

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 CRIMINAL SIDE  
3

4 INDICTMENT NO: 20/11

5  
6 THE QUEEN

7  
8 V

9  
10 DEVON ANGLIN



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13 **Appearances:**

Ms. Cheryll Richards Q.C., Director  
of Public Prosecutions, and Ms.  
Elisabeth Lees for the Crown

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17 Mr. Dorian Lovell-Pank Q.C.  
18 instructed by Ms. Lucy Organ of  
19 Samson and McGrath for the  
20 Defendant  
21

22 **Before:**

The Hon. Mr. Justice Charles Quin

23 **Heard:**

24 29<sup>th</sup> July, 1<sup>st</sup> August and 29<sup>th</sup> August  
25 2011

26 **Preamble**

27 *This Ruling is distributed on the strict understanding that in any report of this*  
28 *kind no persons other than the counsel or the attorneys instructing them (and*  
29 *other persons identified by name in the Judgment itself) may be identified by*  
30 *name or location and, in particular, the anonymity of the witnesses and their*  
31 *families must be strictly preserved.*

32  
33 **RULING**

34 **ON WITNESS ANONYMITY APPLICATION BY THE CROWN**  
35

- 36 1. On the 27<sup>th</sup> July 2011 Detective Sergeant Joseph Wright of the Royal  
37 Cayman Islands Police Service ("RCIPS") filed a formal application for two  
38 Witness Anonymity Orders under s.11(1) of the Criminal Evidence (Witness

1 Anonymity) Law 2010 to ensure that the identities of two witnesses, namely  
2 Witness ‘B’ and Witness ‘EHR1’ (“Witness E”) are not disclosed in, or in  
3 connection with the criminal proceedings related to Indictment 20 of 2011  
4 and involving a shooting death which occurred on the 10<sup>th</sup> September 2009.

5 2. The Director of Public Prosecutions, Ms. Richards, presented the application  
6 filed by Detective Sgt. Joseph Wright, requesting that the witnesses’ names  
7 and other identifying details be removed from these proceedings. Further,  
8 Ms. Richards has applied, pursuant to s.11(2) of the Criminal Evidence  
9 (Witness Anonymity) Law 2010 for an Order that:

10 a) *That the witnesses’ names may be withheld and other*  
11 *identifying details may be removed from the materials*  
12 *disclosed to any party to the proceedings;*

13 b) *That the witnesses may use pseudonyms;*

14 c) *That the witnesses are not to be asked questions of any*  
15 *specified description that might lead to their*  
16 *identification;*

17 d) *That the witnesses are to be screened and not*  
18 *identifiable in the Courtroom;*

19 e) *That the witnesses’ voices are subject to modulation.*

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21 3. Ms. Richards submits that this was a shooting that took place in a crowded  
22 Nightclub where some 300 members of the public were present. Ms.  
23 Richards submits that this is exactly the kind of crime which the Criminal  
24 Evidence (Witness Anonymity) Law 2010 is designed to address – where the  
25 shooter relied on the climate of fear to ensure that he would not be identified.

1           4.       Section 13(1) of the Criminal Evidence (Witness Anonymity) Law 2010 sets  
2                   out the pre-conditions for the making of any Witness Anonymity Order.

3                   S.13(1) reads:

4                   “(1)    *Upon an application pursuant to section 12, the court may make*  
5                   *a witness anonymity order only if it is satisfied that the following*  
6                   *conditions are met –*

7                                   (a) *That the measures to be specified in the order are*  
8                                   *necessary –*

9   (i)    *in order to protect the safety of the*  
10   *witness or another person or to prevent*  
11   *any serious damage to property; or*

12   (ii)   *in order to prevent real harm to the*  
13   *public interest, whether affecting the*  
14   *carrying on of any activities in the*  
15   *public interest or the safety of a person*  
16   *involved in carrying on such activities,*  
17   *or otherwise;*

18   (b) *that, having regard to all the circumstances, the*  
19   *taking of those measures would be consistent with*  
20   *the defendant receiving a fair trial; and*

21   (c) *that the importance of the witness’s testimony is*  
22   *such that in the interests of justice the witness ought*  
23   *to testify and –*

24   (a) *the witness would not testify if the proposed*  
25   *order were not made; or*

26   (b) *there would be real harm to the public interest if*  
27   *the witness were to testify without the proposed*  
28   *order being made.”*

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30           5.       In addition, s.13(2) of the Criminal Evidence (Witness Anonymity) Law  
31                   2010 reads:

32                   “(2)    *In determining whether the measures to be specified in the order*  
33                   *are necessary for the purpose mentioned in subsection (1)(a)(i),*

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*the court shall have regard, in particular, to any reasonable fear on the part of the witness –*

*(a) That the witness or another person would suffer death or injury; or*

*(b) That there would be serious damage to property,*

*if the witness were to be identified.*

6. Section 14 of the Criminal Evidence (Witness Anonymity) Law 2010 sets out six considerations to which a Court should have regard in considering an application for a Witness Anonymity Order. S.14(2) reads:

*“(2) The considerations referred to in subsection (1) are –*

*(a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;*

*(b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his evidence comes to be assessed;*

