b [2019] JMSC Crim 4

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CRIMINAL DIVISION

IN THE HIGH COURT DIVISION OF THE GUN COURT

HOLDEN AT KINGSTON

FILE NO. GC 00025/19

IN THE MATTER OF REGINA v KOWAIN FINDLAY FOR ILLEGAL POSSESSION OF FIREARM AND SHOOTING WITH INTENT

IN THE MATTER OF THE EVIDENCE SPECIAL MEASURES ACT, 2012 AND THE EVIDENCE SPECIAL MEASURES RULES

IN THE MATTER OF AN APPLICATION FOR A PROSECUTION WITNESS TO GIVE EVIDENCE BY USE OF A LIVE LINK DIRECTION

BETWEEN	**REGINA**	**APPLICANT**
AND	**KOWAIN FINDLAY**	**RESPONDENT**

Mr. Okeeto DaSilva, Crown Counsel instructed by the Director of Public Prosecutions

Ms. Zara Lewis, instructed by Zara Lewis & Co.

HEARD: October 2, November 14 & 18 2019

Evidence – Live Link Video - Special measures - Application by prosecution - Whether vulnerable witness - Whether breach of right to a fair trial - Right to confrontation - Right to life - Bench trial - Evidence (Special Measures) Act, 2012, The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, The Constitution of Jamaica (Order in Council), The Evidence (Special Measures) (Criminal Jurisdiction) (Judicature) (Supreme Court) Rules, 2016

WINT-BLAIR, J

[1] This is an application for special measures filed by the Director of Public Prosecutions on June 19, 2019, for a live link direction ("LLD") pursuant to the Evidence (Special Measures) Act ("the Act"). The application concerns the main witness, and complainant in the case of R v Kowain Findlay, a matter currently before the High Court Division of the Gun Court. This application was opposed by defence counsel and both sides have helpfully provided written submissions to bolster their positions.

The Allegations

[2] On Friday December 29, 2017 at about 5:50 pm, the complainant was walking on Brown's Lane, Central Village, Spanish Town in the parish of Saint Catherine. The complainant saw three men walking towards her, to include the accused man. All three men pulled guns and fired shots at her. The complainant escaped unharmed. After the incident the complainant informed a police officer she knew about the incident. The complainant was instructed to report the matter to the Central Village Police Station. The complainant did not report the matter as directed and indicated in her statement; "I did not report this to the police at Central Village Station because I am afraid, I don't know which police mi can trust'. The complainant gave a statement to the police dated January 27, 2018 and a further statement dated April 4, 2019.

[3] The respondent has been indicted before this court for the offences of illegal possession of firearm and shooting with intent. The allegations against the

respondent have been brought by the complainant in this matter who is the main witness for the prosecution. Throughout this decision, the said witness shall be referred to as S.M.

[4] Both crown and defence acknowledge that the witness S.M. has in a further statement dated April 4, 2019 indicated being approached by "Colourfrass", a senior member of the "Night time" gang. He made it known to the witness that he knew that she had identified the applicant to the police as her assailant, he went on to threaten to "shoot her in her face" if she gave evidence. As a consequence, the witness has been relocated.

[5] The witness S.M., is 27 years old, and is the complainant and main witness for the prosecution; her evidence is essential to their case. The prosecution's application is grounded in the submission that the evidence of the witness will not be available to the court without the order granting the application as the witness is in fear and as a consequence, has had to leave the jurisdiction. The witness is now in protective custody. The prosecution submitted that the witness has expressed the personal view that as special measures are available, live link would be the preferred medium from which the court should receive her evidence. The prosecution argued that in all the circumstances, the witness S.M. is a vulnerable witness within the meaning of the Act.

[6] Defence counsel opposes the application for the reasons set out below:

(a) That the Respondent's right to a fair hearing will be affected.

(b) That the Applicant's witness is not a vulnerable witness within the meaning of the Act.

(c) That the Applicant is seeking special measures merely for the convenience of the witness without due regard to the administration of justice.

(d) That the Respondent contends that critical issues to be tested are the credibility and probity of the evidence of the main witness in light of the importance of her evidence to the Applicant's case.

(e) That it is not in the interest of the administration of justice under the Act for the Applicant's witness to be permitted to give evidence by special measures.

(f) That the Applicant has failed to establish that its witness is eligible for special measures as the Applicant has failed to adduce sufficient evidence to establish that its witness is eligible for special measures or that the witness was exposed to threat or intimidation as alleged pursuant to section 3 of The Evidence Special Measures Act 2015.

(g) As a result of not satisfying these conditions the Applicant's witness is not eligible to give evidence by way of video link.

[7] The Legislation

The Evidence (Special Measures) Act

In the Act, the following definitions are provided in section 2:

"criminal proceedings" means criminal proceedings before-

(a) the Gun Court, a Circuit Court or the Court of Appeal;

(b) a Resident Magistrate on indictment or in the exercise of a special statutory summary jurisdiction;

(b) a Family Court or a Children's Court;

(c) any other court designated by the Minister by order, for the purposes of this Act; or

(d) where applicable, a foreign court pursuant to Part V;

"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

(a) the judge, Resident Magistrate 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.

[8] Special measures in Part II of the Act are available to vulnerable witnesses, child witnesses and to witnesses who are available to testify but for whom it is not reasonably practicable to attend in person. No direction for special measures can be given unless arrangements can be made to implement the special measure.

