In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

2008: No. 31

BETWEEN:

THE QUEEN

-v-

STEPHEN GLADSTONE THOMPSON

Date of Ruling: 15th December 2008

Mr. Webber and Mr. McColm, Department of Prosecutions, for the Crown
Mr. Charles Richardson for the Defendant

EX- TEMPORE RULING

1. On Monday, 8th December 2008, the Defendant appeared before this Court on a charge of a single count of Wounding with Intent. He was represented by defence counsel Mr. Charles Richardson. The Crown was represented by Ms. Burgess and Mr. McColm. The trial commenced; it was to be a short trial, with only four witnesses. The evidence of the complainant was given, and he was cross-examined by defence counsel. The evidence of another witness (an eye witness), Ms. Louise Jones, was heard for the Crown, and she, too, was cross-examined. The evidence of the police officer who took the complaint, made the charge, and recorded an audio interview

from the Defendant was heard up to the point where the interview was about to be played.

2. There was no objection to the admission of the interview. Counsel had agreed and consented without objection to the playing of that interview. The interview is said to be 58 minutes long, and since it was ten minutes past four, with another 20 minutes for the day's sitting schedule, it was decided to adjourn the proceedings at that time, so that the interview could be played the next morning, then to be followed by the cross-examination of that witness. It was also agreed that, before the interview would be played the following morning (the 9th December), the doctor (whose evidence does not appear to be in dispute) would be heard first so that he could be released early, and then the interview would be played. So the proceedings were adjourned on the evening of 8th of December with these understandings.

3. On the following morning, the Court commenced at approximately 9:30am, as usual, and certain preliminary matters in respect of other cases were disposed of in a short period of time, and then the case of the Defendant was called up. The Defendant was in the box, and his counsel rose and indicated that he wished to speak with the Court in Chambers. He indicated that this was very important and could not be delayed. The Court then moved to Chambers, and counsel for the Defendant was accompanied by another Senior Counsel from his Chambers, Mr. Craig Attridge. The prosecutors were also in attendance. The Defendant remained in court in the custody of the prison authorities.

4. On return to the court, counsel was allowed to make his application to be removed and the Defendant was called upon to respond. (In Chambers, counsel himself had said that the Defendant had actually fired him.) The Defendant indicated in very strong terms that he no longer wanted defence counsel to represent him, and he was not satisfied with his representation. He referred to him as a "legal aid lawyer", and he said he did not want any legal aid lawyers to represent him. He indicated that he had contacted another attorney, Mr. Mark Pettingill, whom he said was in New York, but was returning to the island that day, Tuesday, the 9th December at 2:00pm, and that Mr. Pettingill had agreed to take his case. The Defendant claimed that he had an appointment with Mr. Pettingill at 2:00pm at his office. He stated that his father had

raised funds, and that they were in a position to pay for his defence. He apologized to the Court for the delay and asked that the Court be adjourned for the day to allow him to have counsel proceed the following day. The Court acceded to the request of defense counsel to allow the Defendant to continue on bail and that was supported by the prosecution, despite the intuition of the Court. The Defendant's bail was continued and the application of defense counsel was allowed. The jury was called in and released for the day, without any indication of what had occurred earlier.

5. On the following morning, the 10th of December, the Court resumed at 9:30 am again, and shortly disposed of some other matters not connected with this matter. The Defendant's case was then called up, and it was learned immediately that the Defendant had not surrendered to the prison authorities, nor was there present any attorney on his behalf, or any of the other persons who tended to accompany him, including his father, who accompanied him during the first two days of the trial. A warrant was immediately issued for the Defendant's arrest, and the Court awaited his appearance.
6. Later that day, it was learned through Officer P.C. Neblett, that the Defendant had left the jurisdiction the day before. Mr. Neblett produced a print out from Jet Blue Airlines (or some other authorities at the airport) indicating that the Defendant had left the Island on Jet Blue and was scheduled to return on 12th December. The Court ordered further investigations to be carried out as to how this had occurred, and the matter remained adjourned until such time as the Court could have Mr. Thompson, the Defendant, appear.
7. Today is the 15th December, some six days since the Defendant was last seen. Since Tuesday, the Court has waited three working days, and he has not appeared. The weekend has also passed, and he has not appeared. The Court has heard the evidence of Mr. Mark Pettingill, the alleged to-be-hired attorney, who has indicated that he was contacted in Boston on December 8th by someone identifying himself as the father of Stephen Thompson, to see if he could make available his services. He explained to Mr. Thompson what would be necessary; that was about 10:00am on the day that occurred (11:00 am Bermuda time). He also indicated that he would need to speak to Mr. Thompson, and what time and date he would be returning to Bermuda.

