IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

Claim NO. DOMHCV2012/0019

BETWEEN:

[1] ANTHONY MARTIN

Claimant

and

[1] ATTORNEY GENERAL
[2] ALLEYNE MAXIMAE
[3] VIVIAN AUGUSTINE

Defendants

Appearances:

Mrs. Gina Dyer-Munro for the Claimant
Miss Joelle A V Harris, Solicitor General for the Defendants

2015: July 8

Ruling on written submissions

[1] **Stephenson, J:.** Hearsay evidence in law has been referred to by many as an area of great difficulty and has been the focus of considerable and important statutory reform over the years.

[2] The issue for determination before the court is whether the words identified below by counsel for the claimants in the witness statements of three witnesses should be excluded as being hearsay.

[3] Written submissions were ordered for the court to rule on before the continuation of the trial in the matter. It is noted that the submissions which were filed on the 3rd July 2015 by the defendants out of time and without leave of the court have not been taken into consideration by the court in this ruling.

Brief Background to the case:

[4] The claimant in the matter has sued the police officers for wrongful arrest and detention.

[5] In their defence the police officers contend that they were acting on intelligence received and they seek to adduce evidence of the instructions they received from the supervising officer.

[6] Counsel for the claimant objected to the evidence on the stated ground that the statements were hearsay.

[7] It is important to briefly state the statements which are being objected to by Learned Counsel Mrs. Dyer-Munro:

Witness statement of Alleyne Maximae

(1) **Para 4:** "*at 2:45 pm on Monday 18th July 2011, Sergeant Daniel B. who was in command of our Drug Squad Unit on that day, told us that he had received intelligence to the effect that a white Hummer had left Portsmouth with illegal drugs, firearms and ammunition and that the Hummer was heading for Roseau"*

(2) **Para 7:** *" Sgt. Daniel and Constable Augustine V were in the vehicle with me. At some time after arriving Mahaut Sgt Daniel received a call on his cellular phone and he told us that the registration number of the suspected vehicle was PN888"*

Witness statement of Vivian Augustine

(3) **Para 4:** *" at about 14:45 hrs on the 18th July 2011, while on duty, Sgt. Daniel B instructed that he had received intelligence that a white Hummer had left Portsmouth with firearms, ammunition and drugs enroute to Roseau. The name of the occupants of the vehicle were not known".*

(4) **Para 7:** *"when we got to a certain area on the Mahaut Public Road we stopped on the western side of the road facing north and awaited the*

arrival of the suspected vehicle. Walter M drove further north of where we stopped. While we waited Sgt Daniel B received a telephone call after which he told us that the registration number of the vehicle was PN888."

Witness statement of Bernard Daniel

(5) **Para 2:** *" On Monday 28th July 2011, I was stationed at the Drug Section and my designation was that of Sergeant in charge of Operation. At about 14:45 hours that day I received intelligence that a white Hummer had left Portsmouth and was travelling to Roseau with firearms, ammunition and illegal drugs. I was not told who was driving the vehicle."*

(6) **Para 3:** *"I immediately informed Constable Maximea A (Acting Corporal at the time), Constable Walters M. Constable Shillingford R. and Constable Augustine V (as he was at the time – he is now a Corporal) that I had received intelligence informing me that a white Hummer that was travelling to Roseau with drugs, firearms and ammunition. I instructed them that we were to proceed on mobile patrol in two vehicles to intercept and search the suspected vehicle and its occupants. We were in plain clothes and were armed with Police issue M16 rifles and nine millimeter pistols"*

(7) **Para 5:** *" while on location on the Mahaut Public Road I got further information that the vehicle's registration number was PN888. I disseminated this information, verbally and via cellular telephone to the other officers on duty with me."*[1]

Submissions of Counsel for the Claimant:

[8] Learned Counsel for the Claimant Mrs. Gina Dyer-Munro submitted that applicable law governing evidence in civil proceedings in Dominica is the Civil Evidence 1968 of the United Kingdom. This is by virtue of the reception provision as set out in Sections 7(1) and 11 of the Eastern Caribbean Supreme Court Act[2].

[9] Sections 7(1) and 11 state as follows respectively

"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 of England on the 2nd November 1978"

and

[1] All the underlined words represent the hearsay which is being objected to by the claimant.
[2] Chapter 4:02 of the Revised Laws of Dominica 1990

"The jurisdiction vested in the High Court in civil proceeding … shall be exercised in accordance with the provisions of this Act or any other law in operation of the State and of the Rules of Court; where no special provision is therein contained such jurisdiction shall be exercised and nearly as may be in inconformity with the law and practice administered on the 1st June 1984 in England"

[10] Counsel submitted that the fact that the Civil Evidence Act of 1968 applies to Dominica means that the corresponding Rules of Court in particular the Rules of Court of the United Kingdom 1956 applies to Dominica. However, it was submitted that those rules no longer apply in Dominica because they have been abolished by the introduction of Civil Procedure Rules 2000 "CPR 2000". [3] In the circumstances counsel submitted that the Rules of Court of the UK of 1965 or 1956 cannot be applied in Dominica.

[11] Learned counsel submitted that the statements objected to cannot be adduced in accordance with the Civil Evidence Act of 1968 as they are neither first hand or second hand hearsay statements. That the said statements have not satisfied the requirements of the said Civil Evidence Act.

[12] Learned Counsel Mrs. Dyer-Munro submitted that the defendants' reliance on the case of Subramanian v Public Prosecutor[4] is misconceived as it pertains to the case at bar. That the reception of hearsay in Civil matter is governed by the provisions of the Civil Evidence Act 1986 of the UK. That the principle articulated in this case is a common law principle where hearsay is admitted to establish state of mind which is a criminal concept and is applicable where there is need to prove intention which is not the issue in the case at bar.

[3] Re: Para 11 and 12 of the Claimant's written submissions in the application
[4] (1956) 1 WLR 965

[13] Mrs. Dyer Munro also submitted that under Part 29 of CPR 2000 the Court has the right to control evidence and that when one takes into concern the Overriding objective admission of the statement would not ensure that the parties are on equal footings and will not enable to the court to deal with the case justly

Submissions of Counsel for the Defendants

[14] Counsel for the defendants submitted that the statements which learned counsel for the Claimant is objecting to, is being adduced to merely establish that a statement was made by Sgt. Daniel B. to the police officers and also as evidence as to the state of the mind of the officers which prompted their actions which is crucial to the matter in the case at bar.

[15] That the evidence is not being adduced to prove that the vehicle No. PN888 was carrying drugs, arms and ammunition but to simply for the purpose to establish the state mind of the officers at the time when the claimant was stopped and arrested.

[16] Learned counsel for the defendants submits that the statements complained of goes to provide evidence that the information was received by the defendants and that based on that information they took certain action. That the evidence relates to their conduct which is subject of the case at bar.

[17] Counsel further submitted that when the rule against hearsay is applied the statements are admissible for this purpose. That it is material to the establishment the intent of the officers or put another way what prompted their actions.

[18] The Learned Solicitor General submitted that in considering whether the relevant statements of the witness amount to hearsay and therefore inadmissible it must first be determined that these statements were made by persons not being called as

witnesses in the matter. She relied and quoted the learning from Phipson's Manuel of the Law of Evidence[5]

> *"Oral or written statement made by persons not called as witnesses are receivable to prove the truth of the fats stated. …"*
> *"Statements by non-witnesses may be either original evidence –i.e., where the material point is whether they were made irrespective of the question whether they were tur or false, ad statements are not taken as proof of the truth of the fact asserted; the test being the purpose for which the evidence is tendered."*

[19] Learned counsel further relied on the quoted statement from Rupert Cross on Evidence[6] as follows

> *"When a witness is asked to narrate a third person's statement for some purpose other than that of inducing the court to accept it as true, his evidence is said to be "original" Original evidence may therefore be defined as evidence of the fact that a statement was made, tendered without reference to the truth of anything alleged in the statement. … if A's sanity is in issue, B's evidence that he had frequently heard A claim to be the Emperor Napoleon would be original and no hearsay, for the claim would not be narrated in order to establish its truth, but as being the utterance of a man of dubious sanity"*

[20] The Learned Solicitor General referred to the decision of the Privy Council in the well-known and often quoted case of Subramanian –v- Public Prosecution[7] which referred to the rule against hearsay in this way

> *"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. "*

[5] Sir Roland Burrows KC, Phipson's Manual of the Law of Evidence (Sweet & Maxwell) at Chapter XIII page 84
[6] Rupert Cross, Evidence, (Butterworths, 3rd Edn, 1967 Vol 17 page 4
[7] [1956] 1 WLR 965 at 969

[21] Learned counsel for the defendants made further reference in support of her submission that the words were not inadmissible hearsay and quoted the words of Lord Parker CJ in **R-v-Wills**[8] when **Subramanian** was applied

> *"It is quite clear that evidence of what has been said by somebody else, who is not called as a witness, may be perfectly good evidence of the state of mind in which the prisoner was. In the recent case in the Privy Council **Subramanian –v- Public Prosecutor**, it was held that the state of mind of a man charged with possessing ammunition, contrary to certain regulations, could be proved by what had been told to him in the case by certain terrorists into whose hands he had come."*

RULING:

[22] The cause of action before the court as pleaded and pursued is that the defendants wrongfully arrested and imprisoned the claimant. In matters such as these, it is important that the court be placed in a position to possibly find /or assess the defendants' state of mind at the time of their action.

