

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT**

**CRIMINAL LAW DIVISION  
VBI No. 97/5 2018**

**BETWEEN**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**Applicant**

**AND**

**STEPHANO CURRY**

**Respondent**

**Before: The Hon. Madam Justice Renae McKay**

**Appearances: Mr. Joel Seymour for the Applicant  
Ms. Crystal Rolle for the Respondent**

**Hearing Date: 11<sup>th</sup> November, 2020**

**Ruling Date: 10<sup>th</sup> December, 2020**

**RULING**

**Criminal – Application for sole witness to give evidence by way of video link application – Sole witness/virtual complainant resident outside of jurisdiction – Travel restrictions due to COVID-19 – Right to fair trial absolute – s. 78B Evidence (Amendment) Act, 2014**

1. This is an application by the Applicant, the Director of Public Prosecutions (**the “Applicant”**) to have its primary witnesses in the matter against the Applicant, Stephano Kenny Curry (**the “Respondent”**) given by way of video link. The application is made pursuant to s. 78B (1) (b) of the **Evidence (Amendment) Act, 2014**.

**Background**

2. By a Voluntary Bill of Indictment filed 17<sup>th</sup> May, 2018, the Respondent was charged with the offence of Rape, contrary to section 6 (a) of the **Sexual Offences Act**. The particulars of the offence are that he allegedly raped Kine Stromsnes (**“Ms. Stromsnes”**) on Sunday, 14<sup>th</sup> January 2018.
3. Ms. Stromsnes, a citizen of Norway, alleged that during her vacation to New Providence, she was on a tour of the island, when she and the driver of the vehicle she was in, were stopped by officers of the Royal Bahamas Police Force for driving the opposite way on the road that they were travelling.

4. She further alleged that they were ordered out of the vehicle, when she informed them that she had been smoking. In response, Officer 1739 informed her that she would have to spend two years in jail for marijuana and he along with the other police officers informed her that they would have to walk her to the police station.
5. Ms. Stromsnes claimed that Officer 1739 took her to a tiny corner in a dark area, bent her over, took out his penis and stuck it in her from behind once without a condom. Thereafter, she felt a wet substance draining down her leg and was told by Officer 1739 not to say anything to anyone.
6. Ms. Stromsnes later reported the matter to the police station and the Respondent was arrested and subsequently charged. His trial is set to commence on Monday, 14<sup>th</sup> February, 2021.

### **The Application**

7. By the Affidavit in Support of Application to Adduce Evidence by Live Television-Link filed 16<sup>th</sup> October, 2020, the Applicant averred that the prosecution witness, Ms. Stromsnes was willing to give evidence via video link as she resided in Norway; adding that it was more economically feasible for her to give evidence therefrom.
8. The Applicant added that during the COVID-19 pandemic, many countries limited traveling for safety precautions, therefore it would be more effective and efficient to have Ms. Stromsnes give her evidence from Norway. Moreover, if the Court acceded to its application, Multimedia Technologies will be contracted by the Director of Public Prosecution's Office to provide television-link services for the named witness.
9. The Applicant explained that Multimedia Technologies is a part of a network of companies around the world which provides audio and video conferencing services to clients. It added that it would provide a private and secure location in The Bahamas for the witness to give evidence.
10. It was further explained that its video conferencing system allowed for pan/tilt and zoom to ensure that the witness is alone in the room when he/she gives evidence. The Respondent averred that in no way would the accused be prejudiced or embarrassed in his defense if Ms. Stromsnes is allowed to give evidence by way of live television-link.
11. At the hearing, Counsel for the Applicant, Mr. Joel Seymour ("**Mr. Seymour**") informed the court that the application was being made for Ms. Stromsnes and her companion who was traveling with her at the time, Mr. Jean Abetta ("**Mr. Abetta**"). He submitted that due to the COVID-19 pandemic throughout the world, the travel protocols requires all visitors to the Country to quarantine for a period of 14 days.
12. He added that it was unknown whether the restrictions would still be in place at the time of the Respondent's trial or what would be the new requirements for individuals coming into the jurisdiction.

13. Mr. Seymour further submitted that the 14 day quarantine would be an unnecessary expense, as the Applicant would not only have to incur the airfare for the witnesses but hotel fees for the 14 days that they would be required to quarantine. Also, he added that he was unsure what the procedure was upon their return to Norway, specifically whether or not they would be required to quarantine.
14. Mr. Seymour contended that the multimedia system that was in place was adequate and would not prevent the Respondent's attorneys from presenting their defence. He added that there was nothing prejudicial to the Respondent and nothing that prevented his Counsel from asking any questions pertinent to their defense and that there was no obstruction of justice.
15. In support of his submissions, Mr. Seymour cited **R v. Blenrick Miller**, a case that was tried before this Court, where an application for the primary witness to give her evidence by video link was made without objection. The accused was charged with the rape of the virtual complainant who was a resident of the United Kingdom.
16. As a result, she was allowed to give her evidence by way of video link and there was no difficulty incurred by defense counsel in cross examining her and by extension no prejudice to the accused as he was found to be not guilty of the charges that were laid against him.

