[2018] JMSC Crim 5

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HOME CIRCUIT COURT

INFORMATION HCC# 754/17(3)

IN THE MATTER OF REGINA v UCHENCE WILSON AND OTHERS FOR BREACHES OF THE CRIMINAL JUSTICE (SUPPRESSION OF CRIMINAL ORGANIZATIONS) ACT 2014, HCC #754/17(3)

IN THE MATTER OF SECTION 3 (1) (A) (i) OF THE EVIDENCE (SPECIAL MEASURES) Act 2012

IN THE MATTER OF AN APPLICATION FOR WITNESSES 'A' & 'B' TO GIVE EVIDENCE BY USE OF A SPECIAL MEASURES

BETWEEN	**DIRECTOR OF PUBLIC PROSECUTIONS**	**APPLICANT**
AND	**UCHENCE WILSON & OTHERS**	**RESPONDENT**

The Evidence (Special Measures) Act 2012 – The Evidence (Special Measures) (Criminal Jurisdiction) (Judicature) (Supreme Court) Rules 2016 – Prosecution's application for a witness to give evidence by live link – Appropriate circumstances for use of special measure of live link – Witness said to be vulnerable but no allegation of actual threat – Right of accused to a fair trial – Credibility significant issue – Whether grant of application prejudicial to Defendants – Overall interests of the administration of justice.

Heard: 4th and 20th December, 2018

FRASER, GEORGIANA J

BACKGROUND

1. I have read the written applications filed by the Prosecution on the 31st August 2018, seeking directions for witnesses 'A' and 'B' to be allowed to testify via "Live Link". I have also taken careful note of the written objections filed by several Defence Attorneys. I have given full consideration to the oral submissions made by the Prosecutor, Mr. Jeremy Taylor and those made by Counsel, Mr. Richard Lynch who was designated by his colleagues to make the collective submissions on behalf of the Defendants. Counsel have provided the Court with several authorities which I have read and digested and have had regard to such aspects of those authorities which I believe was instructive or useful to me in coming to my decision. I take this opportunity to thank Counsel for their industry and assistance to the Court

2. The several Defendants herein are all charged with serious offences and in particular for breaches of the ***Criminal Justice (Suppression of Criminal Organisations) Act*** 2014. The Prosecution proposes to call two civilian witnesses in proof of the case against the Defendants, referred to as Witnesses 'A' and 'B' respectively. Significantly, these two witnesses were allegedly members of the very organization or gang wherein the charges arise. The Prosecution now seeks direction(s) from the Court that witnesses 'A' and 'B' be permitted to give evidence by a special measure, that is to say "live link evidence" (herein after LLE).

APPLICATION FOR SPECIAL MEASURES

3. Special measures are arrangements which can be put in place to assist Litigants receive evidence from a witness who is unable to attend court in person. Special measures including the use of LLE usually requires permission from the court, hence the application made by the Crown herein. There are now statutory underpinnings that authorize the implementation and utilization of IT technology and tools in the criminal trial process so as to enable the utilization of video recording systems and remote witness appearance as part of the trial process in criminal cases. I am of course referring to ***The Evidence (Special Measures) Act, 2012;*** which came into effect on 2nd July 2015.

4. As indicated by the recital, the Act provides "***for the admissibility in criminal and civil proceedings and Coroner's inquests of evidence by the use of special measures, and for matters connected therewith and purposes incidental thereto".*** In effect there are two (2) processes that are featured in this law, the first which is the subject matter of this application relates to evidence via "live link". Section 2 of the Legislation has provided some useful interpretation as to the meaning of particular terms, and these are as follows:

> ***"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;***
>
> ***"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;***
>
> ***"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.***

5. In addition to the ***Evidence (Amendment) Act 2015*** there are also in effect rules and regulations made pursuant to the legislation that sets out the appropriate procedure to be followed where a party to proceedings is seeking an order from the Court for a witness to give evidence at a trial by LLE; namely ***The Evidence (Special measures) (Criminal Jurisdiction) (Judicature) (Supreme Court) Rules, 2016***.

