

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CRIMINAL)
A.D. 2019**

Claim No. AXAHCR 2018/0009

The Queen

v

**DIAYAN AUSTIN
CLIVE HODGE**

Appearances:

Mr. Thomas Astaphan Q.C., with him Ms. Erica Edwards and Mrs. Nakishma Hull
for the Crown

Mr. Horace Fraser of Counsel for Mr. Clive Hodge

2019: June 19; 20;
July 12.

Whether Codes made under the Police and Criminal Evidence Act (PACE) are received into Anguillian law – Section 47 Criminal Procedure Act R.S.A. c. C150 – Section 46 Interpretation and General Clauses Act R.S.A. c. I25 – Code D PACE – Non-intimate samples – DNA evidence – Whether absence of regulations pertaining to the collection and testing of DNA evidence renders DNA evidence inadmissible – Identification evidence – Recognition – Eyewitness – Failure to conduct identification procedure – Whether identification evidence admissible – R v Turnbull – Common law – Expert witness – Forensic scientist – Qualification and certification of expert witness – Section 12 Evidence Act R.S.A c. E65 – Fairness in criminal trials – Section 9 Anguilla Constitution Order 1982 S.I. 1982 No. 334 – Sections 3 and 7 West Indies Act 1967 – Duty of trial judge to warn and direct jury generally in relation to evidence lead at trial

RULING

- [1] **INNOCENT, J. (Ag.):** After the jury was empaneled to try this matter, Mr. Fraser counsel appearing for Mr. Clive Hodge indicated that there were certain preliminary arguments that he wished to advance ahead of the jury hearing any evidence. Mr. Astaphan Q.C. agreed that this was a prudent course to follow

since ultimately it would determine how the trial proceeded. Accordingly, counsel reduced his arguments into a written submission. On 19th June 2019 the court heard the oral submissions of both counsel. On 20th June 2019 the court gave its ruling orally and indicated that written reasons would be provided. This is the ruling of the court which is necessary to dispel any notion that the Police and Criminal Evidence Act ('PACE') and the Codes of Practice made thereunder can be applied in criminal proceedings in Anguilla.

Applicability of PACE

- [2] Both counsel appearing in the matter conceded that this issue would effectually be decisive of many of the issues raised by Mr. Fraser. The issue to be decided is whether **Code D** of the **Police and Criminal Evidence Act 1984** ('PACE') is received into the law of Anguilla by virtue of the provisions of **section 47** of the **Criminal Procedure Act R.S.A. c. C150** (the 'CPA') and **section 46** of the **Interpretation and General Clauses Act R.S.A. c. I25** (the 'Interpretation Act').
- [3] Mr. Fraser argued that the swabs taken from the defendant's hands for the purpose of gunshot residue ('GSR') testing was not done in compliance with the provisions of **Code D** of **PACE**. It follows, he says, that the evidence of Mrs. Carty-Pemberton and Mr. Fitzmore Coates are both inadmissible at the trial.
- [4] According to Mr. Fraser, the provisions of **Code D** of **PACE** is imported into the law of Anguilla by virtue of **section 47** of the CPA and **section 46** of the Interpretation Act. Clearly, if the court accepts Mr. Fraser's proposition, then the challenged evidence may be deemed inadmissible. This is said tentatively for the simple reason that there may very well be the need to conduct a voir dire to determine whether there was non-compliance with Code D of PACE as alleged by counsel for the defendant.

- [5] Section 47 of the CPA says that the laws of England in relation to procedure to apply unless other provisions are made. The section reads:
- “All other matters of procedure not herein nor in any other Act expressly provided for shall be regulated, as to the admission thereof, by the law of England, and the practice of the Superior Courts of criminal law in England.”
- [6] It appears that the issue turns on the interpretation of section 47 within the context of what is contained in the CPA itself. The CPA makes provisions related to the practice and procedure to be followed in criminal courts in Anguilla. The CPA does not purport to deal with matters related to evidence, the admissibility of evidence or adjectival law. The distinction between the two regimes is clear.
- [7] Therefore, it is the court’s view that the purport and effect of section 47 of the CPA is that it receives the procedure practiced in the Superior Courts of England when no specific provision related to procedure is contained in the CPA. The defendant cannot rely on section 47 of the CPA as importing the provisions of PACE Code D wholesale into Anguillian law. PACE Code D deals specifically with procedure as it relates to the obtaining of evidence which ultimately determines the admissibility of that evidence in a criminal trial.
- [8] The court is of the view that had the Anguilla Evidence Act contained a provision similar to section 47 then, perhaps the defendant’s proposition may have held some sway. The Anguilla Evidence Act contains no similar reception provision as the Saint Vincent and the Grenadines Evidence Act when the case of **Eversley Thompson v The Queen** was decided.
- [9] This distinction is explicit and amplified by the case of **Eversley Thompson v The Queen**¹ itself. Interestingly this is one of the cases upon which the defendant relies.

¹ Eastern Caribbean Supreme Court (Court of Appeal) St. Vincent & The Grenadines (July 21, 1997)

[10] The defendant also relied on the decision of Small-Davis J. (Ag.) in the case of **Shayne Richardson v The Attorney General and Anor**² in support of his contention that section 47 of the CPA imported the provisions of Code A of PACE. It will be instructive to set out in full **paragraph [23]** in the judgment of Small-Davis J. (Ag):

“[23] Neither the Anguilla Police Act nor the Police Regulations set out the procedure or guidelines for a police officer exercising his stop and search power. Section 47 of the Criminal Procedure Act provides that “All other matters of procedure not herein nor in any other Act expressly provided for shall be regulated, as to the admission thereof, by the law of England, and the practice of the Superior Courts of criminal law in England.” I therefore consider it helpful to turn to the English Police and Criminal Evidence Act and the subsidiary Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search (“Code A”).”

