



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 CRIMINAL DIVISION

3 IND. No. 38 of 2021

4  
5 IN THE MATTER OF

6  
7 REGINA

8  
9  
10 v

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12  
13 ROGER DAVARD BUSH

14  
15  
16  
17 **Appearances:** Ms. Sarah Lewis, Crown Counsel for the Crown  
18 Mr. Oliver Blunt QC, Ms. Lee Halliday-Davis for the Defendant

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21 **Before:** Hon Mrs. Justice Marlene I Carter (Actg.)

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23  
24 **Date of Ruling:** 9 June 2022

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27 HEADNOTE

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29 *Criminal Law – Judge Alone Trial –*  
30 *Ruling on Application for Special Measures – Use of Live Link*

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33 RULING

- 34  
35 1. The Crown seeks a special measures direction in respect of a witness in these proceedings,  
36 Nikietta Ebanks, for that witness to give her evidence at trial via live link. The application is  
37 supported by the witness statement of Ms. Ebanks dated 10 September 2021.
- 38  
39 2. The application is made pursuant to the *Evidence Act (2021 Revision)*, Sections 41D and 41B.
- 40  
41 3. The Crown’s application is based on the statement of Nikietta Ebanks that she is fearful of  
42 testifying against the defendant to the extent that the quality of her evidence is likely to be  
43 diminished. The Crown’s submission is that the quality of the evidence of the witness would  
44 be improved if the special measure were granted.
- 45  
46 4. The Crown relies on the witness statement of Ms. Ebanks to the effect that the quality of her  
47 evidence will be diminished if she were to give that evidence in the same room as the defendant,  
48 the importance of this evidence to the Crown’s case, described as “*substantial and important*”,  
49 and also the fact that the defendant is represented by very experienced Queen’s Counsel,

1           thereby ensuring that the measures sought would not inhibit the witness' evidence being  
2           effectively tested by the Defence.

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4           5.       Counsel for the Crown has submitted that the court should find that a special measure beyond  
5           the use of a screen from behind which the witness could give her evidence was required. She  
6           argued that the use of the live link would permit the court to see more than the witness' face,  
7           that a fuller picture of the witness could be presented thereby enabling the court to properly  
8           assess the witness' demeanour.

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10          6.       Counsel urged the court to consider that this was a judge alone trial and, without a jury, it  
11          followed that the person to assess the witness' evidence is a professional tribunal. Counsel  
12          submitted that defence counsel's argument that the need for the tribunal of fact to have the  
13          ability to assess the witness necessitates that she be present in the courtroom, may have had  
14          more weight if this were a jury trial and, in the present circumstances, was a less significant  
15          factor in before a professional tribunal.

16  
17          7.       Counsel further indicated that this witness was a protected witness, a risk to her having been  
18          assessed such that protection has been afforded her.

19  
20          8.       The defence oppose the application. The defence submit that: "*The application for evidence*  
21          *via live link is a measure that is not justified under the circumstances as a screen is more than*  
22          *sufficient.*"

23  
24          9.       The defence submit that the credibility of this witness is of the utmost importance in this case,  
25          and therefore a bare assertion by the prosecution that the evidence would be diminished unless  
26          a video link is granted is insufficient, that the prosecution must show that the quality of the  
27          witness' evidence will be diminished.

28  
29          10.       The defence also submit that: "*It is essential that the defence is allowed to cross-examine*  
30          *effectively without any impediment. The best evidence is live evidence; it will enable full*  
31          *observation of the person and not just a face on a screen. The rights of the defendant should*  
32          *not be restricted unless necessary.*"

33  
34          11.       The defence argue that other aspects of the Ms. Ebanks' statement should also be examined.  
35          The witness' claim that she left the Cayman Islands because she feared the defendant is strongly  
36          denied by the defence. They point to the fact that she remained in a relationship with the  
37          defendant until May 2020 long after the defendant pleaded guilty to an assault on her in  
38          November 2019.

39

1 12. The defence urge the court to consider that Ms Ebanks is not the complainant in this matter but  
2 that her evidence is critical to how the crown puts its case. Also, that she is neither young nor  
3 vulnerable. The court is also urged to be mindful that Ms Ebanks is a prosecution witness who  
4 11 months after she had claimed to have a conversation with the defendant, gave an account to  
5 the police and that this is not a case where the prosecution relies on intimidation by the  
6 defendant or members of his family to prevent her from giving evidence.

