
CHAPTER 91B**CRIMINAL EVIDENCE (WITNESS ANONYMITY)**

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CHAPTER 91B
CRIMINAL EVIDENCE (WITNESS ANONYMITY)

An Act to provide for the protection of the identity of witnesses during the investigation of criminal offences and during criminal proceedings and matters connected therewith. *40 of 2011*

[Assent 3rd November, 2011]

[Commencement 4th November, 2011]

PART I – PRELIMINARY

1. This Act may be cited as the Criminal Evidence (Witness Anonymity) Act. Short title.
2. In this Act — Interpretation.
 - “firearm” has the meaning ascribed to it in the Firearms Act; Ch. 213.
 - “investigation anonymity order” means an order made by a court pursuant to section 6 that requires specified measures to be taken in relation to a witness in a qualified criminal investigation that ensures that the identity of the person is not disclosed in, or in connection with, the investigations;
 - “investigative authority” means the Royal Bahamas Police Force, the Customs Department, the Immigration Department or such other public authority or department of Government that the Minister may by order appoint as an investigative authority under this Act;
 - “Minister” means the Minister with responsibility for legal affairs;
 - “offensive instrument” has the same meaning as in the Penal Code; Ch. 84.
 - “witness” in relation to —
 - (a) criminal proceedings, means any person called, or proposed to be called, to give evidence at the trial or hearing in question;

(b) criminal investigations, means any person assisting an investigative authority with its investigations into a qualified offence;

“witness anonymity order” means an order made by a court pursuant to section 11 that requires such specified measures to be taken in relation to a witness in criminal proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in, or in connection with, the proceedings.

Application.

3. This Act applies to criminal investigations and criminal proceedings in cases where —

- (a) the investigation, trial or hearing begins on or after the commencement of this Act;
- (b) the investigation, trial or hearing has begun, but has not ended before the commencement of this Act.

PART II - ANONYMITY DURING THE COURSE OF INVESTIGATIONS

Qualifying offences.

4. (1) The qualifying offences are —

- (a) murder;
- (b) manslaughter;
- (c) robbery while being armed with a firearm or an offensive instrument;
- (d) rape;
- (e) offences under the Dangerous Drugs Act;
- (f) offences under the Anti-Terrorism Act;
- (g) offences under the Trafficking in Persons (Prevention and Suppression) Act,

Ch. 228.

Ch. 107.

Ch 106.

and includes any attempt at the commission of, any steps taken in preparation for the commission of, or the abetment of an offence under this section.

(2) The Minister may by order amend the list of offences under subsection (1).

Qualifying criminal investigations.

5. A qualifying criminal investigation is an investigation conducted by the Royal Bahamas Police Force or any other investigative authority wholly or in part with a view to ascertaining —

- (a) whether a person should be charged with one of the qualifying offences under section 4; or

(b) whether a person charged with a qualifying offence has committed the offence.

6. (1) A magistrate may grant an order, in relation to a specified person, prohibiting the disclosure of information that —

Investigation
anonymity order.

(a) identifies the specified person as a person who is or was able or willing to assist a qualified criminal investigation; or

(b) might enable the specified person to be identified as such a person.

(2) The prohibition in an investigation anonymity order is subject to subsections (3) through (8).

(3) A person shall not contravene an investigation anonymity order by the disclosure of such information as regards the specified person as is described in subsection (1), if the person disclosing the information does not know and has no reason to suspect that such an order has been made in relation to the specified person in connection with the specified qualifying criminal investigation.

(4) A person shall not contravene an investigation anonymity order by the disclosure of such information as regards the specified person as is described in subsection (1)(b), if the person disclosing the information does not know and has no reason to suspect that the information disclosed is information that might enable the specified person to be identified as a person of the sort described in subsection (1)(a) in relation to the specified qualifying criminal investigation.

(5) Where, a person knows that another person is aware that the person specified in an investigation anonymity order is a person who is or was able or willing to assist a criminal investigation relating to the qualifying offence, and that person discloses to that other person that an investigation anonymity order has been made in relation to the specified person in connection with the criminal investigation of a qualifying offence, he shall not contravene the order.

(6) A person who discloses information to which an investigation anonymity order relates does not contravene the order where —

(a) the disclosure is made to a person who is involved in the specified qualifying criminal

investigation or in the prosecution of an offence to which the investigation relates; and

- (b) the disclosure is made for the purposes of the investigation or the prosecution of an offence to which the investigation relates.