*(c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;*

*(d) whether the witness’s evidence could be properly tested, whether on grounds of credibility or otherwise, without his identity being disclosed;*

*(e) whether there is any reason to believe that the witness –*  
*(i) has a tendency to be dishonest;*

*(ii) has any motive to be dishonest in the circumstances of the case,*

*having regard, in particular, to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant; and*

*(f) whether it would be reasonably practicable to protect the witness’s identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.*

### *Summary of the Case*

7. On the evening of Wednesday the 9<sup>th</sup> September 2009, Carlo Noreen Webster attended the Next Level Nightclub on West Bay Road, together with

1 his friend, Christopher Solomon. There were a number of acts of violence  
2 involving associates of Carlo Webster and others, which culminated in Mr.  
3 Webster being shot at close range in his right arm, his head, and, as he was  
4 lying prone on the ground, he was shot in his left shoulder. Mr. Webster died  
5 instantly.

6 8. Immediately after the shooting which CCTV recorded as being at 1:30 a.m.  
7 on Thursday the 10<sup>th</sup> September 2009, a number of calls were received by the  
8 911 emergency communication centre concerning the shooting. Uniformed  
9 police attended initially and cordoned off the area. Mr. Webster was  
10 pronounced dead by paramedics and a full murder investigation was  
11 launched.

12 9. The Crown has provided the Defence with a number of witness statements,  
13 together with a schedule of non-sensitive, unused material, prepared by the  
14 Disclosure Officer, Detective Inspector Dennis Walkington, and reviewed by  
15 Crown counsel, Elisabeth Lees.

16 10. In addition, the Crown has provided the Defence with a further bundle of  
17 witness statements, records, notes and data, with the redacted material solely  
18 relating to the names and identities of Witness B and Witness E.

19 11. The Crown submits that Witness B has known the Defendant for many years  
20 and has seen him many times. Witness B gives a good description of the  
21 clothes which the Defendant wore on the night in question. Witness B also  
22 knew the deceased, Carlo Webster. Witness B's evidence is that he/she  
23 witnessed the murder at fairly close range and saw the Defendant shoot Mr.

1 Webster three times. Witness B also says that he/she saw the Defendant leave  
2 the Nightclub.

3 12. The Crown has supplied the Defence with the redacted typed statement of  
4 Witness B, dated the 24<sup>th</sup> September 2009, and a second redacted typed  
5 statement of Witness B dated the 4<sup>th</sup> May 2011, which relates to the viewing  
6 of the CCTV footage.

7 13. The Crown has also supplied the Defence with details of Witness B's  
8 outstanding traffic offences and further intelligence data relating to Witness  
9 B.

10 14. Witness B did not give his/her evidence to the police immediately after the  
11 incident. Witness B maintains that he/she was shocked and frightened by  
12 what he/she had witnessed, and was aware of the Defendant's reputation for  
13 violence. Accordingly, that is why Witness B said he/she did not go at first to  
14 the police. However, on the 24<sup>th</sup> September 2009 Witness B gave Detective  
15 Chief Inspector Peter Kennett two statements.

16 15. The Crown submitted that there are minor inconsistencies, in that, the  
17 deceased was shot in the arm, whereas, Witness B said the deceased was shot  
18 in the side. Further, the witness said the Defendant went through the North-  
19 facing exit when in fact, the evidence shows that the Defendant went through  
20 the West-facing exit.

21 16. The Crown has stated that the Witness B's evidence is vital to its case and  
22 further, without Witness B's evidence the case against the Defendant cannot  
23 proceed.

1           17.     Witness E was at the Next Level Nightclub in the early hours of Thursday  
2                     the 10<sup>th</sup> September 2009. Witness E witnessed some fights in the Nightclub –  
3                     one of which involved the deceased, Carlo Webster. Witness E then saw  
4                     another male standing directly in the face of the deceased. Witness E noted  
5                     that they were standing so close that it looked as if they were hugging.  
6                     Witness E saw the same guy in a striped shirt that was involved in the first  
7                     fight with the deceased, with a gun in his hand and said, “*He walked past her*  
8                     *normal just like nothing had happened.*” Witness E said that when he/she  
9                     passed he/she saw (the guy in the striped shirt) put the gun in his pants.

10           18.     The Crown has provided the Defence with a redacted typed statement of  
11                     Witness E dated the 25<sup>th</sup> September 2009, and a further redacted typed  
12                     statement of Witness E dated the 2<sup>nd</sup> May 2011.

13           19.     The Crown has also supplied the Defence with documents from the Criminal  
14                     Records Office in the Cayman Islands, and documents from overseas,  
15                     together with a typed statement from the Disclosure Office of Detective  
16                     Inspector Walkington.

17           20.     Further, the Crown has supplied the Defence with handwritten notes taken by  
18                     Detective Sgt. Joseph Wright of different conversations he had with Witness  
19                     E.

20           21.     The Defendant is unknown to Witness E. Witness E states that the murderer  
21                     was wearing a striped shirt. This evidence is corroborated by the CCTV  
22                     evidence where there are photographs showing the Defendant wearing a  
23                     striped shirt.



1           26.    The fifth holding states:

2                                    *“The Act created what might fairly be regarded as a new statutory*  
3                                    *special measure, but it should be regarded as the special measure of last*  
4                                    *practicable resort.”*

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6                                    As the Lord Chief Justice Lord Judge stated in *R v. Mayers* at paragraph  
7                                    6 of the Judgment:

8                                    *“The Act simultaneously seeks to address the provisions of the European*  
9                                    *Convention of Human Rights and the relevant jurisprudence of the*  
10                                    *European Court, by seeking to preserve the delicate balance between the*  
11                                    *rights of the defendant, including his entitlement to a fair trial and public*  
12                                    *hearing, and to examine or have the witnesses who inculcate him*  
13                                    *properly examined, and the witness’s right to life and physical security*  
14                                    *and indeed the right to respect for his or her private life.”*

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16           27.    Lord Judge continued at page 406 paragraph 7:

17                                    *“The Act must be taken to reflect Parliament’s view of how best to*  
18                                    *address the countervailing interests which arise in every criminal trial,*  
19                                    *those of the defendant, the witnesses and victims, as well as the public*  
20                                    *interest in a fair trial process which protects the interests of both, and so*  
21                                    *far as possible, secures the conviction of those who are guilty and the*  
22                                    *acquittal of those are not. It provides a comprehensive statutory*  
23                                    *structure to deal with the many potentially conflicting problems to which*  
24                                    *witness anonymity may give rise. It does so in the context of numerous*  
25                                    *other provisions which address the fairness of the trial process as well as*  
26                                    *the protection of witnesses and the preservation of their rights, whether*  
27                                    *they are to be found in statute, the common law or in the jurisprudence*  
28                                    *of the European Court.”*

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30           28.    As these new and special statutory provisions can be described as  
31                                    groundbreaking new territory, I feel it is necessary to review and cite Lord  
32                                    Judge’s judgment in *R v. Mayers* extensively in order to analyse the present  
33                                    application and adjudicate upon it.



1           33.     At paragraph 19 on page 413 of his judgment Lord Judge stated:

2                           *“None of these considerations outweighs any of the others, and the order*  
3                           *in which they appear does not represent an order of priority or*  
4                           *importance. They are not exhaustive nor restricted to those expressly*  
5                           *mentioned, and they leave open the possibility that in an individual case*  
6                           *some further point may properly arise for consideration. Equally, none is*  
7                           *conclusive on the question whether the individual defendant will receive*  
8                           *a fair trial. Moreover, none precludes the possibility of an anonymity*  
9                           *order, but these considerations do not diminish or minimise the crucial*  
10                          *requirement that before an order may be made conditions A-C in s.4 [the*  
11                          *Cayman s.13] must be met. It is nevertheless clear from even a cursory*  
12                          *glance that the focus of the considerations in section 5 [the Cayman s.14]*  
13                          *is the protection of the interests of the defendant.”*

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15           34.     The following are very important **Mayer** guidelines which the Cayman  
16                          Islands Court of Appeal set out in full in **R v. Bush, Sanchez and Crawford**.  
17                          I can do no better than to repeat the same. At paragraph 20 on page 413 Lord  
18                          Judge stated:

19                          *“The first consideration in effect restates the common law principle that*  
20                          *the defendant is normally entitled to know the identity of any witness who*  
21                          *gives incriminating evidence against him, and incorporates it within the*  
22                          *statutory framework. That is his “general right”, and its promulgation*  
23                          *also acknowledges the potential disadvantage to the defendant if he is*  
24                          *ignorant of the witness’s identity, and reinforces the principle of open*  
25                          *justice. This first consideration is linked with the last. Subsection*  
26                          *(2)(f)[(14(2)(f)] reinforces the view we have already expressed that a*  
27                          *witness anonymity order does indeed represent the last practical resort.*

28                          *The considerations in ss.(2)(b), (d) and (e) are linked in the broad sense*  
29                          *that they relate to the weight to be attached to the evidence of the*  
30                          *anonymous witness and the safeguarding of the process by which his*  
31                          *credibility may, so far as practicable, be objectively verified, and then*  
32                          *tested in cross-examination. They can and indeed should apply to every*  
33                          *witness in respect of whom an anonymity order is sought. In this context*  
34                          *the process of investigation and disclosure is crucial, not simply in*  
35                          *relation to previous occasions when the witness may have been dishonest*  
36                          *in general, but also whether there may be any reason to question his*  
37                          *honesty or motivation in the particular case. The defence statement*  
38                          *provides the benchmark against which the disclosure process must be*  
39                          *examined. So, for example, a defendant who believes that he may be the*  
40                          *victim of a malevolent plot to incriminate him when he is innocent should*

1 normally be able to give some indication of his concerns in his defence  
2 statement, and to indicate the identity of anyone who he believes may  
3 have a malign motive to incriminate him. It can then, if raised by him, be  
4 the subject of further inquiries, perhaps indeed with the use of special  
5 counsel.”

