



# In The Supreme Court of Bermuda

## CRIMINAL JURISDICTION

Case No. 34 of 2019

**BETWEEN:**

**THE QUEEN**

**-and-**

**JAMES ROBERT RUMLEY**

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**Before:**       **The Hon. Justice Juan P. Wolffe, Acting Puisne Judge**

**Appearances:**               Ms. Cindy Clarke & Ms. Tine Tucker for the Prosecution  
                                          Ms. Victoria Greening & Mr. Archibald Warner for the Defendant

**Dates of Hearing:**           18<sup>th</sup> and 19<sup>th</sup> November 2020

**Date of Ruling:**             20<sup>th</sup> November 2020

**Date of Reasons:**         25<sup>th</sup> November 2020

## **RULING**

*Application for Prosecution witnesses to give evidence by the use of audio-visual link – Section 4 of the Evidence (Audio Visual Link) Act 2018 – Prosecution witnesses unable to give evidence in Court due to travel restrictions imposed as a result of COVID-19*

**WOLFFE, AJ:**

1.       The Defendant’s trial commenced on 12<sup>th</sup> November 2020 in respect of three (3) counts of Unlawful Importation of a Firearm, contrary to section 3(1)(b) of the Firearms Act 1973

(the “FA”). The alleged offences on the Indictment (as amended) involve the alleged importation of component parts of a firearm on three (3) separate occasions, namely, on the 3<sup>rd</sup> June 2019 (Count 1) and twice on the 14<sup>th</sup> October 2019 (Counts 2 & 3)(the “Indictment”).

2. On the 18<sup>th</sup> & 19<sup>th</sup> November 2020 the Prosecution made an application pursuant to the newly minted Evidence (Audio Visual Link) Act 2018<sup>1</sup> (the “Act”) for the oral evidence of two (2) prosecution witnesses, namely Trainee Customs Officer 243 Oral Barnett and a Mr. Michael Pausic<sup>2</sup>, to be given via an audio-visual link<sup>3</sup>. At the time of trial both of the witnesses were out of the jurisdiction and could not attend Court in person due to travel restrictions being implemented as a result of the COVID-19 worldwide pandemic.
3. On the 20<sup>th</sup> November 2020 I acceded to the Prosecution’s application and set out herein are my reasons for doing so<sup>4</sup>.

### **The Law**

4. This is the first application and Ruling under the Act and therefore it may be useful to set out the relevant provisions in some detail. Section 4 of the Act stipulates the following:

*“Audio visual link*

*4 (1) A party or a witness may, if a judicial officer so directs, give evidence by the use of an audio visual link in any proceeding.*

*(2) A direction under subsection (1) may be given—*

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<sup>1</sup> The Act came into operation by way of the Evidence (Audio Visual Link) Act 2018 Commencement Day Notice 2020 dated 12<sup>th</sup> November 2020 i.e. the first day of the trial.

<sup>2</sup> The Prosecution’s application was also in respect of a DC Anneka Donawa who, while in the jurisdiction, was in quarantine as a precautionary measure (she had not test positive for the coronavirus). However, the application in respect of DC Donawa was abandoned after it was established that she could attend Court to give evidence after her period of quarantine was completed.

<sup>3</sup> Section 2 of the Act defines “audio visual link” as facilities that enable audio-visual communication whereby a party or a witness, while not present in the courtroom or other place where the proceeding is being held, is able to be seen and heard.

<sup>4</sup> It should be noted that on the 24<sup>th</sup> November 2020, that is before the date of these reasons for my Ruling, TCO Barnett had given his evidence by audio-visual link and that the Prosecution and Defence Counsel no longer required Mr. Pausic to give his evidence remotely.

