence of young children in a case where it was alleged that they had been indecently assaulted by family members. The English Court of Appeal stated clearly that the issue was one for the discretion of the trial Judge, who had a duty to see that justice was done, that is to say that the system operated fairly, not only to the defendant but also to the prosecution and also to the witnesses, and sometimes the Judge had to make a decision as to where the balance of fairness lay.
10. That is the position in England and it is perhaps surprising that there is no more recent authority in Blackstone's bearing in mind the ages of the above cases to which reference is made. It is important to note that the rules and procedures concerning special measures in England and in Guernsey are not identical, and of course in Guernsey we have the Jurats rather than a Jury, the Jurats being an experienced tribunal, who are completely familiar with the various special measures and know and are reminded on each occasion that they must not hold those special measures in any way against a defendant.
11. In Guernsey we have a much more recent authority, namely the Court of Appeal decision in the case of Pinto v Law Officers Judgment 12 of 2013, in which one of the grounds of appeal was specifically the Judge's decision to allow the use of screens to screen the complainant in a rape case from the Appellants and the public. The learned Judges of Appeal emphatically rejected first the argument that defendants in a criminal trial had any right to be physically present, so that they could observe an accuser, there being no common law right of confrontation. Secondly, they rejected the argument that the use of screens to shield a witness from the view of a defendant is exceptional and thirdly, that screens should only be used where otherwise the witness would not give any evidence. They confirmed the inherent jurisdiction of this Court to control its own procedure, which included allowing the protection of witnesses by screens where it is shown to be reasonably necessary and in the interests of justice. Whilst that might be justified by the risk that a witness may not testify, there are other reasons and, in the case before them, the complainant's concern that she would be distracted in the course of her

evidence was deemed sufficient, as her ability to give her evidence would be adversely affected by her seeing the Appellants and by being under the scrutiny of them, their friends and family in the public gallery. The Court must have regard not only to the need to ensure a fair trial for the defendant but also the reasonable interests of the other parties to the court process and in particular witnesses who are obliged to relive, by describing in the witness box an ordeal to which they say they have been subject. It is the clear duty of any Judge to do everything possible, consistent with giving the defendant a fair trial, to minimise the trauma suffered by other participants.

12. Advocate Roffey in his submissions made particular reference to the next passage, which reads as follows:

“Whilst this court accepts that a defendant should only be denied an opportunity to see his accuser in relatively rare circumstances, it considers that the decision as to the use of screens was pre-eminently one for the discretion of Judge Finch, who clearly took into account the full range of factors identified in X, Y and Z”.

X, Y and Z is the case to which I have already made reference.

13. The learned judges concluded that the Judge’s decision could not be faulted and that screening was a proportionate response to the claimed concerns and did not pre-judge the questions of credibility and reliability and did not interfere with the fair trial rights of the Appellants. The complainant was still visible to the Advocates, as well as to the Court and there was, therefore, a full opportunity to test her evidence, which they had stated earlier in the judgment was the key right of the defendant in a criminal trial. I note that it is the practice of this Court always to ensure that the witness is so visible and this will be so in the case before me.

14. The learned judges go on to consider the direction given which they approved and they then say:

“We should note that it is at least open to question whether a request for screens is now to be regarded automatically as a source of prejudice to an accused person given that such measures are much more common and are as likely to be interpreted as indicating a reluctance of a dishonest witness to confront innocent defendants, as indicating the screened witness is an honest witness being intimidated by a guilty accused”.

15. I agree with Advocate Roffey that it appears that the position in Guernsey as to screens is not identical to that in England certainly when comparing the rationale of Pinto with the passage in Blackstone’s quoted above. Pinto was decided in 2013 and we are now some 10 years on and screens and other special measures are a routine part of criminal trials in Guernsey. As Crown Advocate Dunford submitted, there is an increasing awareness of the need to protect witnesses.

16. I consider it no bad thing to have reviewed the authorities and particularly Pinto to ensure that proper consideration is given to the need for a fair trial and the justification for the use of special measures even if, as the Court of Appeal opined, they should not be viewed as automatically prejudicial to a Defendant. Each case must be considered on its merits.

