

**IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

CLAIM NO. 4 OF 2021

BETWEEN:

THE STATE

AND

GLENTISTE BAPTISTE

Appearances:

Ms. Sherma Dalrymple Director of Public Prosecutions, Counsel for the State
Mr. David Bruney, Counsel for the Defendant

2023: March 6th, 7th

JUDGMENT ON APPLICATION TO EXCLUDE EVIDENCE

OVERVIEW

- [1] **FLOYD J.:** This is an application to exclude evidence already received in this trial. In the alternative, the application is for the court to order a mistrial. Learned defence counsel submits that the evidence of the State expert witness, pathologist Dr. Alarcon, is tainted by the admitted destruction of the notes she made at the time of conducting the autopsy in this case. On March 1, 2023, Dr. Alarcon testified. She was deemed an expert in the field of pathology. No objection was made to that designation by defence counsel. She testified that she carried out an autopsy on the body of the deceased on January 10, 2019. She dissected the corpse, examined body cavities and organs, took samples, and made notes at the time. She later used those notes to type and prepare a post mortem report, dated March 10, 2019. That report was disclosed to defence counsel early on in the case, and in advance of the preliminary hearing.

- [2] Unfortunately, the post mortem report was excluded from evidence in this case by a ruling made by this court on February 23, 2023. On the opening day of the trial, defence counsel applied to have the report excluded, and State counsel agreed, as the report did not comply with the proper form and requirements for expert reports. On February 27, 2023, the day before Dr. Alarcon was to testify, State counsel advised the court and defence counsel that, in order to refresh her memory, Dr. Alarcon would need to review her notes. They were to be retrieved from the hospital or other medical repository by 2:00 pm that day. On February 28, 2023, State counsel advised the court and defence counsel that the witness had refreshed her memory from her deposition, which included her report, as the notes had not been located. Defence counsel objected to that procedure and sought to exclude the evidence of the expert pathologist entirely.
- [3] After hearing submissions and reviewing the tendered case law and authorities, this court ruled that the witness could testify, and could refresh her memory from her own report, even though that report was excluded from the formal evidence. Reference was made to, amongst other things, the cases of **The State v Antonio Charlie Matthew¹** and **Josephine Gabriel and Company Limited v Dominica Brewery and Beverages Limited²**. This court held that if the report itself was not found to be biased, it followed that the author and her work was similarly not shown to be biased or lacking impartiality. The report simply did not follow a prescribed pattern and form. It did not, however, display outright bias. Authorities were also produced in support of allowing the expert to refresh her memory from the report.
- [4] When Dr. Alarcon came to finally give her evidence, she testified with the assistance of a Spanish interpreter. She said that she prepared her post mortem report using her notes, which were made at the time of the autopsy. When asked by defence counsel where those notes were, she said that they had been destroyed. She explained that she had *“just started”* and she *“did not realize that I should keep notes, only the report.”* Dr. Alarcon also testified, in cross examination, about blood being found in the head area where the trauma was located. She agreed, however, that was not noted in her report.

¹ DOMHCR2016/0032

² Civil Appeal No. 10 of 2004

THE POSITIONS OF THE PARTIES

- [5] The destruction of the notes is “*incredibly important*” submits defence counsel. The defence has been denied the opportunity of adequate preparation. The notes would have assisted in the preparation of the case for the defence, and in particular, in exploring the inconsistencies in the testimony of the expert and the contents of her report. It is “*critical*” to the defendant’s case. Not only that, but the doctor must have known the notes had been destroyed, and she suppressed that information. At the very least, she did not volunteer that information at an early stage. All of that leads to a loss of impartiality and fairness in her testimony, which is fundamental to an expert witness. The evidence must therefore either be excluded or a mistrial directed, as the prejudice to the defendant is so great. No other remedy is sufficient. The credibility of the expert has been irretrievably damaged.
- [6] Defence counsel submits that if the notes were used to form the basis of the post mortem report, and the post mortem report was used to refresh the memory of the witness, the fruit of the poison tree analogy applies. The notes have been destroyed. Their loss undermines the report, which was used in the testimony of the witness. Therefore, the testimony is tainted and must not be allowed. To be clear, defence counsel alleges no mala fides on the part of the prosecution. It is apparent that the destruction of the notes came to be known only during the testimony of the witness. Prior to that, the notes were simply unable to be located.
- [7] Defence counsel submitted two cases. In **Jackman (Christopher) v R**³, a decision of the Barbados Court of Appeal, the prosecution referred to a written statement given by the accused, but did not tender the statement, notwithstanding that evidence was led as to the voluntary nature of the statement. It was held that the prejudicial effect of admitting the defendant’s oral offer outweighed its probative value. The court indicated that it was wrong for the prosecution to lead evidence which, from the record, clearly indicates that the unproduced statement was the source from which the further evidence was gathered. Defence Counsel submits that this supports his contention that the State should not have made use of the report to refresh the memory of the

³ (1993) 51 WIR

witness when the notes, which form the basis of the report, were destroyed, and never produced. This, in turn, irretrievably taints the testimony of the witness.

[8] In **The State v Paul (Michael), Abraham (Sherwin), Homer (Peter), Minotte (Gerald) and Oliver (Jermaine)**⁴, a decision of the High Court of Trinidad, the issue of disclosure and the loss of evidence was canvassed. The rationale for timely disclosure and the need to avoid prejudice to the defendant was reviewed. Reference was made to the Canadian cases of **R. v A. (D.)**⁵ and **R. v Finta**⁶, which illustrated the burden on the defence to show the impact lost evidence would have on trial fairness. The impact must be shown to be significant, and not trivial or tenuous. Would the lost evidence have rebutted an element of the State's case? There must be an air of reality to the claim that the lost evidence precludes a fair trial.

[9] Learned State counsel, the Director of Public Prosecutions, submits that since the prosecution has closed its case, and the evidence has been admitted, it cannot now be excluded. It is true that the notes have been destroyed, however, it is also true that the report was made on the basis of those notes and other findings from the autopsy. The report was disclosed long ago. It has been in the hands of defence counsel to assist in the preparation of the defence. Therefore, no opportunity has been lost to prepare a defence. There is no prejudice to the defendant. His counsel may refer to any inconsistencies in the testimony of the witness, and draw the attention of the jury to any lack of credibility to be found in that. Further, the defence expert, who is yet to testify, can refer to such perceived flaws in the evidence of the State witness. Finally, a strong direction from the trial judge about credibility issues flowing from the testimony of the State expert, including the destruction of her notes, and her lack of understanding of the need to preserve such material, is sufficient.

[10] In addressing the cases submitted by defence counsel. The Director of Public Prosecutions noted that the **Jackman** case very narrowly dealt with a confession statement and not an expert report, and can therefore be distinguished from this case. The threshold established in the **Paul** case for establishing prejudice, had not been met in this case. Further, the case of **R. v**

⁴ (1999) 57 WIR

⁵ (1992) 76 Can CC (3d)

⁶ (1990) (unreported)

Carosella⁷ at p. 622, which was cited in the **Paul** case, held that the law demands fundamentally fair justice, not perfect justice. There is a need for a system of justice that is workable, affordable, and expeditious. While the production of every relevant piece of evidence might be an ideal goal from the accused's point of view, it is inaccurate to elevate this objective to a right, the non-performance of which leads instantaneously to an unfair trial.

ANALYSIS

- [11] There is no doubt that the State prosecutor has an obligation to provide to the accused all information in her possession relating to the charges against him, unless it is clearly irrelevant. Any information that points to either guilt or innocence that could be used by the accused in meeting the case for the prosecution, advancing a defence, or otherwise determining how to conduct a defence, must be disclosed. The Prosecutor's duty to disclose is ongoing throughout the trial and appeal process, and continues after those processes have concluded. Where a prosecutor has a reasonable basis to believe that the police or other government entity may be in possession of material or information that could reasonably impact the result of the prosecution, the prosecutor has a duty to make inquiries of those parties for the purpose of obtaining the material. That was done in this case. The learned Director of Public Prosecutions advised defence counsel and the court that the medical notes made by Dr. Alarcon would be sought and produced. The understanding was that they were housed somewhere in a medical facility or storage area. That inquiry proved to be fruitless. It was not until Dr. Alarcon testified that she had destroyed her notes, that the issue became a live one. However, learned defence counsel did not stop proceedings at that point and make an application for a remedy. Dr. Alarcon finished giving her evidence. State counsel closed her case. Counsel for the defence opened his case and the defendant indicated he would give evidence by making a statement from the dock. Defence counsel then advised of his intention to call his own expert medical witness, Dr. Pascal. This was objected to by State counsel and submissions were made on that point. Eventually, a *voire dire* was held and a ruling was made by this court on the ability of Dr. Pascal to testify as an expert witness. As a result of that ruling, an amended report from Dr. Pascal was necessary. That brought us to yesterday, and the expectation of Dr. Pascal giving evidence according to his

