In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2018: No. 040

BETWEEN:

FIONA MILLER

Appellant

-and-

JR

Respondent

Before: **Hon. Assistant Justice Jeffrey Elkinson**

Appearances: **Ms Maria Sofianos, Department of Public Prosecutions, for the Appellant**
Mr Charles Richardson, Compass Law Chambers, for the Respondent

Date of Hearing: **3 April 2019**

Date of Judgment: **3 April 2019**

JUDGMENT

The following cases were referred to in the Judgment:

Angela Cox (Police Sergeant) v Jahkeil Samuels [2005] Bda LR 24

Giles and Attorney General v Hall [2004] Bda LR 26

Dyer v Watson and Anor. [2002] UKPC D1

Angela Cox (Police Constable) v Cyril Stirling-Smith [2005] Bda LR 69

Fiona Miller (Police Sergeant) v Janeiro Watts [2013] Bda LR 11

R v Hendon JJ ex parte Director of Public Prosecutions [1993] 1 All ER 411

Fiona Miller (Police Sergeant) v Coreen Scott [2018] SC Bda 78 App.
Sabian Hayward v The Attorney General and Minister of Legal Affairs [2017] SC Bda 102 Civ.
Fiona Miller (Police Sergeant) v Shayne James [2019] SC Bda 21 App.

And the following legislation:-
Criminal Procedure Rules 2013
Bermuda Constitution, Article 6

Background

1. This is an Appeal by the Crown against a Decision made by the Magistrate, Archibald Warner, JP on the 18th September 2018, whereby he dismissed the Information against the Respondent for want of prosecution. The matter had been set down for trial and he was being informed on the day of the trial that the Complainant was unavailable and that the Crown required an adjournment for approximately 10 months until the Complainant returned to Bermuda from her school overseas.

2. The Respondent had been charged with an offence contrary to Section 323 of the Criminal Code which related to a matter of an alleged sexual assault on the 17th August 2017.

3. The chronology, briefly, is as follows:-

   (i) **17th August 2017** assault is alleged to have been committed.

   (ii) **2nd February 2018** Respondent appears represented by Mr. Charles Richardson enters not guilty plea and is provided bail.

   (iii) **28th February 2018** Respondent appears, partial disclosure was served, bail extended and matter set for mention on 21st March 2018.

(iv) **21st March 2018** Respondent appears unrepresented, confirming he will be represented by Mr. Charles Richardson, bail extended and matter set for mention 28th March 2018.

(v) **28th March 2018** Respondent appears unrepresented, disclosure certificate served, bail extended and matter adjourned for mention 23rd April 2018.

(vi) **23rd April 2018** Respondent appears unrepresented, bail extended and matter adjourned for mention on 7th May 2018.

(vii) **7th May 2018** Respondent represented by Mr. Charles Richardson, bail extended and matter adjourned for mention for defence statement.

(viii) **24th May 2018** Respondent appeared represented by Mr. Charles Richardson, defence statement filed and served, matter adjourned for Trial on 18th September 2018 at 9.30 a.m. in Magistrate's Court No. 2, bail being extended to that date. The DPP was represented by Ms. Karen King who appeared for the Crown holding for Ms. Maria Sofianos.

(ix) On **24th May 2018** at 10.12 a.m., Ms. Sofianos sent an email to Mr. Richardson advising that by oversight she had not provided Ms. King with dates when the Complainant was out of the jurisdiction and that she wanted to bring the matter back to the Magistrates' Court to fix an alternate trial date.

(x) **4th June 2018, 27th June 2018, 7th August 2018** Ms. Sofianos sent emails to Mr. Richardson seeking to have the matter brought forward so as to fix an alternate trial date.

(xi) **20th August 2018** Ms. Sofianos on behalf of the DPP wrote to the Magistrates' Court referring to the matter being listed for Trial on the 18th September 2018 and that when the date was fixed she had overlooked the fact that the Complainant was travelling overseas to University in August

2018 and would not be available for the trial date that had been fixed. She referenced that the Complainant was commencing her studies overseas as of August 2018 and she did not plan to return until the following year, June 2019. In the circumstances, the Crown was not able to proceed with the Trial on the 18th September 2018 and sought an adjournment for the Trial to June 2019.

