

ANONYMISED FOR PUBLICATION

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

Between:

THE LAW OFFICERS OF THE CROWN

Prosecution

-v-

K

Defendant

Ruling on Special Measures application for an ISVA to be a witness supporter

Before: Catherine Maureen Fooks, Judge of the Royal Court

Date of perfected Judgment: 21st October, 2024

Counsel for the Prosecution: Crown Advocate S G Watson

Counsel for the Defendant: Advocate P T R Ferbrache

Cases, legislation and texts referred to in Decision:

The Human Rights (Bailiwick of Guernsey) Law 2000

Practice Direction 3 of 2013 for Witnesses Giving Evidence in Criminal Proceedings Special Measures

Home Office - The Role of the Independent Sexual Adviser: Essential Elements (September 2017)

Decision

Introduction

1. I recently granted an application by the Prosecution for a Complainant (“C”) in a case concerning sexual offences to have as her witness supporter an ISVA (Independent Sexual Violence Adviser) from the Witness Service, rather than the usual independent witness supporter from the Witness Service, as had been previously granted in this case, to support C when she gave evidence in Court from behind a screen. I gave brief reasons in open Court for

granting the application and indicated that I might issue written perfected reasons as the Application is the first of its kind. I am doing so now as there is a second application and it may assist counsel in that application to see how the first application was approached.

The Application

2. In support of the Application I had a statement from C and from the ISVA (“S”) which set out the reason for the Application which was the particular anxiety of C and certain medical issues. C explained why her evidence would be impacted if she did not have S supporting her. There was attached to S’s statement the Home Office Booklet entitled The Role of the Independent Sexual Adviser: Essential Elements (September 2017) (“the Home Office Guidance”) which contains the guidance for ISVAs which S confirmed is followed in Guernsey. The Application was unopposed.
3. In her statement, S confirmed the purpose of an ISVA. S said that an Independent Sexual Adviser (ISVA) provides crucial support and advocacy for survivors of sexual violence. Their role includes offering emotional support, providing information about legal and medical processes, and ensuring the client’s rights and needs are addressed throughout their recovery journey. Notably, ISVAs do not know the specific details of a case, and should they become aware of details of a case, they are not able to support a client in court. An ISVA helps by preparing the client for the proceedings, accompanying them to hearings, and offering real-time emotional support to reduce anxiety and stress. This continuous support is essential, it is said, for empowering the client, enabling client to participate fully and confidently in the legal process. This ensures the focus remains on the client’s well-being and ability to give the clients best evidence. In this case, there had been regular meetings over a number of months in which S supported C in terms of her wellbeing and signposted her to any appropriate agencies. S confirmed that there has been no disclosure of evidence to her by C.

Applicable Legal Principles

4. Applications for witness supporters are made under the Court’s inherent jurisdiction rather than under any statutory provision but they are covered by Practice Direction 3 of 2103 entitled “Special Measures For Witnesses Giving Evidence In Criminal Proceedings” (“the PD”), paragraphs 2 and 3 of which are as follows:

“2. The “special measures” within contemplation are the giving of evidence by way of live-link pursuant to The Live-Link Evidence (Bailiwick of Guernsey) Ordinance 2008 or the giving of evidence behind a screen. However, other measures may fall within the terms of this Practice Direction – for example, a vulnerable witness might be prepared to give evidence in open court, but would wish for the reassurance of a friend or relative present in Court when he gives evidence.

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 Ordinance. The utilisation of special measures, accordingly, will not require classification of a witness as “vulnerable, unless it is also intended that the witness is screened or obscured from the view of the defendant.”

5. The PD continues with the procedure for an application for Live Link (see especially paragraphs 4 and 7. The test to be applied is stated at paragraph 4 to be that the Court must be satisfied that it is in the interests of justice to grant the application. Paragraphs 8, 9 and 12 deal with witness supporters in the context of live link but those paragraphs have customarily been applied to all witness supporters whether in the Live Link room or in the Court room and whether behind a screen with a witness or in open Court. Those paragraphs read as follows:

“8. Where a live-link is employed, the only person who will usually be permitted to be in the link room while the witness gives evidence is a representative of witness/victim support (“the supporter”). The supporter will have had no prior involvement with the case other than in the course of acting as a supporter and should not have any knowledge of the circumstances of the case or the evidence the witness can give.

