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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **06/09/07**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JA FOR JUDICIAL REVIEW

Before Kerr LCJ, Campbell LJ and Higgins LJ

KERR LCJ

Introduction

[1] This application involves the question whether an application for special measures (namely a live video link for witnesses who are alleged to be the victims of sexual abuse), made prior to committal in criminal proceedings, may be granted without complying with the procedural requirements in relation to the introduction of hearsay evidence (service of a notice of intention to adduce such evidence).

Factual background

[2] The application arises from a preliminary hearing at Belfast Magistrates Court in respect of eight counts of indecent assault against two female relatives of the applicant when they were children, between 1973 and 1988, and with one count of gross indecency towards a child and one count of inciting a child to commit an act of gross indecency. The last two counts are alleged to have been committed on the younger complainant and to have occurred between 1981 and 1988.

[3] All the charges are specimen charges. They relate to a sustained period of alleged abuse, largely consisting of fondling the genitalia of the complainants and digital penetration, most frequently when each was in bed. The applicant is alleged to have placed emotional pressure on one complainant not to tell her mother and both complainants expressed some fear of him in their initial statements to police.

[4] The applicant was summoned to appear before Belfast Magistrates Court and received a notice of the prosecution's intention to request the court to conduct a preliminary inquiry. In response to this, the applicant's solicitor indicated that a "mixed" preliminary investigation/preliminary inquiry committal was sought, as the defence objected to the tendered evidence of the complainants.

[5] The prosecution applied for special measures to be adopted by the court whereby the two complainants would be permitted to give evidence by video-link and to be screened from the applicant while testifying at the committal. The application relied on two witness statements from the complainants of 30 May 2006 in which they expressed unease about giving evidence in front of the defendant and stated that they would be more confident about giving their best evidence with the special measures suggested.

[6] The defence objected to these statements being introduced without a notice of intention to adduce hearsay evidence. After receiving skeleton arguments from the parties, the resident magistrate, Mr Nixon, decided on 21 June 2006 that the statements were admissible and that the court would grant the special measures sought.

The grounds of challenge

[7] These may be summarised as follows: -

> 1. A witness statement not made in oral evidence in the proceedings, the admissibility of which is not agreed by the parties, irrespective of its content, must come within one of the four categories in article 18 (1) (a)-(d) of the Criminal Justice (Evidence) (Northern Ireland) Order 1984 to be admitted. It constitutes hearsay and the procedure in Rule 149AS of the Magistrates' Courts Rules (Northern Ireland) 1984 must be followed and a determination made under it.
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> 2. In so far as the magistrate's ruling was based on a finding that the documents were not hearsay, it failed to take account of Rule 149AS(1), defining evidence to be adduced on one of the grounds set out in article 18 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 as "hearsay evidence". The evidence here was sought to be introduced under article 18 (1) (b) of the 2004 Order, being evidence made admissible by any rule of law preserved by article 22 of the Order.
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> 3. The magistrate stated in his affidavit that the statements formed part of the *res gestae*. It was submitted that this was an error of law as they

did not concern a statement of mind contemporaneous to a relevant event, did not concern statements made to or heard by a witness and did not concern the witness's present state of mind, but rather an *anticipated* state of mind.

4. The magistrate failed to give reasons in open court for his decision or to enter the reasons in the Order Book, contrary to article 8(5) of the Criminal Evidence (Northern Ireland) Order 1999.

The issues on the hearing

[8] There were five main heads of argument at hearing:

1. As to whether the expressions of a desire not to give evidence through fear were *res gestae* statements.
2. As to whether the statements, if they were *res gestae* statements, were exempt from the statutory scheme for admission of hearsay evidence under the 2004 Order.
3. As to whether the requirement that the court consider "any views expressed" by the witness in article 7 of the 1999 Order required the views to be given as evidence.
4. As to whether a special measures application was within the concept of "criminal proceedings" in article 37 of the 2004 Order.
5. As to whether the magistrate should have, or in the event did, give proper reasons for his decision.

Special measures - the statutory context

[9] The parties agree that the complainants are both eligible for special measures by virtue of article 5 (4) of the Criminal Evidence (Northern Ireland) Order 1999, as victims of sexual offences. The test as to whether a special measures order should be made is set out in article 7 (3) of the Order: -

> "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 so far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular –
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> (a) any views expressed by the witness; and
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> (b) whether the measure…might tend to inhibit such evidence being effectively tested by a party to the proceedings."

[10] Article 4 (5) defines the quality of evidence for the purposes of articles 5 (4) and 7 (3) as follows: -

> "In this Part references to the quality of a witness's evidence are to its quality in terms of its completeness, coherence and accuracy; 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."

[11] Reception of a hearsay statement is permitted in criminal proceedings under article 18 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. Article 18 (1) provides: -

> "18. (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated, but only if:-
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> (a) any provision of this Part or any other statutory provision makes it admissible;
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> (b) any rule of law preserved by Article 22 makes it admissible;
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> (c) all parties to the proceedings agree to it being admissible, or
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> (d) the court is satisfied that it is in the interests of justice for it to be admissible."

[12] In the case of an application made under article 18 (1) (d), a series of nine criteria to be considered by the court and these are set out in article 18 (2). A statement is defined in article 19 as "any representation of fact or opinion". As we have said, the magistrate said that the application was made under article 18 (1) (b), the rule of law in question being the *res gestae* rule, preserved by article 22(4): -

> "*Res gestae*
>
> 4 Any rule of law under which in criminal proceedings a statement is admissible as evidence of any matter stated if-

(a) the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded,

(b) the statement accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement, or

(c) the statement relates to a physical sensation or a mental state (such as intention or emotion)."

[13] Article 37 (1) defines criminal proceedings for the purposes of the Order as "criminal proceedings in relation to which the strict rules of evidence apply".

[14] In so far as is material, Rule 149AS of the Magistrates Courts Rules (Northern Ireland) 1984, as amended by SR 2005/162 provides: -

"*Procedure for the admission of hearsay evidence*

149AS. - (1) This Rule shall apply where a party wishes to adduce evidence on one or more of the grounds set out in Article 18(1)(a) to (d) of the 2004 Order and in this Rule, such evidence is referred to as "hearsay evidence".

(2) A prosecutor who wants to adduce hearsay evidence shall give notice in Form 88E.

(3) Notice under paragraph (2) shall be served on the clerk of petty sessions and on every other party to the proceedings at the same time as the prosecutor complies or purports to comply with section 3 of the Criminal Procedure and Investigations Act 1996 (disclosure by prosecutor).

…

(7) A party who is entitled to have notice served on him by this Rule may waive his entitlement by so informing the court and the party who would have served the notice.

(8) The court may, if it considers that it is in the interests of justice to do so –

(a) dispense with the requirement to give notice of intention to adduce hearsay evidence;

(b) allow a notice required under this Rule to be given in a different form, or orally; or

(c) abridge or extend the time for service of a notice required under this Rule, either before or after that period expires."

[15] Article 8 (5) of the 2004 Order deals with the giving of reasons for a decision on a special measures application. It provides: -

"(5) The court must state in open court its reasons for—

(a) giving or varying,

(b) refusing an application for, or for the variation or discharge of, or

(c) discharging,

a special measures direction and, if it is a magistrates' court, must cause them to be entered in the Order Book."

Were the statements res gestae?

[16] Mr Larkin QC for the applicant pointed out that, whether or not these statements are considered to be *res gestae*, if they are to be adduced under the Order, the procedure prescribed under article 149AS (1) and (2) applies. This follows from the wording of Rule 149AS (1) which states that where a party wishes to adduce evidence on any of the grounds in article 18 (1) (a) to (d) of the 2004 Order (including those specified in article 18 (1) (b)) the evidence shall be referred to as hearsay evidence and this in turn invokes the requirements of Rule 149AS (2) and (3).

[17] There are various species of *res gestae* statements. These are categorised in Roberts and Zuckerman's work, *Criminal Evidence (2004)* as 'excited utterances, physical sensations and mental states'. Under the rubric 'mental

states' the authors discuss declarations of physical sensation, state of mind or intention. The statements appear to us to partake (to some extent) of the latter two of these in that the complainants have referred to their apprehension about giving evidence in the applicant's presence (their state of mind) and of their view that they would give best evidence if the special measures sought were in place, which can be said to be analogous to a statement of intention.

[18] The legal principle in relation to declarations of a state of mind was stated by Lord Bridge of Harwich in the following passage from his judgment in *R v Blastland* [1986] 1 AC 41, 54: -

> "It is, of course, elementary that statements made to a witness by a third party are not excluded by the hearsay rule when they are put in evidence solely to prove the state of mind either of the maker of the statement or of the person to whom it was made. What a person said or heard said may well be the best and most direct evidence of that person's state of mind. This principle can only apply, however, when the state of mind evidenced by the statement is either itself directly in issue at the trial or of direct and immediate relevance to an issue which arises at the trial."

[19] It appears to us that the statements made by the complainants that they were apprehensive about giving evidence in the presence of the applicant constitute statements as to their state of mind and are, on that account, admissible and not excluded by the hearsay rule. In advancing the case that the statements had to be germane to a state of mind existing at the time that a relevant event was unfolding, Mr Larkin relied on the statement of principle contained in *Phipson on Evidence* at paragraph 31-30:

> "The words of a person, be it the victim, the accused or a third party, are admissible at common law to prove that person's contemporaneous frame of mind … if this is relevant"

[20] The effect of Mr Larkin's argument was that, to come within this principle, the statements made by the complainants as to their fear of giving evidence would have had to be uttered when they were about to be required to testify. We do not accept that argument. It does not seem to us that there is any reason that one should distinguish in this context between a fear expressed as to a future event and one that is declared when the apprehended event is about to take place.

[21] Those parts of the statements that declare that the complainants believed that they would be able to give better quality evidence if they were able to avail of the special measures are less easy to characterise as *res gestae*. It can be argued that these are not statements of a state of mind – as that expression must be understood in this context - but refer, rather, to a view as to how the witnesses might comport themselves on a future occasion. Unlike the statements as to their apprehension about giving evidence in the presence of the applicant (which are statements about currently experienced fear) this part of the statements deals with an assessment by the witnesses as to how their evidence might be improved if they gave evidence via live video link.

[22] We have concluded that to adopt this somewhat restrictive – and, it might be said, traditional – view of the limits of *res gestae* would not accord with the intention of the legislature in enacting article 22 (4) (c) of the 2004 Order. It is to be remembered that the provision allows for the reception of a statement of a mental state *such as* intention or emotion. It appears to us that a statement as to a witness's belief that she will be better able to give reliable evidence via a video link must qualify as a statement of her mental state. We therefore hold that the statements were *res gestae* as that concept must be understood for the purposes of the 2004 Order.

Were the statements exempt from the statutory scheme?

[23] We can deal with this issue briefly. If the 2004 Order applies to committal proceedings (an issue that we deal with below), the statements are not exempt from the procedural requirements relating to the admission of hearsay statements. As we observed in paragraph [16], Rule 149AS applies to the situation where a party wishes to adduce evidence on any of the grounds set out in article 18(1) (a) to (d) of the 2004 Order. This includes statements sought to be introduced under article 18 (1) (b). Although technically, *res gestae* statements are exceptions to the hearsay rule, Rule 149AS requires that they be referred to as hearsay evidence and that paragraphs (2) and (3) (relating to the notice to be given) should be complied with.

Does the requirement that the court consider "any views expressed" by the witness in article 7 of the 1999 Order require the views to be given as evidence?

[24] This issue may also be dealt with briefly. As Mr Maguire QC for the magistrate submitted, this question must be considered with the nature of the application firmly in mind. It is an application that the evidence be given in a particular form, not that there be no oral evidence given at all.

[25] In *Neill v North Antrim Magistrates Court* [1992] 1 WLR 1221, the House of Lords held that first-degree hearsay as to state of mind was admissible to prove that a witness was in fear in giving evidence. In that case, the evidence that the witnesses were in fear was not, in the event, first-degree hearsay

because it consisted of what a police officer had been told by the mothers of two youths and, on that account, was not admissible. If the police officer had been told of their fear by the young men themselves, it would have been admissible, however, and Mr Maguire argued that, where all that is sought is to adjust the conditions in which oral evidence is given, it would be incongruous to require evidence to be given to establish that the witnesses had expressed the views that were recorded in their statements.