- (a) *on an application by a party or a witness; or*
- (b) *of the judicial officer’s own initiative.*

(3) *The judicial officer shall direct that the evidence by audio visual link be given by the party or the witness from an appropriate place outside of the courtroom, either in Bermuda or elsewhere.*

(4) *An application for a direction under subsection (2)(a) shall be made to the judicial officer as soon as practicable before the proceeding, or at any later time permitted by the judicial officer.*

(5) *A direction under subsection (1) may be made on the grounds provided in section 68C(3) of the Evidence Act 1905.*

(6) *A direction shall not be given under this section, unless the judicial officer is satisfied—*

- (a) *that it is in the interest of the efficient and effective administration of justice for the person concerned to give evidence in the proceeding by the use of an audio visual link; and*
- (b) *that an appropriate place is available for receiving evidence by the use of an audio visual link.*

(7) *In giving a direction under subsection (1), the judicial officer shall have regard to the nature of the proceeding and the need to ensure—*

- (a) *that there is a fair trial;*
- (b) *the comfort or views of the party or the witness, including the need to minimise stress on a party or a witness;*
- (c) *any other factor that is relevant to the just determination of the proceeding.”*

5. Succinctly, when deciding whether to make an order under the Act for a witness to give evidence by the use of an audio-visual link, the Court must be satisfied that:

- (a) The audio-visual link is made from “an appropriate place” outside of the courtroom either in Bermuda, or elsewhere; and that,
- (b) An appropriate place is available for the receiving of evidence via an audio-visual link; and that,

- (c) It is in the interest of the “efficient and effective administration of justice for the person concerned” to give evidence by the use of an audio-visual link; and that,
- (d) There will be a fair trial.

6. In practical terms, the Act is both party and witness focused, and, it can be applied to a plethora of circumstances<sup>5</sup>. No doubt one of the main impetuses behind the Legislature’s enactment of the Act was to protect vulnerable witnesses, such as children and witnesses of serious crime, from giving evidence in a potentially intimidating court environment. However, the Act is not confined to only those limited scenarios. Patently evident in section 5 of the Act is the Legislature’s intention to give wide scope for any material witness and any party in any type of proceedings to give their evidence by an audio-visual link, and for a multitude of reasons. In this regard, section 5 of the Act provides the following:

*“General criteria; use of audio visual links*

5 (1) *When giving a direction to allow the use of audio visual link for the appearance of a party or a witness in any proceeding, a judicial officer shall consider—*

- (a) *the nature and alleged circumstances to which the proceeding relates;*
- (b) *the age or maturity of the party or the witness;*
- (c) *any physical, intellectual, psychological or psychiatric impairment of the party or the witness;*
- (d) *any trauma suffered by the party or the witness;*
- (e) *the party’s or witness’s fear of intimidation;*
- (f) *the linguistic or cultural background or religious beliefs of the party or the witness;*
- (g) *the nature of the evidence that the party or the witness is expected to give;*
- (h) *the relationship of the party or the witness to any party to the proceeding;*
- (i) *the absence or likely absence of the party or witness from Bermuda;*

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<sup>5</sup> The Act is not limited to criminal proceedings but is also applicable to civil proceedings.

- (j) *the availability, quality and security of the technology to be used;*
- (k) *the potential impact of the use of technology on the effective maintenance of the rights of other parties to the proceeding, including—*
  - (i) *the ability to assess the credibility of the parties or the witnesses and the reliability of evidence presented to the court;*
  - (ii) *and the level of contact with other parties or witnesses;*
- (l) *any other relevant matters, including the effective maintenance of the right of a party to a fair hearing.*

(2) *The availability, quality and security of technology in subsection (1)(i) shall be verified by the Registrar of the Supreme Court on the advice of the appropriate person qualified to advise on such quality and security.”*

7. The criteria set out in sections 5 covers an extensive range of circumstances under which an order for an audio-visual link can be made. Including but not limited to: children or alleged victims of a serious assault or domestic abuse who are demonstrably fearful of seeing the defendant in Court (particularly if the defendant is unrepresented and is called upon to cross-examine the witness); those who are physically or mentally incapacitated to attend Court; those who find it cost prohibitive to travel to and from Bermuda; and, those whose attendance in Court may raise legitimate security concerns for themselves and/or for others involved in the trial.

8. As exhaustive the criteria in sections 5 are, it is probably safe to say that the Legislature, when it enacted the Act, did not have in mind the havoc which a worldwide pandemic would have on the justice system. But this is exactly what has happened. I addressed the effects of the COVID-19 pandemic on our Court operations when I gave my reasons for denying the Defendant bail on the 28<sup>th</sup> August 2020. In those reasons I quoted my words from the earlier authority of *R v. Jahmico Trott (Case No. 27 of 2017 & Case No. 10 of 2019)(18<sup>th</sup> August 2020)*:

*“Court officers throughout most jurisdictions, Commonwealth and otherwise, cannot pinpoint with any degree of certainty when their respective courts will return to some semblance of normality (if indeed at all). As a direct result of lockdowns and other precautionary measures being taken, court operations in most*

*jurisdictions came to a screeching halt which unfortunately led to horrendous backlogs in court cases being heard. Even now, most court systems are still grappling with the daunting task of scheduling matters which they were compelled to adjourn during the pandemic, and, with how the jury trial process will now look when factoring in precautionary measures such as social distancing.*

*21. The Bermuda Court system was and still is no different from other jurisdictions as to the impact of the COVID-19 pandemic. From the end of March 2020 the entire island effectively went on total lockdown which meant that jury trials could not be conducted. It was not until the 2<sup>nd</sup> May 2020 that Phase 1 of the “Reopening of Bermuda” commenced but this involved permission being given by the Bermuda Government for only a limited type and number of services and businesses to operate<sup>6</sup>. While some Supreme Court operations were being conducted remotely, in-person court appearances did not fall within those category of services that were allowed by the Bermuda Government. Therefore, jury trials still could not be conducted.*

*22. It was not until the implementation of Phase 3 of the “Reopening of Bermuda” on the 11<sup>th</sup> June 2020 that Government Services, and hence Court services, were allowed to be carried out. However, as can surely be appreciated, the setting of jury trials, even without the added issue of COVID-19, involves the movement of many interrelated parts. The most difficult and essential part of organizing a jury trial is the mobilization and attendance of a jury panel from which potential jurors could be selected. Placing COVID-19 into the equation increases this difficulty exponentially because the health and safety of jurors now becomes of paramount importance. In order to ensure the health and safety of jurors it is imperative (i) that strict and extensive precautionary measures are put into place to ensure proper social distancing, proper hygiene of the Court environs, and adequate supply of personal protection equipment (PPE) for jurors, and (ii) that the implementation or imposition of such precautionary measures do not hinder, encumber or negate the trial process (to the extent that jurors are unable to properly or fully receive the oral and documentary evidence upon which they will render their verdict).*

*23. Herein lies the conundrum of scheduling trials in the Supreme Court when we are currently knee deep in the throes of the COVID-19 pandemic. Not only must one find suitable dates in the Court diary to schedule trials (which is largely dependent upon the availability of Counsel and witnesses) but time and resources must be found and spent on fabricating the courtroom to ensure the health and safety of all users of the Court, especially the jurors. Moreover, the jurors themselves, some of whom may be vulnerable persons due to age and health, must be willing and able to serve as jurors, even if all precautionary measures are taken by the Court.”*

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<sup>6</sup> The Bermuda Government gave daily COVID-19 updates through press conferences and the dissemination of public service announcements through flyers and fact sheets.

9. Fortunately, since my decision in *Trott* ample precautionary measures have been put in place so that we may safely and effectively conduct jury trials (the Courtroom, Jury room, and Court environs have been fabricated to ensure social distancing, and, adequate PPE has been provided to all Court users). However, despite our best efforts, the threat and effects of the COVID-19 pandemic still hover ominously and we are currently nowhere close to returning to pre-COVID-19 normalcy (we probably never will). So while the Legislature may not have contemplated the applicability of the Act to a worldwide pandemic it seems as if the Act is perfectly designed to deal with such occurrences. It may indeed be our new normal, at least for the next year or two, that overseas witnesses are compelled to give their evidence via audio-visual link because of travel restrictions in their own jurisdictions, or because of legitimate fears that their health and safety would be put into jeopardy if they do travel overseas, or, even because of budgetary constraints of having to travel to and from Bermuda.

