

THE REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
(FAMILY AND CHILDREN DIVISION)
CHILDREN COURT SOUTH**

Case No. C- South-CR-1000-2018-1

IN THE MATTER OF

LESLIE ALEXANDER POLICE CONSTABLE NO. 20114

Complainant

AGAINST

JC

Child

FOR

ROBBERY WITH AGGRAVATION

Before the Honourable Madame Justice Gail Gonzales
Date of delivery: June 24, 2019

APPEARANCES:

Mr. Selwyn Richardson Attorney at Law for the Prosecution
Mr. Carlos Waldron Attorney at Law for the Child

RULING ON APPLICATION FOR SPECIAL MEASURES DIRECTION

1. This is an application by the prosecution to have the virtual complainant give evidence behind a screen or any similar means as the Court seems fit. The Court after considering the written submission filed by the prosecution, the defence not objecting to the application, dismissed the said application because the prosecution failed to satisfy the Court that such an order was necessary.

The Application

2. The prosecution is contending that given the occupation of the virtual complainant, he is fearful to give evidence in circumstances where he can be readily identified by the Child. He is therefore seeking to testify from behind a screen. The basis of the request is that over the past 30 years, 22 fellow prison officers have been murdered. The prosecution is contending that the special measure requested does not prejudice the Child in any way, particularly as the defence is not objecting to it.

Issue

3. The issue the Court had to determine was, whether, despite no objection from the defence, the prosecution has satisfied the Court of a need for such a direction.

The Law

4. Part 18 Rule 3(1) of the Children Court Rules 2018 allows any participant to give evidence pursuant to a special measures direction. Rule (4) sets out the various special measures that can be given. Giving evidence from behind a screen is not one of those measures. There is however, a common law power to allow a witness to give evidence from behind a screen¹. Where a special measure is not provided for in the legislation then resort must be had to the common law jurisdiction of the Court.

Rule 18.5 provides that:

(1) An applicant for a special measures direction shall—

¹ R v Grew [2008] NIJB 355 para 30

(a) explain why the special measure is necessary, giving reasons for the request; and

(b) attach any other material on which the applicant relies.

Rule 18.6 provides that:

(1) The Court may order that the applicant or any other participant give evidence by alternative means as set out in rule 18.4

(2) In making an order under sub rule (1), the Court may take into account–

(a) the welfare of all children involved in the matter;

(b) the safety and security of all participants;

(c) the right of the accused to a fair hearing; and

(d) the opinions of experts

Analysis

5. The prosecution is contending that the witness is willing to give evidence but he is fearful to do so in full view of the Child, in light of the increased attacks upon the life of serving members of the Trinidad and Tobago Prison Service. The prosecution relied on a newspaper article listing 22 prison officers who were murdered since 1990.

Summary of the Legal Position

6. It is clear that any witness may give evidence by alternative means in the Children Court, there is no requirement that the witness be deemed a vulnerable witness or fall into any particular category to be considered eligible. The purpose of the special measures appears to be to remove whatever impediment there is, that affects the ability of the witness to testify. The Court in deciding to make such an order must be satisfied of

the need for the order, so that the Court must be satisfied that there is in fact an impediment and secondly that the direction would remove or greatly reduce that impediment. An application for special measures not covered in the legislation must be made under the Courts inherent jurisdiction **R(On the application of S) v Waltham Forest Youth Court and others²**.

7. In cases where there is a need to have the witness not come face to face with the accused, a screen may no longer be necessary as the court can direct that the evidence be received via video link, making adjustments which will achieve the same objective as a screen. Even though the defence has not objected the Court has a responsibility to ensure that all directions are given in accordance with the law and does not unnecessarily infringe upon the rights of any party to the proceedings.

No Increased Risk

8. The prosecution in its submission has failed to disclose that any of these prison officers were killed because they testified against accused persons. In fact, there is nothing in the application stating why any, each or all of the officers were murdered. From the gist of the newspaper article on which the prosecution is relying, the prisons officers were targeted simply because they were prison officers and soft targets in reprisal attacks on law enforcement and the administration of justice. In light of that, the witness remains at risk whether the Child can easily identify him or not. The witness testifying in open court without more, does not put him at any greater risk for reprisal. The prosecution has therefore failed to satisfy the Court the special measure is needed to ensure his safety.

