

EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

COMMONWEALTH OF DOMINICA
AUDIOCONFERENCE
13th AND 15th May 2020

JUDGMENTS

Case Name:

Richardson Fontaine
v
The State

[DOMHCRAP2015/0007]

(COMMONWEALTH OF DOMINICA)

Date:

Wednesday, 13th May 2020

**Coram for
judgment
delivery:**

The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: **Mrs. Heather Felix-Evans**

Respondent: **Ms. Evelina Baptiste, Director of Public Prosecutions**

Issues:

Criminal appeal – Appeal against conviction and sentence – Unlawful sexual intercourse with a person under fourteen years – Corroboration warning in sexual offence cases – Section 28 of the Sexual Offences Act – Whether trial judge erred by failing to assist jury in determining what evidence amounts to corroboration in a sexual offence case – Whether interruptions by trial judge, of defence counsel, had effect of preventing counsel from fully and forcefully addressing the jury and/or prejudicing the jury’s mind against appellant – Whether trial judge failed to give a balanced and impartial summary of the cases for the prosecution and the defence – Whether trial judge failed to adequately direct jury on elements of credibility and propensity when giving good character

direction – Whether verdict was unsafe and unsatisfactory – Whether sentence imposed was manifestly excessive

Result and Reason:

Held (per Pereira CJ, Michel JA and Webster JA [Ag.]): allowing the appeal, quashing the conviction, setting aside the sentence and discharging the appellant, that:

1. The requirement of corroboration in sexual offence cases is non-existent in the Commonwealth of Dominica by virtue of both judicial authority and the legislative provision contained in section 28 of the Sexual Offences Act. Accordingly, the trial judge was prohibited from giving a corroboration warning in the instant case, but was permitted to give the jury the direction in section 28 of the Act, which he did in fact give.

Section 28 of the Sexual Offences Act, Act No. 1 of 1998 of the Laws of the Commonwealth of Dominica applied.

2. A judge, in a criminal trial, ought to intervene in more than a perfunctory manner during a wholly inappropriate address to the jury by trial counsel, or should take steps to address counsel's inappropriate address in his summation. In such instances, the essential question is whether or not the nature and extent of the interventions have resulted in the defendant's trial becoming unfair. It is clear that the interruptions by the trial judge did nothing to stultify defence counsel and prevent her from fully and forcefully addressing the jury. However, there was potential for serious prejudice of the jurors when the trial judge interrupted defence counsel's address to the jury to say that the appellant's engagement in an extra-marital affair "goes to the very matter that is very much your concern, good character". The prejudicing of the jury's mind against the appellant was at the very least capable of causing a miscarriage of justice, and it cannot be said with any certainty that the verdict would have been the same had their minds not been prejudiced.

Section 38(1) of the Eastern Caribbean Supreme Court (Dominica) Act Cap. 4:02 of the Laws of the Commonwealth of Dominica applied; Barry Randall v The Queen [2002] UKPC 19 applied; Peter Michel v The Queen [2009] UKPC 41 applied; R v Natalie Frances Woods [2011] EWCA Crim 1305 applied; Allie Mohammed v The State [1999] 2 AC 111 applied; Francis Eiley and others v The Queen [2009] UKPC 40 applied.

3. The posture adopted by the trial judge in failing to adequately summarise the evidence of the accused is not a good practice and ought not to be followed by judges in jury trials. Nonetheless, it is not every departure from good practice that renders a trial unfair. In this case, although the judge's failure to at least summarise to the jury the key parts of the accused's evidence, instead of picking parts and portions, sometimes with the aim of highlighting discrepancies in the evidence of both the prosecution and defence's witnesses, was undesirable, it did not render the trial unfair so as to justify quashing the conviction for unlawful sexual intercourse.

Gregory Donnor v The State Criminal Appeal No. 25 of 2005 (Trinidad and Tobago) applied; Barry Randall v The Queen [2002] UKPC 19 followed.

