Recent Developments in Criminal Practice & Procedure:

Non-Jury Trials in the High Court and Witness Anonymity Orders

Presented by:

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At the:

Organisation of Eastern Caribbean States (OECS)
10th REGIONAL LAW FAIR
13th – 15th September 2013
British Virgin Islands

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I think it would be safe to assume that virtually all criminal lawyers, magistrates and judges are in favour of the trial by jury system. Rights to a jury trial continue to be cherished by the public even in the face of occasionally controversial verdicts. The jury is often described as the "*jewel in the Crown*" or "*the cornerstone of justice*". In fact, it really should only be in exceptional circumstances where the State could force a person charged with serious criminal offences to have a non-jury trial. I am pleased to confirm that in the Cayman Islands, whilst we do have judge alone trials, they are purely at the instigation of the defendant and not the Crown/prosecution.

Northern Ireland

As you can probably hear from my accent, I had the good fortune to be born in Ireland and in the fair city of Belfast. This good fortune remained until approximately 1969 when tragically civil unrest in circumstances which were previously unimaginable broke out. I do not intend to go into the history of the civil troubles in Northern Ireland. Suffice it to say that you had paramilitaries/terrorists on the Republican side prepared to use violence in their quest for a united Ireland, whilst you had paramilitaries/terrorists on the Unionist side, who were prepared to use violence to remain British. As a result a report by Lord Diplock recommended that certain serious crimes with terrorist connections should be tried by a judge on indictment without a jury. This was as a result of concern of juror intimidation and "*the danger of perverse convictions by partisan jurors*".[1] Lord Diplock's report was implemented in 1973 by the **Northern Ireland Emergency Provision Act** which had to be periodically renewed. The act set out certain scheduled offences which were tried by judge alone. The last governing statute was The Terrorism Act 2000. Superseding the Diplock system, this is a power in Northern Ireland to try charges with a suspected paramilitary connection before a judge alone.

Under **The Justice and Security (Northern Ireland) Act 2007**, the DPP may issue a certificate that any trial on indictment of a defendant charged with one or more indictable offences is to be indicted without a jury, if he suspects that the defendant is or is an associate of a person who is or has been a member of a proscribed organization. An organisation is a proscribed organization if, at the material time, it is or was proscribed under section 11 (4) of **The Terrorism Act 2000** and connected with the affairs of Northern Ireland.

If the DPP decides to certify the case for non-jury trial, the certification must be lodged in court or modified or withdrawn before the defendant and any co-defendant committed for trial is arraigned. Failure to lodge the certificate before arraignment will probably be interpreted as rendering non-jury trial void.

[1] Commission on Legal Procedures to Deal with Terrorist Activities in Northern Ireland Report of the Commission to consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland, 1972, Criminal 5185 at 17

(There is no right to trial by jury under **ECHR**. **Article 6** of the **ECHR** is not engaged, depriving the accused of trial by jury does not breach his right to a fair and public hearing). **Re Shuker and Ors [2004] NI 367**.[2]

Under the Diplock trials, the sovereign Parliament stipulated what charges would be automatically tried without jury. The new statute differs from the Diplock regime in that the onus is placed on the DPP to make a positive decision that a defendant should be tried without a jury.

[2] Criminal Procedure in Northern Ireland (2nd Edition) BJAC Valentine at paragraph 10.03 on page 255

Belize

On 13th May 2011 during a Special Sitting of the House of Representatives, two Bills were introduced which paved the way for the use of non-jury trials in Belize, the **Indictable Procedure (Amendment) Bill 2011** and the **Juries (Amendment) Bill 2011.**

The Bills sought to allow for non jury trials (mandatory) in relation to the specified (and exhaustive) list of: murder, attempted murder, abetment of murder and conspiracy to commit murder. The Bill further provided that the Prosecution were entitled to apply to the court for the allowance of a non jury trial in limited circumstances, notably jury tampering/intimidation of witnesses, witness fears, gang related offences and complexity, length and burdensome nature of the trial. The Prosecution could apply on the basis of ***interests of justice.*** The Bill failed to provide further definition of 'interests of justice'.

The legislation came into force on 1st August 2011 and is known as the **Indictable Procedure (Amendment) Act 2011** and the **Juries (Amendment) Act 2011.**

The Acts permit the use of non jury trials for three reasons:

1) **Section 65A** Mandatory use for (a) murder (b) attempted murder (c) abetment of murder (d) conspiracy to commit murder.

2) **Section 65B (2)** Prosecution may apply to the court for a non jury trial on the basis of (a) jury tampering or witness intimidation (b) witnesses afraid or unwilling to give evidence (c) gang related offence (d) complexity of trial, length of trial and the burdensome nature of the trial and the use of juries in the interests of justice.