#### **The Respondent's Response**

17. Counsel for the Respondent, Ms. Crystal Rolle ("**Ms. Rolle**") submitted that while the crux of the Applicant's submission was because of the COVID-19 pandemic, she wished to remind the Court that the Applicant had indicated since 2019 that it intended to make the application, prior to the COVID-19 pandemic.
18. She added that while they are now indicating that it was their intention to make the application, the Court had to ask the Applicant on at least four occasions in 2019 about the application and that it was only after the court made an Unless Order that they formerly filed their application.
19. Ms. Rolle also brought to the court's attention that the Applicant's filed application was only in respect of one witness and not the second, arguing that the Respondent is a citizen of The Bahamas and not a foreigner, therefore pursuant to the Constitution of The Bahamas, there was a presumption of innocence on his behalf.
20. With respect to the Applicant's submission that a multimedia facility was being put in place to facilitate the evidence by video link, she submitted that that was also not an expense that the Country could not undertake, thus the purchase of the multimedia equipment and the payment of the hotel fees of the witnesses would amount to the same expense.
21. Ms. Rolle further submitted that as the Applicant's application was founded in s. 78 (1) (b) of the Evidence Act, an alleged travel ban was not an appropriate or a sufficient

reason for the Court to exercise its discretion to allow the witness to give evidence by way of video link.

22. Ms. Rolle cited **Polansky Conde Nast 2005 UK HL 10**, where at para 14 of the judgment, Lord Nicholls of Birkenhead stated,

**“[14]Condé Nast does not suggest otherwise. Improvements in technology enable Mr Polanski's evidence to be tested as adequately if given by VCF as it could be if given in court. Eady J, an experienced judge, said that cross-examination takes place 'as naturally and freely as when a witness is present in the court room'. Thomas LJ said that in his recent experience as a trial judge, giving evidence by VCF is a 'readily acceptable alternative' to giving evidence in person and an 'entirely satisfactory means of giving evidence' if there is sufficient reason for departing from the normal rule that witnesses give evidence in person before the court: see [2004] 1 All ER 1220 at [60]. Whether Mr Polanski's reason is sufficient is the all-important question to which I shall return.**

23. In reliance on Lord Nicholl's dicta, Ms. Rolle contended that in considering the background of the application along with the fact that the Crown intended to make the application prior to COVID-19, their reliance on the existence of the COVID-19 pandemic is now very concerning. With respect to the Applicant's argument being geared around a travel ban, she submitted that travel was fluctuating.
24. Ms. Rolle then contended that the best mode of giving evidence in court is in person and expanded on her constitutional point she had raised earlier in her submissions. She added that **Article 20 (2) of the Constitution** guarantees that a person charged with a criminal offence will have any witnesses giving evidence against him to appear in person to be examined. Ms. Rolle went on to say that the sub stratum of her argument is that s. 78 (b) of the Act is in contravention of Article 20 (2) of the Constitution.
25. Ms. Rolle further contended that the court was required to perform a balancing act of the two provisions and that it is to have credence to the circumstances of the particular case. With respect to the allegations of rape she submitted that in the absence of any requirement for any co-operative element of the witness's case, the Court upon hearing the evidence of all witnesses, had to determine whose evidence to believe.
26. In that regard, she submitted that the demeanor and actions of the witnesses under cross examination is crucial and essential. Ms. Rolle went on to question whether the Court would consider it fair to allow the Applicant's sole, primary witness, to provide their strongest evidence against the Respondent to be given via video link which she suggested was "less than" quality as the better quality was for the witness to appear in person.
27. Ms. Rolle then contended that the reactions of the witnesses under cross examination are to be perceived by the jury not only by the court. She added that the weight to be attached to the reactions of that witness is ascertained through cross examination, which led to the

issue of credibility of the witnesses. Further, that the jury, looking at a witness via video link, would not be able to properly get the demeanor from the witness.

28. On that note, she drew to the Court's attention that while on the virtual hearing, the Court could not see what she was doing under the desk, such as whether her feet were crossed and that some people had certain lying tells. Ms. Rolle continued that notwithstanding Mr. Seymour's submission that certain panoramic views could be done, when somebody moved on the current platform, the system was designed to go directly to that person. She also queried what would be the outcome if there was a glitch or a lapse in time.
29. Ms. Rolle also asked the court to take judicial notice of the fact that inasmuch as technology is very grandeur, there are unexpected things that could sometimes occur that cannot be controlled. She added that while the technology Ms. Stromsnes would be relying on may be a bit more advanced, she could not speak to the technology within the jurisdiction.
30. Ms. Rolle further submitted that there could be the issues of power outages and Wi-Fi dropping and freezing in the middle of a cross-examination which would allow Ms. Stromsnes time to rethink her evidence. In addition, she submitted that the court would not have complete control over the mood and the trial process, which should not occur.
31. She exclaimed that the convenience of technology should not outweigh the Applicant's constitutional right. Additionally, Ms. Rolle queried who would be vetting the individuals who would be operating the multimedia facilitation and whether someone from the Office of the Director of Public Prosecutions would travel to facilitate its set up and if it was something they were considering then it would be the same as bringing the witness to the jurisdiction.
32. Ms. Rolle relied on the authority of **Bruce Colebrooke v. Regina SCCrim App. No. 151 of 2015** where Isaacs JA, in delivering the judgment of the Court, stated at para. 26:

**“26. The ability to conceal the identity of a witness from a defendant has been allowed by statute. It is an incursion into the accepted practice of witnesses giving their evidence before the judge, jury, Counsel, the defendant and the general public. Thus, any conditions put in place by Parliament ostensibly to ensure fairness to the accused while allowing a deviation from the accepted procedure should be strictly observed by the Court. Inasmuch as a party must be able to ask questions of a witness which go to the witness' credit, it is an important part of such questioning to see how the witness reacts to the various questions posed, for example, does he flinch or get fidgety when a particular line of questioning is pursued.”**
33. On that note, Ms. Rolle submitted that a video link would not be able to accurately capture or reflect the witnesses' body actions, facial expressions, mannerisms and overall demeanor which would be tantamount to a crippling effect to the Respondent's defense to a fair trial.

34. She then submitted that the perception of the jury of having to view the witness via video link was something that also had to be considered as it had yet to be tested. Ms. Rolle went on to say that while she appreciated that video link applications were not new to the jurisdiction, it was predominantly utilized with regard to non-essential witnesses such as circumstantial witnesses or expert witnesses but not for a sole witness. In that regard, Ms. Rolle she submitted that the court should not set such a precedent in respect to this particular matter.
35. Ms. Rolle also contended that the jury must be taken as is and that every jury is not the same jury. She added that some jurors have different understandings and that even with the best of caution that the court could give, there could be a possibility that the jury in this case goes awry. Ms. Rolle went on to say that while it may not have happened in the Blenrick Miller (supra), there is a serious possibility that it could happen in this case.
36. She then cited The Queen v. Kimeo Green [2018] JMSC Crim 3 where D. Fraser J of the Jamaican Supreme Court, in discussing whether to grant an application to have a witness give testimony by video link stated:

**“[48] Turning once again to the case of Steven Michael Ragan applying s. 714.1, the court stated at paragraph 58 that: The Crown in the present case has not produced compelling evidence for testimonial accommodation. Mr. Bissett is a critical witness. His evidence is controversial and credibility will be highly contested. Compounding the credibility assessment is that a jury, inexperienced in the fine points of making such assessments, will be undertaking the task. It is also a factor that, even with the best of cautions against prohibited reasoning, the jury might infer from Mr. Bissett testifying by video link that the accused was connected with his shooting.”**

37. Ms. Rolle also cited Estate Lascelles Samuel Panton v. Sun Development Limited Supreme Court Civil Appeal No. 25/2009 where the Jamaican Court of Appeal also had to consider the law concerning a witness giving evidence by way of video link. At para. 13 of the judgment of the Court, Cooke JA set out in summary, the criteria which would inform his judgment:

**“(i). The critical question to be answered is whether there is sufficient reason for departing from the general rule that a witness should be present in court when giving evidence.**

**(ii), In answering the question the court should have regard to:-**

- (a) The fact that giving of evidence by video link is not an indulgence (doesn't mean it's a better practice or make it right) She submitted that just because something exists and could be done, it did not mean that it is a better practice and it does not make it right.**
- (b) Evidence by way of video link is not as ideal as having the witness physically present in court. She added that the constitutional in its infinite wisdom saw that and made it a fundamental right of the accused person, to be afforded the opportunity for that person to appear, for you to look person in the eye, and question the person who is accusing you of something.**

- (c) **The use of the video link as being technologically suitable. In that regard she reiterated her submissions on the possible glitches and things that could happen as far as technology is concerned in addition to the Court's uncertain control over that particular environment.**
- (d) **The convenience of the use of the video should not dictate its use.**
- (e) **The degree of control a court can exercise over a witness at the remote site is or may be more limited that it can exercise over a witness physically before it,**
- (f) **Overall, it must be considered whether utilization of the video link will be likely to be beneficial to the efficient fair and economic disposal of the litigation. She added that that was considering all of the circumstances.**
- (g) **There should be consideration of prejudice. She added that the prejudice in this case would doing a trial where the sole evidence."**

38. Ms. Rolle reiterated that if the primary and sole witness was not allowed to give her evidence in person, it would not be fair or just in the circumstances.
39. In response to Ms. Rolle's submissions, Mr. Seymour clarified that prior to the COVID-19 pandemic, the application was made on the basis that it was economically cheaper to have the witnesses present their evidence via video link. He added that the witnesses do not reside on the island of Abaco in the north or the island of Inagua in the south, but in Europe, a totally different continent.
40. With respect to the reliance of technology, he submitted that there was no evidence that it would be flawed. Mr. Seymour reiterated that in Blenrick Miller (supra), there was no glitch in the technology used that Mr. Miller went on to successfully defend his case. He continued that, the prejudice that Ms. Rolle tried to raise did not exist in these particular circumstances.
41. In relation to the COVID-19 pandemic, he submitted that no one knew if the restrictions would be in place 6 months to a year from now. Mr. Seymour additionally submitted that this was not an application for witness anonymity but an application strictly for the virtual complainant or any other witness that resides out of the jurisdiction to be able to give their testimony via video link for economic reasons and now due to the COVID-19 pandemic. He concluded that it was simply viable given the current circumstances.
42. Ms. Rolle's reply was that the Respondent did not lay the charges against himself and that any costs to be incurred as a result must be against the Applicant and not at his detriment. She concluded that the Respondent had the right, pursuant to Article 28 of the Constitution to apply to the Supreme Court, if there was some doubt that a constitutional right was being infringed.

## **Discussion**

43. In the very recent decision of **Garet O Finlayson et al v. Caterpillar Financial Services Corporation et al SCCivApp No. 97 of 2020**, the Court of Appeal dismissed the appellant's application for a stay pending appeal of Adderley J's decision to continue taking the evidence of the respondent's witness remotely by way of video link. The trial of the action commenced in February 2020 but was adjourned due to the COVID-19 Pandemic.
44. Upon making an attempt to commence the trial remotely via video link, the appellant's counsel objected to the same and a case management conference was held to have the issue canvassed before the court. This resulted in Adderley J's written ruling which directed that the witness continue to give his evidence by video link and the appellant making the application for a stay pending appeal.
45. While the matter before Adderley J was a civil one, she also examined and discussed the jurisdiction of a criminal judge with respect to hearing matters via video link, especially in the present climate that the world finds itself in. The Court of Appeal set out Adderley J's ruling in full which I also find useful to do in the circumstances:

**"11. I set out her Ruling in full.**

**"1. On August 25, 2020 I convened a Case Management Conference ("CMC") between the parties in order to determine whether the part heard trial herein should be adjourned to a date when the parties could appear "in person" at the trial or whether the trial could continue remotely by video-conference. The parties had last been before the Court on February 28, 2020 when the Plaintiff opened its case by calling its first Witness, Mr. Robert Hughes, Accounts Manager with responsibility for the East Coast of the United States of America. After the completion of the evidence-in-chief the matter was adjourned ultimately to August 24 and 25, 2020.**

**2. On March 11, 2020 the World Health Organization declared that a global pandemic COVID-19 existed. The Government of the Bahamas issued the Emergency Powers (Covid 19 Regulations 2020 and the Emergency Powers (Covid) (No. 1) Order, 2020 which went into effect on the 20th day of March, 2020 and which outlined how the islands of The Bahamas would be governed, including a period of lockdown and restricted travel to and from the United States of America and between the islands of The Bahamas. On March 17, 2020 the Honourable Chief Justice Mr. Brian M. Moree issued a number of coronavirus mitigation protocols which have been updated as and when necessary.**

**3. On July 7, 2020 Ms. Karen Brown Counsel for the Plaintiff wrote to Ms. Judith Smith, Counsel for the Defendants via email copied to the Court indicating that Mr. Hughes was concerned about quarantine requirements upon arrival and returning to the United States, and that he had asked that she inquire as to the Defendants' amenability to continuing the trial by video conference so as to avoid international travel. 6 On August 7, 2020 Ms.**



Smith's response was that the Defendants were not in favour of continuing the trial by video conference.

4. On August 7, 2020 Ms. Brown wrote to Ms. Smith enquiring as to the reason for her clients' position in light of the fact that given the present travel restrictions, an in-person trial would not be practical because, (i) domestic travel was restricted, therefore, the Defendants and their counsel were unable to travel to Freeport; and (ii) international travelers are required to enter into a 14 day quarantine upon arrival to The Bahamas.

5. By letter dated August 14, 2020 Ms. Smith referred Ms. Brown to the Emergency Powers (Covid-19 Pandemic) (Lockdown) Order 2020 issued on the 4th August 2020 and to the Court Coronavirus Mitigation Protocols 3.0 – Grand Bahama issued July 23, 2020 and to the requirement for the Court, inter alia, to convene a Case Management Conference in respect of a part heard trial. She also set out reasons why her clients were not in favour of continuing remotely thus, that Mr. Hughes had completed his evidence-in-chief and had been tendered for cross-examination in person. That the same conditions should be extant when he is cross-examined otherwise it would be applying disparate conditions to Mr. Hughes and therefore unfair to the Defendant. That there is a "sensory dilution in video conferencing", and it was not fair that the Defendants should be faced with that disadvantage. Ms. Smith also had concerns if she and her client had to be in different locations and attending via video link. That they were unable under the present Emergency Orders to be in the same location. That she believed that the video link as it had heretofore been used is where all parties except the witness appearing via video link were in the Courtroom. She concluded that her client had a right to have Mr. Hughes appear in person and that the trial must be conducted fairly.

6. On August 18, 2020 I informed the parties that I wished to convene a CMC on August 25, 2020 and asked them to advise of their availability. Counsel agreed to the date.

#### **Submissions**

7. At the CMC conducted remotely via Zoom, Ms. Smith submitted that she had a concern about the environment in which Mr. Hughes would be giving his evidence. He would have given his evidence in person but the Defendants would be at a disadvantage because now he would be able to give his evidence via video. That this is a disadvantage because there is a different setting when a witness is giving evidence by video. He would be very comfortable in his home, whereas when in the witness stand and the person is cross-examining, she and the Court are able to perceive him in real-time. In addition, she submitted that we (those observing) would not know his set up, whether he is going to be sitting down, when in court he would be standing up. There would be different conditions available to him than when he was in Freeport and had to come in person. Conditions should be equal

and that he needs to be cross-examined the same way that he was led and that is in person. That the trial was “on a track” and that now that track was being adjusted or changing in the manner in which that track took place. That she was not certain whether the Orders permitted this, and she did not know whether it was fair.

8. Ms. Brown on the other hand submitted that a video conference does allow for observation in real-time. That the only argument being advanced by Counsel is that the witness would be in a less intimidating environment, which she did not think was something that the Court needed to consider. Ms. Brown saw no difficulty with the witnesses for the Defendants giving evidence remotely provided she and her client could be at the same location.

9. Having heard Counsel I made the determination that in light of the current travel restrictions necessitating a 14 days quarantine for all visitors to The Bahamas, the part heard trial could continue remotely via video conference but that if the Defendants and their Counsel could not be present at the same location so as to facilitate the ability to confer with each other during the cross-examination of the witness, the trial would be adjourned. I indicated that I would give my reasons for this determination and I do so as follows. 8 Reasons

10. On March 15, 2020 Prime Minister the Most Hon. Dr. Hubert Minnis announced during a National Address the terms and scope of the Government’s response to the Covid-19 virus.

