In The Supreme Court of Bermuda

APPELLATE JURISDICTION
Consolidated Appeals
2021: 3
2021: 4

REBECCA WALLINGTON

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT

Appeal against convictions in the Magistrates' Court
Constitutional Rights to a fair trial within a reasonable time
Whether Magistrate ought to have recused himself on grounds of Apparent Bias

Date of Hearing:	13 October 2021
Date of Judgment:	7 January 2022

Appellant	Mr. Mark Pettingill, Chancery Legal Limited
Respondent	Mr. Alan Richards / Ms. Karen King on behalf of the DPP

JUDGMENT delivered by S. Subair Williams J

Introduction

1. The Appellant, Ms. Rebecca Wallington, was separately tried and convicted in the Magistrates' Court on Information 17CR00314 ("Case 314") and Information 17CR00039 ("Case 039") by Magistrate Craig Attridge for offences involving the possession and intended supply of cannabis.

2. On Case 314 (to which Appeal No. 3 of 2021 refers) Ms. Wallington was tried on 15 April 2019, and 9-10 September 2020 for a single count of possession of cannabis which was intended for supply contrary to section 6(3) of the Misuse of Drugs Act 1972

("MDA"). A written judgment dated 30 November 2020 was delivered by Magistrate Attridge.

3. On Case 039 (to which Appeal No. 4 of 2021 refers) Ms. Wallington had previously been jointly charged with Mr. Dennis Robinson. The charges against Mr. Robinson, however, were dismissed pursuant to a Supreme Court Ruling by Assistance Justice Mr. Delroy Duncan where he found that Mr. Robinson's constitutional rights to a fair trial within a reasonable timeframe had been infringed. Ms. Wallington was tried on Count 1 which alleged possession of cannabis with intent to supply and Count 2 which alleged simple possession of cannabis. The trial lasted 3 days, having proceeded on 7-8 January 2020 and 10 September 2020. Magistrate Attridge convicted Ms. Wallington for the reasons recorded in his written judgment of 11 January 2021.

4. The Appellant now appeals to this Court on two principal points. Firstly, it is argued that the conviction in respect of Case 039 should be quashed on the unconstitutional delay of the trial. The second complaint is that Magistrate Attridge ought not to have been the trier of both Case 039 and Case 314 because in doing so it gave rise to an appearance of judicial bias rendering the trial process constitutionally unsound.

5. At the close of the hearing before me I stated that I would reserve judgment which I now provide with these reasons.

The Complaint of the Unfair Trial Delay

6. Ground 1 of the Appellant's Notice of Appeal provides:

Ground 1
That the Appellant did not have a fair trial given the delay of four years before the case was concluded.

7. The complaint of delay is made only in respect of Case 039 / Appeal No. 4 of 2021. A chronology setting out the procedural background to these proceedings is outlined in the judgment of Duncan AJ in *Robinson and Wallington v DPP and AG* [2019] Bda LR 73 [4-8]. More recently, Bell JA delivering the judgment of the Court of Appeal in *Kenneth Williams v R* [2020] Bda LR 75 referred to *Robinson and Wallington* helpfully summarising the background in Ms. Wallington's case as follows [32-33]:

"*32. … More helpful, in my view, is the case of Dennis Robinson and Rebecca Wallington v The Director of Public Prosecutions and the Attorney General [2019] Bda LR 73 a decision of Duncan AJ. In that case, the two plaintiffs had been arrested on drug related charges in November 2016. One of the consequences of that arrest for the first plaintiff was the revocation of his parole and his detention in custody while the trial process began. Although a trial date was set for 13 April 2017, the trial*

did not commence on that date, and despite further trial dates being set in July, October and January 2018, the trial did not in fact get under way until 31 May 2018. The evidence was completed the following day and the matter was adjourned for closing submissions, which were not heard until 18 July 2018. After closing submissions, the matter was 10 adjourned for judgment to be given on 17 August. Judgment was not ready on that date, nor on two further dates in August and September which had been set for judgment to be delivered, resulting in there being further adjournments for the same reason. Then on 5 October 2018 came the extraordinary development that the magistrate, who had heard the trial more than ten weeks previously, advised counsel that he had become aware of a conflict, and recused himself. So in a matter where the trial took place some fifteen months after the first court appearance, the defendants at trial were back at square one a few months later. In the event the plaintiffs sought redress under section 6(1) of the Bermuda Constitution, which provides that "if any person is charged with a criminal offence, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law" (emphasis added).