[23] Hearsay evidence is evidence given by a testifying witness of a statement made by some other person when such evidence is tendered to prove the truth of the statement. It is essential to appreciate that evidence is only hearsay when tendered to prove the truth of the facts asserted, not when tendered simply to show that the statement was made. [9]

[24] Having reviewed the statements of the police officers which are being complained of in view of the provisions of the Civil Evidence Act 1968 I find that the statements are admissible. I find that the statements were not being used to establish that the vehicle being driven by the defendants was in fact carrying illegal arms and ammunition. I find that the statement was made so as to cause the police officers to stop the vehicle take the claimant into custody and take him down to Police Headquarters. Thus in the circumstances the statements would not be hearsay.

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[8] [1960] 1 All E R 331 @ page 333

[9] Halsbury's laws of England Fourth Ed Vol 17 Paragraph 53

[25] The officers were giving original direct admissible evidence of what they actually did. They are seeking to provide a reason for their actions. The evidence which is being adduced is relevant to establishing the state of mind of the defendants' ultimately to decide whether their actions were reasonable in the circumstances.

[26] It is noted that learned counsel for the claimant; Mrs. Dyer- Munro submitted that to admit the evidence of the officers when one takes in to consideration the overriding objective of CPR 2000 would render the trial unfair in that to admit these statements would not ensure that the parties in the case at bar are on equal footing and in those circumstances the court will not be able to deal with the case justly. I disagree that in fact that to allow the evidence will put the case on even footing as the issue at bar is whether or not the defendants were acting lawfully in stopping the claimant on the day in question. How will the court be able to decide this if the defendants are prevented from being able to say what prompted them to act bearing in mind they were acting as police officers on the day in question. Their case is that they were acting on instructions and on intelligence received. To exclude the evidence would in fact prevent them from properly putting their case to the court to enable to the court to decide whether or not they were acting properly or not on the day in question.

[27] That they were instructed to proceed to do certain things and based on information received, they are seeking to provide evidence to the court as to what prompted their actions. That the reason for their actions was that which was told to them by their functional superior who himself will be attesting to that himself. As to whether they were justified is entirely another question to be decided at the end of the case when all the evidence has been presented to the court.

[28] The Privy Council statement as submitted by Learned Counsel for the Defendants in the **Subramanian case**[10] is indeed instructive and helpful.

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[10] Op cit (paras 59-60)

> "*It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by the evidence not the truth of the statement but that that the statement was made"*

[29] Contrary to Learned Counsel's Mrs. Dyer Munro's submission that the principle is not applicable to civil proceedings and in the case at bar, I make reference to the CCJ decision of **Ganga CHarran Singh –v- Ram Singh and Racoomarie Singh**[11]**.** In that matter the Caribbean Court of Justice (CCJ) in ruling on the admissibility of Hearsay in Civil Proceedings endorsed the Privy Council statement in **Subramanian** as being applicable.

[30] In the **Ramsingh Case,** the issue was whether the evidence of what a clerk in the Land Registry in Guyana said to the claimant was hearsay. The claimant was seeking to adduce the evidence of what the clerk said to him because based on what was said to him he took certain actions which were the subject matter of the proceedings before that court, that is the claimant sought to tender payment on property he bought at public auction and when he went to the registry he did not make the payment as he was told by the member of the staff who refused the payment that there was a court case regarding the piece of land. It was held that he could adduce the evidence of what the clerk told him as it is what caused him to do what he did (not make the payment) and that the statement was not being adduced to prove the truth of whether or not there was a court case and not in the circumstances hearsay.

[31] In the judgment of the court delivered by Mr. Justice Hayton the learned judge said this.

> *"The statement of the staff member was not being used to establish the legal proceedings existed but the fact that the statement was made so as to cause the Purchaser to depart the Registry without achieving the purpose he would have expected to achieve when proffering full payment.*

[11] (CCJ Appeal nu. CV 012 0f 2013)

Thus it does not rank as hearsay. We endorse the Privy Council's statement that

"It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made" …[12]

[32] In the event that I am wrong in admitting this evidence I would like to note that this case is being tried by a single judge without a jury and I find the statement of the CCJ in the **Singh Case** (At para 19) to be instructive in the circumstances.

> *"… The judge with his extensive experience of law and life is well placed to decide how much weight – or whether any weight – should be given to such evidence, taking account of other written or oral evidence. He can be trusted to apply his mind without prejudice to assess hearsay evidence for what it is worth in all the circumstances, unlike a jury of differing intellectual abilities with little experience of assessing evidence."*

[33] I am of the view that exclude the evidence would be unfair to the defence in the circumstances of this case. I find the evidence which is being tendered is not to establish the truth of the statement which would make them hearsay but it is evidence to prove that the statement was made and is therefore admissible. In the circumstances I would overrule the objection of Counsel for the Claimant in this regard.

M E Birnie Stephenson

High Court Judge

[12] Ibid para 18