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Witness protection in the criminal justice system of the Bahamas¹

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ABSTRACT

Witness protection is now firmly entrenched in the modern criminal justice systems especially in jurisdictions dealing with organized and violent crime. The decision by the government of The Commonwealth of The Bahamas to enact legislation in respect to procedural and non-procedural measures for protection of witnesses is commendable, given that violent and organized crime is rife in the country. This article highlights the basic tenets of witness protection and the legal framework, both at the international and national level. It also addresses the role of key duty bearers in the process of witness protection. Furthermore the procedural and non-procedural measures taken by law enforcement officers in The Bahamas are explored. And lastly, the challenges encountered in the implementation of the witness protection measures in The Bahamas are examined. This is intended to aid policy makers, advisers and those entrusted with decision making, like parliamentarians, to devise means and ways to eradicate and/or mitigate challenges faced in the implementation of witness protection measures in The Bahamas.

Keywords: Witness protection. Confidentiality. Anonymity. procedural and non-procedural measures. The Bahamas.

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1 INTRODUCTION

The protection of witnesses is often considered as cornerstone of any successful criminal justice system especially in combating organized crime. In addition, the cooperation of victims and witnesses is crucial to achieving successful prosecutions of criminal offenders and dismantling organized criminal groups.³ Yet one of the challenges faced by many criminal justice systems in the investigation and prosecution of crime is obtaining such cooperation. Victims and witnesses may be unwilling to provide information and evidence because of perceived or actual intimidation or threats against themselves or members of their family.⁴ This concern may be exacerbated where, people who come into contact with the criminal justice system are particularly vulnerable. For instance, by virtue of the nature of their evidence, eye witnesses to organized violent crime require that special measures be taken to ensure that they are appropriately assisted and protected by the criminal justice processes.⁵ It has been argued that witnesses who receive appropriate and adequate protection and support are more likely to cooperate with the criminal justice system in bringing perpetrators of crime to justice.⁶ However, inadequacies of criminal justice systems may imply that witnesses are not able to access the protection and support they need and may even be exposed to danger or harm by the criminal justice system itself.⁷

3 Kramer, Karen. "Witness Protection as a key tool in addressing serious and organized crime." (2016) available at https://www.unafei.or.jp/publications/pdf/GG4/Fourth_GGSeminar_P3-19.pdf Accessed on the 22/11/2019.

4 Slate, Risdon N. "The federal witness protection program: Its evolution and continuing growing pains." *Criminal Justice Ethics* 16, no. 2 (1997): 20-34.

5 Montanino, Fred. "Protecting organized crime witnesses in the United States." *International Journal of Comparative and Applied Criminal Justice* 14, no. 1-2 (1990): 123-131.

6 Vermeulen, Gert, ed. *EU standards in witness protection and collaboration with justice*. Maklu, 2005.

7 Sheptycki, James. "Uneasy truths; criminal-informants, witness protection, trust and legitimacy in the policing of organized crime." In *Contemporary Organized Crime*, pp. 213-230. Springer, Cham, 2017.

2 BASIC TENETS OF WITNESS PROTECTION

Witness protection is premised on key tenets to ensure its efficacy, namely, confidentiality and anonymity.⁸ Security of information in respect to victims and witnesses is crucial. This may concern their identity, location, nature of testimony they are to give, the details about their families among others.⁹ These principles ensure the protection of the persons involved including prosecutors, judges, witnesses and also the case itself.

3 CONFIDENTIALITY OF INFORMATION

Confidentiality entails the protection of personal information.¹⁰ Confidentiality means keeping a witness' information between the law enforcement officers and the witnesses under a secure mechanism.¹¹ Confidential data are captured so that the information is not instantly identified with the subject who supplied it, but such a link is possible.¹² Therefore, respect for confidentiality is fundamental. Any breach of confidentiality can have serious consequences for the person providing the information or for those implicated, for the credibility and safety of law enforcement officers, for the confidence with the public and for the effectiveness of the criminal justice system.¹³ All victims, witnesses and other persons cooperating with the investigators and prosecutors have to be informed of the policy on

8 Donat-Cattin, David". Protection of victims and witnesses and their participation in the proceedings." In *The Rome Statute of the International Criminal Court*, pp. 1682-1712. Nomos Verlagsgesellschaft mbH & Co. KG, 2015. At p1683.

9 Paunović, Saša, Dušan Starčević, and Lazar Nešić. "Identity Management and Witness Protection System." *Management* (2013): 66.

10 Eikel, Markus. "Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice." In *Criminal Law Forum*, vol. 23, no. 1-3, pp. 97-133. Springer Netherlands, 2012.

11 Kash, Douglas. "Rewarding confidential informants: Cashing in on terrorism and narcotics trafficking." *Case W. Res. J. Int'l L.* 34 (2002): 231.

12 Dandurand, Yvon, and Kristin Farr. *A review of selected witness protection programs*. Public Safety Canada, 2012.

13 David, Fiona. "Law enforcement responses to trafficking in persons: challenges and emerging good practice." *Trends & Issues in Crime & Criminal Justice* 347 (2007).

confidentiality before being requested to provide information to law enforcement officers.¹⁴ Confidentiality covers the identity of the cooperating person and the information provided (including audio and video recordings, photographs and other types of documentation). Confidentiality with regard to individual protection cases also covers information on the protective measures taken, including any support given by partners external to the law enforcement officers such as social services and nongovernmental organizations to strengthen the protection of a person at risk.¹⁵ This is essential to guarantee the safety not only of the person who benefited from the measures, but also of others who may benefit from them in the future. Witness protection inspires confidence of witnesses and victims of crime in the criminal justice system.

