**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Criminal Division**

**Cri/vbi/81/4/2016**

**Between:**

 **FRED HEDLEY LIFIATE**

 APPLICANT

 **VS**

**THE ATTORNEY GENERAL**

 RESPONDENT

**BEFORE: The Honourable Mr. Justice Gregory Hilton**

**APPEARANCES: Timothy Bailey along with**

 **Lavard Johnson for Applicant**

 **Mary Ann Cadet along with Brenda Lee Rae**

 **For the Respondent**

**Hearing Date: 16th November 2021**

**Ruling – On the Application for the Admission into evidence of a Witness Statement pursuant to section 66 (2) (c) of the Evidence Act, Chapter 65**

HILTON, J,. 1

 1. This is an application by the Prosecution, pursuant to section 66 (2) (c) of the Evidence Act, for the Statement of Tracy Symonette, who is listed as a witness on the back of the Information, to be admitted into evidence on the basis that she could not be found after all reasonable steps had been taken to find her.

 The Defence objected to the application and in the absence of the jury I heard submissions in respect of the issue.

 **BACKGROUND**

 2. This matter commenced with the filing of an Information in the Supreme Court against the Accused on the 5th May 2016 on the charge of Murder. After his initial arraignment the trial was adjourned for various reasons and finally fixed for 1st November 2021.

 Due to the court being engaged in another trial on that date the trial was further adjourned to 10th November 2021 and on the final two Pre-trial Hearings on the 21st October 2021 and 3rd November 2021. All parties indicated that they were ready for trial.

 3. The trial commenced on Wednesday 10th November 2021 with the empanelment of a jury and the Opening of the Crown’s case after which four witnesses were called and testified. Thereafter the trial was adjourned to Monday 15th November 2021.

 4. On Monday 15th November 2021 the crown indicated that they had difficulties locating the main civilian witness Ms. Tracy Symonette and indicated that they would seek to apply to the court to have the witness’ statement admitted into evidence pursuant to section 66 (2) (c) of the Evidence Act.

 **EVIDENCE ACT Section 66**

 5. Section 66 of the Evidence Act provides:

 2

 “66. (1) Subject to section 67 a statement in a document shall be admissible in any criminal proceedings as evidence of any fact stated therein of which direct oral evidence would be admissible if –

 (a) the document is or forms part of a record complied by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information; and

 (b) any condition relating to the person who supplied the information which is specified in subsection (2) is satisfied.

 (2) The conditions mentioned in paragraph (b) of subsection (1) are:-

 (a) that the person who supplied the information:-

 (i) is dead or by reason of his bodily or mental condition unfit to attend as a witness,

 (ii) is outside The Bahamas and it is not reasonably practicable to secure his attendance, or

 (iii) can not reasonably be expected (having regard to the time which has elapsed since he supplied or acquired the information and to all the circumstances) to have any recollection of the matters dealt with in that information;

 (b) that all reasonable steps have been taken to identify the person who supplied the information but that he cannot be identified; and

 (c) that, the identity of the person who supplied the information being known, all reasonable steps have been taken to find him, but that he cannot be found.

 3

 (3) Subsection (1) shall apply whether the information contained in the document was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied was acting under a duty; and applies also where the person compiling the record is himself the person by whom the information is supplied.

 (4) Where –

 (a) a document setting out the evidence which a person could be expected to give as a witness has been prepared for the purpose of any pending or contemplated criminal proceedings; and

 (b) the document falls within subsection (1), a statement contained in it shall not be given in evidence by virtue of this section without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice having regard -

 (i) to the circumstances in which leave is sought and in particular to the contents of the statement, and

 (ii) to any likelihood that the accused will be prejudiced by its admission in the absence of the person who supplied the information on which it is based.

 (5) Where in any criminal proceedings a statement based on information supplied by any person is given in evidence by virtue of this section-

 (a) any evidence which, if that person had been called as a witness, would have been

 4

 admissible as relevant to his credibility as a witness shall be admissible for that purpose in those proceedings;

 (b) evidence may, with the leave of the court, be given of any matter which, if that person had been called as a witness, could have been put to him in cross examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examination party; and

 (c) evidence tending to prove that the person has, whether before or after supplying the information, made a statement (whether oral or otherwise) which is inconsistent with that information shall be admissible for the purpose of showing that he has contradicted himself.

 (6) A statement which is admissible by virtue of this section shall not be capable or corroborating evidence given by the person who supplied the information on which the statement is based.

 (7) In deciding for the purposes of subsection (2) (a) (i) whether a person is unfit to attend as a witness the Court may act on a certificate purporting to be signed by a registered medical practitioner.

 (8) Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him.

