

COMMONWEALTH OF THE BAHAMAS

2018

IN THE SUPREME COURT

CRI/PUB/CON/00042

PUBLIC CONSTITUTIONAL DIVISION

Criminal Side

IN THE MATTER of the Constitution of The Bahamas, Chapter 96, Statute Laws of The Bahamas, 2000, particularly Articles 2, 17, 19, 20(1) 20(2)(e), 20(2)(g) and 28(1) of the Constitution of The Commonwealth of The Bahamas

AND

IN THE MATTER OF the promulgation of the Criminal Evidence, (Witness Anonymity), Amendment Act, 2018.

Between

BRUCE COLEBROOKE

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: The Honourable Madam Senior Justice Mrs. Cheryl Grant-Thompson

**Appearances: Mr. Keod Smith- Counsel for the Applicant
Acting Director of Public Prosecutions Mr. Franklyn Williams (as he then was) along with Ms. Janet Munnings - Counsel for the Respondent**

Date of Hearing: 7th & 12th September, 2022; 6th December 2023 (Provisional Ruling date); 26th February, 2025 (Ruling date)

**DECISION ON CONSTITUTIONAL APPLICATION- MURDER
APPLICATION TO STAY THE PROSECUTION ON GROUNDS OF WITNESS ANONYMITY;
*R v Davis [2008] 1 AC 1128; Grant v. The Queen [2006] UKPC 2; Doorson v Netherlands (1996) 22 EHRR 330; Bruce Colebrooke v Regina SCCrimApp. No. 151 of 2015; The Attorney- General v. Leroy Smith a.k.a “Shaddy” & Tony Smith a.k.a “Jamal” SCCrApp No. 95 of 2014; R v. Horncastle and others (2009) UKSC***

GRANT-THOMPSON J

INTRODUCTION

1. This is a Constitutional motion made by the Applicant pursuant to Article 28 of the Constitution of the Commonwealth of The Bahamas (“The Constitution”), which empowers the Supreme Court of The Bahamas to grant appropriate relief where a person alleges that any of the provisions of Articles 16 to 27 of the Constitution “*has been, is being, or is likely to be contravened in relation to him.*”
2. The Applicant, by way of the Re-Amended Notice of Motion (filed 27th of May 2019) submitted that their Constitutional Right pursuant to Article 20 of the Constitution have been infringed. Further that their right to a fair trial in particular, the entrenched right to a jury trial has been contravened in relation to one of them, namely, Mr. Bruce Colebrooke (*the Applicant*) is likely to be contravened in his impending retrial.

BACKGROUND

3. This is an important judgment which will govern the practical application of the necessary technology to be employed in trials involving anonymous witnesses. The Applicant, Mr. Bruce Colebrooke, was previously convicted and sentenced in 2015 for the offence of Murder. During his trial the primary identification evidence was provided by an Anonymous Witness pursuant to the **Criminal Evidence (Witness Anonymity) Act, 2011 (CEWA-2011)**. The Applicant successfully appealed both his conviction and sentence based on the reception and reliance on the Anonymous Witness’ evidence. The Court of Appeal of The Bahamas found that the Judge erred in law when she allowed the Anonymous Witness to testify whilst completely screened from the Judge and the jury. The conviction was thus quashed, the sentence subsequently set

aside. The matter was ordered remitted to the Supreme Court for a retrial. The retrial was listed for hearing before this Honourable Court.

4. Following the ruling of the Court of Appeal the Applicant now submits that **Article 20 of the Constitution** will be contravened if he is retried. He will be deprived of his entrenched Constitutional Right to a jury trial pursuant to **Article 20(2)(g)** the right to a fair trial should this Anonymous Witness be called.

ISSUES

5. The main issue is:
 - a. Is it likely that the Applicant's constitutional right to a fair trial, will be infringed pursuant to the 2018 amendment of Section 11 of Criminal Evidence (Witness Anonymity) Act (CEWA), which states that *“(1) A court may make a witness anonymity order to ensure that the identity of the witness is not disclosed in or in connection with the criminal proceedings”*

LEGISLATION

SUBMISSIONS OF THE APPLICANT

6. The Parliament of The Commonwealth of The Bahamas in 2011 passed the Criminal Evidence (Witness Anonymity) Act (“CEWA-2011”), providing for the Courts to make Witness Anonymity Orders (WAO's) in various circumstances. The condition precedent for the Court to make a Witness Anonymity Order in criminal proceedings were set out in Section 11 of the CEWA-2011. **Section 11 (1)-(3) of the CEWA-2011** lists the measures which may be taken by the Court in relation to a witness to which a WAO applies.

