

R v G

181/03

Crown Court for the Division of Antrim

Smyth J

Ruling on Application for Special Measures.

The Prosecution have applied to the court under Article 7 of the Criminal Evidence (Northern Ireland) Order 1999 that the evidence of S be received by live video link or, failing that, that the court should allow the witness to be screened from the accused. The application has been properly brought before the court and no issue is taken with the formal proofs. The witness is a complainant in respect of a sexual offence and is therefore eligible for assistance under Article 5(4) of the Order.

Apart from the arguments advanced by counsel no evidence has been submitted to the court in support of this application and under the section of the application that provides for a description of such evidence “not applicable” is written. The requisite facilities are available at the court that will hear this case.

Three reasons are given in support of the application for special measures, namely:

1. The witness is a former partner of the accused and is nervous at the prospect of seeing him in court.
2. The witness has recently given birth.
3. The witness is 19 years old. (She was born on 10th May 1986).

In that section of the application that provides for the views of the witness as to why the measures sought in this application are required it is stated that the witness “wishes her evidence to be given under the special measures sought”. Finally, in Part 2 of the application, which relates to who should accompany the witness, is recorded “It is in the interests of justice and the quality of the witness’s evidence will be maximised.”

The matter first came before the court on Friday 12th January 2004. Mr Connor appeared for the Prosecution and Professor Doran for the Defence. Since the provisions of Article 5 only came into force recently (and therefore there were no precedents in Northern Ireland of which I was aware) and Mr Connor had not had the opportunity to consult with the witness concerned I adjourned this to permit various enquiries to be made as to precedents from other jurisdictions and to permit a consultation to take place.

The accused was arraigned on 27th January 2004 and pleaded not guilty to charges of raping S and of driving with excess alcohol on the 7th April 2003. The adjourned application for special measures resumed and Mr Connor indicated to the court that he had consulted with S.

In the light of this consultation he said the application for special measures was being proceeded with, that the witness would prefer to give evidence using such means but that she was prepared to give oral evidence in open court if that was required. The court was not referred to any relevant precedent. Mr Connor confirmed that it was not the intention of the Prosecution to present or to lead any other evidence.

In these circumstances counsel agreed that the appropriate tests under the order should be applied by me having regard to the statements of evidence in the case and to what I knew about the defence case from the replies of the accused to the police and from the Defence Statement.

Clearly, S is eligible under Article 5(4) and the court does not have to be satisfied that the quality of evidence is likely to be diminished by reason of fear or distress on her part. She has not expressed a wish not to be so eligible.

I have therefore to determine whether any of the special measures available and for which S is eligible would, in my opinion, be "*likely to improve the quality*" of evidence given by her and, if the answer is yes, then to determine which measure would be "*likely to maximise so far as practicable*" the quality of this evidence.

Since the special measures are alternatives the test ultimately has to be applied to each measure individually. In so doing I am obliged to consider all the circumstances but in particular to have regard to any views expressed by the witness. Here she has expressed through counsel a preference that I assume is both considered and strong.

I am told that S is nervous of seeing the accused in court, that she was a former partner of the accused and the alleged offence took part in the context of that situation. I am further told that she is vulnerable both in terms of her age and having recently given birth. She is 19 and the accused is 28.

In particular there is no additional medical evidence or expression of fear on her part of the accused that is relied on by the Prosecution. There is no evidence before the court of a past history of violence or intimidation by the accused either against S or others. I appreciate that such evidence would not be likely to be admissible in the trial but it could, if it existed, still be relevant for these purposes. I have to consider all the circumstances before applying the tests listed above, even though eligibility and Article 5 (1) and 5(2) matters are not in issue.

The quality of a witness's evidence is defined in the Order in Article 4(5) and I quote this Article in full:

(5). In this Part references to the quality of a witness's evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose "coherence" refers to a witness's ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

I therefore take into account the views expressed by the witness, the disparity in the ages of the witness and the accused and that the witness will, at the time of trial, be just short of 20 years of age. I also take into account the absence of any other evidence that would suggest intimidation or past violence on the part of the accused. I further take into account the layout of the court in which this matter will be tried and the extent to which both layout and the taking of ordinary steps short of special measures can avoid the necessity for any direct eye contact between the witness and the accused.