4. When the matter came before the Magistrate on the 18th September 2018, Ms. Sofianos appeared and Ms. Janea Nisbett, working with the Legal Aid Department, appeared holding for Mr. Charles Richardson. The Magistrate raised the question as to whether the Crown was ready to proceed and was directed to the letter of the 20th August 2018. Ms. Sofianos set out the history of the matter and why she was not ready to have the matter heard that day.

5. The Learned Magistrate asked Ms. Nisbett in what capacity she appeared and she informed the Magistrate that she was told just to come to court to obtain a trial date based on the letter provided by the DPP.

6. From reading the verbatim transcript of the exchange with counsel, the Magistrate took issue with counsel for the DPP about the fact that he was ready to hear the Trial of the matter and that the DPP had made the assumption that they had made some arrangement with counsel for the Defendant, now Respondent, that the matter would be adjourned. He took issue with this and the fact that the DPP had not issued an application to the court to have the matter adjourned, particularly where there was no agreement between counsel. He raised the question as to whether it was fair in relation to the Respondent that the Complainant would not be back in the jurisdiction until June 2019. He further raised the issue as to whether there was reasonable delivery of justice to the Respondent in the circumstances. He was critical of counsel on behalf of the DPP, Ms. Sofianos and of Mr. Richardson. The Magistrate expressed the view that counsel should either have been ready to proceed or arrangements properly made to have the matter adjourned. He made reference to the duty of the court to make sure that a Defendant gets a fair and reasonable trial. I would add to that the further duty of

ensuring that a trial takes place within a reasonable period of time as guaranteed under the Bermuda Constitution 1968, Article 6(1).

7. In response to the Learned Magistrate's position and to his further comment that the Complainant should be in the jurisdiction when the trial is listed, counsel for the DPP responded that the Crown could bring her back in the December break but that this would be a cost to the public. On that basis, counsel asked the court to put the matter over for a date in December 2018.

8. The Magistrate then raised the issue that Ms. Nisbett, as a pupil, knew nothing of the case and Mr. Richardson, as the appointed representative of the Respondent, was not present. The case could not go on in any event. This emphasised again to the Learned Magistrate that one of the primary reasons for the difficulty that all found themselves in was that the matter had not been properly brought before the court well in advance of the fixed trial date. He made reference to what had become almost the norm in this jurisdiction for the Crown and the defence counsel to try and make arrangements without making the appropriate applications to the court.

9. The Learned Magistrate addressed the Defendant directly and learnt that his representation by Mr. Richardson was not through Legal Aid but that he was paying him for his services; that he had been to court several times and that he thought to wait another year was a bit too long; that he had plans to go overseas a couple of times but did not do it because of this matter.

10. In all the circumstances, the Learned Magistrate determined to dismiss the Information for want of prosecution.

The Appeal

11. On this Appeal, the ground that the Crown advanced in support of their Application to overturn the Learned Magistrate's decision was that it was unfair

of the Magistrate to dismiss the matter based on the Complainant's unavailability. The Crown submits that Mr. Richardson was not opposing the application to adjourn and had not sought to make an application to have the matter dismissed for want of prosecution. The better course would have been, it was submitted, for the matter to be adjourned for the Crown to ascertain further details of the availability of the Complainant and that it was not an appropriate sanction to dismiss the Crown's case. It was submitted that, in the circumstances, the dismissal was unreasonable, citing previous decisions of this court in **Angela Cox v Cyril Stirling Smith** which in turn quoted **R v Hendon JJ ex parte Director of Public Prosecutions [1993] 1 All ER 411,** and the case of **Fiona Miller v Janeiro Watts [2013] Bda. LR 11**. However, those cases turn on their facts as to whether or not it was reasonable for the Magistrate to have dismissed the Information, that expression being effectively the *ratio decidendi* of those cases. I also recently gave Judgment in a case which involved the Magistrate refusing an adjournment and dismissing the charge and at that time I considered those authorities, referred to above. In the circumstances of that particular case where the decision concerned a matter of genuine public interest, i.e. the legal definition of indecency for the purpose of Section 53(1) of the Telecommunications Act 1986, I determined that the Appeal succeeded and the matter should be relisted in the Magistrates' Court for hearing. This is the case of **Fiona Miller v Coreen Scott [2018] SC Bda. App**. to which I referred the parties.

