[2018] JMSC Crim 3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HOME CIRCUIT CASE MANAGEMENT COURT

CASE NO. HCC 31/17 (1)

IN OPEN COURT

THE QUEEN

V

KIMEO GREEN

Joel Brown, Crown Counsel, instructed by Office of the Director of Public Prosecutions for the Applicant

Richard N. Lynch, instructed by Peter Champhagnie for the Respondent

The Evidence (Special Measures) Act 2012 – The Evidence (Special Measures) (Criminal Jurisdiction) (Judicature) (Supreme Court) Rules 2016 – Application for main witness to give evidence by live link – Appropriate circumstances for use of special measure of live link – Definition of vulnerable witness – Witness said to be in fear but no allegation of actual threat – Right of accused to a fair trial – Credibility significant issue – Risk of incurable prejudice to the accused – Overall interests of the administration of justice.

June 27, July 31 and November 7, 2018

D. FRASER J

INTRODUCTION

[1] On July 31, 2018, I refused the application filed on November 9, 2017 by the prosecution for a Special Measures Direction to permit the sole alleged eyewitness in the case against the respondent to give evidence by live video link. I promised to provide reasons in writing. I now fulfil that promise.

BACKGROUND

[2] It is alleged that Mr. O'Neil Reid was shot and killed on September 19, 2013. On September 26, 2013 Ms. Roxanne Shepherd (R.S.), an alleged eyewitness to events surrounding that shooting, gave a statement in which she did not indicate she saw the respondent at the time of the events.

[3] Almost two years later on August 18, 2015, R. S. gave a further statement in which she indicated she saw the respondent but did not call his name because of fear of reprisals among other things.

[4] The case against the respondent first came before the Home Circuit Court on January 9, 2017. The matter was subsequently set for trial on two dates, not listed in the application, on neither of which R. S. attended. On October 17, 2017, R.S. spoke to a prosecutor from the Office of the Director of Public Prosecutions indicating that she was fearful and did not wish to attend court the following morning. However as stated in the application, "after much persuasion" she agreed to attend. That assurance did not bear fruit. The following morning October 18, 2017, R. S. called the said prosecutor and indicated that after much thought, including about her family members, she was not going to attend.

[5] Later that same day, the investigating officer indicated in court that R. S. was reluctant to attend. The officer was instructed by the court to have her at court, observations being made from the bench that if R. S. was going to waver like this, it would not make sense for the matter to remain on the list. A witness

summons was issued for R. S. to attend on October 23, 2017. She was brought on that date and in court indicated she heard there were other options to giving evidence rather than being in the same courtroom with the accused man, and would prefer one of those options.

THE APPLICATION

The Applicant's Position

[6] R.S. having given that indication the prosecution applied for a Special Measures Direction pursuant to the **Evidence (Special Measures) Act** ("the Act") that R. S. be permitted to give evidence in the case against the respondent by live video-link from another room on the Supreme Court building. Under Part A of the written application, the prosecution sought an extension of time pursuant to Rule 6 (2) of **The Evidence (Special Measures) (Criminal Jurisdiction) (Judicature) (Supreme Court) Rules** 2016 ("the Rules") on the basis that the prosecution first became aware that the witness desired special measures in court on October 23, 2017.

[7] The prosecution sought to ground the eligibility of the witness for the use of special measures on her fear or distress. In explaining why special measures would be likely to improve the quality of her evidence, the prosecution relied on the chronology outlined in the background and continued at B3 of Form 1 prescribed in the Rules as follows:

> [T]he witness being so afraid as to not call the accused man's name in her first statement to the police indicates that her having to now face the accused man in court could also have a drastic impact on the quality of her evidence. This is also coupled with the fact that the witness was visibly shaken and fearful of going into court with the accused man to mention the matter.

[8] Concerning why the court should find the special measure appropriate in the interests of the administration of justice the application records at section B4 that,

> As *(sic)* allegation has been made and the interests of justice demand that the allegation be tested. The only available option for the evidence to be tested at this time is via Live Link with the witness giving evidence from another room. The witness not having to be in the same room as the accused or look at him would provide some level of calm for her and allow her evidence to be led without *(sic)* quickly and without as much fuss as her having to come into the courtroom where the accused man is.

[9] Section B6 of the Form queries and notes as follows: "*What has been done to help the witness express an informed opinion about special measures?* Care must be taken to explain to the witness (a) what is meant by special measures, (b) what measures (s) may be available, and (c) what they would involve for the witness." Under this section it was noted that,

> The witness stated her position unprompted and indicated that she heard that there were other options available and she would want to use one of those options. It was after she stated this that the options were explained to her fully.