33. The judge rejected a contention that the plaintiffs had themselves attempted to delay the trial, and found that their conduct did not disentitle them from making the argument that the retrial of the criminal charges should be stayed because of delay. The judge found that both plaintiffs had been prejudiced by the delay to such an extent that their rights under section 6 of the Constitution had been breached. However, he differentiated between the two because of the first plaintiff's substantial period in custody, staying the proceedings as against him, but allowing them to proceed against the second plaintiff on the basis that such prejudice as she had suffered could be mitigated in the sentence the trial court could impose at the conclusion of the criminal proceedings."

8. The judgment of the Court in the proceedings before Duncan AJ was for a stay of the prosecution against Mr. Robinson and a Declaration that Mr. Robinson's constitutional right to a fair trial within a reasonable time had been infringed. In respect of the case against Ms. Wallington, Duncan AJ found that her right to a fair trial within a reasonable timeframe had also been breached. The Court found that the delay was a direct result of the decision of the trial magistrate (Mr. Archibald Warner) to recuse himself only after hearing all of the evidence called at trial. Having attributed that delay to the administrative or court authorities, Duncan AJ found that such prejudice could be mitigated by the trial Court through a reduction of sentence since she had not been remanded in custody pending trial. Notably, Duncan AJ was not made aware of the intended new trial date for Ms. Wallington. However, he expressly accepted, as part of his reasoning, that the trial would in all likelihood have taken place and concluded by the middle part of 2019. Against this background, on 13 September 2019 Duncan AJ ordered the retrial of Ms. Wallington.

9. Some four months thereafter, Ms. Wallington's retrial commenced on 7 January 2020 and continued on the following day on 8 January 2020. During that period the Crown opened and closed its case and Ms. Wallington gave oral evidence in her own defence. However, the Defence did not close its case on 8 January. Instead an adjournment was sought for Dr. Soares to be called to the stand to give oral expert evidence for the Defence. The matter was accordingly mentioned on 10 January 2020 and a trial continuation date was fixed for 25 March 2020. Of course, the delisting and delay which followed would be of no surprise to anyone as this fixture coincided with the onset of the COVID-19 pandemic and the Court closures which ensued.

10. On 14 July 2020 the matter was mentioned and the new trial continuation date was set to proceed on 9 September 2020. The Defence expert witness, Dr. Soares, however, was unavailable to attend Court on that occasion so the trial continued with his evidence on the following day on 10 September 2020 through to conclusion. Judgment was thereafter delivered on 11 January 2021.

11. The prosecutor pointed out that Dr. Soares' evidence was not controversial and could have been read into evidence had the Crown been given notice of what he proposed to say on the witness stand. Magistrate Attridge's summary of the evidence from Dr. Soares was recorded in his written judgement as follows [91]:

    "*The Defendant seeks to rebut that presumption [of intention to supply] by reference to her stated medicinal use of cannabis for the treatment of chronic back pain. In support of this contention the defence called Dr. Soares, the Defendant's GP, however, as Mr. Richard's [sic] points out at paragraph 15 of his Closing Submissions, the doctor's evidence, based upon her medical records, does not support her contention that she was using cannabis for medicinal purposes in November 2016. As the prosecution quite rightly point out, other than one note in respect of sciatica in 2000 and a second in 2007 for lower back pain, there is no other report of back pain until after the alleged commission of these offences, in May of 2017. It is following that when the various referrals to other doctors were made, and it is not until January 2018, that any application to the Minister of Health is made by the Defendant with the support of Dr. Soares.*"

12. The following high-points may be drawn out of this chronology of proceedings:

    (i) The crucial portion of the asserted unconstitutional delay spans a 4 month period starting from Duncan AJ's 13 September 2019 order for a retrial through to the start of the retrial before Magistrate Attridge on 7 January 2020;

    (ii) The Defence could have reasonably closed its case on the second day of the trial on 8 January 2020 by disclosing the nature of Dr. Soares' uncontroversial evidence to the Crown in order for that evidence to be read in. Had that occurred,

the trial in all likelihood would have been a two-day trial, concluding on 8 January.

