



In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

2022 No: 21

BETWEEN:

R

v

EZE HART

RULING

Application for Special Jury Direction arising out of a complaint by the Defence of Impermissible Witness Coaching by the Prosecution

Hearing Date of Application: Friday 25 September 2025

Date of Ruling on Application: Tuesday 7 October 2025

Counsel for the Crown: Mr. Karim Nelson, Deputy Director of Public Prosecutions

Counsel for the Accused: Mr. Charles Richardson, Compass Law Chambers

RULING of Shade Subair Williams J

Introduction

1. This is an application brought on behalf of the Accused for a special jury direction. The application was heard immediately after the closing of the Crown's case in respect of a trial by indictment on a single count of murder contrary to section 287(1) of the Criminal Code. The direction sought is for what is effectively an admonishment of prosecutorial conduct in respect of a pre-trial witness meeting.
2. The request for the special direction was spurred by a mid-trial reveal of an unminuted 16 January 2024 witness meeting (the "2024 meeting") between the former lead prosecutor and Deputy Director of Public Prosecutions, Mr. Carrington Mahoney, and one of the two key civilian eye-witnesses relied on by the Crown to prove its case, Mr. Elijah Smith, to whom I shall refer as "Witness E" and who is otherwise referred to as "Elijah". The fact of the meeting is not controversial but the propriety of the conduct of the meeting is impugned by the Defence.
3. Witness E gave two statements to the police in the form of video recorded interviews. The first police witness interview was provided on 10 September 2022, the day after the Deceased was murdered. The second interview occurred on 21 April 2023. Another person, Ms. Adia Gibbons ("Person A") who is otherwise referred to as "Adia" or "Adea", is a friend of the Accused who was present at the scene. She also attended the police station to give a video recorded witness interview. That interview took place on 26 September 2022, i.e. prior to Witness E's second witness interview. Person A's eyewitness account of what occurred is in direct and material conflict with that of Witness E. The prosecuting team determined that Person A would not be relied on by the Crown as a witness of truth. That decision made by the prosecution led to protest from Counsel for the Accused, Mr. Charles Richardson.
4. At the pre-trial case management stage of these proceedings, this Court was given notice of Mr Richardson's intention to make application for an order compelling the Crown to call Person A as a witness in the prosecution's case. Efforts were made by this Court to dispose of the application prior to trial. The prosecutor also confirmed his readiness to proceed with the application at the final case management hearing. However, it was agreed, having considered the position taken by the Defence, that the application would be heard on the first day of the trial. Skeleton arguments and authorities were filed and reviewed by the Court prior to the start of trial. Alas, the jury having been excused early on the first day of the trial, Mr. Richardson withdrew the application confirming that on his revised position of the remedies available to him, the Defence would call Person A to give evidence for the defence case.
5. Witness E during his 21 April 2023 interview made statements to the police suggesting that he was aware that Person A had spoken to them as a witness. The extent of Witness E's knowledge about Person A's witness interview prevailed as a point of high interest to the Defence. That

manifested in continuing disclosure requests to the Crown in pursuit of Witness E's source of information about Person A's contact with the police. In that regard, further witness statements were procured from Witness E and the parents of the Deceased. Witness E told the police in a witness statement taken on 14 September 2025, the eve of trial, that the Deceased's mother, Ms. Nekeeba Ford, whom he familiarly knows as "Aunt Keba", told him that Person A "*had gone to the police and told them that what happened*". Witness E says that she told him this at some point in October 2022 when he was present at her residence. The source of Ms. Ford's knowledge is set out in her witness statement of 15 September 2025. In that statement she said that she learned from her ex-husband, Mr. Seitu Ford ("Mr. S Ford"), that the police have a female "star witness". Ms. Ford said that while her ex-husband did not name the female, she immediately knew the identity of this person to be Person A based on her knowledge that Person A is the "*only girl that hangs with the boys*". In Mr. S Ford's witness statement, he explained the strained family connection between the Deceased and the Accused who were in fact first cousins. He said that it was Mr. Jamel Hart, the Accused's uncle, who told him that "*the truth will come out because we have a star witness.*"

6. The Defence pressed Witness E in cross examination about his knowledge of Person A's statements during the 26 September 2022 police interview. Answering to those questions, Witness E disclosed that he met with Mr. Mahoney in January 2024, whereby it was confirmed to him that Adia had given a witness account which was contradictory to his own.
7. In an unsworn affidavit filed by Mr. Mahoney at the request of this Court, Mr. Mahoney confirmed that during the 2024 meeting, he informed Witness E about the crux of what Person A told the police in her witness statement, which the Crown served as unused material. Mr. Richardson submitted that the communication by Mr. Mahoney to Witness E about the contents of Person A's witness statement amounted to grave prosecutorial misconduct in the form of impermissible witness coaching. However, Mr. Karim Nelson, the lead prosecutor and Deputy Director of Public Prosecutions, robustly defended the propriety of Mr. Mahoney's pre-trial meeting with Witness E contending that such conduct formed part of the ordinary duties of a prosecutor not only to prepare a witness for trial but to also examine and test the strength and reliability of the Crown's case.
8. Both Mr. Nelson and Mr. Richardson expressed the longstanding need for the Court to settle the question as to the boundaries imposed by the law on prosecutorial witness preparation. Specifically, this Court was asked to provide a written ruling in answer to these disputed issues for the benefit of present and future similar cases. At the close of Counsel's oral submissions¹, which were of real assistance to this Court, I reserved my decision and the trial continued.
9. As was the aim of this Court, this Ruling comes prior to closing speeches from Counsel.

¹ (Undated) Written submissions were also filed by Mr. Richardson

The Relevant Background

10. The basic facts of this case are that Mr. Kanye Ford (the “Deceased”) was stabbed and killed on 9 September 2022 in the aftermath of a party (the “party”) at Horseshoe Bay Beach, Southampton Parish (the “Beach”). The Crown alleges that it was the Accused who inflicted all three of the stab wounds suffered by the Deceased prior to his passing on the same date or soon thereafter in the early morning hours of 10 September 2022. The Accused, while accepting that he had a physical confrontation with the Deceased that night at the Beach, denies having stabbed or killed the Deceased.
11. By all accounts, Person A was present at the scene when the Deceased was stabbed and killed. Person A also engaged in a verbal confrontation with the Deceased, which escalated to a point at which the Deceased pushed or shoved Person A, immediately prior to the fight which ensued between the Accused and the Deceased. It is uncontroversial that the Deceased and Person A together with others were in one another’s company that evening as friends. Equally, it is unchallenged evidence that the Deceased attended the party with his close friends, Witness E and the other key eyewitness for the prosecution, Mr. Jansen Smith (“Witness J”).
12. Witness E’s evidence is materially inconsistent with the account provided by Person A in her witness statement to the police. In short, Witness E’s evidence is that he saw the Accused stab the Deceased on two separate occasions during the outbreak of violent mayhem in the parking lot area of the Beach. Person A’s version of the events, as she recounted it to police during her 26 September 2022 witness interview, is that Witness J is the one who stabbed the Deceased and not the Accused. Person A claims to have seen Witness J repeatedly stab the Deceased.
13. The evidence heard from Witness E under cross-examination marks the stage at which Mr. Richardson first learned that Mr. Mahoney had previously met with Witness E on 16 January 2024 and informed Witness E about an allegation that Witness J, as opposed to Witness E, had stabbed the Deceased. Of note, the January 2024 meeting shortly preceded the original January 2024 trial fixture. Witness E’s evidence under cross-examination about how he learned about Person A’s statement to the police unfolded as follows:

Mr. Richardson: *Okay that’s the first interview. The second interview on the 21st April 2023- before we get there, when did you find out, according to you, that Adia Gibbons- and you know Adia Gibbons, right?*

Elijah: *Yeah*

Mr. Richardson: *That she had given a statement to police? See you’re smiling again- this is not- when did you find out that Adia Gibbons had given a statement to police?*

Elijah: *Yeah in October 2022, I was up- um- I was up Kanye's momma's house, and around that time, um Kanye's momma had wanted me tell- you know to go in and tell the truth about what happened to Kanye and I refused to, but she had come up to me and she had told me that um, that Adia had went in to give a statement saying that um, that I killed my friend- and basically, lying about- and basically Adia's lying about the whole situation*

Mr. Richardson: *Have you read Adia's statement?*

Elijah: *I think- I think, I heard a little bit of it but I mean- I didn't want to hear the rest because it was- it's- it's- it's a lie and it- it- it triggers me that she would even say something like that.*

Mr. Richardson: *When did you hear a little bit of it?*

Elijah: *I think one time when I was- I think this was in 2024 when I was- when I was at the DPP's Office with Mr. Mahoney.*

Mr. Richardson: *... My Lady, a matter arises"*

14. At this point, I excused the jury at Mr. Richardson's request. Mr. Richardson then made the following statement to the Court:

Mr. Richardson: *My Lady I guess I should say for the record, I think we all know what went wrong just now. This witness has now given positive evidence under oath that he was played, it sounds, a portion of another witness' statement, and then later he's given a statement to counter that. It is entirely improper for prosecuting counsel to show a perspective, not only just a, not even a peripheral witness-*

Court: *What do you want for me to do about it?*

Mr. Richardson: *Well, I'd like, I think an easy cure, I think I know what the answer's going to be, I can work with that. I'll ask my learned friend to ask Mr. Mahoney if that's true. And if Mr. Mahoney says its not true- then I'd expect an agreed fact and we can keep moving. And that will be another lie he's told.*

15. It was then resolved that Mr. Richardson would resume his cross-examination of Witness E while further enquiries would be carried out with the assistance of Mr. Nelson, who agreed to liaise directly with Mr. Mahoney.
16. The jury returned and the cross-examination continued. In answer to the questions posed by Mr. Richardson, Witness E told the Court that he was not shown any video footage of Person A's witness interview. He said; *"I just heard a little bit of what she wrote."* When asked if it was read to him by Mr. Mahoney, Witness E stated that Mr. Mahoney read a small portion of

the statement to him and that Mr. Mahoney confirmed that the statement was that of Person A. (Further below, I address the inconsistency between Witness E's evidence of what Mr. Mahoney said and did and that of Mr. Mahoney himself.)