⁷ 142 DLR 595

further report. It was only then that this application was made. The timing of the application is therefore unfortunate and troubling.

[12] Nonetheless, it is this loss of evidence, which became apparent five days ago, and before the State closed its case, that now forms the basis of the application. Where evidence is in the possession of the State, there is a duty to preserve it. Where evidence is lost or goes missing, this can form the basis of an application for a remedy, based on the breach of the right of the defendant to make full answer and defence, and conduct a fair trial. An obligation exists for the State to explain satisfactorily what has happened to the lost evidence. In this case, we now know the evidence has been destroyed.

[13] The application by the defendant is based on an inability to make full answer and defence. It must therefore indicate how the lost evidence would have assisted the defence in meeting the case. This is referred to in the **A. (D.) and Finta** cases cited in **The State v Paul et al**, which was tendered by counsel for the defendant. Was the evidence of such potential importance that its destruction deprived the defendant of his ability to make full answer and defence? The threshold may be met if the defendant can demonstrate that the missing material would likely have assisted in meeting the case for the prosecution. The onus rests upon the defence to demonstrate actual prejudice flowing from the lost information, which has the likely effect of precluding a fair trial.

[14] The Supreme Court of Canada in the case of **R. v Rose**⁸ at paras 98 and 99 held: The right to make full answer and defence is one of the principles of fundamental justice. In **R. v. Stinchcombe**⁹ at p. 336, Sopinka J., writing for the Court, described this right as "*one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted*". The right to make full answer and defence manifests itself in several more specific rights and principles, such as the right to full and timely disclosure, the right to know the case to be met before opening one's defence, the principles governing the re-opening of the Crown's case, as well as various rights of cross-examination, among others. The right is integrally linked to other principles of fundamental justice, such as the presumption of innocence, the right to a

⁸ [1998] 3 S.C.R. 262

⁹ [1991] 3 S.C.R. 326

fair trial, and the principle against self-incrimination. As suggested by Sopinka J. for the majority of the Court in **Dersch v. Canada (Attorney General)**¹⁰, however, the right to make full answer and defence does not imply an entitlement to those rules and procedures most likely to result in a finding of innocence. Rather, the right entitles the accused to rules and procedures which are fair in the manner in which they enable the accused to defend against and answer the Crown's case.

- [15] The case of **R. v Potvin**¹¹ at **para 32**, reminds us that the court must bear in mind the two competing and frequently conflicting concerns of fair treatment of the accused, and society's interest in the admission of probative evidence in order to get at the truth of the matter in issue. It is a fundamental principle of justice that a trial judge may exclude admissible evidence if its prejudicial effect substantially outweighs its probative value. If the court determines that such a standard has not been reached, then it must go further and ascertain the best way of dealing with the application nonetheless. The learned Justice Wilson, in the **Potvin**, case points out at **para 41** that "*in every case it is for the trial judge on the basis of his or her appreciation of all the circumstances and, may I add, on the basis of the application of sound common sense, to decide whether a warning is required.*"
- [16] The expert witness, Dr. Alarcon, testified that she had destroyed her notes. She clearly thought notetaking was an important aspect of her job, as she said that she made use of them to prepare her report. This is a significant issue in a serious case, and the loss of the notes is troubling. Not only does the loss of the notes impact the subject of disclosure in this case, it indicates a general lack of care, diligence, and competence on the part of this expert witness. That, in turn, must have an impact on the credibility of the witness. It may be argued that the explanation given by Dr. Alarcon for the destruction of her notes based on inexperience is sufficient. However, in her evidence, Dr. Alarcon testified that before coming to Dominica, she worked in the field of pathology for 11 years in Cuba. It may, of course, be further argued that procedures are different in that country. Although it is concerning that the notes would be dealt with in such a cavalier fashion, the court does not agree with defence counsel that there was any intentional suppression of the loss of the notes by Dr. Alarcon. There is no evidence of mala fides on the

