

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

CASE NO. DOMHCR2016/0032

BETWEEN:

THE STATE

AND

ANTONIO CHARLIE MATTHEW

Appearances:

Ms. Sherma Dalrymple assisted by Ms. Carlita Benjamin and Ms. Anne Riviere
State Attorneys for the State.

Mrs. Dawn Yearwood Stewart

2017: April 4th

DECISION ON SUBMISSIONS

Admissibility of Expert Report

- [1] **CHARLES-CLARKE, J:** The prosecution applied to have the report of Albert George Cpl. 215 admitted into evidence. Cpl. George is one of the witnesses whose name is listed on the back of the indictment. The prosecution proposes to call Cpl. George to give evidence at the trial and seeks to have him tender a report which he compiled on 2nd February 2014 of his inspection of the vehicle Toyota Hiace HE 555 which was being driven by the accused on 23rd December 2013.

- [2] The prosecution relies on Section 12 of the **Evidence Act of Dominica Chap. 64** which they submit allows for the admissibility of documentary evidence in Dominica in the same manner as in England. Reference was made to Section 30 (1) of the **Criminal Justice Act 1988** which provides that the report of an expert is admissible in Criminal proceedings whether or not the maker attends to give oral evidence in those proceedings. The law in England also provides that if the person making the report shall not give oral evidence, then it shall not be admissible in evidence unless the permission of the court is given. That is not the case here. The law also allows for advance disclosure to be given of the expert evidence otherwise the party seeking to adduce it may not rely upon it.
- [3] The report was tendered by the witness at the preliminary inquiry and disclosed on the defence. The prosecution contends that this evidence is essential to the prosecution's case since the defence are raising the defence of mechanical defect which the prosecution must negative. Moreover given the fact that the report is of a technical nature it is essential that it be placed before the jury.
- [4] The defence objects to the tendering of the report and contends that the English legislation was applicable until 2nd November 1978 when Dominica became independent at which time all legislation received from England ceased to apply or was no longer received in Dominica unless there existed specific legislation permitting this. Defence counsel referred to Section 7 of the **Eastern Caribbean Supreme Court Act Chap 4:02** of the Laws of Dominica which establishes the jurisdiction of the High Court and Section 10 which provides that the jurisdiction of the High Court shall be in accordance with the **Criminal Procedure Act Chap 12.01, Revised Laws of Dominicas 1990**. The defence further submitted that while they have no issue with the witness giving evidence however as this is technical and scientific evidence the witness should explain everything in his report. The report should not just be handed to the jury.
- [5] Section 12 of the **Evidence Act Chap. 64** of the Laws of Dominica provides:

'Every document, which by any law now in force, or hereinafter to be in force, is or shall be admissible in evidence in every court of justice in England, shall be admissible in evidence in the like manner, to the same extent, and for the same purpose, in any court in the colony, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence.'

- [6] Section 7(1) of the **Eastern Caribbean Supreme Court Chap. 4:02 (ECSC)**, of the **Laws of Dominica** provides:

'The high court shall have and exercise within the State the same jurisdiction and the same powers and authorities incidental to such jurisdiction as may be vested in the High Court of Justice on 2nd November 1978.'

- [7] Section 10 of the said **Act** provides:

'The jurisdiction of the High Court in all criminal proceedings shall be exercised in accordance with the Criminal Law and Procedure Act and any other law in force in the State.'

- [8] It seems to me that Section 12 of the **Evidence Act Chap. 64** allows for the admission of documents in the courts of Dominica in the same manner as in the courts of England and section 7 of the **ECSC Act** preserves the jurisdiction of the High Court as it existed in England in November 1978.

- [9] **Statutory Instrument 1978 No. 1030** section 5 provides:

'Subject to paragraph (3) of this article, all law to which this article applies, whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, which is in force on the appointed day, or having been passed or made before that day, comes or has come into force thereafter, shall, unless and until provision to the contrary is made by Parliament or some other authority having power in that behalf, have the same operation in relation to Dominica, and persons and things belonging to or connected with Dominica, as it would have had apart from this paragraph if there had been no change in the status of Dominica'

This article applies to law of, or any part of, the United Kingdom, the Channel Islands and the Isle of Man and, in relation only to any enactment of the Parliament of United Kingdom or any Order in Council made by virtue of any such enactment whereby any such enactment applies in relation to Dominica, to law of any other country or territory to which that enactment or order extends.'

[10] This is the savings clause which extends the powers conferred upon the Court by Section 12 of the **Evidence Act** beyond 2nd November 1978. So as at 2nd November 1978 the existing law regarding the admissibility of documents in criminal proceedings was section 12 of the **Evidence Act** unless there was some other law which provided otherwise.

