

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. SLUCRD2011/1970,1970A,1971,1971A

THE KING

vs.

CHESTER WILLIAMS

Defendant

BEFORE : The Honourable Justice V. Georgis Taylor-Alexander

APPEARANCES : : Mr. Linton Robinson Counsel for the Crown
Mr. Lorne Theophilus Counsel for the Defendant

2024: May 22;

2024: October 11;

JUDGMENT

- [1] **TAYLOR-ALEXANDER J:** This is an application filed by the Crown on the 24th of April 2023, pursuant to Sections 27 A and 29 of the Evidence Act Cap 4:15 of the Revised Laws of Saint Lucia 2013 for leave to have a witness for the Crown resident overseas give evidence via a live link in the trial of the Defendant. The application is supported by the affidavit evidence of Jonathan Chicot filed on even date. The application is challenged by the Defendant whose submissions in opposition was filed on the 29th of January 2024.
- [2] The Defendant was indicted on the 12th of April 2017, for one (1) count of possession of cocaine simpliciter and for possession with intent to supply cocaine contrary to Section 8(2) and 8(3) respectively of the Drug (Prevention of Misuse) Act Cap 3.02 of the Revised Laws of Saint Lucia.

- [3] The basis of the application is that this witness who is crucial to the prosecution's case, resides in the United Kingdom and is a vulnerable witness under Section 2 of the Evidence Act as a witness whose ability to give evidence or the quality of whose evidence is likely to be affected by reason of her absence from Saint Lucia. The Crown submits that the evidence of the witness can be fairly tested through examination and cross examinations using live link technology, and it is in the interest of efficient and effective administration of justice for the witness to give evidence in that manner.
- [4] The accompanying affidavit of Jonathan Chicot provides that he is authorised to depose the affidavit by the Director of Public Prosecutions, and that the matters deposed to are within his personal knowledge, except where he provides otherwise. He states that the witness is vulnerable by virtue of her absence from Saint Lucia. He conducted investigations into her whereabouts and ascertained that she resides in the United Kingdom. He made contact with the witness at her United Kingdom address and number, and she informed that she is interested in giving evidence in this case but is constrained from returning due to work commitments. She informs that she lives alone and she is able to give evidence via the Zoom platform with a stable WiFi connection from a secure location within her home.

Submissions of the Defence

- [5] The Defence challenges the application submitting that its grant is not a foregone conclusion. Under Section 27A(1) of the Evidence Act of Saint Lucia, such an application requires the exercise of the court's discretion, with Section 27B prescribing the basis on which the courts discretion can be exercised. The Defence submits that the affidavit provided in support of the Crown's application is bereft of the information necessary for the court to exercise its discretion. In particular, there is no confirmation that the witness Nataly Charlemange is out of the jurisdiction, or that she left the State on a particular date. Further the affidavit evidence that supports the Crown's application is made by a Crown's employee, without independent verification of the fact of the witness being out of the jurisdiction or as to the date when she left the jurisdiction.
- [6] The Defence challenges the admissibility of the affidavit of Jonathan Chicot, pointing out that it relies on unverified investigations and contains hearsay statements, particularly in paragraphs six (6) to nine (9), which violate Section 48(1) of the Evidence Act. There is no direct affidavit from the witness herself, which could potentially validate the claims made by Chicot.

- [7] The Defence relies on the authority of **La Vende v The State**¹ to emphasize the necessity of proving a witness's absence from the jurisdiction with proper evidence. The court in **La Vende** said this: -

"It is clear to us that the ordinance contemplates proper proof of the absence from the jurisdiction as one of the conditions precedent to the admission in evidence of the deposition of a witness. It is a fact, which must be proved by evidence however, and it is not one which judicial notice can be taken, nor can any outside knowledge, irrespective of how reliable or how authoritative it is be employed for the purpose of supplying any deficiency in the proof of that fact. Council's submissions is accordingly well taken and we uphold it as sound."