6. The Supreme Court Rules (2016) in Section 2 deals with the interpretation of words and phrases, which are consistent with the definitions provided in the

Act itself. Section 3 provides for the applicability of the rules; also in similar terms as the Act to include the following:

(i) to allow for a witness to give evidence by live link pursuant to section 6 of the Act;

(ii) to allow for the video recording of a statement of a witness to be admissible as evidence in chief of the witness pursuant to section 7 of the Act;

ELIGIBILITY FOR SPECIAL MEASURE

7. Special measures in Part II of the Act is available to witnesses in criminal proceedings other than the accused. Significantly the provision allows not only the parties to the proceedings to apply, but the Court can on its own volition make such directions in relation to a special measure. Section 3 provides that:

> **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—***
>
> ***(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.***

8. I note in particular that no direction for special measures can be given unless arrangements can be made to implement the special measure. In order to give effect to the legislation the Court Administration Division of the Supreme Court, has established a live link witness room for video links in the Home Circuit Court building itself. The corresponding large screen television is located in court no. 3 and a witness who is sequestered in that room can be viewed easily by the other trial participants; including the Accused and his Attorney, the Prosecutor and also the Judge and Jury. This facility to my certain knowledge has been used in criminal trials involving vulnerable witnesses such as children; and has thereby obviated the need for a child witness to be exposed to potential intimidation.

9. The Court Administration Division has also implemented technology which provides interactive video and audio communications between parties in different locations. The technology has the capacity to use video links for criminal hearings and so obviate the cost and inconvenience of moving persons in custody from a detention facility to court and back. Such facilities have been established in several parish locations and Courts, including the Corporate Area Parish Court (formerly Resident Magistrates Court). Additionally, the Court Administration possesses a mobile unit that can be quickly transported to and arranged at a chosen venue.

10. Quite independent of the technical apparatus and technology indicated above, the Court is able to make ancillary orders so as to ensure the integrity of remote locations, such as the appointment of an independent Attorney-at-Law to monitor proceedings at the remote site. The Court can make orders for the preparation of a bundle of documents to be utilized by a witness at the remote site and this can be given into the custody of the independent Attorney-at-Law. In all the circumstances as are within my personal knowledge, I am satisfied that this critical stipulation as provided by the legislation can be fulfilled.

11. The Legislation is particular in its intent as to the categories of persons who can apply for a special measure, Section 2 (2) provides that:

> ***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.

12. For present purposes the Prosecution has submitted that 'Witnesses 'A' and 'B' are currently in the Witness Protection Programme and they are also contending that these witnesses are ***"especially vulnerable",*** they being former members of the criminal organization and to bring them to the Supreme court would expose them to ***"danger"***. The Defendants on the other hand are contending *inter alia*, that both witnesses do not qualify for consideration of LLE as there is nothing to support that they are vulnerable witnesses within the meaning of the Act, and that the Prosecution is seeking special measures merely for the convenience of the witnesses and accordingly the Court should not exercise its discretion in the Prosecution's favour.

13. There is some guidance provided to the Court as to how this issue is to be determined. At paragraph 2 (3) of the Act the Court is instructed that:

> ***(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 OBJECTIONS

14. There is always resistance to change and no less so in relation to special measures, the foremost argument in this instance is that it infringes the rights of an accused person to confront his accuser as guaranteed by the Constitution. The several accused persons are opposing the Crown's application for LLE and the reasons for their objections were itemized by counsel, Mr. Lynch as follows:

(i) *That the Defendants' right to a fair hearing will be affected should this Honourable Court grant the orders for special measures;*

(ii) *That a critical issue to be tested is that of credibility of the main witness in light of the importance of his evidence to the Prosecution's case;*

(iii) *There is nothing to support that 'Witness A' is a vulnerable witness within the meaning of the legislation:*

(iv) *The Prosecution's witness in all the circumstances, does not qualify under the Act to give evidence by special measure, that is by live link; and/or*

(v) *That the request for special measures direction is merely for the convenience of the witness.*

15. Counsel had also advance an additional objection during the course of his oral submission, namely that the LLE would diminish the quality of the identification evidence. In that, the witnesses would not be able to fairly and independently point out individual accused persons without the videographer shifting the camera in the direction of a particular accused; this he said would prompt the witness to make a dock identification of the said particular accused on which the camera focuses. This objection seems to be premised upon the assumption that there will be a cameraman who will be manually operating camera or cameras. To my certain knowledge that is not how the technology operates, so that there is no basis for the presumed prejudiced that is anticipated by the Defence.

16. Making changes in the way we conduct trials and other court procedures has been a long and encumbered process. I say encumbered because changes are usually met with resistance; particularly in the sphere of criminal trials and particularly by accused persons. The accused persons herein are of the view that the special measures application is an infringement of their constitutional rights and they will be put at a disadvantage or be prejudiced if witnesses 'A' and 'B' are allowed to give evidence from a location outside of the physical courtroom. It has been advanced by Counsel on behalf of some of the accused, that this would be a denial of their right to face their accuser. I note that it was

not so long ago that accused persons were challenging the legislative provisions of section 31D of the ***Evidence Act*** as being unconstitutional.