4 ANONYMITY OF WITNESSES

Anonymity is applied in the protection of witnesses and victims of crimes during the various stages of investigation, prosecution and adjudication.¹⁶ The purpose of anonymity is to allow witnesses and victims of crime to give their evidence and or testimony without fear of retaliation against them or their loved ones. Anonymity, whose adjective is “anonymous”, is derived from the greek word *anonymia*, meaning “without a name” or “namelessness”.¹⁷ In a situation where law enforcement determines that a person feels threatened, they will mitigate that threat through anonymity.

Anonymous data are captured by law enforcement officers from witnesses and victims so that the information can never be linked to

14 DOGĂREL, Adrian Constantin. “The Institutional Framework For Witness Protection.” *Journal of Criminal Investigation* 5, no. 1 (2012) pp146-154 at p148.

15 Eikel, Markus. “Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice.” In *Criminal Law Forum*, vol. 23, no. 1-3, pp. 97-133. Springer Netherlands, 2012.

16 Lusty, David. “Anonymous Accusers: An Historical & (and) Comparative Analysis of Secret Witnesses in Criminal Trials.” *Sydney L. Rev.* 24 (2002): 361.

17 LEXICO Dictionary available at <https://www.lexico.com/en/definition/anonymus>.

the subject who supplied it.¹⁸ This involves keeping out of the investigative documents and reports their personal information, including names, social security numbers, addresses, age, profession, place of work, etc. The reports should only contain facts that tend to prove or disprove the allegations against the accused or defendant.

The courts in England, faced with violent crime cases, had to take measures to protect witnesses through anonymity hence triggering law reforms. In *R v Davis*¹⁹, the House of Lords of the UK addressed the circumstances under which witnesses would give evidence anonymously. Briefly, in 2002 two men were shot and killed at a party, allegedly by the defendant, Ian Davis. He was extradited from the United States and tried at the Central Criminal Court for two counts of murder in 2004. At trial the appellant admitted that he had been at the party but claimed that he had left before the shooting and denied having been the gunman. He had gone to the United States on a false passport shortly after the murders. When questioned by the police after his return to this country he had declined to give any answers. Seven witnesses claimed to be in fear for their lives if it became known that they had given evidence against the appellant. Among them were three witnesses, the only witnesses in the case who identified the appellant as the gunman. These claims were investigated and accepted as genuine by the trial judge and the Court of Appeal, and have not been the subject of argument in the House. To ensure the safety of these three witnesses, and induce them to give evidence, the trial judge made an order to the following effect: The witnesses were each to give evidence under a pseudonym; The addresses and personal details, and any particulars which might identify the witnesses, were to be withheld from the appellant and his legal advisers; The appellant's counsel was permitted to ask the witnesses no question which might enable any of them to be identi-

18 Ward, Alan George. "Evidence of Anonymous Witnesses in Criminal Courts: Now and into the Future, The." *Denning LJ* 21 (2009): 67.

19 [2008] UKHL 36.

fied; The witnesses were to give evidence behind screens so that they could be seen by the judge and the jury but not by the appellant; and the witnesses' natural voices were to be heard by the judge and the jury but were to be heard by the appellant and his counsel subject to mechanical distortion so as to prevent recognition by the appellant. He was convicted by the jury and appealed. The court allowed the appeal on the basis that the right to confront witnesses was infringed upon and that this resulted into an unfair trial. The decision of the House of Lords in June 2008 led to Parliament passing the Criminal Evidence (Witness Anonymity) Act, 2008. Three years later, the government of The Bahamas followed suit and enacted the Criminal Evidence (Witness Anonymity) Act 2011. This was due to the fact that The Bahamas is plagued by violent and organized crime. It followed that witnesses to these crimes require protection.

5 THE RATIONALE FOR WITNESS PROTECTION

The openness of judicial proceedings is a fundamental principle enshrined in Article 14 of the International Covenant on Civil and Political Rights (the right to a fair trial).²⁰ This underpins the requirement for a prosecution witness to be identifiable not only to the defendant, but also to the open court.²¹ It supports the ability of the defendant to present his case and to test the prosecution case by cross-examination of prosecution witnesses.²² In some cases it may also encourage other witnesses to come forward.

However, the principle of open justice can sometimes act as a bar to successful prosecutions, particularly in homicides, organized crime,

²⁰ Available at <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

²¹ Lusty, David. "Anonymous Accusers: An Historical & (and) Comparative Analysis of Secret Witnesses in Criminal Trials." *Sydney L. Rev.* 24 (2002): 361.

²² Doak, Jonathan, and Rebecca Huxley-Binns. "Anonymous witnesses in England and Wales: charting a course from Strasbourg?" *The Journal of Criminal Law* 73, no. 6 (2009): 508-529.

terrorism and gun crime.²³ Witnesses may fear that if their identity is revealed to the defendant, his associates or the public generally then they or their friends and family will be at risk of serious harm.

Witness protection is justified for the following reasons:

Firstly, witnesses have a right to safety and security when testifying which is a fundamental human right. This is enshrined under the international human rights instruments.²⁴ Secondly, it is an opportunity for the State to perform its duty of care, to ensure protection of its citizenry from any harm or intimidation and to ensure rule of law.²⁵ Thirdly, victim and witness protection enhances the capacity and integrity of investigations, prosecutions or special commissions of inquiry services.²⁶ Fourthly, witness protection enhances access to justice and promotes the rule of law as the cases depend on witness testimonies given freely and confidently without fear of reprisals whatsoever.²⁷ Fifthly, witness protection helps in securing the testimony of threatened and intimidated witnesses, especially in high profile cases.²⁸ Sixthly, witness protection is critical in ensuring efficient and effective prosecution, thus contributing to effective justice delivery and combating crimes.²⁹ Lastly, to fulfill international obligations under conventions like the UN Convention against Transnational Organized Crime, Article 24, of which obligates states parties to take appropriate measures to protect witnesses; the UN Convention against Corruption; and the International Criminal Court (ICC) Statute (the Rome Statute).

23 Kumar, Miiko. "Secret Witness, Secret Information and Secret Evidence: Australia's Response to Terrorism". *Miss. LJ* 80 (2010): 1371.

24 Trotter, Andrew. "Witness intimidation in international trials: Balancing the need for protection against the rights of the accused." *Geo. Wash. Int'l L. Rev.* 44 (2012): 521.

25 Kiprono, Wilson, Kibet Ngetich, and Wokabi Mwangi. "Challenges facing Criminal Justice System in relation to witness protection in Kenya." *Journal of Humanities and Social Science* (2015).

26 Vermeulen, Gert, ed. *EU standards in witness protection and collaboration with justice*. Maklu, 2005.

27 Mahony, Chris. "The justice sector afterthought: Witness protection in Africa." *Chris Mahony, The Justice Sector Afterthought: Witness protection in Africa*, Pretoria: Institute for Security Studies (2010).

28 Demleitner, Nora V. "Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?." *The American Journal of Comparative Law* 46, no. suppl_1 (1998): 641-664.

29 Dandurand, Yvon. "Strategies and practical measures to strengthen the capacity of prosecution services in dealing with transnational organized crime, terrorism and corruption." *Crime, Law and Social Change* 47, no. 4-5 (2007): 225-246 at 241-2.

6 INTERNATIONAL LEGAL FRAMEWORK

There are a number of international legal instruments in place to enhance witness protection and support to vulnerable victims. The international obligations arise from the ratified international conventions and international human rights laws, «to respect, protect and fulfill the human rights obligations of protecting individuals and groups against violations of their rights and by facilitating the exercise of the rights»³⁰. Therefore, witness protection should not be perceived as a favor to a fearful or threatened person as a result of his or her participation in the justice system, rather as an obligation on the shoulder of the State³¹ vested with the responsibility to protect its population and any resident of its territory, as part of its sovereign function. International organizations like the United Nations Office on Drugs and Crime (UNODC) support States to strengthen witness protection programs and strategies by providing technical assistance.³²

In accordance with Articles 24 and 25 of Organized Crime Convention, State parties shall take appropriate measures within their means to provide effective protection as well as assistance to victims and witnesses of crime. Such measures may include *inter alia* establishing procedures to safeguard the physical integrity of people who give testimony in criminal proceedings from threats against their life and intimidation. Witnesses must be protected from threats, intimidation, corruption, or bodily injury and States are obliged to strengthen international cooperation in this regard.

Article 25 of the UN Convention Against Corruption provides for Obstruction of justice.

30 The Preamble to the UDHR Available at <https://www.un.org/en/universal-declaration-human-rights/>

31 Human Rights Commission, Right to Truth, A/HRC/15/33, p. 5.

32 This includes Legal and institutional assessments; Legislative assistance; Awareness raising programmes targeting criminal justice authorities (including judges, prosecutors, police and prison officials); Training to judges, prosecutors, police and witness protection authorities; Specialized support and advice to assist in the establishment of witness protection units, including advice on developing standard operating procedures, appropriate structures and staffing arrangements and; Strengthening international cooperation for the protection of witnesses.

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention; (b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.

Article 32 of the UN Convention Against Corruption provides for Protection of witnesses, experts and victims.

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them. 2. The measures envisaged in paragraph 1 of this article may include, *inter alia*, without prejudice to the rights of the defendant, including the right to due process: (a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons; (b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means; (c) States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

Article 33 of the Convention Against Corruption provides for Pro-

tection of reporting persons, i.e. Whistleblowers.

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

Article 68 of the Rome Statute provides for the Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counseling and assistance as referred to in article 43, paragraph 6.

7 NATIONAL LEGAL FRAMEWORK OF WITNESS PROTECTION IN THE BAHAMAS

The legal framework for the protection of witnesses in The Bahamas is the Criminal Evidence (Witness Anonymity) Act of 2011.³³ Section 2 of the Act, defines a witness in relation to criminal proceedings to mean any person called, or proposed to be called, to give evidence at the trial or hearing in question; or in relation to an investigation to mean any person assisting an investigative authority³⁴ with its investigations into a qualified offence. Applications for witness anonymity can be made pre-trial under sections 74 to 85 of the Act. The orders known as investigation anonymity orders can be requested at the very start of an investigation thus providing early certainty to people, who may have relevant information, that their identities will not be disclosed.

