IN THE SUPREME COURT OF BERMUDA
CRIMINAL JURISDICTION
Case No. 2 of 2022

BETWEEN:

THE KING

-and-

RAHEEM WRAY

Before: **The Hon. Justice Mr. Mark Pettingill, Assistant Puisne Judge**

Appearances: DPP Ms. Cindy Clarke for the Prosecution
Mr. Jerome Lynch KC for the Defendant

Date of Hearing: 9th October 2023
Date of Ruling: 20th November 2023

RULING
(Reasons)

Application to to have witnesses read in

1. This is a two prong application by the Crown in relation to seeking leave for the evidence of a particular witness to be either read into Court or in the alternative to be conducted by AudioVisual link, a.k.a. Zoom without the witness actually being present in the Court room.

2. By way of brief background, this is a case involving a charge of murder against the Defendant after a stabbing incident during a melee at the end of a party in St. George's in April 2022. The DPP states, and Mr Lynch KC for the Defendant agrees, that the evidence which is the subject of this application relates to "identification", and the proposed witness is *prima facie* the only evidence of identification of the Defendant allegedly, actually stabbing the victim.

3. The underlying basis for the Crown making this application is that the witness is in fear of appearing in person given a perceived threat to him and his family. Both counsel agree, and indeed the Court takes note, that there is a "***don't snitch don't tell***" culture which exists in Bermuda which is extremely disconcerting. The DPP cited a report from the Commissioner of Police, which condemned social media posts, which accused individuals of providing information which may have led to criminals being incarcerated. It was highlighted that this was dangerous and had the propensity to put the lives of individuals at risk. Mr Lynch KC did not take issue with the fact that this was indeed a concerning situation in Bermuda.

4. The Prosecution in its submission indicated to the Court that the identity of the key witness in this case had been protected as long as it was possible, and indeed, his initial witness statement had been filed with a level of anonymity. The Court notes, contrary to the position in the United Kingdom, that there is no provision legally for this approach, with regard to a witness in Bermuda, and the DPP submitted that it was understandable.

5. It was submitted that the witness was in fear of retaliation, simply because he provided a witness statement in the first place. In a second witness statement He stated:

   "***everybody knows how the streets operate***. "

6. I am satisfied that at the time of making a formal statement to the police, the witness was clearly fearful of being exposed as a **"*snitch*."** Furthermore, on the submission of the DPP, who is obviously bound to interview witnesses before trial, it is accepted that some degree of fear continues to operate on the witness's mind. Indeed, in his first statement to the police, he indicated he would be willing to assist but only "***if his statement could be read into Court."***

7. The first limb of the Crown's application is made in accordance with **section 75 of <u>The Police and Criminal Evidence Act 2006(PACE)</u>** which provides that:

   … ***a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible, if that statement was made to a police officer, and at the person who made it does not give oral evidence out of fear or because he has kept out of the way.***

8. The DPP cited the case of **Hewey and Dill, CA 9 and 13 of 2013 at paragraphs 42 to 46** in support of her position that the witness's statement should be read in as reflective of his willingness to give evidence on that basis set out in his first statement. I take the view that the approach taken by the Court in the case of **Hewey** is distinguishable from the current case at Bar. In **Hewey**, the Court stated that "***the statement of the witness explaining the fear was one of the strongest and most comprehensive he had ever seen".*** I do not see that degree of fear being enunciated in the statements before the court from the proposed witness in this matter.

9. In considering whether or not a witness statement should be read in, there are a number of matters that the Court must have and I take note of these considerations prescribed in subsection 1 with regard to the duty of the Court in considering this approach. I make the following observations:

   (i) *I accept with regard to the nature and source of the document, containing the statement that it is properly made and witnessed.*

   (ii) *I accept the document is authentic.*

   (iii) *I accept the statement appears to supply evidence which would otherwise not be readily available i.e the proposed witness is the only eyewitness to the actual stabbing of the victim.*

   (iv) *I accept that the proposed evidence is of relevance and appears to give evidential support for important issues to be determined by the trier of fact, i.e. the identification of the accused.*

   (v) *With regard to the consideration of any risk as to whether or not the statement can be controverted if the witness does not attend to give oral evidence in the proceedings, is in my view, of paramount consideration, and indeed, it is accepted by the Crown that there is a risk that the evidence would not be capable of being controverted if the witness does not testify. The DPP takes a position that any risk of a lack of ability to controvert the evidence is fairly balanced by the Crown not being able to assist a jury with asking questions with regard to reliability.*

   I take the view that in a case such as this involving an "identification" issue, and with all of the significant directions that must be given in accordance with ***Turnbull,*** *guidelines that the risk of unfairness to the accused in not being able to question the reliability and veracity of the witness's statement, and explore the circumstances, is considerable and cannot be reasonably and fairly balanced by any challenges that may arise for the Crown in addressing reliability.*

   (vi) *The foregoing consideration by the Court is confirmed, by the consideration which must be taken into account in* ***section 75(1) (f) of PACE*** :

> … ***whether the admission or exclusion of the statement would result in unfairness to the accused***.

