

JERSEY / JUDGMENT

AG v Akhonya [2022] JRC 272 (08 December 2022)

[2022] JRC 272

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JUDGMENT

THE COMMISSIONER: 1. The Defendant faces two charges which will be heard by the Royal Court with a jury between 12 and 14 December. The first charge is knowingly providing false information for the purposes of giving notice of intended marriage contrary to Article 76(1) of the Marriage and Civil Status (Jersey) Law 2001 and the second is the charge of bigamy contrary to the customary law. The Defendant pleads not guilty and the nature of his defence is that he has never been married to the lady to whom the prosecution claim he has been married in Kenya. 2. I have received an application for special measures in relation to the Complainant, Mrs Akhonya, with the request that I order that she be screened from the Defendant while she is giving evidence and that she also be screened from the public gallery. I have agreed that she can be screened from the Defendant but I have not made the order for screening from the public gallery and this judgment now contains my reasons. 3. The basis of the application made by the Attorney General is summarised in Mrs Akhonya's witness statement in this way: "I understand that I am requested to give live evidence in Court following a complaint I made with the police against my husband Douglas Akhonya. I am willing to attend and present my evidence in person. The situation I am in at the moment together with my children is very complex and emotional. I have reasons to believe that my husband lied to me and our children for several years by him having another wife and children in Kenya. The background of this situation is highlighted in my previous statements given with States of Jersey Police. I have explained before that my husband manipulated our relationship and also made threats to take our kids away from Jersey with fake documentation. When I first approached the authorities to report my complaint, there was a threat made by my husband on WhatsApp. He proceeded to send me a photo of him shooting with guns. I took that as a threat and very intimidating, I still can't sleep properly thinking that he may do harm to me or even to our children. I feel fearful of him and what he can do. I would like to request the Court to allow me to give my evidence using screens. I feel that if I was to face to him, I will be in distress and not able to give my evidence properly. I would crumble with emotions and won't be able to speak properly. I would also like to request the Court to allow screens against the gallery so that I will be protected by any of his friends and family that would be there. Again, that will help me focus on my evidence without being pressured by the people by the gallery." 4. The application for special measures is made under Article 100(2)(b)(ii)(E) of the Criminal Procedure

(Jersey) Law 2018 . I have to be satisfied that the quality of the evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings. The expression 'quality of evidence' is defined as meaning its quality in terms of completeness, coherence and accuracy, and for that purpose, 'coherence' refers to the ability of the witness in giving evidence to give answers which address the questions put to him or her. 5. Article 100(6) charges the Court, in determining whether a witness falls within paragraph (2)(b)(ii)(E) to take into account in particular: "(a) the nature and alleged circumstances of the offence to which the proceedings relate; (b) the age of the witness; (c) such other matters as appear to the Court to be relevant including - (i) the social and cultural background and ethnic origins of the witness; (ii) the domestic and employment circumstances of the witness; (iii) any religious beliefs or political opinions of the witness; (d) any behaviour towards the witness on the part of (i) the defendant (ii) members of the family or associates of the defendant, or (iii) any other person who is likely to be a defendant or witness in the proceedings. 7. For the purpose of a determination under paragraph (6), the Court must in addition consider any views expressed by the witness." 6. The Defendant does not formally object to the making of orders for special measures, but Advocate Boothman has raised a number of issues for me to consider in correspondence with the Bailiff's Judicial Secretary. 7. By agreement of both parties, I have dealt with this matter on the papers. 8. The Defendant makes no admission of wrongdoing as alleged by Mrs Akhonya in her request for screens. I take that to mean that he denies sending her a picture of himself shooting or waving a gun, or if he did so, he makes no admissions of any malicious intent in so doing. I have assumed that the officer in charge of the case would not have tendered the application for special measures through the Attorney General if he had not first checked the telephone of the Complainant for the relevant WhatsApp message. 9. On the assumption that the WhatsApp message was sent as the Complainant indicates in her statement, and noting the lack of any admission from the Defendant that either he sent it or that he had any malicious intent in so doing, if he did, I am satisfied that the Complainant could reasonably be in fear for the purposes of Article 100 of the 2018 Law. I therefore make the order for screens between the Complainant while giving evidence and the Defendant. 10. I do not consider there is anything in the witness statement which justifies screens from the public gallery. There is no indication in the evidence that the Defendant's friends or family will be present, and in any event it will be open to me as trial judge to make such orders as are necessary in the event that any pressure is placed on the Complainant at the time. I have taken into account all the matters set out in Article 100 as relevant in reaching the views that I have. 11. I now wish to add two further comments. 12. Crown Advocate Hallam has submitted the application for a special measures direction pursuant to Rule 53 of the Criminal Procedure (Jersey) Rules 2021 , using the form exhibited at Schedule 12. In that connection: (i) Question A2 asks if the application is made late. The box 'Yes' has been ticked and the explanation given is that the statement to support the application was not made until 6 November and the Crown was therefore unable to make the application by 1 September as date ordered by the Court at the plea and directions hearing. This is not good enough. The Court made that order on 7 July, having regard to the plea and directions hearing form dated 6 July where the answer to Section F was that no application for special measures was being made at that time, but the Complainant was being consulted about a possible