17. However, Mr. Richardson, confident in his opinion that the described conduct of Mr. Mahoney was improper as a matter of prosecutorial practice, put it to Witness E that he was lying. Mr. Richardson said; *"Okay, I'm going to suggest to you that that didn't happen- I'm going to suggest to you that no prosecutor would do that."* Notwithstanding, Witness E maintained his account that a small portion of Person A's statement was read out to him by Mr. Mahoney. This line of questioning continued:

Mr. Richardson: *I am going to make enquiries to find out if that happened- but I'm suggesting to you no prosecutor- that didn't happen- it just didn't happen. Another witness' statement to you? That didn't happen.*

Witness E: *It happened, so you might have to do your enquiries, or whatever*

Mr. Richardson: *Oh I will.. let's return now- I'll come back to that*

18. The cross-examination did not end there. Mr. Richardson put Witness E's 14 September 2025 statement to him. That is the statement which was obtained for an explanation from Witness E about how he came to know that Person A provided a witness statement to police. In that statement, as I earlier noted, Witness E told the police that he learned of Person A's statement to the police via the mother of the Deceased. Mr. Richardson, in a further attempt to discredit Witness E, cross examined Witness E in the following way:

Mr. Richardson: *You never mentioned anything about learning this from the DPP*

Witness E: *Yah*

Mr. Richardson: *Not one word about it*

Prosecutor Mr. Nelson: *I don't understand*

Witness E: *I don't understand either*

Prosecutor: *I don't understand specifically this thing about the DPP..*

Mr. Richardson: *You never told them in that statement that you spoke to Mr. Mahoney from the prosecution's office- that was the point?*

.....

Mr. Richardson: *You coming today- to say that the prosecutor Mahoney read a portion of that statement to you is a lie- its another lie- you just made it up on the stand*

Witness E: *No, I didn't*

19. Evident from this cross-examination, Mr. Richardson unilaterally concluded that any such discussion Mr. Mahoney might have had with Witness E about the content and provenance of Person A's witness statement amounted to real prosecutorial misconduct. On that footing, Mr. Richardson boldly put it to the witness, and repeatedly so, that Witness E was being untruthful about his account of his meeting with Mr. Mahoney.

Statements made by Witness E Prior to January 2024 about Person A

20. During the cross-examination of Witness E, Mr. Richardson highlighted Witness E's refusal to be forthcoming with the police about his knowledge of Person A's provision of a statement to police. On 21 April 2023 Witness E was formally interviewed by the police, having previously given a formal police interview on 10 September 2022 in which he admitted to having provided a dishonest account of the events of 9 September 2022.
21. On the subject of Person A, on 21 April 2023 Witness E told the police that he saw Person A engaged in a confrontation with the Deceased immediately prior to the point when the Accused used a Hennessy bottle to hit the Deceased's head. That is not disputed by the Defence. It is also accepted, as earlier noted, that Person A was part of the friendship circle of the Accused on the night in question.
22. During cross-examination, Mr. Richardson put the 21 April 2023 statement to Witness E to evidence the fact that Witness E was uncooperative with the police when asked about his knowledge of Person A providing a statement to the police. The relevant portions of Witness E's April 2023 police interview are transcribed as follows²:

*"I know who came in to say that that person didn't kill me friend. And that was Adea, that's why, you know, he was released."*³

...

...

...

Witness E: *I'm telling you, the, the main points where you guys need, where you guys hear, what's, what you guys need to hear. If I get charged for something I didn't do because Adea wants to come in and say that Ed didn't do anything....*

² NOA #2 Pages 65 and 82-83

³ NOA #2 Page 65 lines 27-29

DC 992 Edwards: *Who said that?*

Witness E: *That's what Adia [said], that's how he got released.*

DC 992 Edwards: *Who tell you that?*

Witness E: *That's what I heard*

DC 992 Edwards: *From who*

Witness E: *I'm not gonna say I heard from who, but that's*

DC 992 Edwards: *See, and, and that's part of the problem, right. You're, you're sitting up here making allegations or you're, you're...*

Witness E: *Eze (inaudible)*

DC 992 Edwards: *You're saying, this is what happened but then when I'm trying to ask you and have a conversation as to how you know or being enlightened as to the information that you have, "Oh, I, I got nothing, no, I don't have to. Or that's not important." Everything is important in this investigation. Everything is important. And you're sitting there saying that you're trying to provide justice. Provide justice, just tell...*

Witness E: *You're...*

DC 992 Edwards: *...us the truth*

Witness E: *you're asking questions of, of, of, of stuff with e and my, I'm telling you how my friend died, boom(?), and what I saw.*

DC 992 Edwards: *So, I'm just supposed to take down, oh...*

Witness E: *It's 'cause it's the truth*

DC 992 Edwards: *...he got killed and that's it*

Witness E: *I told you how he, I mean, well I, I just tell you how he done it, what I saw.*

DC 992 Edwards: *...Right*

Witness E: *And, and yeah. Straight up.*

DC 992 Edwards: *But we want to make sure you're like, we want the whole story just not part n parcel parts*

Witness E: *That's the story*

DC 992 Edwards: *That's not how you run an investigation.*

Witness E: *I, I just told, I told you what happened*

DC 992: *Okay. Alright. Well let's stick to that, then. Let's just stick to what you're giving*

Witness E: *The truth*

DC 992: *... let's just stick to that*

Witness E: *The truth*

The Substance of Person A's Police Interview:

23. A transcript of Person A's witness interview was placed before this Court by Mr. Richardson during the case management stage of these proceedings. In the transcript heading it is stated that the interview lasted 60 minutes having commenced at 11:44am and concluded at 12:43pm. The Officer in Charge (the "OIC"), DC 2193 Odessa Philip, conducted the interview and Person A's mother was present in support of her then 19 year old daughter for the interview. The transcript of the interview runs for 32 pages and records the detail of Person A's account of the night in question.
24. During this interview, Person A told the police that the party at the Beach was held by "Lowell", the Accused's friend, as a going-away celebration and that she heard about the party by *word of mouth*. She went on to say that the Deceased, Witness E and Witness J (collectively "D-E-J") confronted her, each with knives, about their missing bike which on the evidence was a bike which had been previously stolen. According to Person A's account to police, the Accused witnessed this confrontation from a distance. Person A said that the Accused together with a man named "Banks" approached D-E-J. She said that they had a tense exchange but "basically deescalated the situation".

25. On Person A's account, once the confrontation eased, the Accused and Banks headed back towards the beach entrance way which separates the parking lot from the beach. Describing her subsequent interaction with the Deceased which led to the fight which ensued between the Accused and the Deceased, she told the OIC at pages [4-5]:

"As everyone was going their separate ways, I was more so in the back, closer to Kanye, Jansen and Elijah. Eze and Banks had headed towards, back to the beach. And Kanye kept going on to me about the bike, basically. So I stopped and him and I were now exchanging words about the bike, 'cause I had no clue about this bike that was missing. It was a stolen bike which I mentioned earlier. He was questioning me about the bike basically still going on from what the conversation and situation that had just got deescalated. Eze sees what's going on, again, from a distance. Kanye pushes me and Eze sees him push me and he gets, Eze hits Kanye with a bottle....the fight broke out, now its pretty much chaos, people are running over to ...break up the situation than get involved, but it was pretty much chaos."

26. As it relates to Witness E's role that night after the fight broke out, Person A said the following to the police [5]:

"...They was on the ground fighting, Kanye was on top of Eze. I saw Elijah come in to stop Eze and I kicked the knife out of Elijah's hand. Then their still fighting and chaos is still going on, me and Elijah...run towards the knife, we're running towards that knife, which was north of where the fight broke out. So more towards the road, where the buses would actually drive. He beats me to the knife, but he just, once he gets there, he picks it up, and he just stands there. He doesn't do anything. So I just stand there to watch him."

