IN THE SUPREME COURT OF BERMUDA

CRIMINAL JURISDICTION

2018 No: 9

THE QUEEN

v.

W.F.S.

RULING

Application for special measures under section 542A, Criminal Code Act 1907. Young witness to testify behind screen in court or by video out of court in sexual assault cases.

Date of Hearing: 29th January 2019
Date of Ruling: 14th February 2019

Ms. Christopher for the Defendant
Ms. Sofianos for the Crown

Introduction

1. The defendant is charged on indictment of four counts for attempted unlawful carnal knowledge of a girl under age14, unlawful carnal knowledge and sexual exploitation of a young person by a person in a position of trust, contrary to the relevant sections in the Criminal Code Act.

2. The events are alleged to have occurred on or about September 2016 to June 2017 at the residence of both. The defendant is the father of children of the complainant's aunt. He no longer lives at the residence and since the discovery of the events he has not been in contact with the complainant. At the time, the complainant was about 11 years old. She is now 12 years old.

3. The trial had been fixed to commence in 2018 but was adjourned and is now pending a further fixed trial date.

4. Submissions under section 542A were previously made before another judge who at the time refused an order for lack of sufficient evidence. He granted leave to re-apply if evidence could be obtained from certain named witnesses.

The Application

5. The prosecution has now re-submitted the application and has provided affidavit evidence of three witnesses in support. At the request of defence counsel those three witnesses were called, tendered and cross examined by defence counsel. Defence counsel opposes the application. The prosecution is seeking an order that the complainant be allowed to testify from behind a screen or from outside the court room by way of television video so that she would not be able to see the defendant but the defendant would still be able to see her during her testimony.

The Evidence

6. **RB** is the great grandmother of the complainant and grandmother of her mother, now deceased, since the complainant was three years old. She is the person who made the report to the police in November 2017 and will be a Crown witness in the trial. She supports the Crowns application.

7. She said that after the death of the mother, the child continued to live with her daughter, the child's aunt, and mother of the defendant's children.

8. She said since November 2017, pursuant to a Protective Intervention Order, the child lives with her and that Order was to prevent the defendant from coming into contact with the child.

9. Despite that, she said, the defendant still frequented the neighbourhood and consequently the child was so fearful, she had to be taken places as she became scared of encountering the defendant.

10. She said, prior to the report, the child consistently involuntarily urinated the bed, would frequently cry at home and that those issues ceased since the change of residence.

11. She is concerned that given her meek nature, the trial itself would be traumatic should she have to face the defendant in open court. Further, the child has mentioned she does not wish to face everyone in a court setting.

12. Under cross- examination, she said the child did endure quite some trauma after her mother's death, and started bed wetting then, but then stopped. Prior to the incident with the defendant she was always outside and that despite having received no counselling she gave the police an interview.

13. **AP** is employed in the public education system since the mid 1980's. He is employed as a counsellor at a primary school, has held that position for nearly 10 years and works as a licenced therapist. He holds a BSc and MSc in social work and educational counselling.

He fathers an autistic child and has particular experience with children with learning disabilities.

14. He said he is familiar with the complainant since she was a young student in P1 at his school until she graduated to middle school in 2016.

15. He said during those years, they worked on her issues of self-esteem, self-confidence, grief acceptance and learning challenges. She had difficulty reading and decoding. She was successfully assessed at the reading clinic and received intervention services.

16. Since her graduation he has seen her as she lives near her old school and sometimes visit to say hello. He supports the Crowns application.

17. He described the child as soft spoken, and has known her to experience anxiety in uncomfortable situations.

18. He is aware she is expected to give evidence before a judge and jury but is of the opinion that she will struggle to speak, will be under intense stress, may become highly emotive, crying and may become silent.

19. Under Cross examination, he accepted he did no testing of her, that's for psychologist. In respect of paragraph 8 of his affidavit, he explained she was about 4 years old when assessed at P1. She was very shy, anxious, would tear up, be quiet, solemn, put her head down when she was required to tell someone something of herself. She got more self-confident by P6, became a prefect when she was dealing with little kids, more confident but was still shy etc. when confronting confrontation. In 2016 she left for Middle School.

