



In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

2021: 11A

THE QUEEN

-v-

CHRISTOPHER CLARKE

First Defendant

GAREATH ADDERLEY

Second Defendant

RULING

*Crown's Application for Removal of Defence Counsel of Record
Constitutional Rights of an Accused to be represented by Counsel of choice*

Date of Hearing: 10 November 2021

Date of Judgment: 19 January 2022

Crown Ms. Yanique Gardner-Brown on behalf of the DPP

First Defendant Ms. Victoria Greening, Resolution Chambers

RULING delivered by S. Subair Williams J

Introduction

1. The application before the Court is made by way of a Notice of Motion filed by the Crown for Mr. Archibald Warner to be removed as Counsel representing the First Defendant, Mr. Christopher Clarke on the following grounds:

- (i) That Mr. Warner's representation of Mr. Clarke constitutes a breach of various sections of the Barristers' Code of Professional Conduct 1981 and/or

- (ii) That Mr. Warner's representation of Mr. Clarke may result in a miscarriage of justice and/or an obstruction to the proper administration of justice.
2. Ms. Greening objected to the application for Mr. Warner's removal on the principal basis that Mr. Clarke's constitutional right to be represented by his Counsel of choice outweighed the importance of any ground of complaint advanced by the Crown.
3. In furtherance of the opposing positions taken, affidavit evidence was filed by Ms. Larissa Burgess for the Crown and by Mr. Warner for the First Defendant. Having heard submissions from both sides, at the close of the hearing I reserved my decision which I now provide with the reasons outlined further below.

Background

4. The First Defendant is a former Police Inspector who, on Count 1 of the Amended Indictment, is alleged by the Crown to have procured or counselled Mr. Michael Mello to discontinue a prosecution (or agree to a lesser sentence and/or conditional discharge) against Mr. Stefan Adderley ("Mr. SA"). Mr. SA is the son of the Second Defendant, Mr. Gareath Adderley. On Count 2 Mr. Clarke and Mr. Adderley are jointly charged with conspiring to pervert the course of justice with each other and with Mr. Damien Justin Williams (recently reported as deceased) by way of an agreement whereby money would be exchanged for the discontinuance of the summary prosecution of Mr. SA for the offence of assault occasioning bodily harm.
5. The 17 May 2017 trial of Mr. SA proceeded in the Magistrates' Court through to final conclusion before Mr. Archibald Warner in his former capacity as a sitting magistrate. On 23 May 2017 Mr. SA was convicted and sentenced to a 24 month conditional discharge on 9 August 2017. During the sentencing stage of those criminal proceedings, a Victim Impact Statement was filed in which Mr. Mello expressed his gratitude for Magistrate Warner's refusal to allow the trial to be adjourned on a third occasion. Notably, Mr. Warner was seized of nine separate Court appearances in this matter before the case came to its final disposition.
6. Mr. Mello is now a witness of importance to the Crown's case in the present proceedings against Mr. Clarke and Mr. Adderley and will most likely be required for cross-examination by their respective Counsel.

The Relevant Statutory Provisions

7. The Crown's complaint is grounded on the following provisions of the Barristers' Code of Professional Conduct 1981:

“Public office

...

101. *A barrister should not represent in the same or any related matter any persons or interests with whom he has been concerned in an official capacity. Likewise, he should not advise upon a ruling of an official body of which he is a member or of which he was a member at the time the ruling was made.”*

“Respect for administration of justice

102. *A barrister shall encourage public respect for and shall try to improve the administration of justice.”*

“Responsibility to profession

103. *A barrister shall assist in maintaining the integrity and reputation of the Profession.”*

“Rules to be observed in the spirit

126. *A barrister shall observe these rules in the spirit as well as to the letter.”*

8. (I have considered the case law placed before the Court but do not deem it necessary to outline the non-controversial statements of legal principle or to refer to the facts which are all significantly distinguishable from the present facts.)

The Opposing Arguments

9. Crown Counsel, Ms. Gardner-Brown contended that the requirement of fairness of trial proceedings is owed not only to an accused but also to the witnesses for the Crown. Citing Lord Hewart CJ in *The King v Sussex Justices, ex parte McCarthy* [1924] KB 256 the Crown also relied on the well-established principle that *‘justice should not only be done but should manifestly and undoubtedly be seen to be done’*. To this end, Crown Counsel submitted that the test is an objective one and is determinative by the Court’s view of the public’s view of the circumstances alleged.
10. That said, the Crown invites this Court to impose the test applicable to apparent judicial bias. So instead of asking myself whether an informed and fair-minded observer would perceive a real risk of bias, I am asked to consider whether an informed and fair-minded observer would think that Mr. Warner’s continued representation of Mr. Clarke would give the appearance of a real danger of injustice in these proceedings.
11. Part of the injustice complained of by the Crown is that Mr. Mello would not only be subject to cross examination by Mr. Warner about the allegations giving rise to these indictable proceedings but that he would also likely be questioned to some extent about the related underlying summary prosecution over which Mr. Warner presided as the

magistrate. The prosecution's assertion of trial unfairness is said to be heightened by the juxtaposition of Mr. Warner's previous acceptance of Mr. Mello as a credible witness and his current role which would require him to challenge the reliability of Mr. Mello's pending evidence on facts closely related to the summary trial.

12. Counsel for the first Respondent on the other hand submitted that the facts and allegations rudimentary to the present proceedings are unrelated and separate from the issues disputed at the summary trial of Mr. SA.