Further, **Section 11(4)** of the **CEWA-2011** sets out the prohibitions on the powers of the court. Section 11(4) provided as follows:

“(4) Nothing in this section authorizes the court to require-

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

(i) The magistrate, the judge or other members of the court, if any; or;

and

(ii) The jury, if there is one;

b) the witness voice to be modulated to such an extent that the witnesses’ natural voice cannot be heard by any of the persons within paragraphs

(a)(i) and (ii).”

7. The Court of Appeal determined that the screening of the witness from the Court and jury constituted a material irregularity. The Parliament of The Bahamas by amendment to **Section 11(4) of the CEWA** in 2018, expressly addressed this issue. The amendment made by virtue of the **Criminal Evidence (Witness Anonymity) (Amendment) Act 2018**, deleted Section 11(4) in its entirety. It was repealed and replaced with the following:

“11(4): The Court may upon application order, where the circumstances so require, that the witness be seen and heard in his natural voice only by the Magistrate, Magistrate Panel or Judge.”

8. The Applicant submitted that his right to a fair trial, is guaranteed in Chapter III of the Constitution which deals with the protection of the fundamental rights and freedoms of individuals. Article 20 of the Constitution provides for the protection of the law, erects the necessary safeguards to ensure a fair trial, particularly in the context of a criminal trial. The Applicant submitted that

Article 20 of the Constitution establishes three guaranteed core rights in respect of an accused person relevant to this Application:

- a. **the right generally to a fair trial;**
 - b. **the right to cross examine prosecution witnesses (and all that this entails); and**
 - c. **the right to trial by jury.**
9. **Articles 20(1), 20(2)(e) and 20(2)(g)** of the Constitution of The Bahamas, provides as follows:

“20(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

*20(2) Every person who is charged with a criminal offence —
(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
(g) shall, when charged on information in the Supreme Court, have the right to trial by jury.”*

Common Law

10. A man has the right to confront his accusers. In the case of **R v Davis [2008] 1 AC 1128** at paragraph 5, Lord Bingham stated that the *“long-established principle of English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence.”* In this case the accused was previously convicted by a Jury of two counts of Manslaughter. The evidence of the only identification witness against him was allowed to be given anonymously. The witness was screened

from the Defendant, with the benefit of the voice which was also distorted. The witness could be seen and heard in their natural voice by the judge and jury. The Court of Appeal dismissed Davis' appeal against conviction, but the House of Lords unanimously agreed to allow the appeal. The case was remitted for retrial.

11. Further, Lord Bingham in the case of **R v. Davis (supra)** at paragraph 44 helpfully stated that:

“While I am very conscious of the problems confronting the authorities which have led them to adopt these measures, in my view it is not open to this House in its judicial capacity to make such a far-reaching inroad into the common law rights of a defendant as would be involved in endorsing the procedure adopted in the present case. In effect, the ability of counsel for the appellant to cross-examine the decisive witnesses against him was gravely compromised. Similarly, for the reasons given by Lord Mance, the appellant’s trial did not meet the standard required by article 6 of the European Convention”

12. Additionally, Lord Carswell at paragraph 61 in the **Davis** stated that:

“The testimony of the witnesses concerned was central to the prosecution case. The defence was an attack upon their probity and credibility, yet the defendants and their advisers did not have their names and were unable to see their faces or hear their natural voices. The effect, as intended, was to make it impossible to identify them, which may have been necessary if their testimony was to be obtained, but was a significant potential detriment to the conduct of the defence. The anonymising measures went beyond any which have been adopted in the reported cases.”

13. The **Davis** case is instructive, it recognizes the importance of a Defendant rights to challenge witnesses at common law, separate from his entrenched

Constitutional rights. Secondly, in Davis, the witness was not screened from the judge and jury. Even the defendant's lawyer was allowed to see and hear the witness, although he chose not to do so in the absence of his client. The three relevant persons are the Judge, the jury, prosecuting counsel and defence counsel.

