IN THE SUPREME COURT OF BERMUDA

APPELLATE JURISDICTION 2018: NO. 29

BETWEEN:

FIONA MILLER (Police Sergeant)

Appellant

v.

COREEN SCOTT

Respondent

DATE OF HEARING: 6TH NOVEMBER 2018

DATE OF JUDGMENT: 6TH NOVEMBER, 2018

Ms Jaleesa Simons, for the Appellant

The Respondent in Person

The following cases were referred to in the Judgment:

Angela Cox (Police Constable) – Appellant v Cyril Stirling-Smith Respondent [2005] Bda LR 69

Fiona Miller (Police Sergeant) – Appellant v Janero Watts Respondent [2013] Bda LR 11

R v Hendon JJ ex parte Director of Public Prosecutions [1993] 1 All ER 411

EX TEMPORE JUDGMENT

ELKINSON J:-

INTRODUCTION

1. The Respondent had been charged under Section 53(1) of the Telecommunications Act 1986 with a single count which alleged that the Respondent had sent, by means of public telecommunications service, a matter that was of an indecent nature, namely a video depicting a sexual act.

2. Subsequent to the Information being laid, the matter came before various Magistrates at various times for Mentions relating to the required disclosures under the Disclosure and Criminal Reform Act 2015. On the 9th February 2018 it came before the Magistrate to set a trial date but Respondent's counsel was not present. In the circumstances, the Learned Magistrate adjourned the matter for Mention until the 5th April 2018, at which time a trial date of the 28th May 2018 was set. Even on the 5th April 2018, counsel for the Respondent did not appear.

3. On the 22nd May 2018, the Crown wrote to the court indicating that they would seek an adjournment of the 28th May 2018 trial date due to a witness being overseas. It also appears from the record that, on the morning of the 28th May 2018, counsel for the Respondent came off the record as attorney for the Respondent. If no adjournment was granted, it was likely that Respondent would have had to represent herself at the trial.

4. In any event, on the 28th May 2018 the Learned Magistrate refused an adjournment and determined to dismiss the charge and stated

"having heard counsel for the Crown on an application for adjournment and having consideration of the history of previous adjournments and having considered all of the circumstances, the court is of the view that it would be unreasonable to grant an adjournment. In the circumstances, information 17 CR00513 is dismissed. Defendant is discharged."

THE APPEAL

5. Counsel for the Crown puts forward an Appeal on the basis that the Learned Magistrate erred in law in that he unreasonably refused the application for an adjournment and as a further ground, at that time was wrong to have considered the strength of the case against the Defendant without hearing evidence. The Crown also raise on this Appeal the fact that he did not take into account that the Defendant herself would have been unrepresented and that, in any event, it was possible that the trial could have proceeded on the day even though the Crown was missing a witness.

MERITS OF THE APPEAL/THE LAW

6. The legal issue is whether, in the light of the facts of this case, it was unreasonable of the Magistrate to dismiss the charge against the Respondent. The test that needs to be satisfied is whether this court can be persuaded that no reasonable Magistrate could have come to the decision that the Learned Magistrate came to. If I am persuaded, then the decision of the Magistrate was a nullity and the appeal will be allowed and the relief granted in the terms sought.

7. Counsel for the Crown referred me to two decisions of this court where the law in this area was explored and guidance given to the Magistrates' Court in respect of dismissing summary charges due to some default on the part of the prosecution.

8. In **Fiona Miller (Police Sergeant) v Janero Watts [2013] Bda LR 11,** Chief Justice Kawaley cited the English authority of **R v Hendon Justices and others ex parte Director of Public Prosecution [1993] 1 All ER 411** and cautioned that *"Magistrates should be warned against attempting to penalise Crown Counsel for their non-appearance by hastily dismissing informations which are properly laid before them. Justice must be seen to be even-handed and a fair balance must be maintained between the rights of the defendant and those of the Crown."* As Mr. Justice Bell, as he then was, stated in the case of **Angela**

Cox (Police Constable) v Cyril Stirling-Smith [2005] Bda LR 69, again citing the **Hendon Justices** case, the duty of the justices was to hear information properly before them. That is the Magistrate's duty. In that case, counsel for the Crown, as the trial was about to commence, noted that she had some personal conflict in prosecuting the case due to the fact that she was distantly related to the Respondent. She asked the Magistrate to adjourn the matter to allow it to proceed to trial at another time and possibly, in the alternative, to find an alternative Crown Counsel who would take up the case later that day. Mr. Justice Bell held that even if the Magistrate was of the view that Crown Counsel's perception of conflict was misplaced, it could hardly have been consistent with the duty to dismiss the information simply because it was not being proceeded with in a timely fashion. The sensible and practicable solution was to permit or order a short adjournment and in his view the Magistrate's dismissal of the information was unreasonable.

9. The language used in the Bermuda cases in the context of the Magistrate's power to dismiss is whether it was reasonable. In the case of **R v Parker and the Barnet Magistrate's Court, ex parte Director of Public Prosecutions [1994] 158 JP 1060** Lord Justice Nunn sitting with Mr. Justice Laws on an application for Judicial review of the decision of the Barnet's Magistrate's Court to refuse an adjournment where both the Prosecutor and the witnesses were absent due to a mistake on the part of the court, used the expression as to whether *"… the discretion in this case was perversely exercised."*

10. Ms. Simons directs me to the record of the hearing on the 28th May 2018 when the issue of the adjournment arose. The record sets out the discussion between the Learned Magistrate and the Respondent and the fact that her then attorney had indicated that she would no longer represent the Respondent. The Respondent expressed the desire to obtain an alternative lawyer. The Respondent's attorney had come off the record the morning of the trial and it is evident that if the Crown had not sought an adjournment, the Respondent would have. It is in this context that I

hold that the Learned Magistrate acted unreasonably in refusing the Crown's application for an adjournment. It is not clear from the record if the Crown properly expressed that it was ready to proceed regardless of missing witness. What is clear is that one important aspect of the case before the Magistrate was to have been the legal definition of "*indecent*" and no doubt this was in Respondent's mind when she indicated that she wished to have legal representation.

CONCLUSION

11. This court is always mindful of the busy diaries of the Magistrates and their hearing a varied workload and the difficulty in maintaining impetus in order to bring cases to a timely conclusion. However, there are those instances, such as in this case, where expediency must be secondary to the public interest to have cases heard, the decision of which is of genuine public interest (i.e. the legal definition of indecency). In this particular circumstance, it was unreasonable for the Magistrate to exercise his discretion to dismiss the case and not to have granted the Crown's application for an adjournment.

12. In the circumstances, the Appeal succeeds and the matter should be relisted in the Magistrates' Court for hearing.

Dated this 6th day of November 2018

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JEFFREY ELKINSON

ASSISTANT JUSTICE