



In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

2017 No: 19

BETWEEN:

THE QUEEN

And

HARRY LIGHTBOURN

TRIAL RULING

(Ex Tempore)

Date of commencement of trial: 17 July 2017

Date of Application: 17 July 2017

Date of Ruling: 17 July 2017

Counsel for the Crown: K. King for the Director of Public Prosecutions

Counsel for the Accused: C. Richardson of Compass Law Chambers

*Application to Adjourn Trial (Section 501 of the Criminal Code)
Clarification of Correct Procedure in Criminal Proceedings*

RULING of Assistant Justice S. Subair Williams

Introduction:

1. The trial in this matter is in respect of four counts of drug offences for the importation and possession (with intent to supply) of cannabis and cannabis resin.
2. The Accused entered not guilty pleas on 1 May 2017 when he was first arraigned in the Supreme Court. A trial date was fixed to commence Monday 17 July 2017.
3. The Defence made an application to adjourn the trial immediately prior to the arraignment of the Accused and the selection of the jury. The Crown confirmed that it was ready to proceed to trial but took no formal objection to the adjournment application.
4. So not to further delay the jury panel of 40 persons who were made to stand outside while Counsel addressed the Court, I stated the decision of the Court (which I subsequently reconsidered) in advance of these written reasons which I now deliver as clarification on the correct procedure for the making of adjournment applications prior to trial.

The Application before the Court:

5. Mr. Richardson informed the Court that his application to adjourn arose because his Client had not fully 'instructed' him. It soon became apparent that the issue was more related to the fact that Mr. Richardson had not been properly *retained*. The distinction, in any event, was immaterial to the merits of such a belated application.
6. Mr. Richardson said that his Client did, however, confirm that he was in a position to rectify the issue before the close of business same day. Mr. Richardson advised that if that were to come to pass, he would be prepared to start on Wednesday 19 July 2017 and plausibly complete the trial in the same week of its fixed start date.

Summary of Reconsidered Decision:

7. Mr. Richardson's application to adjourn the trial to start two days later was refused by the Court and leave was refused for him to withdraw as Counsel of record.
8. With visible discomfort but much conviction, Mr. Richardson withdrew from the case without leave.

9. An order followed for the trial to proceed with the Accused as a litigant in person. Accordingly, the Accused was arraigned and a jury of twelve persons plus two alternates was selected thereafter.
10. Moments before the stage of swearing in the jury and putting the Accused in its charge, the Crown appealed for the Court to refrain from having the jury sworn and requested a brief excusal of the jury. Hesitantly, the Court obliged.
11. The Prosecutor, aided by the informal presence of the Director of Public Prosecutions rows behind, informed the Court that the Crown had concerns about proceeding with an unrepresented Accused person and that they would need time to personally serve the Accused with disclosure documents likely to have been retained by Mr. Richardson.
12. In the circumstances, the Crown requested for the matter to adjourn to start two days later on Wednesday 19 July 2017. The irony, of course, is that the Court in refusing Mr. Richardson's request to delay the start of the trial triggered the Crown's request to adjourn to allow for the unrepresented Accused person to be served with sufficient time to read the served material. To put it colloquially, the Crown's application and the Defence application amounted to '*six of one and half a dozen of the other*'.
13. Accordingly, the Court, with intense displeasure, acquiesced to the application to adjourn and resume on Wednesday 19 July 2017.
14. As a measure of compensation for the lost time, a case management hearing was fixed and held later that day so to identify issues which could be reasonably agreed prior to trial so to avoid any further unnecessary delays.

Background:

15. On 1 May 2017 the Accused and his Counsel, Mr. Charles Richardson, appeared before the Hon. Justice Carlisle Greaves. The Deputy Director of Public Prosecutions, Carrington Mahoney, informed the Court that much of the Crown's case had been served save for numerous recordings which remained outstanding.
16. Mr. Mahoney requested a trial date fixture for 17 July 2017 and mention date of 1 June 2017 for case management. Mr. Richardson, however, expressed that he was loathed to accept a trial date prior to receipt of service of the Prosecution's Section 3 and 4 Notices under the Disclosure and Criminal Reform Act 2015 (the 'DCR'). However, when the Judge reinforced the fixture of the 1 June 2017 mention date, Mr. Richardson conditionally accepted the trial fixture.

17. Justice Greaves at the close the 1 May 2017 hearing issued the following directions:

“Alright the trial date is fixed for the 17 July 2017. The matter is to be mentioned on the 1 June 2017 at the Arraignments. The Prosecution and Defence is to serve their appropriate notices and papers to meet satisfaction of the appropriate provisions of the law and to comply with the stated dates above...”

