

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCR 2018/0004

REGINA

V

JOHN ALLEN

APPEARANCES

Henry Gordon and Kenroy Hyman for the Crown.

The defendant was unrepresented.

2018: NOVEMBER 6, 7, 8, 12, 13

NOVEMBER 14

RULINGS

On admissibility of evidence where the defendant is unrepresented

- 1 **Morley J:** On Montserrat, John Allen ('Allen', dob 04.02.52) has chosen to be unrepresented at his trial commencing on 06.11.18 for rape and buggery of MS¹, aged 86. Though legal aid is not available on Montserrat for so serious an offence, the local Bar, through its diligent president Jean Kelsick, and with support from the Attorney General's office, led by Sheree Jemmotte-Rodney, created opportunity for him to be represented. Three counsel were made available to

¹ The parties will be referred to as above, in brackets or letters, rather than as complainant or defendant and other terms of legalese or formality, to help ease of reading, and in addition as the complainant in a sexual offence case is entitled to anonymity, with no disrespect intended to any person.

him, pro bono, including Counsel Kelsick, and each was declined. Counsel Kelsick gave evidence on 12.11.18 of his pro bono offer, for the record and in the absence of the jury. Moreover funding was put in place for counsel to cross-examine the complainant if the need arose, (which did not for the reasons which follow). The state of legal aid on Montserrat is of deep concern to the court, namely that it is unavailable for serious offences other than murder, though in this case representation was made available but declined. I wish to thank the Montserrat Bar and the office of the Attorney General for their attention to this case, and to their selfless public spirit wholly consistent with the high ethical standards expected of a Common Law profession of barristers at law.

- 2 I have made rulings during the trial as follows:
 - a. The ABE interview of MS dated 08.01.18 has been admitted as her evidence in chief.
 - b. She is too frail and infirm to attend court and so there has been no cross-examination of her.
 - c. Recent complaint evidence has been permitted but limited to the officers who first spoke to MS at her brother's bar reporting they were told by her that Allen had raped her.
 - d. A report from Dr Vijaya Valluru and from forensics experts Hilary Mullings and Anika Low have been read without being called.
 - e. Allen's videoed police interview of 09.01.18 has been held admissible and played to the jury.
- 3 Noting the defendant is unrepresented, which puts an additional burden on the court and prosecuting counsel to ensure a fair trial, I promised written reasons for these various decisions, which are these, being delivered after the jury has retired to reach its verdicts.

The allegation

- 4 Allen faces an indictment alleging rape, buggery, indecent assault and burglary with intent to rape.
 - a. On 05.01.18, MS was 86, living in Salem, awaiting her breakfast from her brother seated at his bar, and at about 07.30 Allen was seen her neighbors Livingston Robinson and Sanjae Prince to be crouched by her, stroking her leg with one hand and with his other hand between her legs. He was told to leave her alone.

- b. Next day, on 06.01.18, Robinson found him in her home, chased him out, made a police report, and he was arrested back in her home emerging from her bedroom. MS was found by police at her brother's bar where she reported Allen, who she knows as a relative, had raped her the day before.
 - c. MS presented on 08.01.18 between 15.41 and 16.41 during her videoed police ABE interview (so-called as designed to achieve best evidence), as a feeble, frail, obviously vulnerable person, of a generation reluctant to use words describing sexual anatomy, and who through questions from two female police officers, clearly well-trained in the sensitivities of sexual offence cases, told a story of how Allen had come to her home in daylight on an indistinct recent date while she was on her bed, forced his penis into her vagina and anus, wanted her to suck his penis which she refused, she believed he ejaculated and it appeared he had used a condom.
 - d. At first following arrest on 06.01.18, to officers in the evening of 08.01.18 and in a statement under caution on 09.01.18, Allen said he was merely visiting family with no indecent intent or sexual contact, but later between 10.22 and 11.08 on 09.01.18 in videoed interview admitted sexual intercourse but said it was with consent.
- 5 During the trial it has been unclear what precisely Allen's defence is. Discussing the case in preliminary hearings and in the jury's absence as the trial began, he has denied there was any sexual contact, and yet has also said there was consent to sexual activity. He has been animated to exclude his videoed interview where he admitted intercourse, wanted MS called so she can be cross-examined personally by him as to what happened and on consent, and has wanted the doctor and forensic scientists to say their findings mean there was no rape. On 13.11.18, at the close of the prosecution case he said his defence was there had been consensual sex (consistent with his video interview) and on returning from the toilet minutes later announced he wanted to 'go back' to his original position (as in his statement under caution) there had been no sexual contact. It has seemed to the court that Allen lies in its face as it suits him, while the jury has had no sight of his vacillations. Moreover, on a *voire dire* to support exclusion of his video interview, he had claimed he had been tortured in his cell by five officers applying pliers to his testicles, and yet in evidence before the jury did not put this, and in making a closing speech simply asserted a police sergeant, who had not been a witness in the case, had mischievously