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7 35. Lord Judge continues at paragraph 22 and stated:

8 “These three considerations [(2)(b),(d) and (e)] are distinct, but linked,  
9 and are likely to require an overall view of the potential impact of the  
10 proposed anonymous witness on the trial. Thus, for example, the  
11 credibility of the witness may not be in doubt. A perfectly respectable  
12 member of the public witnessing the departure of the man running away  
13 from the scene of the shooting, (which he has not witnessed personally),  
14 may see the man jump into a car and drive away. His note of the  
15 registration may provide crucial evidence against the defendant. There is  
16 no reason to doubt his integrity, or motive or his credibility. The issue  
17 may be his accuracy, which may be fully tested without his identity being  
18 disclosed. In short, the responsibilities of the prosecution to ensure a fair  
19 trial, and to reveal any material which may undermine the case for the  
20 prosecution or advance the defendant’s own case, and the disclosure  
21 process in particular, will all be crucially engaged in addressing group  
22 of considerations. None of these processes is necessarily conclusive, and  
23 to the extent that the judge deciding whether to make an order believes  
24 that the process has not been fair, full and comprehensive, so he would  
25 be less likely to be satisfied that a fair trial can take place.”

26  
27 *The Three Statutory Conditions*

28 36. The English Court of Appeal in *R v. Mayers* set out guidelines in relation to  
29 a Court’s approach to the statutory conditions and Lord Judge stated at  
30 paragraph 26:

31 “In most cases, the most helpful approach would probably be to address  
32 condition C first. The interests of justice are undefined. The conviction of  
33 the guilty after a fair trial and the acquittal of the innocent are plainly  
34 engaged. The order should not be made where the oral testimony of the  
35 witness, realistically analysed, is not potentially important or where the  
36 proposed anonymous evidence could be addressed by admissions or  
37 agreed facts or, subject to proper editing, capable of being read. It must  
38 in any event also be clear that notwithstanding, for example, the powers  
39 vested in the court in relation to contempt in an appropriate case, the

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witness will not testify. The test is stark. That the witness might prefer not to testify, or would be reluctant or unhappy at the prospect, is not enough. Condition C is expressly directed to oral testimony, and the evidence envisaged in its provisions is the evidence to be given by a witness who will be called – or at the stage where the application is made – is intended to give oral testimony.”

37. Lord Judge continued at paragraph 27:

“We should perhaps add that it is open to the court to reach the conclusion that the witness would not testify if the circumstances of the offence itself justified the inference, for example, where it is apparent that the witness was present when a gun was fired, or the circumstances of the killing showed the kind of outrageous arrogance displayed by the killer (whoever he was) in Davis (Iain). Unhappily the challenge to the rule of law itself posed by gun and weapon-carrying individuals or members of gangs of criminals and the legitimate fears which this engenders in the public, particularly where an attack is carried out in public, is undiminished.”

38. Continuing at paragraph 29 Lord Judge stated:

“Condition A is linked to s.5(6). The order must be necessary. ...Condition A is not fulfilled unless the order is necessary for the protection of the safety of the witness or any other person, or to prevent serious damage to property or, alternatively, to prevent real harm to the public interest. In relation to human beings, the issue is unembellished by adjectives. The question is safety, and this may encompass the risk of personal injury or death, or a reasonable fear of either. In relation to property the risk must be serious, and any harm to the public interest must be real. In this context, different considerations may inform the decision of the court when deciding between different civilian witnesses, for example, children and adults, vulnerable and troubled witnesses, and police officers. It is of course possible to envisage situations which may simultaneously cause real, or create the potential for real harm to the public interest, as required by condition A and serious danger to the interests of justice as reflected in condition C.”

39. Finally in relation to guidelines on the three conditions, Lord Judge states at paragraph 36 on page 418:

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*“Condition B is fact specific. The fairness of the trial process as a whole must be preserved, and it is a deeply entrenched principle of our criminal justice process that a safe conviction cannot be produced by an unfair trial. The act itself demonstrates that witness anonymity does not and is not deemed to produce an unfair trial. Oddly, because a fair trial must be fair both to the prosecution and the defence, condition B appears to be focused on the defendant receiving such a fair trial, even when it is the defendant who is seeking the anonymity order. Be that as it may, in the vast majority of cases all the express considerations in s.5 [our s.13(b)] which bear on the proper protection of the interests of the defendant, will require attention, and it is only after each has been addressed that it may be possible for the court to conclude that condition B has been established. We do not propose to reflect again on these express conditions which we have already addressed in detail. In the end, the trial must be fair, and, so far as this court is concerned, a conviction cannot be upheld unless we ourselves are satisfied that looked at overall the defendant was convicted after a fair trial.”*

*Case for the Defence*

40. Leading counsel for the Defendant, Mr. Lovell-Pank Q.C., submits that few topics rarely engage the attention of the Court more than the consideration given to whether the Defendant can obtain a fair trial with the use of anonymous witnesses. Mr. Lovell-Pank submits that this a very heavy burden to be placed on the Judge who is called upon to make a reasoned and informed decision, which may have far-reaching consequences.
41. Mr. Lovell-Pank submits that there are three different and competing interests, namely (1) the public interest, (2) the witnesses’ right to life and physical security if they give evidence and, (3) the right of any defendant to a fair trial and public hearing where he can examine the Crown witnesses fully and properly.
42. Mr. Lovell-Pank relies on the case of the **R v. Mayers** and says that the Court must follow the principles and guidelines which are clearly set out by Lord

1 Judge in the English Court of Appeal decision. Leading counsel submits that,  
2 in particular, the Court must constantly remind itself that a Witness  
3 Anonymity Order must be a “*special measure of last resort*”.