4. The standard good character direction has two limbs. The credibility limb speaks to the greater likelihood of a person of good character being truthful than one of bad character, and the propensity limb speaks to the greater unlikelihood of a person of good character committing a crime, especially one of the seriousness of the crime with which the appellant was charged. The trial judge gave a good character direction which included both limbs and how to treat with them. This was necessary since the appellant had no previous convictions and his extra-marital affair had no bearing on the verdict which the jury was charged to render. But the trial judge was not required to, and probably ought not to have included in his direction to the jury the fact that the appellant had

twice lied to the court. Nonetheless, this did not amount to a misdirection, nor was it of sufficient significance to negate the value of the good character direction which the judge did give.

R v Hunter & Others [2015] EWCA Crim 631 applied; Andre Penn v The Queen BVIHCRAP2014/0006 (delivered 23rd November 2016, unreported) followed; Teeluck (Mark) and John (Jason) v The State (2005) 66 WIR 319 applied.

5. Though the trial judge did not establish the benchmark sentence for the offence of unlawful sexual intercourse with a minor in the Commonwealth of Dominica or any Eastern Caribbean Supreme Court member state, he did ascertain that the sentences imposed in recent years for unlawful sexual intercourse ranged from 3 to 25 years' imprisonment. He also addressed the aggravating and mitigating factors and the sentencing principles before arriving at a sentence of 10 years' imprisonment, on a charge with a maximum penalty of 25 years' imprisonment. It cannot be said that a sentence of 10 years' imprisonment in all the circumstances was so excessive as to merit appellate interference.

Case Name:

**[1]Fairfield Greenwich Limited
[2]Fairfield Greenwich (Bermuda)
Limited**

v

**[1]Kenneth Krys
[2]Charlotte Caulfield**

**(as liquidators of Fairfield Sentry Limited and
Fairfield Sigma Limited)**

[BVIHCMAP2018/0040]

**[1]Walter Noel
[2]Jeffrey Tucker**

v

**[1]Kenneth Kryś
[2]Charlotte Caulfield
(as liquidators of Fairfield Sentry Limited and
Fairfield Sigma Limited)**

[BVIHCMAP2018/0041]

(TERRITORY OF THE VIRGIN ISLANDS)

Date: **Wednesday, 13th May 2020**

**Coram for
judgment
delivery:** **The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant: **Mr. Ben Mays**

Respondent: **Mr. Alistair Abbott**

Issues: **Commercial appeal — Contractual indemnity clause —
Whether claim in Fairfield Sentry litigation was for loss
suffered within the terms of contractual indemnity clause
or solely an action for restitution based on unjust
enrichment — Whether claim for repayment of overpaid
funds in Picard II litigation fell within contractual
indemnity clause — Indemnity provisions in articles of
association — Whether claim for diminution of share
value fell within indemnity provisions for directors and
company officers under articles of association —
Recoupment of reflective loss — Whether presumption
against recoupment of reflective loss applies**

**Result and
Reason:** **Held (per Pereira CJ, Blenman JA and Thom JA):
dismissing the appeals with costs to the respondents to
be assessed by a judge of the commercial court, if not
agreed within 21 days, that:**

- 1. The IMA Indemnity very clearly covers claims made
for loss suffered by the Funds. While it is true that**

the Funds would have suffered some form of loss, the claim for unjust enrichment by the Funds in the Fairfield Sentry litigation was not for any loss they had suffered in the ordinary sense in which the term “loss” is used, but rather for a reversal of the transfer of excess fees paid to the FG appellants. The learned judge was therefore correct in finding that such a claim would not fall within the ambit of the IMA Indemnity.

Investment Trust Companies v Revenue and Customs Commissioners [2018] AC 275 considered; Goff & Jones: The Law of Unjust Enrichment, 9th Edn. Sweet & Maxwell Ltd (United Kingdom) (2016) at p.1-17 considered.