12. In this case, the Magistrate raised a very important point about how counsel, being fully aware that they could not proceed, allowed the matter to go to the very day of hearing with still no clarity as to whether defence counsel agreed that a new trial date should be given. The matter was listed for hearing for the day and there had been no advance application for an adjournment that would have allowed, if the adjournment was granted, for other matters to have been dealt with by the court on the day. It could have well been the case that Mr. Richardson would have turned up himself and opposed an adjournment on the day. Even if he was agreeing to, or the court ordered, the adjournment, the day was wasted. Counsel for the DPP had extrapolated that Mr. Richardson was agreeing to an adjournment because of the fact that a pupil attended on his behalf only for the purpose of

being told what the new date was. This conflicted with what the Defendant appeared to be stating himself, but again, this is extrapolation.

13. It was disappointing to this court that neither counsel for the DPP (nor counsel for the Respondent) made reference in this Appeal until prompted by the court to the Criminal Procedure Rules 2013. This is the Code under which criminal cases are to be dealt with in Bermuda. The court raised questions on these Rules with counsel during the course of the Appeal and asked counsel to address the court on the effect of those Rules in relation to the outcome of this Appeal.

14. The Rules were brought into force with the overriding objective that criminal cases be dealt with "*justly*." The Rules are very clear in expressing this in Part 1, Rule 1.1. The Rules then go on to state clearly what dealing with a criminal case *"justly"* includes and it sets out that it includes:-

> *"(c) Recognising the rights of a defendant, particularly those under Section 6 of the Bermuda Constitution;"*

15. It further makes reference to dealing with the case *"... efficiently and expeditiously"* and that the case is to be dealt with in ways that take into account the gravity of the offence alleged, the complexity of what is in issue, the severity of the consequences for the defendant and others effected and the needs of other cases.

16. The Rules also impose a duty on the court to actively manage the case and Rule 3.2(1)(f) provides that it is the duty of the court to discourage *"... delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings."*

17. It is the duty of the parties to assist the court in fulfilling its duties and where a party wishes to vary any direction that has been given by the court, Rule 3.5(2) provides that a party who applies to vary a direction must:-

"(a) apply as soon as practicable after he comes aware of the grounds for doing so; and

(b) give as much notice to the other parties as the nature and urgency of his application permits."

18. Of particular relevance to this Appeal is Rule 3.6 where there is an agreement to vary a time limit fixed by a direction. Rule 3.6 states:-

"The parties may agree to vary a time limit fixed by a direction, but only if –
(a) The variation will not –
(i) Affect the date of any hearing that has been fixed; or
(ii) Significantly affect the progress of the case in any other way …"

19. It is clear to me that the Criminal Procedure Rules provide for the very thing that the Magistrate was complaining of; that the parties had tried to make some agreement between themselves about the date of the hearing without reference to the court. They then turned up on the day fixed for the trial with no clear arrangement between them. The court is then inconvenienced and the defendant's constitutional rights possibly trampled on.

20. Article 6 of the Bermuda Constitution provides for the protection of law for any person charged with a criminal offence and the person so charged is to be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. This is the right guaranteed by Article 6 of the Bermuda Constitution.

21. In the case of **Sabian Hayward v The Attorney General and Minister of Legal Affairs [2017] SC (Bda) 102 Civ**., then Acting Puisne Judge Mrs. Shade Subair Williams considered the constitutional rights of a Defendant where there had been a delay from the date of the alleged offence to the date when an anticipated trial could proceed in the Supreme Court of three years two and a half months. The delay attributed to the Defendant was approximately two and a half months and

Defendant sought a declaration that he had been deprived of his right to a fair trial within a reasonable time contrary to Section 6(1) of the Bermuda Constitution.

22. Mrs. Justice Subair Williams considered the legal principles, starting with the Court of Appeal decision in **Giles and Attorney General v Hall [2004] Bda LR 26**. She cited Justice of Appeal Evans where his Lordship in his Judgment in turn cited the Privy Council case of **Dyer v Watson and Anor. [2002] UKPC D1** where Lord Bingham in his Opinion stated the following:-

"[52] In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the Convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face, and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the details, facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.

[53] The court has identified three areas as calling for particular enquiry. The first of these is the complexity of the case …

[54] The second matter … is the conduct of the Defendant … a Defendant cannot properly complain of delay of which he is the author.

[55] The third matter … is the manner in which the case has been dealt with by the administrative and judicial authorities … it is, generally speaking,

incumbent on contracting states so to organise their legal systems as to ensure that their reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonable well organised legal system …"

Justice of Appeal Evans said that this passage was the correct approach for the court to adopt. The reference to the Convention is the European Convention on Human Rights, Article 8 which is reflected in Article 6 of the Bermuda Constitution.