17. It is also important that we follow properly the procedures which are set out in the current Practice Direction and that means having a written application with a statement from the witness explaining exactly what the concerns are, how the special measures would address those concerns, the issue of vulnerability where the Defendant will not be able to see the witness and whether the witness would be reluctant or refuse to give evidence, absent the special measures. I do consider that PW1’s statement could have been better focused on those issues.

18. It appears that there has not been consideration in Guernsey of the use of a camera to allow the Defendant to see the witness, where that is not the specific concern, and perhaps we should be considering that in appropriate circumstances. Advocate Roffey makes the point that the Defence witness, DW wants to be screened from the public gallery but not the Defendant. No point is taken so I do not need to consider the use of a camera.
19. Advocate Roffey also makes the point that a live link may be preferable to screens, as the Defendant can watch on a screen unless a direction is given, on account of vulnerability of the witness, that the Defendant should not be able to view. I agree. Similarly, a direction could be given again on account of vulnerability that the live link or even ABE should not be played to the public gallery, in appropriate circumstances.
20. Both Counsel submitted that the use of screens and rationale has moved on. Crown Advocate Dunford submitted that a Defendant would only have a strong case to see a witness where there is a special reason, for example a husband and wife situation where there might be nuances only apparent to a Defendant. That seems to me to be taking it too far.
21. We did not delve into the issue of vulnerability. The Practice Direction requires that vulnerability be established if the Defendant is to be screened from the view of the Defendant. It was common ground that young persons giving evidence in a sexual case are vulnerable and, in my judgment, that must be right.
22. At the hearing, Advocate Roffey confirmed that, having considered all the issues, there was still no opposition to the above applications. For the avoidance of doubt, I am satisfied that the application for a screen for PW1 should be granted in the interests of justice even though the Defendant will not be able to see the witness. The usual firm direction will be given to the Jurats.
23. I now come on to the application in respect of PW2, which is an application for a screen and also the presence of what she described as a support worker, but I assume means a witness supporter.
24. On the working day before the trial, Crown Advocate Dunford gave notice by email to the Court and the Defendant's Advocate that a further application for the use of screens in relation to another young witness, PW2. It appears that unfortunately the issue had not been discussed with her earlier by the Police. Crown Advocate Dunford wanted to make an oral application which I could not allow him to do, as I consider that the Practice Direction requires a written application however brief, especially as it has to be made in advance of the hearing and accompanied by the witness' statement with defence counsel being given an opportunity to respond. Crown Advocate Dunford has therefore filed a brief written application, relying on the witness' age and the content of her statement. He also added in his accompanying email that he had been advised by one of the parents that there has been some tension and that is also raised in support of the application for special measures. I take this into account, as when the witness is a child, evidence can be received from a parent.
25. The statement of PW2 states that she is anxious about seeing the Defendant and being seen by him and she would like a witness supporter to take some of the pressure off, as she would not feel alone. Advocate Roffey indicated that the application was not opposed.
26. I have no doubt that there are tensions about this case and indeed this is referenced in the statements of others seeking special measures. This witness is 17 and is clearly anxious, the issues are sexual and sensitive and I am satisfied that it is in the interests of justice to grant the application, even though the Defendant will not be able to see the witness. It is also in the interests of justice that she and indeed any of the other witnesses have a witness supporter.

RED Direction

27. I now turn to some issues which arose from the Recorded Evidence Direction. There were four issues:

- 1) the issue of refreshing the Complainant's memory,
- 2) the issue of the transcript and possibly pausing the recording,
- 3) the form of the direction to the Jurats about the transcript, and
- 4) leave to ask further questions.

