

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

BVIHCR 2021/0016

BETWEEN:

THE QUEEN

RESPONDENT

and

ROYDEN SEBASTIAN

APPLICANT

Appearances: Mrs. Kellee-Gai Smith & Mr. Kristian Johnson, Counsel for the Respondent
Mr. David A. Penn, Counsel for the Applicant

2021: December 2nd & 17th

RULING ON APPLICATION FOR DIRECTIONS

[1] **FLOYD J:** This is an Application for Directions, specifically that the Applicant, through Counsel, be allowed access to the locus in quo and to a Crown witness. The Applicant is charged with murder contrary to **s. 148 of the Criminal Code 1997 of the Virgin Islands**. The date of offence is 2nd September, 2020. The Applicant was arrested on 13th October, 2020 and charged the following day. Written submissions were filed by the Applicant on 20th October, 2021 and by the Respondent on 15th November, 2021. Oral submissions were received on 2nd December, 2021.

THE FACTS

- [2] On 2nd September 2020, sometime after 9:00 p.m., a man armed with a handgun, entered a private residence where George Burrows and his five children resided. The man fired one shot at one of the victim's sons, missing him, and then pursued him through the house. As he passed the victim, who was watching television, the man shot Mr. Burrows once in the head, killing him. The gunman continued after his first target, through the house and outside into the street. When he could not catch up to that person, the gunman turned to another of Mr. Burrow's sons. This young man was confined to a wheelchair. The gunman approached the disabled man, put the gun to his head and pulled the trigger several times. However, the gun jammed and failed to discharge. The gunman then struck the male in the wheelchair in the head with the gun and fled the area, making good his escape.
- [3] The gunman was described by witnesses as a black male, well built, over 6' 2" in height, wearing a white T-shirt and black pants. Information was received that the Applicant was at a nearby basketball court close in time to the incident and wearing the same clothing as described. CCTV footage was obtained showing a male, shortly after the shooting, walking near the basketball court, wearing a white T-shirt and dark pants.
- [4] The police interviewed several witnesses, including one, N.D., who was in a nearby residence at the time of the incident. The Applicant was known to that witness. N.D. recognized him. N.D. gave a statement to police. N.D. looked out the window into a well-lit but deserted street. N.D. heard a bang and observed several flashes of light in the kitchen of the victim's house nearby. N.D. heard another bang and saw a male exit the front door of the house. The man wore a white T-shirt, dark pants and dark boots. N.D. saw the male approach the victim's son in a wheelchair, put the gun to his head and pull the trigger several times. The gun did not fire and so the male struck the wheelchair-bound man in the head with the gun. The gunman then moved away towards the basketball court and disappeared. N.D. recognized the gunman as the Applicant and gave a photograph of the Applicant to police.

- [5] Police executed a search warrant at the residence of the Applicant on 6th October, 2020. On 13th October, 2020, the Applicant was located and arrested at the same basketball court, close to where the offence occurred.
- [6] On 14th October, 2020, the Applicant was interviewed under caution. He told police that he was at the basketball court at the time of the incident. He heard shots fired. He remained there for a while and then went home. He denied being involved in the murder.

THE POSITION OF THE PARTIES

- [7] Learned Counsel for the Applicant submits that it is essential to his case that he and his private investigator be allowed to visit the scene of this incident and to interview the eyewitness, N.D. The case of **Connolly v Dale**¹ was tendered in support of this position.
- [8] A private investigator acting on behalf of Counsel for the Applicant provided an Affidavit indicating that he was in contact with the witness N.D. as well as other witnesses. However, his interaction with N.D. was brief.
- [9] Counsel for the Applicant submits that the private residence is a crime scene. As such, he should be allowed access. The Applicant's case would be prejudiced without such access. Photographs of the scene have been disclosed but they are insufficient. The statement of N.D. has been disclosed but that is also insufficient and must be explored. N.D. can choose whether or not to speak to Defence Counsel but N.D. should be produced either by remote video link or at a safe location such as a police station, given that the witness is now participating in the Justice Protection Act Program. In order for the Applicant to make full answer and defence to the charge, he must be given access to the scene and to the witness.
- [10] Counsel for the Applicant submitted that the police were encouraging the witnesses not to allow access to the scene and not to speak with the Applicant's investigator. As such, the police were interfering with the conduct of the defence case.

