March 2013: Issue 6

INDICTMENT

The quarterly Newsletter for Investigators and Prosecutors of Serious Organised Crime

In this edition of Indictment, we are going to take you around the world exploring how different jurisdictions protect witnesses.

The protection of witnesses from intimidation or harm is imperative to the integrity and success of a judicial process. When the threat is high, international practice is that witnesses are relocated and provided with an identity change, as part of a formal protection programme. This requires sustainable long-term resources and a large initial injection of expenditure, which will primarily be for staff. If such startup expenditure is to be undertaken, a commitment is needed to reduce backlogs and improve the efficiency of the criminal justice system, otherwise the programme will not be cost effective.

You will hear from the Philippines and international assistance with their witness protection scheme; Afghanistan to look at the hazards of protecting witnesses in a hostile environment; and to Italy where the concept of witness protection was developed.

Also an issue of Indictment wouldn't be the same without our regular columns, of Stop the Press and Legal Update!

Editor:
Sejilla Mc Dowall

In this Edition:

Page

Witness Protection in the Caribbean 3

The Italian Perspective of Prosecuting Serious Organised Crime 4

Witness Security in Afghanistan 7

A Philippines Perspective 8

Witness Protection and Anonymity in England and Wales.....................9

Special Measures and Witness Anonymity in the Eastern Caribbean (table)........11

The Goodfella 12

No Witness No Justice 13

Stop the Press 14

Legal News 15

Social Media Identification Policy 17

Opinions expressed in this newsletter do not necessarily represent the views of the UK or US Governments

WITNESS PROTECTION IN THE CARIBBEAN

A recent media report may explain the reason for hopelessness amongst those who witness crime:

"Most witnesses will tell you what they saw – only if you're not a policeman. They'll put it on Facebook and BB and spread it through the New Media. But not for all the money in the world would they go to the local Police. Why? Because most feel they could be killed – shot dead by those they will finger – or by someone else they don't even know….A local Witness Protection Programme, well thought out, with sufficient internal and external cooperation and assistance, can certainly work" (The Voice St Lucia: 8th September 2012)

When the murder of eight-year-old Marissa Jn Marie was reported in the St Lucia Sun in October 2010, a comment by a blogger referred to the following (unverified) series of events:

"In October of 2003, six young men from the community of Laborie stabbed a young man to death in the presence of many fellow Laborians. Within a couple days they were all arrested, taken to court and remanded at the Borderlais Correctional Facility. Less than a year later, their court case were all dismissed because there wasn't sufficient physical evidence to convict them and also due to the fact that there were witnesses who came forward to testify. Many of the witnesses were confronted by notorious criminal relatives of the accused six, at least three of them whom they were directly related to. The witnesses lives were threatened, and every one of them refused to give a witness statement to the police. In January of this year, a young girl was shot in the head by one of these same criminals who got acquitted 7 years ago. Not surprisingly, he was arrested and released because witnesses would not come forward. So Laborie has suffered twice because our broken system does not make any provision for the witnesses, hence, criminals could not be taken out of society. Had there been a protocol in place for some kind of witness protection, Laborians would not have to see the face of this criminals walking the streets of the community any more. I feel bad for this family, so much they've endured since summer, I do hope the relevant authorities do take note and correct thus broken system as soon as possible." (St Lucia Sun October 2010)

Whilst these two extracts are taken from St Lucia, these facts will have resonance across the Eastern Caribbean. It is for this reason that the argument for a witness protection scheme often arises. Whilst some States do have ad hoc arrangements, others in the Caribbean, such as Jamaica and Trinidad and Tobago, have a statute based system.

Jamaica's programme introduced in November 2001, pursuant to the Justice Protection Act 2001, offers protection or assistance to witnesses whose lives come under threat before, during, or after a trial. Witnesses to major crimes are placed in safe locations, sometimes overseas, with fictitious names if police investigators determine that they are at risk of being killed or intimidated by defendants or their associates.

Saint Lucia also has on the statute books a Justice Protection Act and St Kitts and Nevis has recently passed a similar Act. The Guide to Investigation and Prosecution of Crime provides an analysis of these Acts for practitioners (see Chapter 5).

However factors hindering witness protection in the Caribbean include limited financial resources, police mistrust, and geographical restrictions. However, where there are backlogs and inefficiencies in the criminal justice system, the time spent in protection can be a long one. As a result witnesses are reluctant to trade their present environment for one, albeit more secure, but less hospitable. In order to be effective, witness protection needs to operate in a criminal justice system where cases are heard quicker. This will mean that witnesses will be more willing to give evidence whilst subject to such a programme. Also there maybe a substantial number of witnesses, who maybe deemed as "*under threat*", who could have danger averted by use of other protective measures, such as witness anonymity and special measures (see Robert Bland article below from page 9 and table at page 11) thereby reducing the financial burden on any witness protection programme.

In this edition of Indictment we explore how these challenges have been managed in other jurisdictions.

THE ITALIAN PERSPECTIVE OF PROSECUTING ORGANISED CRIME :

THE USE OF "COLLABORATORI DI GIUSTIZIA" (COOPERATING DEFENDANTS AND WITNESSES)

BY ANTONIO PATRONO

The Italian Parliament, by law no. 82 of 15 January 1991, enacted provisions for the protection of those persons who intend to cooperate with the judicial authorities.

The law can be applied only if:

1. The person has knowledge of criminal facts that are unknown or only partially known by the judicial authorities
2. The information given by the person is reliable and of considerable importance to ascertain the responsibility of other persons in offences of mafia and terrorism.

This law deals with two fundamental principles: the first concerns protection for "*collaboratori*" cooperating defendants and their families from attacks to their personal safety, the second concerns the benefits that a person can obtain if he cooperates with the judicial authorities.

In effect, the State concludes an agreement with the cooperating defendant by which each of the two parties undertakes to do something in the interests of the other party.

The cooperating defendant undertakes to:

1. Respect all the security regulations which are indicated to him
2. Make himself available for all interviews and examinations necessary both during the investigation phase and in front of the judge
3. Not to disclose to other people the information given to the judicial authority
4. Not to meet any other criminal
5. Not to meet any other cooperating defendant
6. Disclose all assets that he possesses either directly or in the names of third parties and return to the State all assets that he owns which are the proceeds of criminal activity.

The cooperating defendant can either be at liberty or in detention in prison. If the cooperating defendant is in detention, he must be detained in such a way that his safety is guaranteed. If the cooperating defendant is at liberty he must live at a secret location chosen by the Government Agency in charge of his protection which is called the Central Security Service and is an office of the Ministry of the Interior.

If the cooperating defendant does not respect any of the mandatory conditions imposed on him, and in particular if he refuses to be interviewed or examined, or if it is established that he has lied or has committed new offences, the protection programme will be revoked.

