**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT CRI/VBI/89/3/2014**

**Criminal Division**

**Between:**

**THE KING**

 *Applicant*

**VS**

**PETER ROLLE**

**JERMAINE CURRY**

**JUSTIN WILLIAMS**

 ***Respondents***

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

**Appearance: Basil Cumberbatch along with Tabitha Frazier**

 **for the Director of Public Prosecutions**

 **Sonia Timothy for Peter Rolle**

**Murrio Ducille K.C. along with Bryan Bastian for Jermaine Curry**

**Michael Hanna for Justin Williams**

**Hearing Date: 15th March, 2023**

 **Evidence (Amendment) Act No. 13 of 2022. Application for witness to give evidence by video link: Oral Application Procedural Requirements: section 78B(1); schedule to the Act Re: Section 78B(4).**

**RULING**

**HILTON, J.**

1. The Respondents are charged in indictment **No. 86/3/2014** with four (4) counts of Murder and six (6) counts of Attempted Murder alleged to have been committed on 27th December, 2013.

2. The trial was set to commence on the 13th March, 2023 (after two (2) earlier trials on the Indictment were aborted) and the Applicant indicated he wished to make an Oral Application pursuant to Section 78B(1) (a) (b) and (c) of the Evidence (Amendment) Act No. 13 of 2022 to have three (3) Prosecution Witnesses give evidence in the trial by video link.

3. Two (2) of the witnesses the subject of the Application are: Drucilla Moss who is presently bedridden; and Janet Davis who is also presently bedridden and the application for them is based upon Section 78B (1) (b) that they are each elderly and vulnerable persons.

4. The Application for Drucilla Moss and Janet Davis to give evidence by video link was not opposed by the Respondents and the Court, subject to the verification of their vulnerability, will accede to the Application for them to give their evidence by video link.

5. The third witness the subject of the Application is Ashlon Hepburn who is a crucial witness for the Applicant, as he is alleged to have been present at the scene of the shootings and may be considered to be an unindicted accomplice in the trial against the Respondents.

6. The Applicant has orally applied to have this witness give evidence by video link based upon Section 78 B (1) ( c) that the witness is in fear of having to physically testify in the proceedings in court in the presence of the Respondents.

7. The Respondents through their Counsel have each objected to the Application to allow Ashlon Hepburn “the witness” to give evidence by video link and expressed their desire to have the witness physically appear in court to give his evidence in the presence of the Jury**.**

8. The Applicant has submitted that no prejudice to the Respondents will result should the Application be granted and video link testimony is now a very common procedure in court cases. The Applicant also submits that in the interest of justice (due to the fear of the witness and for his safety), the witness should be allowed to give his evidence by video link.

9. Counsel for each of the Respondents have submitted that no evidence has been produced to indicate that the witness is in fear as no Affidavit from the witness had been produced from the witness. Counsel for the Respondents have also submitted that there is no valid reason to depart from the normal procedure in criminal trials for the Accused to face his accuser in the courtroom.

**THE LAW**

10. The relevant provision of the Evidence Act as relates to this application are ***Sections 78B(1), (2) and (4) and Rules 3, 4, 5 and* 6** of the Schedule to the Act which are outlined below:

 **Section 78B (1) reads:**

Any person may give evidence by way of video link in criminal proceedings to which this part applies:-

1. Whether the witness is within or outside the Bahamas;
2. Where the witness is a child, an elderly person, or an otherwise vulnerable person;
3. Where 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 having the physically testify in proceedings in Court.

 **Section 78 B (2) reads:**

2. “Notwithstanding subsection (1), evidence shall not be given by a witness under Subsection (1) without the permission of the Court or upon the Court’s own motion, and in either case, only upon the Court being satisfied that it is in the interest of justice that the evidence be given by video link.

 **Section 78B (4) reads:**

(4) “The provisions of the SCHEDULE shall apply for giving effect to this Part.

 **RULES 3, 4, AND 5 OF THE SCHEDULE READS:**

 **3. Making an application for leave.**

(*1) A court may, of its own motions, direct that a witness appear by way of video link.*

*2. A party to a criminal proceeding who is desirous of the court exercising its power to give leave pursuant to section 78B(2) may make an oral application at any time during such proceedings to the trial judge where the application has become necessary by reason of circumstances beyond the control of, or the need could not have been reasonably foreseen by, the applicant…*

**4. Content of application for video link direction.**

1. A party to a criminal proceeding who is desirous of adducing evidence by way of a video link must give to the court his reasons for wishing to do so.
2. An applicant for a video ink direction shall –

 (a) unless the court otherwise directs, identify the place from which the witness will give evidence;

 (b) show to the court that satisfactory arrangements have been made for efficiently carrying out the giving of evidence by video link;

 (c) if the applicant wants the witness to be accompanied by another person while giving evidence, he shall –

 (i) name the person, if possible; and

 (ii) explain why it is appropriate for the witness to be accompanied.

