

## **In the Crown Court for the Division of Antrim**

### **R v K. McK.**

#### **Application for a Special Measures Direction under Article 7 of the Criminal Evidence (NI) Order 1999.**

#### **Special Measures Application; articles 7, 12 and 15 Criminal Evidence (NI) Order 1999; rape; complainant a former partner; video recording and live link applications.**

1. The accused is charged with a number of offences including rape and indecent assault of Ms H on 26<sup>th</sup> August 2005. The complainant was born on 11th May 1974 and she is therefore 31 years old.

The witness is eligible under Article 5(4) of the Order for a special measures direction.

5(4). Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this paragraph unless the witness has informed the court of the witness's wish not to be so eligible by virtue of this paragraph.

The special measures sought are that her evidence in chief be received by video recording under Article 15 and that cross-examination proceed by live link under Article 12.

The tests I have to apply appear in Article 7(2) of the Order.

- 7(2) Where the court determines that the witness is eligible for assistance by virtue of Article 4 or 5, the court must then –
- (a) determine whether any of the special measures available in relation to the witness (or combination of them) would, in its opinion, be likely to improve so far as is practicable the quality of such evidence; and
  - (b) if so –
    - (i) determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and

- (ii) give a direction under this Article providing for the measure or measures so determined to apply to evidence given by the witness.

(3) In determining for the purposes of this Part whether any special measure or measures would or would not be likely to improve, or to maximise as far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular –

- (a) any views expressed by the witness; and
- (a) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.

Article 15(2) imposes an additional requirement to disallow a video recording if the court concludes that, in the overall circumstances of the case, such a video should not be admitted in the interests of justice.

15(2) A special measures direction may, however, not provide for a video recording, or a part of such a recording, to be admitted if the court is of the opinion, having regard to all the circumstances of the case, that in the interests the recording, or that part of it, should not be so admitted.

2. I have been told by Mr Weir, who appears for the prosecution, that the complainant is both in fear of giving evidence and in terror of the accused, with whom she was in a relationship with for 18 years. I have also heard her give evidence about her wishes and the difficulties she would have if she appears as a witness in open court in the presence of her former partner, the accused. She has stated her wishes that she give evidence in the manner sought and has spoken of the difficulties she would face if she gives evidence in open court.
3. Mr Gallagher, who appears for the accused, has referred to the defence, which is that intercourse took place with consent and that, if the special measures sought are granted, the opportunity of the jury to assess the truthfulness of the complainant will be reduced because the jury will be deprived of the opportunity given them to assess the credibility of the complainant by the delivery of evidence by her in open court in the presence of the accused. The nature of the issue that the jury has to decide will be largely based on its assessment of the credibility of the complainant's evidence and the accused's denials, allowing for the application of the proper approach in a criminal case. The ability of the jury to gauge the demeanour of, and hence to assess the credibility of, the complainant will be reduced if she is not in court and giving evidence facing them and in the presence of the person she accuses.
4. Evidence is normally given in open court in the presence of the accused. This not only is regarded as giving the jury the best opportunity to assess the credibility of the witness and therefore of assessing the weight to be attached to that evidence but the jury may infer that there is some reason why the normal course is not being followed. Since many of the provisions in relation

to vulnerable witnesses are almost automatic the impact of this has been reduced.

5. Before applying the statutory tests to this case I briefly state the prosecution case against the accused. On 26<sup>th</sup> August 2005 Ms H made a statement to Larne police. In it she alleged that early that morning, after she had left a wine bar in Larne with a female friend, she was assaulted by the accused with whom her relationship had recently ended. She says she blacked out and then realised she was in a taxi with both her friend and the accused. They arrived at her friend's flat. She says she left this flat because the accused was threatening to damage the flat. Outside she alleges she was challenged about a relationship with another man and assaulted. She says she went with the accused to her own house to avoid her friend getting hurt. In her house she says that the behaviour of the accused changed but alleges that she "played along out of pure fear". She alleges that they were both in her bedroom, she got undressed followed by the accused, who got into bed with her and started having sex after kissing her. She alleges that she was motionless and afraid to the extent she could not speak and that, during the intercourse, the accused said, "it is like riding a sack of spuds" to which she made no reply.
6. She says the accused got up and was asking her questions to which she made no reply. She says he shouted at her to get up and slapped her on the face. She alleges he then got dressed while she was still in bed and urinated over her face. She alleges he left the house but demanded to be let back in and was readmitted. She makes various allegations about his behaviour including that he poured milk over her and says that she ran from the house and was pursued by him to her friend's house from where she phoned the police as he banged on the door.
7. On the same date, police interviewed K McK on the basis of the allegations contained in the complainant's statement. He made no relevant replies saying no comment.
8. Ten days later a video interview of the Complainant was taken at Garnerville Police station. This was in conformity with relevant protocols governing such recordings. This is largely consistent with the earlier statement. There are some additions as to what was said by the accused but any contradictions with, additions to and omissions from the earlier statement do not appear, on the examination I have given them, to be of major significance, with the possible exception of the addition of an allegation of a forceful punch to her jaw administered outside the wine bar. In the video she says that she "kissed back" when kissed in her house both in the kitchen and in the bedroom and that she touched the accused by having her hands round his back. Such matters may be relevant either to an issue of consent or to a belief on the part of the accused that there was consent. There also were additional allegations of other physical assaults including an allegation that, in bed, the accused had his hands around the complainant's throat and of an indecent assault that he grabbed her vagina. There were allegations of threats referring to knives.

