

JERSEY / JUDGMENT

AG -v- Smale [2013] JRC 131 (26 June 2013)

[2013] JRC 131

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JUDGMENT

THE DEPUTY BAILIFF: 1. I am going to deal, first of all, with the matters which arise out of the Plea and Directions Hearing pro-forma summary, and I make the order that the Prosecution should serve any further evidence, as set out in paragraph 7 of the summary, by the 12 th July; the reduction of material facts which can be admitted is to be provided by the Crown to the Defence by the 12 th July; and the redactions from the interview of the defendant, again, are to be tendered by the Prosecution to the Defence by the 12 th July. 2. The Defence should respond to the draft admissions and the redactions by no later than the close of business on the 26 th July. 3. As to the site visit I will defer the application for a site visit so counsel can have further discussions on whether further photographs can be taken which will achieve the same result. I have already expressed a provisional view that I am not in favour of site visits if there has been a change in the site between the date of the alleged offence and the date when the site visit might take place. As I understand it there may have been some changes in this case. That is particularly likely if a new tenant has moved in, because either the landlord or the tenant may well have made some changes and it then becomes potentially confusing for a Jury which will not be seeing the flat and potentially the stairs in the same condition they were as at the date of the alleged offence. So I start from the premise that a site visit, in this case, would not be appropriate but I can be persuaded away from that if counsel are not able to agree an alternative way of dealing with it by the production of an agreed set of photographs or a plan showing the position as best it can at the date and time of the alleged offence. 4. As to the question of the admissibility of the telephone call, I propose to defer that until after the complainant has given her evidence. The test as to whether or not the evidence is admissible is well set out in the cases, and the AG-v Breckon

[2012] JRC 194 is one of the recent examples of this, and certainly one of the major factors for me then to consider will then be whether the possibility of concoction can be excluded. The rival arguments have been well ventilated and no view expressed today would be other than provisional. I do take the view that 10 minutes is quite a long time and that weighs against the admissibility of the evidence. On the other hand if what the complainant says in her statement is repeated, convincingly, before the trial court then there may be reason for thinking that the 10 minute delay is understandable. I do not exclude the possibility that there may even be a voir dire on the issue of the admissibility of this evidence, if the Crown wish to proceed with it at the relevant time. So I direct the Crown not to refer to the

possibility of the Jury hearing the recording of the telephone complaint in its opening and not to lead evidence of that until after the complainant has given her evidence. When I say not to lead evidence of course the complainant can be asked whether she telephoned the police to make a complaint because that explains why the police arrived on the scene. 5. I turn now to the question of screens. Again the legal test is well established. It 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 Mr Southwell's judgment in that case. I dealt with a similar application, albeit in a sexual offences case, in the case of *AG-v-A*

[2012] JRC 029 :- "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 1st 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." 6. The question I have to ask myself in the context of the present application is, is this -the erection of screens- in "the interests of justice" so that the complainant will not be able to see or be seen by the defendant at the time. I accept that the complainant's evidence generally, and I am speaking in general terms rather than specifically in this case, in a domestic violence case may be adversely affected by not having screens in place. When I say generally that is why I have used the expression "may". In my judgment domestic violence cases are in a special category because it is well known that victims of domestic violence frequently withdraw their complaints after making them, no doubt for a variety of reasons, from the complaints not being true at all, at one end of the spectrum, to a very deep rooted fear of the defendant or a deep rooted love of the defendant, at the other end of the spectrum. And the reasons for making complaints may come at any point on that spectrum from one end to the other. If the problem arises in this case during the course of the complainant's evidence the potential prejudice to the defendant would be very great, and I take that very much into account. I also take into account that it would be wrong to require the complainant to give evidence without a screen so that somehow or other her reactions can be assessed. It is no part of the Court's function to humiliate witnesses in this way. 7. I note what Mr Landick has said, on instructions from the defendant. There is no evidence at this stage, I particularly note, to support his statements that the complainant has been trying to make contact with the defendant through Mr Shales; but there is no statement available to me to reach that conclusion and this is merely something said on instructions at this stage. It seems to me that at the time of trial the defendant, through Mr Landick, might or might not be able to make something of that evidence if it is available, and it will be a matter of judgment for the Defence then to determine the extent to which any comment is made by the Defence as to the use of screens. It will be a matter for the Defence at that point. 8. For my part, as trial judge, I think it is possible for me to give an entirely neutral direction to the Jury along the lines that I have explained to Mr Landick that there is nothing particularly unusual in screens being erected in certain types of case and that the Jury are to pay no attention to the fact that those screens are there. Of course nearer the time I will show the draft direction to both the Crown and to the Defence so that comment can be made upon it. And I make that point now with a request that if I do not expressly draw that direction to

your attention when I show you the draft summing up, if it is not in there you are to remind me of that. 9. In all the circumstances, having regard to all these things and to what the complainant says in the statements which she has made to the police, and in particular to the fact also that there was some obvious distress which she was suffering at the time, which continued even after the police arrived, I take the view that it is in "the interests of justice" that screens should be erected and I so order. 10. Clearly as with all things in a criminal trial there is liberty to apply should matters change between now and the relevant date. 11. You are remanded in custody until the 14 th August, 2013, for trial on this Indictment.

Authorities AG-v-Breckon

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