[10] Section B7 asks what views the witness has expressed about a) his or her eligibility; b) whether special measures would be likely to improve the quality of his or her evidence; and c) the measures proposed. Under a) it is recorded that, *"She expresses that she would be willing to adopt any course that would allow her to not have to come in the same room as the accused man".* Regarding b) it was stated that, *"Without live link the quality of her evidence would be greatly diminished or she may refuse to attend court to give the evidence."* Concerning c) as was already indicated, the request was for *"Live Link from another room on the building".*

The Respondent's Position

[11] The respondent strenuously objected to the application on a number of grounds. Firstly, that R. S. does not satisfy the criteria of being a vulnerable witness therefore she was ineligible for special measures. It was argued that the factors which the court must consider under section 2 (3) of the **Evidence (Special**

Measures) Act 2012 ("the Act") are conjunctive and have not all been established.

[12] Further even if the court were to find that R.S. was capable of qualifying as a vulnerable witness it was contended that the use of the requested special measure would breach the respondent's constitutional right to a fair hearing. This in a context where R. S. is the only witness to fact and her credibility is seriously in issue as she has given two conflicting statements concerning the respondent's involvement in the murder, citing fear of reprisal as the reason.

[13] Counsel therefore advanced that the use of the special measure would carry a risk of intimation to the jury that the reason given by R. S. for her two conflicting statements was true, in a context where the reason for the conflicts is disputed by the respondent, who maintains his innocence. The court was therefore invited to hold the witness was requesting the measure as a mere convenience and deny the application. Counsel relied on the Act; the **Charter of Fundamental Rights and Freedoms** and the cases of ***Steven Grant v R*** [2006] UKPC 2; ***R v Steven Ragan*** 2008 ABQB 658; ***R v Young*** 2000 SKQB 419; ***S.D.L. v R*** 2017 NSCA 58; and ***O'D v Director of Public Prosecutions & Anor*** [2009] IEHC 559.

THE APPLICATION FOR EXTENSION OF TIME

[14] Rule 10 (1) of the Rules provides that an application for a live link direction should be made using Form 1 of the Rules, filed in the Court registry and served on any other party to the criminal proceedings. Rule 10 (2) indicates that the application should be made, "within 5 days of the first appearance of the accused before the Circuit Court at which the evidence is to be given".

[15] The application in this matter indicates that the respondent first came before the Home Circuit Court on January 9, 2017. The application was however filed on November 9, 2017. Rule 6 empowers the court to extend time for the application for a direction and directs that where such an application for extension is made

any delay shall be explained. As indicated earlier, the applicant incorporated an application for extension of time within the substantive application and relied on the fact that it was not until October 23, 2017 when R. S. attended court that her desire to request the use of special measures was first known. Even after this belated notice the application was made more than 5 days later but not significantly so. The respondent did not raise any opposition to the application for extension of time. Having assessed the application, it was appropriate in the circumstances for the extension to be granted, given the time when the prosecution became aware of the witness' position. Further the fact that the delay after the position was discovered was 17 days, did not in any way prejudice the ability of the respondent to resist the application.

THE LAW IN THE SUBSTANTIVE APPLICATION

[16] Turning to the substantive application, subsections 3 (1) and (5) of the Act which outline the basis on which an application can be made and considerations for the granting of a direction for a special measure, in circumstances relevant to this case are set out below:

> 3.— (1) Subject to the provisions of this section, in any proceedings, on application by a party to the proceedings or on its own motion, the court may issue a direction that a special measure, or a combination of special measures, shall be used for the giving of evidence by a witness if—
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> > (a) in the case of a witness in criminal proceedings other than the accused, the court is satisfied that the special measure is appropriate in the interests of the administration of justice, in accordance with subsections (5) and (6); and—
> >
> > > (i) the witness is a vulnerable witness; or
> > >
> > > (ii) the witness is available to testify, but it is not reasonably practicable to secure his physical attendance at the proceedings;
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> (5) Subject to subsection (6), in determining whether a special measure is appropriate in the interests of the administration of justice under subsection (1), the court shall consider

> (a) any views expressed by or submissions made on behalf of the witness;
>
> (b) the nature and importance of the evidence to be given by the witness;
>
> (c) whether the special measure would be likely to facilitate the availability or improve the quality of that evidence;
>
> (d) whether the special measure may inhibit the evidence given by the witness from being effectively tested by a party to the proceedings; and
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> (e) any other matter that the court considers relevant.

[17] Subsections 2, 3, 4, 6 and 7 that deal respectively with issues of the availability of special measures, considerations related to complainants in sexual offences, the reasonable practicability of securing the physical attendance of the witness, and considerations in relation to child witnesses are not or not directly engaged in this application.

[18] Relevant definitions outlined in section 2 of the Act are:

> "live link" means a technological arrangement whereby a witness, without being physically present in the place where proceedings are held, is able to see and hear and be seen and heard by the following persons present in such place—
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> (a) the judge, Parish Judge or Coroner:
>
> (b) the parties to the proceedings:
>
> (c) an attorney-at-law acting for a party to the proceedings:
>
> (d) the jury, if there is one:
>
> (e) an interpreter or any other person permitted by the court to assist the witness: and
>
> (f) any other person having the authority to hear and receive evidence:

"special measure" means the giving of evidence by a witness in proceedings, by means of a live link or video recording, in the manner and circumstances provided for pursuant to the provisions of this Act;

"witness" means in relation to any proceedings, a person who has given, has agreed to give or has been summoned or subpoenaed by the court to give evidence.

