

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO2/2013

[2015] SCSC 171

THE REPUBLIC

Versus

ROY BRIOCHE

First Accused

ROBERT JEAN

Second Accused

DANNY BRESSON

Third Accused

FRANKY THELERMONT

Fourth Accused

NADDY DELORIE

Fifth Accused

GEORGE MICHEL

Sixth Accused

KENNETH ESPARON

Seventh Accused

Heard: 14th, 18th, 19th and 21st May, 2015

Counsel: Mr. David Esparon, Principal State Counsel, and Mr. Hemanth Kumar, Assistant Principal State Counsel for the prosecution

Mr. Camille appearing for first accused

Mr. Clifford Andre appearing for second accused

Mr. Melchior Vidot appearing for third accused

Mrs. Alexia Amesbury appearing for fourth and fifth accused

Mr. Anthony Juliette & Mr. Nichol Gabriel for sixth and seventh accused

All Seven (7) Accused – Present

Delivered: 29th May, 2015

REASONS FOR RULING ON *VOIRE DIRE*

Robinson J

[1] Background

[2] These proceedings concern counts 5 and 6 of the Amended Formal Charge against the first, second, third, fourth and fifth accused persons (hereinafter referred to as "the accused persons"). Count 5 charges the accused persons with unlawful possession of a firearm and ammunition contrary to section 84 (1) of the Penal Code read with section 23 of it and punishable under the said section 84 (1). Count 6 charges the accused persons with possession of a firearm and ammunition without a license contrary to section 4 (1) of the Firearms and Ammunitions Act, Cap 80 read with section 23 of the Penal Code and punishable under section 4 (2) (b) of the said Act.

[3] The category of forensic evidence at issue is an AK 47 Rifle S/N 1953 EW4928 with folded batt and one AK 47 magazine containing 30 of 7.62mm bullets. The prosecution is seeking to adduce expert evidence of opinion. The critical evidence for the prosecution is the examination of the AK 47 Rifle S/N 1953 EW4928 with folded batt and one AK 47 magazine containing 30 of 7.62mm bullets for the purposes of the charges on counts 5 and 6 of the Amended Formal Charge.

- [4] The dispositive issue is whether or not Corporal Radley Moncherry, who serves as an armourer with the Police Support Security Wing in the Seychelles Police Force, is a competent witness to qualify as an expert on the subject of firearms and ammunition.
- [5] This court held a *voire dire* to determine whether or not Corporal Radley Moncherry is properly qualified as an expert on the subject of firearms and ammunition. Mr. David Esparon for the prosecution, in his closing arguments, submitted that Corporal Radley Moncherry is a properly qualified expert. The defence counsel, in their closing arguments, each highlighted the fact that Corporal Radley Moncherry does not hold the qualifications and expertise required for him to constitute an expert witness.
- [6] This court, on the 25th May, 2015, ruled that Corporal Radley Mocherry is not qualified to give expert evidence of opinion on the subject of firearms and ammunition and stated that it will give reasons for its decision on the 29th May, 2015.
- [7] The *voire dire*
- [8] The prosecution called Corporal Radley Moncherry of the Police Support Security Wing, Staff Sergeant Emmanuel Esparon of the Seychelles People's Defence Forces and agent Jimmy Louise of the National Drugs Enforcement Agency.
- [9] The defence called evidence on the *voire dire*. Mr. Anthony Juliette conducted the case for the defence. The defence called Mr. Robert Ernesta and Brigadier Leopold Payet, the Chief of the Seychelles People's Defence Forces.
- [10] Evidence for the prosecution
- [11] The evidence of Corporal Radley Moncherry
- [12] In the *voire dire*, Corporal Radley Moncherry described his qualifications and experience as follows. He joined the National Guard in 1996 and held the rank of Private. He began

discharging the duties of an armourer while serving in the National Guard. On a day-to-day basis he "issued arms" and performed "sentry duty" (*proceedings of 14th May, 2015, at 10:00 am*).

[13] Corporal Radley Moncherry "*qualified on the Armourer Course Class III held at the Defence Forces Headquarters*", Mahe, Seychelles, after completing a six months course from 24th June, 2003 to 20th December, 2003. After completing the course, he discharged the duties of an Armourer Class III. The following excerpts of the examination in chief of Corporal Radley Moncherry, by learned counsel for the first accused, described his duties as follows (*Proceedings of 14th May, 2015 at 10:00 a.m.*) —

Q. So after 2003 you have been doing the job after you were qualified as the Armourer again, you were still doing the job?