10. This is not to say however that such considerations should be at the expense of having a fair trial.

***“Fair Trial”***

11. Of course, it is not automatic that if one or more of the section 5 criteria exist then the Court should then move speedily towards granting an application for evidence to be given via audio-visual link. The prevailing and overarching objective of ensuring a fair trial for all parties concerned must never be subjugated to the comfort or convenience of hearing evidence by an audio-visual link. Having a fair trial should be the starting point and the ending point when deciding whether a witness could give their evidence by a remote medium.

12. In respect of criminal proceedings, the overwhelming importance of ensuring a fair trial is emphasized by section 6 of the Act which is defendant-specific. It states:

*“Additional criteria; audio visual link in criminal proceedings*

6 *In addition to the criteria in section 5, when giving a direction to allow the use of an audio visual link in a criminal proceeding, a judicial officer shall consider—*

- (a) *the potential impact of the use of technology—*
  - (i) *on the effective maintenance of the right of the defendant to a fair trial;*
  - (ii) *and on his rights associated with the hearing;*
- (b) *the ability of the defendant—*
  - (i) *to comprehend the proceedings;*
  - (ii) *to participate effectively in the conduct of his defence;*
  - (iii) *to consult and instruct his counsel privately;*
  - (iv) *to access relevant evidence;*
  - (v) *to examine the witnesses for the prosecution;*
- (c) *the level of contact the defendant has with other witnesses; and*
- (d) *any adverse inference that may arise through the defendant or any witness appearing by means of an audio visual link, and whether that adverse inference may be mitigated.”*

13. Having a fair trial for the defendant in criminal proceedings should be preeminent in light of the presumption of innocence and the fact that an adequately resourced prosecutorial machinery has brought charges against the defendant who in most cases may not have the same wherewithal. However, it must be said that the need to have a fair trial is not just for one party, it is for all parties and witnesses concerned. Therefore, the need to have a fair trial for the prosecution and/or prosecution witnesses should not be diminished. The proper administration of justice also requires that the prosecution are not unfairly encumbered in advancing its case by not being able to call material witnesses. Furthermore, prosecution witnesses should be afforded every opportunity to tell their side of the story. Section 4(6)(a) of the Act supports this position. In essence, section 4(6)(a) of the Act is witness-specific as it compels the Court to also have regard to what is *“in the best interests of the efficient and effective administration of justice for the person concerned to give evidence [my underline] in the proceedings by use of an audio visual link”*. When read with the criteria in sections 5 of the Act it is obvious that the Legislature also recognized the



importance of there being a fair trial for prosecution witnesses, some of whom may be alleged victims or direct witnesses to the crime being committed.

14. Therefore, when deciding whether to grant an application under section 4 of the Act the Court should set about balancing the interests of all parties concerned, namely, the defendant, the prosecution, the plaintiff, the respondent, and any material witnesses. In criminal proceedings, the authority of *DPP v. Ashraf Kamal Makary [2012] QMC 6*, a Magistrates' Court case (out of Brisbane, Queensland), gives helpful guidance in this regard. Quoting Coldrey J. in *Kim Hyun Kim 104 A Crim R 233*, Deputy Chief Magistrate Hine in *Makary* noted:

*“.....where the evidence is relatively uncontroversial, the cross examination is not likely to be lengthy, or no real issue of credit is involved, the taking of video evidence can be beneficial to the administration of justice and consistent with justice between the parties. It may permit the Court to receive the evidence of a witness which would otherwise not have been available, it may permit the evidence to be received without causing undue inconvenience to witnesses (which should be an important matter in the administration of justice), and it is now a feature of litigation — so much so that for some years the Federal Court of Australia has had in place the video conference facilities proposed in the present proceedings.”*