¹ [1995] 3 WLR 786

- [11] Learned Counsel for the Respondent submits that there is no basis in law to support this Application to compel a citizen to grant access to her/his premises and to compel a witness to make herself/himself available for questioning. The locus is a private residence, a family dwelling. The only way an order could be made for a view at a locus is during the trial. The photographs taken by forensic police officers and already disclosed are sufficient for everyone's purposes at this time and prior to trial. In support of this, Crown Counsel referred to the case of **R v Warwar**² wherein the Court indicated that an application for a visit to a locus in quo may be made during the trial if it was thought that it would assist the jury to understand geographic points and physical features referred to, and to follow the evidence. However, it is a matter for the trial judge's discretion.
- [12] Counsel for the Respondent referred to the **Virgin Islands Constitution Order 2007, para 19** in submitting that the witness homeowner has a right to privacy and quiet enjoyment of her/his home. Nothing in this Application would constitute an exception to that right.
- [13] Counsel for the Respondent submits that although there is no property in a witness, a witness nonetheless cannot be forced to take part in an interview. Not even the Crown can force a Crown witness to communicate with her/him. It is clear from the Affidavit of D/C Remy that neither the homeowner nor the witness, N.D., wish to deal with Counsel for the Applicant and his private investigator. The witness, N.D., not only advised D/C Remy of that position but after contact with the private investigator, N.D. reached out to the police and is therefore clearly displaying a reluctance to take part in such an interview. Neither homeowner nor witness can be compelled to speak with or allow access to the property by either Defence Counsel or Crown Counsel. Such compulsion could only be given by a summons, subpoena or court order for the purposes of the trial.

ANALYSIS

- [14] In the analysis of this Application, the Court begins by citing two basic legal concepts in the criminal justice system. The first is disclosure and the second one confirms that there is no property in a witness. The Prosecutor must provide to the accused all information in her/his possession relating to the charges against the accused, unless it is clearly irrelevant. Disclosure of all relevant

² (1969) 15 WIR 298

information is vital to ensuring that the trial process is fair to all those accused of criminal offences. The Prosecutor's duty to disclose is ongoing throughout the life of a case. This fundamental principle of fairness is critical to the administration of justice. It is clear from my review of the material in this case that disclosure has indeed been made. The information necessary for the Applicant to understand the case against him and to mount his defence, has been provided. That includes the forensic photographs of the scene and the statement of the Crown Witness, N.D. Does Crown Disclosure extend to the provision of the addresses and contact details of witnesses? To examine that issue, guidance is provided by the Crown Prosecution Service (England and Wales) **Code for Crown Prosecutors**. Counsel for the Respondent confirmed that, as might be expected, the Office of the Director of Public Prosecutions in this Territory generally follows that **Code**.

[15] The **Code for Crown Prosecutors** indicates that, as a general rule, the address of a Crown witness is not disclosed. However, there will be cases where the address of a witness is material. That would include a case where a witness sees an incident from a window close by, as is the case here. In such a case, it is obviously difficult to withhold the address. However, if the safety of the witness is at risk, care must be exercised in disclosing an address or contact details. That is also the case here. The presence of the witness, N.D., in the Justice Protection Act Program and the serious nature of the charge against the Applicant, confirms that safety is indeed a consideration in relation to N.D. For that reason, the Respondent acted appropriately by having a police officer liaise between Counsel for the Applicant and the witness. That was after the initial contact by telephone between the private investigator for the Applicant and the witness. The initial contact was brief and the follow up contact resulted in the response from D/C Remy that N.D. did not wish to communicate with anyone acting on behalf of the Applicant. That was N.D.'s right, clearly expressed through a police officer, as confirmed in the officer's Affidavit.

[16] Counsel for the Applicant himself referred to the **CPS Code for Crown Prosecutors** wherein it is indicated that both the Prosecution and the Defence may interview each other's witnesses and may take statements from those witnesses without any attempt being made to have a witness change her/his story. However, the **Code** does not stop there. It goes further and states that the witness must first be asked if she/he consents to being interviewed. The witness must be informed that an interview is being requested from the opposing party, she/he is not obliged to attend, she/he may be

accompanied by a solicitor and a record will be made of the interview. The **Code** continues, stating that the accused or the accused's representative must be advised that the investigator requested the interview, whether the witness consented to the interview and whether the witness wished a solicitor to attend. All of that has been done in this case, as D/C Remy confirmed in his Affidavit. The Crown has therefore fulfilled its obligation in that regard. That is the generally accepted practice in a situation like this.

[17] Disclosure has been made of the witness's statement. Initial attempts were made by Defence Counsel to speak with the witness. The witness declined. A formal request was then made through the Crown's Office. That was relayed to the witness through police, particularly as the witness was now in a protected capacity. The police provided the response of the witness. Counsel for the Applicant has provided no authority to this Court upon which any further response could be ordered. As an independent citizen, the witness can decline to participate in the Defence interview. At this stage of proceedings, the Court has no authority to make any Order compelling the witness to appear or to otherwise participate. There is no prejudice to the Applicant by proceeding in this fashion. His Counsel has disclosure of the witness statement. The witness may be cross examined at trial. If the witness fails to appear or participate in the trial process, the Court would then be able to entertain an application to order witness attendance. That would occur at that time but not before. The Application that the Crown produce the witness, N.D., is therefore dismissed.

[18] In support of the Application that Defence Counsel be allowed to attend upon a locus at a private residence, Counsel for the Applicant relied upon the **Connolly v Dale** case. However, that case may be distinguished from the case at bar. In **Connolly**, the Applicant wanted access to a hostel in order to locate potential alibi witnesses. The hostel was not the crime scene. Representatives of the Applicant attended but were prevented by police from entering the hostel and from speaking to witnesses. The Court found the behaviour to be willful obstruction by police of defence access to potential alibi witnesses. Again, that is not the case here. I can find no evidence of the police impeding the Applicant's access to the witness N.D. Indeed, the police, as noted, passed on the request and relayed the response from the witness, which was to decline the interview. With respect, the **Connolly** case is of no assistance.

- [19] If the case for an order mandating access to the locus, a private residence, is based upon procedural fairness towards the Applicant, then surely the rights of the homeowner must also be considered. In that regard, **s. 19** of the **Virgin Islands Constitution** must be examined. The residence is not only the scene of the murder but was the home of the victim and remains the home of his family. Victims have rights. The **Constitution** confirms that every person has the right to respect for his or her private and family life and his or her home. The security of one's home against unreasonable entry, search and seizure is a basic right. One may only be deprived of that right if it is reasonably justified in accordance with the principles of fundamental justice. One may also consent to allow such entry. In this case, the Affidavit of D/C Remy confirms that he spoke with the homeowner, who indicated in no uncertain terms that he would not allow entry to his home by representatives of the Applicant. That is his right.
- [20] Is there any basis upon which this Court, at this stage of the proceedings, can interfere with the decision of the property owner? I refer again to the disclosure issue. Forensic photographs of the crime scene taken by police and provided to the Crown, have been passed on to Counsel for the Applicant by way of disclosure. The defence to this charge may begin on that basis. There is no prejudice or lack of fairness to the Applicant. At the trial of this case, an Order may be sought to view the scene. That is an established legal principle as noted in the **Warwar** case and many others. But we are not yet at that stage. Contrary to the submissions of Counsel for the Applicant, just because a person's home is a crime scene, there is no inherent right conferred upon an accused person's representatives to be allowed inside to conduct examinations. No such exemption is enumerated in **s. 19** of the **Constitution** to a person's right to privacy and the sanctity of one's home. No contrary authority has been provided to the Court by Counsel for the Applicant.
- [21] Further, and with the greatest of respect to the submissions of Counsel for the Applicant, this Court can find nothing in the material filed nor in the submissions made, that the police are actively encouraging witnesses, including the homeowner, not to speak with Counsel for the Applicant or his representatives or to prevent their entry to the residence. Similarly, this Court can find nothing to substantiate the submission that the police are actively interfering with the conduct of the defence of the Applicant. It appears that the police have simply acted as an intermediary between Counsel for the Applicant and the witnesses, which is eminently reasonable in the circumstances.

[22] This Court is not persuaded of the merits of this Application. The Applicant will not suffer prejudice to his case nor experience unfairness nor be unable to make full answer and defence without access to this witness and to this locus. For all of these reasons, the Application is hereby dismissed.

Richard G. Floyd
High Court Judge

By the Court

Registrar