Investigation anonymity orders are only available in limited circumstances, which are: The qualifying offences include murder, manslaughter, armed robbery, rape, and offences under the Dangerous Drugs Act, offences under the Anti-Terrorism Act, and offences under the Trafficking in Persons Act.³⁵ These are applied for by either the DPP/AG or the Commissioner of Police. The Proceedings are heard *ex parte* by the magistrate.

There are anonymity protection orders during criminal proceedings, that is, during the trial process.³⁶ The prosecution is enjoined to make an application for various in court protection measures. The Act makes certain exceptions that the witness though protected; he/she should be visible to the judge and jury. This enables the Trier of law and facts to make their own impressions of the witness' demeanor.

33 Act No. 40 of 2011 Laws of The Commonwealth of The Bahamas.

34 Under section 2, investigative authority includes the Royal Bahamas Police Force, Customs Department, Immigration Department or any other public authority or governmental department as designated by the Minister of Legal Affairs.

35 Section 4 of the Criminal Evidence (Witness Anonymity) Act.

36 These are provided under Sections 11-19 of the Criminal Evidence (Witness Anonymity) Act.

The availability of a protection mechanism allows The Bahamas to enhance its capacity to investigate and punish crimes, and contribute to the credibility of its justice system³⁷. In providing protection to victims and witnesses through its public services of justice and security, The Bahamas guarantees their participation in investigations and trials in connection to crimes perpetrated because of the inability of State agents to prevent or mitigate the perpetration of these crimes and protect individuals, due to either limited resources or the absence of effective and efficient strategies of crime prevention or because of the caliber of organized crimes authors.

8 DUTY BEARERS FOR WITNESS PROTECTION UNDER THE CRIMINAL JUSTICE SYSTEM IN THE BAHAMAS

Witness protection is a shared responsibility with several actors or stakeholders (all persons along the justice chain including police, courts, prosecutors, community members and witnesses) intervening at various stages of the life cycle of a criminal case.³⁸ In all circumstances and at all times, criminal justice officers (CJOs) have an obligation not to jeopardize the life, safety, freedom and well-being of victims, witnesses and other cooperating persons. The best protection CJOs can provide to cooperating persons is to be aware of the potential risks of harm and to exercise good judgment, caution and sensitivity in all their interactions.³⁹

³⁷ The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the United Nations General Assembly in its Resolution 40/34 of 29 November 1985, states that the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by... (d) taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.

³⁸ Reaves, Brian A., and Timothy C. Hart. *Federal law enforcement officers*, 2008. BiblioGov, 2012.

³⁹ Hendradi, Trimulyono. "Securing protection and cooperation of witness and whistle-blowers." Retrieved from Japan: http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P68-75.pdf (2011). At p70.

9 THE ROYAL BAHAMAS POLICE FORCE (RBPF)

The Royal Bahamas Police Force is enjoined to protect persons and their property and maintain law and order, detect, investigate and prevent crime among others.⁴⁰ The Central Detective Unit (CDU) along with other specialized units of police such as the Justice Protection Unit, Drugs Enforcement Unit, Anti-Terrorism Unit, Financial Crime unit, Technology and Digital crime unit among others do encounter vulnerable victims and witnesses in their course of investigations.⁴¹ The Criminal Evidence (Witness Anonymity) Act enjoins police to take measures to protect witnesses under qualifying criminal investigations.⁴² The Criminal Evidence (Witness Anonymity) Act requires the police to take measures to keep the details of witnesses to violent crimes such as murder, drug related crime, anonymous.⁴³ This is done from the investigative stage through to trial. The Justice Protection Unit is the lead unit in the protection of witnesses. The unit does a reasonably good job, however the lack of cooperation by the witnesses on the program makes their work more challenging. Some witnesses, especially in gang related cases, have gone off the program only to turn up dead.⁴⁴ In the case of Caryn Moss v DPP⁴⁵ the convict Caryn Moss was paid by one known violent criminal 'Die' Stubbs to lure a protected witness to a location in Nassau where he was shot dead and his body partially burnt. She is serving a 35 year sentence for conspiracy to commit murder.

40 Section 4 (1) of the Police Force Act 2009.

41 Sutton, Heather. *Crime and Violence in The Bahamas: IDB Series on Crime and Violence in the Caribbean*. Inter-American Development Bank, 2016. At p46.

42 See Long title to the Act and Section 5 of the Act.

43 Sections 6 and 7 of The Criminal Evidence (Witness Anonymity) Act.

44 See <https://thenassauguardian.com/2018/07/06/murdered-man-was-witness-against-die-stubbs-court-hears/> accessed on 15/11/2019.

45 Caryn Moss v DPP CAIS No. 230 of 2018 and DPP V Caryn Moss CAIS 238 of 2018.

10 THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (ODPP)

The ODPP is the constitutional office that controls criminal prosecutions in the country as provided for under Article 78A of the Constitution of The Bahamas. The ODPP is clothed with a constitutional mandate to institute criminal proceedings against any person or authority.⁴⁶ The office is a key lynch pin between the police as investigators of criminal cases and the judiciary in the criminal justice system.⁴⁷ The office deals with witnesses and victims of crime in the course of their work from the onset when a crime is reported to when the witnesses testify and post-trial debriefing. The ODPP works hand in hand with police in dealing with witnesses. This relationship must enhance the protection and safety of witnesses.