(iii) The second notable period of delay between the start of the retrial on 8 January 2020 and the intended trial continuation date fixed for 25 March 2020 amounted to 11 weeks i.e. over 2 ½ months. The lateness of this continuation date was wholly or in part caused by the magistrate's accommodation of Dr. Soares' availability to attend Court to give oral evidence.

(iv) The delisting of the 25 March 2020 fixture for COVID-19 related reasons was unavoidable and it was not suggested to this Court that a relisting to 10 September 2020 was unfair or unreasonable.

13. In my previous judgment in *Kenneth Williams v R* [2020] Bda LR 49 I considered the issue of unfair trial delay and found that the Defence was responsible for 8 months out of the total 19 months it took for the trial to be completed before Magistrate Chin. That decision was overturned on appeal on the ground that I erred in inculpating the Defence for delays which ought to have been prevented and better managed by the trial magistrate. The Court of Appeal also held that I erred in my placing my focus on the question as to whether the magistrate's final judgment was sound despite the prolonged trial process and the multiple trial disruptions.

14. My reasoning in the overturned decision was outlined as follows:

*"**Analysis and Decision on Ground 1***

61. Following the appeal hearing and without the leave of this Court, Ms. Tucker supplemented her submissions with the previous judgment of the Court of Appeal in Andrew Robinson v Commissioner of Police [1995] Bda LR 64 where the question of an eight-month trial delay was examined by the Court of Appeal through a careful reconstruction of the trial history from the appeal record. Without much assistance from Ms. Tucker on the chronology on the trial appearances, I have done much the same.

62. As was the case in Andrew Robinson the Defence argue that the trial delay amounts to a breach of the Appellant's constitutional right to a trial within a reasonable time. Section 6(1) of the Constitution provides:

"(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

63. *In the Andrew Robinson case, the issue of particular concern was the prolonged adjournments between appearances and the four month delay which lapsed while the Defendant was awaiting judgment.*

64. *In this case, trial delays were attributable to the challenge faced by the Court to accommodate the trial in an appropriate Courtroom location; Government internet defects during the taking of remote evidence; adjournments granted at the behest of both the Crown and the Defence and limited dates of mutual availability between the Court and both parties.*

65. *More so, the Defence was responsible for the following unreasonable trial prolongations:*

(i) *The two-month period during which the Defence excessively cross-examined the Complainant;*

(ii) *The three-month period which was wasted in pursuit of the recusal application and the abandoned application for a mistrial;*

(iii) *The three and a half month period during which the Defence excessively cross-examined the Mother; and*

(iv) *The two-day period spent on the meritless application brought by the Defence for a mistrial arising out of the late disclosure of unused material.*

66. *Effectively, the Defence must shoulder the burden of at least eight months of trial prolongation out of the nineteen months spent by the Court on receiving the evidence for the Crown's case and the Defence case. This is in addition to the trial adjournments for which the Defence was responsible and the dates of Court availability on which the Defence did not avail itself. Clearly, the magistrate availed himself to continue and complete the trial over frequent intervals of Court appearances during the first year of the trial. However, the more time which passed, the more difficult it appears it became for the magistrate and the parties to accommodate one-week intervals between the Court appearances. In my view, had the Defence adopted a more practical and reasonable approach to the evidence, the Crown's case and the Defence case could have fully presented within the initial two month period spent by the Defence on cross-examining the Complainant.*

67. *On my assessment of the charges and the relevant evidence, the trial ought not to have been so extensively delayed. Unavoidably, it must be said that it was the duty of the magistrate to manage the trial and in this case he failed to keep sufficient command over the Defence's conduct at trial. That being said, the Defence must not be permitted to benefit from its own folly. The real question for my consideration is whether the magistrate's final judgment was clear and accurate despite the trial*

interruptions and whether the magistrate fairly determined the issues in question and came to the right result. This test is formulated out of the Court of Appeal's judgment in Andrew Robinson [page 5]:

"I would not go so far as to say that such a disjointed process could never be a fair trial. There may be cases where the clarity and accuracy of the final ruling is such that it shows that despite an interrupted trial the Court has properly identified and fairly determined all the issues, and come to the right result..."

