

**ANONYMISED and REDACTED**

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

**Between:**

**LAW OFFICERS OF THE CROWN**

**Law Officers**

**-v-**

**H**

**Defendant**

**Special Measures - screens**

**Case determined on the papers**

**Judgment handed down: 18<sup>th</sup> January 2024**

**Before: Catherine Maureen Fooks, Judge of Royal Court**

**Counsel for the Prosecution: Advocate P F Cobb**

**Counsel for the Defendant: Advocate L C Roffey**

**Cases, legislation and texts referred to in Decision:**

The Sexual Offences (Bailiwick of Guernsey) Law, 2020

Human Rights (Bailiwick of Guernsey) Law, 2000

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

Youth and Criminal Evidence Act 1999

English CPD re Evidence 18C

Pinto & Others v Law Officers Judgment 12 of 2013

Law Officers v A [2023] GRC018

AG for Akrotiri and Dhekelia v Steinhoff 2005 WL 1650601

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

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

R v Taylor [1995] Crim LR 253

R v Davis [2008] UKHL 36

Pope 2010 EWCA Crim 2113

SS (Sri Lanka) v SSHD [2018] EWCA Civ 1391

Blackstone's Criminal Practice 2023, paragraph D 14.47

Achieving Best Evidence in Criminal Proceedings (Published 31 January 2022)

## Introduction

1. This judgment is concerned with applications made by the Law Officers represented by Advocate Cobb for special measures for the trial of the Defendant (“D”) represented by Advocate Roffey on an indictment containing two counts, the first being assault by penetration of the complainant (“C”) contrary to section 12 of the Sexual Offences (Bailiwick of Guernsey) Law 2020 (“the 2020 Law”) and the second being sexual assault of her contrary to section 13 of that Law to both of which counts the Defendant has entered not guilty pleas.
2. There are three applications as follows:
  - a. two dated for
    - i. a recorded evidence direction (“RED”) under section 40 of the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law 2013 (“the 2013 Law”) in respect of the ABE interview of the Complainant (“C”) dated 6th January 2023 as her evidence in chief; and
    - ii. an application for C to give her evidence from behind a screen which Advocate Cobb makes under the Live-Link Evidence (Bailiwick of Guernsey) Ordinance 2008 (“the Live-Link Ordinance”) but which should have been made as an application for the Royal Court to exercise its inherent jurisdiction; and
  - b. one under the Live-Link Ordinance for a Prosecution Witness (“PW”) identified in the application to give her evidence by way of video link.
3. In support of the applications for the screen and Live-Link, Advocate Cobb has filed witness statements from C and from PW. C and PW are both over 18. It is accepted that C is vulnerable.
4. Practice Direction 3 of 2013 (“the PD”) applies to the applications for a screen and video link.
5. Further, Advocate Cobb has filed a Prosecution Case Summary which states that, prior to the alleged offences, D and C had been friends. C had made it clear that D’s wish for the relationship to be more than friendship was not reciprocated. C and PW were due to move into D’s property. C and PW went to D’s house and all 3 consumed alcohol. C and PW went to bed. C woke up to find D engaging in sexual activity with her which ended when she pushed him away. PW did not wake up during the incident. D denies any non-consensual sexual activity.
6. Advocate Roffey has indicated no opposition to all three applications except that in relation to the application for C to use a screen, he asks that the Court grants this on condition that a camera is positioned so that D can see C giving evidence. He filed written submissions with authorities. Advocate Cobb filed submissions in reply. There was a hearing set for which was vacated as the parties were content that I could deal with the matter on the papers. Both parties filed additional submissions by email and it was left that I would set a hearing if one were required. In view of the comprehensive written submissions, no hearing was necessary.
7. I gave my decisions on 6<sup>th</sup> November granting the applications without any conditions and this judgment sets out the reasons for those decisions.

