

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Criminal Division**

**Cri/vbi/275/10/2014**

**Between:**

**REGINA**

**VS**

**RUDOLPH ROBERTS JR.**

**BEFORE:           The Honourable Mr. Justice Gregory Hilton**

**APPEARANCE:    Timothy Bailey for the Applicant**

**Uel Johnson for the Respondent**

**Hearing Dates:   4<sup>th</sup> October 2019**

**RULING – On Application for the admission into evidence of  
a Witness Statement pursuant to section 66 of the Evidence  
Act, Chapter 65.**

1. This is an application by the crown, pursuant to section 66 (2) (c) of the Evidence Act, for the statement of CoderoMcdonald, whose name was listed on the back of the Information, to be admitted into evidence on the basis that he could not be found after all reasonable steps had been taken to find him.

The Defence objected to the application and in the absence of the jury I heard the evidence of a witness called by the Crown in respect of the issue.

2. After hearing the parties I refused the application and promised to provide my reasons in writing which I now do.

### **BACKGROUND**

3. This matter commenced with the filing of an Information in the Supreme Court against the Accused on 14<sup>th</sup> October 2014 on the charge of Attempted Murder. After an initial appearance on 7<sup>th</sup> November 2014 before Justice Bernard Turner the matter was transferred to the late Justice Isaacs for trial to be fixed.
4. For reasons unknown, the file was never received, or dealt with, and apparently fell through “the bureaucratic cracks” and was finally assigned before me on the 25<sup>th</sup> October 2018 and a trial date was fixed by me for the 30<sup>th</sup> September 2019.
5. The Accused who had, from his arraignment, been unrepresented was appointed a Crown Brief and on the last case management hearing date on 8<sup>th</sup> August 2019 all parties verified that they were ready for trial on 30<sup>th</sup> September 2019.
6. At the Pre-trial hearing on 26<sup>th</sup> September 2019 the crown again verified that they were ready for trial on 30<sup>th</sup> September 2019.
7. The trial commenced on Monday 30<sup>th</sup> September 2019 with the empanellment of a jury after which the Crown requested that the commencement of the evidence occur on Wednesday 2<sup>nd</sup>

October 2019, a request to which counsel for the Accused did not object.

8. On 2<sup>nd</sup> October 2019 the Crown indicated that they had difficulties in locating their civilian witnesses (and in particular) the Complainant in the Attempted Murder charge Mr. Codero Mcdonald. The Crown requested a further adjournment and indicated they would seek to apply to have the witness' statement admitted into evidence pursuant to section 66 (2) (C) of the Evidence Act.

### **EVIDENCE ACT**

9. Section 66 of the Evidence Act provides as follows:

“66. (1) Subject to section 67 a statement in a document shall be admissible in any criminal proceedings as evidence of any fact stated therein of which direct oral evidence would be admissible if –

- (a) the document is or forms part of a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information; and
- (b) any condition relating to the person who supplied the information which is specified in subsection (2) is satisfied.

(2) The conditions mentioned in paragraph (b) of subsection (1) are:-

- (a) that the person who supplied the information:-
  - (i) is dead or by reason of his bodily or mental condition unfit to attend as a witness,

(ii) is outside The Bahamas and it is not reasonably practicable to secure his attendance, or

(iii) can not reasonably be expected (having regard to the time which has elapsed since he supplied or acquired the information and to all the circumstances) to have any recollection of the matters dealt with in that information;

(b) that all reasonable steps have been taken to identify the person who supplied the information but that he cannot be identified; and

(c) that, the identity of the person who supplied the information being known, all reasonable steps have been taken to find him, but that he cannot be found.

(3) Subsection (1) shall apply whether the information contained in the document was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied was acting under a duty; and applies also where the person compiling the record is himself the person by whom the information is supplied.

(4) Where –

(a) a document setting out the evidence which a person could be expected to give as a witness has been prepared for the purpose of any pending or contemplated criminal proceedings; and

(b) the document falls within subsection (1), a statement contained in it shall not be given in evidence by virtue of this section 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 having regard -

- (i) to the circumstances in which leave is sought and in particular to the contents of the statement, and
- (ii) to any likelihood that the accused will be prejudiced by its admission in the absence of the person who supplied the information on which it is based.