27. Continuing from this point, Person A told the OIC in her interview⁴:

"He stands there. So, now were both looking at the fight. I see Red come in and he's trying to break it up. I see Banks there trying to break it up, and I wanna say he got sliced in the process. And I also see Jensen. I see Jensen go in to stab Eze. Jensen goes in to stab Eze. I saw him go [at] [my insertion] him a number of times to stab Eze. The fight is all continuing, going on, I'm watching Elijah. It breaks up, they break, they, they break it up. It gets broken up. Eze gets up and we thought that Eze was stabbed because Eze had blood all on the front of his shirt. So check Eze, realise that it was not him, I realise it was Kanye. We go over, we approached them, his friends and, his friends are now surrounding him, we're checking Eze, then with him, we realise it was him. We go over there to help him, to approach help. They still have their knives out, and they come at us again, basically, to say, "Don't come looking back here," (?) and everyone leaves."

⁴ Starting from page [6], line 43 of the transcript

28. The OIC, eliciting more detail about the positioning of the fight and the breaking up of the fight, had the following exchange with Person A:

OIC: *Alright, so when you say they started fighting, describe in detail how they were fighting. What were they doing during the fight?*

Person A: *They was on the ground, Kanye was on top of Eze and pretty much just exchanging blows. It was kind of, people, like, now come over and approached by this point. So it was chaotic, people trying to break it up, people trying to...*

OIC: *Did you try and break it up?*

Person A: *No, I didn't.*

OIC: *Okay. Where was Banks during this time?*

Person A: *He was, he had come over as well. He had approached...*

OIC: *Okay*

Person A: *...them to break it up, as well.*

OIC: *Okay, so he was trying to break it up.*

Person A: *Yeah*

29. In addition to her assertion about Banks' efforts to break up the fight, Person A also told the police during the interview⁵ that as the fighting between the Accused and the Deceased continued, she shouted out for "Red". She said to the OIC; *"He was one of the people who also came up to try and break up the fight. And also he was the one who actually got it broken apart..."*

30. More crucially, Person A claimed to have kicked a knife out of Witness E's hand during the fight between the Accused and the Deceased. This, according to Person A's police interview, was immediately followed by a race between her and Witness E to retrieve the same knife. Person A said that it was Witness E who successfully regained possession of the knife. This part of the transcript⁶ provides as follows:

⁵ Page [23] Lines 38-40

⁶ Pages [19]-[20]

Person A: ...*They was, they was still fighting in the midst of me and, me kicking the knife out of Elijah's hand and us running to get it. He picked it up, I, yeah...*

OIC: *Okay, so they, so...Kanye and Eze were still fighting. Did you see any knives in anyone's hand at that point when they were fighting?*

Person A: *Other than Elijah, no*

OIC: *Okay, alright. Alright, so at what...point did you see Elijah with the knife in his hand? When....*

Person A: *They started fighting, I kind of stood there, people rushed over so I kind of backed up a bit, then, yeah. Yeah, that's when I saw that, so maybe, like, two seconds after they started fighting.*

OIC: *Okay And where exactly was Elijah in the fight? Or around the fight?*

Person A: *The fight's happening where my mother is, he was right here.*

OIC: *Okay, so he was pretty close...*

...

Person A: *Yeah*

OIC: *...so when you saw he had a knife, you said that's when he ran or that's when you chased him.*

Person A: *No, I saw he had a knife and he was going in, I assumed, to stab Eze, so I had kicked it out of his hand.*

OIC: *...So when you say he was going in, what do you mean?*

Person A: *As in, he had it in his hand and he was getting ready to, like...*

OIC: *He was gesturing...*

Person A: *Yeah...And gesturing in the, in the early parts of the action to go in and...*

OIC: *Okay, alright. Did he say anything?*

Person A: *No*

OIC: *Okay. So when you saw this, you kicked the knife out of his hand.*

Person A: *Yeah*

OIC: *Were you successful in kicking the knife?*

Person A: *Yes*

OIC: *Okay, alright. Alright and what happened after that?*

Person A: *We was both rushing towards the knife. He beat me to it, then picked it up.*

OIC: *And where did the knife land?*

Person A: *In the road. On, in the roundabout*

...

...

...

OIC: *Did he ever pick the knife back up?*

Person A: *Yeah, he picked it up. He had it had it in his hand...But he just stood there, he didn't...*

OIC: *...did he say anything to you at this point?*

Person A: *Nnn hnn...*

OIC: *Did you hear him mouth anything, maybe not towards you, but towards the guys that were fighting?*

Person A: *No*

31. Materially, Person A accused Witness J of fatally and repeatedly stabbing the Deceased. The exchange between Person A and the OIC was as follows⁷:

OIC: *Okay. Are you able to say who stabbed Kanye?*

Person A: *Jensen*

⁷ Pages 21-22 of the Transcript

OIC: *Okay. Alright, so tell me about what you saw in respect to that.*

Person A: *I saw Jensen go in, which was also to stab Eze. I saw him go in a few times.*

OIC: *Alright. So you saw Jansen go in and stab Eze, Eze*

Person A: *Yes*

OIC: *Okay and you saw him do that a few times*

Person A: *Yes*

OIC: *...right? Okay. Can you motion what you saw?*

Person A: *They was on the Ground, he was kind of bent down, and then, yeah (inaudible)*

OIC: *Okay. ...Did you see Jensen stab Kanye?*

Person A: *I would say yes, because to my knowledge, I thought it was Eze*

OIC: *Can you tell me how Kanye and Eze were positioned when you saw Jensen go in an stb towards the...*

Person A: *Eze was*

OIC: *...boys*

Person A: *...on his back... Eze was on his back on the ground, Kanye was on top of him, one leg on each side, on his, on his knees, per se.,, ... They was, he wasn't up, they was more so down, he was more so, almost, you could say, laying on top of Eze and they was exchanging...*

OIC: *Okay. Yeah, okay, so that's how they were positioned. And then you saw Jensen coming from where?*

Person A: *From a side angle, from the same angle that Elijah was coming at, the first time.*

OIC: *Okay. And then you saw him going towards where these two guys were fighting on the ground.*

Person A: *Yes*

OIC: *Okay. And what did you see after that? That he had a knife in his hand?*

Person A: *Yeah*

OIC: *Okay. Was that the same knife that he had earlier when he, when you saw it?*

Person A: *Yes*

OIC: *...And which hand did he have the knife in?*

Person A: *His right hand*

OIC: *How many times did you see Jensen motion towards...*

Person A: *I would say four*

OIC: *...And when you saw him making that stabbing motion four times, did you see the knife make contact with anybody?*

Person A: *I saw him make contact with somebody....*

OIC: *Okay and who was that?*

Person A: *....'cause I thought it was Eze*

The 2024 Meeting between Mr. Mahoney and Witness E

32. In the form of an unsworn affidavit⁸ promptly received by the Court, Mr. Mahoney confirmed that he was lead Counsel in this matter in January 2024. He said that on 16 January 2024 he met with Witness E in preparation for the upcoming trial which was then fixed to proceed on a date in January 2024. He went on to state the following paras [5]-[12]:

“THAT in interviewing the witness, I gave him a copy of his statement, and he said he did not need to read it as he knew what he saw. He then gave an account of what he said happened and explained why he was not initially forthcoming to the police.

⁸ The Court invited the Crown to file affidavit evidence from Mr. Mahoney who currently resides overseas. The Court advised that it would accept the filing of an unsworn affidavit on the basis of a sworn copy being subsequently filed as soon as reasonably practicable.

THAT in his explanation, he mentioned a girl who was involved in the incident on the 9th September 2022

THAT he referred to the girl by the name Adia, which turned out to be the name of a witness whose statement was served as unused material who I did not intend to call as a witness of truth.

THAT I then put to him the crux of what the witness had alleged- namely, that it was Jansen who stabbed Kanye and not the Defendant- and asked him if this was true. My recollection is that he stated that she was lying [my emphasis].

THAT at no time did I allow him to view Adia's interview or read the transcript of that interview.

THAT at no time did I read directly from Adia's statement when I spoke to Elijah about the Defence's case.

THAT I simply articulated to the witness the substance of what I had previously read in Adia's statement in the terms expressed in paragraph 8 [above].

THAT at no time did I indicate to the witness that it was Adia who said this. However, it was apparent to me that the witness already knew that Adia had given the police a statement exculpating the Defendant, as the witness raised the matter."

