



**CR 35/2022**

**IN THE SUPREME COURT  
TURKS AND CAICOS ISLANDS**

**REX**

**Applicant**

**v**

**MAXCENE COLAS**

**Respondent**

**Before: The Honourable Mr. Justice Davidson Kelvin Baptiste (Ag.)**

**Appearances: Mrs. Sophia Sandy-Smith for the Applicant / Crown**

**Mr. Willin A Belliard for the Respondent / Defendant**

**Heard: 10<sup>th</sup> July 2023**

**Delivered: 19<sup>th</sup> July 2023**



**RULING**

1. **BAPTISTE J (AG.):** The Vulnerable Witnesses Ordinance CAP 2:16 (“the Ordinance”) provides for special measures directions in cases of vulnerable or intimidated witnesses. Section 3 (1), which is set out in disjunctive terms, provides that a witness in criminal proceedings, other than the accused, is eligible for assistance by virtue of this section:

(a) if under the age of eighteen years at the time of the hearing; or

- (b) if the court considers that the quality of the evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).

None of the circumstances within subsection (2) are engaged in this matter.

2. The Crown has applied for Special Measures directions pursuant to section 3 of the Ordinance in respect of the evidence of the thirteen year old virtual complainant in a charge of rape. The application is being resisted by the defendant. The Crown asserts in the application that the quality of the child's evidence may be diminished by reason of fear or distress should she be required to testify, without the implementation of special measures, at the trial. The application is accompanied by the witness statement of a Senior Social Worker of the Department of Social Development and Welfare, which avers that the child appeared to be afraid of the accused as she shared information of him and obeah.
3. The special measures sought are evidence by live link pursuant to section 12 (1) of the Ordinance; a Social worker to accompany the witness while she gives evidence by way of live link: section 12 (2), and dispensing with the wearing of wigs or gowns during the giving of the witness's evidence: section 14 of the Ordinance. At the commencement of the hearing of the application, the Crown enlarged the measures sought to provide for the witness while giving testimony, to be prevented by means of a screen from seeing the accused, pursuant to section 11 (1) of the Ordinance.
4. Mrs. Sandy-Smith submits that the child is automatically eligible for special measures. The evidence by live link is expected to improve the quality of the evidence; and any prejudice to the defendant can be alleviated by a direction to the jury on the use of live link pursuant to section 20 of the Ordinance. The use of live link technology means that the virtual complainant's evidence will be tested by cross-examination in the usual manner. The defendant's right to confront the accused is not in any way circumvented. The trier of fact will be able to see the virtual complainant and observe her demeanour.
5. Mrs. Sandy-Smith cites **R v Christopher Thomas** [2017] JMSC Crim 4, where Wint - Blair J stated at paragraph 12:

“The stress and fear of attending court and giving evidence particularly when a witness is considered vulnerable must be balanced against the administration of justice. The court must undertake a balancing exercise considering the right of the defendant to face his accuser and the prejudice which will flow if he cannot, against the right of a vulnerable witness to give evidence in a manner which does not lend itself to fear or distress. Distress and fear can and does affect the quality of communication by a witnesses.

What is being sought from the witness is the best evidence obtainable, a complete, coherent and accurate account.”

Mrs. Sandy- Smith also cites paragraph 6 of the judgment which states that:

“Where the vulnerable witness is a child, there is a presumption that each special measure or a combination thereof is appropriate in the interests of the administration of justice and the court shall make a direction to that effect.”

6. Mrs. Sandy-Smith posits that the defendant’s right to confront the child accused is maintained should she be permitted to give evidence by live-link. The defendant’s ability to robustly and effectively cross-examine the child will not be inhibited during the proceedings.
7. Mr. Belliard, on behalf of the defendant, contends that the Crown’s submissions in support of the application for special measures fails to disclose any grounds to establish 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.
8. In relation to the test to be applied, Mr. Belliard states that the Court has first to determine whether the witness is eligible, then whether any of the special measures would be “likely to improve the quality” of her evidence, and if it would, which measures to direct. The Court shall also consider whether the measure might tend to inhibit such evidence being effectively tested by a party to the proceedings.
9. Mr. Belliard argues that the Crown has not identified in its submissions any real grounds or reasons as to why it is necessary for the witness’s evidence to be given by video link. Further, where a child witness is eligible for special measures pursuant to section 3 (1) (a) of the Ordinance, section 8 (2) creates a presumption that special measures will be “likely to maximize” the quality of their evidence. The presumption is however rebuttable. In support thereof Mr. Belliard cites section 8 (4) (d) of the Ordinance. In the premises, Mr. Belliard argues that although the witness is eligible for special measures because of her age; the eligibility does not amount to a mandatory requirement that she must be afforded special measures.
10. Mr. Belliard cites **Regina v (Director of Public Prosecutions) v Redbridge Youth Court** [2001] 1 WLR 2403, where Lord Justice Latham held at paragraph 20:

