

IN THE CROWN COURT FOR THE DIVISION OF LONDONDERRY

THE QUEEN

-v-

D P

HEADNOTE

Trial on indictment – prosecution for rape, assaults and threats to kill – defence witnesses based abroad – evidence by live link – Article 80A PACE – jurisdiction of the court – factors to take into account – common law right to fair trial – Article 6 ECHR – Rule 44P, Crown Court Rules – direction to jury.

McCLOSKEY J

[1] The issue to be determined by this ruling is whether the evidence of either or both of two witnesses based in Poland, scheduled to testify on behalf of the Defendant, should, if necessary, be received through the medium of live television link.

[2] The amended indictment prefers seven charges against the Defendant. It comprises one count of rape, one count of threats to kill, one count of assault occasioning actual bodily harm and four counts of simple assault. The Defendant denies all charges. At this stage of the trial, the prosecution case is completed and the case for the defence is about to begin.

[3] The impetus for this ruling arises in the following way. On the third day of trial, the court was advised by counsel for the Defendant of serious difficulties relating to the attendance of two witnesses based in Poland. The witnesses in question are a married couple. Documentary evidence was supplied to the effect that these witnesses had made arrangements to fly from Poland to Dublin later that day. There was also documentary evidence that, earlier that day, the four months old child of the couple had been admitted to hospital in Poland, as an emergency case. The child was apparently suffering from pneumonia and bronchiolitis and was being treated in intensive care. Later that day, the court was further informed that the child's condition was stable and it was anticipated that he would be admitted to

hospital for a period of seven to ten days. This, apparently, remains the position. It was also represented to the court that while it might be possible for the father to travel to Ireland on his own, the mother would have to be accompanied by him. This, it was suggested, eliminated the possibility of the mother and father travelling separately and successively to this country for the purpose of giving evidence during the trial.

[4] I am disposed to accept that each of the Polish nationals in question is a potentially important witness for the Defendant. In summary terms, during the course of the trial, it has been put specifically to the complainant that these witnesses will give evidence to the effect that many of the incidents alleged by her could not have happened, in the manner described in her evidence. This has been one of the premises upon which the complainant's testimony about assaults perpetrated by the Defendant, resulting visible injuries, heated arguments, screaming and sobbing on her part and damage to property has been challenged in cross-examination. Further, the manner of the cross-examination of the complainant will probably have generated an expectation on the part of the jury that evidence from these Polish witnesses will be forthcoming. This arises from a series of questions couched in the linguistic formula "*AB will say that ... CD will give evidence that ...*".

[5] In a criminal trial, the mechanism of receiving evidence through the medium of a live television link is regulated by Article 80A of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("*PACE*"), which provides:

"Evidence through live links [added 2005 NI 15 on 13 Nov 2006]

80A. - (1) In this Article "live link" means a live television link or other arrangement whereby a witness, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by-

- (a) the judge and the jury (if there is one);*
- (b) legal representatives acting in the proceedings; and*
- (c) any interpreter or other person appointed to assist the witness.*

(2) Where two or more legal representatives are acting for a party to the proceedings, paragraph (1)(b) is to be regarded as satisfied in relation to those representatives if the witness is able at all material times to see and be seen by at least one of them.

(3) Where the court gives leave, a witness (other than the accused) who is outside the United Kingdom may give evidence through a live link in proceedings to which this Article applies.

(4) This Article applies-

- (a) to preliminary investigations or preliminary inquiries into indictable offences;
- (b) to trials on indictment;
- (c) to appeals to the Court of Appeal; and
- (d) to hearings of references under section 10 of the Criminal Appeal Act 1995.

(5) A statement made on oath by a person outside the United Kingdom and given in evidence through a link by virtue of this Article shall be treated for the purposes of Article 3 of the Perjury (Northern Ireland) Order 1979 as having been made in the proceedings in which it is given in evidence.