(2) For the purposes of Part II, a witness is a vulnerable witness if

(a) the witness is a child witness at the time that an application or a motion under Part II is being determined by the court;

(b) the witness is a complainant in criminal proceedings relating to a sexual offence; or

(c) the court determines in accordance with subsection (3) that the evidence of the witness is unlikely to be available to the court, or the quality of the evidence if given in court by the witness is likely to be diminished as regards its completeness, coherence or accuracy, by reason of—

i) fear or distress on the part of the witness in connection with testifying in the proceedings; or

(ii) the fact that the witness has a physical disability, physical disorder or suffers from a mental disorder within the meaning of the Mental Health Act.

(3) In determining whether the evidence of the witness is unlikely to be available to the court or the quality of his evidence is likely to be diminished under subsection (2) (c), the court shall consider—

(a) in the case of criminal proceedings, the nature and circumstances of the offence to which the criminal proceedings relate;

(b) the age of the witness;

(c) any threat of harm made to the witness, a family member of the witness or any other person closely associated with the witness, or to any property of the witness;

(d) any views expressed by or submissions made on behalf of the witness; and

(e) any other matter that the court considers relevant.

[19] Other directly relevant sections of the Act include:

> 6.—(1) A direction issued under Part II may provide for a witness to give evidence by means of a live link.
>
> 8 (2) Evidence given by a witness in accordance with a direction issued under Part II shall be admissible to the same extent and effect as if it were given in direct oral testimony.
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> (4) Where evidence is given in accordance with a direction issued under Part II in criminal proceedings involving a trial by jury, the court shall give the jury any warning, that it considers necessary, to ensure that the fact that the direction was given does not prejudice the accused.

ANALYSIS

[20] I agree with counsel for the respondent that the defendant's constitutional right to a fair hearing is always engaged when the appropriateness of giving a direction as to a special measure is assessed, especially where the direction is opposed. The right to a fair hearing is absolute. However it is well established that procedures apart from traditional approaches may be invoked in the course of a fair trial. It is also well worth remembering that the tried and tested traditional approaches remain preferred, unless there are demonstrated good reasons for departure from them. This sentiment was echoed in the case of ***Steven Grant v R*** that considered the constitutionality of provisions of the **Evidence Act** that permit documentary evidence of witnesses' statements to be received at trial in their absence where witnesses are proved to be unavailable, in keeping with one or more conditions precedent. At paragraph 14 the Judicial Committee of the Privy Council stated,

> The evidence of a witness given orally in person in court, on oath or affirmation, so that he may be cross-examined and his demeanour under interrogation evaluated by the tribunal of fact, has always been regarded as the best evidence, and should continue to be so regarded. Any departure from that practice must be justified.

[21] The prosecution maintains that R. S. is a vulnerable witness because she is in fear and distress at the prospect of appearing in the same courtroom as the respondent. The prosecution contends that the evidence of the witness is unlikely to be available to the court or the quality of her evidence is likely to be diminished if the direction is not granted as prayed.

[22] Under section 2(3) the court is mandated to consider the factors listed in section 2 (2) (c) when assessing the effect on the likely availability or quality of the evidence of the witness if the direction is not obtained. These factors include the nature and circumstances of the offence to which the criminal proceedings relate, the age of the witness, any threats made to the witness, a family member, close associate or property of the witness, views expressed by or submissions made on behalf of the witness and any other factor the court considers relevant.

[23] No local case has been brought to the attention of the court that has addressed the issue to be decided. Guidance will therefore be sought from persuasive authorities from other jurisdictions cited by counsel for the respondent. It will of course be borne in mind that those authorities are underpinned by different legislative provisions and care will have to be exercised in determining to what extent the principles they espouse can be adapted for use and adopted in this jurisdiction.

[24] The first issue I will address does not however rely on any case law for resolution. It concerns a textual interpretation of the Act. Counsel for the respondent argued that R. S. was not a vulnerable witness as all the factors under section 2(3), which should be read conjunctively were not satisfied. In particular counsel submitted that the absence of any allegation of a threat to her, her family, associates or property essentially meant that the criteria had not been met.

[25] I disagree. A witness is deemed to be vulnerable under section 2 (2) if the witness a) is a child, b) the complainant in criminal proceedings relating to a

sexual offence or c) by reason of fear/distress or physical/mental disorder his evidence would be unavailable or diminished in quality unless the direction for a special measure is made. Section 2 (3) is supportive of section 2 (2) (c) and outlines five considerations that the court shall take into account in determining whether the evidence would actually be unavailable or diminished in quality as alleged.

