



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 J
Date of Hearing: 11 April 2018
Date of Ruling: 13 April 2018

Case may be cited as: *Republic v Engar*

CATCHWORDS:

Whether this court is functus officio having delivered an earlier ruling- whether res judicata applies to this application.

Held: That a finding was made that earlier to disallow the prosecution to call the witness subject of this application but that ruling was in a different context.

APPEARANCES:

Counsel for the Applicant: L Tubuakuro

Counsel for the Respondent: S Valenitabu

RULING

INTRODUCTION

1. On 9 April 2018 the applicant filed an application (second application) pursuant to s.100¹ seeking an order that Professor David Leo Ranson (Professor Ranson), Deputy Director and Head of Forensic Services of Victorian Institute of Forensic Medicine

¹ Criminal Procedure Act 1972

(VIFM) be allowed to give evidence on behalf of the prosecution on 17 April 2018 when this trial is due to recommence.

2. The post mortem in this matter was conducted by Dr Yeliana Baber (Dr Baber), Forensic Pathologist of VIFM. Both Professor Ranson and Dr Baber work for VIFM and live in Victoria, Australia. Dr Baber travelled to Nauru to conduct the post mortem as RON Hospital in Nauru did not have a pathologist; the autopsy report was prepared by her on 3 April 2017.
3. The trial in this matter commenced in November 2017 and the prosecution had always intended to call Dr Baber as a witness. The prosecution was informed by VIFM in December 2017 that Dr Baber was on medical leave and the trial was adjourned to January 2018 to allow prosecution to seek her attendance.
4. In January 2018 the prosecution was informed by VIFM that Dr Baber will not be able to travel to Nauru to give evidence because of her medical condition and consequently the applicant filed an application on 13 February 2018 (first application) pursuant to the inherent jurisdictions of the Court seeking the following orders:
 - 1) The attendance of Dr Yeliana Baber 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 the evidence of a substitute forensic pathologist, Professor David Ranson of the Victorian Institute of Forensic Medicine due to unavailability of Dr Yeliana Baber;
 - 3) The autopsy report prepared by Dr Yeliana Baber for the death on Unique Lee Dick, is admissible as a business record of the Victorian Institute of Forensic Medicine;
 - 4) That leave be granted to summon Professor David Ranson as an expert in this matter.
5. After the application was filed Miss Tubukuro, the counsel in carriage of this matter was taken ill and despite her illness she prepared the written submissions and the Director of Public Prosecutions presented oral arguments in respect of the first application. I delivered my ruling on 21 February 2018. In my ruling I stated as follows at [14], [23], [24], [25] and [26]

[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.

[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 Commissioner of Police. The post mortem 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 then 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 (UK).

- [24] The post mortem report prepared by Dr Baber is in compliance with the provisions of s.146(2)(c) of the Criminal Procedure Act 1972. It contains an acknowledgement that should the statements be false then she would be liable for perjury.
- [25] In the circumstances, I admit the post mortem report prepared by Dr Baber in evidence in its entirety.
- [26] Having admitted the post mortem report prepared by Dr Baber under the provisions of the Criminal Evidence Act 1965(UK) I have no powers to allow Professor Ranson to give evidence as an expert witness. So the applicant's application in that regard is refused.
6. Prior to filing the second application, the applicant obtained a statement from Professor Ranson which is annexed to the affidavit of Sgt Adams which sets out his forensic pathology opinion relating to the contents of the autopsy report prepared by Dr Baber and that statement was disclosed to the defence before this application was filed. S.100² provides as follows:

Power to Summon Material Witnesses and Examine Persons Present

- 1) Any Court may at any stage of the proceeding under this Act, of its own motion or on the application of any party, summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall, unless the circumstances make it impossible to do so, summon and examine or recall and re-examine any such person if his evidence, or further evidence appears to be essential to the just decision of the case.
7. The prosecution's reasons for calling Professor Ranson as an expert is to explain the complex medical and pathological terminologies contained in the autopsy report; Miss Tubuakuro submits that an expert witness is allowed to comment on another expert witness's report; and in this matter Professor Ranson should be allowed to comment on Dr Baber's autopsy report.
8. The defence opposes the application and submits that Professor Ranson's statement as disclosed would be prejudicial to the defence. Mr Valenitabu also submits the Court having determined the first application has ruled at [26]³ 'that having admitted the post mortem report under the provisions of the Criminal Evidence Act 1965 (UK) that it has no power to allow Professor Ranson to give evidence as an expert witness'; is now functus officio. Mr Valenitabu also raises the issue of res judicata and submits that since the matter has already been dealt with. Mr Valenitabu also raised a further objection in his written submissions⁴ that despite this Court's order on 21 February

² Criminal Procedure Act 1972

³ Ruling dated 21 February 2018

⁴ Dated 10 April 2018

2018 that Dr Baber's autopsy report be admitted as business record of RON Hospital the 'contents of the report have not been proven as facts'.

