

Neutral Citation no. [2007] NICC 1

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*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 24/01/07

In the Crown Court for the Division of Antrim

06/089262

R v Colin James Thompson

Ruling on application for special measures direction under Articles 7, 12 and 15 of the Criminal Evidence (Northern Ireland) Order 1999.

Smyth J

1. The accused is charged with indecently assaulting HR, a female, on 3rd April 2006. The complainant was born on 8th June 1984 and is therefore 22. The accused was born on 16th March 1975 and is 31.
2. HR is eligible under Article 5(4) of the 1999 Order for a special measures direction.

5(4). Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence....the witness is eligible for assistance in relation to those proceedings by virtue of this paragraph unless the witness has informed the court of the witness's wish not to be so eligible by virtue of this paragraph.

3. The special measures sought are that her evidence in chief be received by video recording under Article 15 and that cross-examination proceed by live link under Article 12. The tests I have to apply appear in Article 7(2) of the Order.

7(2). Where the court determines that the witness is eligible for assistance by virtue of Article 4 or 5, the court must then –

determine whether any of the special measures available in relation to the witness (or combination of them) would, in its opinion, be likely to improve so far as is practicable the quality of such evidence; and if so –

- a. determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and
- b. give a direction under this Article providing for the measure or measures so determined to apply to evidence given by the witness.

(3) 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 as far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular –

- (a) any views expressed by the witness; and whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.

4. Article 15(2) imposes an additional requirement to disallow a video recording if the court concludes that, in the overall circumstances of the case, such a video should not be admitted in the interests of justice.

15(2) A special measures direction may, however, not provide for a video recording, or a part of such a recording, to be admitted if the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording, or that part of it, should not be so admitted.

5. The prosecution case is that HR, “the complainant”, and the accused, Colin Thompson, on 3rd April 2006, were at a party at her house, which she shared. Earlier on Sunday 2nd April the complainant had been socialising at a bar she works at. The accused, who the complainant knows, had also been drinking there. His later presence in her house was by invitation. There is some evidence, if it is admitted, that the accused was intoxicated and behaving badly though not towards the complainant.
6. The complainant, who says she was aware of and felt uncomfortable at the close physical presence of the accused, went into the kitchen, later returned to the living room and went to her bedroom. There she talked to two persons she knew. When the last person, M C, left, the light was out. She was wearing her jeans, bra and panties but had taken off her shoes downstairs and was under

the bedclothes. She went to sleep and was woken by a friend, C, shouting. C was directing his remarks towards someone else in the bed of whose presence the complainant was unaware. The accused was in the bed, underneath the bedclothes and on the far side of the complainant who was the nearest to the door. C was shouting, "Get out of bed! That is my sister!" Times are uncertain.

7. The evidence of the complainant was taken by video recording on 6th April 2006. The allegations grounding the charge of indecent assault are that whilst Colin Thompson was in her bed, and in these circumstances, he put his arm around her, asking her did she want him to go, and kissed her without consent, overt or implied. She clearly infers that something else had occurred. She describes, in some detail, the smell coming from his fingers and believes this was similar to the smell from her period that she was then having. She had a tampon in place. HR makes two further allegations that are related to what she believes must have happened. Her lower clothing was removed to below her knees. She also says that the accused deliberately sniffed his finger. This was as he left her room and when another friend, M C, came in to ask if she was alright.
8. A video was taken of HR's evidence. I was told this was done because of the distress that was shown by the complainant in attempting to relate these matters to the police. The officer in charge of the case gave evidence as to the complainant's evident distress at describing such intimate detail and she said that, after consideration, a decision had been made to use the special measures approach available under the 1999 Order.
9. Additionally, it was mentioned to me that the complainant knew the accused and had done so for about a year. This knowledge was as a result of her work and she was also aware that he knew her from that work at the bar. I was told that because of this she felt vulnerable. She had not been approached or subjected to any act of intimidation but clearly felt apprehensive.
10. The accused's case is clear both from his interviews taken on 10th May 2006 and from the defence statement served on his behalf. He agrees that he had been drinking at the bar and was invited to the party by M C. He had not been in the complainant's house before and had a few drinks there. He felt tired and was waiting for his father to give him a lift when he was on his way to work at 5.00 a.m. He had no money for a taxi. He decided to find somewhere to

sleep and went to sleep, upstairs, in a bedroom unaware of the presence of another person in the bed. He could not remember attempting to go to another bedroom and being ordered out. He denies any deliberate touching of the complainant, kissing her or removing or interfering with her clothing. He says he was woken by shouting. He denies saying “Sorry mate. I did not know she was your sister”. He denies he sniffed his finger, but accepts that he was affected by drink, having had about eight bottles of beer, but denies being very drunk or that he behaved in such a way that people could have thought him to be very drunk. He left without any further relevant incident.

11. Matters that would be most directly relevant to the jury’s consideration, given the allegations and the nature of the defence, are related both to what happened in the bedroom and to what was said in the complainant’s bedroom. To this could be added the position of clothing, bedding and of the persons in the bed. The lay-out of the room and, possibly, the lighting could also be significant. The principal evidence will be that of the complainant and the accused and those who give evidence in relation to what they saw and said in the bedroom.
12. The complainant is eligible under Article 5(4) of the Order for special measures. She does not have to be included in the categories of vulnerable witnesses to be eligible as she is a complainant in a sexual offence and she has not informed the court that she does not wish to be so eligible. The measures sought are that her evidence –in-chief be received by video under Article 15 and that cross-examination be taken by live link under Article 12.
13. The tests I have to apply appear in Article 7(2) of the Order. I have to determine whether any of these measures is likely to improve the quality of the evidence of the complainant and then, if I am of that opinion, determine which measure or combination of measures would be likely to maximise the quality of that evidence.
14. In doing this exercise I must consider all the circumstances including: the views, if any, expressed by the witness and whether any of the measures “might tend to inhibit” the witness’s evidence being effectively tested by the accused’s advisers. In addition Article 15(2) provides that a video recording shall not be admitted if the court is of the view that such is not in the interests of justice.

15. I have considered all of these matters. While I do not feel that the defence would be inhibited from testing the complainant's evidence or that the admission of a recording would be against the interests of justice, I am not of the view that either of the measures sought would be likely to improve the quality of the evidence or maximise the quality of such evidence.
16. Evidence is normally given in court, orally and under oath. It is given so that the jury empanelled can see, hear and assess the witness. That the evidence is given in the presence of the accused is also a matter that allows the jury to be able to assess the demeanour of the witness and of the accused. The courtroom can be a demanding and uncomfortable forum and the effect of stress on a witness relating this type of evidence can only add to that. This does not necessarily reduce the quality of a witness's evidence. The jury is placed so that they can observe demeanour and responses to questions. Some of this, certainly not all, is lost when evidence is given by video and by direct live link via a screen. This is so even if the system is working well, giving both sound quality and image. Clearly everything has to be taken into account that is relevant to the case and the witness in deciding what will maximise the quality of a witness's evidence. This includes the nature of the allegations made against Colin Thompson, the age of the complainant and the reasons why the special measures are sought.
17. The Order refers to three aspects of quality of evidence in particular: "completeness, coherence and accuracy". I take these in order. In relation to *completeness* my view is that HR would complete her evidence in court. In relation to *coherence* I believe that her evidence would be both sensible and intelligible. In relation to *accuracy* a video recording could be more accurate and detailed than a statement of evidence and this could affect evidence given in court. Where a video has been taken however the witness's memory can and should be refreshed by her seeing it before she gives evidence. This would be similar to a witness reading his or her statement before giving evidence. I do not find that accuracy would be affected by whatever means of giving evidence is used.
18. I am of the view that in this case the use of special measures would not serve to maximise the quality of the witness's evidence but might well have the opposite effect, even considering the

discomfort and distress involved in giving such evidence in open court.

19. I have also considered the apprehension that I accept HR feels in relation to her vulnerability at work. It however does not seem to that she is likely to be any more reassured by her giving evidence in this manner. This does not add any protection and giving evidence by video and by CCTV does not expose her to any lesser risk. Her identity, address and place of work are details that are part of the case.

20. Finally, the court in which this trial is to take place can be arranged so that there need be no direct eye contact. In addition I propose to ask whether HR would wish to have the benefit of a screen being attached to the witness box. This can be done throughout the trial and will have no impact on the course of the trial but will avoid any direct eye contact.