¹⁰ [1990] 2 S.C.R. 1505

¹¹ (1989) 93 N.R. 42 (SCC)

part of Dr. Alarcon. Rather, it is more indicative of clumsiness and inattention. However, does the destruction of the notes change the view of the court as to the admissibility of the evidence of Dr. Alarcon? Does the prejudice this causes to the defendant's case rise to a level of unfairness, such that the defendant is unable to make full answer and defence?

[17] In this case, the court is not satisfied that the prejudice suffered by the defendant in the destruction of the notes of Dr. Alarcon reaches that level. In its ruling of February 28, 2023, this court stated that the loss of the doctor's notes was troubling. However, it did not reach the threshold of excluding all that flows from that, including the testimony of the pathologist, Dr. Alarcon. It is clear that the medical pathologist report was made close in time to the notes, and to the medical procedure itself, the autopsy. The defendant has therefore not been precluded from receiving any material authored by the witness, Dr. Alarcon. He simply does not have all of it. As the court said then, it may be a matter of weight. The issue of weight must now be addressed further, based on the destruction of the notes, not simply their loss, as well as the testimony that did not accord with the report. All of that would be something for the jury to consider. The court went on in its earlier ruling to find that the failure to provide the notes does not prejudice the defendant so markedly that it outweighs the probative value of the viva voce evidence of Dr. Alarcon. As the court held in the ruling, the report although excluded, was disclosed, and the witness would be (and now has been) the subject of vigorous cross examination. In addition to that, the autopsy photographs were disclosed and have been admitted, on consent of defence counsel, in their entirety. The point is, alternative evidence of a similar nature to the notes was available and was disclosed. The defendant has therefore been able to marshal his defence and his case.

[18] It would be impossible, at this point in the trial, to withdraw or remove the evidence of Dr. Alarcon from the jury. It might have been possible to consider that course of action if such an application had been made immediately during the evidence of Dr. Alarcon when it was revealed that the notes had been deliberately destroyed. However, that did not occur. Her evidence was allowed to continue to its conclusion. Furthermore, if the destroyed notes were "*critical*" to the defendant's case and were "*incredibly important*," as learned defence counsel stated, then surely, that would have been obvious at the moment it became clear that they had been destroyed. But an application was not made until well after, and the case had proceeded on significantly. Such a lack of diligence in bringing a timely application must have an impact on the court's consideration

of whether the loss of that evidence does indeed have a significant impact on the fairness of the trial, and the alleged prejudice to the defendant.

- [19] As already noted in the case of **Dersch** above, while the ability to make full answer and defence is a fundamental right, it is not an entitlement to rules and procedures most likely to result in a finding of innocence, it is simply fairness enabling an accused to answer the prosecution's case. Here, the evidence is important to the State's case, and the court must balance society's interest in the admission of probative evidence, with the defendant's right to make full answer and defence.
- [20] After much consideration, the court finds that the defendant has not shown that allowing this case to continue in the face of the lost notes, would cause such prejudice as would lead to an unfair trial. It certainly does not lead this court to find that a mistrial should be declared. However, the court is satisfied that, as in the **Potvin** case, a strong warning to the jury is required. The jury will therefore be instructed to be cautious when considering the evidence of Dr. Alarcon. They should carefully consider the impact the destruction of her notes has upon her credibility as an expert witness. Any inconsistencies will be pointed out in the evidence of Dr. Alarcon. All of that, the jury will be instructed, should be considered when assessing the credibility of Dr. Alarcon and her level of expertise.
- [21] For all of these reasons, the application to exclude the evidence of Dr. Alarcon is dismissed, and the jury will be carefully warned and instructed on the caution to be used when approaching her evidence.

Richard G. Floyd
High Court Judge

BY THE COURT

REGISTRAR