4 43. Mr. Lovell-Pank reminds the Court that it is the responsibility of the Crown  
5 to ensure that there is a fair trial. One very important obligation is that the  
6 Crown must reveal any material which may undermine the Crown’s case, or  
7 advance the case for the Defence. Disclosure, Mr. Lovell-Pank argues is  
8 always important, but in the case of witness anonymity, it is absolutely  
9 crucial. Mr. Lovell-Pank submits that it is up to the Crown to ensure that  
10 there is the most thorough investigation into the witnesses and into their  
11 credit worthiness. He submits that the Crown must ensure that the police  
12 officers investigating are aware of their obligations of disclosure, and that the  
13 whole of the prosecution team, including the officer in charge of the case,  
14 and counsel reviewing the material, must constantly be on their guard to  
15 ensure that their obligations of disclosure are properly discharged.

16 44. In this regard Mr. Lovell-Pank relies on the Judgment of Lady Justice Hallett  
17 in the case of *R v. Okuwa* [2010] EWCA Crim 832 where she cites Lord  
18 Judge at paragraph 25 and 26:

19 *“The obligations of the prosecution in the context of a witness anonymity*  
20 *application go much further than the ordinary duties of disclosure ... and*  
21 *require a detailed investigation into the background of each potential*  
22 *anonymous witness will almost inevitably be required.....In short*  
23 *the Crown must be proactive, focusing closely on the credibility of the*  
24 *anonymous witness and the interests of justice.”*

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*Witness B*

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45. In relation to Witness B, Mr. Lovell-Pank points out that in its application the Crown has conceded that Witness B's evidence is vital and that without it the Crown cannot proceed. Mr. Lovell-Pank submits that Witness B is the only witness who says that he/she saw the Defendant shoot the deceased. Accordingly, Mr. Lovell-Pank points out that Witness B is both the sole and the decisive witness in this case for which there is no corroboration.

46. The Defence submits that Witness B is lying, or alternatively, honestly mistaken, and because Witness B is the only witness who says that the Defendant shot the deceased, the application for witness anonymity for Witness B should be refused. Mr. Lovell-Pank asks the Court to note that within hours Witness B tells the police about what he/she saw, and then there is a delay until Witness B gives two statements on the 24<sup>th</sup> September 2010 to Chief Inspector Kennett.

47. Allied to this Mr. Lovell-Pank highlights the assertion made in the application by the Crown that there is "... *nothing of which the police are aware for any justification for Witness B to be lying*".

48. Mr. Lovell-Pank further submits that there are inconsistencies in Witness B's evidence, including the door through which the Defendant left the Nightclub on the night in question.

49. Mr. Lovell-Pank reminds the Court that a Witness Anonymity Order is a special measure of last practical resort, and therefore the Court has an obligation to examine all possible alternatives to ensure that the Defendant is



1 E's reliability and his/her credibility. Mr. Lovell-Pank refers in particular to  
2 the fact that there is no explanation for the differing accounts that Witness E  
3 has given on the 22<sup>nd</sup> September and on the 25<sup>th</sup> of September 2009.

4 54. Furthermore, the Defence invites the Court to look "down the line" and try to  
5 consider the vital importance of the relevant cross examination of the  
6 witnesses for which anonymity is being sought. To this extent, the Defence  
7 also submits that the Crown cannot claim that there is any corroboration from  
8 Ophia Smith, as she has not been called or relied upon by the Crown, and  
9 therefore her account on any facts cannot be regarded as evidence against the  
10 Defendant.

11 55. Mr. Lovell-Pank submits that these factors alone call for the applications for  
12 anonymity to be dismissed.

13 56. The Defence accepts the DPP's submissions that the shooting was done in a  
14 public place, namely the crowded Nightclub. This means that there is, what is  
15 being described in the case law as the "arrogance of the shooter", which the  
16 Defence concedes would be enough to put any witness in fear and,  
17 specifically, Witnesses B and E in fear.

18 57. Mr. Lovell-Pank poses the question which he says the Court must ask itself:  
19 Does the Court have the necessary confidence that the Crown and the police  
20 have shown to the Court's satisfaction that the disclosure exercise is as  
21 thorough and sufficient as it is required to be in a case as serious as this?

22 58. In addition, Mr. Lovell-Pank adds that the burden of proof is on the Crown to  
23 satisfy the Court that the Defendant, Devon Anglin, can have a fair trial if



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(ii) *There would be real harm to the public interest if the witness were to testify without the proposed order being made.*

62. The Court must consider if the importance of the testimony of Witness B and Witness E is such that, in the interests of justice, the witnesses ought to testify, and, the witnesses would not testify if the proposed order were not made, or, alternatively there would be real harm to the public interest if the witnesses were to testify without the proposed order being made.