[26] There are different ways in which the conjunctive is used in statutes. I can think of at least two. There are statutes where the use of the conjunctive means that all the factors listed have to be present before a certain threshold is achieved. There is another use such as exists in section 2 (3), where all factors listed have to be considered, but it does not mean that if one or more does not apply in a particular circumstance, vulnerability of the witness cannot be established. The way the factors are listed in section 2(3) actually make that interpretation clear. The first two will exist in every case and the listing accounts for that. So **the** nature and circumstances of the offence to which the proceedings relate and **the** age of the witness have to be considered. The next three factors are necessarily expressed in a conditional manner *viz* **any** threat…, **any** views of the witness or submissions made on the witness' behalf and **any** other factor the court considers relevant. (Emphases all added.) None of these latter three factors need be present, (though views or submissions would be expected), but if they are they must be considered.

[27] The flaw in the respondent's argument is poignantly demonstrated in that taken to its ridiculous extreme it could mean that unless the court thought of some other relevant factor, even if the first four were present the witness could not pass the test to be classified as vulnerable. Accordingly, I do not find any merit in the argument as framed. I however leave open the question for later in the judgment whether or not sufficient evidence has been adduced to establish that the witness is indeed a vulnerable witness based on the criteria outlined in the Act.

[28] To facilitate moving on to the other bases of challenge to the direction sought, I will therefore assume at this point that the vulnerability of the witness has been established. The case that counsel for the respondent submitted was directly applicable to the present application is ***O'D v Director of Public Prosecutions & Anor.*** In that matter charges against the applicant averred that the alleged victims of sexual abuse, were mentally impaired. They were two of his cousins who were in their 40's. The **Criminal Evidence Act** 1992 provides that for relevant offences, (which include sexual offences), evidence can be given by video link where a) the witness is under 17, unless the court sees good reason to the contrary or b) in any other case with the leave of the court. The Act also in effect provides that persons who suffer from mental impairment who have attained the age of 17 will be deemed to fall under a). In an express attempt to avoid pre-judgment of the issue whether the complainants suffered from mental impairment, the DPP stated the application was brought under limb b).

[29] In ruling on the application made by the DPP the court took into account evidence received in a previous hearing from a social worker assigned to one of the complainants where the issue was whether the complainants could travel to another city, (where some of the offences were alleged to have occurred), to be assessed by a defence psychiatrist. The effect of her evidence was that the complainants had significant levels of mental disability, would suffer severe disruption in their lives if they had to travel to be examined and that in respect of the complainant she had worked with in a court case, "it would be advantageous were she permitted to give testimony by means of video-link."

[30] The issue that arose for determination in the review hearing was whether the complainants giving evidence by video link would create a real risk that the accused would not get a fair trial because the manner of the receipt of their evidence could or would convey to the jury that the complainants had mental impairments, a matter which the applicant disputed as part of his defence.

[31] In outlining the court's reasoning O'Neill J stated that neither a prosecution explanation nor judicial directions to the jury would suffice to ensure that the complainants giving evidence by video link would not convey an implication or determination that the complainants suffered from mental impairment.

[32] At paragraph 5.6 he discussed the considerations to be taken into account by a court in ruling on such applications as follows:

> Where the Court reaches the conclusion that the giving of evidence in this way carries with it a serious risk of unfairness to the accused which could not be corrected by an appropriate statement from the prosecution or direction from the trial judge, it should only permit the giving of evidence by video link where it was satisfied by evidence that a serious injustice would be done, in the sense of a significant impairment to the prosecution's case if evidence had to be given in the normal way, viva voce, thus necessitating evidence by video link in order to vindicate the right of the public to prosecute offences of this kind. The fact that the giving of evidence viva voce would be very unpleasant for the witness or coming to court to give evidence very inconvenient, would not be relevant factors. In all cases of this nature the giving of evidence by the alleged victim will be very unpleasant and having to come to Court is invariably difficult and inconvenient for most persons...The real question is whether the circumstances of the witness are such that the requirement to give evidence viva voce is an insuperable obstacle to giving evidence in a manner that does justice to the prosecution case. **The evidence must establish to the satisfaction of the Court hearing the application under s.13 of the Act of 1992 that the probability is that the witness in question will be deterred from giving evidence at all or will, in all probability, be unable to do justice to their evidence if required to give it viva voce in the ordinary way**. This is necessarily a high threshold, but I am satisfied that in order to strike a fair balance between the right of the accused person to a fair trial and the right of the public to prosecute offences of this kind, it must be so. (Emphasis added)

[33] O'Neil J found that the test had been incorrectly applied. Reliance had in fact been placed on the previous finding of mental impairment in the earlier application that related to the venue of the psychiatric assessment. Further, the determination had been incorrectly made on the basis that the giving of evidence by video link would be "advantageous" and not on the evidence being

unavailable or susceptible to being seriously compromised in quality if not given by video link. Accordingly, O'Neil J granted an order of certiorari quashing the court order permitting the complainants' evidence to be given via video link. The matter was sent to the circuit criminal court for rehearing.

