**COMMONWEALTH OF THE BAHAMAS 2023**

**IN THE SUPREME COURT CRI/con/00004**

**CRIMINAL/ CONSTITUTIONAL DIVISION**

**IN THE MATTER of Articles 20(1) of the Constitution of** **The Commonwealth of The Bahamas**

**BETWEEN**

**ADRIAN PAUL GIBSON**

**Applicant**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**Respondent**

**Before: The Honourable Madam Justice Mrs. Cheryl Grant-Thompson**

**Appearances: Mr. Murrio Ducille KC, along with Mr. Bryan Bastian- Counsel for the Applicant, Mr. Adrian Gibson M.P., Ms. Joan Knowles, and Mr. Jerome Missick;** **Mr. Brian Dorsette previously appearing for Ms. Rashae Gibson; Ms. Christina Galanos- now appearing for Ms. Rashae Gibson; Mr. Raphel Moxey- appearing for Ms. Peaches Farquharson; Mr. Ian Cargill along with Mr. Donald Saunders appearing for Mr. Elwood Donaldson- Counsel for the Respondents**

**Acting Director of Public Prosecutions Ms. Cordell Frazier along with Mrs. Karine MacVean -Counsel for the Respondent DPP**

**Date of Hearing: 8th, 10th, 15th May, 2023.**

**CONSTITUTIONAL JUDGMENT - ARTICLES 20(1), 20(2)(c) & 20(2)(e) OF THE CONSTITUTION**

*A.G. v Leroy Smith a.k.a “Shaddy” Et Al op. cit, Kiarie v Secretary of State for the Home Department [2017] UKSC 42; The State v. Paul (Michael) et al (1999) 57 W.I.R. 48; The Queen v David Shane Gibson BS 2019 SC 26; Warren v Attorney General for Jersey [2011] UKPC*

**Headnote**: On the 13th day of June 2022 the Applicant and his co-accused were arraigned before the Learned Stipendiary and Circuit Senior Magistrate Mrs. Carolyn Vogt- Evans, where he pled not guilty. The matter was subsequently transferred to this Honourable Court. Counsel for the Applicant made an application to have the Learned Justice recuse herself. That application was dismissed.

On the 4th day of May, 2023 the Applicant by a Notice of Motion seeks Declarations that his Constitutional rights had been infringed. He applies for Constitutional relief pursuant to Articles 20 (1), 20 (2)(c) and 20 (2)(e) of the Constitution of the Commonwealth of The Bahamas. The Applicant sought to have the proceedings permanently stayed.

**Held:** The Learned Trial Judge refused to grant the stay of proceedings. The Learned Trial Judge found that the Applicant could receive a fair trial within a reasonable time. The relief sought pursuant to the Constitution was denied. The Application was determined to be misconceived and premature.

In making this decision the trial judge relied on the cases of: *Garet O Finlayson and Caterplillar Financial Services Corporation SCCivApp. No. 97 of 2020*; *A.G. v Leroy Smith a.k.a “Shaddy” Et Al op. cit, Kiarie v Secretary of State for the Home Department [2017] UKSC 42; The State v. Paul (Michael) et al (1999) 57 W.I.R. 48; The Queen v David Shane Gibson BS 2019 SC 26; Warren v Attorney General for Jersey [2011] UKPC*

