IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEALS Nos 17 and 18 of 2010
(SCA 14/10)
C#0351/2010

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 11(1) OF THE CRIMINAL EVIDENCE (WITNESS ANONYMITY) LAW 2010

Between:

HER MAJESTY THE QUEEN

Appellant

V

ROGER BUSH, JOSE SANCHEZ AND ROBERT CRAWFORD

Respondents

Before: **The Rt. Hon. Sir John Chadwick, President**
The Hon. Mr Justice Mottley, JA
The Hon. Mr Justice Conteh, JA

Appearances: Hon. Solicitor General, Ms. Cheryll Richards QC and Ms. Kirsty-Ann Gunn ,Crown Counsel for the Appellant. Tim Spencer QC instructed by Nicola Moore of Priestleys for the 1st Respondent (Roger Bush), Orland Pownall QC instructed by Lee Freeman of Priestleys for the 2nd Respondent (Jose Sanchez), and Ben Tonner of Samson and McGrath for the 3rd Respondent (Robert Crawford).

Date heard and Judgment delivered: 12th August 2010
Reasons released: 26th November 2010

CAYMAN ISLANDS COURT OF APPEAL

REASONS FOR JUDGMENT

Sir John Chadwick, President

1. On 1 April 2010, Roger Bush, Jose Sanchez and Robert Crawford were charged jointly with the murder of Alrick Ricardo Peddie.

2. The material which led to the arrest and charge of the three accused included the statement, dated 26 March 2010, of a witness who, for reasons of anonymity, has been known as "Tom Cruise". Tom Cruise made a second witness statement on 31 March 2010. Further witness statements were made, on 27 March and 1 April 2010, by a second witness known as "James Brown".

3. On 20 April 2010, the Crown applied to Chief Magistrate Ramsay-Hale, pursuant to Section 11(1) of the Criminal Evidence (Witness Anonymity) Law 2010, for a Witness Anonymity Order in respect of the witness, Tom Cruise. That application was made without notice to the accused. The Chief Magistrate, having expressed herself satisfied that the conditions for making such an order were met, made the order sought in the following terms:

> "1. the witness's name and other identifying details are to be withheld from the Defendants and their legal representatives;
>
> 2. the witness's name and other identifying details are to be removed from materials disclosed to any party to the proceedings;
>
> 3. the witness may use a pseudonym, namely 'Tom Cruise';
>
> 4. the witness is not to be asked questions of any specified description that might lead to the identification of the witness;
>
> 5. the witness is to be screened from all persons in the Court except the Magistrate for the purposes of a preliminary inquiry and the judge and any jurors (if applicable) for the trial; and
>
> 6. the witness's voice is to be subjected to modulation."

On 27 April 2010, the Crown sought and obtained a Witness Anonymity Order in similar terms in respect of the witness "James Brown".

4. The orders were served on the accused or their legal representatives. They filed Notices of Intention to Appeal to the Grand Court against those orders. Those appeals came before Justice Quin on 11 and 21 June 2010. For the reasons which he gave in a judgment dated 23 June 2010, he held – correctly in our view – that he had no jurisdiction to entertain those appeals.

5. On 25 June 2010, the matter came back before the Chief Magistrate on a summons, issued on behalf of the Attorney-General, seeking a review of the orders made on 20 and 27 April 2010. On consideration of the further material that was

then put before her by the Crown, and on hearing the submissions made on behalf of the accused, the Chief Magistrate concluded that she could no longer be satisfied – "having regard to the confidential information disclosed to the Court today" – that a Witness Anonymity Order in respect of the witness, Tom Cruise, was necessary. She further concluded that "given the evidence disclosed by the Crown today in elaboration of the confidential part of this application" she was no longer satisfied so that she felt sure that the accused could have a fair trial if the identity of the witness, James Brown, were not disclosed. Accordingly, she refused the orders sought; but, as she put it, made the statutory orders under Section 15(3) of the law subject to appeal.

6. By notices dated 28 June 2010, the Crown appealed to this Court, pursuant to Section 15(5) of the Law, from the Chief Magistrate's refusal, on 25 June 2010, to make the Witness Anonymity Orders sought. On 11 August 2010, the Attorney-General gave formal notice that the Crown did not intend to pursue an appeal in respect of the witness, James Brown.

7. In those circumstances, the only appeal before this Court was that in respect of Tom Cruise. On the conclusion of the oral arguments advanced on behalf of the Crown and on behalf of each of the accused, the Court considered, in closed session, certain confidential material on which the Crown relied. Having done so, the Court was not satisfied that the taking of the measures proposed would be consistent with the accused receiving a fair trial.

