

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COMMONWEALTH OF DOMINICA**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

CASE NO.DOMHCR2017/0029

BETWEEN:

THE STATE

AND

[1] MARTIN SEAMAN

[2] DEVIN CHALLENGER

Appearances:

Ms. Zena Moore Dyer, Counsel for the Applicants/Defendants
Mr. Keith Scotland, Counsel for the Respondent/State

**2022: September 28th
October 21st**

JUDGEMENT ON APPLICATION

[1] **FLOYD J:** This is an application with several grounds. The applicants seek disclosure of the medical report or what is referred to as the “*Death Card*” completed by Dr. Candia Jacob. The applicants ask that the indictment be struck out or quashed for non-disclosure of the Death Card, and because they were committed on a complaint that was not put to them and was not before the court when they were committed for trial in the High Court. The applicants also ask that the matter be returned to the Magistrate’s Court as the depositions of the witnesses Keith Bruno, Allison George and Matthew Cuffy are incomplete. Certain rulings and orders from the Magistrate’s Court are also omitted from the depositions. These include the discharge of Hayden Morgan and others,

inadmissibility of evidence at the committal proceedings, no case applications and rebuttal evidence applications.

The Facts

- [2] The indictment alleges that between the 3rd day of August 2014 and the 6th day of August 2014, Joshua Etienne died while in custody at the Portsmouth police station. The material in the file appears to indicate, however, that the deceased was arrested by police on 4th August 2014 and brought to the station that evening. Mr. Etienne was found dead in a cell at the station on the morning of 5th August 2014. Death was confirmed by Dr. Candia Jacob later that day. A total of five prisoners were in custody in different cells and several police officers were on duty at the time. A document entitled “*Death Card*” was filled out with the words “*sudden death ??? cause*” in the section marked diagnosis. A post mortem report was completed by Dr. Milagros Fernandez, indicating that Mr. Etienne died from “*severe diffuse traumatic hemorrhage of both lungs due to injuries to the thorax.*” The report also noted multiple rib fractures, fractures of the right clavicle and sternum bone, kidney shock, severe congestion of all organs, subarachnoid hemorrhage, and severe edema of the brain.
- [3] The theory of the State’s case, as the court understands it, is that the deceased was a victim of a terrible beating at the hands of the defendants while in police custody. At the time, the defendants were serving police officers.
- [4] The indictment was filed on 18th April 2019, although a preliminary inquiry took place in 2016 with a committal for trial occurring on 18th April 2017. The case has substantial age to it. Originally, a total of five persons were charged in this matter. All were serving police officers. Three defendants were discharged at the preliminary inquiry stage. These two defendants remain before the court. They were arrested and charged on 12th August 2014. They remained in custody until they were granted bail on terms and conditions on 31st July 2018. The case has

yet to come to trial, although documents on file indicate the matter was set for trial on 21st March 2020, and thereafter a tentative trial date of 12th April 2021 was scheduled.

[5] It is unclear from the file why the case was adjourned from those trial dates, although it appears to relate to several pre-trial applications. Those applications are the subject of this hearing. A series of applications were filed by learned counsel, who acts for both defendants. The first Notice of Motion was filed on 28th June 2019. An amended notice was filed on 22nd July 2019. A further notice was filed on 12th March 2020, along with a supporting affidavit from the defendant, Martin Seaman. Interestingly, the affidavit indicates that Mr. Seaman is authorized to swear the affidavit on behalf of the co-accused, Mr. Challenger. Another Notice of Motion was filed on 24th September 2020 with an affidavit in support from Mr. Seaman. A further notice was filed on 9th October 2020 with an affidavit in support from Mr. Seaman. On the very same date, an amended notice was also filed. A written submission was filed by counsel for the applicants on 30th November 2020 along with authorities. The final Notice of Motion was filed on 26th February 2021 with another affidavit from Martin Seaman. Again, it indicates that Mr. Seaman is authorized to swear his affidavit on behalf of the co-accused, Devin Challenger.

[6] A written submission in response from learned counsel for the State was filed on 30th December 2020. The court file contains a series of orders extending the time allowed for both parties to file further material. The last order was dated 15th December 2021. It indicates the State was to file an affidavit in response by 31st January 2022 and the applicants were to file their affidavits in response by 28th February 2022. The matter was fixed for argument on 10th May 2022. On that date, yet another adjournment was granted to 28th September 2022 for argument. The Matter was finally heard on that date.