**GRANT-THOMPSON J**

**BACKGROUND**

1. On the 4th May, 2023 an Originating Notice of Motion was filed, but not served on either the Court nor Crown Counsel for the Respondent until the commencement of the hearing on Monday 8th May, 2023, which was procedurally irregular. The Constitutional application was brought before the Honourable Court by way of Notice of Originating Motion, along with the supporting Affidavit of Mr. Adrian Paul Gibson M.P., Member of Parliament, of #25 Saint Street, Adastra Estates, all filed on the 4th day of May, 2023. The matter was adjourned to the 10th of May, 2023 for hearing. The Applicants Counsel was ordered to provide the Crown with a copy of the aforesaid documents. Mr. Adrian Paul Gibson M.P., is a sitting member of Parliament currently serving in the opposition party and a former Chairman of the Water and Sewerage Corporation of The Bahamas.
2. The Constitutional Application sought the following:
3. A Declaration pursuant to Article 20(1) of the Constitution of the Commonwealth of The Bahamas which guarantees the Applicant a fair hearing within a reasonable time, by an independent and impartial court established by law, has been violated;
4. A Declaration pursuant to Article 20(2)(c) of the Constitution of the Commonwealth of The Bahamas which affords the Applicant adequate time and facilities for the preparation of his defence, has been breached;
5. A Declaration pursuant to Article 20(2)(e) of the Constitution of the Commonwealth of The Bahamas which affords the Applicant facilities to examine in person or by his legal representative the witnesses called by the prosecution before the Court to obtain the attendance and carry out examination of witnesses to testify on his behalf before the Court in the same manner as those applying to witnesses called by the prosecution; and
6. That there be a Declaration staying the proceedings herein.
7. The Applicant was arrested on the 26th day of May, 2022, questioned by the Criminal Investigation Department, later charged with the various offences under the Penal Code of The Bahamas, Chapter 84 and under the Prevention of Bribery Act, Chapter 88. The offences against all of the Defendants ranged from Making a False Declaration (1 Count), Conspiracy to Commit Bribery (10 Counts), Bribery (18 Counts), Conspiracy to Commit Fraud by False Pretences (8 Counts), Fraud by False Pretence (5 Counts), Receiving (21 Counts), Money Laundering (Acquisition) (5 Counts) and Money Laundering (30 Counts). The counts relative to the Applicant, Mr. Adrian Gibson M.P., were comprised of (1) Count of Making False Declaration contrary to Section 452 of the Penal Code, Chapter 84; (31) Counts of Conspiracy to Commit Bribery, contrary to Section 89(1) of the Penal Code, Chapter 84 and 4 (2)(A) of the Prevention of Bribery Act; (12) Counts of Bribery contrary to Section 4 (2)(A) of the Prevention of Bribery Act, Chapter 84; (18) Counts of Receiving. Contrary to Section 358 of the Penal Code, Chapter 84; (25) Counts of Money Laundering contrary to Section 9(1)(A) and 9(1)(c) of the Proceeds of Crime Act, 2018.
8. It is the Applicants case that his Constitutional rights- pursuant to Article 20(1) of the Constitution of The Bahamas- to have a fair hearing within a reasonable time before an independent and impartial Court has been violated. In addition to this the Applicant asserted that his Constitutional right- pursuant to Article 20(2)(c) of the Constitution- to be able to prepare his defence with adequate time and facilities has also been infringed. Lastly, the Applicant also asserted his Constitutional right under Article 20(2)(e) of the Constitution of The Bahamas- which affords him the right to facilities to examine in person or by his legal representative, the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses of the prosecution, has been further infringed.

**ISSUES**

1. The issues which arose for consideration in this matter are as follows:-
   1. Whether the Applicants Constitutional application is misconceived and premature;
   2. That in the result is the application an abuse of the process, when other relief is available to the Applicant; and
   3. Should the relief and Declaration sought by the Applicant be granted.

**The Affidavit of the Applicant**

1. Counsel for the Applicant, Mr. Murrio Ducille KC, submitted that;
   1. On the 13th day of June 2022, the Applicant appeared before Senior Learned Stipendiary and Circuit Magistrate Carolyn Vogt- Evans and pled not guilty to the aforementioned offenses;
   2. The Applicant is being tried along with five (5) others who are separately represented by Counsel;
   3. On the 14th day of September 2022, the Applicant appeared before Senior Learned Stipendiary and Circuit Magistrate Carolyn Vogt- Evans for the service of a Voluntary Bill of Indictment (“VBI”);
   4. On the 28th of September 2022, the Applicant was arraigned before the Learned Acting Chief Justice Mr. Bernard Turner on the aforementioned offences and pled not guilty. The matter was then transferred to this Honourable Court;
   5. On the 29th of September 2022, the Applicant appeared before this Court to set a trial date and for case management. During this hearing Counsel for the Applicant, Mr. Murrio Ducille KC, made an application to have the Learned Justice recuse herself from the matter. The Learned Justice dismissed the recusal application and set the matter down for case management on the 30th of November 2022, and the trial date was set for the 1st day of May 2023;
   6. On the 28th day of February 2023, the Applicant appeared before this Honourable Court for case management. During this time the Applicant asserted that the Crown had only disclosed one (1) item from the Applicant’s defence questionnaire. The matter was adjourned to the 28th day of March 2023 for further case management;
   7. On the 28th day of March 2023 whilst appearing for case management, the Applicant submitted that the Crown had only disclosed two (2) items pursuant to his defence questionnaire. This allegedly led to the Court ordering the Crown to serve all video and audio recordings on the defence by the 3rd day of April 2023. All remaining outstanding items on the Applicant’s defence questionnaire were to be served on the 7th day of April 2023. The matter was then adjourned to the 27th of April 2023 for Pre-trial Review;
   8. On the 27th of April, 2023 Counsel for the Applicant appeared before this Honourable Court for Pre-Trial Review. He submitted that the Crown did not disclose all of the remaining items relative to the Court’s order dated the 28th day of March, 2023;
   9. Although trial was set to begin the 1st day of May, 2023, Counsel for the Applicant was still being served with items from the Applicant’s defence questionnaire up until the 2nd day of May, 2023;
   10. On both the 12th day of April, 2023 and the 1st day of May, 2023, Counsel for the Crown filed and served a Notice of Application to Adduce Evidence by Live Television Link supported by an Affidavit of Perry McHardy on Counsel for the Applicant, relative to the Crown’s key witness, Alexandria Mackey;
   11. The Crown asserted that their key witness, Ms. Alexandria Mackey, is currently awaiting the determination of her I-485 application for the United States of American Permanent Residency or Adjust Status and as a result she is unable to travel outside of the jurisdiction to return to The Bahamas. The Crown further asserted that their key witness cannot travel due to the fact that she has both recently given birth to a child and married;
   12. Counsel for the Applicant- in response to the Crown’s reasoning for requesting that their witness give evidence by way of live television link- asserted that the witness should have been aware of the necessity of her presence for the trial several months ago. Additionally, there is no proof that the witness’ residency application was made prior to her knowledge of the trial dates being set;
   13. Moreover, Counsel for the Applicant further asserted that the witness’ recent child’s birth is of no hinderance for her physical presence during the trial. It is also the contention of Counsel for the Applicant that the Crown has not provided any evidence showing any health implications resulting from the witness’ pregnancy or delivery of the child that would hinder her physical appearance;
   14. There is no supporting evidence provided which proves that there are health, travelling or restriction issues relating to Ms. Mackey or her child, including the inability of the father or any other person to care for the child in the event that he cannot accompany Ms. Mackey into the jurisdiction;
   15. There is no justifiable evidence provided within the Crown’s Application to support Ms. Mackey’s assertions that her physical attendance would present any type of undue hardship on herself or her family;
   16. The presence of the Crown’s key witness is vital since numerous exhibits are pertaining to her.
   17. The Applicant is being severely prejudiced in his defence and asserted that the intended prosecution be stayed given that the process is unconstitutional.

**AFFIDAVIT IN RESPONSE**

1. In response to the Applicants assertions, Counsel for the Respondent Acting Director of Public Prosecutions, Ms. Cordell Frazier by Affidavit in Response filed on the 9th day of May 2022, claimed that;
   1. In regard to the second and third declarations in the Applicants Originating Notice of Motion, the Crown submitted that the Applicant sought a declaration pursuant to Articles 20(2)(c) and 20(2)(e) of the Constitution of The Bahamas. The Crown submitted that there are no allegations that the same have been or are likely to be violated;
   2. The Crown further submitted that the Applicant has made no assertions in his Originating Notice of Motion that Articles 20(2)(c) and 20(2)(e) of the Constitution of The Bahamas have been or are likely to be violated. This Court therefore grants a Declaration that no rights pursuant to Articles 20 (2)(c) and Articles 20(2)(e) have been challenged successfully, or at all. The Applicant made no assertions in his Originating Notice of Motion that Articles 20(2)(c) and 20(2)(e) of the Constitution of The Bahamas, having been or are likely to be violated;
   3. The documents before the Court revealed that on the 26th day of May, 2022 the Applicant was interviewed by Inspector Antoine Mackey at the Criminal Investigation Department. The said interview commenced at 12:37pm, concluded at 6:51pm, in the presence of Mrs. Romona Farquharson-Seymour (the Applicant’s then attorney);
   4. The Respondent submitted that contrary to what the Applicant alleged in paragraph 4 of his Affidavit, he was never charged with Conspiracy to Commit Fraud by False Pretenses, in that they are correct. The Applicant was arraigned before the Acting Chief Justice Mr. Bernard Turner on the 23rd September, 2022 where he pled not guilty to the offences listed:
      1. One (1) count of Making A False Declaration contrary to section 452 of the Penal Code, Chapter 84;
      2. Three (3) counts of Conspiracy to Commit Bribery contrary to sections 89(1) of the Penal Code, Chapter 84 and 4(2)(A) of the Prevention of Bribery Act, Chapter 88;
      3. Eighteen (18) counts of Receiving contrary to section 358 of the Penal Code, Chapter 84; and
      4. Twenty-five (25) counts of Money Laundering contrary to sections 9(1)(A) and 9(1)(C) of the Proceeds of Crime Act, 2018.
   5. The Crown took umbrage with the allegations in paragraph 6 of the Applicant’s Affidavit, wherein he claimed that he is charged along with five (5) others and only three (3) of the Defendants are separately represented by counsel. Counsel for the Applicant, Mr. Murrio Ducille, KC also represents Defendants Ms. Joan Veronica Knowles and Mr. Jerome Missick. Therefore, only three Defendants are otherwise represented;
   6. The matter was thereafter transferred to this Honourable Court for fixture. On the 27th September, 2022 the Applicant appeared before the Court for Case Management. On the said date, Counsel for the Applicant made a recusal application. The Respondent objected to same. The Court having heard arguments by both parties duly adjourned the matter for decision to the 29th September, 2022;
   7. On the 29th September, 2022 the Court rendered a decision dismissing the recusal application and fixed a trial date of the **1st -31st May, 2023**. The matter was adjourned for further Case Management on the **7th November, 2022 at 1:00pm**;
   8. Contrary to the submissions of Counsel for the Applicant (paragraph 12) the first Case Management hearing of the Court in this matter was held on the 14th of November, 2022. At that time neither the Applicant nor any of the Defendants served the Court or the Respondent with their Case Management Questionnaires;
   9. On the 30th of November, 2022 the matter was set for further Case Management. On that date Counsel for the Applicant requested the Plea Agreement of Ms. Alexandria Mackey and the Service Record of Rex Adderley. Contrary to what the Applicant avers at paragraph 13 of his Affidavit, on the 28th February, 2023 the Respondent in the face of the Court did not serve one (1) item from the Applicant’s Questionnaire but rather served a total of fifteen (15) of the requested items on the Applicant;
   10. On the 28th February, 2023 Counsel for the Applicant indicated to the Court that he would serve upon the Court and Counsel for the Respondent an Amended Questionnaire on or before the 6th March, 2023. However, the same was allegedly not served on Counsel for the Respondent until the 10th March, 2023;
