

## GENERAL CRIME | BRIEFING NOTE

### *EYE-WITNESS AND CCTV EVIDENCE IN CONFLICT*

**Date:** 23.06.20

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#### ***Preamble***

*High-quality CCTV and smart phone footage which captures alleged criminal activity is now a regular part of many criminal trials. Philip Evans QC and Kerry Broome consider in what circumstances eye-witnesses can be shown CCTV footage in advance of trial, fairly and after making a witness statement.*

#### **Eye-witness evidence**

The knowledge that eye-witness evidence can be fallible is trite. It is far from unusual for witnesses in the same criminal trial, apparently describing the same events, to attest to having seen those events unfold in markedly different ways or sometimes not at all. The old adage “an honest witness can still be mistaken” holds as true now as it ever did. This is particularly so with ‘flashbulb’ type traumatic events where the stress and shock suffered by an individual can affect their ability to accurately recall specific features of an incident. The picture is further complicated where the witnesses may have been intoxicated or directing their focus elsewhere. These features provide familiar and well-trodden lines of cross-examination.

The advent of better CCTV systems and smart phones has led to the regular use of high-quality CCTV and video footage in criminal trials. The resulting evidence provides an accurate, objective view of the relevant events and often brings the deficiencies of eye-witness evidence into sharp relief. Despite the usually error-free nature of the video footage, many trials become unnecessarily mired in a lengthy consideration of inaccuracies in the evidence of eye-witnesses, wasting the most precious resources of the criminal justice system: time and the patience of juries. Is such consideration necessary or helpful to the jury in determining the issues?

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Often the first time an eye-witness is given an opportunity to view any CCTV footage is during cross-examination. This approach takes time and it has the inevitable effect of unseating the witness at a time when they are already apprehensive, trepid and nervous. Such circumstances are unlikely to result in the next evidence from the witness, whatever that may prove to be, being the 'best evidence' they could provide on the point. Rather than highlighting discrepancies during oral evidence, it would be more efficient and produce better, fairer evidence to allow an eye-witness an opportunity to view the footage after they have given their first account by way of a formal witness statement and to make any corrections or clarifications.

### **R v Roberts to R v Snape**

On 6 April 1998 the Court of Appeal gave judgment in the case of *R v Roberts & Roberts (1998) 162 J.P. 691, CA; [1998] Crim LR 682*. A police constable who witnessed an assault made a statement soon after the event. CCTV was then procured. On the eve of the trial prosecution counsel asked for a detailed commentary of the CCTV which the constable duly provided. At trial in his oral evidence the constable explained there would be differences between his statement and his evidence because he had viewed the CCTV. The defendants were convicted and appealed on the ground it was wrong in principle for the officer to have seen the CCTV. The Court rejected the appeal and held that it was not wrong for a witness to view relevant CCTV after making an initial statement where the witness's account differs from the video. The Lord Chief Justice held, at 694B-C - this presented:

*“a problem of practice which may well be of some significance, given the increased use and availability of video recordings of alleged criminal offences. Viewing the matter quite generally, it seems to us plain that the duty of any witness when giving a statement is to describe the relevant events to the best of his or her honest recollection and certainly not to invent or fabricate evidence to assist the prosecution or the defence. **If, after the giving of such a statement, a relevant video comes to light, it is not in our judgment wrong in principle that the witness should be permitted to see that video. On seeing it the witness may find that in some respects his or her recollection had been at fault, and the witness may wish to correct or modify earlier evidence.** It is however in our view a matter of the utmost importance that nothing should be done which amounts to rehearsing the evidence of a witness, or coaching the witness so as to encourage the witness to alter the evidence originally given. The acid test is whether the procedure adopted in any particular case is such as to taint the resulting evidence. It is, we would stress, necessary to preserve equality of arms so that facilities are not made available to the prosecution which are not made available to the defence. On the prosecution side we see no reason to distinguish between police and non-police witnesses. They should be treated the same”*

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The Court of Appeal recognised that a measure of regulation of such viewings would be beneficial [at 694F]:

*“...the growing use of video evidence merits detailed consideration of such evidence by the appropriate authorities with a view, after necessary consultation, to devising a code of good practice”*

If we fast forward to the recent case of *R v Snape* [2019] EWCA Crim 2415, a violent altercation took place in Stockport outside of a social club called The Salisbury. The defendant left the scene but returned in a car and ran over two individuals, one of whom was killed. The defence was essentially one of accident, that the defendant had not intended to cause death or really serious harm. There were some 17 eye-witnesses, many of whom accepted they had consumed alcohol or drugs, as well as clear CCTV footage. The eye-witnesses were cross-examined at length on inconsistencies in their accounts. The defendant was convicted of murder and attempted murder. He appealed his convictions on the basis that the Judge’s summing up of the inconsistent eye-witness evidence was insufficient and a more detailed direction should have been given. The Court held that:

*“[22.]...Closed-circuit television evidence footage made clear what had happened inside The Salisbury and gave a good deal of information about what had happened outside...whilst there was extensive cross-examination on discrepancies, the majority went to events inside The Salisbury. These were well captured on closed-circuit television which, unlike the evidence of eyewitnesses, was not vulnerable to criticisms of subjectivity. It was plain and objective”*

It appears that a great deal of Court time was taken up during the trial with cross-examination of eye-witnesses, evidence which was ultimately of secondary importance in light of the clear CCTV footage, as the Court noted:

*“[25]...Here, whilst the discrepant aspects of the evidence once challenged...attracted great stress, the reality, reflected in the lengthy summing-up, was that many of the eyewitnesses had drunk a great deal and accepted the inevitable effect upon the accuracy of their evidence. None of that can be said of the closed-circuit television evidence.”*

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## Current procedure

Despite the Court of Appeal's suggestion in *Roberts* in 1998, now over 22 years ago, there is limited procedural guidance. The Criminal Procedure Rules are silent as to the showing of CCTV or any other video footage to witnesses before the giving of their evidence (other than their own pre-recorded interview). There is equally no guidance from the CPS that would allow for such a procedure to be arranged with a witness.

Guidance issued to the police when investigating crimes is of more practical use. As part of the Authorised Professional Practice (APP) content produced by the College of Policing, there is specific guidance on the showing of CCTV to eye-witnesses to highlight where inconsistencies lie in their accounts. It states that:

*“Care must be taken to avoid allegations of contaminating the memory of the witnesses involved when introducing CCTV footage to eyewitnesses. Consequently, it is advised that eyewitnesses to an incident are not shown CCTV footage unless there is a real ambiguity that the investigating officer needs to clarify. This may be required should the victim need to point themselves out or if the offence location needs to be confirmed (e.g. if the scene was crowded). If eyewitnesses are shown CCTV footage, the defence could argue that the witness is only remembering what they saw on the CCTV footage and not what they witnessed during the offence. If eyewitnesses are to be shown footage, this should be after they have made their initial witness statement, and a record must be made of the viewing”*

## Fairness

Taking time in advance to show eye-witnesses the available CCTV footage of events that they earlier described in an initial statement might clarify or eradicate a number of the issues faced at trial with witnesses who are clearly mistaken. This may save valuable court time and promote fairness if an appropriate, properly recorded, viewing procedure was used to ensure transparency. Any change in a witness's account could, if necessary, be examined before the court and no prejudice caused to a suspect or defendant. Such a procedure could stop or at least reduce the number of unhelpful and unproductive occasions where CCTV is played and witnesses are called to speak to all aspects of their accounts regardless of obvious mistakes they have made. It also eliminates the unpredictable effect of confronting the witness with the footage whilst

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they are in the witness box. Any unfairness in such a process could be challenged by an application to exclude the evidence under s78(1) Police and Criminal Evidence Act 1984.

In many cases, the witness's evidence is really of secondary significance and to fail to use the 'Roberts procedure' is not doing justice, is not efficient and prevents the examination by the jury of the 'best evidence' to the possible detriment of both the defence and the prosecution. The use of such a procedure also allow prosecutors to see the real strengths and weaknesses in a case and thereby make more effective decisions in the review process.

### **Code of good practice**

What could a code of good practice look like? To ensure equality of arms with the defence and prevent any possible contamination of the witness's evidence some basic minimum safeguards would be required:

1. The witness's first account must have been documented in a signed, written statement or by way of recorded interview;
2. The witness should be asked whether they have seen any video footage;
3. Video footage should be shown to the witness in controlled circumstances, similar to those used for significant witness interviews or identification procedures, which would include the requirement for video recording and notes being taken;
4. A number of witnesses should not view footage at the same time;
5. The witness to be asked only whether the video footage they have now seen changes the evidence they have already provided.

The steps outlined above are already used in other areas for example identification procedures and where police officers view images for identification or recognition. If these guidelines were followed, could there be any real objection to showing a witness relevant CCTV footage?

### **Even more necessary now?**

On 12 May 2020 the Lord Chief Justice announced that jury trials would recommence from 18 May. A part-heard trial at the Central Criminal Court which was adjourned, as opposed to

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stopped, at the start of the coronavirus lockdown recommenced on the same day and a number of creative measures enabled this, which included video-linking two courtrooms together to enable social distancing. Over the past weeks we have seen further trials starting in other courts and more are planned, however we are a long way from business as usual. There is no question we will see an increased use of witnesses giving evidence remotely and as a result showing them CCTV footage during their evidence will be difficult and cumbersome, if not nigh on impossible. Cross-examination of the type utilised in *Snape* will also be an inefficient use of time, which is now at a premium. There will be a very great need to properly utilise every minute of court time given the backlog in cases and the pressure on jurors. There will be a real need to streamline evidence. This will of course have to be done fairly and without cutting corners. The evidence of witnesses whose evidence is at odds with video footage in some way, falls into this category. If a witness is allowed time to consider the footage and their own evidence, not only will their evidence be shorter, it is likely to be clearer.

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*This briefing note was produced by [Philip Evans QC](#) and [Kerry Broome](#). This note should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at [barristers@qebhw.co.uk](mailto:barristers@qebhw.co.uk). For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website at <https://www.qebholliswhiteman.co.uk/>.*

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