17. In fact, Counsel Mr. Lynch who ably made the submissions on behalf of all the Defendants who are objecting to the Prosecution's application, has submitted that the use of LLE would result in the accused not obtaining a fair hearing and in that vein has relied upon the Privy Council decision of ***Stephen Grant v The Queen,*** [2006] UKPC 2. The Appellant in that case had challenged the admission of evidence from unavailable witnesses pursuant to section 31D of the Evidence Act, and further challenged the constitutionality of the legislation. The Privy Council examined the provisions of the then Chapter III of the Constitution – Fundamental rights and Freedom and in particular section 20 (6)(d) which provided that an accused:

> ***shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution…***

18. The Board in ***Stephen Grant***, did not seek to question the general validity of the principle for which the Appellant argued; that, the evidence of a witness ought to be given orally, in person, in court and on oath or affirmation, so that he may be cross-examined and his demeanour under interrogation evaluated by the tribunal of fact. This has always been regarded as the best evidence, and should continue to be so regarded. However, the Board concluded that section 31D did not infringe the Appellant's so called right of confrontation. That whilst his rights were to be upheld there would be circumstances which would justify during a trial a deviation and the right to a fair trial was not compromised by such special measures as provided by the statute.

19. I am of the view that the circumstances of the instant case are different from that which obtained in ***Stephen Grant***, because that case was in essence a paper trial where an essential eye witness could not be located after reasonable

and diligent search and inquiry had been made to ascertain his whereabouts. In the present case the Defendants will not be put to such a disadvantage because the witnesses' will be present in court, in that, their visages will be readily seen by the Defendants throughout the trial process. The accused will be able to challenge the witnesses' evidence and conduct their cross-examination in the same manner as if the witnesses were in the same physical space as themselves.

20. I have particularly noted as well that the new statutory provisions contain a specific indication at section 8 of the Act that:

> ***(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.***
>
> ***(3) Unless the context otherwise requires, for the purposes of this Act or any other law, a witness is deemed to be physically present at the proceedings when he gives evidence by means of a live link pursuant to a direction issued under Part II.***

21. The Irish case of **O'D v Director of Public Prosecutions and Another [2009] IECH 559** submitted by Counsel for the Defendants, is directly on point in relation to this application. In that decision, the accused man was charged for various sexual offences alleged to have been committed against his cousins who were in their 40's and said to be suffering from a mental disorder. The applicable Act in that jurisdiction, the ***Criminal Evidence Act*** 1992 provides that for the relevant offences (including sexual offences) evidence can be given by way of video link if the person is under a)17 years of age, unless the court sees good reason to the contrary or (b) in any other case, with the leave of the court.
22. The issue that arose for determination in the review hearing was whether the complainants giving evidence by video link would create a real risk resulting in the accused not been able to get a fair trial, because the manner of the receipt of the witnesses' 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.

23. At paragraph 5.6 of the judgment O'Neil, J. 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)***

24. O'Neil, J. held that the correct test was not applied by the tribunal who had heard the application and in the manner as he indicated above so as to achieve the correct balance in the case. That is to say the right of the Applicant to a fair trial and the right of the public to prosecute, as such the decision was quash and the matter sent back to the circuit court for rehearing of the application.

25. It is to be noted that the legislative framework in our jurisdiction and the one in Ireland is not the same but have striking similarities. In relation to the views stated by O'Neil J; I agree with his reasoning that the evidence must establish to the satisfaction of the Court hearing the application, that the probability is

that the witness will be deterred from giving evidence at all or will in all probability be unable do justice to their evidence if required to give it viva voce in the ordinary way. This ought to be one of the determinative factors that the court hearing the application takes into consideration.

26. In all instances where applications are made to the Court for a special measure, the Court must consider the particular factual circumstances of the case which influences the making of the application and therefore the results will vary. The Prosecutor had brought to this Court's attention the case of ***Kimeo Green*** [2018] JMSC. Crim. 3; which I have also found to be instructive on this point. In that case the accused was charged for the offence of murder. The eyewitness gave a statement indicating the events surrounding the shooting but did not state that she saw the accused. Almost two years later she gave a further statement to the police that she saw the accused man but did not call his name because she was afraid of reprisal amongst other things. The witness was summons to appear in court after several missed trial dates.