The State undertakes to do the following:

1. Protect the person and their family, both if at liberty or in detention
2. If the person is at liberty transfer that person from his place of residence to another secret location
3. Provide the person with a house in the new location
4. Help the person to find employment and to integrate socially in the new location
5. Contribute economically for the person to satisfy their living requirements
6. Provide the person with necessary health assistance
7. Sustain the cost of the persons legal expenses
8. Provide the person with an undercover identity document or if necessary definitively change the name of the person.

This article continues on page 5

THE ITALIAN PERSPECTIVE

(Left and below) Court scenes in Italy with witnesses from the witness protection programme testifying

In general terms, the agreement stipulated between the person and the State does not have a pre-determined duration because the agreement remains in force for as long as is necessary, but the conditions can change over time adapting to concrete requirements.

For example, at a certain point the financial contribution can cease, having been substituted by a larger sum paid only once and so the person cannot expect to receive anything else. However, the personal security measures, for example the police escort from the place where the person lives to the place where he must give evidence will always remain in force.

It can also occur that the "collaboratore di giustizia" is simply a witness, or rather a person who is not personally responsible for offences of mafia or terrorism, but has only witnessed something or has information that is useful for the investigation or trials against "mafiosi" or terrorists. In this case the State is required to do the following for that person:

1. Guarantee protection until there is no longer any danger for that person or for his family, also providing for their move to another location.
2. If the person has had to leave his employment for security reasons, guarantee for him financial assistance that provides him with the same standard of living that he had previously.
3. If he was a civil servant, guarantee him employment in the new location where he has moved.
4. If he was not a civil servant, assist him in finding new employment in the new location where he has moved to.

In relation to the benefits that guilty persons can obtain that cooperate with the judicial authorities, it must be remembered that in Italy there is mandatory criminal prosecution, and it is therefore not possible for the "collaboratori" to avoid the trial and the related punishment by a previous agreement, as can happen in countries, such as the USA or the UK, where there is prosecutorial discretion.

Therefore, the "collaboratore", must be tried and convicted and sentenced, but he can obtain a much reduced sentence compared to the usual sentence. In fact, instead of a life sentence he would be sentenced to a period of imprisonment between a minimum of 12 years and a maximum of 20 years, and in relation to all other cases the sentence will be reduced by by one third to a half compared to the sentence that the person would have received.

The "collaboratore" can also receive considerable benefits after his conviction, in relation to the manner in which he serves his sentence. In fact, after having served only a quarter of his sentence, or after having served 10 years of the sentence if the sentence imposed was a life sentence, he can be admitted to some prison benefits, in particular house arrest (that allows for the sentence to be served at his home rather than in prison) up to "conditional liberty" (that allows him to be at liberty on the condition that he respects given conditions imposed on him by the judge).

The law which has been described in summary above has produced good results in Italy, even as it is necessary to always be aware of the major problems that its application has presented in practice. *This article continues on page 6*

THE ITALIAN PERSPECTIVE: THE ISSUES

One of the most frequent problems is the relationship between the "collaboratore" and his family. In fact, often, "collaboratori" come from families rooted by blood in criminal traditions, as is often the rule for those who are members of mafia organisations. In these cases their families also pose an obstacle to the best cooperation and re-integration, because often the families have not shared the choice of the "collaboratore" to assist the judicial authorities and the family often places obstacles in the path of the "collaboratore" either through conviction or for fear of revenge. Therefore, great attention is required in the management of the relations with the families, by controlling all meetings or written correspondence of the "collaboratori" with their relatives.

Another problem to avoid is the "collaboratori" reach an agreement amongst themselves as to the statements that they will give during the investigation phase and in front of the judge, with the aim of appearing credible and in order to obtain the benefits provided for by the law. For this reason it is absolutely prohibited that the "collaboratori" meet each other, both when in prison if detained and when they are at liberty. If two "collaboratori" have met before making a statement in the same trial, they can then no longer be heard and what they have declared will have no value.

Collaborati di Giustizia

Tommaso Buscetta although he was not the first pentito (informant) in the Italian Witness Protection Programme, he is widely recognized as the first important one breaking omertà. He was the star witness in the Maxi Trial that led to almost 350 Mafia members being sent to prison.

It is also necessary that the "collaboratore" clearly understands that if he violates the undertakings that he has agreed to, he will lose every benefit he had obtained. In fact, it is provided for that if he lies or if he commits new offences in the ten year period from his cooperation he will lose all prison benefits (and therefore, if for example, he is on house arrest or at liberty with conditions, he must be returned to prison) and even the reduced sentence which he was subject to can be increased.

But the greatest problem of all is the fact that "collaboratori di giustizia" are often professional criminals, who during their life have done nothing other than commit offences, and therefore they have enormous difficulty in changing their habits. It is therefore very common that they enter into conflict, for example, with the "Protection Service" because they do not respect the rules of conduct imposed upon them, including those rules which relate to their own safety. At an organisational level, therefore, it is necessary that the officers of the "Protection Service" are chosen from people who are psychologically suitable to have contact with people who are objectively very difficult to form a relationship with.

In conclusion, the Law dealing with "collaboratori di giustizia" in Italy has been extremely important because it has allowed the discovery of many criminal offences and resulted in the conviction of the most dangerous criminals (see left re Tommaso Buscetta), but it is necessary to understand that for the Law to function, over and above clear and effective rules, also a considerable financial commitment is required together with extremely well qualified personnel in the "Protection Service."

Antonio Patrono is the Deputy National Antimafia Prosecutor

The presentation of witness evidence is crucial to reach a just verdict in the Islamic Republic of Afghanistan and across the world. An accused has a strong interest in both the ability to secure the attendance of witnesses favorable to the defense (compulsory process right) and to the opportunity to question witnesses offering evidence against him (confrontation right). Yet, for witnesses to remain willing to offer testimony or written evidence, there must be assurances made for their safety.

In Afghanistan, a civil law system, the introduction of evidence from witnesses is focused on the need of the court to obtain information to determine the actual truth of the disputed matter. In criminal cases, the Interim Criminal Procedure Code (2004) provides, at Article 4, that "[f]rom the moment of the introduction of the penal action until responsibility has been assessed by a final decision the person is presumed innocent." Eloquently, the Constitution of Afghanistan (2004), at Article 25, provides, "Innocence is the original state. The accused shall be innocent until proven guilty by the order of an authoritative court."

While the accused is presumed innocent, the law in Afghanistan focuses upon the truth-finding function of the court and the rights of the accused through the vehicle of a compulsory process right, with less consideration of a right of an accused to confront the witnesses against him. However, Afghanistan has signed on to the International Covenant on Civil and Political Rights, which provides for a minimum guarantee that an accused has the right "[t]o 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[.]" Article 14(1).

