IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

DOMHCR2015/0038

THE STATE

V

MITCHEL TOUISSAINT

Appearances:

Ms Evelina Baptiste, Director of Public Prosecutions for the State
Mr Darius Jones of Counsel for the defendant

2019: April 11th

RULING ON APPLICATION TO DECLARE THE COMMITTAL OF THE ACCUSED A NULLITY:

[1] CHARLES-CLARKE, J.: The defendant was indicted for the murder of Alexis Toussaint committed on 26th November 2011. The prosecution gave notice of intention to have the deposition of a witness Dr Jeffery Nine the Government pathologist, tendered into evidence on the ground that the witness is outside of the jurisdiction of the court and is therefore unavailable to give evidence at the trial. In support of its application the prosecution filed affidavits from Marilyn Matthew, clerk of the Magistrate's court.

[2] Defence Counsel Mr Darius Jones filed an objection to the application and also applied to the court for declarations that the depositions of Dr Jeffrey Nine and Hettie Toussaint were not taken in accordance with the provisions of Section 48 of the **Magistrate's Code of Procedure Act Chap 4:20** of the Revised Laws of

Dominica 1990 (The Act) and is therefore defective. He further applied for a declaration that the committal was founded on defective depositions and therefore a nullity. The grounds for the application are as follows:

i) That on the 10th day of February 2012 Dr Nine gave evidence and told the court that he would not be available to give evidence before the High Court as he was relocating to the United States permanently in April. At the time Dr Nine gave evidence the prosecution knew he would not be available. It was therefore unfair to the defendant and an abuse of process of the court to allow his deposition to be read into evidence.

ii) That the accused Mitchel Toussaint was unrepresented when Dr Jeffrey Nine gave evidence and he was not asked whether he wished to cross examine the witness.

iii) That the witness Hettie Toussiant gave evidence at the preliminary enquiry on 12th of June 2014. The defendant was never asked whether he wished to cross-examine the witness at the end of her testimony.

iv) That the Magistrate is a creature of statute and must comply strictly with the statutory requirements of the Magistrate's Code of Procedure Act and that non-compliance is fatal.

[3] Mr Jones also submits that there was an abuse of process in the manner in which the preliminary enquiry was conducted and the taking of Dr Nine's evidence. According to Mr Jones the defendant was arrested on the 26th November 2011 and kept in custody. The preliminary inquiry commenced on the 10th of February 2012 and Dr Nine was the only witness who gave evidence on that day when he indicated that he would be returning to the USA. The prosecution therefore knew Dr Nine would not be present and so there was a rush to get his evidence. The defendant was not given prior notice that the deposition of Dr Nine would be taken on that day. After Dr Nine gave his evidence no further evidence was taken until 2014 even though all the other witnesses were Dominicans and resident here.

Moreover some of the witnesses gave their police statements long after the deposition of Dr Nine was taken. This he asserted amounts to a deliberate manipulation by the prosecution and an abuse of the process.

[4] In support of his application Mr Jones relied on the affidavit of Mitchel Toussaint sworn to on the 21st of June 2017 in which he deposed that on the first day he appeared in court he did not have legal representation and was not familiar with court procedure and laws generally. He deposed that at the hearing of the preliminary enquiry on the10th of February 2012 Dr Nine gave evidence and he did not understand everything he said but remembered Dr Nine told the court that he was relocating permanently to the United States in April and he may not be available to give evidence in the High Court. When Dr Nine finished giving evidence he was never asked any questions by the Magistrate, and she never told him that he had the right to ask the doctor any questions neither did she ask him whether he wished to ask any questions.

[5] With regards to the deposition of Hettie Toussaint taken on the 12th of June 2014, the defendant deposed in his affidavit that on the 12th of June 2014 after Hettie Toussaint gave her evidence he was never asked by the Magistrate whether he wanted to ask her any questions or say anything.

[6] Mr Jones contends that there is nothing on the face of the record that shows the issue of cross examination was ever raised by the presiding Magistrate. As the defendant was unrepresented there was no excuse for the Magistrate not giving him the opportunity to cross examine the witnesses. He submits that when compared with the transcripts of the other depositions, where there is a notation at the end indicating '*no cross-examination'*, '*cross-examination declined*' or '*accused declines opportunity to cross-examine'*, the depositions of Dr Nine and Hettie Toussaint are completely silent on the issue of cross-examination.