A. Yes.

Q. And you had more responsibilities?

A. Right now.

Q. No, after 2003?

A. Yes, I repaired the arms and also to do examination.

Q. What kind of examination?

A. Like for example I have been doing in the Piracy case, if a gun has been shot, I have to examine it to see it to see if the shot has been taken or not, or serviceable.

Q. And how many piracy cases as to your expertise as regards to weapons, guns and ... had you testify before the court?

A. A few.

Q. And has your evidence been accepted by the court?

A. Yes.

Q. Now Mr. Moncherry from the time you received the certificate in 2003 to this date, how many years does it make?

A. I have to count.

Q. That makes around 11 years to 12 years?

A. Yes, about.

Q. And what sort of weapons did you examine during the piracy case?

A. AK 47 and pistol.

Q. And as an armourer, can you tell us roughly around how many weapons have you examine before?

A. I would not remember.

Q. Is it one or –

Mr. Juliette: He says he cannot remember then you suggest the figures to him. He has answered.

Q. Is it one or -

Mr. Juliette: Now he does it again. I have just objected. Please rule. He is leading the witness and we object.

Court: He cannot recall how many.

Mr. Esparon continues:

Q. Can you say approximately maybe?

A. More than 1, more than 2.

Q. In piracy cases themselves how many were there?

A. I would not recall.”.

[14] Corporal Radley Moncherry testified that he remained as an armourer with the National Guard until it was dismantled. Shortly thereafter he joined the Police Support Security Wing of the Seychelles Police Force where he has been serving as an armourer for the past seven (7) years. Corporal Radley Moncherry rose through the ranks, from Private to Corporal.

[15] Corporal Radley Moncherry was subject to vigorous cross-examination by the defence. Each counsel for the defence questioned the qualifications and expertise of Corporal Radley Moncherry. This court gives a summary of the cross-examination of Corporal Radley Moncherry.

[16] Regarding his qualifications and expertise, his evidence was consistent with his evidence in chief. He stated that, after completing the "*Armourer Course Class III*", on a day-to-day basis his duties included conducting minor repairs on firearms; issuing a firearm to police officers authorised to carry arms on sentry duty; cleaning of firearms; and painting of firearms. Corporal Radley Moncherry added that he is not a ballistic expert. He stated that he is an armourer.

[17] The following excerpts of the cross examination of Corporal Radley Moncherry by learned counsel for the first accused are important in relation to the issue of his qualifications and expertise, (*Proceedings of 14th May, 2015 at 10:00 a.m.*) —

"Q: And you said that in your time at National Guard and in your time at the PSSW, the only qualification that you have is a Class III certificate that you did sometimes back in 2003?

A. Yes.

Q: And all this time you have been working as an Armourer, this is all you did?

A. Until now, yes.

Q: And as an armourer you said that you will issue arms when people are going on sentry duty, yes?

A. Yes, whilst I was working at the National Guard and now I also repair, I do minor reparations.

Q: And you said in regards to this Class III, you say you do not know much about this qualification, you said you do not know much about this, it is a Class III Armourer qualification that you have.

A: Yes, for the stage that I have reached for fixing minor."

[18] The following excerpts of the cross examination of Corporal Radley Moncherry by learned counsel for the second accused are important in relation to the issue of his qualifications and expertise, (*Proceedings of 14th May, 2015 at 10:00 a.m.*) —

"Q: No, Mr. Moncherry, the question- I am not asking you what do you do, I am asking you, if you do not know you tell the court, you do not know. What is the duty of an Armourer?

A: I think it must do the same work that I do, if it is an Armourer.

Q: Do you mean an Armourer is to issue weapons-

A: From my knowledge yes when you reach the Class 3 you do the minor reparation. That is in my knowledge what I know.

Q: You are telling me your knowledge only.

A: Yes.

Q: Not necessarily what an Armourer, the definition of an Armourer is?

A: I was told where I was.

Q: So, now Mr. Moncherry correct me if I am wrong, your duty is to issue weapons to officers going on duty, that means, how do you issue them?

A: When you are issuing an officer a weapon you have to write in a book, the record for example if you are issuing Mr. X weapon and bullet you have to write in the book and also the number of the gun.

Q: And then when he returns, he gives you back, you sign the book that is written in the said record book?

A: To check if everything is in order and I have to record in the book.

Q: You told us checking, what do you check?

A: If the 30 bullets are still here.

Q: And this could be done by anyone?

A: There are three of us in the Armory, and if for example I leave the other will do the job.