“...It seems to me that in essence the justices determined that the embarrassment which they accepted would be suffered by the complainants was not such as to give rise to a real risk that the quality of their evidence would be affected.... In those circumstances, the justices were entitled to take the view

that fairness, and therefore justice, required that the complainants' evidence be given live in court. The disadvantages to the defendant and to the court's ability to assess the quality of a witness's evidence, were the evidence to be given by way of a video recorded interview or by video link, could properly be said to justify that conclusion".

11. Mr. Belliard contends that the granting of special measures would inhibit the effective testing of the witness, in that it would affect the demeanour of the witness being examined, thus prejudicing the defendant's case, as it is a case in which credibility is the central issue. The inevitable task of the jury in such cases, is to assess the witnesses and to try to pick out those parts of their evidence that are truthful, credible and reliable. The granting of special measures to a child, has to be balanced against the need to safeguard the interest of the accused. The interest of the accused to have a fair trial, generally includes the right to be present whilst the case against him is being expounded; and to test the evidence against him, such as by cross-examining the child and observing the demeanour of the witness during testimony.
12. In conclusion, Mr. Belliard submits that the proposed special measures are not likely to improve the quality of the evidence given by the witness. The special measures may have the unintended consequences of protecting the witness from the potential exposure that her evidence is not truthful and credible. The interest of justice would not be served by the grant of the application. The application for special measures should not be granted and the witness should be ordered to give her evidence live in open court.
13. I have considered the submissions of the parties in respect of the application for special measures. At the time of the alleged offence the virtual complainant was 12 years old. She is now 13. As a witness in the criminal proceedings under the age of 18, the virtual complainant is undoubtedly eligible for assistance by virtue of section 3 (1) (a) of the Ordinance. She is also a child witness pursuant to section 8 (1) (a), which states that a witness in criminal proceedings is a "child witness" if he is an eligible witness by reason of section 3 (1) (a).
14. Mr. Belliard does not dispute that the witness is eligible for special measures because of her age, but contends that eligibility does not amount to a mandatory requirement that she must be afforded special measures. This contention takes me to the primary rule in a case of a child witness, as articulated in section 8 (3) of the Ordinance. The primary rule is that the court shall give a special measures direction in relation to the witness which complies with two requirements: (a) it shall provide for any relevant recording to be admitted under section 15; (section 15 does not apply here) and (b) shall provide for any evidence given by the witness in the proceedings which is not given by means of a video recording, to be given by means of a live link in accordance with section 12: section 8 (3) (a) and (b).

15. The primary rule provides a mandatory requirement for the court to give a special measures direction in relation to a child witness. In that regard, one of the special measures sought by the Crown is for the evidence of the child to be given by live link. The nature of the primary rule is also articulated in **Blackstone's Criminal Practice 2022**, as cited by Mrs. Sandy – Smith. Paragraph D 14.15 provides that:

“It is vital to appreciate that all child witnesses are automatically eligible for special measures ... it is generally not open to an opposing party to contend that a particular child does not need special procedures because they would not maximize the quality of the child's evidence”.

16. The primary rule is subject to some limitations. For example, it does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximize the quality of the witness's evidence so far as practicable, whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason: Section 8 (4) (d) of the Ordinance.

17. Section 6 (3) of the Ordinance states that:

“In determining for the purposes of this Ordinance whether any special measure or measures would or would not be likely to improve, or to maximize so far as practicable, the quality of the evidence given by the witness, the court shall consider all the circumstances of the case, including in particular ... (b) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.”

18. Section 12 (7) of the Ordinance provides that live link means a live television link or other arrangement whereby a witness, while absent from the courtroom or other place where proceedings are being held, is able to see and hear a person there and to be seen and heard by the judge or magistrate and the jury (if there is one); attorneys acting in the proceedings; interpreter or other person appointed, in pursuance of the direction or otherwise, to assist the witness; and any other person having the authority to hear and receive evidence.