20. **CC** is a co-founder of a local school which specialises in teaching children with learning differences. She has been in children's education for over 30 years and holds a masters of education in school leadership.

21. She said she has known the child since in primary school about 2013. She supports the application. She said the child is naturally shy, lacks confidence, especially when she has to engage with persons with whom she is not familiar. She is somewhat introverted and most comfortable with persons whom she has a relationship with.

22. She said during the period the child was being prepared for trial in 2018. She was observed being withdrawn more so than usual during school. In the early part of the day during morning meeting sessions when peers were engaged in greeting each other and discussed about the day's activities, she sat away from the other students and appeared very sad. She said this behaviour continued throughout the day. She said although she is soft spoken and an observer in discussions, removing herself from activities was unusual. Throughout this period she seemed sad and was asking for hugs from staff.

23. She was of the opinion that evidence in court will certainly be hampered if she is required to give evidence in such a public forum and that every effort should be made to protect her social and well-being.

24. Under cross examination, she said as an educator of over 30 years, she well understands child development. It is her expertise. She feels the well-being of this child will be hampered, it will be detrimental to her well-being…because she is very shy, withdrawn, anxious, only 12 years old, will more than likely shut down and not be able to provide the truth. Because of her self- esteem, that's why she is at the specialist school.

25. To the suggestion, that despite all that, she gave the police a statement, she answered, giving a statement to the police is one thing, speaking in front of someone who did her something is different.

26. To the question or suggestion, whether she believe a child of 12 years should not have to give evidence in front of one who sexually assaulted her, she answered yes. She thinks if it was her child, correct no child should have to do that, she thinks if her child had to do that it would damage her self-esteem.

27. In re-examination she said she thinks she would become very quiet, withdrawn and would shut down.

The Law

524A (1) Where before ……a trial an accused is charged with a sexual offence and the complainant is at the time of the proceedings under the age of sixteen years…… the judge, as the case may be, may order that the complainant shall testify outside the court room or behind a screen or other device that would prevent the complainant from seeing the accused, if the ….judge is of the opinion that such an arrangement is necessary for a full and candid account of the acts complained of to be obtained from the complainant.

(2) A complainant shall not testify outside the court room pursuant to subsection (1) unless –

> (a) arrangements are made for the accused and the special court or as the case may be, …. the judge and jury to watch the giving of the complainant's testimony by means of television or otherwise; and
>
> (b) the accused is permitted to communicate with his counsel while watching the giving of the testimony.

28. A similar provision, section 486 (2.1) may be seen for Canada at Martins Criminal Code 2001.

29. There, the provision speaks of the complainant or any witness under the age of 18 at the time of the trial able to communicate evidence but who may have difficulty doing so by reason of a mental or physical disability.

30. A similar but updated version, section 486.2(1), may be seen for Canada at Martins Criminal Code 2009. There, to the statutory provision was added the words, *unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice*.

31. I think these additional words merely put the objective of the section beyond question but their previous absence did not in my opinion derogate from this objective.

32. The Canadian authorities are therefore helpful with the exercise and both parties relied upon them.

33. *In R v Levogiannnis [1993] 4 R.C.S 475,* the following principles are distilled. Section 486 of the Canadian Code (Section 542A of our Code) is not unconstitutional. In particular, it is not a violation of a defendant's constitutional right to a fair trial and to confront his accuser in trial.

34. The defendant's right to confront his accuser, if it exists, is not absolute. It is subject to qualification in the interests of justice.

35. The defendant still retains his right of confrontation, though limited , but he is still able to observe the complainant as she testifies, he can still effectively cross examine her, he still enjoys the presumption of innocence, the screening is not relevant when tried by a judge alone, and any jury properly informed is not biased by the device.

