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Number 22 November 2015

Albion Chambers CRIME TEAM NEWSLETTER

A victim need not be vulnerable to the Court process itself

A few months ago on Radio 4's Woman's Hour the subject of historical sexual abuse was covered. Over a series of programmes, issues such as reporting how such offences are investigated and how the CPS reviews the evidence were discussed. There was also a programme dedicated to how proceedings are conducted in court. Sadly, the commentary, even from an experienced criminal silk was outdated and unfair to all of the hard work that has been undertaken in recent years. Of course the victims from the recent sex-ring cases were correct when they asserted that they had been let down by the way that they had been treated in court. And we cannot, nor should we, ignore the fact that a number of victims have taken the extreme step of taking their own life after giving evidence or have said that had they known what was involved they would never have made a complaint to the police.

That programme followed a report from the University of Bath which proposed the introduction of specialist sexual violence courts. That key findings of that research were that the court's response to rape remain problematic for victims, some special measures, such as the use of video link cause delays, stereotypes about rape and its circumstances, such as delayed reporting are still exploited throughout the trial and that judges and barristers do not always intervene when cross-examination of the victim becomes irrelevant or distressing for fear of denying the defendant a fair trial. They also found that no matter how victims gave their evidence to the court they often encountered the perpetrator on their way to give evidence or had to wait with the defendant's family.

However, in terms of what is available to assist vulnerable victims and the conduct of those dealing with them in court, both the report and Woman's Hour, though well intentioned and entering a debate that was forced into the public eye due to the number of high-profile cases, themselves propagate outdated views. Because the sad truth is that measures and practices are available which would have prevented the type of cross-examination that took place in the trials referred to by both, but also the isolation that some of the victims felt as they went through the entire process.

What they do highlight is that though such measures are available they are not being adopted in many cases. For that there can be no excuse. Practitioners who conduct these trials have had guidelines, best practice and the higher courts setting out what is permitted in these cases, for a number of years now.

In cases which involve a number of defendants, such as the sex-ring cases, advocates have always had a duty to ensure that their cross-examination is not repetitive and deals only with any issues specific to their client. Further, since the introduction of the Criminal Procedure Rules (CPR) in 2010, trial judges have been forced to use the powers they already possessed but which were rarely used, to enable them to become more proactive in their management of all aspects of the trial. That can include limiting the time permitted for cross-examination (a course commended in both *R v Lubemba & JP* (2014) EWCA Crim 2064 and *R v RL* (2015) EWCA Crim 1215) or the submission of a list of questions to be asked in advance of the trial. In some cases, where the victim is very young, that may even result in the DVD being played but the witness not being cross-examined.

CPR 3.8 (4) (d) requires courts to take "every reasonable step" to facilitate the participation of witnesses and defendants in the trial process. In the case of a vulnerable victim that means that a ground rules hearing must be held during which issues of cross-examination, the wearing of wigs and gowns, the type of language that should be used when addressing the victim and the issue of an intermediary must be resolved. Such a hearing must very obviously be heard in advance of the trial so that any questions to be put to the witness can be prepared, or if the attendance of a witness is deemed unnecessary that information can be relayed to the witness as soon as possible. Such hearings have become second nature to those of us who specialise in this field but for those unaccustomed to dealing with vulnerable witnesses the advocates gateway (www.theadvocatesgateway.org) is an invaluable asset.

Since 2000, all vulnerable witnesses have had the protection of the special measures provided for within the Youth Justice and Criminal Evidence Act 1999 (YJCEA) with measures being extended to all victims of sexual offences a few years later. Allied to those measures, the training of judges and advocates has addressed the specific concerns raised by the researchers at the University of Bath, namely the so called rape myths. Of course an advocate faced with a complainant who hasn't made a complaint for many years or has not acted in the way that someone might expect will mention that in her closing speech. But the prosecutor now has to take a proactive approach, dealing with it in her address to the jury. And there is a standard direction in the Bench Book dealing with such myths with sections 17 (1) to (4) dealing with alerting the jury to the danger of making assumptions, the issue of delay, the evidence of child witnesses and issues of consent, capacity and voluntary intoxication respectively. Such measures have resulted in an increase in the number of convictions which would have been unimaginable only 10 years ago.

But it can't simply be a matter of these measures being available; they have to be used carefully and selectively. Just as with

the old, bad practices, they should not and cannot be a one size fits all. Equally, good practice that has evolved in one area of the country must not be limited to that area. One of the issues raised on Woman's Hour was the pre-trial preparation of prosecution witnesses. But no mention was made of the special measures meetings which I have with every vulnerable witness who requests one in advance of the trial. Rather than being an exceptional step as some still believe, such meetings are allowed and in fact should be offered in every single case involving a vulnerable witness. And rather than being an opportunity to coach a witness as the sceptics and critics argue, such meetings are simply an opportunity for the witness to see the court building and have the court procedure outlined by the barrister who will be conducting the trial. That enables the witness to put a face to the name and to be less nervous on the morning of trial. It is also an opportunity to ask them how they, not the CPS lawyer or the officer in the case, would like to give their evidence.

Witnesses who are to give evidence via DVD should have the opportunity to view that DVD at a facility away from the courtroom in the week preceding the trial. If they wish to view it again in court of course they can (there is no limit put on the number of times a witness who has made a written statement can read that statement) but it is inhumane, given the technology available, to force a fearful, vulnerable witness to watch it for the first time in a tiny room in the court while still visible on a monitor, at the same time as the jury and everyone else in court. Again, safeguards which take place when any video is viewed in a criminal investigation, including noting when and where the viewing took place and any comments made during or after the viewing, such practice presents no difficulties for those acting for the defence and should be common place.

If a witness is particularly vulnerable or as in a case I recently prosecuted, unable to attend the court building due to mental or physical incapacity, or through fear, the video link can be set up in premises away from the court. That would mean that such a witness need never set foot in the court building, something that is envisaged in the case of young witnesses with the introduction of s.28 YJCEA 1999.

Another consideration might include a preliminary hearing. For example, if a case involving a vulnerable witness is conducted by an advocate that the judge considers incapable of conducting the trial, the judge shouldn't simply comment upon that fact outside of the courtroom but should enquire of the advocate, in open court, whether it is intended that they should be the trial advocate. If the answer is yes, the judge should at the very least suggest that the case is returned to counsel who has experience of such cases. It is no longer fair for defendants or witnesses to have cases conducted by advocates that the court considers are incapable of conducting such cases. If witnesses are concerned about meeting or coming face-to-face with defendants or their families, the judge has the discretion to clear the public gallery during that witness's evidence and to allow the witness to be brought into the court building and the court room via a separate entrance.

And finally where the complainant in either a sexual or serious violent offence becomes reluctant, the tried and tested approach of simply offering no evidence or issuing a witness summons and threatening them with arrest are not the only options in the armory of the prosecution. In a number of such cases I have arranged a meeting with the witness where I have gone through the options and explained to the witness why I, as trial counsel, have decided that despite her wishes the trial will go ahead. In each case so far, once the witness has understood and met the person who will be conducting the case in court that has resulted in the case proceeding without the witness turning hostile in court or the need for a witness summons.

All of those measures are already at the disposal of judges and practitioners. By using them, in addition to providing proper, relevant education to everyone who undertakes such cases, the careful selection of advocates instructed on both sides and judges willing to intervene should it become necessary, then it will be possible for vulnerable victims to have the best possible chance of giving their evidence in the best way that they can.

Sarah Regan

Proceeds of crime

Third party interests
The Serious Crime Act 2015

"10A Determination of extent of defendant's interest in property
(1) Where it appears to a court making a confiscation order that –
(a) there is property held by the defendant that is likely to be realised or otherwise used to satisfy the order, and
(b) a person other than the defendant holds, or may hold, an interest in the property,
the court may, if it thinks it appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant's interest in the property."

Section 1 of the Serious Crime Act 2015 inserts a section 10A into the Proceeds of Crime Act. The words "...the court may, if it thinks it appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant's interest in the property", quietly and without fanfare changes the confiscation landscape dramatically.

Background

For a number of years, members of Albion Chambers, have been instructed on behalf of third parties, who may have, or claim to have, an interest in certain assets that fall within a defendant's 'realisable assets'. We've had competing interests as between the family courts and criminal courts, we've been swimming with sharks in the civil courts arguing ToLATA claims and we've been in some of the leading, unfathomable cases, see Stodgell as an example.

In the criminal courts we've 'forum shopped' (but for legal purposes - only a little bit) for dual family/crime ticketed judges, to try and import a consistency in decision making, we've had family practitioners in the criminal courts, and criminal practitioners in the family courts, those with dual experience such as David Chidgey and Hannah Wiltshire have proved invaluable.