27. The said witness upon her attendance at court, told the court that she heard there were other options to giving evidence in court in the presence of the accused man and she would rather exercise one of those options. One of the issues of contention in the application, was whether the accused man would get a fair trial in the circumstances, where it is that the sole eye witness to the murder had given two contradictory statements as to events surrounding the murder of the deceased man. In addressing the issue of whether the application if granted would result in the accused man obtaining a fair trial, the court took into consideration the Constitutional underpinnings and cases such as ***Steven Grant.***

28. The application was refused for a number of reasons, the Court having concluded at paragraph 55 (V) that:

> *"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*"

29. This court notes that the pivotal issue in **O'D v Director of Public Prosecutions and Another** and in ***Kimeo Green*** concerned the possible impressions that a jury or a lay person might erroneously conceive, and that these are issues of credibility. I am aware that similar issues will arise in the instant case; but this should not be reason alone to refuse an application. I note moreover that in the instant case the trial will be conducted by judge alone. A judge of the Supreme Court is a trained legal mind who is accustomed to conducting trial of serious offences all without the assistance of a jury. There is a proven track record in this regard, as many such decisions as made by judge alone have been probed to the highest appellate level and have withstood such probing. Surely we can continue to have confidence in such a process.

30. Counsel Mr. Lynch has also contended that the critical issue of credibility of the main witnesses is to be tested in light of the importance of their evidence to the Prosecution's case. Counsel did not however develop this line of objection in any appreciable way as to how the Defendants would be prejudiced in this regard. The Prosecutor had set out the potential evidence to be given by the witnesses 'A' and 'B' and as far as I can discern it would be important evidence which alleges firsthand accounts of and knowledge of the several offences which the witnesses allege they saw the several Defendants commit.

31. I have discerned that the Defendant's concern herein, is whether the witnesses are likely to tell lies when testifying remotely. We do not know because there are no statistics to support a finding one way or the other, whether the psychological separation from the courtroom itself that accompanies remote testimony affects the willingness to lie. Although physical absence from the courtroom might make it easier psychologically to lie, such an ease does not necessarily mean that a witness would in fact lie. Conversely the physical presence in a court room does not guarantee truthfulness. If a witness is prone to give false testimony, then to my mind it does not matter if they are face to face with the questioner or in another physical space. My experience as a

judge indicates that there are persons who will glibly and in a barefaced manner lie through their teeth after swearing the oath, and will do so while staring the judge and counsel in the in the face.

32. In my own experience I have had the conduct of one each civil and criminal trial utilizing LLE. The reason proffered in the criminal trial **(R v Alpha McClymont)** to justify the procedure was that the allegedly sexually abused, young child needed to be insulated from the fear that can accompany being in the same courtroom with the defendant who was a close family member. This Judge did not regard such a process to be significantly different in effect than if the witness was physically in the courtroom rather than elsewhere. I was satisfied with the arrangements for a number of reasons as follows:

I. The witness' image was displayed life-size behind the witness stand;
II. The integrity of the facility was assured;
III. I was able to interact with the child witness and conduct a voire dire; and
IV. The witness was examination-in-chief and subjected to cross-examination under oath.

33. The central issue in the **McClymont** case was one of credibility in circumstances where the Prosecution had presented no medical evidence in support of the allegations of sexual abuse. It was further suggested to the witness that his mother had influenced him to make the false allegations. These suggestions were vehemently denied by the young complainant and his mother. The full scale trial however resulted in an acquittal in favour of the accused man. Clearly the jurors who were lay persons were able to effectively and reasonably sift the evidence and make a determination of the credibility issue.

34. Would a judge sitting alone in the circumstances of this case be expected to do any less? I think not. Particularly since judges are legally trained individuals who must at all times demonstrate how they have treated with particular issues such as credibility and identification, and indicate their reasons for a factual finding one way or the other. There is no reason for this Court to contemplate that the witnesses' appearance by LLE would in any way hamper a

Defendant's ability to test a witness' credibility and evidence of identification by the usual means of cross examination; nor a judge's ability to determine the creditworthiness of such a witness' evidence.

35. When considering this application, the Court has asked itself an initial threshold question: does this application fall under any of the preliminary grounds for using LLE evidence? These preliminary grounds are listed in section 3 (1) of the Act. The Court has further had regard to all the circumstances of the case particularly and in accordance with section 3 (5) which provides that:

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

36. Although this provision states that a Court shall consider these four (4) factors, it is important to note that a Courts is not limited to only considering these. There is scope for considering any others which might affect whether LLE should or should not be allowed in any particular case.

