



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2022: 02

FIONA MILLER
(POLICE SERGEANT)

Appellant

-v-

DAMON EDWARDS

Respondent

JUDGMENT

Crown's Appeal against Magistrate's dismissal for want of prosecution after the close of the Crown's case- Section 4 of the Criminal Appeal Act 1952

Date of Hearing: 09 November 2022

Date of Judgment: 15 November 2022

Appellant Mr. Alan Richards for the Director of Public Prosecutions

Respondent Unrepresented by Counsel

JUDGMENT delivered by Shade Subair Williams J

Introduction

1. This is the Crown's appeal against the decision of Acting Magistrate Ms. Auralee Cassidy whereby she dismissed Information 19TR07613 for want of prosecution. The Respondent had been charged for the offences of driving whilst impaired, contrary to section 35AA of the Road Traffic Act 1947 (RTA) and refusing to comply with the demand of a police officer for a sample of breath for analysis, contrary to section 35C(7) of the RTA.

2. In this case, the Crown had closed its case and the Defendant had given evidence on the stand when the acting magistrate dismissed the case for want of prosecution.
3. On appeal, Senior Crown Counsel, Mr. Alan Richards, complained that the case was wrongly dismissed and that the magistrate's refusal to adjourn amounted to an abuse of her discretion.

Background

4. The charges against the Respondent alleged that he committed the offences on 16 November 2019. The Information was laid against him on 20 November 2019 when he would have first appeared in the Magistrates' Court.
5. On account of the COVID-19 Pandemic which started in March 2020, a two year delay lapsed before Mr. Edward's trial started on 17 November 2021. The trial was then adjourned part-heard to 10 December 2021 when the Crown closed its case and the Defence opened with the Respondent's evidence on the stand. For reasons which are not known to this Court, the case did not conclude but was further adjourned part-heard to 21 December 2021. On that occasion, the matter did not proceed. The acting magistrate, in recalling this, stated that she was unable to sit on account of the fact that her appointment had not yet been formalised by H.E. The Governor.
6. It seems that the matter was called before Magistrate Mr. Khamisi Tokunbo on 21 December and further adjourned to appear before A/Magistrate Cassidy on 11 January 2022. It is said that on that occasion the trial prosecutor was out of office due to illness. That being the case, no other prosecutor appeared before the learned acting magistrate who proceeded to dismiss the case for want of prosecution.

Decision and Reasons

7. Part II of the Criminal Jurisdiction and Procedure Act 2015 (CJPA) governs the summary trial procedure. As pointed out by Mr. Richards, section 10(1) provides as follows:

Non-appearance of prosecutor

(10) (1) Where at the time and place appointed for the trial or adjourned trial of an information the accused person appears or is brought before the magistrates' court and the prosecutor does not appear, the magistrates' court may dismiss the information or, if evidence has been received on a previous occasion, proceed in the absence of the prosecutor.

8. Section 10(1) contemplates two distinct positions. The first applies where evidence has not yet been received. Under those circumstances, a magistrate is empowered with a discretion to dismiss the information. The latter part of section 10(1) envisages the non-appearance of a prosecutor after evidence has been called. In that kind of scenario, the magistrate may either proceed in the absence of the prosecutor or exercise the Court's statutory power to adjourn under section 7, as recognised by section 10(2).
9. Section 7(1)-(2) reads:

Adjournment of trial

7 (1) *The magistrates' court may at any time, on its own motion or on the application of a party to proceedings, whether before or after beginning to try an information, adjourn the trial.*

(2) *The magistrates' court may when adjourning either—*

- (a) fix the time and place at which the trial is to be resumed; or,*
- (b) unless it remands the accused person, leave the time and place to be determined later by the court,*

but the trial shall not be resumed at that time and place unless the magistrates' court is satisfied that the parties have had adequate notice thereof.

10. In my judgment, all that was open to the acting magistrate to do in this case, where the Crown had closed its case, was to either proceed in the absence of the prosecutor or to adjourn the matter to continue on another occasion. It seems to me that it would have been reasonable on the part of the acting magistrate to stand the matter down for a brief period to enable a prosecutor to be sent over from a neighbouring Courtroom or to be dispatched from the Office of the DPP. This is particularly so in this case because the evidence-stage of the trial was nearing completion. That said, I cannot overstate it, as a matter of general principle, that it is not and ought not to be the responsibility of the Court or its administration to embark on a search exercise to secure the appearance of a prosecutor in respect of listed Court fixtures.
11. The Respondent, Mr. Edwards, appeared for the continuation of his trial on 11 January when it was dismissed. It was not his fault that the start of the trial was delayed for a two year period after his first appearance and he is not responsible for the circumstances which led to this matter being dismissed by the acting magistrate and appealed to this Court. On my assessment, it is unlikely that this matter would be tried before the end of this year, if this Court ordered for the case to be remitted to the Magistrates' Court for a re-trial or trial continuation. At best, any further proceedings in the Magistrates' Court would resume some three years after the Information was laid. This in my view, does not qualify as fair trial within a reasonable timeframe, given these particular facts and circumstances.

Conclusion

12. For these reasons, I allow the Crown's appeal but decline to order a retrial or the continuation of the part-heard trial proceedings in the Magistrates' Court.

Dated this 15th day of November 2022



THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE