Neutral Citation No. [2008] NICC 15 | *Ref:* **HAR7110**

Judgment: approved by the Court for handing down | *Delivered:* **14/3/2008**
*(subject to editorial corrections)**

IN THE CROWN COURT OF NORTHERN IRELAND

NEWRY CROWN COURT (SITTING AT BELFAST)

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THE QUEEN

v

SAULIUS PETRAITIS, VITALIJUS PETRAITIS and AUDRIUS SLIOGERIS

_____

HART J

[1] This application by the prosecution that the complainant in the present case, to whom I shall refer as TR in order to protect her identity, be screened from the defendants and from the public gives rise to a novel preliminary point as to whether the court can entertain objections to the application made on behalf of two of the defendants which are out of time. Having heard submissions from counsel I indicated that I was prepared to extend the time and said that I would give my reasons for doing so later, which I now do. I then heard the substantive application and the objections thereto and reserved my decision.

The preliminary point.

[2] Rule 44B(6) of the Crown Court Rules (Northern Ireland) 1979 ("the Crown Court Rules") provides that:

> "Any party who wishes to oppose the application shall, within 14 days of the date notice of the application was served on him, notify the applicant and the chief clerk, in writing, of his opposition and give reasons for it".

In this case it is conceded that the notice of objection to the special measures direction application filed by Vitalijus Petraitis by letter dated 11 December 2007, and that by Saulius Petraitis lodged on 7 January 2008, were both out of

time as the applications were dated 10 October 2007, and were served prior to the committal which took place on 6 November 2007. However, as the committal did not take place until 6 November 2007, I consider it appropriate that the time should be considered as running from that date because it was only when the defendants were returned for trial that it became necessary to address the question of a special measures direction. Nevertheless, it was prudent of the prosecution to serve the notices in advance of committal, and that gave the defence additional time to consider how they would respond to the notices in the event that, as proved to be the case, the defendants were committed for trial.

[3] Rule 44B makes no provision for an extension of time for the respondent to an application for a special measures direction to file a notice of objection, although provision is made to extend the time for an applicant to apply for the grant of a special measures direction even after the expiration of the 28 day period from committal specified by Rule 44B(3)(a). Under Rule 44C it is possible to apply for an extension of time either before or after the 28 day period has expired, provided a statement is provided setting out the reasons why "the applicant is or was unable to make the application within that period". This statement "shall be served by the applicant on the chief clerk and on every other party to the proceedings".

[4] In addition, Rule 44CA(1)(a) provides that even though the requirements of Rule 44B have not been complied with "an application may be made for a special measures direction orally at the trial", and if this is done, then Rule 44CA(2)(a) requires the applicant to state the reasons for the late application. Where such a late application is made Rule 44CA(3) provides that "The Court shall determine before making a special measures direction – (a) whether to allow other parties to the proceedings to make representations on the question", and (c) "whether the question should be determined following a hearing at which the parties to the proceedings may be heard".

[5] These provisions replicate the equivalent provisions of the Crown Court (Special Measures Directions and Directions Prohibiting Cross-examination) Rules 2002 which apply in England and Wales, and which make no provision for an extension of time to be granted to the respondent to an application for a special measures direction. Although an application for a special measures direction is almost always made by the prosecution, any party may make such an application, as in R v Alan James Stuart B [2006] EWCA Crim 1978 where an unsuccessful application was made on behalf of the defendant.

[6] The absence of a provision enabling an extension of time to be granted to the respondent to an application may be thought to indicate that when the Rules were framed in both England and Wales and in Northern Ireland it was

considered desirable, perhaps essential, that special measures directions be dealt with speedily before trial. This is desirable, not just for case management purposes, but, more importantly, so the witness will know well before the trial how he or she is to give evidence, thereby alleviating as soon as possible any apprehension or fear the witness feels at the prospect. These are powerful considerations in support of a construction of the Rules that does not permit an extension of time to object to such applications.

[7] Nevertheless, to prevent a respondent, often though not invariably the defendant, from mounting an objection purely because of a failure to observe a time limit may be thought to be unduly draconian. The Rules recognise that the respondent to an application should have the opportunity to make representations against a special measures direction in certain circumstances, as may be seen from the provisions of Rule 44CA(3)(a) and (c).

[8] The use of the word "shall" in Rule 44B(6) would have been regarded in the past as an indication that the requirement was to be interpreted as mandatory, meaning that a failure to comply with its requirements meant that a step taken outside that time was not valid. However, as Carswell LCJ pointed out in the Court of Appeal in Wallace v Quinn [2004] NI 164 at page 171, in recent years the courts have re-examined "the rigid dichotomy between mandatory and directory provisions", and "This has caused the courts to re-examine the doctrine and to focus rather on attempting to determine the intention of Parliament in respect of the consequences of failure to observe the statutory requirements". In the present case the parties referred to Wallace v Quinn. The analogy between the circumstances of that case and this case is not exact, because in Wallace v Quinn the applicant would have been prevented from appealing by way of case stated if the court had not been prepared to regard the rule in question as directory only, whereas in the present case were Rule 44B(6) to be interpreted as a mandatory requirement, that would merely prevent a respondent who wished to object to the manner in which a witness gives evidence from doing so, it would not determine whether the evidence should be given.

[9] In R v Christian Thomas Brown & Jason Grant [2004] EWCA Crim 1620 the Court of Appeal in England considered a failure to comply with the 28 day limit within which the application was to be brought, a provision equivalent to Rule 44B(3)(a) of the Crown Court Rules. Although Buxton LJ erroneously stated that the application had to be made 28 days before trial, he said:

> "… we do not accept that the provisions of Rule 4(2)(b) are mandatory, in the sense that if they are not complied with it is not possible for the judge to give the relevant direction. In our judgment they are directory, and the principal reason why they

> are there is that Special Measures Directions Rules apply to all special measures, including, in particular, the giving of evidence by video recording. There are obvious reasons why it is desirable that the latter applications should be made well in advance in those cases. It is much less obvious why it should be necessary for there to be a 28 day lead-in, if we may use that expression when screens are going to be used."

[10] R v Brown & Grant therefore provides support for the proposition that despite the ostensibly mandatory wording of some of the provisions of Rule 44B, these should be interpreted as being directory. I consider that to interpret Rule 44B(6) as mandatory when there are other provisions in the rules expressly providing for applicants for special measures directions to be relieved of the consequences of their failure to comply with equally stringent time limits, would be disproportionate to the failure on the part of a respondent to lodge a notice of objection within 14 days as required by the rules, and I consider that Rule 44B(6) should be interpreted as directory rather than mandatory. It is therefore open to the court to consider whether an extension should be granted.

[11] However, it must be appreciated that the rules are there to be obeyed, and that applications for extensions of time will not be granted automatically. In deciding whether or not to grant an extension of time to a respondent to object to an application for a special measures direction the principles I sought to identify in R v Grew & Ors at [15] can be adapted and applied to such applications. I consider that the following principles should be applied to applications for an extension of time to file a notice of objection.

(1) Time limits require to be observed because the objective of the rules is to ensure that cases are dealt with efficiently, fairly and expeditiously, and this depends upon adherence to the timetables prescribed by the Crown Court Rules.

(2) The court will not lightly intervene to relieve a party of the consequences of its failure to follow proper procedures.

(3) Whilst the court has a power to extend the time limit within which a notice of objection may be lodged, the exercise of that discretion must have regard to the interests of justice, and in particular the later the respondent wishes to file a late notice of objection the greater the difficulty he will face in persuading the court that the time limit should be extended.

(4) Amongst other factors which may be relevant to late notices of objections are:-

(a) the reasons for the late objection;

(b) whether the applicant has had a reasonable opportunity to make any investigations into issues raised by the late objection;

(c) whether the late objection requires the applicant to seek an adjournment in order to respond to the objection;

(d) if the objection is brought shortly before trial, whether the lateness of the objection puts undue pressure on the court or the applicant to deal with the objection at short notice in order to avoid disruption to the trial timetable, and so possibly interferes with other court business.

[12] Mr Taggart for Saulius Petraitis conceded that his instructing solicitor was unable to say when the special measures direction application had been served. As directed the court at a review hearing the notice of opposition by his client was filed by 11 January 2008, more than two months after the committal.

[13] Mr Lindsay for Vitalijus Petraitis pointed out that the notice of opposition on behalf of his client had been filed by way of a letter dated 11 December and so was brought more speedily. He also pointed to the voluminous papers in the case (which run to several lever arch files) as a reason for the delay. Mr Mateer QC for the prosecution, who alerted the court and the parties to the absence of any express power to extend time in the rules, did not suggest that the prosecution had been prejudiced in any way by the failure to lodge the notices in time. In all of the circumstances I considered it appropriate to extend the time within which the notices of opposition could be filed.

The application for a special measures direction.

[14] TR and the accused are Lithuanian nationals. She alleges that on the date on which the offences commenced she was standing outside a chemist's shop when a car pulled up with the accused in it. She was ordered into the car and driven some distance until she was ordered out of the car somewhere near a pylon, and forced to have sex with all three men. She alleges that she was then driven to a house where she was held for a period of some 36 hours, during which she was repeatedly raped vaginally, anally and orally by all three accused, and by two or three other men. On the second day of her captivity she alleges that a further man came to the house and offered to buy her for €15,000 for the purposes of prostitution, but only if she was willing. She refused the offer, and her captors then decided that she had to pay them £5,000 to gain her release. She told them that she knew a rich Irishman she had previously worked for who would pay the money. She was permitted to

call him, and then taken back to the spot from where she had been abducted in order to see this man at his work premises. She contacted him and he advised her to contact the police.

[15] In a statement made on 30 August 2007 for the purposes of the special measures application she described this as "a terrifying ordeal and I find it very difficult and distressing to talk about it." She described how she has been in a Witness Protection Programme since she reported the matter to the police, and said:

> "This incident has had a massive impact on my day to day life and I have had a very lonely existence since it occurred. The whole incident has been very traumatic for me and the thought of having to face these people in court is terrifying. I feel it would be very intimidating if I have to see my attackers or their families in court. It is again my opinion that if this were to be the case it would have a detrimental effect on me giving my evidence. I feel I would be distracted and would not be in a position to give a complete and full account of the ordeal that I was subjected to. It would be very difficult to talk about the things that happen to me in front of the judge and all the other court officials not to mention to have to talk about it in open court. I believe I would have problems if I have to discuss these issues in full view of everyone in the court and it would have an adverse effect on the evidence I have to give."

She refers to the Lithuanian community in Northern Ireland being a small one, and that she is concerned lest she would be blamed for the situation that she now finds herself in. She continued:

> "As such I feel it could be very detrimental for me to give my evidence in open court. I believe that if I am afforded some sort of protection when I have to give my evidence then this will help me to give the best account that I can".

[16] A three stage test has to be applied to applications such as this under the Criminal Evidence (Northern Ireland) Order 1999 ("the 1999 Order"), see R v Marshall & Ors [2005] NIJB 135.

(1) Is the witness eligible for assistance on the grounds of fear or distress about testifying? The complainant is an eligible witness as she is the victim of an alleged sexual assault, see Article 5(4) of the 1999 Order.

(2) Would a screening order therefore be likely to improve the quality of the evidence given by the witness? See Article 7(2)(a) of the 1999 Order.

(3) If the answer to (2) is yes, would a screening order "be likely to maximise so far as practicable the quality of such evidence"?

[17] So far as (2) is concerned, the court is required to consider (a) any views expressed by the witness; (b) all of the circumstances of the case, and (c) whether the screening of the witness might tend to inhibit such evidence being effectively tested by the defendants.

[18] As can be seen from the passage quoted above from the complainant's statement she seeks screening. The events which she described are very traumatic, and I have no difficulty in accepting that she faces very considerable apprehension if she is required to face the defendants in open court. I accept that she finds this a very intimidating prospect and that it would have a detrimental effect on her ability to give evidence. It is correct that there is no medical evidence in support of the application, but that is not necessarily a bar to the application being granted. The court is required to look at all of the circumstances, and may properly infer from the complainant's accounts of events that they were such as to render her concerns about not being screened credible and substantial.

[19] I am satisfied that her concerns are credible and substantial, and that were she to be screened while giving evidence this would maximise the quality of her evidence, and I grant the application. She will therefore be screened from the defendants, but not their lawyers or the jury, whilst giving evidence. This inevitably means that she will require to be screened from the public as well. For the reasons I identified in R v Grew & Ors, it will be necessary for the trial to take place at a venue other than Newry Courthouse because of the difficulties in screening witnesses at that venue. The trial will accordingly be listed at Armagh Courthouse.