3) The Defendant is also afforded the opportunity to apply for a non jury trial on the basis that pre trial publicity which would mean that the defendant would not receive a fair trial.

The **Belize Constitution, Chapter 4, March 2012** makes no reference to a constitutional right to jury trial. As is commonplace, **Part II, section 6 (2)** of the Constitution requires that all accused are entitled to be tried before a fair and impartial tribunal.

The first non-jury trial took place on the 15th March 2012 resulting in the conviction of **Akeem Thurton** for the attempted murder of Rodwell Williams.

Turks and Caicos Islands

Although an uncommon feature of much of the Commonwealth and the Caribbean, trial by jury was recognised as a constitutional right in Turks and Caicos. Research suggests that the right was established as early as 1903 with the **Turks and Caicos Islands Constitution Order 1976** being the first Constitution to contain the said right.

Due to political unrest, the **Turks and Caicos Islands Constitution Order 2006, SI 2006/1913** was suspended on 14th August 2009, effectively removing the defendants' constitutional right to a jury trial.

The **Auld Commission of Inquiry 2008-9**, published August 2011 recommended that certain criminal trials should be judge only as a consequence of corruption, intimidation and fear of witness tampering (**para 5.26 – 5.29 Auld Report**). Subsequently, the **Trial Without A Jury Bill 2010** was published on the 14th September 2010 which sought to permit non jury trials at the volition of the judge in the interests of justice, or at the request of the judge, prosecution or defence based on the nature of the offence, complexity and length of the trial.

Published on the 15th November 2010, in Turks and Caicos Islands Gazette Extraordinary Vol 161, No.52, the **Trial Without Jury Ordinance 2010** now permits non jury trials in the interests of justice (**section .4 (1)**) at the behest of the judge or for reasons of nature of the offence, complexity of the proceedings, pre trial publicity or jury tampering (**section 4 (3) (a) – (e)**) at the request of any party to the proceedings (**section 4 (2**)).

The **Turks and Caicos Constitution Order 2011, 2011/1681** came into force on 15th October 2012 with the right to jury trial omitted.

Jamaica

Since 1974, Jamaica has adopted both the 'traditional' jury system and a unique system known as the Gun Court which renders gun crime offences subject to a judge only hearing, the exception to this mandatory requirement being concerned with those defendants whose alleged offences also include murder or treason, these offences being capital offences for which a jury trial is necessary.

The Gun Court was created pursuant to **section 3, Gun Court Act 1974** and came into being on 2nd April 1974. Defendants brought before this court are subject to in camera proceedings chaired by a Supreme Court Justice only.

Initially, these courts were chaired by magistrates, but this was amended by the **Gun Court (Amendment) Act 1976**. This legislation being the result of a challenge as to the constitutionality of the Court and incidental issues relating to separation of powers.[3]

Further, **section 8 (1)** of the **1974 Gun Court Act** identified that those convicted of a scheduled offence were to be sentenced to indeterminate and/or life imprisonment (with or without hard labour), a sentence which was not open to appeal (**section 14 (1)**). However, the **Gun Court (Amendment) Act 1983** granted judges discretion to pass sentences other than the mandatory minimum term.

The Gun Court has been subject to significant criticism, with critics arguing that the objective of speedier trials is far from being achieved. Indeed the Privy Council has found that the delays certain offenders have encountered are unreasonable.[4]

The **Constitution of Jamaica 1962** does not recognize jury trials as a constitutional right. Fair trial provisions are addressed by **Chapter III, section 16 (1)** which requires that all accused must receive a fair, impartial and independent hearing in public (**section 16 (3)**).

A further challenge to the constitutionality of the 1974 Act arose in **Trevor Stone v Queen (Jamaica) [1980] UKPC 5.** Counsel for Stone argued that the right to trial by jury was a right entrenched within the 1962 Constitution. Further, Counsel argued that the Gun Court Act 1974 had been made ultra vires **section 4 (b), section 5 (2)** and **section 9 (b)** of the Constitution and was therefore inconsistent with the right to trial by jury and void. Stone was unsuccessful in his appeal.

[3] Hinds et al v Queen (Jamaica) [1977] AC 195 PC

[4] Herbert Bell v DPP (Jamaica) [1985] 22 JLR 268

United Kingdom

Sections 43-50 of **The Criminal Justice Act 2003 ("CJA 2003")** introduced for the first time in England and Wales the concept of trial on indictment without a jury. There are two different sets of circumstances: fraud trials and jury tampering.

Section 43 of the **CJA 2003** gives the prosecution the right to apply for a trial in the Crown Court to take place without a jury (ie in front of a judge sitting alone). In the case of serious or complex fraud, however, section 43 was never brought into force and has been repealed by the **Protection of Freedom Act 2012, section 113 and schedule 10 part 10** without any replacement provision.