(5) Where in any criminal proceedings a statement based on information supplied by any person is given in evidence by virtue of this section-

- (a) any evidence which, if that person had been called as a witness, would have been admissible as relevant to his credibility as a witness shall be admissible for that purpose in those proceedings;
- (b) evidence may, with the leave of the court, be given of any matter which, if that person had been called as a witness, could have been put to him in cross examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examination party; and
- (c) evidence tending to prove that the person has, whether before or after supplying the information, made a statement (whether oral or otherwise) which is inconsistent with that information shall be admissible for the purpose of showing that he has contradicted himself.

(6) A statement which is admissible by virtue of this section shall not be capable of corroborating

evidence given by the person who supplied the information on which the statement is based.

(7) In deciding for the purposes of subsection (2)

(a) (i) whether a person is unfit to attend as a witness the Court may act on a certificate purporting to be signed by a registered medical practitioner.

(8) Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him.

(9) In estimating the weight, if any to be attached to a statement admissible in evidence by virtue of this section regard shall be had to all circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular-

(a) to the question whether or not the person who supplied the information from which the record containing the statement was compiled did so contemporaneously with the occurrence or existence of the facts dealt with in that information; and

(b) to the question whether or not that person concerned with compiling or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts.

(10) Nothing in this section shall prejudice the admissibility of any evidence that would be admissible apart from this section.'

## **EVIDENCE**

6

10. The crown called Sgt. 235 Allan Ferguson in support of their application. He testified that he was employed as a process server in the office of the Director of Public Prosecution and was responsible for locating witnesses and serving them to appear before the court.
11. He testified that he was given a Summons to serve on the witness CoderoMcdonaldin September 2019 and commenced his attempts to locate and serve the witness on Friday 27<sup>th</sup> September 2019 (the trial having been set to commence on Monday 30<sup>th</sup> September 2019.)
12. He testified that he was unsuccessful in locating and serving the witness and filed an affidavit outlining what he did in attempting to serve the witness. The Affidavit was tendered in evidence during the proceedings and is reproduced here as follows:

## **AFFIDAVIT**

**I, SERGEANT ALLAN FERGUSON**, of the Southern District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas make oath and say as follows:-

1. That I am Sergeant in The Royal Bahamas Police Force and I am duly authorized to make this Affidavit on behalf of the Director of Public Prosecutions from information received by me in my capacity aforesaid.
2. That this Affidavit is made in relation to an application pursuant to s. 66 of the Evidence Act, Chapter 65 by the Applicant.
3. That the Respondent, Rudolph Roberts Jr., aged 25 (Date of Birth: 01/07/1994) was charged with three

counts of Attempted Murder which occurred on Thursday, 10<sup>th</sup> July, 2014 at New Providence.

4. That the CoderoMcdonald is one of the Virtual Complainants in this matter.
5. That in execution of my duties as a process server I attempted to serve the named witness on Friday 27<sup>th</sup> September, 2019 and was advised that he worked at Wild Flower Entertainment Company. However I was advised that he was only a part time worker there and was laid off. .
6. That further inquiries revealed that Mr. Mcdonald's mother lived at Whylly Close. On Monday 30<sup>th</sup> September, 2019. I made inquiries at that location but was advised that Codero's mother was not at home and would call me on her return. However she never returned my Call.
7. That his Lawyer Mr. Geoffrey Farquharson was advised that he was a Virtual Complainant in this matter and request Mr. Mcdonald contact me. But he never called.
8. That Radio announcements were placed on the radio and aired on AM 1540 and FM 104.5 on Tuesday and Wednesday 2<sup>nd</sup> and 3<sup>rd</sup> October, 2019 during the Community Announcements in the morning news. A copy of the Radio announcements request is marked and exhibited as "**A.F.1.**"
9. In the circumstances the Applicant requests that the Honourable Court exercise its discretion and admit the Statement of CoderoMcdonald into evidence on the basis that Mr. Mcdonald is intentionally not making himself available to give evidence in this matter.