[11] Without pontificating on the correctness of the decision in **Shayne Richardson** this court is not bound by this decision. The court does not think that section 47 of the CPA can be interpreted and applied in this way for the reasons already stated.

[12] In addition, section 47 of the CPA cannot be said to regulate the practice and procedure adopted by the police in Anguilla under the Anguilla **Police Act** and the **Police Regulations**. This point was specifically raised by Mr. Astaphan Q.C. Essentially, Mr. Astaphan Q.C. argued that there is no lacuna as the defendant suggest. Mr. Astaphan Q.C argued that the practice and procedure governing the police in Anguilla would be the Judges’ Rules and the common law. The court agrees with this submission with one exception and would qualify that statement by saying where the Police Act is silent in relation thereto.

² AXAHCv2008/0012 delivered 7th July 2009

[13] To take the point a bit further the court has examined the provisions of the **Anguilla Police Act, R.S.A. c. A70** (the 'Police Act'), in particular the provisions of sections 26 and 27 which deals specifically with the powers of the police to take measurements, photographs and fingerprints (section 26) and the power to take non-intimate samples (section 27). Therefore, contrary to Mr. Fraser's assertions there is in fact in place in Anguilla a comprehensive code of practice regulating the procedure which the police must adhere to when taking intimate and non-intimate samples.

[14] As far as the law of evidence is concerned, the court holds that the law of Evidence in Anguilla is governed by the **Anguilla Evidence Act** and the common law.

[15] I turn now to consider **section 46** of the **Interpretation and General Clauses Act** which provides:

"Whenever any Act of the United Kingdom is extended to Anguilla, such Act shall be read with such formal alterations as to names, localities, courts, officers, persons, money, penalties and otherwise as may be necessary to make the same applicable to the circumstances."

[16] Again the determination of the question of whether section 46 of the Interpretation Act receives the provisions of PACE and the Regulations and Codes of Practice made thereunder depends on the interpretation of that provision. Section 46 of the Interpretation Act expressly states that "Whenever any Act of the United Kingdom is extended to Anguilla..." Anguilla is a British Overseas Territory. Therefore, there is a specific legislative regime followed by the United Kingdom Parliament should it wish to make laws for Anguilla. Therefore, for an Act of the United Kingdom Parliament to "extend" to Anguilla, there would have to be in place the necessary Standing Orders and Orders in Council bringing that law into force. In other words, that law would have to be incorporated into Anguillan Law. In any

event section 46 of the Interpretation Act simply says that when an Act of the United Kingdom is extended to Anguilla it shall be modified in a particular way.

[17] Therefore, the defendant cannot rely on section 46 of the Interpretation Act to buttress his argument that Codes made under PACE are received as part of the law of evidence and that it regulates the practice and procedure of the police.

[18] To further illustrate this reasoning the court has examined the provisions of the Anguilla Constitution and West Indies Act 1967 (the 'Act'). The court will deal only with the provisions of sections 3 and 7 of the Act. Section 3 of the West Indies Act provides:

“(1) Except as provided by subsections (2) to (4) of this section, no Act of Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to an associated state as part of its law, unless it is expressly declared in that Act that that state has requested and consented to it being enacted.

(2) Where any Act of the Parliament of the United Kingdom contains a provision expressly declaring –

(a) that that Act, or an enactment contained in it which is specified in that provision, extends to all associated states, or to such one or more associated states as may be so specified, and

(b) that it is required so to extend in the interest of the responsibilities of Her Majesty's Government in the United Kingdom relating to defence and external affairs,

That Act, or that enactment, as the case may be, shall extend in accordance with that provision notwithstanding anything in the preceding section.”

Section 7 (1) of the Act provides:

“(1) Without prejudice to the provisions of section 5(4) of this Act, Her Majesty may by Order in Council made at the request and with the consent of an associated

state make, as part of the law of that state, any provision which appears to Her Majesty to be necessary or expedient for the peace, order or good government of that state.”

- [19] Simply put, based on the provisions of the Act cited above there is no legislative enactment by the British Parliament extending PACE to Anguilla.
- [20] With respect to the other submissions made in relation to DNA evidence, it appears that the mere fact that there is no specific statutory provision relating to the collecting, testing and admissibility of DNA evidence will not ipso facto render DNA evidence inadmissible in the courts in Anguilla.
- [21] Generally, the evidence with which the defendant takes objection can be challenged in the course of the trial in so far as the issues pertaining to fairness and relevance of the evidence are concerned.
- [22] Having made the finding that the provisions of PACE and the Codes of Practice made thereunder do not apply to Anguilla as it relates to identification evidence, the court adds that the case of **Turnbull v R** provides sufficient safeguards to the defendant. In fact, the provision of PACE appear to be a codification of the principles enunciated in **Turnbull v R**. In any event it is safe to say that the jury will clearly benefit from the necessary directions and warnings that will be given to them, both during the course of the trial and prior to them retiring to consider their verdict.
- [23] For the above reasons the defendant's application is dismissed.

Shawn Innocent
High Court Judge (Ag.)

By the Court

Registrar