Analysis of the Factual Circumstances

The Evidence of Witness E's knowledge about Person A's statements to the police

33. Notwithstanding the complaint made by the Defence that Witness E was privy to the substance of Person A's statement, it was plainly accepted by the defence during cross examination that after the January 2024 meeting with Mr. Mahoney, Witness E continued to believe that Person A had alleged in her statement that he, Witness E, fatally stabbed the Deceased. Otherwise put, Witness E's evidence of his own belief and understanding that Person A was pointing the finger at him was unchallenged by the defence.
34. Mr. Richardson, during his cross-examination of Witness E, put it to Witness E, as a big reveal, that Person A had in fact accused Witness J, not Witness E. In doing so, it was never suggested that Witness E indeed knew and understood from Mr. Mahoney that Person A had told the police it was Witness J who stabbed the Deceased and not him, Witness E. That part of the cross-examination unfolded as follows:

Mr. Richardson: ...*You said that, and you said it to the police on the 21st and you said it again- that you were aware that Adia had given a statement in which you believe she had said that you stabbed Kanye, correct?*

Witness E: *Yeah*

Mr. Richardson: *Do you still think that?*

Witness E: *Do I still think-*

Mr. Richardson: *That she gave a statement saying that you stabbed Kanye*

Witness E: *Yes*

Mr. Richardson: *I don't think that is something that we disagree on, but I can- she never said you stabbed Kanye*

Court: *What's the question?*

Mr. Richardson: *She never said you stabbed Kanye, so let me ask you this. Knowing that, if it hadn't come to your attention, falsely, that Adia was saying that you stabbed Kanye, would you have ever come and give that statement on the 21st? I don't think you would have*

Witness E: *Yeah, yeah, I think I would have. I would have.*

35. However, in Mr. Richardson's written submissions, he argued at paras [32]-[33]:

"It should be noted that the prosecutor deposes that he informed the witness that Adia had said it was Jensen and not Eze who stabbed Kanye.

36. I pause here to correct this misstatement of the factual position. Mr. Mahoney expressly stated that he never informed Witness E that it was Person A who made the allegation he put to Witness E.

37. Continuing with Mr. Richardson's written submission:

This is in fact what Adia's statement says. But up until that January 16th 2024 meeting Elijah Smith was of the view the statement from Adia said that HE (Elijah) stabbed Kanye. By putting the substance of the statement to Elijah the prosecutor was not discussing the facts already known to the witness- he was giving the witness new facts from another witnesses' [sic] statement and inviting comment.

Furthermore, when giving evidence the witness said that he only learned of the fact that Adia said it was Jansen and not him when he was being cross-examined. If he was told what Mr.

Mahoney claims to have told him, he would have been aware that the allegation was directed to Jansen and not to him. So, he either forgot what [Mr.] Mahoney said to him, or lied about not knowing the allegation was against Jansen and not him, or that the prosecutor has provided inaccurate information.”

38. Be that as it may, Witness E was never asked by Mr. Richardson to explain how or why it is that he continued to believe, notwithstanding what Mr. Mahoney told him, that Person A alleged in her witness statement that he, Witness E, stabbed the Deceased. Had he been challenged or at least asked to explain the basis for his continued belief, Witness E might have offered any one or more of the following plausible explanations in reply:

- (i) Witness E might have denied that Mr. Mahoney effectively clarified that Person A accused Witness J of the stabbing and not Witness E.
- (ii) Witness E might have stated that he shut his attention closed from the detail of what Mr. Mahoney was telling him, given that he [Witness E] knew that Person A’s narrative was entirely untruthful. Effectively, Witness E’s evidence was that he “*heard a little bit of it*” and that he did not want to hear the rest because it was a lie which “*triggered*” him. That gives rise to an inference that the conversation about Person A was brief and abruptly ended. Also, on this explanation, it would have been open to Witness E to say that his focus was not on what Person A said in fabrication to the police but on convincing Mr. Mahoney that Person A was not a witness to be believed.
- (iii) Witness E might have stated that the small portion of the statement that was read to him by Mr. Mahoney confirmed his view that Person A had in fact accused him of being responsible for the death of the Deceased. When asked by Richardson about the “little bit” that he heard Mr. Mahoney read out to him, Witness E told the Court: “*I think she said that I used Ed’s knife to stab Kanye. I think that’s what I remember me hearing. I just know that what she was saying, I didn’t want to hear any more of it because it wasn’t the truth*”.

Witness E’s evidence on the stand that a small portion of Person A’s statement was read out to him by Mr. Mahoney warrants scrutiny. That is achievable by a search for any short passage from the transcript of Person A’s interview which might correlate or broadly compare to what Witness E stated he thought he remembered hearing read to him.

Having reviewed the transcript record of Person A’s witness interview, I consider it only fair to point out that Person A did in fact tell the police that she saw Witness E with a knife in his possession. She said “*he [Witness E] was going in, I assumed, to*

stab Eze, so I had kicked it out of his [Witness E's] hand... .. They was, they was still fighting in the midst of me and, me kicking the knife out of Elijah's hand and us running to get it. He picked it up, I, yeah.....". After Person A made those statements, the interviewing OIC asked her if she saw anyone other than Witness E with a knife while the Accused and the Deceased were fighting. In reply, she confirmed that she did not see anyone other than Witness E with a knife at that stage of the violent outbreak.

That small portion of Person A's interview discloses what she had to say about Witness E's role during the violent mayhem of that fateful night. Arguably, person A's narrative in this small portion of her interview is capable of being construed by Witness E as confirmation that Person A had in fact laid the blame on him.

- (iv) Witness E might have confirmed that he did in fact fully hear and understand Mr. Mahoney to be telling him that there was an allegation against Witness J and not him. However, it would have also been open to him to state that he never stopped believing in the truth of what the Deceased's mother had previously informed him, that is that Person A had told the police that it was him, Witness E, who killed the Deceased. The evidence on what Witness E says he was told by the Deceased's mother is as follows:

Witness E: *But my thing is this- if, if she's telling the truth, she's going to say-*

Mr. Richardson: *Could you answer that question? Were you told exactly what she said?*

Witness E: *I was told a bit but-*

Clarification between Court and Counsel: (The question refers to what Person A said to the police).

Mr. Richardson: *What were you told about what she said to the police?*

Witness E: *That I killed my friend*

Mr. Richardson: *And you're saying that Kanye's mother told you that Adia had told the police that you killed Kanye? Or did that come from somewhere else?*

Witness E: *No I told police that Adia had come in to give a – um statement*

Mr. Richardson: *Right, we know that much*

Witness E: *Of me killing my friend*

Mr. Richardson: *Right, Okay well, what I'm asking you is- were you told anything other than that; "oh Adia gave a statement saying you killed your friend"? That's all you were told?*

Witness E: *Yeah*

Mr. Richardson: *And you were told that by Kanye's mom?*

Witness E: *Yeah*

On my assessment, any strong-willed belief by Witness E in what the Deceased's mother told him would be consistent with not only his familial relationship with the Deceased's mother but also the general distrust for police and prosecution authorities which implicitly underpins the anti-snitch culture which previously governed Witness E for however long. Witness E's evidence is that after the Deceased died, the story was that he killed his friend. He said that for months leading up to his 21 April 2023 interview, rumours originating from the Accused's camp of friends of him killing the Deceased. As was expressly put by the Defence, those rumours started as soon as the day after the Deceased was killed. Witness E's evidence was that he had to "*fight through that*".

So, it is entirely plausible that Mr. Mahoney's "crux" type summary never disavowed Witness E of his belief that Person A had in fact called his name as a person or the person who stabbed and killed the Deceased.

39. Whichever the case might have been, the fact of the matter is that Witness E's evidence of his post January 2024 belief that Person A had accused him of inflicting the fatal stab wounds was wholly unchallenged by the Defence. So, in my judgment, it would not only be wrong in principle but wholly unfair to use legal submissions to characterize Witness E's evidence on his state of belief as a potential lie when the sworn evidence of what he believed was never challenged during cross-examination.
40. As part of the fact-finding mission relevant to the present application for a special jury direction, Mr. Richardson probed Witness E on the information he had in relation to Person A's witness interview during the point when he, Witness E, was speaking to police in his own recorded interview of 21 April 2023. Mr. Richardson put it to Witness E that his motivation for speaking to the police was to afford him an opportunity to contradict Person A's statements to police. Mr. Richardson put it to Witness E that he spoke to the police knowing that "*Adia probably told them everything*". So, on the case put by Mr. Richardson, Witness E was navigating his statements to police based on what he supposed (as opposed to knew) what

Person A had said to the police. This is also illustrated by Mr. Richardson's suggestion to Witness E that he "*knew she was going to tell them about that [“the phone argument”] because it happened*". Again, the suggestion put by Counsel refers more so to what Witness E figured Person A had or would say rather than what he knew she did in fact say.

41. As the cross-examination continued, Mr. Richardson expressly put it to Witness E that his knowledge of what Person A told the police was confined only to a paraphrase of what Witness E was told about Person A's statement to the police. Mr. Richardson squarely put it to Witness E that he was not told exactly what Person A had said to the police. That part of the cross-examination developed as follows:

Mr. Richardson: *You were now aware that Adia had given a statement and your main concern- we turn to it over and over again during that statement was to explain to them that what Adia said wasn't true*

Witness E: *Yeah, that was one of my concerns because I knew that (s)he is not telling the truth*

Mr. Richardson: *But Elijah, you don't know what she said do you? Other than what you were told*

Witness E: *If she didn't say exactly what I said when I came up here, she's not telling the truth*

Mr. Richardson: *But you see that's the problem. You were not told exactly what she said, were you?*

42. I pause here to point out that the thrust of Mr. Richardson's cross-examination, particularly through the latter two suggestions put to Witness E is that Witness E's current knowledge of what Person A said to the police is limited, such that Witness E was in no position to state that Person A had told lies to the police.