(6) Where in proceedings before a magistrates' court-

- (a) evidence is given by means of a live link by virtue of this Article, but
- (b) suitable facilities for receiving such evidence are not available at any court-house in which that court can (apart from this paragraph) lawfully sit,

the court may sit for the purposes of the whole or any part of those proceedings at a place designated by the Lord Chancellor, after consultation with the Lord Chief Justice, as a place having facilities to receive evidence given through a live link.

(7) Without prejudice to any power to make such rules, magistrates' courts rules, Crown Court rules and rules of court may make such provision as appears to the authority making them to be necessary or expedient for the purposes of this Article.

(8) References in this Article to a person being able to see or hear, or be seen or heard by, another person are to be taken as not applying to the extent that either of them is unable to see or hear by reason of any impairment of sight or hearing.

(9) In this Article, 'judge' includes, in relation to a magistrates' court, resident magistrate.."

[6] The power to make appropriate Crown Court Rules, contained in Article 80A(7), has been duly exercised. The subject matter of Rule 44P of the Crown Court Rules (Northern Ireland) 1979 is "***Evidence by live link where witness is outside the United Kingdom***" and the text of the rule is as follows:

"44P. – (1) An application for leave under Article 80A(3) of the Police and Criminal Evidence (Northern Ireland) Order 1989 for a witness (other than the accused) who is outside the United

Kingdom to give evidence through a live link shall be made by giving notice in writing which shall be in Form 7J in the Schedule.

(2) The notice under paragraph (1) shall be served on the chief clerk and every other party to the proceedings within 28 days from the date –

- (a) of the committal of the defendant; or*
- (b) on which Notice of Transfer under Article 3 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 or under Article 4 of the Children's Evidence (Northern Ireland) Order 1995 was given; or*
- (c) on which leave to present an indictment under section 2(2)(e) of the Grand Jury (Abolition) Act (Northern Ireland) 1969 was given, or*
- (d) on which an order for retrial is made.*

(3) Any party who wishes to oppose the application under paragraph (1) shall, within 14 days of the date on which notice of the application was served on him, notify the chief clerk and every other party to the proceedings in writing, of his opposition giving reasons for it.

(4) Except where notice is received in accordance with paragraph (3), the Court may –

- (a) determine the application in favour of the applicant without a hearing; or*
- (b) direct a hearing.*

(5) Where a party to the proceedings notifies the chief clerk in accordance with paragraph (3) of his opposition to the application, the Court shall direct a hearing of the application.

(6) Where a hearing is to take place in accordance with paragraphs (4) or (5), the chief clerk shall notify each party to the proceedings of the time and place of the hearing.

(7) A party notified in accordance with paragraph (6) may be present at the hearing and be heard.

(8) The chief clerk shall, as soon as reasonably practicable after determination of an application under paragraph (1), notify all parties of the decision of the court in Form 7K and, where leave is granted, the notification shall state –

- (a) the country in which the witness will give evidence;*
- (b) if known, the place where the witness will give evidence;*

- (c) *where the witness is to give evidence on behalf of the prosecutor or where the disclosure is required by section 5(7) of the Criminal Procedure and Investigations Act 1996 (alibi), the name of the witness;*
- (d) *the location of the Court at which the trial will be held; and*
- (e) *any conditions specified by the Court in accordance with paragraph (9).*

(9) *In determining an application under paragraph (1), the Court may specify that as a condition of the grant of leave the witness should give evidence in the presence of a specified person who is able and willing to answer under oath or affirmation any questions the Court may put as to the circumstances in which the evidence is given, including questions about any persons who are present when the evidence is given and any matters which may affect the giving of the evidence.*

(10) *The Court may, if it considers that it is in the interests of justice to do so –*

- (a) *allow a notice required under this rule to be given in a different form, or orally; or*
- (b) *abridge or extend the time for service of a notice required under this rule, either before or after that period expires."*

[7] In England, there are two comparable statutory powers which have come to my attention. The first is Section 32 of the Criminal Justice Act 1988 ("*the 1988 Act*") as amended, which provides:

"(1) A person other than the accused may give evidence through a live television link in proceedings to which subsection (1A) below applies if –

- (a) *the witness is outside the United Kingdom;*

But evidence may not be so given without the leave of the court.

