

**COMMONWEALTH OF THE BAHAMAS**  
**IN THE SUPREME COURT**  
**Criminal Division**

*Cri/vbi/122/5/2017*

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

*Applicant*

**AND**

**MARK MCKENZIE aka "Kenzil Higgins"**

*Respondent*

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**RULING**

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**Before:** The Honourable Mr. Justice Franklyn K M Williams KC

**Appearances:** Ms. Jacklyn Burrows for the Applicant  
Ms. Miranda Adderley for the Respondent

**Hearing Date:** 18 March 2023

## ***WILLIAMS J***

### **Introduction**

1. On Monday 9 January 2017, Carlos Adderley Jr was shot and killed at the rear of Chapel on the Hill, off of the Tonique Williams Darling Highway, Baillou Hills, New Providence. The following day 10 January 2017, Alpha 1 gave a statement to the police by which they purported to identify the respondent as the shooter. Witness Alpha 1 subsequently identified the respondent during an identification parade conducted on 9 March 2017.
2. The respondent was subsequently charged with the murder of Carlos Adderley Jr.
3. The trial of the matter was scheduled to commence 17 April 2023.
4. On 11 May 2017, a Stipendiary and Circuit Magistrate ordered:
  - i) That the names and other identifying details of the witnesses Alpha 1 and Alpha 2 be withheld from the respondent and his legal representative;
  - ii) That the witnesses names and other identifying details be removed from materials and not be disclosed to any party in these proceedings;
  - iii) That the witnesses be screened and that the witnesses voice be subject to modulation.
5. The Director of Public Prosecution applied to have that Order continued and to so facilitate by live television or video link pursuant to sections 11(1) and (2) and 12 (1) of the Criminal Evidence (Witness Anonymity) Act and section 78 (b) (1) (a), (b) and (c) of the Evidence Amendment Act respectively.
6. Having given an oral ruling, in which I acceded to both applications, and having undertaken to provide a written ruling, I now do so.

### **The issue**

7. Whether the conditions of the Criminal Evidence (Witness Anonymity) Act, 2011 have been met for the grant of the applications sought by the Director of Public Prosecutions.

## The Application

8. The crux of the case of the applicant is that the witness Alpha 1 observed the actual shooting of the deceased by the respondent, whom he identified to the police. In other words, their evidence directly links the respondent to the commission of the crime. Alpha 2 is said to have been in the vicinity, having seen and heard things corroborative of Alpha 1's evidence.

## Affidavit of Inspector Monique Turnquest

9. Inspector Monique Turnquest averred:

"6. Witnesses, Alpha 1 and Alpha 2 have agreed to give information to the police and testify in the criminal proceedings **on the condition that** neither their identity or their whereabouts are revealed, and have stated to the police that **they are in fear of their lives**, and they are of the view **that they may be killed or suffer serious harm** should their identities be revealed.

7. In the circumstances, in order for Witnesses, Alpha 1 and Alpha 2 to give testimony, the following measures should be taken:

- a. That the identities of Witness Alpha 1 and Alpha 2 should be withheld;
- b. They should be referred to by pseudonyms;
- c. They should be screened; and
- d. Their voices should be subjected to modulation.

8. Further, I am informed and verily believe that Mark Mckenzie aka "Kenzil Higgins" **is known to the police.** (emphasis mine)

10. During the hearing of the application, Ms. Burrows for the Director of Public Prosecutions ("the DPP), laid before the Court the antecedents of the respondent which included a conviction for murder alleged to have been committed on 4 March 2017 (date of conviction 10 June 2022) before Fraser J.

11. Ms. Miranda Adderley for the respondent denied that the respondent had been so charged and convicted. Ms. Burrows then laid before the Court the sentencing decision of Fraser J in the case of *The Director of Public Prosecutions v Mark Mckenzie aka Kenzil Higgins* Cri/vbi/89/8/2017 of whom I am satisfied is the respondent.

### Discussion

12. The Court must decide whether, on the evidence before it, i) to grant an order anonymizing the witnesses Alpha 1 and Alpha 2, and if granted whether the respondent may receive a fair trial, and ii) whether to permit the testimony of same by live television link.

13. The Court of Appeal in *Attorney General v Leroy "Shaddy" Smith et al*

SCCrApp No.95 of 2014 held:

"31. Furthermore on the authorities, although the Anonymity Statutes have amended the common law in relation to the appearance of witnesses at trials, with proper safeguards to ensure fair proceedings built into the legislation, as in the case of the Anonymity Act, they are not in breach of Article 20(1) of the Constitution which guarantees a fair trial to a person accused of a crime."

14. Section 12 of the Act sets out the procedure for applying for an anonymity order. Section 13 mandates the pre conditions for making the order including, inter alia, evidence that the witness will not testify unless he/she receives identity protection, that the witness testifying will prevent real harm to the public interest, and that the measures imposed would be consistent with the defendant receiving a fair trial:

"13. Conditions for making an order.

(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

[in determining whether the measures specified in the order are necessary the court shall have regard, in particular to any reasonable fear on the part of the witness that if the witness were to be identified he or another person would suffer death or injury, or there would be serious damage to property - s13(2)] [note added]

(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) the importance of the witness testimony is such that in the interest of justice, the witness ought to testify and-

- (i) the witness would not testify if the proposed order were not made; or
- (ii) there would be real harm to the public interest if the witness were to testify without the proposed order being made.”

15. Section 14 contains the relevant matters which the court must consider:

“14. Relevant considerations

(1) When deciding whether the conditions in section 13 are met in the case of an application for a witness anonymity order, the court shall have regard to—...

(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 and decisive evidence implicating the defendant;
- (d) Whether the witness evidence could be properly tested, whether on grounds of credibility or otherwise, without his identity being disclosed;
- (e) Whether there is reason to believe that the witness—
  - (i) has a tendency to be dishonest; or
  - (ii) has any motive to be dishonest in the circumstances of the case, having regard, in particular, to any previous convictions of the witness and to any relationship between the

witness and the defendant or any associates of the defendant; and

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

16. Section 11(2) sets out the measures any one or more of which may be imposed in the order. They include: the witness name and identifying details may be withheld or removed from the material disclosed to any party in the proceedings; the witness may use a pseudonym; that the witness is not asked questions of any specific description that may lead to his identification.
17. By section 11(4) [Criminal Evidence (Witness Anonymity) (Amendment) Act, 2018, the court, where the circumstances so require, order that the witness be seen and heard in his natural voice only by the judge.
18. When I heard the application on 13 March 2023, the evidence that was before me in support of the continuance of the witness anonymity order was the same as that which was before the learned stipendiary and circuit magistrate in order to obtain the original order; additionally buttressed by the record of conviction and sentencing of the respondent on the charge of murder (10 June 2022).
19. That evidence, *in toto*, brought the application within the requirements of the Anonymity Act.
20. The affidavit of Inspector Monique Turnquest made clear that witnesses Alpha 1 and Alpha 2 *would not* give evidence unless protected (paragraph 9, *supra*)
21. I refer to section 14(e) of the Act. Alpha 1 had no antecedents; Alpha 2 had an antecedent for dishonesty, stealing by reason of service, being ordered to pay compensation of fourteen (14k) thousand or 18 months imprisonment.

22. Whilst I concluded that Alpha 2 had a tendency to be dishonest, I found that, in the particular circumstances of this case he/she had no motive to be so. The evidence of Alpha 2 was, in a general, non determinative sense, corroborative of Alpha 1. Alpha 2 claims to have heard two gunshots and, thereafter two more gunshots, after which he saw a male run towards a silver right hand drive Honda Accord. That male entered front passenger seat of the Honda as it drove off onto the Tonique Williams Darling Highway. He neither purported to have seen the murder nor to have identified the respondent as the person seen running.
23. The antecedents of Alpha 2 having been discovered to the respondent, he would have the opportunity, in light thereof to place the issue of the former's credibility squarely before the jury.
24. Counsel for the respondent opposed the continuation of the anonymity order. There was, it was submitted, only the affidavit of Inspector Turnquest and none from the Witnesses Alpha 1 and Alpha 2 stating their reasons for anonymity. It was also submitted that the description given by Alpha of the assailant bears no resemblance to the respondent.
25. At any rate I am and would be mandated to give an appropriate warning to the jury with reference to the evidences of Alpha 1 and Alpha 2, in particular the latter.
26. In light of the serious averments in the affidavit of Inspector Monique Turnquest of the Royal Bahamas Police Force and the conviction of the respondent for murder, that the witnesses apprehended death or serious bodily harm if the respondent knew their identities, that they would refuse to testify without an anonymity order, and, considering that in the circumstances it was reasonable for each to so apprehend (*Anglin*), I exercised my discretion that the order should continue; also that the evidence of Alpha 1 and Alpha 2 should be given by live television link.
27. Further, in light of the prevalence of murder, and the crucial and in the case of Alpha 1, determinative nature of the evidence,  
  
    "...it would promote the course of justice and be in the public interest to ensure that important evidence in this case is before the court.



Failure to ensure that the evidence is led could do harm to the public interest.” Adderley JA in *Attorney General v Leroy Smith aka “Shaddy” and Tony Smith aka “Jamal”* SCCrApp No.95 of 2014

28. In the premises, I was satisfied that the relevant considerations of section 13 of the Act had been met, that it was possible for the respondent to have a fair trial, anonymity order notwithstanding.

  
Franklyn K M Williams KC

Justice

22 May 2022