



[2016] JMSC Civ. 197

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 07133

BETWEEN	JOHN MORRIS	CLAIMANT
AND	RADIO JAMAICA LIMITED	1ST DEFENDANT
AND	LATOYA JOHNSON	2ND DEFENDANT

Ms. Jean M. Williams for the Respondent/Claimant.

Mrs. G. Gibson Henlin, Q.C., & Ms. Kristen Fletcher for the Applicant/1st Defendant.

HEARD: October 31, 2016 & November 7, 2016

EVIDENCE – VIDEO LINK – CIVIL PROCEEDINGS - EVIDENCE SPECIAL MEASURES ACT 2012, SECTIONS 2, 3, 5, 6 - CIVIL PROCEDURE RULES 29.2(1), 29.3

CORAM: WINT-BLAIR, J. (Ag.)

[1] I have been assisted by both written and oral submissions from both counsel appearing in the matter. In this judgment I will reference the evidence and submissions only to the extent necessary to explain my findings and decision. The parties should rest assured that in order to arrive at my decision I considered all the material before me and I am indeed grateful to learned counsel for their able assistance

[2] The first defendant in a notice of application for court orders filed on October 26, 2016 sought the following orders:

1. The applicant's witness, Latoya Johnson, is allowed to attend the trial of this action fixed for hearing on the 16th and 17th November 2016 and all subsequent dates that this matter may come on for hearing through a video link or Skype.
2. Time for service of this application is abridged;
3. Costs of the application are costs in the claim.
4. Such further and /or other relief as this Honourable Court deems fit.

[3] The applicant is the first defendant in a lawsuit filed by way of claim form on December 20, 2012. The claimant claims damages, costs and interest for defamation pursuant to the Law Reform (Miscellaneous Provisions) Act.

[4] The brief facts of the claim are that the second defendant was a reporter employed to the first defendant and covered a story which alleged that, the claimant, a decorated former Superintendent of police was connected to a police investigation which led to a raid on his offices in Montego Bay. The raid was in regard to the pervasive "lotto scam" and the report was broadcast on the 5:00 p.m. newscast entitled "Senior cop being probed in lottery scam" on December 17, 2009.

The first defendant filed a defence on February 4, 2013. To this end trial dates have been fixed for November 16 and 17, 2016. The first defendant requires the attendance of the second defendant in order to establish its defence as she is their sole witness to fact.

[5] The applicant relied on the affidavit of urgency of Kristen Fletcher, attorney-at-law, filed on the 26th day of October, 2016. She deponed in her affidavit that Ms. Johnson attended along with her cameraman, a raid being carried out by the police and soldiers at the claimant's place of business.

[6] The matter was first fixed for trial on July 27 and 28, 2015 at which time the witness was unable to attend in person being in an advanced state of pregnancy and not able to travel. The trial was adjourned. The applicant then sought

permission for the witness to give evidence by way of video link. The application was adjourned for various reasons and eventually withdrawn on July 27, 2016 as the witness had indicated to counsel that she would be able to attend for the new trial dates of November 16 and 17, 2016.

- [7] The Corporate Secretary of the first defendant, Stephen Greig, booked a flight to secure the attendance of the witness for trial. On October 5, 2016 counsel, Ms. Fletcher, spoke with the witness, who indicated that she could not travel to Jamaica as her passport had expired. She also told counsel that she was in the process of regularizing her citizenship in the USA and therefore she did not intend to renew her Jamaican passport. The witness had operated on the erroneous belief that she could have travelled on the expired passport, renewing it in Jamaica.
- [8] The witness did not believe that she could obtain a renewed passport in time if she applied for it in the USA as it takes some 7 to 8 weeks. Counsel advised the witness to obtain an emergency travel document. The witness was provided with copies of the passport application form via email from counsel dated October 18, 2016. The witness has not been able to do so as she lives in Redan, Georgia, USA and the consular office in Georgia has been closed, the closest available office is in Miami, Florida.
- [9] The submissions of counsel were both oral and written. It was submitted by Mrs. Gibson-Henlin Q.C. on behalf of the applicant that the witness in support of the earlier application for permission to attend the trial by video link had indicated then through the affidavit of Stephen Greig, that her advanced state of pregnancy and a motor vehicle accident were the reasons she would not be able to attend the trial as she had earlier hoped.
- [10] On this application, the witness does not have a valid travel document and between October 18, 2016 and November 15, 2016 she will be unable to secure one. Counsel has not given any indication in her submissions, whether or not the

witness has applied for an emergency travel document. The witness has elected to attend by video link and has asked counsel to make this application.

[11] The submissions of counsel Ms. Jean Williams were made orally, she indicated that she had only been served with this application filed on October 26, 2016 on October 28, 2016 for hearing on October 31, 2016. She participated nevertheless as the trial date looms large. She argued that this matter had been ventilated and withdrawn after an appeal had been filed. It was Ms. Williams' understanding from this that the witness would be attending in person for the trial. Now, she argued, the court was being asked to accept that the witness whose travel documents could still be renewed within 4 to 7 days by mail and which could still be done before the trial has not been done. It is the witness who has decided she would wish to attend the trial by video rather than in person. She has not indicated any good reason why she should not be present in person. If the application is granted, the witness will be outside the control of the court and there may be issues regarding documents to be shown to the witness. In addition, the witness has not filed her affidavit despite the orders of Daye, J and Palmer, J(Ag) The application, in sum, amounts to an abuse of process.

[12] In response, Mrs. Gibson-Henlin, Q.C. submitted that this application should be treated as a first hearing as the matter has not ever been fully ventilated and a different factual basis now exists. The witness is not compellable; there will be insurmountable prejudice to the applicant if the application is refused as the first defendant would have no witnesses.

[13] The Evidence (Special Measures) Act, 2012 provides in section 2(1) the following definitions:

"civil proceedings" means any proceedings, other than criminal proceedings, before-

(a) the Supreme Court or the Court of Appeal;

(b) ---

(c) ---

(d) ---

(e) ---

"court" means any court of law in Jamaica, and includes a Coroner exercising jurisdiction under the Coroners 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.

"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;

"video recording" means a recording on any medium from which a moving image may be produced by any means and includes any accompanying soundtrack;

"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.

- [14]** The Act makes a distinction between a witness as defined above and a vulnerable witness who is one as defined in section 2. If the witness is not to be considered vulnerable then the court ought to consider the provisions of Part 3.

[15] In Part 3, the types of proceedings are distinguished, between the witness in criminal proceedings, section 3(1)(a) and civil proceedings, 3(1)(b). It is section 3(1)(b) with which we are concerned in this application as it sets out the threshold test and this is whether the special measure being sought is appropriate in the interests of the administration of justice.

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-

--- (b) in the case of a witness in civil proceedings, or at a Coroner's inquest, the court is satisfied that the special measure is appropriate in the interests of the administration of justice.

[16] The applicant has to establish by evidence on affidavit that the factors set out in section 3 (5) are present to ground the application. These are set out below:

- 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*

[17] The section does not bar counsel acting on behalf of the applicant from setting out his/her own affidavit evidence and making submissions on the applicant's behalf. It is my humble view that the meaning of "views expressed" at paragraph (a)

simply means the perspective, attitude or stance being taken by the witness as regards the evidence to be given. These “views expressed”, may be expressed to counsel or someone else and they in turn, may be communicated by that someone else, on behalf of the witness. The section makes provision for the reception of hearsay evidence.

It is expected that opposing counsel will make submissions on the need for effective cross-examination particularly where credibility is in issue, the need for documents to be shown to the witness, that the quality of the evidence may suffer and such the like.

[18] Rule 29.2(1) of the Civil Procedure Rules (‘CPR’) states:

29.2 (1) the general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved -
(a) at trial, by their oral evidence given in public; and
(b) at any other hearing, by affidavit.

Rule 29.3 provides:

“The court may allow a witness to give evidence without being present in the courtroom, through a video link or by any other means”.

Both the Act and Rules indicated above provide for the exercise of a judge’s discretion. In the case of **Estate of Lascelles Samuel Panton v Sun Development Limited** SCCA 25 of 2009 delivered on May 29, 2009, Cooke, J.A. stated at paragraph 10 that:

“It is obvious that evidence given through a video link is not within the general rule. Accordingly there must be sufficient circumstances to justify a departure from the general rule.”

[19] In considering the case of **Polanski v Conde Nast Publications** [2005] UKHL 10, Cooke, J.A. cited with approval paragraphs 14, 21 and 26 of the judgment of Lord Nicholls. This case was also cited in support of this application at bar by Mrs.

Gibson-Henlin, Q.C. It involved the application by a fugitive from the United States who was afraid to return to London to give evidence in a case in which he was a party for fear of being extradited to the USA.

