

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Criminal Division

CR 130/2015

THE STATE

v

RAJESH RAMGOBIN

FOR

CORRUPTION

Before The Honourable Justice Lisa Ramsumair-Hinds

Appearances:

Ms Sophia K. Chote SC and Mr Peter Carter for the Accused

Ms Anju Bhola for the State

Date of Delivery: Tuesday 19th January, 2021

RULING ON APPLICATION BY THE STATE FOR IN-PERSON HEARING

BACKGROUND

1. On 16th October, 2020, the State requested for the trial of the Accused, Mr Rajesh Ramgobin, to be conducted by means of an in-person hearing. They posit that the Court should not proceed with the trial by electronic means as this trial involves circumstances requiring in-person proceedings, namely:
 - a. That the State anticipates their primary witness Mr Ryan Ramkhelawan is likely to display a hostile animus at the trial, which may necessitate confronting him with segments of his previous statements, including those tendered during the committal proceedings and his original statements to the police; and
 - b. That there are certain physical exhibits which must be tendered at the trial and in respect of which there is no agreement.
2. In support of their application, the State relied on a number of recent Australian civil authorities which discuss the suitability of virtual hearings and which provide some guidance on how courts should exercise their powers to order such hearings in the interest of justice, in light of the restrictions of the Coronavirus pandemic.
3. In response, the Defence submitted skeleton arguments on 22nd October and 16th November, 2020, respectively, which postulate that in the absence of primary legislation, this court lacks jurisdiction to order and thereby receive evidence via audio and video link.
4. They further submit that the 2020 Practice Directions issued by the Honourable Chief Justice are insufficient to empower the court to receive evidence by such means and as a result, the reception of same will infringe upon the accused's right to confront witnesses in person.
5. Additionally, (in the event the jurisdiction argument fails) the Defence agrees with the State's position that the circumstances of this case, namely, the physical exhibits in question and the nature of the evidence expected by the Virtual Complainant, based upon his demonstrated hostile animus and general reluctance to answer questions during the committal proceedings, beckon caution in proceeding with a fully virtual trial in this matter.
6. They have supported their submissions with authorities from the United Kingdom, including the recent Privy Council decision of the **Attorney General of the Turks and Caicos Islands v Misick and others**¹.

¹ [2020] UKPC 30

7. The Court is grateful to Counsel for the State and Defence for their submissions and the accompanying authorities. I have considered them, as well as several others².

ISSUES

8. Juxtaposing the State's request and the Defence's challenge, I have distilled two issues which require determination. These are:
 - a. Whether the court has the jurisdiction to direct and/or receive evidence by audio and/or video link; and
 - b. Consequent upon the determination of a) and in all the circumstances of this case, what is the appropriate mode of trial.

APPLICABLE LEGAL PRINCIPLES

The Practice Directions

9. Since March 2020, there have been a number of Practice Directions issued by the Honourable Chief Justice regulating the operations at court buildings as the country navigated the COVID-19 emergency. These prescriptions were critically important to the Judiciary's ability to ensure continued access to justice while remaining ever vigilant to protect the national public health. Practice Directions and indeed, Public Health Regulations, continue to be issued mandating the curtailment and/or modification of activities as necessary, in the herculean task of suppressing the spread of the still novel coronavirus. For the avoidance of doubt, and though 2021 promises an arrest of its impunity, COVID-19 still unceasingly rages across parts of the globe. Indeed, it was reported just about one week ago that more than 3000 deaths were recorded in the US in a single day.
10. Subsequent to the filing of the applications and submissions in this matter, there have been some changes in court operations.

² Auken Animal Husbandry Pty Ltd v 3RD Solution Investment Pty Ltd [2020] FCA 1153
DPP v Combo [2020] VCC 726
Regina v BD [2020] NSWDC 150
Rex v Satini [2020] CR 227 of 2019: Supreme Court of Tonga
R v Burt [2012] NBPC 6
R v Chehill [2014] NSSC 421
R v Gibson [2003] BCSC 524
R v Johnson [2020] NSWDC 153
R v Le Blanc [2014] NSPC 116
R v Morin [2005] ABQB 331
R v Oh [2013] ABPC 96
R v UD [2020] ACTSC 90
R v Young [2000] SKQB 419

11. By Practice Direction No. 7³, effective 18th October, 2020, the Honourable Chief Justice suspended in-person hearings for all matters, save and except urgent applications involving domestic violence. In particular, paragraphs 1 & 2, state:

*“During this period no in-person hearings shall be conducted except as otherwise provided for by these directions and **all Judges, Masters, and District Judges shall conduct hearings and/or sittings of the Supreme Court and Summary Courts by electronic means only.**”*

Where it is impossible to conduct a particular hearing by electronic means, or where in the opinion of the Court a hearing by electronic means is not in the interests of justice, the Court shall adjourn any such hearing and give such directions as may be necessary in the circumstances.”

