

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

OVERSEAS TERRITORY OF MONTSERRAT

CLAIM NO: MNIHCR2024/0103

BETWEEN:

[1] THE KING

Crown

and

[2] ADRIAN LLEWELYN CARTY

Defendant

BEFORE: Hon. Madam Justice M E Birnie Stephenson (Ag)

Appearances:

Ms. Allana Cumberbatch Crown Counsel for the Prosecution

Ms. Chivone Gerald with Mr. Kenroy Hyman for the Defendant

2025: October 29

December 8

RULING

[1] **STEPHENSON J, [AG].:** The defendant is before the court on a four-count indictment alleging indecent assault. During the testimony of the virtual complainant, prosecuting counsel asked the following questions:

Question: "After the last incident of inappropriate touching did you have any conversation with Mr Carty?"

Answer "No".

Question: "After the last incident of inappropriate touching did Mr Carty speak to you on the 12th September 2024?"

Answer "On the 12th he apologized to me and I did not take it seriously because of the way he apologized".

- [2] Counsel Mr Hyman objected to the second question and answer. There was a voir dire to consider Counsel's objection. Counsel's objection was not allowed. These are the reasons for the decision which I promised to deliver.

- [3] Counsel for the defence grounded his objection on principle of law of the finality of answers. Counsel submitted that the defence found the second question posed by the prosecution to be objectionable on the ground that the first question was a straightforward question and a straightforward answer was given. It was contended that when straightforward questions are asked and straightforward answers are given and there is no ambiguity it brings into play the concept and doctrine of finality of answers. Therefore, the question ought not to be asked again.

- [4] Counsel Hyman further submitted that the prosecutor's line of questioning amounts to a total erosion of that doctrine. Counsel pressed on, that the rules of evidence are being flouted by experienced and competent prosecuting counsel. Mr Hyman submitted that when the question was asked **"after the last incident of inappropriate touching with Mr Carty did you speak or have a conversation with Mr Carty"** there was a straight forward answer **"No"**.

- [5] Counsel further submitted that there was nothing ambiguous about the question or the answer to the question and the jury must have understood clearly the question and the answer given. Mr Hyman insisted that prosecuting counsel cannot be allowed to come via the back door to elicit as it were, the answer she is looking for, or to pull out of the witness the answers that she did not get. It is wrong and it runs against the thread of what the doctrine of finality of answer envisaged.

- [6] Counsel further expressed the defence's concern, that the jury heard that on the **"12th September came and apologized to me and I did not accept"** and that this is highly prejudicial and the jury have been made aware that right or wrong Mr Carty apologized to her. Counsel submitted that the dilemma is that the accused apologized "for what?"¹. Counsel noted that the question put to the witness was premised on Mr Carty's action ... and that the jury must be

¹ Counsel Hyman's Oral objections

thinking that based on the premise of the question that that the question related to the accused actions that, they must be thinking that wait a minute, that this young lady is saying that Carty apologized to her, that it suggests that Mr Carty is accepting that there was inappropriate touching.

- [7] At this point the court pointed out to Counsel Hyman that the Doctrine of Finality of Answers arises in cross examination as it relates to collateral issues, and that the witness was still giving her evidence in chief.
- [8] The court then invited prosecuting counsel to respond to defence counsel's objection.
- [9] Counsel Ms Cumberbatch agreed with the court and submitted that the rule of finality of answers only applies to cross examination when it goes to the collateral issues and is therefore not applicable. Counsel further submitted in response that the evidence is not new. *"That the defence knew of the evidence as it is in the witness's statement and they never indicated their objections relating to the apology. Counsel also noted that the witness had not gotten to the point of stating the words Mr Carty said to her".*²
- [10] Counsel Ms Cumberbatch submitted that the statement is contained in the witness's written statement and that it is relevant and it cannot be excluded on the ground as sought by defence counsel.
- [11] Defendant Counsel further submitted that she asked about a conversation with Mr Carty after the last incident in relation to the inappropriate touching and that was her question specifically. Counsel submitted that the witness answered to that, then she asked another question that is did *"Mr Carty speak to you after the last incident?"* Counsel submitted that though they are similar questions they are not the same. Ms Cumberbatch then went on to submit that when you ask questions of a witness persons have different abilities to understand and based on their abilities they would respond to the question.

Court's Considerations

- [12] Counsel for the defence grounded his objection to counsel for the prosecution repeating her previous question to the witness having rephrased it on the doctrine of finality of answers.