While the investigating prosecutor (the Primary Saranwal) is conducting the investigation, the defense counsel and the accused have the right to be present. Interim Criminal Procedure Code, Art. 32 & 38; Advocate's Law (2007), Article 10. This includes the attendance of defense counsel and the suspect at "confrontations [where two witnesses with conflicting testimony are present at the same time to argue their disputed observations] […] and expert examinations[.]" Interim Criminal Procedure Code at Art. 38.

When a witness is not present in court, the opportunity to be present throughout the investigation provides some semblance of a confrontation right. However, the court is not afforded an opportunity to gauge the credibility of an absent witness.

At trial, both the prosecutor and the accused, whether appearing with defense counsel or choosing to represent himself, have the ability to secure the appearance of witnesses at trial. "Witnesses and experts are duty bound to be present in this hearing indicated at the notification served on them." Id. at Art. 49. If a witness fails to appear, then that individual will be brought to court by the police and fined. Id. Witnesses over fourteen years of age "are duty bound to swear, before giving testimony in Allah's name to tell the truth and be honest in their testimony." Id. at Art. 50. Both the parties and the court may question witnesses. Id. at Art. 53.

As in other parts of the world, witnesses may be reluctant to appear based on concerns about their safety or the security of family members. Unfortunately, Afghanistan has no legal provision or actual practice for witness protection or relocation. Article 55 of the Interim Criminal Procedure Code allows for a record of a witness's testimony or an expert examination report to be introduced as evidence at trial, but only if the accused, or the accused and his lawyer, were present during the interview or examination and "were in a position to raise questions and make objections." While this process does not completely avoid contact between an accused and a witness, it would permit a witness unwilling to attend trial to have his evidence admitted.

Witness security concerns are likely at their height in dealing with national security cases. In these matters, the appearance of a lay or expert witness at trial is extremely rare. Instead, courts consider written statements of lay witnesses which include a thumbprint. The thumbprint of the witness is deemed akin to a notarized statement. When the statement bears the thumbprint of the witness, it will be considered by the court. Often these statements are positive character evidence. Yet, even if inculpatory, these statements are accepted by courts without regard to the lack of attendance of the accused or defense counsel during the earlier interview.

Balancing witness security and the rights of accused individuals is an ongoing challenge, but it is especially acute in countries which face an ongoing state of organized violence. The Islamic Republic of Afghanistan and other war torn countries continue to struggle to reach just solutions.

Erik Guenther is presently serving as the Defense Attorney Justice Advisor, with PAE, at the Justice Center in Parwan (JCIP) in the Islamic Republic of Afghanistan. He has worked previously as a defense attorney advisor in Afghanistan with the Justice Sector Support Programme (JSSP) and as the Deputy Country Director, in Belize, with the American Bar Association Rule of Law Initiative (ABA ROLI). In these positions, his work was funded by the U.S. Department of State Bureau of International Law Enforcement and Narcotics Affairs. He has also maintained a criminal defense and constitutional litigation practice in the United States of America. He can be reached at atlasadvocacy@gmail.com.

A PHILIPPINES PERSPECTIVE

In 2010 Jackie Kerr, a Senior Policy Advisor with the Crown Prosecution Service visited the Philippines on a secondment to the EU-Philippines Justice Support Programme (EPJUST).

Funded by the European Union, the 18-month programme was set up in 2010 to help the Philippines government address the problem of extra legal killings and enforced disappearances of activists, journalists, trade unionists and farmers' representatives. Extra legal killings are generally defined as killings committed outside the judicial process by, or with the consent of, public officials.

The programme worked with government agencies, constitutional bodies and the public in the Philippines to support the investigation, prosecution, and trial of this type of crime.

Ms Kerr was part of a two-person team tasked with analysing the measures in place to support victims and witnesses. Her placement had particular focus on the witness protection programme and she worked with Detective Chief Inspector Tomi Jansson, who oversees Finland's witness protection unit.

Commenting about her secondment, Ms Kerr said: "The work there was fascinating. We interviewed people from a wide range of organisations, including religious organisations, some of whom bravely provide sanctuary to witnesses in fear for their lives.

We also worked with prosecutors and lawyers representing the families of the deceased and developed close links with the head of the witness protection programme."

A particularly interesting aspect of the secondment was a visit to one of the most high profile trials ever to take place in the Philippines. The defendants - nearly 200 - were charged with involvement in the 'Maguindanao massacre' which took place in November 2009 in the town of Ampatuan on the island of Mindanao and resulted in 57 people being killed.

Ms Kerr said: "Mr Jansson and I observed some of the testimony of one of the eye witnesses to the killings. Because the witness's testimony was critical to the prosecution case, he was in fear for his life and had been admitted to the protection programme. Other security concerns meant the trial was being held in a temporary courtroom within a prison in Manila."

The presence of EU observers at the trial caused a great deal of comment in the Philippines. But according to the head of the witness protection programme, it also provided comfort to the families of the victims, demonstrating that there was international interest in the trial and its outcome.

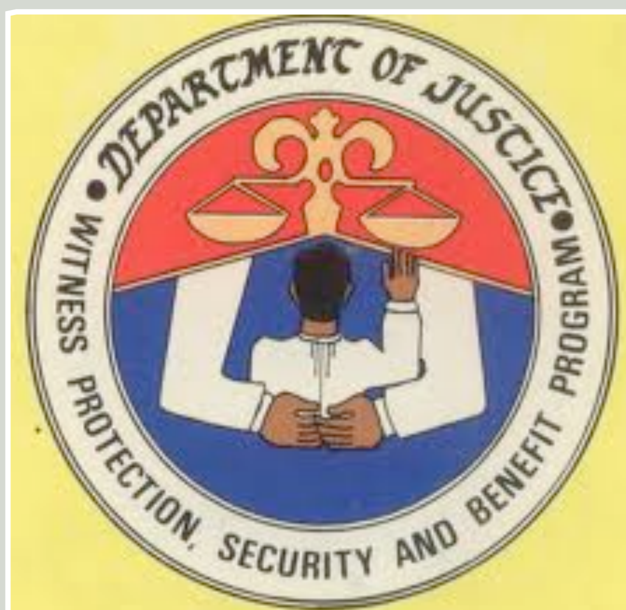
Ms Kerr commented "Observing the investigative and trial process in the Philippines brought home to me how much information, care and support we provide to victims and witnesses in England and Wales, particularly in the most serious offences.

One of the issues we found in the Philippines was that victims and witnesses were inclined to disengage from the process because they were not aware of what was happening whilst the case was being investigated or awaiting listing for trial."

Other activities that the EPJUST team were involved with included training for Filipino lawyers on human rights, analysis of prosecution files and security training for judges, prosecutors and civil society organisations.

Ms Kerr's secondment culminated in a final report containing 28 recommendations for improving the criminal justice experience of victims, witnesses and their families.