12. At the material time therefore, by requesting an in-person hearing, the State was effectively applying for an adjournment until such future time as in-person hearings resumed.

13. The situation has since changed. Though hearings are still to be conducted primarily through electronic means, Practice Direction No. 8⁴, which took effect on 26th October 2020, empowered judges and judicial officers to give directions for the taking of evidence by any specific means and from a specific location, including the Judiciary’s Virtual Access Customer Centre (VACC) or any court building. Significantly, judges and judicial officers were permitted to direct the taking of in-person viva voce evidence at the court’s buildings, though such hearings should be limited to exceptional circumstances.

14. Today, court operations for the reception of in person viva voce evidence at the VACC facility and court buildings remain the same as prescribed by the most recent Practice Directions Nos. 9⁵ and 10⁶.

15. In particular, **Paragraph 8 of Practice Direction 9** provides that:

“Viva voce evidence may only be taken in person at a court building in exceptional circumstances where in balancing the interests of justice and the health and safety of all concerned, the court deemed it absolutely necessary to require the physical

³ Gazette No. 179 of 2020, Court Operations Covid-19 Pandemic Directions with Effect from October 19 2020

⁴ Gazette No. 182 of 2020, Court Operations Covid-19 Pandemic Directions with Effect from October 26 2020

⁵ Gazette No. 201 of 2020, Court Operations Covid-19 Pandemic Directions with Effect from December 1st 2020

⁶ Gazette No. 219 of 2021, Court Operations Covid-19 Pandemic Directions with Effect from January 1st 2021

presence of the witness. In particular, the following factors shall be taken into account in determining exceptional circumstances:

- a) Where hard copy documents or physical exhibits must be tendered in evidence by a witness and there is no agreement between the parties as to the tendering of same electronically;*
- b) Where identification is a material issue in dispute and the particular witness is expected to be given leave to do an in-court dock identification; or*
- c) Where the witness has no available means to appear electronically and is unable to be accommodated at one of the Judiciary's Virtual Access Customer Centres."*

The Defence Challenge on Jurisdiction to receive evidence by live-link video

16. The allowance for in-person hearings to be conducted in exceptional circumstances notwithstanding, the Defence cautions against the reception of ANY evidence by live-link video (at least at the time of filing). They suggest that neither the COVID-19 Practice Directions nor the Practice Direction on Hearings by Electronic Means lawfully permit such testimony in the regular course of a criminal trial.

17. Regarding their contention that primary legislation is required, the Defence has helpfully referred me to the fact that the recent **Evidence (Amendment Bill) 2019**, which sought to introduce provisions for the reception of evidence by audio and video links in criminal proceedings⁷, lapsed in the Senate of the 11th Parliament of Trinidad and Tobago.

18. As a consequence, the Defence contends that the Court is precluded from receiving evidence in this manner and that the subsisting Practice Directions of the Honourable Chief Justice are not sufficient to provide for the reception of same. The Practice Directions, they maintain, are devoid of "a statutory bedrock" and they argue further that the only way in which evidence can be received via audio and video link can be by way of an amendment to either the Evidence Act or the Criminal Procedure Act, such as that contemplated by the Bill that has since lapsed.

19. Before I move forward, I wish to indicate that I am fully aware that the Evidence Amendment Bill is once again the subject of debate before the Senate of the 12th

⁷ Clause 4: Proposed sections 12AD and 12AF

Parliament and it is tabled as the **Evidence (Amendment) Bill, 2020**⁸. While I do look forward to the development and outcome of same, there is no need for me to tarry.

20. Indeed, it is evident that subsequent to the submissions of the Defence, the proclamation of the **Miscellaneous Provisions (Administration of Justice) Act, 2020** satisfies Senior Counsel's desire for statutory underpinning of the Practice Directions of the Honourable Chief Justice relating to the regulation and prescription of audio and video link evidence. There is therefore no need for me to address my mind to that aspect of Senior Counsel's submissions.

21. **Section 3** of the **Miscellaneous Provisions (Administration of Justice) Act, 2020**⁹ which was proclaimed on 24th December, 2020, is of particular importance. **Section 3** amends the **Supreme Court of Judicature Act**¹⁰, by including a new **Section 14A** which provides that:

“The Chief Justice may, when the circumstances warrant, issue directions as deemed necessary for regulating and prescribing the manner in which—

- a. criminal and civil trials may be conducted by audio and video link; and*
- b. evidence may be given by audio and video link or other communication medium, from a remote point both in criminal and noncriminal matters.”*

22. I find however that I am unable to leave this issue. In advancing its position that such a statutory underpinning was necessary, the Defence relied on the English authority of **R v Ukpabio**¹¹ (which adopted the approach in **R v Waltham Forest Youth Court**¹²). In **Ukpabio**, the Court of Appeal held that the **UK Youth Justice and Criminal Evidence Act 1999** provides a complete statutory scheme for the giving of evidence by live link, and that there is no common law power to direct the use of live link for the accused/defendant to give evidence.

⁸ See the progression of the Bill as at 19th January, 2021 here: <http://www.ttparliament.org/publications.php?mid=28&id=908>

⁹ Act No 29 of 2020

¹⁰ Chapter 4:01

¹¹ [2007] EWCA Crim 2108

¹² [2004] EWHC 715 (Admin)

23. I note however that in the House of Lords decision of **R v Camberwell Green Youth Court**¹³, **Baroness Hale** noted, at paragraphs 58-59, while citing the Court of Appeal's decision in **R v S.H.**¹⁴, that even though live link testimony by the defendant was not statutorily provided for in the **Youth Justice Act**,

*“the Court of Appeal also made it clear in R v S.H. that the court has wide and flexible inherent powers to ensure that the accused receives a fair trial, and this includes a fair opportunity of giving the best evidence he can. In that case (R v S.H.) the defendant had learning and communication difficulties. The court could allow him the equivalent of an interpreter to assist with communication, a detailed written statement could be read to the jury so that they knew what he wanted to say, and he might even be asked leading questions based upon that document, all in an attempt to enable him to give a proper and coherent account.”*¹⁵ [emphasis mine]

24. It is my view that in the **Camberwell** case, **Baroness Hale** challenged the adoption of a rigid interpretation of the decision of **R v Waltham Forest, supra**. At paragraph 63, Her Ladyship opined thus:

*“Clearly, therefore, if there are steps which the court can take in the exercise of its inherent powers to assist the defendant to give his best quality evidence, the 1999 Act does not exclude this. However, in R (S) v Waltham Forest Youth Court [2004] EWHC 715 (Admin), 31 March 2004, the Administrative Court held that there was no inherent power to allow a defendant to give evidence by live link, on the ground that Parliament had sought since 1988 to provide exclusively for the circumstances in which live link might be used in a criminal trial. **With respect, while it is true that section 32 of the 1988 Act did not contain an express saving for any inherent power the court might have to assist the accused, section 19(6) makes it clear that the 1999 Act does not purport to make exclusive provision for any of the special measures it prescribes. The point does not arise for decision in this case, and so it would be unwise to express an opinion upon it. It is in any event better taken on an appeal against conviction in which the defendant argues that he was not given a proper opportunity to defend himself. For the reasons given earlier, the situations of defendants and other witnesses are so different that it would only very rarely be necessary for a defendant to give evidence by live link, but the case of a younger child defendant who was too scared to give evidence***

¹³ [2005] UKHL 4

¹⁴ [2003] EWCA Crim 1208

¹⁵ Ibid, para 59

*in the presence of her co-accused might be an example. I would therefore prefer to reserve my position on whether the Waltham Forest case was correctly decided. It cannot in any event affect the result of this case. **The fact that the accused may need assistance to give his best evidence cannot justify excluding the best evidence of others.**” [emphasis mine]*

25. Going a little further back and across to another Commonwealth jurisdiction, I am supported in my view that the court is empowered by its inherent jurisdiction, in the Canadian decision of **R v Dix**¹⁶. In that case, the accused was charged with murder. One of the Prosecution’s main witnesses lived in New York and the trial was set to take place in Alberta, Canada. The Prosecution made an application for evidence to be taken via video link and the court granted their request. This case is significant because at the time of the Prosecution’s application in 1998, **there was no statutory provision for the reception of evidence by video conferencing.**

26. At paragraph 14, **Justice Costigan** noted that:

“This Court has an inherent jurisdiction to control its procedures and must decide when and how to obtain evidence.”

27. Notably, **section 714** of the **Criminal Code of Canada**, which statutorily provided for audio and video conferencing in criminal proceedings was enacted a year later, in 1999.

