In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

2025: No. 2

BETWEEN:

THE KING

-v-

CADELL SMITH

Defendant

RULING

Date of Hearing: **2nd September 2025**
Date of Decision: **2nd September 2025**
Date of Reasons: **3rd September 2025**[1]

Appearances: **Mr Karim Nelson and Ms Taneka King, Counsel for the Prosecution**
Ms Susan Mulligan, Counsel for the Defendant

RULING of Richards J

Introduction

1. Yesterday afternoon Ms Mulligan applied orally to:

   (i) dismiss the charges; or in the alternative

[1] This final and authoritative version of the Ruling was issued to Counsel electronically on 4th September 2025, they and I having identified some typographical errors in the version handed down the day prior.

(ii) to exclude certain evidence upon which the prosecution intended to rely; or in the further alternative

(iii) to adjourn the matter in order to afford her more time to take instructions etc.

2. For the prosecution, Mr Nelson opposed the first and second of those applications and suggested that an adjournment may be the appropriate course.

3. I am grateful to both Counsel for their cogent and helpful submissions.

4. In the result, I refused the first application and allowed the second in part. I now give my reasons for those decisions and also explain why it was not ultimately necessary to resolve the third.

The Relevant Procedural History

5. The offences charged in this Indictment are alleged to have been committed on 7th November 2024. An interim analyst's report, dated 10th November 2024, which appears in the Record at pages 20-22, was served on the Defendant personally on 12th November 2024. That is also the date on which he made his first appearance before the Magistrates' Court on Information 24CR00498, upon which he was sent to this Court for trial. The Prosecution filed a Record and Form 1 on 31st December 2024. That Record contained only four items of used material, namely the witness statements of Detective Constable Damon Hollis (the Case Officer) and Police Constable Carol Skerritt (the Custody Officer who was present when Mr Smith was informed that he was to be charged), the notes of FSU Officer Michelle Freeman and the interim analyst's report, previously served on 12th November 2024.

6. The Defendant made his first appearance before this Court on 2nd January 2025. He was then represented by different Counsel. On that occasion I ordered that the prosecution were to complete disclosure within the statutory timeframe and the matter was adjourned for mention at the next arraignment session. By operation of section 29 of the Criminal Jurisdiction and Procedure Act 2015 ("**CJPA**"), the statutory timeframe expired on 21st January 2025[2].

[2] i.e. 70 days from the day on which the Defendant was sent for trial.

7. However, it is apparent that no further disclosure was in fact made to the defence until the morning of Mr Smith's next appearance before the Court, that is on 3rd February 2025. On that date a number of items were emailed to defence counsel. They included the witness statements of all of the witnesses upon whom the Crown now relies, save for Ms Paula Ramotar and Detective Constable Warren Bundy.

8. A number of items of unused material were also supplied at that time, however the notes of the Government Analyst, Ms Nadine Kirkos, were not disclosed and nor were those of the DNA experts, namely Miss Stacey Sainte-Marie and Ms Laura Devine.

9. It seems to me that, prior to 3rd February 2025, the Crown had failed to serve a *prima facie* case. That question has not been fully argued before me, but it seems improbable that the Crown would have been able to establish a sufficiency of evidence in the absence of any witness statements from any officers of His Majesty's Customs, for example. That is certainly Ms Mulligan's position and Mr Nelson has not sought to argue otherwise.

10. On 3rd February 2025 my brother Justice Wolffe ordered the defence to file Form 2 within 21 days. None was forthcoming. An Application to Dismiss, pursuant to section 31 of the CJPA could in fact have been sought at any time after 21st January 2025, but it was not.

11. Nor did the prosecution make an application pursuant to section 30 of the CJPA to extend time. The view has previously been expressed by the then Registrar[3] that this legislation has the effect of requiring the prosecution to make such an application before serving a Notice of Additional Evidence outside the statutory timeframe[4]. However, so far as I am aware, that question has not yet been fully argued or resulted in a reasoned judicial decision. It seems to me that it is at least arguable that it would be inconsistent with section 3(4)(c) of the Disclosure and Criminal Reform Act 2015 ("**DCRA**") so to hold. That provision expressly preserves the "*right*" of the prosecution to *"rely on additional evidence at trial, provided*

[3] Now the Acting Chief Justice, the Honourable Mrs Justice Subair Williams.
[4] See paragraph 35 of the Guidance Notes issued with the previous Case Management Form 1.

that the prosecutor first serves a copy of the additional evidence on the accused person." It is interesting to note that paragraphs (a) and (b) of section 3(4) of the DCRA are both subject to the leave of the court, but (c) is not. That seems to me to be a clear indication that the prosecution does not require the court's leave to file Notices of Additional Evidence containing further evidence that it seeks to rely on at trial. The question whether they are ultimately able to rely on such evidence will always be subject to the well-established power of the court to exclude evidence under section 93 of the Police and Criminal Evidence Act 2006 ("**PACE**") *"if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."* That will encompass situations where such evidence was disclosed late, such as those that resulted in the oft-cited ruling of Ground CJ in *Ze Selassie,* dated 4th August 2009.

12. However, the question as to what evidence the prosecution should be permitted to rely upon in response to a section 31 application is a different question. It seems clear to me from the confluence of sections 29, 30 and 31 of the CJPA, that it is the Crown's duty to disclose evidence upon which it says there is at least a *prima facie* case against the defendant within the statutory timeframe. If it neither does so nor seeks an extension of time in which to do so, it runs the risk that the court will leave out of account any evidence served outside the statutory timeframe when determining sufficiency. In some cases that may result in a matter being dismissed.

13. This question may benefit from further and fuller argument in the future, but it seems unlikely to me that a court confronted with a timely application pursuant to section 31 of the CJPA would be likely to take into account evidence served outside the statutory timeframe in respect of which it concludes that the Crown should not be given an extension of time (whether sought before or after time has expired). It will often, therefore, be helpful to resolve that question first (not least because it may be conceded that, if the evidence is admitted, there will be a sufficiency or that, if it is not, there will not).

14. I have considered the judgment of the English High Court in *R (Fehily) v the Governor of HMP Wandsworth* [2002] EWCA 1295 (Admin). Ms Mulligan has argued that I should be slow to translate the holding in that case to Bermuda's context because here the statutory timeframe is enshrined in primary legislation, whereas in England it was prescribed in regulations made under that legislation (and is likely now to be found in the Criminal Procedure Rules). I am not persuaded that that is a sound reason to disregard *Fehily.* The more important point, it seems to me is that, more than a decade after that case was decided, Bermuda's Legislature chose to adopt comparable legislation, which prescribes a time limit, but does not specify the consequences of it being breached. Ms Mulligan is right that that leaves the question of remedy up to the courts. Applying the reasoning in *Fehily* (which I see no reason not to do), it is apparent that a failure to abide by the time limit in section 29 of the CJPA will not automatically result in the dismissal of the proceedings or even the automatic exclusion of evidence served outside the time limit. It will be for the court to determine whether to permit the Crown to rely on such evidence in any particular case.

15. Before concluding this section of my Ruling, I should record that the material disclosed via email on 3rd February 2025 was formally served in a Notice of Additional Evidence dated 13th May 2025, which also included the witness statements of Paula Ramotar and DC Warren Bundy and the final version of Ms Kirkos' certificate.

The Application to Dismiss

16. If an application to dismiss this indictment had been filed on 22nd January 2025, it is possible that it would have succeeded. However, that would have depended on what happened because it is equally possible that an application to extend the statutory timeframe from 21st January 2025 to 3rd February 2025 would have succeeded, even if it had not been made until 3rd February 2025 or possibly slightly later.

17. In my judgment the evidence disclosed on 3rd February 2025 established a sufficiency on both counts of this indictment. I do not think that the evidence of Paula Ramotar and DC Warren Bundy were necessary to do that. It is true that the evidence of DC Bundy goes to the issue of intent to supply, but I accept Mr Nelson's submission in relation to the

presumption in section 27D and Schedule 7 of the Misuse of Drugs Act 1972 ("**MDA**"). It may very well be that, following *Lambert* [2001] UKHL 37 and *Luke Hill* [2001] Bda LR 83, that provision should not be construed to impose what is often called a "*legal*" or "*persuasive*" burden of proof on a Defendant. However, for the purposes of a sufficiency determination, it seems to me that evidence that a quantity of controlled drugs exceeded 20 grams is capable of establishing a *prima facie* case that they were intended for supply.

18. The reality is that neither an application to dismiss nor one to extend time were made in this case. In so observing I imply no criticism of Mr Smith's previous Counsel. Like me, he may well have concluded that the material disclosed to him on 3rd February 2025 established a sufficiency of evidence and, further, that the short delay since the expiration of the time limit was unlikely to persuade the Court to exclude that material from its consideration on any section 31 application. The matter, therefore, progressed through the Court's standard case management processes. It was previously listed for trial on at least one occasion. That trial did not proceed because Mr Smith's then Counsel encountered some difficulty in taking his instructions and I concluded that the issue of his fitness to plead should be investigated (which it was, with the result that he was found fit to plead). Some time thereafter Ms Mulligan began to represent Mr Smith.

19. We are where we are and it would be artificial, in my judgment, effectively to turn the clock back to 22nd January 2025 and now exclude evidence which the Crown disclosed 7 months ago and formally served approximately 4 months ago. I reject Ms Mulligan's contention that, in these circumstances, I should still exclude everything served after 21st January 2025 simply because no section 30 application was made. Such a strict reading of the legislation seems to me to be inconsistent with *Fehily*.

20. I therefore refused the application to dismiss the indictment.

The Application to Exclude

21. However, that is not the end of the matter. Although I was not willing to dismiss the matter at this stage, I do have a duty to ensure that the trial is a fair one. I therefore considered the

late disclosure of DC Bundy's witness statement, Ms Kirkos' notes and the DNA experts' notes. I reminded myself that, pursuant to section 93 PACE: *"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."*

22. DC Bundy's witness statement was served on 13th May 2025. Its contents are well within the usual ambit of such statements, of which Ms Mulligan must (with no disrespect intended) have seen literally hundreds of specimens. As an experienced criminal practitioner, she will be well able to decide whether there is a need to cross-examine Mr Bundy and do so if she feels that need. In my judgment, there is no unfairness in the admission of DC Bundy's evidence and, if I am wrong about that, any unfairness certainly falls short of requiring its exclusion.

23. Although it was a closer call, I reached a similar view in relation to the evidence of Ms Kirkos. The Defendant has been on notice since 12th November 2024 that she had found the controlled drugs in this case to be Cannabis. Her notes could and should have been disclosed before 22nd August 2025. I disagree with Ms Mulligan that they are to be regarded as used material. I think they are properly to be regarded as unused material, but they should still have been disclosed and she should not have had to ask for them. However, they were served about 12 days ago. I do consider that this lateness may give rise to some unfairness, but I was not persuaded that the admission of Ms Kirkos' evidence in these proceedings would have such an adverse effect on the fairness of them that it required the exclusion of her evidence. It seemed to me that Ms Mulligan is adequately equipped to decide whether and, if so, how to challenge this evidence effectively.

24. I reached a different conclusion, however, in relation to the admission of the DNA experts' evidence. Their notes still have not been disclosed. Indeed it would seem that they are not even in the possession of the police, let alone the prosecution. Ms Mulligan very properly

accepts that she had not yet requested them specifically, but equally properly Mr Nelson has not sought to argue that they should not be disclosed. Indeed Form 1 did not assert that disclosure was not required, merely that it had not been effected. From my own experience, that material is likely to be voluminous and technical in nature. The only other way that I could ensure the fairness of this trial, in these circumstances, would be to adjourn for an indeterminate period. It was not clear how soon it would be possible to relist this matter and it is possible that the disclosure, if and when it came, would necessitate further enquiries and/or the instruction of a DNA expert by the defence. Mr Smith is in custody and has been since his arrest. I, therefore, concluded that the admission of the DNA experts' evidence would have such an adverse effect on the fairness of these proceedings that I ought not to admit that evidence.

The Application to Adjourn

25. I may have reached a different conclusion if Ms Mulligan had continued to press for an adjournment even if the DNA evidence were excluded. If, contrary to my view, she had maintained that she needed more time properly to deal with Ms Kirkos' evidence, it is possible that I would have concluded that the trial should be adjourned in order to cure any unfairness in the admission of both that evidence and the DNA evidence. Having taken instructions, however, she was able to indicate that she would not persist in that submission.

Conclusion

26. For these reasons I refused the application to dismiss and granted the application to exclude in part and refused it in part.

Dated this 3rd day of September 2025

THE HONOURABLE MR JUSTICE ALAN RICHARDS
PUISNE JUDGE