

JERSEY / JUDGMENT

AG -v- D [2012] JRC 025A (27 January 2012)

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JUDGMENT

THE commissioner: 1. The defendant is due to stand trial on 20 th February, 2012, for one count of indecent assault. The complainant was about 11 at the time of the alleged offence and is now 16, turning 17 shortly after the trial. 2. The prosecution have two applications under the Criminal Justice (Evidence of Children)(Jersey) Law 2002 ("the Criminal Justice Law"), the first under Article 3 for leave to allow a video recording of her ABE interview with the police made on 21 st January, 2011, to be given in evidence by way of her evidence in chief and the second under Article 2 for leave for her cross-examination to be conducted via a live television link. 3. A brief background is necessary. The defendant and the complainant are first cousins. The defendant was a regular visitor to the complainant's home and was very much like a brother to her. At the time of the alleged assault, the defendant was about 17; he is now 23. The complainant will say that she had been admonished by her mother for an incident involving a ring and sent to bed early. She says that the defendant came up to her room when she was in bed to comfort and cuddle her and they both fell asleep. She then woke up and he had his hand down in her pants about half way. He then put his hand to the back of her pants and under her bra between her breasts. She alleges that he then took her hand and made her touch his penis. She walked out to the toilet. As she went, the defendant said "I need a cuddle" but she ignored him and went next door to her brother's room to sleep. She alleges that he went into her brother's room after her and briefly put his hand on her knee. Nothing was said and he left the room. There is no corroboration of the complainant's allegation. 4. The complainant did not speak to anyone about the incident until approximately two years later when she was watching an episode of Eastenders with her mother, which had a story-line involving child abuse. She informed her mother of the alleged incident but was not ready for any formal complaint to be made. However the mother informed the defendant's mother, her sister, and a serious rift between the two families developed. 5. In early 2011, there was an altercation at St James' Wine Bar between the mother and the defendant over this allegation in which the police were called. Shortly after, the complainant informed her school counsellor of the allegation and five days later gave the ABE interview to the police which I have viewed. The prosecution followed. 6. On 13 th January, 2012, the complainant made a statement about giving evidence at the trial and asking for her ABE video to be presented to the jury and to be cross-examined by video link from a separate room. In that statement, she says that she is "terrified of having to face [the defendant]" . She continues by saying " I know that by speaking out about what happened that it would cause problems with the

family, but it would be terrifying for me to stand in Court and say what happened, go through it all over again in front of him and his family". If she had to go to Court to give evidence she says she does not know how she would deal with it and was sitting in tears at the thought of it. 7. The defendant accepts that being under 17 the complainant is a child for the purposes of Article 2 of the Criminal Justice Law and being under 18, is a child for the purposes of Article 3 of the Criminal Justice Law. 8. Article 3 creates a presumption in favour of the ABE interview being allowed in evidence:- "(2) subject to the exercise of any of its powers to exclude evidence which is otherwise admissible, the court shall give leave under paragraph (1) unless -

- (a) it appears that the witness will not be available for cross-examination:
- (b) any rules of court requiring disclosure of the circumstances in which the recording was made have not been complied with to the satisfaction of the court; or
- (c) it considers that, having regard to all the circumstances of the case, in the interests of justice the recording ought not to be admitted." 9. Both counsel referred me to R-v-Redbridge Youth Court

(2001) 2 Cr. App. R.25 which gives a helpful analysis of the exactly equivalent provisions under the Criminal Justice Act 1988 . The facts of that case are of no assistance, but quoting from paragraph 15 of the judgment of Latham LJ:- "Conclusion In my judgment, there is a distinction to be made between the approach of the court under section 32 [our Article 2] and section 32A [Article 3] of the Act. In the case of video interviews, Parliament has provided that the primary method of presenting evidence of a child witness where there is a video interview is by means of such an interview. There is no such presumption in section 32. But the general legislative purpose of both sections is the same, namely to provide, in relation to a child, conditions which are most conducive to ensuring that a child is able to give as full an account as possible of the events in question. The procedures are intended to provide a mechanism whereby a child witness who might otherwise be upset, intimidated or traumatised by appearing in court is not as a result inhibited from giving a full and proper account of the events of which he or she was a witness: see McAndrew Bingham

[1992] 1 Cr. App. R.293; [1999] 1 WLR 1897. It follows that orders under either section are appropriate where there is a real risk that the quality of the evidence given by that child would be so affected or that it might even be impossible to obtain any evidence from that child. Fairness to the defendant is achieved by enabling the defendant to see the witness giving evidence in interview, or by a television link, and having a full opportunity to cross-examine by way of the television link. 16. In relation to section 32A, there is a further purpose, namely that the evidence of a child should be the account of the child given as contemporaneously as possible, so that evidence-in-chief is not a memory test. The wording of subsection (3) makes it clear that leave must therefore be granted for a video recording of an interview to be given in evidence, unless any of the exceptions are established. If the exceptions in

- (a) or (b) are established leave must be refused. If under (c) the question is raised whether or not in the interests of justice the recording should not be admitted, the court is required to carry out a balancing exercise bearing in mind the legislative purposes to which I have referred. This requires the court to consider whether there will be any arguable injustice in admitting the video. If the injustice alleged is simply the fact that the witness will not be giving live evidence, it is unlikely that that could ever prevail if there was material which established that the witness could be upset, intimidated or traumatised by appearing in court as a result of which there was a real risk that the quality of the child's evidence would be affected or that no evidence would be forthcoming. To permit such an argument to succeed would defeat the legislative purpose. This principle in my view applies whatever the age of the defendant. It follows that the court is required to consider on the one hand the extent to which the witness's evidence would be so affected if the video recording was not admitted in evidence, and on the other the prejudice to the defendant if the video recording were to be admitted in evidence. In carrying out that exercise, the court must bear in mind that Parliament has determined that the primary method by which a child witness's evidence should be given to a court is by means of the video interview. It seems to me to follow that it is for a defendant to establish that any prejudice to him displaces this parliamentary intention." 10. Recognising this presumption and accepting the onus upon the defendant to displace the legislature's intention, Mr Haines accepted that leave should be granted for the ABE interview to be played to the jury by way of the complainant's evidence-in-chief, but that does not relieve me of my duty to consider the matter. Article 3(2) (a) and (b) do not apply and in relation to (c) I have considered the balancing exercise and am satisfied that there is no injustice in admitting the video. Leave is therefore granted. 11. The defence strongly opposed, however, the application to have the complainant's cross-examination conducted through live video link. Latham LJ went on to say this in relation to the equivalent of our Article 2:- "17. In relation to section 32, as I have said, the position is different. Parliament has provided no presumption one way or the other as to the way in which the evidence should be given. It is necessary therefore to consider in every case the extent to which justice is best achieved by making or not making the order applied for. In doing so the court will bear in mind that the paradigm or norm in our courts is that a witness should give evidence in court in the presence of the defendant. It follows that some good reason must be shown in accordance with the legislative purpose if an order is to be made under section 32. Again the court is required to strike a balance, on this occasion between the right of the defendant to have a hearing in accordance with the norm and the need to provide protection in accordance with the legislative purpose, in the interests not only of the child witness but also of justice, to ensure that the witness will be able to give evidence and give evidence unaffected by the stress of appearing in court itself." 12. Mr Haines asked me to treat the complainant's statement with caution, as it was (inevitably) self-serving but accepted that it would not be appropriate for that statement to be tested in Court. The complainant had left school and was now at Highlands. The ABE interview had taken place a year ago. She had matured since then. Indeed, any adjournment of the case beyond March of this year would see her outside the provisions of Article 2. 13. The

defendant had produced his own statement saying that he had been informed that like other teenagers the complainant socialised at clubs and public bars in St Helier. He expressed a concern that the complainant was being placed under immense pressure by her mother because of the feud that existed between the two families. 14. Mr Haines submitted that the complainant would understandably be anxious and nervous about giving evidence for the first time in a court but that was not a sound basis for the granting of the application. The best evidence in this case was for the complainant to give live evidence before the jury and to be cross-examined in open court. The defence case was that she was not telling the truth. The best opportunity to test the credibility of her evidence is in open court. The jury should be permitted to see the whole of her demeanour and assess this live, whilst giving evidence. It is easier, he said, for accusers to maintain a lie if they do not have to give live evidence and/or do not have to give evidence in front of a jury and/or the defendant. 15. As I said in discussion, my initial reaction on reading the papers was to incline towards allowing the complainant to be cross-examined in Court but with the defendant screened from her view and, if necessary, the Court cleared pursuant to the provisions of Article 5 of the Criminal Justice Law. I was influenced firstly by the nature of the allegations which, although serious, are arguably at the lower end of the scale and secondly by the age of the complainant. 16. However, I note that Latham LJ went on to say this at paragraph 18:- "18. In the instant cases, the only prejudice suggested by the defendants to the criminal proceedings is that they would be deprived of the benefits of seeing and hearing the witnesses live in court. Whilst there is no doubt that this procedure has the advantage of enabling a defendant and the court to see directly the demeanour of the witness and the way in which his or her evidence is given, the court must bear in mind the fact that both the video recording and a television link provide an opportunity, albeit in indirect form, to carry out that same exercise. The court should also bear in mind that although there may be disadvantages in the indirect method of giving evidence, they do not necessarily disadvantage only the defendant. The impact of evidence given directly to the court is likely to be greater whether it be in favour of the prosecution or the defence." 17. The only prejudice suggested in this case is that the defendant will be deprived of the benefits of seeing and hearing the complainant live in Court. I am reminded that the purpose of both articles is to provide, in relation to a child, conditions which are most conducive to ensuring that the child, who might otherwise be upset, intimidated or traumatised by appearing in court, is able to give as full an account as possible of the events in question. 18. The fact of the matter is that the complainant is still a child for the purposes of Article 2. The alleged assault was carried out by her first cousin with whom she was very close and the incident has given rise to a serious rift between the two families, to the extent of causing public altercations, which quite apart from the embarrassing nature of the allegations, I am satisfied places the complainant under great pressure. On careful reflection, I conclude that the prospects of giving evidence in open court in these circumstances will prejudice the complainant's ability to give as full an account as possible of the events in question and in the exercise of my discretion, I will therefore grant leave for her to be cross-examined through a live television link. Authorities Criminal Justice (Evidence of Children)(Jersey) Law 2002. Criminal Justice Act 1988. R-v-

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