19. In objecting to the evidence by live link, Mr. Belliard raises the issues of the witness's demeanor and credibility, which he regards as critical to the case. It is instructive therefore to briefly address these issues. “The term “demeanour” is used as a legal shorthand to refer to the appearance and behavior of a witness in giving oral evidence as opposed to the content of the evidence: **The Queen on the application of SS (Sri Lanka) v The Secretary of State for the Home Department** [2018] EWCA civ 1391, paragraph 33. In **SS (Sri Lanka)** at paragraph 36, the court stated “... it has increasingly been recognised that it usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth.”

20. There is a difference between demeanour and credibility. Demeanor is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility involves wider problems than mere “demeanor”. It covers problems like: is the witness a truthful or untruthful person? Is he, though a truthful person, telling something less than the truth on this issue? See **Onassis v Vergottis** [1968] 2 Lloyd’s Rep 403. HL.

21. At paragraph 41 in *SS (Sri Lanka)*, the court stated that:

“No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices”

The court went on to say that:

“Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.”

22. Having regard to the definition of “live link” in section 12 (7) of the Ordinance and the above exposition of the law relating to demeanour and credibility, Mr. Belliard’s concerns that the granting of live link testimony would inhibit the effective testing of the witness by affecting her demeanour being examined, thus prejudicing the defendant’s case, as it is a case in which credibility is the central issue, are not well founded. The defendant’s right to confront the child accused is maintained and his ability to robustly and effectively cross-examine the child will not be inhibited during the proceedings. The jury will be able to see the child as she deploys her evidence and assess her demeanour and credibility.

23. Further, evidence by live link has become part of the legal landscape in criminal trials in the Turks and Caicos Islands. See for example, *Court Live Link (Remote Participation) Ordinance*, Chapter 2:08. Some of these cases would involve issues of credibility of a key witness. Live link would not inhibit such evidence from being effectively tested by the defendant, nor hamper the assessment of demeanour or credibility of the child witness. The child witness’s evidence would be subject to cross-examination in the usual manner. The trier of fact would not be compromised in the ability to see the witness and observe her demeanour and assess credibility.

24. I cannot discern any prejudice to the defendant or impairment of the administration of justice by the live link measure; or for that matter, the dispensing of wigs or gowns or for a specified person to accompany the witness while giving evidence by live link. These

measures will maximize the quality of the child's evidence. In so far as the witness would be giving evidence by live link, I do not see the utility of screening her from the accused. No such direction will be made.

25. In the circumstances the application for special measures in respect of the child witness, who I will refer to as, SN, is granted and the following orders are made:

- (1) The Crown's witness, SN, the subject of this application being a child witness, will be allowed to attend the criminal trial by live link on the trial date to be fixed and give evidence by live link.
- (2) The Registrar of the Supreme Court is to make arrangements for technological support for the trial on the days that the witness SN is needed to testify by live link.
- (3) The Prosecution is to identify to the Registrar of the Supreme Court, in consultation with the defence, an appropriate venue to serve as a live link facility from which the witness SN will testify by way of live link ("the remote site"). The venue is to be approved by the Registrar.
- (4) The Registrar of the Supreme Court is to make provision for technological support to be present at the remote sight, and of any equipment to be used, together with the names, email addresses, and telephone numbers of all responsible personnel at the remote site, not less than three days before the first date fixed for trial.
- (5) The Registrar of the Supreme Court is to make the necessary arrangements to enable transmission from the remote site to the court where the trial is being held.
- (6) The witness SN shall not give evidence in any other way unless a judge of the Supreme Court varies these directions.
- (7) The wearing of wigs and robes will be dispensed with during the giving of the live testimony of the witness SN.
- (8) SN will be accompanied by a Social worker while giving evidence by live link.

26. As an addendum, I endorse the following statement from Mr. Justice Baker in **Navigator Equities Ltd & Anor v Deripaska** [2020] EWHC 1798 (Comm) at paragraph 9, with respect to remote evidence:

“If a witness is to give evidence remotely, where he or she will be and who (if anyone) will be with them, and why, should be discussed between the parties in advance. That is always so in my view, but especially it is so if the arrangement may be such that there could be interaction with the witness during their evidence that will not be visible to the court. Any arrangement other than that the witness will be on their own during their evidence should be approved by the court, in advance if possible, and parties should not assume that an arrangement will be approved just because (if it is) it is agreed between them. Sensible arrangements discussed and agreed in advance are likely to meet with approval if the court does not identify any difficulty of possible substance that the parties may have overlooked. But it must be for the court, not the parties, to control how it receives the evidence of witnesses called before it.”

**The Hon. Mr. Justice Davidson Kelvin Baptiste**  
**Judge (Ag) of The Supreme Court.**