special measures application which might be made in due course. Not only has the prosecution failed to comply with the date set by the Court, but the application for a direction now gives no reason or excuse for that failure. Orders made by the Court are not to be disregarded. Where it is not possible to comply with them, some proper reasons should be advanced. As far as this Court is concerned, it is unlikely that the discretion will be exercised in favour of a party seeking a special measures direction if these circumstances should re-occur. (ii) Secondly, Advocate Boothman is correct to point to the existence of Rule 53(3) of the Criminal Procedure Rules which indicates that any party who objects to a special measures application can do so within the fourteen days following receipt of the application. In this particular case, the application was made fourteen days before trial. That means that, had there been any objections which the defence wished to advance, there was a real possibility that the late application by the Crown might have an impact on the hearing date fixed for trial. This also would justify making no special measures orders. In this case, the statement in support was dated 6 November and the application for special measures was not made until 25 November. Either the officer in charge or the prosecution have failed to move on a timely basis. Such failures are not the failures of the Complainant, which is why the first of the special measures has been granted, despite these various defaults on the part of the law enforcement agencies. 13. The second comment arises in connection with the Criminal Procedure (Jersey) Rules 2021 . B5 asks the question 'What has been done to help the witness express an informed opinion about special measures?'. Care must be taken to explain to the witness (a) what is meant by special measures, (b) what measure(s) may be available and (c) what they would involve for the witness. There is then a footnote which is in these terms: "If the witness does not want a special measure, he or she should be asked to explain why. The witness should also be told that if he or she changes his or her mind as the trial approaches, a further application to the Court can be made." 14. It is hard to understand how this footnote has come to be framed as it has. There are eligible witnesses as defined in Article 100 of the Criminal Procedure Law who might now appreciate the desirability of a special measures direction, but the drafting of the form in this way gives the impression that any eligible witness should have to justify why the special measures direction is not required. As an eligible witness qualifying under Article 100(2)(b)(ii)(E) is only so eligible in circumstances where the quality of the evidence given by the witness is likely to be diminished by reason of his or her fear or distress in connection with testifying, the fact that the witness does not want a special measure would seem to provide a complete answer to whether or not such a measure should be ordered. 15. It might be thought that this is mere pedantry. The vice, however, in the language of the form is that it gives in my judgment a wrong emphasis to the nature of a special measures application. The very term 'special measures' suggests that these are not made routinely in any criminal case, albeit there is a strong working assumption that they will be appropriate to protect children and complainants in sexual and domestic violence cases. Authorities Marriage and Civil Status (Jersey) Law 2001. Criminal Procedure (Jersey) Law 2018. Criminal Procedure (Jersey) Rules Page Last Updated: 29 Dec 2022 Back to top About JLJB Accessibility Contacts Disclaimer Feedback Privacy policy Site map © Jersey Legal Information Board 2001- This website is not compatible with your web browser. You should install a newer browser . If you live in Jersey and need help upgrading call the States of Jersey web team on 440099. BAILII: Copyright Policy | Disclaimers |

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