For more information on the witness protection scheme in the Philippines see: http://www.doj.gov.ph/witness-protection,-security-and-benefit-program.html



WITNESS PROTECTION AND ANONYMITY IN ENGLAND AND WALES BY ROBERT BLAND

The openness of judicial proceedings is a fundamental principle enshrined in Article 10 of the Universal Declaration of Human Rights (the right to a fair trial). This underpins the requirement for a prosecution witness to be identifiable not only to the defendant, but also to the court.

However the principle of open justice can sometimes act as a bar to successful prosecutions, particularly in homicides, organised crime and gun crime. Witnesses may fear that if their identity is revealed to the defendant, his associates or the public generally they or their friends and family will be at risk of serious harm. Normally the police will inform the prosecutor that a witness is in fear.

Special measures

The Youth Justice and Criminal Evidence Act 1999 (YJCEA) sets out a range of measures that are available to witnesses in criminal proceedings who are deemed to be 'intimidated'.

- Screening the witness in court from the accused;
- Evidence by live link;
- Evidence given in private.

Section 17 YJCEA deals with intimidated witnesses and provides that special measures may be provided where the quality of evidence given by a witness is likely to be diminished by reason of fear or distress on the part of the witness when testifying in proceedings.

Reporting restrictions

Section 46 of the YJCEA enables courts to make a direction which prohibits any matter relating to the witness to be published during the lifetime of the witness if it is likely to lead to the identification of the individual as a witness in criminal proceedings.

The court must apply a two stage test to determine whether a witness is eligible for this protection along much the same lines as an application for special measures.

The victim in a case of rape or certain sexual offences is entitled to 'anonymity' in the press. Section 11 of the Contempt of Court Act 1981 empowers the court to impose a permanent ban on the publication in certain circumstances.

Applications to hold a Crown Court hearing in camera

There are certain situations where proceedings can be heard in camera, i.e. in private, when the public are excluded.

Excluding the public by virtue of the court's inherent common-law powers is justifiable if the administration of justice so requires e.g. if there is a possibility of disorder. A decision to sit in camera is not justified merely on the ground that a witness would find it embarrassing to testify however the necessity principle may apply if a witness is unable or unwilling to give evidence; the principal object of the court is to secure that justice is done.

This article continues on page 10

Withholding the name of a witness

Generally, a witness should not be required to provide their address in open court or to the defence. Ordinarily a witness will be required to give his name at the beginning of examination-in-chief. The name of the witness will already have been disclosed in the statements served upon the defence prior to the commencement of the proceedings.

The trial judge, in the exercise of his inherent jurisdiction may permit a departure from this practice. The witness will not be required to give his name in public and will usually be allowed to write their name down. In cases such as blackmail this has become accepted practice.

Other departures from the usual practice are rare but have included, for example, prostitutes called by a letter when giving evidence against a woman charged with exercising control over them (**R v Jones, Dee and Gilbert**, unreported, December 1973, Central Criminal Court).

Anonymity

Applications for witness anonymity can be made pre-trial under sections 74 to 85 of the Coroners and Justice Act 2009. The orders known as Investigation Anonymity Orders can be requested at the very start of an investigation thus providing early certainty to witnesses that their identities will not be disclosed.

Investigation anonymity orders are only available in limited circumstances, which are:

1. That a qualifying offence has been committed (murder or manslaughter where the death was caused by being shot with a firearm or injured with a knife);
2. That the person likely to have committed the offence or is a member of a group engaging in criminal activity was at least 11 but under 30 years old at the time the offence was committed and;
3. The person in respect of whom the order would be made has reasonable grounds to fear intimidation or harm if they were identified as assisting the investigation.

Applications can be made to a justice of the peace by police officers or prosecutors.

The granting of an investigation anonymity order does not guarantee that anonymity will be granted at the trial. A separate application has to be made for a Trial Anonymity Order under sections 86 to 90 of the Coroners and Justice Act 2009.

The DPP has set out the procedure to be followed by prosecutors when considering whether or not to apply to the court for a witness anonymity order, in Guidance. The Act and the Guidance apply to all witnesses, including undercover police officers and police officers involved in test purchase operations.

Witness Protection

In some very serious cases, the risk to a witness is so great that they may need to relocate to another part of the UK and even change their identity. Witness Protection is the means of providing protection measures for people involved in the criminal justice process who find themselves at risk of serious personal harm as a result of that involvement.

Witness Protection, as defined within the Serious Organised Crime and Police Act 2005, is generally directed to those persons who have provided crucial evidence and against whom there is a substantial threat. This definition does not preclude police forces and law enforcement agencies from offering protection measures to witnesses and others at risk.

The ramifications for individual witnesses who have to participate in Witness Protection are immense and it should only be used sparingly.

Robert Bland is the former Criminal Justice Advisor to Trinidad and Tobago and consulted on the Code for Prosecutors launched in 2012.

Special Measures and Witness Anonymity in the Eastern Caribbean

ANTIGUA AND BARBUDA	SAINT CHRISTOPHER AND NEVIS	SAINT LUCIA	SAINT VINCENT AND THE GRENADINES	DOMINICA	GRENADA
Witness Anonymity See Sections 18-25 of the Evidence (Special Provisions) Act 2009	**Witness Anonymity** See Part IV of the Evidence Act 2011 (not promulgated)	**Witness Anonymity** No provisions *	**Witness Anonymity** No provisions *	**Witness Anonymity** Witness Protection Act 2013 Part 1	**Witness Anonymity** No provisions *
Special Measures See Section 19(2)(d) of the Evidence (Special Provisions) Act 2009 that would allow screening of a witness if granted witness anonymity	**Special Measures** See Section 28(3) of the Evidence Act 2011 that allows use of a video-link, including evidence from a witness who is abroad.	**Special Measures** See Section 29 of the Evidence Act. Also see Section 31(3)(a) of the Counter Trafficking Act allowing a child witness to give evidence outside of court or by video. This equipment is used in the High Court	**Special Measures** See Section 32(3)(a) of the Prevention of Trafficking in Persons Act allowing a child witness to give evidence out of court or by video. Also see section 3(2) of Criminal Procedure Code re use of procedures in England***	**Special Measures** Witness Protection Act 2013 Part 11	**Special Measures** No provisions however consider common law powers**

*The common law position following a House of Lords ruling (**R v Davis** [2008] UKHL 36) re witness anonymity is that a defendant must see his accuser. Lord Bingham held it was unfair to require an accused, “To take blind shots at a hidden target”.

* *The common law position re special measures (such as using screens to prevent the witness seeing the accused) is that they can be applied for through the Court’s inherent powers to ensure a fair trial and to allow the best evidence to be given (**Independent Publishing Co. Ltd v Attorney-General for Trinidad and Tobago** 2005 1 All ER 499 (PC) and **Police v S** (1994) DCR 257 (DC)).