15. One of the hallmarks of ensuring a fair trial is affording a party the time, opportunity and ability to fully and properly challenge and assess the credibility of a witness (as acknowledged by section 5(k)(i) of the Act). Of course, the preferred vehicle to assess the credibility of a witness is for them to physically appear in Court and be subjected to a barrage of piercing cross-examination questions in front of a scrutinizing judge and/or jury. No doubt, the use of an audio-visual link may take away some of the immediate sting that a carefully crafted cross-examination may have in Court, particularly if there is a delay in the audio and visual transmission. Moreover, the ability to fully assess the demeanour of a witness may be somewhat hampered through the pixels on a monitor or even a slight distortion of a speaker system. These are certainly factors which should be taken into consideration when deciding whether to grant an order under section 4 of the Act.

16. However, it must also be appreciated that through the use of an audio-visual link that the opposing party is not losing their right to cross-examine the witness at all, and, that in criminal proceedings that the defendant is not losing their right to confront their accuser. A party or their lawyer would still be able to robustly and fulsomely cross-examination the witness, and, the judge's or jury's ability to assess the credibility and demeanour of the witness is not likely to be significantly prejudiced, if at all. This is vastly unlike an application to have a witness' statement read into evidence thus depriving the opposing party of their right to cross-examine the witness.
17. Moreover, pursuant to section 8 of the Act the Court is obligated to direct the jury that it should give the same weight to the witness' evidence as if it had been given by the witness in the courtroom. Therefore, a properly directed jury would still be able to treat the witness and their evidence via an audio-visual link as if the witness was physically giving evidence in Court.
18. Ms. Greening advised the Court that the credibility and demeanour of TCO Barnett and Mr. Pausic will not feature as issues in this case. Of course, the ability to assess the credibility and demeanour are not the only indicia of a having a fair trial. However, and following *Kim* and *Makary*, in trials where credibility and/or demeanour are not pivotal issues the prejudicial effect to a defendant if an audio-visual link is used is probably reduced, and simultaneously, the likelihood of the relevant witness giving their evidence via audio-visual link is probably increased.
19. Coldrey J. in *R v. Strawhorn [2004] VSC 415* (which is cited in *R v. Benjamin Kai Wee [2015] QDCPR 10*) also weighs into the balance "*public interest considerations which point to the desirability of utilizing the video-link technology*". So, in addition to establishing what is in interests of the parties and their witnesses, one must also factor in the potential erosion of the public interest if a crucial witness, who is willing and able to give evidence as to the commission of a crime, is prevented from doing so because they may be out of the jurisdiction or are too fearful to attend Court in person. But of course, the section 5 and 6 criteria must still be met before an audio-visual link order can be made.

20. If there are any concerns about the judge or jury's ability to properly assess the credibility of a witness via an audio-visual link then their concerns can be assuaged by the safeguards which are built into the Act and which require that the audio-visual technology used is of such a quality that it would allow witnesses to be clearly seen and heard when giving their evidence. Section 5(2) in the Act obligates the Registrar of the Supreme Court to verify the availability, quality, and security of the technology used for the audio-visual link; and, section 7 of the Act gives the Court the power to vary or revoke an order made under section 4 of the Act if the section 5 or 6 criteria are not met, or, if there has been a material change in circumstances.
21. I will now briefly move onto other pertinent requirements of the Act, such as what may constitute "an appropriate place" for the purposes of the Act.