11. On March 17, 2020 The Honourable Chief Justice Mr. Brian M. Moree, having been informed by the measures announced in the said National Address, implemented the first phase of the Court Coronavirus Mitigation Protocols, Notice #1, which came into effect on March 18, 2020 and which stated its purpose: “The Judiciary has now developed its coronavirus mitigation protocols reflecting the twin priorities of: (i) protecting the safety and health of our judicial officers and staff, the law enforcement personnel assigned to the Courts, members of the Bar who work in and around the Courts and all public users of the Courts; and (ii) keeping the Judiciary operating to provide continued access to justice as it discharges its mission-critical functions in a democratic society.”

12. With respect to civil trials the Protocols provided as follows: “Supreme Court – Civil Side (all cases which are not Criminal): Part heard Trials – part heard trials will be completed. Social distancing procedures to be followed. Wherever possible witnesses (in New Providence and elsewhere) to give evidence by video conference.”

13. The continuing spread of the virus throughout several islands of the Commonwealth of The Bahamas caused the Government of the Bahamas and the Honourable Chief Justice to revise and extend the Emergency Powers Orders, Regulations and Protocols as and when necessary.

14. In response to the measures announced by the Government and to ensure the continued operation of the Courts and access to justice the Chief Justice issued 11 Notices and several Practice Directions up to the time of the CMC. Notice #8 The Court Coronavirus Mitigation Protocols 2.0 came into effect on July 1, 2020 and with respect to the Supreme Court – Civil Side (all cases which are not Criminal) provided: “6. (i) Part heard trials in New Providence and Grand Bahama commenced before 17 March, 2020. The Judge will conduct a Remote Hearing for directions in each case and after considering submissions on behalf of the parties will determine whether the trial is to continue prior to the Expiration Date or adjourned to a date after the Expiration Date. (ii) In the event that the trial is to continue prior to the Expiration Date the Judge will direct which Disposition Mode is to be used and give such other directions as necessary to facilitate the completion of the trial. (iii) In all cases, the parties will be given not less than ten (10) calendar days’ notice of the date of the resumption of the trial unless a shorter period is agreed by all parties.” “Expiration Date” is defined as the date when these Protocols shall cease to have effect pursuant to the direction of the Chief Justice by Practice Direction. Notice #8 sets out a detailed process as to how Remote Hearings ought to be conducted.

15. NOTICE #9 The Coronavirus Mitigation Protocols 3.0 – Grand Bahama came into effect on 23 July, 2020 and expired on August 11, 2020 (“the Cessation Date”) and stated that the Protocols 2.0 continued to be in effect subject to modifications in respect to Grand Bahama during the period July 24 to August 11, 2020. At Section 4 part heard trials commenced before July 24, 2020 were suspended until 10 August 11, 2020 and were to continue thereafter on a date and at a time and in a manner fixed by the presiding Judge (emphasis mine).

16. On August 5, 2020 the Chief Justice issued NOTICE #10 The Court Coronavirus Mitigation Protocols 4.0 which extended the Notice #9 Court Coronavirus Mitigation Protocols 3.0 to Grand Bahama until the Cession Date, August 11, 2020. In this Protocol August 24, 2020 was stipulated as “the Extension Period”.

17. On August 10, 2020 the Chief Justice issued NOTICE #11 Extension of the Court Coronavirus Mitigation Protocols which extended as of August 12, 2020 Protocols 4.0 to Grand Bahama with the exception of a few modifications. Section 4 of Protocol 4.0 states: “Supreme Court – Civil Side (all cases which are not criminal): 4. During the Extension Period, unless the presiding judge determines otherwise after hearing submissions by or on behalf of the parties: (i) In-Person hearings under paragraphs 6 and 7 of the Protocols 2.0 are suspended. All such hearings which are adjourned as a result of such suspension will be rescheduled by the judge to a fixed date after the Extension Period; (ii) the Court will proceed with all Remote Hearings and Applications on the Papers under paragraphs 8 and 9 of the Protocols 2.0. (Emphasis mine).

18. The common thread running through all of the Protocols is the power of this Court to exercise its discretion to suspend “in person hearings” in relation to part heard trials if the circumstances warrant such suspension. The spread of the virus was one such circumstance. What the Protocols do not do is prohibit remote hearings in part heard trials. The Protocols in fact promote remote hearings, bearing in mind 11 the purposes set out in the Chief Justice’s Protocols of March 17, 2020.

19. It is clear from a reading of Notice #11 that the Presiding Judge has the discretion to, after hearing from the parties, up to August 24, 2020, to either suspend In-person hearings and reschedule the trial after August 24, 2020. There is no prohibition against having remote hearings in either instance. In fact, 4 (ii) permits the Court to proceed with all Remote Hearings.

20. Practice Direction No.3 of 2020 New Court Procedures in the Supreme Court deals extensively with the conduct of Remote Hearings during the Emergency Period: “Remote Hearings 3. The Covid 19 pandemic necessitates the wider use of remote hearings whenever possible. Accordingly, the Court accelerated the implementation of its remote platforms and since 14 May, 2020 has increased its use of Remote Hearings for applications and, where appropriate, Videoconferencing for trials under the relevant statutory provisions. You are specifically directed to paragraph 11 of Notice # 8 with reference to these modes of proceedings. Attached hereto as Annex 1 is a copy of that paragraph. Additionally, counsel should ensure that his/her face is visible on camera at all times during a Videoconferencing hearing in front of a neutral background and that all incoming audible notifications to their computer are muted or turned off. 4. The method by which all hearings, including Remote Hearings, are conducted is always a matter for the presiding judicial officer, operating in accordance with applicable law, Rules, Protocols and Practice Directions. In determining whether there should be a Remote Hearing, the judicial officer must have regard to the interests of justice, public health issues and the ability to maintain appropriate physical distancing attendance in courtrooms. Further, when considering the suitability of a Remote Hearing, judicial officers must consider issues such as the nature of the matters at stake during the hearing, any issues which the use of video/audio technology may present for participants in the hearing, the individuals’/witnesses’ needs and any issues around public access to or participation in the hearing.” [Emphasis added]