* ** See the Youth Justice and Criminal Evidence Act Part II (England and Wales) at: http://www.legislation.gov.uk/ukpga/1999/23/contents

For more detailed analysis of use of special measures and witness anonymity see chapter 5 of the Guide to Investigation and Prosecution of Serious Organised Crime. This Guide also provides pro forma application forms for special measures and witness anonymity applications. For your copy please contact: dansuter1975@yahoo.com

THE GOODFELLA

His Story

The Witness Protection programme relocated him to Redmond, Washington, in 1980, and Hill, who's changed his name to Martin Lewis, was supposed to keep a low profile and stay out of trouble. He wasn't very good at either -in 1985 he and writer Nicholas Pileggi turned his mob exploits into the bestselling book Wiseguy, which became the hit move Goodfellas.

WHAT HAPPENED: When the book became a bestseller, "Martin Lewis" couldn't resist telling friends and neighbours who he really was. Even worse, he reverted to his life of crime. Since 1980 Hill racked up a string of arrests for crimes ranging from drunk driving to burglary and assault. In 1987 he tried to sell a pound of cocaine to two undercover Drug Enforcement officers, which got him thrown out of the Witness Protection Programme for good.

"Henry couldn't go straight," says Deputy Marshal Bud McPherson. "He loved being a wiseguy. He didn't want to be anything else." Hill died in a Los Angeles hospital on 12th June, 2012, one day after his 69th birthday.

If there was one film that summed up what it was to get on the wrong side of the "*Mob*", it was Goodfellas.

One of the best of its genre, this film, tells the story of Henry Hill, mobster-turned-informant.

It starts with the classic line that sets the tone for the film:

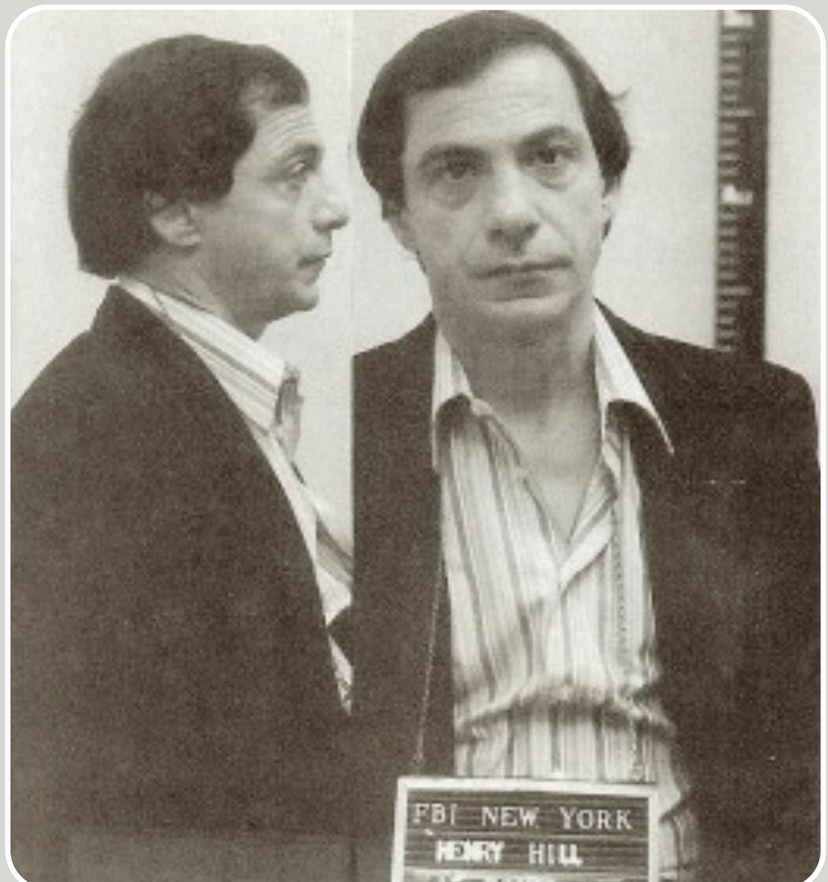
"As far back as I can remember, I'd always wanted to be a gangster."

How wrong his choice of career was!

Hill starts his life of crime when he is 12. As part of his apprenticeship he becomes entrenched in the Mafia family. He climbs the crime family ladder after the armed robbery of $US420,000 from Air France cargo at JFK airport. However, greed gets the better of him and he earns the wrath of the crime family when he deals drugs against the wishes of the Boss.

He then faces a choice of inevitable death or having to turn himself in. He entered the Witness Protection Scheme in 1980. His testimony led to 50 convictions including his previous 'captain' Paul Vario who was found guilty on multiple charges including extortion of air freight companies at JFK Airport.

As we reported in Indictment 5 the use of justice collaborators or assisting offenders is currently underused in the region. This contrasts considerably with the 26% of defendants in US drug trafficking cases who receive sentence reductions as a result of 'substantial co-operation' with the investigation, and the 10-15% of defendants in serious drug trafficking cases in Australia who take advantage of similar provisions (UNODC Witness Protection Manual 2008). Furthermore, the United States Department of Justice claims a successful conviction rate of 89% when a protected witness testifies ("S. Marshals Service talks WitSec to the world", America's Star: FYi, vol. 1, No. 1 (August 2006))



NO WITNESS NO JUSTICE!

DO THE RIGHT THING!

(Top) Students who attended from the RAISE Project in the Bahamas return to tell the, U.S. Chargé d'Affaires John Dinkelman about their experiences

(Middle) Students showing off their t-shirts

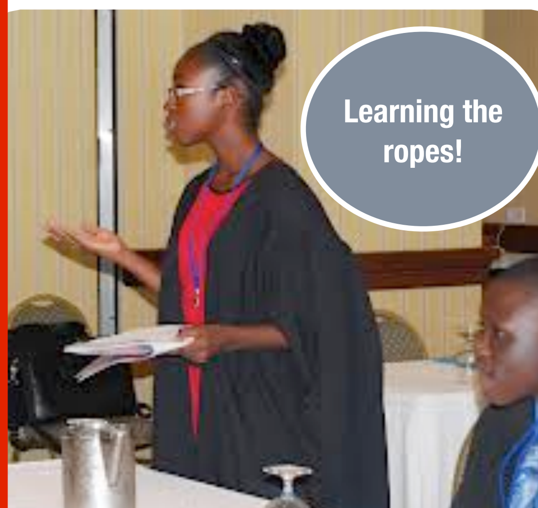
(Bottom) Students from Guyana return to meet the U.S. Ambassador D. Brent Hardt

In order to know if a witness needs protection, they need to come forward. In December the Caribbean Basin Security Initiative Youth Conference was held in Barbados to educate on the NWNJ message of "Do the Right Thing!". With Teachers and Students from across the Caribbean learning the NWNJ school mock trial. Watch out lawyers there are some enthusiastic students on your heels!