7  
8 13. In all the circumstances, the defence submitted that the use of a screen would facilitate this  
9 witness giving her evidence in a confident manner to quell her anxiety and that any measure  
10 beyond the use of the screen was going over the top.  
11

12 **Court's considerations**  
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14 14. The application is for the witness Nikietta Ebanks to give her evidence by way of live link.  
15 Section 41B states as follows:

16 ***“41B. Witnesses eligible for assistance on grounds of fear or distress about testifying***

17 (1) *For the purposes of this Part a witness in criminal proceedings, other than the*  
18 *accused, is eligible for assistance by virtue of this subsection if the court is satisfied*  
19 *that the quality of evidence given by the witness is likely to be diminished by reason*  
20 *of fear or distress on the part of the witness in connection with testifying in the*  
21 *proceedings.*

22 (2) *In determining whether a witness falls within subsection (1) the court shall take*  
23 *into account, in particular —*

24 (a) *the nature and alleged circumstances of the offence to which the*  
25 *proceedings relate;*

26 (b) *the age of the witness;*

27 (c) *such of the following matters as appear to the court to be relevant, namely*  
28 *—*

29 (i) *the social and cultural background and ethnic origins of the*  
30 *witness;*

31 (ii) *the domestic and employment circumstances of the witness; and*

32 (iii) *any religious beliefs or political opinions of the witness; and*

33 (d) *any behaviour towards the witness on the part of —*

34 (i) *the accused;*

35 (ii) *members of the family or associates of the accused; or*

36 (iii) *any other person who is likely to be an accused or a witness in*  
37 *the proceedings.*

1           (3) *In determining that question the court shall in addition consider any views*  
2           *expressed by the witness.*  
3           *...”*  
4

5 15. I am satisfied that the witness Nikietta Ebanks is an eligible witness within the provisions of  
6 Section 41 B of the Act. She is a witness who *is eligible for assistance*. I am satisfied that ***the***  
7 ***quality of evidence given by the witness is likely to be diminished by reason of fear or distress***  
8 ***on the part of the witness in connection with testifying in the proceedings.***

9  
10 16. On this application, the defence do not take issue with the eligibility of the witness for assistance  
11 by way of a special measures direction. The defence does take issue with the special measure  
12 that is sought by the Crown, that is, by live link.

13  
14 17. ***Section 41 I of the Evidence Act states as follows:***

15           ***“41 I: Evidence by live link***

16           (1) *A special measures direction may provide for the witness to give evidence by means*  
17           *of a live link.*

18           (2) *Where a direction provides for the witness to give evidence by means of a live link,*  
19           *the witness may not give evidence in any other way without the permission of the*  
20           *court.*

21           (3) *The court may give permission for the purposes of subsection (2) if it appears to the*  
22           *court to be in the interests of justice to do so, and may do so either —*

23                   (i) *on an application by a party to the proceedings, if there has been a material*  
24                   *change of circumstances since the relevant time; or*

25                   (ii) *of its own motion.*

26           (4) *In subsection (3)(a) “the relevant time” means —*

27                   (i) *the time when the direction was given; or*

28                   (ii) *if a previous application has been made under that subsection, the time*  
29                   *when the application, or last application, was made.”*  
30

31 18. In determining an application for a special measures direction for an eligible witness the  
32 primary aim is to ensure that the quality of the evidence given by the witness is ***“likely to***  
33 ***improve, or to [be] maximise[d] so far as practicable”***. Therefore, once eligibility has been  
34 determined the court’s decision as to the appropriate direction to be made will be greater  
35 influenced by the factors set out at 41D (3).  
36



1 19. Section 41(D) of the Evidence Act states:

2 ***“41D. Special measures direction relating to eligible witness***

3 *(1) This section applies where in any criminal proceedings —*

4 *(a) a party to the proceedings makes an application for the court to give a*  
5 *direction under this section in relation to a witness in the proceedings other*  
6 *than the accused; or*

7 *(b) the court of its own motion raises the issue whether such a direction should*  
8 *be given.*

9 *(2) Where the court determines that the witness is eligible for assistance by virtue of*  
10 *section 41A or 41B, the court shall then —*

