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The Coronavirus Act 2020 c.7, Schedule 23, Live Links in criminal proceedings. Is the giving of evidence live essential anymore?

Keith Arno Mitchell – Libertas Chambers – March 2021

The creation of the Nightingale Court at Prospero House, annexed to Southwark Crown Court during the Covid 19 pandemic, is undoubtedly a good thing and its success has led to other similar type courts opening up across England and Wales. I was part of a recent multi-million pound 'boiler room' fraud trial there, one of the first after its opening. It lasted a period of three months and continued throughout lockdown, despite every obstacle that the pandemic could throw at the case, including court staff and defendants (and their families) contracting Covid before the trial reached a conclusion. A major contributor to the completion of this trial, was the willingness to use video technology, and by taking advantage of a subtle but important amendment to the Criminal Justice Act 2003 brought about in the Coronavirus Act 2020, which allowed for, what was believed to be for the first time in a fraud trial, the calling of defendants to give evidence over a video link from home and be cross examined during a crown court trial.

The expansion of powers as set out in Schedule 23 section 53 of the Coronavirus Act 2020 and the increased availability of live links in criminal proceedings has brought into play a potential new way for the prosecution and defence to present their cases, without the necessity of the defendant being present. This amendment has far reaching consequences for criminal cases in respect of a defendant who is unable to be present, for whatever reason.

The Schedule amends the Criminal Justice Act 2003 in order to extend the circumstances in which a criminal court can use audio and live links during hearings. Previously, section 51 of the CJA 2003 allowed a witness, *other than the defendant*, if the court so directed, to give evidence through a live link in criminal proceedings in a trial on indictment. The Coronavirus Act 2020 c.7, Schedule 23, Live Links in criminal proceedings, has changed all that, and has amended the Criminal Justice Act 2003 to allow a defendant the right to give evidence via a live audio or video link. The amended section 51(1) states, 'A *person may, if the court so directs* take part in eligible criminal proceedings through (a) a live audio link, or (b) a live video link ', opening the door for a defendant to give evidence via such a link.

An important safeguard is put into to place, at section 51.4 (a) which the Judge must consider in reaching any decision, and must state in open court, the reasons for granting or refusing to give a live link direction. Section 51.4(a) of the Act makes it quite clear that court may not give a direction for a person to take part in eligible criminal proceedings through a live audio link or a live video link unless, the court is satisfied that it is *in the interests of justice* for the person concerned to take part in the proceedings in accordance with the direction through the live audio link or through the live video link, (b) the parties to the proceedings have been given the opportunity to make representations, (and in the case of) (c) the relevant youth offending team has been given the opportunity to make representations, if it is a case where the

defendant is a party to the proceedings and either, (i) the defendant has not attained the age of 18 years, or (ii) the defendant has attained the age of 18 years since proceedings for the offence were begun, and the court has decided to continue to deal with the case as if he or she had not attained that age".

The 'Boiler Room' fraud at Prospero House presented a number of interesting scenarios. The second defendant started and finished live evidence, but in-between took advantage of the now available video link as he was forced to self-isolate, as a result of contact trace with a relative who'd tested positive for coronavirus. The third defendant lived in Birmingham and found the daily travel to court onerous and expensive, and this coincided at the time of his trial, with the country in national Lockdown. The defendant preferred to listen to the evidence of the co-defendant, from a local solicitors office or from home. The defendant was in possession of a laptop with suitable link and an iPad of jury exhibits. The Crown did not object to such a course nor did the Judge, so the defendant attended the local solicitors office and the trial continued.

The defendant's Mother with whom he lived, then contracted the virus, and the defendant was required to self-isolate. He was allowed to continue with his evidence from home, again with the agreement of the Judge and Prosecution, and continued to take part in proceedings. The defendant's time to give evidence arrived whilst he was still isolating. The defendant was allowed to give evidence from home via a video link, relying upon the amendments to the Criminal Justice Act 2003, and duly gave evidence and was also cross examined.

It is important to stress that the amendments do not remove the inalienable right of a defendant to give evidence in person in front of a Judge and a jury. The giving of live evidence is paramount to ensuring a completely fair trial. A video link cannot capture the '3D' of evidence of a defendant, and the importance of a jury seeing and hearing the defendant live cannot be overstated and should not be replaced if at all possible. It also has to be said that the video proceedings do not always run without a hitch. There are issues involving connectivity, security and privacy and of course there will always be a number of different scenarios, which require the prosecution or defendant (or court for that matter) to oppose such a link, such as the facilities not being available, or the circumstances themselves just may not be appropriate. The interests of justice safeguard at section 51.4 are in place for a good reason and can and will cover most, if not all eventualities.

As Courts across the England and Wales are increasingly using Cloud Video Platform, (CVP) for the vast majority of preliminary hearings there are significant advantages in the increasing use of video or audio technology in all aspects of trial subject to the important safeguards as set out in section 51.4. If the current backlog of criminal cases is to be shifted then new technology and new approaches such as that envisaged by this amendment have to be embraced even more so, without necessarily any loss or diminution in the quality of Justice.

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