



IN THE SUPREME COURT OF NAURU
AT YAREN (CRIMINAL JURISDICTION)

Criminal Case No 3 of 2017

IN THE MATTER of an application by the
Prosecution for leave to adduce evidence from a
substitute forensic pathologist pursuant to the
Inherent Jurisdiction of the Court

BETWEEN

The Republic

APPLICANT

AND

Samaranch Engar

RESPONDENT

Before: Khan I
Date of Hearing: 20 February 2018
Date of Ruling: 21 February 2018

Case may be cited as: *Republic v Engar*

CATCHWORDS:

APPEARANCES:

Counsel for the Applicant: J Rabuku (DPP)
Counsel for the Respondent: S Valenitabua

RULING

INTRODUCTION

1. The respondent is charged with the offence of murder and the case is part heard. The prosecution has called 15 witnesses and it intends to call 2 more witnesses who are Sgt Iyo Adams and Dr Yeliena Barber (Dr Barber) who is a specialist forensic pathologist based in Melbourne and employed by Victorian Institute of Forensic Medicine (VIFM).

2. The trial commenced on 16 November 2017 and continued on until 22 November 2017 when the prosecution sought an adjournment to call its remaining 2 witnesses in February 2018. On 12 December 2017 the prosecution was informed that Dr Barber was sick and would not be available to travel to Nauru to give evidence.

APPLICATION

3. On 13 February 2018 the applicant filed a Notice of Motion seeking the following orders:
 - (1) The attendance of Dr Yeliena Barber of the Victorian Institute of Forensic Medicine, the forensic pathologist in this case cannot be procured.
 - (2) Leave is granted to the prosecution to summon and adduce evidence of a substitute forensic pathologist, Professor David Ranson of the Victorian Institute of Forensic Medicine due to unavailability of Dr Yeliena Barber.
 - (3) The autopsy report prepared by Dr Yeliena Barber for the death of Unique Lee Dick is admissible as business record of the Victorian Institute of Forensic Medicine.
 - (4) That leave be granted to summon Professor David Ranson as an expert witness in this matter.

In support of the application the applicant filed the affidavit of Sgt Adams and Neol Woodford who is the Director and consultant pathologist of the VIFM. Mr Woodford states in his affidavit that Dr Barber has been on indefinite sick leave since October 2017 and he was unable to state as to whether she will return to work; and if so, in what capacity. He further stated that VIFM is not in a position to confirm when Dr Barber will return to work and that VIFM is willing to provide a substitute pathologist namely Professor David Ranson who is the deputy director of VIFM.

4. The respondent opposes the application and in his affidavit, he states that Dr Barber will be cross-examined as to the pathological findings; and that Professor Ranson cannot assist as he was not the author of the post mortem report.
5. Apart from seeking leave to call Professor Ranson as a substitute pathologist the applicant is also seeking an order that the autopsy report prepared by Dr Barber is admissible as a business record of VIFM as she is unable to come to Nauru to give evidence.

SUBMISSIONS

6. I had ordered both parties to file submissions simultaneously on 19 February 2018. The respondent filed his submissions on 19 February 2018 and the applicant filed a skeleton submission and was granted leave to file full submissions by 20 February 2018. The applicant's submissions address two issues namely:
 - a) Whether Professor Ranson can be called as a substitute pathologist?

- b) Whether the autopsy report can be tendered as a business record under the provisions of the Criminal Evidence Act 1965; and whether Professor Ranson should be allowed to give evidence as an expert witness.
7. I shall first deal with the issue of substitute pathologist first and then address the issue of admissibility of the pathological report as a business record.

CONSIDERATION

Whether Professor David Ramon can give evidence as a substitute pathologist?