43. The Defence also sought to characterize Witness E's statements to the police about the phone argument as a devised plan to speak about matters he knew Witness A would cover, as opposed to a knowledge of what she had actually said to police. The suggestions put in cross examination were as follows:

Mr. Richardson: *But why did you mention the argument with the phone? Because you were told she mentioned that, didn't he?*

Witness E: *No I wasn't told she mentioned that*

Mr. Richardson: *Well let me ask you this. If she did mention that, she would be telling the truth, wouldn't she?*

Witness E: *If she mentioned about the phone?*

Mr. Richardson: *Yeah- the phone argument. If she told the police about that, she'd be telling the truth wouldn't she? There was an argument over a phone.*

Witness E: *If— if she mentioned, mentioned how she and his friends approached us with knives then, yeah that's the truth-*

Mr. Richardson: *No no, That's not what I said to you-*

Witness E: *if she mentioned that*

Mr. Richardson: *Phone argument to the police and she told the truth- there was an argument over a phone*

Witness E: *Yeah but*

Court: *...If Adia told the police that there was an argument about a phone between her and ...Kanye or anyone between your group of three friends, would that have been the truth?*

Witness E: *Yeah*

Court: *The fact that there was a phone argument*

Witness E: *Yeah*

Mr. Richardson: *And I'm going to suggest to you that the reason why you were telling the police about the phone argument is (inaudible) you knew that they had spoke to Adia- and you knew she was going to tell them about that because it happened*

Witness E: *No*

Mr. Richardson: *You was trying to get in front of it*

Witness E: *I was trying to get in front?-*

Mr. Richardson: *You were trying to get in front of – and get an explanation in for the whole phone argument*

Witness E: *Can you break it down?*

...

Mr. Richardson: *So, Adia was at that party, you agree with that?*

Witness E: *Yeah*

Mr. Richardson: *And you even told the police at some point that Adia would have been in a position where she would have seen everything*

Witness E: *Yes, she did, she did*

Mr. Richardson: *Okay and now you're going to the police eventually- remember, you'nt said nothing to police all this time about this. But you know that Adia has. So Adia has already been to the police- agreed?*

Witness E: *Yeah*

Mr. Richardson: *And now you're coming, giving police a statement and during the course of your free flow, where you aren't interrupted, you volunteer that there was (using a mocking tone): "an argument over a phone"*

Witness E: *Yeah*

Mr. Richardson: *The reason you did that, I'm saying, is because you knew Adia's probably told them everything, let me get in front of that. That's what I'm suggesting to you.*

Witness E: *No*

Court: *...so, just to put it for my note, the reason for your mention of the phone argument in your statement in April 2023 was not and had nothing to do with your knowledge that Adia had already spoken to the police?*

Witness E: *No*

Court: *Was that a fair surmise of your question?*

Mr. Richardson: *It's a fair surmise...*

44. On a close examination of Witness E's 21 April 2023 police interview two things are contextually clear about the "phone argument":

- (i) Witness E's characterization of the phone argument⁹ applies to the point in time that Lahool (unnamed by Witness E during the interview), the Accused, Adia and others from that "crew" approached and confronted D-E-J about a phone.
- (ii) Witness E's reference to the phone argument is wholly unrelated to the argument which ensued between Adia and the Deceased after the initial confrontation by the Accused and Lahool dwindled. Witness E told the police that he did not know what Person A and the Deceased were arguing about, save to say that Person A "kept arguing about something irrelevant."¹⁰

45. In actual fact, Person A never made any mention in her statement to the police about a dispute regarding a missing phone, contrary to what Mr. Richardson seemed to be putting to Witness E.¹¹ The only mention Person A made to the police about a phone was in relation to her use of the phone she had on her person.¹²

46. The cross-examination continued but detoured as follows:

Mr. Richardson: *It's a fair surmise. I'll follow up on that. If that is true it that had nothing to do with your knowledge of Adia speaking to police, then why did you lead off your statement to police by saying; "Look, I'm here. I know Adia said this and that to you. And then you went systematically to deconstruct the things you thought she had said*

(Prosecutor, Mr. Nelson objects):

Mr. Nelson: *My Lady, I don't think that that question is fair. He's never said that he has deconstructed the thing that he thought- there's only one thing ... There's only one thing that he had said he heard. He heard that Adia said that I killed my friend.... So when my friend talk about 'tings' that he's deconstructing- things that he thought that she had said. He has never said that he'd be deconstructing anything.*

Court: *That's true.*

⁹ NOA #2 pages 65-66 and 72

¹⁰ NOA #2 pages 63 line 47

¹¹ Counsel will be required to address the Court as to the fairness and risk of the jury being left with an impression or understanding that Person A had in fact told the police about the phone argument, given that M. Richardson put it to Witness E that he (i) knew more than what he was letting on about the contents of Person A's statement and (ii) spoke about the phone argument in his 21 April 2023 statement only because he knew that Person A had already done so..

¹² See page 11 Lines 20-22

Mr. Richardson: *I never said he said it in Court but I'm entitled to put to him-*

Court: *That what?*

Mr. Richardson: *That he was told certain things about the content of that statement not-*

Court: *So he knows more about-*

Mr. Richardson: *He knows more than he is letting on- yes*

Court: *So, he knows more about Adia's statement than he's letting on?*

Mr. Richardson: *... yes...*

Court: *So, its being suggested to you Mr. Smith that you know a lot more about what Adia said to the police than what you are telling us today*

Witness E: *No, I just know that she said that I killed my friend*

47. It has to be said that Mr. Richardson vacillated in his cross-examination between two conflicting positions put by the Defence. In earlier part of the cross-examination, Mr. Richardson effectively put it to Witness E that his knowledge of what Person A said was limited only to what Witness E had heard said about Person A's witness interview. Additionally, Mr. Richardson put it to Witness E that what Witness E had heard was something other than a verbatim account of what Person A told the police. Within this portion of the cross examination, Mr. Richardson mounted no challenge to Witness E's claim to a continued belief that Person A had accused him of having stabbed the Deceased to death. In fact, Mr. Richardson expressed agreement from the Defence when Witness E stated on the stand that it was still his belief that Person A had accused him of committing the murder. By way of reminder:

Mr. Richardson: *You said that, and you said it to the police on the 21st and you said it again- that you were aware that Adia had given a statement in which you believe she had said that you stabbed Kanye, correct?*

Witness E: *Yeah*

Mr. Richardson: *Do you still think that?*

Witness E: *Do I still think-*

Mr. Richardson: *That she gave a statement saying that you stabbed Kanye*

Witness E: *Yes*

Mr. Richardson: *I don't think that is something that we disagree on, but I can- she never said you stabbed Kanye*

48. So, the case originally put by the Defence was that Witness E's knowledge of Person A's statement was and is limited to only what Witness E had heard about what Person A said, whether by the Deceased's mother, the rumours which swiftly circulated after the killing or from Mr. Mahoney himself. On this part of the defence case it is suggested that the steps Witness E took on 23 April 2023 to counteract Person A's account were informed only by what Person A had "*probably*" told the police rather than on the basis of any knowledge of what she actually told the police.
49. However, as the cross examination continued, the premise of the Defence case shifted. This change of course appears to have been offset by the prosecutor's objection to Mr. Richardson's suggestion to the witness that he had sought to "*deconstruct the things*" that Witness E "*thought* [my emphasis] *she had said*". At this point Mr. Nelson properly pointed out that Witness E had never stated or agreed that he had "deconstructed" anything. Mr. Nelson emphasized that Witness E's evidence thus far was that he had heard about only one allegation made by Witness E, that being that she had accused Witness E of carrying out the fatal stabbing.
50. In quick recovery, Mr. Richardson incongruously asserted his entitlement to put it to Witness E that he in fact knows more about Witness E's statement than what he was letting on. This sudden detour taken by the Defence, that is that Witness E was effectively harbouring the fullness of his knowledge about Witness A's statement, remained latent as no further suggestion as to what Witness E actually knew was put, nor was the source of this disguised knowledge put to Witness E. That suggestion stood in a vacuum, isolated from the previous questions and suggestions put by the Defence asserting that Witness E's knowledge of what Person A told the police was restricted to only what he had heard about what Person A told the police, which was something other than exactly what she said.
51. During cross-examination, Mr Richardson put it to Witness E that he was lying about Mr. Mahoney having shown or told him anything about Person A's witness statement. Mr. Richardson daringly put this to Witness E without having waited to inspect the fruits of Mr. Nelson's enquiries. The consequence of that decision, artful as it appeared from an advocacy perspective, was such that the Defence put a false fact to Witness E in the course of attacking Witness E's credibility. That indeed requires a special direction to the jury.

Summary of Factual Findings:

52. In this case, both the Crown and the Defence rely on the same facts stated by Mr. Mahoney in his unsworn affidavit to buttress their respective arguments. That “evidence”, however, is to be carefully assessed alongside the evidence of Witness E for its proper context.