68. *In this case, I find that the magistrate's final judgment was clear, reasonably accurate and demonstrative of his grasp of the facts and issues before him. Where he otherwise may have erred, I find that, overall, he fairly determined the issues in question and came to the right conclusion.*

69. *For these reasons, this ground of appeal fails*."

15. However, Bell JA delivering the decision of the Court of Appeal said [27-28]:

"*27. The key issue in this appeal is the fairness of the trial, to which I will come in due course. And in this regard I would emphasise that it is the fairness of the process which is in issue, and not the question whether the magistrate ultimately reached the right conclusion. But before moving to that, I would address the remaining period of delay identified by the judge, being the question of the three months' loss of time "wasted in pursuit of the recusal application and the abandoned application for a mistrial." I have commented on the magistrate's responsibility for proper case management in regard to these aspects of the case at paragraphs 9, 22 and 26 above. It does not seem to me that this delay should be regarded as attributable to the defence, if indeed this is the effect of the judge's comments. I do not regard it as appropriate to blame the defence for the delay of eight months identified, and if and insofar as the judge did so, in my view that was wrong. When the cases talk of a defendant's conduct as negating the effect of delay, as in Boolell, one must bear in mind that the conduct in that case was truly egregious, and the delay was of a much greater extent. And even then, with delay caused by the defendant as in Boolell, Lord Carswell said at page 3728:*

"Their Lordships consider, however, that when it became clear that time was dragging on and that the defendant 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. This should have led to the injection of an element of urgency after the nolle prosequi was entered and the trial had to begin afresh. Certainly from that point onwards, the court should have explored more effectively ways of conducting the trial without gaps between sitting days and of moving it quickly on after the disposal of attempts by the defendant to delay it.(emphasis added)"

28. Conducting the trial without gaps, and certainly without lengthy gaps, between sitting days is clearly a critical feature of a fair trial, and one that Mr Lynch rightly emphasised. This was particularly the case in relation to the mother's evidence, which took place over a period of more than six months, over some six or seven separate hearing days. As Mr Lynch pointed out, such a fragmented process necessarily meant that time would be wasted in orientation at the start of each session."

16. In a concluding portion of the judgment the Court of Appeal in *Kenneth Williams v R*, Bell JA said:

"*At the end of the day, the question for this court is whether there was a fair trial. Ms Sofianos in her address submitted that there was no unfairness to the Appellant and that the judge's judgment, supporting that of the magistrate, was sound. I have already indicated that I do not think that the judge was right to blame defence counsel for delay said to have been caused by excessive cross-examination of the Crown's witnesses, nor in relation to meritless applications made by defence counsel, when the task of case management was one for the magistrate. Meritless applications should be dealt with quickly, so as not to delay the trial process inappropriately. The view that Ground PJ took of the delay in the case of Andrew Robinson seems to me also to apply in this case, namely that by reason of the numerous interruptions and delays, the whole process amounted to a miscarriage of justice. In saying that I appreciate that the magistrate did express concern at the slow pace of the trial. But it was up to him to do something about it, for instance by acceding to counsel's request (when it was apparent that the trial was moving far too slowly) that a sufficient block of time should be reserved to enable the trial to be completed without any further delay. That request was made in January 2018, after the trial had been under way for almost five months, but unfortunately it fell on deaf ears, such that another sixteen months passed before judgment was given. I do not think it is an answer to the unfairness of the trial to say, as the judge did in paragraph 67 of her judgment, that the magistrate's judgment was clear and accurate, and that he came to the right result. The ultimate issue is whether the trial process has been fair, and for the reasons advanced by Mr Lynch, in relation to its length and fragmented nature, I do not think that it was. For this reason, I would set aside the convictions, and substitute verdicts of acquittal, as we did*."