Now is the time to look out for the project near you!

There are many exciting local plans being discussed, from filming the mock trial in local courts and a song.

Also check out the Facebook page for photos of events: http://www.facebook.com/media/set/?set=a.10151299586373537.492004.143560048536&type=3



Learning the ropes!

(Top) Students in Dominica have a press conference after returning home

(Middle) Grenadian students appeared on Spice Morning to talk about the project

(Bottom) Bajan Pop Sensation Cover Drive attended the Conference to lend their support

Bermuda

A Barbadian national accused of importing more than 700 grams of cocaine worth around US$178,000 into Bermuda has been granted bail after initially being remanded in custody. Dave Trotman, 39, was charged with importing a controlled substance and possessing a controlled substance with intent to supply. The charges relate to an incident which took place in St George's on December 18 and involves 741 grams of cocaine. While Trotman was initially remanded by Senior Magistrate Archibald Warner, Warner released Trotman on US $25,000 bail with a like surety, ordering him to surrender his travel documents and report daily to the Somerset Police Station. He must also provide the courts with a fixed address in Bermuda and must ask the court's permission to change that address. Read more: http://www.jamaicaobserver.com/latestnews/Barbadian-gets-bail-on-cocaine-charge#ixzz2KFn46FeE

British Virgin Islands

Marian Walters who was arrested at the Terrance B. Lettsome International Airport in 2011 with US$208,000 worth of cocaine has been successful in getting the Court of Appeal to reduce her five-year sentence to three years. Walters, 34, a native of Jamaica who has a United States passport and resides in New York, was detained at the Terrance B. Lettsome International Airport on April 27, 2011 with 2.08 kilos of cocaine. On April 27, 2011 around 10:30 am, Walters arrived in the BVI via LIAT flight 310 from St. Lucia. However, acting on information received from Customs officials in St. Lucia, she was detained and cautioned by Deputy Commissioner of Customs, Dean Fahie. Officers upon checking the bag, found four sealed transparent plastic bags which were each wrapped in blue coloured carton paper and contained a white powdery substance suspected to be cocaine. The court was told that the substance was found in a sealed compartment of the bag and in order to retrieve it, officers had to cut away part of the bag. Former Senior Magistrate Valerie Stephens sentenced the woman, who had pleaded guilty, to five years in prison for unlawful importation of cocaine and reprimanded and discharged her on the unlawful possession of cocaine charge. (BVI Platinum News 24th January 2013)Read more: http://bvipolitics.com/news.php?module=news&page=Article&articleID=1359028256

Dominica

Three Dominicans and one Columbian, Johnny Joseph, Kelvin Collins Paul, Benedict Augustine and Camilo Andrien Pinzon Gomez were intercepted by Coast Guard officials on December 10th. The men were jointly charged with possession of cocaine, possession with intent to supply cocaine and importation of cocaine. Read More: http://thedominican.net/2012/12/cocaine-bust-in-dominica.html

Guyana

GEORGETOWN, Guyana (GINA) -- On 17th January 2013, the Drug Enforcement Unit (DEU) of the Guyana Revenue Authority (GRA) made the largest drug bust in the history of Guyana, when a total of 359.8kg was discovered in a shipment of lumber destined for the Netherlands. (Caribbean News Now) Read More: http://www.globalpost.com/dispatch/news/thomson-reuters/130220/guyana-discovers-big-cocaine-shipment-logs-bound-holland

Montserrat

Police in Montserrat say they have severely disrupted a cocaine smuggling ring in that island with the arrest of three Dominican men and a Venezuelan. Derrick Nicholas, Elroy Gussie, and Ackmel St. Jean of Dominica, as well as Juan Vasquez of Venezuela have all been charged for cocaine possession and importation and made a preliminary court appearance yesterday where they were remanded for a future court date.According to Police reports, the four men were detained after their Dominican registered vessel was intercepted at sea. They also found two separate cocaine burial sites consisting of approximately 65 kilos of cocaine with a street value in excess of EC $ 3 million believed linked to the men. (The Dominican.net 7th February 2013) Read More: http://thedominican.net/2013/02/dominicans-charged-for-cocaine.html

St Lucia

The Royal Saint Lucia Police Force is claiming to have made probably their largest-ever drug seizure. Yesterday, Assistant Commissioner of Police (Crime and Intelligence) Frances Henry confirmed that approximately 109.6 kilogrammes of a white substance believed to be cocaine was found on a pleasure boat in the Rodney Bay area. (The Voice, 8th November 2012)

Bail

In **Huey Gowdie v R** [2012] JMCA 56), Brooks JA provides guidance on the general principles that apply for bail hearings. Although this is a Jamaican case and refers to the application of their Bail Act 2000, it is recommended reading. Primarily because it considers the principles which may be of assistance to a court which is considering an application for the grant of bail. The judgment (paragraph 21) refers to a number of well known authorities (**Hurnam v The State PCA** No 53/2004 (delivered 15 December 2005)**, Stephens v The Director of Public Prosecutions** 2006 HCV 05020 (delivered 23 January 2007)**, and Thelston Brooks v The Attorney General and Another** Claim No AXA HCR 2006/0089 (a decision of the Eastern Caribbean Supreme Court in the High Court of Justice in the territory of Anguilla (delivered on 15 January 2007)) when detailing the following guiding principles which will be applicable to prosecutors in the region:

> *1. "It is an international principle "that the right to personal liberty, although not absolute...is nonetheless a right which is at the heart of all political systems that purport to abide by the rule of law and protects the individual against arbitrary detention..." (**Hurnam** paragraph [16]).*
>
> *2. The court should "begin with the high constitutional norm of liberty and therefore lean in favour of granting bail (i.e. restoring the constitutional norm)" (**Stephens** paragraph [25]).*
>
> *3. It should then consider the allegations against the accused. It should not "undertake an over-elaborate dissection of the evidence." (**Hurnam** paragraph [25]).*
>
> *4. It should then "consider whether there are grounds for refusing bail" (Stephens paragraph [25]). The grounds to be considered include:*
>
> *(i) The risk of the Defendant absconding bail;*
> *(ii) the risk of the Defendant interfering with the course of justice;*
> *(iii) preventing crime;*
> *(iv) preserving public order;*
> *(v) the necessity of detention to protect the Defendant." (**Brooks** paragraph [19])"*

Importantly, and this is significant for all prosecutors in the region, the Judgment highlights:

*In this context, the court may receive information which would not normally be receivable at a trial, including hearsay evidence. This information could concern previous convictions and unsavoury associations or practices of the accused person.... In **re Moles** [1981] Crim.L.R.170 is authority for stating that the "strict rules of evidence were inherently inappropriate in a court concerned to decide whether there were substantial grounds for believing something, such as a court considering an application [for bail] Further guidance in this area may be gleaned from the judgment of Chilwell J in **Hubbard v Police** [1986] 2 NZLR 738. The learned judge said at page 739:*

"There are two main tests involving factual questions which have to be considered by the Court in determining whether to grant or refuse bail. They are, first the probability or otherwise of the defendant answering to his bail and attending at his trial, and, secondly, the public interest.

So far as the first factor is concerned, the criteria to be considered include:

> *(i) The nature of the offence with which the person is charged, and whether it is a grave or less serious one of its kind.*
> *(ii) The strength of the evidence; that is, the probability of conviction or otherwise.*
> *(iii) The seriousness of the punishment to which the person is liable;; and the severity of the punishment that is likely to be imposed.*
> *(iv) The character and past conduct or behaviour of the defendant.*
> *(v) Any other special matter that is relevant in the particular circumstances to the question of the likelihood of the accused appearing or not appearing.*

Public interest criteria include:

> *(i) How speedy or how delayed is the trial of the defendant likely to be?*
> *(ii) Whether there is a risk of the defendant tampering with witnesses.*
> *(iii)Whether there is a risk that the defendant may re-offend while on bail.*
> *(iv) The possibility of prejudice to the defence in the preparation of the defence.*
> *(v) Any other special matter that is relevant in the particular circumstances to the public interest.***"**

JA Brooks then outlines two further guiding principles:

"5. The court should then consider..."whether the grounds for refusing bail are substantial" (Stephens paragraph [25]).

6. Thereafter, if it finds that there are substantial for refusing bail, the court would "consider whether imposing conditions can adequately manage the risks that may arise and how effective these conditions [would] be" (Stephens paragraph [25])."

Civil Forfeiture In the Bahamas

In **Attorney General v Davies et al** (App No. 47 of 2011) the Court of Appeal in the Bahamas decided that a forfeiture order from the United States couldn't be registered there.

Mr Turner the seventh respondent pled guilty in the United States to several charges of mail frauds and money laundering. A preliminary forfeiture order was granted in 2005 and he was sentenced to a significant sentence in 2006. However on Appeal the conviction and sentence were quashed and replaced with a shorter sentence and a final forfeiture order in 2009. This required Mr Turner to pay restitution of US$55m, a US $6m forfeiture order and the specific forfeiture of properties in the Bahamas and Australia.

The first to sixth respondents instituted proceedings against Mr Turner in the Bahamas in 2005 and properties were ordered to be sold by way of an agreed position as a result.

The appellant submitted that the proceeds should be repatriated to the United States and made available to victims through the restoration process.

The Appeal Court disagreed upholding the decision of the trial judge that there were no assets in the Bahamas to which the 2009 final forfeiture order could attach.

This was on the basis that the 2005 forfeiture order (in the US Courts) and restraint order (in the Bahamas Court) could only attach to assets in existence which had been acquired from the misappropriated funds. All properties were sold by court order in 2007 having been declared the property of the first to sixth respondents in a judgement arising from the 2005 proceedings. Therefore after the successful appeal and judgment in the 2005 proceedings, there were no assets in the Bahamas to which the forfeiture order in 2009 could attach.

Extension Application

The High Court of Grenada decided in **The Director of Public Prosecutions v Jerry Seales** (SUIT NO. GDAHCV 2011/0310) that there was delay in filing an application by the defendant (a Magistrate) to appeal a decision of Price-Findlay J made on 4th April 2012 to quash a decision of the Defendant made on 12th May 2011 to discharge Curtis Bapiste on a charge of rape of a 13 year old female and to compel him to commit the said Curtis Baptiste to stand trial in the High Court. Firstly, the CPR allow for 14 days to file an application and the Defendant's had been filed after 26 days. Secondly, the reasons for the delay were not excusable. Namely, that the Defendant's Counsel had been present when the decision of 4th April was rendered, the Government had confirmed before the expiry of the time limit that they wouldn't represent the defendant and the Defendant could have made time despite being a busy Magistrate to meet with his attorney. Thirdly that if the extension was granted the Defendant didn't have a chance of his appeal succeeding. Lastly that the victim, accused and society as a whole would suffer prejudice if the instant application was granted, thereby preventing a trial within a reasonable period of time.

Cases from England and Wales

R v Waya the appellant, in November 2003, purchased a property for £775,000 using a mixture of his own funds (£310,000) and mortgage monies advanced by a lender (£465,000). It later transpired that the mortgage advance had been fraudulently obtained and, in July 2007, the Appellant was convicted of a count of obtaining a money transfer by deception contrary to s. 15(A) Theft Act 1968 as amended. By the time of the confiscation proceedings, the property had increased in value, the original mortgage had been redeemed and the property had been remortgaged to a different lender. The sum of £862,000 remained outstanding on the second mortgage. A confiscation order was made against the Appellant in the sum of £1,540,000, being the current value of the property less the original untainted purchase monies contributed by the Appellant.

The issue is whether a person who has obtained a money transfer by deception, and thereby causes a lending institution to transfer funds to his solicitor for the purpose of a mortgage advance to enable him to purchase a property, does:

(i) The person obtain a benefit from his conduct in the form of property within the meaning of Part 2 of the Proceeds of Crime Act 2002 ("POCA")?

(ii) If so, is the value of the benefit the value of the loan advanced or his interest in the property or some other value?

(iii) If not, does the individual obtain a pecuniary advantage within the meaning of Part 2 of POCA?

Held: Appeal allowed, confiscation order of £392,400 substituted. LINK

In **R v Mehta** the Court of Appeal decided whether it was appropriate to convict on the basis of a conspiracy with a person not mentioned on the indictment. The Crown was criticised for not amending the indictment, but conviction upheld. LINK

When considering the supply of drugs, and circumstantial evidence, the Court of Appeal in **R v Akinsete** said there is no rule of law that there has to be direct evidence of a supply of drugs in a case brought under section 4(3)(b). The leading case of R v Hughes is not authority for such a proposition and the court were shown none that is. The prosecution can rely on circumstantial evidence. The judge gave a perfectly proper "circumstantial evidence" direction at page 12D to E of the summing-up. He correctly warned the jury to be careful to distinguish between arriving at conclusions based on "reliable circumstantial evidence" and "mere speculation". The judge explained what he meant by speculation and did so correctly. There were no errors in the directions given by the judge. The court said that the prosecution and the judge were 'rather favourable' to the appellants because the case was put upon the basis that the appellants were directly involved in the actual supply of the controlled drugs, whereas a case under section 4(3)(b) does not require proof of direct involvement in the actual supply. LINK

In **R (E) v Wood Green Crown Court** – Every advocate is taught that when deciding bail the court must take the prosecution case at its highest. No-one appears to know however where that proposition came from. In this case the crown concedes and the court rules, that such a proposition is incorrect. LINK

The Court of Appeal in **R v Alexander and McGill** provided guidance on ID using Facebook (para 27 onwards). LINK

In para 29 of R v Alexander and McGill (see above in Legal News 2 page 15) the President of the Queen's Bench Division (E and W) outlined:

"It is not for us, we think, to set out for the future what processes should be adopted. It seems to us that this is a matter to which the Director of Public Prosecutions and ACPO [Association of Chief Police Officers] could, in conjunction with the relevant Ministry, give consideration so that short and simple guidance can be given in short order, so what happened in this case does not reoccur."