## The RED Application

8. I can quickly dispose of this application which is not opposed. I am satisfied that the offences are “relevant offences” under the 2013 Law. D has had an opportunity to make representations. There is a presumption that such applications should be granted unless it is not in the interests

of justice so to do. These are sensitive sexual matters and it is entirely in the interests of justice for the application to be granted with a view to achieving best evidence by playing C's ABE interview conducted shortly after the alleged offences. I am also satisfied that C will be available for cross-examination, (subject to whatever special measures are granted). The Jurats are well used to receiving evidence in this manner and will be directed accordingly. I am satisfied as to the Prosecution's proposed arrangements for the witness to refresh her memory though I observe that it is not considered best practice for the witness to watch it for the first time immediately before giving evidence while it is being played to the Court as this may heighten distress before giving evidence (a point covered in my judgment Law Officers v A [2023] GRC018 (which has been cited by counsel in this matter using the name of the defendant in that case whereas it should only be cited in its anonymised published form)).

9. In this case, a copy of the transcript of the ABE interview will be made available to the Court when the recording is played to assist the Jurats with passages if the sound quality is poor or where individual words are indistinct. The transcript would be removed from the Jurats at the conclusion of the witness' evidence, as is the normal practice. I would hope that by now any edits have been agreed as well as the accuracy of the transcript and that arrangements have been made to test the sound quality in Court.

### **The application for Live-Link for PW**

10. Again, I can quickly dispose of this application which is not opposed. I take account of the content of PW's statement filed in accordance with the PD in which she explains why she would find it impossible to give evidence in open Court on account of her conditions and anxiety. She is a young adult. I am satisfied that these proceedings are criminal proceedings for the purpose of the Live-Link Ordinance, that the relevant equipment will be in place and that PW will be visible to the Court, D and counsel. I am satisfied that it is in the interests of justice for the order to be made. It is standard procedure for a witness supporter to accompany a person giving evidence via video link.

### **The Application for a screen for C**

11. This application is opposed only to the extent that D seeks a condition that there be a camera positioned so that D can see C. It is agreed that the application is in accordance with the PD.
12. In her first statement in support of the application, C explains that she is very nervous and apprehensive. She says, specifically, that she does not want D to be able to see her. She has not seen him since the incident and the thought of seeing him scares her. She sets out her medical conditions. She would be very vulnerable if she had to face D in open Court and would feel a lot happier and less intimidated if she had screens. She would be extremely reluctant to give evidence without protection and feels that screens would be best. In her second statement, she says that she had said previously that she did not want D to see her face if she had to give evidence. In terms, she says that having him watching her would impact negatively on her evidence because she would be anxious, stutter, mix up her words which will impact on explaining herself, say the wrong thing through nerves and find it harder to think straight through anger. She also says that she is scared of him.

### **The Applicable legal principles**

13. It is accepted that the application for a screen falls under the inherent jurisdiction of the Court and that the PD applies to such applications. The PD specifies that the same principles apply to an application for a screen as apply to an application for live-link so that the test is the same i.e. whether it is in the interests of justice to use a screen.

14. Section 1(2) of the Live-Link Ordinance sets out the conditions which must be satisfied before an application for evidence to be given by Live-Link can be granted. The granting of an order is discretionary. Section 1(2)(b)(i) states:

*“(i) the witness can subject to (subsection (3)) be clearly seen and heard by the court, the Greffier or clerk of the court, the defendant and counsel for each of the parties,”*

there is then a provision enabling the Court to screen/obscure a vulnerable witness from the view of the Defendant:

*“(3) The conditions in paragraph (2)(b) do not prevent the court from making any order which it might otherwise make for the purpose of screening or obscuring a defendant from the view of, or otherwise affording protection to, a vulnerable witness.”*

15. Paragraph 3 of the PD ties in with those provisions thus:

*“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.”*

It is clear, therefore, that if it is proposed that a Defendant not be able to see a witness, that witness' vulnerability must be established.

16. Counsel have referred to the Guernsey Court of Appeal Case of Pinto and Others v the Law Officers 12/2013 (which post-dates the PD by a few months) in which a challenge was made to the use of screen which had the effect that the Defendants could not see the witness. As a Court of Appeal Decision it is binding on this Court. The nub of it is contained in the following paragraphs:

*“9. [...] There is no common law right to physical confrontation with a witness. The court may, in the exercise of its inherent jurisdiction, control its own processes by adopting procedures, such as the use of screens, whenever the interests of justice require it, provided that the right of cross examination is not impaired. There is no test of exceptionality or necessity. The power to order the use of screens is not limited to circumstances where the witness would otherwise decline to give evidence.*

*13. [...] Whilst the risk that a witness may not testify is often the main reason for a screening order, there are cases where other reasons, such as the trauma likely to be caused to the witness, have been held to justify an order.*

*14. For all these reasons we are not satisfied that there is under the laws of Guernsey any absolute right to face to face confrontation with a witness in a criminal trial. It is a right that is, at least, subject to qualification in the interests of justice.*

*17. [...] that the risk of prejudice [to a defendant] is a factor to be considered by the judge in striking an appropriate balance, but it is no more than that. [...].*

*18. The suggestion that the Complainant's concern about distraction provided an insufficient justification for screens in this case does not do justice to the nature of the Complainant's fear as expressed in her pre trial statement made in support of the application for the use of screens. It is clear from her pre trial statement that the Complainant's concern was that her ability to give her evidence would be adversely*

*affected by her seeing the defendants and that she had serious concerns about her ability to do so if she gave her evidence under physical scrutiny by the Appellants, their families and friends in the public gallery.*

*19. We consider that the Royal Court was bound to take this concern into account. In R v Brown (Milton) [1998] 2 Cr App R 371 the English Court of Appeal pointed out that a trial judge is obliged not only to have regard to the need to ensure a fair trial for the defendant but also to the reasonable interests of other parties to the court process, in particular witnesses who are obliged to re-live 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.*

*20. 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 screen was pre-eminently one for the discretion of Finch J, who clearly took into account the full range of factors identified in X, Y and Z. We do not believe that his decision to permit the use of screens can be faulted. It was in the interests of justice that the Complainant should give full and complete evidence. The screening was a proportionate response to her claimed concerns and did not purport to prejudge the questions of credibility and reliability in issue at the trial. The screening order did not interfere with the fair trial rights of the Appellants. The Complainant was visible to the Advocates as well as to the Royal Court. There was therefore a full opportunity to test her evidence.*

*21. Did the use of screens cause any prejudice to the Appellants? In any case we are satisfied that, even if Finch J erred in permitting the use of screens, no undue prejudice was caused to the Appellants. Finch J gave the Jurats a comprehensive direction that the use of screens and live-link evidence was commonplace and that the purpose of screens was to permit the witness the comfort of giving evidence away from the public gaze. The Jurats were warned that the use of screens did not reflect in any way on the defence and was a facility that was available for both prosecution and defence witnesses. It was made clear to the Jurats that the use of a screen was not intended to pre-judge the evidence which a witness gives and should not be regarded as prejudicial to the Appellants in any way. In our judgment this was an unimpeachable direction and served to remedy any prejudice that might have been caused.*

*22. 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 now 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.”*

17. It is important to note that the learned Judges concluded that there was no absolute right of the accused to confront his accuser face to face. Rather, they considered it a qualified right – qualified in the interests of justice - which required the Judge to exercise his/her discretion. X Y and Z to which they refer was a case concerning sexual offences in which the witnesses were children. It was held that:

*“The judge was under a duty to endeavour to see that justice was done and that the system operated fairly not only to the defendant but also to the prosecution and to the witnesses. Sometimes a judge would be obliged to make a decision as to where the balance of fairness lay. In the instant case, the judge was correct to conclude that the necessity of trying to ensure that the children would be able to give evidence*