(1A) *This subsection applies –*

- (a) *to trials on indictment, appeals to the Criminal Division of the Court of Appeal and hearings of references under Section 9 of the Criminal Appeal Act 1995; and*
- (b) *to proceedings in youth courts and appeals to the Crown Court arising out of such proceedings and hearings of references under Section 11 of the Criminal Appeal Act 1995 so arising.*

(3) *A statement made on oath by a witness outside the United Kingdom and given in evidence through a link by virtue of this section shall be treated for the purposes of Section 1 of the Perjury Act 1911 as having been made in the proceedings in which it is given in evidence".*

Section 32(4) makes provision for corresponding rules of court. Section 32 initially came into operation, in part, on 5th January 1989, when subsections (1)(a) and (3) were omitted. With effect from 26th November 1990, the Criminal Justice Act 1988 (Commencement No. 12) Order 1990 brought the remainder of the Section into operation for the following purposes:

- (a) Proceedings for murder, manslaughter or any other offence consisting of the killing of any person.
- (b) Proceedings conducted by the Director of the Serious Fraud Office under Section 1(5) of the Criminal Justice Act 1987.
- (c) Proceedings in which a Notice of Transfer has been given under Section 4 of the latter enactment by one of the designated authorities. Ultimately, with effect from 1st September 2004, the Criminal Justice Act 1988 (Commencement No. 14) Order 2004 brought subsections (1)(a) and (3) into operation, without the aforementioned limitations and with prospective effect only.

Ultimately, Section 32(1)(a) and (3) were brought fully into operation by the Criminal Justice Act 1988 (Commencement No. 14) Order 2004, with effect from 1st September 2004, but confined to proceedings falling within the ambit of subsection (1A)(a).

[8] The second comparable statutory power in England is contained in Section 51 of the Criminal Justice Act 2003, which provides:

"51. Live links in criminal proceedings

(1) *A witness (other than the defendant) may, if the court so directs, give evidence through a live link in the following criminal proceedings.*

(2) *They are –*

- (a) *a summary trial,*
- (b) *an appeal to the Crown Court arising out of such a trial,*
- (c) *a trial on indictment,*
- (d) *an appeal to the criminal division of the Court of Appeal,*

- (e) *the hearing of a reference under section 9 or 11 of the Criminal Appeal Act 1995 (c. 35),*
 - (f) *a hearing before a magistrates' court or the Crown Court which is held after the defendant has entered a plea of guilty, and*
 - (g) *a hearing before the Court of Appeal under section 80 of this Act.*
- (3) *A direction may be given under this section –*
- (a) *on an application by a party to the proceedings, or*
 - (b) *of the court's own motion.*
- (4) *But a direction may not be given under this section unless –*
- (a) *the court is satisfied that it is in the interests of the efficient or effective administration of justice for the person concerned to give evidence in the proceedings through a live link,*
 - (b) *it has been notified by the Secretary of State that suitable facilities for receiving evidence through a live link are available in the area in which it appears to the court that the proceedings will take place, and*
 - (c) *that notification has not been withdrawn.*
- (5) *The withdrawal of such a notification is not to affect a direction given under this section before that withdrawal.*
- (6) *In deciding whether to give a direction under this section the court must consider all the circumstances of the case.*
- (7) *Those circumstances include in particular –*
- (a) *the availability of the witness,*
 - (b) *the need for the witness to attend in person,*
 - (c) *the importance of the witness's evidence to the proceedings,*
 - (d) *the views of the witness,*
 - (e) *the suitability of the facilities at the place where the witness would give evidence through a live link,*
 - (f) *whether a direction might tend to inhibit any party to the proceedings from effectively testing the witness's evidence.*
- (8) *The court must state in open court its reasons for refusing an application for a direction under this section and, if it is a magistrates' court, must cause them to be entered in the register of its proceedings."*

Section 51 has been the subject of limited commencement. With effect from 7th December 2007, it has been in operation in relation to proceedings initiated on or

subsequent to that date in the Crown Court for specified sexual offences [see SI 2007/3451, Articles 2-4]. For the moment, therefore, Section 32 of the 1988 Act and Section 51 of the 2003 Act coexist. While it might appear that the legislative intention is that, ultimately, Section 51, with its more elaborate model, should replace Section 32 this is not entirely clear and is not material for the purposes of the present ruling.

[9] There are some evident structural and textual differences between Article 80A of PACE and Section 51 of the 2003 Act. In particular, Section 51 specifically contemplates that the court may direct that evidence be adduced through a live link in three basic situations – upon an application by the prosecution; or upon an application on behalf of the Defendant; or of the court's own motion. The more sophisticated model created by Section 51 is not fully replicated in Article 80A of PACE. Likewise, Article 80A is not a direct reproduction of Section 32 of the 1988 Act. However, at its core, Article 80A would appear to be more closely modelled on the latter than the former. In particular, there are three features in common. The first is the investing of the court with a discretionary power, framed in the language of "*leave*". The second is the absence of any expressly prescribed governing criteria or factors to be taken into account by the court, in determining whether to exercise the power. The third is the absence of any explicit mention of applications to the court on behalf of the prosecution or the defence inviting the exercise of the power.

[10] In the present case, the first question to be determined is whether the power enshrined in Article 80A(3) of PACE is exercisable by the court acting on its own initiative. The defence argued that Article 80A does not bear this construction. In my view, this restricted interpretation of Article 80A is not warranted either by its express terms or the discernible underlying intention. Article 80A creates a valuable power, designed to facilitate the effective and expeditious conduct of a criminal trial. It is in the interests of everyone concerned – prosecution, defence, victims, witnesses, juries and trial judge – that criminal trials be conducted with efficiency and expedition. This also, manifestly, serves the public interest. Moreover, an efficiently and smoothly conducted criminal trial is more likely than not to fulfil the Defendant's fundamental rights at common law and under Article 6 ECHR. Bearing these considerations in mind, I am satisfied that the exercise of the power enshrined in Article 80A of PACE is not confined to cases where the court is seised of an application to adopt this course on behalf of the prosecution or the defence. Article 80A contains no express provisions to this effect. The key provision is found in paragraph (3). I consider that Article 80A(3) confers on the court a freestanding power to direct that evidence be given through the mechanism of live link, exercisable of its own motion. There is nothing in Article 80A suggestive of the contrary. Moreover, to construe Article 80A as narrowly as the defence suggest would deprive the court of a valuable aid to an efficiently and fairly conducted trial in circumstances where either the prosecution or the defence decline or omit, for whatever reason, to expressly invite the court to make the appropriate order. In my opinion, it cannot have been intended by the legislature that the court would be powerless to act in such circumstances.

[11] The construction of Article 80A which I favour, as explained above, is in no way undermined by the terms of Rule 44P of the Crown Court Rules. These provisions prescribe the procedure to be followed where *an application for leave* is made under Article 80A. In my opinion, a rule contained in subordinate legislation made pursuant to an enabling power enshrined in parent legislation cannot in any way modify or emasculate the parent statute. Furthermore, it is difficult to understand how a subordinate rule can properly operate as an aid to construction of the parent statutory provisions. It is entirely unsurprising that Rule 44P regulates the procedure to be followed where either the prosecution or the defence determines to apply to the court to exercise its power under Article 80A(3). However, there would be no need to establish any procedure for the exercise of the court's freestanding power to order the facility in question, of its own motion. I consider that, in such a case, the process is regulated by a combination of the common law principles of procedural fairness and the Defendant's right to a fair trial. These sources invest the court with the flexibility required to act in any given case. Accordingly, I reject the contrary argument advanced to the court, on behalf of the Defendant, based on Rule 44P.