Complainant Refreshing her Memory

28. Taking them in turn, at the hearing Crown Advocate Dunford raised the fact that the Complainant would like to watch her ABE over the weekend before the trial and it was usual to offer the opportunity to watch it again whilst it was being played to the Court. Advocate Roffey raised concern that this was not appropriate and that a live witness would not have that opportunity. He made written submissions, referring to the English CPD V Evidence 18C of which we have no equivalent in Guernsey. It does however provide useful practical guidance. It is stated that it is a matter for the Judge's discretion to be exercised on a case by case basis. Advocate Roffey highlighted two sentences which I have extracted with the context:

- *The witness's first viewing of a visually recorded interview can be distressing or distracting.*
- *It should not be seen for the first time immediately before giving evidence; and, whether it is necessary for the witness to see the DVD more than once for the purpose of refreshing.*
- *The Court will need to ask the advice of the intermediary, if any, with respect to this.*

29. I do wonder if the last sentence is more in the context of an intermediary situation where multiple viewings might be needed for cognitive reasons. In the end, there was no actual dispute with the arrangements but we should make sure in future cases that this point is adequately covered.

ABE Transcript and Direction

30. At an earlier directions hearing, Advocate Roffey had raised whether the ABE could be played without the provision of a transcript to the Jurats. It has been the practice to have transcripts available to the Jurats subject to clear direction that the video is the evidence and that they would not be allowed to retire with the transcripts. It is a matter of record that Prosecution and Defence Counsel in a recent case sought to proceed without the transcript but it became obviously quickly that the quality of that recording was not adequate, so the transcript was used in the usual way. It is acknowledged that the English case law to which this Court looks for guidance is R v Popescu [2010] EWCA Crim 1230 and R v Sothilingham (Prashad) [2008] EWCA Crim 2884. It is clear that the starting point is whether a transcript is necessary at all. I decided that we should try out the recording in advance in this case and what we discovered was that it was at least mostly intelligible without a transcript when played on a laptop, but once played in Court the audio quality was not considered adequate by either Counsel or me. I have directed therefore that a transcript must be provided in this case. It was also canvassed that the recording could be paused if requested by me to enable notes to be taken as would happen with a live witness, and we will review that as the recording is played.

31. As Advocate Roffey raised concerns that the transcript would, in all cases, distract the Jurats from watching the witness we discussed the form of direction to be given to the Jurats and I provided Counsel with the standard direction. He has asked that it be augmented, to emphasise the need to focus on the demeanour of the witness thus, *“Use the transcript to follow the evidence but please do not concentrate just on the written word. Look at the video as well so that you can see how the witness is describing events”*. Crown Advocate Dunford raised no objection to that augmentation. I will accede to this but I make the point that the Jurats are very experienced in criminal trials, the assessment of witnesses and specifically watching ABE interviews with a transcript and taking notes, if they choose to do so. My full direction will be:

“The Complainant in this case has given an ABE recorded interview with which process you are familiar. It is played as the [greater part of the] Complainant’s evidence in chief. You should pay the same close attention to the ABE recording as if the witness had been present in Court to give that evidence and assess the witness in the usual way. Put another way, use the transcript to follow the evidence but please do not concentrate just on the written word. Look at the video as well so that you can see how the witness is describing events. You are being given a transcript to follow as sometimes it is hard to follow such interviews but it is the recording not the transcript which is the evidence. You are not allowed to keep the transcript because you do not have statements of any other oral witness’ evidence”.

Additional Questions

32. Crown Advocate Dunford indicated that he would be seeking leave to ask additional questions of the Complainant in addition to her ABE. He requires leave under Section 40(4)(b) of the Criminal Justice (Sex Offenders & Miscellaneous Provisions) (Bailiwick of Guernsey) Law 2013.

(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.

33. Crown Advocate Dunford set out the further questions with reference to the Admissions and specific exhibits. Advocate Roffey indicated promptly that he had no objection to the additional questions. I am satisfied that they are questions which have not been dealt with adequately in the ABE, as they relate to exhibits which were not available during that interview. I see no difficulty with the arrangements Crown Advocate Dunford has proposed in order to deal with the exhibits. Advocate Roffey raised no objections to the arrangements.

Catherine Maureen Fooks
Judge of the Royal Court

27th April, 2023