36. The main objective of the section is to better provide for the obtaining of the truth in sexual abuse cases involving young victims. It includes balancing the rights of the defendant and the rights of witnesses, particularly young child witnesses. And it includes the duty of the court to elicit the most favourable way to elicit the truth. Thus it is to facilitate the child to focus on giving the evidence rather than be distracted by the presence of the accused.

37. The section therefore recognises that young complainants may react negatively in the face of a defendant during a trial and thus may require different treatment than that of adults.

38. The screen (or video link) blocks the complainant's view of the defendant, not the defendant's view of the complainant witness.

39. A trail judge has substantial latitude in deciding when the special measures order should be granted but may only do so where he is of the opinion after hearing the evidence to

support the order, that it is necessary in order to obtain a full and candid account of the complaint.

40. The evidence does not have to establish that exceptional or inordinate stress may be caused to the complainant nor is it necessary that it be evidence from an expert.

41. In *R v JM* [2004] OJ 4832, an authority the defence relies upon, Fieldman J, at page 2, said *'It is accepted that the onus on the applicant is on a balance of probabilities. It is not enough that the complainant does not feel comfortable talking in front of a lot of people and the accused and that he or she would find it easier if people were excluded from the court room. The onus would not be met if it were* ***only*** *the case the complainant might not be able to give evidence without a screen and that the complainant might freeze.*

42. He dismissed the application, finding at page 4 that the prosecution had not met the onus, since inter alia, there was much improvement in the complainant's disposition some significant time after the alleged event and that there was no evidence about her present attitude and ability to provide a full and frank account.

43. In *R v Paul M* [1990] OJ No. 2313, another authority upon which the defence relied, the Ontario Court of Appeal allowed an appeal against conviction and held that the judge erred in making the order because *"almost all of the evidence adduced related to the complainant's discomfort testifying in front of other people and the consequent need to exclude people from the court room. The only evidence which was directed to the issue (the complainant did not want to be able to see the accused because she did not like him) fell short of satisfying the necessity requirements. 486 (2.1)"* In that case the complainant had testified at a preliminary hearing in the presence of the defendant and others. Submissions were subsequently made about her performance or lack thereof there, hence she was questioned on a voir dire before the trial.

The Submissions

44. The prosecution by written submissions, further expounded at the hearing, submits that a special measures order should be granted under section 524A of the Criminal Code Act, granting permission for the young witness to deliver her testimony either behind a screen or by way of video link from a place outside the court so that she would not have to face the defendant. They submitted that the witness is a vulnerable witness, shy, soft spoken, dyslexic, needing of support with her reading, suffered the trauma of her mother's death at an early age, has now at age 11 or thereabouts suffered through the trauma of sexual assault by an adult family member of the household, namely the defendant and is likely to clam up or shut down, making difficult her delivery of testimony fully and candidly, if required in the presence of the defendant.

45. The defence submits the defendant's constitutional right to a fair trial is the starting point. Consequently he is entitled to see his accuser testify in his presence so he can properly instruct his counsel to challenge aspects of that evidence. Furthermore, the statutory provision is an exception to that rule, which the prosecution by relevant evidence must prove, before an order can be made, which in effect would deny him his right.

47. She submitted that the presence of the screen or evidence by video link conveys a message to the jury that the defendant must have done the complainant something wrong thus requiring that she be protected from him.

48. Finally, she submitted that the test for the exclusion on the evidence lead, has not been met by the prosecution. In short the attributes attributable to the complainant by the witnesses are insufficient or inadequate for the triggering of the Special Measures Order.

Reasoning's

49. I will commence firstly by considering the arguments of the defence. I accept and find that the defendant has a basic right to confront his accuser and is therefore entitled to have her testify in his presence unless good and proper reasons established by evidence proves otherwise.

50. I am unable to agree however, that testimony by the witness behind a screen or by way of video streamed from out of court, without more, denies him a fair trial or puts him at any material disadvantage.

51. I would say that, because he would still be able to see and hear the witness as she testifies. He would still be able to give his counsel instructions immediately upon that testimony. His counsel would still be able to cross examine that witness and the jury would still be able to not only judge her testimony but also her demeanour.