***"An appropriate place"***

22. The Act is silent as to the definition of "an appropriate place" but it should most likely be a place which, as much as possible, replicates the procedure, decorum, and other intangible aspects of the courtroom atmosphere. This would ultimately mean that the place and technology used by the witness to give their evidence would be as if the witness was actually giving oral evidence in court in-person.
23. An appropriate place must therefore be a location which is quiet, private, secure, free from interruptions, and, with a setting or background which is banal. While it would be preferable for the witness to give their evidence from the professional offices of persons who should understand and appreciate the need for the requisite confidentiality, such as a prosecutor's or defence lawyer's office, logistically this may not be possible for the witness or the party. Allowances should therefore be made for persons to give their evidence from their home or from some other convenient place so long as they confirm to the Court that for the entire time that they are giving evidence that: (i) they are alone in the room (unless the witness is a child); (ii) they will not refer to any witness statements or any other material

(whether documentary, electronic, or otherwise) unless they are directed by the Court to do so; (iii) the video and microphone functions of their audio-visual link shall remain enabled at all times (even during any refreshment breaks); and, (iv) if required to do so by the Court, that they shall at any time pan the camera of their device around the room in which they are giving their evidence.

24. Equally important is the manner in which the witness gives their evidence via audio-visual link. It goes without saying that the swearing in or affirming of witnesses, and the adherence to all rules of evidence, still must strictly apply when the witness is giving their evidence via audio-visual link (probably even more so). It is also imperative that close attention be given to ensuring that the manner in which the witness gives their evidence is in keeping with the formality and decorum of court proceedings. Remote hearings, partly because the witness may be giving evidence within the comfort and familiarity of their own home or office, tend to inject an air of casualness which could give the appearance that a witness is being casual, nonchalant or even disrespectful. This is an important consideration since in most court proceedings, whether criminal or civil, the demeanour of a witness can be used by the trial judge and/or the jury to determine the credibility of the witness. Therefore, it is crucially important that the lawyer or party making the application for their witness to give their evidence electronically makes it abundantly clear to the witness that they should always strive to maintain the same appearance (i.e. clothing), tonality of words and body language that they would have if they actually physically appeared in the courtroom to give their evidence.
25. As to the technology to be used, sections 5(1)(j) and 5(2) of the Act ensure the availability, quality and security of the audio-visual technology used to transmit and receive evidence via audio-visual link. Therefore, before any evidence is heard via an audio-visual link the Court should first be satisfied that the audio-visual technology used by both the witness and the Court is: (i) readily available to transmit the witness' evidence; (ii) that it is of such an audio-visual quality that the Court, and most importantly the Jury, can fully and properly see and hear the witness; and, (iii) that there are various layers of cybersecurity so that the proceedings are not compromised in any way whatsoever. Unless or until the Registrar of

the Supreme Court, on the advice of an appropriate qualified person (such as an information technology specialist), verifies such availability, quality, or security of the technology then the Court should not proceed with the hearing of evidence via audio-visual link. Court proceedings, whether criminal or civil, are far too important for them to be jeopardized by any unreasonable loss in translation or delay in the transmission of evidence because of insufficient or sub-standard technology.

### **Decision**

26. It is indisputable that the offences for which the Defendant has been charged are at the top end of the seriousness scale. Such seriousness is reflected in the nature of the evidence to be given by each and every Prosecution witness. Especially since it would appear by the scant content of the Defence Statement dated 1<sup>st</sup> September 2020 that the Defendant, as he is entitled to do, is seeking to put the Prosecution to strict proof of each and every element of the offences.
  
27. None of the evidence of the Prosecution's witnesses are more material than that of TCO Barnett and Mr. Pausic as the respective evidence which they are expected to give goes to the core of the Prosecution's case, and, it would appear, of the Defendant's defence. In respect of TCO Barnett, his witness statements found on pages 61 to 63 of the Court Bundle indicate that: he was the customs officer who on the 3<sup>rd</sup> June 2019 first targeted and then x-rayed a FedEx package allegedly containing component parts of a firearm (the subject of Count 1 on the Indictment); and, that on the 14<sup>th</sup> October 2019 he selected, opened and searched another FedEx package and discovered that it also allegedly contained component parts of a firearm (the subject of Count 2 on the Indictment). As for Mr. Pausic, whose witness statement appears on page 126 of the Court Bundle, he was responsible for obtaining the CCTV footage of two (2) separate FedEx facilities in Pennsylvania in the United States (US) which, according to the Prosecution, show the Defendant importing into Bermuda each of the three (3) FedEx packages which allegedly contained component parts of a firearm (they are in respect of all counts on the Indictment). Therefore, the evidence of TCO Barnett and Mr. Pausic, alone and when taken together, go to salient

issues surrounding (a) the identification of the Defendant, (b) the transit of the FedEx packages from overseas FedEx facilities to local FedEx facilities via Bermuda Customs where they were searched, and (c) whether the FedEx packages were tampered with by anyone during their journey from the United States to Bermuda.