8. It followed from that conclusion that it was not open to this Court to make the Witness Anonymity Order sought. The Court indicated that the Crown's appeal would be dismissed; and that it would put its reasons in writing.

The Criminal Evidence (Witness Anonymity) Law 2010

9. The Criminal Evidence (Witness Anonymity) Law 2010 came into force on 16 March 2010. The relevant provisions are found in Part III (Anonymity in Criminal Proceedings). They are in these terms, so far as material:

"11(1) A court may make a Witness Anonymity Order in order to ensure that the identity of the witness is not disclosed in or in connection with the criminal proceedings.

(2) The measures that may be required to be taken in relation to a witness to which a Witness Anonymity Order applies, include measures for securing one or more of the following –

(a) that the witness's name and other identifying details may be -

(i) withheld; or

(ii) removed from materials disclosed to any party in the proceedings;

(b) that the witness may use a pseudonym;

(c) that the witness is not asked questions of any specified description that might lead to the identification of the witness; or

(d) that the witness is screened to any specified extent; or

(e) that the witness's voice is subjected to modulation to any specified extent.

(3) Sub-section (2) does not affect the generality of sub-section (1).

(4) Nothing in this section authorises the Court to require:

(a) the witness to be screened to such an extent that the witness cannot be seen by -

(i) the Judge or other members of the Court, if any; or

(ii) the jury, if there is one;

(b) the witness's voice to be modulated to such an extent that the witness's natural voice cannot be heard by any persons within paragraph (a)(i) and (ii).

(5) In this section "specified" means specified in the Witness Anonymity Order concerned.

. . .

12(1) An application for a Witness Anonymity Order to be made in relation to a witness in criminal proceedings may be made to the Court by the Prosecutor or the Defendant.

(2) where an application is made by the Prosecutor, the Prosecutor shall –

(a) unless the Court directs otherwise, inform the Court of the identity of the witness; and

(b) not to be required to disclose in connection with the application –

(i) the identity of the witness; or

(ii) any information that might enable the witness to be identified,

to any other party to the proceedings or his legal representatives.

(3) . . .

(4) Where the Prosecutor or the Defendant proposed to make an application under this section in respect of a witness, any relevant material which is disclosed by or on behalf of that party before the determination of the application may be disclosed in such a way as to prevent –

(a) the identity of the witness; or

(b) any information that might enable the witness to be identified,

from being disclosed except as required by sub-section (2)(a) or (3)(a).

(5) . . .

(6) The Court shall give every party to the proceedings the opportunity to be heard on an application under this section.

(7) The Court may, notwithstanding sub-section (6), hear one or more parties in the absence of a defendant and his legal representative, if it appears to the Court to be appropriate to do so in the circumstances of the case.

(8) . . .

13(1) Upon an application pursuant to section 12, the Court may make a Witness Anonymity Order only if it is satisfied that the following conditions are met –

(a) that the measures to be specified in the order are necessary -

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

(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 those measures would be consistent with the Defendant receiving a fair trial; and

(c) that the importance of the witness's 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

> 15(1) Where a Court refuses an application for a Witness Anonymity Order, the applicant may appeal to the Court of Appeal against that refusal.
>
> (2) . . .
>
> (3) If an applicant has indicated an intention to appeal a refusal, the Court which refuses an application for a Witness Anonymity Order shall nonetheless make the order as requested by the applicant and that order shall be endorsed with the words "subject to appeal".
>
> (4) An order made under sub-section (3) has effect until the appeal is determined or otherwise disposed of.
>
> (5) The Court of Appeal shall consider afresh the application for a Witness Anonymity Order and section 12(2) to (8) applies accordingly to the determination of the application by that Court."

Decisions under the United Kingdom Act

10. The Criminal Evidence (Witness Anonymity) Law 2010 was enacted in terms which, for present purposes, are indistinguishable from the relevant provisions in the United Kingdom Criminal Evidence (Witness Anonymity) Act 2008. The United Kingdom Act was enacted following the decision of the House of Lords in *The Queen v Davies* [2008] UKHL 36; [2008] 1 AC 1128. The operation of that Act was reviewed, at some length, by the Court of Appeal of England and Wales in *The Queen v Mayers (Jordan)* [2008] EWCA Crim 1418, [2009] 1 Crim App R 30.

11. In *The Queen v Mayers* Lord Judge, Chief Justice, delivering the judgment of the Court of Appeal of England and Wales, described a Witness Anonymity Order under the United Kingdom Act as "the special measure of last practical resort". He went on to say this:

> "There was a degree of unreality about the submission that witness relocation should normally provide a practical alternative to an Anonymity Order. We shall assume for present purposes that all the necessary funding would be available to relocate every anonymous witness, and provide the witnesses and their families with a new identity and employment. By definition, however, the witnesses would be cut off from all their roots, and have to start completely new lives: so would their spouses or partners and their children. The interference with the life of any such witness would be tumultuous, and would effectively penalise him for doing his duty as a citizen. Witness relocation can only be a practical or alternative in the rarest

> of circumstances, and certainly if in effect forced on the witness, would itself engage his or her right to a private life."

12. Those observations have particular force in a relatively small island community such as that on Grand Cayman. Practical considerations dictate that relocation would have to be "off island". In addition to the factors described by Lord Judge in *Mayers*, there would be the need to make arrangements in a foreign jurisdiction for a new identity and employment for the witness and his or her family.

13. Lord Judge went on to observe that:

> "The obligations of the Prosecution in the context of a Witness Anonymity application go much further than the ordinary duties of disclosure. As we shall when we examine the statutory considerations a detailed investigation into the background of each potential anonymous witness would almost invariably be required."

14. He developed that requirement in the context of examining the considerations mentioned in sub-section (2) of Section 4 in the United Kingdom Act (Section 14 in the 2010 Law). He said this:

> "The first consideration in effect restates the common law principle that the defendant is normally entitled to know the identity of any witness who gives incriminating evidence against him, and incorporates it within the statutory framework. That is his "general right", and its promulgation also acknowledges the potential disadvantages to the defendant if he is ignorant of the witness's identity, and reinforces the principal of open justice. This first consideration is linked with the last. Sub-section (2)(f) reinforces the view we have already expressed that a Witness Anonymity Order does indeed represent a last practical resort.
>
> The considerations in sub-section (2)(b), (d) and (e) are linked in the broad sense that they relate to the weight to be attached to the evidence of the anonymous witness and the safeguarding of the process by which his credibility may, so far as practicable, be objectively verified, and then tested in cross-examination. They can and indeed should apply to every witness in respect of whom an Anonymity Order is sought. In this context, the process of investigation and disclosure is crucial, not simply in relation to previous occasions when the witness may have been dishonest in general, but also whether there may be any reason to question his honesty or motivation in the particular case. The defence statements provide the benchmark against which the disclosure process must be examined. So for example a defendant who believes that he may be

> 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 justified the inference, for example, when it is apparent that the witness was present when a gun was fired, all the circumstances of the killing show 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".

16. The Court then turned to Condition A (which appears as paragraph (a) in section 13(1) of the Law). It emphasised that the Witness Anonymity Order must be "necessary". The requirement went well beyond what might be described as "desirable" or "convenient".

17. The Court went on to consider Condition B (paragraph (b) of what is section 13(1) of the Law). Lord Judge said this:

> "Condition B is facts 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 focussed on the defendant receiving such a fair trial, even when it is the defendant who is seeking an Anonymity Order. Be that as it may, in the vast majority of cases all the express considerations in section 5, 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 expressed 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 at a fair trial."

18. In the context of a consideration of Condition B we were taken to the decision of Mr. Justice Hughes (as he then was) in *The Queen v Aston Bola* (unreported: 18 June 2003) and to the decision of the Court of Appeal of England and Wales in *The Queen v Chisholm (John)* [2010] CWCA Crim 258.

19. The former case, of course, was decided before the enactment in 2008 of the United Kingdom Act. But the judge had to consider, in the context of an application by the Crown for a witness Anonymity Order under common law principles, whether the resulting trial, if such an Order was made, would be fair. He said this:

> "This witness is, on the information which is already known, a criminal embroiled in two extremely unscrupulous trades and he is, secondly, an associate of, or at least known to, both the deceased and the defendant. He is a witness in whose case there is a real risk that if – my emphasis – he is untruthful it will be because of some personal motive. The personal motive might be hostility to the defendant or to associates to the defendant. It might be conceived by the witness himself or it might be held on behalf of associates of his, particularly in a case where there is every indication that there is a feud between two or more rival drug gangs. Alternatively, the personal motive may be a desire to protect the true culprit and to pin the blame on somebody else.
>
> On behalf of the Crown, Mr. Spencer, QC, who if I may say so has like Mr. Joyce presented the case in a manner which has been of considerable assistance to me, submits that it is illusory to suppose that the defendant himself will have any information, even if he is provided with the identity of this witness, with which his veracity can properly be challenged. He says that for two reasons. First he says it is known that the defendant has only been in the United Kingdom since 24th March 2002: thus he had only been here for a little under seven months at the time of the shooting. Says Mr. Spencer, it is most unlikely that in that time a vendetta or a resentment between him and any other material person, including this witness, will have arisen. I understand the reasons why that submission is made but I am afraid I cannot accept it. However long he had been here, the defendant was somebody who had plainly attracted sufficient interest for someone to make a determined effort either to kill him or very nearly to kill him and the witness is clearly somebody who moves in circles in which deep resentment is likely to arise.
>
> Secondly, says Mr. Spencer, the volume in police intelligence which has been available to the defence is such that it is most unlikely that there is any lurking grievance or dispute which has not been revealed by the police enquiry. I paid tribute to the intensive nature of the police enquiries and I am absolutely satisfied that they have done everything they could and a good deal more than many people would have done but it is, I am afraid, no substitute for what is in the defendants own head. It seems to me that there is no answer to this question: how is the defendant to be put in the same position as he would be if he were able to say, "Oh, well, if it is Bloggins, I can tell