- [8] The Defendant also submits that the Crown application for the evidence to be given from the home of the witness provides no safeguards against a witness refreshing her memory from her witness statement or from being coached in the evidence she gives. He also argues that the Crown has not provided evidence to demonstrate the witness's inability to return and has not satisfied the conditions in Section 27B(2)(b) of the Evidence Act, which outlines requirements for live link procedures and in particular that the court may not give directions for the use of live link unless it has been notified by the Registrar, clerk or authorized or responsible officer of the court before who or which proceedings are held, that suitable facilities for receiving evidence through a live link are available in the area in which it appears to the court that the proceedings will take place, that enables the accused or any person referred to in Section 27A to see and hear the court and to be seen and heard by it.
- [9] In support of his submission the Defence relies on the case of **King v Julian Adjodha et al**² where the court ruled, after hearing submissions from a Defendant that; (1) the affidavit evidence did not provide reason as to why a witness was unable to attend in person to give evidence in person, (2) that giving evidence from his home compromised the integrity of the trial process and (3) that in any event that witness was unable to confirm the chain of custody in the case; that the prosecution's application had not satisfied the requirements of Section 27B (2) of the Evidence Act and the Crown did not meet the threshold which could satisfy the court that the witness had left the jurisdiction.

¹ (1979) 30 WR 460 at page 464

² SLUCRD2011/0651, SLUCRD2011/0651A, SLUCRD2011/0652, SLUCRD2011/0652A, SLUCRD2011/0652B, and SLUCRD2011/0685

- [10] Overall, the Defence contends that the Crown has not met the necessary evidentiary requirements to justify the use of live link testimony for Nataly Charlemagne.

The Crown's Submissions

- [11] The Crown clarifies that their application seeks permission for the witness to give evidence via live link, acknowledging some irregularities in the form used.
- [12] While the Crown admits that Jonathan Chicot's affidavit contains hearsay, it argues that Sections 50 to 63 of the Evidence Act provide exceptions to the hearsay rule. Particularly, section 63 permits hearsay in interlocutory proceedings if the source of the information is identified, which Chicot does by citing Nataly Charlemagne.
- [13] The Crown asserts that the affidavit's information is adequate for an interlocutory application for live link testimony. They emphasize the distinction between live link applications and those seeking to admit unsworn witness statements due to unavailability of a witness for trial. The Crown contends that live link allows for real-time observation, questioning, and cross-examination of the witness, thereby preserving the integrity of the trial process. This contrasts with the admission of unsworn statements as evidence, which hinder the Defence's ability to confront the witness. The Crown submits that the Evidence Act sets a more stringent threshold for admitting unsworn statements as evidence, indicating that live link testimony upholds fair trial standards hence requiring less rigorous requirements. The Crown also submits that the case of **La Vende v The State** (supra) is not relevant in these circumstances, as it dealt with the admission of a deposition from an unavailable witness, which involves a higher threshold and the application of different legal principles.
- [14] The Crown addresses the Defence's claim regarding Section 27B(2)(b) of the Evidence Act, explaining that this section applies specifically to live links from designated locations such as a court building whereas Sections 29(2) and 29(5)(b) accommodates evidence via platforms like Zoom without such restrictions.
- [15] The Crown submits that the case of **King v Julian Adjodha et al** can be distinguished on the applications made. In **Adjodha**, the application was only made pursuant to Section 27 (A) where the requirements are stricter, and neither did it meet the requirements of Section 27(B) as it did not disclosing the whereabouts of the witness nor did it disclose why he was unable to attend the trial in person other than the fact that he was now resident abroad. In the present case the

address of the witness and the difficulties she would encounter in returning to give evidence, was disclosed.

- [16] Finally, the Crown concludes that granting the application will not prejudice the Defendant. The Defendant will still have the opportunity to observe the witness's demeanour, cross-examine her, and confront her as his accuser, ensuring a fair trial process.