9. The video also contains replies to questions by Detective Constable Lavery who was told, on the day of the alleged incident, by the complainant that she did not wish to make a complaint about being raped. In the video recording Ms H makes it clear that she wishes to complain that she was raped. She is recorded as saying that she said she consented to sex “because she went upstairs with him but I only went up out of pure and utter fear”. Before this recording was made, and after she made her initial statement of complaint, she had received some advice about her complaints and the law from Rape Crisis.
10. There is no dispute that the accused and the complainant have one son and that the complainant was 13 when they first met. The accused was interviewed a second time following the recording, on 3<sup>rd</sup> October 2005. What he said to the police I summarise as follows: he said there had been a confrontation in the wine bar when Ms H came across to him and hit him in the eye. Later outside there was a further altercation and the complainant struck her head on a lamppost after he pushed her, that they went to the complainant’s friend’s house in a taxi where there was kissing between them.. They went to Ms H’s house where there was further kissing and he received a love bite. They went to the bedroom where there was consensual kissing and fondling followed by energetic sexual intercourse. He says he fell asleep but got punched and wet the bed. He says he left the house but went back for his mobile phone. He says he apologised for “wetting the bed”. He says there were allegations from Ms H about a woman whose name she must have found on his mobile. He says he was getting orange out of the fridge and Ms H was verbally berating him when he flicked the top of the orange carton and threw the orange which “came out over” the complainant. She then ran out. He says he went round to Ms H’s friend’s house and asked for his phone. The police arrested him but his mobile phone was left at his friend’s two days later.
11. If the accused’s account is accepted the sexual intercourse was entirely by consent. He has to concede that the signs of physical injuries resulted from their physical conflicts but he says the complainant had earlier assaulted him. He wet the bed involuntarily when he was being assaulted. He concedes throwing orange juice over the complainant.
12. If the complainant’s various accounts are accepted she was assaulted quite badly over the course of the evening and, after intercourse throughout which she was silent, was urinated over deliberately in a way designed to humiliate her. She later had milk thrown over her. However, if her account is accepted, there would still be an issue for the jury who would have to address the issue as to whether, assuming they find that the complainant did not consent to intercourse, whether in all the circumstances they are satisfied that the accused did not believe Ms H was consenting.
13. The complainant made a further witness statement on 2<sup>nd</sup> November 2005. This was clearly following the comments made by the accused. She conceded she struck the accused in the wine bar. She conceded she saw a love bite but denied giving such to the accused. She again addressed, briefly, the circumstances in which intercourse took place, indicating that no force was used and that she took off her clothes. She also concedes phoning a woman

whose number she obtained from the accused's mobile. She concedes violence towards the accused on an occasion prior to this incident.

14. There is also medical and other evidence supporting her allegations that she was subjected to, at the very least, a reasonable degree of violence in humiliating circumstances.
15. I have considered all the above factors and now apply the relevant statutory tests. I do so separately in relation to each measure. There seems to be a two-fold approach in the Order. I have, first of, to decide whether any of the available measures would be likely to **improve the quality** of the complainant's evidence and, then I have to determine which measure or measures is likely **to maximise the quality** of the evidence.
16. For reasons that appear below I answer the first question positively. One of the measures sought is, in my view, likely to improve the quality of Ms H's evidence.

### **Article 15.**

17. I do not accede to the application that evidence in chief be received by video recording.
18. The video was recorded ten days after a witness statement had been taken and before another such statement was taken. In my view the recording could not be regarded as completing the complainant's evidence in chief. I have looked at the aspect of quality as defined in Article 4(5). I have already mentioned the issue of completeness. The sequence of events that night is clearly complicated but, in my opinion, the witness is capable of understanding questions and giving appropriate answers to them that can be collectively and individually understood, given the effect of my ruling under Article 12.
19. In coming to this decision I also have had regard to the views expressed by the witness and the question as to whether this measure would inhibit the effective testing of her evidence. I feel that the issues are such that the evidence would be best received with evidence in chief being given by questions asked and answers given rather than by a mixture of this and a video recording. Whether it is looked at in the context of either improving or of maximising the quality of Ms H's evidence I answer this in the negative.
20. I have also to address the provision in Article 15(2). I feel, independently of the above, that in all the circumstances of this case, particularly the fact that the video does not cover all the evidence in chief of the complainant and the way the three occasions on which evidence was received by the police from Ms H relates to the overall issues in this case, the admission in evidence of a recording would not be in the interests of justice. My decision in this respect has been made easier by the firm conclusion I have formed on the Article 12 measure.

### **Article 12.**

21. In relation to this measure, that the witness give her evidence by live link, I accede to this. I do so for the following reasons. In all the circumstances I feel this measure will be likely to improve the quality of the witness's evidence. I am concerned, especially considering what she said in evidence before me, that she might be unable to complete her evidence in open court in the presence of the accused. Her allegations, if correct, that she was subjected to acts designed to humiliate her are such that she may well have difficulty in giving coherent answers to these matters in open court.
22. There is ample evidence that tends to support her allegations of both physical assault and deliberate humiliation. In relation to the requirement of Article 7(2)(i) I have determined that giving evidence by live link, as opposed to any other special measure, would be likely to maximise the quality of the witness's evidence.
23. In relation to the question as to whether such a measure might tend to inhibit the effective testing of Ms H's evidence on behalf of the accused I have had regard to the nature of the issues as I see them, and the ability of the defence to ask questions based on the various statements and the recording of the accused. I am satisfied that the defence will not be inhibited in their testing of Ms H's evidence if she were to give that evidence by live link.
24. I, for these reasons, grant the application that Ms H's evidence be received under Article 12 by live link. Given my Ruling on Article 15 this will apply to all of Ms H's evidence and I so direct.