*outweighed any possible prejudice to the defendants by the erection of the screen. Even without the direction that the judge had given to the jury, no sensible jury could have been prejudiced against the applicants by the presence of the barrier.”*

18. Counsel have also referred to A above. In that judgment I set out my analysis of Pinto and other authorities and guidance. I do not consider it contentious to say that the whole area of Special Measures has moved on in Guernsey since Pinto and is continuing to develop as we strive to adopt best practice for witnesses and Defendants, often taking guidance from the current practice in England and Wales. In England as in Guernsey, as it was at the time of Pinto, and now, the underlying aim is to ensure that the best evidence is given which is in the interests of justice for both the Prosecution and Defence. It is important to note that in England there is a presumption in favour of granting special measures particularly in cases involving sexual allegations but our framework in Guernsey is as set as above and that is what has to be applied unless and until it is changed.
19. The Court must always have at the forefront of its mind the defendant’s right to a fair trial under Article 6 of ECHR incorporated into domestic law by virtue of the Human Rights (Bailiwick of Guernsey) Law, 2000 but it must be recognised that witnesses also have rights. That is in accordance with paragraph 19 of Pinto above.
20. In the course of my judgment in A, I referred to the guidance at paragraph D14.47 of Blackstone’s concerning screens and the incidental effect that the witness is screened from the defendant, which is the position when screens are used in Court 1. The commentators go on “*and this has become common practice. 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*” citing two English cases, R v Taylor [1995] Crim LR 253 and Watford Magistrate’s Court ex parte Lenman, 1993 Crim LR 388. The passage continues “*absent 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*”. It is on this passage that Advocate Roffey relies.
21. In A the issue of a camera was not explored as the defendant in that case did not object to the screen even though he would not be able to see the witness. I noted in A that there seemed to be no more recent authority on the possible use of a camera. Counsel in this case have been unable to find anything. Enquiries made by counsel and myself of those involved in such matters in England have produced anecdotal evidence which points more away from than towards the use of cameras in practice.
22. The two cases Watford and Taylor cited in Blackstone’s as authority for the proposition that a camera might be used were cases where the issue was one of anonymity for identification of witnesses in cases of violent disorder (Watford) and perverting the course of justice following a murder (Taylor). Both cases and X Y and Z are analysed in R v Davis [2008] UKHL 36 in which their Lordships were concerned with an appeal against the orders made for a combination of protective measures and were intended to ensure the anonymity and safety of witnesses who were found to be justifiably in fear of their lives in a murder case. Those protective measures included screens but their Lordships considered and distinguished X Y and Z, Taylor and Watford. Lord Carswell at paragraph 54 summarised those cases and said:

“54. R v X, Y and Z (1989) 91 Cr App R 36 concerned rather different issues. It was known that child victims in such cases are reluctant to give evidence, being unwilling or unable to speak about the facts to be proved. The judge approved the erection of a screen which prevented the children from seeing the defendants or being seen by them. Their identity was well known to the

*defendants and counsel could see them as they gave evidence. It is clear that the object in this case was, as the Common Serjeant said, to prevent the children from being influenced one way or the other by the defendants in the dock or being intimidated by their surroundings. The Court of Appeal upheld the convictions. It does not seem to me that this decision, which was plainly justifiable in the circumstances, gives much assistance on the present issues.*