Issues:

- [17] The issues for determination distilled from the application and submissions are as follows: -
- (I) What is the appropriate form of an application for a witness to give evidence via live link under the Evidence Act.
 - (II) The sufficiency of the application and of the affidavit of Jonathan Chicot.
 - (III) The law relevant to such an application, and whether Section 27 B (2) and (4) are engaged for consideration.

Form of the application for live link evidence

- [18] Both Section 27B (1) (a) and Section 29 (2) and (5) of the Evidence Act allow a court to direct that a witness give evidence via live link, either on its own motion or upon a party's application. Both provisions acknowledge that if not on the court's own motion any request for such a direction is on application. The Crown's decision to file a notice instead of an application presents procedural challenges, as this method is not recognized by the Evidence Act. However, the core of the Crown's request seeking a direction for a witness to give evidence via live link from outside the courtroom and jurisdiction is clear. Despite the irregularity, I am prepared to accept the Crown's request focusing on the substantive issues rather than strict procedural compliance. This approach reflects the court's awareness of the case's age and the urgency to prepare all parties for the upcoming trial. Nevertheless, it should be emphasized that going forward, the procedural framework set out in the Evidence Act must be complied with.

The Sufficiency of the Application and of the Affidavit of Jonathan Chicot

- [19] Under the rules governing affidavits in interlocutory proceedings, hearsay statements may be admissible if the source is identified. The affidavit of Jonathan Chicot identifies the source of his information, which is implicitly understood to be the witness, Nataly Charlemagne. Although

Chicot does not explicitly name her as the source in his affidavit, the context makes it clear that she is the only possible source for the information he provides.

Given this understanding, the court accepts Chicot's evidence regarding the witness's location abroad and the challenges she faces in attending the trial, specifically her work commitments that impede her ability to be present in person.

The Law Relevant to the Application and the application of Section 27B (2) and (4)

- [20] The Common Law rule as regards the conduct of criminal trials is that “the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence” **R v Davis**³. Counsel for the Defence relied on the Privy Council dicta in **Grant (Steven) v R**⁴ quoted by Sykes J in **Adidja Palmer and Others**⁵ as being a true statement of what remains the general principle in the conduct of criminal trials. Their Lordships stated:-

“evidence of a witness given orally in person in court, on oath or affirmation so that he may be cross examined and his demeanor under interrogation evaluated by the tribunal of fact, has always been regarded as the best evidence and should continue to be so regarded, any departure from that practice must be justified.”

- [21] In **Adidja Palmer**, Sykes J was addressing the statutory exceptions to the Common Law rule created by the Evidence Act of Jamaica, particularly an exception akin to Section 55 of the Evidence Act of Saint Lucia, that allows a statement made by a person in a document to be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person cannot be found after all reasonable steps have been taken to find him.

- [22] Although the above is relevant to understanding the Common Law rule on best evidence, it is necessary to distinguish between the authorities of **Adidja Palmer** and **Grant (Steven) v R** cited by the Defendant to the case at hand. The cited cases primarily involve reliance on depositions and or witness statements as unsworn testimony in lieu of oral testimony due to witness unavailability. It was apropos for the court in these circumstances to restate the Common Law rule, so as to appreciate the scrutiny that is to be applied to any exception sought, particularly

³ [2008] 1 AC 1128

⁴ [2006] UKPC 2

⁵ [2013] JMGCCDD1

exceptions that preclude a Defendant from confronting his accusers. In this case, the Crown's application does not undermine the Defence's ability to see, hear, and observe the witness, nor does it impede the Defendant's right to cross-examine or confront the witness. The primary distinction is that the Defendant will not be able to do so in person, but the integrity of the confrontation is preserved through the live link. The Common Law rule is not without statutory exceptions.

[23] According to Section 6 of the Evidence Act, Nataly Charlemagne is considered an available witness, even though she currently resides in the United Kingdom. Her absence from Saint Lucia classifies her as a vulnerable witness under Section 2 of the Evidence Act. This classification as a vulnerable witness is significant, as it allows for accommodations to be made to facilitate her participation in the trial process. The court may consider her status to ensure that her rights and the integrity of the judicial proceedings are upheld, particularly in terms of how her evidence is delivered, such as through a live link.