11 *(a) determine whether any of the special measures available in relation to the*  
12 *witness, or any combination of them, would, in its opinion, be likely to*  
13 *improve the quality of evidence given by the witness; and*

14 *(b) if so—*

15 *(i) determine which of those measures, or combination of them,*  
16 *would, in its opinion, be likely to maximise so far as practicable*  
17 *the quality of such evidence; and*

18 *(ii) give a direction under this section providing for the measure*  
19 *or measures so determined to apply to evidence given by the*  
20 *witness.*

21 *(3) In determining for the purposes of this Part whether any special measure or*  
22 *measures would or would not be likely to improve, or to maximise so far as*  
23 *practicable, the quality of evidence given by the witness, the court shall consider*  
24 *all the circumstances of the case, including in particular —*

25 *(a) any views expressed by the witness; and*

26 *(b) whether the measure or measures might tend to inhibit such evidence*  
27 *being effectively tested by a party to the proceedings.*

28 *(4) A special measures direction shall specify particulars of the provision made by the*  
29 *direction in respect of each special measure which is to apply to the witness's*  
30 *evidence.”*

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32 20. Regarding the first factor, the views expressed by the witness, the relevant aspects of the  
33 witness' statement, her expressed views on this issue of her giving evidence in court and the



1 need for special measure are set out at paragraph 6 and 7 of her witness statement dated 10  
2 September 2021.

3  
4 *“6. Just the thought of Roger Bush causes me anxiety. I'm sure that I will not be*  
5 *able to sit in court and look at Roger Bush and feel comfortable. I know that*  
6 *I'm required to give evidence at the trial of Roger Bush, but the thought of doing*  
7 *so makes me anxious to the point where I feel numb. I will not be able to relax*  
8 *and give evidence against him in a composed manner. If I must attend court*  
9 *and sit in the same room as Roger Bush, I may get sick.*

10  
11 *7. I wish I could give evidence at the trial of Roger Bush from another room from*  
12 *where he is. If that is not possible, I wish to please beg the judge to make me*  
13 *give evidence from behind a screen where he's not able to see me and more*  
14 *importantly where I do not have to see him. I am so fearful of Roger Bush that*  
15 *I can't explain in words.”*

16  
17  
18 21. The second factor set out at Section 41D (3) is whether the measure or measures might tend to  
19 inhibit such evidence being effectively tested by a party to the proceedings. Learned Queen's  
20 Counsel for the defence has not expressed that the live link would so inhibit counsel's ability to  
21 effectively test the witness' evidence, that is not part of the response to the application.

22  
23 22. Learned Queen's counsel, noted that features of her account would be open to cross-  
24 examination in the course of the trial and that her presence even behind a screen but in court  
25 would ensure that her evidence and such cross examination took place where she was available  
26 to the scrutiny of court and counsel.

27 **Conclusion**

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29 23. This case concerns a very serious offence, one of the most serious that any court has to consider.  
30 It is an allegation of murder. There is in this case a pre-existing relationship between the  
31 witness and the defendant. I have considered the matters that the witness has raised, mindful  
32 that such matters are not solely determinative on this application.

33  
34 24. Taking into account the submissions of the Crown and the defence and the matters raised therein  
35 and after hearing oral submissions, I am satisfied that this witness Nikietta Ebanks should give  
36 evidence by live link. I believe that that is a measure which, in this instance, would be likely  
37 to improve her evidence so far as possible, the quality of her evidence, and that to do otherwise  
38 may diminish the quality of that evidence presented before the court.

39  
40 25. I am satisfied that the witness giving evidence in this way will not affect the defendant's right  
41 to a fair trial. This court, the finder of fact in this case, will be well able to scrutinize the witness  
42 as she gives her evidence. The use of the live link will not impair the court's ability to assess

1 the witness's evidence, to determine her credibility and reliability. It is in the interest of justice  
2 that this particular direction is made in all the circumstances of this case.

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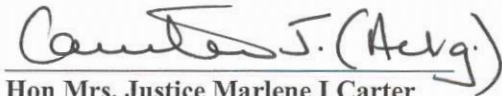
5 26. The application by the Crown for Ms Ebanks to give evidence by live link is granted.

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10 **Hon Mrs. Justice Marlene I Carter**  
11 **Acting Judge of the Grand Court**