Findings on Mr. Mahoney’s Unsworn Affidavit Evidence

53. In respect of Mr. Mahoney’s pre-trial witness conference with Witness E, I accept Mr. Mahoney’s explanation that he told Witness E, in “crux” form, that it had been alleged that it was Witness J who stabbed the Deceased and not the Accused. I further accept that Witness E told Mr. Mahoney that Person A was lying.

54. I also accept Mr. Mahoney’s explanation that it was Witness E who first raised Person A’s name in the meeting. Additionally, I am satisfied to proceed on the basis that Mr. Mahoney never expressly told Witness E that it was Person A who authored the allegation, the crux of which he put to Witness E. However, I do find that Mr. Mahoney would have likely known that Witness E would easily decipher that the allegation against Witness J emerged from Person A. Yet, nothing material, in my judgment, turns on that.

55. Mr. Mahoney stated that he never permitted Witness E to view Person A’s interview footage or to read the transcript of the interview. I accept that as part of the proven facts underlying this application.

56. Regrettably, however, this Court also finds that Mr. Mahoney failed to take a written note of the January 2024 meeting.

57. Finally, I confirm, on the findings of this Court, that there is no evidence before me which would lead me to reasonably believe that it was Mr. Mahoney’s intention to influence Witness E’s evidence, one way or the other.

Findings on Witness E’s Evidence

58. For the purpose of this application and for the reasons outlined earlier herein, I am not inclined to make a finding that Witness E was dishonest about his continued belief that Person A had told the police that he had carried out the stabbing. Indeed, I accept that Witness E maintained a belief that Person A alleged in her statement to police that he stabbed and killed the Deceased.

59. As for the suggestion made on the defence case that Witness E is concealing the full scope of his knowledge about the contents of what Person A told the police, I decline to make any such finding for the reasons set out further above in this Ruling.

60. What I have extrapolated from this, is that there is no evidence before this Court from which I might properly conclude that Witness E received, or likely received, any information about the content or substance of Person A's witness interview other than (i) a false rumour that Person A had accused him of committing the stabbing and (ii) a confirmation from Mr. Mahoney, in the form of a crux of the allegation, that it had been said that it was Jansen who stabbed the Deceased.

The Competing Legal Arguments:

Summary of Mr. Nelson's Submissions

61. In circumstances where the police receive conflicting accounts between two eyewitness statements, such that only one of the two persons may be proffered as the witness of truth, the prosecution will be required to determine which of the two accounts represents the true position. In this case, the prosecutors decided, as they were entitled to do, that Person A was not a witness of truth. For that reason, her statement was served as unused material.
62. In the course of the prosecutor's evaluation, it was necessary for Mr. Mahoney to test and assess the reliability of Witness E's account and in so doing Mr. Mahoney properly put, at baseline level, the substance of the opposing account of the night in question. That exercise not only fits perfectly within the rights of a trial prosecutor but also forms part of the duties of a prosecutor to properly and continually assess whether the matter is worthy of prosecution.

Summary of Mr. Richardson's Submissions

63. The role of a prosecutor is to be distinguished from the zealous advocacy of a private attorney. Essentially, a prosecutor serves as a "minister of justice" whose primary duty is not to secure a conviction at all costs but to see that justice is done.
64. A prosecutor is entitled to engage in legitimate witness preparation; however, there is corresponding duty to refrain from the practice of unethical coaching. In this case, Mr. Mahoney, by the conduct outlined in his unsworn affidavit, exceeded the boundaries of permissible witness preparation. Having introduced to a testifying witness the substantive exculpatory material contained in an unused witness statement, Mr. Mahoney wrongly engaged in an exercise of improper witness coaching. The effect of that witness coaching (i) influenced Witness E's testimony and / or (ii) provided Witness E with facts of which he had no prior knowledge.
65. By informing Witness E about the crux of what Person A alleged, namely, that it was Witness J and not the Accused who stabbed the Deceased, Mr. Mahoney directly violated established guidelines in common law jurisdictions.

66. As stated in Mr. Richardson's written submissions before the Court at paras [6]-[7]:

"The implications of this conclusion are significant. The prosecutor faces potential professional discipline, including reprimand or suspension, and the integrity of the Department of Public Prosecutions is called into question.

Furthermore, the case itself is jeopardized, as the tainted testimony of the witness Elijah Smith may be ruled inadmissible, or the misconduct could form the basis for a mistrial or a successful appeal of any future conviction."

The Legal Issues for Determination

67. Based on my findings of fact, I am required to assess whether the law permits a prosecutor, in the course of preparing that witness to give evidence at trial, to put opposing exculpatory information reported by another person whose police witness statement was served as unused material. This legal issue requires some analysis of the following questions:

- (i) To what extent, if at all, does the law permit a prosecutor to disclose to a witness any aspect of the defence case or any exculpatory account or material provided by or on behalf of **the Accused**?
- (ii) To what extent, if at all, does the law permit a prosecutor to disclose to a witness any opposing account or exculpatory material from **another witness**?
- (iii) To what extent, if at all, does the law permit a prosecutor to disclose to a witness any opposing account or exculpatory material from **a third party**?

68. Counsel informed this Court that there is no local jurisprudence or codified rules or guidelines which offer learning on these principles and standards, sacrosanct as they are to the integrity of the criminal trial process. That being the case, an overview of the basic underlying principles is warranted. That guiding light is the starting point of the search for an answer to the above three questions. In the end, each of those questions rely on the same set of principles for resolve.

69. Before I address these legal tenets, I wish to credit both Mr. Nelson and Mr. Richardson for the skillful analyses and scholarly research put before the Court in the hearing of this application.

The Law on Prosecution Witness Preparation

70. The right to a fair trial pursuant to section 6(1) of the Bermuda Constitution is not only an entitlement inalienably held by the Accused but is also a sacred guarantee vouchsafed to the Crown for the benefit of a victim and or the local community who look up to the Courts to dispense justice for all.
71. A trial without a witness is no trial at all. So, positioning a witness to give his or her best evidence is a prosecutor's investment in the fairness of the trial process. That is the core purpose of witness preparation. It thus follows that prosecutors have a professional duty to meet all witnesses before they give evidence. Equally, prosecutors are dutybound to create a dated written note or record of every witness meeting. That obligation is charged to the prosecution because a witness preparation meeting is neither an adversarial tool nor a private non-disclosable matter. It is an exercise to be commissioned and executed by the prosecutor in his or her capacity and role as a "minister of justice" and officer of the Court. What is to be taken from that is this: when witnesses are properly prepared to give their best evidence, the fairness of the trial proceedings is enhanced.
72. The question before this Court turns on the crucial distinction between witness preparation and witness coaching. In addressing this area of the law, Mr. Richardson furnished this Court with the UK's Crown Prosecution Guidelines¹³ (the "CPS Guidelines") entitled "Speaking to Witnesses at Court". The CPS Guidelines are instructive of the practice standards and ethical principles which govern a prosecutor's conduct of the witness preparation process. The introductory paragraphs provide:

"The aim of this guidance is to set out the role played by prosecutors at or before court in ensuring that civilian witnesses give their best evidence. This is a core part of the prosecutor's job and will, if done properly, impact positively on both the quality of the witness's evidence in court and the perception of the service they receive from the CPS..."

The guidance emphasises the need to ensure that witnesses are properly assisted and know more about what to expect before they give their evidence. Prosecutors have an important role in reducing a witness's apprehension about going to court, familiarising them with the processes and procedures- which may seem alien and intimidating- and managing their expectations on what will happen whilst they are at court.

Some prosecutors may be uncertain about what they are allowed to say to witnesses. This guidance makes clear what is expected and permissible and explains the difference between

¹³ Revised: 27 March 2018 and updated 15 October 2024

assisting a witness to be better able to deal with the rigors of giving evidence (which is permitted) and witness coaching (which is not permitted).

... ..”

73. The value which is derived from that guidance parallels that taken from an opinion paper¹⁴ issued by the Ethics Committee of the UK Bar Council in October 2005¹⁵. This document may be viewed as a best-practice announcement from the Bar Council on the importance of carrying out witness preparation while avoiding slippage into witness coaching or training domain. That was the Bar Council’s swift same-year response to the concerns raised by the English Court of Appeal in *R v Momodou & Limani* [2005] EWCA Crim 177 against witness coaching.

74. That said, the Bar Council Witness Preparation paper highlighted the importance of sourcing these legal boundaries from the Bar Standard Board (“BSB Handbook”)¹⁶ and the BSB’s Guidance on Investigating, Collecting Evidence and Taking Witness Statements. Rule gC7 sets out the position as it relates to drawing a witness attention to other conflicting evidence. The rule provides:

“gC7 For example, you are entitled and it may often be appropriate to draw to the witness’s attention other evidence which appears to conflict with what the witness is saying and you are entitled to indicate that a court may find a particular piece of evidence difficult to accept. But if the witness maintains that the evidence is true, it should be recorded in the witness statement and you will not be misleading the court if you call the witness to confirm their witness statement.”