23. This case was cited by Mr. Justice Bell, as he then was, in the case of **Angela Cox (Police Sergeant) v Jahkeil Samuels [2005] Bda LR 24,** where the Magistrate had dismissed a Summary Information on the basis of delay of two years, with the Magistrate expressly referring to *"memories fading."* Mr. Justice Bell examined the facts of that case and found that of all the adjournments that had taken place and the significant delay, he was unable to say that there had been unreasonable delay or that it was the responsibility of the Crown. He determined that the Learned Magistrate was wrong to have dismissed the Information on the grounds of delay and allow the Appeal.

24. What I am left with in this Appeal, having regard to the authorities, is to determine the appropriate balance between ensuring that the Respondent is given a fair hearing within a reasonable time and ensuring that a Complainant, who has made a complaint of sexual assault, is able to have her case put forward and for that matter to be heard such that the charged party gets a reasonable opportunity to defend himself and for the independent and impartial court to then determine the innocence or guilt of the person so accused. I refer to the recent decision of Chief Justice Hargun in **Fiona Miller v Shayne James [2019] SC (Bda) 21 App.,** another Appeal relating to delay albeit in different circumstances. He referred to the notion of unfairness requiring the Court to consider the impact of the decision on the victim of the alleged offence as well as the accused. Quoting

Sir Scott Baker, President of the Court of Appeal in **The Queen v NN [2015] Bda LR 42** at paragraph 27:-

> *"Fairness to the complainant is relevant as well as fairness to the accused and the effect of the permanent stay ordered by the judge is that SL is deprived of the opportunity to give her account in evidence …"*

25. I would add that I am further guided in my decision by the underlying evidence in this complaint appearing to be confined mainly to two principal witnesses and that there is no issue as between Complainant and Respondent as to what occurred but whether it was a case of mistaken identity. To that extent, the passage of time should not impact getting a just result at trial.

26. In this case, the Complainant is not responsible for how the Crown proceeded to bring this matter to trial. It started with the error of allowing a date to be fixed for trial when the Crown knew of the dates of availability of the Complainant. The Crown could have sought an early hearing before the Complainant left to go away for school. They could have sought a hearing in December 2018 by bringing her back to Bermuda at an expense, but not a vast one, to ensure that there was minimum delay. They should have sought an adjournment of the trial date by application to the court in advance rather than allowing the matter to sit until the very day that the matter had been fixed for trial knowing full well that they did not have the relevant witness available. The Magistrate should be actively involved in these matters as anticipated by Part 3 "Case Management" of the Criminal Procedure Rules 2013.

27. Due to the serious nature of the offence with which the Respondent is charged and that the Complainant is not the author of the abuse of process and the consequential delay, I am of the view that the sanction in this case of dismissing the Information is not a just result. I take into account also that Respondent's counsel was prepared to agree to an adjournment, although that is extrapolated from the fact that the pupil was only in attendance to get a new trial date. I would expect that the Crown will seek to correct the errors committed to date by

ensuring that the Respondent is given an early hearing date upon the return of the Complainant to the Island in June as they have stated. I would expect the Crown on receiving this Judgment to commence making arrangements to ensure a trial in the summer.

28. In all the circumstances, while fully sympathising with the position that the Learned Magistrate found himself in and being supportive of many of the comments that he made, and equally sympathizing with the Respondent for the delay to date, the correct course is for this matter to be remitted to the Magistrates' Court for the hearing of the Information as laid on the 2nd February 2018. The Crown should take every step to request and secure an expedited hearing of this matter. The Learned Magistrate, who had many years' experience, most of them as Senior Magistrate, was correct to point out that the procedure followed by the Crown could have jeopardised the Defendant's rights and it would appear to be the case that little attention has been paid to the Criminal Procedure Rules 2013. It is time that this was corrected.

Order

29. The Appeal succeeds and the matter is to be relisted in the Magistrates' Court for hearing at the earliest possible date. Given the circumstances which gave rise to this Appeal, I order that the Respondent be paid his costs, measured at $1,000, out of the Consolidated Fund.

Dated this 3rd day of April, 2019

JEFFREY P. ELKINSON

ASSISTANT JUSTICE