8. The following morning, the 9th December, he received another call on his way to the airport, from a gentleman who identified himself as Stephen Thompson, and he also gave him similar instructions. He indicated that he was returning about mid-day, and he would be in the office after 2:00pm. He told Mr. Thompson how to get in contact with him at the office. He also had another call from a person who identified herself as the godmother. Mr. Pettingill said he has never seen Mr. Thompson; he never appeared at his office, and he never spoke to him since that morning, the 9th December at 7:00am. He has no reason to believe that Mr. Thompson, or any of the other persons, have attended his office, and certainly no funds have been paid in, so he has never been retained.

9. We have also heard the evidence in the voir dire of PC Neblett, who indicated that he has carried out certain investigations; he attended the airport and the appropriate authorities there, including Jet Blue and the other department that keeps customer travel records. His investigations revealed that on Tuesday, 9th December, the Defendant, Mr. Thompson, called the Jet Blue airline about 10:58 am in the morning and reserved a ticket for a flight to leave the Island at 3:40pm. On the same day, that afternoon, he appeared at the airport at 1:00pm, where he paid for his ticket in cash and by way of a Visa card and he left the Island. The ticket had a return date of 12th December, and on that date he (PC Neblett) went to the airport, to meet that flight, about 2:00pm.

10. Of the 45 passengers who arrived, 4 were "no-shows", and the Defendant was one of those. Investigations further revealed that the Defendant has not returned to the Island. The police have carried out further investigations, both overseas and locally, among them, investigations to locate the father of the accused that has been unsuccessful. They have also been unable to locate the surety of the accused, who attended Court with him on Monday, the only day of the trial; but she, too, cannot be located and has changed her address. Even her mother could not be found at work.

11. The prosecution has made an application that the Court exercise its discretion to continue this trial in the absence of the accused, on the ground that he has voluntarily, and without permission, absented himself from his trial. Given the above facts, it appears to this Court clearly that at the time of his last appearance before the Court,

the Defendant had embarked upon this scheme to escape trial. It is my view that his ploy of dismissing his counsel was the first step, and his suggestion that he had retained or that another counsel has agreed to represent him, was part of that plan. The time at which he had called the airline clearly demonstrates he had no intention of seeking any counsel or reappearing for any trial. It even appears on the evidence that he may have had co-conspirators to assist him in this endeavor.

12. Section 526 of the Criminal Code of Bermuda entitled "Presence of Accused Persons at Trial", sets out in subsection 1 that:

> "*The trial must take place in the presence of the accused person, unless he so conducts himself as to render the continuance of the proceedings in his presence impractical, in which case, the Supreme Court may order him to be removed, and may direct the trial to proceed in his absence, provided that the Court may, with the consent of any person charged with him. If the accused person absents himself during the trial without leave, the Court may direct a warrant to be issued to arrest him and bring him before the Court."*

13. This section seems to be silent as to what the Court is to do when the Defendant has not been found, but it has long been accepted in the common law that where a Defendant escapes from his trial voluntarily, or does not appear for his trial, especially when that trial has commenced, that the Court has the discretion to proceed in his absence. The case referred to by counsel for the prosecution, *R –v- Stuart and Finch* [1974] Queensland Report page 297, indicates that this section, which is identical to the section in the Queensland Code from which it was taken, allows for the Court to proceed in the absence of an accused who, during the course of his trial, absents himself without the permission of the Court, and does so voluntarily.

14. The case of *R –v- John Victor Hayward* [2001] EWCA 168, also found at [2001] QB 862, a Court of Appeal decision, sets out the guidelines which the Court should follow in situations such as these. In that case it was said:

> (1) a defendant has, in general, a right to be present at his trial, and a right to be legally represented;
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> (2) those rights can be waived separately or together, wholly or in part, by the Defendant himself, if knowing or having the means of knowledge as to when

and where his trial is to take place, he deliberately and voluntarily absents himself and/ or withdraws instructions from those who are representing him. They may be waived in part if being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him;

(3) the trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives;

(4) that discretion must be exercised with great care and it is only in rare and exceptional cases that they should be exercised in favor of a trial taking place or continuing, particularly if the defendant is unrepresented;

(5) in exercising that discretion, fairness to the defence is of primary importance, but fairness to the prosecution must also be taken into account.

15. The judge must have regard to all the circumstances of the case, including:

(1) the nature and circumstance of the defendant's behavior in absenting himself from the trial or disrupting it, as the case may be, and in particular whether his behavior was deliberate and voluntary, and such as plainly waived his right to appear;

(2) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings;

(3) the likely life of such an adjournment;

(4) whether the defendant, though absent, wishes to be legally represented at the trial, or has, by his conduct, waived his right to representation;

(5) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence;

(6) the extent or disadvantage to the defendant in not being able to give his account of events having regard to the nature of the evidence against him;

(7) the nature of the risk of the jury reaching an improper conclusion about the absence of the defendant;

(8) the seriousness of the offence which affects the defendant, victim or public;

(9) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events which it relates, and;

(10) the effect of delay on the memories of witnesses.