8. The applicant submits that there is no Criminal Evidence Act in Nauru. It is correct that we do not have a Criminal Evidence Act enacted by the Parliament of Nauru as such, however, by virtue of s.4 of the Customs Laws and Adopted Act 1971 the statutes of general application, including all Rules, Regulations and Orders of General Application made thereunder, which was in force in England on 31 January 1968 was adopted as the Laws of Nauru; and that amongst others includes Criminal Evidence Act 1965 (UK).
9. The applicant further submits that there is no provision relating to the admissibility of post mortem/autopsy report in the Criminal Procedure Act 1972; and whether a person other than the author of the post mortem or autopsy report can give an opinion on that document.
10. The applicant submits that in the absence of any legal provisions I should consider the provisions of s.46 of the Courts Act 1972 which empowers the Supreme Court to exercise jurisdiction similar to the High Court of England where there is a lacuna in the Nauruan Law regarding practice and procedures. The applicant concedes that s.4 of Customs Laws and Adopted Act 1971 limits the jurisdiction of the law in England which was in force as at 31 January 1968.
11. The applicant also concedes that both under the Criminal Procedure Act 1972 and under the Criminal Evidence Act 1965 there is no provision for Professor Ranson to give evidence as a substitute pathologist. The applicant further submits that the Criminal Evidence Act 1865 was repealed by the Criminal Justice Act 1988 by the UK Parliament and s.30 provides:
- (1) An expert report shall be admissible as evidence in criminal proceedings, whether or not the person making it attempts to give evidence in those proceedings;
 - (2) If it is proposed that the person making the report shall not give evidence, the report should only be admissible with leave of the Court;
 - (3) For the purpose of determining whether to give evidence the Court shall have regard —
 - a) As to the contents of the report;
 - b) To the reasons why it is proposed that the person making the report shall not give evidence;

- c) To any risk having regard in particular to whether it is likely to be possible to controvert statements in the report if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion would result in unfairness to the accused or, if there is more than one, to any one of them;
 - d) To any other circumstances that appear to the Court to be relevant.
- (4) An expert report, when admitted shall be evidence of any fact of opinion of which the person making it could have given oral evidence.
12. The applicant further submits that other jurisdictions including New South Wales, Victoria and Fiji have provisions to allow a substitute pathologist to give evidence. Fiji's Criminal Procedure Act was very similar to the Criminal Procedure Act of Nauru and the relevant provisions of the Criminal Procedure Act in Fiji was amended by Criminal Procedure Decree 2009 contained in s.133(1) and s.133(5) where it is stated:
- s.133(1) Any plan, report, photograph or document purporting to have been made or taken in the cause of an office, appointment or profession by or under the hand of any of the person specified in subsection (3), may be given in evidence in any trial or other proceedings under the provisions of this Decree, unless the person shall be required to attend as a witness by:
- a) The Court; or
 - b) The accused person, in which case the accused person shall give to the prosecutor not less than 14 clear days notice before the trial or other proceedings.
- s.133(5) The contents of any report which the prosecution intends to give as evidence under this section and about which notice has been given under subsection (2), may be referred to and commented upon by any other expert called as a witness in any criminal trial.
- 13, S.133(5) was considered by the Supreme Court in Fiji in *Nacagilevu v States*¹ where it was stated at [32] as follows:
- [32] In light of the matters considered above it can be concluded that the provisions contained in s.133(5) of the Criminal Procedure Decree 2009 can be invoked in order to summon an expert as a witness to comment on a post mortem report prepared by a different pathologist having produced it in evidence provided that the post mortem report prepared after a post mortem examination conducted by the pathologist falls within the scope of s.4 of the Evidence Act 41.

¹ [2016] FJSC 19; CAV 023.2015 (22 June 2016)

14. Unlike other jurisdictions which have legislative provisions to allow a substitute pathologist to give evidence, we do not have any provisions in Nauru and in the absence of which I cannot allow Professor Ranson to give evidence of the autopsy report as a substitute pathologist.

Whether the autopsy report can be tendered as a business record under the provisions of Criminal Evidence Act 1965: and whether Professor Ranson should be allowed to give evidence as an expert witness

15. The RON Hospital does not have a pathologist so that upon the death of the deceased for which the respondent is charged for murder the Australian Federal Police in consultation with the Nauru Police Force arranged for the deceased to undergo an autopsy by the VIFM. As I stated earlier that the report was carried out by Dr Barber who cannot come over to Nauru to give evidence or tender the autopsy report because of ill health.
16. VIFM is a body corporate established under the Victorian Institute of Forensic Medicine Act 1985 and its functions are stated at [7] of Noel Woodtford's affidavit where it is stated:

[7] The VIFM is a body corporate under the Act however its role and function is multifaceted. It operates under the auspices of the Victorian Department of Justice in providing forensic services to the Justice Department; it is also the Department of Forensic Medicine at Monash University. It is empowered to enter agreements with private citizens and law enforcement agencies internationally for forensic services.
17. VIFM provides forensic medical services to the law enforcement agencies in Australia and other jurisdictions. In this case the services were provided by VIFM were paid for by the Australian Federal Police upon the request of the Nauruan Commissioner of Police, Corey Caleb.
18. The applicants are seeking to have the post mortem or autopsy report prepared by Dr Barber to be admitted in evidence under the provisions of the Criminal Evidence Act 1965 as business record.
19. The respondent opposes this application and relies on *R v Crayden* (Crayden)². Mr Valenitabua submits that at³ that "...the post mortem on Unique's body was done at Nauru Government Hospital. Records of post mortem were prepared and copies ought to have been kept in Unique's medical file at RON Hospital. The reports were then provided to the Nauruan Police Force for investigation purposes. VIFM by implication, became part of the Nauru Government Hospital which is an entity for public benefit and not private profit. VIFM and Nauru Government Hospital were in the circumstances not businesses.
20. Mr Valenitabua relies on Crayden at page 704 where it is stated:

² [1978] 2 All ENR 700

³ Respondent's written submissions dated 19 February 2018 [4.5]

“The supply of goods or services by a body specified in s.1(4) is a form of commercial activity carried out for the public benefit, but not for private profit.”

21. In *Town Investments Limited and others v Department of Environment*⁴ Lord Diplock stated at page 819 as follows:

“The answer to this question depends on how broad a meaning is to be ascribed to the word ‘business’ in the definition of ‘business tenancy’ in the two counter-inflation orders. The word ‘business’ is an etymological chameleon; it suits its meaning to the context in which it is found. It is not a term of legal art and its dictionary meaning as Lindley J pointed out in *Rolls v Miller* embrace ‘almost anything which is an occupation, as distinguished from a pleasure — anything which is an occupation or a duty which requires attention is a business...’. That was said by Lindley J in **connection with** construction of a covenant of a lease against carrying on of any trade or business on the demised premises.... ”.

In *Crayden* it was stated at page 704 as follows:

“Every one of the activities specified in the enlarging words of 1965 Act relates to an activity which has an element in it of supplying services or goods although it may not be the only element. The supply of goods or services by bodies specified in s. 1(4) is a form of commercial activity carried on for the public benefit, but not for private profit. It follows, in our judgment that the words ‘business’ as used in the 1965 Act has a commercial connotation.

22. Section 4 of the Criminal Evidence Act 1965 is similar to s.4 of the Evidence Act (41) of Fiji. In *Singh v State* it was stated by the Fiji Court of Appeal as follows:

“Section 4 in their definition of ‘business’ are clearly based on similar provisions of the Criminal Evidence Act 1965 (UK).”

23. The preparation of the pathologist report is the responsibility of the RON Hospital as the only hospital in Nauru and because of the lack of facilities it was prepared by VIFM at the request of the Commission of Police. The post mortem report was done at the RON Hospital by VIFM who charged a fee. I am satisfied that if RON Hospital does not have facilities available in terms of expertise it can outsource work and the work done on its behalf falls within the ambit of business as defined under the Criminal Evidence Act 1965.
24. The post mortem report prepared by Dr Barber is in compliance with the provisions of s.146(2)(c) of the Criminal Procedure Act 1972. It contains an acknowledgment that should the statement be false then she will be liable for perjury.
25. In the circumstances, I admit the post mortem report prepared by Dr Barber in evidence in its entirety.

⁴ House of Lords (1977) 1 ALL ER A23

⁵ [1999] FJCA 33; AAU00012L97S (14 May 1999)

26. Having admitted the post mortem report prepared by Dr Barber under the provisions of the Criminal Evidence Act I have no power to allow Professor Ronson to give evidence as an expert witness. So the applicant's application in that regard is refused.

Dated this 21 day of February 2018



Mohammed Shafiullah Khan
Judge