[34] It must be immediately observed that the legislative framework considered in ***O'D v Director of Public Prosecutions & Anor.*** is nowhere near as extensive as that contained in the Act. Only two sections of the **Criminal Evidence Act** of 1992 were applicable whereas the Act is tailor made to focus on special measures. For present purposes what needs to be highlighted are the similarities and differences between both acts in the determination of who is eligible to testify by video/live link.

[35] In ***O'D v Director of Public Prosecutions & Anor*** the facility to testify by video link in trials involving relevant offences was limited to persons under 17 or those who were mentally impaired. Essentially a test of vulnerability based on age or mental capacity, though the phrase "vulnerable witness" is not used in the **Criminal Evidence Act** 1992. The additional test applied by the judge, which I highlighted in the section extracted from the judgment, concerning the need for the crown to additionally prove that the testimony would be unavailable or its quality seriously compromised if not received by video link, appears to have been a judicial construct and superimposition as it does not appear in The **Criminal Evidence Act** 1992. That construct apparently emanated from the proviso whereby the evidence of a person under 17 or mentally impaired could be received by video link, *"unless the court sees good reason to the contrary."*

[36] The apparently superimposed construct is similar to the test in the Act where vulnerability is based on a witness' i) fear or distress, or ii) physical disability or physical/mental disorder. (See s. 2(c)). What is significant though is that in the Act that test or conditionality of vulnerability applies only to the last two of four categories of witnesses whom the Act deems vulnerable. In the Act if a witness is a) a child or b) a victim of a sexual offence, either of those facts conclusively

establishes that witness as vulnerable, without the need for proof that their evidence would be otherwise unavailable or its quality diminished if not allowed to testify by live link. (See s. 2(a) & (b)). Distinctions between categories of vulnerable witnesses in the Act will be further discussed in later analysis.

[37] The cases of ***R v Steven Michael Ragan*** and ***R v Allen***, 2007 ONCJ 209 show the importance of carefully considering the basis on which an application for reception of evidence by video link is made and the limits of utilising case law based on a different legislative framework than the Act. In ***Steven Michael Ragan*** the accused was charged with conspiracy to murder and assault. The police investigation into the alleged conspiracy commenced when they were called to the house of Mr. Bissett. He was found on the floor armed, wearing a bullet proof vest and suffering from a gunshot wound to the head. He told the police that he had been hired by the accused and a neighbour to kill relatives of the neighbour. He also told the police that he had spent an advance given to him by the accused but never intended to fulfil the contract.

[38] The accused's potential involvement in Mr. Bissett's shooting was investigated but no charges laid. Mr. Bissett's assailant remained unknown. Mr. Bissett suffered a significant brain injury from the shooting. Overtime his physical injuries improved but apparently he had "persistent anxiety". He indicated he was fearful of his safety should he testify in person, which prompted the crown to make an application to have his evidence received by video link.

[39] The crown brought the application under section 714.1 of the Criminal Code which reads:

> A court may order that a witness in Canada give evidence by means of technology that permits the witness to testify elsewhere in Canada in the virtual presence of the parties and the court, if the court is of the opinion that it would be appropriate in all the circumstances, including
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> (a) the location and personal circumstances of the witness;
>
> (b) the costs that would be incurred if the witness had to be physically present; and

(c) the nature of the witness' anticipated evidence.

[40] Though the crown's application was brought under section 714.1 the court also considered section 486.2. Section 486.2 (4) states in part:

> 486.2(4) Despite section 650[1], if an accused is charged with an offence referred to in subsection (5)[2], the presiding judge or justice may order that any witness testify
>
> > (a) outside the court room if the judge or justice is of the opinion that the order is necessary to protect the safety of the witness; and
> >
> > …

[41] Section 486.2(3) requires the court to consider factors outlined in s. 486.1(3) when determining whether to grant and application under section 486.2(4). Section 486.1(3) reads:

> 486.1(3) In making a determination under subsection (2), the judge or justice shall take into account the age of the witness, whether the witness has a mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstance that the judge or justice considers relevant.

[42] Having analysed s. 714.1 and s. 486.2, Topolniski J concluded that s. 714.1 did not apply as it related to Mr. Bissett's safety concerns as applications for video link testimony based on witness safety fell under s. 486.2. That section however did not apply as the offences charged did not satisfy the precondition for s. 486.2 to be engaged. The court however went on to consider whether in all the

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[1] Deals with the default position that the accused should be present in the courtroom at trial subject to certain exceptions which all have safeguards.

[2] The offences of conspiracy to murder and assault do not fall within subsection 5. The offences listed relate to serious offences associated with a criminal organization, terrorism offences and certain offences under the Security of Information Act in Canada.

circumstances Mr. Bissett should be allowed to testify via video link pursuant to s. 714.1.