[26] Article 7 (3) of the 1999 Order requires the magistrate to consider all the circumstances of the case and, particularly, the views expressed by the witnesses. No provision is made as to how those views are to be conveyed to the court. In particular, it is not stipulated that oral evidence of the views of the witnesses be given. It certainly would be anomalous that they should be required to give the evidence themselves since this would defeat the purpose of protecting witnesses in the vulnerable category to which the complainants belong. And, in the absence of any specific requirement to that effect, we can see no reason that oral evidence as to their views must be given by some other witness. We have concluded, therefore, that, provided the magistrate has no reason to question the authenticity of the views attributed to them, he must take into account the views of the witnesses in whatever form they are conveyed to him.

Is a special measures application one to which the strict rules of evidence apply?

[27] In *R v Bradley* [2005] Cr App R 397 the English Court of Appeal considered the meaning of the phrase, "criminal proceedings in relation to which the strict rules of evidence apply" (which also appears in the equivalent English legislation at section 112 (1) of the Criminal Justice Act 2003). In that case the appellant's trial began on 15 December 2004, the day on which the bad character provisions in the Criminal Justice Act 2003 came into force. Defence counsel contended that the bad character provisions only applied to charges laid on or after 15 December 2004. The judge ruled that the words "criminal proceedings in relation to which the strict rules of evidence apply" were to be interpreted as applying to trials and that section 141 of the Act (which provides that section 112, among other provisions, did not have effect in relation to criminal proceedings begun before the commencement of the relevant part of the legislation) only operated in relation to trials begun before 15 December 2004. Evidence of the defendant's bad character was accordingly admitted and he was convicted.

[28] At paragraph [29] the Court of Appeal said: -

> "The researches of counsel and the knowledge of the members of this Court do not reveal any prior use in a criminal statute of the words "criminal proceedings in relation to which the strict rules of

> evidence apply". Their immediate origin appears to be clause 17(1) of the draft Bill accompanying the Report of the Law Commission on "Evidence of bad character in criminal proceedings" (no.273). Paragraph 17.23 of that report reads:
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> > "We recommend that the above rule should apply where the criminal rules of evidence currently apply, namely in Courts-Martial, Summary Appeal Courts, the Court-Martial Appeal Court and standing Civilian Courts, and in Naval Disciplinary Courts and professional tribunals established by Statute, but should not affect Coroners' Courts."

[29] The court concluded that that the new provisions should be applied to all trials and Newton hearings. It was concluded that the trial judge had been correct to admit the evidence and the appeal was dismissed. Although it refused leave to appeal to the House of Lords, the Court of Appeal certified that a point of law of general public importance was involved in its decision, namely: -

> "Whether the phrase 'criminal proceedings' in section 141 of the Criminal Justice Act 2003 has the same meaning as 'criminal proceedings' as defined by sections 112(1), 134(1) and 140 of the Act and, if so, whether it means:
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> > (a) that part within the criminal process comprising trials within which disputed issues of fact are resolved; or
> >
> > (b) criminal proceedings from the charging of the accused or laying of an information until determination of all disputed facts."

[30] It is significant, of course, that the Court of Appeal in *Bradley* was not required to consider the position in relation to committal proceedings since committal as it still exists in Northern Ireland has largely been abolished in England and Wales. In this jurisdiction a committal may still take the form of a preliminary investigation where witnesses are required to give oral evidence or it may partake partly of such an investigation and partly of a preliminary inquiry so that some evidence is admitted in the form of written statements of witnesses and some in the form of oral testimony. Such was the proceeding in the present case and, of course, oral evidence before the

magistrate must be given in accordance with the strict rules of evidence. On that account, the decision in *Bradley* can be distinguished.

[31] Moreover, we respectfully question whether the passage from the Law Commission's report on which the Court of Appeal based its decision should be taken to signify its intention that proceedings which preceded the actual trial should be excluded from the ambit of the bad character provisions. The section of the report in which paragraph 17.23 appears is headed "Service Courts and Professional Tribunals". Paragraph 17.21 refers to the recommendation contained in the consultation paper and states: -

> "17.21 In the consultation paper we expressed the provisional view that any reforms that we recommended should apply in places where the criminal rules of evidence currently apply, namely courts-martial and professional tribunals established by statute."