you why he might be saying this"? With all the resources at their disposal no police team would claim to have the same knowledge of what is happening in disputed territory between groups or as to who is part of which group to the same extent as somebody who is personally involved in it.

By contrast, Mr. Joyce draws attention to the fact that an inevitable concomitant of the witness's anonymity is that, for example, exactly what he did in order to sustain the convictions that he has cannot be known, his associates, who may be absolutely critical to these events, are not known and cannot be explored, nor can enquiries be made as to any non drug related motive that there may be, or most any other disputes to which he may be party. Mr. Joyce offers, simply by way of example, hampered as he is by lack of information, that nobody knows whether the witness has, by reason of immigration difficulties or other personal troubles, debts or scores to pay.

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

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 such as well as that of the defendant is that that 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.

I have asked myself whether I should take the view that the trial process contains its own cure for any possible risk to the defendant. If this trial were to proceed with Fish giving evidence anonymously

> the defence would be able not only to expose his criminal habits and unsatisfactory personal history but they would also undoubtedly be able to draw powerful attention to the limits of their information and, as they would say, no doubt, to the way they have to proceed with one or both hands tied behind their back. Given that the burden of proof is firmly on the Crown to a high standard, would that secure a fair trial?
>
> I regret to have reached the conclusion that that answer is not sufficient. In a very serious case of this kind there is an instinct in respectable jurors to want to see the culprit brought to account if they can and it seems to me that they would be disabled from reaching a safe verdict by not being able to consider not just the hypothetical possibility of a personal motive for untruthfulness but any personal motive which could actually be asserted if his identity were known."

20. The latter case, *The Queen v. Chisholm (John)* on which The Crown relies heavily, was an appeal from conviction following a trial at which a number of witnesses for the prosecution had given evidence anonymously pursuant to rulings made by the trial judge under the United Kingdom Act. One of the grounds for appeal was that the Witness Anonymity Order in relation to a witness "X" ought not to have been made because there were grounds to believe that X was holding back on matters which might have been helpful to the appellant. It was said that he had refrained from disclosing those matters fully because he had been corrupted by one Smart. Lord Justice Toulson giving the judgment for Court of Appeal, said this:

> "Furthermore, the theory as to X being compromised by Smart was just that, and no more, on any material before the Judge. Complaint was made by Mr. Elvidge that he was not able to explore full details of any common relationships which there might be between X and Smart, i.e. their mutual knowledge of somebody who might have been an intermediary, for fear that such line of questioning would ultimately narrow the range of people who might be X. But that is no basis for a conclusion that the proceedings were unfair, absent some more solid foundation for the suggestion of the corruption of X, which was in truth tenuous.
>
> It was also submitted that there ought to have been made available to the appellant's legal team confidential material relied on by the prosecution in support of the witness anonymity applications: at least to the extent that the material raised matters to which the appellant might have been able to put forward answers had he known what the material was. Indeed, at one stage Mr. Elvidge's argument seemed to be that, not merely should there be disclosure of the material relied upon to persuade the judge that the statutory criteria were met, but

also that the appellant should have an opportunity to explore whether the relevant source of that material might have a motive to implicate the appellant which the court and the prosecution and the police could not possibly imagine unless the appellant was given all the material necessary for him to be able to say whether there was such a possible motive.

If fairness required disclosure of these matters it is obvious that the statutory provisions would be unworkable in many, if not most all, cases. In argument, the example was given of a witness who is a former wife or partner of the defendant. The witness tells the police that she is able to give evidence that the defendant has committed a particular crime, but she is terrified of doing so because they were in an abusive relationship and she fears for the consequences. On Mr. Elvidge's argument, the appellant would have to be given the opportunity to rebut the suggestion that he had subjected her to abuse, which would immediately blow her cover. If one extends his argument to the point that the appellant must have the opportunity of investigation whether there might be some motive for falsehood on the part of the witness, beyond the possible suspicion of the police on the material available to them, that would seem to be a submission of general application which would apply to every source of any material relied upon in support of a witness anonymity order. Parliament cannot have had such an intention.