[12] What are the factors which should inform the exercise of the court's power under Article 80A of PACE? This is the second question to be determined in the present case. As already observed, no express governing criteria or considerations are prescribed. In contrast, Section 51(4)(a) of the 2003 Act specifically stipulates that as a pre-requisite to the exercise of its power, the court must be satisfied that "... *it is in the interests of the efficient or effective administration of justice for the person concerned to give evidence in the proceedings through a live link*". However, Section 32 of the 1988 Act differs in this respect and is properly comparable to Article 80A. In my opinion, the answer is found by resort to the Defendant's right to a fair trial and the rights guaranteed by Article 6 ECHR. I consider that if the court were to conclude that the exercise of the power contained in Article 80A(3) could infringe any of these rights, the exercise of the power would be inappropriate. By the same token, there can be no objection to exercising the power in circumstances where the court is satisfied that there would be no ensuing impairment of any of the Defendant's fair trial rights.

[13] In the context of the present case, the fundamental question, in my view, is whether the exercise of the power contained in Article 80A(3) vis-à-vis the two defence witnesses based in Poland could infringe the Defendant's right to a fair trial. This requires the court to engage in a prediction of the future course of the trial, based on its experience of the trial to date, the arguments of the parties and all available information sounding on the impact and consequences of exercising the power. The only argument of substance canvassed on behalf of the Defendant was that if the court were to exercise the power, the impact on the jury of the evidence of the witnesses in question would be diluted. There was no elaboration or particularisation of this suggestion. It was further submitted that the jury would not be able to assess the demeanour of the witnesses and the nuances in their evidence.

However, the basis upon which this suggested handicap was asserted was not developed.

[14] The concept of fairness in the context of a criminal trial has been explained by Lord Steyn in *Attorney General's Reference No. 3 of 1999* [2001] 1 All ER 577, at p. 584 in a celebrated passage which bears repetition:

"The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public".

[My emphasis].

Moreover, fairness will always entail a contextualised evaluation, tailored to the specific circumstances of the individual trial. Thus, in the present case, it is appropriate to take into account that this is a rape trial in which the complainant has already undergone the ordeal of recounting extensively in evidence the details and circumstances of the alleged rape and the other offences specified in the amended indictment. It would plainly be undesirable to abort this trial and recommence afresh - with all the delay, uncertainty and anxiety which this would generate - in the absence of sufficient reason to justify this course. I further take into account that the Defendant is being tried by a demonstrably attentive and assiduous jury which, in my view, will not be disadvantaged in any way by the physical absence from the courtroom of either or both of the defence witnesses in question.

[15] The final question to be addressed is whether, in the particular circumstances, Article 6 ECHR adds anything of substance to the Defendant's common law right to a fair trial and, if so, whether the exercise of the court's power under Article 80A(3) of PACE would give rise to an infringement. One of the assorted rights guaranteed by Article 6 is expressed, in paragraph (3)(d) in the following terms:

"(3) Everyone charged with a criminal offence has the following minimum rights: ...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

During argument, specific attention to this provision was directed on behalf of the Defendant. Where prosecution witnesses are concerned, the European Court has said the following:

"All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, the accused must be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage".

In the immediately ensuing passages, the Court explicitly acknowledged that the rights of the accused may have to be balanced against those of witnesses or victims in cases where issues of life, liberty or security of the person or interests falling within the ambit of Article 8 are in play: see *PS -v- Germany* [2003] 36 EHRR 61, paragraphs [21] - [23], where the Defendant had been charged with a sexual assault on a girl aged eight years who had not been called to give evidence, in order to protect her personal development, with the result that the Defendant had been convicted primarily on the evidence of the child's mother who rehearsed the account conveyed to her by the girl. The European Court concluded that the trial had contravened Article 6, since the conviction was based solely or mainly on the evidence of a witness whom the Defendant was not permitted to question. In cases of this *genre*, the European Court has consistently emphasized the need for sufficient counterbalancing measures in order to respect the Defendant's fair trial rights: see, for example, *Doorson -v- The Netherlands* [1996] 22 EHRR 330 and *Van Mechelen -v- The Netherlands* [1997] 25 EHRR 647.