[7] He therefore contends that in the case of both witnesses there was a breach of Section 48 of the **Magistrate's Code of Procedure Act**. According to Mr Jones it would have been different if the defendant was given the opportunity and he did not take advantage of it. He referred the court to the case of Cauldero and Nigill Francois v The State[1] where defence counsel was given full opportunity to cross examine the witness but did not take it.

[8] He invited the court to consider whether the statutory conditions were fulfilled and submitted that failure of the Magistrate to follow the statutory requirements would invalidate the deposition. Reliance was placed on the case of Bramble v R[2].

[9] In response to the application and submissions of defence the Director of Public Prosecutions, Ms Evelina Baptiste submits that there was compliance with Sections 48 and 49 of the Act which set out the conditions necessary to create a deposition. She argued that there are six conditions to be satisfied for a witness' evidence to become a deposition. These are:

i) The evidence of every witness shall be given in the presence of the accused.

ii) The accused or his counsel or solicitor shall be entitled to cross-examine the witness upon all facts relevant to the charge.

iii) As each witness gives evidence the material part shall be taken down in writing by the magistrate in narrative or if and so far as the magistrate may think fit, in the form of question and answer.

iv) The evidence of the witness taken down in writing shall be read over to the witness.

v) The deposition shall be signed by him;

vi) The magistrate shall also sign.

[10] The Director of Public Prosecutions (the DPP) submitted that the evidence of both Dr Jeffrey Nine and Hettie Toussaint satisfied all these requirements and were

[1] [1999 UKPC 44]
[2] [1959] 1 WIR 473

taken in accordance with Sections 48 and 49 of the said Act. The DPP further argued that the sections place no obligation on the committal magistrate to record any questions posed by her or answers given by the defendant and that the defenant was given an opportunity to cross-examine the witness. She argued that what must be taken down in writing is the evidence given by the witness. Therefore such failure cannot be a bar to the evidence of the witness who gave a deposition being adduced at the High Court.

[11] The DPP relied on the affidavits of Magistrate Candia Carette George to show there was compliance with the Act and that the defendant was given the opportunity to cross examine Dr Jeffrey Nine and Hettie Toussaint and argued that their depositions are valid.

[12] In her affidavit affirmed on 15th November 2018 Chief Magistrate Candia Carrette-George deposed that in 2012 she held the position of District Magistrate. She commenced a preliminary inquiry into a charge of murder against Mitchel Toussaint on 10th February 2012 for the murder of Alexis Toussaint. She took evidence on oath from Dr Jeffrey Nine in the presence and hearing of the accused Mitchel Toussaint. At the end of Dr Nine's evidence she gave the accused the opportunity to cross examine the witness. She deposed that she told the accused in plain language that he could cross-examine Dr Nine on anything he had said in his evidence or anything else about the matter which is relevant that he wants Dr Nine to answer. The accused did not cross examine Dr Nine.

[13] Similarly in her affidavit affirmed on 3rd December 2018 Magistrate Carette-George deposed that on the 12th of June 2014 she took the evidence of the witness Hettie Toussaint in the presence and hearing of the accused. She deposed that when the witness Hettie Toussaint completed her evidence she told the accused he could cross-examine the witness and she explained to him that he could question her about anything she had said in her evidence and about anything concerning the matter. The accused did not cross-examine the witness. She further stated that

through inadvertence she did not make a written notation of her questions and what she told the accused about cross-examining the witness.

[14] With regards to the taking of the evidence of both witnesses the DPP submitted that the magistrate inadvertently omitted to make a record of what she said to the accused about his right to cross examine the witnesses. Therefore the affidavits of Magistrate Carette-George seek to address or cure that omission. She submits that the court can hold an inquiry into the circumstances surrounding the taking of the depositions.

[15] Mr Jones objects to the affidavit of Candia Carette-George and argues that the affidavits are in direct contradiction to what is contained in the transcripts. According to Mr Jones the affidavits speak of matters that are not represented in the transcripts. The magistrate indicates that she did not make a record through inadvertence and it is crafted in such detail as to give the impression that there was communication between the Magistrate and the accused about the right to cross-examine Dr Nine. He further submits that the evidence provided in the affidavit constitutes new or fresh evidence.