63. I have examined the evidence contained in the statements of Witness B and Witness E. The Court finds that their evidence is important and could not be addressed by admissions or agreed facts.

64. As Lord Judge said in *R v. Mayers* at paragraph 26:

*“The test is stark. That the witness might prefer not to testify, or would be reluctant or unhappy at the prospect, is not enough.”*

65. I am satisfied that the importance of the testimonies of both witnesses is such that, in the interests of justice, the witnesses ought to testify, and further, I am satisfied that, from the material presented by the Crown, the witnesses would not testify if the proposed Order were not made.

66. Indeed, I am grateful to leading counsel for the Defence for his very proper concession that, whilst their client’s position is that he is not guilty of the shooting, the shooting falls within the category of cases described by *Mayers* where the circumstances of the killing show “outrageous arrogance.” Accordingly, Mr. Lovell-Pank has, very properly, accepted that the inference

1 can therefore be reasonably be drawn from the circumstances of the case that  
2 the witnesses would not testify without a witness anonymity order.

3 67. For the avoidance of any doubt, both Witness B and Witness E have stated  
4 that they will not testify without anonymity. In light of the outrageous  
5 arrogance of the shooting, and the climate of fear engendered by murders in  
6 the Cayman Islands, I find that these witnesses would not testify if  
7 anonymity is not given.

8 68. Accordingly I accept the Crown's submission that where there has been a  
9 shooting in a public place such as in this case, the fact that Witness B and  
10 Witness E can give evidence which may lead to the identity of the culprit, is  
11 in the interests of justice, and therefore, in my view, the Crown has satisfied  
12 this condition.

13 *Condition A*

14 69. Condition A as set out in Section 13(1)(a)(i) and (ii):

15 "13. (1) Upon an application pursuant to section 12, the court  
16 may make a witness anonymity order only if it is satisfied that the  
17 following conditions are met-

18 (a) That the measures to be satisfied in the order are necessary  
19 -

20 (i) In order to protect the safety of the witness or  
21 another person or to prevent any serious  
22 damage to property; or

23 (ii) In order to prevent real harm to the public  
24 interest, whether affecting the carrying on of any  
25 activities in the public interest or safety of a  
26 person involved in carrying on such activities,  
27 or otherwise;"

28

1       70.     Both witnesses have expressed a fear that they will suffer death or injury if  
2             they were to be identified.

3       71.     I accept the Crown's submissions that both witnesses have expressed a  
4             genuine fear for their identities being revealed.

5       72.     In addition, the circumstances of the killing, mainly that the perpetrator used  
6             a gun without any attempt to conceal his identity in such a public place, itself  
7             presents a real and justifiable ground for such fear on the part of the  
8             witnesses.

9       73.     Detective Sgt Wright's investigation and disclosure demonstrate that the  
10            Defendant and his associates have a reputation for violence and intimidation,  
11            which I accept can give rise to a real and entirely reasonable fear that  
12            violence and intimidation might be used against the two witnesses for which  
13            anonymity is sought.

14       74.     Accordingly, I find that Condition A is satisfied because it is reasonable for  
15            the witnesses to believe that, in testifying against the Defendant, it could lead  
16            to a serious injury or death.

17       75.     The Court also accepts the Crown's submission that it is in the public interest  
18            that all available relevant evidence should be put before the jury or the  
19            Tribunal that hears the case. Lord Justice Burnton in the English Court of  
20            Appeal case of *R v. Azhar Nazir* 2009 WL 392168 asks this question when  
21            considering Condition A:

22                            *"One has only to ask what, if the witness's evidence were true?"*

1       76.     When applied to this case the Court can ask itself the question, “What might  
2             a man who had murdered another man in a crowded Nightclub do to  
3             someone who gave evidence against him and was responsible for that same  
4             man facing life imprisonment?”

5       77.     Accordingly, I find that this condition is satisfied as there is sufficient  
6             material put before the Court in Sgt. Wright’s application, that the anonymity  
7             is necessary for both Witness B and Witness E to protect their safety, and  
8             that it is perfectly reasonable for both Witness B and Witness E to fear that  
9             they would suffer death or injury as a consequence of their giving evidence  
10            without such anonymity.

11      78.     I also consider, as did our Court of Appeal in *Bush, Sanchez, Crawford*  
12             where, the President, Sir John Chadwick stated at paragraph 39 that, in this  
13             case, it would also be:

14                    “...quite impractical to relocate the witnesses, their wives and children  
15                    off island on permanent basis.”