28. As to the circumstances to which the section 4 application is being made by the Prosecution, Ms. Clarke advises the Court that TCO Barnett is currently in the United Kingdom (UK) training as an air traffic controller and that since all flights to Bermuda from the UK are suspended due to the recent surge of COVID-19 cases in the UK TCO Barnett will not be able to travel to Bermuda directly from the UK for some time. Moreover, TCO Barnett has found it increasingly difficult to travel to Bermuda via alternative routes, such as through Canada or the US, as those countries too have imposed travel restrictions on overseas travel. Regarding Mr. Pausic, as a Special Agent with the Department of Homeland Security in the US, and also due to the recent considerable uptick in COVID-19 cases in the US, he is prohibited by his employers from travelling outside of the US. To compound matters, even if TCO Barnett and Mr. Pausic were able to travel to Bermuda to give their evidence in Court, the COVID-19 precautionary measures currently imposed by the Bermuda Government would require them to be routinely tested for the coronavirus and for them to be quarantined for approximately fourteen (14) days before even setting foot in the courtroom. It is my understanding that but for the COVID-19 pandemic that TCO Barnett and Mr. Pausic would have travelled to Bermuda to give their evidence in Court.
29. Having heard Ms. Clarke, and seeing no competing evidence to the contrary, I accept that TCO Barnett and Mr. Pausic are unable to travel to Bermuda to give in-person evidence at this trial, and, that the reasons for their absences are beyond their control or that of the Prosecution. Therefore, considering (i) the nature of the evidence that TCO Barnett and Mr. Pausic are expected to give, and (ii) the nature and circumstances to which these proceedings relate, I am satisfied that it is in the interest of the efficient and effective administration of justice for both witnesses to give their evidence by audio-visual link.

30. So, can the Defendant have a fair trial with TCO Barnett and Mr. Pausic giving their evidence via audio-visual link? I answer this question in the affirmative. It would appear that the thrust of Ms. Greening's primary objection to TCO Barnett giving his evidence electronically is that he would not be present in Court to handle the FedEx box in which he saw the black "Powerbuilt" case and which allegedly contained component parts of a firearm (as said earlier, credibility and demeanour of TCO Barnett and Mr. Pausic are not issues in this case). He said in his witness statement dated 21<sup>st</sup> October 2019 that the glue on the flap of this FedEx box was "excessively strong" because he had "difficulty opening and pulling it apart". According to Ms. Greening, this expected evidence of TCO Barnett goes to the Defendant's defence that at some point in time during its transit to Bermuda someone must have tampered with the FedEx box and somehow put the component parts of a firearm in the black Powerbuilt case. However, I fail to see how TCO Barnett's inability to handle this FedEx box in open court would be prejudicial to the Defendant's defence.
31. Firstly, the actual FedEx box and photographs of it have already been entered into evidence (they were made Prosecution Exhibits 11(a) and 10 respectively). Therefore, TCO Barnett can still, through the audio-visual link, show the Jury exactly which flap of the box that he was referring to and where on the box he saw the glue that in his opinion was excessively strong. He could also give evidence through the audio-visual link as to whether he was of the view that this excessively strong glue gave any indication that the box was tampered with. He would not need to be in the courtroom to do this. Secondly, even if TCO Barnett made an appearance in court, he still would not be able to recreate the strength he used to open the box flap as the box has already been opened (as can be seen from the photographs). He could still assist the Jury with how he opened the box by showing them through the audio-visual link the hand and arm gestures he may have employed in getting the box opened. Thirdly, the Jury will be given every opportunity, if they so desire, to inspect the box for themselves and see where the box flap was glued shut. In doing so, they would be able to use what they see to ascertain whether or not the box had in fact been tampered with. Therefore, it would appear that the evidence which the Defence seeks to elicit from TCO Barnett can still be sufficiently obtained via the audio-visual link.

