

IN THE SUPREME COURT OF BERMUDA

APPELLATE JURISDICTION

2007: No. 25

TORONTO DARRELL

v

JOSEPH ADRIAN COOK (POLICE SGT)

JUDGMENT

Date of Hearing: 5th December, 2008

Date of Judgment: 22nd January, 2009

Mr. Gordon Rick Woolridge, Phoenix Law Chambers, for the Appellant

Mr. Michael McColm, Department of Public Prosecutions, for the Respondent

1. On the 21st November 2007, the Appellant appeared before Senior Magistrate Warner on a charge of entering as a trespasser a dwelling house and stealing, contrary to section 339(1)(b) of the Criminal Code Act 1907. He was represented by counsel Charles Richardson. He entered a plea of not guilty. Trial was set for 5th February, 2008 and the appellant was remanded into custody.
2. On 2nd January, 2008 the Appellant appeared before Magistrate Tokumba on a bail application. This time he was unrepresented by counsel. He informed the court that he wished to retain lawyer Mark Pettingil. The matter was adjourned for mention on the 4th January, 2008.
3. On 4th January, 2008 the Appellant again appeared unrepresented. He informed the magistrate that he was not represented because he owed his lawyers money. He also informed the court that he will represent himself. He was granted bail with a surety.

4. On the scheduled day of the trial 5th February, 2008, the Appellant again appeared unrepresented. Before the trial commenced, he applied for an adjournment to obtain a lawyer. He said he had lawyers and lost them because he owed them money and that he had applied for legal aid but it had been refused. The Magistrate reminded him of his earlier representation that he was going to represent himself.
5. The Magistrate concluded that he did not believe granting him a further adjournment would have assisted or altered the Appellants position with regard to legal representation.
6. The trial proceeded, the Appellant did not cross examine the witnesses nor did he testify. The prosecution's case rested upon fingerprint evidence attributable to the defendant, found on an item inside of the complainants' residence. There was no explanation for its presence other than it must have been the defendant who entered the dwelling and committed the theft. He was convicted.
7. The magistrate considered the extensive record of the appellant; over thirty convictions; found little in mitigation and noted that the offence was committed during the period of two suspended sentences. He sentenced the appellant to three years imprisonment and activated the suspended sentences to run concurrent with each other but consecutive to the three year sentence.
8. The Appellant now appeals on the grounds that a) Miscarriage of justice; and b) He was not given sufficient time to secure legal counsel.
9. At the appeal hearing he was represented by counsel who submitted that he was representing him on a legal aid certificate just received. He had become qualified for legal aid because he had been in prison for more than twelve months and thus was not barred by the means bar.
10. Counsel submitted that the defendant was deprived of his constitutional right to have an attorney of his choice when the magistrate failed to give him a reasonable time to acquire counsel. This submits counsel had the effect of denying the defendant his constitutional right to a fair trial. Further, he submitted, there was a miscarriage of justice because the defendant was only served with his papers by the prosecution on that morning of the trial.
11. Section 6 of the Bermuda Constitution enshrines a defendant's right to counsel of his choice at his expense and his right to a fair trial within a reasonable time.
12. That a court must allow a defendant reasonable opportunity to attain counsel is so well established, that I think there is no need for this court to enter any prolonged discourse on the subject.

13. The question here is did the magistrate allow a sufficiently reasonable opportunity for the appellant to obtain counsel? Whether such is the case will depend on the circumstances in each case.
14. Among the factors to be considered are, the nature of the court, the nature of the charges, the likelihood of the defendant obtaining counsel in a reasonable time, whether the defendant is adopting unreasonable tactics to stall or unreasonably delay the trial, the interests of the complainants, the likelihood of the lost of witnesses or evidence as a result of the delay and so on. These factors are not exhaustive.
15. It is now well established that a court has a duty to reasonably and properly manage its affairs. It ought to act in due course to dispose of its matters within a reasonable time and to avoid unreasonable delay to a defendant. A failure to do so may not excuse a court even when such delays may have been caused or contributed to by the defendant.
16. This principle is clearly demonstrated and enunciated in the Privy Council decision of *Prakash Boolal v The State*. UKPC No 39 of 2005. Though the facts in that case are greatly more aggravated than in the instant case, the principle is nevertheless applicable. In that case 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*”.
17. In *Felix Durity v. The Attorney General of Trinidad and Tobago* UKPC 83 of 2007 the board said, “*Cases may arise where the delay in having the matters investigated is contributed to by judicial officers As L.J Roger of Errsfrey pointed out in *Dyer v Watson* [2002]UKPC1;1AC379 paragraph 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 maybe replaced by something worse”.*
18. In this case another magistrate may have given the Appellant more time, but that is not the test. The above guidelines provide the test. They elucidate the factors which the magistrate in the circumstances may apply in his assessment. He obviously did.
19. This was a defendant experience in the workings of the courts, he had thrown away several lawyers due to his failure to properly secure them; he had been refused legal aid, it was very unlikely that he would retain any counsel in a reasonable time. On his previous appearance he had indicated that he was going to proceed on his own; the matter was a simple one; the magistrate felt that ample time had been given and that further time would not have led to any improvement.

- He in his judgment therefore thought it just to proceed. In the circumstances a court must be slow to fault him.
20. Counsel for the Appellant further submitted that there was a miscarriage of justice because the prosecution only served the papers on the defendant on the morning of the trial. This was never brought to the attention of the magistrate by any party and it formed no part of his decision.
 21. The duty of the prosecution to serve documents on the defense is one that is to be exercised in a reasonable time. A reasonable time can be sometimes as late as the trial in some circumstances. I see no established or likely prejudice against the appellant in this case. As earlier said, this was a simple summary case based upon a complaint by one witness that her house had been broken into sometime in the night and an item or items stolen. The appellant's fingerprints were found on an item inside of that house. That needed an explanation for being there.
 22. In all the circumstances the appeal is dismissed.

Dated this day of **January** **2009.**

Hon. Carlisle Greaves
Puisne Judge