 (9) In estimating the weight, if any to be attached to a statement admissible in evidence by virtue of

 5

 this section regard shall be had to all circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular-

 (a) to the question whether or not the person who supplied the information from which the record containing the statement was compiled did so contemporaneously with the occurrence or existence of the facts dealt with in that information; and

 (b) to the question whether or not that person concerned with compiling or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts.

 (10) Nothing in this section shall prejudice the admissibility of any evidence that would be admissible apart from this section.’

 **EVIDENCE**

 6. The Crown did not call any witness in support of the application, but relied upon the Affidavit of Police Constable 3889 Edmond Johnson sworn on 15th November 2021 and filed the same date. The Affidavit was tendered in evidence during the proceedings and is reproduced here as follows:

 **AFFIDAVIT**

 **I, POLICE CONSTABLE 3889 EDMOND JOHNSON,** of the Southern District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas make oath and say as follows:-

 6

 1. That I am an Officer of the Royal Bahamas Police Force attached to the Court Liaison Section at the Office of the Director of Public Prosecutions and I am duly authorized to make this affidavit on behalf of the Applicant from my own knowledge and from information received by me in the capacity as aforesaid.

 2. That this Affidavit is made in relation to an application pursuant to s. 66 of the Evidence Act, Chapter 65 by the Applicant.

 3. That the Respondent, FRED LIFIATE, (Date of Birth: 1/4/979) was charged with one (1) count of MURDER which occurred on the 15th February, 2016 in New Providence.

 4. That one of the witnesses to this Murder is Tracy Symonette.

 5. That the last known address for Tracy Symonette is 6th Street Cocoanut Grove over the Urban Renewal Headquarters. Telephone numbers 553-6445 and 438-4687.

 6. That none of the telephone numbers provided by Tracy Symonette have assisted in making contact with her. I have visited the residence, but I was unable to locate Miss Symonette. The persons living in the residence were not willing to assist me in finding Miss Symonette.

 7. That on 9th November, 2021 at 7:50 pm I was able to serve summons on one of the residence at the usual address of Miss Symonette but she has not appeared to our office for pre-trial interview or to court to give evidence. See a copy attached and marked **“E.J.1”**

8. That in the circumstances the Applicant requests that this Honourable Court exercise its discretion and admit the witness statement of Tracy Symonette into evidence on the basis that she is outside The Bahamas and it is not reasonably practicable to secure her attendance.

 7

 9. That the contents of this Affidavit are true to the best of my knowledge, information and belief.

 **SUMMONS**

 **To: TRACY SYMONETTE 6th Street Cocoanut Grove. Ph# 553- 6445 / 438-4687 Nassau Bahamas.**

 **TAKE NOTICE** that you are ordered to appear before the **Honourable Mister Justice Gregory Hilton,** a Judge of the Supreme Court of New Providence, The Bahamas, Bank Lane, on **Wednesday 19th November, 2021 A.D. at 10:00 o’clock** in the morning and every day thereafter, as you are required by law to give evidence.

 **TAKE FURTHUR NOTICE** that should you fail to attend at the place and time required by law, a warrant for your arrest may be issued to ensure your attendance.

 **In Witness Registrar of the Supreme Court this 9th day of November A.D., 2021**

7. The Crown specifically indicated that paragraph 8 of the Affidavit contained an error and were not relying on paragraph 8. The Affidavit also had exhibited the Summons which was left at the purported residence of the witness with a person not named; and an indication by constable Johnson that the person refused to sign. The Summons was dated 9th November 2021.

8. From the Affidavit it is clear that the Police Constable commenced his actions to locate the witness on the 9th November 2021. That he called the telephone numbers he was given for the witness with no success in reaching her. That he visited the Address given for the

 8

 witness on one occasion on the 9th November 2021 at 7:50 p.m. with no success in finding her.

9. While it is not stated in his affidavit there is no evidence that the Police Constable checked the Hospital, Morgue or Police AS 400 system for the witness nor attempted to place any advertisement in the Newspaper or TV/Radio Station for the witness.

10. The Crown submitted that the evidence of the witness is crucial to their case as she is the sole eye-witness and in the interest of justice the witness statement should be allowed into evidence in the trial. The Crown submitted that based on the evidence ALL REASONABLE STEPS had been taken to find the witness and that the witness could not be found and the statement of the witness should be admitted into evidence.

11. Counsel for the Accused submitted that, based on the evidence, all reasonable steps had not been taken to locate the witness and that the Accused would be prejudiced in the conduct of his defence by the admission of the statement in not being able to cross-examine the witness.

12. The Court is not convinced that all reasonable steps have been taken to find the witness in the circumstances of this case. Constable Johnson commenced his search for the witness on Tuesday 9th November 2021 when the trial (originally set for 1st November 2021) commenced on Wednesday 10th November 2021. The Constable did not check The National Insurance Board (N.I.B.) to ascertain if the witness worked and where she worked. He did not check the Voters ` Registration Officer to ascertain her last known or present address. (there being two General Elections held since she gave her statement in 2016) no advertisements for the witness were placed in newspapers, T.V. or Radio or Social Media fora.