That leaves jury tampering. Where there is a danger of jury tampering, the prosecution will be able to apply for the trial to be conducted without a jury. Further, where the jury has been discharged in the course of a trial because of jury tampering, the prosecution will be able to apply for it to continue without a jury. "Jury tampering" is likely to include threatened or actual harm to, or intimidation or bribery of, a jury or any of its members, or their family or friends or property. For the prosecution's application to be granted in respect of a trial which has yet to take place, the court must be satisfied that two conditions are fulfilled:

a) that there is evidence of a real and present danger that jury tampering would take place (**CJA 2003, section 44 (4)**); and

b) that there is so substantial a risk of jury tampering that it is necessary in the interests of justice for the trial to be conducted without a jury, notwithstanding any steps (eg police protection) that might reasonably be taken to prevent the risk (**CJA 2003 section 44 (5)**).

The court has considerable discretion in the United Kingdom. Where the trial is already under way and the judge is minded to discharge the jury in accordance with his common law powers, because jury tampering appears to have occurred, he must hear representations from the defence and the prosecution as to how he should proceed. In **T [2009] 3 All ER 1002**, the Court of Appeal concluded that it would be appropriate for a court to reach its decision in reliance on sensitive material not disclosed to the defence. If the judge decides to discharge the jury, he may order that the trial shall continue without a jury, if he is satisfied that this should be fair to the defendant. Alternatively, he may terminate the trial and has the option of ordering that the re-trial is to take place without a jury. Again he must be satisfied that the danger of jury tampering is such as to make trial without jury necessary in the interests of justice, notwithstanding any steps that could be taken to prevent jury tampering. In the case of **T**, the English Court of Appeal stressed that the preferred option would be for the judge to continue to hear the case alone rather than to order a re-trial.

In England there is one other provision where the prosecution can seek trial on indictment without a jury under **The Domestic Violence, Crime and Victims Act 2004, sections 17 and 18**. The conditions are that the judge must be satisfied that to have a jury would be impracticable, each count can be tried as a sample of counts and in the overall interests of justice to grant the order.[5]

Cayman Islands

In 1995 the Legislative Assembly in the Cayman Islands introduced new legislation to allow the election of trial by judge alone by the defendant.

Section 129 of the Criminal Procedure Code (2011 Revision) reads:

"*if an accused person is of the opinion that due to the nature of the case or the surrounding circumstances, a fair trial with the jury may not be possible, he may, at least 21 days before the date of the trial or the date of arraignment, whichever is earlier, elect to be tried by a judge alone; and such election shall be made by notice in writing addressed to the clerk*."

Section 129(2) reads:

"*notwithstanding subsection (1) a judge may permit an accused person to make an oral or written election at any time before a jury is empanelled, where such accused person has proven that, because of exigent circumstances, it was not possible for him to make an election within that time limit as specified in subsection (1)*."

And **section 129 (5)** reads:

"*where there are two or more accused persons joined in the same indictment, the election mention in subsection (1) shall only be exercisable by all such accused persons jointly*."

Although **The Criminal Procedure Code** states that the defendant should give at least 21 days notice, what frequently occurs is that the defendant comes into court, he has a studious review of the jury panel, you then see him enter into deep discussion with his attorney and an application is then made for a judge alone trial. What happens in the Cayman Islands is, I am sure very likely to happen in all smaller islands and smaller communities, the defendant sees one or more people on the jury panel who he did not expect to see and who he did not want to see. The court is faced with a late application, but I have always found to be fair to the defendant is the overriding consideration and consequently I have never refused an application for a judge alone trial.

Procedure - No case to answer

Now I am sure that I am not teaching any of you anything new. The "No Case to Answer" submission is governed by the classic dicta of Lord Lane, the then-Lord Chief Justice of England

[5] Blackstone's Criminal Practice 2013 D13.81 on page 1696

and Wales in **R v Galbraith [1981] 1 WLR 1039**.[6] If you follow the guidelines in **Galbraith** you will probably not go far wrong. Our courts in the Cayman Islands have also followed the Northern Ireland case law because they have been dealing with judge alone trials for over 40 years. I give you two very good examples which may be of assistance. The late Lord Lowry stated in **R v Hassan and Ors [1973] NIJB**:

"*my own impression is therefore important which would not be relevant in a trial held with a jury: if I am clear (as I am in this case) that in no circumstances could I entertain the possibility of my being convinced beyond reasonable doubt, or indeed to any accepted standard, by the evidence given for the prosecution there can be no justification for allowing the trial to continue*".

I found this dicta from the late Lord Lowry to be particularly helpful.

Another example is Lord Kerr, who now sits in the Supreme Court, in **Chief Constable v Lo [2006] NICA 3** where he states at paragraph 13:

"*where there is evidence against the accused, the only basis upon which a judge could stop the trial at the directions stage is where he had concluded that the evidence was so discredited or so intrinsically weak that it could not properly support a conviction. It is confined to those exceptional cases where the judge can say, as Lord Lowry did in **Hassan**, that there was no possibility of his being convinced to the requisite standard by the evidence given for the prosecution*".

Lord Kerr went on to state as paragraph 14 in **Chief Constable v Lo**, which again I find extremely helpful:

"*the proper approach of a judge or a magistrate sitting without a jury does not, therefore involve the application of a different test from that of the second limb in **Galbraith**. The exercise the judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that the judge should not ask himself the question, at the close of the prosecution case, "do I have a reasonable doubt?" The question that he should ask, is whether he is convinced that there are no circumstances in which he could properly convict? Where evidence of the offence charge has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict*."

Duties of a judge in a judge alone trial in his judgment

As some of you may know the Cayman Islands was part of Jamaica until Jamaica went independent in 1962. The Jamaica Court of Appeal remained the Court of Appeal for the Cayman Islands until the Cayman Islands Court of Appeal was set up in 1984. We were fortunate to have as our President, Justice Zacca and also on the Court of Appeal was Justice James Kerr also from

[6] Blackstone's Criminal Practice 2013, paragraph D16.55; Archbold Criminal Pleading Evidence and Practice 2013, paragraph 4-364

Jamaica, Justice Telford Georges from Dominica and Justice Kenneth Henry from Jamaica. Later Justice Ira Rowe, former President of the Jamaica Court of Appeal, joined the court and it is his dicta that started our jurisprudence in **Richards v R [2001] CILR 496**. The Cayman Islands looked to the Court of Appeal of Jamaica for guidance to judges of the Grand Court and Magistrates of the Summary Court and indeed applied many of the earlier judgments of judges such as Justice Henderson Downer and latterly Justice Wright in **R v Cameron Jamaica Court of Appeal SCA 77 [1988] unreported**:

"*the judge must demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person, he has acted with the requisite caution in mind. Such a practice is clearly in favour of consistency as the judge will then be less likely to lapse into the error of omission when he sits with the jury or alone*".[7]

Rowe JA stated **at page 507 in Richards v R** (applying Downer JA **in R v Simpson [1993] 2LRC**)**:**

"*when a trial judge sitting alone has advised himself to the applicable principles of law, and given himself any necessary warning, he must indicate clearly in his judgment his reasons for acting as he did, in order to demonstrate that he has acted with the requisite degree of caution in mind as therefore heeded his own warning. No specific form of words is necessary for this demonstration, what is necessary is that judge's mind upon the matter should be clearly revealed*".

More recently in a Cayman Islands court of appeal decision **of Whittaker v R 2010 (1) CILR 29**, Justice Mottley gave the judgment of the full court and applied the classic dicta of Lord Lowry in **R v Thompson (1977) NI 74** where he stated at page 83, paragraph 50:

"***in R v Thompson****, Lowry LCJ giving the judgment of the Court of Appeal in Northern Ireland from a decision of a judge sitting alone said: "while on the subject I might say a word on the duty of the judge when giving judgment in a trial under the* ***1973 Act****. He has no jury to charge and therefore will not err, if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial as to instruct laymen as to every relevant aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view and preferably, to notice any difficult or unusual points of law in order that, if there is an appeal, it may be seen how his view of the law informed his approach of the facts*".

I am sure, like me, some of you wonder how does one find some original thought. If I read the judgments of judges like Henderson Downer, Telford Georges, Lord Bingham, Lord Lowry, I quickly come to the view that it is far better to recognize the clarity of their thought and expression and adopt the same.

[7] Criminal Litigation in the Cayman Islands (3rd Edition) –Deborah Barker Roye, until recently Assistant Director of Legal Studies, Truman Bodden Law School

1. Professor John Jackson and Sean Doran of the Queen's University in Belfast has conducted considerable research into the Diplock courts in Northern Ireland. In the **Scottish Law Reporter** of Tuesday, 14 August 2007 he states that:

"*Even at the feverish height of the troubles, Diplock courts were acquitting 40-45% of defendants before them*".

A professional judge is accountable for his or her decisions more than the lay tryer of fact. Furthermore, the fact that any appeal will be based on the verdict which provides reasons actually allows for a wider opportunity to challenge a conviction than in the case of a simple jury verdict."