17. In the present case, I must remind myself that a Court of concurrent jurisdiction found that Ms. Wallington has already suffered an unconstitutional trial delay in these proceedings on the supposition that a retrial would have concluded somewhere around mid-2019. But for Duncan AJ's 13 September 2019 finding that the unconstitutional delay could be mitigated by a reduction of sentence since Ms. Wallington had not been remanded in custody, it seems that her charges would have been dismissed.
18. In reality, Ms. Wallington's trial did not draw to its conclusion until a year after Duncan AJ's order for a retrial. So, the question is not whether there has been unconstitutional delay but whether that additional one year period negated the opportunity to mitigate

her constitutional damage by a reduction in sentence. Arguing the case on behalf of the AG and the DPP, Crown Counsel Ms. Tanaya Tucker submitted that the appropriate sentence for Ms. Wallington would range between 18 months and 2 years.

19. It is not lost on this Court that the Information against Ms. Wallington was laid on 2 February 2017 and that it is in respect of offences alleged to have occurred on 15 November 2016. The overall trial process delay running from 2 February 2017 to 10 September 2020 is approximately 4 years. The trial delay period with which Duncan AJ was concerned on 13 September 2019 when he ordered a retrial was approximately 3 years. So the important question for me to resolve is whether the additional year which lapsed rendered it impossible to remedy the unconstitutional delay by a reduction in sentence. In my judgment, it did not. As was the case when Duncan AJ considered Ms. Wallington's complaint, she remains on bail and has not been remanded in custody for the present offence. It would therefore continue to be open to the magistrate to consider the appropriateness of a suspended sentence or a reduction of any custodial sentence she may receive, to the extent that it reflects the fact that Ms. Wallington's trial delay was found to be unconstitutional on 13 September 2019 and that the re-trial did not commence for another 4 months thereafter.

20. This ground of appeal therefore fails.

The Complaint of the Appearance of Bias

21. The Appellant's second ground of appeal alleges that there was apparent bias on the part of Magistrate Attridge. The complaint under Ground 2 is as follows:

Ground 2

That the Learned Magistrate should have recused himself from hearing the trial against the accused given that he was also the trial Judge in another case against the Appellant alleging the same type of offence.

22. On the Appellant's case an appearance of judicial bias arose on account of the fact that Magistrate Attridge, as the trier of both fact and law, tried Case 039 and Case 314 within the a dangerously proximate period. Mr. Pettingill argued that the risk of bias is visible through select portions of Magistrate Attridge's judgment where he conflated the factual issues between the two cases.

23. Mr. Richards for the Crown, however, contended that there was a sufficient nexus between the two cases to qualify for a trial joinder. On that footing, he said, it was always open to the Crown to have Case 039 and Case 314 tried together and so the objection of bias could not withstand the reality that it would have been legally proper for Magistrate Attridge to deal with both cases at the same time. Mr. Pettingill invited this Court to reject that argument and find that the Crown's failure to make a joinder

application meant that the Appellant retained all of the rights which comes with her matters being tried separately.

24. I shall first consider the Crown's joinder argument. Section 480 of the Criminal Code provides:

Joinder of charges in indictment

480 (1) A charge or charges for any indictable offence may be joined in the same indictment with any other such charge or charges or with a charge or charges for any summary offence which may lawfully be included in that indictment by virtue of section 13 and of the proviso to section 485(2)—

(a) if those charges are founded on the same act or omission; or

(b) if those charges are founded on separate acts or omissions which together constitute a series of acts done or omitted to be done in the prosecution of a single purpose; or

(c) if those charges are founded on separate acts or omissions which together constitute a series of offences of the same or of a similar character,

but shall not otherwise be so joined:

Provided that no one count of an indictment shall charge an accused person with having committed two or more separate offences.

(2) Notwithstanding anything in subsection (1), where it appears to the Court that an accused person is likely to be prejudiced by any joinder of charges against him, the Court—

(a) may require the prosecutor to elect upon which one of the several charges he will proceed; or

(b) may direct that the trial of the accused person be had separately upon each or any of the charges.