   11. On the 28th March, 2023 the Respondent further served item 9 (which related to 10 cheques issued by WSC) and item 10 (which related to copies of wires from WSC to Elite Maintenance and Baha Maintenance and Restoration- a total of 37 wire payments) of the Applicant’s Questionnaire. At that time, Counsel for the Respondent had not yet provided copies of the audio/video recordings. The Court instructed Crown Counsel that same should be served by the 3rd April, 2023 and that all other outstanding requests were to satisfied by 7th April, 2023. The matter was thereafter adjourned to the 27th April, 2023;
   12. The Court held a Pre-Trail review on the 27th April, 2023. Counsel for the Applicant intimated to the Court at the hearing that the Respondent had not disclosed approximately 98% of the requested Case Management Discovery items. Counsel duly read into the record that which comprised almost the entire Applicants Questionnaire. The Court requested an Audit be prepared by the Respondent of the items actually disclosed on the 1st May, 2023. A copy of the Audit was served both on the Court and Counsel for the Applicant on the 2nd May, 2023. The Respondent relied on the detailed Audit of the disclosure items to demonstrate their compliance with their obligation to disclose not only the documents they intend to rely on at trial but rather all documents in their possession, relative to the facts in issue, that may reasonably assist the Applicant in the preparation of his defence. The Respondent claimed that the Applicant has not demonstrated how any item that has not been disclosed can assist him in his defence having regard to the precise nature of the offences charged;
   13. The Applicant is alleged to have requested documents which did not exist. Former DPP Franklyn Williams’ (as he then was) was alleged to have traveled to interview the witness Alexandria Mackey. The Crown submitted that this never occurred, that the Applicants were engaged in a fishing expedition. Therefore, then the request for a copy of former DPP Franklyn Williams’ plane ticket, hotel accommodations, rental car, itinerary and food and that of David Cash was an impracticable request under the circumstances. Similarly the Respondent submitted that no bids, nor procurement requests existed relative to the WSC Management and the Board of Directors;
   14. In respect of the audio/video recordings, the Respondents claimed that they served all recordings within their possession. The Crown can do no more under the circumstances. If this was insufficient, the jury will say so by their verdict. Counsel for the Respondent claimed that they advised Counsel for the Applicant that not all of the interviews were recorded;
   15. Hundreds of documents, contained in the banking statements received by Mr. Emrick Seymour, Director of Financial Intelligence Unit (FIU) relative to the Defendants were not served until the 5th May, 2023 by compact disk (CD). The trial was due to commence on the 1st May, 2023. Approximately two weeks (14 days) has passed since these items were in the possession of the Applicants. The Court will further request that this witness be called at a later stage of the trial in the event the Applicants are in need of additional time to prepare for cross-examination. The Applicants are not to be disadvantaged or prejudiced by the late service of documents by the Crown. However, the Crown pointed out that at no time did Counsel for the Applicant seek more time to prepare its defence nor have they stated that the late service of documents they requested affected their ability to put on a defence. This is crucial to the submissions of the Applicant;
   16. The Court reminds itself of the balancing act between the admission of probative and prejudicial evidence enshrined in section 178 Evidence Act, Chapter 65. In the event these documents are foundational evidence, Mr. Emerick Seymour would be allowed to give evidence-in-chief, strictly to that extent and can recalled at a later date to complete his testimony;

**The Video Link Application**

1. The Respondent filed an application to adduce the evidence of Alexandria Mackey by way of Live Television Link supported by the Affidavit of Counsel Mr. Perry McHardy (all filed on the 12th April, 2023). The application was made initially pursuant to Section 78B(1)(b) and (c) of the Evidence (Amendment) Act, 2011, but later amended to Section 78B(1)(a) and (b) of the Evidence (Amendment) (No. 2) Act, 2014. The Court notes that the proposed amendment was not objected to by Counsel for the Applicant, nor any other Counsel for the Defendants. The Court acceded to the Respondent’s application. The relevant provisions provide the following-

“*(1) A person, other than the accused, 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-*

* + - * 1. *The witness is within or outside of The Bahamas;*
        2. *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 witness in connections with testifying in the proceedings;*”