[32] It appears to us that the Law Commission intended in this section of its report to distinguish proceedings in *coroners' courts* from other courts and tribunals and that it was not intended that the provisions be restricted to trials or *Newton* hearings. We have concluded, therefore, that the application in the present case was subject to the 2004 Order.

What is the effect of the failure to comply with the procedural requirements of the 2004 Order?

[33] Since we have concluded that the application was subject to the 2004 Order, it follows that the necessary notice under Rule 149AS should have been served. It was also necessary for the magistrate to state in open court the reasons that he had made the order and to cause those reasons to be entered in the Order Book. Although there was an exchange between the legal representatives of the parties and the magistrate in the course of the application which may have thrown some light on his thinking, we do not consider that his expressed reasons for making the order ("After balancing all the factors the statements are admissible and that applying all matters the court would grant the special measures application for the witnesses") are sufficient to satisfy the requirements of article 8 (5).

[34] No entry was made in the Order Book as to the magistrate's reasons for making the order. The magistrate has now arranged for those reasons to be entered retrospectively.

[35] We feel it necessary to point out that magistrates who make such an order must be careful to give a clear statement in open court of the reasons for making it. This should disclose the reasoning underlying the decision and,

where necessary, should state why particular arguments were accepted or rejected. It is also necessary that they should ensure that the reasons are entered in succinct form in the Order Book. It is not acceptable to rely on exchanges with legal representatives to provide the material from which the reasons might be gleaned. Nor is it acceptable that reasons be entered in the Order Book some time after the decision has been made. Save in exceptional circumstances, these reasons should be entered on the day that the decision is made.

[36] Given that the procedural requirements were not complied with, the question arises whether this affects the validity of the order made. Mr Maguire submitted that the approach of the court should be to look at the procedural provisions as part of the overall scheme for the making of a special measures direction. The purpose of the notice was to ensure that the defendant was given sufficient opportunity to oppose the application and was sufficiently appraised of the reasons for it. Article 8 (5) imposed on the court a discipline in its decision making by requiring reasons to be stated in open court and by having them entered into the Order Book. Mr Maguire argued that, without diminishing the importance of the provisions, the objective of the overall exercise was to improve the quality of the evidence to be given by the witness whose testimony was to be received under the terms of the special measures order. In those circumstances it could not have been the intention of Parliament that a failure to comply with the procedural provisions should result in the invalidation of a direction.

[37] In this case the objective of ensuring that the defendant be made aware of the application and the reasons for it is amply fulfilled. Full argument was presented on his behalf to the resident magistrate. No submission was omitted or neglected as a result of the failure of the prosecution to serve the requisite notice. While we cannot approve of the failure of PPS to serve the necessary notice, we are firmly of the view that this failure should not invalidate the order.

[38] In *Re Misbehavin'* [2005] NICA 35 this court discussed the issue of mandatory/directory statutory provisions in the following passage: -

> "In *Re Robinson's application* [2002] NI 206, Carswell LCJ reviewed the vexed question of whether a statutory provision requiring that a certain step be taken by use of the word 'shall' should be taken to connote a mandatory or directory requirement. As he pointed out, recent judicial authority has tended to regard the classification of provisions in the traditional categories of mandatory or directory as not infallibly indicating the consequence of a failure to

comply strictly with the provision. The approach favoured by Carswell LCJ was that outlined by Lord Woolf CJ in *R v Immigration Appeal Tribunal, ex parte Jeyeanthan* [1999] 3 All ER 231 where he said at pages 238-9:-

> "… I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test … Which questions will arise will depend on the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not."

[39] In *Re Misbehavin'* we concluded that the paramount objective in construing such provisions was to ascertain the intention of the legislature. Following that approach in the present case, we are entirely satisfied that the failure of the PPS to serve the necessary notice cannot invalidate the order. Likewise, the magistrate's failure to state his reasons for making the order or to ensure that these were entered timeously in the Order Book cannot deprive the order of validity. We are quite satisfied that it could not have been the intention of Parliament that a failure to observe the procedural requirements would have that effect, particularly when the objective of those requirements has in fact been achieved.

Conclusions

[40] None of the arguments advanced on behalf of the applicant has succeeded. The application is dismissed.