I have paid particular attention to the nature of the allegations made against the accused by the witness. The witness statement of S is quite long. The allegation against the accused is that he arrived at the house of S, from whom he had separated, after midnight and that complainant met him in his car. She was in her nightclothes. He was drunk and took the complainant, against her wishes, to a lay-by at Dunclug College on the Doury Road where the rape took place.

I do not recite the detail of the allegations here but it is clear that in order to recount them the complainant will have to give a fairly detailed description of intimate matters in court that would not be easy for any witness. The sequence of events alleged and their nature (including what was allegedly said by the accused) strongly suggest that what happened was intended to humiliate the complainant. Quite apart from the rape allegation there is also an allegation of violence that may well have been gratuitous to the rape.

The Defence case is that what took place was short of intercourse and took place with consent. There is a considerable amount of additional evidence but it is not necessary to list it here. It would appear to support the complainant's evidence.

Having regard to the detail of the allegations and their nature I have had regard to the likely pressures upon a witness of this description giving evidence in open court in the presence of the accused and all the others present.

If I may, I will take *coherence* first. Coherence as defined in the Order is the ability of a witness to give answers to the questions put to her that address the questions she is asked in a way that can be understood both individually and collectively. I have little doubt that these allegations if true will result in such answers being given. Giving this evidence will be difficult and distressing but I feel that such distress on the part of an honest witness of this age and description will not affect the coherence of her answers.

I take *completeness* next. I find this difficult to assess but there is no evidence that suggests that S is likely to break down or be unable to complete her account of what happened or to be able to respond to reasonable cross-examination. On the facts before me I feel that her evidence is likely to be completed in open court. It is difficult to separate completeness entirely from accuracy and I return to this later.

Finally I take *accuracy*. Pressures on memory and recall must exist for any witness. Those who, like myself, have never given evidence in court can only estimate the difficulty that witnesses have in giving a complete account in a reasonably logical sequence of what happened to them some time previously. By the time S gives evidence these events will have occurred almost a year previously. Such considerations might possibly affect completeness in a limited sense.

No doubt it will be possible that some matters either will be described out of sequence and that some matters be left out. As in all these cases some detail may be remembered that was not in an original statement. This will understandably give rise to cross-examination. But as far as accuracy is concerned these matters will still be as problematic if the witness is giving evidence on a video link or if she is screened from the accused in court. In that sense I am unable to say that my view is that either of the special measures sought will be likely to improve the quality of S's evidence.

In considering all the circumstances, I also have to have regard to the effectiveness of evidence given in open court. I can appreciate that the Article directs my attention to the question whether any of the measures tends to inhibit the effective testing of evidence by the accused. My task includes that but also goes beyond such a consideration. In my view the accused through his counsel will be adequately able to test evidence whether it is given by live video link or from behind a screen.

In my view, however, the opportunity given to a jury to assess evidence given in open court in such cases is reduced if it is given by a video link. Some spontaneity and immediacy is lost. In open court the jury is able to see the witness directly as he or she answers questions and is better able to assess the witness's demeanour and appearance than on a screen. They also can see the accused in a way that is not possible if they are concentrating on an image on a screen. This would not apply to screening but that has other undesirable, though sometimes necessary, effects.

In this case to order either of the special measures sought would prevent the complainant being in court for the opening of the case and for the evidence given by the accused. She does not have to be present and this clearly is a matter that no doubt was taken into account when her wishes were being ascertained. If, however, she chooses to do so arrangements can be made so that she does not have to look at the accused and can be present in court in such a manner that she can, as will the accused, become used to the atmosphere of court and can hear what is being said.

Having considered all these matters above I decline to order the special measures sought on the ground that I am unable to say that either of the measures sought would, in all the circumstances, be likely to improve or to maximise the quality of S's evidence.

Before the trial and in the absence of the jury I would expect to discuss with counsel what steps can be taken to avoid or reduce any direct eye contact between S and the accused when she comes into court, is present in court, comes to the witness box or is giving her evidence from the witness box.