1. Further (27th April, 2023) the Court ordered Counsel for Applicant and the Defendants who intended to oppose the video link application to do so in writing by the 2nd May, 2023. No written response was submitted by the Applicant to date. Only the Defendant, Mr. Elwood Donaldson, filed and served an Affidavit in response to that of Counsel Perry McHardy (5th May, 2023). Again, this was after the trial was scheduled to begin on the 1st May, 2023.
2. The Applicant has only responded to the said application orally. The Crown contends that Counsel sought to address the video link application by Affidavit in support of his Originating Motion. Crown Counsel further submitted that to fail to comply with the Court’s order and thereafter file an Originating Motion is an abuse of the Court’s process. In the Courts view redress was available without resorting to the Constitution.
3. The Applicants claim to be unable to receive a fair hearing on the basis that the application to adduce the evidence of Alexandria Mackey by way of live television link prejudices him in his defence. The Applicant’s contention that his Constitutional rights pursuant to Article 20(1) has been violated on the basis of an application which has yet to be decided is premature and could be considered an abuse of the Courts process. The Applicant never filed an Affidavit in opposition of the video link application. Rather, the Applicant invoked the Constitution.
4. Constitutional relief is a remedy of last resort. It should only be invoked where there is no other adequate remedy available. Notwithstanding that in the instant case, the Applicant proceeded with an oral response to the Application for Live Video Link the Applicant did not await the Courts Ruling before asserting that his rights have been infringed under the Constitution. The Respondents contend that the Applicants request for the witness’ presence in Court being vital to his case is unfounded. The video conferencing permits for the witness to be seen in real time and the jury will be able to assess her demeanour as well as she will be able to be examined and cross-examined by Counsel. Due to the technological advances in the courtroom, the screen can be split in two which would allow the witness to be fully seen on one side and the documents used in evidence on the other.

**Is a Witness required to attend physically**

1. The Respondent averred that the Applicant has no Constitutional right to have a witness physically present in Court. The Court is of the view that the definition of presence is not merely restricted to physical but includes virtual presence in circumstances where the witnesses face and voice can be clearly seen and heard. The Court does not accept the submissions of Counsel for Mr. Elwood Donaldson (Mr. Cargill) that virtual presence was strictly confined to cases heard during the advent of the crucial Global Pandemic which existed between 11th March, 2020 and 5th May, 2023 when the era of the horrific Covid-19 pandemic was finally declared to be over. Further the Evidence (Amendment) (No. 2) Act, 2014 (No. 46 of 2014) allows for evidence to be given by way of a live television link in proceedings. Provided the quality of the evidence to be given by the witness is likely to be diminished by reason of fear or distress on the part of the witness. The Court accepts the evidence produced by the Respondent which shows this particular witness is in fear and distress directly as a result of actions allegedly committed by Applicant Mr. Adrian Gibson, M.P., (See Affidavit of T’Shura Ambrose containing information directly from the witness and Affidavit of Perry McHardy purporting to contain a letter provided by the witness to the Respondent).
2. I hereby dismiss the Application requesting a Declaration pursuant to Article 20 (1) of The Constitution on the ground that the Applicant would not have a fair hearing within a reasonable time by an independent and impartial court by virtue of the witness Ms. Alexandria Mackey not being physically present in the courtroom. I have determined that she would be physically present in our coutroom albeit virtually.

**Stay of the Proceedings**

1. The Applicant faces very serious allegations of corruption in public office. The Court is of the view that he can receive a fair hearing and trial. In the interest of justice the trial should continue. This application for Constitutional redress is denied as alternative remedies were available to the Applicant. This Honourable Court dismisses the Applicants Originating Notice of Motion filed herein on the 4th May, 2023. The Court hereby declares that the Applicants rights under Articles 20(1), 20(2)(c) and 20(2)(e) of the Constitution of The Bahamas have not been infringed. The matter will proceed to trial. There will be no permanent stay in respect to these proceedings.