Section 2(2) of the Act states:

“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.

The Evidence (Special Measures) (Criminal Jurisdiction) (Judicature) (Supreme Court) Rules, 2016 ("The Rules")

[9] The Rules contain the following relevant definitions:

"court" means the Supreme Court of Judicature of Jamaica.

"live link direction" means a direction issued by the court under Part II of the Act that a witness may give evidence by live link.

"Vulnerable witness" has the meaning assigned to it under the Act.

The approach of the court

[10] The court will approach the determination of the application for a live link direction by first finding that this is an application which falls within section 2(2)(c) of the Act. Such a finding then involves a consideration of the provisions of section 2(3) in order first to determine: "*whether the evidence of the witness is likely to be unavailable 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 fear or distress on the part of the witness in connection with his/her testimony*."

[11] The first question will of necessity be, whether the witness, the subject of this application, is a vulnerable witness within the meaning of the Act. The definition of a vulnerable witness in this context would be one who it is concluded will have, his/her evidence likely diminished in its completeness, coherence or accuracy as a result of fear or distress on the part of the witness while giving evidence, or a witness who will be unavailable to testify due to fear. This involves an element of predicting witness behaviour at the point of trial.

[12] The first question shall be answered following a consideration of the following factors as set out in section 2(3) of the Act:

(a) 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 other matter that the court considers relevant.

[13] I wish to make it clear that in determining this application there has been no pre-judgment of any of the triable issues in this matter. The submissions of counsel upon the said issues and any discussion in this decision thereupon, relate strictly to the application before this court. There has in no wise, been any decision upon those matters which are within the purview of the trial Judge. The respondent remains clothed with the presumption of innocence for these purposes.

Submissions

[14] Both sides agree that the witness S.M., has given a further statement dated April 4, 2019 in which, she details a threat made to her by Colourfrass, a senior member of the Night time gang. She alleges that the respondent is a member of the same gang. Colourfrass told the witness that it was known to him that she had identified the respondent to the police as her assailant. She went on to say that he "is going to shoot me in my face if I give evidence." It is agreed that the witness has been relocated outside of this jurisdiction and is in protective custody.

[15] In answer to the question, whether the witness S.M. is a vulnerable witness within the meaning of the Act. The prosecution submits that the witness qualifies as she is the complainant on the indictment which has been preferred against the respondent. The witness is a vulnerable witness based on fear and distress and

additionally, the witness is out of the jurisdiction, which means that without the order granting the application, the evidence of this essential and main witness would be unavailable. The witness was born in 1992 and is 27 years old. S.M. alleges being shot at by the respondent and two other men on December 29, 2017. The complainant gave her statement to the police on January 27, 2018. The use of special measures will ensure that her evidence is available to the court. LLD will also improve the quality of the witness' evidence and will not prevent robust cross-examination by the respondent's counsel.

[16] The defence submits that the witness is not a vulnerable witness as the further statement indicates a threat was made but the date on which the threat was said to have been made is unknown. Juxtaposed against the original witness statement, the further statement is bereft of date and time of the alleged threat as well as a description of Colourfrass. There is also no indication in the further statement that a report was made to the police against Colourfrass. Defence counsel argued that there is insufficient evidence to support the allegation of threat. Defence counsel did not go as far as to demonstrate where the Act pointed to a requirement for evidence in section 2(3). This assertion was unsupported by any reasons or authority.

[17] Further, the applicant is seeking the LLD for mere convenience without due regard to the administration of justice. The credibility and probity of the witness are critical to the defence case and will be the main issues at trial. Both counsel cited a number of authorities in support of their positions on the application, however none of those were specific to the definition of a vulnerable witness within the meaning of the Act.

Whether the witness should be classified as a vulnerable witness

[18] The basis of the witness' fear is specific to her having made a report to the police in which she identified the respondent as the assailant. This led to his arrest and the charges before this court. It is an undisputed fact that this report had been

somehow conveyed beyond the confines of the police station and to the attention of Colourfrass. I can infer that on a day between January 27, 2018 and April 4, 2019, Colourfrass, a senior member of the Night time gang took it upon himself to visit the crown witness and to threaten her that if she gives evidence she will be shot in the face.

[19] This decision on this application is being made in 2019 at a time when there is a high prevalence of gun crimes in the city of Kingston and within this island as a whole. The witness has been threatened not to testify in court in relation to the case at bar for if she does then she will be shot in the face and most likely killed. In the context of the reality of crime in this society, I cannot improve upon the words of G. Fraser, J in the matter of **Regina v. Uchence Wilson** [2018] JMSC Crim 5, paragraph 39, where the learned Judge states:

> *"I am of the view that the Applicant should be accorded the benefit of the doubt where the expressed fear is for the loss of life or the expectations of grave reprisals by former alleged criminal associates. In the reality of Jamaica today it is by no means a fanciful assumption on the part of the witness that in testifying he or she is putting life and limb at risk. There is a manifest culture in this country which view witnesses as "informers" and the oft recited reprisal in songs and common parlance is that "informa fi dead." In such circumstances the Court has determined that the Applicant[s] [is a] "vulnerable witness" within the meaning of the Act.*

[20] I adopt this statement from G. Fraser, J and apply it to the fact situation in this case. The witness was specifically told that it was she who had named the respondent in her report to the police. This is what is meant colloquially by the pejorative "informer". There is cultural significance to the descriptor which is not lost on this court.