14. A similar right to cross-examine a criminal Defendant exists pursuant to **Article 14(3)(e) of the International Covenant on Civil and Political Rights ("ICCPR")**. The Bahamas ratified this relevant Convention in 2009. However, the ICCPR was not incorporated into domestic law. Therefore, it does not create a separate source of rights enforceable by the domestic court. The Court finds persuasive value in the ratified treaty. The Courts notes **Article 14(3)(e) of the ICCPR** which provides that:

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

...

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"

15. In this Court's view it is acceptable that a man should see his accused. To observe his demeanor. To surely know the case against him. This will, however, fall under the discretion of the individual Learned Trial Judge, in this exceptional case of an anonymous witness and screen his identity to potentially preserve his life. The Learned Trial Judge may decide to exclude the ability of the Defendant to see the individual providing material evidence against him.

16. The Applicant asserts that Article 20 of the Constitution of The Bahamas is patterned largely upon **Article 6 of the European Convention on Human Rights** (“ECHR”). **Article 6(1) of the ECHR** guarantees the right to a fair trial. Pursuant to **Article 6(3)(d)** the right to examine adverse witnesses or have them examined is provided for. In this regard, the jurisprudence of the ECHR is relevant and persuasive authority to the interpretation of the Commonwealth Caribbean Constitutions. However, the Court notes one fundamental point of divergence: the Constitution of The Bahamas is almost unique among the Constitutions of the Commonwealth Caribbean in that it guarantees the right to a trial by a jury when tried on information or Voluntary Bill of Indictment in the Supreme Court.
17. In the persuasive Jamaican authority of **Grant v. The Queen [2006] UKPC 2** Lord Bingham stated at paragraph 17 that:
- “Thirdly, the Board readily accepts the relevance of the Strasbourg jurisprudence on article 6(3) of the European Convention, since that Convention applied to Jamaica before it became independent and the close textual affinity between article 6(3)(d) and section 20(6)(d) makes it appropriate to pay heed to authority on the one when considering the meaning and effect of the other. Both parties acknowledged the persuasive authority of the Strasbourg jurisprudence, as did the Court of Appeal, and rightly so. That jurisprudence undoubtedly gives general support to the appellant’s argument on the need for prosecution witnesses to give evidence in court, and expose themselves to cross-examination by a defendant, at some stage of the proceedings.”*

18. Counsel for the Applicant submitted that notwithstanding there may be permissible restrictions placed on several of the constituent elements of the right to a fair trial, the ECHR has held in a line of cases that convictions based “solely or to a decisive extent” on the evidence of an anonymous witness, violated the right to a fair trial.
19. In the case of **Doorson v Netherlands (1996) 22 EHRR 330**, the ECHR developed strict guidelines to protect the accused from any unfairness by the use of anonymous witnesses by prescribing two main conditions for their use:
 - (i) “the use of an independent verification mechanism to challenge the evidence of the anonymous witnesses, any attempt to cast doubt on their reliability, and
 - (ii) (ii) that the overriding principle governing the use of anonymous witnesses was that “no conviction can solely or to a decisive extent be based on the evidence of anonymous witnesses.”
20. In the case of **Bruce Colebrooke v Regina SCCrimApp. No. 151 of 2015**, the Court of Appeal highlighted the importance of the jury being able to observe the demeanor of the witness as part of the process of Cross-Examination. Court of Appeal Justice The Honourable Mr. Issacs JA stated at paragraph 44 that “*While Alpha’s [the AW] purported identification of the Appellant may have its weaknesses, the task of evaluating the reliability of all of the evidence adduced in the trial, falls to the triers of the fact, namely, the jury.*”. This is a crucial and important consideration.

SUBMISSIONS OF THE RESPONDENT

21. Counsel for the Respondent submitted that the fundamental basis of the Applicant's assertions, his collective protestations herein arise from his claim of the unlawful effect of the amendment to **Section 11(4) of the Criminal Evidence (Witness Anonymity) (Amendment) Act, 2011**.

22. The Respondent relied on the case of **Bruce Colebrook v. Regina SCCrimApp No.151 of 2015**. The Court of Appeal did not determine whether the pre-amendment provisions of the Criminal Evidence (Witness Anonymity) Act was unconstitutional, but instead determined that the Learned Trial Judge did not follow her own order nor the law, which did not make provision for her actions. In short, the Court of Appeal determined that this amounted to an irregularity. The Appellate Court ordered a retrial due to the Learned Judge's failure to abide by the strict terms of the Act.