Nevertheless, if we ignore the ingenuity and expertise of the lawyers involved, a third party had no 'right' to be heard, she had no right to put her case about her assets, at best, she became a witness for the defendant (if they were still on good terms). At enforcement an

individual could intervene, but this was very much the horse cantering after the cart.

What's changed?

Parliament, for once, has listened to our complaints. Section 10A is a good thing, a sensible thing, a pragmatic thing, hardly things usually associated with PoCA legislation. However, before we let off the party poppers, let's have a closer look.

The rest of the section reads as follows:

"(2) The court must not exercise the power conferred by subsection (1) unless it gives to anyone who the court thinks is or may be a person holding an interest in the property a reasonable opportunity to make representations to it.

(3) A determination under this section is conclusive in relation to any question as to the extent of the defendant's interest in the property that arises in connection with:

(a) the realisation of the property, or the transfer of an interest in the property, with a view to satisfying the confiscation order, or

(b) any action or proceedings taken for the purposes of any such realisation or transfer.

(4) Subsection (3):

(a) is subject to section 51(8B), and

(b) does not apply in relation to a question that arises in proceedings before the Court of Appeal or the Supreme Court.

(5) In this Part, the "extent" of the defendant's interest in property means the proportion that the value of the defendant's interest in it bears to the value of the property itself."

In short, we can see that before the court makes a determination regarding an asset which the court suspects another may have an interest in, that other person (or organisation) must be invited to make representations. However, once the court gives that 'reasonable opportunity' the court can proceed to determine the matter. No doubt a substantial body of case law will develop in relation to the term 'reasonable opportunity', we'll watch with interest.

So if we boil down the entire section, the court 'may' take this route; if it does it must give a 'reasonable opportunity' to a third party to make representations; but the determination is 'conclusive' on the defendant for the purposes of PoCA.

Limitations?

The next question is: how does the court know or suspect that a third party might be floating around? The burden falls onto the CPS, once again.

"(1) In section 16 of the Proceeds of Crime Act 2002 (statement of information), after subsection (6) insert:

(6A) A statement of information (other than one to which subsection (6B) applies) must include any information known to the prosecutor which the prosecutor believes is or would be relevant for the purpose of enabling the court to decide:

(a) whether to make a determination under section 10A, or

(b) what determination to make (if the court decides to make one).

(6B) If the court has decided to make a determination under section 10A, a further statement of information under subsection (6)(b) must, if the court so orders, include specified information that is relevant to the determination."

Whether this is fair on an understaffed, underfunded CPS (or other prosecuting authority) is a debate for another article. However, bearing in mind the pressures on the organisations in question, the writer does wonder how effective this requirement will be. If, to satisfy the test of *"it appears... a person other than the defendant holds, or may hold, an interest in the property"* relies on the prosecuting authority to convey this information, the FIs, the prosecuting lawyers and prosecution counsel will all have to be alive to these potential third party interests. Each must have in their mind the question *"can I make this more complicated for me?"*; the duty of disclosure with knobs on.

If the prosecuting authority does not comply with its duties, the arguments of a third party that the have not had a "reasonable opportunity" to make representations under s.10(A)(2) will be bolstered.

The risk, however, is the litigation to sort out whether there was a reasonable opportunity is likely to take longer than the shortened three-month time to pay (also stemming from the Serious Crime Act 2015) for a defendant. A default sentence may be being served whilst the interest in an asset is still being debated.

Conclusions

The new law is, without a doubt, an improvement on the old law. PoCA was crying out for this refinement, this practical solution to allow a third party to have their say.

The difficulty the writer foresees rests with the obligation on the prosecuting authority to be the conduit of this information, to ensure the court is aware of the potential third party interests. When does a flaky claim, become a potential claim, when does speculative, a chancer, become something to be litigated? Are the prosecuting authority lawyers going to be trained to identify the myriad of interests (and the law that stands behind them), will they know about ToLATA? If not, how can it be said that the prosecuting authority is complying with its statutory duties under the new PoCA? If they don't know a set of circumstances could be an interest, how can it be communicated as part of the s.16?

The intentions are laudable. The drafting is of a high standard. Whether our prosecutors are properly and sufficiently supported is a very different question.

Richard Shepherd

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