[43] Before continuing to address the court's analysis concerning the application of s. 714.1, it is perhaps best to interpose a consideration of the case of ***R v Allen***, given the pronouncements made in that case concerning the effect of s. 714.1. In ***Allen*** a preliminary inquiry was to be held into the murder of a man allegedly killed because of a drug debt owed to a drug cartel. There was reliable information that the main witness, an informant on the witness protection programme was to be killed and the only opportunity would be his attendance at court. There was also another witness, the girlfriend of a co-accused who was also afraid of her safety, and though not on the programme had removed to a secret location. The crown applied under s 714.1 for their evidence to be taken by video link.

[44] Duncan J having reviewed several authorities, held at paragraph 9 that s 714.1 did not address witness safety but rather permitted the court, *"to receive evidence by video-link upon conducting a sort of distance-cost, benefit-prejudice analysis. It is no coincidence that most of the case law arises from the more remote regions of Canada."* Further he noted at paragraph 10 that an examination of s. 486.2 disclosed that it was inappropriate to interpret s.714.1 as providing some residual authority in cases of witness safety in light of the limiting parameters of s.486.2 (4) & (5) which, *"would render those limitations and the section itself, redundant."*

[45] In assessing the application of s. 486.2 he opined at paragraph that:

> [W]here Parliament has authorized the use of new technology to address a problem, courts should not hesitate to embrace it, where appropriate. There should be no bias in favour of doing things the traditional way. Here the court has been given a tool that provides a perfect solution to the problem of witness safety. I would think that, before a court refuses to use it, there must be some very substantial downside to doing so.

[46] In considering the issues raised by the defence such as the time-delays that may make cross-examination difficult and the possible challenges with assessing credibility, Duncan J indicated that the matter before him was a preliminary inquiry and not a trial where the balance on such matters might well be different. Credibility was not in issue at a preliminary inquiry. He did however advert to a number of authorities which suggested that the assessment of credibility was not necessarily impeded where evidence was received by video-link. He ruled that the main witness' evidence should be received by video-link and the other witness against whom there was a less credible threat should testify in person.

[47] The fact that the purpose of s.714.1 is not to protect vulnerable witnesses but to promote the receipt of evidence at reduced cost and enhanced convenience must be actively borne in mind in the assessment of the value of applying jurisprudence derived from its interpretation, to the determination of whether live link evidence should be permitted in this case.

[48] Turning once again to the case of ***Steven Michael Ragan*** applying s. 714.1, the court stated at paragraph 58 that:

> The Crown in the present case has not produced compelling evidence for testimonial accommodation. Mr. Bissett is a critical witness. His evidence is controversial and credibility will be highly contested. Compounding the credibility assessment is that a jury, inexperienced in the fine points of making such assessments, will be undertaking the task. It is also a factor that, even with the best of cautions against prohibited reasoning, the jury might infer from Mr. Bissett testifying by video link that the accused was connected with his shooting.

[49] Accordingly the court denied the application holding that alternate measures could be taken to address Mr. Bissett's anxiety.

[50] The final case I will briefly review before turning to my final analysis is ***R v S.D.L.*** In that case the appellant who was convicted of sexual offences, challenged the trial judge's decision to allow the main evidence against him coming from the complainant and his mother to be given by video link. The Nova Scotia Court of

Appeal considered the principles that should guide determinations whether video link evidence should be allowed under s. 714.1.

[51] The second of the eight principles distilled was that, "*when credibility is an issue, the court should authorize testimony via 714.1 only in the face of exceptional circumstances that personally impact the proposed witness. Mere inconvenience should not suffice.*" Included among the other principles was the importance of good quality control measures and a sufficient evidentiary basis for the application. Considering that credibility was the only issue, the absence of an evidentiary basis for the crown's request and the significant technical problems which "broke the flow" of the witnesses' testimony, it was held that the appellant had been denied an opportunity to make a full answer and defence. The appeal was allowed, convictions set aside and a new trial ordered.

Is R.S. a Vulnerable Witness?

[52] Pursuant to section 2(2)(c)(i) and 2(3) the court has to be satisfied that due to fear or distress on the part of R.S., in connection with testifying in the proceedings, her evidence is unlikely to be available to the court, or the quality of her evidence if given in court is likely to be diminished as regards its completeness, coherence or accuracy. To assess whether her evidence is likely to be rendered unavailable or diminished the court is required to consider 5 factors. I will list and consider each in turn.

a) *in the case of criminal proceedings, the nature and circumstances of the offence to which the criminal proceedings relate*

In the application the prosecution did not include any details of the incident beyond the fact that R.S. was an alleged eye witness who saw the accused and other men armed with firearms jump a wall. There was no indication of the circumstances of the killing, the connection if any of the witness to the deceased, how the witness may have been affected at the time of the incident or any other factor that might explain why she suffers fear leading her to seek the

accommodation of testifying by live link. These types of factors must be considered in a context where it is a given that for the average person witnessing especially violent crime is likely to be an upsetting experience that is unpleasant to recount in a testamentary environment. There needs therefore to be specific information supporting the application that does not rely on generic assumptions or speculative inferences.