[24] The Crown's application under Sections 27A, 27B and 29 of the Evidence Act is premised on these two (2) factors. The application requires further scrutiny under Sections 27A, 27B and 29. The relevant provisions are as follows: -

Section 27 A of the Evidence Act (Use of Live Links)

"(1) A person may, if the court so directs, give evidence through a live link in any proceedings."

Section 27 B of the Evidence Act (Directions by the Court)

"(1) Subject to subsections (2), (3) and (4), a direction may be given by the court under Section 27A: -

- (a) On an application by a party to the proceedings or*
- (b) the courts own motion.*

(2) A direction may not be given under Section 27A unless-

- (a) the court is satisfied that it is in the interest of the **efficient or effective administration of justice** for the person concerned to give evidence in the proceedings through a live link.*
- (b) It has been notified by the Registrar, clerk or the authorized or responsible officer of the court, before whom or which proceedings are held that suitable facilities for receiving evidence through a live link are available in the area in which it appears to the court that*

the proceedings will take place which enables the accused or any person referred to in Section 27 E to see and hear the court and to be seen and heard by it and

(c) the notification referred to in paragraph B has not been withdrawn.

(3)

(4) In deciding whether to give a direction under Section 27 A. The Court must consider all the circumstances of the case including in particular-

(a) the availability of the person.

(b) the need for the person to present himself or herself at the place where the proceedings are held.

(c) the importance of the person's evidence to the proceedings.

(d) the views of the person.

(e) the suitability of the facilities at the place where the person would give evidence through a live link.

(f) whether a direction might tend to inhibit any party to the proceedings from effectively testing the persons evidence."

Section 29. of the Evidence Act (Giving evidence outside the Courtroom)

"(1) Where the witness is the complainant in the case and is less than 12 years of age, he or she shall be taken to be a vulnerable witness and shall give evidence in a manner described in subsection (5) (a), (b) or (c) as directed by the judge, and the judge may also apply other measures outlined in subsections (5) (d) to (i) in relation to that testimony.

(2) In any case other than in subsection (1) the judge may, either on the application of a party or a witness or on the judge's own initiative, direct that a vulnerable witness is to give evidence in a manner described in subsection (5).....

(5) Where a judge makes a direction under subsections (1) or (2), the judge may in addition direct that—

(b) the witness gives evidence from an appropriate place outside the courtroom, either in Saint Lucia or elsewhere by means of technology which allows for the witness to see and or hear a person in the courtroom and be seen and heard by the persons listed in paragraph (a) (i) (ii) and (iii);(the judge or jury; the legal representative acting in the proceedings; any interpreter or other person appointed to assist)"

Discussion on the Law

- [25] The provisions of Sections 27A, 27B, and 29, as amended by Act No. 14 of 2011, reflect a legislative intent to expand the circumstances under which special arrangements can be made for taking evidence, particularly through live links from outside the courtroom. Section 27A and B are insertions into the Act, to accommodate live link proceedings. Originally, Section 29 focused primarily on accommodating vulnerable witnesses, such as those who are deaf or mute. However, the amendment allows for a broader range of witnesses to provide testimony outside the courtroom, even if they do not fall within the categories of vulnerability defined in Section 2. This aligns with modern practices that prioritize the efficiency and integrity of legal proceedings while accommodating diverse witness needs.
- [26] Counsel for the Crown suggests that Section 29 is more applicable to the current application than Sections 27A and 27B. Initially, this submission seemed reasonable at first blush. However, upon further examination, it becomes clear that while Sections 27A and 29 serve distinct purposes, they are interrelated. Section 29 outlines the procedures for receiving evidence from outside the courtroom, including the use of pre-recorded video testimony and technology that allows a witness to interact with the court, such as through live links. On the other hand, Section 27A specifically addresses the use of live links across all court proceedings, emphasizing its applicability in various contexts, including cases where evidence is being presented. Both provisions assert the importance of the discretion of the Judicial Officer to ensure the fairness of the proceedings. I have difficulty appreciating that the legislature would have established an elaborate procedure under Sections 27A and B to ensure the integrity live links, only to disregard its application in Section 29 in less secure circumstances. The logical conclusion is that the two provisions are interrelated. Thus, an application for evidence to be taken via live link from outside the courtroom implicates both Sections 27A and 29, necessitating compliance with Section 27 as well.
- [27] The Court must consider all the circumstances of the case. Including in particular: -
- (a) the availability of the person;
 - (b) the need for the person to present himself or herself at the place where the proceedings are held;
 - (c) the importance of the person's evidence to the proceedings;
 - (d) the views of the person;

