

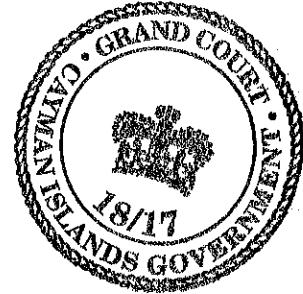
1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE

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4 INDICTMENT NO: 43 of 2018

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6 REGINA

7
8 v.

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10 ASSAD ADANA WALKER
11 FITZROY OTTEY
12 OWEN OMAR REID
13



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16 **Appearances:**

Mr. Garcia Kelly for the Crown

17
18 **Ms. Amelia Fosuhene of Bradys, Attorneys for Defendant Walker**
19 **Mr. J Hughes of Samson Law for Defendant Ottey**
20 **Ms. P Bodden of Samson Law for Defendant Reid.**
21

22 **Before:**

Hon. Justice Marlene Carter (Actg.)

23
24 **Ruling Delivered:**

15 March 2019

25
26 **HEADNOTE**

27 **Application to stay proceedings; Abuse of process; Non-disclosure**

28 **RULING ON AN APPLICATION TO STAY PROCEEDINGS**

29 **(Revised transcript of Oral Ruling delivered 15 March 2019, and**
30 **Approved for Release 25 November 2019)**
31

32 **Introduction**

- 33 1. On day four of the defendants' trial, counsel for the defendants applied for a stay of the proceedings
34 on behalf of these three defendants. They submitted that there was an abuse of the process of the
35 Court, relating specifically to disclosure issues.



4 The defendants are charged with firearm offences as well as being concerned in the importation of
5 ganja, relating to matters which took place on 2nd March 2018. Not Guilty pleas were entered and
6 a trial date was fixed for September 2018.

5

6 3. In December 2018, the matter came before Madame Justice Dobbs. Justice Dobbs gave directions
7 with regard to how the matter should proceed. The parties were to inform the court whether or not
8 they intended to adopt certain positions. This was to have been done by mid-January 2019.

9

10 4. The Crown accepted that upon the defence not having given an indication that they were going to
11 take a certain course in this trial, that the Crown should have been trial ready on the date fixed for
12 trial i.e. 11th March 2019. From mid-January 2019, this trial date has remained firm.

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14 5. The Crown also accepts that when the defendants indicated that they would seek a *Goodyear*
15 direction from this court, the *Goodyear* direction having been heard on Monday, the first day of
16 this trial, that this did not in any way effect the trial preparation or trial readiness which was to be
17 expected from the Crown.

18

19 6. The Defences' submissions point to a number of matters relating to disclosure. These I will deal
20 with as follows:

21

22 **(i) The service of photographs upon which the Crown intend to rely.**

23 7. The photographs in question are approximately 200 photographs which were served on Tuesday
24 of this week the 12th March, the second day of this trial. No index was provided at the time of
25 service of the photographs. However, the index was received by the defence yesterday, on what
26 would have been the fourth day of the trial.

27

28 **(ii) The issue relating to DS 1-8 – photographs which were shown to the defendants**
29 **during the course of their records of interview.**

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31 8. Counsel for the defendants state that a request was made, I believe late on Monday or early Tuesday
32 of this week, seeking from the Crown, evidence regarding the provenance of those photographs.
33 The defence say that it is relevant, given their indication that one of the main issues for the defence
34 is the chain of custody relating to RSC 13, the exhibit in which the firearm and ammunition, which



form part of the main part of this indictment, was found. These photographs relate to RSC 13 exhibit.

(iii) The lack of service of unused material.

5 9. When the question was posed by this Court to Crown Counsel yesterday, the indication from him
6 at that time was that the unused material had not yet been served in its entirety. I understand from
7 Crown Counsel that there are notes from various police officers which he, before this Court rose
8 yesterday, still did not have in his possession. Crown Counsel agreed with the court that unused
9 material would, in the normal course of things, have been served as primary disclosure in advance
10 of trial.

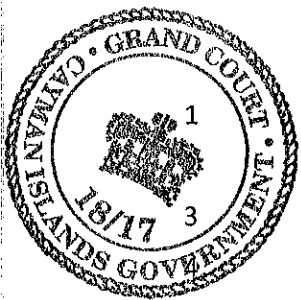
(iv) The late service of the Scenes of Crime Report and other documents.

