

JERSEY / JUDGMENT

AG -v- Humble [2018] JRC 056B (09 March 2018)

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JUDGMENT

THE DEPUTY BAILIFF: 1. This is an application by the defendant to exclude an Achieving Best Evidence (ABE) interview conducted with one of the complainants in the prosecution against him. 2. The defendant is charged with three counts of rape against two separate complainants. Counts 1 and 2 concern complainant A and Count 3 complainant B. All three offences are alleged to have taken place in a period between December 1976 and June 1977. 3. Without going into the detail of the allegations, both of the complainants are vulnerable adults and were in residential accommodation where their needs were catered for. The defendant was in a position of authority within that institution. 4. The application concerns an ABE interview conducted in 2013 with complainant A. It is the only ABE interview conducted with this complainant and if it is excluded, and the trial proceeds with regard to her allegations, she will give evidence through a video link. 5. Arrangements for the deployment of an ABE interview are dealt with under the Criminal Justice (Evidence of Children) (Jersey) Law 2002 which in the long title indicates that it is "concerned with the giving of evidence of children and certain other persons by means of television links and video recording..." . 6. Article 3 of that Law provides: "(1) in any proceedings in connection with an offence referred to in Article 2(1) the Court may give leave to allow video recording to be given in evidence of an interview which - (a) is conducted between an adult and a witness described in Article 2(2)(a) or (b); and (b) relates to any matter in issuing the proceedings. (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." 7. The problem with the ABE interview can be simply stated. One of the two cameras that should have been running during the interview had not in fact been switched on as a result of which the only view of the complainant during the course of the interview is of the top of her head. There is no view of her face and accordingly there is no ability for the jury, in viewing the ABE interview, to take into account her facial appearance in assessing the credibility or otherwise of her evidence. 8. No attempt has been made by the investigating officers or the Crown to re-interview the complainant

and accordingly there is no other ABE interview available for deployment by the Crown in the trial. 9. In 2011 the English Ministry of Justice published "Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures ". At paragraph 2.184 the guidance states that:- "The presence of an interview monitor is desirable because they can help ensure that the interview is conducted in a professional manner, can assist in identifying any gaps in the witnesses account as it emerges, and can ensure the witnesses needs are kept paramount." 10. At paragraph 2.186 of the Guidance it is stated:- "The equipment should always have an operator for the duration of the interview. This will allow the view recorded by the camera to be adjusted if the witness moves. It should also provide an opportunity for the interviewer to be alerted at the earliest possible moment in the event of an equipment failure, rather than such a failure only being discovered at the end of the interview." 11. From the second of these quotations it is apparent that the camera should be focussed on the witness (and I take it as obvious that such a focus should be on a relevant part of the witness, namely the witness's face) and that any equipment failure should ideally be identified at the earliest possible moment rather than discovered at the end of the interview. 12. It is difficult to be certain when the failure in the recording was first detected but clearly it does not appear that either an interview monitor was present or that the equipment had been checked or had an operator who was monitoring it. 13. It is perhaps axiomatic in criminal cases that the jury should have the best possible opportunity of assessing the demeanour of the witness and how he or she makes her allegations against the defendant as well as how he or she responds to cross-examination. 14. The importance of demeanour is emphasised in *R v Popescu*

[2011] Crim LR 227 in which at paragraph 35 et seq the English Court of Appeal made these observations:- "35. We venture to suggest some general comments before coming to the particular facts of this case. First, the general rule must be that great care must be taken before a jury is given transcripts of an ABE interview at all, even whilst the video is being shown. It should only be given to the jury after there has been discussion of the issues between the judge and counsel in the absence of the jury, and it should only be done if there is a very good reason for it, e.g. the evidence will be difficult to follow on the screen or the audio quality is very poor. 36. Secondly, if the transcript is given to the jury, we suggest, first, that the judge must warn the jury then and there to take care to examine the video as it is shown, not least because of the importance of the demeanour of the witness in giving evidence. ..." 15. The prosecution argues that the Court should not exclude the ABE interview. It points out that guidance is advisory and does not amount to a legally enforceable code of conduct and also submits that the correct test for me to apply is to ask the question "could a reasonable jury properly directed be sure that the witness has given a credible and accurate account on the video tape, notwithstanding any breaches?" If the answer to that question was yes then I should leave the matter of the evidence given on the ABE interview to the jury, if no then I should refuse to admit it. 16. The Crown also point out that complainant A (as is indeed is her co-complainant) is a vulnerable witness and should not unnecessarily be subject to the stress of giving her evidence in chief when it could otherwise be dealt with by an ABE interview. She will be cross-examined over video