. . .

It is one thing to say that the prosecution need to consider positively whether there is reason to suspect collusion between witnesses. It is quite another thing to submit that when there is no such apparent evidence, the prosecution must nevertheless suppose that there is such collusion and set out in order to be able to prove the negative. This would be to require the prosecution to prove that the haystack does not contain a needle."

The underlying facts

21. With that guidance to the approach which should be adopted in cases where a Witness Anonymity Order is sought, we turn to consider the facts in the present case. For the purposes of the appeal we can take those facts from the summary prepared by the prosecution:

> "On Wednesday the 24th May 2010 about 3.18 p.m. Emergency Communications Centre received a report that a male had been shot outside house #275 Willie Farrington Drive, West Bay.
>
> Officers responded. On their arrival, a male was observed on the ground at the back of the said house face up, unconscious and not breathing. The victim received multiple gunshot wounds. He was

identified as Alrick Ricardo Peddie, born on the 7th October 1984, a Jamaican national married to a Caymanian and has a son. A total of nine shell casings were recovered along with a machete beside his body.

Crime scene:

The crime scene was examined by Scene of Crime Officers. A full death scene report was completed, for photographs and samples were taken from the scene.

A red Honda Civic Hatchback in which the three defendants were travelling in at the time of the incident was identified by witnesses.

At about 5.30 p.m. on the same day, the said vehicle was reported stolen by the owner, Mr. Blake Barrell.

On Thursday the 25th March 2010 the said vehicle was observed abandoned in an open lot on Alexander Close, West Bay. It was examined by the Scene of Crime Officers and towed to the Georgetown Police Station for processing.

Post-Mortem Examination:

On Saturday the 27th March 2010 the Pathologist Dr. Bruce Hyma carried out a post-mortem examination on Alrick Peddie at the Georgetown Hospital. Peddie's wife made a visual identification and confirmed this in writing.

Death was caused by multiple gunshot wounds from a 9 millimetre bullet. Five bullets were recovered from his body. The trajectory of one of the bullets fractured his right thigh bone, the remaining four to his body in which some went through his spine, his sternum, his heart and lung. Entry wounds are to the back of the body of the deceased.

Facts:

The vehicle the defendants were in, was seen entering the yard in which the deceased was, just seconds before gunshots were fired. All bullets entered through the deceased's back. There was no-one else in the yard with the deceased at the time except the three men who entered the yard in the said vehicle."

22. Two of the three accused were interviewed and arrested on 26 March 2010: the third, Jose Sanchez, was arrested on 28 March 2010.

The witness statements

23. The witness Tom Cruise made two statements. The first is dated 26 March 2010. In its edited version it reads as follows (so far as material):

> "On Wednesday 24th March 2010, I witnessed the murder of Alrick Peddie, also known as 'Bling'. I am willing to give information as it

relates to the murder, however I am in fear for my safety and for my life. I do not wish for my identity to be revealed at any time.

On Wednesday 24th March 2010 about 3 p.m. I was around the area when I saw Bling driving in with his car and parked up. I saw a red Civic hatchback with doughnut rims waiting to turn into the yard.

The Civic was tainted dark and it is owned by a guy I know as 'Blake'. The car turned into the yard and I looked in the direction of the car. The car stopped about twelve to fifteen feet from where I was standing. I looked in the car and I saw three men. The driver of the car was a guy I know as 'Deward'. I have known Deward for more than ten years and he lives in West Bay. I do not know the exact name of the road he lives on, but I know where he lives. The person travelling in the front passage seat of the vehicle had a shirt partially over his face and he was wearing shades. He is clear skinned and skinny, I recognised him as Jose Sanchez, who is also called 'Pedro' or 'Ganja baby'. I have known Pedro for over ten years, however I do not know where he lives. The way the shirt was positioned over his face still allowed me to recognise him clearly, as it was only covering his hair and his ears. The last man in the rear of the car is a man I know only as 'JR' or 'Young superman'. I have known JR for about ten years also. JR is around sixteen to seventeen years old and he lives in Pearl Smith Drive, West Bay, JR is constantly in trouble with the police for stealing cars.

When the car pulled into the driveway and stopped, I got to look at the occupants of the car for between five to ten seconds. The view I had of the occupants in the car was clear and unobstructed, it was daytime and outside was sunny and hot. I can recognise all of these men if I see them again, as I know them well. When I saw that Pedro had the shirt over his face I knew right away that they were up to no good and I ran off. I heard was sounded to me like gunshots and kept running. I heard about six to seven gunshots and some sounded hard and some sounded soft. I kept running until I heard the gunshots stop and then I walked back.