(7) A person does not contravene an investigation anonymity order by a disclosure —

- (a) in pursuance of a requirement imposed by any law; or
- (b) made in pursuance of an order of the court.

(8) A person who discloses such information as regards a specified person in subsection (1) may not rely on the provisions of subsection (4) in a case where —

- (a) it may have been determined that the person was required or permitted to withhold the information, whether on grounds of public interest immunity or on other grounds; and
- (b) the person disclosed the information without there having been a determination as to whether the person was required or permitted to withhold the information,

and that the disclosure for the purposes of seeking such a determination is not a contravention of an investigation anonymity order.

(9) In this section “specified person” means the person specified in the respective investigation anonymity order.

Application for investigation anonymity order.

7. (1) An application for an investigation anonymity order may be made to a magistrate by —

- (a) the Commissioner of Police; or
- (b) the Attorney-General.

(2) An applicant for an investigation anonymity order shall not be required to give notice of the application to —

- (a) a person who is suspected of having committed or who has been charged with an offence to which the qualifying criminal investigation relates; or
- (b) that person’s legal representative.

(3) An applicant for an investigation anonymity order shall, unless the magistrate directs otherwise, inform

the magistrate of the identity of the person who is to be specified in the order.

(4) A magistrate may determine the application without a hearing.

(5) Where a magistrate determines an application for an investigation anonymity order without a hearing, the magistrate shall notify the applicant of the determination.

(6) The Minister may, by order, amend the list of persons in subsection (1) who may make an application under this section.

8. (1) A magistrate may make an investigation anonymity order if satisfied that there are reasonable grounds for believing that the conditions set out in subsection (2)(a), (b) and (c) are met or the condition in (d) is met.

Conditions for making an order.

(2) The conditions referred to in subsection (1) are that —

- (a) a qualifying offence has been committed;
- (b) the person who would be specified in the order has reasonable grounds for fearing intimidation or harm if identified as a person who is or was able or willing to assist the criminal investigation as it relates to the qualifying offence;
- (c) the person who would be specified in the order —
 - (i) is able to provide information that would assist the criminal investigation as it relates to the qualifying offence; and
 - (ii) is more likely, as a consequence of the making of the order, to provide such information;
- (d) the person likely to have committed the qualifying offence is a person who was at least sixteen years of age at the time the offence was committed.

(3) Where it is suspected that the qualifying offence was committed by two or more persons, it is sufficient for the purposes of subsection (1) that the magistrate is satisfied that there are reasonable grounds for believing that the conditions in subsection (2) are satisfied in relation to one person.

(4) The Minister may, by order, amend subsection (2)(b) and (d) and subsection (3).

Appeal against refusal to make an order.

9. (1) Where a magistrate refuses an application for an investigation anonymity order, the applicant may appeal immediately to a Judge against that refusal.

(2) An appeal under this section shall be dealt with expeditiously.

(3) An applicant may not appeal under subsection (1) unless the applicant indicates —

(a) in the application for the order; or

(b) if there is a hearing of the application before the magistrate, at the hearing,

that the applicant intends to appeal a refusal.

(4) Where an applicant has indicated an intention to appeal a refusal, the magistrate who refuses an application for an investigation anonymity order shall nonetheless make the order as requested by the applicant and that order shall be endorsed with the words “subject to appeal”.

(5) An order made under subsection (4) has effect until the appeal is determined or otherwise disposed of.

(6) The Judge of the Supreme Court to whom an appeal is made shall consider afresh the application for an investigation anonymity order and subsections (2) through (5) of section 7 applies accordingly to the determination of the application by that court.

Discharge of order.

10. (1) A magistrate may discharge an investigation anonymity order where it appears to him to be appropriate to do so.

(2) The magistrate may discharge an investigation anonymity order on an application by the person on whose application the order was made or any person specified in the order.

(3) An application may not be made under subsection (2) unless there has been a material change of circumstances since the relevant time.

(4) Any person who is eligible to apply for the discharge of the order is entitled to be party to the proceedings on the application in addition to the applicant.

(5) Where an application to discharge an investigation anonymity order is made by a person other

than the person specified in the order, the magistrate may not determine the application unless —

- (a) the person specified in the order has had an opportunity to oppose the application; or
- (b) the magistrate is satisfied that it is not reasonably practicable to communicate with the person.

(6) A party to these proceedings may appeal to a Judge of the Supreme Court against the magistrate’s decision.

