DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Skey* [2020] QDC 27
PARTIES:	**THE QUEEN** (applicant) **v** **SEAN THOMAS SKEY** (defendant/respondent)
FILE NO:	306/19
DIVISION:	Criminal
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	Orders made on 21 February 2020 Reasons delivered on 9 March 2020
DELIVERED AT:	Maroochydore
HEARING DATE:	21 February 2020
JUDGE:	Cash QC DCJ
ORDERS:	**1. When the evidence of [the complainant] is taken she will be in a room separate to the court room, and from which all persons other than essential persons as that term is defined in section 21A of the *Evidence Act* 1977 (Qld) are excluded (pursuant to section 21A(2)(c)); and** **2. When the evidence of [the complainant] is taken, a support person approved by the court will be present in order to provide emotional support to [the complainant] pursuant to section 21A(2)(d) of the *Evidence Act* 1977 (Qld).**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – MISCELLANEOUS MATTERS – EVIDENCE BY CLOSED-CIRCUIT TELEVISION – where defendant charged and convicted of one count of choking – where prior to the trial the Crown made an application for a special witness declaration and measures, namely to give evidence via video-link or closed-circuit television – where the complainant would be uncomfortable giving evidence in the presence of the defendant – where there is common law principle that a defendant be able to confront their accuser – whether the measures would detract from the ability of the jury to assess the credit of the complainant – whether special witness measures would unfairly prejudice the defendant

Evidence Act 1977 (Qld), s 21A

R v Davis [2008] 1 AC 1128
R v Wilkie (2005) 193 FLR 291

COUNSEL: G J Cummings for the applicant
M W C Harrison for defendant/respondent

SOLICITORS: Office of the Director of Public Prosecutions for the applicant
Lawler Magill for the defendant/respondent

Introduction

[1] The defendant, Sean Thomas Skey, was charged on an indictment with an allegation that he choked his domestic partner without her consent, contrary to section 315A of the *Criminal Code* (Qld). The trial proceeded over three days commencing 2 March 2020. The defendant was convicted and sentenced to imprisonment. On 21 February 2020, a little more than a week before the trial, I heard an application made by the prosecution for orders to permit the complainant to give evidence over video-link, for her to be supported by another person when she testified, and to have her evidence recorded before the commencement of the trial. The application was largely opposed by the defendant.

[2] After hearing submissions I made orders permitting the complainant to testify at the trial over video-link and with a support person. I declined to order that her evidence be recorded before the trial. These are my reasons for making those orders.

Statutory framework

[3] The basis for the prosecution application was section 21A of the *Evidence Act* 1977 (Qld). So far as is relevant the section provides:

> **21A Evidence of special witnesses**
> (1) In this section—
> …
> "special witness" means—
> (a) a child under 16 years; or
> (b) a person who, in the court's opinion—
> (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
> (ii) would be likely to suffer severe emotional trauma; or
> (iii) would be likely to be so intimidated as to be disadvantaged as a witness;
> if required to give evidence in accordance with the usual rules and practice of the court; or
> …
> (d) a person—
> (i) against whom domestic violence has been or is alleged to have been committed by another person; and
> (ii) who is to give evidence about the commission of an offence by the other person;
> …
> (2) Where a special witness is to give or is giving evidence in any proceeding, the court may, of its own motion or upon application made by a party to the proceeding, make or give 1 or more of the following orders or directions—

(a) in the case of a criminal proceeding—that the person charged or other party to the proceeding be excluded from the room in which the court is sitting or be obscured from the view of the special witness while the special witness is giving evidence or is required to appear in court for any other purpose;
(b) that, while the special witness is giving evidence, all persons other than those specified by the court be excluded from the room in which it is sitting;
(c) that the special witness give evidence in a room—
  (i) other than that in which the court is sitting; and
  (ii) from which all persons other than those specified by the court are excluded;
(d) that a person approved by the court be present while the special witness is giving evidence or is required to appear in court for any other purpose in order to provide emotional support to the special witness;
(e) that a videorecording of the evidence of the special witness or any portion of it be made under such conditions as are specified in the order and that the videorecorded evidence be viewed and heard in the proceeding instead of the direct testimony of the special witness;
(f) another order or direction the court considers appropriate about the giving of evidence by the special witness, including, for example, any of the following—
  (i) a direction about rest breaks for the special witness;
  (ii) a direction that questions for the special witness be kept simple;
  (iii) a direction that questions for the special witness be limited by time;
  (iv) a direction that the number of questions for a special witness on a particular issue be limited.