16             As with the Court of Appeal, I would reiterate the words of the President:

17                    “*It is impossible to think that, if a threat to the witness’s safety exists*  
18                    *before he gives evidence, it will cease to exist once he has given evidence*  
19                    *which leads to a conviction. There would be an obvious motive to cause*  
20                    *him harm as an example to others”*

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**Condition B**

23      79.     Condition B as set out in Section 13(1)(b), states that a witness anonymity  
24             order should only be granted if the Court is satisfied:

1                   “13. (1) Upon an application pursuant to section 12, the court  
2                   may make a witness anonymity order only if it is satisfied that the  
3                   following conditions are met-

4                                   (b) That, having regard to all the circumstances, the taking of  
5                                   those measures would be consistent with the defendant  
6                                   receiving a fair trial;”

7

8           80.       This is, in many ways, the Defendant’s primary and most serious objection to  
9                   the Crown’s application for witness anonymity. To that extent, the Defendant  
10                  relies on a number of the considerations which the Court must take into  
11                  account, contained in the Criminal Evidence (Witness Anonymity) Law  
12                  2010. It is convenient at this stage to re-state the relevant considerations  
13                  when examining whether condition B has been satisfied, namely:

14                               “(a) The general right of a Defendant in criminal proceedings to  
15                               know the identity of a witness in the proceedings

16                               (b) the extent to which the credibility of the witnesses concerned  
17                               would be relevant factor when the weight of their evidence  
18                               comes to be assessed.

19                               (c) whether evidence given by either or both witnesses might be the  
20                               sole or decisive evidence implicating the defendant.

21                               (d) Whether the witness’s evidence could be properly tested,  
22                               whether on grounds of credibility or otherwise, without their  
23                               identity being disclosed.

24                               (e) Whether there is any reason to believe that the witnesses have a  
25                               tendency to be dishonest or have any motive to be dishonest in  
26                               the circumstances of this case, having regard, in particular, to  
27                               any previous convictions of the witnesses and to any relationship  
28                               between the witnesses and the defendant or any associates of the  
29                               defendant.”

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1 81. Before analyzing the facts of this case and the material presented in Sgt.  
2 Wood's application, I remind myself of the clear guidance Lord Judge gave  
3 at paragraph 36 of *R v. Mayers*:

4 *"Condition B is fact specific. The fairness of the trial process as a whole*  
5 *must be preserved, and it is a deeply entrenched principle of our*  
6 *criminal justice process that a safe conviction cannot be produced by an*  
7 *unfair trial."*

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9 82. The Defence is particularly concerned that Witness B provides, what in their  
10 view, is the sole and decisive evidence against the Defendant because  
11 Witness B is the only witness who says the Defendant actually shot the  
12 deceased. The Defence submits that in order for the Defendant to have a fair  
13 trial there should be no anonymity.

14 83. The Supreme Court in *R v. Horncastle and Another* [2010] 2 A.C. 373  
15 considered this issue in the Judgment delivered by the President, Lord  
16 Phillips of Worth Matravers, when he stated at paragraph 56:

17 *"Thus Parliament has decreed that the question of whether evidence is or*  
18 *is likely to be sole or decisive is relevant to the question of whether the*  
19 *court should permit it to be given anonymously but there is no mandatory*  
20 *rule prohibiting the admission of such evidence."*

21  
22 84. Lord Judge also examined the "sole or decisive" point in his Judgment in *R*  
23 *v. Mayers* at paragraph 23 where he stated:

24 *"If the evidence of the anonymous witness may be either the sole or the*  
25 *decisive evidence incriminating the defendant, that consideration must*  
26 *be addressed and taken into account when the Court is deciding whether*  
27 *condition B is satisfied."*

28





1                                    *“It is one thing to say that the prosecution need to consider positively*  
2                                    *whether there is reason to suspect collusion between witnesses. It is quite*  
3                                    *another thing to submit that when there is no such apparent evidence, the*  
4                                    *prosecution must nevertheless pre-suppose that there is such collusion*  
5                                    *and set out in order to be able to prove the negative. This would be to*  
6                                    *require the prosecution to prove that the haystack does not contain a*  
7                                    *needle.”*

8

9            97.        I am satisfied from the disclosure material provided by the Crown that there  
10                                    is no evidence of collusion between Witness B and Witness E.

11            98.        In a pre Witness Anonymity Law case of *R v. Bola*, (unreported 18<sup>th</sup> June  
12                                    2003) an application for anonymity for a witness who was a drug dealer and  
13                                    a pimp with previous convictions was refused. It is in this case that Lord  
14                                    Justice Hughes used the memorable words, by posing the question at  
15                                    paragraph C on page 18:

16                                    *“How is the defendant to be put in the same position as he would be if he*  
17                                    *were able to say, “Oh, well, if it is boggens, I can tell you why he might*  
18                                    *be saying this.”? With all the resources at their disposal, no police team*  
19                                    *would claim to have the same knowledge of what is happening in*  
20                                    *disputed territory between groups, or as to who was part of which group,*  
21                                    *to the same extent as somebody who is personally involved in it.”*

22                                    Lord Justice Hughes continues at paragraph G on page 18 to state:

23                                    *“Of course, knowing that the witness is a drug dealer and a pimp will*  
24                                    *enable the defence, if this proceeds, to undermine his general standing.*  
25                                    *Is that enough? Unhappily, no. In the case where the killing is likely to*  
26                                    *be viewed as the product of a drug-related feud, it is only commonsense*  
27                                    *[that] it is only very exceptionally committed in front of impartial and*  
28                                    *unimpeachable witnesses. The jury will perfectly well know and, indeed,*  
29                                    *will be told that in circles like this the evidence, if there is any evidence,*  
30                                    *is likely to come from those who have themselves murky backgrounds or*  
31                                    *worse. The risk, therefore, plainly exists that the jury will not think that*  
32                                    *the exposure of unsatisfactory background is a sufficient test of the*  
33                                    *veracity of the witness and what they will be deprived of is the*  
34                                    *opportunity to have considered any personal reason for untruthfulness*  
35                                    *which the witness may have.”*