52. Frankly, in this case, I am bewildered by the insistence of the defence that this young witness should be forced to testify with sight of the defendant. I see no advantage to him other than a hope that she would as a result flame out. However, I cannot, on that basis, deny him his right.

53. The second limb of the defence's argument seems, on its face, to have more merit. It is arguable that the presence of the screen or testimony by video link in a case such as this may convey to a jury some adverse inference against the defendant. I think the same could hardly be said in a trial by judge alone. However, any such inference or speculation can be cured upfront by a proper direction or caution to the jury, by the judge, conveying that it is a matter of law in modern sexual offences trials where the witnesses are young, that evidence can now be given in this manner and that no adverse inference maybe drawn against the defendant whatsoever as a consequence thereof, and that the defendant

is presumed innocent until proved guilty. In fact, I think this is a caution that should always be given whenever a Special Measures Order is granted and a witness testifies under it. I think *R v Levogiannis* is strong support for my opinion in respect of the defence's first two submissions above. I think a suggestion therefore that the screen or television conveys a message of wrongdoing by the defendant has no true merit. A jury can never be asked to infer or consider that, either by any counsel or by any judge. Nor is the converse arguable either as was referred in R v Paul, where the Court of Appeal at page 2 said, *"A caution to the jury to the effect that the use of the screen favourably enhances the demeanour of the witness and that this should be taken into account in assessing the credibility of the witness is not appropriate. The use of the screen is a neutralising factor designed to deal with the inhibitions of youthful witnesses. An instruction which suggested that the use of the screen is a factor counting against credibility of the witness would defeat the general purpose of the legislation".*

54. Finally, in respect of her final submission, that the test has not been met. To answer this submission, I will in effect be answering the prosecutions submission as a whole.

55. I have distilled the principles above as expounded by the Canadian Court of Appeal in the leading case of *Levogiannas.* I think despite defence counsel's submission that she is not opposing the constitutionality of section 542A, that is what she has indirectly done and I have found as was done in *Levogiannas* that the defendant's constitutional rights are not infringed.

56. If therefore, as I have found, the defendant will still be presumed innocent, will still be able to see, hear, test the witness, communicate with and instruct his counsel and the jury will be properly directed no adverse inference can be drawn against him by reason of the testimony behind screen or video, the only question left to be answered is whether the evidence I have heard leads me to the opinion that this is a fit and proper case for the Order to be granted. It is not necessary for the evidence to reach the criminal standard. I must only be satisfied that it is necessary to meet the objective of the section by seeking to ensure that by what-ever manner the young complainant gives her evidence, it allows for full and frank testimony by her. My mission is to obtain the truth through a process that is fair to both her and the defendant.

57. I have carefully considered the evidence of the three witnesses. They are each in a better position than I am to know the young complainant. They have each had a long history of dealing with her, observing her demeanour and manner, particularly when in stressful environments and they unlike me have been participants in solutions for her improvement.

58. I have taken into account that it is arguable that they may each have an interest to serve in respect of her. But I am not persuaded that this has been an overwhelming factor in this

case. I have not found that any have sought to embellish their evidence to make it sound more traumatic or dramatic than it is.

59. I am satisfied that this young lady is likely to clam up in the atmosphere of this court if she is required to give evidence from the witness stand. I am furthermore satisfied that she may likely do so more so because of the presence of the defendant but I must still be satisfied that she would be able to give a frank and candid account of the events.

60. I have taken into account her educational challenges, she apparently not the quick type, though there has been some improvement since her P1 years, her shyness when in the presence of strangers, her tendency to withdraw since the alleged incidents, the effect the incidents had on her thereafter, including her bed wetting in the same household frequented by the defendant and which could possibly be triggered again upon sight of the defendant, her expressed fearfulness of encountering him, that she has had no counselling since the events, that he was an adult in the household with strong ties to her aunt by way of the children he has from her, all of whom still live in the house-hold. I have taken into account, his previous authority to discipline her, though there is no evidence he did so physically. I have taken into account her alleged hiding of the events from her relatives which I think I am entitled to infer at this point may have been influenced by his continued presence in the house-hold until he was put out.