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13 10. The scenes of crime report was served only yesterday – the fourth day of the trial. Defence counsel
14 include in this application before the Court the fact that, at this stage, there are no agreed summaries
15 of the records of interview, there is no agreed jury bundle, and there are no agreed admissions, the
16 draft admissions having been served by the Crown yesterday – the fourth day of the trial.

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18 11. Also included in this 4th point are the issues relating to the statements of Police Officer Durrant and
19 Police Officer Stewart. Officer Durrant is a Crown witness who has begun his evidence before this
20 court. During the course of that evidence certain matters arose which then led to a further statement
21 having to be taken from the witness. The defence argue that all of this material is relevant to their
22 preparation of the defence, that the Crown should have been aware of these issues and produced
23 these statements before trial.

24
25 12. Officer Stewart has not yet been called as a witness for the Crown, but every indication is that he
26 would be called as a witness on the trial. The defence submit that there is the further related issue
27 of whether or not that officer had now been alerted to matters raised at the trial, and asked the court
28 to consider whether or not that would prejudice their clients and their defence of these charges.

29
30 13. Taking all those disclosure issues in the round, taking account of the fact that disclosure has come
31 piecemeal during the course of the trial, the defence submit that they are not confident that these
32 defendants could receive a fair trial. They say that the Crown has not fulfilled its disclosure
33 obligations. They argue that there is a lack of readiness with regard to the Crown's conduct of the



trial and that all of these factors could have the result that these defendants are not able to receive a fair trial.

Crown's Response

5 14. On behalf of the Prosecution, Crown Counsel submits that some of the disclosure issues identified
6 on this application are now in hand. With regard to the provenance of photographs DS 1-8, Counsel
7 indicated that statements have been sought and that indexes have now been provided. Crown
8 Counsel offered that with the matters relating to Officers Durrant and Stewart, are matters that
9 could be cured within the trial process. He argues that the defence can challenge those Officers in
10 cross-examination regarding what was contained or not in their statements now before the court.

11
12 15. It is submitted on behalf of the Crown that this therefore is not a case where the Court should find
13 that it should stay the proceedings and instead invited the Court to consider whether or not the
14 issues that have been raised, and any prejudice that might have been suffered by the defendants,
15 could be cured by an adjournment of this trial, or a discharge of the jury and setting of a new trial
16 date.

The Law

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19 16. I have been referred to the authorities of *R v Salt*¹ and *R v Boardman*². I consider that *Boardman*,
20 as in many of these cases, is a case that was decided on its facts. *Salt*, however is an authority
21 wherein the Court of Appeal delved into the many factors that this court must consider on the
22 instant application.

23
24 17. The power of the Court to stay proceedings where abuse of process is alleged, is considered in
25 cases to which the court has been referred: *R v Maxwell*, [2011] 1 W.L.R. and *R v Horseferry Road*
26 *Magistrates Courts, ex parte Bennett* [1994] 1 A.C. p. 42 and also *R v Latif* [1996] 1 W.L.R. 104.

27
28 18. The main principles can be summarised as follows: a court has the power to stay proceedings in
29 two categories of cases, namely, (1) where it would be impossible for the defendant to have a fair
30 trial and, (2) where it offends the court's sense of justice and propriety to be asked to try the
31 defendant in the particular circumstances of the case. In the first category of case, if the court

¹ R v Salt [2015] 1 WLR 4905

² R v Boardman [2015] 1 C. App R 504

1 concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No
2 question of the balance of competing interests arises. In the second category of case, the court is
3 concerned to protect the integrity of the criminal justice system. In this second category, a stay
4 will be granted when the court concludes that in all the circumstances, the trial will offend the
5 court's sense of justice and propriety.

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7 19. I have looked at the factors which Counsel have highlighted and I have also considered those found
8 in *Salt*, enumerated and applied by the Court of Appeal. These factors are:

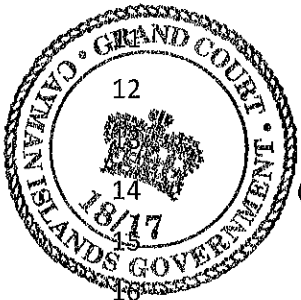
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10 (i) The gravity of the charges. These defendants are charged with very serious
11 matters and if convicted can serve a mandatory minimum term of imprisonment
12 of 10 years, for the first two offences. These are very serious charges.