[16] He submits that it is undesirable that the magistrate should prepare an affidavit to rebut what is disclosed in the transcript and referred to the case of Gregory Martinez v Cpl. 190 Alden Dawson Magisterial Appeal to the Supreme Court of Belize where the court was of the view that it was most unnecessary and undesirable that the Chief Magistrate who presided in the appellant's trial should swear to an affidavit to rebut the averments in the appellant's affidavit stating that on appeal against a judgement or decision whether the Magistrate court or a higher court, the presiding officer of the court whose decision or judgement is appealed, is not a party to the appeal and should not be called as a witness whether he is called to testify orally or by affidavit.

[17] Mr Jones referred to cases where the judge had failed to inform the defendant of his right to call witnesses and had also failed to make a record. These cases held that as a result of that failure the accused did not have a fair trial and therefore the

conviction and sentence was quashed. – R v The State v Cleveland Clarke[3]; He referred to the case of Leslie Tiwari v The State where the Privy Council found that the note on record "*case for the defence closed*" was insufficient and was consistent with the judge making no reference to the defence witnesses or asking the appellant whether he had any witnesses in court. In that case the court noted that the trial had taken place 13 years before and no affidavit evidence could be given that he judge did inform the appellant of his right to call witnesses. Also in R v Carter[4] where the accused was unrepresented by counsel the Court of Appeal found that the appellant should have been given every opportunity of putting forward his defence, calling his witnesses and the court should have given him every assistance.

[18] He submitted that the court should consider all the circumstances surrounding the taking of the deposition of Dr Nine such as:- the advancing of the hearing date of the preliminary inquiry from 20th April to 10th February 2013; the fact that the accused was unrepresented; and was not given adequate disclosure. This raises issues of a fair trial and abuse of process.

[19] In response the DPP submits that the evidence of Dr Jeffrey Nine is relevant to an issue in the trial namely the cause of death of the deceased. Further there is no prejudice to the accused in calling Hettie Toussaint to give evidence at the trial and that her evidence is highly probative as she is an eye witness whose evidence is necessary to negative the defence of self-defence raised by the defendant. She relied on the principle espoused in R v Sang[5] that all relevant evidence is admissible provided that its probative value outweighs its prejudicial value.

[20] The issues which the court has to determine are:

i) whether there was a breach of section 48 of the Magistrates Code of Procedure Act in that the magistrate failed to inform the

[3] (1976) 22 WIR 249
[4] (1960) 44 Cr. App. Rep. 225
[5] 1979 2 ALL ER 1222

defendant of his right to cross examine the witnesses Dr Jeffrey Nine and Hettie Toussaint;

ii) If the court finds there was such a breach what is the effect of the breach;

iii) Whether the depositions are invalid thereby rendering the committal a nullity.

iv) Whether the deposition of Dr Nine can be read into evidence on the ground that he is unavailable and outside the jurisdiction of this court.

[21] Section 48 of The Act provides:

> 'The evidence of every witness shall be given in the presence of the accused and or his counsel or solicitor shall be entitled to cross-examine the witness on all facts relevant to the charge, but not, except with leave of the Court, upon matters relevant only as to his credit'

[22] Section 49 provides:

> 'As each witness gives evidence the material part of it shall be taken down in writing by the Magistrate in narrative form, or, if answer so far as the Magistrate may think fit, the form of question and answer, but if the Magistrate is from any cause unable to take down the evidence in writing, the same shall be taken down in writing by the clerk of the court under the Magistrate's direction. The evidence of a 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 to be a deposition.'

[23] In Matthews (Charles) v The State[6] the Court of Appeal of Trinidad and Tobago per De La Bastide CJ. held that it was not every breach which results in nullification of the committal. The court distinguished between mandatory provisions the penalty for breach of which is nullification, and directory provisions breach of which is deemed to have a less drastic consequence. The court opined that some breaches of the procedural rules for the conduct of preliminary inquiries

[6] (2000) 60 WIR

are less grave than others. The degree of gravity may vary not only according to which rule is broken, but also according to particular circumstances in which the breach occurs, so that different breaches of the same rule may produce different results, at least in the case of rules which are not an essential part of due process. Noting that the consequences of the breach must be considered on a case by case basis the court held that where an accused who was represented by counsel at the preliminary inquiry elected to remain silent after being cautioned, where it can be assumed that counsel was aware of the accused right to call witnesses if he so chooses and where on the facts there was no one who could have been called by the accused as a witness, it was clear that the accused suffered no prejudice as a result of the failure of the magistrate to ask whether he wished to call any witnesses and the committal proceedings could not be impugned on the ground of breach of that provision.

[24] Reference was made to the cases of **Neil v North Antrim Magistrate's Court**[7] where it was held that where the magistrate had received inadmissible evidence the breach was fatal and rendered the committal a nullity; and R v Feener[8] a case from the Ontario High Court where Wells J remarked that:

> "On a preliminary hearing it is mandatory for the magistrate to ask the accused if he wishes to call any witnesses to give him an opportunity to do so, pursuant to section 454(3) of the Criminal Code, and a failure of the magistrate in this respect deprives him of jurisdiction and where he commits accused for trial such committal must be quashed. Semble: also, that where an accused is unrepresented by counsel it is not enough for the magistrate to merely ask the accused if he wishes to question the Crown witnesses, following their testimony, but should specifically explain to the accused his rights in respect of cross examination, particularly as here where the accused is charged with a serious crime**"**. (My emphasis)
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> De La Bastide CJ distinguishing Feena stated:
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> > "One significant difference between that case and ours is that the accused there was not represented by counsel. Also, while the decision of the Ontario court was not founded on it there was the additional factor in Feener that the accused was not given any

[7] [1992] 4 ALL ER 846
[8] (1960) 29 CAN CC 314

guidance with regard to cross-examination and in fact did **not ask any questions of the witnesses"**. (My emphasis)

[25] In The State v Cleveland Clarke[9] the court considered what evidence it would accept and rejected evidence of a letter from the trial judge of what he did. In that case the appellant was unrepresented by counsel at his trial and on appeal, complained that he was not informed by the trial judge of his right to call witnesses to testify on his own behalf when as a matter of fact he had witnesses who could have done so. There was no record to be found that the trial judge had told him of that right. The court allowing the appeal, held that this was a breach of his constitutional rights and also stated that the trial judge should make a note that he has informed the accused of his rights to call witnesses on his own behalf and also stated:

> **"..there ought to be no dearth of affidavit evidence, if the need for** such arises in the future to show us that the judge did in fact inform the accused of his right to call witnesses on his behalf. It is only by such means that one can ensure that that there has been a fair trial and that the cause of justice has been served. (My emphasis)
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> In this case, neither the "State Book" nor the original copy of the indictment had been of any help to us, and as the trial had taken place exactly one year ago, we did not think a letter from the trial judge could be of any assistance to us in this matter. We had no option therefore but to quash the conviction and sentence and discharge the accused".

This case makes it pellucid that the court can receive affidavit evidence, if it thinks fit, to show that the judge did in fact inform the defendant of that right.

[26] In The State v Nadisha Drigo Demizene[10] this court held that the failure of the magistrate to comply with the requirements of Section 48 of the Magistrate's Code of Procedure Act to give the defendant who was unrepresented the opportunity to cross examine a key witness was a fundamental breach which resulted in unfairness and rendered the deposition invalid and the committal a nullity. The court took this position because this was a key witness and the evidence of cross examination was not reflected in the deposition, there being no other evidence to

[9] (1976) 22 WIR 249
[10] Case No. 49 of 2016

indicate that the magistrate gave the defendant the opportunity to cross-examine the witness.

[27] The following can be distilled from the cases:

i) a failure to inform the defendant of his right to cross examine a witness or to call witnesses in his defence at a preliminary inquiry is a fundamental breach especially where the defendant is unrepresented by counsel which can amount to unfairness in the proceedings and denial of due process;

ii) It is not every breach that renders the deposition invalid and the committal a nullity. It depends on the effect of the breach and the prejudice to the defendant, which will be determined by the nature of the breach, the importance of the witness' evidence and its effect on the fairness of the trial;

iii) Where the record does not indicate that the magistrate followed the procedure as required by the statute the court can receive affidavit evidence to indicate what was done by the magistrate;

[28] Under Section 48 the right to cross examine a witness is mandatory and if the defendant is not given the opportunity this amounts to a fundamental breach which can render the committal a nullity. This breach is not only a denial of due process as it affects the defendant's right to face his accuser and present his defence which is a constitutional right but is compounded in a case where the defendant is unrepresented. In the instant case the defendant was not represented by counsel therefore it was imperative that he was given an opportunity to cross-examine the prosecution witnesses.

