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IN THE GRAND COURT OF THE CAYMAN ISLANDS

CRIMINAL DIVISION

INDICTMENT NO. 20/2011



13-12-11

REGINA

V

DEVON ANGLIN

IN OPEN COURT

BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

THE 13TH DAY OF DECEMBER 2011

APPEARANCES:

Ms. Cheryl Richards QC, Director of Public Prosecution and
Ms. Elizabeth Lees, Crown Counsel for the Crown

Mr. Dorian Lovell-Pank QC instructed by Ms. Lucy Organ of
Samson & McGrath for the defence

**Application for the discharge of witness
anonymity orders in respect of Witnesses B and E**

1. On 31st August 2011, Justice Quin of this Court granted orders for the protection of the identity of two witnesses in this case who then came to be called Witness B and Witness E.
2. The trial having progressed before me as a judge sitting without a jury to the point now of the imminent closure of the prosecution's case including the testimony of the two witnesses; Counsel for the defence applies for the discharge of the witness anonymity orders on the basis that there has been a material change of circumstances.

3. Mr. Lovell-Pank QC cites and relies upon section 17 of the Criminal Evidence (Witness Anonymity) Law 2010 which, in relevant part provides:

(1) A Court that has made a witness anonymity order in relation to any criminal proceedings may in those proceedings subsequently discharge, vary or further vary the order if it appears to the court to be appropriate to do so in view of sections 13 and 14 that applied to the making of the order.

(2) The Court may discharge, vary or further vary a witness anonymity order –

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

(b) on its own initiative.

4. The anonymity orders having been made in the first place because the Court was satisfied that the conditionalities of section 13 were satisfied as informed by the considerations identified in section 14; the question now arising of whether or not there has been a material change of circumstances must be considered also by reference to the same conditionalities and considerations.

5. Section 13(1) (a), (b) and (c) specify the conditions which must be fulfilled before the order can be made. It follows that the Court must still be satisfied that these continue to be fulfilled. Otherwise the anonymity orders must be discharged. Those conditionalities are:

(a) that the measures specified in the orders are necessary –

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

- (ii) *in order to prevent real harm to the public interest, whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise;*
- (b) *that, having regard to all the circumstances, the taking of these measures would be consistent with the defendant receiving a fair trial; and*
- (c) *that the importance of the witness' testimony is such that in the interest of justice the witness ought to testify and –*
 - (i) *the witness would not testify if the proposed order were not made; or*
 - (ii) *there would be real harm to the public interest if the witness were to testify without the proposed order being made.*

(While the requirements of the last conditionality of paragraph (c) would have been satisfied before the orders were made, there remains throughout the trial the question whether there would be real harm to the public interest if the anonymity of either witness were to be lifted).

6. The considerations which inform the application of the conditionalities of section 13 appear from section 14 in these terms:

- (1) *When deciding whether the conditions in section 13 are met in the case an application for a witness anonymity order, the court shall have regard to –*
 - (a) *The considerations mentioned in subsection 2; and*
 - (b) *Such other matters as the Court considers relevant.*
- (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' evidence could properly be tested, whether on the ground 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; or*
 - (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' identity by any measure other than by making a witness anonymity order specifying the measures that are under consideration by the court.*

7. This last consideration would not apply to the present application which is for the lifting of the anonymity already granted for the protection of the witnesses' identities.

Upon a review of the anonymity orders, the competing imperatives of the Law will continue to apply and must continue to guide the Court. While the Court must always be primarily concerned to ensure that the defendant receives a fair trial, as was declared by LCJ Judge in *R v Mayers [2009] 1 Cr. App. R. 30* the (Law) “(seeks) to preserve the delicate balance between the rights of the defendant, including his entitlement to a fair trial and public hearing, and to examine or have the witnesses who inculpate him

properly examined, and the witness' right to life and physical security and indeed, the right to respect for his or her private life."

8. In my approach to this application for the lifting of the anonymity orders, I consider that the main question that should guide my decision is whether circumstances have arisen such as to give real cause for concern that a fair trial would no longer be achievable without the anonymity orders being lifted and thus whether that "*delicate balance*" to be maintained for the preservation of the witnesses' rights has been tipped in favour of the defendant's right to a fair trial.
9. Mr. Lovell-Pank QC has identified certain factors described by him as going so fundamentally to undermine the reliability and credibility of witnesses B and E, as to justify the conclusion that a fair trial is no longer possible without the anonymity orders being lifted. He submits that with the witnesses' reliability and credibility having been so glaringly brought into doubt, the defendant must now be regarded as entitled to know who his accusers are so that he can explore the natural and obvious concern that they may be deliberately lying against him and so have a motive for inculcating him.
10. While it is acknowledged by the Director of Public Prosecutions ("the DPP") that inconsistencies or contradictions have seemingly arisen in the evidence of the witnesses, either internally within their own testimony or as between their testimonies and other factual evidence in the case, she submits that these do not rise to the level of the concern identified by Mr. Lovell-Pank QC as justifying the lifting of the anonymity orders. At their highest, she submits, these inconsistencies raise the issue of the reliability of the witnesses but do not rise to the level of suggesting such lack of credibility leading to a

concern that the witnesses are deliberately lying. Or, for that matter, that either is now shown possibly to have a motive for seeking to inculpate the defendant.

