

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

(Criminal Division)

Cri/vbi/139/6/2016

Between

STEPHEN GIBSON

Applicant

Vs.

THE ATTORNEY GENERAL

Respondent

Before: The Hon. Mr. Justice Gregory Hilton

**Appearances: Cordell Frazier along with
Janessa Murray for Applicant**

Tai Pinder for Respondent

Hearing Dates: 10th March 2021

**Evidence Amendment Act (No.36) 2011 and (No.2) 2014
Application for witness to give evidence via Live Television
Link.**

RULING

1. The Respondent is charged in Indictment No. 139/6/2016 with Murder which is alleged to have been committed on 1st May 2016.
2. The Applicant has filed an application dated 10th May 2019 pursuant to section 78 B (1) (b) of the Evidence Amendment Act (No. 36) of 2011 and (No. 2) of 2014 seeking to have a prosecution witness, Tavon Thompson, give evidence in the trial by way of live Television link.
3. In support of its application the Applicant relies on an Affidavit filed 10th My 2019 and sworn by ASP Nathan Mackey settled in the following terms:

AFFIDAVIT

I, ASP NATHAN MACKEY of the Southern District of the Island of New Providence, one of Islands of the Commonwealth of The Bahamas, make oath and Say as follows:-

1. That I am a Police Officer of the Royal Bahamas Police attached to the Court Liaison Section at the Office of the Director of Public Prosecutions and I am duly authorized to make this affidavit on behalf of the Applicant from my own knowledge and from information received by me in the capacity as aforesaid.
2. I make this Affidavit in support of an application by the Applicant to adduce evidence from a witness by way of live television link pursuant to section 78 (B) (1) (b) of the Evidence (Amendment) (No. 2) Act, 2014, Chapter 65.
3. This application is made on the grounds that:
 - a. It would protect the safety of the witness;

- b. It would not prevent the Respondent from receiving a fair trial;
 - c. The importance of the witness' evidence is such that, in the interest of justice, he ought to testify;
4. The witness Tavon Thompson is one of the witnesses in this matter, he was present when the Respondent fought with the deceased moments prior to his death.
5. Tavon Thompson is scheduled to give evidence in the trial of the Respondent which is scheduled to commence on the 13th May, 2019, before the Honourable Justice Gregory Hilton.
6. Tavon Thompson is essential to the case of the Applicant. He has stated that he is in fear of his safety and therefore has agreed to testify in criminal proceedings in relation to his matter on the condition that he does so by way of live television link.
7. That the providers of the video conferencing service will provide a private secure room where Tavon Thompson will give his evidence on or after the 13th May, 2019.
8. The video conferencing of the witness is essential to the case of the Applicant and in the interest of the administration of justice.
9. For the reasons the witness Tavon Thompson is desirous of giving evidence by way of live television link.
10. The contents of this Affidavit are true to the best of my knowledge, information and belief.

4. Paragraph 6 of the Affidavit sets out the reason for the application to allow the witness Tavon Thompson to give evidence by way of Live Television Link as being: “Tavon Thompson is essential to the case of the Applicant. He has stated that he is in fear of his safety and therefore has agreed to testify in criminal proceedings in relation to this matter on the condition that he does so by live television link.”
5. The trial in this matter was originally set to be heard on 13th May 2019, but did not proceed (for reasons unrelated to this application) and a new trial is set to commence on 15th March 2021.
6. The Applicant has submitted that no prejudice to the Respondent will result should the application be granted and that in the interest of justice and (due to the fear for his safety) the witness should be allowed to give his evidence by way of live Television Link.
7. The Respondent has objected to the application on the basis that the Affidavit in support of the application was sworn by A.S.P. Mackey and not the witness Tavon Thompson and additionally the Affidavit did not contain any reference to the “mandatory” provision of Rule 4A of the Evidence Amendment Act No. 2 of 2014. Counsel for the Respondent in particular referred to Rule 4A (1) (d) and Rule 4A (2).

THE LAW

8. The relevant provisions of the Evidence Act as relates to this application are sections 78 B (1) (b); 78 B (2) and Rules 4A (1) (d) and 4A (2) of the schedule to the Act which are outlined below:

Section 78B (1) (b) reads:

- (1) “A person, other than the accused person, may give evidence by way of a live television link in proceedings to which this part applies, where the evidence is essential to the case of the applicant and –
 - (a) the witness is within or outside the Bahamas.
 - (b) the quality of the evidence to be given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings;

Section 78 B (2) reads:

- (2) “ Any evidence given pursuant to subsection (1) may not be given without the permission of the court or upon the court’s own motion and in either case the court being satisfied that it is in the interest of justice that the evidence be given by a live television link.”

Rule 4A (1) (d) and 4A (2) reads:

“4A. Evidence of witness on grounds of fear or distress.

- (1) In determining whether a witness falls within section 78B (1) (b) the court must take into account in particular –
 - (a)
 - (b)
 - (c)
 - (d) any behaviour towards the witness on the part of :
 - (i) any party to the proceedings.
 - (ii) members of the family or associates of the accused, or
 - (iii) any other person who is likely to be an accused or a witness in the proceedings.