10. I am of the view that the reading in of this type of evidence in a case where the proposed evidence may well be pivotal to proving a key componenet of the allegation, without the Defence having an ability to contradict the witness of asking probing questions, would create a situation of significant unfairness to the Defendant. Furthermore, the Court has a concern that a witness, as is the case here, stating that they are only prepared to have their statement go forward if it can be read in would potentially open "***Pandora's Box***" to a plethora of future potential witnesses taking the same approach because they simply do not wish to attend Court to give evidence because of the existence of the "***snitch culture"*** in Bermuda.

Despite the concerns with regard to this social anomaly, the justice system cannot be held hostage to witnesses, dictating in what matter they are prepared to give *vive voce* evidence or not. It is the duty of members of the public who are witnesses to acts of criminal violence, to be prepared to courageously and confidently come forward and state honestly what they have seen. Certainly, all that can be done to protect them from fear of any reprisal must be taken, but the Court takes a view that people must be prepared and encouraged to do the right thing in the public interest. Clearly this has to be balanced with the Constitutional protection of the rights of an individual to a fair trial, which must necessarily include the ability for a key witness statement to be subject to cross-examination by the Defence Counsel, perhaps most particularly in cases where "identification" is a significant element of a case given the particular guidelines that are in place.

11. As I indicated at the time of the hearing, and on the basis of the foregoing considerations, I am not prepared to take the approach of allowing the statement of the witness to be read in, and for this key witness not to give evidence orally and be cross examined in some form.

12. I now consider the alternative application of the Crown which is made under **section 4 of the Evidence(Audio Visual Link) Act 2018.** A direction may be given in accordance with section 5 and 6 of that Act and the Crown bases its application on the following six grounds:-

(i) The nature and circumstances to which the proceedings relate.
(ii) The proposed witness's fear of intimidation.
(iii) The relationship of the witness to any party to the proceedings.

(iv) The nature of the evidence that the witness is expected to give.
(v) The availability, quality and security of the technology to be used.

(vi) *Any relevant matters, including the effective maintenance of the right of a party to a fair hearing .*

In this regard, the DPP submits with regard to the issue of fairness, that, given the vulnerability of intimidation of the witness, that permitting him to give evidence via **"Zoom"** will allow him to be examined in chief, and most importantly, cross-examined by Counsel for the Defence. This will allow for his demeanor and manner to also be scrutinized. The DPP emphasizes that precedent has confirmed that the advancement of technology offers a better lens to observe the witnesses demeanor, and determine the witness credibility which is paramount in criminal trials.

13. Mr. Lynch KC, for the Defendant, understandably makes the forceful submission that the evidence in a case, such as this, involving a key witness to an alleged murder, should be given *vive voce* from the witness box in accordance with normal procedure and time established principles of fairness. Counsel further submitted that there must be compelling reasons why the Court would depart from the norm. Mr. Lynch KC asserted that this issue relates to the primary witness and that a Jury should be able to gauge him "live" rather than through a screen and that the Crown is not indicating the witness will refuse to give evidence if the direction is that he must do so "live".

14. Mr. Lynch KC submitted that any concerns about the witness giving evidence in the proceedings in court could be ameliorated by other measures being put in place and suggested the following:-

(i) *Police who enters the Court Room during his evidence.*
(ii) *Clear the public gallery.*
(iii) *Screen the public gallery.*
(iv) *Keep his name from being spoken out loud in the Court.*
(v) *Prohibit reporting of anything that would identify the witness.*
(vi) *Any other measures that might assist (I would think such as security etc.).*

15. The foregoing are all sensible and reasonable suggestions and indeed have been applied in hearings in Bermuda in the past.

16. I will address the foregoing before giving my reasoning on the Court's decision in this matter. Whilst the measures suggested may have application in particular cases and indeed may be essential on occasion, they are also, in my view, a departure from the norm and

have the potential to cause speculation by a Juror, despite any warnings the Court may give. My significant concern here is for fairness to the Defendant in that a Jury may form the view that special protection has to be given to a key witness because the Defendant is to be feared. I see a real risk of the loss of the shield of the presumption of innocence and indeed good character if too much of a "circus" ensues in what measures are imposed during a live hearing. I take the view that the measures properly suggested should only occur in the most compelling and extreme circumstances and I do not see that arising in the current case.

17. Taking into account all of the matters raised I am of the view that a very sensible balance needs to be struck between ensuring that a key witness does give evidence, and is not put off by fear of reprisal and the fundamental right of the accused to have a fair trial which must always include the right to have Counsel cross examine the witness.

18. In all of the circumstances of this case I am of the view that the most sensible and indeed the fairest course is to allow the witness to give evidence via "Zoom" link.

19. In order to avoid any speculation, I intend to give a simple direction to the Jury that in this modern age it is not uncommon for a witness to give evidence in this manner because they may not be available to give evidence live in Court . Of course I will indicate that the Jury must assess the testimony in the same manner as they would if the witness were in the witness box. I will consider any other suggestions Counsel may have in order to ameliorate any concerns about the evidence being given in this manner.

Conclusion

1. The Crown's Application to have the witness statement read is refused.

2. The Crown's Application, for the reasons I have set out, to have the witness give evidence via Audio Visual link is allowed.

Dated the 20th day of November 2023

THE SEAL OF THE SUPREME COURT OF BERMUDA
SIGNED

The Hon. Mr. Justice Mark Pettingill, Assistant Puisne Judge