21. Further, as the Chief Justices noted in the Practice Direction, Order 31A(1)(k) of the Rules of the Supreme Court Rules provides for the court to actively manage cases by “making appropriate use of technology” and Order 31A r18(2)(n) provides that the Court may hold a hearing by “...electronic means or use any other method of direct communication: Provided that where evidence is received by telephone or other electronic means, all persons participating must be able to hear each other and to identify each other so far as practicable.” Section 78C (2) of the Evidence

Act as amended by section 2 of the Evidence (Amendment) Act, 2013 provides that in criminal proceedings “...the court may, at any time during any proceedings relating to an offence other than at a time when the evidence of a witness is being taken, direct that the accused appear by live link or by any other means that will allow the court and the accused to engage in simultaneous visual and oral communications.” For completeness, (Sections 78A-E of the Evidence Act as amended by section 4 of the Evidence (Amendment) Act, 2011 makes provisions for the use of live television link and recorded evidence in criminal proceedings. In particular, section 78B (1)(b) provides “A person, other than the accused person, may give evidence by way of a live television link in proceedings to which this Part applies, where the court is satisfied that – the witness is outside of The Bahamas”. Clearly, the legislative framework exists for the Courts (on the Civil and the Criminal side) to conduct remote hearings/trials, part heard or otherwise. [Emphasis added]

22. On August 25, 2020 the Bahamas Government issued the Emergency Powers (Covid 19 Pandemic) (No. 5) Order, 2020 at Section 18 (2) and (3) a visitor to The Bahamas must have a negative RTPCR COVID 19 molecular diagnostic test and must submit to a mandatory 14 days quarantine at a government identified facility. Mr. Hughes would be subject to these restrictions upon entering The Bahamas. While I am of the view that the restrictions are reasonably justifiable in a pandemic, they would be onerous on the Plaintiff, to have an executive forced to remain in the Bahamas for 14 days. Further, he would not be able to attend Court to give evidence until the end of his quarantine period, further delaying his departure from The Bahamas. Furthermore, the 2nd Defendant and his Counsel would also be subject to a 14 days quarantine after inter island travel.

23. Practice Direction 3 of 2020 sets out the “test” or the matters that the Court should consider when determining whether to proceed with a trial remotely as follows: (i) Interests of justice: Ms. Smith argued that to change the manner in which the trial was being conducted would amount to unequal treatment of the Defendants, that it would be unfair to continue remotely. I do not accept this argument. Mr. Hughes would be subject to the same cross-examination via video conference as he would have been at an in person trial. The Defendants will not be denied their right to ask him questions on or to test his evidence-in-chief. The Defendants’ fundamental right to equal treatment before the law would not in my opinion be infringed by the trial proceeding remotely. (ii) Public health issues: The Protocols were clearly implemented to reduce the number of persons attending the Court. Remote hearings meet this goal. What is also relevant is the high risk now involved in travelling through busy international airports in a pandemic, which Mr. Hughes and participants from Nassau, N.P. would 14 be subject to if I were to convene an in person hearing. (iii) The ability to maintain appropriate physical distancing attendance in courtrooms: The witness list in this action is short. Each party intends to call one witness and total of 2 Counsel have

the carriage of the action. My Courtroom is large and so social distancing would not have been an issue should I have determined to continue with the in person trial. (iv) The nature of the matters at stake during the hearing: this action is fairly uncomplicated. It is an action to recover money and involves primarily a fair amount of documentation. But each party and the Court has a copy of the bundle of pleadings and documents to refer to no matter where each participant happens to be sitting or standing. A remote hearing will cause no difficulties here. (v) Any issues which the use of video/audio technology may present for participants in the hearing: Ms. Smith argues that neither she nor the Court would be able to observe the Witness as he gives evidence. In other words, we would not be able to observe his body language as he gives evidence. I disagree. I have been conducting hearings remotely almost since the pandemic affected The Bahamas. I am of the view that I see even more of the witness's facial expressions and body movements from the waist up. Hearing the evidence is often clearer. The video is a real time device. We would be seeing the witness give evidence in real time as argued by Ms. Brown. Ms. Smith's complaint is that Mr. Hughes would be in a relaxed environment as opposed to standing in the witness box. As I recall Mr. Hughes did not appear to be particularly intimidated by the Court setting. In light of the "test" to be applied I do not accept that this is an issue that I need to consider. (vi) The individuals'/witnesses' needs: None of the witnesses have any special needs that I am aware of that would be affected by a remote trial. (vii) Any issues around public access to or participation in the hearing: Notice of the trial will be contained in the Cause List and a monitor will be set up in my court room so that any member of the public could watch the trial from my Courtroom should they have an interest, thereby satisfying the "open Court" requirement. Similar issues were considered by the Court in The Attorney General of the Turks and Caicos Islands CL-AP 06/2020 which I found to be most instructive and one which I highly commend to Counsel.

24. It is for these reasons that I have determined that the part heard trial may continue remotely provided that Ms. Smith and Mr. Finlayson can be at the same location. 25. Ms. Smith was given leave to appeal this decision."