9. It is recognised that a relationship of trust should exist between the supporter and the witness and therefore the supporter should, where possible, be available to meet the witness at any pre-hearing court visit that is arranged. Advocates are therefore encouraged to make applications for special measures at an early stage. Before the actual trial begins the Judge will enquire of the supporter if he has met the witness before and in what circumstances, if he knows anything about the case and if he has discussed the witness’s evidence with the witness or anyone else. If the Judge is satisfied with the responses, the supporter will retire from the court ready to accompany the witness into the link room. The supporter will remain in view while the witness gives evidence. During any breaks in the evidence, the supporter must not discuss the witness’s evidence with the witness or anyone else.

12. The witness may be released from court having given his evidence. However, in case the witness is required to return to court to give further evidence, the supporter should not discuss the case or the witness’ evidence with the witness until the hearing has finished.”

6. It is important to keep in mind that the whole purpose of Special Measures is to enable a witness to give the witness’ best evidence, in the interests of justice in the broadest sense. The Jurats are completely familiar with such provisions and are always directed that they have no bearing on their assessment of the evidence of the witness or their judgment of the defendant.
7. Although paragraph 2 of the PD suggests that a witness might have a friend or relative present in Court when the witness gives evidence, witness supporters have always independent and from the Witness Service. They are typically asked to confirm the following, or similar:
 - *you have had no meeting with witness before today bar a familiarisation visit;*
 - *you know nothing of the case/evidence and*
 - *you know that you must not discuss the evidence with the witness during or after the trial.*
8. What distinguishes the Application for S to be the witness supporter in this case is that S has had extensive meetings with C in S’s role as ISVA. Paragraph 9 of the PD recognises that there should be a relationship of trust but it would not be usual for a witness supporter to have had the number of meetings that an ISVA ordinarily has with the person who is being supported.

ISVAs from the Witness Service

9. S is an ISVA but is also what I will term a regular witness supporter from the Witness Service. The Court is familiar with the role of ISVAs, not from the Witness Service, but in family cases where they support persons who are claiming to be victims of domestic abuse and are heavily involved with the facts of the case. The role of an ISVA from the Witness Service, as in S’s case, is different. Whilst there is an ongoing supportive relationship and there will, therefore, have been potentially many meetings between the ISVA and the witness, the Home Office Guidance is followed so that the person who is being supported by an ISVA is not allowed to divulge to the ISVA any details of the case. The consequence of the different relationship between an ISVA from the Witness Service and witness and between a regular witness supporter and witness is that the former cannot confirm the limited number of meetings as is contemplated by the PD and routinely asked in Court.

The Home Office Guidance

10. This document sets out clearly the approach taken in England. It is, of course, not binding in Guernsey but it is helpful guidance in respect of a new role in Guernsey which has been adopted from practice in England.

Counsel's submissions

11. I received written submissions from Advocate Watson from the Law Officers. Advocate Ferbrache did not oppose the Application so it was not necessary to hear oral submissions. Advocate Watson invited me to take a broad interpretation of the PD and to accept that S's role remains within scope of the PD as supporter. The thrust of the above paragraphs of the PD is that a witness should be supported, there should be a relationship of trust but that the supporter must not know about the case or have had any discussions about the evidence. In Advocate Watson's submission, with some adjustment to the questions, the spirit of the PD could be preserved.
12. Advocate Watson proposed that S be asked slightly different questions based on paragraphs 3.4 and 3.5 of the Home Office Guidance which read as follows:

“3.4 It is important that ISVAs ensure that the victim/survivor is made aware of and fully understands the need for the ISVA to maintain strict boundaries when providing support as part of their role. This will help to minimise the possibility of victims/survivors providing the ISVA with disclosable information relating to the evidence in a court case and information relating to the offence itself. An ISVA who does not maintain strict boundaries and becomes aware of evidence or who discusses the evidence with the victim/survivor may not be permitted to support the victim/survivor at court and it may give rise to a challenge by the defence of coaching a witness.