- (e) the suitability of the facilities at the place where the person would give evidence through a live link;
- (f) whether a direction might tend to inhibit any party to the proceedings from effectively testing the person's evidence.

Direction under Section 27B

- [28] On reflection, I find no substantial basis to deny the Crown's application for the witness to give evidence from outside the courtroom, particularly considering the evidence of her residing overseas and the work-related challenges that would hinder her ability to attend in person. Importantly, the Defendant's rights are preserved, as he will still have the opportunity to confront his accuser.
- [29] However, a significant concern arises regarding the suitability of the proposed location from which live link evidence will be given, that is the witness's home and from her personal device. This arrangement raises potential issues and defeats the intention of the legislators as reflected in Section 27B(2)(a), which emphasizes the need for independent verification from the Registrar or an appropriate court officer regarding the adequacy of the facilities for live link testimony.
- [30] The court agrees with the Defence's assertion that "suitability" entails ensuring that the court can monitor the witness and confirm that she is not communicating with others or receiving assistance during her testimony. This is crucial for maintaining the integrity of the evidence presented. The Crown's application falls short of this requirement. This does not automatically defeat their application. Instead, the court, acting in the interest of efficient and effective justice administration, can make an order to ensure that the necessary safeguards are implemented. This may involve specifying appropriate arrangements to verify the suitability of the location and ensure a secure and controlled environment for the witness's testimony.
- [31] Having considered all of the circumstances of the case and in particular the factors identified in Section 27B(4) adumbrated at paragraph 24 above to determine whether my discretion ought to be exercised on the Crown's application, other than my concerns with factor identified at 27B(4)(e), I am satisfied that my discretion ought to be exercised in favour of granting the application, but with further appropriate orders to ensure the suitability of the facilities at the place where the person would give evidence via live link, and the integrity of the proceedings.

Disposition

1. The application of the Crown to allow the witness to provide evidence from a location outside of the Court room via link is granted.
2. To ensure the integrity of the evidence, the witness is to give evidence from a local court or other office in the foreign jurisdiction which location is approved as suitable by the Registrar for live link facilities.
3. It is for the Crown to ensure that any permission for the use of the facility, is obtained in good time before the hearing at which the witness is to give evidence and to inform the Court that such permission has been obtained.
4. Notification of the facility that is to be used, is to be communicated to the Registrar, who shall inform the court of the suitability of the facility for receiving evidence through a live link, that will enable the witness to see and hear the court and enable the court to see and hear the witness.
5. The Crown must notify the Defence at the earliest opportunity of the facility it proposes to use and the measures it proposes to put in place, with a view to permitting a representative of the Defence if necessary to attend or make arrangements to ensure that the Defence can ascertain that the witness is not communicating with any other person or otherwise receiving assistance during the course of their evidence.
6. The Crown is to arrange to have more than one (1) camera available in the location from which the witness is giving their evidence to ensure that impermissible reference to notes, prompting etc. is not taking place.
7. The evidence is to be taken following the protocol for video conferencing and remote hearings issued by the Eastern Caribbean Supreme Court on the 5th of May 2020.

Justice V. Georgis Taylor-Alexander
High Court Judge

BY THE COURT

REGISTRAR