2. In order to determine whether the claim against the FG appellants in the Fairfield Sentry litigation falls within the IMA Indemnity, the court must examine the entirety of the claim and determine firstly the nature of the claim made against them. When the claim is examined as a whole, it is clear that its intent was to recover a particular sum which represents the overpaid fees. It was not a claim for loss, within the meaning of the IMA Indemnity.
3. For the Fairfield Sentry litigation to fall within the terms of the IMA Indemnity, the FG appellants were required to prove that the claim against them was for loss suffered by the Funds as a result of their (the FG appellants’) acts or omissions. Whether loss to the Funds resulted from acts or omissions by the FG appellants, was not argued or in issue before the learned judge. It was therefore not open to the judge to make findings on that point. The FG appellants have therefore failed to prove that the claim against them was for loss suffered by the Funds and accordingly that they were entitled to be indemnified within the terms of the IMA Indemnity.
4. The Picard II litigation against the FG appellants did

not seek to recover any sums due or belonging to the Funds, but rather sought to recover loss suffered by BLMIS. While some of the sums recovered by Picard II from the FG appellants would go towards reducing the liability of the Funds to BLMIS, BLMIS simply cannot recoup their loss twice, both from the FG appellants and from the Funds. Furthermore, the claim made by Picard II is that acts and omissions by the FG appellants resulted in loss to BLMIS and not the Funds. The learned judge therefore did not err in finding that the claim by Picard II was not for a loss suffered by the Funds.

5. To fall within the Articles Indemnity, Mr. Noel and Mr. Tucker had to establish that the loss for which they sought to be indemnified, was a direct loss caused by some act or omission by them in the discharge of directors' duties to the Funds. Based on their pleadings, Mr. Noel and Mr. Tucker, as shareholders of Fairfield International Managers Inc. ("FIM"), were claiming that their shares suffered a diminution in value because of losses suffered by FIM. The diminution in value of the shares in FIM is a reflective loss. Mr. Noel and Mr. Tucker have not shown that FIM has no recourse to deal with its depletion of assets. Accordingly, and in all the circumstances, the loss claimed by them does not fall within the ambit of the Articles Indemnity.

Prudential Assurance Co Ltd v Newman Industries Ltd and others (No 2) [1982] 1 All ER 354 considered; Johnson v Gore and Wood & Co (A firm) [2001] 1 All ER 481 applied; Giles v Rhind [2008] EWCA Civ 118 considered.

6. In order to engage the Articles Indemnity, a person must also show that their costs, loss or expense arose out of some act or omission in their capacity as a director or officer of the Funds. The onus was on Mr. Noel and Mr. Tucker to establish all of the

elements of the indemnity and prove that the indemnity applied. The matters referred to by Mr. Noel and Mr. Tucker in the court below do not evidence any act or omissions by Mr. Noel and Mr. Tucker as directors of the Funds, which resulted in the loss. The learned judge therefore did not err in concluding that the Articles Indemnity did not apply and in dismissing their application on that basis.

APPLICATIONS AND APPEALS

Case Name:

Anselm Drigo

v

The State

[DOMHCVAP2014/0004]

Date:

Wednesday, 13th May 2020

Coram:

**The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant: No appearance

**Respondent: Ms. Evelina Baptiste, Director of Public Prosecutions, and
Ms. Sherma Dalrymple**

Issues:

Appeal against sentence — Appellant has already served sentence and is no longer interested in appeal

Type of Order:

Adjournment

Result / Order:

[Oral Delivery]

IT IS HEREBY ORDERED THAT:

1. The hearing of the appeal against sentence is adjourned and traversed to the next sitting of the Court of Appeal in the Commonwealth of Dominica scheduled for the week commencing 9th November, 2020.
2. Mr. Darius Jones who is counsel on record for the appellant has indicated through the Director of Public Prosecutions that he intends to file a Notice of Discontinuance in this matter and so nothing in this order prevents him from so doing.