32. In respect of Mr. Pausic, I equally fail to see how his giving evidence via audio-visual link would be prejudicial to the Defendant. The height of Mr. Pausic's expected evidence is that he collected CCTV footage from the FedEx facilities in Pennsylvania, put it on DVD's, and then sent them onto the Bermuda Police Service. That is it. He does not identify the Defendant or anyone in the CCTV footage, and nor does he speak to what is occurring on the footage. He was purely the conduit through which the CCTV footage made its way into the hands of the Bermuda Police Service. Therefore, other than adding to the evidence as to the chain of custody of the CCTV footage, Mr. Pausic's evidence does not bolster or discredit the Prosecution's case or the Defendant's case any further. Any questions as to what is actually portrayed on the CCTV footage would most likely be left to other Prosecution witnesses.
33. I therefore find that the Defendant will still be able to have a fair trial in that his legal representatives will still be able: (i) to have access to the oral and other evidence of TCO Barnett and Mr. Pausic; (ii) to fully and properly cross-examine and challenge both of the witnesses; (iii) to test the credibility of both of the witnesses; (iv) to assess both witnesses demeanour; and (v) to advance the Defendant's defence.
34. Ms. Greening is correct to question whether the arrangements as to where and how the witnesses will give their evidence remotely are "pristine" and conducive to TCO Barnett and Mr. Pausic giving their evidence in a manner which is consistent with the proper administration of justice. I was advised by Ms. Clarke that TCO Barnett would most likely be giving his evidence from his place of residence, and that Mr. Pausic will be giving his evidence from an office at his place of employment. Earlier in this Ruling I set out what should constitute an appropriate place and having heard what the arrangements are for TCO Barnett and Mr. Pausic to give their evidence I am satisfied that they fit the description of an appropriate place for the purposes of the Act.
35. To further ensure that the arrangements for TCO Barnett and Mr. Pausic to give their evidence via audio-visual link are in keeping with the proper administration of justice,



when I gave my extemporaneous ruling on the 20<sup>th</sup> November 2020 I ordered that the following should be provided before TCO Barnett and Mr. Pausic give their evidence via audio-visual link:

- (i) Pursuant to section 5(2) of the Act, that written verification shall be given by the Registrar of the Supreme Court as to the availability, quality, and security of the technology used (by the Court and by the witnesses).
- (ii) Full details of the places from where TCO Barnett and Mr. Pausic will be giving their evidence, and that such details shall include but should not be limited to their addresses, and, whether anyone else has access to the room in which they will be using.
- (iii) Written confirmation from TCO Barnett and Mr. Pausic that they understand that when giving their evidence that they: (a) must be in a room alone; (b) shall not refer to their witness statements or other written material unless or until they are directed to do so by the Court; (c) shall have their audio and video functions on (i.e. not muted) during the entire time that they are giving their evidence and during refreshment breaks; and, (d) should be prepared to show, by use of their device camera, the entire room or area in which they are giving their evidence.

36. By the date of these reasons TCO Barnett had given his evidence via audio-visual link and before doing so the above arrangements were fully met. Mr. Pausic was not called upon to given evidence via an audio-visual link.

**Conclusion**

37. In consideration of the above paragraphs I confirm my Ruling on the 20<sup>th</sup> November 2020 that pursuant to section 4 of the Act that TCO Barnett and Mr. Pausic are allowed to give their evidence via audio-visual link.

**Dated the 25<sup>th</sup> day of November, 2020**

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**The Hon. Acting Justice Juan P. Wolffe**