The prosecutor's submissions

[4] The prosecutor submitted that in deciding whether or not to record the complainant's evidence in advance of the trial, "the only issue is whether the trial to follow is likely to be adequately fair to both the prosecution and the defence." That is, it is unnecessary to consider what the usual procedures of the court for receiving evidence are, and whether there is a reason or justification for departing from these procedures. In support of this argument the prosecutor referred to the legislative history of section 21A and to a number of cases said to illustrate the modification of established procedures to ensure the fairness of a trial.

[5] Section 21A was inserted into the *Evidence Act* in 1989. As originally enacted, the definition of a "special witness" was limited to a child under the age of 12 years and:

> "a person who, in the court's opinion—
> (i) would, as a result of intellectual impairment or cultural differences, be likely to be disadvantaged as a witness; or
> (ii) would be likely to suffer severe emotional trauma; or
> (iii) would be likely to be so intimidated as to be disadvantaged as a witness;
> if required to give evidence in accordance with the usual rules and practice of the court."

[6] It can be seen that the part of the definition applying to "disadvantaged" witnesses has essentially not changed and specifically refers to disadvantage or trauma resulting from compliance with the "usual rules and practice of the court". As enacted, section 21A(3) prohibited making orders intended to overcome

demonstrated disadvantage if it appeared to the court it would "unfairly prejudice … the person charged or the prosecution".

[7] Over the years additions were made to the definition of special witness. None contained a reference to the usual rules and practice of the court. In early 2004 section 21A(3) was repealed. At the same time Division 4A was inserted which had the effect of making pre-recorded evidence for child witnesses commonplace. In 2015, the definition of special witness was expanded to include those who are alleged victims of domestic violence.

[8] Thus, it was submitted, the shrinking relevance of "the usual rules and practices of the court" in determining who might be a special witness has resulted in the sole test being whether the proposed method for receiving evidence would produce an unfair trial. Under the legislation as originally framed it might be thought three steps were required: Is the witness a special witness? Is there a reason or justification to depart from usual procedure? Would departing from usual procedure produce unfairness? Instead, the prosecutor proposed only two questions need be considered: Is the witness a special witness? And would the proposed order or direction produce unfairness?

Consideration

[9] In my view there are at least two reasons why the prosecution submissions cannot be accepted. The first is that the long established principle of the common law that the defendant in a criminal trial should be confronted by their accusers in order to challenge their evidence has not been entirely displaced by section 21A. The second is that there is nothing in section 21A which compels the conclusion that any of the measures permitted by section 21A(2) are to be adopted automatically for any special witness.

[10] It was not in dispute that the common law recognises a principle, which is sometimes called a right, to confront one's accuser. A helpful discussion of the principle can be found in *R v Davis* [2008] Crim LR 915; [2008] 1 AC 1128; [2008] 3 WLR 125 (at [5] to [7]). The prominence of the principle waned and waxed, such as during and immediately after the Inquisition and Court of Star Chamber. Like so many rules of evidence and procedure, the principle crystallised in the late 18th and early 19th centuries. It has never been thought that the principle granted to the defendant an inviolable right to personally confront and ask questions of their accuser. This has been the case even in the United States where the principle was constitutionally enshrined by the Sixth Amendment in 1791.

[11] There has been considerable legislative activity in recent times that might be thought to encroach on the original principle. Apart from Division 4A of the *Evidence Act* there are provisions that may permit a witness to give evidence under a pseudonym[1] or prohibit a defendant from directly questioning a particular class of witness.[2] Other provisions to similar effect can be found, but none of the legislative intervention has gone so far as to deny a defendant the opportunity to confront and question their accuser by some means. It follows that the common law principle has not been legislated out of existence, either directly or by implication. If it had, there would be no work for section 21A to do. If there was no presumption that a defendant is entitled to confront and question their accuser, it would be unnecessary to resort to

---

1 *Evidence Act 1977* (Qld), Division 5.
2 *Evidence Act 1977* (Qld), Division 6.

section 21A to authorise a procedure that departs from this principle. The starting point must be that the normal procedures will apply unless there some reason or justification for departing from those procedures.

[12] The second reason for rejecting the prosecution submission is that the text of section itself requires a consideration of the reasons or justification for adopting a particular procedure. The terms of the section are such that it remains necessary to consider the circumstances of the witness weighed against the procedure that it proposed. The essence of the prosecution submission was that, by not enacting a requirement to show likely disadvantage or trauma in section 21A(1)(d), parliament intended that there be a presumption of disadvantage which is itself sufficient to warrant departure from normal procedures. Even if the purpose for this change was to recognise that certain categories of witness are necessarily disadvantaged or traumatised, it does not follow that it is unnecessary to consider the reason for the proposed change of procedure. There is no specific connection drawn between the definition of special witness and the measures permitted by section 21A(2). Logic dictates that, for a witness who is a special witness by reason of identified disadvantage pursuant to section 21A(1)(b), the nature of the disadvantage will inform the kinds of measures that may be necessary to overcome that disadvantage. For other categories of special witness it remains necessary to identify, and consider, the circumstances that make it necessary to adopt a different procedure. How else could it be known whether or not the procedure will provide fairness for the witness?

