



In the Supreme Court of Bermuda
CRIMINAL JURISDICTION
2017: No. 15

B E T W E E N:

THE QUEEN

v

MELISSA BURTON

ADDENDUM RULING TO NO CASE APPLICATION NO. 2

Date of Hearing: 13th and 16th July 2018

Date of Ruling: 17th July 2018

Larry Mussenden and Alan Richards, Office of the Director for Public Prosecutions
Mark Pettingill, Chancery Legal Ltd., for the Defendant

1. The Court handed down its ruling in the second no case hearing on the morning of the 17th July 2018. Having read it, Mr. Mussenden sought to address the court on a matter that he considered the court had overlooked. The court allowed Mr. Mussenden to bring the matter to the court's attention. He brought to the court's attention paragraph 23 of the above judgment, in which the court stated:

“Mr Richards contends that the indictment does not need to be amended in the circumstances. He argues that the defence has had a second attempt at a “no case submission” on different grounds than the earlier application. He further contends that if there was any merit in the submission of “no case” the court would have expected the arguments to have been raised sooner.”

2. Mr. Mussenden pointed out to the court that he had addressed the court earlier in terms of the prosecution seeking an amendment to the particulars to incorporate an alternative to “money” if

the court was of the view that the particular “money” could not stand. The court accepts that as a submission that it ought to have considered in its above ruling. The court’s comments in paragraph 23 of the above ruling resulted from the court referring to an argument made by Mr Richards in his written submission which the court received 16 July 2018. Mr Mussenden addressed the Court prior to receipt of the written submission at the end of the previous week.

3. The court considered Mr. Mussenden’s application to amend the indictment insofar as the particular “money” as drafted in counts 1 through 5 (the theft charges) is concerned to coincide with the suggested wording by Mr. Richards. The court gave an *ex tempore* judgment and now provide full reasons.
4. The test of whether an amendment should be allowed is whether the amendment would cause prejudice to the defendant. The court finds that an amendment to the particular “money” as proposed by the prosecution would cause prejudice to the Defendant, especially at this late stage in the case.
5. It is a further point, and it may not appear to directly concern the Defendant or any prejudice to her, but the proposed amendment will require the court to completely reconstruct the summing-up that the court has spent a considerable amount of time writing. As mentioned in the ruling above, counsel have all addressed the jury about “money” and have sought in no way to explain or refer to anything other than “money”. The court of course accepts that it is not counsel’s duty to explain the law. However, in the short period of time now left to the court to properly adjust the summing up, there is a risk that the summing-up may fall short of what would safely be required of it. That therefore raises a risk of injustice to the Defendant.
6. However, it is to be observed that at this late stage in the proceedings, counsel and in particular defence counsel will not have an opportunity to readdress the jury let alone have any witness recalled for the purposes cross examination, I believe this constitutes prejudice to the defendant. The Court cannot assume that if Mr. Pettingill had had an opportunity to address them in terms of the amendment sought by the prosecution, that it would not have made a difference to their deliberations.

7. We have been two day discussing this law and over all that period of time the jury had in their mind “money”, in the ordinary sense of the word, as counsel have addressed them. This protracted period of time (four days) resulted from legal arguments, those arguments coming at a very late stage in the proceedings. This is in my experience an extraordinary delay between counsel’s address to the jury and the earliest possible time for the summing-up in the circumstances of this case. Strictly speaking, the prosecution ought to have seen the deficiency in their charge and sought an amendment much closer to arraignment rather than summing-up. So the amendment will not be allowed and a directed verdict will be given.

DATED this **17th** day of **July** 2018.

Charles-Etta Simmons
Puisne Judge