**5. Evidence of witness on grounds of fear and distress.**

(1) In determining whether a witness falls within section 78(B)(1)(c) the court shall take into account –

 (a) the nature and alleged circumstances of the offence to which the proceedings relate;

 (b) the age of the witness;

 (c) such of the following matters as appear to the court to be relevant namely-

 (i) the social and cultural background and the ethnic origins of the witness;

 (ii) the domestic and employment circumstances of the witness; and

 (iii) any religious beliefs or political opinions of the witness;

 (d) any aggressive or threatening behavior towards the witness on the part of –

 (i) any party to the proceeding:

 (ii) members of the family or associated of the accused; or

 (iii) any other person who is likely to be an accused or a witness in the proceedings.

 (2) In determining the question is paragraph (1), the court must in addition, consider any views expressed by the witness.

11. The Court is of the view that the evidence of the witness Ashlon Hepburn is essential to the case of the Applicant. Indeed this is not disputed by the Respondents.

12. With respect to whether the Applicant, in making the Application “Orally”, has done so in conformity with Rule 3(2) of the Schedule the Court has not been given any information that the application has become necessary by reason of circumstance beyond the control of, or the need could not have been reasonably foreseen by, the Applicant with respect to the witness Ashlon Hepburn.

13. With respect to whether the Applicant has established that 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 having to physically testify in court, the Court has received no information from the witness to that effect. Counsel for the Applicant cannot speak for the witness to comply with the provisions of the Act. Indeed as Rule 5(2) of the Schedule states:-

 “In determining the question in paragraph (1) the Court *must* in addition, consider the views expressed by the witness.”

14. The Court is of the view that the requirements set out in Rule 5 (2) of the schedule are mandatory and in particular, the views expressed by the witness must be 1st person expressed by the witness himself and not 3rd party “hearsay” by the Applicant.

 The Applicant cannot speak for the witness and the Court cannot determine if the witness is in fear to testify in open court without hearing from the witness directly either orally of by statement in writing/Affidavit.

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

 “40. When the Learned Judge heard the application on 5th and 6th May, 2014 the evidence that was before him in support of continuance of the witness Anonymity Order was the same as that which was used to obtained the original order namely: The Affidavit dated 25th September, 2012 sworn by Solomon Cash, Assistant Superintendent of the Royal Bahamas Police Force. The Judge was uncertain, whether the facts had changed. The Affidavit stated that the witness would be reluctant to testify without the order.”

 “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 Afffidavit of witness Alpha, (as distinct from ASP Cash) dated 7th May, 2014, before this Court, but which was not before the Learned Judge, stated that he/she would not give evidence unless protected………”

15. The above case is instructive as it deals with the requirement for a witness seeking to give evidence anonymously to himself provided a Statement (usually by Affidavit) that he will not testify unless he can do so anonymously.

16. Applications for witness anonymity orders are almost always dealt with conjunctively with applications to give evidence by way of video link for the witness; And provisions to allow this must be carefully scrutinized as the allowance of such testimony detracts from the constitutional provision (article 20 (2) (e)) for the witness to testify in person, in Court, and in the presence of the Accused.

17. 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 3(2) and 5(2) of the Schedule to the Act (as amended) which I find are mandatory.

18. The result is that the application pursuant to Section 78B (1) (c) is denied,

**Dated this 20th day of March A.D., 2023.**

**Gregory Hilton**

**Justice of Supreme Court**

**6. Decision of court –**

 **Where the court –**

 **(a) gives leave for a person to gie evidence by way of a video link; or**

 **(b) refuses to give permission, the court shall announce its decision, at the hearing in public before the witness gives evidence.**

**PART II – VIDEO RECORDING OF TESTIMONY FROM CHILD WITNESS**

**1. Application of Part.**

 **This Part applies where the court gives leave under section 78D of the Act for a child to give evidence by way of video recording.**

**2. Making a application.**

 **The court may give leave under rule 3 on –**

 **(a) an application by a party to proceedings; or**

 **(b) the court’s own motion.**

**3. Requirements in case of a child witness.**

 **A party who is desirous of adducing the evidence of a child witness shall as soon as reasonably practicable-**

 **(a) notify the court of the intention to adduce such evidence;**

 **(b) serve any video recorded evidence he proposes to adduce on –**

 **(i) the court officer; and**

 **(ii) each other party.**

**4. Application to very or discharge a direction.**

 **(1) a perty who want the court to vary or discharge a direction shall –**

 **(a) apply in writing, as soon as reasonably practicable, are becoming aware of the ground for doing so; and**

 **(b) serve the application on –**

 **(i) the court officer; an**

 **(ii) each other party.**

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**DECISION**

**[ Criminal Law-Notice of Additional Evidence – requirement of “Reasonable Notice”]**

**Hilton. J.**

 1 The Accused Victoria Gibson is charged with the offence of Murder alleged to have occurred on 10th March, 2017.

She was arraigned in the Supreme Court on a Voluntary Bill of Indictment (VBI) filed on 18th May, 2017 and her original date for trial in April 2022 did not proceed and her trial was re-fixed for 16th January, 2023.