[29] In the instant case the evidence before the court was in the form of affidavits from both the Magistrate and the defendant. Neither magistrate Carette-George who was available for cross-examination nor the defendant was cross-examined. It is therefore left for the court to decide whose affidavit evidence to accept. In the case of Magistrate Carette George her evidence is that she told the accused in plain

language that he could cross examine Dr Nine and ask him questions about anything he had said or anything else which is relevant to what he said. The defendant declined to cross examine Dr Nine. With respect to Hettie Toussaint she explained to him that he could ask Hettie Toussaint questions about anything she had said or anything concerning the case. However the defendant who was unrepresented stated in his affidavit that he did not understand the proceedings and everything the Dr said, but he heard Dr Nine say he would be leaving the state. He deposed that the magistrate did not ask him if he wanted to ask the Dr any questions nor did she inform him of his right to cross examine Dr Nine. Similarly in the case of Hettie Toussaint he deposed that he was not asked by the magistrate to cross-examine the witness.

[30] In keeping with the learning in Cleveland Charles, I accept the affidavit evidence of magistrate Carette-George that she informed the accused of his right to cross-examine Dr Nine after he gave his evidence. Although this evidence was not tested in cross examination I accept it as a truthful account of what transpired at the preliminary inquiry. The magistrate swore to an affidavit that through inadvertence she omitted to make a record. I believe that the magistrate fully understands the implications of swearing to an affidavit. While I agree with Mr Jones that the record would confirm whether the magistrate gave the defendant the opportunity to cross examine the witness. However in the absence of such record I believe that other evidence can be received by the court to determine whether the magistrate followed the procedure in accordance with Section 48. Such evidence can be furnished by way of affidavit.

[31] I do not accept defence counsel's argument that the affidavit of magistrate Carette-George constitutes fresh evidence as it is not evidence in the substantive case for which the accused is before the court. Instead it is information of what transpired at the preliminary enquiry into which this court can enquire. This must be distinguished from the situation in Martinez which involved an appeal against conviction and sentence of the same magistrate's decision who purported to give evidence by way of affidavit. I am satisfied that the magistrate Carette-George

affidavit establishes that the defendant was informed of his right to cross examine the witnesses and that she in fact did inform him. Accordingly I hold that there was compliance with section 48 of the Magistrate Code of Procedure Act. I do not find there was a breach of the procedural requirements for taking the depositions of Dr Jeffrey Nine and Hettie Toussaint. I therefore hold that the depositions are valid and the committal is safe and therefore dismiss the application by the defence.

[32] As regards the issue of abuse of process I will only deal with that issue relative to the taking of the deposition at this stage. I do not find there was an abuse of process by advancing the date of the preliminary inquiry to allow the prosecution to take the evidence of Dr Nine. Section 171 of the **Magistrate's Code of** Procedure Act[11] makes provision for the magistrate to take the deposition of a person who is about to leave the State whether the preliminary enquiry has commenced or not or is in progress in the manner prescribed by this Act. This means that the legislature foresees that there will be situations when it will become necessary to advance the date for taking of the evidence of a witness who is about to leave the state. The taking of Dr Nine's evidence was done in accordance with the statute and I therefore do not find there was an abuse of process or a manipulation of the process by the prosecution.

[33] Regarding the question of admissibility of the deposition of Dr Nine, Mr Jones accepted that the question of admissibility of the deposition is a question for the discretion of the trial judge which only arises after the prescribed conditions have been satisfied. (See Barnes Desquottes et al & Scott et al v R)[12]. At this stage since no evidence has been led to establish the prescribed conditions for admission of the deposition, accordingly the issue of admissibility of the deposition of Dr Nine will be addressed during the course of the trial.

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[11] Chap 4.20

[12] Privy Council No.s 2 of 1987 and 32 of 1986)

[34] Finally, I wish to thank both counsel for their submissions and authorities provided in this matter.

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Victoria Charles-Clarke

High Court Judge

By The Court

Registrar