[21] Colourfrass in his conversation with the witness did not tell her anything she did not already know. His demonstrated knowledge of her police report which led to

the arrest and charge of his cohort, coupled with his decision to convey the fact that he had this knowledge to the witness, can reasonably be interpreted to have been intended to demonstrate to S.M. the length of his reach.

[22] There is also the position of influence held by Colourfrass in his gang as one of its senior members. He demonstrated that he was able to obtain information pertinent to her position, as a crown witness as by April 4, 2019, the case would have been before the courts. It also is reasonable to infer that the fact that the witness had made a report to the police did not mean that she was safe from his reach and influence. It also means he was not at all in fear that she as a crown witness, would make a report to the police in respect of the threat he had made to her. His actions demonstrate a level of confidence in the systems employed by the criminal underworld for exacting its own brand of justice which operate with impunity despite the involvement of the police in a criminal case. A threat of this nature is in my view an attack on all law abiding citizens of this nation who would do their civic duty by reporting criminal activity. Further, it is an attack on the entire justice system of this country which relies on the testimony of witnesses in trial matters.

[23] The witness's articulable fear that retributive steps would be taken if she testifies has been recorded by the police and made available to both sides and to the court. The court cannot fail to appreciate the significance of the threat to the life of a crown witness and must not act in a manner which discourages the reporting of crime and dissuades witnesses from coming forward to testify in court.

[24] I would go further to say that S.M.'s attendance to give evidence at the trial will be the only time that she could be located and therefore the threat can be carried out. Further, any such act would of necessity and logic take place before her evidence is taken and preserved at trial. There can be no failure in this court to appreciate the circumstances surrounding the application. The court is satisfied that all the criteria set out in the Act have been met. The witness S.M. is therefore classified as a vulnerable witness within the meaning of the Act.

The balancing act

[25] Having determined that the witness S.M. is a vulnerable witness within the meaning of the Act, the court now moves to sections 3(1) and 3(5) of the Act.

[26] In balancing the interests of the administration of justice pursuant to section 3(5) against the needs of a vulnerable witness, the court shall consider whether the special measure is appropriate in the interests of the administration of justice by weighing the following factors:

1. The views of the witness or submissions from prosecuting counsel made on behalf of the witness.

2. The importance of the witness's evidence to the proceedings.

3. The availability of the witness.

4. Whether the special measure would improve the quality of the evidence.

5. Whether a direction may inhibit any party to the proceedings from effectively testing the witness's evidence.

6. Any other relevant factor.

[27] The court has to undertake a balancing exercise to determine whether in relation to a vulnerable witness, the LLD is appropriate in the interests of the administration of justice.

[28] Crown counsel submitted that the witness is in protective custody and that this was also the situation in **R v Uchence Wilson** (supra) in which G. Fraser, J decided that for the upcoming bench trial, the witness was considered a vulnerable witness who would be virtually present for cross-examination.

[29] Defence counsel submitted that the starting point should be that oral evidence given in person in court should be received as that is the best evidence: **Steven Grant v R** [2006] UKPC 2. Defence counsel argued that the witness did not provide credible information to this court on this application based on the statements she had given to the police. Further, that the witness is now in protective custody and any risk of exposure to violence has been reduced. The defence will test the witness' credibility at trial in light of her importance to the prosecution's case. Additionally, defence counsel submitted that alternate measures could be taken to address any anxiety which the witness may feel, protective custody being one of those measures which has already been instituted. The fairness of the trial is absolute for any conviction to be upheld. Prejudicial inferences would likely arise from the mode of trial which are incapable of nullification by judicial direction.

[30] Defence counsel relied on the cases of **R v Uchence Wilson**, **D. O'D v. Director of Public Prosecutions and another** [2009] IEHC 559, **Mervin Cameron v The Attorney General of Jamaica** [2018] JMFC FULL 1 and **R v Kimeo Green** [2018] JMSC Crim 3.

[31] In the case of **D. O'D v. Director of Public Prosecutions and another** [2009] IEHC 559, a decision of the High Court of Ireland delivered by O'Neill, J, the trial would involve complainants said to be mentally impaired who were the witnesses in a sexual offence case. The question to be decided by the court was whether a fair trial would be impugned by the complainants appearing to give evidence by video link, which would or could convey to the jury that the complainants were mentally impaired, a matter which the applicant disputed as a part of his defence.

[32] The case of **D. O'D v DPP** is distinguishable on both the facts and law, nevertheless, I adopt the analysis of D. Fraser, J in **Kimeo Green** at paragraphs 34 to 36:

[33] *"[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."

[34] In my experience, in applications under the Act, the material provided to the court does not often take the form of evidence on oath. This is distinguishable from the position in Ireland in which the court had to be satisfied by evidence pursuant to the Criminal Evidence Act, that a serious injustice would be done. In the case at bar there are no affidavits before the court and this is permissible in our legislation.

[35] In the case of **Uchence Wilson**, G. Fraser, J makes the point that the Court must consider the particular factual circumstances of the case which influences the making of the application on a case by case basis. It is of note that the court in **Uchence Wilson** did not indicate that there was any evidence before her. There were both oral and written submissions from both sides as is the case here. When defence counsel submits that this court has insufficient evidence before it to determine the application, in fact, the court has none.

