

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCR 2020/0015

REGINA

V

KAYOY JARRETT

APPEARANCES

Mr Oris Sullivan, the DPP, and Ms Jai Len Williams for the Crown.

Mr Kenroy Hyman for the defendant.

2021: MAY 6

RULING

On allowing an intermediary to ask questions of child aged 11

- 1 **Morley J:** Kayoy Jarrett is being tried for unlawful sexual intercourse in July 2020 with a child aged 10, AB¹, who is the daughter of his partner. The jury was sworn² on Monday 19.04.21, and two videoed police interviews were played to the jury on 19 and 20.04.21, as evidence in chief permitted under **s281 Criminal Procedure Code 2019** cap 4.01, dated 30.08.20 (16.20-18.10hrs) and 27.09.20 (17.55-19.23hrs), and though quiet-spoken, and wary of speaking to strangers, in both interviews, she said of Jarrett 'he put his penis into my vagina'.

¹ The complainant is entitled to anonymity and will not be identified.

² Kayoy Jarrett was later convicted on a majority by the jury on 07.05.21, this ruling being mid-trial but now publishable post-trial.

- 2 On 20.04.21, AB, now 11, was on videolink to be cross-examined, with social workers in the room with her, being Ms Lee and Ms Sharon Francis. The courtroom was introduced to her on video (not showing Jarrett). However, she would not speak, except to confirm her name, which was so quiet it could not be heard. She appears clearly traumatised by the attention of so many strangers, including from counsel, jury and judge.
- 3 That she would not speak was not flagged by the prosecution in advance, nor at trial start, though counsel had met her two weeks earlier when she had not then said a word.
- 4 Her evidence was put back to another day, the evidence of her mother was received on 20 and 21.04.21, and then Counsel Hyman fell ill, so that trial did not resume until Wednesday 28.04.21.
- 5 On Friday 23.04.21, DPP³ Counsel Sullivan wrote an email to the court and parties to invite consideration whether Social Worker Sharon Francis might act as an 'intermediary' to assist in getting AB to speak.
- 6 On 28.04.21, following argument, the court decided, balancing the interests of the prosecution and defence, to accede to the DPP's request, so that SW Francis became an intermediary under **s283 Criminal Procedure Code**, supra. To move matters forward I delivered the ruling orally at 12.00 on 28.04.21, and said in due course I will offer written reasons for it, (which today are these, offered at the conclusion of the Crown's case).
- 7 The trial from 28.04.21, during 29.04.21 and 04.05.21, then proceeded with all other Crown evidence, including with evidence agreed from a doctor who examined AB, and live from AB's uncle and three investigation police officers, all thoroughly and intelligently cross-examined.
- 8 On 05.05.21, there was final discussion of the safety parameters under which SW Francis would work, while 27 questions were distilled from many sought by the defence, submitted in advance, edited by the Judge to try to make them simpler for a child aged 11, avoiding negative interrogative tags, with approval from Counsel Hyman. With the help of the intermediary, in the

³ Director of public prosecutions.

afternoon of 05.05.21 the questions were then all answered by AB on videolink in the presence of the jury, with no re-examination nor further questions from the court.

9 The parameters under which the intermediary worked were as follows, as disclosed in writing to her, and reported to the jury.

- a. In the videolink room with AB, SW Francis will have as much time as she reasonably needs to put AB at ease, using toys, a pet, and drawings;
- b. If SW Francis thinks it may help, AB's mother may also be in the room for reassurance, though not to participate;
- c. There will be in the videolink room a person satisfactory to the defence to observe no impropriety occurs;
- d. SW Francis will tell AB the court and jury are listening, but her screen showing the court will be blank and the court mic will be off, though the court screen will allow visual and audio connection fixed directly on AB;
- e. SW Francis will establish AB understands the difference between truth and lies, and will ask AB to promise to tell the truth;
- f. When SW Francis judges the time right, she will ask AB each approved cross-examination question in the exact language offered, in a neutral tone, up to three times to secure any response, desisting if a response is offered, and failing any response will move to the next question;
- g. SW Francis will not follow-up with other questions of her own to elicit clarification or further material;
- h. If AB is hard to hear, SW Francis will quote her exactly, and not offer interpretation or opinion on what is meant;
- i. If AB shakes her head, SW Francis will ask in a neutral tone, up to three times: 'Speak up, do you mean yes or no?';
- j. The questions will not be distributed to SW Francis until she is in the videolink room with AB;
- k. If there is to be any follow-up or re-examination, this will be addressed at sidebar with counsel after all the questions have been asked.
- l. Any question of AB writing down her answers will be addressed later if the need arises, but to begin the court will seek verbal answer from AB.

