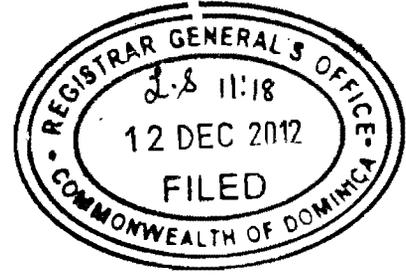


IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA



(CRIMINAL)

CASE NO: DOMHCR2012/0006

THE STATE

V

ALBERT STEVEN JR

Before: the Hon. Justice Birnie Stephenson

Appearances: Mr. Gene Pestaina Director of Public Prosecutions and Mr. Clement Joseph and

Miss Arthlyn Nesty for the State

Mrs. Zena Moore Dyer and Mrs. Gina Dyer Munro for the Defendant

29th November & 3rd December 2012

RULING

[1] **Stephenson J:** This is a motion filed by the Defence to have the indictment in the case at bar quashed on the ground that the mandatory provision of Section 49 of the **Magistrates Code of Procedure Act**¹ has not been complied with, there being no proper deposition of the witness Kalos Richards before the Court and in the circumstances the accused Albert Steven Jr. was not lawfully and legally committed to trial.

[2] This application arose because Kalos Richards a witness for the Prosecution was asked during cross-examination to identify his signature on his deposition, wherein the witness indicated that one of the signatures appearing on one of the pages of the deposition was not his signature.

¹ Chapter 4:20 of the Revised Laws of Dominica 1990

[3] The evidence from that witness therefore came to an immediate halt and given the strange seemingly unprecedented twist in the witness' evidence, the matter was adjourned to the following morning for Counsel on both sides to review the authorities which would serve to guide the Court in such circumstances.

[4] On the following morning when the matter was called Learned Counsel for the accused Mrs. Zena Moore Dyer filed the notice of motion at hand. Learned Counsel then made submissions in support of her application.

[5] In her submissions, Learned Counsel said that her application is based on the fact that the witness for the prosecution alleged that he did not sign one of the pages of his deposition; that this rendered the deposition faulty and in the circumstances of the case the committal proceedings a nullity and the subsequent indictment should be quashed.

[6] Learned Counsel made reference to Section 49 of **The Magistrates Code of Procedure Act**² which says:

"As each witness gives evidence the material part of it shall be taken down in writing by the Magistrate in narrative form, or, ... the evidence of the witness so taken down shall be read over to the witness and shall be signed by him and by the Magistrate, and the evidence so taken down and read over and signed shall be deemed a deposition."

[7] Learned Counsel submitted that the word "*shall*" in section 49 is to be interpreted as imperative as stated in section 3(2) of **The Interpretation and General Clauses Act**³.

[8] Mrs. Moore Dyer further submitted that it was an admitted fact that the witness Kalos Richards who gave evidence in chief and on being cross examined said to the Court that he did not sign all the pages of the deposition; that the signature on one of the pages of the deposition was not his; that in the circumstances, the deposition was not in conformity with the requirement of the Statute and was therefore invalid.

[9] Counsel further submitted that when one looks at the other depositions no prima facie case would be made out against the accused and therefore the committal is illegal.

² Ibid

³ Chapter 3:01 of the Interpretation and General Clauses Act of the Laws of Dominica

[10] Counsel cited and relied on the following cases in support of her application:

- i. **R-v-Gee et al** ⁴
- ii. **R –v- Phillips, R –v- Quayle** ⁵
- iii. **R-v- Edgar et al** ⁶
- iv. **Thomas & Wilson –v- R** ⁷

[11] The Learned Director of Public Prosecutions in response to the application submitted that if the deposition in question was indeed invalidated that did not in any way invalidate the preliminary inquiry and committal. That there was a prima facie case made out against the accused for which he was subsequently indicted.

[12] The Learned Director of Public Prosecutions submitted that the cases cited by Learned Counsel in support of her application supports the Prosecution that even if the Court finds that the deposition is invalid that this does not invalidate the committal proceedings, and that there was evidence to support a prima facie case against the defendant upon which the Learned Magistrate properly committed the Defendant to stand trial before the High Court.

[13] In the event that the witness did not in fact sign that page of the deposition does that invalidate the deposition? The simple answer to that would be yes it would be as it would not have been signed in compliance with the law.

[14] Would this invalidate the committal proceedings? A review of the authorities cited by Counsel for the Defendant is that no, if the deposition is invalid it would not automatically invalidate the Committal proceedings.

[15] In the case of **R –v- Gee** ⁸ it was held that at the preliminary hearing the depositions must be taken in strict accordance with the law which in this case would be the Magistrates Code of Procedure Act. That they must be taken down in writing at the hearing in the presence of the accused and then in such presence

⁴ (1936) 2 ALL E R 89

⁵ (1938) 3 ALL E R 674

⁶ (1958) 42 CAR 192

⁷ Crim. App. Nos. 6 & 7 of 1996 St Christopher & Nevis

⁸ Op cit

read over to the witnesses and signed by them. The whole of the depositions must be signed by the justices. If this procedure is not followed there can be no legal committal for trial.