[7] The court found no material in the file with a date stamp for the year 2022. The State filed nothing further and therefore the applicants filed nothing in reply. Both parties relied upon their written submissions already filed and had no oral

submissions to make. Notwithstanding that, the parties were able to answer questions posed by the court, and that forms part of the material considered in this application. Despite the multiple notices and affidavits pertaining to this application, the grounds and the remedy sought changed very little and have already been summarized above.

The Position of the Parties

- [8] Learned Counsel for the applicant submits that the indictment should be quashed and the case returned to the Magistrate for completion. There are gaps in the recorded evidence and the indictment before this court is not the one that the defendants faced in the Magistrate's Court. It was confirmed that there are no audio recordings and no transcripts of proceedings at preliminary inquiries in this jurisdiction. Reliance is had on the handwritten notes of the court during depositions. However, counsel for the applicants advised the court that much material including notes and documents were destroyed in the natural disaster caused by Hurricane Maria in 2017. The court file does, however, contain the handwritten notes of police officer Matthew Cuffy, a printed statement for officer Cuffy, sixteen additional printed witness statements, several document exhibits and depositions from the witnesses, Matthew Cuffy, Keith Bruno, and Allison George. The depositions were taken in March, September, and November 2016. It is important to note that the depositions of Mr. Bruno and Mr. George appear to contradict their earlier statements given to police. Their depositions seem to actually assist the case for the defence. Counsel for the applicants agreed, in answer to questions from the court, that it was not so much the no case submissions and the discharges of the other three defendants that were critical to her case, it was the evidence in the depositions of these three witnesses. If that is so, then the depositions that are found in the file currently, go some way to resolving the issue. There is, of course, a need for a record to be kept of proceedings at a preliminary inquiry. However, the loss of some records is not necessarily fatal to the validity of the order to stand trial.

- [9] Counsel for both the applicants and the respondent agreed that the main player in this tragic incident was acquitted at the preliminary inquiry, and this may cause them to meet and to further review the case in its totality. Nevertheless, the matter remains before the court for now and must be moved forward.
- [10] Learned counsel for the respondent submits that the file is complete, but if some material has been lost or is outstanding, it is not sufficient to defeat the case at this stage. The case to be met is known to the defendants. Disclosure has been given and the fact that some defendants were discharged does not impact the overall case against these defendants. They were properly committed for trial by a Magistrate.
- [11] Learned counsel for the respondent agreed that the medical certificate of Dr. Jacob sought by the applicants is material and constitutes a document worthy of disclosure. However, it was indicated that efforts have been made to locate the document, but it has not been found. A formal affidavit to that effect has been prepared and will be served and filed. That being so, it is to be hoped that counsel will confer with a view to coming to an agreement on the content of the document, if possible, so that certain stipulations can be made at trial.
- [12] Although counsel for the applicants takes issue with the current complaint or charge, she indicated to the court that it is the filing date and the reduction in number of accused from five to two, that are at issue. However, if that is so, does that significantly impact the case for the applicants, such that they are prejudiced and unable to adequately mount their defence?
- [13] Learned counsel for the respondent submits that the indictment was properly preferred. The learned Magistrate, upon hearing the evidence and the submissions, committed the applicants for trial on a charge of murder. It is an offence known to law and was supported by the evidence heard. There was, therefore, authority for the committal. Even if not all the committal documents

survived the natural disaster of Hurricane Maria, what remains in the file continues to disclose a case to answer to, just as it did in the Magistrate's Court.

[14] With regard to the depositions of the three witnesses referred to, counsel for the respondent submits that sufficient evidence from the depositions exists, and taken together with the other evidence, was sufficient for the Magistrate to base a committal upon. Further, if there were any irregularities in the taking of evidence during the depositions, the defects were not substantial but merely technical in nature. A prima facie case was made out and was sufficient to base a committal upon.

[15] Counsel for the respondent submits that there is no basis upon which the court can quash the indictment. Even if there was such a basis, the State could simply reinstitute process. However, to do so, would not be a wise use of court and judicial resources. The court must be careful, however, to ensure that the rights of the parties are respected and that, if a basis to quash exists, then it must be upheld. It would then be a prosecutorial question to answer as to what is a proper and appropriate use of jurisdiction and facilities to restart the case.

Analysis

[16] There can be no doubt that proper procedure must be followed in order to indict individuals and have them stand trial, particularly for offences as serious as murder. It is unfortunate, to say the least, that issues relating to committal in this case have not been addressed until eight years after the event and the lives of so many people have been impacted. The defendants have been in custody and thereafter, placed under strict terms of bail. The friends and family of the deceased have waited, as have the many witnesses involved and the greater community, for the case to be concluded.