18. On 1 June 2017 Defence Counsel, Vaughan Caines, appeared (holding for Mr. Richardson) before the Supervising Case Management Judge, the Hon. Justice Charles-Etta Simmons. The Crown was again represented by Mr. Mahoney. The trial date for 17 July 2017 was confirmed without trepidation from either side.

19. Justice Simmons inquired whether any disclosure compliance issues arose. Mr. Mahoney advised that Court that the Crown’s disclosure forms were outstanding. He advised that the Crown would be in compliance, however, by the end of the week. With a moment to reconsider, Mr. Mahoney then requested for the Crown to have leave to file and serve its notices by the following week.

20. The Court then ordered the Crown to file and serve FORMS 3 and 4 on or prior to 9 June 2017. (The Court in issuing this direction clearly intended for the Crown to file the case management forms applicable to the Prosecution ie FORMS 1 and 5 in satisfaction of its disclosure obligations under sections 3 and 4 of the DCR).

21. Justice Simmons issued the following directions:

“...Forms 3 and 4 by the 9th June 2017 and then I would expect the Defence Form¹ to be filed shortly thereafter...Don’t let Mr. Richardson tell you that I’ve got 30 days- 40 days -50 days whatever it is under the Act. I would like it as soon as possible after- because it is the only way in which we can properly manage the trial- to make sure that we are going to have all the witnesses and we are going to have sufficient time for the trial etcetera etcetera. If there are any issues that are outstanding, those issues can be resolved before the trial date so we are not languishing during the trial period awaiting disclosure etcetera etcetera etcetera ...

...Okay so mention on the- no-we don’t actually have a case management date but one is to be requested by whichever one of you is aggrieved by whatever has not happened or whatever issue has arisen. I am going to trust you to make- meet the trial date. Alright thank you.”

¹ (Circular No. 3 of 2017 issued by the Registrar on Friday 27 January 2017 requires the Defence to file FORMS 2, 3 and 4 in compliance with s. 5 of the DCR)

22. On 12 July 2017 the Crown filed a Notice of Compliance under section 3 of the DCR.
23. By email received on Friday 14 July 2017, Mr. Richardson wrote to the Court via his administrator, as follows:

"Sent: 14 July, 2017 12:25 PM

To: Lynch, Joann; Supreme Court; King Deane, Karen; Binns, Deanna M.

Cc: Compass Chambers

Subject: The Queen v Harry Lightbourne

This message is being sent on behalf of Mr. Charles Richardson

Good Day All,

Please note that at this time Mr. Richardson has not been properly instructed in regards to commencing the Supreme Court trial that is due to start on Monday 17, July 2017 in Supreme Court # 1.

In this premise Mr. Richardson will be seeking an adjournment in relation to this matter.

Regards..."

24. On Friday 14 July 2017 at 4:16pm the Crown filed Notice of Additional Evidence #1 which comprised of two additional statements from the arresting officers who had already provided statements included in the Trial Record.
25. Neither the Prosecution nor the Defence filed any Case Management Forms in this case.

Case Management

26. By Court Circular No. 3 of 2017 issued on Friday 27 January 2017, the Registrar of the Supreme Court issued Guidance Notes and Case Management Forms for application to all indictable matters which were sent to the Supreme Court on or after Monday 30 January 2017. This case falls under the new regime of case management.
27. The modernized scheme calls for both parties to a criminal case to file and serve case management notice forms in compliance with their respective statutory disclosure duties under sections 3, 4 and 5 of the DCR.
28. The Forms are as follows:
- (i) FORM 1 - The Prosecution Disclosure Notice
 - (ii) FORM 2 - The Defence Pre-arraignment Notice
 - (iii) FORM 3 - The Defence Statement
 - (iv) FORM 4 - The Defence Statement (Trial Timetable)
 - (v) FORM 5 - The Prosecution Statement (Trial Timetable)

29. It was most unsatisfactory that neither the Prosecution nor the Defence in this case filed any of these forms, notwithstanding the directions issued by Justice Greaves on 1 May 2017 and those issued by Justice Simmons on 1 June 2017.
30. Mr. Richardson remarked that generally, the Case Management forms are loosely enforced by the Court. However, in my view the Court directions issued by both Justice Simmons and Justice Greaves in this case clearly demonstrated the Court's intention for the Prosecution and the Defence to comply with their obligations to file the requisite forms.
31. The object of the Court's directions and the scheme under which they were issued is to avoid placing the Court in the very position it found itself, disrupted on day 1 of the trial by the application of the Defence to adjourn the trial.