37. The Court to whom the application is made should, therefore, give consideration to other factors raised by the Applicant and since there is a dearth of precedent in this jurisdiction, the court could also look to other jurisdictions and decisions which have considered other factors that have influenced the Court's decision making. I have had regard to the landmark 2005 House of Lords decision in ***Polanski v Conde Nast*** [2005] UKHL 10 ("Polanski"). Although this was not a case involving a criminal trial there are some useful and persuasive approaches that was utilized by that Court and

which has been acclaimed in terms, that in English jurisprudence, no case has had a larger impact on this area of law.

38. As a proposed approach the foregoing case law suggests that, while the normal method of giving oral evidence is in person, there is no strong presumption that this must be the preferred method if there are reasonable grounds advanced in support of an application to give evidence via LLE. Lord Slynn of Hadley at paragraph 43 page 12 of the judgment enunciated that:

> ***"It seems to me...that as a starting point it is important to recall that although evidence given in court is still often the best as well as the normal way of giving oral evidence, in view of technological developments, evidence by video link is both an efficient and an effective way of providing oral evidence both in chief and in cross examination."***

39. These sentiments are similar to those expressed by the Privy Council in the ***Stephen Grant case****, a* decision from this very jurisdiction and which therefore fortifies me in my view that cases from other jurisdiction determinative of the issue under consideration can be a valuable aid to this Court. The considerations that should influence a Court to decide such applications appear to be largely practical rather than doctrinal, and the pivotal consideration is whether the Applicant will gain an advantage which, in the circumstances of the case, will be unfair. This Court has determined the issue by asking and answering the following questions:

1. Does the Applicant genuinely believe in the grounds which he advances for his reasons why he is unable appear in the physical court room for the trial? This is a straightforward threshold test. Courts should not entertain an application which is not made in good faith; for example, applications made at a very late stage might suggest that the applicant is only seeking to gain a procedural advantage and acting in bad faith. Counsel Mr. Lynch has urged this Court to deny the applications because it is being made merely for the witnesses' convenience. In practice however, it will not always be easy to make a positive finding of fact against the applicant on this point, especially on the basis of

written witness statements only, and a courts in appropriate circumstances ought to be willing to give the benefit of the doubt to Applicants.

2. Even if the Applicant genuinely believe in the grounds that he advances, is his belief fanciful? There must therefore be an objective, as well as a subjective, basis for the application. Traditionally, reasonableness is the bar of measurement that a Court will employ as an objective barometer. 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 a 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 Applicants are "vulnerable witness" within the meaning of the Act.

3. The Court has asked itself the further question; does the Applicant's reasons amount to the furtherance of a valid/legitimate personal interest of the witness? Even if the witness has a genuine belief in the reasons for his aversion to giving evidence in person, and such belief is not fanciful, the Court still needs to assess whether that reason should objectively be regarded as a valid reason which should allow LLE to be given. In the words of the legislation the court must be satisfied that the special measure is appropriate in the interests of the administration of justice, in accordance with subsections (5) and (6).

40. It is a matter for the Court's discretion to determine how low the threshold will be set. But there is an indication from the decided cases that if sufficient and satisfactory reasons are given why the actual physical presence of witnesses cannot be effected, a Court should lean in favour of permitting LLE in lieu of the normal rule of physical presence in the court room. Sufficient reason ought not to be assessed at too high a threshold or be too onerous for the Applicant

to overcome and should be assessed with a liberal and pragmatic attitude. It should be noted that the unattractiveness of the witness' reasons for wishing to give LLE does not of itself make the reason invalid or illegitimate. Indeed, in ***Polanski***, Lord Hope stated (at [59]):

> ***"... But now that we are looking for a general rule, I would hold that the appellant's case falls within the generality of cases where the fact that the claimant wishes to remain outside the United Kingdom to avoid the normal processes of law in this country is not a ground for declining to allow him to remain abroad and give his evidence by VCF."***

41. On the other hand, and most importantly, this Court has also already considered whether the Applicant is seeking to deprive the Defendants of their right to a fair hearing or otherwise commit an abuse of process and I have determined this in the negative.

42. How important is the evidence of the witness in relation to the outcome of the critical issues of the case? In every such application, there will be competing interests which have to be balanced. The more important the witness' testimony, the greater the need to demonstrate that the interests of justice will not be prejudiced by allowing the witness to give LLE. Expressed differently, the more important the witness' testimony, the greater the need to demonstrate that the use of LLE will not diminish the Court's ability to analyze the witness' testimony, I have also already contemplated this earlier in relation to the credibility issue raised by Counsel Mr. Lynch. I have noted that in the ***McClymont*** case, there was no inherent disadvantage in cross-examination by LLE. Accordingly, the criticality of the evidence of the witness will not normally be a factor against the application, and may even, militate in favour of LLE.