The distance I ran was approximately from West Bay Police Station to the first pink shop on Rev Blackman Road. It did not take me a long time to walk back and when I reached there, I saw Bling lying on the ground and people around him. One person was holding his head and the other person was holding his feet. I also heard people crying. I spoke to the people over Bling however, I do not wish to name them. I ask them if they saw who was in the car and they said yes. I then called out the names to them and they said yes, those were the people in the car.

I then left them out there with Bling's body because I could not bear the site of seeing him dead. I would like justice for Alrick, while at the same time I fear for the safety of myself and my family."

24. On 31 March 2010 the witness Tom Cruise made a longer statement. In its edited version it is in these terms:

> "On Friday 25th March 2010 I gave a statement to the police relative to the murder of Alrick Peddie which I witnessed. In the statement I identified the person responsible for killing him as Deward, Pedro - also known to me as Jose Sanchez or Ganja baby - and JR. I said I have known all three of these men for over ten years. I know them so well that I know that Deward has a child from a lady named Janet, and that he is a drug lord. I know that Jose Sanchez has two children from a lady named Evelyn. I know that JR's fathers name is Kevin and they call him superman, I also know that JR's brother Henry who was just released from prison. Today 31st March 2010 I went to a location where I saw an officer who was dressed in the uniform of the Royal Cayman Islands Police Service. The officer showed me some photo spreads and she told me she would like me to look at the photos and see if I could identify the persons I referred to as Deward, Jose Sanchez, Pedro, Ganja baby or JR were present in any of the photo spread. She also said she was not saying they were in the photo spread but she wanted me to take my time and look and see.
>
> . . .
>
> I am positive that these were the three men who were in the car and who killed Alrick Peddie.
>
> On Wednesday 24th March 2010, when I was present and witnessed the incident, there were no other people around that I saw. When the car stopped it took them about ten to fifteen seconds before I ran off but before running off I saw both car doors fly open but I did not wait around to see who got out. A man got something over his face, but when I say this I mean that the shirt covering his hair and his ears. I do not know what "Bling" did because I ran for my safety because I felt the men were up to no good.
>
> There was a black handle machete by the side of the driver's door where you would pop the switch for the car track. Bling always travelled with this machete in his car. When I ran off I heard the first shot about five to six, seven seconds after; and then I heard the remaining shots in quick time after the first shot. The shots that I heard sounded like they were coming from behind me and the only people behind me were "Bling" Deward, Jose Sanchez and JR, however I did not see any of them with anything in their hands. When the gunshots stopped, I was approximately a hundred metres away and it took me less than thirty seconds to get there.
>
> I then walked back along the route I ran and when I saw Bling lying on the ground with the two men over him I saw the same black machete handle that was in his car lying a few feet from his body. I do not know how the machete got out of the car and next to Bling's body. When I got back there I did not see the red car nor did I hear

> when the car left. It took me about two minutes to get back to where I saw Bling's body, because I took my time because I wasn't sure if they were still there and if it was safe to go back.
>
> When I say I was not sure if they were still there I mean the Gunmen Deward and Pedro.
>
> When the gunshots stopped, I did not run back I walked. The two men that were trying to assist him and they were not present when the car drove into the driveway or when I ran off. I do not know where they came from."

25. The statements made by the witness Tom Cruise were confirmed in some respects by the statement made on 27 March 2010 by the witness known as "James Brown". He stated there that, on Wednesday 24 March 2010, at about 2.30 p.m., he was at the Batabano Plaza. He saw a red Honda Civic which he recognised as being owned by a man known to him as Blake. The vehicle stopped at Batabano Plaza and he saw that there were three persons inside the car. He didn't recognise the driver of the vehicle but said that the person in the back seat looked like Robert Crawford. He positively identified Jose Sanchez, who he also knew as "Pedro" and "Ganja baby". He stated that Jose Sanchez came from the vehicle and went inside a store at the Plaza. He also saw Alrick Peddie drive past Batabano Plaza and turn into Willie Farringdon Drive. He observed Jose Sanchez getting back into the red Honda Civic. The car drove off and turned into Willie Farringdon Drive. Shortly afterwards he heard about five to seven shots. He jumped the fence separating Batabano Plaza from 275 Willie Farringdon Drive. He went into the house at that address, where he saw Alice Booth. He spoke to her. He went outside, where he saw Alrick Peddie lying face down on the ground.