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And at paragraph D Lord Justice Hughes states:

*“The proposition can be put another way and it is this.*

*Of course, if the assumption is made that the evidence of Fish is truthful, then it is evidence which is crucial and must be given and, of course, in that situation we should be protective. The public interest in that case is on one side only. It is in the criminal being brought to book. If the contrary assumption is made or the contrary possibility is entertained, that the evidence is not truthful, then the public interest as well as that of the defendant is that the fact should be exposed. The assumption of truth is exactly the assumption which I cannot make and I am satisfied that there is a real danger on the facts of this case that if this evidence is untruthful it may be impossible for that fact to be exposed because it comes from an anonymous source whose motives for saying what he does cannot properly be investigated.”*

99. In the case before me neither Witness B nor Witness E falls into the category of Witness Fish in *R v. Bola*. Lord Justice Hughes in *R v. Bola* was clearly concerned that Witness Fish was a drug dealer and a pimp, who was in a gang in a drug-related world. In this case, neither Witness B nor Witness E have previous convictions, and it cannot be said that these witnesses come from the “murky backgrounds” of drug-related gangs. I accept the DPP’s contention that in this case, where the Crown has conducted an extensive investigation, there is no reason to doubt the credibility of these witnesses.

100. My attention is drawn to the dicta of the English Court of Appeal in *R v. Powar and Powar* [2009] 2 Cr. App. R. page 8 where at paragraph 85 Lady Justice Hallett stated:

*“The reality is that there was and is no reason at all to doubt the credibility of any of these witnesses. The real question was as to the witnesses’ reliability not credibility;”*

1           101.    The Crown submits that from the detailed inquiries and investigation, there is  
2                           no reason to doubt the credibility of Witness B and Witness E. Further, the  
3                           Defence can suggest that both witnesses are unreliable or mistaken, and their  
4                           evidence can be tested by rigorous and full cross examination.

5           102.    The Court asks itself whether the evidence of the witnesses can be properly  
6                           tested, whether on the grounds of credibility or otherwise, without their  
7                           identities being disclosed, and reminds itself again of Lady Justice Hallett’s  
8                           dicta in *Powar* at paragraph 94 where she states:

9   *“Of course it is not ideal that the defence do not know where the*  
10   *witnesses are viewing the scene from but we do think there was a proper*  
11   *opportunity for examination of the circumstances in which their*  
12   *observations were made. No witness suggested that their view was*  
13   *obscured by the tree or by anything else; indeed there was no reason to*  
14   *think that the views of any of these witnesses were obscured or masked in*  
15   *any way.”*

16  
17           103.    In this case, the Defence can challenge the evidence of Witnesses E and B  
18                           and, the Defence has a full opportunity to examine the circumstances in  
19                           which their observations of the Defendant were made.

20           104.    On reviewing the material disclosed to me by the Crown, I have to ask  
21                           myself the question whether there is any reason to believe that the witnesses  
22                           (1) have a tendency to be dishonest or (2) any motive to be dishonest? I find  
23                           that both witnesses have been the subject of a fairly rigorous investigation –  
24                           both in relation to their past and in relation to questions of honesty and or  
25                           possible motivation in this particular case. I find that the investigation has  
26                           been thorough and extensive and I can find no reason to be concerned that  
27                           these witnesses are dishonest or, alternatively, have any motivation to act

1 against the Defendant or in favour of the deceased. I also find, on the  
2 evidence before me that Witness B and Witness E are not known to one  
3 another, and therefore, I find that there is no basis to support any allegation  
4 that there has been any collusion between them.

5 105. The Defence will be able to cross examine both witnesses as to their  
6 recollections on the night in question. As to their evidence implicating the  
7 Defendant, the Court can continue to monitor the situation and should  
8 anything occur, which changes the present position relating to the credibility  
9 of these witnesses, and which causes the Court a concern that the Defendant  
10 is not receiving a fair trial, the Court can intervene. Section 17(2) of the  
11 Criminal Evidence (Witness Anonymity) Law 2010 states:

12 “17. (1) ....  
13 (2) *The Court may, discharge, vary or further vary a witness*  
14 *anonymity order-*  
15 (a) *on an application made by a party to the*  
16 *proceedings if there has been a material*  
17 *change of circumstances since the*  
18 *relevant time; or*  
19 (b) *on its own initiative.”*  
20

21 106. Having reviewed the Crown’s application, all the materials filed with the  
22 Court, and the materials served on the Defence, and having heard the  
23 submissions of Ms. Richards and Mr. Lovell-Pank, I find that the Crown has  
24 met the three Conditions set out in the Criminal Evidence (Witness  
25 Anonymity) Law 2010.