16. In this case, I think all these directions classically fits the Defendant's behavior, to the extent that the Court should, in my opinion, continue the trial without him. Guideline No. 1 is clear. As I have said, the Defendant voluntarily absented himself, and deliberately has done so. It was a plan spectacularly carried out. The Court is of the view that an adjournment is not likely to result in the Defendant being caught. The Court has no indication and very little hope, that the Defendant will be apprehended in reasonable time enough that this trial could continue in his presence. As to whether he wished to be legally represented or not, the Defendant by his behavior clearly indicated that he does not wish to be legally represented. First, he dismissed his attorney, in my opinion, without proper reason, because I could find no flaw or fault on the part of his attorney. His attorney is an experienced one and very skillful, and in the opinion of this Court, was properly conducting his case, vigorously mounting his defence. In relation to the new attorney he was allegedly instructing, that never occurred, and he has no instructions despite his willingness to do so.
17. There may be some disadvantage to the Defendant not being able to give his side, but I think that his counsel has strongly put his defence by way of cross-examination to the two key witnesses in the matter. The interview to be now played is unchallenged and although one may think that the absence of a defendant may put him to some disadvantage, I do not think that this disadvantage is to the extent that this case should be further adjourned. He voluntarily chose that path.
18. As to the risk of the jury reaching an improper conclusion, I think the case is of the sort that the jury will reach the decision on the basis of the evidence, once properly instructed. This offence is a serious one; it is Wounding with Intent, and I think that to adjourn the matter without end may affect not only the victim but the public at

large. The message it would send to Defendants is that they can delay the trial as long as they like, and this may cause the public to feel, rightfully so, outraged.

19. That also impinges on guideline No. 9. I hold the view that further delay in this trial may not bring it to a reasonable conclusion in time. The effect of delay on the memories of the witnesses, I think, is real. The key witness, Ms. Jones, appears to be fairly advanced in age, and she is very important to the prosecutions' case. A delay may affect her memory, and indeed, may very well affect her availability, especially in this jurisdiction, where there are so many problems with getting citizens to come forward to testify.

20. In the case of *Dyer –v- Watson* [2002] UKPC 1 (also found at [2004] 1 AC 379, and in particular at paragraph 157), Lord Roger had this to say, when speaking about a defendant's right to have a trial conducted by an impartial tribunal within a reasonable time, the effect of delay, and that right conferred under Article 6 of the European Human Rights Convention:

> "*The reality is that especially when they are out on bail, many accused who are in fact guilty may prefer to dwell in the interim state of uncertainty rather then to march steadily to the end of their case, where that state of uncertainty may well be replaced with a considerably more idealizing state of prolonged imprisonment. Delay may indeed bring positive advantage to such persons: prosecution witnesses may die, leave the country, lose interest, or forget. The right conferred under Article 6 is therefore somewhat unusual. Not infrequently, accused persons may appear to have an interest in invoking it, not in order to benefit from its fulfillment, but rather in the hope of benefiting from its breach. The point has been made repeatedly in Canada, where the remedy for breach of unreasonable time requirement is a stay of the proceedings. As Corey J. pointed out, in such a system, the risk is that the right is one that can often be transformed from a protective shield to an offensive weapon in the hands of the accused."*

21. That statement was adopted in the recent case of *Felix Durity –v- Attorney General of Trinidad and Tobago,* Privy Council Appeal No. 83 of 2007. That was delivered on

the same day that we started this trial, on 8th December 2008, in which the Board said "*Cases may arise where the delay in having the matters investigated is contributed to by the judicial officers.* As L.J. Roger of Errsfrey pointed out in *Dyer –v- Watson* [2002] UKPC 1; 1 AC 379 para 157: *"Many accused persons who are in fact guilty may prefer to dwell in the interim state of uncertainty rather than march steadily on to the end of the case, where that state of uncertainty may be replaced by something worse."*

22. This Court is not saying that the Defendant is guilty of anything. What the Court is saying, however, is that delay in this case ought not to be used as a sword rather than a shield by the Defendant. In the Privy Council decision of *Prakash Boolell –v- The State* (16 October 2006) PC Appeal No. 39 of 2005, the Privy Council set out clearly the principles relating to the duty of the Court when managing affairs to avoid delays in trials. Their Lordships said "*When it became clear that time was dragging on and the Appellant was bent on dislocating the course of the trial and prolonging the proceedings by every means within his power, it was incumbent on the Court to take such steps as it could to expedite matters and reach a conclusion."*
23. So in all the circumstances, having considered all the authorities and the particular facts of this case, the Court is of the view that it should exercise its discretion to continue this trial in the absence of the accused, and it so rules.

Dated the 15th of December 2008.

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Puisne Judge CarliseGreaves