The confidential material

26. As we have said, on the completion of *inter partes* submissions, the prosecution provided confidential material to the Court in the absence of the accused and their representatives. We considered this material – and heard submissions upon it from the Crown - before reaching our conclusion that the appeal should be dismissed. We understand that, following that decision, the prosecution has provided the name of the witness Tom Cruise to the accused and their representatives. In those circumstances, the Crown has confirmed that, save in two respects, there is no

longer a need to preserve confidentiality in the material which was put before us. The two respects in which the need for confidentiality remains are: (i) material comprising Royal Cayman Island Police reports which contain sensitive information as to police intelligence and methods; and (ii) parts of a family liaison log. Accordingly, we say nothing in this judgment in relation to those matters.

27. The confidential material disclosed that the witness Tom Cruise was some 25 twenty five years of age, that he resided in West Bay – where he had extended family connections - and that he was married with two small children. Two family members resided at #275 Willy Farringdon Drive.

28. The material confirmed what was already known from the edited witness statements to which we have referred: that the witness had known all three defendants for some ten years. This – it was said - was to be expected having regard to the "compactness of West Bay, a community in which "everyone is, in a sense, connected by either friends or a family". There was some more specific connection between the witness and two of the defendants: in that Roger Bush had a child by his cousin, and Jose Sanchez had dated another cousin.

29. There was a "loose association" with a number of named individuals whom, it was suggested on behalf of the accused, might be "gang" members. But, again, "loose association", in this context, meant "he knows . . . these persons – because of the compactness of the West Bay district, this would cause everybody to know everybody in a sense because of . . . he being a person of a particular age then he associates himself with these persons who might come to the plaza or they might go to events . . . in a social way". They would "meet and greet" as young men within the district who had attended school together.

30. The confidential material contained evidence that the Royal Cayman Island Police were satisfied from their checks, enquiries and police intelligence that the witness Tom Cruise was not involved in any "gang" activity. Nor did the premises at #275 Willy Farringdon Drive feature in any gang activity. The Police were unable to identify any reason or motive which would lead the witness to give false evidence against the accused: there was nothing to suggest that he bore ill-will against any

of them. Nor was there anything to suggest any collusion between this witness and the witness, James Brown.

31. In his witness statement dated 26 March 2010 the witness Tom Cruise had stated that, although he was willing to give information as it relates to the murder of Alrick Peddie, he did not wish for his identity to be revealed at any time. As he put it: "I would like justice for Alrick, while at the same time I fear for the safety of myself and my family." It is clear from the confidential information provided to us that the Police regarded that fear as well founded: there had been numerous instances where witnesses to suspected gang killings had been threatened or killed. The Police had thought it necessary, in the present case, to relocate the witness, Ton Cruise, off-island, pending trial, for his safety. The confidential material included a witness statement dated 29 July 2010 in which the witness had said this:

> "I believe that if my identity is disclosed to the defendants this will cause a great risk of danger that might also result in my death or serious harm against my family. I believe this, because I am the main witness for the prosecution and my evidence could result in the conviction of the defendants that killed Alrick Peddie, which would mean that they are sent to prison for life and they will be well aware of these facts.
>
> The defendants that I am giving evidence against have already demonstrated that they have access to firearms which have nor been recovered by the Police and are willing to use them again to kill. The level of violence that the Cayman Islands have experienced during the past few months has only heightened my fears for my safety and those of my family who are close to me.
>
> If I am not permitted to give evidence anonymously then I will refuse to give evidence at all because I am in fear for my safety and the rest of my family for the reasons I have stated."

32. We should add for completeness that – as was disclosed to the accused and their advisers - the witness Tom Cruise has a number of convictions. Four are for consumption or possession of ganja: in respect of which probation orders were made for twelve months. The fifth was for failure to surrender to custody, for which he was admonished. We were not persuaded that those convictions – for what may fairly be described as low level offences - gave rise to a risk that the

accused might not have a fair trial if the witness Tom Cruise were to give evidence subject to a Witness Anonymity Order. But they provide some further indication that the witness is, at least, on the fringe of the criminal community in West Bay.

The section 13 Conditions

33. As we have said, section 13(1) of the Law of 2010 provides that the Court may make a Witness Anonymity Order only if it is satisfied that each of three conditions are met:

> **Condition A** – that the measures to be specified in the order are necessary in order to protect the safety of the witness or another person or to prevent any serious damage to property; or to prevent real harm to the public interest;
>
> **Condition B** – that, having regard to all the circumstances, the taking of those measures would be consistent with the Defendant receiving a fair trial; and
>
> **Condition C** - that the importance of the witness's testimony is such that in the interest of justice the witness ought to testify and either (i) that 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.