9. I drew the provisions of s.1 of the Criminal Evidence Act 1965 (UK) to Mr Valenitabu's attention and he withdrew his opposition in respect of 'the contents of the report have not been proven as facts'. S.1⁵ states:

1) Admissibility of certain trade or business records

- i) In any criminal proceedings where direct oral evidence of a fact would be admissible any statement contained in a document intending to establish that fact shall, on production of the document be admissible as evidence of that fact if –
 - a) The document is, or forms part of, a record relating to any trade or business and compiled in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and
 - b) The person who supplied the information recorded in the statement in question is dead, or beyond the seas or unfit by reasons of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters within the information he supplied.

CONSIDERATION

10. The defence does not dispute that Professor Ranson is an expert and in his curriculum vitae it is stated that he has performed several thousand autopsies and he gave expert testimony in various courts.

THE ISSUE FOR DETERMINATION IS WHETHER THIS COURT IS FUNCTUS OR THE MATTER IS RES JUDICATA

11. Functus officio and res judicata can be used interchangeably; a Court is functus officio when having made a valid determination it is precluded from re-opening the matter; and the principles of res judicata apply when a Court having made a final determination it is prevented from re-opening the same matter.

12. In my ruling of 21 February 2018, I was called upon by the applicant to allow them to call Professor Ranson as a substitute pathologist under the common law principles and the prosecution conceded that neither the Criminal Procedure Act 1972 nor the Criminal Evidence Act 1965 (UK) which is the law of Nauru pursuant to the Customs Laws and Adopted Act 1972 made provisions for a substitute pathologist to give evidence. I ruled at [14]⁶ that in the absence of any legislative provisions I cannot allow Professor Ranson to give evidence as a substitute pathologist.

⁵ Criminal Evidence Act 1965 (UK)


⁶ Ruling dated 21 February 2018


13. There was a further application that the autopsy report be tendered as a business record of VIFM and I admitted the autopsy report as the business record of RON Hospital under the provisions of the Criminal Evidence Act 1965 (UK); the full consequences of the admission of the autopsy report has been explained earlier that the entire document is to be treated as an 'evidence of the facts'. When I admitted the autopsy report I stated at [26]⁷ of my ruling that I had no powers to allow Professor Ranson to give evidence as an expert; as the autopsy report is already admitted as evidence of the facts stated.

THIS APPLICATION

14. This application by the prosecution is an application to call Professor Ranson to explain the autopsy report of Dr Baber which is already in evidence.
15. The autopsy report is some 12 pages long and it contains some very complex medical/pathological terminologies and neither the Court nor any of the counsels have the knowledge to fully understand those terminologies. Further, if Dr Baber was available to give evidence then no doubt she would have explained the entire report in simple layman's language.
16. This application is only to assist the parties and the Court to have a better understanding of the autopsy report by an expert who holds a very senior position within VIFM and his explanation will enable the parties to cross examine him on the explanations that he provides.
17. I reiterate that my ruling on 21 February 2018 was in the context explained earlier and this application is in an entirely different context under the provisions of s.100 of the Criminal Procedure Act 1972 and I am satisfied that Professor Ranson would be a material witness, so I allow the application.
18. I notice that at page 12 of the autopsy report Dr Baber states that: "*This case has been reviewed in its entirety by a second pathologist.*" It is not known as to who the second pathologist is but if he/she reviewed the case in its entirety then he/she may well be a co-author of the report and therefore he/she may be able to tender the report in that capacity and also comment on it. I do not have all the details before me at this stage and I thought that it is important that I should bring this matter to the attention of the parties and in particular to the prosecution who may want to consider this further matter in that regard.

Dated this 13 day of April 2018


Mohammed Shafiqul Khan
Judge



⁷ Ruling dated 21 February 2018