advised him to lie he had had sex with MS to improve his position. The case has been a good example of the difficulties an unrepresented defendant can create.

Why was the ABE interview of MS her evidence in chief?

- 6 An ABE interview is permissible as evidence in chief under **s281 Criminal Procedure Code** cap 4.01 (as amended for 01.01.13). It says:

Video recorded evidence in chief

281. (1) A special measures direction may provide for a video recording of an interview of the witness to be admitted as evidence in chief of the witness.

(2) A special measures direction may, however, not provide for a video recording, or a part of such a recording, to be admitted under this section 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.

(3) In considering for the purposes of subsection (2) whether any part of a recording should not be admitted under this section, the court must consider whether any prejudice to the accused which might result from that part being so admitted is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview.

- 7 Eligibility for special measures is determined by **s 270** supra:

Witnesses eligible for assistance on grounds of ... incapacity

270. (1) For the purposes of this Part, a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section—...

(b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).

(2) The circumstances falling within this subsection are—

(a) that the witness—...

(ii) otherwise has a significant impairment of ... social functioning;
(b) that the witness has a physical disability or is suffering from a physical disorder.

(3) ...

(4) In determining whether a witness falls within subsection (1)(b) the court must consider any views expressed by the witness.

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

- 8 The assistance contemplated for an eligible person is in **s272** supra, which allows the court to use **s281** above.

Special measures direction available to eligible witnesses

272. (1) For the purposes of this Part—

(a) the provision which may be made by a special measures direction by virtue of each of sections 277 to 284 is a special measure available in relation to a witness eligible for assistance by virtue of section 270...

- 9 Concerning MS, she has been the subject of a cognitive assessment report dated 05.03.18 by Khalilah Nelson, who has 15 years of experience as a counsellor, with ASc, BSc and MSc qualifications, demonstrating expertise particularly in gerontology and the psychological and cognitive effect of ageing. On assessment MS scored 3/30 on the MMSE (mini-mental state examination) indicating severe cognitive impairment, and it was the opinion of the expert the challenge of appearing in court might actually lead to MS declining and dying. Contemplating **s270(2)** supra, the evidence was that MS suffered 'significant impairment of social functioning', and from her visibly enfeebled state 'physical disability'. It was plain from the expert, and from a non-expert viewing of the ABE video, that calling MS to the formalities of a courtroom would

inevitably lead to a lack of narrative 'coherence', as contemplated in **s270(5)**. In consequence, it was adjudged right her ABE video should stand as her evidence in chief, as permitted under **s284**.

Why has MS not been cross-examined?

10 Of greater sensitivity has been the prosecution application that MS not be presented for cross-examination.

11 The reason is that the ordeal may cause her health seriously to deteriorate and in any event her severe cognitive impairment will mean her evidence under cross-examination will likely lack coherence.

12 **The Evidence Act, s30**, cap 2.08 provides as follows:

No examination...shall be read in evidence at any trial, without the consent of the party against whom the same may be offered, unless it shall appear, to the satisfaction of the Court, that the examinee...is ...unable from permanent sickness, or other permanent infirmity, to attend the trial; in all, or any, of which cases the examination...certified under the hand of the Judge, officer...or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions.

13 The prosecution have argued that MS is 'unable from permanent sickness, or other permanent infirmity, to attend the trial', which on the evidence is correct. It follows the power to play her video is available, as a species of having her evidence 'read' under **s30** supra, bearing in mind the original Act which used the word 'read' was promulgated in 1876, long before video was contemplated, allowing the word 'read' as a matter of statutory construction to be updated to modernity to mean 'played'.