34. In *The Queen v Mayers* Lord Judge suggested that it would usually be convenient for the Court to ask itself, first, whether it was satisfied that the requirements of Condition C were met. We were satisfied on the material which has been put before us both that the importance of the testimony of the witness Tom Cruise is such that in the interests of justice he ought to testify; and that he would not testify (or that there would be real harm to the public interest if he were to testify) if the proposed Witness Anonymity Order is not made. Accordingly, we were satisfied at the conclusion of the hearing that the requirements of Condition C were met.

35. Turning to Condition A, we were satisfied, also, that the measures sought by the proposed order were necessary in order to protect the safety of the witness Tom

Cruise and members of his family and to prevent real harm to the public interest. In this respect we differed from the view which – it seems – was taken by the Chief Magistrate at the hearing before her on 25 June 2010 and recorded in her written ruling dated 5 August 2010. She was, we think, persuaded to take the view that the measures sought by the proposed order were not necessary because she understood the witness to be in a secure location off-island. We were told that she did not address her mind to the position following trial. Nor did she address her mind to the safety of the witness's immediate family, who had remained on the island. The evidence given to this Court in the course of examining the confidential material satisfied us that it was really quite impractical to relocate the witness, his wife and children off-island on a permanent basis; and that, if that could not be done, his safety (when he returned to Grand Cayman following a trial) and the safety of his wife and children while he was off-island could not be secured. We do not read Condition A as limited to the period up to the point at which the witness gives evidence. We are satisfied – and the Crown did not suggest otherwise - that it is necessary to have regard to the safety of the witness and his family after trial. It is impossible to think that, if the threat to the witness' safety exists before he gives evidence, it will cease to exist once he has given evidence which leads to a conviction. There would be an obvious motive to cause him harm as an example to others.

36. Nevertheless, although we were satisfied that Conditions A and C were met in the present case, we were not so satisfied in respect of Condition B. We had regard to the need – emphasised by Lord Judge in *The Queen v Mayers* in the passage which we have cited – to address each of the matters in section 14(2) of the Law. This is a case in which the evidence given by the witness Tom Cruise might well be decisive: assessment of his credibility would be a very important factor in reaching a verdict. As we have already indicated, we were not persuaded that his own previous convictions for what we have described as low level offences suggested that the witness had a tendency to be dishonest – or a motive to be dishonest in the circumstances of the case – but we cannot ignore the fact that those convictions indicate that he is, at the least, on the fringe of the criminal community in West

Bay. We acknowledge – and gave weight to - the general right of a defendant in criminal proceedings to know the identity of his accuser.

37. The matter to which we gave particular weight is that mentioned at paragraph (d) of section 14(2) of the Law: the need to be satisfied that the witness's evidence could be properly tested without his identity being disclosed. It is an important feature of this case that the witness Tom Cruise and the accused have been known to each other over a period of some ten years. It is said that they have grown up together in the same community. This feature, as it seemed to us, gave particular force – in the present context – to the observations of Mr Justice Hughes in *The Queen v Aston Bola*, which we have set out earlier in this judgment. Given the association between the witness and the accused, there is really no answer to the question – in this case as in *Aston Bola*- "how are the accused to be put in the same position as they would be if they were able to say 'Oh well, if it is Bloggins, I can tell you why he might be saying this' ". As Mr Justice Hughes pointed out, there is – in a case of this nature – really no substitute for the knowledge which the accused may have as to any motive which might lead the witness to give untruthful evidence.

38. We should make it clear that we have not reached the conclusion that the accused could not have a fair trial if the witness Tom Cruise were to give evidence subject to a Witness Anonymity Order. That is not the test which Condition B requires the Court to apply. The question for the Court – under section 13(2)(b) of the Law - is whether it is satisfied that, having regard to all the circumstances, the taking of the measures in the proposed order would be consistent with the accused receiving a fair trial. It is enough, as it seemed to us, that the Witness Anonymity Order sought in the present case might lead to an unfair trial of these accused. It would, we think, be very likely to lead to a perception – at least in the minds of the accused – that the trial was unfair. That perception could not be dismissed as fanciful. In those circumstances the Law does not permit a Witness Anonymity Order to be made.

Conclusion

39. It is for those reasons that we dismissed the Crown's appeal from the Chief Magistrate's refusal to make a Witness Anonymity Order in respect of the witness Tom Cruise. As we have said, the Crown indicated, on 20 August 2010, that it did not intend to pursue its appeal against the refusal to make a Witness Anonymity Order in respect of the witness James Brown. Accordingly, we dismissed that appeal also. The orders made under section 15(3) of the Law are discharged.

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Chadwick P

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Mottley JA

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Conteh JA