Witness protection not only ensures preservation of testimony crucial for the ends of justice but also for the protection of the case.⁴⁸ In the absence of key testimony, the prosecution would fail to discharge its high legal burden and standard of proof. The ODPP also is enjoined to protect the public interest and promote administration of justice.⁴⁹ In this, witnesses by offering to give testimony, they should not be exposed to any form of danger. Otherwise, it would expose the justice system to be surrendered into the hands of criminals.⁵⁰

46 The Commonwealth of the Bahamas' Constitution in its article 78A provides for the establishment and functions of the ODPP. Article 78B provides for the mandate of the Director of Public Prosecutions (DPP) which consists in instituting criminal proceedings against any person or authority in; to take over and continue any criminal proceedings instituted by any other person or authority; and to discontinue at any stage before judgment is delivered, any criminal proceedings instituted by himself or any other person or authority.

47 Bakibinga, David Baxter. "The Role Of Prosecutors In Preventing Torture And Ill-Treatment Of Accused Persons And Proposals For Reform." *Revista Acadêmica: Escola Superior do Ministério Público do Estado do Ceará*, Fortaleza 10, no. 1 (2018): 217-235.

48 Allum, Felia, and Nicholas Fyfe. "Developments in state witness protection programmes: the Italian experience in an international comparative perspective." *Policing: A Journal of Policy and Practice* 2, no. 1 (2008): 92-102.

49 Griffin, Leslie C. "The prudent prosecutor". *Geo. J. Legal Ethics* 14 (2000): 259. At 268-9

50 Lawson, Raneta J. "Lying, cheating and stealing at government expense: striking a balance between the public interest and the interests of the public in the Witness Protection Program." (1992) *Arizona State Law Journal* (1429-59) at p1429-30.

11 COURTS OF JUDICATURE IN THE BAHAMAS

The Judiciary must dispense justice to all manner of persons in accordance to the law.⁵¹ At the core of the administration of justice lies victim support and witness protection.⁵² The courts are enjoined to work hand in hand with the ODPP and Police in ensuring that victims of crime and witnesses are protected. This includes in court protection, issuing protection or injunctive orders, conducting in camera proceedings to protect privacy and ensure anonymity of vulnerable witnesses. The court plays a pivotal role in the determination of applications for anonymity orders and issuance of the same under the Criminal Evidence (Witness Anonymity) Act. Furthermore Section 78B of the Evidence (Amendment) Act⁵³ provides for witness testimony via live television link. This procedure is among others adopted where a witness is considered a vulnerable person.⁵⁴ The courts must act judiciously in the grant or denial of the applications for protection measures balancing the fair trial rights of defendants and the safety of witnesses.

12 MEASURES UNDER WITNESS PROTECTION

All criminal justice systems have a duty to put in place procedures to provide measures for the protection of persons whose cooperation with the criminal justice system in an investigation or prosecution may put them, or persons closely associated with them, at risk of serious physical or emotional harm.⁵⁵ Such measures may include: Assistance before and during trial to cope with the psychological and

51 See Part VII of The Constitution of the Commonwealth of the Bahamas.

52 Goldstein, Abraham S. "The victim and prosecutorial discretion: The federal victim and witness protection act of 1982." *Law & Contemp. Probs.* 47 (1984): 225. At p229.
53 No. 36 of 2011.

54 Section 78B (1) (C) of the Act.

55 van Lent, Yorik. "Legal Regulation of Witness Protection in the European Union." (2019). 139-148 at p.141 Available at <https://repository.mruni.eu/bitstream/handle/007/15526/van%20Lent.pdf?sequence=1>

practical obstacles of testifying; Protective measures before, during and after hearing or trial for “at risk” witnesses; Court procedures to ensure the witness’ safety while testifying; and a covert witness protection program.⁵⁶

13 NON-PROCEDURAL MEASURES

There are non-procedural, or out of court, measures employed by law enforcement officials as expounded upon below:

Safe houses: This entails placing the witness in a safe house or secure location and ensuring the witness has round-the-clock close protection.⁵⁷ The safe or protection houses are run by the Justice Protection Unit under the RBPF or witness protection agency. They are operated anonymously to ensure that the witnesses are not traced to them.

Witness protection program: These are covert programs used before and after trial to ensure the continued safety of a witness and involve the relocation of witnesses and giving them new identities depending on the risk posed to the witness.⁵⁸ This is done as the last resort when there is grave danger against the witness. Witnesses in serious and transnational crime cases are often at risk of intimidation, physical harm, or murder.⁵⁹ Where law enforcement assesses the witness to be in the category of the highest risk, then efforts are made to relocate them to third countries with changed identity.

Police protection: This when the police assigns teams to provide physical protection to the witnesses.⁶⁰ Most of this is done by under-

56 UNODC, Victim Assistance and Witness Protection <https://www.unodc.org/unodc/en/organized-crime/witness-protection.html>

57 Minnaar, Anthony. “Witness protection programmes-some lessons from the South African experience.” *Acta Criminologica: Southern African Journal of Criminology* 15, no. 3 (2002): 118-133.

58 Montanino, Fred. “Protecting the federal witness: burying past life and biography.” *American Behavioral Scientist* 27, no. 4 (1984): 501-528.

59 Dandurand, Yvon, and Kristin Farr. A review of selected witness protection programs. Public Safety Canada, 2012. At p9.

