**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: 28th March, 2023**

**DECISION**

 **[Criminal Law – Notice of Additional Evidence - Requirement or Reasonable Notice]**

**Hilton, J.**

1. The three (3) Accused men are charged with four (4) counts of Murder and six (6) counts of Attempted Murder alleged to have occurred on 27th December, 2013.

2. The Accused were arraigned in the Supreme Court on a Voluntary Bill of Indictment (VBI) filed on 18th March, 2014 and their original trials in 2017 and 2019 were aborted for reasons not germain to this Ruling and their present trial commenced on 13th March, 2023.

3. After the jury was empanelled and some twenty one (21) witnesses were called the Crown on 28th March, 2023 filed and served on the Defence a Notice of Additional Evident (NOAE) for Chief Superintendent Anton Rahming who they wished to call and whose evidence substantially would be that on 19th February, 2014 he was given information by the Director of Public Prosecution Mr. Garvin Gaskin that because of the particular characteristics of the Accused Justin Williams an Identification Parade should not be conducted for him and that instead a twelve (12) man photo array should be utilized.

4. Chief Superintendent Anton Rahming’s name was not on the back of the VBI as a witness.

5. All Defence Counsel objected to the introduction of this evidence after the trial had commenced on the basis that the non-disclosure of this evidence to the Defence prior to the trial commencement was prejudicial to the Defence and additionally the content of the evidence was hearsay and should not be allowed.

 Defence Counsel also submitted that this evidence now sought to be led by the Crown was available to the Crown from February 2014 and it would be unfair to the Defence to allow this evidence at this late stage.

 Prosecution Counsel Mr. Basil Cumberbatch’s response was that while the notice to adduce the additional evidence was late, the evidence was important for the Crown’s case and was formal in nature and the evidence should be allowed. He gave no reason or explanation as to why the late service of the NOAE occurred

6. In determining whether to permit the Crown to adduce the evidence of the Notice of Additional Evidence, the Court must consider the provisions of Section 166 of the Criminal Procedure Code which governs the introduction of additional evidence. This section provid**ed:-**

 ***“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.”***

 The law required that each of the Defendants receive 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**.**

7. In this case the service of the Notice of Additional Evidence two (2) weeks after commencement of trial and after Case Management and Pre-Trial hearings in which the Prosecution indicated to me that they were “ready” for the trial does not appear to me to be considered reasonable notice.

8. The Constitution of the Bahamas Article 20 (C) guarantees the right of every Accused person to “Adequate time and facilities for preparation of the Defence:’

 **Section 166 of the C.P.C. states that the Accused must be given “Reasonable Notice**.”

 These Statutory and Constitutional provisions are not placed there in vain. They are placed there primarily to ensure that an Accused person receives a fair trial and is not confronted with or by new evidence which he had not had time to prepare for.

9. With respect to the NOAE the Court noted that Chief Superintendent Rahming would have been in possession of the information the Crown now seeks to adduce from 19th February, 2014. His statement would have been available to the Prosecution from that date which was approximately one (1) month prior to the filing of the VBI on 1st March, 2014.

 None of the Accused nor their Counsel were advised by the Crown regarding the existence of this witness until two (2) weeks after the commencement of the trial on 13th March, 2023.

10. I have considered the cases cited by both Counsel for the Crown and Counsel for the Accused. I do not consider that the NOAE was reasonable having regard to the time when the evidence was available to the police and the service of the NOAE two (2) weeks after the commencement of the trial.

11. I am also of the view that while “relevant” evidence should generally be allowed in Criminal Trials, the evidence sought to be adduced would amount to hearsay and is not merely formal and to allow this evidence would affect the fairness of the trial.

12. It cannot be overstated that proper and timely disclosure of relevant evidence must be done in criminal cases. Fairness in criminal trials means fairness to both the Prosecution and the Defence.

13. As was said by ***DaCosta J. in R. v. Flowers Bahamas Supreme Court 95/10/1979*** at page 3;

 “ **The case before me is one in which no explanation has been offered by the Crown as to why evidence which appears to have been known or at least forthcoming at the Preliminary Inquire, was not led there. I refuse to allow it to be adduced as additional evidence at this stage”.**

 In the present case the evidence the subject of the NOAE would have been known prior to the filing of the VBI in March of 2014 but still the witness name was not put on the back of the VBI as a witness.

14. I would also refer to the comment of late Senior Justice Stephen Isaacs *in*

 ***R.v. Bain, McKenzie and Nottage Bahamas Supreme Court No.96/9/2008.***

 **“… Service of a Notice of Additional Evidence after a trial commences is to be disapproved generally, and the Crown appropriately chastised for such conduct.”**

15. In all the circumstances, I find that the Notice of Additional Evidence filed on 28th March, 2023 is not reasonable and will not allow the Prosecution to call the additional witness,

**Dated this 29th day of March, 2023**

**Gregory Hilton**

**Justice of Supreme Court.**