² [2004] EWHC 715 para 30

No Impediment to Testifying

9. The prosecution has not established that the witness' fear emanated from the Child or anyone connected with him, or from this matter. The prosecution has not established that the witness is afraid of the Child, his family members or his associates and that fear will affect his ability to testify. While it is not essential to establish fear, if the prosecution is contending that he is fearful for his safety then they must satisfy the Court that that fear is related to the matter before the Court. They have also failed to establish that the Child has a history of violence or intimidation. The prosecution has not established that there exists in relation to this matter any real impediment to the witness testifying except for his desire to protect his identity.

10. The prosecution did not put forward and the Court did not find that the very nature of the offence is one which would make any reasonable person in the position of the witness fearful of testifying in the presence of the Child. A general fear of reprisal against prison officers, that is unrelated to the matter at bar is not sufficient to prove fear for personal safety, intimidation or distress, which could be minimized or eliminated by a special measures direction. The court must be satisfied that whatever impediment there is, is reasonably expected to interfere with the witness's ability to testify and that a special measures direction is needed to alleviate or remove that impediment. The prosecution in its application has not indicated that the virtual complainant is unwilling to give evidence in person in the absence of the special measure, so that it does not fall for the Court to determine the issue of the justice of the matter if he refuses to testify at all.

The Common Law Position

11. An accused has a right to face his accusers³. That right may be abrogated in certain circumstances in the interest of justice. The position was succinctly summarized by Hart J in the **R v Marshall and others**⁴:

“In striking that balance the importance of the accused knowing the identity of his accuser is a factor of great weight but in some cases the balance of fairness may come down on the prosecution. Notwithstanding that the circumstances could not be described as rare and exceptional.”

12. Further the case of **R v Smellie**⁵ stated:

“Witnesses would normally be allowed to testify behind a screen, once it is necessary, in the interest of justice and this is justice of all participants of the trial. In those instances, the Court would allow the witness to testify from behind a screen where to do otherwise, would be traumatic or distressing to the witness, even an adult witness.”

13. The approach of the Courts is reflected in the judgment of Eady J in the case of **R (on the application of S) v Wltham Forest Youth Court and others supra**⁶: *“Nevertheless however desirable it may be to protect vulnerable witnesses, restrictions upon an accused’s qualified right to confront an adverse witness should not be imposed lightly. In R v Taylor (1994), The Times 16 August, the Court of Appeal emphasized that the right should only be encroached upon in exceptional circumstances. The*

³ [2008]3 ALL ER 461 at 467

⁴ [2006]NIJB 135

⁵ (1919) 14 Cr App Rep 128

⁶ Para 32

Courts discretion in this respect will therefore in practice be exercised only rarely.”

14. Eady J went on to say that in that case the witness had given evidence anonymously and behind a screen although she could have been seen on a video screen. The Court of Appeal did not interfere with the exercise of judicial discretion because the court had taken into account all relevant considerations. These included whether there were any real grounds for fear of the consequences if the witness’ identity were revealed and whether the defendants would suffer undue prejudice. One factor mitigating any prejudice was the fact that the witness though anonymous could be seen on the video screen.

15. The prosecution has not satisfied this Court that being present in Court with the Child would cause the witness any discomfort, stress or trauma. The prosecution has not established any basis for fear. In this case it seems that the witness is more concerned with concealing his identity so as to protect himself from retaliatory acts of violence against prison officers, rather than being placed in a more comfortable position to give evidence. The prosecution has provided no exceptional grounds on which it would be appropriate to deny the Child his right to face his accuser.

No Application for Anonymity Order

16. The prosecution is requesting the special measure of a screen “to block the Child from viewing [the witness’] face as he gives evidence”. The prosecution however has not applied for an anonymity order. Although the Criminal Proceedings Rules 2016 and the Children Court Rules 2018 specifically prohibits the address of a witness being disclosed, the prosecution has already disclosed the name, address and occupation of

the witness, keys to his identification. No useful purpose would be served by having the witness give evidence from behind a screen, when he is already identifiable and has already been identified.

17. In any event, a special measures direction to protect his identity must of necessity be accompanied by an application for an anonymity order or else having the witness testify from behind a screen would be pointless.

Conclusion

18. Under the common law, in the absence of any grounds for the need to protect the identity of the witness, and the prosecution's failure to apply for an anonymity order, the application must fail. Under the Children Court Rules on which the prosecution purported to rely, the application fails on the ground that the prosecution has failed to establish that there is something, whether it be fear, intimidation, physical or intellectual limitations that hinders the witness' ability to testify and therefore an order is needed to remove or reduce any perceived impediment to testifying in the presence of the Child. The prosecution has also failed to establish an unwillingness to testify in the absence of such an order.

19. The application is therefore dismissed.

G Gonzales

Judge