60 Dedel, Kelly. “Witness intimidation.” US Department of Justice Report (2016). At p23-4.

cover agents and through surveillance. In The Bahamas, this is done by the Justice Protection Unit under the Royal Bahamas Police Force.

14 PROCEDURAL MEASURES

Redacted information: Redacted evidence refers to written evidence which has been edited to the extent necessary to be suitable for admission into evidence and publication to the jury.⁶¹ It is often used to describe documents from which sensitive or personal information has been expunged or blacked out. It is intended to allow the selective disclosure of information in a document while keeping other parts of the document confidential.⁶² This is done to protect personal information that would lead to the easy identification of a witness exposing them to perils especially in organized crime cases.

Witness Anonymity: In an anonymous witness case, the witness is called to the court, but is screened from the defendant, screened from the public gallery and his evidence is received through means of technical equipment, so for instance the voice is disguised for the defendant and the public gallery. This is done pursuant to a court order to protect the identity of the witness.⁶³ Only the jury and judge see and hear the witness in his natural state. The reliance on anonymous witnesses is whereby the accused person and his or her lawyer will never find out the identity of the witness testifying. This is used as a last-resort, exceptional measure, because it gravely impinges on the fair trial rights of the accused person (e.g., the right to examine witnesses). When anonymity is used, human rights safeguards need to be introduced. The Criminal Evidence (Witness Anonymity) Act of 2011 provides for due process to ensure that the rights of the accused/defendant are protected and those of the witnesses. The process of

61 Eikel, Markus. "Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice." In *Criminal Law Forum*, vol. 23, n° 1-3, pp. 97-133. Springer Netherlands, 2012.

62 Anderson, John. *Gang-related witness intimidation*. Bureau of Justice Assistance, 2007.

63 See Section 11 of the Criminal Evidence (Witness Anonymity) Act n° 40 of 2011.

witness anonymity is regulated by court and where the Crown seeks to rely upon the measure of anonymity, they must obtain a court order.⁶⁴

Face and voice distortion and Masks: These measures include making efforts to conceal the features or physical description of the witness at trial (e.g., allowing the witness to testify behind an opaque shield).⁶⁵

Assignment of a pseudonym (e.g., the witness would be designated with a title such as “Witness 56” or “Witness XY”) is one of the court room protection measures.⁶⁶

Nondisclosure of records that identify the witness to the accused and his or her lawyer until a reasonable time before the trial: This delayed disclosure is aimed at preventing any retaliatory attacks against the witness prior to their testimony in court.⁶⁷ For instance if the details are released less than 24 hours before the testimony then there could be a less likelihood for the accused or his/her cohorts to come up with a plan to target a given witness. This would be done on a case by case basis depending on the threat level as some criminal groups are more sophisticated and can eliminate witnesses at a given opportunity.

Expunging the witness name from the public record: This is done in rare cases where a given witness faces imminent danger.⁶⁸ For instance, if one defected from the top echelons of a criminal organization or was an agent provocateur. In this case their records from birth, education, medical, insurance, social security, marriage, employment, and others, are removed from the public records. The individual would then be given a new identity and records. Relocation to another country would follow if the danger is persistent.⁶⁹

64 See Sections 12-19 of the Criminal Evidence (Witness Anonymity) Act.

65 See Section 11(2) (d) and (e) of the Act.

66 See Section 11 (2) (b) of the Act.

67 Fyfe, Nicholas, and James Sheptycki. “International trends in the facilitation of witness co-operation in organized crime cases.” *European journal of criminology* 3, no. 3 (2006): 319-355. At p332.

68 Leigh, Monroe. “The Yugoslav Tribunal: Use of unnamed witnesses against accused.” *American Journal of International Law* 90, no. 2 (1996): 235-238. At p236.

69 Fyfe, Nicholas R., and Heather McKay. “Police protection of intimidated witnesses: A study of the

Prohibiting counsel or a suspect from revealing the name of the witness to anyone: This is done through a court order but it is very unsafe especially when it comes to cases of organized crime.⁷⁰ Organized criminals are more often in possession of loads of money to enable them escape justice. A court order would not bar them from 'leaking' the particulars of witnesses to the press and to their associates with a view of intimidating or endangering them.

In camera proceedings: In camera is a Latin derivative meaning "in a chamber". It is a legal term that means in private. The same meaning is sometimes expressed in the English equivalent: in chambers. Generally, in camera describes court cases, parts of it, or process where the public and press are not allowed to observe the procedure or process.⁷¹ Entire cases may be heard in camera when, for example, matters of national security or protected witnesses are involved.

Video link testimony: Generally, a witness must be present in the courtroom to give oral evidence in The Bahamas. However, the Evidence (Amendment) Act 2011 sets out the rules for how evidence can be given by video-link in certain cases.⁷² If you are giving evidence by video-link you don't need to go into the courtroom. Instead you can sit in another designated room and give your evidence by live video-link. A television monitor is placed in the court, which transmits your image, and you have a television monitor in your room that transmits the image of what is happening in the courtroom. The aim of video-link evidence is to make it easier for some witnesses to give evidence.⁷³ The courtroom can be very intimidating for some witnesses and other witnesses may find it very difficult being in the

Strathclyde police witness protection programme." *Policing and Society: An International Journal* 10, no. 3 (2000): 277-299.

