



[2017] JMSC Crim 2

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE HOME CIRCUIT COURT**

**CLAIM NO. 2015HCC00200**

**R v. CHRISTOPHER THOMAS**

Mrs. Natiesha Fairclough-Hylton, Crown Counsel, instructed by the Office of the Director of Public Prosecutions for the Prosecution.

Mr. Trevor Cuff instructed by Zavia Mayne and Company for the Defendant.

Heard: June 6, and 12, 2017

**Evidence -- Criminal proceedings – Supreme Court - Trial – Application for special measures - Video Link — Child Witness - Vulnerable Witness - Evidence (Special Measures) Act 2012**

**Wint-Blair, J (Ag.)**

[1] This is an application for special measures filed by the Director of Public Prosecutions for the complainant, a child and vulnerable witness within the meaning of the Evidence (Special Measures) Act (“the Act”) to give evidence by way of live link. This application was opposed in writing by defence counsel and a hearing was conducted in open court to determine the issue. I am grateful for the submissions of counsel which helped to navigate this relatively uncharted yet important area.

**The Evidence (Special Measures) Act**

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

*"child witness" means a witness under the age of eighteen years;*

*"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.*

- [3]** Special measures in Part II of the Act are available to witnesses in criminal proceedings other than the accused, 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.<sup>1</sup> No direction for special measures can be given unless arrangements can be made to implement the special measure.<sup>2</sup>

**[4]** (2) *For the purposes of Part II, a witness is a vulnerable witness if -*

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

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

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

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

*(ii) the fact that the witness has a physical disability, physical disorder or suffers from a mental disorder within the meaning of the Mental Health Act.<sup>3</sup>*

**[5]** An application which falls within section 2(2)(a) or (b) moves the court to consider the provisions of sections 3(6) and 3(1)(a)(i).

**[6]** Where the vulnerable witness is a child, there is a presumption that each special measure or a combination thereof is appropriate in the interests of the administration of justice and the court shall make a direction to that effect.<sup>4</sup> The child should be mature enough to understand the solemnity of the proceedings and the special measure to be used.

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<sup>1</sup> Evidence Special Measures Act, section 3(1)(a).

<sup>2</sup> s. 3(2).

<sup>3</sup> Section 2(2).

<sup>4</sup> Section 3(6).

[7] This presumption is rebutted by submissions to the court to satisfy it that the special measures are not necessary as they are unlikely to improve the quality of the evidence or the child witness wishes to testify in open court. If the child wishes to testify in open court he or she can opt out, however, the court still has to decide whether the coherence, accuracy and completeness of the evidence can be attained before allowing this.<sup>5</sup>

[8] The enquiry then moves to balancing the interests of the administration of justice pursuant to section 3(5) against the needs of a vulnerable witness or a child witness. The court shall consider 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.

[9] The application before me concerns a vulnerable witness under section 2(1)(a) and (b) of the Act. The presumption that special measures are appropriate therefore arises on the application before the court.

### **Submissions**

[10] Prosecuting counsel submitted that the complainant who is fourteen years of age shakes uncontrollably due to nervousness when she sees the defendant. She is the main witness for the prosecution and her evidence is of vital importance. Special measures, namely evidence by live link will improve the quality of her

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<sup>5</sup> Section 3(6)(a) and (b).

evidence as she will not be in the same room as the defendant and therefore not nervous. The issue of the complainant's nervousness will significantly diminish the quality of her evidence. The use of live link technology means that her evidence will be tested by cross-examination in the usual way. The court, jury and defence will be able to see the complainant, get her responses and observe her demeanour. The jury will be directed on the use of live link technology and no prejudice will therefore result to the defendant. The court can accommodate the matter in court 3 where there are facilities for evidence by live link. This has been the location of all such other cases.