[17] Dealing first with the disclosure of the report or death card of Dr. Jacob, counsel for the respondent has conceded that the document is relevant and constitutes an

item that is appropriate for disclosure. Unfortunately, despite best efforts, the document cannot now be located. This court agrees that the document is relevant and should be disclosed, if it still exists. Counsel for the applicants referred to the case of **R. v Stinchcombe**¹, confirming that *"the Crown (the State) has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not the property of the Crown (the State) for use in securing a conviction but the property of the public to be used to ensure that justice is done."* Counsel also referred to the case of **The Queen v Silky Benn**², as it relates to disclosure. However, that case can be distinguished from the case at bar. In **Silky Benn**, the prosecution counsel was less than forthright in advising what material was in his possession. Indeed, the court characterized it as counsel not being as forthcoming as he should have been, in his duty to disclose statements that were in fact on file. That is not the case here. There is no indication of any mala fides on the part of the prosecution. As found in the respondent's submissions, **Rule 14.5.4 of the Code for Prosecutors (Dominica)**, confirms an ongoing duty to disclose evidence that is reasonably material to the case.

- [18] Indeed, it is a recognized principle in any criminal proceeding that the prosecutor must provide to the accused all information in her/his possession relating to the charges against the accused, 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 duty to disclose is triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence. The duty to disclose gives rise to a corresponding right to the disclosure of all material which meets the threshold for disclosure. The duty to disclose is ongoing throughout the trial and appeal process. This has been recognized by the State in this case, as it should be. That being said, the disappearance of the medical document is troubling.

¹ [1991] 3 S.C.R. 326

² St. Vincent Criminal Case No. 66 of 1996

[19] The document is relevant. It pertains to the cause of death, which is apparently a live issue in this case. It was prepared by the medical doctor who initially examined the body of the deceased immediately after the event. It must be material and relevant, and therefore the subject of disclosure obligations. However, an affidavit has apparently been prepared confirming the fact that efforts have been undertaken to locate the document, to no avail. It is to be hoped that counsel for the applicants and the respondent will be able to reach an agreed position as to the content of the document, should it be needed, to place the matter before the court at trial. If that cannot be done on consent, then the parties are at liberty to raise the issue at the appropriate moment with the trial judge. For the purpose of this application and noting the concession by counsel for the State that the document is disclosable, an order will be made directing the State to continue to make best efforts to locate and disclose the medical report or death card prepared by Dr. Jacob. As noted, the parties are at liberty to raise the matter again with the trial judge, if necessary.

[20] Where evidence that should have been disclosed has been lost, the State has a duty to explain the loss. Where the explanation satisfies the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached. In considering whether the explanation is satisfactory, the court will review the circumstances surrounding the loss of the evidence. The main consideration will be whether the State or the police took reasonable steps in the circumstances to preserve the evidence for disclosure. One factor for consideration will be the relevance of the evidence. As relevance increases, so must the degree of care for its preservation. See the case of **R. v La**³. A challenge based on non-disclosure will require a showing of actual prejudice to the defendants' ability to make full answer and defence. We have not yet reached that stage in this case. However, if the parties are unable to resolve the issue, this will no doubt be the path followed.

³ [1997] 2 S.C.R. 680, 116 C.C.C. (3d) 97

[21] The remaining issues can be dealt with together under the general heading of whether the defendants were properly committed for trial and whether the material that may be missing from the depositions impacts the case, such that it should not proceed, should be quashed, or should be returned to the Magistrate's Court. As counsel for the respondent points out in his submissions, the timing of this application is curious. If there were problems with the charge or the complaint as framed, then why was it not raised in the lower court? The defendants went through the preliminary inquiry process. They heard the evidence. They were aware of the allegations and the case against them. They were represented by counsel. There appears to be no vagueness or lack of clarity in the case. Anyone accused of a criminal offence must understand the allegations, be provided with full disclosure, and be afforded an opportunity to test the evidence and confront the witnesses. That was done in this case.