43. What prejudice will be suffered by the Defendants if the witness gives evidence via LLE? This is an important consideration that must be balanced against the needs or wishes of the witnesses. Inevitably, the standard argument raised by the Defendants is the perceived advantages of cross examining a witness in person, rather than by LLE. However, the decided cases have repeatedly

stated that cross examination by LLE is not in itself prejudicial to the cross examining party. Accordingly, the argument that the evidence of the witnesses in question is critical and, therefore, cross-examination must be face to face has found no favour with this Court. The Defendants' fear that they might not be able to adequately cross-examine such a witness, nor present adequate witness demeanour to the tribunal of fact, is baseless. I would point out that although this is a legitimate concern there is no basis for saying that this will obtain. The one concern that appears to be beyond our ability to adequately ascertain is, whether remote testimony is more likely to yield intentionally false testimony. In trials where there are in-court witnesses there is no means by which we can readily discern which witnesses are telling the truth, which ones are telling the truth as they know it and which ones are not. We traditionally depend upon the acumen and integrity of the tribunal of fact to sift the evidence and after applying a good dose of common sense, determine where the truth lies. There is no good reason why we cannot continue to apply this time tested and proven method with remote or LLE witnesses.

44. Furthermore, when a witness gives evidence by LLE, his facial features and reactions are often times magnified to a greater extent to a tribunal or Court viewing his evidence especially if a large high definition screen is used, and this will address the concerns of Defendants/Counsel who insist on being able to see the whites of the eyes of a witness under cross-examination. Accordingly, the balance of advantage will normally be neutral, if not adverse to the witness, vis-a-vis viewed by LLE.

45. What prejudice will be suffered by the party presenting the witness for LLE if the application is not allowed? This has often proved to be a vital element in the equation, especially if the witness' evidence is critical to the determination of a material issue in the case, and the consequence of the decision to disallow his LLE is that he does not give evidence at all. This has usually been considered to be determinative of any balance of prejudice in favour of the Applicant. I have therefore weigh on the scale the pros and cons that are live in this case.

46. The Prosecution has alleged that the “Witnesses ‘A’ and ‘B’ are the main witnesses for the Crown. The evidence of these witnesses will ground the case against the accused persons and as such these witnesses’ evidence are of utmost importance. As a pro therefore the allowance of LLE would no doubt result in an improvement of both witnesses’ cooperation, and the Prosecution may secure evidence that would be otherwise unavailable. The Prosecution has also submitted that “the use of special measure would be fundamentally fairer to the accused persons as in the absence of these witnesses, the crown would present in evidence the written statements and/or deposition of Witness ‘A’ and ‘B’. Furthermore, the grant of the special measures application will secure the presence of the witness and facilitate “the effective testing” of the witnesses’ credibility.

47. On the other hand, there is no negative scenario presented by the Defence such as, that the performance of the witnesses may be worse or that there may be less control of the witnesses. In any event either of those two occurrences would only enure to the benefit of the Defendants, as inevitably the loss of credibility on the part of a witness would be adversely viewed by the tribunal of fact.

48. The Court strives to achieve a balance of these competing issues and interests and having balanced these against each other the Court finds that the cost (not necessarily financial) and logistical difficulties of bringing the witnesses into the courtroom is considered to be legitimate considerations particularly for witnesses in the WPP and alternatively that LLE provides a good workable solution.

49. I have also considered what will be the wider consequences of allowing or disallowing the applications of the Prosecution, both in terms of public policy and the overall justice of the case at hand? This is the ultimate determining factor, particularly in a criminal trial. The highest value is normally placed on the right of a Defendant to a fair trial. So if denial of an application for LLE evidence will result in a Defendant being denied the opportunity fully to present his case to the prosecution witnesses, the approach has been that the

application will not be granted. This Court is not persuaded that such will obtain in the instant case.

50. In the absence of further examples from decided cases, to say that the legitimate measures as provided by the legislation ought not to be considered by a Court, or ought not to be utilized in favour of an Applicant, I believe the forgoing factors that I have taken into consideration will in this case, adequately satisfy the requirements of section 3 (5) & (6) of the Act and that the granting of a direction for special measures (LLE) is appropriate in the interests of the administration of justice.