- [11] Defence counsel submitted that he is opposed to the use of special measures as the complainant was able to give full and complete evidence at the preliminary enquiry. She was able to withstand the rigours of cross-examination there therefore the use of special measures is unwarranted. The complainant was to have received counselling and the trial was adjourned for that undertaking, the result of which is unknown. The special measure would inhibit the effective testing of the witness in that it would affect the demeanour of the witness being examined. This would lead to prejudice to the defence case as this is a case in which credibility is the central issue. The solemnity of the occasion would be lost on the witness by removing her from the courtroom. Most of all, the jury may speculate and draw adverse inferences from the complainant's absence from the courtroom despite any direction given by the court and any favourable evidence presented by the defendant. The interests of the administration of justice would not be served by the grant of the application.

### **Discussion**

To what extent is the court to accommodate the witness in a criminal trial? This no doubt is a controversial issue and both prosecution and defence would disagree on just how far the court should be prepared to go. However, both sides should agree on the recent attention being paid by the legislature to the special needs of children and vulnerable witnesses. The law already provides for

trials involving children and witnesses in sexual offence matters to be held in camera and for non-publication of the identities of complainants in these matters. There of course must be suitable accommodation by a court for anyone to include a witness or defendant who needs access to justice but has personal or physical constraints. The Act also expressly provides that the court shall consider the emotional state of a vulnerable witness in determining the application.

- [12]** The stress and fear of attending court and giving evidence particularly when a witness is considered vulnerable must be balanced against the administration of justice. The court must undertake a balancing exercise considering the right of the defendant to face his accuser and the prejudice which will flow if he cannot, against the right of a vulnerable witness to give evidence in a manner which does lend itself to fear or distress. Distress and fear can and does affect the quality of communication by witnesses. What is being sought from the witness is the best evidence obtainable, a complete, coherent and accurate account.
- [13]** This explains the structure of the Act and Rules which indicate that in the case of a vulnerable child witness, there is a presumption in favour of special measures unless the witness opts out or the presumption is rebutted. The court as a corollary, will embark on a process of weighing the respective interests. Additionally, the court is to be satisfied that the special measure is necessary in order to ensure that what will be given in evidence by the witness will be the best account.
- [14]** The right to face one's accusers need no longer be given a literal interpretation as a witness who appears by live link is deemed to be physically present though the witness is physically absent he or she is virtually present.<sup>6</sup> This right has not been diluted, it is and has always been, the right of a defendant to be present in court at his trial, to hear the case against him and to answer and defence make.

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<sup>6</sup> Section 8(3).

The presumption that the defendant is innocent until proven guilty has not been removed by the advances in technology. I posit a more liberal view of the defendant's right as one of the factors to be taken into account in the balancing exercise when an application of this nature is being determined.

- [15] Mr. Cuff submits in rebutting the presumption, that the impact of the evidence of a witness by live link on the jury may lead them to speculate about the reasons for the absence of the witness. This is readily cured by the trial Judge directing the jury at the outset of the trial as to the different ways the law has allowed for the reception of evidence to be received. The reason for the reception of evidence by live link may be explained to the jury as saving cost, time, distance to travel and as a technological advance which is new today, but which will soon be commonplace. That there should be no negative inference drawn from the witness being virtually present, nor any speculation as to why, as it is a decision of the court by which the defendant is bound. The technology is also available to the defendant and his witnesses. Prosecuting counsel shall open to the fact that the evidence of a witness will be presented in this way and remind the jury that it is a decision of the court which cannot be used against the defendant.<sup>7</sup>

### **Credibility as the central issue**

- [16] Mr. Cuff also submitted that the central issue is credibility. This is a case in which strident cross examination will be paramount. The use of live link means the in-person effect of cross-examination will be lost to the jury. It is indeed true that in our adversarial system of trials, the importance of cross-examination cannot be gainsaid. There has not been a removal of cross-examination by the provisions of the Act. Trial courts are well used to cross-examination being used as a precision instrument in the hands of a skillful attorney. Nonetheless, the legislature has seen fit to provide certain exceptions where witnesses fall into the defined categories of "vulnerable" or "child". This is to ensure that the evidence

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<sup>7</sup> Section 8(4)

of these witnesses can be heard by the court without fear or distress, diminishing its quality.