(7) Where during the proceedings a party indicates an intention to appeal against a determination to discharge the investigation anonymity order, a magistrate who makes such a determination shall provide for the discharge of the order not to have effect until the appeal is determined or otherwise disposed of.

- (8) In this section “the relevant time” means —
 - (a) the time when the order was made; or
 - (b) if a previous application has been made under subsection (2), the time when the application, or the last application, was made.

PART III - ANONYMITY IN CRIMINAL PROCEEDINGS

11. (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.

Witness
anonymity order.

(2) The measures that may be required to be taken in relation to a witness to which a witness anonymity order applies, include measures for securing one or more of the following —

- (a) the witness’s name and other identifying details may be —
 - (i) withheld; or
 - (ii) removed from material disclosed to any party to the proceedings;
- (b) that the witness may use a pseudonym;
- (c) that the witness is not asked questions of any specified description that may lead to his identification;
- (d) that the witness is screened to any specified extent; or

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- (e) that the witness's voice is subjected to modulation to any specified extent.
 - (3) Subsection (2) does not affect the generality of subsection (1).
 - (4) Nothing in this section authorises the court to require —
 - (a) the witness to be screened to such an extent that the witness cannot be seen by —
 - (i) the magistrate, the judge or other members of the court, if any; or
 - (ii) the jury, if there is one;
 - (b) the witness's voice to be modulated to such an extent that the witness's natural voice cannot be heard by any of the persons within paragraphs (a)(i) and (ii).
 - (4) In this section “specified” refers to such specifications as may be detailed in the witness anonymity order concerned.

Application for
witness
anonymity order.

- 12.** (1) An application for a witness anonymity order may be made to the court by the prosecutor or the defendant.
- (2) Where an application is made by the prosecutor, the prosecutor shall —
 - (a) unless the court directs otherwise inform the court of the identity of the witness; and
 - (b) not be required to disclose in connection with the application —
 - (i) the identity of the witness; or
 - (ii) any information that might enable the witness to be identified,
 to any other party to the proceedings or that other party's legal representative.
 - (3) Where an application is made by the defendant, the defendant shall —
 - (a) inform the court and the prosecutor of the identity of the witness; and
 - (b) not be required to disclose in connection with the application, if there is more than one defendant —
 - (i) the identity of the witness; or

(ii) any information that might enable the witness to be identified,
to any other defendant or his legal representative.

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

- (a) the identity of the witness; or
- (b) any information that might enable the witness to be identified,

from being disclosed except as required by subsection (2)(a) or (3)(a).

(5) In this section “relevant material” means any document or other material which falls to be disclosed, or is sought to be relied on, by or on behalf of the party concerned in connection with the proceedings or proceedings preliminary to them.

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

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

(8) Nothing in this section is to be taken as restricting any power to make rules of court.

13. (1) Upon an application pursuant to section 12, the court may make a witness anonymity order only if it is satisfied that the following conditions are met —

Conditions for making an order.

- (a) that the measures to be specified in the order are necessary —
 - (i) in order to protect the safety of the witness or another person or to prevent any serious damage to property; or
 - (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;

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- (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.

(2) In determining whether the measures to be specified in the order are necessary for the purpose mentioned in subsection (1)(a)(i), the court shall have regard, in particular, to any reasonable fear on the part of the witness—

- (a) that the witness himself or another person would suffer death or injury; or
- (b) that there would be serious damage to property, if the witness were to be identified.

Relevant considerations.

14. (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); and
- (b) such other matters as the court considers relevant.

(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;

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- (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.

15. (1) Where a court refuses an application for a witness anonymity order, the applicant may appeal to the Court of Appeal against that refusal.

Appeal against refusal by court to make an order.

(2) An appeal under this section shall be dealt with expeditiously.

(3) An applicant may not appeal under subsection (1) unless the applicant indicates —

- (a) in the application for the order; or
- (b) where there is a hearing of the application before the court, at the hearing,

that the applicant intends to appeal a refusal.

(4) Where an applicant has indicated an intention to appeal a refusal, the court that refuses an application for a witness anonymity order shall nonetheless make the order as requested by the applicant and that order shall be endorsed with the words “subject to appeal”.

(5) An order made under subsection (3) has effect until the appeal is determined or otherwise disposed of.

(6) The Court of Appeal shall consider afresh the application for a witness anonymity order and subsections (2) through (8) of section 12 applies accordingly to the determination of the application by that court.