14 The stage has therefore been set in law that the ABE video of MS can be played without her being cross-examined.

Why is the trial not unfair if MS cannot be cross-examined?

- 15 The question which then arose is whether the trial of John Allen will become unfair if he cannot cross-examine MS.
- 16 A first point to consider is that Allen is not allowed under **s287 Criminal Procedure Code** supra to cross-examine as a defendant in person. It could be said therefore that he has no right to cross-examine in person, and so if he insists on representing himself, as here, then there is in law no expectation that the complainant will be called.

Complainants in proceedings for sexual offences

287. No person charged with a sexual offence may in any criminal proceedings cross-examine in person a witness who is the complainant...—

(a) in connection with that offence...

- 17 It is a disquieting feature of the case that Allen has been persistent in wanting to cross-examine personally and has declined pro bono representation by three counsel.
- 18 However, in theory, it would have been possible for a counsel to be paid a modest fee to cross-examine, notwithstanding that Allen declined full representation, as the Attorney General has made a discreet fund available to pay counsel a fee limited to cross-examining a complainant where there is an unrepresented defendant in a sexual offence case.
- 19 Assuming therefore that cross-examination could have taken place by counsel, at the instruction of the court, notwithstanding possible unhappiness from Allen, and a lack of instructions from him, the court has therefore looked to balancing the interests of the prosecution and defence in whether the trial has become unfair by playing the ABE video and not presenting MS to counsel for cross-examination.
- 20 There is guidance from the sister Common Law jurisdiction of the UK in how to approach the question. While law and practice in a sister jurisdiction can be persuasive and of assistance,

there is specifically provision in **s12 Evidence Act** supra that UK practice can be adopted on Montserrat where there is an absence of legislation on the point, as here:

Every document, which, by any law now in force, or hereinafter to be in force, is or shall be admissible in evidence in any Court of Justice in England, shall be admissible in evidence in the like manner, to the same extent, and for the same purpose, in any Court in Montserrat, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence.

- 21 Adopting therefore the UK approach, in **Ali Sed [2004]** EWCA Crim 1294, the 81-year-old victim of an attempted rape was suffering from Alzheimer's Disease. At trial, the judge allowed the Crown to adduce in evidence (under then **ss23 and 26 Criminal Justice Act 1988**, with the latter expanded as **s114 Criminal Justice Act 2003**) the ABE interview of the complainant without the need for her to be called for cross-examination, following which the defendant was convicted. Akin to the instant case, whilst the complainant's responses to the officers' questions were sometimes confused, the strong theme that emerged from her responses was that she had been subject to the penile penetration of her vagina. The trial judge allowed the Crown to adduce the complainant's ABE interview, having heard expert evidence to the effect that the complainant was not fit to give evidence in court owing to her mental state (in that case, due to her dementia). Akin to **s30 Evidence Act**, the **1988 Act** supra allows for the admissibility in evidence of certain documents as exceptions to the hearsay rule if the witness is "by reason of his bodily or mental condition unfit to attend as a witness", subject to the interests of justice. By **Schedule 2, paragraph 5** to the **1988 Act**, a document includes a video-taped interview. The appeal against conviction failed.
- 22 In the **1988 Act**, **s23** provides the gateway for admissibility and the interests of justice test is set out in **s26**.

s23 First-hand hearsay

...a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if—

- (i) the requirements of one of the paragraphs of subsection (2) below are satisfied; or
- (ii) the requirements of subsection (3) below are satisfied.

(2) The requirements mentioned in subsection (1)(i) above are—

(a) that the person who made the statement is ... by reason of his bodily or mental condition unfit to attend as a witness;

s26 Statements in documents that appear to have been prepared for purposes of criminal proceedings or investigations.

Where a statement which is admissible in criminal proceedings by virtue of section 23...above appears to the court to have been prepared...for the purposes—

- (a) of pending or contemplated criminal proceedings; or
- (b) of a criminal investigation,

the statement shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard—

- (i) to the contents of the statement;
- (ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and
- (iii) to any other circumstances that appear to the court to be relevant.

23 Reflecting on the 1988 test, the ABE video was made in contemplation of criminal proceedings. Looking to its content, it does disclose a case that she has been the victim of serious sexual

offending about which there is a strong public interest there shall be prosecution and assessment by a jury. Looking to any risk, having regard to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, Allen can give evidence if he chooses and thereby controvert her, and will benefit from a direction to the jury that the evidence of MS must be treated with caution as Allen has had the disadvantage of being unable to test his case on her through cross-examination before the court.

24 The interests of justice test has been expanded as **s114(2) Criminal Justice Act 2003**:

(2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d) [in the interests of justice], the court must have regard to the following factors (and to any others it considers relevant)—

- (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
- (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
- (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
- (d) the circumstances in which the statement was made;
- (e) how reliable the maker of the statement appears to be;
- (f) how reliable the evidence of the making of the statement appears to be;
- (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
- (h) the amount of difficulty involved in challenging the statement;
- (i) the extent to which that difficulty would be likely to prejudice the party facing it.

25 Reflecting on the 2003 test,

- a. If true, the probative value of the ABE video is high.
 - b. Other evidence in support of what was said in the ABE interview is that Robinson and Prince see Allen touching MS sexually on 05.01.18, he is found loitering in her home on 06.01.18 emerging from her bedroom suggesting a sexual interest, and in his video interview Allen admits to sexual intercourse with MS, claiming consent, which will be weighable against her visibly enfeebled state on video.
 - c. The ABE video is highly important to the case as a whole, as without it, there would be no case on rape and buggery (though the indecent assault and the burglary with intent to rape are independent of MS, supported by the neighbors).
 - d. The circumstance in which the ABE video was made was after concerned neighbors raised the alarm, MS told officers she had been raped, and the interview on the video was made by trained officers.
 - e. MS appears reliable, though confused, yet persistent in her allegation of rape, with culturally age-appropriate discomfort talking about sexual organs, begging from her presentation whether it is feasible she is mistaken or making any of this up.
 - f. The reason oral evidence cannot be given is because MS has been adjudged on 05.03.18 to suffer severe cognitive impairment, and even with improvement over time to the present so that she may be said now to have medium impairment, the gerontology expert has said the ordeal of giving evidence, and retraumatization being questioned in court would require, may so affect her health as to lead to her decease.
 - g. Challenge to her evidence can be offered by the defendant choosing to give evidence, and he will benefit from a clear jury direction to treat uncross-examined evidence with caution.
 - h. Any prejudice can be overcome by jury direction.
- 26 Overall, I am of the view that this serious allegation must be the subject of jury assessment, with proper direction. It would be a scandal in the public mind if the fact MS is so weak and elderly as to be unable to come to court must mean no prosecution can be mounted, as this could imply no defendant can be prosecuted for wronging one of society's most vulnerable precisely because such a person is so vulnerable.

- 27 Therefore, for the reasons above, with reference to the relevant legislation, the ABE video of MS has been played to the jury and she has not been made available to Allen to cross-examine.

Why was the evidence of the doctor and scientists read?

- 28 At an early stage of the trial, Allen wanted the doctor and forensic scientists called so that he could ask them whether their findings were consistent with rape, thinking they would say their findings showed there had been no rape.
- 29 Dr Valluru was named on the back of the indictment, and forensic scientists (FSs) Mullings and Lowe were each a notice of additional evidence dated 02.10.18.
- 30 Dr Valluru is no longer on Montserrat, and has returned in September 2018 to India after her contract ended and has not been contactable. She examined MS on 06.01.18 and inter alia found her vagina 'atrophied' and that MS 'complained of pain all over her chest, abdomen and back as the person rubbed her'². No injuries were found, and on the police medical form, where asked if her findings were consistent with rape, wrote 'n/a'³. I will bring to the jury's attention, to Allen's possible benefit, that there has been no explanation available as to what is an atrophied vagina and if one would expect to see damage if there had been penetration, that MS was not complaining of rape but of being rubbed, and the doctor has said there was nothing found to support rape. However, it was explained by me to Allen that from many years' experience in practice it is vanishingly unlikely any doctor would ever say such findings mean there was no rape, so that to call Dr Valluru to say this would be impractical, dangerous and naïve, undermining the positive points that can be made from the report and as I will make for him as he is unrepresented.
- 31 FS Mullings found blood relating to MS on certain intimate swabs, and semen from Allen on his penile swab, seized pants and grey underpants, but there was no cross-contamination. FS Lowe found DNA from MS on her items, and DNA from Allen on his items, but there was no cross-contamination. Both are on Jamaica, where the laboratory is located, as the Institute of Forensic

² Exhibit 7.2.