This is a suggested policy written in conjunction with the Office of the DPP of Saint Vincent and the Grenadines:

Social Media Identification Policy

1. Purpose

1.1 The purpose of this policy is to outline the proper procedure for the Police and Prosecution when a witness identifies a suspect through Social Media.

2. Definitions

2.1 Social Media

2.1.1 A group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user-generated content. Platforms include (but are not limited to) Facebook, Blogger, Twitter, WordPress, LinkedIn, Pinterest, Google+.Tumblr, MySpace and Wikia

3. Policy

3.1 Identification evidence is a significant component of many criminal investigations. The identification process must be carefully administered to minimize the likelihood of misidentifications. Moreover, constitutional safeguards must be observed in the process. The goal of reducing erroneous convictions can be furthered in many ways. This policy on Social Media identification is one way of doing this.

3.2 An identification by a witness through use of Social Media is only one step in the criminal investigative process and one increasingly used. A positive identification can reduce the risk of a conviction being based solely on erroneous eyewitness identification. However there is no substitute for a competent and thorough criminal investigation and this policy provides best practice for an identification through Social Media.

3.3 This policy was written following **R v Alexander and McGill** *[2012] EWCA Crim 2768* to provide guidance on social media identification of a suspect by a witness. It is fundamental that a proper record is completed explaining how an identification was made. This will enable a jury or magistrate to assess in more detail the circumstances in which the identification occurred.

4. Guidance

4.1 Documenting the Procedure

4.1.1 In order to strengthen the evidentiary value of any identification using Social Media, it should be documented in full in a statement taken by the Police. It should be standard practice for the Police when taking any statement about a crime to ask the witness if they have viewed any social media to identify the suspect. Any statement taken by the Police **must** be provided to the Prosecution.

4.2 Statement

4.2.1 If the witness confirms that they have viewed Social Media and identified a suspect as a result, it is essential the Police take steps to obtain, in as much detail as possible, evidence in relation to this initial identification.

4.2.2 A statement in relation to the circumstances of the identification using Social Media should include reference to (but not limited to):

- Why Social Media was used;
- When the identification was made;
- How the witness knows from viewing the Social Media that the individual identified is a suspect;

- Any relevant factors that support the first description, such as: special facial features, hair, marks, etc.
- How certain the witness is that the suspect identified committed the crime
- If more than one suspect was involved, what the suspect identified actually did;
- Any other Social Media Images that were viewed, that didn't show the suspect;
- How long the witness viewed the Social Media images for;
- Who else was present when the identification was made;
- Anything else said by any other person present when the identification was made. A statement should also be taken from this other person present at the initial identification;
- What steps were taken to contact the Police by the witness after this Social Media identification;

4.2.3 The Police should access the Social Media image/s that were viewed that resulted in the identification. The witness should then confirm in a statement that these were the image/s viewed to make the identification.

4.2.4 How the image/s were obtained by the Police, should be detailed in the Officer's statement. If any image was obtained by the Police when the witness was present, this should be exhibited and referred to in the Officer's statement. The Officer's statement should also detail anything said by the witness during this process. The image/s should be printed and the witness asked to sign and date a further statement confirming this was the image/s used to identify the suspect. The Officer's statement should also confirm the web address to the image/s.

4.2.5 If possible the image should be printed in the same colour as it appears on a computer screen and then exhibited in the Officer's statement.

4.2.6 After the statement is taken, the witness should be advised by the Police not to confer with other witnesses about the identification using Social Media.

4.2.7 When any formal identification procedure is conducted, such as an identification parade or video identification parade, the Police must notify the suspect and their legal representative, in writing, of the fact the suspect was identified from Social Media and allow the image/s to be inspected by them (provided this does not compromise the Police investigation).

4.3 Disclosure

4.3.1 If the statement and exhibited image/s are not used in evidence, Prosecutors **must** ensure that the disclosure regime is scrupulously followed, and assess if this is material that would tend either to materially weaken the prosecution case or materially strengthen the case for the defence (**Maureen Peters v The Queen** *HCRAP 2009/5 Territory of the Virgin Islands*).

This is a draft policy only but we encourage its use, so please feel free to use!

Indictment is obliged to the Director of Public Prosecutions of Saint Vincent and the Grenadines for review of this Policy before its publication

TIME FOR A DIET

Sixteen stone Brazilian prison inmate Rafael Valadao ended up surrounded by giggling guards after a failed escape attempt. The two inmates following behind were also left with glum faces after he foiled their plans!

THE LAW

The Interviewing of Suspects for Serious Crimes Act 2012 in Saint Kitts and Nevis was Gazetted in December 2012. All interviews for serious crimes, including murder, rape and money laundering must now be on video, unless the prosecution can prove beyond reasonable doubt that there were exigent circumstances.

HOW TO CATCH A DRUG BARON

If you want to read about how a cell phone number was used to seize 1.5 tons of cocaine in a yacht sailing from Trinidad, arrest, charge and convict a major drug baron follow this link: http://www.dailymail.co.uk/home/moslive/article-2236810/Cocaine-baron-Hunting-Britains-elusive-drugs-lords.html

......AND FINALLY

If ever there was a reason to explain why we do our jobs of investigating and prosecuting serious organised crime, it is the tragic events of Mexican Mayor Maria Santos Gorrostieta. This edition of Indictment is dedicated to her memory:

http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/mexico/9707550/Maria-Santos-Gorrostieta-Mexicos-mayor-heroine-found-beaten-to-death.html

THE GUIDE

The third edition of the Guide to Investigation and Prosecution of Serious Organised Crime is now available with more authorities and more precedents (inc. special measures and cash seizure). For your copy please contact: dansuter1975@yahoo.com

I fought the law and the law won!

The Clash

INDICTMENT

FUNDED BY

British
High Commission
Bridgetown

Please send us articles

We are always looking for interesting news to share and experiences to demonstrate good practice to others in the region.

If you have had any great results or would like the region to know about what you are doing in the efforts against organised crime then please contact:

dansuter1975@yahoo.com