The Court's General Approach to Adjournment Applications

32. The subject of adjournments is addressed in the Registrar's Guidance Notes ("the Guidance Notes") issued under the said January 2017 Circular.
33. Paragraphs 154-155 of the Guidance Notes reads as follows:

154. FORM 4 and FORM 5 are the trial timetable statements. The intention is for these two forms to assist in preventing trial delays / adjournments occasioned by Counsel seeking to:

- (i) consider the late disclosure of unused material or additional evidence;*
- (ii) liaise with one another in respect of pre-trial applications and objections;*
- (iii) exchange skeleton arguments and/ or case law for legal arguments;*
- (iv) edit transcripts and video / audio footage by agreement;*
- (v) edit photo albums by agreement;*
- (vi) consider witnesses whose evidence may be read in;*
- (vii) view exhibits in Court; and/ or*
- (viii) obtain electronic equipment or other aids for the presentation of evidence*

155. Adjournments or delays for any of these reasons are most often avoidable where both sides have applied adequate thought and attention to these issues prior to trial.

34. Paragraph 162 of the Guidance Notes applies to FORM 4 and requires pre-trial notice of an application for adjournment with reference to the sections 489A and 501 of the Criminal Code in addition to reference to the operative rule set out in the Practice Direction of Chief Justice, Richard Ground (as he then was) issued on 18 May 2004.

35. The correct practice for the making of adjournment applications is well established and has been in place for much over a decade now. The Practice Direction issued by the former Chief Justice reads as follows in its pertinent parts:

“Fixtures

1. A fixture should be regarded as just that, and the parties should start to work towards trial the moment the date is set. Supreme Court criminal fixture will take precedence over everything else, including civil fixtures, and the personal or business commitments of counsel of the defendant.

Adjournments

2. Should the need for an adjournment become apparent during preparation, the court and the other side should be notified forthwith. In this respect attention is drawn to Rule 60 of the Barrister’ Code of Conduct 1981.

3. If the need to vacate the date becomes apparent, an application should be made to the court forthwith by Notice of Motion in the proceedings. (Footnote 1: i.e. in Form 38 in Appendix A to the Rules of the Supreme Court 1985, or some similar form, headed with the title and number of the criminal case.)

4. No application for an adjournment will be entertained on the trial date, unless it is due to some reason wholly unforeseeable before then, such as sudden illness.

5. In particular, counsel should ensure that their fee arrangements are in place in good time. Counsel will not be allowed to withdraw on the day of trial, and in this respect their attention is drawn to Rule 72 of the Barrister’ Code of Professional Conduct 1981. Nor should defendants be able to obtain an adjournment by failing to put their Counsel in funds: a defendant seeking an adjournment on the grounds of inability to pay will have to demonstrate that he has taken all reasonable steps to put his counsel in funds or obtain legal aid.

6. The same principles apply to ‘warned’ dates. In particular Counsel in a warned case should ensure that he/she is available and otherwise ready for trial on that date. If a fixture has to be adjourned at the last minute, and there are warned cases for that date, the jury should be released for only as long as is necessary to bring on the warned case.

7. In any event a warned case should not be released until the trial of the preceding fixture trial has actually commenced.”

33. Mr. Richardson, in making his application (foreshadowed only by his 14 July 2017 email), advised the Court that he was not previously aware of the requirement for the filing of a Notice of Motion. He stated that the accepted practice was to simply notify the Court by way of email. This practice is, of course, not encouraged.

Conclusion

36. The Court calendar must not be vulnerable to collapse merely because an Accused person or the Prosecutor delays in the preparation of its case and its case management duties. These Courts often retort, '*Justice delayed is justice denied...Time lost can never be regained.*' I would add that the tail must not be permitted to wag the dog.
37. When a trial is unexpectedly pushed to commence on a day beyond the fixed start date, inconvenience is most often imposed on the thirty-six plus jury panel members who have mandatorily attended Court to answer to their civic duty. The impact extends to an Accused person who may be remanded in custody awaiting trial. It also affects professional and civilian witnesses who have made themselves available to attend Court during the trial period (sometimes at great public expense). Additionally, adjourned trial dates potentially frustrate other Accused persons and Complainants who may have been made to wait in line for the next available trial fixture on the Court calendar.
38. It is for these reasons, which are not exhaustive, that the Court's starting point to trial fixtures is that the matter shall proceed.

Dated this 19th day of July 2017

SHADE SUBAIR WILLIAMS
ASSISTANT JUSTICE OF THE SUPREME COURT