- [20] Both the House of Lords and our own Court of Appeal considered that the reason the witness wished to give evidence by video link was the “*all important question.*” Lord Nicholl went on to say that:

“recent advances in telecommunication technology have made video conferencing a feasible alternative way or presenting oral evidence in court.” [Paragraph 21]

“The powers conferred by the rules (to allow evidence through a video link) is intended to be exercised whenever justice so requires. Seeking a VCF order is not seeking an indulgence.” [paragraph 26]

- [21] It is the dictum of Lord Parker at paragraph 60 which marks the positive approach the courts in Great Britain have taken to the application of video evidence. He stated:

“The improvements in technology are such that, in my recent experience as a trial judge, the giving of evidence by [video conference facilities] VCF has become by 2003 a readily acceptable alternative to giving evidence in person, provided there is a sufficient reason for departing from the normal rule that witnesses give evidence in person before the court. In the ordinary run of a case, a sufficient reason may easily be shown. If there is sufficient reason, then even in cases where the allegations are grave and the consequences to the parties serious, the giving of evidence by VCF is now an entirely satisfactory means of giving evidence in such cases.”

- [22] The House of Lords by a majority recognized that the general rule is that the witness should be physically present in court. This is ideal, convenience should

not be allowed to indicate the use of video conferencing and the court can only exercise limited control over a witness not physically before it. Nonetheless, the House of Lords went on to affirm the decision of the court below that the order should have been made despite the antecedents of the applicant, he should not be denied access to justice.

- [23] The Supreme Court of Canada has clearly indicated that it is in favour of a move from conventional courtroom procedure steeped in tradition to a more modern, flexible approach tailored to the needs of a particular case.

In **Robert Hryniak v Fred Maudlin et al and Ontario Trial Lawyers Association and Canadian Bar Association** 2014 SCC 7, the court was dealing with the issue of a motion for summary judgment and interpreting amendments to Ontario Rules of Civil Procedure. The court held:

“Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result. A shift in culture is required.”

- [24] The exercise of the discretion whether to allow a witness to give evidence by video link is seen by the learned editors of Halsburys as a specific example of the court’s case management power under the Civil Procedure Rules to make use of technology.¹ It goes on to say a witness may be allowed to give evidence through a video link or by other means.²

The footnote (number 3) dealing with hearing of the application states:

¹ Halsburys Vol 17(1) para 1013 (4th edn reissue)

² *ibid*

“No defined limit or set of circumstances must be placed upon the discretion to permit video link evidence, which is to be exercised with the objective of enabling the court to do justice.

Although a refusal to attend which can be characterised as an abuse or contemptuous, or which seeks to obtain a collateral advantage, may put an application beyond the favourable exercise of the discretion, considerations of cost, time, inconvenience etc. are relevant considerations. Regard must be had to the need that parties should be on as equal footing as far as possible. Full access to the court for justice in a civil matter should not, save in exceptional circumstances, be at the price of a litigant losing his liberty and facing criminal proceedings.”

[25] Section 3(2) of the Act provides that:

“The court shall not issue a direction under subsection (1) unless arrangements to implement the special measure are available to the court.”

I am satisfied that there are appropriate arrangements in place to implement the special measure being sought as this technology is in use in the criminal courts. This is also not being disputed by either side. Section 6 sets out the order to be made upon an application.

“6. (1) A direction issued under Part II may provide for a witness to give evidence by means of a live link.

(2) Where a direction under subsection (1) provides for a witness to give evidence by means of a live link, the witness may not give evidence in any other way in the proceedings unless the court revokes or varies the direction.”

(3) ...

- [26]** In the instant case, the witness was pregnant and had been involved in a motor vehicle collision but is now not relying upon those past issues. She is now unable to travel as her passport has expired. The applicant relies upon the affidavit of Kristen Fletcher, Attorney-at-law which indicates that the witness will have to apply to the consulate in Miami, Florida as there is no longer a consulate in Georgia. From the evidence of counsel, Ms. Fletcher, having sent the application details to the witness, I can infer that no application was made as the affidavit doesn't say that it was. The supporting documents attached to Ms. Fletcher's affidavit includes one from the Jamaican consulate in Miami which states that the processing time for a mail - in application is 4 to 7 days for an emergency passport. A walk-in application can be processed in 24 hours.
- [27]** The evidence of this witness is vital to the first defendant's defence. The witness will be extensively cross-examined of that I am certain. Is her inability to attend for trial in person reason enough to allow her to attend by video link?
- [28]** Cost is not a factor in this case, it has not been raised by the applicant.
- [29]** Is it convenient for the witness to attend? The witness has indicated it in this way, in July 2015, she was in an advanced state of pregnancy then and her counsel has submitted that she would have to travel with a young baby. This will be inconvenient for the witness. She is also regularizing her stay in the USA. She had not intended to renew her Jamaican passport as a result.
- [30]** What prejudice will flow from the witness attending by video? Counsel will be able to cross-examine the witness in real time. Documents can be shown to the witness by having an agreed bundle available at the location so that an approved representative may show them to her in the ordinary way. This approved representative must be someone who is capable of administering the oath and called to the bar in that jurisdiction. As Mrs. Gibson-Henlin has posited, the prejudice which will flow will be if the witness cannot attend in person as she is not

compellable and her evidence comprises the substance of the defence of the first defendant.

[31] In balancing the importance of the evidence, I weigh the claimant's unqualified right to have the witness attend in person for cross-examination and the potential prejudice that might arise if she does not. On the other hand, I weigh the convenience, cost, distance to travel for the witness and the impact upon the case of the first defendant if she does not attend at all.

[32] A witness attending for a trial by video is **virtually** present. The witness can see and hear all the parties, as can they the witness. The available technology allows for an instantaneous live transmission of both image and voice and Skype is well known and used globally.

[33] In terms of controlling the witness the Act provides in section 11 self-explanatory terms as follows:

“11. - (1) Where a witness in a foreign state gives evidence by means of a live link in proceedings that are conducted in Jamaica, the witness shall not be compelled to give any evidence which he could not be compelled to give-

- (a) in criminal or civil proceedings in the foreign state; or*
- (b) in criminal or civil proceedings in Jamaica.*

(2) Subject to subsection (1), for the purposes of the laws relating to evidence, procedure, perjury and contempt of court, the witness referred to in subsection (1) shall be deemed to be physically present before the court or tribunal in Jamaica when giving evidence pursuant to this Part.

[34] If the legislature has moved one aspect of trial procedure into the new millennium it is this. A modern, efficient trial system is the goal and video link evidence is able to

take the courts one step closer. It is not for the courts to decry modern technological advances which save time, cost and eliminate delay since it is those factors which are the greatest obstacles to efficient court administration.

- [35]** The civil trial court ought not to be constrained by a lack of rules or a practice direction governing this area of procedure. It is simply a matter of modifying the criminal rules currently in force so as to accommodate the party and party structure of a civil trial until then.
- [36]** I would hold that the performance of a witness appearing by video link would enure to the benefit of the court as the witness may perform more capably, due in part to there being less stress from the audience of strangers in the courtroom, little to no consideration of lengthy distances to travel, there being no flight to catch, no concern for family business or employment being negatively affected by his/her departure.
- [37]** In addressing the vexed issue of assessing demeanour by the medium of video conferencing. 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 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.
- [38]** The effect of the video 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.

[39] Documents can be transmitted by way of facsimile or other medium between the locations. Agreed bundles can be provided to any representative chosen by the parties who will show them to the witness as would occur in person. The costs of the proceedings will be borne by the applicant which will not be a burden to the other side.

[40] I do not find that abuse of process arises for determination in this matter. The administration of justice is the overriding concern of the court and to this end the grant of this application will achieve those ends.

[41] For the reasons stated I hereby grant the application in terms of the draft orders sought:

1. The Applicant's witness, Latoya Johnson, is allowed to attend the trial of this action that is fixed for hearing on the 16th and 17th November 2016 and all subsequent dates that this matter may come on for hearing through a video link including Skype
2. Time for service of this application is abridged
3. Trial must take place in Courts 3 or 10 and none other. The Registrar of the Supreme Court must make arrangements for technological support from Court Administration Division for the trial and on each date of trial.
4. The Applicant is to identify an appropriate venue to serve as a video link facility in Georgia (the "remote site").
5. The Applicant is to make the necessary arrangements to enable transmission from the remote site to the Supreme Court in Jamaica (the "local site.")
6. 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

7. The Applicant is to arrange for an Attorney-at-Law to act as Clerk at the remote site for the purposes of administering the oath and handing documents to the witnesses.
8. The trial bundles including all documents are to be delivered to the remote site by the Applicant not less than three days before the first date fixed for trial.
9. Costs of the transmission, including the costs of hiring equipment and technical personnel for its operation, are to be borne initially by the Applicant; however, all such costs will be considered as part of the costs of the proceedings
10. Costs of the application are costs in the claim.
11. Applicant's Attorney-at-law to prepare file and serve the orders made herein.