[13] In my view, when considering an application pursuant to section 21A, it is necessary to identify a reason or justification why the normal procedures of the court should be adapted.

[14] There remains an issue not fully ventilated in the course of argument. What is the effect of the repeal of section 21A(3) in 2004? In doing so the parliament deleted the prohibition on making orders that appeared to the court would "unfairly prejudice … the person charged or the prosecution". I did not take this as evidencing an intention by the parliament to displace a requirement fundamental to all criminal trials in this State: an adequately fair trial between the State and the defendant. Whether this is an additional step in the process of reasoning or part of the calculus of deciding if there is a reason or justification for changing normal procedure does not much matter. It remains necessary to consider whether the adoption of any particular measure would produce a trial that is impermissibly unfair.

The evidence in the application

[15] The complainant, understandably, did not give evidence on the application. Nor was there direct evidence in affidavit form. Instead, affidavits were filed that contained statements made by the complainant to employees of the prosecution or by text message to the defendant's mother. The communications relied upon by the prosecution were to the effect that the complainant would be uncomfortable if in the same room as the defendant and this would impair her ability to testify. The defendant relied upon text messages, apparently sent by the complainant to the defendant's mother. Relevantly, the complaint wrote, "I'm not standing in a room and facing him and watching the pain on his face. We have both been through enough it's absolutely ridiculous that they think I would do that," and, "I can't think of a worse thing than breaking up with someone after so long then having to go to court against them. I don't want to do it at all." Other parts of the messages suggests the complainant was reluctant to proceed with her complaint at all.

[16] The state of the evidence was somewhat unsatisfactory. Hearsay material from the prosecution did not make it easier to identify the reasons why it was appropriate to make the orders sought, especially when one proposal was that the complainant's evidence be recorded before the trial. The material filed by the defendant could, on one view, detract from the notion that the complaint would be adversely affected by testifying in front of the defendant. On the other hand the words written by the complainant are not necessarily inconsistent with a person who would have difficulty confronting the defendant. Considering the evidence as best as I could, I was satisfied the capacity of the complaint to give evidence would have been enhanced if she were not in the court room with the defendant.

Consideration

[17] The evidence discloses sufficient reason to receive the evidence of the complainant in a manner that differs from usual procedures. As noted, the prosecution proposed that the complainant testify over video-link with a support person and that the evidence be recorded before the trial. The defendant did not object to a support person but opposed the other measures. The defendant submitted that to receive evidence by video-link would detract from the "atmosphere" of the trial and the ability of the jury to assess the reactions and demeanour of the complainant in a case where her credit was central to the trial. In this way the defendant would suffer impermissible disadvantage.

[18] I did not accept this submission. Taking evidence by video-link is now almost commonplace. The notion that juries who see video evidence are less able to determine issues of credit is not a proposition with which I would readily agree. There is research to suggest that an average person's ability to detect lies based on "demeanour" is little better than chance.[3] Whatever the value of being able to see as well as hear a witness, I endorse the observations of Howie J in *R v Wilkie* (2005) 193 FLR 291 (at [31]):

> "[T]here is in my view little diminution of the jury's ability to take that matter into account in determining the reliability of the witness occasioned by the fact that the witness is not physically present in the courtroom, particularly having regard to the improvements in receiving visual and audio transmissions brought about by modern technology."

[19] In the result I determined that permitting the complainant to testify using a video-link would not render the defendant's trial impermissibly unfair.

[20] There remained the prosecution's application to have the complainant's evidence recorded before the trial. The only matter that supported pre-recording the evidence was the possibility that if the trial aborted for some reason it would not be necessary for the complainant to testify again. It was not suggested that there would be any real difference in how the evidence would be taken whether it was before or during the trial. I was not prepared to assume that a retrial would be such a likely outcome as to justify the order sought, particularly when the trial listing was so close.

---

[3] Ekman, P, *Telling Lies: Clues to Deceit in the Marketplace, Politics and Marriage* (Norton, New York, 1985); Aamodt, MG and Custer H, 'Who can best catch a liar? A meta-analysis of individual differences in detecting deception' (2006) (Spring) *The Forensic Examiner*, 6–11; Bond, CF and DePaulo, BM, 'Accuracy of deception judgments' (2006) 10 *Personality and Social Psychology Review*, 214–234.

[21] It was for these reasons that I made orders allowing the complainant to give evidence by video-link and with a support person.