10 The questions asked were as follows:

- 1 Did you and your brother and your mommy sometimes go to Kev's house in Look Out?
- 2 When you and your brother were at Kev's house did you see inside Kev's bedroom?
- 3 When Kev was your mommy's boyfriend, sometimes did he take you and your brother and your mommy to the shop?
- 4 Did Kev take all of you to Aravins where sometimes your mommy bought grapes?
- 5 After being at the shop with your mommy, your brother, and Kev, sometimes did Kev then take all of you to his house?
- 6 Do you remember telling the woman doctor Kev did not put his finger in your vagina?
- 7 Is it true Kev did not put his finger in your vagina?
- 8 Do you remember telling the woman doctor sex with Kev was in Kev's living room?
- 9 Are titties and breasts the same?
- 10 Do you remember telling Laurel Allen Kev did not touch your titties?
- 11 Is it true Kev did not touch your titties?
- 12 Do you remember telling Rochelle Reid Kev touched your breast?
- 13 Was it a mistake to say Kev touched your breast?
- 14 Do you remember you did not tell Laurel Allen Kev took you to Aravins for grapes?
- 15 Is it true Kev did not take you to Aravins for grapes?
- 16 Do you know a man called Silk, whose proper name is Garnett Thompson?
- 17 Last year did you message Silk on your mommy's phone using facebook messenger?
- 18 Did you ask Silk to have sex with you?
- 19 When you messaged Silk, did you pretend to be your mommy?
- 20 Do you remember you told Rochelle Reid you only bought grapes at Aravins?
- 21 Do you remember you said to Rochelle Reid Kev took you alone to Aravins?

22 When you said that, did you make a mistake?

23 Have you been to Kev's house plenty times?

24 Do you remember you told Laurel Allen and Rochelle Reid you went to Kev's house only once?

25 When you said that, did you make a mistake?

26 Do you remember you told people Kev put his penis in your vagina?

27 When you said that, did you make a mistake?

11 In answer to question 26 AB said yes, and to 27 quickly shook her head, saying no.

12 The overarching reason for using SW Francis as an intermediary has been in the judgment of the court it was in the interests of all parties the child speaks, somehow, and therefore in the interests of justice, so that whatever may help her to find her voice, within safety parameters, should be encouraged. It was clear from events on 20.04.21 the child was unlikely to communicate to strangers, like people in a court, and so it was judged right to place her in comfortable conversation, monitored by the court, with a person she knew.

13 The relevant legislation in the **Criminal Procedure Code 2019** is as follows:

s283 Examination of witness through intermediary

(1) A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this section ("an intermediary").

(2) The function of an intermediary is to communicate -

a. To the witness, questions put to the witness; and

b. To any person asking such questions, the answers given by the witness in reply to them,

and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

- (3) Any examination of the witness pursuant to subsection (1) must take place in the presence of such persons as rules of court or the direction may provide, but in circumstances in which –
 - a. The judge...and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the intermediary; and
 - b. ...the jury... are able to see and hear the examination of the witness.
- (4) ...
- (5) A person may not act as an intermediary in a particular case except after making a declaration in such form as may be prescribed by rules of court, that he will faithfully perform his function as intermediary.
- (6) ...
- (7) A person acting as an intermediary is liable for perjury in the same way as a person lawfully sworn as an interpreter in a judicial proceeding;...

- 14 The application for this special measure was undeniably late, being something the Crown ought reasonably to have raised pre-trial as part of trial preparation, particularly as the child on video was obviously quiet-spoken and Crown counsel reported on 28.04.21 when he had met her two weeks earlier had said nought; as above, in fact the application was only raised on day five of the trial, during Counsel Hyman's illness.
- 15 Moreover, it is only right to record Counsel Hyman was overruled, but who has strenuously, and properly, objected, and continues to object, to the use of an intermediary, so late, and to Sharon Francis, unqualified, being a social worker, said to be too close to the case and arguably objectively not neutral. While good points, instead the court has taken the view 'needs must', so that some form of evidence might be garnered.
- 16 Prior to acting as intermediary, it was discussed by the court over videolink with SW Francis her role, what interaction there had been with AB, and whether there had been possibly any inappropriate influence on the coming testimony. Insofar as she was able, she satisfied the court as to her integrity and reliability, with no questions being raised by counsel.
- 17 This is the first time an intermediary has been used on Montserrat. Elsewhere in the Commonwealth an intermediary is often a trained person, with no previous connection to the case, (though this is not specifically expressed needed in the local Act). All parties have tried

honourably to perform their function, including the court, aware it is an incursion into the usual control an advocate has over cross-examination, for the questions to be edited and asked by a stranger. It is the view of the court the trial remained fair, and if the case proceeds to the jury, there will be a full direction the procedure has hampered defence counsel, to be taken into account when weighing whether the reliability of the evidence has been fully tested to their satisfaction.

- 18 In the event of a conviction an appeal may be inevitable. The critical feature is the jury did get to hear the child who appeared clear there had been sexual intercourse. It will possibly be a matter for the Court of Appeal to review the fairness of these proceedings, but it is hoped in the knowledge expressed through this ruling all have sought to perform their duties in good faith.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

6 May 2021