Q: No, what I am saying Mr. Moncherry is all of us know how to count, so we can see there are 30 bullets. That anyone can do that, anyone can count there are 30 bullets it is okay. So, anyone can do that. No, I am just asking you. If it is yes, you say yes. Anyone can count if there are 30 bullets or not.

Court: Mr. Andre, I can count too, if it is 30 bullets.

Mr. Andre Continues

- Q: Yes, even the Judge can count that there are 30 bullets.**
A: We all can count but when the officers are giving back the gun, you have to check.
- Q So, my question to you now Mr. Moncherry, we do not need an expert to count 30 bullets, is that correct?**
A: You do not need an expert, but it is in my line of duty.
- Q: Now, you told us you do minor repairs. Can you tell us what type of minor repairs?**
A: If the trigger is broken and also the batt also. If the gun is not clean I have to clean it and also to paint it.
- Q: So, the duties you do is not done by an expert?**
A: As an Armorer I do it, I do not know if you have to be an expert to do it.
- Q: I put it to you Mr. Moncherry that you do not have the required academic capacity to be an Armourer. Would that be correct for me to say?**
A: I would have not been issued a certificate if I was not.
- Q: So, for you to get the certificate what did you do in that course?**
A: Like I have said, it shows us how to repair the small minor reparation and also to paint weapon also.”.

[19] The following excerpts of the cross examination of Corporal Radley Moncherry by Mr. Anthony Juliette are important in relation to the issue of his qualifications and expertise, (*Proceedings of 18th May, 2015 at 9:30a.m.*) —

- ”Q: In a case I referred to you last week a pirate’s case that you gave evidence in remember that case?**
A: Yes.
- Q: The prosecutor called you in that case and made you out to be a ballistic expert and the judge gave a judgment on that saying that you are a ballistic expert you are aware of that.**

A: This is what he said I did not say this. All I have said is that I am an Armourer not a ballistic expert because I know that I am not one.

Q: And the prosecutor in the present case has again on many occasions told the Court that you are an expert in that field are you an expert?

A: My position stays as I have told you.

Q: Armourer?

A: Yes.

Q: I put it to you Sir that the course that you have done does not qualify you to be an expert in the fields of arms?

A: If it is you who is telling me I do not know.

Q: And I further I put it to you that upon your own admission many many times in this box under oath you have told us that you are not an expert?

A: Ballistic expert I am not.

Q: You are an expert in what then?

A: I am an armourer.

Q: You are not an expert in armoury.

A: Armourer."

[20] *The evidence of Staff Sergeant Emmanuel Esparon*

[21] The prosecution then led the evidence of Mr. Emmanuel Esparon, an armourer and a weapons technician. He testified that Corporal Radley Moncherry and himself "*qualified on the Armourer Course Class III held at the Defence Forces Headquarters*" in 2003. In chief, he described the course as follows (*Proceedings of 18th May, 2015 at 9:30a.m.*) —

"Q: Now that long for a person after his course having a class 3 armourer for example you have a class 3 armourer now?

A: Yes.

Q: You have done the job like you said for 12 years?

A: Yes.

Q: How qualified would you be?

A: The course which I did in 2003 was only a basic training there was supposed to be a follow up after to continue because this is class 3 in this course they showed us how to issue firearms, how to register and the basic how to disassemble the firearm and also to do minor repairs on it.

Q: And what else?

A: That's it."

[22] This court gives a summary of the cross-examination of Mr. Emmanuel Esparon. In cross-examination, Mr. Emmanuel Esparon stated that he is a Staff Sergeant in the Seychelles People's Defence Forces. He pointed out that the "*Armourer Course Class III*" focused on the "*AK 47, pistol and light machine gun*". The cross examination of the witness, by learned counsel for the second accused, on the issue of "*disassembling*" of a firearm, is important (*Proceedings of 18th May, 2015 at 9:30a.m.*) —

"Q: Would it be true for me to say that everyone who joins the army knows how to disassemble and assemble an AK47 if it is an officer a pistol a warrant officer upwards a pistol would it be right for me to say that?

A: Yes you are right.

Q: So it is not a speciality that is attributed to one person would that be correct for me to say?

A: Yes."

[23] *The evidence of agent Jimmy Louise*

[24] Mr. Jimmy Louise is an agent in the National Drugs Enforcement Agency. Agent Jimmy Louise testified that Corporal Radley Moncherry and himself followed the "*Armourer Course Class III held at the Defence Forces Headquarters*" in 2003. Agent Jimmy Louise did not complete the said course.

[25] *The evidence for the defence*

[26] *The evidence of Mr. Robert Ernesta*

[27] Mr. Anthony Juliette led the evidence of Mr. Robert Ernesta. Mr. Robert Ernesta served in the Seychelles People's Defence Forces from 1979 to 2007 and rose in rank to become a Lieutenant Colonel. Mr. Robert Ernesta exhibited a copy of the Armourer Course Class III Certificate of Corporal Radley Moncherry.

[28] Mr. Robert Ernesta stated that an armourer conducts minor repairs on small arms; issues small arms to those authorised to carry them; cleans small arms; and paints small arms. This court did not consider the evidence of Mr. Robert Ernesta on the issue of "*firearm serviceability*".

[29] *The evidence of Brigadier Leopold Payet*

[30] Brigadier Leopold Payet is the Chief of the Seychelles People's Defence Forces. He was called by the defence to testify regarding the circumstances of the departure of Mr. Robert Ernesta following an attack on the credibility of the witness by learned counsel for the prosecution. He testified that Mr. Robert Ernesta, a man of exemplary character, left the Seychelles People's Defence Forces voluntarily.

[31] Discussion

[32] The prosecution argued that the expertise of Corporal Radley Moncherry stems from training ("*Armourer Class III Course*") and practical experience as an armourer. The defence did not share this view. The defence counsel were of the view that Corporal Radley Moncherry has not attended any firearm and ammunition course that would allow him to call himself an expert, and that as an armourer he did not qualify to give expert evidence of opinion on firearms and ammunition.

[33] The general rule is that the evidence of a witness in the form of opinion is inadmissible in both civil and criminal cases, and that a witness is confined to giving evidence of facts. The admissibility of expert evidence is the principal exception to this rule.

[34] The admission of expert evidence depends on the application of the following criteria —

- (a) relevance;
- (b) necessity in assisting the trier of fact or judge;
- (c) the absence of any exclusionary rule;
- (d) a properly qualified expert.

In the present proceedings only the qualification and expertise of Corporal Radley Moncherry is at issue. What constitutes an expert for the purposes of giving expert evidence of opinion remains at the discretion of the trial judge. The main considerations that this court will take into account are the possession of knowledge of the expertise in question, and an ability to use that knowledge as a result of training or education in that specialism. During argument in *R v Silverlock* [1894] 2 QB 766 Vaughan-Williams J stated that —

"No one should be allowed to give evidence as an expert unless his profession or course of study gives him more opportunity of judging than other people."

[35] In light of the above, this court agrees with the submission of the prosecution that, whether or not the expertise of a person stems entirely from practical experience or from formal study or a mixture of both is irrelevant once the person proves that he has acquired the knowledge that gives him an expertise not possessed by the ordinary person. Therefore, the question for the determination of this court is whether or not the prosecution has established that Corporal Radley Moncherry has acquired special knowledge through study or experience in respect of the matters on which he undertakes to give evidence.

[36] Corporal Radley Moncherry undertakes to give expert evidence of opinion on the subject of firearms and ammunition. This court noted that Corporal Radley Moncherry never claimed to be an expert in firearms but was presented as an expert by the prosecution.

[37] The limitations of Corporal Radley Moncherry as an expert were exposed fully under examination-in-chief and cross-examination. In examination-in-chief, he testified that his duties included, in the words of the witness, *"like for example I have been doing in the Piracy case, if a gun has been shot, I have to examine it to see it to see if the shot has been taken or not, or serviceable"*. He has examined more than two (2) weapons as an armourer and could not remember how many weapons he has examined for the purposes of *"piracy cases"*. No evidence was led by the prosecution regarding how Corporal Radley Moncherry has acquired expertise in relation to the examination of firearms and ammunition. According to Corporal Radley Moncherry, on a day-to-day basis, his duties included conducting minor repairs on firearms, issuing firearms to police officers authorised to carry them on sentry duty, cleaning of firearms and painting of firearms. Having considered the evidence in these proceedings, this court is satisfied that the evidence of Corporal Radley Moncherry fell short of proving that he is a firearms and ammunition expert.

[38] Decision

[39] In light of the above, this court is of the opinion that Corporal Radley Moncherry, who serves as an armourer with the Police Support Security Wing in the Seychelles Police Force, is not a competent witness to qualify as an expert on the subject of firearms and ammunition.

Dated signed and delivered at Palais de Justice Ile du Port this 29th May 2015.

Fiona Robinson
Judge of Supreme Court