Reason:

The Director of Public Prosecutions, Ms. Baptiste, indicated that the appellant completed his sentence on 23rd September 2019. Ms. Baptiste also indicated that she was advised by the appellant's counsel, Mr. Darius Jones, that the appellant was no longer interested in pursuing his appeal; and that Mr. Jones intends to file a notice of discontinuance in the appeal. Neither the appellant nor his counsel was present at the hearing of the appeal. The Deputy Registrar of the High Court confirmed that Mr. Jones was advised by email on the 11th May 2020 of the hearing of the date and time of the hearing of the appeal.

Case Name:

Liston Lowe

v

The Police

[DOMMCRAP2017/0011]

Date:

Wednesday, 13th May 2020

Coram:

**The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal**

Appearances:

Appellant: Mr. Wayne Norde and Mrs. Gina Abraham-Thomas

**Respondent: Ms. Evelina Baptiste, Director of Public Prosecutions, and
Ms. Sherma Dalrymple**

Issues:	Criminal appeal — Appeal against conviction for offence of being in possession of a firearm without a valid licence contrary to section 5(3) of Firearms Act, 2011 — Expert evidence — Section 51 of Firearms Act, 2011 — Whether a firearms expert who is not accepted as a ballistic expert pursuant to section 51 of the Firearms Act, 2011 can give expert evidence in relation to an offence under the Act — Whether magistrate erred in permitting firearms expert to give evidence — Elements of offence under section 5(3) – Whether prosecution failed to prove elements of the offence — Whether learned judge erred in dismissing the no case submission
Type of Order:	Oral Judgment
Result / Order:	IT IS HEREBY ORDERED THAT: The appeal is dismissed.
Reason:	This was an appeal against conviction by Liston Lowe, who was convicted of the offence of being in possession of a firearm, without a valid licence, contrary to section 5(3) of the <u>Firearms Act, 2011</u>. Mr. Lowe was sentenced to pay a fine of \$5000.00 within 3 months and in default, 9 months' imprisonment. Mr. Lowe did not appeal against his sentence. His notice of appeal contains two grounds: (i) the magistrate erred in admitting the evidence of Mr. Jefferson Mayers as a firearms expert; and (ii) the magistrate erred when he dismissed the no case submission. In relation to ground (i) the thrust of the submission by counsel for the appellant, Mr. Wayne Norde, was that pursuant to sections 51(3) and 51(5) of the <u>Firearms Act, 2011</u> only a ballistics expert could give expert evidence in relation to firearms. The Court did not agree with that interpretation of section 51. In the Court's view, on a careful reading of the provision, section 51 provides for the certificate of a person, who has been designated as a ballistics expert, to be admitted into evidence without that person having to appear in court. It does not exclude the application of the well-established common law principles and procedures as outlined in several cases including <u>The State of Trinidad and Tobago v Boyce [2006] UKPC 1</u>,

and Myers v R [2015] UKPC 40 for the admissions of expert evidence at trials. In the Court's view, therefore, the learned Magistrate did not err in admitting the evidence of Mr. Ferrell, who had in excess of 25 years' experience in the examination of firearms.

In relation to ground 2, Mr. Norde contended that the magistrate erred in dismissing the appellant's no case submission on the basis that the prosecution failed to prove the elements of the offence, in particular, that the shot gun possessed by him was within the specific definition of "shot gun" under the Firearms Act, 2011. Mr. Norde contended that the prosecution was required to do so, having stated in the particulars of the complaint that the appellant was in possession of a 4.10 mm shot gun. The Court was also not persuaded by this submission. The Court noted that the appellant was charged under section 5(3) of the Firearms Act, 2011, and that Mr. Norde accepted that the elements of the offence are that there must be: (i) the possession of a firearm; and (ii) the absence of a valid license. The Court further noted that Mr. Norde accepted that the shot gun, whether in its original form, or in a modified form, would fall within the definition of "firearm" within the terms of the Act. In the Court's view, therefore, the type of firearm particularised in the complaint was of no moment. Rather, what is of importance is that the relevant object was within the definition of "firearm" under the Act.