13. In Mr. Warner's affidavit evidence he underscored that he never had any personal or extra-judicial knowledge about this case or the facts related to prosecution of Mr. SA. He deposed that to the best of his recollection, neither Mr. Clarke, Mr. Adderley nor Mr. Justin Williams were ever involved or mentioned in the evidence called at Mr. SA's trial. He added that in late 2019 Mr. Clarke approached him in his capacity as an attorney. At that time Mr. Clarke had already retained another lawyer in respect of disciplinary proceedings being brought against him so he was not yet Mr. Warner's client. Mr Warner said in his affidavit evidence [10]; "... *at that time I was unaware that Michael Mello featured in the disciplinary investigation, or that I had been a Magistrate in any trial connected to the investigation...*"

14. It was not until Mr. Clarke was arrested for the allegations resulting in the present proceedings that Mr. Warner was retained to represent him as the Senior Legal Consultant with Resolution Chambers. Mr. Warner deposed [14]:

"...Christopher Clarke was eventually charged and ultimately disclosure was served on Resolution Chambers on his behalf, including initially the information sheet and summary of evidence, which substantially disclosed the circumstances and evidence relating to this case. It was only on perusal of these papers that it became clear to me and I was aware that Christopher Clarke's alleged involvement/offences related to the case of R v Stephen Adderley (16CR00282) which I had presided over."

15. Via Ms. Greening, Mr. Clarke asserted his constitutional rights to be defended by a lawyer of his own choice, as afforded by section 6(2)(d) of the Schedule 2 of the Bermuda Constitution Order 1968. Ms. Greening made it known to the Court that Mr. Clarke is fully aware of Mr. Warner's previous judicial involvement in the assault trial of Mr. SA but that he is nevertheless insistent on being represented by Mr. Warner as the lawyer of his own choosing. On her written submissions to the Court she argued [19]:

"There is no appearance of bias with Mr. Warner acting for the Defendant in this matter. The reasonably informed observer would be informed that Mr. Warner had no previous knowledge or connection to any of the alleged offences and that his role in acting as Magistrates [sic] in the assault case was a purely independent role in an unrelated and separate case."

Analysis and Decision

16. This Court cannot be expected to form any view on the nature of the defence which will likely be relied on by Mr. Clarke if and when this matter comes to the stage of a trial. This means that consideration must be given to the wide range of possibilities which might arise at a trial which might thereby give rise to an unfair conflict or the undermining of the proper administration of justice. For the sake of an example, it should remain open to Mr. Clarke to decide whether he will assert his own good character and credibility as a witness in his own defence at trial. In doing so, it may be necessary for the Defence to positively assert dishonesty on the part of the Complainant, Mr. Mello.
17. It seems to me that Mr. Warner's transition from the role of magistrate in the trial of Mr. SA to the cross-examiner of the same Complainant, Mr. Mello, poses a real and equal danger of unfairness to both the Defence and to the Crown. An attack on Mr. Clarke's character and/or credibility may from the outset be thought by a jury as inexplicably inconsistent coming from the same magistrate who previously accepted the truthfulness and reliability of Mr. Mello as a witness.
18. Conversely, there is also a real risk of an unfair disadvantage to the Crown. Supposing still that Mr. Warner, on behalf of Mr. Clarke, was to be permitted by the trial judge to attack Mr. Mello's character and/or credibility as any cross-examiner might likely do, any one or more members of a jury may be wrongly tempted into presuming that the expressions made by the former presiding magistrate of the assault trial are more worthy of trust and favour.
19. In my judgment, these kinds of resulting issues offend the meaning and spirit of section 101 of the Barristers' Code of Professional Conduct 1981 which is ultimately aimed to keep the integrity of the administration of justice intact. The assault occasioned by Mr. SA against Mr. Mello is the seed, if not the nucleus, of the factual matrix underlying these proceedings. Mr. Mello's full account of what occurred is a narrative of (1) the assault he suffered and (2) how he was coerced not to proceed with his criminal complaint or to agree to a low penalty. The magistrate who, as trier of both fact and law, accepted the first part of his narrative as being true and reliable cannot appropriately or fairly be permitted to challenge the same Mr. Mello on the second part of his account within the same justice system in defence of any person. For present purposes, the cohesion of these facts is not severed merely because the facts are to be borne out in separate Court proceedings. This is evident from the fact that the Crown included the assault trial documents in its disclosure package to the Defence.
20. Another way of assessing this conflict issue is for me to consider whether Mr. Warner would have been subject to judicial recusal had he first defended Mr. Clarke in the present proceedings through to completion before going on to sit as the trial magistrate

in the prosecution of Mr. SA. In my judgment, he would have plainly been conflicted and unable to conduct the assault trial on this supposition.

21. I agree with the prosecution that the question is not whether Mr. Warner himself is dispossessed of integrity or whether he had any special or personal knowledge of the facts. It should be made plain that no such suggestion has been made or implied against the former magistrate who was once the Senior Magistrate and has for many years been widely regarded as an experienced, competent and skilful jurist. For the avoidance of any doubt, I accept all of Mr. Warner's unchallenged evidence about his judicial impartiality and the scope and timeframe of his knowledge of the relevant facts.
22. In this application the Court is being asked to reinforce the well-established doctrine that justice must not only be done but also be seen to be done. This simply means that it must appear to an informed and fair-minded observer that the administration of justice is not being operated in any way which would present a real risk of impartiality or inequity in the process.
23. For these reasons, I am obliged to grant the Crown's application for the removal of Mr. Warner as Counsel of Record in these indictable proceedings.

Conclusion

24. By Order of this Court, Mr. Warner is to be removed as Counsel of Record.

Dated this 19th day of January 2022

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE