The Court of Appeal for Bermuda

CRIMINAL APPEAL Nos. 13 of 2018 and 3, 5, & 6 of 2019

B E T W E E N:

JEREMIAH DILL
(Criminal Appeal No. 13 of 2018)

ALEX WOLFFE
(Criminal Appeal No. 3 of 2019)

WILLIAM FRANKLYN SMITH
(Criminal Appeal No. 5 of 2019)

KIARI TUCKER
(Criminal Appeal No. 6 of 2019)

Appellants

- v -

THE QUEEN

Respondent

Before: **Clarke, President**
Bell, JA
Smellie, JA

Appearances: Charles Richardson, Legal Aid Office, for the Appellant Dill;
Susan Mulligan, Christopher's Ltd., for the Appellant Wolffe;
Paul Wilson, Legal Aid Office, for the Appellant Smith
Susan Mulligan, Christopher's Ltd., for the Appellant Tucker;
Carrington Mahoney, Office of the Director for Public Prosecutions, for the Respondent

Date of Hearing: **5th November 2019**
Date of Ruling: **22nd November 2019**

RULING

CLARKE P:

1. This is the ruling of the Court in respect of a number of regrettable and disruptive applications for adjournment.

2. On Tuesday 4 November 2019, the first day of the November Session of this Court, we had before us four applications to adjourn criminal appeals fixed to be heard in the following week. The applications fell to be made because Counsel for the appellant had not complied with the orders of the Court to file

written submissions by specified dates. In threE of the cases the Court had made more than one order (after the failure of the appellant to fulfil the first one). In three of the cases the written submissions were provided very late, and so late that the Crown could not fairly be required to file its submissions in reply in time for them to be considered before the hearing of the appeal. The same obviously applied in respect of the case where no submissions were provided by Counsel for the appellant at all. In one of those cases it was possible to move the date for hearing back to Friday, 15 November, which would enable the Crown to provide its submissions in time for them to be considered before the hearing on that date. We thus found ourselves with no option but to grant an adjournment in three of the cases.

3. We would not normally publish a ruling of this nature setting out the sequence of events in respect of each of the four appeals where an application to adjourn was made. We do so in order to draw attention to the lamentable failures which compelled us to take the course that we did; to explain to a wider audience why we have been unable to sit for three days of the current session; and to indicate that this state of affairs must not be allowed to be repeated. We set out at the end of this ruling at paragraphs 48-58 some of the lessons which we think are to be learned for the future.

4. The reasons why this sort of problem must be rooted out are obvious. This Court sits, usually, for three 3-week sessions a year. At least two, and often three, members of the Court will not be Bermudian and will be in transit to the Island shortly before the beginning of the session. They, and our Bermudian Justice, need to be provided with the submissions of the parties in sufficient time to be able properly to consider them. That requires production of the documents substantially before the commencement of the Session. The Court orders the production of submissions by dates that will enable that to be done.

5. If a case has to be adjourned from the session in which it is fixed to the following session that has several effects which are prejudicial to the administration of justice. The appellant will not have his or her case heard until months later. If a convicted person's appeal against his conviction is allowed, he or she will have remained in prison for longer than he or she would have done if the case had been heard when originally fixed and when it should have been heard. If cases are moved from the session in which they were due to be heard to the next one, other cases which might otherwise have been capable of being heard in the next session will have to be moved to the next but one, which may prejudice those whose cases could have been, but cannot now, be heard in the succeeding session. Lastly, if the adjournment of cases leads to

substantial gaps in the timetable the Justices of this Court are unable to fulfil their judicial function in the empty days; and expenditure is wasted.

6. We set out in the following paragraphs the facts in relation to each of the four cases.

Kiari Tucker v The Queen

7. On **13 June 2019** Kiari Tucker was convicted of the crimes of murder and using a firearm whilst committing an indictable offence. On **25 June** he gave notice of appeal against conviction and on **29 July** notice of an application for leave to appeal against sentence. On **10 September** an order was made that the appellant should file and serve written submissions on or prior to **Friday 20 September**, with the Crown's submissions to follow 14 days thereafter. The hearing was set for **6 November**.

8. On **12 September** the Order 3 Rule 10 transcripts were provided. On **16 September** leave to appeal against sentence was given. On **25 September 2019** the Record of Appeal was provided.

9. On **18 October** a further order was made for the appellant's written submissions to be filed and served on or prior to **21 October 2019**.

10. Written submissions were produced in respect of the appeal against conviction on **Friday 25 October 2019** i.e., 5 weeks after the date by which they were originally ordered to be provided.

11. Ms Susan Mulligan of Counsel offered her apologies to the Court, which we accept, and told us that she had done her best; but said that she had faced a number of problems including the loss of an associate, other commitments in courts and some surgery. She also apologised for not communicating with the Court until late on and not communicating with the Crown at all.

12. This state of affairs led to an application by the Crown to adjourn. Mr Carrington Mahoney for the Crown drew attention to the fact that there were some 22 grounds of appeal. These were only provided on Friday 25 October, and he did not see them until Monday 28 October. In the light of those grounds and how matters were put it was, he submitted, apparent, in a way that had not been so before, that the evidence of some 15 witnesses would need to be transcribed and that the hearing would last at least two days. The case would take about five days for him to consider.

13. In the light of those submissions we felt compelled to adjourn the hearing; to order the transcripts which the Crown had sought; to specify a date for the provision of the Crown's submissions; and to order a Directions Hearing for 18 December.

Alex Wolffe v The Queen

14. On **15 May 2019** Alex Wolffe was convicted of wounding with intent to cause grievous bodily harm, attempted robbery and two counts of intimidation. His notice of appeal was dated **5 June**. On **21 June** Ms Victoria Greening took the place of Ms Mulligan on a directions hearing before this court. On that occasion we refused to order the production of a full transcript of the trial, as had been requested, but ordered that there should be a transcription of those rulings which related to the grounds of appeal. We also ordered that any further requests for transcripts should be made to the Registrar swiftly.

15. On Monday **1 July** Ms Mulligan emailed Mr Quallo, the Administrative Officer of the Court, to say that she had not been able to get a clear answer to what was expected of her to move the matter forward, and asked if he would be good enough to review the Court's directions and provide them to her. We are somewhat surprised at this email which appears to indicate a lack of communication between counsel. On the same day Mr Quallo indicated that the orders in respect of the criminal directions made in June would be produced that week.

16. On Tuesday **9 July** Ms Mulligan wrote again to ask for the directions. Mr Quallo, who was under pressure to transcribe judgments and directions orders from the June session, rightly reminded Ms Mulligan that compliance with Court orders was not predicated upon Counsel being provided with a hard copy of the order; and that it was the duty of counsel, or any person they appoint to take their stead, to take an adequate note of what the Court had said. On the same day Ms Burgess for the Crown emailed Ms Mulligan to say that her note was to the effect that the appellant's request for the entire trial transcript was refused; that in relation to the grounds of appeal it was ordered that counsel should supply the dates of the arguments/rulings that were being challenged; and those transcripts would be provided. Mr Quallo emailed to say that his recollection accorded with Ms Burgess' note.

17. The Order as made provided:

> *"1 Portions of transcripts are granted which deal with grounds of appeal*

2 Further requests for transcripts shall be made to the Registrar swiftly

3 This matter to be mentioned on a date fixed by the Registrar."

18. The drafting of this order is not as felicitous as it might have been but it was apparent from it and the communications between Ms Mulligan, Ms Burgess and Mr Quallo that the appellant could have transcripts of material which related to his grounds of appeal but would need swiftly to specify what transcripts were sought.

19. On **10 September** the appellant was ordered to file and serve written submission on or prior to Friday **20 September**. The appeal was set to be heard on Wednesday **13 November**

20. On **12 September** the Order 3 Rule 10 transcripts were provided

21. On **16 October** i.e. over two months after the July 2019 communications Ms Mulligan requested that seven witnesses' evidence should be transcribed.

22. On **18 October** a further order was made for the appellant to file and serve written submissions on or prior to Monday **21 October 2019**. Between **25 and 31 October** 2019 three of the transcripts sought were provided. The appellant's submission were in fact filed on Tuesday **5 November** i.e. over 6 weeks after the date when they were first ordered to be provided.

23. We adjourned consideration of the position until Thursday 7 November on which date it, fortunately, became apparent that the Crown could prepare submissions in reply in time if the appeal was to be heard, as we re-ordered that it should be, on Friday 15 November.

William Franklyn Smith v The Queen

24. On **26 June 2019** William Franklyn Smith was convicted of carnal knowledge of a girl under 14 and two counts of sexual exploitation of a young person by a person in a position of trust. A Notice of Appeal was filed on **8 July**. On **10 September** an order was made for written submissions to be provided by the appellant on or prior to **20 September** for a hearing date of **12 November**. In the event no submissions were provided by that date or at all. On **15 October** a Notice of Hearing was issued requiring the attendance of Counsel on **5 November** to answer for breach of the Court's order of 10 September.

25. On **16 October** Mr Paul Wilson, Legal Aid Counsel, emailed Mr Quallo to say that he had double-checked with his office manager, and had discovered that the appellant would "*remain with me*" for the appeal. But, as he said, he had not received any documents in that regard and was only just made aware of a certificate going to the Legal Aid Committee for decision the next day; he said that the decision was likely to confirm him as counsel. Mr Quallo then sent him the Record of Appeal on the same day. On **18 October** the Court Transcriber emailed the Order 3 Rule 10 transcripts to Mr. Wilson and former counsel.

26. On **5 November** Mr Paul Wilson appeared before us. When we asked him why no submissions had been filed he told us that there had been concerns as to who was to represent the appellant which had now been rectified. It appeared that at some stage in September the appellant had said that he no longer wished to be represented by his former Counsel; and that there had been a transfer to him in the second week of October. He told us that he was now ready to look at the file. The file was ready for collection, as he had been told last Friday i.e. 1 November. He had not however collected it yet.

27. In those circumstances we had no option but to adjourn the hearing until the March session. The facts of this illustrate a not unfamiliar problem when an appellant at a late stage seeks to change his counsel. If that happens it seems to us that the Legal Aid authorities will have to give serious consideration as to whether to permit such a change. If it becomes apparent that there is to be such a change it will be essential for steps to be taken swiftly with a view to ensuring that replacement counsel can step into the shoes of his or her predecessor in order that the case may be heard in the session in which it has been fixed.

28. We were surprised to find Mr Wilson appearing before us on the first day of the session in a position to tell us that he was ready to look at the file of previous defence counsel but had not yet done so.

29. Again, we felt constrained to adjourn the case and make further orders for the provision of skeletons and a Directions hearing on 18 December.

Jeremiah Dill v The Queen

30. On **2 November 2018** Jeremiah Dill was convicted of premeditated murder and using a firearm whilst committing an indictable offence, following a trial which had begun on 22 October 2018. Mr Dill had been represented at trial by Mr Craig Attridge, who was appointed a Magistrate in late November 2018. A

Notice of Appeal was filed by Mr Attridge on **22 November 2018** giving Mr Dill's address for service as the Legal Aid office. The letter from Mr Attridge accompanying the Notice said that he understood that Mr Dill had applied to the Legal Aid Office for the transfer of his certificate from Mr Attridge to Senior Legal Aid Counsel, Mr Charles Richardson.

31. On **23 November 2018** Mr Quallo emailed Mr Attridge and Mr Richardson to inform them of his intention to have the matter listed before the Court in the March session for directions and to confirm the appeal in the June 2019 session.

32. On **15 March 2019** an order was made by this court for the appellant to have leave to have transcribed the evidence of three witnesses and the summation. The order provided that any application to amend the Notice of Appeal or for further transcripts should be made with swift promptitude (sic) to the Registrar upon receiving the Notice of Appeal. By an order of **29 April**, the appellant was ordered to file skeleton submissions on or prior to Monday **13 May** The appeal was fixed to be heard on **14 June**.

33. The appeal was not in fact heard in June because of the illness of Mr. Warner who was by then acting for the appellant.

34. On **21 August** Mr Quallo emailed to Mr Richardson, following a brief telephone conversation in which Mr. Richardson had indicated that he wished to review the judge's summation to see if there were any grounds for appeal, noting that he was now counsel of record and, as per his request, attaching a copy of the transcribed summation in order for Mr Richardson to review it and determine whether the appeal was meritorious. He also included the transcript of all rulings made during the trial. He said that he looked forward to Mr Richardson's swift indication as to whether the appeal would make it to the November session.

35. On **10 September** the Court ordered the appellant to file and serve written submissions on or prior to 20 September.

36. On **20 September** Mr Quallo wrote to Mr Richardson again asking for confirmation as to whether the appeal was going to proceed and, if so whether he was on track insofar as complying with the Court's order was concerned.

37. On **24 September** Mr Richardson emailed to say that much seemed to hang on the evidence given by two particular witnesses and asked whether their

evidence had been transcribed. Eleven minutes later Mr Quallo replied to the effect that they had been and attached the transcripts to his email. Later that day Mr Richardson emailed to say that he was having real difficulty completing his research with all of the power outages and internet absence, and said that he needed more time to compete this. Mr Quallo asked him how much time he thought he would need as he would have to take his direction from the President, to which Mr Richardson replied that he was hoping just a few days.

38. Mr Quallo replied to say that he would consult with the President on timing and, hopefully would revert the next day with a fresh order for directions. He asked whether Mr Richardson intended to adopt Mr Attridge's grounds of appeal. Mr Richardson replied to say that he was of the view that the grounds were a fair reflection of the relevant options but that the client did not agree and was maintaining his request for another counsel; and that until he was directed otherwise, he would still prepare his best to deal with the appeal.

39. On **30 September** Mr Quallo informed Mr Richardson by email that he had conferred with the President and requested Mr Richardson to file a notice of Motion seeking leave to adjourn with an affidavit in support.

40. This did not happen until 22 October. On **21 October** Mr Quallo emailed Mr Richardson to ask where the application to adjourn was. He told Mr Richardson that the application must be made orally before the Court on Tuesday 5 November. On **22 October** Ms Erin Butterfield of the Legal Aid Office emailed the application to adjourn and asked whether anything more needed to be done. She was told by Mr Quallo on the same day that the application must be supported by an affidavit by the applicant setting out the reasons why an adjournment was being sought. The affidavit was then emailed at 1405 on **22 October**, unsworn. When the affidavit was eventually "sworn", it was in fact executed by Mr Richardson who signed it, before a Commissioner for Oaths, who signed as a witness, apparently oblivious of the fact that it was not the appellant who was signing. This was a serious error involving the production of an affidavit apparently, but not in fact, sworn to by the appellant.

41. In "his" affidavit the appellant said that, although his appeal was listed for the November session, he had recently instructed Mr Richardson having become dissatisfied with his former counsel. According to his affidavit there was a sequence of events relating to the instruction of counsel as follows:

- 18 June – The Legal Aid Certificate is assigned to Mr Attridge.

- 24 January – The Certificate is transferred to Mr Archibald Warner (who appeared before us in March)
- 28 June/3 July – Letters addressed to Mr Warner and the Legal Aid Committee request that the Certificate be transferred to an overseas QC
- 9 July – Legal Aid Committee refused that request
- 29 July – The appellant writes to the Committee requesting that the Certificate be transferred to Ms Patricia Harvey
- 8 August – Legal Aid Certificate transferred to in house Legal Counsel
- 23 September – The Appellant speaks with Mr Richardson on the telephone who subsequently agrees to be his counsel.

42. When he appeared before us on **5 November** Mr Richardson told us that he was originally, i.e. in 2018, suggested as counsel, but had to step aside because of a conflict problem in relation to one of the witnesses. He was aware of the transfer of the Legal Aid Certificate on 8 August 2019, which arose because section 12 of the Legal Aid Act as amended in March required a legal aid matter to be assigned to Legal Aid counsel, save in restricted circumstances (e.g. a conflict). At that time the appellant still wanted other counsel. He was not involved until September, becoming counsel of record on 23 September 2019. The Legal Aid Committee had been concerned about the cost/benefit ratio of farming the matter out to Ms Harvey, He took steps to get material from former counsel. He got the transcript but not the order of the Court.