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14 (ii) Is there is a question of denial of justice to complainants? In this case, it is not
15 the regular complainants. The complainants here would, in a sense, be the wider
16 society – persons who need to be protected where allegations with regard to
17 persons being involved in drugs and firearms are being brought into its
18 jurisdiction. Those would be the wider complainants that this court would have
19 to consider.

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21 (iii) The importance of disclosure. In *Salt* it was the importance of disclosure in sexual
22 offences cases, but here, the importance of disclosure generally, it being accepted
23 by all that disclosure is an essential prerequisite to ensure a fair trial.

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25 (iv) Importantly, in this case, there has been no allegation of bad faith on the part of
26 the prosecution, or of the police. There seems to have been allegations of
27 incompetence, and I take that with regard to, for example, the statement of
28 Durrant, whether he should have provided a fuller statement. However, there is
29 no direct evidence of serious incompetence of the sort that was alleged in *Salt*.
30 On the matter of non-disclosure, the Crown has accepted that in some of the
31 instances highlighted by the defence there were deficiencies on their part.

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33 (v) The nature and materiality of the failures to disclose. From the matters already
34 identified, the most significant of these, it seems to me, would be the 200





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photographs upon which the Crown intend to rely, that were served on the second day of trial. The matter of the unused material is also important. The defence are entitled to know exactly what is contained in the unused material because, although it is unused by the Crown, it could be that there are matters within this material that the defence might find useful to their case. It is absolutely important and essential that the defence have all of this material pre-trial.

(vi) While the other matters identified relating to summaries, agreed jury bundles or admissions, might not have the same weight as the physical evidence of the photographs or the unused material, late disclosure of these can have the effect of delaying trial proceedings and this court has to consider whether, cumulatively, these affect a fair trial.

(vii) I find that there is no issue regarding failures by the defence. I find that the application is not a frivolous one and it is one that the defence are entitled in these circumstances to properly make. In this case, there is no issue that there has been piecemeal disclosure.

20. The defence have also raised the issue of whether the Crown has gained an unfair advantage in terms of how the matters have proceeded thus far.


21. I have considered whether there has been a waste of resources and the effect on the jury. The jury has only been in court on two occasions, and has heard very limited evidence. The jury has had to be in and out of this building, waiting to be told where the proceedings would go each day and as a result there has been some discomfort and discommoding of the jury. I am very conscious how these matters impact their view of the judicial system.

22. With regard to the Court's resources, it is true that the first two days of the trial were taken up with legal arguments, the first being necessary to hear submissions on the *Goodyear* indication. The second legal argument dealt with an application from the defence. These are all factors that I have to consider.

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Court's conclusions

23. It is now for the Court to determine whether, taking into account all of the circumstances as they have been laid out before me, I find that these defendants can get a fair trial.
24. I have to consider whether defence counsel, having not had sight of all of the material which they should, are able to confidently test the Crown's case or to determine how to put their case. And further, whether this can be cured in any way within the course of the trial.
25. I am mindful that the defendants are in custody and the nature of the offences for which they are charged, it might be that they would remain in custody whatever determination I do make on this application. However, that is not one of the major factors for my consideration on this application.
26. I bear in mind that it is only exceptional circumstances that late disclosure in a trial is not be dealt with by an adjournment or by discharging the jury, and that, in most instances, the determining factor is whether there has been unusual or serious misbehaviour on the part of the prosecution or police.
27. Having considered all of the relevant factors, I do not find that these defendants could not receive a fair trial. While some of the information which is not yet disclosed does relate directly to material issues raised by the defence, these are not such as to cause me to believe that these defendants could not get a fair trial if defence counsel were afforded an opportunity to have that material and to properly prepare for trial.
28. I therefore find that the applications to stay the proceedings for an abuse of process must be dismissed. I will order that the jury be recalled and discharged. A new trial date will be set. Previous to that trial date, within the next 14 days, this trial will be listed for a case management conference at which time all matters relating to disclosure must be finally determined.


Justice Marlene I. Carter
Acting Judge of the Grand Court

