**COMMONWEALTLH OF THE BAHAMAS CRI/vbi/203/10/2019**

**IN THE SUPEME COURT**

**Criminal Division**

**B E T W E E N**

 **REGINA**

**vs**

**DENNARJAE JOHNSON**

**Before: The Honourable Mr. Justice Gregory Hilton**

**Appearance: Kendal Carroll III along with Tameka Gibson for the Crown**

 **Stanley Rolle along with Darnielle Kemp the Accused**

**Hearing Date: 11th August, 2022**

D E C I S I O N

[Criminal Law – Notice of Additional Evidence Requirement as to Reasonable Notice – Later Service – Expert evidence.]

**HILTON, J.**

1. The Accused Dennarjae Johnson is charged with the offences of Armed Robbery, Kidnapping and receiving alleged to have occurred on 27th September, 2019.

 He was arraigned in the Supreme Court on a Voluntary Bill of Indictment (VBI) filed on the 20th November, 2019 and on 19th December, 2019 his trial was fixed for 8th August, 2022.

 Prosecution and Defence Questionnaires were exchanged at Case Management hearings in 2020 and 2021 with the Prosecution indicating in writing that the number of witnesses to be called would be seven (7), as listed on the back of the V.B.I.

 At the Case Management hearing on 19th September, 2021 the Defence requested that the Prosecution provide them with a copy of the Record of Interview of the Accused along with any and all other outstanding documents.

 At the Case Management hearing on 23rd June, 2022 the trial was confirmed to commence on 8th August, 2022 and both Prosecution and Defence Counsel indicated that they were ready for trial.

 On the 8th August, 2022 the Jury was empaneled and the Crown commenced its case and called two (2) witnesses. On 10th August, 2022 the Crown served Defence Counsel with a Notice of Additional Evidence of Sgt. 298 Rosenell Butler a fingerprint expert they wished to call, whose evidence substantially, is that the fingerprint impression, she examined which purportedly came from the vehicle the subject of the charges matched the official rolled fingerprint of the Accused, and orally gave notice of their intent also to call Cpl. 3478 David Rolle who would purportedly have taken the official fingerprint of the Accused after he was arrested in 2019, and the notice was filed on 11th August, 2019.

 Neither Sgt. 298 Butler nor Cpl. 3478 Rolle names appeared on the back of the V.B.I. as witnesses.

 Defence Counsel Stanley Rolle objected to the introduction of this evidence after the trial had commenced on the basics that the non-disclosure of this evidence to the Defence prior to the trial commencement was prejudicial to the Defence and tantamount to “Trial by Ambush”. He submitted that it would be an abuse of the Court’s process to allow the additional evidence at this late stage as the Defence would be deprived of the proper time and facilities to prepare a Defence such as to seek an independent examination of the prints and to be able to properly cross-examine the Crown’s expert witness. Particularly as the prints were not even disclosed in the Notice of Additional Evidence (NOAE) as an exhibit.

 Defence Counsel also submitted that this evidence now sought to be led by the Crown was available to the Crown from October 2019 and notwithstanding requests by the Defence in September of 2021 for disclosure of all relevant documents, the Prosecution made no effort to disclose and produce the fingerprint evidence and it would be unfair to the Defence to allow this evidence at this late stage.

 Prosecution Counsel, Mr. Kendal Carroll’s response was that while the notice to adduce the additional evidence was late, the evidence was crucial to the Crown’s case and its probative value outweighs any prejudicial effect enuring to the Defence.

 Prosecution Counsel also submitted that he was advised that the report of the fingerprint expert was just recently prepared and that, that was the reason for the late service of the Notice of Additional Evidence.

 In determining whether to permit the Crown to adduce the evidence of the two (2) Notices of Additional Evidence, the Court must consider the provisions of Section 166 of the Criminal Procedure Code which governs the introduction of additional evidence. This section provided:-

 ***“166. No witness who has not given evidence at the Preliminary Inquiry shall be called by the prosecution at any trial unless the accused person has received reasonable notice in writing of the intention to call such witness.***

 ***Such notice must state the witness’s name and give the substance of the evidence which he intends to give. It shall be for the court to determine in any particular case what notice is reasonable regard being had to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness’s evidence and decided to call him as a witness.***

 ***Provided that when, under the provisions of section 120 of the code, the plan of a survey or the report of a medical practitioner or analyst has been tendered at preliminary inquiry it shall not be necessary to the prosecution to give notice of the intention to call any such survey or medical practitioner or analyst as a witness at the trial of the information.”***

 The law requires that each of the Defendants receive reasonable notice in writing, having regard to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness’s evidence and decided to call him as a witness.

 In this case the service of the Notice of Additional Evidence two (2) and three (3) days are commencement of trial and after Case Management and Pre-Trial hearings in which the Prosecution indicated to me that they were “ready” for the trial does not appear to me to be considered reasonable notice.

 The Constitution of The Bahamas Article 20 (C) guarantees the right of every Accused person to “Adequate time and facilities for preparation of the Defence”.

 Section 166 of the C.P.C. states that the Accused must be given “Reasonable Notice”.

 These Statutory and Constitutional provisions are not placed there in vain. They are placed there primarily to ensure that an Accused person receives a fair trial and is not confronted with or by new evidence which he has not had time to prepare for.

 With respect to each of the Notices of Additional Evidence the Court notes that Sgt. Butler’s report is dated 17th October, 2019 which would be the date that her examination of the submitted prints was completed, and that Cpl. Rolle’s report was dated 15th October, 2019.

 Both of these witnesses’ statements should have been available to the Prosecution from October, 2019 particularly as these were important to the Crown’s case.

 Neither the Accused nor his Counsel were advised by the Crown regarding the existence of these witnesses.

 I have considered the cases cited by both Counsel for the Crown and Counsel for the Accused.

 I do not consider that the Notice of Evidence was reasonable having regard to the time when the evidence was compiled by the police and the service after commencement of trial.

 I am also of the view that, while “relevant evidence” should generally be allowed in criminal trials to allow this evidence would affect the fairness of the trial.

 It cannot be overstated that proper and timely disclosure of relevant evidence must be done in criminal cases. Fairness in criminal trials means fairness to both the Prosecution and the Defence.

 As was said by ***DaCosta J in R. v Flowers Bahamas Supreme Court 95/10/1979.***

 **“The case before me is one in which no explanation has been offered by the Crown as to why evidence which appears to have been known or at least forthcoming at the Preliminary Inquiry, was not led there. I refuse to allow it to be adduced as additional evidence at this stage”.**

 I also refer to the comment of the late ***Senior Justice Stephen Isaacs in R. v Bain, McKenzie and Nottage Bahamas Supreme Court 96/9/2008***where he stated.

 **“…. Service of a Notice of Additional Evidence after a trial commences is to be disapproved generally, and the Crown appropriately chastised for such conduct…”**

 In all of the circumstances, I find that the Notices are not reasonable and will not allow the Prosecution to call the two (2) additional witnesses.

***Dated this 12th day of August, 2022***

***Gregory Hilton***

***Justice of Supreme Court***

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