[16] The European jurisprudence, outlined above, provides some insight into the correct approach to be adopted in the context of the present trial. In this trial, the case for the prosecution has been based almost exclusively on the evidence of the complainant, the Defendant's spouse, who, pursuant to a special measures order, testified through the medium of a live television link. If either or both of the Polish witnesses scheduled to testify on behalf of the Defendant were to do likewise, the "*conditions*", for the purposes of Article 6(3)(d), would be the same for both prosecution and defence. Accordingly, on this elementary ground, I hold that no infringement of this discrete right would be occasioned by the exercise of the court's power under Article 80A of PACE. Even if the complainant had given evidence in the courtroom, it seems to me unlikely that this would give rise to any material distinction in "*conditions*" if the defence witnesses from Poland were (or either of them was) to testify via live link. I consider that in matter of this kind substance must prevail over form.

[17] In my view, the objections canvassed on behalf of the Defendant to the exercise of the court's power amount to little more than bare assertion. I am satisfied that the exercise of the court's power under Article 80A of PACE in respect of either or both of the Poland based witnesses will in no way impair the Defendant's common law right to a fair trial and will be compatible with his rights under Article 6 ECHR. The exercise of this power will also be consonant with the other interests in play, as identified above. Furthermore, at present, there is no basis for

apprehending any significant shortcomings in the technical quality of the audio-visual transmission. I am satisfied that the jury will be amply equipped to properly absorb and evaluate the evidence given in this manner.

[18] Finally, I would commend to practitioners the illuminating and painstaking analysis contained in the ruling of District Judge White in *DPP -v- McKenna and Others* [2008] NIMAG 01, in the context of committal proceedings. In that particular case, the learned judge was disposed to take into account the cost and practicability of securing the attendance of military witnesses based in Afghanistan and the disruption to ongoing military operations there: see paragraph [16]. The judge further observed:

"[17] ...Courts are now well used to witnesses giving evidence by way of live link, both at committal and at trial, and I do not consider that there are any practical difficulties which cannot be overcome".

Notably, District Judge White also highlighted some of the practical realities relating to cross-examination. He observed that in committal proceedings, both questions and answers must be typed out. This has a certain resonance in the present case, where the assistance of a Polish interpreter was required during certain parts of the complainant's evidence and the interpreter's services are being employed for the totality of the Defendant's evidence. The court has also been informed that the evidence of the two defence witnesses, the subject of this ruling, will be given exclusively in the Polish language. In *McKenna*, the court acceded to an application on behalf of the prosecution to exercise its power under Article 80A of PACE to receive evidence from five witnesses by live link from Afghanistan.

Conclusion

[19] In the exercise of the power contained in Article 80A of PACE, I give leave for the evidence of TB and MB to be given by live link. In making this ruling, the court has been informed that there are suitable facilities available for this purpose in the city of Rzeszow, Poland, which is proximate to where the witnesses reside. Both prosecution and defence will have the opportunity to address the court on any consequential or ancillary issues. At the appropriate time, the jury will be specifically directed that there is nothing extraordinary about the reception of evidence by this mode and, further, that the evidence of *all* witnesses in this trial, whether physically present in the courtroom or otherwise, should be treated equally.

[20] If, in the fluid circumstances prevailing, both of the witnesses travel to this jurisdiction for the purpose of testifying, or if either of them does so, there will be no requirement to implement this order and it will effectively lapse, with the evidence being received through the more conventional medium of the witnesses presence in the courtroom.