[11] Section 10 of the ECSC gives the High Court the power to exercise jurisdiction in criminal proceedings in accordance with the **Criminal Procedure Act Chap. 12:01**. The question is whether this Act provides for the receipt of documents in criminal proceedings. If it does then this legislative provision will prevail and the law relating to the admissibility of evidence will be applied accordingly. If it does not then section 12 of the **Evidence Act Chap. 64** is the prevailing law.

[12] However it should be noted that the provision states that the documents shall be admissible and therefore speaks to the admissibility of the evidence. It is well established law that the issue of admissibility of evidence is a matter for the trial judge in that the judge has the discretion whether or not to admit the evidence, in this case the expert report. Therefore this section cannot fetter the discretion of the trial judge. The Court therefore has to determine whether it is in the interest of justice to admit the document. In doing so the court has to consider the form of the document as well as the effect of placing the document in its current form before the jury.

[13] It is noteworthy that the report is not in accordance with the form prescribed by the English legislation. See **Phipson on Evidence Seventeenth Edition Para 33-55** which speaks to the form and contents of an Expert Report in Criminal

Proceedings. The report relied upon by the expert witness Cpl. George does not conform to these requirements. Therefore if the prosecution is relying on the law in England to argue that the report is admissible then it must conform to Section 12 of the **Evidence Act of Chap 64** of the Laws of Dominica and **Criminal Procedure Rules (Crim. PR) R.33.3** which governs the admissibility of expert reports in England.

[14] The report at best is a reproduction of the notes made contemporaneously by Cpl. George when he examined the vehicle. The court accepts defence counsel's submission that given the technical nature of the report it should not just be handed to the jury for them to rely upon but that it should be explained to the jury by the expert. The court also accepts prosecution's submission that the expert evidence is critical to its case in negating the defence of mechanical defect. I therefore believe that it is in the interest of justice to allow the expert witness to give evidence of his findings in accordance with the report compiled contemporaneously with the examination conducted on 4th February 2014. In accordance with the law relating to refreshing memory in court the witness will therefore be allowed to refresh his memory from his report when giving evidence. However the report in its current form will not be tendered into evidence.

Conflict of Interest

[15] Defence also raises the issue of conflict of interest in that the expert witness Cpl. George is the manager of the company Kitty Hop Handling and Towing Services which hauled the vehicle HE 555 from the scene of the accident to the police compound at Morne Bruce Roseau where the inspection was conducted on 3rd February 2014. Defence counsel contended that as owner of the business the expert's opinion may have been tainted by the fact that he was being paid by the State to haul the vehicle and provide a report of his observations so that the state can found an arrest and obtain a conviction. Counsel further states that his report

may have been influenced by the fact that he had a business arrangement with the State from which he would benefit if his report was favourable to the State, in that he would continue to get business from the State. Also as a police officer he would craft his report in a manner that would be biased in favour of the State and his duty to the court as an expert in explaining scientific evidence would be affected. Counsel also indicated that the report was not accompanied by photographs and the evidence given by the photographer did not indicate any of the defects noted by the expert witness. In the circumstances Cpl. George's duty to be unbiased may be diminished by the need to maintain the business relationship. Therefore the court should take that into account when considering whether to allow that evidence.

[16] Reference was made to the case of **Toth v Harman**¹, in which the court had to consider the failure to disclose a potential conflict of interest and the effect of such interest on the outcome of the case. In that case the expert witness whose evidence the trial judge relied upon to arrive at his conclusion was a member of the Medical Defence Union which paid for the defendant's representation in the legal action brought against him. The court found that the presence of a conflict of interest did not automatically disqualify an expert but instead what was required was the independence of the expert. The court stated at para 100:

'It is now well established that the expert's expression of opinion must be independent of the parties and the pressures of litigation'.

[17] Referring to the dicta of **Creswell J in National Justice Compania Naveira SA Prudential Assurance Co. Ltd**² as summarised on pp 939-9 of (**Civil Procedure 2006**);

'1. Expert evidence presented to the court should be seen to be, the independent product of the expert uninfluenced as to the form and content

¹ 2006 EWCA CIV 1028

² [1993] 2 Lloyd's Rep. 68

*by the exigencies of litigation (**Whitehouse v Jordan [1981] 1 WLR 246 HL at 256, per Lord Wilberforce**).*

2. An expert witness should provide independent assistance to the court by way of unobjective unbiased opinion in relation to matters within his expertise (Polivitte Ltd. V Commercial Union plc (1987) Lloyd's Rep 379 at 386, per Garland J, and Re FCR 193, per Cazalet J. An expert witness in the High Court should never assume the role of an advocate....'