11. Ms. Richards refers to the extensive background information about the witnesses which had been accepted by this Court when the orders were made as showing in particular, the impartiality of the witnesses and as showing the absence of any motive of the sort which would be of concern now. She submits that nothing new has emerged that could objectively or reasonably change that view to be taken of these witnesses or to ascribe to the seeming inconsistencies or other apparent weaknesses in their evidence, the more sinister connotation of mendacity or untrustworthiness which the defence seeks to ascribe.
12. In my response to the application, first I must note my acceptance of the legal premise of the application. It is implicit in section 17(2) of the Law that a trial judge is required to keep an anonymity order under constant review in the same way as an order granting public interest immunity would be kept under constant review. Accordingly, my concern will not be what the position was at the beginning of the trial but rather to consider whether, as circumstances exist now, it remains safe and appropriate that the anonymity orders should be maintained.
13. Concerns about the credibility or trustworthiness of an anonymous witness will naturally and understandably loom large in the mind of a defendant and the sort of issues raised now by Mr. Lovell-Pank QC on behalf of his client can hardly be described as surprising.
14. As he observed, while the defence has only heard the witnesses, as the tribunal of fact in this trial, I am the only person who has both seen and heard the witnesses. Both the

defence and the prosecution are therefore wholly reliant upon my assessment of the reliability and credibility of the two witnesses.

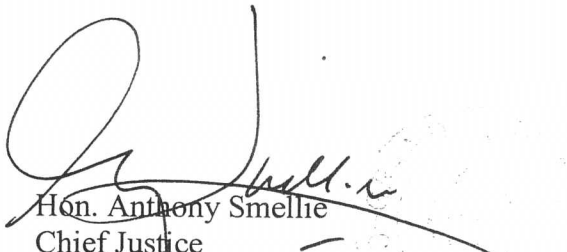
15. This, by itself, is not however a basis for concern. In any trial, at the end of the day, it is what the tribunal of fact makes of the reliability and credibility of the witnesses that matters. The uniqueness of my perspective as the trial judge does however underscore the importance of my obligation constantly to review those crucial questions of reliability and credibility, or as I think it is more precisely to be described in this case – trustworthiness.
16. The question as it is posed here, is not unlike the question posed to the English Court of Appeal in *R v Powar and Powar* [2009] 2 Cr. App. R. 8. In that case, as in this, there was no real concern about the presence of the witness at the time of the crime and so their opportunity to witness the crime. The question was whether there was any reason to doubt the witnesses' creditworthiness or trustworthiness. In that case, as in this, there had been effective cross-examination of the witnesses as to the crucial issue of the view that each witness had of the incident and opportunity to explore whether the evidence of either of them might have been tainted or contaminated by rumour, suggestions or discussions between themselves. The Court being satisfied that the order had been properly made in the first place and being satisfied about the concerns that had been raised, kept the anonymity order in place.
17. Having made myself fully acquainted as did Justice Quin, with the detailed information that has been available about the background of witnesses B and E, and being satisfied that the Crown has continued to fulfill its obligation of discovery and disclosure in that

regard, I am satisfied that I am appropriately informed to be able to decide upon the present question of whether the anonymity orders should be lifted.

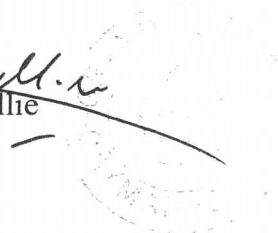
18. I am satisfied that they should not be lifted.
19. First, this is for the reason that there remains nothing about the background or circumstances of either Witness B or Witness E to suggest that either witness would have a motive to lie so as to inculcate the defendant. This is, in essence, the primary concern that is said to arise from the nature of the inconsistencies or contradictions which have been identified in respect of the evidence given respectively by the witnesses.
20. Secondly, there is nothing about the inconsistencies or contradictions which have been identified which must inexorably lead to a conclusion that either witness has deliberately lied to this Court.
21. Such as those inconsistencies or contradictions may be, I am satisfied that a fair trial of the defendant remains eminently achievable without the need to disclose the identity of the witnesses.
22. I do not think it is either necessary or appropriate to traverse and comment upon each of the identified inconsistencies or contradictions now.
23. Suffice it to say that I have indeed kept the witnesses under constant scrutiny as they testified and have kept constantly in mind the need to ensure that the defendant's right to have these witnesses properly examined is ensured.
24. From all the circumstances of this case, including the known circumstances of the witnesses themselves, I remain satisfied that this is not a case in which the impartiality or trustworthiness of the witnesses should be of concern.

25. Having reached that conclusion, it is not immediately apparent what could be sought to be achieved by recalling either witness for further cross-examination – the secondary application of the defence.

26. Nonetheless, I am amenable to being persuaded otherwise.



Hon. Anthony Smellie
Chief Justice



December 13 2011