**Covid-19 Protocols/ Virtual Court?**

1. In addition to the Applicants submissions which Counsel Mr. Ian Cargill adopted, he also provided oral submissions to the Court on the 10th day of May, 2023. These submissions are as follows;-
   1. That the Court in determining whether to allow the Prosecutions witness to give evidence by way of live television link, should not take into consideration the Covid 19 protocols. Counsel, Mr. Cargill asserted that this was because these practices and protocols were only relied upon during the “COVID-19” era when the Court was subject to certain restrictions, which have been since lifted;
   2. Counsel, Mr. Cargill submitted that during the “COVID-19” pandemic the Court only allowed persons to be seen and heard virtually in an attempt to stop the spread of the then dangerous and unpredictable virus, but this is no longer the case for the Courts. The Court accepts that the Director General of the World Health Organization (WHO) has declared the official end of the COVID-19 pandemic on the 5th May, 2023. The Court further accepts that Courts in The Bahamas have resumed functioning physically since the declaration made by the Chief Justice in his address during the opening of the legal year in January of 2023. However the law does allow for witnesses to be heard virtually in certain relevant circumstances pursuant to the Evidence (Amendment) Act 2014. The Court has so determined that this witness will be heard virtually;
   3. Counsel, Mr. Cargill asserted that the Affidavit of Counsel Perry McHardy on which Counsel for the Respondent seeks to rely is nothing more than documentary hearsay because Mr. McHardy is merely stating what someone told him. However the Court has accepted the evidence of Ms. Alexandria Mackey exhibited and referred to in the Affidavits of Counsel Perry McHardy and Chief Counsel T’Shura Ambrose;
   4. Counsel, Mr. Cargill asserted that the Prosecution witness should have provided both the Court and the other Attorneys in this matter with a copy of an Affidavit which was sworn by Ms. Alexandria Mackey, personally. The Court accepts that the witness in question in presently out of the jurisdiction and it may have been procedurally impractical for her to swear an Affidavit. In any event the evidence contained in the relevant Affidavits meet the requisite standard;
   5. It was also proposed by Counsel Mr. Cargill that if Counsel for the Respondents truly wanted to have the witness present for this matter they could have reached out to the United Stated (US) Embassy, request their witness’ presence at the trial, with no penalization relative to her during her citizenship application period. Ms. Alexandria Mackey resides in Orlando, Florida, United States of America and claims potential hardship if she were to leave before the determination of her application for permanent status in that country. Notwithstanding the submissions by Mr. Cargill, this Court cannot compel a foreign government on the manner in which they should conduct their affairs. The Court is therefore satisfied that in the interest of justice the evidence should be given by live television link;
   6. In addition, Mr. Cargill submitted that the Prosecutions witness claims that she is worried amongst other things about travelling to The Bahamas for the trial as it would result in her being away from her husband and child for an extended period of time. Mr. Cargill pointed out to the Court that the witness would rather drive 3+ hours from her residence to The Bahamas Consulate General in Maimi, than to take a 30-minute flight to The Bahamas for the trial and then return home after the day is completed to be with her loved ones. In the view of the Court this underscores the distress the witness allegedly feels in preferring to stay abroad and endure hardship in order to testify as opposed to being in the same room as the Applicant who she alleges induces fear and distress in her (See paragraph 49 of Affidavit of T’Shura Ambrose). On this note, if it is later determined that these side issues which currently ground this application are ruled relevant to the trial, the Jury will have to be expressly warned that there is no charge before the Court of any unsavory domestic behavior relative to any of these Defendants- and that are not to be prejudiced against them in this regard, or at all.
   7. Counsel Mr. Raphael Moxey and Counsel Ms. Christina Galanos, both Counsel for the other Applicants adopted the submissions of both Mr. Cargill and Mr. Ducille, KC.
   8. Lastly, it must also be noted that the Court of Appeal of The Bahamas is currently sitting and hearing matters virtually and there could be no challenge that it is an actual Court. In the Court of Appeal case of **Garet O Finlayson and Caterplillar Financial Services Corporation SCCivApp. No. 97 of 2020** it was stated within its headnote that:-

“*The decision to continue these proceedings by way of remote video link is a case management decision which is within the discretion of the trial judge. The power to do so has been in existence prior to the COVID 19 pandemic that has crippled the world. The case management discretion to take evidence remotely is wide and must be exercised based upon ordinary principles of fairness, and justice. The Ruling of the trial judge is well reasoned and I see no error of principle, nor that she took into account irrelevant matters. The decision is not plainly wrong*”

**THE LAW**

1. The Constitution of the Commonwealth of The Bahamas (“the Constitution”) by virtue of Article 20 (1) confers unto all individuals the right to a fair trial:-

***“(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law***”

1. Article 20 (2)(c) of the Constitution also bestows upon persons the right to adequate time and facilities for the preparation for an individual’s defence;

“***2) every person who is charged with a criminal offence***

(***c) shall be given adequate time and facilities for the***

***preparation of his defence***”

1. Article 20 (2)(e) of the Constitution further states that:-

“***2) every person who is charged with a criminal offence-***

***(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the Court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the Court on the same conditions as those applying to witnesses called by the prosecution***;…”

1. **Article 28(2) of the Constitution of The Bahamas** provides that:

“***Provided that the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law”***

1. The Court cites with approval the case of **A.G. v Leroy Smith a.k.a “Shaddy” Et Al op. cit** wherein Justice Adderley JA (as he then was) stated that:-

“***As a matter of ordinary construction the words, “in person” in Article 20(2)(e) refers to the accused not to the witness. The Article provides that the accused “in person” or ‘by his legal representative’ must have an opportunity to examine the witness at trial.”***

The accused Applicant in the instant case will be present in person, the witness Ms. Alexandria Mackey will not.