46. Barnett P, in delivering the judgment of the Court, discussed the greater use of technology due to the COVID-19 pandemic. Beginning at para. 16 of the judgment he stated,

"16. Since the COVID 19 pandemic courts throughout the world have made greater use of technology to have matters heard remotely. The business of the courts cannot come to a standstill and judges, court staff, lawyers and litigants have had to adjust to this new reality. In her Ruling Justice Adderley referred to the Practice Directions issued by the Chief Justice after the pandemic for the conduct of remote hearings in the Supreme Court.

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18. Indeed, in *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] 2 FLR 297 the English Court of Appeal said: “The decision whether to conduct a remote hearing, and the means by which each individual case may be heard, are a matter for the judge or magistrate who is to conduct the hearing. It is a case management decision over which the first instance court will have a wide discretion, based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. An appeal is only likely to succeed where a particular decision falls outside the range of reasonable ways of proceeding that were open to the court and is, therefore, held to be wrong.”

19. Although said in the context of a family law matter, the principle in my judgment must apply generally to litigation in the courts. The case management discretion to take evidence remotely is wide and must be exercised based upon ordinary principles of fairness, and justice.

20. The appellant claims that it is unfair and contrary to justice that the cross examination be taken remotely since the examination in chief was not done in that manner.

21. I do not agree. The appellants concede that they could have no complaint if the examination in chief had been done remotely but they are disadvantaged by the cross examination being done in a different manner. In my judgment it does not automatically follow that the cross examination by remote will be unfair to the appellant. For example if the issues in a case is to be determined based upon documentary evidence it is hardly likely that cross examination remotely will be disadvantageous or unfair to the appellants. Even if it were, that is an issue that can be canvassed by a Court of Appeal after a full trial if appellants lose in the court below. The parties and the court will be able to examine the record of the trial and make a determination whether as a matter of fact an appellant was disadvantaged by being required to cross examine remotely. So in balancing the respective interests it is difficult to see how the appellants in this case would be prejudiced if a stay is refused and the trial continue as scheduled.

22. The appellants have submitted that they had a “legitimate expectation” that once the evidence in chief was taken in one manner then the cross-examination and re-examination would take place in a similar manner. This legitimate expectation they argue is based upon prior regular and established practice in the courts. In ordinary times that may be a reasonable expectation but it is not an enforceable legal right. There can be a myriad of circumstances which may cause evidence taken in one manner to be completed in another manner. An example of this may be where the witness was in an accident in the middle of his examination and had to be hospitalized. COVID 19 has created its own issues. Supposed a witness in the middle of his examination tested positive. It is in the interest of none of the parties or the court that his evidence continue to be taken in their physical presence. On the appellants argument the evidence could not continue to be taken until he has recovered. With respect, simply to put the proposition is to reject it as untenable.

23. As to the failure to follow the Practice Direction by not adjourning to receive written submissions the appellants conceded that the judge was aware of their objection and the reasons for it.

24. I have read the Ruling of the trial judge. It is well reasoned and I see no error of principle, nor that she took into account irrelevant matters. The decision is not plainly wrong.”



47. Like the civil side, criminal judges are also guided by statutory rules for the proper management of its cases. In that regard, the **Criminal Procedure Code (“CPC”)** which came into effect in 1968, addresses the taking of evidence by witnesses. At section 104 (1) the CPC states,

**“104. (1) Except as may be otherwise provided by any law, all evidence taken in any inquiry or trial under this Code shall be taken in the presence of the accused, unless with his consent his absence has been dispensed with in accordance with the provisions of this Code.”**

48. More recently, in 2011, the **Evidence (Amendment) Act, 2011**, provided for the evidence of a person other than an accused to be taken by way of video link by Section 78B which was also subsequently amended by the **Evidence (Amendment) Act, 2014**. Section 78B now states as follows:

**“78B. Evidence by way of live television link.**

**(1) A person, other than the accused person, may give evidence by way of a live television link in proceedings to which this Part applies, where the evidence is essential to the case of the applicant and —**

**(a) the witness is within or outside of The Bahamas;**

**(b) the quality of evidence to be given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings;**

**(c) the witness is a child, elderly, ill or otherwise considered a vulnerable person; or**

**(d) the witness is to be cross-examined following the admission of a video recording of testimony from him under section 78D.**

**(2) Any evidence given pursuant to subsection (1) may not be given without the permission of the court or upon the court’s own motion and in either case the court being satisfied that it is in the interest of justice that the evidence be given by a live television link.**

**(3) A statement made on oath by a witness outside of The Bahamas and given in evidence by way of a live television link, by virtue of this section, shall be treated for the purpose of the prosecution of perjury as having been made in that proceedings in which it is given in evidence.**

**(4) Subject to subsection (5), where the court gives permission for a person to give evidence by way of a live television link, such person may not then give evidence other than by way of a live television link without the permission of the court.**

**(5) A court may give permission where it appears that it is in the interest of justice.”**

49. The overriding factors from the statute law and case law are fairness and justice. Apart from the existence of the COVID-19 pandemic, one of the considerations for whether such an application should be acceded to is whether the witness is outside of The Bahamas. In the instant case, Ms. Stromsnes and Mr. Abetta are outside of The Bahamas as they reside in and are residents of Norway.

50. Counsel for the Applicant has helpfully pointed out that the Applicant’s application is made pursuant to s. 78B (1) (b), despite their submissions being centered around the

COVID-19 pandemic and economic reasons surrounding the witnesses' residence outside of the jurisdiction. However, I do not see this omission as a reason to disregard the fact that s. 78B (1) (a) makes provision for a witness to give evidence as a result of being resident outside of the jurisdiction.