[18] The court noted that the overriding duty of an expert was defined in (**Civil Procedure Rules**) **CPR** as that of assisting the court in relation to matters which fall within his expertise and to deal with cases justly. This duty overrides any obligation to the person from whom the expert has received instructions or by whom he has been paid. The court further stated at para 102:

'Where an expert has a material or significant conflict of interest, the court is likely to decline to act on his evidence, or indeed to give permission for his evidence to be adduced. This means that it is important that a party who wishes to call a party with a potential conflict of interest should disclose details of that conflict at as early a stage in the proceedings as possible'

[19] The court opined that disclosure should be made when the report was first served on the other party as this was necessary in the interest of transparency and the need for deflecting suspicion. Further it was for the court to decide whether a conflict of interest was material or not.

[20] It has been stated in **Cross on Evidence** that these same principles governing expert evidence apply in criminal cases.

[21] In the instant case the prosecution has disclosed the potential conflict of interest albeit at a late stage. Disclosure was first made by way of a Notice of Potential Conflict of Interest filed by the prosecution on March 27, 2017, the date when this trial was scheduled to commence. The trial commenced on 28th March 2017

whereupon defence indicated that they had no issue of conflict of interest in this case. However on 29th March 2017 defence indicated that having seen the Expert's report she would be objecting to the expert giving evidence and tendering his report based on conflict of interest. At which stage the court enquired of both parties how much time was needed to allow defence to make submissions and for the prosecution to respond. Upon agreement of both sides the matter was adjourned to 30th March at 10:00 am.

[22] Accordingly the court finds that although disclosure was late counsel's initial indication that she would not be raising any issue of conflict and the subsequent adjournment given for her to properly take issue with that evidence cures the effect of the late disclosure.

[23] The issue which remains is whether the court finds that the witness can give independent evidence by way of objective unbiased opinion in relation to matters within his expertise notwithstanding he is a police officer and his towing company was used to haul the vehicle from the scene of the accident to the location where he inspected it.

[24] In the case of **Fields v Leeds City Council**³ the question arose whether the evidence of a surveyor employed by the city council could be adduced as expert evidence. The court held that there was no assumption that an employee could not be an expert witness. According to Lord Wolf what was important was that the witness was aware of his duties as an expert in particular the need to be objective.

[25] In **R v Stubbs** ⁴the Court of Appeal had to decide whether the evidence from R who was an employee of the bank which the defendant was charged with

³ (2000) 17 EG 165, 1999 HLR 618

⁴ 2006 All ER (D) 133 Oct., EWCA Crim 2312

defrauding, was expert evidence and possessed the necessary independence given his position in the bank and the importance of the case to the bank. The trial judge held after a *voire dire* that the witness had acquired sufficient knowledge of the subject to render his opinion of value in resolving the issues concerning the operation of the online banking system and that his position in the bank and the importance of the case to the bank were matters that went to the weight of the evidence rather than its admissibility.

[26] The court of appeal in dismissing the appeal held that the judge had been right in his finding and stated at para 59:

'As to independence, we do not accept that his employment with HSBC and the importance of the case to HSBC disqualified him from giving expert evidence. ...our attention has not been drawn to a feature of his evidence that could support a case of conscious bias or lack of objectivity. In any event it is a matter for the jury to determine whether there was any conscious or unconscious bias or lack of objectivity that might render his evidence unreliable. This was as the judge said a matter going to weight rather than admissibility. The circumstances did not warrant a refusal by the judge to admit the relevant parts of Mr Roddy's evidence at all.'

[27] In the instant case the defence is submitting that by virtue of his employment by the State and the fact that he receives business from the State as an expert witness it means that Cpl. George cannot be objective in assisting the court as an expert. I am of the view that the mere fact that Cpl George is a police officer and an employee of the State does not mean that an expert cannot be independent and unbiased. In fact this is what police officers are called to do every day. It is the nature of the oath they take and the duties they discharge. Moreover the fact that his company was paid to haul the vehicle and for him to write a report as an expert cannot without more indicate that he will present a report that favours the litigant who hires him. It is the norm for expert witnesses to be paid. It would have been preferable for someone unconnected with the police to engage in this exercise. However in this case the defence have furnished no facts upon which to base their

claim of bias nor have they pointed to any feature of the case which points to conscious or unconscious bias by Cpl. George. This is a matter which can be explored by defence in cross examination and which can be left to the jury to determine whether there was a potential for bias. The jury will then determine what weight they attach to the evidence of this witness and whether they can accept him as an expert who has given independent evidence on this matter. Accordingly I find that there is no conflict of interest which affects the independent, unbiased and objective opinion of Cpl. George in this matter.

Victoria Charles Clarke
High Court Judge

By The Court

Registrar