43. Mr Richardson told us that he had always understood from Mr Quallo that there was no intention that the appeal should to go ahead in November, and that, once he filed a notice applying to adjourn the appeal it would be relisted. Mr Quallo told us that what he told Mr Richardson was that he must file a Notice of Motion and an affidavit, in which the case the Court might be prepared to determine the application on the papers. Mr Richardson told us that he was still verifying whether a possible ground of appeal based on the incompetence of counsel was valid; and he had instructions not to advance the appeal unless it contained that new ground. He had a handwritten document from his client which he needed to consider.

44. In the light of the matters set out above we considered that we had no option but to adjourn, to specify the time for the provision of submissions, and to order a directions hearing on 18 December. We also ordered that the hearing would take place at the March 2020 session whether the appellant was represented or not.

45. The position set out above is profoundly unsatisfactory. A case where the conviction was on 2 November 2018, and which was intended to be heard in the June 2019 session, is now not to be heard until the March session of 2020. The question as to who was to be counsel had not been finally resolved until September. It appears that Mr Richardson was close to being able to file submissions in September, but this had not happened because of a possible new ground of appeal relating to the competence of trial counsel which appears to have arisen in late September. Mr Richardson was then not in a position to take a view on it even by 5 November. We found it surprising that he was still in this position on that date, despite having become counsel of record on 23 September, and despite the fact that Mr Richardson had given Mr Quallo some indication orally of the nature of the potential complaint against counsel on 24 September.

46. In addition, we find it difficult to understand how Mr Richardson can have thought that an application for an adjournment was a formality, particularly when he had been informed of the need for both an application and an affidavit. No counsel should assume that a request for an adjournment is a formality.

The Future

47. The history of the events in the four cases display some disturbing features. These include (a) either an apparent preparedness simply to ignore the mandatory intent of the Court's orders, or a failure so to plan matters as to be able to comply with them, or both; (b) a failure of communication with either the Court or the Crown as to any difficulties in producing submissions until a very late stage; (c) a failure timeously to address the question of what transcripts other than those specified by Order 3 Rule 10 may be needed for the appeal so as to ensure that they are transcribed in time; and (d) a failure of adequate communication between counsel when more than one counsel had been involved.

48. For the future a number of things are required.

49. First, Counsel must appreciate the obvious, namely that the Court's orders are there to be obeyed. If difficulties are foreseen, they should be raised with the Court before the order is made; and, if they arise later, the Court and the Crown should be appropriately informed.

50. We are conscious of the burden that rests on Counsel in the preparation of submissions. But it is not an acceptable excuse for noncompliance for the

Court to be told that Counsel has a myriad of things to do and has been working day and night (unsuccessfully) to comply with the order. If the work cannot be done in accordance with the order of the court it should not be taken on.

51. Second, it is important for appeals to be planned for. When a notice of appeal is filed counsel will need to consider what transcripts other than those automatically provided pursuant to Order 3 Rule 10 are likely to be needed and make a timeous application for them. Asking for them a fortnight before the hearing is not acceptable. He or she will also need to arrange space in his or her timetable to accommodate the drafting of submissions.

52. In this connection we would observe that, at present, transcripts are transcribed by a single transcriber as and when required on a piecework basis. We would suggest that consideration be given either to having more than one transcriber engaged (or employed) or some form of automatic transcription service.

53. The Court has it in mind to issue a Practice Direction to the effect that all criminal appeals shall be filed under cover of a letter which informs the court whether the appellant (a) intends to apply for further transcripts in addition to those provided for by Order 3 Rule 10, in which case the letter must be accompanied by a notice of motion with an affidavit in support, identifying the transcripts which are sought and the reasons why they are sought; and (b) whether the appellant requires a copy of any segment or the whole of the CourtSmart recording of the trial. It is also likely to provide that, if any of the grounds of complaint is that previous counsel was incompetent, the appellant must, at the time of the filing of the appeal file an affidavit which specifies (a) what the appellant says he or she instructed their barrister to do; (b) how it is said (if it is said) that the barrister did not comply with those instructions or otherwise acted incompetently; and (c) how it is said that a result of counsel's non fulfilment of instructions or other incompetence the appellant has suffered prejudice.