Professor Jackson along with Sean Doran, a senior lecturer in law at Queens University, Belfast wrote a book "**Judge without Jury: Diplock trials in the Adversary System**" and stated:[8]

In an article in the Independent entitled "Diplock Courts": a model for British Justice the authors posed the following question:

"*while peace should herald the reaffirmation of jury trial as the norm in all classes of case, a more thoughtfully devised system of trial by judge alone at the election of the accused might be salvaged from the troubled lineage of the Diplock system. In this way, the Northern Ireland legal process might untypically take the lead in the progress of reform on this side of the Atlantic.*"[9]

[8] Judge Without Jury: Diplock Trials in the Adversary System. Clarendon Press Oxford 1995

[9] The Independent Newspaper (UK), 13 September 1995

WITNESS ANONIMITY

In recent years many of us have become familiar with the new concept of "special measures". Special measures legislation in Cayman and many other jurisdictions has been put in place largely to protect vulnerable and intimidated witnesses. Vulnerable witnesses are obviously witnesses under the age of 17 and intimidated witnesses are witnesses too scared to give evidence of serious crime in court proceedings. We have seen the advent of "video link", evidence being given so that a child does not have to necessarily see the defendant or "the screen" which allows the attorneys and the jury to see the witness, but nobody else. Probably the most extreme special measure is the relatively new "Witness Anonymity" Order.

As Deborah Barker Roye stated in her **Third Edition of Criminal Litigation in the Cayman Islands**:

"*a long standing problem in the criminal justice system is securing the evidence of witnesses to serious criminal activities who are fearful that their cooperation with the police and prosecuting authorities will lead to reprisals from the accused, his associates or the criminal community. Many witnesses refuse to assist the police due to fear of such reprisals and in a small jurisdiction, like the Cayman Islands, this is a serious issue*".

The birth of this special measure comes out of a House of Lords decision in **R v Davis [2008] 1 AC 1128**.

A defendant in the first case was charged with two counts of murder, the defendants in the second case with two counts of murder and three counts of attempted murder. At each trial the judge ruled that the witnesses had a genuine fear that if they gave evidence their lives and those of their families and friends would be endangered and accordingly, they could give evidence anonymously. The testimony of those witnesses was "decisive" or represented "the sole evidence" against the defendants. The defendants in both cases were convicted. They appealed to the Court of Appeal in England and the Court of Appeal with a judgment being given by Lord Judge the Lord Chief Justice dismissed the appeal and held:

1. that there was a clear jurisdiction at common law to admit incriminating evidence against the defendant by anonymous witnesses;

2. that a trial was not unfair and the conviction unsafe simply because the evidence of anonymous witnesses in justifiable and genuine fear, whose testimony could be tested in the adversarial process, might be decisive of the outcome;

3. that a trial could take place provided appropriate safeguards were applied and the judge was satisfied that overall it would be fair;

4. that when coming to his decision the judge would usually be acting in anticipation of the evidence as a whole, and certainly in advance of the evidence of the proposed anonymous witness;

5. that, therefore, on appeal following conviction, it might not be sufficient for the court to dispose of the appeal on the basis that, at the time the decision was made, it was not open to criticism;

6. that if the court concluded that the order for witness anonymity had in fact produced an unfair trial, the conviction would be quashed; but that, in the circumstances the decisions in both cases to order anonymity was justified and had not effected the fairness of the trials. Accordingly, the Court of Appeal ruled that the convictions were safe. At the trial there was undisputed evidence from a detective who had specialized in gun-related murder investigations. His evidence was quoted in **R v Davis and R v Ellis [2006] 1 WLR 3130 at page 1134 paragraph 9**:

"M*ost people opt not to cooperate and do not get involved. Doors are not opened, arranged meetings result in a witness not turning up, telephone messages go unanswered and messages left at home. Addresses work, although discreet, are ignored. This is not a problem that exists on an occasional basis . . . it is a problem that exists in practically every investigation in one way or another. Such problems exist on a daily basis. I have spoken to witnesses about a reluctance to give evidence. The common factor between all of them is fear. They are in fear of their lives and of their families and friends. There is a very real danger to such a person, of death or serious injury, either to prevent them from giving evidence or to punish them for giving evidence and to send a warning to those who maybe thinking of assisting the police*".

As Lord Judge stated on page 3135 at paragraph 10:

"*in summary, quite apart from the ghastly callousness involved in the use of firearms to kill and the devastation suffered by the families of the deceased, it is not an exaggeration to point out that, whether they are aware of it or not, these gun-carrying criminals are challenging the rule of law itself. One common feature of both these cases and many others like them, is the absence of any or any significant attempt at concealment. People are gunned down in busy crowded areas. Although the offences are witnessed, those who use their guns expect to escape justice. They anticipate that the guns which have been used to kill will also serve to silence, blind and deafen witnesses. Without witnesses, justice cannot be done*".

Problem

So what does one do with a witness who has seen a violent murder or a former gang member who gives evidence against the gang who have committed murder. There are two possible ways of protecting this vulnerable witness.

1) Witness protection programme. That is fine in a large country like Canada or the UK, but not so easy to achieve in a small island;

2) Constant protection which of course is a gross invasion of the right of the witness and his family, deprived from family life, hence witness anonymity which includes screening, voice modulation and other special measures.

The difficulty arises with the conflict between these measures and the over-arching principle of the common law, once memorably described by Lord Bingham as the "birthright of every citizen", that is the right to a fair trial.

In the Court of Appeal decision of **Davis and Ellis**, the Court of Appeal dismissed the appeals and said there was a clear jurisdiction at common law to admit incriminating evidence against the defendant by anonymous witnesses. That a trial was not unfair and the conviction unsafe simply because the evidence of anonymous witnesses in justifiable and genuine fear whose testimony could be tested in the adversarial process, might be decisive of the outcome. That a trial could take place provided appropriate safeguards were applied and the judge was satisfied that overall it would be fair. The decision in both cases to order anonymity was justified and had not effected the fairness of the trial.

Mr. Davis appealed to The House of Lords. The House of Lords in **R v Davis [2008] 1 AC 1128** disagreed with the Court of Appeal and allowed the appeals on behalf of the defendant and held:

1) it was a long-established common law principle that subject to recognized exceptions and statutory qualifications, a defendant in a criminal trial should be confronted by his accusers so that he might cross-examine them and challenge their evidence.

2) Although witness intimidation had long been a serious threat to the administration of justice, there had been no departure from that rule until the Courts' recent authorization of witness anonymity that such a practice was irreconcilable with the common law rule and any departure from it was for Parliament to consider, not the Courts' to create; that having regard to the jurisprudence of the European Court of Human Rights, the use of anonymous evidence was not in all circumstances incompatible with the convention, but the fairness of a defendant's trial was to be assessed by reference to the proceedings as a whole, the extent to which the defendant had been handicapped in his defence by such anonymity and the extent to which that evidence was decisive; and that, although the European Court's jurisprudence might encapsulate no absolute rule, where a conviction was based solely or to a decisive extent on the testimony of the anonymous witnesses, the trial could not be regarded as fair.

3) Allowing the appeal. Since the effect of the protective measures imposed by the judge had been to prevent defence counsel from investigating the witnesses or pursuing in cross-

examination any effective challenge to the decisive evidence they had given. He had been hampered in the conduct of the defendant's case in the manner and to an extent which rendered the trial unfair and that accordingly, the case should be remitted to the Court of Appeal with an invitation to quash the conviction and if application were made, whether to order a re-trial.

As Lord Bingham stated in **Davis:**

"*No conviction should be based solely or to a decisive extent upon the testimony of anonymous witnesses.*"

Here Lord Bingham was merely applying the test which had been developed in the jurisprudence of the Strasbourg Court since **Doorson v Netherlands (1996) 22 EHRR 330** in which the court held that:

"*Even when (procedures are adopted to counterbalance the effects of anonymous witness evidence) . . . a conviction should not be based either "solely" or "to a decisive extent" on anonymous statements.*"

As many commentators have noted the force behind the "sole and decisive" test is obvious: it is unfair to adduce evidence that is solely or decisively supportive of the accused guilt in a manner that makes it impossible for the accused to challenge it.[10]

Within a month of the House of Lords' decision in **Davis**, the UK Parliament responded with the **Criminal Evidence (Witness Anonymity) Act 2008** which abolished the common law and introduced a new procedure for Witness Anonymity Orders. Lord Judge the Chief Justice comprehensively analyzed the new statutory regime in **Mayers [2009] 1 WLR 1915** and he stressed that:

"*an Anonymity order should be regarded as a special measure of last practicable resource*"

but as the learned editors of **Blackstone** state **at D14.49** of their **2013 Edition**:

"*but that in such circumstances it represented Parliament's view as to how best to address the counter-vailing interests of the accused, the victim and the public and therefore complied with the European Convention of Human Rights, article 6. A Witness Anonymity order protects the identity of the witness from disclosure in proceedings, although it cannot include screening of the witness from the judge or jury*". **Section 86(4)**.

In the Cayman Islands, **part 3** of the **Criminal Evidence (Witness Anonymity) Law 2010** provides for the making of a Witness Anonymity order in respect to any witness to criminal

[10] Al Khawaja v UK [2009] 49 EHRR 1

proceedings. The order is made to ensure that the identity of the witness is not disclosed in or in connection with criminal proceedings. The Witness Anonymity order will include one or more measures for securing the witness's identity, **section 11 (2)** details such measures:

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

   i) withheld; or
   ii) removed from materials disclosed to any party to 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;
d) that the witness is screened to any specified extent; or
e) that the witness's voice is subject to modulation to any specified extent.

An application for an order of Witness Anonymity can be made to the Court either by the prosecutor or the defendant. If the request is made by the prosecution, the prosecutor must inform the Court of the identity of the witness, but is not permitted to inform the identity or anything that would lead to the discovery of the witness's identity to the other party in the proceedings or the legal representative of the party.

If the application is made by the defendant, the defendant must inform the Court and the prosecutor of the identity of the witness, but if there exists other co-defendants, neither they nor their legal representative must be informed of the identity of the witness or any information which could result in the identification of that witness.

PROCEDURE

The procedure is set out in criminal proceedings: **Witness Anonymity and Forms 2009, 1WLR 157** and in **Blackstone 2013, paragraph D14.50** and in **Archbold, paragraph 8 – 168-172**. In summary:

a) The application must be served on all parties and contain nothing that might identify the witness. It should specify the measures proposed, explain how they comply with the law and why no lesser measures will suffice. The required supporting documentation is the statement of the witness whose anonymity is sought, any disclosure relating to that witness and the defence statement or other available particulars of the defence case. The Court of Appeal in **Mayers [2009] 1 WLR 1915** made clear that the prosecution's disclosure obligations in relation to an anonymous witness, "*go much further than the ordinary duties of disclosure*", adding that disclosure must be "*complete*" and "*full and frank*". Any failures in disclosure will be very closely scrutinized. **Okuwa [2010] EWCA Crim 832.**

b) The accused (or other opposing party) is then afforded 14 days to respond to the application. In **Mayers** the Court of Appeal stressed the importance of detailed defence statements, both to anonymity applications and to disclosure in relation to anonymous witnesses;

c) at the hearing of the application, the applicant should provide the court, but not the other parties, with the information redacted from the application and either identify the witness in question or set out the reasons why it is not possible to identify him. An oral hearing will take place only where such a hearing has been sought. If there is no such hearing, the applicant must reveal the witness's identity to the court before the witness gives evidence.

d) Any hearing should normally take place in private, and can take place, in part, in the absence of the accused or his representative. Such an ex parte hearing will, in any event, take place after the court has heard or received in writing the parties' representations, so the court can be addressed about, and give rigorous scrutiny to, the confidential material additional to the application. The court's overriding obligation is to ensure that the proceedings are fair and no order should be made without hearing representations from the parties, even if there is no hearing.

e) The court may also use its common law power to appoint a special advocate – **H [2004] 2AC 134 at paragraphs 21-22**, adapting the procedures as needed from public interest immunity applications (**Mayers at paragraph 10**). For examples for the use of special advocates to cross-examine the witnesses claiming anonymity on a voir dire, see **Nazir [2009] EWCA Crim 213** and **Chisholm [2010] EWCA Crim 258**.

f) In **C [2008] EWCA Crim 3228**, the court of appeal stressed that anonymity orders should not be made the subject of interlocutory appeals as only at trial can their impact be assessed.[11]

The Court must give all parties an opportunity to be heard on the application, but, where the Court deems it appropriate in the circumstances to do so, the Court may hear one or more of the parties in the absence of the defendant and his legal representative. In the Cayman Islands, Section 13 (1) of the **Criminal Evidence (Witness Anonymity) Law 2010** sets out the three conditions which must be met before the Court can grant a Witness Anonymity order.

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

[11] *"The prosecutor's role in applications for witness anonymity orders"* (see appendix 2, Blackstone) and the DPP has also issued guidance, The Director's Guidance on Witness Anonymity – www.cps.gov.uk/publications/directors_guidance/witness_anonymity.html

ii) in order to prevent real harm to the public interest, whether effecting 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 interests 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.

The Court is required to have regard to any reasonable fear on the part of the witness that he or she or another person would suffer death or injury or that there would be serious damage to property if that witness is identified.

As the interests of the witnesses are not the only relevant interests in the decision to grant anonymity, it is important to balance these three conditions with considerations concerning protection of the accused's right to a fair trial. The law therefore, requires that the Court must, when deciding if the three **Section 13** conditions are met, also have regard to the following six considerations. The considerations referred to in **sub section (1)** are:

Section 14 (2)

(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 the decisive evidence implicating the defendant;[12]

(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:

[12] Luka v Italy [2001] 36 EHRR 46, PS v Germany [2003] 36 EHRR 61, Sadak v Turkey [2003] 36 EHRR 26

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's identity by any means other than by making a Witness Anonymity order specifying the measures that are under consideration by the Court.

In the Cayman Islands we had a recent case of the **Crown v Devon Anglin**.[13] We considered it wise for the judge hearing the application for witness anonymity not to conduct the trial. The judge hearing the witness anonymity application is likely to hear or read evidence which is prejudicial to the defendant and although he is a professional judge, it seems to me to be unfair to the defendant and wrong that a trial judge should see this prejudicial material. In many respects the judge hearing the witness anonymity application should be the disclosure judge as distinct from the trial judge.

Another measure which can be introduced is for the court to appoint a special counsel/advocate to ensure that the defendant's rights are protected during the ex parte stage of the application. It goes without saying that if the judge entertains any reservations about the good faith of the efforts of the prosecution to invest any relevant consideration, an application will be met with a point blank refusal.

It is important to note that all three **Section 13** conditions have to be met. No one condition is more important than any other condition.

Again, in relation to the six **Section 14(2)** considerations, they are all to be taken into account and again one does not outweigh the other, nor do they represent any order of priority. They are not exhaustive but their focus is the protection of the defendant.

It is vital that the disclosure judge and later the trial judge continue to scrutinize this evidence and all the circumstances surrounding it as Lord Judge stated at paragraph 13 on page 411 of **R v Mayers**:

"*Nothing in the act diminishes the overriding responsibility of the trial judge to ensure that the proceedings are conducted fairly*".

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[13] R v Devon Anglin Ind 20/11
Judgment of Quin J dated 31/8/11
Judgment of Smellie CJ dated 20/1/12
Judgment of Campbell JA in CICA 4/12 dated 19/2/13

The obligations of the prosecution are set out by Lady Justice Hallett in the case of **R v Okuwa [2010] EWCA Crim 832**, where she cites Lord Judge at paragraph 25 and 26:

"*The obligations of the prosecution in the context of a witness anonymity application go much further that the ordinary duties of disclosure . . . and require a detailed investigation into the background of each potential anonymous witness will almost inevitably be required . . . in short the Crown must be proactive, focusing closely on the credibility of the anonymous witness and the interests of justice*".

Condition (c): The court must find that the importance of the anonymous witness is such that in the interests of justice, the witnesses ought to testify and further the witness 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.

Condition (a): The court has to find and be satisfied that it is reasonable for the anonymous witness to believe that in testifying against a defendant that it could lead to a serious injury or death.

Condition (b): The court is embarking on a quasi-judicial investigation of the material produced by the Crown, which is similar to the second stage of a judicial enquiry conducted by an examining magistrate in continental jurisdictions. The court must be satisfied that a detailed investigation has been conducted and that there is no evidence of impropriety or collusion.

Two very pertinent observations in two English, Court of Appeal decisions illustrate the problems with witness manipulation: one by Lord Justice Toulson in the English Court of Appeal case of **R v Chisholm [2010] WLR 517064** where he stated at paragraph 23:

"*It is one thing to say 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 presuppose that there is such collusion and set out an 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*".

In another case of **R v Bola [Unreported] 18 June 2003**, Lord Justice Hughes used the memorable words by posing the question at paragraph c) on page 18:

"*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 was part of which group, to the same extent as somebody who is personally involved in it.*"

Anonymous evidence presents various issues of difficulty:

a) it directly impedes the disclosure of witness identity;

b) it will not be possible for a defendant to investigate the credibility of adverse witnesses out of court, nor may it be possible to test their credibility in cross-examination;

c) if the witness is screened, face to face confrontation is eliminated, so it will not be possible for the defendant himself to identify the witness, or to observe that witness's demeanour;

d) the witness will be shielded from public view, making the proceedings less transparent;

In summary, the defendant's ability to advance his case and to undermine that of the prosecution is rendered unequal in some respects. Furthermore, there is also the possibility that a jury upon being instructed that a witness is to give evidence anonymously may assume that the defendant is of bad and dangerous character. The trial judge must give a strong direction to ensure that the jury does not make any assumptions adverse to the defendant or favourable to the anonymous witness.

Thank you for your kind attention.

The Honourable Mr Justice Charles Quin
13 September 2013

RECOMMENDED READING

1. "Conventional Trials in Unconventional Times: the Diplock Court Experience"
   4 Criminal Law Forum 503 (1995)

2. "Diplock and the Presumption against Jury Trial"
   John D Jackson and Sean Doran, 1992 Criminal Law Review 755

3. "Jury Systems around the World"
   (2008) Cornell Law Faculty Publications paper 305
   https://scholarships.law.cornell.edu/facpub/305

4. "An Introduction to Comparative Jury Systems"
   Nancy S Marder, Professor of Law and Director of the Jury Center
   Chicago-Kent College of Law
   www.kentlaw.edu/jurycenter

5. "A Comparison of Criminal Jury Decision Rules in Democratic Countries"
   Ethan J Leib, Associate Professor of Law
   University of California's Hastings College of the Law

6. "Juries and Law Assessors in the Commonwealth: A Contemporary Survey"
   Neil Vidmar, Criminal Law Forum

7. "Coroners and Justice Act 2009 "the Witness Anonymity and Investigation Anonymity"
   Provisions"
   D Amerod, A Choo and R Easter 2010 Criminal Law Review 368