51. Therefore, in the absence of the COVID-19 pandemic, the Court can make a determination on whether or not to accede to an application to give evidence by way of video link, solely based on the fact that the witness is resident outside of the jurisdiction, provided that it is in the interest of justice.
52. As Mr. Seymour rightfully submitted, such a decision was made by this court in **Blenrick Miller** (supra) where the accused ultimately had a fair trial, which included the virtual complainant, who resided outside of the jurisdiction, giving her evidence against him by way of video link.
53. Therefore, contrary to Ms. Rolle's arguments, the giving of evidence by the virtual complainant in a rape case, has been tested and proven to be a successful tool in the administration of justice in ensuring that a fair trial is held for an accused.
54. In respect of the travel restrictions in place as a result of the COVID-19 pandemic, at the time **Finlayson** (supra) was heard by the Supreme Court and Court of Appeal, all criminal trials were suspended. On 22<sup>nd</sup> November, 2020, by **Notice #13, The Court Coronavirus Mitigation Protocols 6.0**, the resumption of criminal trials in the Supreme Court were allowed with the following requirements:

**"1. (i) New criminal jury trials: In-person criminal jury trials will resume in New Providence on 23 November, 2020. In each case, Counsel will be expected to proceed on the assigned date for the trial. All persons entering court buildings will be required to:**

- (a) comply with physical distancing protocols while in court buildings;**
- (b) comply with all hand sanitizing procedures;**
- (c) have his/her temperature taken by a court Marshall. Any person who has an elevated temperature reading (i.e. above the normal level recommended by public health officials) will not be allowed to enter the building;**
- (d) wear a face mask, which fits securely to his/her face, covering his/her nose and mouth and continue to do so at all times while in the building;**
- (e) avoid gathering in corridors or other public access areas outside of court rooms or offices; and**
- (f) generally follow directions of court Marshalls and other court staff with regard to public health and/or safety protocols."**

55. Despite the resumption of criminal trials, travel restrictions are still in place. At the date of this ruling, there is no requirement to quarantine upon entering the Country. According to the Ministry of Tourism's website the following steps must be taken:

- **A negative COVID-19 RT-PCR (swab) test must be possessed and should be taken no more than 5 days prior to the date of arrival;**

- **The negative test is required in order to apply for and pay for the Bahamas Health Visa application. The cost of the Travel Health Visa is dependent on the length of stay;**
- **Upon arrival, wear a face mask and if exhibiting any symptoms take a rapid antigen test. If this test is positive, a follow up RT-PCR test is required;**
- **A traveler staying in The Bahamas longer than 4 nights and 5 days is required to take a rapid COVID-19 antigen test;**
- **Once on island, wear a face mask and physical distance when in public places; and**
- **Abide by all protocols and restrictions as outlined the most recent Emergency Powers Order.**

56. While there is no requirement to quarantine at this time, the existence of COVID-19 in The Bahamas and throughout the world has proven to be unpredictable. For example, earlier in the year there was a complete shutdown of the Country and domestic and international travel was completely banned as a result of the existence and increase of cases.
57. After the amount of cases decreased, the decision was made to reopen in phases and domestic and international travel was allowed. Unfortunately, this led to another outbreak of the virus and caused restrictions to be implemented once again, ceasing domestic and international travel. Again, after the virus was brought under control, the decision was again made to resume domestic and international travel, on the premise that all travelers entering or returning to the Country, had to quarantine for 14 days.
58. Therefore, given the unpredictable state of the Country due to COVID-19, it is prudent to consider making an order for a witness to provide evidence via video link if that witness is not within The Bahamas.
59. In that regard, I am guided by Barnett P's finding in Finlayson (supra) that there is a myriad of circumstances that would warrant a departure from the norm, which would not deprive the Respondent from having a fair trial. Therefore, in addition to the Applicant's witnesses not being within The Bahamas and having to jump through hoops to arrive in The Bahamas, the travel process itself could be deemed to be emotionally draining for the witnesses and affect the giving of their evidence physically.
60. Whereas, if the witnesses are allowed to remain in their Country and avoid the rigors of travel in this uncertain climate, they would be able to give their evidence in a relaxed environment which would probably lead to them giving more open and honest evidence and a relaxed demeanor.
61. Another consideration is the possibility of the witnesses testing negative prior to travel but exhibiting symptoms while at the trial or testing positive prior to travel and ultimately delaying the matter, thereby causing the Respondent to lose his trial date.
62. There is also the limit of individuals that should be gathered in a room. In the instant case, the absence of the witnesses would allow the court to conform to the number of

individuals required to be in an enclosed area at any given time and adhere to the social distancing protocols put in place by the government of The Bahamas.

63. The Respondent's right to a fair trial has not been forgotten. It is an absolute right and should never be fettered. While an in person hearing has always been the preferred mode of giving evidence, the introduction of technology has provided for the introduction of a new facet to the right to a fair trial.
64. As previously stated, this facet has been tested and proven in a case involving the allegation of rape. Therefore, in consideration of both the Applicant's and Respondent's submissions, I find that it is fair and in the interests of justice and in conformity with the Respondent's right to a fair trial, to accede to the application to have Ms. Stromsnes and give her evidence by way of video link. This I so do order.
65. As pointed out by Ms. Rolle, the present application is only in relation to Ms. Stromsnes. Should a similar application be made for Mr. Abetta in the circumstances, I shall be obliged to accede to that application.

10<sup>th</sup> December, 2020

  
The Hon. Madam Justice Renae McKay