1. I adopt the ratio decidendi of the House of Lords in **R v. Maxwell** [2010] U.K.S.C. 48 and by the Privy Council in **Warren v. Attorney General for Jersey** [2011] U.K.P.C. 10, [2011] 2 All E.R. 513, which stated that:

“***It is well established that the court has the power to stay proceedings in two categories of case,*** ***namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will ‘offend the court's sense of justice and propriety’ (per Lord Lowry in R v. Horseferry Road Magistrates’ Court, Ex p Bennett [1994] 1 A.C. 42, 74 g) or will ‘undermine public confidence in the criminal justice system and bring it into disrepute’ (per Lord Steyn in R v. Latif [1996] 1 W.L.R. 104, 112 f).***”

1. In his dissenting judgment, Lord Brown referred to what Professor A L-T Choo said in Abuse of Process and Judicial Stays of Criminal Proceedings, 2nd ed (2008), at page 132 where he summarized the approach of the courts of England and Wales to the second category of case, outlined above;

“***The courts would appear to have left the matter at a general level, requiring a determination to be made in particular cases of whether the continuation of the proceedings would compromise the moral integrity of the criminal justice system to an unacceptable degree. Implicitly at least, this determination involves performing a 'balancing' test that takes into account such factors as the seriousness of any violation of the defendant's (or even a third party's) rights; whether the police have acted in bad faith or maliciously, or with an improper motive; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability or otherwise of a direct sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the defendant is charged***.”

1. **The Queen v David Shane Gibson BS 2019 SC 26** at paragraph 38 provided that:

“***the law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed***:”

This Court agrees with these sentiments.

1. **Warren v Attorney General for Jersey [2011] UKPC** 10 goes further and states (at paragraph 34) that:

“***the jurisdiction to stay proceedings as an abuse of process extends to circumstances in which there has been no unfairness to the accused. Such unfairness was the context in which the nature and extent of the jurisdiction to stay were discussed in Bennett and the speeches, in our view, should be read in that context. The same is true of Lord Steyn's speech in Latif***”

1. In the case of **Kiarie v Secretary of State for the Home Department** **[2017] UKSC 42** Lord Carnwath (at paragraph 103) states that:-

“***I see no reason in principle why use of modern video facilities should not provide an effective means of providing oral evidence and participation from abroad, so long as the necessary facilities and resources are available.***”

**Disclosure**

1. However the obligation on the prosecution to make full and proper disclosure, does not include details of every twist and turn of an investigation, this was shown in the case of **The State v. Paul (Michael) et al (1999) 57 W.I.R. 48** (the headnote reads as follows):

**“*The defence has no right to see material, which is available to the prosecution but unused, except where such disclosure is dictated on the ground and the defence can show that prejudice would result from nondisclosure. Nor is the prosecution under any consequential duty to preserve all material gathered in the course of an investigation, except to the extent that it would be unfair not to preserve unused material or where its non-disclosure would be an affront to the public conscience as undermining accepted standards of fairness*”**

The defence has shown no proper justification for the material requested nor prejudice which arises from the non-disclosed material in this particular case. Nor was the prosecution under any duty to preserve even the unused irrelevant material in their investigation. This Court will not undermine ordinary and accepted standards of fairness which govern disclosure by the Prosecution of material collected. The Court has considered the material disclosed and not disclosed and the reasons for the non-disclosure which is the Crown no longer has within their possession, nor could they reasonably anticipate or would be required. In my view the have acted in good faith.

1. Senior Justice Charles (as she then was) states in the case of **The Queen v David Shane Gibson BS 2019 SC 26** at paragraphs 105-106 that:

“*105. The prosecution is under a duty to disclose as soon as is reasonably practicable all relevant material. The question of what material should be disclosed was considered in* ***Keane (1994) 99 Cr. App. R. 1****. The Court of Appeal said that the test of what was discloseable was to determine whether the material was relevant (or possibly relevant) to the issue in the case, or raised (or possibly raised) a new issue the existence of which was not apparent from the prosecution evidence, or held out a real prospect of providing a lead on evidence relevant to these matters. If the prosecution was in doubt about the materiality of information the court should be asked to rule*

*106. The principle establishes that it will be for the defence to establish why the material might be expected to assist them. The requirement that it might “reasonably be expected” to assist means that fishing expeditions or fanciful possibilities will not suffice as reasons for an order for disclosure. On the other hand, if proper explanation of the relevance of the material and as to how it might assist is given, the court will be under a duty to order disclosure in the interests of a fair trial.*