b) *the age of the witness*

No information was provided on the witness' age. However based on the nature of the discussions she reportedly had with crown counsel and the fact that she was subpoenaed, it is clear she is an adult.

c) *any threat of harm made to the witness, a family member of the witness or any other person closely associated with the witness, or to any property of the witness;*

No allegation of any threat of harm was made in the application

d) *any views expressed by or submissions made on behalf of the witness*

The most substantial information was provided here. It was indicated that the witness stated in open court that she heard there were other options available and she would want to use one of those options. It was submitted on her behalf in the application that *"…the witness being so afraid as to not call the accused man's name in her first statement to the police indicates that her having to now face the accused man in court could also have a drastic impact on the quality of her evidence. This is also coupled with the fact that the witness was visibly shaken and fearful of going into court with the accused man to mention the matter."* It was also submitted in the application that ,*"The witness not having to be in the same room as the accused or look at him would provide some level of calm for her and allow her evidence to be led without (sic) quickly and without as much fuss as her having to come into the courtroom where the accused man is."*

e) *any other matter that the court considers relevant*

Nothing was canvassed under this head at the time of the application as the primary challenge was based on the purported prejudicial effect that the witness testifying in this manner would have on a jury. That issue I will shortly turn to. However, before leaving this matter, on reflection in an application like this, it may be relevant for the court to also be advised of factors such as:

i) the reason why the witness eventually came forward despite his/her initial fear;

ii) subject to the need to avoid the disclosure of any sensitive security information, whether any other formal or informal steps have been taken to address the witness' fear, and if not;

iii) whether testifying by live link would be, by itself, an adequate means of addressing the witness' concerns.

[53] The most serious omission is the absence of any detail concerning the nature and circumstances of the offence. That information must necessarily be the foundation on which a court can assess the claim that the witness is suffering fear or distress in relation to testifying in the proceedings about the offence. As I indicated earlier in the judgment, information on the nature and circumstances of the offence to which the criminal proceedings relate and the age of the witness would be expected in every application, while the other factors may always not be present; though one would reasonably also expect some expression of views by the witness and/or submissions on the witness' behalf in almost every case. On the basis of the omission of the information required under section 2 (3) (a) the application must fail.

[54] This "evidential" insufficiency could however be cured and there is nothing in the legislation that prevents a renewed application. In fact, Form 1 anticipates the possibility of more than one application as it queries whether an application has

been made before. On the basis that there could be a renewed application and also the possibility that I could be wrong in my finding of "evidential" insufficiency, I will go on to consider the main challenge to the making of the direction.

Is the special measure appropriate in the interests of the administration of justice?

[55] Whether a witness' status as vulnerable is deemed based on age/being an alleged victim of a sexual offence or contingent on the witness' state of mind or physical or mental health, there are specified safeguards set out in s 3 (5) that the court has to consider. As I did earlier in relation to the factors set out under section 2 (3), I will consider and address in turn each of the factors under s. 3 (5).

a) *any views expressed by or submissions made on behalf of the witness*

These have already been considered.

b) *the nature and importance of the evidence to be given by the witness*

There is no doubt that the evidence is crucial for the prosecution. She is the only eyewitness as to fact. From the prosecution's standpoint this is a powerful reason to ensure that her evidence is available as without her there would be no case. From the defence standpoint that is a critical factor that should lead the court to refuse the application. It is contended that the main evidence should if at all possible be given in court. See ***R v Heynen,*** 2000 YTTC 502 at para. 323 (b) (ii) included in ***R v Ragan*** at para. 39. Further the defence has challenged the bona fides of the reason R. S. has given for changing her statement to implicate the respondent.

I will not decide the application on this point as there has not been full argument on it and in light of observations I make later at paragraphs 56 to 58.

c) *whether the special measure would be likely to facilitate the availability or improve the quality of that evidence*

The prosecution essentially maintains that the evidence of the witness may well be unavailable unless the special measure is granted and given her state of fear the quality would be improved if she testified out of the actual but in the virtual presence of the accused. The witnesses stated position does support a conclusion that the granting of the special measure would facilitate the availability and improve the quality of the evidence. This position is however weakened by the "evidential" insufficiency earlier highlighted which hampers the court arriving at a robust finding in that regard.

d) *whether the special measure may inhibit the evidence given by the witness from being effectively tested by a party to the proceedings*

i) The most significant concern raised by the respondent is that the use of the special measure would carry a risk of intimation to the jury that the reason given by R. S. for her two conflicting statements was true, in a context where the reason for the conflicts is disputed by the respondent, who maintains his innocence. It goes without saying that determinations of applications for a special measure where vulnerability is based on a witness' alleged fear or distress will necessarily be very fact sensitive. This fact sensitivity will relate both to the alleged basis and manifestation of the fear as well as to the anticipated evidence in the case. The nature of the anticipated evidence in this case is such that the issues of identification and credibility are inextricably intertwined. A major issue the jury will have to resolve is, "did R.S. see and correctly identify the respondent in circumstances that incriminate him in the offence, but did not initially disclose that fact out of fear or is she now deliberately lying." The "fear factor" is thus critical not just to this application but also to the resolution of this matter at trial.