[22] Counsel for the applicants relies upon an older case, **R. v Gee, R. v Bibby & R. v Dunscombe**⁴, in support of her position that procedure was not followed at the Magistrate's Court and depositions are missing. However, one of the main issues in that case was the taking of statements. They were not taken down in the presence of the defendants. The statements of the witnesses' evidence were then used at the hearing and merely "*checked off*." That is not the situation here. The depositions of the three witnesses in question are confirmed as having been given orally on oath, and in the presence of the defendants and their counsel. Cross examination took place. Even if a portion of the deposition evidence is missing, which is not at all clear, how is that prejudicial to the defendants and their case? The defendants were committed for trial on the evidence disclosed and heard. They were present with their counsel. There is no uncertainty and no lack of clarity. The Magistrate at the preliminary inquiry heard the same evidence and committed the defendants. Any evidentiary issues will now be a matter for the parties, their counsel, and the trial judge. There is no prejudice to the defendants and their case. Indeed, the depositions that are in the file indicate what may be

⁴ [1936] 2 All ER 89

described as a recantation by the civilian witnesses, apparently resiling from their statements given to police. That evidence might be described as supportive of the defence, although it has yet to be presented formally at trial. The point is, the depositions that are present do not prejudice the case for the defendants, they may in fact assist.

[23] Even if it is successfully argued that portions of the depositions are missing, it is clear that the evidence received by the Magistrate was accepted by him as being sufficient to warrant committal. As learned counsel for the respondent submits in the case of **R. v Edgar et al**⁵, even where certain depositions in the committal proceedings were invalid, that does not render the whole committal bad. What the courts have found is that if there is a prima facie case as disclosed on the evidence received, then that is sufficient to support committal and proceed to trial. That is the situation here. The record of proceedings at the preliminary inquiry confirms that both defendants were represented by legal counsel. The committal document confirms that a total of seventeen witness statements, together with exhibits, were tendered and no objection was upheld that the statements did not disclose enough evidence to commit the defendants to stand trial for the offence. The learned Magistrate was satisfied that sufficient evidence was presented, such that a reasonable jury properly instructed could return a verdict of guilty against these defendants. This court can find nothing in the material filed to contradict that.

[24] Learned counsel for the applicants has submitted that the indictment should be quashed because evidence is missing or did not form part of the depositions received. However, in oral submissions, she agreed that it was not the no case submissions or the discharge of the co-accused that were relevant to this issue, it was the evidence of the three named witnesses. Counsel also agreed that, although the complaint or charge put to the defendants is different to what is now before the court, the only real difference is in the filing date. If that is so, where is the prejudice to the defendants in continuing the matter as framed? Such an

⁵ (1958) 2 All ER 494

irregularity, if it is in fact, cannot be construed as being significant. Even if the shortcoming rose to the level of a basis for quashing, there is nothing to prevent the prosecution from reinstituting proceedings. Delay may then become an argument against such procedure but it is open nonetheless. However, the court is not satisfied that there are grounds for quashing the indictment. If the only troubling aspect of the committal is the filing date, then all of the particulars must be satisfactory. The statement of offence, the parties involved, the charge, the date and place, are all properly set out. That, combined with the evidence presented in the presence of the defendants and their counsel, must have been sufficient for committal, and is sufficient for the matter to proceed to trial.

- [25] This is a serious offence. A citizen lost his life while in police custody. The application requires careful and thorough scrutiny. The court has listened to the submissions of counsel and reviewed all of the material filed. The date of offence goes back to August 2014. The case has been in the criminal justice system for over eight years. It needs to proceed. The court is not satisfied that the applicants would be prejudiced or oppressed in any way if the case continued to trial. The indictment should be maintained as framed and need not be quashed. Sufficient evidence was tendered at the preliminary inquiry to satisfy the court and to order committal. Evidence as to each element of the offence was presented, such that the learned Magistrate was satisfied, and the defendants were committed to stand trial. The record reflects that. A record must be made of proceedings at a preliminary hearing. However, a loss of a portion of that record is not necessarily fatal to the committal order. Statements and exhibits were tendered. Examination of witnesses under oath occurred. A record of those depositions exists. Any deficiencies in the depositions are not confirmed and in any event are not sufficient to justify a return of the matter to the Magistrate's Court. The applicants are under no misapprehension as to the case against them. The case remains the same, although the depositions in the file from two of the named witnesses actually inure to the benefit of the applicants. For the reasons advanced, the application is hereby dismissed, save and except as it relates to the disclosure of the report of

Dr. Jacob. In that regard, the State is hereby ordered to use its best efforts to locate and disclose the said report, and to provide a formal written response to counsel for the applicants as to the result of that search, within 30 days of the date of this decision. The parties are at liberty to renew that application and review the issue with the trial judge, if necessary.

Richard G. Floyd
High Court Judge

By the Court

Registrar