[36] The court will then go on to determine whether the special measure is appropriate in the interests of the administration of justice pursuant to section 3 of the Act. The primary focus of course must be on the words of the section itself. It is immediately apparent that the section confers a discretion. As always, where discretion is to be exercised, the process involves identifying and balancing the competing interests and relevant circumstances.

[37] In the decision of O'Neill, J referred to earlier, the balance of competing interests and relevant circumstances weighed in equal scales are the right to a fair trial, as against the public interest in the prosecution of serious crime. The court appreciates that the failure of the latter would lead to a serious injustice and of necessity operate against the due administration of justice.

[38] Having put each measure into the scale then O'Neill, J went on to find at paragraph 5.6:

> *"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 mine).*

[39] In **Steven Grant v R** [2006] UKPC 2 at paragraph 14 the Board states:

> *"The Board would not wish to question the general validity of the principle for which the appellant argues. 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."*

The best evidence is therefore an in person appearance with evidence given in a courtroom. Any departure from this practice must be justified, the Act is the justification in this instance as Parliament in its wisdom, has seen fit to enact legislation for those who would wish to testify but for reasons of fear, distress or unavailability may not be able to do so. The guarantee of fairness is ensured by the fact that an application for special measures has to be made to the court. The legislation contemplates than a person accused may also want to make such an application as well and the technology is available to any party in criminal proceedings. The technology provides for the virtual presence of the witness thereby preserving the ability of counsel to cross-examine.

[40] The Parliament of Jamaica, is free to enact legislation such as the Act, in order to reflect its policies and priorities, taking into account societal values which it considers important at a given time. It is clear that, in enacting the Evidence (Special Measures) Act, Parliament was well aware of the plight of the victims of crime, as well as the need to preserve the evidence to be given by those persons. This is perfectly legitimate, particularly in a high crime society. The only limit placed on Parliament is the obligation to respect the constitutional rights of those affected by the new or amended legislation.

The witness' personal views

[41] In my view, the reasons given by a witness for not attending in person while significant, and required by the Act, should not in themselves, preclude the Court from hearing evidence that is relevant and admissible. This Court has an inherent jurisdiction to control its own procedures and can decide when and how to obtain evidence in any matter before it. That judicial function cannot be held hostage by the personal reasons of a witness.

[42] It is here that I will adopt the dictum of O'Neill, J at paragraph 5.6 of D. **O'D v. DPP** regarding the personal reasons given by a witness for not wishing to attend upon the court:

> *"5.6 … 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. Most witnesses have vital commitments which have to be adjusted to allow them to come to Court…"*

Right to a fair trial

[43] Defence counsel for the respondent argues that granting the application for LLD will breach her client's right to a fair trial. She submitted as applicable, the passage from **O'D v Director of Public Prosecutions** delivered by O'Neill, J which states where the court has concluded that the giving of evidence by LLD carries with it a serious risk of unfairness to the accused which cannot be corrected by an appropriate statement from the prosecution or direction from the trial judge then the court must be satisfied by evidence that a serious injustice would be done. The duty of defence counsel would be to show that a serious risk of unfairness would arise. This has not been shown, in addition, the case of **O'D v DPP** involved a trial by jury and there, the trial Judge was faced with the issue as to whether a jury may erroneously form certain impressions of the complainants based on the mode of trial and this would affect the issue of credibility. This will not obtain in this case which will be a bench trial. The case of **O'D v DPP** does not assist to establish that there will be a breach of the respondent's right to a fair trial.

[44] In **Steven Grant v R**, the Board noted the "close textual affinity between article 6(3)(d) of the European Convention and section 20(6)(d) of the Constitution of Jamaica," (now section 16(6)(d)), and said that it is "appropriate to pay heed to authority on the one when considering the meaning and effect of the other." Article 6(3) states:

[45] *"ARTICLE 6*

Right to a fair trial

3. Everyone charged with a criminal offence has the following minimum rights:

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

[46] The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 proclaimed in force on April 8, 2011("the Charter") replaced the repealed Part III of the Constitution of Jamaica and guarantees the right to life as well as the right to examine witnesses:

> *"13(3)(a) "the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted;"*
>
> *…*
>
> *"16(6) Every person charged with a criminal offence shall-*
>
> *(d) [be entitled to] examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."*

[47] The right to examine witnesses is therefore identical in both provisions. The Board makes the point at paragraph 17(1) of **Steven Grant**, that the right to a fair trial is absolute and can never be compromised in any circumstances but states that the constituent rights in article 6 and section 20(6), (now section 16(6)(d)) are not themselves absolute: **Brown v Stott (Procurator Fiscal, Dunfermline)** [2003] 1 AC 681, 704.

[48] In paragraph 17(2) the Board goes on to say that section 13 of the Constitution recognizes that individual rights cannot be enjoyed without regard to the rights of others and the Strasbourg court has recognized the need for balance.

"17(2) Thus the rights of the individual must be safeguarded, but the interests of the community and the victims of crime must also be respected. An example, not based on the present facts, illustrates the point. In Jamaica, as in England and Wales, as already noted, the statement of a witness may be adduced in evidence if he is shown to have absented himself through fear of the consequences to him if he gives evidence. In the case of a prosecution witness, such fear is likely to have been induced by or on behalf of a defendant wishing to prevent adverse evidence being given. As observed by Potter LJ in R v M(KJ) [2003] EWCA Crim 357, [2003] 2 Cr App R 322, para 59, echoed by Waller LJ in R v Sellick [2005] EWCA Crim 651, [2005] 1 WLR 3257, paras 36, 52-53, it would be intolerable if a defendant shown to have acted in such a way could rely on his human rights under article 6 (or section 20) to prevent the admission of hearsay evidence. Where a witness is unavailable to give evidence in person because he is dead, or too ill to attend, or abroad, or cannot be traced, the argument for admitting hearsay evidence is less irresistible, but there may still be a compelling argument for admitting it, provided always that its admission does not place the defendant at an unfair disadvantage.

17(3) While, therefore, the Strasbourg jurisprudence very strongly favours the calling of live witnesses, available for cross-examination by the defence, the focus of its inquiry in any given case is not on whether there has been a deviation from the strict letter of article 6(3) but on whether any deviation there may have been has operated unfairly to the defendant in the context of the proceedings as a whole. This calls for consideration of the extent to which the legitimate interests of the defendant have been safeguarded. For reasons given in paragraph 21 below, the law of Jamaica, properly applied, provides adequate safeguards for the rights of the defence."

The right to life

[49] Section 13 of the Constitution of Jamaica as it was originally enacted recognized that there has to be a balancing of rights. This remained unchanged in the Charter. The witness, S.M. is guaranteed the right to life, liberty and security of the person. Once credible information is presented to the court which threatens this guaranteed right pursuant to section 13(3)(a), then the court has a duty to balance the right to life, liberty and security of the person of the vulnerable witness with the right to examine witnesses set out in section 16(6)(d). Accordingly, this court is prepared to acknowledge the public interest in the prosecution of serious crime and to guarantee the right to life, liberty and security of the person of a vulnerable witness. In exercising that discretion, the right to examine a witness at trial does not necessarily mean the right to confront the accuser for reasons I will go into later on.

The right of confrontation

[50] It is the right of a criminal defendant to be confronted by named and identified accusers and to assess their demeanour, this right has been well-recognised and established in England for some centuries before adoption of the European Convention.

[51] In the case of the **R v Christopher Thomas** [2017] JMSC Crim 2, at paragraphs 18 and 19, a decision of this court involving a child witness I addressed the issue of credibility:

> *"[18] In addressing the vexed issue of assessing demeanour by the medium of live link. I hold that in assessing the credibility of a witness, demeanour is but one of the many factors to be considered. There is also the substance of the evidence which is generally approached by a tribunal of fact with reason, logic and common sense. The proper approach is to consider the evidence of the witness against the backdrop of the evidence lead in the trial. This assists in making the connections from one witness*

to another and back to the facts. Demeanour is certainly not by any means the sole determining factor.

[19] The presentation of the evidence by live link will not impact upon the ability of the court to make its findings as to credibility, the questions to be asked both in chief and in cross-examination will be both asked and answered as if the witness were present in person. The fluency and spontaneity of the proceedings will be unaffected, objections and rulings thereon will proceed in the usual way."

The common law position

[52] In **Bennion on Statutory Interpretation**, 7th edn., (2017) at page 650 it states:

> *"An appreciation of the ordinary rules and principles operating in the relevant area of law is therefore essential to understanding the meaning and effect of an enactment. As Lord Hope of Craighead said in **Wisely v John Fulton (Plumbers) Ltd, Wadely v Surrey County Council** [2000] 1 WLR 820:*
>
> > *"As a general rule Parliament must be taken to have legislated against the background of the general principles of the common law. It may be found on an examination of the statute that Parliament has decided not to follow the common law. In that situation the common law must give way to the provisions of the statute. But an accurate appreciation of the relevant common law principles is nevertheless a necessary part of the exercise of construing the statute."*

[53] In **R. v. Smellie** (1919), 14 Cr. App. R. 128, the accused appealed his conviction for assaulting his eleven-year old daughter. During the trial, before the appellant's daughter was called to testify, the appellant was compelled by the warder, by

order of the court, to sit upon the stairs leading out of the prisoner's dock, out of sight of the witness while she gave her evidence.

[54] The appellant submitted to the Court of Criminal Appeal that this rendered the trial a nullity on the grounds that:

(1) A prisoner is entitled at common law to be within sight and hearing of all the witnesses throughout his trial;

(2) On a charge of this kind the effect on the minds of the jury of the removal of the prisoner from the dock by order of the court at the moment when his daughter entered the witness box was incalculable;

(3) That in this particular case the effect of his removal on the evidence of the little girl would also be incalculable, as he had beaten her for stealing, and she might therefore be inclined to say things which were untrue in his absence which she would not have said under the restraining influence of his presence.

[55] The following decision of the court, in what is probably the shortest judgment, ever handed down was given by Lord Coleridge J. at p. 130:

> *"If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter."*

[56] It may be noted that in the case of **Smellie** both the accused and witness were out of the sight of the other. This means that at common law, there was no right to gaze upon the witness embedded within the right to confrontation. There has always been a discretion in a criminal court to control its own procedures and to ensure the due administration of justice.

[57] In **R v Davis** [2008] UKHL 36 at paragraphs 68 to 71, Lord Mance reviews the right to confrontation:

"A right to confrontation?

68. Lord Bingham in para 5 et seq. discusses the long-established principle of English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence. Common law exceptions to this principle include the rules permitting proof of dying declarations in cases of homicide and of statements made by witnesses as part of the res gestae. Another common law exception is the rule, recognised by the Judges in Lord Morley's case (1666) 6 St Trials 770, para 5 and permitting the reading at trial of a statement by a witness who had been deposed before a coroner but who was absent at trial because detained by the means or procurement of the defendant incriminated by the statement. Subsequent authorities were considered and this exception again accepted in R v Scaife (1851) 17 QB 238, where Hunter arguendo (at p 241) referred to the maxim that justice "will not permit a party to take advantage of his own wrong" and also noted (p 240) that the coroner's deposition in Lord Morley's case had probably been taken in the absence of the defendant. The exception was endorsed by the United States Supreme Court (though wrongly attributed to the House itself) in Reynolds v United States 98 U.S. 145 (1878), 158-9, as an "outgrowth" of the same maxim which "if properly administered, can harm no one". It was recently referred to by the Supreme Court in Crawford v Washington 124 S Ct 1354 (2004), 1370 as a "rule of forfeiture by wrongdoing (which we accept), [which] extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability".

69. In R (D) v Camberwell Green Youth Court [2005] UKHL 4, [2005] 1 WLR 393, para. 14, my noble and learned friend Lord Rodger said of the right of confrontation enshrined in the Constitution of the United States by the Sixth Amendment that:

> *"It is for the people of the United States, and not for your Lordships, to debate the virtues of the Sixth Amendment in today's world. It overlaps, to some extent, with article 6(3)(d) of the Convention as interpreted by the European court. But, as interpreted by the Supreme Court, the Sixth Amendment appears to go much further towards requiring, as a check on accuracy, that a witness must give his evidence under the very gaze of the accused. For my part, I would certainly not disparage the thinking behind that requirement. But, whatever its merits, this line of thought never gave rise to a corresponding requirement in English law. That is amply demonstrated by the very brevity of the decision of the Court of Criminal Appeal in R v Smellie (1919) 14 Cr App R 128, holding that a judge could remove the accused from the sight of a witness whom his presence might intimidate."*

In the same vein, my noble and learned friend, Lord Bingham, giving the advice of the Board in Grant v The Queen [2006] UKPC 2, [2007] 1 AC 1 observed, at para 20, that

> *"the right to confrontation expressed in the sixth amendment to the US Constitution, for all its interest to legal antiquarians, is not matched by any corresponding requirement in English law: R (D) v Camberwell Green Youth Court …. para 14".*

In R v Smellie a defendant accused of mistreating his eleven-year old daughter was ordered to sit upon the stairs leading to the dock, out of her sight, in order to avoid her being intimidated. The Court of Criminal Appeal rejected in the shortest of judgments (p 130) an objection rested on, inter alia, a proposition that "a prisoner is entitled at common law to be within sight and hearing of all the witnesses throughout his trial" (p 128).

70. There have also been some statutory provisions authorising special measures under certain conditions (see Youth Justice and Criminal Evidence Act 1999, sections 16-36, permitting screening (though not from the judge and any jury, legal representatives or any interpreter) and evidence by video link or recording, as well as sections 23-28 of the Criminal Justice Act 1988 or now sections 114-126 of the Criminal Justice Act 2003 discussed by Lord Bingham in para 20. As Lord Bingham notes, the latter provisions allow the admission in evidence in certain situations of statements not made in oral evidence, but they involve disclosure of the witness's identity and permit a defendant to respond by giving evidence of any prior inconsistent statement by the witness and, exceptionally, of any material which, had the witness been called, could have been put to him or her in cross-examination.

Anonymous witnesses?

71. The right to confrontation recognised in the United States has, therefore, no exact counterpart in English common law..."

[58] To accept the submissions of defence counsel that the witness S.M. must be present in the courtroom in person, would mean that the Act could never apply in a case where the essential or only witness is being threatened to keep away from the trial. That is an intolerable result and as a general proposition could only lead to an encouragement of and the emboldening of criminals who are quite willing to indulge in the very kind of intimidation which the Act was designed to defeat.

[59] Certainly, common sense, would suggest that no invariable rule as suggested should be either propounded or followed. Where a witness gives information to the police that she is fearful of giving evidence as a result of a threat which has been made to her, the Judge may accept on the material before the court or may be able to draw the inference from the circumstances and the material provided that the threat was made, if not at the instigation of the defendant, perhaps at

least with his approval. In my view, this should normally be conclusive as to how the discretion pursuant to section 2 should be exercised.

[60] In criminal proceedings, unless there has been a preliminary enquiry conducted in open court, the only opportunity for the examination of a witness is at the trial itself. That has the consequence that there is just that one moment when, if the witness can be kept away by fear, or become too fearful or distressed to give reliable evidence which is coherent, accurate and complete, a defendant may be able to escape conviction because the evidence is simply unavailable. It would seem to me that a defendant, who utilizes fear or intimidation as a weapon to, keep a witness away from the trial, has effectively deprived himself or herself of the right and the opportunity to cross-examine that witness. In such a scenario, how can it be said to be an infringement of the defendant's right to examine witnesses for him to deprive himself of that opportunity?

[61] I bear in mind, that **Steven Grant** was a paper trial in which the prosecution proceeded by way of an application pursuant to section 31D of the Evidence Act as amended. There was no witness to be cross-examined and the issue turned on the admission of statements in the possession of the prosecution which impacted overall trial fairness.

[62] In the case at bar, the right to examine witnesses cannot be said to be infringed if the witness will not be physically in the courtroom, as the witness will be virtually in the courtroom and present in real time to be cross-examined by defence counsel. The mode of giving evidence is not an arguable issue once the evidence itself is available and the witness is present to be tested.

[63] The defence also cited **R v Kimeo Green** [2018] JMSC Crim 1. That case involved a witness who cited reasons of fear, she failed to attend court on the trial date despite indicating to the investigating officer that she would do so, citing reasons of fear. She attended upon the court pursuant to a witness summons and indicated on the return date that she would rather give evidence from a place

other than the courtroom. The crown applied for a special measures direction for the witness to give evidence from another room on the Supreme Court building as the witness who was an eyewitness to a murder, was too fearful to name the assailant in her statement to the police, was visibly shaken and fearful of going into court with where the accused man would be. These factors would diminish the quality of her evidence.

[64] D. Fraser, J dealt with the issue of the interpretation of the factors used to determine whether a witness could be classified as a vulnerable witness under the Act. At paragraphs 24 to 28, the learned Judge demonstrates how the statute should be interpreted:

[65] *"[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. 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."

[66] The case of **Kimeo Green** referred to cases cited to the learned Judge from Canada where there is no right to confront a witness. The Criminal Code of Canada is more concerned with a cost-benefit analysis and not witness safety in section 714.1 which provides for evidence by live link. Factors such as weather, the personal circumstances of the witness, the great distances to travel and the nature of the evidence compared to cost of obtaining the witness' in person

appearance are factors which play a far greater role in that jurisdiction than they do here. In section 714.2 of the Code, the evidence is received by live link once the witness is outside of Canada unless the respondent can show that "the reception of such testimony would be contrary to the principles of fundamental justice." The Canadian Charter of Rights and Freedoms in Canada provides for the right to full answer and defence which falls under the principles of fundamental justice. The provisions of the Canadian Charter are different from our Charter and cases from Canada should be cited to the court within that context.

[67] The method of interpretation of the Jamaican constitution was set down by the Full Court in **Mervin Cameron v The Attorney General of Jamaica** [2018] JMFC FULL 1:

> *[23] It has been said that fundamental rights provisions of constitutions are not like ordinary statutes passed by the legislature. The rights are to be given a generous interpretation. Some have even used the expression purposive interpretation. I understand all this to mean that the starting point is the actual text of the constitution. As with all written texts that are intended to convey meaning the authors of the document use words which have a meaning and convey an understanding at the time they were used. All words in any language that are intended to convey ideas from one mind to another via written text have a prima facie meaning which the author hopes or expects that the reader appreciates. If the reader does not have the understanding of the words used by the author then no communication has taken place regardless of how elegant the phraseology, the beauty of the syntax and the correctness of the grammar.*
>
> *[24] The fundamental rights provisions of constitutions have been said to be a living document. The idea here being that the contemporary understanding is more important and should inform the interpretation at*

the time the constitutional provision is being interpreted rather than seek to understand what the author of the text meant at the time it was written. Assuming this to be true the living document theory has to start with the actual text of the constitution. This must be so because no constitution has all conceivable rights in its bill or charter of rights if there is such a bill or charter. By including some rights, restricting others, and excluding others, the authors of the text of the constitution have indicated their choice of rights.

[25] The authors of a bill of rights can limit the extent of a right by using appropriate language and if that is done then it is not for the courts to say that the text does not mean what it plainly says. The courts are not allowed to inject its own biases using the living document theory as the vehicle for that. It is my view that even if the words of a fundamental right are given an extended meaning such meaning must be within the range of meanings that the actual text can legitimately bear.

This, I believe, was the Privy Council's position in Minister of Home Affairs v Fisher (1979) 44 WIR 107 where Lord Wilberforce in reacting to the submissions counsel noted that there were two approaches to the interpretation of fundamental rights provisions. At page 113 his Lordship said:

> *The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship.*

Also at page 113:

> *The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for*

principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.

[26] His Lordship expressed his preference for the second but added this important and often time forgotten injunction at page 113: But their lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences. (emphasis added)"

[68] Applying the dicta of the Full Court to the interpretation of the relevant provisions of the Charter section 13 provides as follows:

"13.---(1) Whereas-

(a) the state has an obligation to promote universal respect for, and observance of, human rights and freedoms;

(b) all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and

(c) ***all persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter, the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others."*** (emphasis mine)

[69] I adopt the statement of the Privy Council in **Steven Grant** which reminds this court that in our Charter it is provided that there must be a balancing of rights. That the rights of the individual are weighed in the same scales as the rights of the community. In the case at bar I hold that the community includes a vulnerable witness who has been the victim of crime.

[70] I will give the last word to Wigmore on the principle of confrontation in **Wigmore on Evidence** (Chadbourn rev. 1974), vol. 5, p. 150, §1395:

> *§1395. Purpose and theory of confrontation. In the period when the hearsay rule was being established, and ex parte depositions were still used against an accused person (§1364 supra), we find him frequently protesting that the witness should be "brought face to face", or that he should be "confronted" with the, witnesses against him. The final establishment of the hearsay rule in the early 1700s meant that this protest was sanctioned as a just one — in other words, that confrontation was required. What was, in principle, the meaning and purpose of this confrontation? So far as there is a rule of confrontation, what is the process that satisfies this rule? It is generally agreed that the process of confrontation has two purposes, a main and essential one, and a secondary and dispensable one: The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.* **The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had**

except by the direct and personal putting of questions and obtaining immediate answers. That this is the true and essential significance of confrontation is clear, from the language of counsel and judges from the beginning of the hearsay rule to the present day….

At pp. 151-2: Thus the main idea in the process of confrontation is that of the opponent's opportunity of cross-examination; the former is merely the dramatic feature, the preliminary measure, appurtenant to the latter.

At p. 153: There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the judge and the jury are enabled to obtain the elusive and incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness.

At p. 154: ***This secondary advantage, however, does not arise from the confrontation of the opponent and the witness; it is not the consequence of those two being brought face to face. It is the witness' presence before the tribunal that secures this secondary advantage — which might equally be obtained whether the opponent was or was not allowed to cross-examine. In other words, this secondary advantage is a result accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross -examination.***

At p. 199:

§1399. Confrontation, as requiring the tribunal's or the defendant's sight of the witness. So far, then, as the essential purpose of confrontation is concerned, it is satisfied if the opponent has had the benefit of full cross-examination. ***So far, furthermore, as a secondary and dispensable element is concerned, the thing required is the presence of the witness before the tribunal so that his demeanor while testifying may***

furnish such evidence of his credibility as can be gathered therefrom. *In asking whether these two requirements are fulfilled, the inquiry, for the first element, is determined by the rules already examined (§§1373-1397 supra).*

At pp. 199-200: For the second element, there is a little room for dispute in the application of the principle; it is satisfied if the witness, throughout the material part of his testimony, is before the tribunal where his demeanor can be adequately observed. It is possible to quibble over the precise fulfilment of this requisite in a given instance; but it will ordinarily be easy to determine whether in substance the desired object of the law has been obtained." (emphasis mine)

Conclusion

[71] There is therefore a right to examine witnesses preserved by our Charter, this does not necessarily mean that there is an in person, in court, right of confrontation. The essential purpose of confrontation is satisfied if the opponent has had the benefit of full cross-examination.

[72] I cannot improve upon Wigmore's analysis of the law and would not venture so to do. Accordingly, I will return to the case at bar which will involve a bench trial. In my view, the respondent's right to examine witnesses as set out in the Charter does not contravene the accused's right to be presumed innocent. The potential effect on the minds of jurors is not relevant in this case since the accused will be tried by a Judge sitting alone. In any event, a jury adequately informed by an opening statement by the prosecution and properly directed by a trial Judge would not be biased by the use of such a special measure. In the case at bar, the trial Judge will warn him/herself adequately and draw no adverse inference from the attendance of a witness by live link. The Supreme Court Criminal Benchbook sets out a direction which the trial Judge may give when special measures are employed in a trial.

[73] This court having weighed the competing interests and balanced the rights of both the witness S.M. and respondent finds that the balance weighs in favour of granting the application for a live link direction.

Orders

[74] The application for a live link direction is granted.

[75] The witness, S.M. will give evidence by way of live link and be virtually present from a remote location known only to the Registrar of the Supreme Court and the court.

[76] The witness, subject of this application shall be named S.M. in this order.

[77] The trial is to be held on [a date to be named].

[78] The witness, S.M. shall be allowed to attend the trial of this matter by live link on the trial date to be fixed and on all subsequent dates that this matter may come on for trial.

[79] This trial shall take place in Court # - or such other courtroom as designated by a Judge of this Court.

[80] The Registrar of the Supreme Court must make arrangements for technological support from Court Administration Division for the trial on the first and each subsequent date of trial that the witness is needed to testify.

[81] The Applicant is to identify to the Registrar of the Supreme Court, an appropriate venue to serve as a live link facility from which the witness will testify (the "remote site").

[82] The Registrar of the Supreme Court is to make the necessary arrangements to enable transmission from the remote site to Court # (the "local site.")

[83] The Applicant is to make provisions for technological support to be present at the remote site and should provide details of the remote site, and of any equipment to be used, together with the names, email addresses and telephone numbers of all responsible personnel at the remote site, to the Registrar of the Supreme Court, not less than three days before the first date fixed for trial.

[84] The parties may agree upon a registrar to be present at remote site.

[85] The parties are to agree if possible, the documents to which they intend to refer during the testimony of the said witness.

[86] If there can be no agreed bundle then each side shall file in the Supreme Court Gun Court Registry, their own bundle no less than three days before trial.

[87] Any party wishing to reduce their bundle to an electronic copy for display by means of a document camera, audiovisual equipment of fax machine may do so.

[88] The witness named in this order shall not give evidence in any other way unless a Judge of this court revokes or varies these directions.

[89] Applicant is to prepare, file and serve the orders made herein.