³ Exhibit 7.1.

Science and Legal Medicine in Kingston. I will make the point to the jury that the forensic evidence proves nothing either way, and specifically does not support the allegation of rape, which may help Allen, pointing out that there is no information on why there was a finding of blood and semen, neither being put in any context, with no indication as to quantity or of how normal or abnormal these findings are, so that the jury should not conclude anything adverse to the interests of Allen. Like for Dr Valluru, the point was made it is vanishingly unlikely any scientist would say these findings mean there was no rape, so that it would be impractical, dangerous and naïve to call them to try to get them to say it.

- 32 As the trial developed, in fact on 12.11.18 Allen wanted to ask the Investigating Officer, PC Carlisle, about the reports from Dr Valluru and specifically wanted the evidence to go before the jury which seemed a reversal of his earlier concerns to have the doctor called.
- 33 Nevertheless it is still appropriate, given Allen is unrepresented, to reflect on the admissibility of the evidence without calling Valluru, Mullings and Lowe.
- 34 Concerning FSs Mullings and Lowe, Allen asked for them at first, not sure of why they were in the case, but following discussion seemed to accept their evidence would be led by the Investigating Officer as non-probative of rape, and indeed only being offered by the prosecution acting as a minister of justice as evidence in fairness to Allen as possibly supportive of his case. In theory, either or both might have been able to appear by skype, but their attendance was not pursued.
- 35 Concerning Dr Valluru, her evidence was admissible under **s116 Criminal Justice Act 2003** from the UK, (applying locally **s12 Evidence Act** supra).

(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if –

- a. Oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,
- b. The person who made the statement (the relevant person) is identified to the court's satisfaction, and
- c. Any of the five conditions, mentioned in subsection (2) is satisfied.

(2) The conditions are – ...

- c. That the relevant person is outside the United Kingdom [or here, Montserrat] and it is not reasonably practicable to secure his attendance;

36 Applying the test, live evidence from Dr Valluru would be admissible in the proceedings, she is satisfactorily identified, she is outside the jurisdiction, and it is not reasonably practicable to secure her attendance as her whereabouts are unknown. This means her evidence can be read if in the interests of justice.

37 As to the interests of justice, it is plainly in the defence interests her evidence is put before the jury, and so it has been, and on application by the defendant.

Recent Complaint

38 On being seen by police in the morning of 06.01.18, MS said pithily she had been raped by Allen the day before. This evidence has been admitted as an exception to the rule against hearsay under the well-established doctrine of recent complaint, it being her first mention of complaint, to show she has been consistent in the complaint she has gone on to make in her video interview, which tends to negative consent, but it is not independent evidence to support the truth of her allegation as it cannot be independent because it comes from the same source, namely MS. The jury will be directed to this effect.

39 Other more elaborate complaints, recorded later at the hospital, have been excluded, as not the first things said, and consequently inadmissible as ordinary hearsay.

The defendant's video interview

40 On 07.11.18, there was a *voire dire* on the admissibility of Allen's video interview. Sgts Rasool and Wade gave evidence. Allen was saying his testicles had been squeezed with pliers by five officers in his cell to get him to confess to sex with MS, all denied by the officers. Allen declined to give formal evidence. The video was played and there was no evidence of injury or discomfort to Allen, and nowhere did he complain. During the trial he did not ask for Wade and did not

question Rasool that he had been tortured, instead complaining Rasool had not got him a lawyer, though Rasool countered he had been told he could have one, which Allen declined, as appeared in Rasool's statement made on the same day, 09.01.18.

- 41 The short point is, concerning attempt to exclude the video interview, there was nothing but bare self-interested assertion by Allen. The allegation of torture was without any evidential support and notably not pursued at trial. I was quite sure the interview was voluntary and reliable, visibly so when watched, and so it was played to the jury.

Discharge of a juror

- 42 Finally, on 12.11.18, the foreperson of the jury was discharged as her father had died on Guyana on 10.11.18. A jury on Montserrat, whose population is only about 5000, consists of nine persons, with ability to continue at trial with up not less than seven persons. The question of discharging the remaining jurors was considered. The defendant wanted the trial to continue, and so it did, with a jury of eight.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

14 November 2018