- [17] Special measures will also tend to reduce the need for adjournments to accommodate these witnesses, in respect of the completeness of the evidence to be given. If the attendance of the witness will cause distress or fear or render the witness unable to communicate effectively such that the clarity, coherence and accuracy of the evidence is undermined then the exercise would be one in futility.

### **Demeanour**

- [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.

### **Integrity of the trial**

- [20] The prosecution in a criminal case bears the burden of proof. It must ensure that the court is satisfied that the necessary safeguards are in place for the presentation of its case in an environment which will preserve the integrity of the evidence. It is for the prosecution to satisfy the court that there is no potential subversion of the trial process. In other words, the location from which the



witness will testify must be sterile. A living room or backyard is not what is being contemplated. The court must know exactly what is happening, where it is happening and who it is happening to. In all this, the witness must be alive to the requirement that the solemnity of the trial cannot be comprised.<sup>8</sup>

### **Impeaching credibility by the use of documents**

- [21] Documents can be transmitted by way of facsimile or other medium between the locations if facilities are available. Agreed bundles can also be provided to the Clerk or Registrar at the remote site who will show them to the witness as would occur in person. Another arrangement could be that all of the documents to be referred to at trial should be stored on separate databases for each side and managed by the Registrar. Screens similar to those used to display photographs and other exhibits could be installed upon which the relevant documents can be displayed. Then, when referring to a document (whether it was a document that the witness had a paper copy of in the bundle, or a document that was not in the bundle and was being shown to the witness by counsel) for the document to be displayed on the screens both in the courtroom and in the room in which the witness is present. In the courtroom what should be seen is a split screen, with one frame displaying the document and the other frame showing the live witness. That is another solution, the technology experts can come up with far better ones than I. Of course, these arrangements would necessitate the consent of both sides with a view to the smooth flow of the trial.
- [22] 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.

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<sup>8</sup> Evidence (Special Measures)(Criminal Jurisdiction)(Judicature)(Supreme Court)Rules, 2016. Rule 11(e).

- [23] The criminal law has evolved and in the search for truth, any arrangements which can be made to protect and balance both the right of the defendant to make full answer and defence and the obtaining of the best evidence of a witness aided by technology is a welcome change and one which the court should embrace.
- [24] Many Commonwealth countries have embraced this feature in criminal trials. Australia by way of the Crimes Act and at the Federal level, the Mutual Assistance in Criminal Matters Act of 1987. This feature was originally included in New Zealand's legislation in the Evidence and Procedure (New Zealand) Act of 1994. This Act was replaced, but the law allowed for the reception of evidence by video link in their Evidence Act of 2006 (later amended in 2016). Canada by way of section 714.1 of the Canadian Criminal Code and in the United Kingdom's Youth Justice and Criminal Evidence Act, 1999, sections 16 and 33 as well as section 51 of the Criminal Justice Act, 2003.
- [25] The Supreme Court of Canada has stated that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be readjusted – a shift in culture which maintains the goal of a fair process that results in a just adjudication of disputes but does so in a way that is proportionate, timely and affordable: **Hryniak v. Mauldin**, 2014 SCC 7, [2014] 1 S.C.R. 87.
- [26] The general principle that trial evidence should ordinarily be presented orally is articulably and unequivocally the procedure, it is also appropriate, in light of the 21<sup>st</sup> century to take a modern view of the use of technology as an aid to conducting targeted, pointed, efficient criminal trials. The use of technology does not derogate from the general principle that oral evidence should be given by a witness in court. As I have indicated, a witness appearing by live link, is in court, virtually so. Any evidence is given orally, under oath or affirmation, and is "live" as it would be with the witness present in the courtroom. Questions are asked and answers are given in the usual way. The witness will be observed by all and in fact, demeanour and non-verbal cues that could be missed if the individual

was physically present can be observed clearly on the screen. The evidence is received by the court and heard and understood by counsel and all others present in the courtroom as required by the Act.

[27] Available technologies include not only the ability to examine a witness but, also, to put to that witness in a contemporaneous way documents and other exhibits, again using technology.