23. It is prudent to take in consideration the provisions of **Article 15 of the Constitution** which provides as follows:

“Whereas every person in The Bahamas is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

24. In the case of **The Attorney- General v. Leroy Smith a.k.a “Shaddy” & Tony Smith a.k.a “Jamal” SCCrApp No. 95 of 2014** the Court of Appeal at page 2 paragraph 2 stated that *“in light of the prevalence of the offence of murder, it would promote the cause of justice and be in the public interest to ensure that such important evidence is before the court at trial. Moreover, as the evidence stood, the court was sure that it was possible for the respondents to have a fair trial despite the continuance of the Anonymity Order”*. Furthermore, in that case the court was persuaded by Counsel for the Crown that it was prudent and proper and right-minded for the Court to take judicial notice that witness tampering, and intimidation is increasing worldwide, as well as it is in The Bahamas.
25. **Section 12 of the CEWA- 2011** sets out the procedure for applying for an anonymity order. The Respondent submitted that **Section 12(6) of the CEWA-2011** is clear that in such applications the Court shall give every party to the criminal proceedings the opportunity to be heard on an application

under that Section. In addition to this **Section 13 of the CEWA- 2011** mandates the preconditions 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.**

“Section 13- Conditions for making the 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; 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

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

26. **Section 14 of the CEWA-2011** provides that the Court must consider:

“(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-

(a) the considerations mentioned in subsection (2);

(b) ...

(2) The considerations referred to in subsection (1) are-

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

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

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

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

(e) whether there is any reason to believe that the witness-

(i) has a tendency to be dishonest; 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.”

27. In reference to the validity of the amendment to **Section 11(4) of the CEWA** the Respondent avers that it is trite law that an enactment is presumed constitutional. Lord Bingham in the Privy Council case of **Grant v. the Queen (2006) UKPC 2** stated at paragraph 15 that “*it is, first of all, clear that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional, and the burden on a party seeking to prove invalidity is a heavy one...*”
28. Furthermore, as the Court of Appeal opined in **Leroy Smith(supra)** as per paragraph 31 “*... on the authorities, although the Anonymity Statutes (around the region, the Commonwealth and the World, my emphasis) 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”.*

ANALYSIS

29. Regarding the right to have a fair trial the Applicant accepted that there may be permissible restrictions placed on several of the constituent elements of that right. The European Convention on Human Rights decided based “solely or to a decisive extent” on the evidence of anonymous witnesses, violated the right to a fair trial. Having reviewed the submissions made by both Counsel for the Applicant and Counsel for the Respondent, this Honourable Court finds that the Applicant’s Constitutional Right to a fair trial and trial by jury

will not be infringed. This Court accepts the assertion that an individual's constitutional right is sacred. It is sacrosanct. It should not be easily disregarded nor overstepped.

30. Article 15 of the Constitution of The Bahamas articulates the principle that even though a Constitutional right should not be readily displaced. The right in itself is not absolute. It is subject to exceptions. In the present case the Applicant has submitted that due to the amendment of Section 11(4) of CEWA his right to a fair trial and trial by jury will be breached. This Court does not agree with the Applicant's assertion. The purpose of the Witness Anonymity Order is to protect the safety of the witness or other person, in order to prevent serious damage to property, or prevent real harm to the public interest. By amending Section 11(4) this Court is of the view that it was Parliament's intention to further fulfill this purpose, as there have been several instances where an anonymous witness' identity was disclosed can result in serious injury or demise.

31. The Hansard records the proceedings in the House of Assembly making Parliament's purpose transparent. They seek to protect witnesses from harm. According to the Hansard of the proceedings of the House of Assembly on the 18th of April 2018 (page 5), The Honourable Member of Parliament Mr. Desmond Bannister (as he then was) stated that:

“We appreciate that this proposed amendment may have a weakness. We appreciate that. It will permit a judge in appropriate circumstances to screen a witness from the sight of a jury. I want to invite Members to consider that as we debate the amendment. Because on the one hand, Article 20, Sub-Article 2(g) of the Constitution gives everyone who is

charged before the Supreme Court the right to trial by jury. So a very legitimate question that we may ask is whether the making of such an order, as we are considering permitting today, would constitute a constitutional infringement with respect to trial by jury...

Government takes the position today, sir, that we have a duty to do our best to protect witnesses who are brave enough to come forward to give evidence against murderers, drug dealers, human traffickers and other despicable criminals who would otherwise get away and return to our communities to do more harm...

However, Mr. Speaker, we must try, and in this respect I am comforted by the fact that section 13 of the Act outlines rigorous conditions and circumstances that must be complied with before a judge may make an order. So a judge can't just come out and decide to make an order like this. He has to comply with any number of conditions that have to be complied with....

Persons on the jury are bound to know who the witness is, and also who the accused is. The question that has to be considered was whether the identity of an anonymous witness could be deliberately or inadvertently disclosed by a jury. And that's a very serious question because it has happened before in our country.. ”

32. This Court agrees with the sentiments expressed by the former Minister. Article 15(d) of the Constitution which speaks limiting a Constitutional right when it comes to the security of the person, does in fact allow for only the Judge, in select circumstances, to screen an Anonymous Witness. The Commonwealth of The Bahamas is a very small island nation of approximately Four Hundred Thousand (400,000) citizens. Further the

communities within our small Bahama land are very close-knit. This means there is a higher probability that the identity of Anonymous Witness, whether it be directly or indirectly, is likely to be disclosed. The Bahamas is not like the United States or United Kingdom where the identity of an Anonymous Witness is less likely to be disclosed due to their populations being in the millions. The witness lingo distinguishes which island they are from. The distortion of voice in the Courts view is material. However, this Court will not usurp the rulings of my brother and sister Justices, they will decide what is needed in any particular case.

33. The Court considered with approval the House of Lords decision of **Grant v the Queen (supra)** where it was stated that:

“Such cases, it was rightly said, showed that there could be departures from the principle that a defendant is entitled to be confronted in court by his accusers. These departures have, however, been the subject of express statutory authorization, in section 23-28 of the Criminal Justice Act 1988 and sections 114-126 of the Criminal Justice Act 2003 and, for instance, sections 31A to L of the Jamaican Evidence Act 1843, as amended.”

34. As previously stated, the principle outlined within Article 15 of the Constitution expressly allows for the Court to depart from the Constitutional right of a trial by jury (which allows a defendant to be confronted in court by his accusers) once it is for the safety of the witness.
35. The principle of the fairness of the trial being the overriding principle is fully elucidated in **Grant v the Queen (2006) UKPC 2**. In reliance on this case the

Respondent submitted that the arguments led in this case by the Applicant are similar, if not identical, to those raised in Grant against the constitutionality of Section 31D of the 1995 (Jamaica) Evidence Act.

36. Section 31D of the Evidence Act (Jamaica) reads as follows:

“Subject to 31G a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the Court that such person- (a) is dead... or (e) is kept from the proceedings by threats of bodily harm, and no reasonable steps can be taken to protect the person.”

37. The case of **Grant (supra)** dealt with the admission of statements made by persons who would not be attending the criminal proceedings at all. Similar to the operation of Section 66 of the Evidence Act, Statute Laws of The Bahamas, by which it prescribes circumstances for the admission of hearsay statements may be made and acceded to. In the eyes of this Court there do exist exceptions and safeguards in place for the Court’s consideration of these kind of applications.

38. The Privy Council in the case of **Grant (supra)** concluded that the criticized section of the Jamaican Evidence Act did not infringe the then Appellants rights to a fair hearing. Though it is understood that the Constitution of Jamaica does not provide the express right of a trial by jury, this Court is of the view that its neighboring Caribbean nation, expresses the sentiments that the rights of a Defendant, though important, are still subject to limitations. One of those limitations being where the safety of a witness is concerned. As

a result of this, a Defendant or in this case the Applicant right to a fair trial will not be infringed.

39. The Applicant herein relies on Article 14(3)(e) of the International Convention on Civil and Political Rights 1966, Article 6(3)(d) of the European Convention on Human Rights, and to the **Strasbourg (supra)** case. The Privy Council in the case of **Grant (supra)** noted that the Strasbourg Court has time and time again insisted that the admissibility of evidence is governed by national law and that its sole concern is to assess the overall fairness of the criminal proceedings in question. The same is true when dealing with the conditions under which a witness is allowed to give evidence.

40. In the case of **R v. Horncastle and others (2009) UKSC** Lord Phillips concluded that the overriding consideration in the allowance of Anonymous Witnesses is the maintenance of fairness in the overall proceedings. In this case the Defendants were convicted of grievous bodily harm before the jury and the witness was not called. Lord Phillip placed the concept of fairness in proper context by saying “*thus the rights of the individual must be safeguarded, but the interests of the community and the victims of crime must be respected.*”. On principle, while ensuring that a trial is fair there needs to be a fair balance between the general interests of the community and the personal rights of the individual.

41. Further, in the **Leroy Smith (supra)** case the Court referred to the same view expressed by the Privy Council in **Huntley (Albert) v The Attorney- General (1994) UKPCA 46** which held that when considering fundamental rights and freedoms, a court must adopt a non-rigid approach and generous interpretation

and must look at the reality and substance of the matter and not be over-concerned with technicalities.

42. Though the Applicant is afforded under the Constitution of The Bahamas the right to a fair trial this Court finds that the amendment of CEWA operates with proper safeguards in order to protect the identity of the witness. Witnesses must feel safe giving evidence in our courtrooms. They must come in under the protection of the Courts. The rights of the Accused will also be safeguarded. The Learned Trial Judge will exercise their discretion on a case by case basis.

CONCLUSION

43. The Court concludes that the Applicant's Constitutional Right to a fair trial and trial by jury will not be infringed, by **Section 11(4) of the CEWA 2018**.
44. Moreover, the Court finds:
- i. Section 11(4) to be good law;
 - ii. A judge and jury must hear and evaluate the evidence in this jurisdiction. Which at the time the application was originally brought there were trials by jury. At the time of the judgment's delivery, the law provides for judge alone trials as well; Paragraph 5 of The Official Gazette of The Bahamas published 3rd July 2024 provides:

“In a trial by judge alone, the judge shall have the power, authority, and jurisdiction which he would have had in a trial by jury, and the power to determine any question and to make any finding which would have been required to be determined or made by a jury.”

- iii. The judge determines the law, the jury are the judges of the facts in jury trials. The jury is instructed by the Learned Trial Judge to assess the demeanor and “body language” of a witness. In order to effectively do so they must see and hear the witness.
- iv. This amendment to the Act will allow the Learned Trial Judge on a case-by-case basis to determine what is required for the particular trial having regard to the facts, the vulnerability of the witness, the need for the jury to intelligently assess the case, the safety of the witness and the general public. The Trial Judge will determine if the witness’ life is in jeopardy. The Learned Trial Judge will consider what is required in each case. More often than not, it will include the Judge and jury seeing the face of the witness and hearing the witness in his or her natural voice to determine their credibility.
- v. That the Learned Trial Judge will also make a decision on a case by case basis if Counsel for the Defendant will additionally be permitted to view the same screen as the Judge and the jury.

The Defence

- 45. The Defendant and his Attorney will have to be considered. Both he and the Prosecution witness stand to lose much. The witness who is compromised could potentially lose their life. The Defendant if he cannot see who is making the accusations against him and is ultimately convicted stands to lose his liberty. All of these are very serious concerns.
- 46. The Defendant will hear the witness albeit in a distorted fashion. The modulated voice recorder must be clear, the words distinct. The Defence Counsel can be invited to see the witness as well. In the Davis decision above,

he may on his instructions reject this offer. Notwithstanding, if Counsel for the Defendant is allowed to see the anonymous witness, the Court fully understands that Counsel's first duty is to the Court and his second duty is to his client. If he, the Defence Counsel follows those rules, even if the Defence Counsel, recognizes the witness, he is duty bound not to reveal the anonymous witness identity to his client. This then continues to pose a difficulty to the client who would be unable to say if the anonymous witness has an adverse interest to serve.

47. What the Defendant and his Attorney are able to see and hear the Learned Trial Judge must determine. Consideration has to be given to whether or not there is institutionally "bad blood" between the Defendant and the potential witness; "a vibe" such as would cause a witness to have a reason to lie on the Defendant. If he cannot see his accuser, he may be unable to instruct his Attorney as to the reason, if any, the witness may have to lie on him. An explanation which he is unable to give if he cannot see his accuser. These will all be matters for the Learned Trial Judge. The Trial judge will also have to determine what is in the best interest of the Defendant, carefully safeguarding his Constitutional rights on a case by case basis.
48. This Court promised to put its reasons in writing. This I now do.

Dated the 4th day of March A.D., 2025

The Honourable Madam Senior Justice Mrs. Cheryl Grant-Thompson