3.5 Examples of when this could occur include circumstances when a victim/survivor:

- Discloses particulars of the offence itself to the ISVA. Any information recorded by the ISVA would be subject to examination to ensure it does not undermine the prosecution case or assist the defence. There is also potential for the ISVA to be called to give evidence at a trial and/or the victim could be subject to cross examination about the disclosure;*
- Discusses with the ISVA the best way of giving evidence to ensure the jury believe what the victim/survivor is saying. This could preclude an ISVA from supporting the victim at court and additionally may result in the defence team making an application to 'stay' proceedings on the basis that this interaction is coaching and is an abuse of process;*
- Is told by the ISVA about other evidence which may exist. This could influence the way in which the victim deals with questioning in a police interview or at trial. Again this may result in a defence application to stay and;*
- Discusses with the witness the experience of other victims in court. This could influence the victim to react a certain way before the jury. Again the court could determine that the victim had been 'coached' and the case may not proceed.”*

Discussion, Decision and Procedure

13. In considering the Application, I have kept in mind the purpose of Special Measures to enable a witness to give best evidence, the Defendant's Article 6 right to a fair trial under ECHR incorporated into Guernsey Law through The Human Rights (Bailiwick of Guernsey) Law 2000

and the test for Special Measures applications that the measures must be in the interests of justice. The PD applies and I must, therefore, apply its provisions to the Application even though it is in terms not contemplated by the PD,

14. The PD is clear that the cornerstone of witness support is that it should be independent and we are fortunate in this jurisdiction to have the Witness Service which is able to provide that regular independent witness support. The principle is that there should be no knowledge of the witness supporter of the details of the case/evidence and no discussion of the evidence until the trial is over. The objections to knowledge of the case and evidence and wider involvement in the case are not articulated in the PD but it is obvious that such knowledge and involvement could lead to disclosures of evidence to a witness supporter which could place the witness supporter and the witness in difficulty, disclosure from a witness supporter with wider knowledge of the case to the witness, which would be of grave concern, and the risk of coaching of the witness whether specifically or more generally. All of these issues have the potential to render a trial unfair and could lead to a stay of the trial or to a successful appeal. The Home Office Guidance sets out these risks and the guidance seeks to address those concerns where the witness supporter is an ISVA.
15. Whilst an ISVA may have an enhanced relationship with the witness and know more in general terms about the case than a regular witness supporter, the clear line drawn that there must not have been any discussion of the evidence or details of the case or coaching does enable the Court, in my judgment, to approve an ISVA as witness supporter within the terms of the PD. The PD envisages a relationship of trust and that the witness supporter will have met the witness so prior meeting is no impediment and indeed is positively endorsed by the PD. It is important to acknowledge that the PD is now quite old and there has been significant development in the intervening time as to how best to meet the needs of witnesses and indeed Defendants to improve their participation in cases. I do not consider the broadening of witness supporter to include an ISVA, in an appropriate case, as a matter of principle, to violate the PD or interfere disproportionately with a defendant's right to a fair trial.
16. In this case my decision was that C had particular needs and the presence of the particular ISVA, S, was reasonable, in the interests of justice and proportionate. I granted the Application subject to the questions below to which (neither counsel raised any objection) being answered satisfactorily:

Please confirm that

- *the witness has not disclosed any details of the case to you*
- *you have not discussed with the witness the best way to give evidence to ensure that the Jurats believe her*
- *you are not aware of other evidence in the case and/or have not disclosed any other evidence to the witness*
- *you have not discussed with the witness the experience of other complainants in Court*

to which should be added the usual warning not to discuss the evidence with the witness during the trial.

17. In this case C had asked to give evidence from behind a screen which has the effect that the Defendant could not see her. In accordance with the PD, I had considered this when granting the application for the screen and the regular witness supporter. I do not see that the replacement of the witness supporter with S changes that aspect of the special measures application.

18. In the event, S came along and was able to answer the questions in the affirmative. I asked those questions in the absence of the Jurats. In fact, on reading the Practice Direction, those questions should always be asked of witness supporters in the absence of the Jurats.
19. I reiterate that the above decision was made on the facts of the case and each application must be considered on its merits.

Catherine Maureen Fooks
Judge of the Royal Court

Date: 21st October, 2024