28. It might appear that Parliament’s intervention resolves Senior Counsel’s argument that this court was (at the time of filing of her submissions) without jurisdiction to receive evidence by audio and/or video link. While it is convenient that no more judicial time need be spent on such a challenge, I am of the firm view that courts in the Criminal Division cannot be said to have had a blanket restriction from receiving or prescribing the taking of such evidence simply because there is/was no statutory underpinning, especially when one considers the ambit of the court’s inherent jurisdiction.

29. In addition to and consequent upon the court’s inherent jurisdiction to control its own procedures, well prior to the 2020 Practice Directions, the criminal courts have been mandated to promote the use of technology in advancing the overriding objective of the Criminal Procedure Rules, namely that criminal cases be dealt with justly.

¹⁶ 1998 ABQB 370

30. It surprises me that the State, through Mrs Lyons-Edwards, purported to join the Defence in its challenge, when it was the State itself, albeit in the person of another Prosecutor, that submitted to me in 2019 that I had authority by virtue of my inherent jurisdiction and the CrPR to receive the evidence by live-link video of an eye-witness who was unable to return to this country, in a jury trial on an Indictment for murder, no less. Indeed, in that matter¹⁷, Counsel for the Defence agreed on the point of jurisdiction. He went further to note that the live-link facility was a preferred alternative to other options open to the State, in that his client would be afforded the right to confront through cross-examination. (May I suggest, even as I appreciate that individual Prosecutors do enjoy a degree of autonomy in trial strategy, that they are careful to advance some consistency in their arguments on behalf of the learned DPP.)

31. One might be tempted to question the need then for the Practice Direction on Hearings by Electronic Means¹⁸. They may find no need to go any further than the stated objectives¹⁹, namely:

- To provide **clear guidance** to Judges, judicial officers, attorneys at law, members of court staff, litigants and other stakeholders as to the **procedure to be adopted** in the conduct of hearings by electronic means as well as to establish
- **mechanisms** that promote the use of technology and the dispensation of justice by electronic means consistent with provisions of Rules of Court;
- **a uniform and reliable approach** to hearings by electronic means and the methodology for the arrangements and conduct of such hearings;
- a **feasible and workable** alternative to in-person hearings which may be utilized both **in the course of normal operations as well as in times of crisis**; and
- **access to justice.**

32. I therefore answer the first issue for determination in the affirmative. For the avoidance of doubt, may I add that this answer would be the same even without Parliament's Christmas Eve gift.

¹⁷ CR 97 of 2001 The State v Kevon Nurse

¹⁸ Gazette No. 41 of 2020, Practice Direction, Hearing by Electronic Means, March 27 2020

¹⁹ Ibid, Pg 438

Mode of Trial

33. Certainly, there are cases in which evidence by video link may not be appropriate. The exceptional circumstances contemplated by the provisions of the more recent COVID-19 Practice Directions underscore some of the more direct examples.
34. As it relates to this matter, I agree with both sides that there are exceptional circumstances that may warrant the need for in-person hearings, though not for all witnesses.
35. I am of the view that a hybrid trial is the most appropriate mode of trial, and while I agree that it is necessary for Ryan Ramkhelawan and perhaps some of the police officers to give their viva voce evidence in-person, I see no reason why Rita Rampersad, for example, cannot give her testimony from the VACC facility at King's Court.

DISPOSITION

36. In view of the foregoing, it is my ruling that the application by the State for a *complete* in-person trial is refused.
37. The mode of trial shall be hybridized to include the taking of viva voce evidence in-person as well as by electronic means.
38. The Defence and State shall, no later than 15th February 2021, indicate in writing which witnesses they believe must be taken in-person, noting specifically the exceptional circumstances involved in the testimony. Where the exceptional circumstances involve the tendering of documents, they must be specified.
39. Subject to the consideration and approval of the court, only those witnesses whose evidence involves exceptional circumstances shall be directed to give evidence in-person. The scheduling of all in-person sittings will be done in accordance with the relevant Practice Direction then in force.
40. All other witnesses shall give evidence at the Judiciary's VACC facility at King's Court. Counsel must indicate if they require a bundle of documents to be available through court staff at the VACC facility during the hearing.

41. I further direct that COVID-19 protocols as required by any Practice Direction and Public Health Regulations then in force will be strictly implemented at all scheduled in-person hearings and at the Judiciary's VACC facility.
42. Further pre-trial management is scheduled for the next adjourned date and will be conducted by electronic means.

Ramsumair-Hinds J

Puisne Judge

19th January 2021