

***R v BNS* [2016] ACTSC 51 (24 March 2016) – Australian Capital Territory Supreme Court**

‘Accused has conviction for intimidating witness’ – ‘Evidence via audio visual link from remote location’ – ‘History of family violence by accused against witness’ – ‘Physical violence and harm’ – ‘Questioning witnesses’ – ‘Safety and protection of victim and witnesses’

Hearing: Application for evidence to be given by audio visual link from a location outside the courtroom.

Facts: The accused, BNS, pleaded not guilty to 2 counts of incest and 5 counts of committing an act of indecency on TN. At the time of offence, BNS was in a relationship with SN, the mother of TN, and was the step father to TN. SN was called to give evidence at trial. She was expected to give evidence of complaint made by TN and relationship evidence (of her and the child’s relationship with BNS).

Here, an application was made for SN to give evidence by audio visual link from a remote location. BNS was physically abusive to SN during the relationship. SN said she had ongoing anxiety and depression which would inhibit her ability to give her best evidence if she was required to give evidence in the courtroom. In light of the history of family violence, she felt intimidated in front of BNS. Finally, BNS also had a conviction for intimidating a witness.

SN did not have the right to give evidence by audio visual link from a remote location under Part 4 of the *Evidence (Miscellaneous Provisions) Act* because she was not a child, complainant, or a similar fact witness. In the absence of statutory provision, it was noted that there is no power at common law for a court to allow evidence to be heard by video link: *R v Hampson* [2009] EWCA Crim 1569. However, s 32 of the *Evidence (Miscellaneous Provisions) Act* empowered the court to direct a person to give evidence by audio visual link from a remote location.

Issue/s: Whether the application to give evidence outside the courtroom via audio visual link should be allowed under s 32 of the *Evidence (Miscellaneous Provisions) Act*.

Decision and Reasoning: The application was allowed as the pre-conditions set out in s 32 were met. First, the necessary facilities were available (See [10]). Second, the evidence could be more conveniently given from a remote location by video link. SN's aversion to the accused would make it more convenient for her to give evidence remotely. It was also more convenient for the court to have the evidence given free of the inhibitions troubling SN (See [12]-[13]). Finally, BNS did not object to SN giving evidence remotely and, accordingly, it could not be said that it would be unfair to the accused for SN to give evidence remotely. Although the general rule is that prosecution witnesses should give evidence in the presence of the accused, it was noted that there have been numerous past occasions where the giving of evidence by video link has not been unfair (See [14]-[22]). Further, there were no discretionary matters requiring the application to be refused (See [23]-[30]).