13. The steps taken to locate the witness were begun late (on the eve of the trial) and were woefully inadequate in the courts view. Also in cases such as this, where the crown proceeded by V.B.I. and the

 9

 witness being sought was never bound over to testify (which happens at a preliminary inquiry) earlier checks for the witness should have

 been done as the witness was under no legal obligation to attend court as she was never bound over or served with process.

14. Attorneys and witness care officers and process servers in the Director of Public Prosecutions Officer should take heed to the words of Hugh L.J. in R. v. Adams [2008] 1 Cr. App R. 35 at paragraph (13) where he stated:

 ““All the experience of the criminal courts demonstrates that witnesses are not invariably organised people with settled addresses who respond promptly to letters and telephone calls and who manage their calendars with precision. They often do not much want to come to court. If they are willing they may not accord the appointment the high priority that it needs. Even if they do both of those things, it is only too foreseeable that something may intervene either to push the matter out of their minds or to cause a clash of

 commitments. Holidays, work, move of house, illness of self or relatives and commitments within the family are just simple examples of the kind of considerations which day in, day out, lead to witnesses not according the obligation to appear at court the priority that they ought to do. We are told that in the present case it turned out that Mr. Chambers had taken his wife to hospital. If he had to do that, and it may be he did, that should have been found out at the very least the previous week and then consideration could have been given to whether the trail could start a little later in the day, or some other adjustments made to enable the process of justice to take place. All of that was simply rendered impossible by the wholly inadequate approach of those whose duty it

 10

 was to keep in touch with the witness. It may very well be that, however regrettably, the police are no longer able themselves to undertake the care of prospective witnesses. That is not a matter on which it is right for us to express any view. But whoever it is who does undertake it, the need to keep in touch, to be alive to the witness’s needs and commitments is not less now than it used to be. Leaving contact with a witness such as this until the last working day before the trial is not good enough and it certainly is not such steps as it is reasonably practicable to take to find him. In addition to that, once the message was not known to have been received on the Friday and there was doubt about it, we agree with Mr. Lynn that reasonably practicable steps which ought to have been taken included a visit to his address and/ or to his place or work or agency, or at least contact with those places, perhaps by telephone. (emphasis added)

15. Counsel for the Accused referred to the Bahamas Court of Appeal decision of Rashad Mcphee v. Regina SC Cr. App No. 9 of 2017 which is instructive at paras: 50-53 where the Court cautioned:

 50. It is important to warn prosecutors and trial judges that section 66 applications should not be permitted to become the norm and should not be lightly granted.

 51. Although mindful of the cautionary note of Lord Griffins we also remind those involved in criminal prosecutions and criminal trials that:

 **“The evidence of a witness given orally in person in court, on oath or affirmation, so that he may be cross-examined and his demeanour under interrogation evaluated by the tribunal of**

11

 **fact, has always been regarded as the best evidence, and should continue to be so regarded. Any departure from that practice must be justified”. See Grant v. R [2006] UKPC 2 at para 14.**

 52. Greater effort and resources should be placed to ascertain the location of witnesses for trial. I do not propose to repeat the warning in **R v Adams** (2008) 1 Crim App Rep 35. I do however repeat what this court said in **Kevaughn Bethel v. R** SCCr App. No. 265 of 2016.

 **“There is also a need for the authorities to use available technology to locate witnesses and to expand the range of their searches.”**

53. In each individual case the judge must evaluate the evidence which must satisfy the judge beyond reasonable doubt that “all reasonable steps” have been taken to locate the witness and that (given the particular circumstances of the witness e.g. his last known address, relatives, workplace (if any) contemporaneous connections and contacts) he cannot be located.

16. I find that the efforts made by constable Johnson to locate and serve the witness were clearly last minute and inadequate. Taking “all reasonable steps” does not mean “all possible steps” in the sense of whether the process server could have done more; but it means, at least, what the process server did was reasonable. As was stated elsewhere, the statute does not require perfection but it requires reasonableness.

17. In my view it was not reasonable for constable Johnson to commence his search for the witness on the Tuesday before the start of the trial on the Wednesday following, nor was it reasonable for him not to go to the N.I.B. or Voter’s Registration Office or contact relatives particularly the mother of the witness who was also a witness in this case.

 12

18. I find that in respect of the witness, Tracy Symonette all reasonable steps have not been taken and I decline to have her statement admitted into evidence under section 66 (2) (c) of the Evidence Act.

 Dated the 16th day of November A.D., 2021

 The Hon. Mr. Justice Gregory Hilton