- (2) In determining that question the court must in addition consider any views expressed by the witness.”
9. The court is of the view that the evidence of the witness Tavon Thompson is essential to the case of the Applicant. Indeed this is not disputed by the Respondent.
10. With respect to whether the Applicant has established that the quality of the witness' evidence is likely to be diminished by fear or distress in connection with the witness testifying in the proceedings the court is of the view that the Affidavit sworn by A.S.P. Nathan McKenzie, while it speaks to this issue of fear in paragraph 6 of the affidavit, it makes no mention of the requirements set out in Rule 4A (1) (d) and 4A (2) of the Schedule to the Act.
11. The court is also of the view that the requirements specified in Rule 4A (1) and (2) of the schedule are mandatory and in particular that the views expressed by the witness must be 1st person expressed by the witness himself and not 3rd party (hearsay) by the affiant A.S.P. Nathan Mackey in this case.

A.S.P. Mackey cannot speak for the witness and the court cannot determine if the witness is in fear of testifying in open court without hearing from the witness directly either orally or by statement in writing / Affidavit.

This is what has been done in cases where witness anonymity orders have been sought in conjunction with live television link orders see: A.G. v. Leroy Smith and Tony Smith SCCr. App. No. 95 of 2014 para: 40-42 where it is stated: .

“40. When the learned judge heard the application on 5 and 6 May 2014 the evidence that was before him in support of the continuance of the witness Anonymity Order was the same as that which was before him to obtain the original order, namely: the affidavit dated 25 September 2012 sworn by

Solomin Cash, Assistant Superintendent of the Royal Bahamas Police Force. The Judge was uncertain whether the facts had changed. That affidavit stated that the witnesses would be reluctant to testify without the order. It read in part as follows:

- “4. Officers investigating the matter have located a key witness to this offence, (hereinafter referred to as Witness Alpha), who has agreed to testify during the criminal proceedings. The testimony of this witness links Leroy Smith aka Shaddy and Tony Smith aka Jamal Penn to the commission of the offence.....
6. Witness Alpha has agreed to give information to the police and testify in the criminal proceedings on the condition that neither his/her identify or whereabouts are revealed, and has stated to the police that he/she is in fear for his life, and are of the view that he/she may be killed or suffer serious harm should his/her identity be revealed. In this case, witness Alpha has also indicated that he/she has already been threatened with death in relation to this matter, and warned not to talk to the police.....
8. Further, I am informed and verily believe that Leroy Smith aka Shaddy and Tony Smith aka Jamal Penn are well known to the police. In Particular, at the time of this offence Tony Smith aka Jamal Penn was on bail for two offences of murder. Both of those matters have recently been discontinued, as the key witnesses refused to testify.....

10. The evidence of Witness Alpha is crucial to the criminal proceedings, as it is direct evidence of the circumstances under which the victim died, and the identify of the persons who committed the offence.
11. I make this Affidavit in support of the application for a Witness Anonymity Order on the grounds that :

(d) Witness Alpha **would be reluctant** [my emphasis] to testify if the Order were not granted.” [emphasis added]

41. However, on this appeal new evidence was allowed by the Court. That evidence brought the application within the requirements of the Anonymity Act and on that basis we allowed the appeal that the Anonymity Order be continued.
42. The new Affidavit of witness Alpha dated 7 May 2014 before this Court, but which was not before the learned judge, stated that he/she would not give evidence unless protected. It is set out below:

“I am Witness “Alpha”. I made a statement to police in reference to the Murder of the deceased in this matter, Tristan Bartlette, who was killed on 8th February, 2012, allegedly by the Defendants named herein..... [he then stated what he saw....] I emphatically state that I am still in fear for my life in relation to giving evidence in this matter. Also I gave police a statement in this

matter on the condition that my identity remains anonymous and I am protected from serious harm or death that may come to me as a result of giving evidence in this matter. I am afraid of reprisals or deadly consequences that may occur to me when I give evidence in this matter. I am afraid of being killed by the Respondent and/or their Associates if they are granted bail as they have evinced an intention to kill me, they have issued death threats to me, and they told me not to go to the police. I am afraid that if my identity does not remain anonymous that there is no other measure of witness protection that will keep me from harm, danger and possible death. I **will not** [emphasis added] testify if I do not remain anonymous. I have previous convictions for Drugs Possession and Causing Grievous Harm. I have never been involved in any gang activity.” [emphasis added]

12. The above case is instructive as it deals with the requirements for a witness seeking to give evidence anonymously to himself provide a statement (usually an Affidavit) that he will not testify unless he can do so anonymously.
13. Applications for witness anonymity are almost always dealt with conjunctively with applications to give evidence by way of live television link for the witness. And provisions to allow this must be carefully scrutinized as the allowance of such testimony detracts from the constitutional provision for witnesses to testify in person, in court, and in the presence of the accused.

14. Considering the view of the law, as I understand it, the application as presently framed cannot succeed as there is no compliance with the conditions set out in Rule 4A of the Schedule which I find are mandatory.
15. The result is that the application pursuant to section 78 B (1) (b) is denied.

Dated this 11th day of March A.D. 2021

The Hon. Mr. Justice Gregory Hilton