54. Third, counsel need to be communicators. If one counsel stands in for another, he or she needs to inform his or her fellow counsel what exactly has occurred and what has been directed by the Court at the hearing he or she attended. Similarly, Counsel need to communicate with the Court and the Crown as to any impediments to progress. Whilst neither Court nor Crown need a blow by blow account of problems it is unacceptable for both of them to be left in the dark until the eleventh hour (or later) about what is going on. If it is thought

that an adjournment is needed it must be applied for timeously and supported by an affidavit. Applications for an extension of time should be made to a Single Judge before the expiry of time.

55. In another of the cases with which we have been concerned (not one of the above four) Mr Richardson allowed the Supreme Court (in an appeal from the Magistrate) to make an order on **16 November 2017** for the provision of submissions within 14 days without indicating that he could not do so or would be in any difficulty. When that order was not complied with he told the Court on **8 February 2018** that, if given a date, he could produce a skeleton quickly and the Court ordered provision of a skeleton by **12 February 2018** with the hearing fixed for **26 March 2018**. No such skeleton was ever produced and it appears that at some stage in March Mr Richardson indicated that he had not heard from the appellant and was not properly instructed.

56. The true position was that Mr Richardson was awaiting instructions from his client, with whom he said he had no means of communication, for the prosecution of the appeal (as opposed to the filing of the notice of appeal), and as to what grounds he should advance. Mr Richardson told us that he was acting in the interests of his client and did not want to harm his appeal by saying that he was trying to track him down. He said that he would not act in this way again. It is plainly unacceptable to play the system along by letting the Court think that the submissions can be provided by the date specified when that is not in fact the case because counsel is not in contact with the client and is without instructions – a fact of which the Court should be told.

57. Fourth, it is also apparent to us, in the light of what has happened that it may be necessary for the Court to consider making directions for the filing of submissions earlier than has previously been the case, to be followed by a Directions hearing in order to see that the Court's orders are being or will be followed. Further, if problems of the kind that have arisen persist in the future, the Court will have to consider making orders both against the appellant and Counsel personally in order that, in the event of noncompliance, Counsel may be fined pursuant to section 5 of the *Administration of Justice (Contempt of Court) Act 1979*. It may also have to consider making orders that, if submissions are not filed by specified dates, the appeal will stand dismissed.

58. Fifth, we would draw the attention of the Legal Aid Committee to the difficulties that may arise if there is a late change of counsel. It is desirable that the person who is to be counsel on an appeal is identified early on and not thereafter changed, or that, if there has to be a change, it is done as early as

possible and in sufficient time to ensure that the case can be heard when the hearing has been fixed. We are also concerned that one possible result of the amendment to the Legal Aid Act 1980 is, in practice, to reduce the number of counsel available to serve and that that may cause substantial delay in having cases ready to be heard.

59. What we have said above identifies a number of negatives. On a more positive note it is right to observe that the administration of justice is a collaborative exercise in which the Court, the Court's officers and Counsel, who owe duties to the Court, all have their part to play. We are conscious that the Criminal Bar has concerns as to the structure and operation of the system for criminal appeals. These include (a) whether appeals are being set down for hearing too soon to enable proper preparation to take place; (b) whether the arrangements for production of the Record of Appeal and transcripts are satisfactory; and (c) whether the timing for the making of orders for submissions and the time allowed therefor by such orders is appropriate. With a view to taking things forward I have invited the President of the Bar to indicate what changes would be welcome and I intend to meet with appropriate representatives of the Bar at or shortly before the March Session to discuss any proposals that may be raised.

60. With proper cooperation, forethought and application these problems can be solved. We would invite all those concerned to join forces so as to ensure that Bermuda has a procedure for criminal appeals that is truly fit for purpose.

Clarke P

Bell JA

Smellie JA