55. *In R v Watford Magistrates' Court, Ex p Lenman [1993] Crim LR 388 an order was made in committal proceedings and upheld on appeal which permitted witnesses to be screened from the defendants and their voices to be distorted, though they were visible to the lawyers. As Lord Bingham has pointed out (para 13), the question was left open on appeal whether the witnesses' anonymity could be maintained when the case came to trial in the Crown Court.*
56. *In R v Taylor and Crabb (1994, unreported) the witness in question was a young girl known in the proceedings as Miss A, who gave corroborative evidence tending to identify Taylor as one of the men who carried the body of the murder victim from a public house into a horsebox, the main evidence against him being given by witnesses who could be regarded as accomplices. She was permitted to give evidence under screening arrangements whereby she could be seen by counsel and the jury, but not by the defendants. The latter could nevertheless see her by means of a video camera, so enabling them to ascertain whether they knew or could recognise her. The court held, after balancing the factors which might lead to unfairness against those in favour of allowing this degree of anonymity, that the trial judge had correctly exercised his discretion and dismissed the appeal."*
23. The passage in Blackstone's continues with a reference to another English case of Pope 2010 EWCA Crim 2113 in which the learned Judges of Appeal allowed an appeal against conviction where the key identification witness in a burglary was allowed to give evidence anonymously from behind a screen as they concluded that, in that particular case, the defendant was significantly prejudiced by not being able to see the witness to determine whether he recognised the witness and whether the witness might have some motive or reason wrongly to implicate the accused in the offence charged. The defence case was based on mistaken identification and the contention that the witness and the police had fabricated the case against him. It must be noted that Pope was a case about anonymity and identification. The Judge did try to address the prejudice by allowing the defendant to see the witness on the video of the identification parade but that was not sufficient to address the prejudice as the quality was too poor. The Judges considered that the Live-Link rather than a screen should have been used.
24. Returning to Blackstone's the commentators go on to say that circumstances might justify screening the witness from the defendant, as when the witness does not want the defendant or the defendant's associates to see the witness's current physical appearance. This appears to be a reference to anonymity.
25. From the above closer look at the English cases, it can be seen that the issues were primarily ones of anonymity. In Davis, their lordships endorse the use of screens for the child witnesses when giving evidence in X Y and Z, a case of a sexual nature, note that the decision in Watford was only at committal and conclude that, in Taylor, there was no prejudice in the anonymity order as the use of a camera in that case answered any unfairness to the defendant who had a need to see the witness.

## **Counsel's submissions**

26. In his submissions Advocate Roffey fairly concedes that C is vulnerable based on her conditions, as disclosed in her statements, supplemented by additional medical evidence disclosed as unused material which is attached to his submissions. Having accepted that C is vulnerable, Advocate Roffey properly concedes that this justifies the use of a screen but he argues that this “does not result in D being denied the opportunity to observe his accuser”. I take him to mean “should not automatically result...”. He relies on the statement in paragraph 20 of Pinto that a defendant should be denied the opportunity to see his accuser only “in *relatively rare circumstances*”. He seeks an order for the use of a camera as is mentioned in the extract from Blackstone’s 14.47 above. He submits that there was no consideration of a camera in Pinto and, at the time of X Y and Z, giving evidence by way of video link was not an option.
27. Advocate Roffey draws attention to the fact that, in her first statement, C states that she wants screens so that D cannot see her but the rest of her statement is concerned with why she does not want to see him.
28. Advocate Roffey relies on paragraph 20 of my judgment in A:

*“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...”*

He asserts that in the last sentence I was paying heed to the fact that the default position is that the defendant should be able to see his accuser. He further submits that insufficient reason in this case has been given by Advocate Cobb to derogate from that default position. Picking up the husband and wife point he submits that the friendship between C and D is sufficiently close that D would be prejudiced as his counsel would not be able to spot nuances in C’s demeanour that would be apparent to D. He points to a lack of intimidation or need for anonymity which would enable this case to be distinguished from the cases cited in the passage from Blackstone’s.

29. In response, Advocate Cobb emphasised the binding nature of Pinto and non-binding nature of A and submits that my paragraph 20 in A is per incuriam. She submits that the PD clearly envisages a situation in which a defendant will not be able to see the witness. She emphasises the word “relatively” in the quotation from paragraph 20 of Pinto and submits that the Court of Appeal was not seeking to say that it should only be in rare cases that this should occur rather that it was a matter for the discretion of the judge. Pinto establishes that there is no right to confrontation. Insofar as the cases cited in Blackstone’s indicate that, absent intimidation or a need for anonymity, a defendant should be able to see a witness, this places too narrow a restriction on the “relatively rare circumstances” stated in Pinto. The rights and needs of an alleged victim should be taken into account. The overriding principle is the interests of justice. Further, in this case C is to be treated as an intimidated witness by virtue of the nature of the offence. In her submission the request for a camera or the effect of having a camera could be intimidatory.
30. Advocate Cobb submitted that the Court must balance the competing interests of a defendant and witnesses. She produced and relied upon the publication “Achieving best evidence in criminal Proceedings” and in particular the section on the Court’s responsibilities to witnesses. At paragraph 5.8 it talks of balancing a defendant’s right to a fair trial with ensuring witnesses are able to give best evidence. The Court should be concerned with matters which may adversely affect the quality of evidence.

31. Advocate Cobb filed a second statement from C which focusses on her concerns should D be able to see her which Advocate Cobb says demonstrate an impact on her evidence. She submits that D must expand on precisely why he needs to see C give evidence and why his right to a fair trial would be compromised were he unable to see her. There was no intimate relationship akin to husband and wife. She rejects any suggestion of prejudice arising from inability to spot nuances of demeanour. She relies upon paragraph 36 of SS (Sri Lanka) v SSHD [2018] EWCA Civ 1391 which warns against relying on demeanour as an indicator as to whether a person is lying or telling the truth. She also relies on AG for Akrotiri and Dhekelia v Steinhoff 2005 WL 1650601 where it is said at that it is settled law that the mere fact that the accused cannot see a particular witness during that witness' evidence does not render a trial unfair. The passage goes on to deal with the deficit in that case namely that the accused's counsel could not see the witness. The learned Judges in Pinto were clear that the screening order did not interfere with the fair rights trial of the Appellants. The PD clearly envisages a defendant beings screened from a witness.
32. By way of response Advocate Roffey accepts that there is no right to confrontation but there must still be an application to change the default position that an accused can see a witness and that application must pass the interests of justice test. He submits that there is a contradiction between what Advocate Cobb is saying and what Crown Advocate Dunford said as recorded in paragraph 20 of A. In Advocate Roffey's submission, those making false allegations will be much more comfortable if screened from the defendant. He urges caution when considering the case of SS (Sri Lanka) as it is a civil case and the passage relied upon is at odds with the criminal court's focus on demeanour. He rejected as unsubstantiated the suggestion that a request for or use of a camera might be intimidatory. He submitted that cameras are used routinely in England but could produce no caselaw in support.
33. Both counsel were agreed that, were a camera ordered, C should be told even though this appears not to have been the case in Taylor.

## Discussion

34. The test in Guernsey for the granting of an application for a witness to have a screen is the interests of justice test as per the PD and following the principles in the Live-Link Ordinance which require the witness to be vulnerable if the witness is to be screened from the defendant. Here it is conceded that the test is met in respect of C but Advocate Roffey seeks the positioning of a camera behind the screen so that D can see C to assess her demeanour and give instructions to his Advocate in circumstances where the previous friendship of D with C, in his eyes, renders him better placed than his Advocate to pick up nuances of demeanour indicative of lying, which is the thrust of his defence and an intrinsic part of the assessment of evidence in the criminal court.
35. There is no reference in Pinto to the use of cameras but Advocate Roffey relies on the general principle in that judgment that the circumstances in which a defendant should be denied an opportunity to see his accuser should be "relatively rare". I see no utility in trying to define what the learned Judges of Appeal meant by this. They were clear that an application for screens is a matter for the Judge's discretion based on the circumstances of each case. "*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...*"
36. I do agree with Advocate Cobb that "relatively rare" cannot mean that, absent intimidation or a need for anonymity, a defendant should be able to see a witness. That would be contrary to the actual decision in Pinto where the decision to allow screens was upheld in circumstances where the issue was neither of those things but a concern for the negative impact on the quality of the evidence were the complainant being watched by the defendants and their families and friends. It was said to be in the interests of justice that the complainant should give full and

complete evidence. In other words it was an interests of justice decision based on achieving best evidence in that case and that is the core principle – subject always to a defendant’s right to a fair trial. It is clear from Pinto that screens of themselves do not render a trial unfair even though the defendant is unable to see the witness but each case must be considered on its facts so, in my judgment, there is room for prejudice to a defendant in a particular case by the use of screens but it will be for the defendant to raise and evidence that prejudice.

37. The above-mentioned English cases (except X Y and Z) are concerned with anonymity of witnesses where identification of defendants is in issue. The learned Judges of the House of Lords in Davis distinguish such issues from those in cases of a sexual nature so that the English cases cited in the passage in Blackstone’s on which Advocate Roffey relies do not appear to me to be authority in themselves for the use of a camera in cases of a sexual nature. Each case must be considered on its facts. The English caselaw is helpful in terms of its focus on how to assess prejudice which must be real and not theoretical and how to undertake the balancing exercise.
38. D asserts that, in this case, D will be prejudiced if there is no camera. I must first consider the extent of any prejudice which a screen without a camera will cause to D in this case before considering the effect of a camera and the balance between securing the best evidence from the witness whilst not diminishing D’s right to a fair trial.
39. The issue in this case is the assessment of demeanour. Having considered carefully what has been said, I am not satisfied that D has made the case that there is any particular prejudice in C being screened from his sight. There is no evidence of a pre-existing intimate or other relationship which would render D peculiarly able to pick up nuances undetectable to defence counsel or the rest of the Court. In this case, C has set out her issues of vulnerability and why she would not wish to be seen or be seen by D. Her concerns are about him, not the Court room or the public. Her first statement did not fully cover the reasons but her second did and she says that she had raised the issue more fully at the time of her first statement. I am satisfied that the positioning of a camera so that D could see C would disproportionately diminish the quality of her evidence.
40. For completeness, I am also satisfied that Advocate Cobb was unable to evidence any intimidatory intent on the part of D in requesting a camera or that the request itself is an act of intimidation by him.
41. My reason for issuing the written judgment in A was because I was concerned that there was no consistent procedure for applications for Special Measures and that the PD was not being followed. An example of this is to be found in paragraph 17 of that judgment about the content of the witness’ supporting statement which I found wanting in that case. The same can be said of the first statement of C in this case which I believe led to the application made in this case. It is very important that the statements address the issues including vulnerability. Screening a witness from a defendant must be justified and proportionate. When I wrote the judgment in A, I was harbouring a concern that greater attention should be paid to the incidental effect of the defendant being unable to see a screened witness. I have expressed the view that the video link might be more appropriate where a witness does not wish to be in the Court room or seen by those in the public gallery but has no issue with being seen by a defendant. I have not changed my views. In so saying I do not ignore the reality that in most cases of a sexual nature it will not be a high hurdle to establish vulnerability on the part of a witness justifying screens. Advocate Cobb’s point about the need for the Court to be alert to the potential for a request for a camera being intimidatory is well made. Each case must be considered on its facts.

## Decision

42. In this case it is accepted that the use of screens is justified and proportionate in general terms but D asserts that he will be prejudiced unless there is a camera so that he can see C. It is necessary to consider the issue raised by D of specific prejudice in this case. Having considered all the submissions and applicable legal principles, I am satisfied that, in this case, there is no specific prejudice to D which requires the positioning of a camera so that he can see C behind the screen. Such an order is not necessary in the interests of justice. The interests of justice require that C gives the best evidence she can, taking into account her conditions and her expressed fears and concerns. The right of D to a fair trial is in no way diminished by the use of a screen without a camera in this case.
43. P's application for C to give evidence from behind a screen is granted without any conditions as to a camera or otherwise.

**Catherine Maureen Fooks**  
**Judge of the Royal Court**

**Dated: 18<sup>th</sup> January, 2024**