75. Mr Richardson also produced academic material published by the College of Law in Australia, authored and or presented by Justice John Griffiths of the Federal Court of Australia on 5 March 2014. That text cites Young J in *Re Equiticorp Finance Ltd* (1992) 27 NSWLR 391. Australian where a call from the Bench was made for the placement of “very severe limits” on practitioners in preparing a witness to give evidence. Young J at [395] listed various examples of valid advice that may be given to a witness. That list of examples provides some helpful guidance to local prosecutors.

76. Witness preparation is a procedural step aimed to provide the witness with information of general application on what anyone might reasonably expect when appearing in Court as a witness. It is not an opportunity for a prosecutor to merge into investigation mode. In other

¹⁴ See concluding paragraph entitled “Important Notice”: “*This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. It is not “guidance” for the purposes of the BSB Handbook...*”

¹⁵ Last reviewed in November 2019

¹⁶ Version 4.8 which came into force on 21 May 2024

words, prosecutors ought not to misuse the witness preparation stage as an opportunity to uncover material facts not stated in the witness proof. Instead, it is to be readily understood and accepted that witness preparation is about helping a witness to feel prepared for the Court experience.

77. A clear and express statement to a witness that their evidence ought to be and remain uninfluenced by the prosecutor is an obvious safety measure available to prosecutors who are anxious not to slip into witness coaching. But, that alone would not generally suffice. Prosecutors must also remain within their professional boundaries.

78. By way of illustration, below are few examples of acts which generally constitute legitimate witness training:

- (i) familiarising the witness with the procedural norms and nuances of the Courtroom and the trial process.
- (ii) informing the witness of their general duties and rights as a witness
- (iii) advising a witness about the general operation of evidence in chief, cross examination and re-examination
- (iv) providing the witness the opportunity to refresh their memory from that witness's statement(s) and
- (v) informing the witness about the general nature of the defence case in appropriate cases

79. As to the question on how far a prosecutor may go in informing a witness about the defence case, the CPS Guidelines describe the tier of information that may be shared as follows:

“The general nature of the defence case where it is known (for example mistaken identification, consent, self-defence, lack of intent). The prosecutor must not, however, enter into any factual basis of the defence case...”

The nature of the defence case may be obtained from a number of sources including the police interview, the Defence Case Statement... ..

Prosecutors should not speculate on potential defences and where the general nature of the defence is not clear, the prosecutor should speak to defence advocate(s) to clarify the defence case before speaking to the witness.”

80. Interestingly, mock examinations in chief, cross and re-examination are permissible in the view of the UK Ethics Committee, so long as the focus and purpose of the exercise is about acquainting the witness with the process of giving oral evidence. Strict boundary lines are imposed to avoid the dangers of witness coaching. For example, it is expected that any such a mock exercise

would not be based on facts which are the same as or similar to the facts of the current or impending trial proceedings.

81. Of more direct application to the circumstances of this case is the following passage from the CPS Guidelines in relation to the prosecution's disclosure duties:

"...When the witness has been spoken to at court on the day of trial, the prosecutor will need to decide whether anything said meets the test for disclosure and if it does, to disclose this immediately to the defence..."

82. The duty of a prosecutor to keep its disclosure obligations prominent in mind even in the context of witness familiarisation courses was also addressed by the Ethics Committee at para [11.13]:

"Although not directly addressed in Momodou, the Ethic Committee considers that prosecuting counsel, and those instructing them, have a duty to ensure that the trial Judge and the Defence are informed of any witness familiarisation programme organised for prosecution witnesses. [footnote 6]: The contrary view, that this is a matter of disclosure of relevant prosecution material in accordance with the statutory tests, does not recommend itself to the Committee. It is rather a matter that goes to the integrity of the trial process itself, which should always be disclosed."

Impermissible Witness Coaching and Witness Training

83. As pointed out by Mr. Richardson, the rule against witness coaching or training was considered with care by the English Court of Appeal in *R v Momodou*. In that case the Court found as follows at paras [61]-[62]:

"61. There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness. (See Richardson [1971] CAR 244; Arif, unreported, 22nd June 1993; Skinner [1994] 99 CAR 212; and Shaw [2002] EWCA Crim 3004.) The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case

itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.

62. This principle does not preclude pre-trial arrangements to familiarise witness[es] with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness's own uncontaminated evidence. Equally, the principle does not prohibit training of expert and similar witnesses in, for example, the technique of giving comprehensive evidence of a specialist kind to a jury, both during evidence-in-chief and in cross-examination, and, another example, developing the ability to resist the inevitable pressure of going further in evidence than matters covered by the witnesses' specific expertise. The critical feature of training of this kind is that it should not be arranged in the context of nor related to any forthcoming trial, and it can therefore have no impact whatever on it."

84. Mr. Nelson, however, relied on the more recent decision of the English Court of Appeal in *MacMillan Cancer Support v Rebecca Toogood* [2022] EWCA Crim 633. In that case it is reported that the prosecution concerned the disappearance of money raised for the charity, MacMillan Cancer Support (the "Charity"), a by a customer of a public house, Butler & Hops public house (the "pub"), which was managed by the appellant. The appellant, Rebecca

Toogood, was the pub's land lady who was responsible for transferring the funds raised by the donor, Mr. Darren Johnson.

85. Mr. Johnson, a customer of the pub, registered for the charitable event with the assistance of the appellant. In doing so, she printed off the sponsorship forms which Mr. Johnson completed. Mr. Johnson some sponsorship money to the assistant manager of the pub, Jackie Cooper who was later rumoured to have stolen the charitable funds after she had secured the funds at her residence for a temporary period. With the assistance of a friend, Louise Woods, Ms. Cooper counted the money and then travelled to the pub handing the funds over to the appellant at the pub. The appellant, without providing a receipt for the funds, placed the money in a glass behind the bar.
86. Mr. Johnson raised an additional sum of money after Ms. Cooper left the pub. He gave that money to the appellant. Thereafter, Mr. Johnson entrusted the appellant to deposit all the money raised into a Nat West Bank account nominated by the Charity. After a period of time, Ms. Cooper raised concerns about the disappearance of the funds with the owners of the pub. The owners passed those concerns on to the Charity.
87. The Charity had their own investigators, Bob Browell and Lee Duddridge (collectively the "investigators"). The investigators, having concluded that the Charity never received Mr. Johnson's sponsorship funds, launched a full investigation and a private prosecution on behalf of the Charity. At trial, one of the two private investigators, Mr. Duddridge, gave evidence about separate meetings he held with prosecution witnesses Ms. Cooper and Mr. Fisher, the appellant's ex-husband who worked at the pub with the appellant but denied any involvement with the disappearance of the money. Those meetings were held after the defence statement had been served on the Charity's solicitors. The appellant's defence at trial was that Mr. Fisher had indeed taken the funds.
88. Having been served with the defence statement, the Charity's solicitors drafted questions to be put to the prosecution witnesses by Mr. Duddridge during the witness meetings.
89. At trial, Mr. Fisher told the Court under cross examination that during his meeting with the Charity's investigators, he was taken through the appellant's defence statement. However, he was not provided with a copy of the document nor was it read out to him. As noted by the Court of Appeal, the appellant's defence statement contained considerable detail about the appellant's version of what had occurred in respect of the missing funds.
90. The investigators' meeting notes were served on the Defence as unused material. In those notes it was recorded that a summary of the appellant's defence statement, as opposed to a copy of the document, was given to both prosecution witnesses.

91. Counsel for the appellant in *MacMillan* argued that the private investigators had gone beyond developing reasonable lines of enquiry emerging from the disclosure of the defence statement. It was the appellant's case on appeal that the private investigators had:

- a) Influenced their witnesses;
- b) Enabled the witnesses to tailor and adjust their accounts; and
- c) Given them advance notice of the cross-examination that they would likely be subject to.

92. Grounded on these complaints, a special jury direction was sought as an alternative remedy to the exclusion of evidence application. The trial judge's ruling on the appellant's application for a special direction is summarised in the Court of Appeal ruling at paras [31] and [57] as follows:

"31. The judge ruled that there was nothing improper in prosecution witnesses being advised of the nature of the defence case, or in further evidence being obtained from them to deal with that case. There was nothing in the recorded minutes of the meetings that suggested the witnesses had been coached or encouraged in what to say.

...

57. ... "The purpose of this meeting was to gather further evidence, which if appropriate could be put into witness statements and that is what subsequently happened.... So, I see nothing in those notes or in the evidence that I have heard which suggests that there has been any impropriety at all as far as the witnesses were concerned. As I say, in my experience this is commonplace to meet Prosecution witnesses to discuss matters with them to see if they can add further to the evidence they have already put into witness statements and that, in my judgment, is what happened in this case."

93. On the third ground of appeal, the appellant complained that the prosecution disclosed a significant part of the defence and the defence case statement of the appellant to the key prosecution witnesses, Mr. Fisher and Ms. Cooper. Counsel for the appellant is quoted in the judgement at para [55] as having submitted that the jury could no longer reliably assess the truthfulness of Mr. Fisher because he had been "irrevocably tarnished as a witness through advanced and detailed knowledge of the defence case about him". So, at trial, the appellant through her Counsel sought an order for the exclusion of Mr. Fisher's evidence or a special jury direction in the alternative.

94. On the specific facts in *MacMillan*, the appellant's complaint on appeal was that Mr Fisher had been made aware of the appellant's belief that he in fact stole the money. It was also complained that the investigators had taken Mr. Fisher through the defence statement of the appellant prior to Mr. Fisher providing his second witness statement.

95. Addressing this complaint about prosecution witnesses being made privy to the detailed facts underlying the defence case, the Court of Appeal said at paras [59]-[60]:

“59. One of the purposes of a defence statement is to enable the prosecution to pursue reasonable lines of inquiry. Indeed, it is the duty of the prosecution to do so, not least because further inquiries may produce evidence that undermines the prosecution. The exercise may involve raising issues disclosed within it with prosecution witnesses and seeking evidence from them, which is then reduced into further witness statements. It may lead to approaches to new witnesses. For example, the defence statement now covers the ground formerly found in alibi notices which should be investigated; so too details supporting a defence of self-defence.

60. Ms Graham's concerns focus on Mr Fisher and the detail found within the defence statement that went beyond the high-level assertion that he took the money. We agree with the judge that it was entirely appropriate for evidence to be obtained from Mr Fisher concerning the detail of what the appellant said occurred on the day in question and more generally on arrangements for the banking of the pub's taking. This is in substance no different from taking a witness statement from a complainant in a case of violence when details are given of a defence of self-defence.”

96. Most significantly, the Court of Appeal distinguished this case from *Momodou* as follows [61]:

“61. Ms Graham relied on the decision of the Court of Appeal in R v. Momodou and another [2005] 2 All ER 571. In that case it was agreed that there had been inappropriate witness coaching. At para. 61 Judge LJ said:

“... This is the logical consequence of the well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness: see [authorities cited]. The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids, any possibility that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. [...] An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be “improved”. ...”

The appellant's concern is different. The complaint is not that prosecution witnesses colluded or shared information with the risk of influence upon each other's evidence, rather that witnesses were informed of the nature of the defence case so that they could make further

statements. There was nothing improper in that. There is no question of an abuse of process; nor was a direction needed, of a sort that was necessary in the Momodou case.”

97. The distinction between the issues decided in *MacMillan* and *Momodou* valuably marks the crucial difference between (i) making the nature of the defence case known to prosecution witnesses for the purpose of possibly procuring further witness statements and (ii) witness collusion and shared information between witnesses resulting in the risk of influence on each other’s evidence. The Court of Appeal in *MacMillan* approved the former.

98. In *R v Gary Skinner* [1993] EWCA Crim J1108-3; [1994] 99 Cr. App. R. 212 Farquharson LJ sitting in the Criminal Division of the English Court of Appeal delivered the judgment of the Court disapproving of discussions held between police witnesses about the case in circumstances in which the discussion took place within the Court precincts immediately prior to giving evidence on the stand. This scenario was distinguished from that where police officers confer in making up their notebooks immediately after the events or interviews in which they partook.

99. Farquharson LJ said;

“As a general rule, any discussions as to what evidence is going to be given by them should never take place between two or more witnesses.... ..

... ..it is a matter for the judge to deal with in his own way according to the particular circumstances that apply at the time. His task is to bring to the notice of the jury what the learned judge in this case properly described as the "down side" of what had undoubtedly taken place. In other words the jury should have very clearly put before them the fact that because the conference had taken place and the interchange of recollections of evidence which is to be inferred from what occurred, they should bear in mind that the evidence for that reason is all the more suspect. To use his own words, "if the officers had made up their minds to lie about it, it gives them an opportunity to get their lies straight". So long as the jury have in mind that that is a consequence that would arise from this kind of conduct, it seems to us that it is sufficient. We do not, however, in the same breath, approve of the way in which he approached the matter for the reasons I have already explained. It is not correct to say there was nothing wrong with conferences of the kind that I have been describing.”

Final Analysis and Application of the Law and Facts

100. There is no material conflict on the statements of these legal principles by the 2005 Court of Appeal decision in *Momodou* and the emerging 2005 opinion paper issued by the Ethics Committee of the UK Bar Council or by the CPS Guidelines and the BSB Handbook. Effectively, the UK Courts and the legal professional regulatory bodies are united in their recognition of the differences between legitimate and necessary witness preparation and

witness coaching. Young J’s reasoned decision in *Re Equiticorp Finance Ltd* and other more recent academic materials used by the College of Law in Australia for judicial training demonstrate that the English approach to this distinction has the support of a wider reach throughout other Commonwealth jurisdictions. I see no reason why the position in Bermuda would or should differ. These are universal principles which have been created to ensure the fairness of trial proceedings.

101. As I understood Mr. Richardson’s submission, the case of *MacMillan* is of no assistance and can be distinguished from *Momodou* on the basis that the English Court of Appeal’s reasoning applied uniquely to an investigator’s interaction with a prosecution witness rather than that of a prosecutor or other legal practitioner. If that indeed was the point argued at the hearing I would be unable to agree with that proposition. The Court of Appeal expressly explained the distinction. The key difference between *MacMillan* and *Momodou* is that the former is concerned with the scope of information shared with prosecution witnesses about a defence case for the purpose of possibly procuring further witness statements. *Momodou* is about witness coaching. Of course, both cases concerned complaints of a resulting risk of undue influence and tainting of the witness’s evidence.
102. Factually speaking, the case before me concerns a complaint from the Defence that Mr. Mahoney wrongly disclosed to a prosecution witness, namely Witness E, the substance of the allegation made by Person A that she had accused Witness J of carrying out the stabbing. As correctly pointed out by Mr. Nelson during his oral submission, that allegation is relied on by the defence and is expressly pleaded in the “Updated Defence Statement”¹⁷ dated 3 January 2024 which provides:

“...The defendant accepts that he did have an altercation with the deceased but at no time did he have any knife or bladed article in his possession.

The Defendant will assert that during the altercation he had with the deceased someone else actually inflicted the stab wounds on the deceased.

The Defendant is aware that the Police have a statement from a witness who says that they saw the only witness who says that Defendant had a knife (Jensen Smith) himself with a knife, and that he approached the area where the deceased and the Defendant were involved in a struggle and began to make stabbing motions toward the Defendant, but appears to have inadvertently stabbed his own friend (the Deceased). This witness’s statement has been served as unused material when it should be a part of the trial record. [my emphasis]

¹⁷ Although this document was termed an “Updated Defence”, it was the first Defence Statement filed with the Court

The Defendant on this basis asserts that he was not responsible for the infliction of any stab wounds on the deceased.

The Defendant intends for the witness whose statement is not included in the main bundle to be treated as a witness whom the prosecution is duty bound to call on their case or at least proffer for cross-examination.”

103. In my judgment, the facts of this case align more with the case of *MacMillan* rather than *Momodou*. As was certainly submitted by Mr. Richardson, the purpose recognised by the English Court of Appeal for sharing aspects of a defence statement with a prosecution witness is to ascertain if it will lead to the production of further evidence. That is why the exercise is charged to the role of an investigator as opposed to that of the prosecutor. However, English law certainly recognises a prosecutor’s entitlement to inform a witness about the general nature of the defence case. Mr. Richardson argued that the fact of it having been alleged that it was Witness J and not the Accused who stabbed and killed the Deceased resulted in Witness E being given factual detail underlying the defence.
104. Mr. Richardson argued that a proper description of the general nature of the defence case would be to simply state that the Accused did not stab the Deceased, someone else present did. I do not accept that over-simplification of the defence case. In my judgment, no wrong was committed by Mr. Mahoney in advising Witness E that it was being said that it was Witness J who killed the Accused. That is comparable to the facts in *MacMillan* where the defence statement shared the defence case that it was Mr. Fisher, the appellant’s ex-husband, who was thought to have stolen the money.
105. However, with that said, I am unable to fully endorse Mr. Mahoney’s conduct of this meeting with the approval of this Court primarily on the basis that he failed to either create or retain a simultaneous note recording the events of his meeting with Witness E. This opened his conduct of the meeting to scathing criticism from the Defence. The better practice would have been for a note of the meeting to be secured for possible disclosure to the defence. Ideally witness conference notes should be standardised in format and they should include a caption which expressly states whether the witness, in the prosecutor’s opinion, has stated any new information which should be recorded in a further witness statement. That is the learning which I hope will be derived from the circumstances of this case. That is also broadly consistent with Mr. Nelson’s sensible concession that prosecutors ought to keep a written note of their witness preparation meetings.
106. Notwithstanding, the business of this Court is to provide as fair of a trial as possible for both the Accused and for the ultimate benefit of the victim and the community at large. It is not for

this Court to assume the role of the regulatory or supervisory bodies empowered to address professional disciplinary measures in a seat of first instance.

107. In this case, there is no cause for concern that Witness E's evidence was influenced by having been told what the general nature of the defence was. I have found that there was no wrongful conduct in the provision of that bare information.

Conclusion

108. The application for a special jury direction admonishing Mr. Mahoney's 2024 meeting with Witness E is accordingly refused.

Dated this 7th day of October 2025



THE HON. JUSTICE MRS. SHADE SUBAIR WILLIAMS
PUISNE JUDGE