² Counsel Cumberbatch's oral submission

- [13] The general rule regarding finality of answers can be stated thus, that answers of witnesses to questions in cross examination pertaining to matters collateral to the proceedings are final. This rule is applicable to the cross examination of a witness and it *"merely prevents the cross-examiner from calling further evidence in respect of matters which are not directly relevant to the issues in the proceedings. Collateral matters do not bear directly on the facts in issue in the trial, but on matters such as the character of a defendant or the credibility or consistency of a witness."*³
- [14] The case was at the stage where the virtual complainant was giving her evidence in chief. It is well established that the purpose of the evidence in chief in a criminal trial is to allow the prosecution to draw from their witnesses all the relevant facts which can be used to support their case, to enhance the witness's personal credibility and to anticipate issues to be raised in cross examination. (emphasis added)
- [15] There are basically three limitations to the types of questions that can be asked during examination in chief. The limitation extends to leading questions, that a witness is to speak from his or her personal knowledge and that the examining counsel must not discredit his or her own witness.
- [16] The question which is the subject of counsel Hyman's objection does not fall into the category of questions not allowed in evidence in chief. Further the ground upon which Mr Hyman sought to rely on is not relevant to the situation where a witness is giving his or her evidence in chief. Mr Hyman's objection fails on this point.

Prejudicial Effect of Jury

- [17] Counsel Hyman expressed his concern about the prejudicial effect of the witness's answer and that the jury could be led to thinking that if Mr Carty apologised it could amount in the eyes of the jury to Mr Carty accepting that he was guilty of inappropriate touching.
- [18] Inherent in the defendant's right to a fair jury trial is the requirement for the trial to be fair and impartial. This is an absolute right. Juries in criminal trials are required to render a verdict that is based solely on the evidence that has been adduced in court.

³ Halsbury's Law of England Volume 27 (2021) paragraph 545

- [19] This court is of the view that defence counsel's concerns could be cured by an appropriate curative instruction to the jury by the court in its summing up. A curative instruction to the jury is utilised by the judge in the judge's summing up to cure any potential prejudice caused by the jury's exposure to any prejudicial evidence which may have been adduced. This even extends to the admission of inadmissible evidence. A judge is at liberty to instruct a jury to disregard or limit the use of any such evidence which may have been introduced at trial.
- [20] A judge's admonition to a jury is not a mere formality, it serves as a significant tool to guide the thought processes of the jury with a view to avoiding injustice and ensuring the fairness of the trial and ultimately protecting the integrity of the judicial proceedings and the administration of justice. This court is of the view that if there is any prejudice in the jury hearing the objected evidence this could be cured by an appropriate admonition and warning to the jury. This would reduce, if not erase the perceived prejudice that the evidence would have on the jury.
- [21] Counsel Hyman though he did not press the issue did make mention of the fact that he thought the court should consider discharging the jury on the ground that the answer to the question was prejudicial to the defendant and the defendant's right to a fair trial.
- [22] This court understood counsel's statements as a possible⁴ application for the declaration of a mistrial and to discharge of the jury on the ground of the prejudice that can be meted out to the defendant.
- [23] Where a statement has been made in the presence of a jury which could give rise to possible prejudice the trial judge has a choice as to the course of action to be taken, which includes possibly discharging the jury. Should the judge consider that there is prejudice which would make the trial potentially unfair and that warnings and admonitions to the jury would not diminish the risk of prejudice to a sufficient extent, *"he should give consideration to the course which he should take even if counsel have, for what ever reason, not asked for the jury to be discharged or even submitted that this should not be so"*. **Re: R -v- Mitcham**⁵
- [24] Lord Carswell considered the principles to be applied concerning the improper admission of potentially prejudicial evidence and stated that the applicable test for discharging the jury was for

⁴ Counsel did not make a formal application for the jury to be discharged

⁵ [2009] 5 LRC 209 Per Lord Carswell at Para 15

the judge to consider" whether *to continue with the trial would or could by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction.*" ⁶. The test is whether it is considered that the risk of prejudice to the accused is sufficient to make the trial unfair.

- [25] A judge is at liberty to declare a mistrial and discharge a jury where it has been determined by the judge that the alleged prejudice cannot be cured by a jury admonition or instruction. Put another way, the issue of discharging a jury is entirely within the discretion of the presiding judge should the judge consider that the evidence heard by the jury is such that would prejudice the jury to render the trial unfair.
- [26] It is well established law that a trial judge is clothed with the discretion to discharge a jury at any stage of a trial. **Re: Winsor -v- R**⁷
- [27] The question considered by this court is whether the impugned answers given by the virtual complainant are capable of prejudicing the jury so as make the defendant's trial unfair.
- [28] This court is of the view that the answer given by the witness is insufficient to create such prejudice as to render the trial in the case at bar unfair. Further, this court is of the view that the jury can be admonished as to how to deal with the evidence which would minimise any possible prejudice. This court is also of the view that the risk of prejudice to the defendant is minimal and would decline to discharge the jury at this stage.

DISPOSITION

- [29] It is this court's finding that the defendant's objection to the question and answer was overruled, and the court declines to discharge the jury for the reasons as stated. This court is of the view that the overall integrity and fairness of the trial was not compromised, and no prejudice has been caused to the defendant. It is this court's finding that if there was to be any prejudice to the defence as alluded to by defence counsel that prejudice could be cured by directions and an admonition not the jury capable of eliminating any risk of unfairness resulting from the Virtual Complainant's answer regarding an apology coming from the defendant.

M E Birnie Stephenson
High Court Judge (Ag)

⁶ Ibid at paragraph 15
⁷ (1866) L.R. 1 QB 289



By the Court

BMade
Registrar