25. Case 039 and Case 314 are founded on separate facts. In this case, an order of joinder could have only been asserted on the basis of a similarity of the character of the offences or on the ground that the two offences formed a series of offences. A joinder application on these grounds could have been confronted with an opposing argument that Ms. Wallington would have been otherwise prejudiced by the joinder of charges.

26. In my judgment, it would be wrong for this Court, exercising only an appellate jurisdiction, to impose its view or estimation on whether a joinder application would have been successful in the Court below. The appropriateness of a joinder application was a matter for argument by both sides and determination at first instance. At this stage it is insufficient for the Crown to argue the issue of joinder. More so, I accept Mr. Pettingill's argument that belatedly treating the two cases as having been properly joined at this stage would unfairly deprive Ms. Wallington of the opportunity and advantage of deciding how and whether she wished to state her evidence in respect of both charges on the same and one occasion. For these reasons, I am bound to reject the Crown's invitation for me to suppose that the two cases had been formally joined.

27. There is an abundance of case law governing the issue of judicial bias which I need not outline for present purposes and the law in this area is uncontroversial. (See my previous ruling in *Ewart Brown v DPP et al* [2021] SC (Bda) 74 Civ (10 September 2021)). Established legal principle requires me to consider in this case whether an informed and fair-minded observer would find that there is a real risk of bias in the same magistrate dealing with these similar offences in the space of one year. In both Case 039 and Case 314, the magistrate was required to determine whether the legal presumption of an intention to supply the cannabis in Ms. Wallington's possession was effectively or sufficiently rebutted. To some real extent, this judicial exercise necessitated independent assessments of Ms. Wallington's credibility as a witness.

28. Magistrate Attridge in his written judgment of 30 November 2020 in respect of Case 314 found [93]:

    "*Ultimately, this Court has had the opportunity to assess the Defendant, and to consider her demeanour as she gave her evidence, and, in all the circumstances, I do not find the Defendant to be an honest or credible witness. On the contrary, I agree with the submission of prosecuting counsel that the explanation that she has provided in respect of being set up is, in the court's view, both implausible and incredible- Ms. Wallington was not, in the view of this court, a witness of truth in that regard*."

29. Only a few months later in his written judgment of 11 January 2021, Magistrate Attridge found as follows in Case 039 [85]:

    "*This Court has had the opportunity, ultimately, to assess the Defendant, and to consider her demeanour as she gave her evidence, and, having regard to that and the evidence she gave in this case, as well as the prior versions provided in her police interviews, and in all the circumstances, I do not find the Defendant to be an honest or credible witness. She was not a witness of truth.*"

30. It is to be noted that the issue of credibility was not wholly determinative of the magistrate's final decision. Notwithstanding, it was a significant, if not pivotal, issue. In my judgment, an informed and fair-minded observer would surely find that there is

a real risk that the magistrate would have been partial to his earlier opinion of Ms. Wallington's lack of honesty and credibility in one case when assessing the question of her truthfulness and credibility in the latter case.

31. For these reasons, I find that this ground of appeal must succeed.

Question of a Retrial

32. Sequentially, Case 314 preceded Case 039. So the risk of judicial bias in Case 039 is obvious on the reasoning I have outlined above under Ground 2. However, the prejudicial effect of the appearance of judicial bias on Ground 2 taints both cases because Magistrate Attridge had heard and unfavourably assessed Ms. Wallington's evidence in Case 039 before he handed down his judgment in Case 314. For that reason I find that the convictions in both Case 039 and Case 314 are unsafe under Ground 2.

33. Given the inordinate delay which has lapsed since the Information was first laid on 5 July 2017 in Case 314 and Duncan AJ's findings of unconstitutional delay in Case 039, I find that it would be unfair and wrong in all circumstances to order a retrial.

34. (Ground 3 was not pursued.)

Conclusion

35. For all of the reasons stated herein, the appeal is allowed under Ground 2 and the convictions for Case 314 (Appeal No. 3 of 2021) and Case 039 (Appeal No. 4 of 2021) are hereby quashed.

Dated this 7th day of January 2022

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THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE