

JERSEY / JUDGMENT

AG -v- A [2012] JRC 029 (06 February 2012)

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JUDGMENT

THE DEPUTY BAILIFF: 1. This is an application by the Attorney General for evidence which is given by the complainant B in the trial of the defendant to be given behind screens so the witness cannot see or be seen by the defendant. She made a statement in April 2011 asserting that when she was aged about 15 the defendant raped her at the family home and subsequently put his penis in her mouth. Those allegations form Counts 2 and 3 on the Indictment. She concluded her statement by saying that what the defendant had done to her had impacted on her life; he took away her trust in people and took away her childhood and her outlook on relationships. 2. I am told by counsel for the prosecution that at the time this statement was made to the police in England, in what is described as the "rape suite" there, the taking of the statement was taped on a DVD and that the witness was clearly distressed and broke down in tears. It was said that she found it difficult to give her account of what had taken place. For the defendant, Advocate Preston agreed that the complainant had cried at certain stages, although the extent of her distress was questioned, albeit he had not had the opportunity of looking at the DVD for some time. 3. On 1 st February this year, in her own hand, the witness has made a statement in which she says she understands the importance of giving evidence in court and is willing to do so but in the last 9-12 months she has found it extremely difficult to give her account and to be reminded of what happened to her. She asks that she be allowed to give her evidence in court from behind a screen. She says that she does not think she will be strong enough to give that evidence in the presence and sight of the defendant and the sheer thought of him being close to her makes her physically sick and very apprehensive. She says that although she would not look at him, the thought of him seeing her would cause her to feel intimidated. 4. Advocate Preston for the defendant resists the application. There is no dispute as to the applicable law. He has agreed that the complainant cried at certain stages during the interview as I have mentioned; but he points out that at the plea and directions hearing on 12 th December, the Crown indicated that no applications would be made for a screen. That was some months after the statement was taken by the police in England and here we are at the eleventh hour with a short hand written statement; the Crown now makes the application and the defence has no realistic means of challenging what B says in that statement which puts the defendant in an impossible position. He says she must have been asked about it and that the Court should be therefore careful to ensure that there is a reasonable height to the hurdle which must be overcome. 5. I understand from Mrs O'Donnell that the witness received advice from the police in the UK where the witness statement was taken and the

understanding is that the English police thought that no special measures were possible in Jersey. When she was told last week that it would be possible to ask for screens, she immediately made that application and counsel's submissions in that respect are based upon information given to her by DS Hill. 6. The legal test which is to be applied is set out in the decision of the Court of Appeal in *Myles-v-AG*

[2005] JCA 065 and in particular at paragraph 19 of the judgment of Mr Southwell JA which is setting out the basis of the test in full. The Jersey law in relation to special measures has been developed by judicial decision rather than the adoption of statutory provisions such as those which appear in the Youth Justice and Criminal Evidence Act 1999 . In my judgment the nature and alleged circumstances of the offence to which the proceedings relate is one of the most important factors which the judge should take into account in determining an application for special measures. Sexual offences alleged to have been committed by the defendant on a person under age, however old that person may be when he or she comes to give evidence, are, if proved, likely to have a significant impact on the ability of the witness to give evidence fully and reliably before a jury. In this instance that seems to be borne out by what I have been told of the DVD taken at the time the witness complaint was made and indeed it is some support for what the witness now says in her statement of 1 st February. 7. I note from the case of *R-v-Brown*

[2004] CLR, the Court of Appeal in England held that for the purposes of construing Section 17 of the English 1999 Act it was open to the judge to reach his conclusions solely by a reference to the nature and alleged circumstances of the offence to which the proceedings related. It is thus the case that as a matter of statutory construction in England the court reached the same point which I consider ought to be reached by the common law in Jersey. In the same case it was noted that the fact that special measures might be available for one witness but not for another was not in itself a reason for refusing an application for a special measures direction in the case of any of the witnesses. And that is relevant because, as is agreed by both counsel, the complainant here in respect of the first Count has not requested any special measures in relation to the giving of her evidence. 8. I note that there is nothing in the case of *Myles* which operates as a restriction on making a special measures direction only in the cases of young persons or vulnerable witnesses; there must of course be proper reasons for a judge to exercise his or her discretion to permit any part of the trial to take place in such a way that the defendant cannot see all that is taking place in court. This is not a test such as that adopted by the English case of *R-v-Schaub and Cooper* , *The Times*, 3 December 1993 to which reference is made in *Myles* where it was said that screens should only be used in exceptional cases. The issue for me is really only whether the interests of justice are met by the use of screens to shield the witness from the gaze of the defendant if the witness's evidence may be adversely affected by not having such screens in place. Then, in my view, there would not be fairness as between the prosecution and the defence if such screens were not ordered to be put in place as long as it is possible to tackle any potential prejudice to the defendant from the use of such screens. Now the bench book standard direction may not in terms quite work

in Jersey but I am satisfied that a proper direction to the jury can be given which will in effect say that it is entirely normal for screens to be put up as a comfort for witnesses in sexual cases, if they consider that they need such screens, but of course it does need some adaptation and I will show counsel the draft direction tomorrow morning before the trial starts so that comments can be made upon it. 9. I recognise that the application comes very late. The Crown have given a reason for it coming so late which is understandable, given that the English police might well have thought that no special measures provision was possible in this Island. To the extent that there was a mistake by the prosecution, a mistake of this kind can be remedied without unfairness because the direction can be given to the jury and at the end of the day, the prime consideration is to ensure a fair trial, fairness to both the defence and to the prosecution. 10. I therefore allow the application for screens to be put up for the evidence of B. The screens will be put up immediately prior to her giving her evidence and so there will be a brief adjournment at that stage for the screens to be put up. Authorities Myles-v-AG

[2005] JCA 065. R-v-Brown [2004] CLR. R-v-Schaub and Cooper, The Times, 3 December 1993. Youth Justice and Criminal Evidence Act 1999. Page Last Updated: 02 Feb 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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