

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

DOMINICA CIRCUIT

(CRIMINAL)

DOMHCR2018/0020

BETWEEN:-

THE STATE

-and-

JOSELLE FONTAINE

DEFENDANT

Appearances:

Carlita Benjamin with Daina Matthew led by Evalina E-M Baptiste Director
of Public Prosecutions for the State

Darius Jones for the Defendant

2020: February 19, 20

RULING

[1] STEPHENSON J.: Before the court is an application to adduce additional evidence brought by the prosecution. The defence objects to the application. Both sides were given the opportunity to make their oral submissions to the court with authorities and the court having heard counsel and reviewed the submissions with authorities now rules.

[2] The accused Joselle Fontaine was indicted on the 10th day of April 2019 with the offences of causing grievous bodily harm with intent and unlawful wounding. There were seven witnesses listed to give evidence on the back of the indictment including Cpl Yankee B. A perusal of

the deposition as filed with the indictment would show that there is no mention made by the magistrate whether or not the officer after he completed his evidence was cross examined.

[3] There is agreement by counsel that section 48 of the Magistrate's Code of Procedure Act¹ states as follows "*The evidence of every witness shall be given in the presence of the accused and he or his counsel or solicitor shall be entitled to cross examine the witness upon the facts relevant to the charge, but not, except with the leave of the Court, upon matters relevant only as affecting his credit*".

[4] It is in fact agreed by counsel that the fact that there is no notation by the investigating magistrate² whether or not the witness at the PI was cross examined does in fact invalidate the deposition.

[5] It is clear that the prosecution's position as submitted by learned Counsel Carlita Benjamin in

¹ Chapter 4.20 of the Laws of the Commonwealth of Dominica

² Magistrate conducting the Preliminary Inquiry

the face of the invalid deposition the officer should be allowed to testify upon leave being granted by the High Court and relying on the officer's witness statement which Learned Counsel has pointed out to the court has been served on the defendant during disclosure at the Preliminary Inquiry and at again at the trial of this matter. Or put another way that irregularity can be remedied by the oral evidence of the witness at the trial in the high court.

[6]The prosecution's application was being brought pursuant to Common Law. The grounds as stated in the application are as follows that:

- a. The witness gave a witness statement in the matter as the investigating officer and his evidence is relevant to the matter;
- b. A copy of the witness statement was disclosed to the accused at the Preliminary inquiry and is also attached to his application
- c. The witness gave a deposition in the Preliminary Inquiry in conformity with Section 49 of MCCP which was disclosed to the accused on the filing of the indictment in the matter
- d. The failure of the magistrate to record whether the accused was given an opportunity to cross examine the witness

- is a procedural irregularity that is remediable by the availability of the witness at this trial to give oral examination in chief and to have his evidence challenged on the cross examination by the accused;
- e. That the granting of this application has more probative value than prejudicial; and
 - f. That it is in the interest of justice that the application is granted.

[7] Learned Counsel for the prosecution submitted that the evidence of this witness is highly relevant³ to the matter before the court. That he is the investigating officer in the matter, and he was the person who investigated the entirety of the matter and his evidence focusses only on the primary issue before the court. That the evidence of this witness is absolutely crucial to the issue at bar and is not a distraction to the court or the jury. In fact, this evidence will help the court in its deliberations.

[8] Counsel submitted that failure of the magistrate to record whether or not the accused was given the

³ Re Halbury's Laws of England Volume 28 (2015 at paragraph 442

opportunity to cross examination by be remedied by the taking of the oral evidence during this trial and he can be cross examined by the accused or her counsel. Learned Counsel submitted that the oral evidence coupled with its importance and the written evidence that the court ought to allowed the witness to testify. Counsel relied on the case of **T Anne Maried Justin -v- R⁴** at paragraph 38 where Baptiste JA in delivering the judgment of the court said

“ ... The fact that a written record of the confrontations was not produced in court does not preclude the reception of oral evidence of the confrontations or make the oral evidence inadmissible.

18 I agree with the Director of Public Prosecutions that there was no need for the trial judge to warn the jury that the record of the appellant's denial that she had returned to the deceased's house that day was not produced. Further, it is noted that the jury had the benefit of hearing the oral testimony of Justin and Corporal Lamontagne of what transpired at the confrontation. Corporal Lamontagne's account was not

⁴ HCRAP 2008/005

challenged”.

[9] The prosecution further contended that the evidence that they are seeking to adduce to the witness is far more probative to the case that it is prejudicial based on the fact that he was the investigating officer and his evidence is crucial. Further, that he can give oral and direct evidence as to his involvement in the matter. It was submitted that given the nature and importance of this witness's evidence it is in the interest of justice for this witness to be allowed. Counsel stressed that the evidence which they are seeking to adduce is not whimsical evidence and pertains only to what the accused is charged with before the court. Counsel relied on **R -v- Sang**⁵ where Lord Diplock said

“... (1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence obtained

⁵ [1979] 2 All E R 1222

from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned how it was obtained.”

[10] Learned Counsel Mr Jones submitted that the accused objection was based on the failure of the investigating magistrate to comply with the mandatory requirements section 48 of the Magistrate’s Code of Procedure Act. It was stressed that this section gives the accused person a right and if those rights are taken away that the accused persons rights are therefore jeopardised. That this failure amounts to taking away the accused right to a fair trial especially when the accused is unrepresented. I pause here to say I am not sure that the accused was unrepresented as a review of the depositions before the court discloses that there was no cross examination of all the witnesses save Dr

Robertson Thomas where it is recorded that Counsel Mr Jones cross examined the Doctor.

[11] Mr Jones submitted that failure to comply with Section 48 of the Magistrate's Code of Procedure Act in taking the deposition in question therefore means that the said deposition is "tarnished and tainted" and the High Court ought not to and should not ignore the fact that the deposition was taken in an irregular manner. Counsel cited and relied on **Re: Knight -v- R**⁶ in recognition of the fact that the court has the discretion whether or not to admit the deposition. Learned Counsel also made reference to the **Barnes Desquottes And Johnson v R Scott And Walters v R**⁷ in submitting that the magistrates are bound to follow the dictates

⁶ 53 West Indian Reports 125

⁷ (1989) 37 WIR 330