70 Hamann, Kristine, and Jessica Trauner. "Witness Intimidation: What You Can Do To Protect Your Witness." *Prosecutor, Journal of the National District Attorneys Association* 51, no. 2 (2018): 13-29.

71 Wald, Patricia M. "Dealing with witnesses in war crime trials: Lessons from the Yugoslav Tribunal." *Yale Hum. Rts. & Dev. LJ* 5 (2002): 217.

72 Section 78B (7) of the Act and Schedule on Criminal Proceedings (Evidence By Way of Live Television Link and Video Recording) Rules, 2011.

73 Trotter, Andrew. "Witness intimidation in international trials: Balancing the need for protection against the rights of the accused." *Geo. Wash. Int'l L. Rev.* 44 (2012): 521.

same room as the accused especially in violent crime cases.

In criminal proceedings, there are certain situations where video-link evidence is acceptable, these include:

Firstly, if the proceedings involve a sexual or violent offence, the victim and any other witness may be allowed to give their evidence by live video-link, if they are less than 18 years of age, or for any other reason that the judge allows⁷⁴; and Secondly, if the judge thinks it is necessary to protect the victim from further victimization, the victim can give evidence by live video-link.⁷⁵

In certain circumstances, a physical screen or partition can be positioned in the courtroom, so the witness can their give evidence in the court without having to see the accused when doing so.⁷⁶ This option is available at the judge's discretion if the witness is under 18 and the proceedings are about a sexual or violent offence.⁷⁷ This is done in order to protect the witness from secondary or repeat victimization. It is crucial that the judge and lawyers must be able to see and hear the evidence the witness is giving if a screen is used.

15 CHALLENGES IN WITNESS PROTECTION

There are number of challenges experienced in ensuring protection of witnesses. This paper highlights a few to enable the reader appreciate the task faced by those in law enforcement offices.

The first challenge is that a witness protection programme is extremely expensive in terms of operations, recruitment and capacity building. Like the adage goes that 'Justice is expensive', in order to secure witnesses as a key component of criminal justice the tax payer

74 Hanna, Kirsten, Emma Davies, Charles Crothers, and Emily Henderson. "Child witnesses' access to alternative modes of testifying in New Zealand." *Psychiatry, Psychology and Law* 19, no. 2 (2012): 184-197.

75 Leader, Kathryn. "Closed-circuit television testimony: Liveness and truth-telling." *Law Text Culture* 14 (2010): xxxvii. At p316.

76 Benedet, Janine, and Isabel Grant. "Taking the stand: Access to justice for witnesses with mental disabilities in sexual assault cases." *Osgoode Hall LJ* 50 (2012): 1. At p29.

77 Bala, Nicholas, Angela Evans, and Emily Bala. "Hearing the voices of children in Canada's criminal justice system: Recognising capacity and facilitating testimony." *Child & Fam. LQ* 22 (2010): 21. At p15-20.

must bear the burden.⁷⁸ Secondly, it is labour intensive. A number of actors are involved from protection officers, social welfare officers, back ground investigators, court liaisons, and rapid response teams among others.⁷⁹ All these put in a lot of time and other resources to ensure the smooth running of the operations. Thirdly, the operation of the programme is covert and confidential in nature.⁸⁰ This is the core foundation of witness protection. This requires absolute loyalty, commitment and teamwork by all those involved so that there are no breaches whatsoever. Any compromises would render the efforts nugatory. Fourthly, balancing the rights of accused persons and the need to protect victims and witnesses.⁸¹ This arises in a situation where the witnesses testify anonymously. The accused may deem that their right to confront their accuser has been compromised especially since most organised crimes are indictable and carry hefty jail terms.⁸² Fifthly, the challenge to the employees suffering the “socio death” phenomenon. This situation arises when a protected witness was employed and all over a sudden he or she becomes redundant.⁸³ Most of them would feel that their world has fallen apart by virtue of witnessing something that may have nothing to do with them directly at least in their minds. Such witnesses usually violate the rules of anonymity as the ‘socio death’ is perceived as worse than the actual death. These witnesses place extreme pressure on their handlers under the program. Sixthly, The challenge of media involvement as they are always intrusive seeking for scoops which could jeopardize the programme by exposing

78 Minnaar, Anthony. “Witness protection programmes-some lessons from the South African experience”. *Acta Criminologica: Southern African Journal of Criminology* 15, nº 3 (2002): 118-133. At p119
79 Slate, Risdon N. “The federal witness protection program: Its evolution and continuing growing pains.” *Criminal Justice Ethics* 16, no. 2 (1997): 20-34. At p20.

80 Mass, Stuart. “The Dilemma of the Intimidated Witness in Federal Organized Crime Prosecutions: Choosing Among the Fear of Reprisals, the Contempt Powers of the Court, and the Witness Protection Program.” *Fordham L. Rev.* 50 (1981): 582. At p590.

81 Bates, Maile Brady. “A Balancing Act: The Rights of the Accused and Witness Protection Measures.” *Trinity CL Rev.* 17 (2014): 143.

82 Momeni, Mercedeh. “Balancing the procedural rights of the accused against a mandate to protect victims and witnesses: An examination of the anonymity rules of the International Criminal Tribunal for the Former Yugoslavia.” *Howard LJ* 41 (1997): 155.