[28] Video testimony can be and is often used in criminal cases in Canadian courts, in cases where the central issue is credibility. In **Paiva v. Corpening**, 2012, ONCJ 88, 9 R.F.L. (7<sup>th</sup>) 203, the court noted, at para. 31:

*“It is worth noting that there are other criminal cases decided under s. 714.1 [of the Criminal Code] in which video conference evidence was permitted because of a complainant’s personal circumstances, including the cost of travelling to trial. These were cases of domestic assault and sexual assault in which assessment of the credibility of the complainant was crucial; judges in those cases found that they were not hampered in any substantial way in making credibility assessments.”*

[29] The suitability of video conferencing in cases where credibility was the main issue was also reviewed in **R. v. Allen**, [2007] O.J. No. 1353 (O.C.J.), at para 26:

*“The defence further submits that it will be more difficult to get a sense of the witness’s credibility without him being present. I don’t think that can be assumed to be so. In some respects there are advantages in that the court will presumably have the benefit of a full face on-view of the witness as opposed to the profile seen in court. The testimony will be taped and be replayed at will. It is worth noting that video-linked evidence of children is routinely received in our courts and the credibility assessments are not hampered by the procedure. Further, some of the cases....dealing with s. 714.1 have commented that video-linked evidence has been found to be superior in these respects: see for example [R. v. Hannen, 2000 Y.T.T.C. 502, [2000] Y.J. No. 6 (Terr. Ct.) at paras.] 315, 327.”*

[30] Each request will have to be decided on its own facts and on its own circumstances, provided that there is a reasonable explanation for a witness not being able to attend in court to give evidence, once the technology is available and can readily be deployed, a court should be slow to refuse the request of

either side to receive the testimony of a witness by live link. I would hold that the performance of a witness appearing by live 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 even in a closed courtroom and in this case being in the same room as the defendant.

**[31]** It is for the prosecution to ensure that the evidence of the witnesses can be taken by live link on the day of trial. This is not a cost to the defendant who may be legally represented. The widespread availability of video conferencing services is such that the lack of precise details of the where, when and how of a request is not a reason to reject the Crown's request in principle as I have indicated. It is for the Crown to satisfy the court that the integrity of the trial process will not be compromised in the presentation of its case via live link.

**[32]** It has been my experience, that in such trials the picture and sound quality were excellent. Counsel and the court registrar were able to efficiently manage the process. The flow of the trial was not much less spontaneous than it would have been if the witness had been present in court. The entire experience of trial judges has been entirely satisfactory. The fears expressed by the defendant in opposing the application sought are unfounded.

**[33]** Perhaps, by way of a cultural shift looking towards the future as opposed to focusing pensively upon the past; as long as court resources permit, counsel and the court could also consider the potential for out-of-town witnesses to testify via live link. Counsel could ensure that the court can accommodate the request and is comfortable with the testimony being heard by live link. Video technology has advanced such that courts have found that it is possible to make findings of fact and decisions about credibility based on evidence taken in that way.

**[34]** The court will therefore grant the application sought and make the following orders:

1. The Prosecution's witness, subject of this application is a child and vulnerable witness, she will be named S.F. in this order.

2. The trial of R v Christopher Thomas is to be fixed on the 12<sup>th</sup> day of June, 2017.
3. S.F. will 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.
4. This trial must take place in Court 3.
5. 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, S.F. is needed to testify.
6. The Prosecution is to identify to the Registrar of the Supreme Court and the court on the 12<sup>th</sup> day of June, 2017 by 4 pm an appropriate venue to serve as a live link facility from which the witness will testify (the "remote site").
7. The Registrar of the Supreme Court is to make the necessary arrangements to enable transmission from the remote site to Court 3 of the Supreme Court in Jamaica (the "local site.")
8. The prosecution 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.
9. The Prosecution and Defence are to agree if possible, the documents to which they intend to refer during the testimony of S. F.
10. If there can be no agreed bundle then each side shall file their own bundle no less than three days before trial.
11. Any party wishing to reduce their bundle to an electronic copy for display on screen may do so.
12. The witness S.F. shall not give evidence in any other way unless a Judge of this court revokes or varies these directions.