2. Prosecution and Defence Questionnaires were exchanged in Case Management hearings in 2021 and 2022 and at the Pre-Trial hearing on 12th January, 2023 both prosecution and Defence Counsel indicated that they were ready for trial.

 3. Prior to the commencement of trial the Prosecution filed four (4) Notices of Additional Evidence on 4th January, 2023. On the day of trial on 16th January, 2023 after the Jury was empaneled, Counsel for the Accused advised the Court that she would be objecting to two (2) of the Notices of Additional Evidence filed on 4th January, 2023 on the basis that she had not been given “Reasonable Notice” as required by Section 166 of the Criminal Procedure Code.

 4. The two (2) witnesses (with respect to the Notices of Additional Evidence) which the Defence objected to were:

 a) Inspector Ezra Maycock and

 b) Shaquille Wilmore

 Neither of their names appeared on the back of the VBI as witnesses.

 5. Ms. Rea objected to the introduction of the evidence of the two (2) witnesses on the basis that the “Notice” to have these witnesses give evidence was late and not Reasonable and their evidence was purely prejudicial to the Accused with no probative value.

 6. Ms. Cashena Thompson for the Crown submitted that the Notices of Additional Evidence filed on 4th January, 2023 was reasonable and that the Counsel for the Accused made no objection or queries at the Pre-Trial hearing on 12th January, 2023 to their evidence being admitted during the trial. Additionally, Counsel produced a Notice of Additional Evidence document filed in the Criminal Registry on 7th January, 2022 for the witness Shaquille Wilmore, and submitted that the evidence that Inspector Ezra Maycock was expected to give was purely formal in nature as it related to the Accused’s declining to take part in an Identification Parade.

 **7. Section 166 of the Criminal Procedure Code States;**

 ***“166. No witness who has not given evidence at the Preliminary Inquiry shall be called by the prosecution at any trial unless the accused person has received reasonable notice in writing of the intention to call such witness.***

 ***Such notice must state the witness’s name and give the substance of the evidence which he intends to give. It shall be for the court to determine in any particular case what notice is reasonable regard being had to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness’s evidence and decided to call him as a witness.***

 ***Provided that when, under the provisions of section 120 of the code, the plan of a survey or the report of a medical practitioner or analyst has been tendered at preliminary inquiry it shall not be necessary to the prosecution to give notice of the intention to call any such surveyor or medical practitioner or analyst as a witness at the trial of the information.”***

 8. The Law requires that the Defendant receives Reasonable Notice in writing, having regard to the time when and the circumstances under which the Prosecution became acquainted with the nature of the witness’s evidence and decided to call him as a witness.

 9. Counsel for the Accuses submits that the Defence is prejudiced by the late disclosure given the nature of the evidence and the seriousness of the charge.

 10. Counsel for the Crown disputes that the Notice given is unreasonable for Shaquille Wilmore and that the time of the filing of the notice for Inspector Ezra Maycock, while not ideal, is also reasonable; As his proposed evidence is formal in nature and was foreshowed in the Witness Statement of Sgt. 2586 Evans, who is also a witness in the trial and no prejudice arises to the Accused.

 11. I have considered the cases cited by both Counsel for the Accused and Counsel for the Crown.

 I find firstly, that the Notice of Additional Evidence with respect to Shaquille Wilmore was neither late not unreasonable as it was a re-filing of a Notice originally filed on 7th January, 2022 (one year (1yr.) prior to the trial in January, 2023).

 Secondly, that the Noticed of Additional Evidence with respect to Inspector Ezra Maycock (not withstanding it being filed twelve (12) days prior to the trial) is reasonable and it does not prejudice the Accused and additionally on the principle that ALL relevant evidence should be made available to the Jury. I will allow his evidence to be given in the trial.

 12. Consequently, the objection by Counsel for the Accused to the Notices of Additional Evidence is overruled. The evidence of both witness will be allowed to be given in the trial.

**Dated the 20th Day of January, 2023**

 **Gregory Hilton**

**Justice of Supreme Court**