83 O'Malley, Margaret. “Witness intimidation in the digital age: the basics.” *Prosecutor, Journal of the National District Attorneys Association* 48, no. 4 (2014): 12-20.

protected witnesses.⁸⁴ The media both mainstream and the online in their quest to out manoeuvre each other with perceived 'juicy stories' expose many witnesses under protection. Criminal groups have made inroads in all facets of society including the media.⁸⁵ Seventhly, the lack of co-operation from other criminal justice agencies - may frustrate the operations of the witness protection agency.⁸⁶ The judiciary and prosecution must guard against exposing protected witnesses especially during the process of disclosure and the trial proceedings. Concerted efforts must be undertaken to preserve the integrity of witness protection. There have been situations where details of protected witnesses wind up on social media. Eighthly, the slow pace of trials means that witnesses stay on the programme longer which renders it expensive and increases the likelihood of breaches.⁸⁷ The wheels of justice do not move as fast as they should due to many factors. There is need to develop a mechanism of fast tracking cases with protected witnesses to mitigate the attendant challenges. Ninthly, the lack of cooperation of witnesses which results into death⁸⁸ and or the exposure of safe houses as anonymity is compromised. This renders the process of witness protection nugatory.⁸⁹ Tenthly, some witnesses have too many expectations from the witness protection process.⁹⁰ Many would desire for the law enforcement agencies to take care of their economic and social problems. Other witnesses on

84 Yahav, Inbal, David G. Schwartz, and Gahl Silverman. "Detecting unintentional information leakage in social media news comments." In Proceedings of the 2014 IEEE 15th International Conference on Information Reuse and Integration (IEEE IRI 2014), pp. 74-79. IEEE, 2014.

85 Sheptycki, James. "Uneasy truths; criminal-informants, witness protection, trust and legitimacy in the policing of organized crime." In Contemporary Organized Crime, pp. 213-230. Springer, Cham, 2017.

86 McDermott, Yvonne. "Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court." In The Ashgate Research Companion to International Criminal Law, pp. 53-89. Routledge, 2016.

87 Kiprono, Wilson, Kibet Ngetich, and Wokabi Mwangi. "Challenges facing Criminal Justice System in relation to witness protection in Kenya." Journal of Humanities and Social Science (2015). At p96

88 In Caryn Moss v DPP CAIS No. 230 of 2018 and DPP v Caryn Moss CAIS 238 of 2018, Caryn Moss lured a protected witness O'Neil Marshal to a location in Nassau from where he was murdered from. She is serving a 35 year sentence. See also <https://thenassauguardian.com/2018/07/06/murdered-man-was-witness-against-die-stubbs-court-hears/> accessed on 15/11/2019.

89 Anderson, John. Gang-related witness intimidation. Bureau of Justice Assistance, 2007.

90 Slate, Risdon N. "The federal witness protection program: Its evolution and continuing growing pains." Criminal Justice Ethics 16, no. 2 (1997): 20-34. At p20.

the program shun their social obligations.⁹¹ In other words they hold the state at ransom. Lastly, the lack of court house witness protection infrastructure. The courts of The Bahamas were constructed without the foresight of having in court protection measures. It follows that the witness would likely be exposed. In the bribery trial of a former Minister Shane Gibson, these inadequacies were evident.⁹² There are no designated entrances for such witnesses. The officers would cover the witness with jackets but make a 50 yard dash to and from the unmarked police car into court. That dash is too long for any would be marks man hell bent to take out a vital witness.

16 FINAL CONSIDERATIONS

Witness protection not only ensures preservation of testimony crucial for the ends of justice but also for the protection of the case. In the absence of key testimony, the prosecution would fail to discharge its high legal burden and standard of proof. The ODPP also is enjoined to protect the public interest and promote administration of justice. In this vain, witnesses by offering to give testimony, they should not be exposed to any form of danger. Otherwise the justice system would be open to the control of the criminal groups. Nonetheless, The Bahamas has taken steps in the right direction towards the protection of witnesses although, a lot still needs to be done.

⁹¹ *Ibid* at p25.

⁹² <https://thenassauguardian.com/2019/10/08/defense-grills-ash-as-gibson-trial-continues/> accessed on 01/11/2019.

PROTEÇÃO DE TESTEMUNHAS NO SISTEMA DE JUSTIÇA PENAL DAS BAHAMAS

RESUMO

A proteção das testemunhas está agora firmemente arraigada nos modernos sistemas de justiça criminal, especialmente nas jurisdições que lidam com o crime organizado e violento. É louvável a decisão do governo da Comunidade das Bahamas de promulgar legislação a respeito de medidas processuais, e não processuais, para proteção de testemunhas, dado que o crime violento e organizado é predominante no país. Este artigo destaca os princípios básicos da proteção de testemunhas e a estrutura legal, tanto em nível internacional quanto nacional. Ele também aborda o papel dos principais responsáveis no processo de proteção de testemunhas. Além disso, são exploradas as medidas processuais, e não processuais, adotadas pelos policiais nas Bahamas. E, finalmente, são examinados os desafios encontrados na implementação das medidas de proteção a testemunhas nas Bahamas. O objetivo é ajudar os formuladores de políticas, conselheiros e encarregados de tomar decisões, como parlamentares, a criarem meios e maneiras de erradicar e/ou mitigar os desafios enfrentados na implementação de medidas de proteção a testemunhas nas Bahamas.

Palavras-chave: Proteção de testemunhas. Confidencialidade. Anonimato. Medidas processuais e não processuais. As Bahamas.

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