61. I have taken into account her young age of 10 or 11 at the time of the alleged event and her present young age of only 12 and the possible triggers that may occur upon reliving the events in his presence during trial. I have taken into account her natural shyness, introverted tendency, lack of confidence in the presence of unfamiliar persons, recent display of sadness and withdrawal as she approached the last trial date which is likely to reoccur upon the approach of the next date, and the opinion of the witnesses that she is likely to shut-down and may even suffer emotional harm. I have no evidence to the contrary.

62. But I am not satisfied that the prosecution has met the standard for a grant of the Order.

63. I acknowledge that this case maybe distinguished from the *JM* and *Paul* cases, referred to above, where the sole or major basis for the order granted appeared to be, *only that she may freeze without the screen or that she did not feel comfortable in front of people or that she did not want to see the defendant…because she did not like him.*

64. It is arguable that more is alleged in the instant case but on careful analysis of that evidence, I think it still falls short.

65. For example, AP's evidence was concerned with the complainant when she was a very young child, long before the alleged assault. He said the issues she had were worked on. He gave no valuable evidence of her recent or present disposition.

RB's assertion of her mother's death when she was four years old does not assist to establish any sufficient effect upon her at this time preventing her from testifying with or without the defendant present. The protection Order granted in 2017 is not evidence of anything done to her or caused to her other than the alleged assault complained of in the instant case. Her fear of him frequenting the neighbourhood, hence requiring her to be accompanied raises no likelihood of fear that he could in anyway interfere with her in the presence of this court room, given the presence of others. Her meekness carries no more weight than that of any other witness, including other young witnesses. That she does not wish to face everyone in court has already been rejected by the legal authorities.

RB's opinion that the trial will be traumatic to her does not elevate her difficulty in giving of evidence in court above her giving of evidence at all.

66. CC's evidence is that giving evidence in this public forum will be detrimental to her self-esteem. She is of the view no child should have to.

67. Those assertions are not the mischiefs at which the statute is aimed. It is open to Parliament to do so when it considers fit.

68. Her evidence that prior to the upcoming trial, she noticed the child was sad, withdrawn and was requesting hugs, was perhaps the most probative of the evidence heard. But it falls short. There is no evidence that she ever learnt from the witness that her sadness was because she was going to be required to testify, furthermore testify in the presence of the defendant.

69. I have considered the evidence in totality and in in all the circumstances, I think I am compelled to accept the submission of the defence that the prosecution has not made out a case for the granting of the Order under Section 524A of the Criminal Code Act.

A Practical Solution in Bermuda

70. May I pause to suggest that in Bermuda, given the present configuration of the two criminal courts now in use, it may be practical in cases like these to, in some cases, cause the witness to testify whilst the defendant is in the dock, by shifting the counsel who is examining or cross examining the witness, particularly the defence counsel, to the position now traditionally occupied by the prosecution, which in each case is the position closest to the witness and the jury. I think in each case, it is possible that the witness will not have the defendant in his or her line of sight at all. In court 4, the defendant will be behind the witness. In court 1 the defendant will be to the left side of the witness with the witness looking right towards the jury and counsel. In that court the defendant may be shifted to a seat behind the witness on the opposite side of the court and in Court 4 he may be shifted further west in the long dock. These are subtle changes virtually unnoticeable by the jury.

72. I recognise that in some cases it may not be a proper solution since it maybe that being aware of the presence of the defendant in the same room even if not seen maybe enough to hinder the witness from giving a candid account of the events. I am open to submissions on this suggestion.

The Decision

73. The prosecution's application for a Special Measures Order under section 524A of the Criminal Code Act 1907, is refused.

Dated the 14th day of February 2019

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C. Greaves. J.
Puisne Judge