During the course of his submissions to the Court, Mr. Norde also sought to introduce a new ground of appeal – that there was no evidence in relation to the appellant's possession of a valid license. The Court took the view that counsel ought not to be allowed to add new grounds of appeal during the course of submissions, especially in circumstances where grounds already advanced on the appeal are not persuasive. In any event, the Court noted that the case for the appellant before the learned Magistrate was not that he (the appellant) had, or did not have a valid license. Rather, the appellant's case was that he knew nothing about the firearm in the first place. Mr. Norde's new ground, therefore, in any event, could not take the appeal any further.

For these reasons, the Court dismissed the appeal on all grounds.

Case Name: **First Domestic Insurance Company Limited**
v
[1] Industrial Enterprises Limited
[2] J. Astaphans Co. Ltd
[DOMHCVAP2014/0024]

Date: **Friday, 15th May 2020**

Coram: **The Hon. Mde. Louise Esther Blenman, Justice of Appeal**
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Applicant: **Mrs. Heather Felix-Evans**

Respondents: **Mr. Ian Benjamin, SC with Ms. Danielle Wilson**

Issues: **Civil Appeal — Application for to strike out appeal for want of prosecution — Failure to file record of appeal**

Type of Order **Oral Judgment with Written Reasons to Follow**

Result / Order: **IT IS HEREBY ORDERED THAT:**
1. The appeal is struck out on the basis of the failure by First Domestic Insurance Company Limited to prosecute their appeal.
2. Costs are awarded to the respondent in the sum of \$2000.

Reasons: **The Court indicated that it would give written reasons for its decision.**

Case Name: **Yasim James**
v
The Police
[DOMMCRAP2017/0001]

Date: Friday, 15th May 2020

Coram: The Hon. Mde. Louise Esther Blenman, Justice of Appeal
The Hon. Mr. Mario Michel, Justice of Appeal
The Hon. Mde. Gertel Thom, Justice of Appeal

Appearances:

Appellant: Mrs. Dawn Yearwood-Stewart

Respondent: Ms. Sherma Dalrymple and Ms. Carlita Benjamin, on behalf of the Director of Public Prosecutions

Issues: Criminal Appeal — Appeal against sentence — Whether sentence imposed by magistrate excessive in the circumstances — Withdrawal of appeal

Type of Order: Oral Judgment

Result / Order: IT IS HEREBY ORDERED THAT:
The appeal is dismissed, having been withdrawn.

Reason:

This was an appeal filed by Yasim James who pleaded guilty to 4 charges. James was reprimanded and discharged on 2 of the charges, sentenced to 3 years' imprisonment for one offence and 2 years' imprisonment on the other, with sentences to run concurrently.

In his notice of appeal, James argued that the sentence of 2 years' imprisonment and also a fine of \$1,400 he purported to have been ordered to pay by the learned magistrate, was excessive in the circumstances. The Court noted the absence of any reference to a fine whether in the minutes of conviction or the notes of evidence of the proceedings before the learned magistrate. The Court having discussed the matter with counsel for the appellant, Mrs. Yearwood-Stewart, counsel conceded that there was in fact nothing properly before the Court upon which the Court could make any determination as to the fine of \$1,400 purported to have been ordered. Against that background, Mrs. Yearwood-Stewart conceded that there would be no basis upon

which she could proceed with the nub of the appeal, which was as to the overall severity of the sentence.

In all the circumstances, Mrs. Yearwood-Stewart sought leave of the Court to withdraw the appeal. The Court was minded to grant leave to withdraw and the State Attorneys representing the Director of Public Prosecutions did not object to the withdrawal of the appeal.