ii) There are two concerns. If the court were to grant the application it would amount to a pre-judgment of the issue that R.S. is actually in fear of the accused, a fact which the defence has at least impliedly put in issue. More seriously, though the jury would not be advised of the reason why the court made the order, and there could be prosecution statements and judicial directions as contemplated under s. 8 (4) of the Act that no adverse inference should be drawn against the accused by reason of the mode of testimony and that the issues in the trial were entirely for their determination, these safeguards would be inadequate. Unlike in a case where there is a child witness or the witness is an alleged victim of a sexual offence, the directions could not indicate that such testimonial accommodation was available if appropriate to all such witnesses who desired it.

iii) The jury would be hard pressed to avoid even subconsciously being affected by the irresistible inference that the witness was not in court because of fear, an inference that would lend credibility to her explanation of her inconsistent statements. Thus the concern is not just that “credibility is in issue”. The concern is that the fact of remote testimony in and of itself would likely prejudice the jury’s determination on the critical issue of credibility, once they become aware of the contending narratives in the case. This concern is quite apart from any effect the virtual presence of the witness might have on their ability to assess demeanour or other matters generally associated with questions of credibility.

iv) My conclusion is supported in part by dicta from the case of ***O’D v Director of Public Prosecutions & Anor***. It will be recalled that O’Neill J held that in the circumstances of that case neither a prosecution explanation nor judicial directions to the jury would suffice to ensure that the complainants giving evidence by video link would not convey an implication or determination that the complainants suffered from mental impairment; an element of the offence the crown had to prove which was in dispute.

v) He however went on to suggest that where such situation existed the evidence should not be permitted to be given by video link unless in effect it would be otherwise unavailable or its quality seriously impaired. That is where I depart from O'Neill J, as it would seem to me that if a special measure carries with it an inherent risk of prejudice to the accused that cannot be adequately mitigated by judicial directions or some other safeguard, that special measure should not be granted. This is where I respectfully suggest O'Neill J went wrong, by apparently building onto the provision he was interpreting a judicial construct relating to the likely unavailability or diminished quality of the evidence. The right to a fair trial is absolute. (See ***Mervin Cameron v Attorney General of Jamaica*** [2018] JMFC Full 1 at para 237.) Whatever the methods used in the trial process and any necessary safeguards employed, the sum total of the exercise must be that the trial was fair, for any result adverse to an accused person to be upheld.

vi) Some of the reasoning in the case of ***R v Ragan*** also supports the position I have arrived at under this head. It will be recalled that in refusing the application of the crown for its main witness to give evidence by video link due to fears for his safety, the court observed at paragraph 58 that:

> Compounding the credibility assessment is that a jury, inexperienced in the fine points of making such assessments, will be undertaking the task. **It is also a factor that, even with the best of cautions against prohibited reasoning, the jury might infer from Mr. Bissett testifying by video link that the accused was connected with his shooting.** (Emphasis added)

The effect of the prejudicial inferences that would likely arise from the mode of testimony itself which were incapable of effective nullification by judicial directions was, as in the instant case, deemed decisive in the outcome of the application.

vii) Thus, the basis on which I conclusively hold that the application must fail is my finding that the use of a live link would likely inhibit the evidence given by the witness being effectively tested by the respondent, given that the mode of testimony would raise prejudicial inferences directly related to a central issue in the trial, which inferences could not be adequately addressed or mitigated by judicial directions.

e) *any other matter that the court considers relevant*

No other matter needs to be considered.

[56] Before parting with this matter it is important to specifically address the fact that there are aspects of the authorities that have interpreted s. 714.1 in Canada which suggest that the more important the evidence, and where credibility is in issue the less likely the court is to grant a request for evidence to be received by live link. I however make no such pronouncements or determinations in this matter for a number of reasons. Firstly, and most importantly such pronouncements are unnecessary for the resolution of this matter.

[57] Secondly, that does not appear to be the general legislative steer in the Act given that child witnesses and alleged victims of sexual abuse are automatically deemed vulnerable and their evidence may often be the only or major evidence in situations where credibility is also heavily in issue. In fact, the presumption that special measures should be utilised where appropriate in the interests of justice, seems to be reflected in the fact that it is specifically provided that an alleged victim of a sexual offence or a child may opt out of using a special measure. See s. 3 (3) and (6).

[58] Thirdly, the court has not had the benefit of full arguments and submissions from the crown on those matters in a context where the legislative framework and intendment is wholly different from that from which those principles spring. It should also be borne in mind that there is dicta in ***R v Allen*** that suggests there could in some circumstances actually be advantages in the assessment of

credibility where evidence is given by video link and the quality of the technology used is good and appropriately deployed, to maximize effective communication and observation.

CONCLUSION

[59] It is for these reasons that, as indicated at paragraph 1, the application was refused.