**ANAYSIS AND CONCLUSION**

1. The application grounded on alleged breaches of the Constitution is misconceived and premature. The Court finds that it discloses no cause of action. The Court declares that the Constitutional rights of the Applicant pursuant to Article 20 (2)(c) and 20 (2)(e) of the Constitution of The Bahamas has not been breached.
2. The Application borders dangerously close to an abuse of the courts process. The Respondent submitted that this application was simply a farce to cover up the Applicants failure to challenge the issues of disclosure and having a witness adduce evidence by way of television link at the pretrial hearings. They submitted that the Constitutional Application is premature since the Court has not yet ruled on the substantive extant issues.
3. This Honourable Court has considered the arguments of both parties. The Constitution should not be used to circumvent the proper practice and procedure of the Court where adequate redress is available. The issues of disclosure, and adducing evidence by way of video link can be dealt with by means other than this Constitutional application. The Court possesses the power to stay the proceedings under two circumstances namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the Court's sense of justice and propriety to try the accused in the particular circumstances of the case.
4. In this case all of the persons accused can have a fair trial, with the necessary safeguards in place, and the tools available to a Supreme Court Justice without infringing on their Constitutional rights. This Court is of the view that these accused persons can be given a fair trial in this matter without being deprived of their Constitutional rights or prejudiced in anyway. The defence is not entitled to the unused materials of the Prosecution where they cannot properly assert why they need it or why not having it would result in prejudice to their client. They have not so proved here. The Defence must in fact establish why the material they seek might be useful to them. *“The requirement that it might “reasonably be expected” to assist means that fishing expeditions or fanciful possibilities will not suffice as reasons for an order for disclosure* (See **David Shane Gibson** supra)*.”*
5. Applying common law principles the court finds that the Defendants’ Constitutional right to a fair hearing would not be infringed if they are not able to receive these documents.
6. Relative to the video link issue there is no reason why use of modern video facilities in a courtroom in the Commonwealth of The Bahamas should not provide an effective means of receiving oral testimony and witness participation from abroad, provided that the necessary facilities and resources are available. The Court will also direct personnel from the IT department to be on standby to ensure the witness is able to give evidence and simultaneously review any document that may be put to her. The case of **The Director of Public Prosecutions v Stephano Curry (supra)** further bolsters the view of this Court that allowing a witness to give evidence by way of video link would not infringe upon the individuals Constitutional right to a fair trial.
7. In regard to the challenge of these issues it is noted that Counsel for the Applicant was afforded an opportunity to submit written submissions objecting to the Respondents applications, but none were made.
8. Due to the Applicants failure to provide a valid response to the Respondents extant Application it would be unusual for them to successfully mount a Constitutional motion on relatively the same grounds, challenging the same issues. The Court considered the Constitutional Motion and the Application relative to disclosure and video link separately and in tandem. This Court found no jurisdiction to stay the proceedings, nor an abuse of the process. In all of the circumstances there was no unfairness to the accused.
9. In addition to this the case of **Warren v Attorney General for Jersey (supra)** was helpful relative to abuse of process. As previously stated, it is shown that “*the jurisdiction to stay proceedings as an abuse of process extends to circumstances in which there has been no unfairness to the accused*”. There has been no unfairness towards the Applicants nor the Defendants in this matter. The Applicant would receive a fair and timely trial. This Court will not exercise its jurisdiction to stay these proceedings.
10. On the second issue which arose out of this Constitutional motion which revolves around the question of “**is there an abuse of the process when other relief is available**.” Article 28(2) of the Constitution of The Bahamas states that “*Provided that the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law*”.
11. There is other available relief for the Applicant without having to resort to invoking the Constitution. The Applicant could have awaited the ruling of the Court on the issues of disclosure and adducing evidence by way of live television link having regard to the substantial oral objections of his Counsel. Counsel for the Applicant could have petitioned the Court for an extension of time to properly file his written objections to the Respondents application and further he could have sought an extension of time to properly consider the documents and material which he claimed were disclosed late by the Crown. Those witnesses could have been called late in the trial to allow the Counsel ample opportunity to prepare their cross-examination. Further, this Court could rule that the witness should appear in person- which would mean the entire Constitutional Application falls away and underscores why this application is wholly bad and must fail under all of the circumstances.
12. Under all of the circumstances it cannot be reasonably stated that there were in fact not several options for relief available to Counsel for the Applicant before he filed a Constitutional motion. Thus, pursuant to Article 28 of the Constitution of The Bahamas, given that there were other forms of redress/ relief available to the Applicant the Court refuses the Applicants Constitutional motion.
13. The third issue which the Court must address is “Can relief and the Respondents declarations be granted.” The Court does not accept that to allow the Crowns key witness to adduce evidence by way of video link, his Constitutional rights pursuant to Articles 20(1), 20(2)(c) & 20(2)(e) of the Constitution. The Court does in fact have the jurisdiction and discretion to dismiss the Constitutional motion of the Applicant and thus I now do, the Court also refuses the Declarations sought.
14. Pursuant to Article 28 of the Constitution of The Bahamas bestows upon this Honourable Court the inherent jurisdiction to dismiss the Applicants Constitutional motion and refuse the Declarations requested by the Applicant if other remedies are available.

**Dated this 15th day of May A.D., 2023.**

**The Honourable Madam Justice Mrs. Cheryl Grant-Thompson**