[16] I am of the view that this case is to be distinguished from the case at bar in that in this case all of the depositions taken in the committal proceeding were invalid, that the procedure followed in the preliminary hearing and the recording of deposition did not comply with the law and it was found that :

*"The proceedings before the magistrate were so defective that there was no lawful committal for trial ... at all"*⁹

and therefore cannot be applied to the case at bar in totality.

[17] In R –v- Edgar et al¹⁰ some of the depositions were not signed by the examining justice and the Court of Criminal Appeal decided on whether the committal was invalidated where there were other signed depositions that were sufficient to justify committal on some of the charges before the court. It was held in that case that even though certain depositions in the committal proceedings were invalid that did not render the whole committal bad.

[18] The Court of Appeal of the Eastern Caribbean Supreme Court in the case of Clement Thomas & David Wilson –v- The Queen¹¹ it was decided that :

"... If from the depositions properly taken, a prima facie case is disclosed, the committal is valid despite the fact of the defective depositions. The fact that the taking of a certain deposition did not comply with the statute cannot without more render the whole committal bad. ... if, upon the depositions which were properly taken a prima facie case was disclosed, the committal was valid".

[19] I am bound to hold following this decision that if the deposition in question is invalid if the remaining depositions are valid and together they disclose a prima facie case against the accused the committal is valid. Counsel for the accused has urged upon this court to find that when one reviews the other depositions taken in the preliminary inquiry there is no prima facie case made out against the defendant for the offence as charged and therefore the committal was invalid and she has invited me to quash the indictment. I will come to this consideration shortly.

⁹ R-v-Gee op cit per Goddard J at page 91

¹⁰ Op cit

¹¹ Op cit

The witness denying that his signature appears on one of the pages of the deposition:

[20] This motion arose out of the witness saying under cross examination that the signature on one of the pages of the deposition was not his. Now, how does the court deal with such a situation?

[21] Learned Counsel for the defence urged the Court to accept that the witness Kalos Richards was speaking the truth when he said he did not sign one of the pages of the deposition **without more** (emphasis mine). It is noted that once the witness said that the signature on the page was not his, there was no further questions put to the witness by Learned Counsel for the defence or prosecution or the Court. Therefore, that statement has not been challenged in any way. I am of the view that the witness should be questioned further to ascertain the truthfulness of his statement. It is clearly a statement of fact which in my respectful view is for the jury to hear and decide

[22] **Archbold Pleading, Evidence and Practice in Criminal Cases**¹² states:

"If a witness denies his signature or mark to a deposition, it may be proved by the evidence of any competent person who heard it taken; ..."

The cases of **R –v- Hallet**¹³ and **R –v- Hearn**¹⁴ were cited as the authorities for this proposition. It is, therefore, clear that based on this principle of law in the face of the witness' denial it does not automatically invalidate his deposition, the prosecution can adduce evidence to prove so or otherwise.

[23] In the case at bar, the deposition of Kalos Richards was prima facie valid. If the witness during the cross examination says the signature of one of the pages is not his, that is a question of fact which is to be decided to by the jury in order to ascertain whether or not the witness is being truthful. Respectfully, I do not accept Counsel's submission that the accused statement must be taken as the truth **without more**, that, like all other issues of fact in this case, it must be tested and the prosecution, the court and possibly the jury must be given the opportunity to question the witness about it, ultimately with the jury deciding whether he is telling the truth. I am fortified in my view by the decisions in **R –v- Hallet** and **R –v- Hearn** as quoted above. That situation is also one for the Learned Judge to deal with in her summation to the jury.

[24] In the circumstances the application cannot be granted as the deposition is not invalid until there is sufficient evidence before the court to support same.

¹² 43rd Edition Page 490 Paragraph 4-325

¹³ (1841)9 C & P. 748

¹⁴ (1841) 3 & Mar .109

[25] In the event that the deposition is invalid I now turn to look at the depositions which have been filed in the matter to see whether a prima facie case was made out against the accused for the charge with which he has been indicted.

[26] The accused has been charged with Wounding with Intent for that he on the 26th day of December 2008, at Bowers Lane, Goodwill in the Parish of St George, in the Commonwealth of Dominica, unlawfully and maliciously wounded Mandela Andrew with intent to do him grievous bodily harm.

[27] It is trite law that the function of committal proceedings is to ensure that no one shall stand trial unless a prima facie case has been made out. That is, that there is sufficient evidence of the offence upon which the accused could be tried. I have reviewed the depositions filed in this case and am of the view that there is sufficient evidence on the depositions for which the defendant can answer the charge and accordingly the committal proceedings are not invalid.

[28] For these reasons therefore I find no merit in this application and having come to that conclusion and for the reasons already stated this notice of motion is dismissed.



M E Birnie Stephenson
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M E Birnie Stephenson
High Court Judge