16. The Judge of Supreme Court shall, where on a trial on indictment with a jury and evidence has been given by a witness at a time when a witness anonymity order applied to that witness, give the jury such warning as the Judge considers appropriate to ensure that the fact that the

Warning to jury.

order was made in relation to that witness does not prejudice the defendant.

Discharge or
variation of
order.

17. (1) A court that has made a witness anonymity order in relation to any criminal proceedings may in those proceedings subsequently discharge, vary or further vary the order if it appears to the court to be appropriate to do so in view of the provisions in sections 13 and 14 that applied to the making of the order.

(2) The court may, discharge, vary or further vary a witness anonymity order —

(a) on an application made by a party to the proceedings where there has been a material change of circumstances since the relevant time; or

(b) on its own initiative.

(3) The court shall give every party to the proceedings the opportunity to be heard —

(a) before determining an application made to it under subsection (2); or

(b) before discharging, varying or further varying the order on its own initiative.

(4) The court may, notwithstanding subsection (3), hear one or more of the parties to the proceedings in the absence of a defendant in the proceedings and his legal representative, if it appears to the court to be appropriate to do so in the circumstances of the case.

(5) In this section, “the relevant time” means—

(a) the time when the order was made; or

(b) where a prior application has been made under subsection (2), the time when the last application was made.

Discharge or
variation of order
after criminal
proceedings have
come to an end.

18. (1) Where a court has made a witness anonymity order in relation to a witness in criminal proceedings and those proceedings have come to an end the court that made the order may discharge, vary or further vary the order if it appears to the court to be appropriate to do so in view of —

(a) the provisions in sections 13 and 14 that apply to the making of a witness anonymity order; and

(b) such other matters as the court consider relevant.

(2) On an application made either by a party to the criminal proceeding or by the witness, the court may

discharge, vary or further vary a witness anonymity order if there has been a material change of circumstances since the relevant time.

(3) The court may not determine an application made to it under subsection (2) unless in the case of each of the parties to the original criminal proceedings and the witness —

- (a) it has given the person the opportunity to be heard; or
- (b) it is satisfied that it is not reasonably practicable to communicate with the person.

(4) The court may, notwithstanding subsection (3), hear one or more of the persons mentioned in that subsection in the absence of a person who was a defendant in the original criminal proceedings and that person's legal representative, if it appears to the court to be appropriate to do so in the circumstances of the case.

(5) In this section, “the relevant time” means —

- (a) the time when the original criminal proceedings came to an end; or
- (b) where a previous application had been made under subsection (2), the time when the application, or the last application, was made.

19. (1) Where a court has made a witness anonymity order in relation to a witness in the trial proceedings and a defendant in the trial proceedings has in those proceedings —

- (a) been convicted;
- (b) been found not guilty by reason of insanity; or
- (c) been found to be under a disability and to have done the act charged in respect of an offence,

the Court of Appeal may, in proceedings on or in connection with an appeal by the defendant from the trial proceedings, discharge, vary or further vary the order if it appears to the court to be appropriate to do so in view of the provisions in sections 13 and 14 that apply to the making of a witness anonymity order and such other matters as the court considers relevant.

(2) The Court of Appeal may not discharge or vary the order unless in the case of each party to the trial proceedings —

Discharge or
variation by
Court of Appeal.

- (a) it has given the person specified in the order the opportunity to be heard; or
- (b) it is satisfied that it is not reasonably practicable to communicate with the person.

(3) The Court of Appeal may, notwithstanding subsection (2), hear one or more of the parties to the trial proceedings in the absence of a person who was a defendant in the trial proceedings and that person's legal representative, where it appears to the court to be appropriate to do so in the circumstances of the case.

(4) In this section, a reference to the doing of an act includes a reference to a failure to act.

(5) In this section, "trial proceedings" means the criminal proceedings from which the appeal lies.

PART IV — MISCELLANEOUS

Withholding of information on the grounds of public interest immunity.

20. Nothing in this Act affects any common law rules as to the withholding of information on the grounds of public interest immunity.

Penalties.

21. A person who discloses information in contravention of —

- (a) an investigation anonymity order; or
- (b) a witness anonymity order,

commits an offence and is liable on summary conviction to imprisonment for a term in the range of three to five years.

Regulations.

22. The Minister may make regulations prescribing all matters for the carrying out of or giving effect to the provisions of this Act.