10. That the contents of this Affidavit are true to the best of my knowledge, information and belief.
13. Sgt. Ferguson was cross-examined and stated that after being advised that CoderoMcdonald did not live at Whyly Close he did not check the area of Sea Breeze Imperial Park (which was the Address listed for the witness on the Police Hospital Form).
14. Sgt. Ferguson also stated, under cross examination, that it is usual procedure (when a witness cannot be located) to check with the National Insurance Board (NIB) and Parliamentary Registration Voter Registration Office to ascertain the address and/or work place of a witness. He testified that he did not check any of these places with respect to his efforts to locate the witness.
15. Sgt. Ferguson testified that it was his belief that the witness was intentionally not making himself available because, even though he left requests for him to contact him the witness never contacted him.
16. While it was not testified to in his testimony, there is no evidence that Sgt. Ferguson checked the hospital, morgue or Police AS400 system for the witness nor attempted to place any advertisement in the major newspapers for the witness.
17. The Crown submitted that based on the evidence all reasonable steps had been taken and that the witness could not be found and the statement of the witness should be admitted into evidence.
18. Counsel for the Accused submitted that, based on the evidence, all reasonable steps had not been taken to locate the witness and that the Accused would be prejudiced by the admission of the statement in the absence of the person who made it.

19. The court is not convinced that all reasonable steps have been taken to find the witness in the circumstances of this case. Sgt. Ferguson commenced his search for the witness on Friday 27<sup>th</sup> September 2019 when the trial was set for Monday 30<sup>th</sup> September 2019. He admitted that he did not check the N.I.B. or Voter's Registration Office which, according to him, was something that should have been done.

The witness testified that he never checked the Sea Breeze, Imperial Park area (which is the area of the address of the witness on his Police hospital Form and on the request letter addressed to the Broadcasting Corporation of the Bahamas seeking to have an advertisement placed for the witness on Radio on 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> of October 2019.)

20. The steps taken to locate the witness were woefully inadequate in the court's view. Also in cases such as this, where the crown proceeded by V.B.I. and the witness being sought was never bound over to testify (which happens at a preliminary inquiry) earlier checks for the witness should have been done as the witness was under no legal obligation to attend court as he was never bound over or served with process.
21. Attorneys and witness care officers / process servers in the Director of Public Prosecution's Office should take heed to the words of Hugh L.J. in R. v. Adams [2008] 1 Cr. App. R. 35 at (13) where he stated:

"All the experience of the criminal courts demonstrates that witnesses are not invariably organised people with settled addresses who respond promptly to letters and telephone calls and who manage their calendars with precision. They often do not much want to come to court. If they are willing they may not accord the appointment the high priority that it needs. Even if they do both of those things, it is only too foreseeable that something may intervene either to push the matter out of their minds or to cause a clash of

commitments. Holidays, work, move of house, illness of self or relatives and commitments within the family are just simple examples of the kind of considerations which day in, day out, lead to witnesses not according the obligation to appear at court the priority that they ought to do. We are told that in the present case it turned out that Mr. Chambers had taken his wife to hospital. If he had to do that, and it may be he did, that should have been found out at the very least the previous week and then consideration could have been given to whether the trial could start a little later in the day, or some other adjustments made to enable the process of justice to take place. All of that was simply rendered impossible by the wholly inadequate approach of those whose duty it was to keep in touch with the witness. It may very well be that, however regrettably, the police are no longer able themselves to undertake the care of prospective witnesses. That is not a matter on which it is right for us to express any view. But whoever it is who does undertake it, the need to keep in touch, to be alive to the witness's needs and commitments is not less now it used to be. Leaving contact with a witness such as this until the last working day before the trial is not good enough and it certainly is not such steps as it is reasonably practicable to take to find him. In addition to that, once the message was not known to have been received on the Friday and there was doubt about it, we agree with Mr. Lynn that reasonably practicable steps which ought to have been taken included a visit to his address and/ or to his place or work or agency, or at least contact with those places, perhaps by telephone. (emphasis added)

22. I find that the efforts made by Sgt. Ferguson to locate and serve the witness were clearly last minute and inadequate. Taking “all reasonable steps” does not mean “all possible steps” in the sense of whether the process server could have done more; but it means, at least, that what the process server did was reasonable. As was stated elsewhere, the statute does not require perfection but it requires reasonableness.
23. In my view it was not reasonable for Sgt. Ferguson to commence his search for the witness on the Friday before the start of the trial on the Monday following nor was it reasonable for him not to check to area of the address of the witness in Imperial Park or not to check N.I.B. or Voter’s Registration Office (which he himself said was ordinary procedure).
24. I find that in respect of the witness all reasonable steps have not been taken and decline to have his statement admitted into evidence under section 66 (2) (c) of the evidence Act.

Dated the 7<sup>th</sup> day of October 2019

The Hon. Mr. Justice Gregory Hilton