link and, so it is argued by the Crown, the jury will have more than enough opportunity to assess her demeanour. Moreover there is the suggestion that in the period between when she gave her ABE interview and now her mental ability has deteriorated and it is much harder for her to express herself and to give evidence. This, it is suggested, may be as a result of dementia. 17. It seems to me that I should take into account the vulnerabilities of any witnesses. It is clear that, but for the difficulties with the ABE interview, this would have been an entirely appropriate case for such an interview to be played. I acknowledge the additional stress that would be placed on the complainant were she have to spend time being examined as well as being cross-examined. 18. However, I also have to balance those considerations against the imperative that the defendant in this case receives a fair trial. I cannot compromise that. 19. Since oral argument concluded on this issue I have received from the Crown an addendum report on complainant A prepared by Moira Pook, her registered intermediary. That report is dated the 11 th February, 2018, and is supplemental to an earlier report that she prepared in this case. Although it is a report prepared in connection with a different case it relates to complainant A's ability to give evidence before this court and is equally relevant, in my view, to this case. 20. The earlier report prepared by the intermediary is dated 13 th September, 2016. It contained the following: "[A] tends to agree with the questioner as a first response if the questioner is assertive, the question complex or when asked a leading question." 21. The first report also contains the following in terms of specific recommendations:- "Don't ask tag question or leading questions. A tag question is not in fact a question. It is a statement which has a short question inviting corroboration of its truth i.e. you stayed at home that day, didn't you? It is a powerfully suggestive linguistically complex form of speech and responses may be ambiguous....typically for a person with a learning difficulty. [A] has demonstrated difficulties with complex questions and a certain compliance which would make tag questions particularly challenging." 22. The registered intermediary, since preparing that earlier report, has met with complainant A on further occasions, the most recent being the 8 th February this year. The addendum report, produced as a result, contains the following: "During these last two visits I notice significant changes to [A] communication abilities which, I feel, will have a significant impact on her abilities to communicate her evidence. I have asked to report these observations to the court." 23. As to the meeting of the 8 th February, 2018, the registered intermediary said this:- "...on this occasion it was evident that the clarity of [A] speech had deteriorated further. It was extremely difficult to understand her speech for the majority of the time and repetitions of her responses no longer have the clarity as they had done in October 2017." 24. The addendum report goes on to indicate that, notwithstanding this deterioration, complainant [A] could still deal with simple yes/no questions by hand gestures or nodding or shaking her head. She understood the questions and she was able to signify a reliable yes/no response. 25. Lastly, the addendum report contains recommendations as follows:- "3.1 I reiterate my recommendation that [A] ABE interviews be played as her evidence in chief. 3.2 I further recommend that any questions, which are put to [A] during cross-examination, should be phrased in such a way as to require a yes/no response only. Whilst my assessment has

indicated that she continues to understand questions requiring more complex responses, she will be unable to articulate such responses in a way that will be understood by the court." 26. These most recent recommendations are of course very different and at odds with the recommendation made in the earlier report and reflect, quite clearly, the deterioration in [A's] ability to give evidence. 27. This further information is put to me by the Crown as further support for the Crown's argument that the ABE interviews should be played. For its part, the defence argue that it makes the entire cross-examination of [A] difficult in the extreme and the defence is in effect likely to be denied any ability effectively to cross-examine [A]. 28. Had this additional information not been available to me, I would clearly in the exercise of my discretion have excluded the ABE interview. 29. This is not a case where there is a simple failure to meet some technical requirement of the guidance. This is, rather, a major failure that undermines the basis of an ABE interview, namely that the jury should be able to assess the complaint by hearing it given it in the witness's own words where they can observe the manner in which she gives it. One of the fundamental ways of assessing demeanour in a witness is to observe their facial expressions and I cannot see that a jury no matter how directed, can form any satisfactory view as to the manner in which this evidence was given by the complainant if they cannot see her face when she gives it. 30. Does, therefore, this further information that I have received about [A's] ability to give evidence alter the view that I have expressed in the preceding paragraph? With reluctance I conclude that it cannot. The problems with the ABE interview are not of the defendant's making. It seems to me that it would have been open at any stage after the fault with the interview had become known (which should have been very quickly after it was made) to the police or subsequently the Crown to re-do that interview. The transcript of the original interview would need to have been available to the defence and that may have given rise to cross-examination in relation to inconsistencies. That cannot, in my view, be a reason not to do it where otherwise one is left with an ABE interview that is as flawed as this one. 31. In my view it is in the interests of justice in ensuring that the Defendant has a fair trial that the ABE interview of complainant A is excluded and I so order. Authorities Criminal Justice (Evidence of Children) (Jersey) Law 2002. R v Popescu [2011] Crim LR 227. Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures. Page Last Updated: 03 May 2018 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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